Liverpool City Council
Public Inquiry

Lessons from the Liverpool City Council Experience:

Recommendations for Public-Private Partnerships in Local Government

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SECTION 1

Views on structuring public-private partnerships in Local Government

Views on structuring public-private partnerships in Local Government

1.1 Background

1.1.1 The various matters that the Public Inquiry into Liverpool City Council had to deal with are laid out in the Terms of Reference, which have been spelt out in Report 1. Behind each of the Terms of Reference there lurks one substantive issue: the manner in which the council entered into various arrangements with private sector entities to establish new infrastructure. This issue is one that potentially can affect any council, as Public-Private Partnerships (PPP) in Local Government will undoubtedly be considered as a means of providing infrastructure and services over the next decade. The focus of this report, therefore, is the lessons that the Liverpool City Council experiences have to offer in terms of the approach of councils in considering PPP. The Recommendations made at the end of the Report are intended to provide approaches that will assist councils in structuring a PPP. Report 3, which follows this report, provides a detailed assessment of the processes used by Liverpool City Council in its various commercial arrangements with private sector entities. Report 3 contains the background information to the substantive issues discussed in this report.

It is apparent that building public-private commercial partnerships is a significant, but relatively new, proposition for Local Government. With the limited resources available to Local Government to service an ever-enlarging range of needs of communities, public-private partnerships emerge as a potentially beneficial means of creating infrastructure and delivering services. The focus of this report is to discuss more generally issues confronting public-private partnerships in Local Government, building on the insights that the particular case of Liverpool City Council provides.

1.1.2 Although the council entered into a number of arrangements with private sector parties for development of infrastructure on the Woodward Park Precinct between 1996 and 2003, there now remains only one such arrangement: the MOU between the council and Macquarie. After both councillors and senior council staff, and representatives of Macquarie had appeared at the Public Hearings, the Inquiry sought further assistance. The Inquiry asked both the council and Macquarie to supply a submission addressing a range of issues relevant to building Public-Private Partnerships (PPP) within Local Government. In asking for the submissions the Inquiry posed the following questions:

- How should PPP be defined?
- What structures and resources should be in place within a council before it enters into a PPP?
- If resources are not available within a council, how might they be supplemented?
- Given that councils are likely to be the consent authority, how might possible or perceived conflicts of interest be avoided?
- Do you think that guidelines should be prepared to assist councils in assessing PPP proposals?
- If guidelines are needed, what areas should they cover?
- Who should be responsible for developing such guidelines?

In this Section of the report the answers provided by the council and Macquarie are compared. This is not an attempt to assess those answers. It is designed, rather, to point to areas where the views of the two bodies coincide and where they differ. The full text of the two replies is given in the volume of background papers that will follow the issuing of the third, and final, report.

1.2 How should PPP be defined?

1.2.1 Both bodies start with the definition of PPP provided in the NSW Government's policy framework as set out in Working with Government: Policy for Privately Financed Projects. It states: "PPP is a general term covering any contractual relationship between the public and private sectors to produce an asset or deliver a service".

1.2.2 Both bodies point out that the State procurement guidelines deal generally with Privately Financed Projects (PFP), whereas the range of possibilities is much larger.

1.2.3 The council response lists a range of key factors of a PPP; these are dealt with in Section 2 of this report. It also points out the complexity of PPP.

1.2.4 Macquarie's response specifically puts a focus on council-owned land. It discusses the sub-optimality of council property dealings and why councils need private sector partnerships.

1.3 Structures, resources and procedures that should be in place within a council before it enters into a PPP

1.3.1 The council response suggested that the council's structure and resources must be sufficient to allow it to assess the value for money of a PPP. To do this the council must consider capital costs, recurrent costs, risk transfer and management, and probity. It argues that councils do not normally have available specific expertise in-house to tackle such tasks as feasibility testing, business case development (including risk analysis), procurement, contract negotiation, and probity.

1.3.2 The Macquarie response raised a number of issues that might be summarised as:

- The need for expert legal and financial advice
- A clear vision for the area based on knowledge of community needs
- Workable planning instruments and clear lines of accountability within councils

1.4 Supplementing councils' resources

1.4.1 The council argues that in general councils needed to supplement their human resource base with private sector expertise. It is suggested that a council should do a skills audit of its staff when considering entering a PPP, and compare that to a matrix of skills needed to execute each stage of the PPP. If a private sector body assists the council in the scoping and selection stages of a proposal, it should be excluded from bidding for the project. It is emphasised that councils need to focus on skill and experience, rather than price, in obtaining private sector assistance. There is an emphasis on the private sector, rather than the State Government, because the State Government may act as a review body assessing whether PPP proposals are viable. It is also suggested that the Local Government body as a whole might establish a team that could assist councils structure PPP.

1.4.2 Macquarie argues that managing contracts and planning are core business items for councils, and that resources ought to be in place. Specialist consultancy might be obtained on an as needs basis. The Macquarie Community Partnership is crafted to suit the particular circumstances of a council, while being based on a generic model. Cost savings can come from councils establishing shared functional areas with neighbouring councils.

1.5 Conflicts of interest

1.5.1 Difficulties inevitably arise for councils when, in a partnership, they effectively become both a developer and the consent authority for a project. There is a perception, held by some, that conflicts of interest must arise.

1.5.2 The council argues that the Local Government agency is the appropriate body to manage the consent process. State Guidelines for PPP suggest that one way around the conflict of interest problems is to seek the appropriate approvals before the bid process begins. Another solution is suggested in the council's submission: contracting an Independent Certifier as assessor, (based on public consultation, and design review panels), and using Independent Hearing and Assessment Panels.

1.5.3 Macquarie focused on ICAC recommendations for solving the conflict of interest problem (against a general background of councils' roles in planning and consent matters). It notes that ICAC warned that councils should not enter into any contractual arrangements that purport to guarantee outcomes that are subject to a separate regulatory process. The ICAC solution involves using independent experts, neighbouring councils, or an Independent Hearing and Advisory Panel in the consent process. The Macquarie comments warned against creating more controls or checks in an effort to solve the problem. It argues that if a PPP project is consistent with the council's planning instruments there ought be no perceived conflicts of interest. The State Minister might be seen as a final fail-safe authority for regionally significant projects. It is argued that councils need to be in a position to judge the financial and other risks and benefits involved in a development. There is an argument that the Elected Representatives ought to be the ones to make the final determination on a development proposal. It is also suggested that expert individuals are rare, and that, when they are paid by the council, there is still a likelihood that they will be seen to be under the council's influence.

1.6 Are Guidelines needed?

1.6.1 The council submission points out that each of the mainland State Governments in Australia has issued Guidelines. It suggests that the NSW November 2001 Guidelines might need to be reviewed, and that it would be appropriate to consider PPP in relation to Local Government in such a review.

1.6.2 The Macquarie submission argues Guidelines should only be prepared if they resolve serious problems in administering PPP. These, in relation to Local Government, are suggested as: poor decision-making processes; inadequate access to independent high quality advice; unreasonable constraints on arranging exclusive mandates for complex projects; and unclear or non-existent policy direction from the State Government. It argues that principles have to be established, and that there are many types of partnership arrangements, and new types will evolve. This evolution should not be stifled.

1.7 Areas to be covered by Guidelines

1.7.1 The council submission did not address this issue.

1.7.2 Macquarie believes that Guidelines should cover: exclusive mandates; safeguarding the value of council assets; public interest; value for money; and management and delivery of market risk.

1.8 Responsibility for developing Guidelines

1.8.1 The council submission did not deal with this issue.

1.8.2 Macquarie argues that the Guidelines should be developed by the State Government in consultation with Local Government and the private sector. A senior officer of the Premier's Department should lead the process with representatives of Local Government and private sector representatives.

SECTION 2

Templates for structuring public-private partnerships

Templates for structuring public-private partnerships

2.1 Background

2.1.1 PPP, in their present form, were pioneered in the United Kingdom in the late 1980s following a period of privatisation of public entities. PPP were introduced to maintain public sector ownership or involvement with infrastructure and service delivery. The objectives of PPP include:

- Delivering significantly improved public services by increasing the quality and quantity of investment
- Releasing the full potential of public sector assets
- Allowing stakeholders to receive a fair share of the benefits generated by PPP

2.1.2 For a variety of reasons the PPP movement was initially slow to develop, but by the mid-1990s the number of PPP attempted, and the number of successful outcomes, had begun to grow. The PPP system learnt by experience, and from 1997 to 2000, 150 projects in the UK were undertaken leveraging some $40 billion in capital investment. By the end of the 1990s PPP were established as a significant means of achieving better public services. Over 50 countries had consulted the UK Treasury about how to structure PPP.

2.1.3 Each of the Australian mainland state government has adopted PPP as a policy base to increase the value and quality of public infrastructure and services. Between 2001 and 2003 each state has drawn up Guidelines for State Agencies wishing to enter into PPP. The Guidelines usually mention their broad value for Local Government, but in no state have specific guidelines been drawn for the sector.

2.1.4 There is no doubt that PPP will increasingly be used by Local Government to build infrastructure and deliver services. There cannot, however, be a direct transfer of the approaches of the State Governments to Local Government. The numerous problems that arose with the various Liverpool City Council attempts to develop commercial arrangements with private sector groups suggest that there needs to be a review of the ways in which Local Government can conduct PPP so that the outcomes are more predictable and reflective of community needs. This Section considers the broad template of approaches that have arisen at state or national levels, and reviews their relevance for Local Government.

2.2 Types of PPP

2.2.1 The general definition of a PPP contained in the NSW Guidelines states that a PPP is any contracted relationship between the public and private sectors to produce an asset or deliver a service.[1]

2.2.2 Relationships between the public and private entities may take many different forms. As the Macquarie submission to the Inquiry pointed out, there will be forms of PPP that have not yet been created, and the concept of a PPP is evolutionary. Since PPP at Local Government level in Australia are as yet experimental and developmental, there is every likelihood that specific forms of PPP particularly suited to councils will emerge.

2.2.3 In many of the PPP the private sector will build a facility, and then own and operate it for an agreed period of time, often later transferring the ownership/operations back to the public sector when that time period is finished. Two of the most common forms of PPP used in Australia are the Build, Own, Operate (BOO) and Build, Own, Operate, Transfer (BOOT) systems. In 1995-1996 Liverpool City Council examined various proposals of these types, and the Stardome project also belonged to this type.

2.2.4 Other variations of PPP, similar to the BOO/BOOT types, are:

- Build-Buy-Operate
- Build-Transfer-Operate
- Lease-Develop-Operate
- Design-Build-Finance-Operate

2.2.5 All of the PPP types listed above are variations of the Privately Finance Project (PFP) where an asset is created through private sector financing and ownership control for a specified period. This has been the most commonly used PPP in New South Wales. There is some difficulty with applying the PFPs to councils. At the State level the attraction of a PFP is the capacity of the private sector group(s) to own and operate infrastructure over a long time-period (often 25-30 years), earning profits from the fees paid by the public to use the services provided. Toll roads are a typical example. The vast majority of the services that councils provide, however, do not produce large profits, and it is likely that there would be great community resentment if councils (or a private sector entity) attempted to push up prices to the level where profits might be attractive to the private sector.

1. NSW Government Working with Government: Guidelines for Privately Financed Projects, 2000, p. iii

2.2.6 There are other forms of PPP that have been used at State and national government levels. They include Alliance Contracts where the public and private sector entities are jointly responsible for the project's results with agreed targets for costs, time, quality of service; such contracts would contain bonus/penalty provisions. Another involves Barter Arrangements where the government agency disposes of an asset in return for facilities and infrastructure of equal value.

2.2.7 The intention here is not to provide a complete list of all possible types of PPP. The variety of types briefly described point to the fact that if a number of councils entered into a PPP, the actual arrangements in each may be quite different to each other. In broad terms, they will be joint ventures between councils and one, or a number of parties, in relation to a project(s) that aims to produce mutually agreeable results. The distinctive challenge facing Local Government is the creation of PPP forms that cater for the needs of councils, but also recognise their limitations.

2.2.8 Councils generally do not have a service base that offers the private sector long-term contractual arrangements and the prospect of significant profit generation. In regional New South Wales councils provide such services as water and sewerage provision. In many places the infrastructure related to these services is in need of refurbishment or enlargement, but the systems owned and operated by any one council are generally too small to generate private sector interest, and the distances between the head-works of systems of different councils make it difficult to bundle their operations. All councils on a private contract, or council-provided basis, provide waste services, but on a cost-neutral basis to the council. Local roads and bridges expenditure are very large items on any council's budget, but there is no real way that the use of local roads can generate income streams in the way that toll roads do.

There is one asset, however, that all councils possess, and that is land, often in quantity, and often located in desirable locations. The attraction that stimulated various private sector entities to form commercial links with Liverpool City Council was its land resources. Land will feature as the key to many PPP involving councils in the future.

2.3 General steps in PPP projects

2.3.1 Because so many PPP have been attempted in the past decade, mainly at State or National government levels, a fairly consistent framework has evolved for moving a PPP from conception to outcome. Although the actual form of the PPP will vary with the character of the project and the kind of partnership needed, the following steps are generally recommended to be undertaken. In the case of the Liverpool City Council's attempts to establish workable commercial arrangements with the private sector many of the steps were omitted, or compressed. In the following summary of these steps, some indications are given as to what councils might do if they are to develop practices in relation to involving themselves in PPP that accord with the general framework. It is noted that in the Liverpool City Council arrangements very little of the standard framework was followed.

2.3.2 The starting point for a PPP is for the public entity (council) to establish the need for the infrastructure or service, and the relationship of a project to the council's strategic plan. The principal test is whether the project is in the public interest, and whether by entering a PPP the council can protect the public interest. Since a project will inevitably involve council resources (money, time, staff etc) and assets, the private partnership must provide value for money. Logically a council would survey all the options open to it to produce infrastructure and services, specifying the objectives of the project, and their relationship to the overall objectives of council. Often, however, councils will seek private sector assistance, having developed a grand, but loosely specified, scheme. Councils might recognise that they themselves cannot finance or manage the project on their own, and go to the private sector with the hope that it will both find the money for the scheme, and will fill out the specifications of the council's scheme. There is a danger that the council might become obsessed by its vision, as happened with Liverpool City Council, and fail to appraise their options.

2.3.3 Once a need has been proofed the next step is to establish a business case. This is a vital step that Liverpool City Council omitted, allowing its simple original ambition to grow into a complex and far-reaching multi-layered set of projects, without ever creating a business case along the way. In building a business case the council should consider the range of costs and revenues that will accompany the projects. Included in these are direct capital costs such as design, land development, raw materials, payments to external providers, public procurement costs, payments to external consultants and advisers, and plant and equipment. The council would also need to consider direct operating and maintenance costs, and indirect costs. Staff costs should also be considered (they weren't considered by Liverpool City Council). The council would also need to provide revenue estimates, and sources of revenue. All of these elements feed into a business plan.

Liverpool City Council collected some of the cost and revenue data, but not all of it, and not in relationship to each of the variations in the schemes that were proposed. Liverpool City Council never created a business plan. It never demonstrated the council's ability to access the resources and skills to manage the processes effectively, and according to a timetable.

2.3.4 A more complicated extension of the business case approach, frequently used, is for the public sector entity to develop a comparator. This models the hypothetical risk-adjusted cost of a project if it were to be financed, owned and operated by the entity. The comparator offers a benchmark against which a council can appraise the advantages that a PPP might bring, and a means of comparing different proposals. The sophisticated comparator models are difficult to construct at the council level. Some form of benchmarking, however, is needed if councils are to enter a PPP convinced that it is the best delivery vehicle for their objectives. Liverpool City Council never considered benchmarking of any form. The in-house skills needed to undertake the task are considerable, and many councils would struggle to establish benchmarking procedures.

2.3.5 Another important step that needs to be made early in the process of a PPP is the development of a probity plan. This is to ensure a system where each part of the process is transparent, ensures competitive neutral, and is accountable. The Liverpool exercises had no probity plan attached.

2.3.6 To keep the community informed and involved with the process, a council should develop a community relations plan early on. Liverpool City Council never had such a plan; indeed it deliberately shut the community out.

2.3.7 Following the standard approach used by other levels of government, council would also develop a preliminary risk management plan. As demonstrated in Report 3, Liverpool City Council failed to consider the risks in any depth, consistently preferring to place an optimistic spin on outcomes.

2.3.8 The reporting mechanisms to be used in a project should be spelt out, and widely known, by intending private sector partners and by the community. Liverpool City Council followed a somewhat erratic process of reporting, and most significantly failed to disseminate the reports, or the messages of the reports, effectively, even to their key decision-makers.

2.3.9 The next step in the standard process involves the project development: the fleshing out of an original concept into a form whereby the council can evaluate the viability of the project. This is a critical stage. The proposal moves from being a broad concept to becoming a possible project. It involves a number of inputs, and most councils do not have an in-house capacity to do all the evaluations. All feasible options have to be evaluated on a whole-of-life and public interest basis.

An economic appraisal is needed to examine options in terms of alternative means of providing the infrastructure or services, alternative scales of construction or operations, and alternative time-paths. The aim is to analyse systematically all the costs and benefits associated with the different ways in which the objectives can be met. Usually this is done by cost-benefit analysis (where major benefits can be quantified) or cost effectiveness analysis (where outputs are not readily measured in monetary terms). A preliminary financial appraisal would also be made, identifying and measuring cash-flows. The assumptions upon which the project is based are identified, specified, and tested for best and worst case scenarios. This involves identifying market risks, competition risks, operating risks, regulatory-change risk, and private-sector partner risk. The initial statement of fiscal impacts is made, alongside an assessment of the Department of Local Government loan rules in relation to the project. The process also includes a summary of proposed accounting treatments. The next step in the process ought to be an independent review of the appraisal to check its soundness. It is clear that Liverpool City Council did not systematically go through all of these steps of project proofing. Some steps were done in part for some proposals, but not for others. One reason why such a systematic process was not in place was because the council did not have the in-house resources to do so. They relied on outside assistance to do parts of the job, but never developed a team where external resources complemented staff to build an effective project development group.

2.3.10 Once the soundness of a proposal has been assessed, Expressions of Interest (EOI) from the private sector are usually sought. On June 29, 1989 Liverpool City Council resolved to call for Expressions of Interest from companies interested in re-developing the old pool site. After the 1992 Master Plan the council also invited expressions of interest in assisting the council with the broad development of Woodward Park. The council made no further effort to test the market beyond then. The council's market-testing exercises were conceptually weak. Not one of the standard steps that take a concept to the stage where it can be presented to the market (described above) was undertaken. Beyond 1992 Liverpool City Council was at the mercy of unsolicited proposals from various groups; proposals that were never effectively evaluated by the council.

In the standard approach the EOI document informs the market of the potential of the project, and invites submissions. An EOI evaluation system will be drawn up to assess the experience and financial and technical capacity of the applicants, to measure their compatibility with the council's aims, and their potential to provide innovative and rewarding outcomes. The bidding process is critical because competition is so important in achieving value for money. In the bidding process maintaining competitive tension is important. The private sector party through innovation that produces cost reductions or adds value to the outcome can provide value for money. The process must be transparent and neutral in competitive terms. The bids must also show that the interests of the community are to be protected and that no community group is unreasonably disadvantaged. Because of the limited experience of councils in developing PPP for projects, it is likely that they will receive a number of unsolicited proposals from the private sector. This has the advantage of bringing innovative solutions to the continuing struggle that councils face in providing infrastructure and services with a limited resource base. Some form of market testing (sometimes difficult because of problems associated with protecting intellectual capital) or external evaluation of unsolicited proposals is always called for.

2.3.11 Having short-listed the applicants, the usual procedure is for the public sector body to submit a proposal that specifies the details of how the private sector group would produce outcomes, detailing the legal and financial structures, technical details, staging definition, and the terms and conditions under which the council and the private sector entity would work.

2.3.12 In assessing the proposals, a critical feature for the council to consider is the way in which risk is transferred and measured within the projected partnership. Risks have to be identified, the consequences of each risk quantified, the probability of each risk identified, and the value of the risk calculated. This is done by using such techniques as sensitivity analysis and scenario planning. Risks can be aggregated and a risk matrix calculated. This leads to risk-response planning and the way in which risks are to be managed. Guidelines used for State projects suggest that a very large range of risks need to be evaluated.[2] Because councils are very inexperienced in venturing into large commercial projects, and because councils have limited resources, it is critical that strong risk assessment and risk management processes be put in place. Clearly, Liverpool City Council did not place any high value on understanding risks, and paid the penalty for that.

2.3.13 The obvious next stage is negotiations with the preferred applicant and the awarding of a contract. Most PPP contracts contain both bonus and penalty clauses that offer incentives to the parties and define the cost of not fulfilling aspects of the contract. There are also agreed termination arrangements, and defined conditions whereby the public sector entity can exit. Milestones will be defined in the contract and review mechanisms will be agreed upon. The contract also stipulates how the profits are to be shared. Some contracts offer a guaranteed, capped return to the private sector party, and a profit-sharing system for additional profits above the cap. Ground lease arrangements are another way of producing returns for the public sector entity. Contracts also will contain value-preserving guarantees for public assets, and the way in which assets will be valued and ownership is transferred at the end of the contract period. Dispute resolution processes should also be included for the life of the contract.

2. These risks are: commissioning, construction, demand, design, environment, financial, force majeure, industrial relations, latent defect, operating, performance, change-in-law, residual value, technology obsolescence, and upgrade.

2.3.14 Once the contract is made the emphasis shifts to contract and project management. Often the private sector party does the bulk of the work from that point, with the public sector entity having the means to ensure that financial, legal, and probity information and processes are properly shared, and that agreed milestones are achieved, and the conditions of the contract are met. Clearly, Liverpool City Council built in none of the systems that would ensure that outcomes for the Oasis project fitted their expectations.

2.3.15 To address the range of issues considered as the various steps in creating a PPP are taken, a fairly standard set of committees and key positions have been put in place for most PPP.

2.3.16 The Steering Committee provides overall direction to the project. It approves all recommendations made to the council, and to key external bodies. It approves all major documents, approves the appointment of advisers, their tasks, and the terms of their engagement. It provides overall guidance in relation to commercial, financial, contracting and procurement process issues. It approves the timetable and resources. It develops and manages communications, and is responsible for safeguarding the public interest. It has the ultimate responsible for the delivery of the project. This committee is the key in-house body responsible for the project. In the case of Liverpool City Council and its Woodward Park projects, the Mayor and the General Manager effectively assumed the role of the Steering Committee.

2.3.17 In New South Wales large infrastructure proposals to be developed by State Agencies in association with private sector parties, have to be considered by the Budget Committee of Cabinet. This body provides an independent assessment of the viability of the project.

2.3.18 At an early stage of developing and testing the project's concepts and worth it is necessary to appoint an independent Probity Auditor. The Auditor verifies the integrity of the awarding process, and is to ensure that the public sector entity proposing the PPP maintains a high level of accountability. The Auditor oversees the Probity Plan, and ensures that all bidders are given an equal opportunity, ensures that the bid assessment procedures result in a fair and unbiased consideration of all bids, and ensures that confidential material is protected throughout the tender process. Broadly, across the project, probity implies values of integrity, fairness and honesty. The probity process is meant to address conflicts of interest when they arise, and produce accountability for decision-making at all levels.

2.3.19 The Evaluation Committee develops evaluation criteria. It considers all aspects of proponent submissions. It carries out reference checks. It may invite applicants to make presentations, or it may seek clarification from them on areas of their application. It takes into account advice from Advisory Committees and consultants. It prepares the evaluation report and makes recommendations.

2.3.20 A number of Advisory Committees might be established, consisting of external experts and members of the public sector body. In the appointment of Advisory Committees their role within the process is defined, bringing accountability for their actions. Their relationship to other committees and to other persons and bodies connected to the proposal is made clear. Liverpool City Council did not develop a structured committee structure to provide advice. Instead it relied on individual advisers whose role was defined by the immediate brief given to them, rather than by their place within the evaluative and developmental processes of the project. The council also changed advisers from time to time. The advisers who were used on several occasions had no connection with the proposals in between the times they were consulted. This created a very uneven, ragged, and somewhat unconstructive input of expert advice.

2.3.21 The Legal Advisory Committee might cover such matters as risk minimisation and allocation, advice on commercial issues, advice to negotiators, and the drafting of contracts.

2.3.22 A Financial Advisory Committee might help organise the development of a business case, analyse financial risk, assist in constructing a financial model, determine loan requirements and cash-flow data, and recommend accounting systems to be employed.

2.3.23 A Technical Advisory Committee might prepare specifications and offer advice on design, construction, output, timing, costs, planning and other matters.

2.3.24 A Budget Committee would be established to oversee the various flows of money and resources associated with the project.

2.3.25 A Project Director is appointed to manage the whole development of the proposal and the implementation of the contract. This may be a person from within the public sector body, or someone appointed from outside. In the case of councils an outside appointment is almost inevitable, given the fact that a council's skills pool is unlikely to possess an individual with the professional and commercial experience needed for a large project. Liverpool City Council did not appoint a Project Director specifically for the Oasis project.

2.3.26 The public sector entity would appoint a Project Control Group to be responsible for the timely development, and quality of performance, of the project. It would manage and review the project's business case, its financial and economic appraisals, its financial model, the benchmarking exercises, the output specifications, risk allocation and risk management, and contract issues. Essentially it would manage all the procurement processes. It would act as an interface between the Steering Committee and the range of other committees associated with the project. In this way it would facilitate the decision-making processes, producing progress and briefing reports for the Steering Committee and the Budget Committee on matters that required their approval. It would obtain all necessary approvals and manage the project teams associated with carrying out aspects of the project. It would organise and respond to the input of external consultants. It would be responsible for all project records. No such body was established across the various projects that were meant to involve Liverpool City Council. At different times, and in relation to different potential projects, committees were formed, but there was no sustained effort to shape a control structure that would drive the projects on behalf of the council. Instead, the most enduring aspect of council's structure was that one person, working part-time, assumed for all practical purposes the raft of duties normally belonging to the Project Control, or Project Management Group.

SECTION 3

The capacity of councils to enter into public-private partnerships

The capacity of councils to enter into public-private partnerships

3.1 Why councils are attracted to PPP and why private sector bodies are willing to create partnerships with councils

3.1.1 In the past 15 years the range of responsibilities managed by councils has grown significantly. This has partly come about because community priorities and expectations have grown, and partly because the composition and characteristics of society have changed. It has also occurred because at both the Federal and State government levels new policies, new processes, new structures, and new financing systems have been put in place, and the role of Local Government in relation to these has inevitably changed. Council revenues have not risen at a rate that would allow councils to accommodate comfortably all of their added responsibilities. With the 1993 Local Government Act councils also became more autonomous, and that inevitably expanded the variety of structures and policy priorities adopted by councils. This has produced a much more complex system of Local Government. One that has provided councils with the opportunity to act creatively and design responses to their challenges appropriate to the needs of their communities and their own resources. In this context PPP may be regarded as a potentially important means by which councils can deliver new infrastructure and services.

3.1.2 There is little doubt that there is one central asset held by councils that is attractive to many groups in the private sector: land. Councils often own, or have the management of, land that is located in prime positions (CBD, waterfront etc), and they often hold large quantities of land.

3.1.3 In terms of development potential council land is often regarded as a “lazy asset” by the private sector. Councils do not generally see property development as core their role and responsibility. In fact, in an age of booming development, many councils have seen their role as being that of a manager of development, rather than as an agent of development; they see their focus as preserving community values, and the public interest. In this sense the private sector sees land held by councils to be a “lazy asset”, given the range of infrastructure and services that councils might be called on to deliver. In this context it is not surprising that a number of initiatives to develop council-held land come from the private sector.

3.1.4 Private-sector initiatives, however, are not the only source of PPP proposals. Councils often have a strong interest in providing new infrastructure in the form of civic centres, youth or old aged facilities, libraries, sporting venues and the like. In concert with the private sector such infrastructure may be put in place in the context of a broader commercial or residential development so that the council may receive both the infrastructure and some revenue, whilst the private sector parties profit from the construction and sale of new buildings, or the longer-term revenue from managing the rentals of the buildings. Councils also often have ambitions to develop land to accommodate population growth, or to cater for segments of the population (such as the aged), but lack either the capital or the know-how to perform the task. Partnerships with the private sector clearly represent a solution. Councils in recent years have ventured into new functions that they traditionally have not had to manage. The provision of local medical services and an extending role in law and order maintenance are examples. Again, there is potential for private sector involvement in such areas. In rural areas councils often run the water and sewerage systems, and councils have begun to play a bigger role in energy production through wind-farms and energy-sharing programs. Council roles in recycling and, especially in rural areas, with broader waste management issues are further areas where collaboration with the private sector is possible. This summary represents just a sample of the ways in which councils and the private sector may form linkages. As successful PPP in Local Government are achieved, the lessons learnt will trigger new initiatives, and new ways of linking Local Government with the private sector.

3.1.5 Councils have the responsibility for local planning, and so can "make things happen" in the eyes of many in the private sector. By being in a partnership with a council it is believed that a significant risk associated with developments (planning restrictions) can be diminished. A zoning change, or exemption, can add substantial value to a property, and substantial profits to the development group.

3.1.6 Council are also the consent authority for development applications, and as such this creates a perception that outcomes will be guaranteed in projects where the council is a partner. If the DA risk is diminished, or removed, one of the biggest risks for project proponents is put aside. Private sector interest is magnified when there is a conviction that their projects will easily pass through the council processes.

3.2 Disadvantages in relation to councils entering into PPP

3.2.1 The governing body of a council faces two main difficulties in assessing the worth of a PPP proposal. First, the Elected Representatives have a primary duty to their constituents. They are elected to fulfil the wishes of the community. The assets that they might bring to a PPP belong to the community, and do not belong to the councillors. The responsibility of representing the will of the community is grave, especially since a PPP might bind the council to arrangements that could extend over decades.

First, there are great challenges for Elected Representatives in making decisions on behalf of the community that may have a big impact on the character and functions of an area, which may have significant implications for the economic and social well-being of the council and community, and which might bind future generations and future councils to arrangements that ultimately could be judged not to be in the community's best interests.

Second, the Elected Representatives will almost certainly stand at a considerable disadvantage in their dealings with private sector groups. Directors, who have been chosen for their experience and business acumen, will govern those groups. They will probably view the world in a very different way to the councillors, and in a business sense, will speak a different language to them. People are elected to councils for a wide variety of reasons, but their capacity as businessmen is probably a minor factor in most elections. The two difficulties (the Elected Representative's duties to the community and their capacity to manage business decisions) fold into each other as obstacles to councils being able successfully to develop PPP.

3.2.2 Private sector entities with an interest in Local Government PPP create assemblages of people who have the skills to conceive and manage major projects. Council staff often have high levels of skills, but they are skills honed to delivering the core services that a council provides for its community. In terms of working with private sector groups in a PPP, council staff will normally be playing on a distinctly uneven field. Since PPP are usually built around the use of council assets and the delivery of services, it is important that a council maintain a reasonable level of control over projects. This is very difficult to achieve when a council enters a PPP without a sufficiently strong operational skills-base. The solution is for councils to buy-in skills from external bodies. Because PPP in Local Government are relatively new, the means of effectively linking external expertise to the council structure are still somewhat experimental. Councils need two kinds of external assistance. On the one hand, they must rely on the independent advice of outside experts to avoid making bad decisions on financial, legal, technical, budget, and probity issues. For the advice to be truly independent, the advisers must be at arms-length from the project. Councils also need external skills from people or groups that will become part of their team within a project. Separating these roles, and using external skills to the best advantage, are exercises that are being trialled, rather than proven, by councils.

3.2.3 A large number of PPP developed at State Government level involve projects, such as the building and operation of a toll road or a prison, wherein the private sector group can earn a reasonable profit from operating the system over a long time-period protected by contract. Such schemes are largely seen as win-win situations for both the public and private sector groups involved. Councils offer a fairly restricted range of services where this type of arrangement can take place.

3.2.4 Whatever the nature of a PPP project might be, councils necessarily have to bring to the bargaining table various responsibilities that might be seen as heavy restrictions on commercial deals by the private sector. Protection of heritage or the environment is a duty of the council, whereas it might be seen as an option to a private sector party. Councils also have to try and assess such things as the impact of a project on community amenity, a concept that might be seen by the private sector as too nebulous to govern commercial arrangements. Councils also have such a diversified economic, demographic, and social clientele that it is difficult for them to bring a single strong focus to the negotiating table.

3.2.5 More generally, engagement in commerce is not the primary focus of councils, and so councils cannot be considered to have a strong base of commercial knowledge. The kinds of contractual dealings that councils normally engage in are very different to the challenges presented by large-scale development projects.

3.2.6 The geography of councils is also a barrier to their effective participation in PPP. In Sydney, for example, there are 43 councils. In size they range from Hunters Hill, which covers 5.8 square kilometres and has a population of around 14,000 people, to Blacktown, which covers 240 square kilometres and has a population over 260,000. The variations in size, revenue, and resources affect the capacity of councils to enter into viable PPP. The incoherence of the geographic base also affects the development of schemes where the market area for the product of a PPP can be easily assessed.

3.2.7 Councils, as observed above, have a large degree of autonomy in their decision-making, and necessarily respond to the priorities of their communities. Councils are in a form of competition with each other in gaining resources to develop their community assets and to find ways of seizing their opportunities. It may lead to a particularly enterprising council entering into a PPP to build infrastructure that logically might have been better placed in a neighbouring council. The fact of inter-council competition distorts the opportunity surface for effective PPP. Competition also makes it difficult for councils to join together in a PPP, by bundling their resources to improve the scale of a project.

3.2.8 Partnership arrangements between councils and State Agencies for the purpose of infrastructure creation have been slower to evolve in New South Wales than in some other Australian states. Council territories are always part of a regional system (defined in different ways for different purposes). The facts of an incoherent geographic base to councils, and the level of competition between councils, make it more difficult for such partnerships to arise. The somewhat ragged interface between councils and their regions makes the establishment of significant projects in partnership with either state or private sector parties more difficult to achieve.

3.2.9 The provision of new infrastructure, through a PPP based on council inputting land, also raises some difficulties for councils. As the project progresses, and certainly at its completion, the value of the land will have risen considerably. In this early stage of developing council-based PPP the issue of who amongst the partners captures the land value increases, and how equitable arrangements might be developed, is unresolved.

3.2.10 Unsolicited proposals also carry some problems for Local Government. It is inevitable that unsolicited proposals will be made, especially at the early stages of the evolution of council-related PPP. Unsolicited proposals are likely to bring innovative ideas to the development of Local Government infrastructure and services, and therefore play a very useful role. For the many reasons discussed above, however, neither the Elected Representatives, nor the staff of councils, are particularly well-placed to assess the merits of unsolicited proposals. If an unsolicited proposal is accepted by a council safeguards need to be put in place that enable the council to maintain relevant control over the project, and ensure that its actions are in the public interest. The fact that the proposal is unsolicited, and probably contains a measure of intellectual capital, makes it difficult for the council to market-test the proposals when making a decision about entering a PPP, and adds further difficulties of control as the project develops.

3.2.11 The fact that a council has local area planning responsibilities and is also the consent authority poses continuous problems for councils when entering a PPP. There are various solutions that might be applied to cover any conflict of interest problems, but none is perfectly suited to allay all perceptions of conflicts of interest, nor is there one standard solution because each project is likely to throw up different complications. The fact that councils play both roles (planning and consent) also raises a problem in terms of maintaining competitive neutrality. The public sector group engaged in a partnership with the council will largely be seen to have an advantage over other groups who don't have commercial links with the council.

3.2.12 A further obstacle to building effective PPP involving councils is that Section 358 of the Act deals with the question of a council creating a company, but does not extend to the variety of arrangements that may be made under a PPP. Also Section 55 of the Act deals with a council's obligations to go to tender, but there are aspects of arrangements in a partnership, or during the formation of a partnership, which appear to complicate the council's role in respect of tendering.

3.3 Advantages that private sector involvement brings to council projects

3.3.1 Private sector interest in forming PPP with councils is stimulated by the evidence of strong demand for new infrastructure in parts of the Local Government sector, and the opportunities that exist, but have not yet been recognised, or acted upon, within the Local Government sector. It is bolstered by the private sectors' conviction that it can supply the expertise needed to produce new infrastructure and services, and overcome obstacles that currently exist.

3.3.2 From a council's point of view the main attraction of working with private sector partners is that they may alleviate the financial restraints often faced by a council attempting to do projects on its own. Private sector groups, in the normal course of their commercial operations, either have internal resources that allow them to fund large projects, or they have access to external finance. Sections 621 and 622 give councils authority to borrow funds, but Section 624 stipulates that the Minister may, from time to time, impose limitations or restrictions on borrowings by a particular council or councils. State Treasury defines a global limit on how much the Local Government sector as a whole may borrow in a year. Councils generally do not receive routine approval for borrowings above $10 million when they apply to the Minister. $10 million is insufficient to fund the kind of projects that will generally attract the private sector. Regardless of any restrictions on council borrowings, the reality is that ordinary revenue-cost relationships of councils preclude their capacity to raise the volume of funds necessary to undertake large-scale projects. Private sector groups entering partnerships with councils often bring with them the capacity to raise funds, often in situations where they are compensated to some degree by the council's ability to supply assets, such as land, to the project.

3.3.3 Besides having financial limits on their ability to undertake large-scale projects, councils rarely have the skills and resources to manage such projects. Private sector parties interested in PPP with councils usually bring their own experience and capacity to the projects.

3.3.4 Local Government projects of a size that attract private sector interest are also usually complex in their structure. The private sector brings to partnership the skills and experience needed to make complex projects work.

3.3.5 The private sector flourishes by finding innovative ways of creating infrastructure or delivering services. The level of innovation in their practices frequently forges their competitive advantage. Councils are not especially noted for innovation in making large projects work, although there is an ongoing process of innovation related to their normal tasks. The private sector usually brings a level of innovation to a partnership, and so expands the chances of a project being successful.

3.3.6 Driven by the competitive demands of the marketplace private sector firms are more likely than councils to invest in new technology or systems. By so doing they bring a dimension to projects that would be unlikely to be found if councils attempted to work on their own.

3.3.7 Councils have to manage a portfolio of assets, and under AAS 27 accounting methods, have to measure the worth of those assets and allow for their depreciation. In areas where much of the infrastructure is old, or in areas where council has to establish new infrastructure to keep pace with growth, the establishment and maintenance costs of infrastructure pose serious challenges to councils. By using PPP in sector projects with high maintenance costs, a council can shift some of the responsibility for maintaining assets to the private sector.

3.3.8 Design of systems, either to provide operational efficiencies or better aesthetics, may be improved if a council forms a partnership arrangement with a private sector group that can provide design features.

3.3.9 One of the problems that may hamper a council in forming partnerships is that the regulatory systems of council, their decision-making practices, and the need to allow public input into processes can slow the pace of developments to a point that is unacceptable to the private sector.

3.3.10 The formation of PPP is hampered by levels of uncertainty about just what are the rights and responsibilities of councils in establishing PPP, and the lack of corresponding information on the structures and safeguards for private sector partners within a PPP.

SECTION 4

Recommendations

Recommendations

1. That the Local Government Act 1993 be amended to provide the Minister for Local Government with the power to make regulations concerning the participation of councils in Public-Private Partnerships

The regulations might contain some, or all, of the following:

- A definition of Public-Private Partnerships (PPP)
- The cost-of-project threshold at which the regulations would become effective
- The processes to be followed by councils in considering a PPP
- The structures that a council would need to put in place to develop, evaluate, and manage those processes
- The establishment of a Local Government Project Review Committee
- A review of the roles, responsibilities, and obligations of the Elected Representatives of a council entering a PPP

1. Defining a Public-Private Partnership

In Working with Government: Guidelines for Privately Financed Projects (NSW Government, 2000, p.iii) a general definition of a PPP is given. It is: a PPP is any contracted relationship between public and private sectors to produce an asset or deliver a service.

2. Defining Threshold Costs

The threshold at which the regulations would be invoked might be based on either:

(1) a proposal with an estimated total project cost of $30 million or more; or
(2) a proposal with an estimated total project cost equal to, or greater than, 25% of a council's total annual revenue, whichever is the lower.

The $30 million threshold would only affect councils whose annual total revenue is equal to, or greater than, $120 million. The Comparative Information on New South Wales Councils 2001-2002 (the latest published edition) shows that there were only 10 councils in New South Wales with this level of revenue.

For small to medium metropolitan councils[1] the threshold cost-of-project would vary from $4 million to $15.8 million. For large to very large metropolitan councils the threshold range would be $10 million to $30 million. For small to medium regional towns the threshold range would be $2.5 million to $15 million. For large to very large regional towns and cities the range would be from $25.5 million to $30 million. For small to medium fringe metropolitan councils the threshold range would be $6 million to $13.5 million. For large and very large metropolitan fringe councils the range would be from $16.5 million to $30 million. Small agricultural councils would have a threshold range from $1 million to $1.5 million. Medium-sized agricultural councils would have a threshold range of $1.5 million to $3.5 million. Large agricultural councils would have a threshold range from $2.25 million to $4 million, and very large agricultural councils would have a threshold range of $3.25 million to $9.75 million.

Since total council revenues vary from year to year, the revenue figure used for councils whose income is less than $120 million per year, might be taken on an average figure for the three years prior to their considering entering a PPP.

3. Establishing PPP Processes

A. The Initial Stage of a PPP proposal

Public-Private Partnerships may result from a proposal produced by a council, or may result from an unsolicited proposal brought to the council from the private sector. In both cases the processes used to formulate, evaluate, and develop the proposal should essentially incorporate the same steps. The first steps involve identifying the need, or needs, of the council that the proposal might seek to fill, and creating a business plan showing that the council has the capacity to join with a private sector partner, or partners, in providing infrastructure or services that would fulfil the identified need, or needs.

(i) Establishing the need

- Specifying the objectives of the project
- Establishing relationship of the project to council's strategic and management plans
- Defining the public interest aspects of the project
- Surveying alternative approaches to achieving outcomes, including council stand-alone approach and various forms of PPP

1. The categories follow the Australian Classification of Local Governments

(ii) Creating a business plan

- Defining desired outcomes
- Establishing time-frames
- Incorporating a whole-of-life structure
- Identifying resources (council's inputs, external needs)
- Costs and revenues (i) preliminary estimates and sources of revenue

(ii) direct and indirect costs
(iii) capital and recurrent expenditure
(iv) operating and maintenance costs

B. Preliminary review by the Local Government Project Reference Committee

- Focussing on the capacity of the council to undertake the project, but not judging the merits of the project
- Assessing the steps taken
- Assessing council resources (financial and human)
- Assessing connection of project with council's strategic/management plans
- Assessing the extent of external involvement likely to be used/needed
- Assessing whether project should proceed to next level of development

C. Structuring the approach

- Establishing a Probity Plan: guaranteeing processes are:
  - Transparent
  - Preserving competitive neutrality of council
  - Accountable

- Establishing a Community Relations Plan
  - Methods of informing the community
  - Outlining costs and impacts
  - Incorporating community input
  - Informing community of initial summary of risks, benefits and expected outcomes

- Doing a preliminary risk analysis
  - Identifying major risks
  - Summarising likelihood of risks
  - Identifying council's capacity to meet risks

- Establishing the costs to council of providing the infrastructure or service without a private sector partner, and establishing benchmarks to assess the benefit/cost advantages of having a private sector partner or partners; the approach is similar to the comparator modelling done for State Government PPP projects.

- Identifying reporting mechanisms
  - Reporting to council
  - Reporting to community
  - Reporting to partners

D. **Constructing a Project Plan**

- Option justification
- Economic appraisal
  - Cost benefit
  - Cost effectiveness

- Financial appraisal and financial model
- Project assumptions
- Loan requirements
- Accounting treatments
- Expected private sector involvement
- Risk evaluation

E. **Assessment by Local Government Project Review Committee**

- Project proceed
- Committee requires more information
- Project not to proceed

F. **Approaching and Evaluating Potential Private Sector Partners**

(i) Seeking Expressions of Interest

- Creating an evaluation process
- Establishing evaluation criteria
- Ensuring competitive neutrality
- Safeguarding public interest
- Conducting a probity review
- Protecting intellectual capital of potential private sector partners

(ii) Short-Listing processes

- Ensuring transparent processes
- Ensuring security of information
- Conducting a probity review
- Assessing the experience and capability of proponents

G. Requesting short-listed proponents to provide detailed submissions on the details of proposals

- Identifying the inputs, roles and responsibilities of the private sector entity (entities) in the project
- Defining expected outcomes
- Elaborating the type of PPP to be structured
- Detailing the public/private responsibilities in the PPP
- Identifying financial structures in the project
- Establishing legal processes within the project
- Outlining the technical specifications of the proposal
- Establishing risk transfer processes
- Establishing time frames
- Identifying milestones
- Ensuring accountability within the project

H. Selection of private sector partner(s)

I. In principle approval by council

J. Contract development

- Expected outcomes and responsibilities
- Output specifications
- Negotiation process agreed
- Milestones defined and progressive project review mechanisms agreed
- Bonus/penalty clauses in relation to outcomes and responsibilities
- Structuring the project vehicle
- Vehicle delivery definition
- Profit-sharing arrangements
- Value-preserving guarantees for public assets
- Management structures
- Lease, ownership, transfer arrangements
- Dispute resolution processes
- Risk transfer provisions
- Finance and resource structures
- Exit and termination provisions
- Probity review

K. **Assessment of project details by Local Government Project Review Committee**

- Approval
- Further negotiations
- Rejection

L. **Council approval**

M. **Contract signing**

N. **Review of project at key milestones or major project reformulations by Local Government Project Review Committee**

4. Structures to be established by council when considering a PPP

The committee structure put in place by a council will reflect the nature of the project being considered or undertaken in a PPP. There is, therefore, some flexibility, notably in relation to the Advisory Committees. Whereas the possible composition of the committees may include councillors, staff, external experts, community representatives, and representatives of various NSW Government Departments the individuals sitting on each committee will be chosen for their relevance to the role of the committee, and so it is most likely that different people from the same body may be involved on committees at different times.

1. **Steering Committee**

A body established by the council that has the overall responsibility for directing the project development, assessment, selection, contract negotiation, and contract conclusion. This body would report to the Local Government Project Review Committee, and the governing body of the council.

Possible make-up of Steering Committee: delegated councillors and staff, community representatives, independent experts.

2. **Probity Auditor**

A person, external to the council, who would be appointed at the start of the processes to ensure their transparency and accountability. The probity auditor may work with the council's internal auditor (if such existed) in the development of the council's probity plan. The probity auditor would maintain an arms-length relationship to the council in examining and assessing processes. The probity auditor would report to the Steering Committee.

3. **Advisory Committees**

- Legal
- Technical/design
- Finance
- Economic viability/feasibility
- Budget

These committees might include council officers, independent experts, State Government representatives. Since the skills base of council staff will generally need to be augmented by committee members from the private sector or the State Government, it is important that their roles are clearly defined. There are two possible roles that external advisers can play. One is to work with the council team to progress the project and its various processes. In this role they become effectively part of the council's team. The other role involves an external adviser providing arms-length appraisals of such things as the processes adopted by the council, the feasibility of the project, and legal, technical and financial aspects of different parts of the project or various issues that arise. In these roles the external advisers do not act as part of the project's team; rather, they act as independent assessors.

4. **Evaluation Committee**

The group responsible for managing the processes associated with going to the market through the expressions of interest, evaluation, short-listing, examination of detailed proposals by short-listed firms, and preparing recommendations for the Steering Committee to consider.

Membership might include delegated council officers and/or councillors, independent experts, DLG or State Government representatives, and community representatives. If a person or group is part of the evaluation committee they would not be able to be part of a group placing expressions of interest.

5. **Project Director**

An individual, appointed by council, with appropriate experience and skills to manage the development of the project, and to interface with private sector parties on the operational aspects of the proposal. The Project Director would chair the Project Control Group.

Generally, such a person would be recruited from outside of the council but council may decide to appoint a Deputy Project Director from within its ranks.

6. **Project Control Group**

This is a body of the council charged with responsibility for managing all aspects of the procurement process. In particular it would:

- Manage project specifications
- Conduct financial and economic appraisals
- Establish relevant benchmarks
- Construct the financial model
- Determine resource allocation interface with Advisory Committees
- Interface with the Steering Committee

The committee might include delegated councillors /council officers, external experts, and a community representative.

7. **Project Vehicle**

This is the entity designed to link the council with its private sector partner(s) to construct and manage the infrastructure and/or services associated with the project. In particular it would be responsible for:

- Design, planning and construction
- Financial management and reporting
- Decision-making mechanisms
- Contract processes
- Progress assessments
- Reporting mechanisms
- Auditing processes
- Project reviews

It would be made up of council and private sector members.

8. **Management Board**

This group would have the responsibility of overseeing the operations and development of a project, including budget reviews and compliance with contract details.

The Board would comprise representatives of the council, and representatives of private sector partner(s). The Chair of this Board ought to be independent of both groups, but ought to be selected through a process involving both groups, and based on the person's skills and experience in the project area.

5. Local Government Project Review Committee

The Director General of the Department of Local Government would establish this body.

It would have a significant role in assessing the viability of the proposal, and the council's capacity to enter into a PPP. The role of the Committee, however, would not be to judge the merit of the project. The Committee would comprise reviewers who are external to the council, with the skills and experience to assess the viability of the project, the capacity of the council to engage effectively in a PPP, and the steps taken by council in testing and examining all the features of the proposal from concept to contract, as laid out above.

Membership would include the Director General of the Department of Local Government (or nominee) as Chair, a representative from at least two of the following NSW Government Departments (Treasury, Premiers, Infrastructure, Planning, and Natural Resources, and Commerce), a representative of the Local Government or Shires Association, and a person with experience and skills in working in fields allied to the projects within the private sector. The membership of the Committee might change as it progresses through the various stages of the project. At a certain stage, for example, financial issues might be paramount, whilst at another stage the main focus might be on project management issues. Representatives with skills particular to the issues would join the Committee at the appropriate time.

6. Elected Representatives responsibilities in relation to a PPP

- The Government should give serious consideration to ensuring that Elected Representatives assume similar responsibilities and obligations in a PPP to those of the Directors of a registered company. The Mayor's position would be similar to the Chair of a company board.

- Prior to any project commitment, the Elected Representatives should receive appropriate training to enable them to better perform their responsibilities and obligations in relation to the projects associated with a PPP.

- A similar regime may be extended to projects that are not part of a PPP, but which have great significance to the community of the council.

2. **That Section 358 of the Local Government Act 1993 be strengthened by requiring the Minister's consent to a council forming, or participating in the formation of, a commercial organisation by a council with private sector entities that is not a corporation, but which effectively operates in a commercial sense in a similar way to a corporation. The provision should extend to cover any form of legal entity established outside the structure of the council.**

There is a range of joint venture structures with private sector entities that councils may participate in without seeking the Minister's consent. Many of these arrangements perform functions that are akin to those of a corporation, but might lack the safeguards afforded by corporate law. There is a likelihood that as PPP develop within Local Government the range of structures linking the council to the private sector will grow and diversify. The shape of a PPP is formed by the contract negotiated between the parties, and is determined by the nature of the project that the PPP will develop. The Project Vehicle chosen for one PPP may have a considerably different structure to that of another PPP. PPP with councils may take on a variety of forms. Since councils are responsible for protecting and managing community assets, there is a need to reconsider Section 358 of the Act to ensure that when councils enter into Agreements or contracts with their private sector partners, there is a capacity for the Minister to review the appropriateness of the formal vehicle that binds a council to the private sector entity, or entities. In relation to the current version of Section 358 a council has to obtain the Minister's consent to acquire a controlling interest in a corporation . There is nothing to stop a council, however, from acquiring a substantial share (up to 49%) of an existing corporation.[2] In the Oasis project ODC was formed to construct various projects within the Oasis scheme, and there was nothing in Section 358 to stop the council acquiring a share of that company.

3. **That Section 55 of the Local Government Act 1993 be strengthened to ensure that councils go to the market when considering entering a PPP, whether the proposal is solicited or unsolicited.**

In the case of Liverpool City Council's various commercial agreements with private sector groups the council effectively by-passed the requirements of Section 55 of the Act (which deals with tendering). This effectively meant that there was no real market-testing of the council's arrangements. Consequently, there was no proof or test of whether the different agreements provided value for money for the council.

2. This does not prevent a council from being a member of a cooperative society or a company limited by guarantee and licensed not to use the word "Limited" in its name.

4. That under Section 23A of the Local Government Act 1993 the Director General of the Department of Local Government issue guidelines to assist councils who might be considering entering into a PPP. Such guidelines may be varied by the Director General from time to time.

There are a variety of factors that might be considered by the guidelines. Amongst them are the following:

- Mechanisms for relating council PPP projects to State/Regional infrastructure plans
- Mechanisms for strengthening inter-Agency relationships to council PPP proposals
- Developing State-Local Government partnership arrangements in relation to certain PPP projects
- Accessing State Government expertise in relation to PPP
- Means of strengthening a council's resource base (human, financial etc) when considering a PPP
- Processes of community consultation
- Uses of external expertise

– Maintaining arms-length relationships with external advisers so that the council receives frank and independent advice
– Incorporating external experts with the council's functional team for a PPP

- Establishing ways that the Local Government or Shires Association can assist a council that might be considering a PPP

- Developing standard approaches to land issues within a PPP, covering such issues as classification, zoning, ownership status, land value, environmental and heritage status, use patterns etc

- Developing approaches to dealing with planning issues including, project relationship to current plans (LEP, REP, DCP), processes for changing plans, deciding planning issues prior to/beyond a PPP, independent planning appraisals, State Government approvals etc

- Finding ways of dealing with consent issues involving councils in a PPP, including providing State Government input for major projects, and using independent assessors and other processes

- Removing conflict of interest issues including planning and consent issues, relationships with private sector partners, and competitive neutrality between the PPP project and other projects

- Developing loan processes and approvals, and finding innovative funding mechanisms (including use of NSW Treasury Corp.)

Other Issues that might be considered when establishing guidelines include:

- Providing case-studies of successful PPP at Local Government level
- Encouraging/supporting pilot projects involving PPP
- Finding appropriate groups with suitable PPP expertise to provide training and information to councils about PPP processes
- Encouraging councils to identify and use appropriate State Government expertise on PPP
- Setting up a development fund (perhaps $5 million) to assist councils to adopt proper procedures of evaluating and developing PPP
- Providing information about structures and developments of PPP across the New South Wales Local Government sector
- Structuring a system whereby inter-councils PPP may be developed where appropriate
- Exploring ways in which PPP at the level of a single council may be developed by bundling projects together to create an appropriate scale
- Exploring how councils can use PPP to provide soft infrastructure (eg. libraries, community centres) as well as hard infrastructure (eg. roads, bridges)
- Encouraging councils to seek innovative ways of linking with the private sector in producing infrastructure or service delivery, whilst protecting community assets, and reflecting community needs and values