

Passed by both Houses



New South Wales

Local Government Amendment (Public-Private Partnerships) Bill 2004

Contents

	Page
1 Name of Act	2
2 Commencement	2
3 Amendment of Local Government Act 1993 No 30	2
Schedule 1 Amendments	3

I certify that this PUBLIC BILL, which originated in the LEGISLATIVE ASSEMBLY, has finally passed the LEGISLATIVE COUNCIL and the LEGISLATIVE ASSEMBLY of NEW SOUTH WALES.

*Clerk of the Legislative Assembly.
Legislative Assembly,
Sydney, , 2004*



New South Wales

Local Government Amendment (Public-Private Partnerships) Bill 2004

Act No , 2004

An Act to amend the *Local Government Act 1993* in relation to the participation of councils in public-private partnerships; and for other purposes.

I have examined this Bill, and find it to correspond in all respects with the Bill as finally passed by both Houses.

Chairman of Committees of the Legislative Assembly.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Local Government Amendment (Public-Private Partnerships) Act 2004*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Amendment of Local Government Act 1993 No 30

The *Local Government Act 1993* is amended as set out in Schedule 1.

Schedule 1 Amendments

(Section 3)

[1] Section 55 What are the requirements for tendering?

Insert after section 55 (1) (h):

(h1) a contract for the formation of a public-private partnership,

[2] Section 55 (5)–(7)

Insert after section 55 (4):

(5) Subject to the regulations, a council must comply with the requirements of this section even though the contract concerned involves something being done to or by an entity that the council has formed or participated in forming.

(6) However, if the entity concerned is a public-private partnership, subsection (5) has effect only to the extent that the contract is not part of a project that has been assessed or reviewed in accordance with Part 6 of Chapter 12.

(7) For the purposes of subsections (5) and (6):

entity means any partnership, trust, corporation, joint venture, syndicate or other body (whether or not incorporated), but does not include any such entity that is of a class prescribed by the regulations as not being within this definition.

this section includes the regulations made for the purposes of this section.

[3] Section 358 Restrictions on formation of corporations and other entities

Insert “or other entity” after “corporation” wherever occurring in section 358 (1).

[4] Section 358 (3) and (4)

Insert after section 358 (2):

(3) In applying for the Minister’s consent under subsection (1) (a), the council is required to demonstrate, to the Minister’s satisfaction, that the formation of, or the acquisition of the controlling interest in, the corporation or entity is in the public interest.

(4) In this section, *entity* means any partnership, trust, joint venture, syndicate or other body (whether or not incorporated), but does not include any such entity that is of a class prescribed by the regulations as not being within this definition.

[5] Chapter 12, Part 6

Insert after Part 5:

Part 6 Public-private partnerships

Division 1 Preliminary

400B Definitions

- (1) In this Act, a reference to a *public-private partnership* is a reference to an entity formed under an arrangement between a council and a private person for the purposes of:
 - (a) providing public infrastructure or facilities (being infrastructure or facilities in respect of which the council retains a beneficial interest under the arrangement), or
 - (b) delivering services in accordance with the arrangement, or both, but does not include a reference to any such entity if it is of a class that has been excluded from the operation of this Part by the regulations.
- (2) In this Part:

arrangement includes a contract or understanding.

entity means any partnership, trust, corporation, joint venture, syndicate or other body (whether or not incorporated).

PPP guidelines means the guidelines in force from time to time under section 400C.

private person means any person other than:

 - (a) the Government (including the State, the Crown and a Minister of the Crown), or
 - (b) a public or local authority (including a council or a State owned corporation), or
 - (c) a public sector employee or other person or body acting in an official capacity on behalf of the Government or a public or local authority.

relevant council, in relation to public-private partnership or proposed public-private partnership, means the council that has formed, or is proposing to form, the partnership.

significant project means:

 - (a) any project with an estimated total cost of more than \$50 million or such other amount as may be prescribed by the regulations, or

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- (b) any project in respect of which the relevant council's financial contribution, or its equity position, amounts to 25% or more of the council's annual revenue that is lawfully available for spending on facilities or services of the kind to which the project relates.
 - (3) In determining a relevant council's financial contribution or equity position in relation to a project for the purposes of this Part, all elements of the project that the council provides are to be taken into account, including land value, the provision of non-monetary goods and services and any costs associated with the council's contractual liability in the event of the council incurring a loss under the project.
 - (4) For the purposes of this Part, a project under a public-private partnership that is carried out in stages is to be treated as a single project. The PPP guidelines may also specify other circumstances in which related projects carried out under a public-private partnership are to be treated as a single project for the purposes of this Part.

400C Guidelines to be followed by councils in relation to public-private partnerships

- (1) The Director-General may from time to time issue guidelines requiring specified procedures and processes to be followed by councils in relation to the formation of, and the carrying out of projects under, public-private partnerships.
- (2) Without limitation, the PPP guidelines may contain provisions requiring:
 - (a) feasibility and risk assessment, and
 - (b) the identification of appropriate governance and administrative arrangements (including appropriate management structures and auditing requirements), and
 - (c) the undertaking of on-going risk management measures, and
 - (d) due diligence in the carrying out of projects under public-private partnerships.

400D Ancillary provisions relating to PPP guidelines

- (1) The PPP guidelines are to be made available to councils in such manner as the Director-General thinks appropriate.
- (2) The Director-General may from time to time amend or replace the PPP guidelines.

Division 2 Restrictions relating to public-private partnerships

400E General requirements

- (1) A council must not:
 - (a) form a public-private partnership, or
 - (b) carry out any project under a public-private partnership, except in accordance with this Part.
- (2) Without limiting subsection (1), a council is required to comply with the PPP guidelines at all times while carrying out a project under a public-private partnership.

400F Council to provide assessment of PPP project to Director-General

- (1) A council must not form a public-private partnership unless the council has provided the Director-General with an assessment of the project to be carried out under the partnership.
- (2) In providing such an assessment, the general manager of the council is required to certify that it has been prepared in accordance with the PPP guidelines.
- (3) If:
 - (a) the project to be carried out under the public-private partnership is a significant project, or
 - (b) the Director-General is of the opinion, having regard to the criteria specified in the PPP guidelines, that the project has a high risk,the Director-General is to advise the council that the project is required to be referred to the Project Review Committee for review.
- (4) If the Director-General advises the council that the project is not required to be referred to the Project Review Committee, the council is entitled:
 - (a) subject to obtaining the Minister's consent under section 358 (1) (a), to proceed with the formation of the public-private partnership, and
 - (b) subject to this Division, to carry out the project that is the subject of the assessment.

400G Minister may require PPP project to be referred to Project Review Committee

- (1) The Minister may, on such grounds as the Minister thinks fit, direct a council to refer any project that is to be carried out, or is being carried out, under a public-private partnership to the Project Review Committee for review.
- (2) Any such direction:
 - (a) may be given at any stage in the process of forming the public-private partnership or in the carrying out of the project under the partnership, and
 - (b) must be complied with by the council.

400H Director-General may require council to provide assessment of varied PPP project

- (1) If the Director-General is of the opinion that a project that is to be carried out, or is being carried out, under a public-private partnership has been, or is proposed to be, varied in a significant manner, the Director-General may require the relevant council to provide the Director-General with an assessment of the project as varied or proposed to be varied. Section 400F (2) applies in relation to any such assessment.
- (2) If the Director-General is of the opinion that the project has or will become:
 - (a) a significant project, or
 - (b) a high risk project (having regard to the criteria specified in the PPP guidelines),the Director-General is to advise the council that the project is required to be referred to the Project Review Committee for review.
- (3) The relevant council must comply with a direction under subsection (1).

400I Review of PPP project by Project Review Committee

- (1) If a project is required or directed to be referred to the Project Review Committee for review, the relevant council must not form a public-private partnership to carry out the project, or proceed with the carrying out of the project under a public-private partnership, unless:
 - (a) the relevant council has provided the Project Review Committee with an assessment of the project in accordance with the PPP guidelines, and

- (b) the Project Review Committee has reviewed the project and is satisfied that the requirements of the PPP guidelines have been complied with in relation to the project.
- (2) The relevant council has the responsibility of demonstrating to the Project Review Committee, in conducting its review of the project, that the requirements of the PPP guidelines have been complied with in relation to the project.
- (3) If the Project Review Committee advises the council that the Committee is satisfied that the requirements of the PPP guidelines have been complied with in relation to the project, the council is entitled:
 - (a) to proceed with the formation of the public-private partnership (if it has not already been formed), or
 - (b) subject to this Division, to proceed with the carrying out of the project.
- (4) The Project Review Committee's decision as to whether or not the relevant council has complied with the requirements of the PPP guidelines in relation to a project is final and cannot be reviewed by any court or tribunal.

Division 3 Local Government Project Review Committee

400J Establishment and constitution of Project Review Committee

- (1) A Local Government Project Review Committee is established.
- (2) The Project Review Committee is to consist of the following members:
 - (a) the Director-General (or an officer of the Department nominated by the Director-General) who is to be the chairperson of the Committee,
 - (b) the Secretary of the Treasury (or an officer of the Treasury nominated by the Secretary),
 - (c) the Director-General of the Premier's Department (or an officer of the Premier's Department nominated by that Director-General),
 - (d) the Director-General of the Cabinet Office (or an officer of the Cabinet Office nominated by that Director-General),
 - (e) the Director-General of the Department of Infrastructure, Planning and Natural Resources (or an officer of that Department nominated by the Director-General of that Department),

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- (f) such other persons as may be appointed by the Director-General for the purposes of enabling the Project Review Committee to exercise its functions.
 - (3) The appointment by the Director-General of persons as members of the Project Review Committee under subsection (2) (f) is to be made on the basis of the nature, or subject-matter, of the project that is before the Committee for review. In doing so, the Director-General is to ensure that any person appointed as a member has the relevant expertise to enable the Committee to properly exercise its functions in relation to the project concerned.
 - (4) Without limiting subsection (3), the Director-General may appoint persons from the private sector as members of the Project Review Committee.
 - (5) The Project Review Committee has such functions as are conferred or imposed on it by or under this or any other Act.
 - (6) Schedule 3 has effect with respect to the members and procedure of the Project Review Committee.

Division 4 Miscellaneous provisions

400K Compensation not payable

- (1) Compensation is not payable by or on behalf of the State arising directly or indirectly from any of the following matters occurring before or after the commencement of this Part:
 - (a) the enactment of the *Local Government Amendment (Public-Private Partnerships) Act 2004* or the operation of this Part,
 - (b) the exercise by the Minister, an officer of the Department or a member of the Project Review Committee of any function under this Part (including any failure or delay in exercising any such function),
 - (c) any statement or conduct in connection with public-private partnerships or this Part.
- (2) Compensation is not payable by a council to any private person as a consequence of the council being prevented, by the operation of this Part, from forming a public-private partnership or from carrying out a project under a public-private partnership.
- (3) However, subsection (2) does not apply in relation to a council if the public-private partnership concerned is a partnership referred to in section 400N (2).

(4) In this section:

compensation includes damages or any other form of monetary compensation.

conduct includes any act or omission, whether unconscionable, misleading, deceptive or otherwise.

statement includes a representation of any kind, whether made verbally or in writing and whether negligent, false or misleading or otherwise.

the State means the Crown within the meaning of the *Crown Proceedings Act 1988*, and includes an officer, employee or agent of the Crown or any member of the Project Review Committee.

400L Decision by council to form public-private partnership

Any decision by a council in relation to the formation of a public-private partnership may only be made by resolution of the council.

Note. Section 377 (1) provides that any function expressly required to be exercised by resolution of the council cannot be delegated.

400M No contracting out

This Part applies regardless of the terms of any arrangement between a council and a private person.

400N Application of Part

(1) This Part does not apply to any public-private partnership that a council resolved, before 28 June 2004, to form under an arrangement with a private person, even though the arrangement was entered into after that date.

(2) However, if a council resolved, on or after 28 June 2004 but before the commencement of this Part, to form a public-private partnership with a private person, this Part applies to and in respect of the partnership (regardless of whether the arrangement for the formation of the partnership was entered into before that commencement).

[6] Section 428 Annual reports

Insert “(including public-private partnerships)” after “joint ventures” in section 428 (2) (q).

[7] Section 625 How may councils invest?

Insert “or an entity within the meaning of that section” after “corporation” in section 625 (4).

[8] **Schedule 3**

Insert after Schedule 2:

**Schedule 3 Provisions relating to members and
procedure of Project Review
Committee**

(Section 400J (6))

1 Definitions

In this Schedule:

appointed member means a person who is appointed by the Director-General under section 400J (2) (f) as a member of the Project Review Committee.

Chairperson means the Chairperson of the Project Review Committee.

member means any member of the Project Review Committee.

2 Terms of office of appointed members

Subject to this Schedule, an appointed member holds office for such period as is specified in the member's instrument of appointment.

3 Part-time appointments

Appointed members hold office as part-time members.

4 Remuneration

An appointed member is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine in respect of the member.

5 Removal of appointed members

- (1) The Director-General may remove an appointed member from office at any time.
- (2) A person is not entitled to any compensation if the person is removed from office under subclause (1).

6 Disclosure of pecuniary interests

- (1) If:
 - (a) a member has a direct or indirect pecuniary interest in a matter being considered or about to be considered at a meeting of the Project Review Committee, and
 - (b) the interest appears to raise a conflict with the proper performance of the member's duties in relation to the consideration of the matter,the member must, as soon as possible after the relevant facts have come to the member's knowledge, disclose the nature of the interest at a meeting of the Committee.
- (2) A disclosure by a member at a meeting of the Project Review Committee that the member:
 - (a) is a member, or is in the employment, of a specified company or other body, or
 - (b) is a partner, or is in the employment, of a specified person, or
 - (c) has some other specified interest relating to a specified company or other body or to a specified person,is a sufficient disclosure of the nature of the interest in any matter relating to that company or other body or to that person which may arise after the date of the disclosure and which is required to be disclosed under subclause (1).
- (3) Particulars of any disclosure made under this clause must be recorded by the Project Review Committee in a book kept for the purpose and that book must be open at all reasonable hours to inspection by any person on payment of the fee determined by the Director-General.
- (4) After a member has disclosed the nature of an interest in any matter, the member must not, unless the Minister or the Project Review Committee otherwise determines:
 - (a) be present during any deliberation of the Project Review Committee with respect to the matter, or
 - (b) take part in any decision of the Committee with respect to the matter.
- (5) For the purposes of the making of a determination by the Project Review Committee under subclause (4), a member who has a direct or indirect pecuniary interest in a matter to which the disclosure relates must not:

- (a) be present during any deliberation of the Committee for the purpose of making the determination, or
 - (b) take part in the making by the Committee of the determination.
- (6) A contravention of this clause does not invalidate any decision of the Project Review Committee.

7 Effect of certain other Acts

- (1) Chapter 2 of the *Public Sector Employment and Management Act 2002* does not apply to or in respect of the appointment of an appointed member.
- (2) If by or under any Act provision is made:
 - (a) requiring a person who is the holder of a specified office to devote the whole of his or her time to the duties of that office, or
 - (b) prohibiting the person from engaging in employment outside the duties of that office,the provision does not operate to disqualify the person from holding that office and also the office of an appointed member or from accepting and retaining any remuneration payable to the person under this Act as a member.

8 Personal liability

A matter or thing done or omitted to be done by the Project Review Committee, a member of the Project Review Committee or a person acting under the direction of the Project Review Committee does not, if the matter or thing was done or omitted to be done in good faith for the purpose of executing this or any other Act, subject a member or a person so acting personally to any action, liability, claim or demand.

9 General procedure

The procedure for the calling of meetings of the Project Review Committee and for the conduct of business at those meetings is, subject to this Act and the regulations, to be as determined by the Chairperson.

10 Quorum

The quorum for a meeting of the Project Review Committee is a majority of its members for the time being.

11 Presiding member

- (1) The Chairperson (or, in the absence of the Chairperson, a person elected by the members of the Project Review Committee who are present at a meeting of the Committee) is to preside at a meeting of the Committee.
- (2) The presiding member has a deliberative vote and, in the event of an equality of votes, has a second or casting vote.

12 Voting

A decision supported by a majority of the votes cast at a meeting of the Project Review Committee at which a quorum is present is the decision of the Committee.

13 Transaction of business outside meetings or by telephone

- (1) The Project Review Committee may, if it thinks fit, transact any of its business by the circulation of papers among all the members of the Committee for the time being, and a resolution in writing approved in writing by a majority of those members is taken to be a decision of the Committee.
- (2) The Project Review Committee may, if it thinks fit, transact any of its business at a meeting at which members (or some members) participate by telephone, email, closed-circuit television or any other means, but only if any member who speaks on a matter before the meeting can be heard by the other members.
- (3) For the purposes of:
 - (a) the approval of a resolution under subclause (1), or
 - (b) a meeting held in accordance with subclause (2),the Chairperson and each member have the same voting rights as they have at an ordinary meeting of the Project Review Committee.
- (4) A resolution approved under subclause (1) is, subject to the regulations, to be recorded in the minutes of the meetings of the Project Review Committee.
- (5) Papers may be circulated among the members for the purposes of subclause (1) by facsimile, email or other transmission of the information in the papers concerned.

[9] Schedule 6 Regulations

Insert after clause 17:

17A Public-private partnerships (including meetings of a public-private partnership)

[10] Schedule 8 Savings, transitional and other provisions consequent on the enactment of other Acts

Insert at the end of clause 1 (1):

Local Government Amendment (Public-Private Partnerships) Act 2004

[11] Dictionary

Insert in alphabetical order:

Project Review Committee means the Local Government Project Review Committee established under section 400J.

public-private partnership—see section 400B.