

## PUBLIC PRIVATE PARTNERSHIPS AND LEGITIMACY

GRAEME HODGE\*

### I INTRODUCTION

Public private partnerships ('PPPs') are an increasingly popular phenomenon and a global trend. But they are also a paradox, in that they are vaguely defined, hotly disputed and poorly evaluated. They are, in essence, poorly understood by citizens as well as researchers. Hodge and Greve argue that there are multiple literatures on PPPs from which a family of five clusters might be discerned.<sup>1</sup> If we view PPPs as alternative governance structures, they may be seen in terms of public policy networks; civil society development initiatives; central business district or urban redevelopment activities; institutional cooperation; and long-term contracts for the provision of infrastructure or services. In Australia, it is common to regard PPPs as the last of these.

This paper will argue that whilst partnership notions have a long historical pedigree, the new long-term contractual form of partnership has three characteristics that deserve research: the preferential use of private finance, high level of complexity through bundled contracts, and new accountability and governance assumptions. Moreover, the first two of these characteristics have major implications for the third.

The findings of recent parliamentary inquiries in New South Wales ('NSW') and Victoria as well as international empirical evidence are adopted to support the argument that the performance of this governance tool is mixed,<sup>2</sup> and importantly, that the PPP tool currently lacks legitimacy in the eyes of citizens in whose name it is being employed.

---

\* Director, Centre for Regulatory Studies, Faculty of Law, Monash University, Melbourne.

1 Graeme Hodge and Carsten Greve, 'Public-Private Partnerships: An International Performance Review' (2007) forthcoming *Public Administration Review*.

2 Public Accounts and Estimates Committee, Parliament of Victoria, *Seventy First Report to the Parliament, Report on Private Investment in Public Infrastructure* (2006); Public Accounts Committee, Parliament of New South Wales, *Inquiry into Public Private Partnerships* (2006).

## II HISTORICAL CONTEXT

Notions of public and private cooperation go back centuries. Whether it is privateer shipping, mercenary armies, mixed economies, the early reliance on private business accountants to run the state treasury, or simply early outsourcing examples, history is replete with examples. Whilst the public-private mix has a long pedigree, Wettenhall also reminds us that such forms of service provision and governance were often corrupt and were sustained by quiet, cozy relationships.<sup>3</sup> Once arrangements were made transparent, many such forms of cooperative partnerships were deemed illegitimate by communities, whilst legitimate forms of partnership have continued through into the present day.

Of course, partnership notions have also long been as much a public policy language game as they have been anything of real substance.<sup>4</sup> This is not surprising, but such games being played in the context of long-term contracts are not inconsequential. Two examples come to mind. First, the United Kingdom ('UK') Government has been quite explicit in its private finance initiative ('PFI') documentation that PPPs are simply an equivalent form of privatisation,<sup>5</sup> whilst over the other side of the world, the reformist Victorian State Government has worked hard to differentiate PPPs from the privatisation activities of the former Kennett administration.<sup>6</sup> Second, the very label 'partnership' for large private finance contracts is a nonsense. Infrastructure finance construction deals are no more partnerships than when citizens sign a house mortgage with their local bank. The point here is that public policy language games are used in the partnership arena to suit local political objectives and such games obscure meanings rather than clarify and sharpen our understanding of partnership phenomena. In Australia, the warm glow of partnership language is certainly employed nowadays for voter consumption in preference to the harsher sounding imagery of privatisation or private finance contracts.

In terms of providing essential public infrastructure or services through history, there is much in today's debates that is not new. Governments have always made sensitive decisions that have resulted in the provision of essential large scale public infrastructure. Such decisions have often had huge, long-term financial implications. Likewise, governments have, for centuries, employed private contractors to undertake works and services, and competitive bidding for

---

3 Roger Wettenhall, 'The Rhetoric and Reality of Public-Private Partnerships' (2003) 3 *Public Organization Review: A Global Journal* 77; Roger Wettenhall, 'The Public-Private Interface: Surveying the History' in Graeme Hodge and Carsten Greve (eds), *The Challenge of Public-Private Partnerships: Learning from International Experience* (2005) 22.

4 Murray Edelman, 'Political Language and Political Reality' (1985) 18 *Political Science* 10; Stephen Linder, 'Coming to Terms with the Public-Private Partnership: A Grammar of Multiple Meanings' (1999) 43 *The American Behavioral Scientist* 35.

5 Her Majesty's Treasury, *PFI: Meeting The Investment Challenge* (2003) <[http://www.hm-treasury.gov.uk/media/648B2/PFI\\_604.pdf](http://www.hm-treasury.gov.uk/media/648B2/PFI_604.pdf)> at 21 October 2006.

6 Christopher Sheil, 'Privatisation, Politics and Public-Private Partnerships' in David Hayward and Peter Ewer (eds), *Visions for Victoria* (2003) 67; Carsten Greve and Graeme Hodge, 'Introduction' in Graeme Hodge and Carsten Greve (eds), *The Challenge of Public-Private Partnerships: Learning from International Experience* (2005) 1.

construction contracts by private companies has been around now for decades. So the PPP phenomenon should not be misconstrued as a public versus private debate or a debate about the merits of infrastructure provision. Lastly, governments have for some time also been progressively trialling more adventurous ways to coordinate public infrastructure delivery since the 1970s, and have become more comfortable in the use of consortia to provide projects through ‘design and construct’ as well as ‘build, own, operate, transfer’ (‘BOOT’) type arrangements.

### III DIMENSIONS OF AUSTRALIAN PPPs

#### A Preference for Private Finance

Whilst in theory PPPs are not strictly dependent on the provision of private finance, the reality in Australia appears otherwise. Victoria’s bold partnership branding, for instance, relies completely on the provision of initial private finance. This may have been understandable in terms of the original rationale of the UK Government to adopt a PFI approach for capital projects as a means of avoiding the public sector borrowing limits, but initial private funding is still essentially taking on debt, and this rationale for Australia today is highly questionable, having been confirmed through recent changes to accounting standards. Importantly, private finance arrangements usually come at a premium, and whilst bankers are happy for the business and political parties are grateful to receive party donations for election campaigns, the real financial test for Australian PPPs is articulating the size of this premium paid over the life of the project. Furthermore, we ought to determine the degree to which voters are comfortable with this.

The policy rhetoric still sees the oft repeated assertion that PPPs ‘take the pressure off the government budget’ and provide scope to undertake other important activities like education and health.<sup>7</sup> But such finance arrangements simply convert a once off capital sum into a series of annual repayments with interest on top. There is no magic pudding for public sector projects! More crucial to financial concerns is establishing the veracity of the claim that PPPs lead to better value for money (‘VFM’) for citizens.

On this matter, there is an array of international evidence.<sup>8</sup> It varies along a continuum from the positive assessments of commentators such as Pollitt<sup>9</sup> or the

---

7 Rafeal Epstein, Interview with Michael Porter (ABC Radio National, 17 January 2001) <<http://www.abc.net.au/pm/content/2005/s1283567.htm>> at 21 October 2006; Philip Hopkins, ‘States Urged to Boost Infrastructure Spending’, *The Age* (Melbourne), 8 February 2005, 2.

8 See, eg, Graeme Hodge and Carsten Greve (eds), *The Challenge of Public-Private Partnerships: Learning from International Experience* (2005); Darren Grimsey and Mervyn K Lewis, *Public-Private Partnerships: The Worldwide Revolution in Infrastructure Provision and Project Finance* (2004); Sanford V Berg, Michael G Pollitt and Masatsugu Tsuji (eds), *Private Initiatives in Infrastructure: Priorities, Incentives and Performance* (2002) 142.

9 Michael G Pollitt, ‘The Declining Role of the State in Infrastructure Investment in the UK’ in Berg, Pollitt and Tsuji, above n 8, 142; Michael G Pollitt, ‘Learning from the UK Private Finance Initiative Experience’ in Hodge and Greve, *The Challenge of Public-Private Partnerships*, above n 8, 207.

National Audit Office<sup>10</sup> ('NAO') to the sober assessments of critics such as Shaoul.<sup>11</sup> Pollitt summarises the findings of the NAO in the UK showing that in a sample of 10 major PFI case evaluations undertaken, the best deal was probably obtained in every case, and good VFM was probably achieved in eight of the 10 cases.<sup>12</sup> More recent support has come from Mott Macdonald<sup>13</sup> and the NAO<sup>14</sup> with both reporting PPP projects as being delivered on time far more often than traditional infrastructure provision arrangements.<sup>15</sup> Pollitt also concludes that despite the lengthy and costly bidding process amongst a small number of bidders, and despite observing the UK Government's extreme positive stance in the face of high profile problems with individual PFI projects, compared to the previous government procurement system, 'it seems difficult to avoid a positive overall assessment'.<sup>16</sup> Thus, relative to the counterfactual of what might have happened under conventional public procurement, Pollitt argues that projects under PFI 'are [now] delivered on time and to budget a significantly higher percentage of the time. Construction risks are generally transferred successfully and there is considerable design innovation'.<sup>17</sup>

At the other end of this evidence continuum is the contrast provided by Shaoul's analyses. In the midst of the UK Government's rationale, itself described as an 'ideological morass', she presents a litany of failed PFI project examples; a VFM appraisal methodology biased in favour of policy expansion; pitiful availability of information needed for project evaluation and scrutiny; and projects in which the VFM case rested almost entirely on risk transfer but for which, strangely, the amount of risk transferred was almost exactly what was needed to tip the balance in favour of undertaking the PFI mechanism. Added to this apparent manipulation of the Public Sector Comparator ('PSC') process were the observations that in hospitals and schools 'the PFI tail wags the planning dog'<sup>18</sup> with projects changed to make them 'more PFI-able',<sup>19</sup> highly profitable investments being engineered for private companies with 'a post-tax return on

---

10 National Audit Office (UK), *Examining the Value for Money of Deals under the Private Finance Initiative* (1999) <[http://www.nao.org.uk/publications/nao\\_reports/9899739.pdf](http://www.nao.org.uk/publications/nao_reports/9899739.pdf)> at 21 October 2006.

11 Jean Shaoul, 'The Private Finance Initiative or the Public Funding of Private Profit' in Hodge and Greve, *The Challenge of Public-Private Partnerships*, above n 8, 190.

12 Pollitt, 'The Declining Role of the State', above n 9.

13 Mott MacDonald, *Review of Large Public Procurement in the UK* (2002) <[http://www.hm-treasury.gov.uk/media/A00/D3/greenbook\\_mott.pdf](http://www.hm-treasury.gov.uk/media/A00/D3/greenbook_mott.pdf)> at 21 October 2006.

14 National Audit Office, United Kingdom, *PFI: Construction Performance* (2003) <[http://www.nao.org.uk/publications/nao\\_reports/02-03/0203371.pdf](http://www.nao.org.uk/publications/nao_reports/02-03/0203371.pdf)> at 21 October 2006.

15 They report that whereas traditional 'public' infrastructure provision arrangements are on time and on budget 30 per cent and 27 per cent of the time, PFI type partnerships are on time and on budget 76 per cent and 78 per cent of the time respectively. These findings are impressive. But we also should regard them with a degree of flexibility given the lack of clarity on what constitutes a 'traditional arrangement' and the criticisms of Shaoul that timelines and budget estimates have simply increased to ensure that such estimates are more often met in practice. Whilst this may appear cynical, it is true that these criteria are not absolute and are set in the context of human behaviour with strong incentives to look good and be seen as delivering policies for advocating governments.

16 Pollitt, 'Learning from the UK', above n 9, 226.

17 Ibid.

18 Shaoul, above n 11, 197.

19 Ibid.

shareholders' funds of 86 per cent',<sup>20</sup> several refinancing scandals; and conspicuously unsuccessful information technology projects and risk transfer arrangements that, in reality, meant risks had not been transferred to the private sector at all but had been taken on by the public. Not surprisingly, Shaoul concludes that, at best, the PFI model has turned out to be very expensive with, moreover, a lack of accountability leading to difficulty in learning from past experiences. Partnerships, in her view, are 'policies that enrich the few at the expense of the majority and for which no democratic mandate can be secured'.<sup>21</sup>

Other evidence lies in between these two extremes. This includes multiple case study reviews from the United States and Australasia documented in Boardman, Poschmann and Vining,<sup>22</sup> Fitzgerald<sup>23</sup> and Hodge.<sup>24</sup> The international evidence on the single VFM criterion, therefore, is clearly mixed rather than all one way.<sup>25</sup>

Locally, advocates such as Minister John Brumby in Victoria neglect to remind citizens that Victoria's Fitzgerald Review estimated citizens had probably already paid around \$350 million more than needed for the eight Victorian projects reviewed by Fitzgerald<sup>26</sup> because Treasury officials had supported contracts with repayment rates of interest up to 3 per cent higher than was necessary.

The implications for democratic legitimacy here are profound. It is little wonder perhaps that doubts have been expressed as to whether such officials lacked the technical capacity to discern what interest rates should be and the size of risks undertaken. More broadly, advisors such as the Allen Consulting Group

---

20 Ibid 200.

21 Ibid 203.

22 Anthony E Boardman, Finn Poschmann and Aidan R Vining, 'North American Infrastructure P3s: Examples and Lessons Learned' in Hodge and Greve, *The Challenge of Public-Private Partnerships*, above n 8, 162.

23 Peter Fitzgerald, *Review of Partnerships Victoria Provided Infrastructure* (2004) <<http://www.gsg.com.au/pdf/PPPReview.pdf>> at 21 October 2006.

24 Graeme Hodge, 'Public-Private Partnerships: The Australasian Experience with Physical Infrastructure' in Hodge and Greve, *The Challenge of Public-Private Partnerships*, above n 8, 305.

25 We should also note here that the goalposts for the PPP political project have shifted several times as we have moved forward and become somewhat slippery. Initially, as Edwards et al noted, the rationale seems to have begun with broader macroeconomic concerns in terms of public sector debt levels, and then moved to more direct value for money concerns: Pam Edwards et al, *Evaluating the Operation of PFI in Roads and Hospitals*, ACCA Research Report 84 (2004) <<http://image.guardian.co.uk/sys-files/Society/documents/2004/11/24/PFI.pdf>> at 21 October 2006. This saw initial promises of 'reduced pressure on government budgets' and then 'better value for money' in the provision of public infrastructure. Added to these promises was the implicit ethos of better accountability and improved business confidence: Graeme Hodge, 'Who Steers the State When Governments Sign Public-Private Partnerships?' (2002) 8 *The Journal of Contemporary Issues in Business and Government* 5. Following this, there was further shifting of the PPP goalposts and, by 2005, explicit objectives had changed to include better 'on time' and 'on budget' delivery of infrastructure. Additional goalposts of improved creativity and innovation were also later added. Interestingly, this shifting of goalposts largely mirrors the major shifts in outsourcing goals progressively claimed by governments throughout the 1980s and 1990s globally.

26 Fitzgerald, above n 23.

have argued that governments should not shift their responsibilities for essential infrastructure services onto others.<sup>27</sup>

## B Complexity

The second important characteristic of Australia's PPPs was the observation that partnership contract deals involved high complexity. Of course, there is increasing complexity in all aspects of our lives and greater complexity has been introduced through more adventurous project management mechanisms and more complex finance arrangements over recent times. This complexity is problematic when it leads to reduced transparency and lower accessibility to information for citizens.

Complexity, however, is not simply a matter of narrow legal concerns within a project. Throughout several presentations to parliamentary committees on PPPs, it has been rare to find parliamentarians who themselves have understood the deals being done. There are also few parliamentary committees overseeing such infrastructure as new innovative methods emerge. Cabinets as a whole seem to have been asleep as deals have proceeded. Worryingly, Ministers appear to have been supporting these deals on trust. Citizens are unable to get a clear picture of their worth underneath either the veil of complexity or the cloak of 'commercial-in-confidence'.<sup>28</sup>

The need for extensive legal and other contractual documentation for all financial flows and relationships between multiple parties to further understanding is a direct result of the complexity of the partnership phenomenon. A further factor here is the need for the state to have both the administrative and intellectual capacity to understand these deals, to monitor them as they operate, and also manage them as they evolve over time.

Perhaps the real issue in terms of democratic legitimacy is not the matter of complexity itself, but how complexity is handled through political and democratic processes. Public policy decision making in government by its nature deals with multiple complex issues<sup>29</sup> ranging from stem cell research and information technology privacy, to intricate matters of national economic and financial importance. The question here is whether complexity is addressed by ensuring that improved accessibility mechanisms for citizens are created, or alternatively, whether what is created is a shield behind which governments can shelter and avoid accountability. Current media reports that the Victorian Government is delaying numerous requests for information on PPPs which might

---

27 Allen Consulting Group, *Funding Urban Public Infrastructure, Approaches Compared* (2003) <<http://www.allenconsult.com.au/publications/download.php?id=258&type=pdf&file=2>> at 21 October 2006. See also Tom Richman, *Evaluating Public Private Partnerships* (2005) The Brisbane Institute <[www.brisinst.org.au/resources/brisbane\\_institute\\_ppps.html](http://www.brisinst.org.au/resources/brisbane_institute_ppps.html)> at 21 October 2006.

28 See Valarie Sands, 'The Right to Know and the Obligation to Provide: Public Private Partnerships, Public Knowledge, Public Accountability, Public Disenfranchisement and Prison Cases' (2006) 29(3) *University of New South Wales Law Journal* 334.

29 Horst W J Rittel and Melvin M Webber, 'Dilemmas in a General Theory of Planning' (1973) 4 *Policy Sciences* 155.

damage its election prospects certainly do not sit well with claims that PPP arrangements are sufficiently transparent to assure legitimacy.<sup>30</sup>

### C Accountability and Governance Arrangements

PPPs encompass different accountability and governance arrangements compared to traditional procurement – indeed, these differing arrangements are one of the claimed advantages of this provision method. Interlinked financial incentives across a consortium of players, the sharing of risks through carefully contractualised legal relationships, and more flexible decision making processes between executive government and the service provider all feature as improvements over traditional procurement arrangements. Moreover, the progressive contractualisation of the state's services and activities has been accompanied by the general assumption of increased accountability in all its forms, but this has rarely been tested. Whilst contractualisation may have increased managerial accountability, this may have been at the expense of reduced public accountability in its various forms. And whilst we have instituted a 'regulatory state' of independent regulators, ombudsmen and audit review bodies in order to disperse power away from political quarters after the privatisation of state businesses, this has not yet occurred with these deals.

PPPs have essentially continued to be two-way government-business deals rather than also involving the community or any other independent accountability or representative bodies. They have also been handled on a case-by-case basis, by the government itself in the face of multiple conflicts of interest, with government simultaneously acting as policy advocate; economic developer; steward for public funds; elected representative for decision making; regulator over the contract life; commercial signatory to the contract; and planner.

The potential for the interests of the government and business partners to dominate over the public interest is palpable. Indeed, early drafts of Victoria's PPP guideline materials did not even mention the 'public interest' notion and treated government solely as if it were a contractual partner in a commercial deal. This is reminiscent of the 16<sup>th</sup> century.<sup>31</sup> Clearly, communities need far more discussion and debate as to how we might better ensure that the public interest is met through PPP deals, as well as meeting the needs of the contract parties.

Again, the implications for shortfalls observed in this characteristic are profound. To the extent that new infrastructure contract delivery arrangements have reduced existing accountability arrangements and altered longstanding governance assumptions with little democratic debate, new partnership arrangements lack legitimacy. We might even posit that PPPs as they currently operate in Australia have become very much an illegitimate child of the historical partnership family. So, what does the evidence from recent parliamentary inquiries say?

---

30 Jason Dowling, 'Bracks' Secret State', *The Age* (Melbourne), 24 September 2006, 15; Farrah Tomazin, 'Secrecy Shields Bracks' Deals from Scrutiny', *The Age* (Melbourne), 5 October 2006, 1.

31 Feedback to this effect resulted in the development of a 'public interest test' within the Department's guidance material, which – if the boxes are ticked – guarantees (at least in terms of advocating bureaucrats) that the public interest has been 'defined' and met.

### III PARLIAMENTARY INQUIRY FINDINGS

We now turn briefly to the findings of two recent high level PPP reviews in NSW and Victoria.<sup>32</sup> The details of these reviews deserve a separate discussion, but a few general characteristics are striking.

First, if we were bold enough to review the recommendations of these two reports from the perspective of the above categories (that is, financial, complexity, and accountability and governance concerns) it is observed that some 35 of the 46 recommendations fall into these areas (including four recommendations relating to the need for increased capacity in government to manage PPPs). In other words, the abovementioned academic concerns have, in reality, also been the subject of some 76 per cent of the changes recommended by our recent parliamentary committees.

Second, the largest two categories of these recommendations address concerns over PPP accountability and governance, and concerns stemming from the implications of the private finance preference. It appears that parliamentary committees also recognise these priorities.

This is demonstrated through some of the recommendations. One group of accountability recommendations relates to the release of PPP materials. There is a suggestion that the publication of PPP documentation be made 'mandatory through the introduction of legislation'.<sup>33</sup> This would entail the publication of contract summaries for PPPs, the actual PPP contract and a VFM report,<sup>34</sup> as well as the revision of contract summaries if a significant change occurred to a PPP.<sup>35</sup> A second group of recommendations suggests that the public interest be given greater prominence in PPP assessment.<sup>36</sup> This would entail, for example, the review of the policy on the disclosure of the PSC in consideration of the public interest.<sup>37</sup> A third set of recommendations relates to increased policy review mechanisms for disclosure and the formulation of PPPs. For example, there is a suggestion that processes for risk categorisation and determining VFM be reviewed.<sup>38</sup> This could be through periodic audits by the Auditor-General<sup>39</sup> and post-implementation evaluations;<sup>40</sup> more precise definition of VFM;<sup>41</sup> the introduction of independent competitiveness studies of the Australian PPP market;<sup>42</sup> independent research into risks;<sup>43</sup> increased parliamentary oversight;<sup>44</sup> and improved toll setting arrangements for monopoly situations to more closely

---

32 See Public Accounts and Estimates Committee, above n 2; Public Accounts Committee, above n 2.

33 Public Accounts Committee, above n 2, ix, Recommendation 2, Recommendation 8.

34 Public Accounts and Estimates Committee, above n 2, 26, Recommendation 13.

35 Public Accounts Committee, above n 2, ix, Recommendation 9.

36 *Ibid* x, Recommendation 12.

37 *Ibid* ix, Recommendation 5.

38 *Ibid* x, Recommendation 14.

39 Public Accounts and Estimates Committee, above n 2, 27, Recommendation 16.

40 Public Accounts Committee, above n 2, xi, Recommendation 18.

41 Public Accounts and Estimates Committee, above n 2, 28, Recommendation 17.

42 *Ibid* 28, Recommendation 19.

43 *Ibid* 28, Recommendation 20.

44 *Ibid* 25, Recommendation 11.



align with those of independent regulatory bodies such as the Independent Pricing and Regulatory Tribunal.<sup>45</sup> The final set of governance recommendations focuses on increasing the skills base in the Treasury to manage PPPs.<sup>46</sup>

There is a remarkable consistency between the tone of recommendations made by the Committees and the concerns expressed so far in this paper.

#### IV CONCLUSION

The very existence of these parliamentary inquiries (as well as the additional parliamentary inquiry into the Cross City Tunnel project)<sup>47</sup> is a testament to the degree to which the current legitimacy of PPPs is questionable. The Victorian Report, for instance, found explicitly that

the use of commercial-in-confidence reasons by government to limit public and parliamentary access to key information on major PPP contracts has diminished the accountability of government to the Parliament for substantial state expenditure.<sup>48</sup>

In terms of taxpayers interests, Tomazin states that ‘State Government secrecy surrounding billions of dollars worth of projects done in partnership with the private sector means Victorians have no idea whether they provide value for money’.<sup>49</sup> Moreover, Tomazin argues that the Report found “‘the lock-in” effect of long-term contracts might have an effect on the decision making capacity of future governments”<sup>50</sup> and quoted the Report as finding that ‘the mandatory “public interest test” for each PPP “does not automatically guarantee the public interest is served”’.<sup>51</sup>

The fact that the Premier and Ministers of the NSW Government refused to attend the Cross City Tunnel Parliamentary Committee to explain their perspectives<sup>52</sup> is arguably a further testament to the fact that ministerial accountability for PPP transactions is almost non-existent. The illegitimacy of one government being happy to sign up the next dozen governments to multi-billion dollar contract payments with subsequent elected representatives then not participating in a fundamental public accountability mechanism to explain decisions is an all time low in our traditional democratic polity.

It is also interesting to observe that the bolder reforms were put forward by the NSW Committee (rather than the more aggressive partnership state, Victoria) and why this might be so. This may be dependent on committee leadership style, or signal that Victoria’s policies did not need so much change. Alternatively, the possibility that there was in fact a significant amount of performance material omitted from the final document (if we believe leaks reported in the daily

---

45 Public Accounts Committee, above n 2, xi, Recommendation 23.

46 Ibid x, Recommendation 15.

47 See Joint Select Committee on the Cross City Tunnel, Parliament of New South Wales, *Second Report – The Cross City Tunnel and Public Private Partnerships* (2006); Joint Select Committee on the Cross City Tunnel, Parliament of New South Wales, *First Report – Cross City Tunnel* (2006).

48 Public Accounts and Estimates Committee, above n 2, 16.

49 Tomazin, above n 30.

50 Ibid.

51 Ibid.

52 See Joint Select Committee on the Cross City Tunnel, *First Report*, above n 47, xi.

newspaper at the time)<sup>53</sup> suggests that there continues to be much need for legitimacy-based reforms to be instituted. It also implies that clearer information on the performance of PPPs in Victoria would have been most embarrassing for both the past Kennett/Stockdale Government and its Ministers as well as the present Bracks/Brumby Government. This possible coalition of political interests against the interests of truthful revelations to citizens is an alternative but more sinister logic.

Finally, we could speculate that there nonetheless continues to be an obvious broader confluence of interests between political interests and the private financial interests of financiers, consulting firms, advisors and infrastructure companies. This is because it is the government who would enjoy better party funding for elections and who would reap the benefits if big infrastructure projects were delivered earlier. If anything goes awry, the government can then shift the blame to other parties. These all suggest that despite the clear concerns voiced by these two parliamentary committees, the pressure to continue employing PPPs as a major tool for public infrastructure is strong. PPPs may well continue for some time yet.

Overall then, we might conclude that whilst PPPs can have some potential advantages over traditional project arrangements, their legitimacy currently remains weak. As Collins noted, 'contract law is now being called upon to play a more pivotal role in the governance mechanisms of the post-regulatory state'.<sup>54</sup> But whether this rule-setting mechanism is sufficiently democratic and accountable is at issue. The future legitimacy of PPPs will depend on the ways in which the partnership phenomenon can be reformed and this deficit overcome. Daintith also once remarked that the use of contracts as a governing tool can amount to 'the power to rule without Parliament'.<sup>55</sup> Have we now reached that stage? In any event, with little practical oversight from administrative law, Australian PPPs need, as a minimum, to become more transparent and democratic before their legitimacy is acceptable.

---

53 Tomazin, above n 30.

54 Hugh Collins, 'Regulating Contract Law' in Christine Parker et al, *Regulating Law* (2004) 13, 31.

55 Terence Daintith, 'Regulation by Contract: The New Prerogative' (1979) 32 *Current Legal Problems* 41.