



Government of **Western Australia**
Department of **Treasury**

Public Private Partnerships

Commercial Principles

Additional Policy Guidance

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Overview and Purpose

The purpose of this document is to supplement the National Public Private Partnerships Guideline – Volume 3 Commercial Principles for Social Infrastructure Guidance (The ‘Guidelines’).¹

The National Guidelines acknowledge that each project will have unique characteristics and risks. The aim of this document is to provide additional policy guidance to clarify the general allocation of risk preferred by the State of Western Australia when entering into Public Private Partnerships (PPP) projects.

The National Guidelines also recognise that circumstances alter cases and that there will accordingly always be situations where project by project departures will be appropriate. The component elements of PPP contracts also interact, so that variations to any given clause may generate a need to make different choices elsewhere in the final agreement.

As always with PPP contracting, the aim is to attain the best overall result for the public at the end of bidding and final negotiations without undue cost or delay to any party.

Application

The users are expected to be those preparing Invitations for Expressions of Interest and Requests for Detailed Proposals for a specific PPP project, including government agencies, external commercial advisors and the PPP Support Unit of the Department of Treasury (Treasury).

The document does not replace the National Public Private Partnerships Guideline – Volume 3: Commercial Principles for Social Infrastructure Guidance and should be used in conjunction with The Guidelines which provide detailed guidance on the Commercial Principles underpinning government parties’ preferred attitudes to risk allocation among the participants in PPP arrangements, in general.

Structure

The following set of specific jurisdictional positions take a range of core commercial principles, first summarising the agreed National Guidelines’ starting point alongside the corresponding recommended Western Australian stance.

¹ (http://www.infrastructureaustralia.gov.au/files/National_PPP_Guidelines-Vol_3_PSC_Guidance_Dec_08.pdf)

Updates

Treasury has the sole discretion to amend this document as and when it considers it necessary.

1. On Time Completion

The desire to have major projects completed on time is a major factor in choosing PPP approaches to procurement because the government's payments to its private sector agent are directly related to performance. There may be an incentive for the private sector consortium to even strive to finish ahead of time so as to have State payments commence sooner, but avoiding late delivery is of the greatest importance to government.

Summary of National Guidelines And Practice	Additional Policy Guidance
<p>Approaches to Project Term vary between jurisdictions. Responses to late delivery may be to rely on the erosion of operating term or (additionally) to consider seeking liquidated damages. Neither alternative is mandated.</p> <p>The Draft National Commercial Principles for Economic Infrastructure discuss the incentive of liquidated damages as an alternative to erosion of the length of operating term as a value for money decision.</p>	<ul style="list-style-type: none"> • The project term commences at financial close and, as determined on a project specific basis, ends on a fixed date up to 30 years after financial close. • The services payment on non-economic PPPs is not paid by the State until completion of the relevant asset is achieved. The State will not extend the concession period if the Facility is not completed by the contractual date for completion. Therefore, if Project Co does not achieve the required contractual 'date for completion', the period of time over which Project Co has the opportunity to earn revenue and therefore the amount of revenue is reduced. • Given the reduction in the service fee for late completion under this model, the State will often make a saving. Accordingly, liquidated damages should only be sought on an exceptions basis where: <ul style="list-style-type: none"> – The State has a direct and quantifiable financial liability; and – The reduction in service fee is insufficient to cover the State's losses. • The Project Agreement will specify that Project Co is not entitled to achieve completion of the relevant asset prior to the contractual date for completion without the State's consent. • The State does not require an ability to trigger a Major Default or Default Termination on an assessment prior to the contractual date for completion that Project Co will not achieve completion by that date. • Sunset dates are generally not needed as long as there are effective force majeure and default regimes that incentivise rectification and otherwise entitle termination by the State for delay to completion by Project Co.

2. Security Bonds

The Government may sometimes require a bond to increase the certainty of the performance of crucial obligations of the Project Co beyond the primary obligations of the underlying contract.

Summary of National Guidelines And Practice	Additional Policy Guidance
<p>The National Guidelines contemplate the possibility of the State requiring bonds or guarantees where non payment or abatement falls short of compensating the State for late or inadequate facility or service delivery.</p> <p>Banks bonds are preferred to Insurance bonds, but are not mandated.</p>	<ul style="list-style-type: none"> • As a rule, the State will not generally require : <ul style="list-style-type: none"> – bid bonds to mitigate the risk of a preferred respondent not entering into final project documents with the State. – a conditions precedent bond (CP Bond) or indemnity by the sponsor to mitigate the risk of the conditions precedent to financial close not being achieved, however the State will consider this issue on a case by case basis. – any direct bonds from Project Co or require the provision of a parent company guarantee. Instead it will rely on the performance bonds and guarantees that Project Co is required to obtain from its subcontractors. • Though the State will not mandate a requirement for subcontractor bonds or parent company guarantees, these are likely to be required by financiers and the State will evaluate the robustness of the financial structure and security arrangements proposed by consortiums. • Handover bonds will be considered as an alternative to payment reduction for end of term condition risk.

3. Utilities

Government agencies frequently (but not always) supply the services of utilities that may not be parties to the PPP contract. Sometimes the risk of interruption to services are shared; sometimes treated as beyond the control of any of the contracting parties. Whether relief may be considered for interruption to utilities upstream of a connection point is to be dealt with using the principles expressed in Section 13 – Relief Events (below).

Summary of National Guidelines And Practice	Additional Policy Guidance
<p>Government to normally take risk on unit price of utilities.</p> <p>Volume risk to be allocated on a project by project value for money basis.</p>	<ul style="list-style-type: none"> • Project Co will take unit price risk for a fixed period where long term contracts with providers can be obtained. • The State and Project Co will take the unit price risk in cases where the unit prices are regulated by the government. • Project Co will take volume risk.

4. Defects

The privately financed and owned assets are needed to supply government services under a contract that will always oblige the private sector party to deliver those services irrespective of asset condition at any time. Normally the assets revert to the State at the end of contract because they rest on government land. Principles in Section 6 - Handover (below) are also relevant.

Summary of National Guidelines And Practice	Additional Policy Guidance
<p>Some jurisdictions specify a defects liability period for the private sector to reflect the Builder's Defects Liability Period; some require defects to be corrected at completion, others once manifest throughout the operating term.</p> <p>The Draft Economic Infrastructure Commercial Principles nominate the private sector party as bearing the risk of correcting defects over the contract term.</p>	<ul style="list-style-type: none"> • Project Co will be liable to fix defects over the term of the project. • The Services Specifications will provide that fitness for purpose is required to be achieved throughout the term. There will be no fair wear and tear exclusion from fitness for purpose.

5. Modifications, Minor Modifications and Minor Works

In cases where a need for modifications arise, there is a possibility of paying twice for services that the private sector should be supplying for the original fee if, among other margins, a project management margin is paid. Unintended extensions of scope may also occur.

Summary of National Guidelines And Practice	Additional Policy Guidance
<p>Costs of State initiated Modifications will be borne by the State.</p> <p>States have complete discretion over the acceptance of private party initiated Modifications – such modifications being funded by the private party.</p> <p>Net savings from Modifications should be shared between parties on a basis reflecting compensation principles.</p>	<ul style="list-style-type: none"> • A Modifications regime will be included in the Project Agreement along similar lines to the regimes included in PPP projects in other jurisdictions. • The inclusion of fixed percentage margins for Modifications will be required. • Modifications will be based on costs actually incurred plus a margin and not based on a schedule of rates. Where the State requests a variation, it may also seek, or require Project Co to seek, an open tender process for subcontracting. • A ‘Minor Works’ regime may be included in the Project Agreement to allow an amount to be included in the contract price which can be used by Project Co to deliver certain works that are over and above Project Co’s scope of services. • The inclusion of a ‘Minor Modifications’ regime may be considered. This regime will be limited to the design development phase to account for the ‘unders and overs’ that will occur during detailed design. If such a regime is included, it must be robust enough to ensure that the State is not exposed to increases in price that should have already been included in the services payment at financial close.

6. End of Term Handover

Related to Section 4 above, the issue of ensuring assets revert to government in a properly maintained condition at the end of term may be handled in diverse ways from relying on the payment mechanism alone, through to prescription of the hand back condition or requiring a security bond.

Summary of National Guidelines And Practice	Additional Policy Guidance
<p>The National Guidelines assign responsibility for maintenance of assets to the States' requirements (determined by an independent expert) to the private sector.</p> <p>Bonds and/or payment deductions from the remaining 5 year's payments may secure the performance of the identified works.</p> <p>For Economic Infrastructure, a bond or a payment to an escrow account may secure the performance of the works.</p>	<p>A regime will be included in the Project Agreement which reflects the standard National PPP approach to handover at the end of the term. The regime will have the following features:</p> <ul style="list-style-type: none"> • Condition reviews 5 years out from hand back. • The State will be permitted to either escrow amounts from the services payments (but never more than the remaining quarterly service payments) or to require a bond to cover the cost of refurbishment works. • The State will retain discretion to direct Project Co not to perform any element of the final refurbishment works. Any such direction will constitute a modification in favour of the State. • Either one of two asset hand back standards may be chosen: <ol style="list-style-type: none"> 1. a standard which requires Project Co to maintain the asset in the best possible condition and to hand the asset back to government in that condition such that government can use the asset for a set number of years, for example 30 years; or 2. a lesser standard whereby only certain assets are identified to have a residual life.

7. Disputes

Summary of National Guidelines And Practice	Additional Policy Guidance
<p>Failing unanimous agreement of a 2 man dispute resolution panel of a representative of the government parties and a representative of the private sector parties, disputes may be referred to an independent expert or to an arbitrator.</p>	<ul style="list-style-type: none">• All disputes will be referred to an internal escalation process as a preliminary step• The issues that are capable of being referred to expert determination will be identified in the Project Agreement. There will be a right to appeal from decisions of the expert by litigation.• Arbitration will not be included in the Project Agreement as a form of dispute resolution.

8. Role of the Independent Certifier

As with disputes in general, determining when payment should commence (or if a partial payment should be made etc) is not always a simple matter. Lengthy discussions between government and the private sector parties may occur.

Summary of National Guidelines And Practice	Additional Policy Guidance
<p>Government and Project Co jointly appoint and pay for an Independent Certifier (additional to Project Co's statutory certifier) to certify project completion for the purposes of the contract..</p>	<ul style="list-style-type: none"> • An Independent Certifier (IC) will be jointly appointed by the State and Project Co. • Project Co will be required to nominate three firms with capability to fulfil the role of IC and the State may select a firm from those nominated. The State reserves the discretion to refuse to accept a firm nominated by Project Co. • The costs of the IC will be shared between the State and Project Co equally. • For projects where there is a two stage completion process (ie technical completion and final completion), the IC will certify that the completion tests are satisfied and the State will certify that the other completion requirements have been achieved (i.e. that the Facility meets the functional requirements of the State set out in the Project Brief). • The scope of the IC will include assessing the merits of time related claims.

9. Returned Works

The term Returned Works refers to a class of ancillary items owned and operated by third parties often constructed by and sometimes operated by Project Co so as to effectively coordinate with the core project works or assets.

Summary of National Guidelines And Practice	Additional Policy Guidance
<p>No position is expressed in the National Guidelines for Social Infrastructure projects, however, the Commercial Principles for Economic Infrastructure do contemplate a category of 'returned works'. The Economic Infrastructure Principles suggest Project Co is to bear the risk of correcting defects during a defects liability period nominated by the State.</p>	<p>A regime which addresses 'Returned Works' may be required on a project specific basis depending on whether Project Co is required as part of its scope to undertake works and construct infrastructure which will be owned and operated by others during the operating term.</p>

10. Global Financial Crisis Provisions

Until the Global Financial Crisis (GFC), sources of private finance were plentiful and governments viewed the manner in which the private sector parties marshalled their finance as a matter for themselves. Market disruption and clauses requested by the private sector to avoid late surprise variations in funding costs, common during the Crisis, can pass risks that formerly lay with the private sector to government.

Summary of National Guidelines And Practice	Additional Policy Guidance
<p>National Guidelines provide for no refinancing without prior State consent, after considerable due diligence, and the State shares 50% of any refinancing gain when the projected equity return exceeds the level of the original Base Case Financial Model.</p>	<ul style="list-style-type: none"> • The Project Agreement would not normally specifically cater for GFC type events and the State should proceed on the basis that the worst effects of the GFC have passed and that it is now 'business as usual'. • On this basis, the State will go to market with a position whereby the State shares equally in refinancing gains, but will not be exposed to any refinancing losses (eg as per the position under the NCPs). • The State will respond to particular concerns of the private sector in respect of GFC clauses as an evaluation consideration.

11. Proceeding at Own Risk

‘Proceeding at Own Risk’ is a term referring to attempts to clarify whether the government’s desire to dictate design is so far reaching that a long time may pass before the private sector feels confident it can advance or if it should wait longer for an endorsement of its designs. The government, while wishing to see the designs, does not wish to assume the design risk it thought it was paying the private sector to take.

Summary of National Guidelines And Practice	Additional Policy Guidance
<p>The private party is responsible at its own cost for designing the facility so as to be fit for the intended purpose (and is to provide a warranty to this effect),</p> <p>Government has a (time limited) right to comment on the detailed design documents and the private party must amend the design documents to the extent that they do not meet the requirements of the project agreement.</p> <p>Further,</p> <ul style="list-style-type: none"> • construction must await the expiry of the period for comment. Deadlocks may be broken by referral to an independent expert. • Government comment on design never relieves the private sector party of its obligations or warranties. 	<p>The State will consider the inclusion in the Project Agreement of a timetable identifying design information according to which designs are to be lodged for State examination and comment and when it may be lodged.</p> <p>Project Co will only be entitled to proceed at its own risk with construction prior to endorsement of the design documentation in the following limited circumstances:</p> <ul style="list-style-type: none"> • The State must be afforded the time provided in the Project Agreement to review the submitted design documentation. • If the State fails to comment within the required time limit, this will be deemed to mean that the State has no comments and Project Co may proceed to the next stage of the process but not that the State approves the documentation; it means that the time for comment has passed and Project Co may, if it wished, continue. The responsibility for the designs remains with Project Co. • If the State provides comments on the submitted design documentation and Project Co does not agree with those comments, Project Co must initiate the dispute process. If the dispute process has been initiated, Project Co may proceed at its own risk. • The time period that the State is allowed to review the design documentation does not commence unless the design documentation is of sufficient quality and meets the requirements of the Project Agreement.

12. Reviewable Services

PPP contracts are long lived and to keep service costs competitive over the project’s life periodic tests of ongoing value for money, especially if technical advance has been rapid, are normally recommended. Reviewable Services are those where there are likely to be differences between market prices and the costs paid by the State to Project Co which can be examined. The process is acknowledged to require the application of considerable skill in practice.

Summary of National Guidelines And Practice	Additional Policy Guidance
<p>Reviewing and market testing of the cost of specified Reviewable Services are used to keep service costs competitive over the long life of the project and ensure government achieves value for money.</p>	<ul style="list-style-type: none"> • Reviewable services should be those with a strong labour component and generally more limited capital. • The Project Agreement should allow the State to market test. • Market testing is preferable over benchmarking. • The State wants the flexibility to maintain the existing services provider. • The State wants the flexibility to negotiate with the existing services provider prior to being required to market test. • The possibility of capping the uplift of the services provider for the first review may be requested. • The treatment of reviewable services that have a capital element needs to be considered on a case by case basis. <p>Services will not be reviewed for Economic Infrastructure type contracts.</p>

13. Relief Events

Sections 13, 14 and 15 relate to a spectrum of reactions to a contract that is not being fulfilled as expected. If this situation is not corrected it progresses towards the contract's termination by degrees. The first of these stages is usually a request for time to get back on track.

Summary of National Guidelines And Practice	Additional Policy Guidance
<p>Relief Events are specified events which prevent performance by the private party of its obligations at any time. Relief Events will not include events within the private party's control or which, although outside the control of the private party, are best managed by the private party (including where the private party should have put in place appropriate contingency plans).</p> <p>Provided that certain conditions are met, the occurrence of a Relief Event will entitle the private party to relief from default/termination. However, the private party will bear any additional costs or losses incurred as a consequence of a Relief Event unless that event is also a Compensation Event.</p>	<ul style="list-style-type: none"> (a) During the D&C Phase, the State will be able to achieve some commonality across availability PPPs and BOOT projects in relation to the types of events for which it grants relief to Project Co (assuming the BOOT projects include a required Date for Completion). A list of recommended Extension Events and Compensable Extension Events is set out at Schedule 1. (b) Accordingly, Project Co should retain the benefit of any contingency in its program. (c) Project Co should be entitled to an extension of time to the Date for Completion for Extension Events that delay the achievement of Completion provided the delay is on the critical path of the Project. The assessment of the critical path needs to be made on a factual basis at the time of the delay having regard to the then current and approved construction program for the Project. The State should be able to rely on the program or conduct an audit to determine if a delay has occurred. (d) The State prefers not to fix a daily rate for delay costs payable to Project Co for Compensable Extension Events or fix a maximum daily rate for delay costs but that Project Co is only entitled to recover its reasonable and properly-incurred proven delay costs as assessed at the time of the claim to require. These should include preliminaries and overhead (as delay costs will be calculated on this basis) but should exclude margin. (e) Intervening Events and Compensable Intervening Events may occur in the operating phase and are specific to availability PPPs. These events should entitle Project Co to a suspension of its obligation to perform services and relief from default, termination and abatement for non-performance.

Summary of National Guidelines And Practice	Additional Policy Guidance
	<p>(f) A Compensable Intervening Event will also entitle Project Co to financial compensation. A list of recommended Intervening Events and Compensable Intervening Events is set out at Schedule 1.</p> <p>(g) Relief during the operating phase for BOOT projects (and during the D&C Phase where there is no required Date for Completion) should be in the form of a material adverse effect or key risks regime. State financial assistance is considered a remedy of last resort. The details of any material adverse effect regime that will be appropriate for the BOOT projects will be discussed on a case by case basis.</p> <p>(h) Determinations in relation to extensions of time and cost should be made by the Independent Certifier.</p>

Schedule 1 – Summary Table of Relief Events

Relief event	Remedy	Availability PPPs				BOOT (with EOT regime)	
		D&C		Operating term		D& C	
		Time	Cost	Suspension	Cost	Time	Cost
An act or omission by government at the facility/site other than performance of State services or any act or omission authorised or permitted under the project contracts		X	X			X	X
Failure of a government agency to carry out works or provide services for the implementation of the Project, unless it is acting in accordance with its statutory powers		X		X		X	
State-wide industrial action that has not been caused by Project Co		X		X		X	
Any event or occurrence (outside the control of either party) which deprives possession of, or access to, the project site other than any event or occurrence arising from third party rights to use or access the site		X				X	
Force Majeure Events		X		X		X	
A breach by the State of any project document to which it is a party		X	X	X	X	X	X
A State or court direction to suspend or cease all or part of the works because of a native title claim or as a result of the discovery of an artefact (provided this has not resulted from a Project Co breach)		X	X	X	X	X	X
State modifications		X	X	X	X	X	X

Project Disclosure Policy

Industrial action taken by a State Associate which directly affects the Project and which is the direct result of an act or omission of the State or a State Associate at or in relation to the Site or the Project (excluding industrial action caused or motivated by opposition to PPPs)	X	X	X	X	
An act or omission of the State or a State Associate in exercising its rights in respect of an 'emergency' (except if the emergency is the result of a force majeure event or an act or omission of Project Co or a Project Co Associate).			X	X	
For high risk sites, Contamination for which the State retains liability under the project agreement.	X	X	X	X	
Delay or disruption caused by a third party engaged by the State to undertake capital works or provide services at the Site.	X	X	X		X
Where Project Co is unable to respond to or rectify a failure event due to a specific request by the State Delegate to delay the response or rectification.			X		
Loss caused by the reckless, unlawful or malicious act or omission of the State or a State Associate to the extent not caused by a Project Co breach for failure to protect against such a loss.			X	X	

In this table 'State Associate' includes those other parties created by its statutes whose actions affect the project and 'State Delegate' the party appointed to administer the contract with Project Co on the State's behalf. Project Co's 'Associates' are associates as understood by the Corporations Law and may include its employees, subcontractors and even visitors to the site.

14. Default and Remedy

Intermediate between Relief events and the consequences of Termination lie events of Default and Remedies for unsuccessful attempts by the private sector parties to cure.

Summary of National Guidelines And Practice	Additional Policy Guidance
<p>The National Guidelines discuss :</p> <ul style="list-style-type: none"> • a wide range of practices, distinguishing quite long lists of 'Events' of default from 'Project' default (the latter leading more directly to ultimate Termination) and • a process of issuing Notices to the private sector party to devise and to follow a Cure Plan which extends for a period additional to the normal response and rectification times for original service failures. <p>Failure to cure converts an Event of Default to a Project Default allowing the government rights to terminate, step in and even to require the private parties to exercise their security rights.</p>	<p>The State will generally allow debt providers the first opportunity to cure a default, and will only ultimately step in if health and safety or other such concerns arise or if Lenders do not pursue or are not successful in pursuing a cure.</p> <p>The State's expectation is that:</p> <ul style="list-style-type: none"> • the project owners would initially take effective steps to rectify matters; and, failing that • the creditors would enforce their rights.

15. Termination Payments

Of the three stages, with the arrival at a realisation by both sides that the contract will not be fulfilled, and that earlier attempts to rectify have failed, a point of last resort is reached.

Summary of National Guidelines And Practice	Additional Policy Guidance
<p>On early termination of the project agreement, government generally pays a Termination Payment to the private party.</p>	<p>If the project is terminated (for default or otherwise) before its scheduled expiry financiers may receive termination payments from the State.</p> <p>Compared with economic / toll road PPPs, the State prefers slightly more limited cure rights for social infrastructure assets as the State is more directly involved in using the asset.</p> <p>Where the agreement is terminated for a default by Project Co, termination payments may be made by the State.</p> <ul style="list-style-type: none"> • For social infrastructure, the calculation of the termination payment for social infrastructure PPPs will be based on the lesser of Project Co's interest in the project as per the financial model or the market value of Project Co's interest in the asset at the time of termination in acknowledgment of the fact that the State would receive an asset of some value, less all State costs including sunk costs, costs relating to the termination and any outstanding costs. • For Economic infrastructure, there will be no default termination payment. <p>Where the project is affected by an extensive period of Force Majeure both the State and the private sector may have a right of termination. A termination payment to compensate the private sector for the cost of repayment of the lesser of outstanding debt and base case financial model debt.</p> <p>The State expects to have a general right to terminate the project agreement at its own election. In this case, the State would expect to pay the value of both debt and equity, in each case as shown in the Base Case Financial Model but not so as to compensate equity for anticipated excess profits, nor, depending on the calculation method, equity returns after the date of termination.</p>

16. Dealing with a Special Purpose Vehicle

Summary of National Guidelines And Practice	Additional Policy Guidance
<p>The National Guidelines presume nothing more than a separate legal person capable of entering into a contract with government.</p>	<p>To mitigate the risk of contracting with a limited recourse entity, the State would normally require:</p> <ul style="list-style-type: none"> (a) Review of sub-contracts by the State. As a condition of financial close, Project Co will be obliged to obtain the State's approval of each sub-contract. The State may be expected to conduct a legal and a financial review of the terms of these agreements and may submit commercial, technical and legal comments. (b) Project Co and the builder each to undertake that they will not grant or seek any waivers or variations of the approved contracts until the State has consented to these. (c) A direct contractual undertaking from each of the key sub-contractors, giving it a direct legal relationship with the key sub-contractors so as to restrict the ability of the sub-contractors to terminate their agreements and to give the State a right to cure any breaches by transferring the sub-contracts to a new proponent. (d) A charge over all of the assets and undertaking of the Project Co of equal first ranking with a charge that Project Co will grant to its financiers.

17. Change in Law

The NCPs define change in law to include the following occurrences after the execution of the Project Agreement:

- a) The enactment of new laws;
- b) The amendment, repeal or changes of any law; and
- c) In some jurisdictions, any judgment of a relevant court of law which changes a binding precedent.

'Law' is defined to mean State legislation, subordinate legislation, rules, regulations and policies or guidelines with which Project Co is legally obliged to comply.

Where a change in law occurs during the operating term for which Project Co receives compensation, then Project Co should not be given relief from performance as Project Co must continue to perform the services varied in accordance with the change in law. However if a change in law results in requirement for additional capital works during the operating term, Project Co may be granted relief from performance where services are unable to be provided because of that impediment.

Summary of National Guidelines And Practice	Additional Policy Guidance
<p>Government will compensate for Changes in Law which exclusively affects the project or category of project. Government will also share the cost of general Changes in Law which necessitate capital expenditure or operating cost effects not captured through indexation or reviews of Reviewable Services (although, in some jurisdictions, no Relief or Compensation will be granted for general Changes in Law during the design and construction phase). Generally, changes in tax arrangements are to be borne by the private party.</p>	<p>At a general level, the State expects to bear the risk of changes in law which exclusively affect the project.</p> <ul style="list-style-type: none"> (a) In respect of general changes in law, any 'business as usual risk' should be retained by Project Co. (b) The Project Agreement should include a regime whereby the risk of changes in law / policy during the operating term are borne by Project Co until the next services review (ie usually on a 5 yearly basis). (c) Changes in law / policy that have a material capex effect should be excluded from the 'mop up' provisions described above.

	<p>(d) Where a change in law causes a delay to construction during the D&C Phase, if Project Co is entitled to be compensated for the change in law, Project Co should also be entitled to an extension of time and delay costs.</p> <p>(e) No general change in law relief will be given during the construction phase.</p>
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