

# Transparency in Public-Private Partnerships

## Some Lessons from Scandinavia and Australia

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### *Document Version*

Final published version

### *Publication date:*

2011

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### *Citation for published version (APA):*

Greve, C., & Hodge, G. (2011). *Transparency in Public-Private Partnerships: Some Lessons from Scandinavia and Australia*. Paper presented at The 1st Global Conference on Transparency Research, Newark, United States.

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# **Transparency in Public-Private Partnerships: Some Lessons from Scandinavia and Australia**

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Paper for the 1<sup>st</sup> Global Conference on Transparency Research

Rutgers University, Newark, 19-20 May 2011

First version

## **Abstract**

This paper examines the transparency of public-private partnerships (PPPs). The key question is “How has transparency and accountability been implemented in PPPs?”. PPPs in infrastructure have been presented as enabling synergy and as a major alternative to previous contracting out techniques. These partnerships have most usually involved the preferential use of private finance, highly complex ‘bundled’ infrastructure delivery contract arrangements and new governance and accountability assumptions. Risk management is also particularly important to PPPs. Contracts between the governments and partnering private firms, however, have also been more complex and have not necessarily lead to simple synergy, but to more negotiations and governance structures. One ongoing concern from critics has been the accusation of illegitimacy due to the use by governments of these contracts to hold project information secret, rather than providing details of the deals to citizens. This paper first presents the transparency concept as it relates to modern day infrastructure PPPs. Second, the paper discusses how transparency and PPPs are related, and suggests a typology of transparency based on degree on openness and phases of the PPP process. Third, the paper examines empirical evidence on transparency elements in PPP contracts and governance structures based on two cases from Scandinavia and Australia. Fourth, the paper concludes by observing how different transparency dimensions relate to the different phases in a PPP project, including the important point about the contract institution that defines a PPP. The paper also concludes by suggesting some ways forward to improve transparency in future PPPs to enhance legitimacy.

## INTRODUCTION

This paper examines transparency in public-private partnerships (PPPs). The paper uses some illustrations from Scandinavia and Australia where PPPs have developed differently. Scandinavia has had limited experience with PPPs. Some Australian states such as Victoria, have had full experience with PPPs. PPPs are new forms of organization that have risen in the last decades (Hodge, Greve & Boardman 2011). There has been much debate about what PPPs are and how to best define them. Briefly, PPPs can be defined as “cooperation of some durability between public and private actors in which they jointly develop products and services and share risks, costs and resources which are connected with these products and services” (Van Ham & Koppenjan 2001: 598). They are a part of the broader New Public Management (NPM) (Hood 1991) agenda to use market mechanisms for public infrastructure and service delivery. PPPs also are an element in the wider cooperation and collaboration efforts between the public sector and the private sector that is part of the New Public Governance (NPG) agenda which is more recently described under the heading of “collaboration” (Kettl, 2002, 2009; Osborne ed. 2009).

Transparency has become highly topical in literatures on public management and public governance in recent years (Hood & Heald, eds. 2006). Transparency is also now part of the current public management and governance reform agenda of which the Obama administration’s transparency policy is the most visible one (Coglianese 2009). In recent years, transparency is becoming a topic for public policy researchers who are interested in the effects of the world wide web and its possibilities of disclosure and availability of information (Margetts 2006). Clearly, as well, transparency issues have found new life with the internet with wide coverage of phenomena such as the Wikileaks affair).

Transparency issues in relation to PPPs are occurring because of this move towards including the private sector in public service and infrastructure provision. As Alasdair Roberts (2006: 117) noted, “(...) FOI (freedom of information, ed.) laws have been undercut by governmental experiments with new modes of delivering public services”. There is a widespread sentiment that transparency is threatened by PPPs or other market-type mechanisms. This leads to a potentially paradoxical situation: there is more focus on transparency as an issue in the public sector while more and more tasks are being moved away from the public sector and “privatized” or transferred to PPPs.

The key research questions are therefore: How does the occurrence of PPPs affect transparency? What transparency measures and mechanisms exist for PPPs? How can transparency be improved in PPPs in the future?

The hypotheses are the following: H1: PPPs made transparency for public services more difficult. H2: Transparency mechanisms for PPPs focus on the process and too little on the contract. H3: Transparency can be improved by attending more to the contract institution, but there will continue to be dilemmas and trade-offs attached to transparency in PPPs.

This paper first presents a conceptual discussion on how “transparency” and “PPPs” can be understood. Second, the paper discusses how transparency and PPPs are related. The section presents a model on transparency in PPPs. Third, the paper reviews selected empirical evidence on transparency elements in

PPPs based on studies from Scandinavia and Australia. The Scandinavian countries have had relatively little experience with long-term infrastructure contract PPPs (LTIC-PPPs). Australia has been seen as one of the frontrunner countries in line with the UK and Canada. Fourth, a conclusion sums up the findings on transparency in PPPs, and has suggestions for some ways forward for improving transparency in PPPs.

## TRANSPARENCY

Why has “transparency” become so topical? There are different answers to this question. Hood (2006, chapter 1), in an overview of the historical rise of transparency, has given some indications of why he believes transparency is now so strongly on the public governance agenda: First, a discussion on “openness between executive government and citizens. There is both a fundamental issue of governments being open and accessible to their citizens, and an issue of deliberative democracy where more views and perspectives are taken into consideration when making public policy decisions. The first issue has been pursued through “freedom of information acts” of which the US 1966 “Freedom of Information Act” and US the 1976 “Government in the sunshine Act” spawned many similar institutions around the world. Hood is quick to point out that some countries have much longer experiences to draw from, for example Sweden with its “Freedom of the Press Act that goes all the way back to 1766. Today we see organizations established to fight for freedom of information and accessible government, for example the American organization OMB Watch that was started by Gary Bass in 1983 ([www.ombwatch.org](http://www.ombwatch.org)). The other issue is the belief in deliberate democracy and the point that democracy gets stronger if more people participate in democratic activities which means that they have to have access to information to act effectively as citizens. The broadened framework of participation also includes third sector organizations and NGOs. In the literature on public administration development, this is often referred to as part of a “good governance” agenda. Second, the NPM movement preferred market-type mechanisms for public service delivery and envisaged the citizen-as-consumer. For a consumer or customer to choose in a market place, there has to be transparency of prices and goods so the choice can be made rationally. NPM came to herald “cost centre” accounting that allowed for insights from citizens-as-consumers into what the public sector and private contractors were producing. Auditors came to play a more prominent role as someone who ensured that enough information was available and that public service producers had disclosed sufficient information. Third, there has been a discussion on transparency in the corporate governance literature. Corporate governance is concerned with the relationship between the owners, the boards and the chief executive officers. As Hood (2006: 17) explains that “(...) extensions of the obligations on corporations to disclose and publish information about themselves came steadily with the advance of regulation and with audit and accounting reforms ostensibly intended to produce “reassurance” (Power 1997) in the aftermath of multiple corporate failures and scandals. And the quantum extension of trading in securities in the twentieth century led to ever-increasing pressures on corporations to produce open and comparable information on all aspects of their activity for the benefits of investors or their agents (...)” (Hood 2006: 17).

These three strands provide some suggested answers to the “why transparency” question. But what is the concept of transparency as it is relevant today, more specifically? From the literature, these meanings seem to be relevant:

- Freedom of information for citizens
- Openness in dealings by office-holders
- Predictability in decision-making processes
- Fighting corruption

Nelson (2003) discusses four issues of transparency: Fullness of disclosure, the accessibility of documents, the timeliness of information availability and the mechanisms available for recourse and influence (Nelson 2003). Closely associated with “transparency” is also the concept of “accountability”. This concept, which at its core, means to give reasons for one's actions has been increasingly broadened over the years to now include the role of responsibility, the expectation to control (as distinct to simply giving an account after the event), and the desire to encourage responsiveness. Under this broader meaning, accountability is nowadays therefore firmly connected to notions of assessment, blame, redress, explaining and changing behaviour after failure as well as transparency, control, responsiveness and improving performance through investigating and scrutinising; Hodge (2008).

The internet and data-driven government has accelerated these issues. Helen Margetts (2006) has discussed this development and there is now a whole movement focusing on watching governments (OMB Watch and others). Transparency policy under Obama has also accelerated this discussion. Obama made transparency a key part of his public management and governance reform the first day he took over as president of the USA. The Obama government has published websites such as [recovery.gov](http://recovery.gov) and [USAspending.gov](http://USAspending.gov) which call for more open government. Technology can greatly enhance how people and the media can access information.

#### *A Model of Transparency?*

One way to define transparency has been to say that it is “the degree to which government information is available (Piotrowski and Borry 2009). As Coglianese (2009: 30) observed writing from the US perspective: “The Bush-to-Obama transition reveals that the most important challenge for open government is not secrecy versus transparency but figuring out how much transparency, and what type to have over the governmental process”. Heald (2006) has suggested a model of transparency. Heald discusses four directions for transparency: 1) transparency upwards (in hierarchies), 2) transparency downwards (to citizens), 3) transparency outwards (the activity of observing the peers and/or competitors), and 4) transparency inwards (when those outside can observe what is going on inside, see the FOI measures).

Heald also distinguishes between event versus process transparency, transparency in retrospect versus transparency in real time; nominal versus effective transparency and the timing of the introduction of transparency.

Concerning the distinction between “event” and “process”, Heald has the following to say: “In the case of event transparency (...), the objects of transparency can be input, outputs or outcomes. In the case of process transparency, the components are procedural and operational aspects” (Heald 2006: 29).

We think that the distinction makes sense, but we would like to suggest a third category which will be relevant for public-private cooperation: Much of the focus in PPPs is related to what the contract as an institution is, and how it is interpreted in law. Adding “institution” to “event” and “process” may help the analysis of transparency in PPPs and other instances where market mechanisms are employed to produce public services.

### *Limitations of transparency?*

Roberts (2006) point to the fact that government officials are likely to informally to adopt strategies to counter more openness and transparency. These moves can come in many forms, and Roberts lists some of them, including spinning the media.

Another issue is the limits that are always included in FOI acts. There are certain topics and dealings that are excluded from transparency, for example measures related to national security. More widely, governments are trying to protect their core interests. For private sector companies, commercial confidentiality is an important underpinning of private markets operating to reward (or punish) innovation in commercial decision making. This notion is also one of the key aspects when market-type mechanisms are applied to public infrastructure and service delivery.

### **PUBLIC-PRIVATE PARTNERSHIPS**

We have already noted the Van Ham and Koppenjan definition of PPP: (viz. ‘cooperation between public-private actors in which they jointly develop products and services and share risks, costs and resources which are connected with these products and services’). But partnerships between the public and private sectors come in many forms. Hodge and Greve (2007) and others have each defined partnerships as encompassing several different families of activities. And the desire to more clearly articulate public-private partnership continues. Thinking about infrastructure partnerships, for example, a recent OECD report defined PPPs as ‘an agreement between government and one or more private partners (which may include the operators and the financiers) according to which the private partners deliver the service in such a manner that the service delivery objectives are aligned with the profit objectives of the private partners and where the effectiveness of the alignment depends on a sufficient transfer of risk to the private partner’ (OECD 2008: 17). Whilst this definition has some advantages, it does not include the non-profit sector where voluntary organizations cooperate with the government, and therefore the definition ought to be extended to also include the non-profits.

In the United Nations, PPPs are defined as ‘voluntary and collaborative relationships between various parties, both state and non-state, in which all participants agree to work together to achieve a common purpose or undertake a specific task and to share risks and responsibilities, resources and benefits’ (UN General Assembly 2005, p. 4; cited in Bull 2010: 480). Such partnerships can include those oriented towards resource mobilization, advocacy and policy goals as well as long term operations.

There are several crucial concepts here. One concept is 'risk'. In almost all definitions, sharing of risks in an explicit way is mentioned as one of the key aspects of PPP. This differs from earlier ideas on risk sharing through contracting out / outsourcing arrangements where this was more implicit<sup>1</sup>. Another key concept is 'innovation': the public sector and the private sector have to come up with new solutions and 'work together or achieve a common purpose'. More is expected of PPPs than just 'ordinary' collaboration. As well, there is also usually a sense of hope that the relationship is a long term one – and desirably longer than the temporary relationship achievable through traditional 'contracting-out' of services. Additionally, many partnerships entertain the notion of a certain degree of power sharing whilst working together jointly.

The last few decades has indeed shown that PPP comes in many shapes and sizes. One s most visible form of recent partnership has been *the long-term infrastructure contract partnership (LTIC)*. The LTIC is organized around a design, finance, build, own, operate, transfer model and involves private sector financing and private sector project management capabilities. Historically, too, the urban development and downtown renewal experience of the US from the 1960s onwards saw close redevelopment partnerships as a visible and important PPP form; Bovaird (2010; 50). Another form is the widespread cooperation with between governments and non-profit organizations. This has been a tradition in some countries, especially in the USA where non-profit sector organizations run many public services (Amirkhaynan 2010; Kettl 2009). In the UK, there has been a debate on 'the big society' since Prime Minister David Cameron took office. Recently, 'the big society' is also meant to be a guide for a research effort though universities express misgivings about that (The Guardian 24 March 2011). There are also other, newer forms of partnering where the public sector and the private sector team up in new innovative formats to solve common challenges. 'Gate21' is a current example of a partnership on environmental issues. Gate 21 – sustainable future forum' was begun by a local government, but quickly adopted relationships with other local governments, private sector companies and non-profit organizations as well as universities and housing associations ([www.gate21.dk](http://www.gate21.dk)).

PPPs are moreover found at various levels of government. From regional partnerships between local governments and local private sector companies or associations to national governments that team up with national companies or associations to international organizations that team up with multinational companies (Skanska) or associations (the Red Cross). There are of course a number of combinations possible within that framework (Donahue). Some challenges arise when local governments try to deal with global partners, or when national governments want to form partnerships with multinational companies.

PPPs are also clearly more than projects (the building of a hospital or the building of a bridge). PPPs are now also associated with policies on how the government should interact with the private sector in order to improve public services or create innovation (the recent Danish government 'Strategy for public-private partnerships and markets' is an example of this). At the UN level, there is a PPP policy (Bull 2010). At an even broader level, PPPs could be a metaphor or a brand for how governments want their interaction with society viewed<sup>2</sup>, or alternatively, how they want the role of government in the economy viewed. And at a broader level still, the UN's Millenium Declaration (and the subsequent establishment of the Millenium Development Goals) saw partnership being used in the context of

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<sup>1</sup> See (Montiero 2010) who sees risk explicitly at the centre of the OECD definition of PPP performance. In the OECD's own words, 'the effectiveness of the alignment depends on a sufficient transfer of risk to the private partner'.

<sup>2</sup> See Klijn 2010.

developed countries having a role in aiding developing countries; goal eight here was to achieve a 'global partnership for development' through various means<sup>3</sup>.

Perhaps it makes sense to view PPP as being understood at many different levels. Hodge (2010b) formulated it in this way: PPPs can be understood in terms of four distinct but interconnected levels of meaning: as (1) a specific project or activity, (2) an infrastructure delivery mechanism or organizational form, (3) a policy statement as to the wide variety of ways the private sector can cooperate with government and the role of the government in today's mixed economy, and (4) as a governance tool or symbol. All of these meanings, too, exist in a broader historical context and set of cultural assumptions. What this means is that there are indeed multiple meanings being constantly given to the phrase PPP. It not only means different things to different people (because they may talk of different members of the various PPP families and use the same label for these alternative forms). It also importantly means that in talking of PPP success, for example, PPP success may reside in any one of these four levels; at the single project; the delivery mechanism level; at the policy level; or at the governance level. Multiple grammars indeed!

### *The PPP model*

PPPs have often been described in terms of long-term infrastructure contracts (LTIC-PPPs). There is a long historical pedigree to PPPs and the private funding of public infrastructure also goes back centuries; Wettenhall 2010; Bovaird, 2010. Whilst the partnership story has multiple sources, two are of particular interest to modern infrastructure PPPs. The first was the use of the private sector in the US to fund and complete the challenge of down town urban renewal and redevelopment in the 1960s and 1970s. Billed as 'public-private partnership', these initiatives were the recent source of the PPP grammar. The second source was the Private Finance Initiative (PFI) in the UK. In this case, the comprehensive policy preference of UK governments to use private finance and bundled contracts pushed the PFI to global prominence. Tony Blair's labelling of the PFI project as PPP was a political masterstroke, however, and catapulted the idea into popularity (Hellowell 2010). A significant attraction to governments of the private financing of public infrastructure was that it managed to keep the financing "off balance sheet" for a considerable time period.

The PPP model has been described in various ways, but a common understand is that it represents different phases or functions: Design, Finance, Build, Own, Operate, Transfer of DFBOOT – or some combination in between. Duffield (2010) lists a number of these combinations.

PPPs have added a number of dimensions to the usually know outsourcing or contracting out of public services. One dimension is (1) risk sharing. Risk sharing is filled with challenges. A popular way of saying it is that the risks should be allocated to the sector that can bear the risk. (2) value for money: PPPs must secure value for money in terms of better outputs and/or outcomes. OECD aptly termed their 2008-report on PPPs: "Public-Private Partnerships: In Pursuit of Risk Sharing and Value for Money". (3) The creation of a new organization. When establishing a PPP, the most common way is to create a "Special Purpose Vehicle" (SPV) that embodies the partnership in a specific form. The SPV is a legal body of its own, and often jointly owned by the partners (4) Potentially multiple public partners and multiple private partners that go together in consortia or teams. Usually, there are more public partners to a partnership, and more private companies that make up a consortium.

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<sup>3</sup> Whilst the UN's use of 'partnership' in the context of the MDGs strictly speaking calls on the developed countries to assist the developing countries, it is essentially a call for the wealth (both private and public) of developed countries to play a role in solving the common problem of poverty across developing countries.



### *Understanding Transparency in PPPs*

An understanding of transparency in PPPs may combine the insights by Heald, Nelson and others with the special characteristics of the PPP.

- Heald (2006): Process and event. Added: Focus on institutions, particular the contract institution.
- Criteria: Fullness of disclosure, the accessibility of documents, the timeliness of information availability and the mechanisms available for recourse and influence (Nelson 2003).

The process can be divided into the following five phases:

1. Pre-contractual phase (design, finance)
2. Contractual allocation and contractual agreement (decision)
3. Operational phase and forming an SPV (build, own, operate)
4. Judgment phase and evaluation of output and outcome
5. Decision on continuation or break (transfer)

If we put these combinations – the dimensions of transparency and the stages of the PPP process, we get the following table.

	<b>Fullness of disclosure</b>	<b>Accessibility of documents</b>	<b>Timeliness of information availability</b>	<b>Mechanisms available for recourse and influence</b>
<b>Phase 1</b>	Example: Disclosure in the pre-contractual phase (process)			
<b>Phase 2</b>		Example: Accessibility of the contract (event, institution)		
<b>Phase 3</b>		Example: Accessibility to information on operating PPP company (process)		
<b>Phase 4</b>			Example: Timeliness of information of performance of PPP (event)	
<b>Phase 5</b>				Example: Influence on future of PPP project after performance review (event)

Table 1: Dimensions of Transparency and the Process of Private Partnerships

## SOME LESSONS FROM SCANDINAVIA AND AUSTRALIA

This section discusses some recent examples from Scandinavia and Australia. The case from Scandinavia is from Denmark, the case from Australia is from the state of Victoria.

### *A Case of a PPP in Scandinavia (Denmark)*

The National Archive was one of the first new infrastructure being built as a PPP in Denmark. The Danish government was looking for a project that would be suitable for trying out the PPP concept. Plans for a new national archive in the capitol of Copenhagen had been underway for some time, but there had been political disagreement over its finance and especially its placement. In 2004, the minister for economics and business affairs announced the following: “The building of the National Archive in central Copenhagen is now tendered as a PPP project. Minister for economics and business affairs, Mr

Bendt Bendtsen, and minister of cultural affairs, Mr Brian Mikkelsen, are now ready to launch the project. The choice of the private partner is expected to take place in 2005, building will commence in 2006, and the archive should be ready for use in 2008-2009" (Press release 2 September 2004, Ministry of Business and Economics Affairs).

There was a public debate as to whether a new archive was the best project to start the PPP policy initiative off with. Some argued that you only need one type of National Archive, and therefore it is not possible to construct a market for that particular kind of facility. Others argued that the government needed a project that could be launched without so much worry, and that was not going to be overtly controversial in the eyes of the taxpaying public. The minister argued for the new PPP like this:

"It is no secret that this government wants to secure value-for-money in national construction. With the launch of the first PPP project we think that we will have an efficient solution and draw many good lessons that benefit both this project and future PPP projects. The private partner shall not only be responsible for construction, but also be responsible for finance, maintenance and operations" (ibid: 2004). . In January 2005, the Copenhagen Local Government announced a "local planning initiative" about the National Archive and called for opinions about the project from the public. The official process for giving evidence and voicing opinion lasted from 23 June 2005 until 23 September 2005. In January, the Copenhagen Local Government proclaimed a new "local plan" for the area destined for the new National Archive. In 2006, the process began in earnest to find the private partners for the new archive. The government stated that "the private partners is expected to own the building for about thirty years" (Press release 13 March 2006). In 2006, there was a competitive tendering process for the contract for building the archive, and the winner was announced later. The government was following the European Union competitive tendering rules. These rules are meant to ensure that the contract is awarded fairly. In June 2007, the government signed a contract with the "Pihl consortium"; a consortium consisting of E.Pihl & Søn as the overall contractor, PLH Arkitekter as the architects or designers of the building, and Kemp and Lauritzen as the maintenance and operation's company. The building itself is designed to be of a top modern standard and has two 15,5 meter high halls for storing material as well as 7 separate magazines of which four of them are designed to contain highly classified material from NATO and the intelligence services. The new magazines are designed to care for utmost security as well as environmentally friendly.

#### *Comments on governance and transparency*

The Danish National Archive PPP project was the first larger PPP project in Denmark, and therefore had much focus on it. It largely went without any sort of controversy. The government has been keen to promote the PPP project, but only up to a point. Ministers have not tried to "oversell" the PPP project as a big success. The competitive tendering process raised some interesting economic and financial issues, and there was some debate over whether the government could in fact have built the archive by itself without having a private finance partner in on the deal. The government made use of external consultants to help advice on the financial side of the partnership project.

As the government was saved any public embarrassment because of no visible scandals, the PPP project went smoothly ahead, and the building was finally taken into use in 2009. In the opening program for the government in November 2007, the government restated its broad support for a PPP policy (in the document “the society of possibilities” / mulighedernes samfund)

#### *A Case of a PPP in Australia (Victoria)*

The construction of Melbourne’s early CityLink transport project provides a relevant recent examples of major PPPs. This illustrates some of the important policy lessons to date and offers an opportunity for reflection. This case study, drawn from Hodge and Duffield (2010), are also interesting as they transcend multiple governments and multiple partnership policies in Victoria.

Melbourne’s CityLink road infrastructure project is regarded as part of Australia’s PPP folklore and was an important early demonstration of recent PPP project delivery philosophy. As a case study, it demonstrated riskiness in both technological and political terms, innovation in the project arena and speed of delivery.

The CityLink road infrastructure project was a massive BOOT22 undertaking. One of Australia’s largest recent public infrastructure projects, it became a symbol of the former Kennett government’s approach to public infrastructure. The CityLink project linked up three major freeways in Melbourne – the South Eastern, West Gate and Tullamarine Freeways through the construction of 22 km of road, tunnel and bridge works. The project involved the construction, operation and maintenance of several sections of roadway, including new and upgraded roads, some elevated, and 6 km of tunnels through difficult silt conditions as well as other works. Following an Environmental Effects Statement in 1994 and the subsequent public inquiry, a brief was issued calling for parties to register their interest in completing the project. Two consortia were chosen for further development of ideas for the links, and following a second project brief specifying requirements in 1995, the Transurban CityLink Ltd consortium was nominated as the preferred bidder<sup>4</sup>. The estimated cost of the whole CityLink project was approximately AUS\$2.1 billion, including AUS\$1.8 billion financed by the consortium and AUS\$346 million of associated works and other costs financed by the state. Opened over the period 2000/2001, the consortium has leased land from the state to operate a public toll- way for 34 years, with ownership reverting to the state at no cost and in a fully maintained condition. The predicted benefit–cost ratio for these works was 2.0, with a net present value of AUS\$1.3 billion according to economic studies. The Melbourne CityLink also indicated that initial investors should expect to receive a real rate of return of 17.5 per cent after tax for the life of the project. To govern the project, specific enabling legislation (the Melbourne CityLink Act 1995), was established, along with a statutory authority (the Melbourne CityLink Authority) as the state’s contract manager. This project also crossed the lives of two governments, and both sides of politics agreed to the need for this infrastructure. Indeed, after having previously identified this need, the former Kirner Labor government moved the project forward to the stage of bidding documentation. The new Kennett Liberal government then reviewed this documentation and renegotiated the deal. This paved the way for the PPP mechanism.

But several factors then made this project a divisive political hotbed. Forecasts of net project benefits varied wildly. Accusations were also made that favourable treatment was given to the consortium and that misleading environmental impact emission information on tunnel air quality was provided by the

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<sup>4</sup> Transurban CityLink Ltd is a joint venture between Transfield Pty Ltd and Obayashi Corporation.

consortium to the government's MCLA. Also, amidst water shortages for citizens, Melbourne's drinking water was for some time being pumped into the tunnel surrounds to ameliorate a lowered groundwater table and structural problems with the tunnel.

After cracks began to appear in the tunnel walls (not acknowledged by CityLink until 17 months later), the tunnel needed to be redesigned in 1998. Further engineering problems also delayed the tunnel opening. State-of-the-art electronic technology was tested, almost on the run. Additionally, direct tolling (rather than a shadow toll paid by government based on traffic volumes) probably diverted between 15 and 37 per cent of traffic off the link and into adjacent side streets (Russell et al., 2000). A constant stream of legal controversies in the CityLink project between members of the consortium alleged various contract breaches for cost overruns, construction delays and faulty design. Even the government itself was accused of delays and breaches of contract, and it alleged negligence by the builders and designers. These issues, along with the Kennett government's use of a 'crash-through' political culture legitimized through the legal powers of the project<sup>5</sup>, provided a colourful cocktail of politics and power to deliver this PPP.

Overall, then, substantial risks were indeed transferred to the private sector in this project. Private contractors, for instance, bore almost all of the construction risks, along with most of the design, construction, operating, financing and market risks based on the contract<sup>6</sup>. Also, the majority of the legal conflicts were between private parties, with few involving the government directly – despite the good newspaper copy. Overall, then, we might conclude that most of these commercial risks were indeed borne by the private sector investors and that they deserved to earn a margin.

#### *Comments on governance and transparency*

Interestingly, though, whilst the commercial and technical aspects of the project were generally positively regarded, this cannot be said of governance matters. And lack of transparency in the private contract as well as other secrets being held inside government were central to many of the concerns voiced. The forecasts of net project benefits (which varied wildly) were initially inaccessible to the public. Additionally, no comparison had occurred between undertaking this task in the public or private sectors. Moreover, the Victorian Freedom of Information Act did not apply to this 'special project'. So amidst the accusations of favourable treatment to the consortium and misleading environmental impact emission information on tunnel air quality, the arrangements were deemed to be illegitimate until proven otherwise. Other governance shortcomings were also evident. This partnership deal was essentially a two-way affair rather than including citizens' interests directly. The state's enabling legislation even provided scope to override any potential delays from the normal complications of 'due process'. There was no separate provision for the protection of consumers, and little apparent concern that the concession period might in the end be as high as 54 years in an effort to achieve profitability for the consortium. Magnifying long-term governance policy concerns, the former state treasurer, an ardent supporter of privatization policies and PPPs, took on a top job with Macquarie Bank in its Infrastructure Investment Group, to lead future PPP efforts. Importantly, the precise contractual conditions which the state had agreed to were not made accessible to the public until the Kennett government had been voted out and a new government held a high level Inquiry into this contract deal.

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<sup>5</sup> The often cited example here was the use of the State's infringement notice system of debt collection.

<sup>6</sup> From a technical point of view the CityLink project was indeed a very challenging one, requiring a large technical advance in the tolling technology, real construction risks in tunnelling through soft Yarra River silt and considerable risks in environment issues concerning air quality and the height of the water table around the river. The private sector took on these risks fully and in accordance with the signed contracts.

There has been disappointingly little debate on whether the CityLink achievements were worth the price paid. Investors' interests were protected over citizens' interests, with high returns to private investors being achieved by minimizing risks through concession deed arrangements. The financial arrangement for the annual concession fee payable to the state for this monopoly facility was also far from clear, despite assurances to the contrary. The high level review by a team of lawyers of metres of legal documents found that payment by the contractor to the state for this monopoly facility could, at the contractor's choice, vary by a factor of four depending on timing options and only if both a reasonable rate of return had been earned by the private investors and if sufficient cash flow were available. In other words, it was not at all clear, even when the contract documentation had been analyzed, what the 'deal' was that the state had committed itself to. Citizens of Victoria paid a price in terms of lack of clarity here as well as a financial price. Considerable uncertainty existed until recently, when the deal was reappraised by the State's Auditor General. Clearly, the state should in future avoid, where possible, contractual obligations that affect its discretion for up to 54 years, and regulatory powers should be established for such projects through the state's independent regulatory authorities such as the Essential Services Commission. Critics also stressed that future projects should be subject to stronger parliamentary and public scrutiny before implementation.

#### DISCUSSION: TRANSPARENCY IN PUBLIC-PRIVATE PARTNERSHIPS

The OECD states that "ready access to information at all stages of PPP procurement assists both the public and private partners, and improves transparency, accountability and management of projects" (OECD 2008: 125). OECD goes on to say that "For the public, transparency helps to ensure that a project is fair and that the planned costs are open for public scrutiny. For private firms, too, access to PPP data, particularly from past tenders and from ongoing project evaluations, will provide a better chance for robust project development and competitive modeling" (OECD 2008: 126). We agree with these statements.

But transparency comes in many forms and whilst in a technical sense more information is nearly always better, this clearly can conflict with the need in politics to push through projects which may be unpopular, and blunt the attacks of government's critics.

In this paper we have described the main dimensions of transparency and the phases of the PPP development. There are a couple of issues that could be raised in relation to this: (1) Transparency is present at different stages of a PPP development. (2) "Less transparency" has not been a direct goal of PPP policy, but can be a consequence of using contracts and PPPs for public infrastructure building, and also inclusion of private partners in public policy more broadly.

*Transparency is present at different stages of a PPP development:* Transparency understood as disclosure of information and accessibility of information is especially present in the pre-contractual phase. In Denmark, the local government announced a "local planning initiative", necessary by law, that calls for opinions and evidence for a set period. Citizens and organizations can voice and submit their

opinion on the project. The project's plans are made available for citizens to examine. Accessibility of documents only concerns the general plans, not the financial proposals put forward by private companies. In the competitive tendering process, the process is guided by tendering rules. In Europe, these are guided by the European Union procurement rules that are meant to secure a competitive bidding process, and that must work against corruption. The institution of the contract is what sets PPPs (and contracting out/outsourcing) apart from legislation in a Parliament or Congress. When awarding a contract, the principles of commercial confidentiality will be influential. Transparency understood as timeliness of information is important it concerns the issue of when government can release information on contracts. In the period after the contract is signed, the maintenance and operation is taken care of by a private company or a Special Purpose Vehicle, and there is less transparency. Judgments about what type of infrastructure and services are delivered is bound to come in full only after the contract has expired, and that is 30 years away for some projects. Therefore, there has to be some intermediate goals and milestones that progress can be assessed from. This is in line with the points made earlier by Hood, Fraser and McGarvey (2006), for example when they observe that "However, such data collection and transparency of information about PFI (private finance initiative, ed.) contracts are most notable by their absence. From a political point, PFI has thrown up many issues concerning accountability and transparency. PFI contracts appear immune to the normal welter of oversight, regulatory, and scrutiny mechanisms that other public services face" (ibid: 43).

"Less transparency" has not been a direct goal of PPP policy, but can be a consequence of using contracts and PPPs for public infrastructure building, and also inclusion of private partners in public policy more broadly: Governments around the world, including in Scandinavia (Denmark) and Australia have set out to create value-for-money, make long term planning possible and make room for innovation when they establish PPP. They have not deliberately wanted to reduce transparency or conceal important information as such. However, when PPPs are established, the signing of a legal contract is one of the key aspects of a PPP, and that contract creates a legal body called the Special Purpose Vehicle. Another aspect is that the contracts are often very complex documents that need lawyers, financial experts and accountants to comprehend and understand. As Hood, Fraser & McGarvey (2006: 43) noticed, "the detailed and technical nature of many of the projects means that politicians often lack the know-how and expertise to understand the implications for the short-, medium- and long-term public finances". The Australian case of the CityLink project in Victoria is evidence of the same issue. The deal is highly complex and is not something easily accessible to politicians, let alone the media or the wider public. The lack of disclosure of material is a "side-effect" of having a commercial contract that gives the operational responsibility to a private sector-led consortium.

PPPs continue to be important instruments and institutions in the policy challenges facing nations in the coming years. It is therefore crucial that the discussion on transparency for these large infrastructure projects begin to take form. One step is to ensure that the groundwork is prepared competently as witnessed by the GAO (2008) in the US in their analysis of the highway sector: "More rigorous upfront analysis could better secure potential benefits and protect the public interest". The auditors and the audit offices play a key role in securing better transparency here. A recent meeting of European auditors

(Bundesrechnungshof 2011) emphasized the need to be more precise about what is expected of auditors, and to reconsider if auditors got sufficient competencies and skills to be able to scrutinize the complex PPP deals.

## CONCLUSION

This paper makes two primary contributions. First, it identifies and traces the development of the relationship between transparency and PPPs. Transparency has been a major policy issue, most recently named by the Obama Administration in the US as a key ingredient in the current US public management and governance reforms in the federal government. Transparency has also been an issue for organizations such as the OECD and the European Union. In this paper, we have identified transparency as having at least four elements: degree of disclosure of information, accessibility of information, timeliness of information and recourse and influence. Transparency is overall about the degree to which government information is available, following Piotrowski & Borry. Transparency for PPPs must be analyzed in terms of the different phases of a PPP project. In the pre-contractual phase, transparency is more likely to place than in the awarding of the contract itself, and transparency in terms of accessibility of information becomes harder once the contract is signed and the PPP organization, the “Special Purpose Vehicle” has been established. Recourse and influence may depend heavily on the way the contract is written and the context of the contractual institutions.

Less transparency is not a direct purpose of PPPs, but a significant consequence of more PPPs. While countries around the world have been preoccupied with getting more value for money and promoting innovation as main drivers for wanting PPPs in the first place, a key effect of establishing PPPs is often that there is less transparency in the economic deals and contractual realities than had the project been a pure public undertaking. If governments decide to use private sector organizations more in the future, there will be a need to consider the transparency issues more seriously. The paper has tried to illustrate this issue by providing recent examples from Scandinavia (Denmark) and Australia (Victoria). We examined the two infrastructure cases briefly: the constructing of a new National Archive in Copenhagen, Denmark, and the construction of the EastLink project in Melbourne, Victoria. Both projects are bigger infrastructure projects, and while they are transparent to some extent, the contractual complexity and the presence of the private companies make transparency issues more complicated.

Around the world, there is a movement to reconsider the PPP policy in light of the global financial crisis. This will be a relevant opportunity to review the transparency issues for PPPs again, and to help secure a stronger degree of disclosure-, accessibility- and timeliness of information while thinking about how to influence PPP decisions in the future.



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