

INFRASTRUCTURE 2012

GETTING THE WORK DONE



MinterEllison

LAWYERS

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MICHEL MASSON, YARRA TRAMS

Sydney's Westlink M7 project is an example of the successful infrastructure outcomes Australia needs.

Getting the work DONE

The analysis and information outlined in this **Infrastructure 2012** magazine is designed to tackle issues that companies, investors and governments will face in planning and delivering infrastructure in 2012. The title theme – *getting the job done* – reflects the practical goal that unites all people involved in project delivery, from architects and planners through to constructors and operators. Their mission this year is to advance projects when the surrounding economic conditions are tough and the need for an efficient approval and delivery environment is more important than ever.

The articles about integrated planning, streamlined approvals processes and enhanced procurement are all designed to explore key factors that can delay project development or unnecessarily add to completion costs. In a similar vein, the contributions on specific cases of infrastructure delivery highlight the options available to deliver complex infrastructure in difficult conditions.

These matters are significant because the infrastructure challenge that Australia faces is increasing, due to population growth and record expansion of export-focused industries. By the middle of the century, our total population will have reached over 40 million people; requiring a sustainable program to deliver new public transport and social infrastructure. It is also predicted that booming international trade by Australian companies will have caused a tripling of the national freight task by 2050; requiring the development of efficient commercial rail networks, modernised ports and a better connected highway system.

Simply put, record investment in fresh infrastructure will be essential if we are to enhance productivity and improve quality of life.

Financing these projects continues to be the underlying challenge. Governments (national, state and local) are curtailing their capital works spending and balancing their budgets. And companies will look upon new project investments in 2012 with the caution that comes from their experience of the GFC and the still uncertain markets.

Optimal planning and a confirmed delivery path will therefore be critical ingredients when new economic or social infrastructure is being considered. If this is accompanied by a sense of teamwork from the proponents of projects and the bodies that regulate or influence them, success is more certain.

Perhaps we can learn some valuable lessons from a project that involved all of this and which is seen as a near perfect case study of how to plan and construct a large but essential public asset – Sydney's Westlink M7. The M7 (shown in the photo on these pages) is the 40 kilometre tollway through western Sydney that opened, on budget and ahead of schedule, in 2005 and linked the M2, M4 and M5. Critically, it won strong support from motorists, business users and transport experts.

Fundamental to its success was long-term planning and a procurement process that got the best out of the public and private sectors. The M7 was planned over several decades, with the easement formally set in 1974. Environmental design began in 1993 and a full EIS was put on display in 2001. Similarly rigorous was the examination of delivery options, with a PPP chosen after evaluation of the best models to get value for money and encourage innovation.

And all three levels of government made specified financial contributions, signaling that major projects like this are most likely to proceed when all participants have a stake and risks are appropriately shared.

Australia's future will be defined by the way it scopes out and organises many more infrastructure projects like the Westlink M7. We must never forget that advanced planning of use and design pays real dividends, as does sound business evaluation and environmental assessment. Cooperation by governments on statutory approvals and budgetary issues is critical, as is a determination to tackle projects which are transformative.

2012 will be well used if Australia remembers these lessons and utilises all available skills and resources to progressively develop the infrastructure we need.



Mark Birrell
Leader of the Infrastructure Group at Minter Ellison

Comp Edge

Angela Schooneman



et i t i v e

Streamlining the planning approval process

When it comes to attracting funding for major infrastructure projects, having clear and efficient regulatory regimes can provide a significant competitive advantage, as *Angela Schooneman* and *John Carey* discuss.

IN AN ENVIRONMENT where the competition for infrastructure funding is tight, securing a competitive advantage is crucial. One immediate area in which it is possible to demonstrate such an advantage is through the provision of an efficient regulatory regime which streamlines the delivery of development approvals for major projects.

In its 2010 publication *Infrastructure Planning and Delivery: Best Practice Case Studies*, the Commonwealth Department

of Infrastructure and Transport identified the management of local and environmental impacts as one of six key lessons. However, to date, much of the focus has been on environmental, rather than town planning, approvals.

Now, more than ever, there is a pressing need for state based regulatory bodies to streamline their planning processes and reassess their approach to major and complex infrastructure developments.



It's time to change

The state of Victoria has a strong history of seeking continuous improvement to its planning system, however, as most other states have recently conducted, or are in the process of conducting, reviews of their planning regimes, this is no longer a significant point of difference. Whilst process reviews are indeed necessary, there needs to be a clear political will to make real changes. Without this, it is likely that major infrastructure projects will continue to be delivered utilising an ad-hoc approach to managing development approvals.

Many key infrastructure projects in Victoria over the last decade have actually relied on project specific legislation to overcome the development approval risk.

The major facilities for the Commonwealth Games (northern stand of the MCG, Games Village and Melbourne Sports &

Aquatic Centre upgrade) were delivered through the *Commonwealth Games Arrangement Act 2001* (Cth). This legislation exempted declared Commonwealth Games projects from a range of statutes, including the *Planning and Environment Act 1987*.

Similarly, Eastlink was delivered under of the *Eastlink Project Act 2004*, which specifically provided that nothing in a planning scheme required a permit for use and development of Eastlink, or prevented the use and development of Eastlink.

For the Peninsula Link project a specific document was incorporated into the Frankston and Mornington Peninsula Planning Schemes. This incorporated document, which resembled a planning permit, allowed the development and use of the Peninsula Link land in accordance with specified conditions.

Uncertainty for sponsors and proponents

Whilst these methods have proved successful in facilitating development approval, the use of different processes creates a degree of uncertainty for both sponsors and proponents. The legislative solution requires, a level of bipartisan support, which can allow political motives to intervene.

As noted by the Department of Infrastructure and Transport, “close and meaningful community engagement can lead to major design and delivery changes that are welcomed by local communities and improve the asset”. Uncertainty about the regulatory method for approving a project can complicate that engagement.

A key concern for proponents arises where the development approval process is susceptible to challenge. Some form of judicial review challenge may be inevitable in any decision making process (as occurred with both Eastlink and the Port of Melbourne channel deepening project). However, some methods can leave projects open to other challenges.

In the case of Peninsula Link, the requirement in the incorporated document for certain plans to be approved and complied with, formed the basis for an application for an enforcement order (effectively an injunction) by a local community group. The application was ultimately unsuccessful, but caused uncertainty and delay.

Legislative reforms

In December 2009 the former Victorian State Government sought to provide for a greater level of consistency in the approval process through the *Planning and Environment Amendment (General) Bill 2009*.

This Bill proposed that projects could be declared of state significance and subject to an assessment and approval process detailed in the Bill. The draft Bill attracted much attention, however with the change of government in November 2010 the Bill has disappeared into the ether.

The new government has appointed a ministerial advisory committee to advise on ways of improving the planning system. Despite the focus of this review being on the functional operation of the Victorian Planning Provisions and planning schemes, it is hoped that the Committee will take the opportunity to review the method of delivery of major infrastructure projects and provide greater clarity for proponents, agencies and the community on how large scale infrastructure projects are assessed and approved.

A one stop shop

Whilst any suggested, and implemented, modifications which streamline the development approval process will be beneficial, there would be real and substantial benefit in considering a ‘whole of government’ approval process. Ideally there should be a ‘one stop shop’ arrangement so that all State regulatory approvals can be assessed and obtained through a single process, rather than through a series of separate processes.

This path was recently adopted in the United Kingdom, where in 2008 a new statutory body, the Infrastructure Planning Commission, was introduced to oversee the approval process for nationally significant infrastructure projects. By facilitating a single process, the need to apply for consents under as many as eight separate and overlapping regimes is now a relic of the past.

In November 2011 the UK government subsumed the Commission within the Planning Inspectorate and rebranded it as the Major Infrastructure Planning Unit. The final decision on projects has been transferred to the Secretary of State. Time will tell if the changes result in political intervention in the decision making process, but the principle of a single body making one decision on a major infrastructure project remains entrenched.

Having a single, streamlined process for the deployment of planning and other project approvals is something that each of Australia’s states should consider more closely.

Many key projects have actually relied on project specific legislation to overcome the development approval risk.



Pit to Port

The changing dynamic of mine to port rail systems



Australia's mine to port rail infrastructure is about to experience its biggest investment phase since the mid 1800s, yet the jury remains out on how to ensure the best possible outcomes for public and private stakeholders, as *Ian Briggs* and *Michael Creedon* discuss.

IN RESPONSE TO the substantial growth in international demand for its mineral resources, the development, ownership and management of Australia's mine to port rail systems is set to undergo a remarkable transformation. There is a pressing need for new and upgraded rail infrastructure, and questions abound as to how these developments will be funded, developed and operated.

Meeting demand

The recent emergence of China and India as powerhouses of industrial growth has triggered a significant boom in Australian mineral resources, and acted as a catalyst for investment by companies from those countries.

Chinese interests include Citic's Cape Preston project and Yancoal's investment in Felix Resources. Indian investment in Australian coal has been spearheaded by Adani and GVK which have both taken significant equity stakes in Galilee Basin coal projects.

To capitalise on the boom, Xstrata, Anglo, Peabody and BHP Mitsubishi Alliance (BMA) all have significant new coal projects planned for Queensland over the next decade. In Western Australia, the focus is on iron ore with multi-billion dollar developments under construction or in planning for Rio Tinto, BHP Billion, Fortescue Metals and others.

Infrastructure ownership

To date, Australian railways and ports have largely been developed, funded and owned by governments or their agencies. This approach is adequate when incremental network growth can be accommodated within capital works budgets. The urgency of the resources industries' current requirements, however, demand a different paradigm.

Increasing complexity, rapid industry expansion and the emergence of new stakeholders, have combined to create substantial deficiencies within the mineral transport supply chain and in the future, solutions that go beyond government funding will be essential.

Multiple stakeholders

Australia's growing mine to port infrastructure is characterised by an increasing number of stakeholders, with competing and complimentary interests. These include mining companies who are competing for customers in the world market, private and public operators of rail track infrastructure, rail operators, export terminals, as well as state and territory competition and consumer commissions.

In order to maximise investment and ensure the best possible outcome for both private and public organisations, the future delivery of rail infrastructure is likely to require significant collaboration between these stakeholders.

Private ownership

Privately funded and operated rail systems are one way of meeting the need for upgraded rail infrastructure and a number of mining houses have expressed a preference for their own dedicated rail systems.

For example, Jignesh Derasari, CEO of Indian energy giant Adani, has said the company wants to see a vertical integration of all facets of its mining process, which includes a \$3 billion rail network that would be used to haul coal from the Galilee Basin in central Queensland to two ports.

It has also been the preference of BHP and Rio Tinto to seek the security of dedicated infrastructure for WA iron ore projects. Most recently, BMA has sought government approval for a \$1 billion railway which will run from its central Queensland coalmines through to the port of Abbot Point. Hancock Coal is also pressing ahead with its plan for a dedicated rail link from its Galilee deposits.

These projects raise a pivotal question that is yet to be fully answered: will other organisations be able to secure access through Australian competition laws? This is a real issue for smaller miners in Western Australia where rail infrastructure is vital to unlocking the region's mineral potential.

Access to private rail lines has been the cause of a long running dispute between Fortescue Metals and Rio Tinto, in which Fortescue Metals has been denied access to rail lines in the Pilbara which were built by Rio Tinto and BHP. Court rulings so far have found that such access is "not in the public interest", and it has been noted that it would cause 'unacceptable problems' for the main users. A High Court appeal is pending.

Ultimately, reliance on privately funded dedicated infrastructure will not provide a satisfactory, productive solution. The bottom line is that industry and government bodies will need to work together to address key issues such as optimised operational management of the mine-rail-port transport chains, greater cooperation

Increasing complexity, rapid industry expansion and emergence of new stakeholders, have combined to create substantial deficiencies within the mineral transport supply chain.



on capacity planning, improved management of project lead-times, risk profiles and capacity triggers for the mine-rail-port transport chain.

Collaborative approaches

Industry stakeholder agreement is required to facilitate the development of a whole of supply chain model that optimises overall supply chain performance and best manages the major investment decisions needed for new railway projects.

It is critical that public and private stakeholders address how they can work together to fund and deliver the rail and port services necessary to meet this growth. A good example of this sort of collaborative approach is the recent development and expansion of Port Waratah in Newcastle, which encompasses: Coal & Allied Industries (part of Rio Tinto Coal Australia), Xstrata Coal NSW, Anglo Coal Australia and Hunter Valley Energy Coal.

Government role

Governments have begun to show the leadership required to provide a coherent platform for common infrastructure

planning and delivery. In Queensland, the Surat Basin Rail Line and Wiggins Island and Abbot Point port developments provide good examples of this leadership and of the vital role end users can play in the development common infrastructures.

For the Wiggins Island development, eight mining companies (Aquila Resources, Bandanna Energy, Caledon Resources, Cockatoo Coal, New Hope Corp, Wesfarmers Curragh, Yancoal and Xstrata Coal) have come together, through a special purpose company, to construct and fund a multiple user coal terminal near Gladstone and associated rail infrastructure. The anticipated cost of the development exceeds \$2.5 billion.

Abbot Point

The strategy for expanding the Port of Abbot Point is different. There, the port owner, North Queensland Bulk Ports Corporation, has taken the lead role in planning a multi-cargo facility for up to six separate terminals. However, the funding of the facility, including common access roads, land bridges and shipping channels will be met by the end users, requiring step by step collaboration through all project phases.

The companies chosen to build the six new terminals are Anglo American Metallurgical Coal, Rio Tinto Coal, Brazil's Vale, Clive Palmer's Waratah Coal, Macmines Austasia and the North Queensland Coal Terminal Consortium of Macarthur Coal, Peabody Energy, New Hope Corporation, Middlemount Coal and Carabella.

Challenges and opportunities

Creating and scrutinising these new partnerships between public and private sectors brings some substantial, but not insurmountable, challenges for all participants.

First and foremost, all stakeholders must work hard to fully understand the objectives, drivers and process requirements of the others. Project outcomes must be, in alliancing parlance, 'win/win', so it is important to align objectives to the greatest extent possible.

The private sector must recognise the environmental constraints within which government agencies operate, and conversely, governments must come to grips with the commercial imperatives of the end users and balance them with public policy imperatives.

Ian Briggs and Michael Creedon are both Partners in Minter Ellison's Construction Division.

Strateg coordination

Streamlining environmental approvals
through strategic impact assessment

Peter George and Jillian Button discuss the current and future deployment of strategic environmental assessments and their consequences for major or complex infrastructure projects.

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There is a real and pressing need for the deployment of more streamlined and tactical coordination between regulators and across projects.

AUSTRALIA'S CURRENT INFRASTRUCTURE boom has led to a surge in the need for project based environmental approvals, however, a lack of strategic coordination between regulators and across projects is creating challenges and delays for some project proponents.

Challenging times

There was a time in Australia's not too distant past when a major infrastructure project involved little more than a planning permit. Today, such projects are likely to require multiple approvals at federal, state and local government levels, and address a broad range of environmental concerns. These concerns can include the potential impact of the project on native vegetation, wildlife, matters of national environmental significance, Aboriginal and non-Aboriginal

heritage values, water resources, coastal processes and most recently, climate change.

The proliferation of project based environmental approvals is necessary to ensure ecologically sustainable development, but it is not without its setbacks. Most notably, the process involved in obtaining an environmental approval for a major or complex infrastructure project can create significant challenges for proponents who are required to anticipate and respond to each regulator's views on the various environmental issues and attempt to coordinate approvals on time and on budget.

As the number of national environmental assessments continues to increase, there is a real and pressing need for the deployment of more streamlined and tactical coordination between regulators and across projects.

Strategic Environmental Assessment

The Federal Government has recently taken steps which should enable a more strategic approach to the administration of some national environmental approvals. It has done so by implementing Strategic Environmental Assessments (SEA), which are provided for in Australia's principal piece of federal legislation dealing with the environment: the *Environment Protection and Biodiversity Conservation Act* (Cth) (EPBC Act).

SEA is concerned with evaluating the impact of policies, plans and projects, including infrastructure plans and policies, in a strategic way to better achieve ecologically sustainable outcomes. It also eases the problem of duplicative regulatory requirements at different levels of government.

SEA has an input into decision making at an earlier stage than the permit application stage, and functions at a higher level.

The SEA process is designed to assess environmental impacts as part of a tiered system of strategic actions, which allows the collective impact of multiple projects to be considered. The SEA process is not intended to replace state and territory environmental assessment processes, but rather to run in parallel with them.

How it works

SEA under the EPBC Act can be undertaken in relation to a whole policy, plan or program (PPP), as opposed to an individual project.

Establishing the SEA involves a number of steps. First, terms of reference are drafted and a draft report is then prepared on the environmental impacts of the PPP. This report is made available for public comment before being provided to the Minister, who may make recommendations including suggestions for modifying the PPP. Finally, the PPP is endorsed by the Minister if he or she is satisfied that it adequately addresses all relevant environmental impacts.

Importantly, the Minister may approve certain actions by proponents without the need for a separate assessment, provided the actions are in accordance with an endorsed PPP.

So far, the SEA process has been used primarily for residential developments, with six of the nine SEA processes commenced to date relating to large scale urban development programs and associated infrastructure in various states. The SEA process is also being used for Browse Basin LNG Precinct, the Midlands Water Scheme and South Australia's fire management policy.

Strategic assessments are a prominent element of environmental regulation in other jurisdictions, including the EU and US, however, their integration into Australian statutory processes has not been without growing pains. The strategic assessment of Melbourne's urban growth program (the first SEA of a plan under the EPBC Act) has sparked fierce debate amongst affected developers, some of whom disagree with the environmental management strategies proposed as part of the program.

The road ahead

In September 2011, the Federal Government announced a round of reforms to further expand the role of strategic assessments and to cut down on inconsistent controls between jurisdictions. Provisions dealing with SEA will be strengthened, amendments will be introduced to allow minor variations to endorsed policies, plans and programs, and the focus will shift to regional environment planning and landscape scale assessments.

Some states and territories have also started to act to help ease the passage of major proposals through the development approval process, enabling environmental impacts to be integrated into planning processes and for future 'derived' proposals to proceed without further assessment.

An SEA is a big undertaking, and there is a risk that proponents will struggle with the administration of unwieldy broad scale environmental assessments. Nevertheless, it is evident that SEAs will be a more common element of Australian development approval process in coming years.

Lessons learnt from current SEA processes will, we believe, assist with a smoother and more streamlined implementation of future strategic assessments. This is ultimately a positive in terms of both ecological and infrastructure outcomes.



Strategic assessment processes to date

At the time of publication, nine strategic assessment processes have commenced under Part 10 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

| STRATEGIC ASSESSMENT | MATTERS ASSESSED |
|---|---|
| Perth and Peel region (WA) | Environment and heritage impacts of urban expansion to accommodate Perth's population growth. |
| Browse Basin LNG Precinct (WA) | Impact of proposed common user LNG hub precinct on Kimberley wilderness. |
| Melbourne's urban growth boundary (Vic) | Environmental impact of urban expansion to accommodate Melbourne's population growth. |
| Molonglo Valley Plan (ACT) | Environmental impact of urban development in the Molonglo Valley in Canberra. |
| Heathcote Ridge, West Menai (NSW) | Environmental impact of urban development of Heathcote Ridge in Sydney's north. |
| Western Sydney growth centres (NSW) | Environmental impact of urban expansion in Sydney's west to accommodate population growth. |
| Fire management policy (SA) | Environmental impact of fire management policies and procedures for public land. |
| Midlands Water Scheme (Tas) | Impact of construction and operation of irrigation scheme on environment and heritage. |
| Mount Peter Master Planned Area (Qld) | Impact of the development of regional centre south of Cairns, including impact on Great Barrier Reef. |

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Skill Acquisition

Global procurement offers a number of unique and cost effective advantages for project owners, however, it also raises a number of challenges that need to be carefully managed, as *Cameron Ross and Owen Cooper* discuss.

AS AUSTRALIA'S INFRASTRUCTURE projects become increasingly complex, more and more proponents are looking to engage overseas entities to assist in project delivery. Over the last few years, Australia has witnessed a significant increase in international procurements with transactions involving Canadian, Chinese, South African and Spanish companies in rail, hospital and road developments.

While international procurement presents many advantages to Australian infrastructure developments, several issues need to be carefully considered in order to make certain that the procurement process is successfully managed and the best possible project outcomes are achieved.

Due diligence

Where an international contractor, consultant or supplier is identified as a possible project participant but an established relationship does not exist, it is important to undertake appropriate due diligence. This is necessary in order to ensure that the international party has the appropriate technical skills and resources to meet the expectations of the project.

Financial due diligence is also vital as it enables Australian project owners to determine whether the proposed international entity has the necessary financial standing required for the project. It is difficult in some countries to undertake the equivalent financial due diligence that

is available for Australia, such as reviewing company financial reports. In these instances, it may be necessary to engage a local agent to assist in this process and additional performance security may be required.

Risk allocation

Risk allocation can raise significant issues for organisations seeking to use global procurement for infrastructure projects. Infrastructure developments often involve bespoke and heavily negotiated contracts between project owners and head contractors, so the basis of risk allocation needs to be resolved from the outset. It is usual practice for participants to seek to flow through the terms of the head contract to the contractor, consultant or supplier, however where the contractor, consultant or supplier is an international entity they may be unfamiliar with the nature of risk allocation. They may also be unaware of Australian-specific issues, such as the requirements arising of security of payment or occupational health and safety legislation.

Resolving such issues may require additional resources in order to negotiate an acceptable contract. Failing to do this may mean that risks that would normally be passed through to the contractor, consultant or supplier cannot be effectively transferred.

Depending on the nature of the international supply, it may also be necessary for international trade terms

Several issues need to be carefully considered in order to make certain that the international procurement process is successfully managed.



be incorporated into the contract, particularly when the parties take risks and responsibilities for the supply, insurance and import of specific goods. If these issues are not adequately covered in the head contract so that they can be passed through under the procurement contract, the parties may look to incorporate international commercial terms or negotiate other appropriate terms.

Performance security

Obtaining performance security from the international contractor, consultant or supplier is becoming increasingly important when dealing with international procurement.

Unlike domestic procurement, different considerations may need to be applied to international entities. This is because the usual forms of security may not be available. For example, national laws may restrict the form and amount of a parent company guarantee, such as the legislation regulating companies in South Africa. Similarly, other laws may make the provision of a parent company guarantee problematic. This is the case in China where the foreign exchange control policy issued by The People's Bank of China restricts the availability of guarantees provided for a foreign beneficiary.

The practicality of accessing any performance security offered by an international entity should also be taken into account as the security may only be accessible in certain locations outside Australia.

Commercial risks

An important commercial issue in international procurement arrangements is determining the relevant currency for payments for the works, services or goods. The Australian dollar's significant fluctuations against the US in the second half of 2011 highlight how a failure to clearly express the relevant currency of payment can have a major impact on the commercial basis of the procurement. If the procurement is in Australian dollars it is necessary to specify when the currency rates are to be set and the process for setting such rates.

International procurement arrangements may also have significant and unforeseen tax consequences for the international contractor, consultant or supplier. This may include a requirements to be registered for GST purposes or withholding tax consequences. These issues require expert advice on the implications for both parties to the procurement. Given their potential impact, the issues should be dealt with early in the procurement process.

Problem solving

Significant problems can arise if the procurement arrangements with the international contractor, consultant or supplier are not enforceable outside Australia.

In some jurisdictions it is not possible to enforce the judgements of Australian courts because Australia does not have treaty arrangements with the relevant

country. Examples of Australia's major trading partners where arrangements are not in place include China, USA, India, Thailand and Malaysia.

In such circumstances, the parties to the international procurement should consider whether arbitration is a viable alternative, as the New York Convention arrangements between Australia and most countries permit the enforcement of arbitral awards in the local jurisdiction.

Cultural and language barriers

Cultural and language differences also have the potential to complicate international procurement. Terms that may have a particular industry or legal meaning in Australia may have a very different meaning in overseas jurisdictions, and similarly, non-Australian entities may not have experience with Australian legislative requirements or project requirements, such as relevant Australian Standards. Furthermore, it is preferable that deliverables under the procurement (such as manuals or training documents) are delivered in the local language.

Summary

While the challenges of international procurement for infrastructure projects are not insurmountable, multiple issues need to be considered early and in the context of the overall project in order to ensure the procurement is effectively managed and optimal project outcomes are achieved.

Cameron Ross is a Special Counsel and **Owen Cooper** is a Senior Associate in Minter Ellison's Construction Division.

Unprecedented

Private sector involvement in Hong Kong infrastructure

Sam Farrands considers the Hong Kong Government's move to revitalise private sector involvement in large infrastructure projects.

PRIVATE SECTOR INVOLVEMENT has a long history in Hong Kong infrastructure. The earliest project adopting it can be traced back to the development of the Cross Harbour Tunnel in the late 1960s, which was well ahead of other countries such as England and Australia that now champion it.

The Cross Harbour Tunnel was the first tunnel built to link Hong Kong island to the mainland. It was developed as a Build-Operate-Transfer project with a 30 year concession period. When the concession expired in 1999, the ownership and operation of the project was transferred back to the government. Today the tunnel remains as the busiest cross harbour tunnel in Hong Kong. The project has been so successful that the government adopted a similar PSI model to develop two subsequent cross harbour tunnels as well as various land tunnels throughout Hong Kong.

Based on the success of these transportation projects, the Hong Kong Government began to adopt private sector investment in other sectors. Notable recent examples include the Asia World Expo Exhibition Centre and the SkyCity Hotel. However, despite the overall success of these projects, private sector investment has not been used as widely in Hong Kong as in many other jurisdictions.

One of the major reasons for not using it as widely is that, unlike many other jurisdictions, Hong Kong has a large fiscal surplus. As such, there has been less need for private funding. When combined with the government's fiscal policy that recurrent expenditure should be kept to minimum, and a desire to increase capital expenditure to promote employment, traditional private sector investment models in Hong Kong infrastructure have been infrequent.

Concerns over handing too much responsibility to the private sector and inflexibility in project delivery have also played their part. Potential private sector investment projects have frequently failed to reach fruition and the use of private investment in Hong Kong has, until recently, been limited to a few established sectors such as transportation.

However, there has been a recent change in the government's attitude. In light of the global financial crisis, the government has proposed various stimulus packages which involve the development of an unprecedented level of infrastructure projects in Hong Kong. These include the Hong Kong-Zhuhai-Macau Bridge and various MTR railway projects of significance. Whilst those projects are being procured predominantly on a traditional design and build basis, many other projects being put to market will

not. The government is once again looking to use private sector investment more widely to deliver projects in a speedier, more efficient and innovative manner. This is particularly the case with projects that have been traditionally delivered by the government and are falling short of the community's expectations. The government is now looking to private sector investment to bring in the private sector's innovation.

To enable a more effective use of private sector investment, traditional models are being adapted to suit the Hong Kong market and the government's unique set of circumstances. The design-build-operate model (DBO) is emerging as the most suitable model to be adapted for the Hong Kong market. Instead of requiring the private sector to fund construction as in a traditional design-build-operate arrangement, the government will fund the capital expenditure of the project (ie. the design and build component of the work), with construction and operations in the hands of the private sector.

Since the capital expenditure is paid by the government upfront, there is reduced need for recurrent expenditure (in the form of service fee payments) during the operation phase which would otherwise be required if the private sector funded the investment. Private sector investment during the operations phase provides opportunities for increased efficiencies and innovation. This is especially the case where the private sector is also involved in the initial detailed design phase. This form

growth

A man with short grey hair and glasses, wearing a dark pinstripe suit, a white shirt, and a pink patterned tie, stands with his hands in his pockets. He is positioned in front of a modern, multi-story building with a glass and steel facade. The building has a distinctive white structural grid. Other buildings and greenery are visible in the background.

of procurement is now being used on a number of water treatment and sludge treatment projects in Hong Kong.

The government is also using a form of private sector investment for heritage conservation projects and projects that involve redevelopment for cultural, recreational and tourism purposes, where innovation is often crucial to project success. A recent example is the proposed development of the Central Harbour Front areas into a vibrant and accessible mix-use area for public enjoyment, similar to King Street Wharf and the Barangaroo project in Sydney. The government is currently seeking private sector views on the potential for developing the harbour front sites using a private sector investment approach. Slow progress has been made on the project since it was first considered in 2007, however the pace has quickened in the past 12 months and a decision is expected soon on the appropriate model for the development of the project.

Given the size and nature of the central harbour project, if its adoption of private sector investment is successful, it will certainly create a precedent for the implementation of a wide range of infrastructure projects for which the DBO model may not be suitable. The development of the West Kowloon Cultural District and the Kai Tak Sports Stadium will also follow similar approaches, starting a new chapter in Hong Kong's use of private sector investment in infrastructure development.

Sam Farrands is a Partner in Minter Ellison's Real Estate Division.

The big Picture

An Australian infrastructure overview

A background image of a grey and yellow passenger train on tracks. The train has multiple windows and doors, and is positioned on a gravel bed with metal rails.

Virginia Briggs considers the big picture of Australian infrastructure development.

CURRENT DIFFICULTIES IN today's economic climate are again highlighting the challenge of developing the necessary infrastructure in Australia.

A series of natural disasters, the ongoing resources boom, solid population growth and a desire to continually improve productivity and liveability have resulted in Australia's large infrastructure backlog. This backlog is estimated to cost around \$700 billion over the next ten years and coincides with an unprecedented need for new infrastructure development across a range of sectors.

There is little debate on whether investment in Australia's critical infrastructure is required. The real question is how to fund this investment at a time when all levels of government are facing budgetary constraints and credit rating pressures.

Funding the backlog

With limited government funds available, the challenge now is to suitably prioritise projects and encourage innovative funding solutions from different sources. There is also a need to continually improve processes in infrastructure planning, policy development and project evaluation.

In a recent report to the Council of Australian Governments, Sir Rod Eddington, Chairman of Infrastructure Australia, outlined the need for greater focus on these areas, stating: 'Those of us working in the infrastructure sector need to find better ways of ... making the case for change in the way we plan, deliver

and manage our infrastructure networks. Most critically, we need to make the case for major reform in the way we finance the development, operation and maintenance of our infrastructure networks'.

Upcoming projects

Both the public and private sectors will play important roles in funding, planning and developing Australian infrastructure over the coming years.

The private sector is likely to continue its investment in vital infrastructure, particularly in the resources sector to fund mines, roads, rail and ports, where the projects are financially viable and there are acceptable risks. For instance, there appears to be fierce competition among major resources companies to fund the proposed open access port at Anketell Point near Karratha.

On the public sector side, the Commonwealth Government is doing its part to facilitate infrastructure development through Infrastructure Australia, a national statutory body that advises government, by focusing on priority projects that are nationally significant and economically viable.

A common theme among the 2011 state government submissions to Infrastructure Australia is a focus on transport development. These road, rail and port projects seek to reduce congestion along major freight pathways, increase productivity, improve competitiveness, and enhance liveability in our major cities.

One such project is the new National Managed Motorways Program which aims to improve the functioning of Australia's mainland capital cities via the construction and retrofitting of intelligent transport systems throughout Queensland, New South Wales, South Australia, Victoria and Western Australia. With an estimate price schedule of \$4 billion, this projects represents one of the nation's most progressive infrastructure developments.

State governments are also prioritising developments across a range of other areas with upcoming projects across the energy, wastewater and social infrastructure sectors. One of the largest and most significant is the CopperString Project which is a 1100km high voltage transmission link connecting Mt Isa to the National Electricity Market near Townsville to facilitate mining, mineral processing and industrial development in the region. Projects such as these will prove vital to ensuring productivity gains and the long term economic growth of our nation.

Future optimism

Despite ongoing budgetary pressures, many large and vitally important infrastructure projects are set to proceed over the coming years (see right). These developments, combined with the ongoing push for further reforms and the trend towards securing new infrastructure projects via funding from different sources, makes this an exciting time in Australia's infrastructure sector.

Virginia Briggs is a Partner in Minter Ellison's Real Estate Division.

Port Hedland Inner Harbour Capacity Enhancements
\$500 million - \$1 billion

Oakajee Port Common-User Services
\$680 million

Darwin East Arm Port Expansion
\$336 million

Freight Access to Port of Adelaide – Northern Connector
\$1.12 billion

Adelaide Rail Freight – Goodwood and Torrens Junctions
\$418 million

Perth Stadium*
\$700 million

Gateway WA – Perth Airport and Freight Access
\$955 million

East Rockingham Wastewater Treatment Plant
\$239.5 million

South West (Bunbury) Infrastructure – Road, Rail & Port Upgrades
\$668 million

The Pic



Mt Isa to Townsville Transmission Line – CopperString Project
\$1.5 billion

Abbot Point Multi Purpose Harbour
\$3.3 billion

Federal Highway Link to Monaro Highway – Majura Parkway Stage 2
\$288 million

SOURCE: Annual Report of Infrastructure Australia and other project proposals.

* Image courtesy Department Sport and Recreation, WA

** Image courtesy Linking Melbourne Authority

*** Image courtesy Transport for NSW

Moreton Bay Rail Link
\$1.15 billion

Cross River Rail
\$7.7 billion

Eastern Busway (Stages 2b and 3)
\$825 million

Gold Coast Heavy Rail Capacity Upgrades and Extension
\$2.875 billion

Pacific Highway Corridor Upgrades
\$7.6 billion



North West Rail Link***
\$7.5 billion+

Northern Beaches Hospital (proposed)
\$600 million

Freight Access to Port Botany and Kingsford Smith Airport – M4 Extension
\$9.1 billion

Northern Sydney Freight Access – F3-M2 Link
\$4.75 billion

Melbourne Metro Stage 1
\$4.9 billion

Bendigo Hospital
\$630 million

Port of Hastings
\$80 million+

Westlink – as part of the East-West motorway proposal**
\$5 billion+



Hobart – A World Class, Liveable, Waterfront City Plan
\$120 million

Breaking barriers

Chinese investment in Australian infrastructure

China's growing appetite to finance and develop Australian resources and infrastructure projects has seen its overseas investment footprint expand in recent years. However, as *Marcus Best* discusses, entities that consider entering the Australian market need to navigate a range of complex issues.

CHINA HAS A well-articulated 'go global' policy which encourages companies to engage in foreign direct investment. On the back of strong economic growth and rapid urbanisation, there is a thirst to secure raw resources and diversify exchange reserves through overseas investment opportunities.

Australia has been a significant beneficiary of this 'go global' strategy. After all, Australia has many of the attributes that Chinese businesses find desirable in an investment market; an advanced economy, a stable political and regulatory environment, strong legal protection, access to skilled labour, sophisticated technology and a minimal time zone difference.

It is therefore little wonder that Chinese investment in Australia has grown significantly in recent times, particularly in energy and resources.

China now has a strong growing interest in being involved in Australian infrastructure construction, in particular, transport from iron ore and coal mines to local transport centres, and from there, rail and road links to ports and port facilities.

While Australia welcomes and encourages this foreign investment, there are a number of complex issues that Chinese companies need to consider before entering the market.

Access to finance

Chinese companies have typically preferred to enter the Australian market by funding Australian infrastructure companies or by participating in joint ventures with Australian partners. Much of the finance for these activities has been supplied by commercial banks in China who have issued Renminbi denominated loans for foreign direct investment.

The current challenge is to build on this success by providing better access for China's investment in Australian infrastructure. This can be achieved by improving China's understanding of the investment opportunities currently available within Australian infrastructure.

There has also been increased interest in China participating in infrastructure finance, in both syndicated loans with Australian partners as well as in the funding and joint development of mining



Chinese investment in action

One of the most significant Chinese investments in Australian infrastructure is the Sino Iron Project at Cape Preston in the Pilbara region of Western Australia.

This fully self-contained, greenfield iron ore mine, processing and export facility includes the design and construction of a concentrator, a self contained 450 Megawatt power station, 51 gigalitre desalination plant, an accommodation village, a 25km slurry pipeline, and associated roads and a new port at Cape Preston.

The power station is one of the largest of its type in Australia and will generate enough electricity to power the entire Pilbara region.

infrastructure projects. In fact, as the number of potential lenders has decreased as a result of the global financial crisis, Chinese banks are now regularly sought out by Australian arranging banks as to their interest in participating in larger lending syndicates.

In the near future, substantial refinancing requirements for Australian infrastructure projects may also provide an opportunity for increased Chinese investment in this sector.

Regulatory

The next hurdle that Chinese companies need to overcome is the regulatory restrictions on foreign investment in Australia.

It is compulsory for government entities and foreign companies to notify the Foreign Investment Review Board (FIRB), which advises the Australian Treasurer, of certain types of investment proposals.

FIRB and the Treasurer have broad discretion when assessing applications from Chinese investors. In most cases, the recommended approach includes the careful preparation of a draft application and reasons why FIRB should approve the application.

Foreign investors should also work closely with FIRB before lodging any application. Experience suggests that FIRB prefers investors to directly and confidentially engage with them early in the process before any deal is signed. Building a relationship with FIRB based on respect and open communication will pay dividends when negotiating a mutually acceptable position.

Skilled labour

One of the hallmarks of the Australian market is a shortage of skilled labour to deliver major resource and infrastructure projects. The Australian Government

has recently indicated that Australia will need another 70,000 workers for major resources projects over the next five years.

Several Chinese companies have expressed interest in importing their own labour forces to meet the labour shortage. This option is gaining momentum through Australia's 457 temporary visa scheme, which allows employers to sponsor overseas workers to fill nominated positions. The Australian Government is also examining the creation of Enterprise Migration Agreements for 'mega' resources projects (projects worth more than \$2 billion and a 1500 plus peak construction workforce) so that construction staff can be brought to Australia during the critical construction phase. These mechanisms may assist overseas investors to successfully secure an appropriately skilled workforce.

Planning and native title

Australia prides itself on the protection of its natural environment and Aboriginal heritage, and has implemented a strong set of requirements for any proponent seeking to establish an infrastructure project.

New projects are now likely to require approvals at the federal, state and local levels covering the complete range of environment and native title issues. This has the real potential to create challenges and delays for new infrastructure projects.

Early engagement with environmental regulators, understanding the local issues, and engaging a team of suitable experts will help to streamline the process and maximise the chances of success.

The local environment

Like any country, Australia has its own set of challenges for international investors. These include workplace relations issues, requirements based on layers of local, state and federal government interaction, a lack of harmonisation of laws between different jurisdictions, possible application of taxation legislation and the significant bid and procurement costs typically associated with large infrastructure projects in Australia. Gaining a strong understanding of these challenges and navigating the local issues is critical to the success of a foreign company investing in Australia.

Executives who already have on-the-ground experience dealing with the local practicalities will prove invaluable. They can provide guidance on developing appropriately tailored local strategies, bridge cultural divides and help to secure the long-term success of the investment.

Marcus Best is a Partner in Minter Ellison's Corporate Division.

More sectors open to foreign investment in China

by **Yi Yi Wu**, Partner – Shanghai, and **Nancy Sun**, Senior Associate – Shanghai

Australian businesses have a unique opportunity to take advantage of China's continued economic development and invest in key sectors such as healthcare, new technologies, and environmentally-friendly industries.

A new Foreign Investment Industrial Guidance Catalogue came into effect in China on 30 January 2012. The catalogue reflects China's commitment to further opening its market and continues to allow investment in many infrastructure sectors.

The Catalogue sets out categories of 'encouraged', 'restricted' and 'prohibited' industries and activities for foreign investment.

Foreign investment in any industry or activity listed in the 'encouraged' sector of the catalogue may benefit from simpler approval procedures and preferential treatment, customs incentives, taxation deductions and financial support.

Further activities that have been added into the 'encouraged' category include, but are not limited to:

- automobile and equipment manufacturing
- commercial services
- electricity supply
- mining
- wholesale and retail
- specialised equipment manufacturing (eg., waste textile recycling and treatment facilities, and removable and composite water purifying devices).

The new catalogue also liberalises several activities for foreign investment that were previously restricted or prohibited, which may be relevant to the following sectors:

- financial services
- manufacturing
- wholesale and retail
- healthcare (such as the construction and operation of medical institutions).

Adapting the 'new' model for

Social housing estate renewal projects

The use of public private partnerships for social housing estate renewal projects represents a significant advance in Australian infrastructure development, as *Paul Paxton* discusses.

IN APRIL 2007 the New South Wales Department of Housing entered into a public private partnership (PPP) with the private sector for the \$368 million revitalisation of an 81 hectare housing estate in the western Sydney suburb of Bonnyrigg. This was the first PPP of its kind and represented a ground breaking transaction in Australian infrastructure.

On 30 November 2011, the NSW Government announced the second PPP of its kind, the Airds Bradbury Renewal Project. The Airds Bradbury development is a substantially larger project than its predecessor. It involves a proposed renewal and revitalisation of a (primarily) social housing estate with 1470 dwellings located in the Campbelltown local government area.

It is the strong desire of the NSW Government to use this transaction as a template for fine tuning a new model for the much needed re-development of a series of housing estates across NSW.

Much will be achieved with this modern approach, which will attract fresh finance and expertise to the field of social housing. Of course, participants in this sector know that market conditions have changed significantly since the Bonnyrigg PPP was closed and the model needs to be adapted to fit different drivers in a post-GFC economy.

It therefore seems that there is no time like the present to reflect on governmental objectives and corresponding key issues for estate renewal projects that require considerable thinking 'outside the box' of traditional PPP projects for this model to be successful, in the current environment and into the future.

Private property development and social housing


A fundamental objective of estate renewal projects is to reduce the concentration of social housing (and associated disadvantage) and achieve a community with a variety of incomes, improved amenities and offering opportunities for residents to realise their goals.

In practice it is usual to seek an optimal split between private housing and social dwellings of 70% and 30% respectively.

Managing the interaction, differing objectives, market players and funding models typical of private property development (construction of residential homes for private sale) and social housing renewal (construction, long-term maintenance and tenancy management of social housing) gives rise to a series of logistical and financial challenges.

Success





**Innovative solutions will be found
to make this a sustainable model
to enhance the lives of many
across Australia.**

1. Simultaneous progression

It is impossible to reduce the concentration of social housing on an estate without progressing the development and sale of private property at the same time.

Significantly, the progression of this component depends heavily on the ability of the developer to pre-sell a large proportion of private housing at a suitable price so as to secure funding to commence the development. Residential property market conditions at the time of this process are obviously an important factor.

Yet, what happens if residential property market conditions, over a 15 year period, adversely affect the progression of the private housing developments?

Whilst contractual mechanisms (as in the Bonnyrigg PPP) can provide additional time to the private consortium to deliver the required project outcomes, the reality is that the entire project can be significantly delayed and ultimately, terminated, if those adverse market conditions persist.

2. Interaction

Market participants in the PPP sector are quite distinct from those that engage in the private property development space. The levels of risk and the risk profiles of the two sectors are also very different. Ultimately, the respective financiers and investors prefer two separate sets of quarantined, limited recourse, project finance style obligations (and vehicles) which allow them to assess and price the risks in the part of the project they intend to fund.

Government however, prefers to view the private property development and the social housing components as a holistic project, with the ability of failure in one to result in a failure of the project as a whole.

This essentially leads to a thorny issue; what level of cross default (if any) is bankable for the private sector whilst allowing government to achieve whole-of-project outcomes? The answer may lie in the application of the regime for compensation by government on the different types of termination scenarios, whilst also minimising cross default elements only to those fundamental to the progression of the entire project.

3. Committed costing and funding

Ensuring that project costs, and in particular construction costs, are well understood at financial close is an important part of the PPP transaction, as this provides certainty to the government about the periodic payments that it needs to make over the term of the concession. However, complications arise in social housing PPPs as a result of the staged and long term nature of these projects. For example, Bonnyrigg involves 18 stages over 13 years.

It is difficult to obtain this length of construction financing in the current market. It is also potentially uneconomical to obtain committed funding for the entire cost of construction. This is further compounded by the uncertainty surrounding the construction price for later stages which will happen several years into the future.



4. Off-estate acquisitions and rehousing process

The objective to dilute the concentration of on-estate social housing must be balanced with a government commitment to ensure that there is no reduction in the absolute number of social dwellings. Consequently, if density on the estate cannot be significantly increased (as at Bonnyrigg), there is the need to source a substantial number of dwellings for social housing outside the boundaries of the estate and rehouse tenants into those dwellings.

This represents a considerable challenge for government and the private sector, not just in terms of the cost of acquisitions (which is potentially one of the largest cost components of the entire project) but also the uncertainty of where and for how much these new properties can be sourced over the term of the construction phase, and which party is best placed to manage this risk.

5. Role of the community housing provider

A majority of social housing in NSW is now managed through Community Housing Providers (CHPs), which are not-for-profit organisations with specific skills and significant experience in tenancy and property management of this type of accommodation.

Often these organisations do not have the commercial expertise or financial capacity to lead a private sector PPP consortium and their tenancy management obligations have previously required 'wrapping' by a more financially bankable institution such as the facilities manager.

Whilst this approach enhances the bankability of the project, it is not necessarily ideal. This is because the CHP is usually the 'face of the project' for the community and there is a desire that it not be relegated to the position of a sub-subcontractor with diminished flexibility in the performance of its obligations.

If the objective of elevating the CHP in the structure is one that the government wishes to pursue then the provision of additional financial enhancements may need to be explored. It may also necessitate a review and potentially a relaxation of the usual PPP style abatement regime around the CHP's obligations which may give lenders the level of comfort they desire.

Conclusion

The development of the social housing estate renewal PPP model poses some interesting and complex challenges. There are, however, numerous economic and social benefits to the community in the progression of these projects and recognising these benefits, there is also a strong desire by the NSW Government to make this a successful model that can be rolled out into the future.

There is no doubt that, with this kind of willingness by the participants in this sector, innovative solutions will be found to make this a sustainable model to enhance the lives of many across Australia.

Multi-user corridors

Antra Hood discusses the complex issues that need to be addressed in order to realise the many possible benefits of multi-user infrastructure corridors.

MULTI-USER INFRASTRUCTURE corridors are a relatively recent and positive development for the provision of infrastructure in Australia. They are generally owned by government and used by a variety of private and public sector entities to co-locate their linear infrastructure.

It is instructive to assess the experience with multi-user in Queensland where they have now been developed for some time in different contexts. During the drought in the early 2000s, water pipelines were placed in existing linear electricity easements after special legislation was enacted to permit this to occur more easily. Similarly, in 2010, as part the QR National coal transport IPO, the State reserved extensive rights in its lease of railway land to QR National to place linear telecommunications infrastructure in the rail corridor.

Multi-user infrastructure corridors are also becoming necessary as a consequence of the Queensland resources boom. As Queensland's mineral and petroleum resources are generally located inland, they need to be transported to the coast so that they can be processed or sent by sea to their various markets. Multi-user infrastructure corridors are also under consideration in other locations in Australia.

Facilitation role

Queensland's Coordinator-General is currently facilitating the State Government's role in a number of major new LNG projects as a part of the 'gas super highway'. Four LNG proponents are currently at different stages of feasibility in the construction of coal seam gas wells, pipelines and LNG refineries, in what will become a multi-billion dollar industry with the potential to bring thousands of temporary and permanent jobs to Queensland, as well as substantial royalties to the State. The two major multi-user corridors are the Callide Infrastructure Corridor, the Gladstone State Development Area and the Stanwell to Gladstone Infrastructure Corridor, all in Central Queensland. These corridors will be able to accommodate multiple underground pipelines in a single area for uses including various types of water, gas, and mineral slurries, as well as telecommunication cables.

Multi-user infrastructure corridors through habitable agricultural land have many benefits. They should:

- reduce fragmentation of landholdings caused by linear infrastructure easements, and consequentially government compensation bills

- reduce negative interactions between landowners and proponents
- encourage cooperation between proponents
- minimise the intrusive impact that resources infrastructure can have on agriculture.

To achieve these benefits it is essential to address numerous practical and legal issues associated with multi-user infrastructure corridors, ideally in advance.

Securing tenure

The current legislative mechanisms which allow the Queensland Government to secure tenure for private parties for infrastructure projects are slow, and are subject to legal challenge. In a recent situation, a proponent's 495km railway corridor from mine to port was delayed for around 18 months while administrative law challenges to the State's compulsory acquisition mechanisms were resolved through the courts. Additionally, without legislative change in Queensland, it is not legally possible to provide any kind of tenure to proponents for linear infrastructure over certain types of State-owned land. This leads to unacceptable gaps in tenure. The tenure provided in the corridors also needs to be bankable for proponents.



Location

Corridors are usually declared and acquired before final surveys and technical and environmental studies are completed, and before development approvals are obtained. This means that occasionally a corridor may need to be moved slightly, however it is very difficult to make even minor boundary adjustments.

Pricing

Tenure is often given to proponents on an almost indefinite basis which makes the mechanism for determining the price to be paid for that use contentious. The government is required to consider alternatives such as pure cost recovery or developing an actual revenue stream from the corridor. As proponents are accustomed to paying relatively small amounts for easement tenure to landowners, they find it difficult to justify paying extra for tenure within a corridor.

Safety

Safety is a paramount concern for government. Infrastructure in corridors is generally very close together and construction is often staged, so proponents need to work around or over preceding infrastructure. If the infrastructure is underground, the surface of the land can continue to be used for low-impact agricultural activities.

Co-use arrangements

Corridors are generally not wide enough for all proponents to exclusively occupy enough land within them for construction and laydown areas, or even to place all their ancillary infrastructure within their corridor. Consequently, proponents (who are often competitors) need to permit

others to access their areas, under co-use arrangements, and to share access routes and crossing points. Negotiating long term arrangements that will balance proponents' rights and risks is fundamental, but challenging.

Crossing existing and new infrastructure

Most multi-user infrastructure corridors cross existing infrastructure, such as powerlines. Striking a balance between respect for the existing investment and encouraging new investment represented by the new linear infrastructure, is critical for the success of the corridors. A similar issue arises in relation to preservation of State rights to cross a proponent's new infrastructure. From the Government's point of view, it is essential that the multi-user infrastructure corridor does not itself become a barrier to adjacent development on either side of the corridor. Proponents, on the other hand, are understandably unwilling to give government unfettered rights to cross their infrastructure in the future.

One of the issues for proponents is that their industries are often highly regulated. Taking tenure in a multi-user infrastructure corridor under a contract with government carries the risk that a further layer of possibly inconsistent rules will be imposed on proponents, including compensation and access rights.

Good land use planning principles and government concern for the rights

and continued existence of agricultural communities means that multi-user infrastructure corridors will continue to be used in Australian situations where transportation of resources to a port over any distance is required. The corridors concept needs to become more sophisticated for the mutual benefit of landowners, proponents and the State.

Landowners need to recognise the value in containing all infrastructure within one relatively small area and, working with government and proponents, ensure that the corridors do not themselves become barriers. This will help ensure that agricultural activities are able to safely occur on either side of, or even on the surface of the corridors.

Balancing Control and Certainty

Proponents should approach multi-user infrastructure corridors with an open mind and concede that a loss of absolute control over their tenure should be balanced in the long-term by certainty of government-granted tenure and reduced costs. Such cost reductions are likely to result from shared infrastructure and maintenance, and reduced interaction and negotiation with individual landowners.

Governments may need to consider making changes to legislation to facilitate easier and quicker procurement of bankable tenure. It may also be necessary for corridor owners to consider how multi-user infrastructure corridors could offer extra services and benefits to proponents.

A changing

Super fund investment in infrastructure



Maged Girgis explores the changing dynamics of super fund investment in infrastructure in light of the Australian Government's recent tax and superannuation reforms.

Australian superannuation funds are estimated to have \$6 billion invested in Australian airports, including Sydney, Melbourne and Adelaide Airports.

landscape



AS FUNDS FOR investment in infrastructure continue to be in high demand, Australia's pool of approximately \$1.3 trillion of superannuation funds is often cited as a potential source of finance. However, to date, only one third of super funds have actually invested in infrastructure, and for those that have invested, infrastructure only constitutes between 2% and 10% of their investment allocation.

With the government's drive for greater infrastructure projects, it is timely to reflect on why has there not been more investment from super funds, and what is likely to happen in the future to bolster support from this sector.

Why has there not been more investment?

Several issues have historically influenced the decision of super funds to limit investment in infrastructure.

Firstly, super funds are subject to portability requirements, which effectively require them to transfer or rollover a member's benefit within 30 days of a member's request. Generally, infrastructure investments are illiquid and so funds must carefully determine the extent to which they invest in infrastructure to ensure that they have the liquidity to meet these requests and other expected cash outflows and benefit payments (eg. to retiring members)

as they arise, without breaching legislative requirements.

Secondly, as there is typically a small market for infrastructure assets, there may be no recent sales in similar assets against which to benchmark or value infrastructure assets. As a result, it can be difficult for funds to value infrastructure assets with confidence.

Many super funds also find it difficult to attribute increases or losses in the value of infrastructure assets to departing members. The challenge of precisely valuing an infrastructure asset raises the concern of attributing to departing member more (even less) value than what would have been attributable to the member had they taken their benefit after the infrastructure asset was sold.

Unlisted infrastructure assets are often seen as relatively expensive to acquire and maintain. Typically, major infrastructure projects have high set up costs and require large amounts of capital. These costs and capital considerations have historically created further barriers. Not only does this mean that only large funds seek to invest in unlisted infrastructure projects, but also that the return required to make the investment attractive must be higher.

Finally, past issues over asset quality and ownership have deterred many super funds from infrastructure based

investments. Some infrastructure projects such as the Sydney Cross City Tunnel and the Sydney Airport Rail Extension, have not performed as anticipated or have suffered cost blow outs. Lengthy and complex projects can also face tax uncertainties. In many cases, ownership of the infrastructure asset may eventually revert back to the government resulting in a decrease in its capital value over time. All of these factors impact on expected returns and therefore limit the attractiveness of the investment.

Of course, this is not to say that investment in infrastructure is not worthwhile for super funds. On the contrary, the long term nature of infrastructure developments are ideally suited to the nature of superannuation funds and their investment strategies. Likewise, the benefits of long term earning stability, tax effective dividends and portfolio diversification represented by infrastructure should not be underestimated.

Proposed tax changes

To address these issues the Federal Government proposed a number of tax changes in its 2011-12 Budget. The intention of these reforms is to make it easier for super funds and other private sector investors to invest in Australian infrastructure.

The long term nature of infrastructure developments are ideally suited to the nature of superannuation funds and their investment strategies.



Currently, tax losses from expenses at the early stages cannot be used until there is enough income to offset the tax loss. This means that the tax value of these expenditures is devalued by inflation and the time value of money. For example, a tax deduction of \$1 million incurred in year 1 is worth less in year 4 or 5 if the inflation rate has been 2% or 3% per annum for that period.

As a new tax incentive for potential investors in infrastructure, the government plans to preserve the value of tax losses over the length of a project, by uplifting them at the 10 year government bond rate. The global expenditure cap on this incentive is expected to be approximately \$25 billion, over the period from Royal Assent of the enabling legislation to 30 June 2017.

The new budget proposals will also ensure that tax losses incurred by infrastructure projects listed on Infrastructure Australia's National Priority List will be exempt from

the Continuity of Ownership Test and the Same Business Test, which will protect investors against losing the benefit of tax deductions where infrastructure investments change hands.

Superannuation reform

Although the Federal Government has expressly declined to require super funds to invest in Australian infrastructure, proposed superannuation reforms are likely to enhance the potential for investment.

Of particular relevance is the introduction of the MySuper super product which forms the first part of the Federal Government's response to the Cooper Report. MySuper is the default superannuation product for members who do not make an alternate product choice. It has a standard set of features regardless of provider, with a default investment strategy and no ability to switch investment options. A defining

feature of MySuper is that trustees have a specific duty to deliver value for money, as measured by long term net returns, and ensure that the product has the scale necessary to deliver that value.

It is anticipated that a natural consequence of these reforms will be a consolidation of the superannuation industry. This will result in a smaller number of funds holding stronger investment power, which in turn, will increase the potential for infrastructure investment.

The Cooper Report estimated that the minimum fund size needed to take advantage of economies of scale was \$27 billion. At the time of release of that report, it was estimated that only one or two funds had that sort of scale. As a result of recent merger activity, mainly spurred on by the Stronger Super Reforms announced by the government, there are now four or five funds which are greater than \$27 billion and this trend is set to continue for some time.

Pilbara



John Prevost

*John Prevost and
Lee Rossetto consider
the delivery of cities
to the Pilbara.*

cities

Delivering vital infrastructure

THE PILBARA REGION in Western Australia's north-west plays an important role in the economic development of the nation. However, despite the importance of the region, its growth continues to be hampered by inadequate infrastructure, a lack of affordable housing and poor community services.

To tackle this problem, the Western Australian Government launched the Pilbara Cities project in 2009 to deliver vibrant, higher-density regional cities supported by modern services and facilities.

The Pilbara Cities plan will cost the State Government over \$1 billion funded through the Royalties for the Regions

program. This injection, together with additional funding from the Federal Government, local government authorities and the private sector, will deliver vital infrastructure and community upgrades to key towns in the Pilbara including Karratha, Port Hedland, Newman, Dampier, Tom Price and Onslow.

Building modern towns

The Pilbara region has for a long time been synonymous with fly-in/fly-out workers. Mining companies seeking to meet the challenges of a labour shortage have flown in skilled workers from Perth and increasingly other parts of Australia.

This fly-in/fly-out option combined with high housing and cost of living prices, plus the lack of infrastructure and social cohesion makes the region undesirable for most potential permanent residents.

The primary objective of the Pilbara Cities plan is to attract people to settle in key towns on a permanent basis to secure the long term future of the region after the resources boom has peaked. To do this, the State Government is implementing a program to make available permanent accommodation for workers, families and visitors in town centres that have all of the required amenities and facilities.



The State Government is commencing development work in 2013 on more than 1,500 houses in Karratha on serviced land connected to water, energy and wastewater. Other purpose-built 'key worker' accommodation for those in the retail, tourism and service sectors is also earmarked for Karratha and South Hedland.

The drawback of affordable and available accommodation will be coupled with new developments to improve the lifestyle in the region. Most town centres will be redeveloped with new schools, TAFEs, leisure and entertainment facilities together with shopping and retail precincts.

Alongside that, there are plans for significant transport, water and social infrastructure upgrades that will deliver services similar to that found in other Australian cities.

Meeting the challenges

The State Government has taken the first steps towards addressing the longstanding challenges in the Pilbara by upgrading infrastructure, improving leisure facilities and making land available. However, it remains to be seen whether the Pilbara Cities plan alone will be enough to consistently draw new residents to the region.

Population growth and a strong local resident base is crucial for the prosperity and long term survival of the Pilbara's towns. The State Government is banking on new permanent residents bringing both a sense of community and the

day-to-day services and businesses required to sustain regional towns.

LandCorp (the government agency managing the land releases) and private developers will need to negotiate the notoriously difficult native title, land access, environment and planning issues to house these new residents. Assuming that happens, the upgrades and improvements, together with the relatively low worker accommodation rental prices, are likely to bring new families to the region in the short term.

In the long term, the challenge for the State Government will be to make enough housing available to satisfy demand and put downward pressure on property prices while simultaneously encouraging more residents to relocate to the Pilbara.

The State Government is anticipating a decrease in the fly-in/fly-out workforce in lieu of people relocating to the Pilbara. However, with Fortescue Metal Group announcing in late 2011 that its fly-in/fly-out contingent will likely increase by 350% over the next five years, a concerted policy that includes incentives to settle in the Pilbara may be required. Some such incentives could include more attractive tax concessions for those living in the Pilbara, reducing or removing the fringe benefits tax for companies wishing to build worker accommodation, larger grants for building or buying in the region, and programs to encourage local employment and training opportunities.

Of equal importance is the timely and ongoing delivery of the required infrastructure projects to complement the redevelopment activity and encourage relocation. Any potential delays in developing or upgrading critical infrastructure will hold back the momentum created by the exciting Pilbara Cities plan.

Proposed new projects in the Pilbara

- Upgrading the Karratha and Port Hedland airports to accommodate the increase in fly-in/fly-out workers
- Relocating the Port Hedland Waste Water Treatment Plant
- Replacing ageing overhead electricity infrastructure with underground networks in South Hedland, Roebourne, Karratha and Onslow
- Constructing the South Hedland Multi Purpose Recreation Centre and the Onslow Sporting and Multi Purpose Complex
- Upgrading and constructing new hospitals and medical centres
- Creating new Port Hedland and Dampier marinas and waterfront areas
- Land infill program to support land release in town centres
- Undertaking second stage development of the Karratha Senior High School project.

John Prevost is a Partner and Lee Rossetto is a Senior Associate
in Minter Ellison's Real Estate Division

Getting it DONE

Nicole Green discusses practical challenges that face Australian infrastructure development and what can be done to address them.

THERE IS LITTLE doubt that both the public and private sector are extremely keen to meet the infrastructure challenges that confront the Australian market.

While a number of measures have recently been taken to facilitate the mammoth task that lies before us as a nation, several key hurdles still need to be addressed in order to facilitate infrastructure development in Australia.

Bid costs

The costs of tendering continue to be a sore point for the private sector. One has to look no further than the amounts that the government has had to pay out on the Sydney CBD Metro project that failed to proceed.

The private sector continues to incur substantial cost just to be in the market.

If processes and documentation used on significant infrastructure projects are able to be streamlined and made consistent across the states, this could go some way to assisting in limiting bid costs for each project.

New entrants

It may also be beneficial for governments to consider, on specific projects, whether to make some contribution towards bid costs. For example, this may be done to help attract new entrants into the bidding process.

The ability to access a qualified skills base and sufficient resources also provides a challenge. This operational dilemma is intensified by the resources boom in Western Australia and Queensland which has attracted key skills away from the delivery of traditional infrastructure developments across the nation.

This is not merely a private sector issue. The public sector can play a role in recruiting, developing and retaining project team members with a deep understanding of the issues associated with delivery of large scale infrastructure projects. Having experienced personnel within the public sector makes for a more efficient delivery of infrastructure.

It is therefore critical to the success of Australia's future that more students are encouraged to qualify in engineering and building. This will go some way to ensuring a continuous and capable pipeline of talent.

Funding options

With many of the states' coffers somewhat depleted, the ability for governments to bring on infrastructure projects with significant price tags presents a major hurdle. Some state governments are trying to address this through the privatisation of various assets. This is a necessary step in accessing the critical funds required to deliver the infrastructure, which in turn, makes our economy and

our nation more productive and efficient. Several state governments are also seeking to obtain federal funding through submissions to Infrastructure Australia.

An alternative source of funding is through the private sector and access to the debt markets. Given the current 'European contagion', being able to raise debt for infrastructure projects is now more difficult than it has been for a number of years. Despite this, given Australia's performance through the 2009 global financial crisis means it remains a relatively attractive country in which to invest.

Strategic planning

Another crucial stumbling block which needs to be overcome is the need for integrated and coordinated strategic planning. This is the case for both the states' and the nation's infrastructure at large. Short-term politics needs to be removed from determining the projects that are going to be delivered.

There needs to be bipartisan support and independent plans put in place to ensure that a continuous pipeline of projects are able to be brought online well into the future. At the same time, it is important that there are not too many projects at any one time which would cause further concern in relation to quality and access to resources.

Working together

Given the number of obstacles at play, the future success of Australian infrastructure development rests upon the ability of the private and public sectors to work together. Overcoming these hurdles will ultimately decide the fate of our nation.

Nicole Green is a Partner in Minter Ellison's Construction Division.

Getting infrastr





structure moving

Guest contributor *Michel Masson* makes some personal observations on world-class public transport, achieving optimal performance and expanding Australia's infrastructure base.

YOU COULD DESCRIBE trams as the lifeblood of Melbourne. Every day, they safely and reliably nourish the economic cells around the veins and arteries of the city and form an integral part of its future development.

As the operator of the largest tram network in the world, it is our role to provide transport options for a vibrant city that is proud of its sport, multiculturalism, arts and liveability.

Public transport and urban development are interrelated and, as such, focused on the structural changes that Melbourne is currently undergoing. Paying attention to urban development allows us to prepare a public transport network that the next generation deserves to enjoy.

Melbourne is growing vertically and medium to high density apartment buildings are being built at a rapid rate.

With planning limits on the number of car parks available in the city, we now seek to

engage with real estate developers as early as possible in order to ensure that people no longer buy just an apartment, but also the mobility solution attached to it.

Equally, more can be done to ensure workers at large corporate headquarters, such as those in the Docklands precinct, have a mobility/public transport solution. This starts with mobility packs for newcomers, online information on next available departures and *myki* corporate cards to ensure employees use the tram as a kind of corporate shuttle for their business trips.

Melbourne's transport solution must be embedded as early as possible into its urban design if it is to offer a true public transport value-proposition. A perfect example of this is Yarra Trams' collaboration on the proposed Fishermans Bend development which seeks to explore possible tram network extensions to the area.



Michel Masson



Public transport must compete for the allocation of capital to fund much needed infrastructure projects.

Developing premium lines

As the operator of Yarra Trams, it is the vision of KDR Victoria to transform Melbourne's tram network into a modern, light rail system offering a world class service to all passengers.

Experience in Europe shows that the best value for money is achieved by concentrating investment on dedicated lines. The development of 'premium lines' eventually delivers a 'premium network'. Melbourne's first premium line will be deployed in 2012-2013.

Key features of premium lines are:

- absolute traffic light priority (Melbourne has the slowest tram network in the world, with 17% of time spent stopped at traffic signals. If we can reduce journey times by just 1% across all routes, we essentially increase the tram fleet by five trams, at a fraction of the price of new vehicles)
- strong segregation, to prevent cars from interfering with the tram traffic
- accessible tram stops
- new rolling stock (the State of Victoria has placed an order for 50 new Bombardier trams, being manufactured at Dandenong)
- passenger information
- feeder connections with buses.

Integrating the network

KDR Victoria only operates the tram network in Melbourne, however we have always sought to bring benefits to the entire public transport network. For the passenger, this means a seamless journey and a greater incentive to use all modes of public transport.

Interconnectivity comprises five fundamental pillars:

- integrated ticketing system
- infrastructure that ensures interconnectivity between modes with easy, accessible and safe flows from one mode to another
- real-time passenger information
- alignment of timetable changes
- management and coordination through the Public Transport Development Authority

In some locations, only a short extension of a tram line is required in order to connect with a nearby train station. This has the potential to create a brand new transport option for many commuters.

Major Events

Yarra Trams is uniquely positioned to encourage patrons to use public transport when commuting to and from major events.

The closer we work with major event organisers, the better the service we provide. Through our association

with Tennis Australia, the crowds flock to the Australian Open each year on special shuttle trams included in the price of their event ticket.

For the Melbourne Formula One Grand Prix, the Yarra Trams fleet operations centre serves as the control room for all transport agencies and emergency services.

Financing the future

Like many other sectors, public transport must compete for capital to fund much needed infrastructure projects.

To me, the paradox in Australia is to see a country obsessed with budget surpluses at state and federal levels, and yet high aspirations for world class public transport, health care and education.

There is a profound disconnect between financial means and current aspirations.

I argue that Australia does not have enough debt. We should distinguish between the 'good debt' (preparing infrastructure for the Australia of our children) and 'bad debt' (used to pay operating expenses for the State, – as in France).

I see nothing wrong in sensibly increasing the level of debt to finance cross-generational projects. While future generations will bear the interest on debt, they will also enjoy the economic benefit that flows from the asset.

Private financing through PPPs also needs to be increased. The Gold Coast Rapid Transit light rail project, which Keolis Downer EDI Rail will operate from 2014, is a good model of how this can work. Our French parent company Keolis forms part of the equity owners.

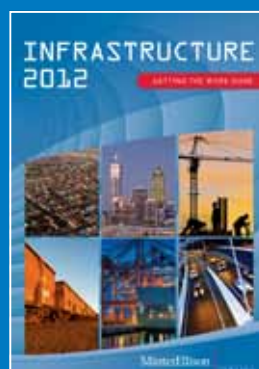
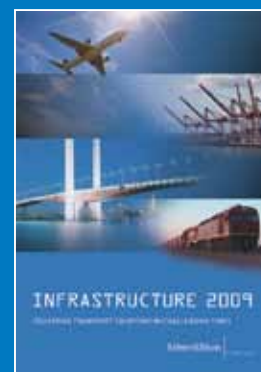
Green energy

Another significant infrastructure opportunity in Victoria concerns the energy source for public transport.

When combined, trams and trains are the second biggest electricity user in the state (500Gwh/annum). The state pays for the electricity used by the train and tram networks (the majority of which is generated from brown coal) however, at the same time, it has an obligation to have 20% renewable energy by 2020, with 5% solar.

By giving visibility and long term commitments to purchase electricity, the state could encourage the dedicated building of solar capacity in Victoria (two units of 125Mwh each are enough) with private funds or from superannuation.

This would place Melbourne as the only city in the world to have its rail transport fully carbon-neutral for an additional cost to the user of less than five cents a boarding.



The Minter Ellison Infrastructure Industry Group is pleased to release the fifth edition of its major thought leadership publication – *Getting the work done*.

This publication series features thoughtful analysis on how Australia can plan, deliver and fund new infrastructure throughout the coming decade.

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