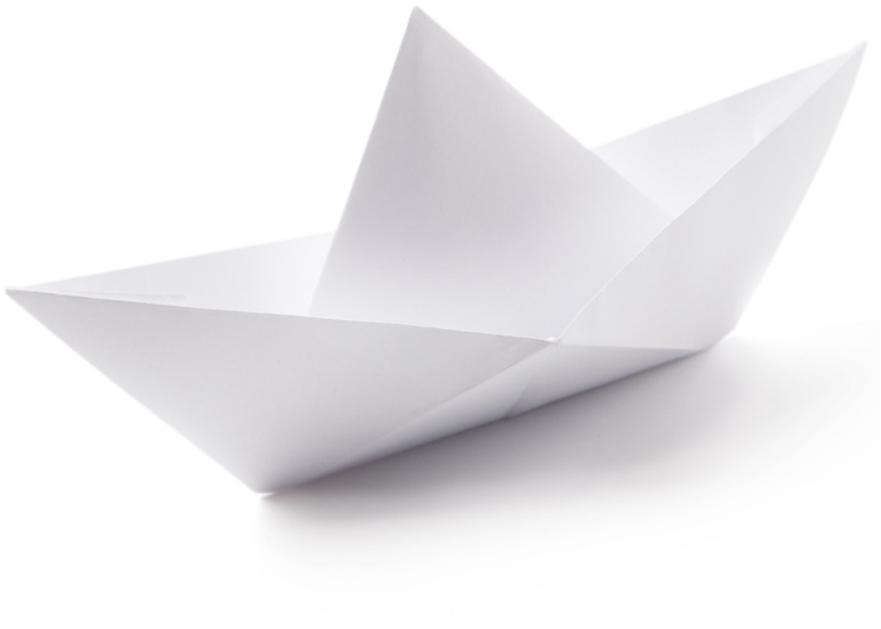
Public-private partnerships and public law risk

Policy discussion paper



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Public-private partnerships

Public-private partnerships are the latest evolution of the relationship between private and public sectors. The mechanism is distinctive. Public law recognises that PPPs contemplate direct and continuing provision of public services by private parties. From a private law standpoint, PPPs involve a greater transfer of risk to the private sector than traditional government contracting models. If PPPs are to be successful, a coherent legal framework needs to emerge from these overlapping — and sometimes competing — public and private law doctrines.

The role of government

PPPs entail a necessary role for government. The government is, by definition, both a contracting party and a purchaser of specified services or outputs. It is this involvement of government that means that PPPs contain an inherent public law element.

Public law is the law that regulates government decision making and action, and regulates the relationship between government and private parties. As a distinctive form of law, public law brings with it its own concepts and language. For example, one of the principal concerns of public law is providing protection against the abuse or arbitrary exercise of power. This concept is captured in traditional public law language referring to "limited government" or the "separation of powers". Private law thinking generally considers that individuals should be as free as possible to do that is not specifically prohibited. In contrast, the desire to limit the abuse or arbitrary exercise of government power means that the basic principle of public law is that government action is restricted unless specifically validated by due process of law.

Public law has developed in contrast to private law because the object of public law — government — is manifestly different from private actors. Governments are different from the private sector because they have the ultimate responsibility for providing services and facilitating activities that are inherently public. For example, the maintenance of a criminal justice system is a fundamental public good that only the government acting in the name of the state can legitimately provide. Similarly, the welfare of the citizenry must form part of a uniquely government agenda. Complete indifference or disregard of such matters would have consequences for the wider public order that no pragmatic or responsible government could ignore.

As a result of these functions, the government has special powers that are not available to the private sector. Significant power attained through wealth (through the ability to compel taxation), control of the law through legislation and coercion are unique to government and cannot be legitimately or effectively replicated by the private sector. As a result of this significant power that only government can wield, a government's mandate is (at least in theory) limited to promoting or facilitating the public good on behalf of its citizens. This is the essence of modern liberal democracy, and is perhaps the most fundamental difference between the public and private sectors. The private sector, by definition, has no necessary interest in the public good.

There is nothing in the nature of a PPP that changes these features of government or the public law that regulates it. PPPs and other models of government contracting are specific public policy mechanisms intended to advance the ends of government in particular ways, usually through the provision of public services or to meet other public policy goals. This feature of PPPs is inherently public and entails a necessary role for public law.

Public law is distinctive

Public law is an essential element in the PPP framework, but what, if anything, does it add to the private law thinking that already characterises long-term contracting arrangements? Is the public law perspective sufficient distinctive to warrant specific consideration?

The answer is undoubtedly "yes". The distinction between public law and private law modes of thought in a PPP context can perhaps be demonstrated with reference to the contrasting language used by different government departments.

Treasury has largely approached the issue of PPPs in terms of the language of contract that exemplifies a private law mind-set. Take, for example, this definition of PPPs advanced by the National Infrastructure Unit:[1]

> *PPPs ... refer to long-term contracts for the delivery of a service, where the provision of the service requires the construction of a facility or asset, or the enhancement of an existing facility. The private sector partner finances and builds the facility, operates it to provide the service and usually transfers control of it to the public sector at the end of the contract.*

Compare the above definition with a similar one adopted by the Auditor-General:[2]

> *... any mutually beneficial commercial procurement relationship between public and private sector parties that involves a collaborative approach to achieving public sector outcomes.*

While the first definition emphasises service delivery (and takes the time to detail the various key components of that service delivery), the second definition refers simply to "public sector outcomes". Similarly, the first definition discusses what it is the private sector does, whereas the second references the nature of the relationship between the public and private sector (described in terms of a "collaborative approach"). This is not naivety on the part of the Auditor-General in respect of the commercial reality of delivering long-term infrastructure projects. It is merely an approach that emphasises the public law dimensions that are obscured when PPPs are seen to be solely a matter of contract.

Accountability

We can investigate the relevance of public law to PPPs in practical terms by focusing on a particular dimension of public law — accountability. Accountability requires that individuals with the power to affect the public interest are responsible for their decisions and actions. This is a core public law concept. As a principle, it touches on issues that go to the heart of our system of government. All government decision making is ultimately accountable to the people through the electorate's power to recall their representatives at periodic free and fair elections. No other concept is as central to regulating the exercise of public power in a New Zealand context.

Accountability also has particular relevance when the practice of PPPs is being discussed. In part, this is because inevitable arguments about whether government service provision is best met through contracting or other mechanisms are likely to reduce down to debates about the appropriate form of government accountability.[3] In addition, PPPs themselves contemplate distinctive forms of accountability:[4]

> *PPPs encompass different accountability and governance arrangements compared to traditional procurement — indeed, these differing arrangements are one of the claimed advantages of this provision method. Interlinked financial incentives across a consortium of players, the sharing of risks through carefully contractualised legal relationships, and more flexible decision making processes between executive government and the service provider all feature as improvements over traditional procurement arrangements.*

The common mistake is that these distinctive means of promoting accountability are assumed to operate as a replacement for traditional public law accountability mechanisms. In reality, an increased focus on contractual mechanisms is intended to complement other forms of public law accountability. The mistake is, however, understandable. Contractual mechanisms do not generally fit well with public law values or modes of thinking. As a result, government by contract often blurs the lines of accountability and responsibility between the public and private sector. But the public sector interest in achieving policy outcomes in an appropriate way cannot be delegated to the private sector, and so cannot be managed solely through contractual terms. A wider set of public law accountability mechanisms is always in play.

In order to demystify the multifaceted nature of public law accountability for PPPs, it may be useful to draw on an analogous context — that of state-owned enterprises. These provide a useful analogy with PPPs because they marry together commercial enterprise and public service delivery that is ultimately held to account in democratic terms. In discussing the accountability of state-owned enterprises in New Zealand, Matthew Palmer identifies nine (overlapping) categories of accountability mechanisms:[5]

- statutory principles;
- judicial review;
- company law;
- Audit Office scrutiny;
- ministerial responsibility;
- parliamentary disclosure and reporting requirements;
- the Official Information Act 1982;
- the Ombudsman's jurisdiction; and
- Parliamentary select committees.

With the exception of company law, all of these forms of accountability have a distinctive public law element to them. This shows the complicated nature of public sector accountability, and that it will invariably entail more than a "tick-box" exercise. Public sector accountability is interlinked and amorphous. No contractual mechanism could hope to replicate either the breadth or nuance of these overlapping limbs of holding decision makers to account.

Palmer's list offers a useful starting point for considering PPP accountability mechanisms. But PPPs are distinctive because of the way they employ contractual mechanisms to achieve the ends of government. This means that a tenth element — contractual accountability mechanisms — needs to be added to complete the list from a PPP perspective. But even when considering contractual accountability mechanisms, there is a danger in overlooking the public law aspect. Contracts, if well drafted and negotiated, provide appropriate accountability of the private sector contracting party to deliver under the contract. They also place important disciplines on the public sector contracting party. The onus on the public sector to develop clear, agreed and measurable outcomes has the effect of holding the public sector to account if policy objectives are not delivered satisfactorily. Success for (and therefore the accountability of) the public sector turns not just on completion of the contract, but in crafting an appropriate set of contractual obligations in light of prevailing public policy interests.

Understanding public law risk is key to managing it

PPPs are not simply long-term contracts for the construction of assets and the subsequent provision of services. It is not possible to reduce the role of government to a mere "purchaser of services". Public law principles ensure that government is ultimately responsible for both the "what" and the "how" of effective policy delivery, even where that is achieved through novel contractual arrangements.

It is not clear that even sophisticated (either public or private) parties understand, or undertake assessment of, the full range of applicable accountability mechanisms when conducting risk analysis in preparation for entering into a PPP arrangement. Best practice dictates that they should. Further, a review against the changing political environment and how it affects each mode of accountability may need to be undertaken regularly.

Endnotes

1 National Infrastructure Unit *Guidance for PPPs in New Zealand* (Treasury, Wellington, 2009) at 1.
2 Office of the Auditor General *Achieving Public Sector Outcomes with Private Sector Partners* (Wellington, 2006) at 4.
3 Ellen Dannin "Red Tape or Accountability: Privatization, Public-ization, and Public Values" (2005) 15 Cornell J L & Pub Pol 111 at 113
4 Graeme Hodge "Public Private Partnerships and Legitimacy" (2006) 12 UNSWLJ 43 at 45.
5 Matthew SR Palmer "The State-owned Enterprises Act 1986: Account-ability?" (1988) 18 VUWLR 169 at 179.

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