

# Partnerships Victoria public interest test

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## Template

### 1. Purpose

The public interest test is to assess whether the structure of the public private partnership (PPP) project adequately protects the public interest. This template assists procuring agencies assess public interest issues such as access, transparency and equity when procuring a PPP project.

### 2. Policy requirement

The National PPP Guidelines outline that governments will consider the public interest in all investment evaluation decisions and subsequent project procurement decisions. Considering public interest matters is an important part of PPP planning and project development.

The Partnerships Victoria Requirements require that Victorian PPP projects must complete a public interest test for approval.

The public interest test covers consumer rights, transparency and other criteria designed to protect the interests of the community.

Confirmation, or updates to the public interest test are required at key stages throughout the project, at a minimum, at release of the expression of interest and contract close. Ongoing monitoring of public interest matters during procurement will be useful in ensuring that the project remains in the public interest.

The required approval steps for Partnerships Victoria projects are set out in the Partnerships Victoria Requirements and precedent examples can be found in project summaries published on the Department of Treasury and Finance website.

### 3. The test for assessing the public interest

Public interest may initially be considered as part of project development and approval of the business case.

A public interest test incorporating the eight elements below is to be undertaken and submitted when seeking approval to commence procurement. The public interest test may be updated throughout procurement, and must be assessed and updated when seeking government approval at contract execution stage.

The on-balance determination of whether the public interest can be adequately protected under a Partnerships Victoria contract requires a judgement of whether the failure to adequately protect any individual public interest element is a significant concern and whether it outweighs (on its own, or together with other failures) the benefits to the public interest arising from the potential project being delivered as a Partnerships Victoria project.

### 4. Reporting and disclosure requirements

Procuring agencies must include the results of the public interest test in the general format outlined in this guidance, together with an on-balance assessment of the test results, with documentation seeking approval to commence procurement.

There is an ongoing requirement throughout the procurement process at key stages of government approval (expression of interest, request for proposal, contract execution) to identify any changes to the public interest assessment and/or confirm that the project remains in the public interest.

The request for proposal should include a clear description of the public interest issues and the manner in which any areas of potential concern have been taken into account in the proposed contractual or regulatory framework.

The project summary published following the completion of the procurement process is to include a summary of the public interest considerations and attach the final public interest test assessment. Further detail on the project summary is available on the Department of Treasury and Finance website.

## 5. Protection of the public interest: what does it mean?

The Partnerships Victoria Requirements provide that protecting the public interest entails an assessment of the impact of the project on the following eight elements of public interest:

### 5.1 Effectiveness

**Is the project effective in meeting government objectives?**

The public interest is served by truly effective achievement of project objectives.

### 5.2 Accountability and transparency

**Do the partnership arrangements ensure that the community can be well informed about the obligations of government and the private sector partner, and that these can be overseen by the Auditor-General?**

Partnerships Victoria projects are subject to the same whole of government openness and disclosure policies such as freedom of information requirements and Victorian Government Purchasing Board contract publishing requirements.

The only contract matters withheld from voluntary disclosure are:

- trade secrets;
- genuinely confidential business information; and
- material, which if disclosed would seriously harm the public interest.

Government must generally weigh the public interest in maintaining confidentiality against the public interest in disclosure. Confidentiality is particularly important during the tender stage where confidential commercial information is supplied by bidders and disclosure of cost structures would disadvantage the competitive bidding process. However, transparency of the tender process is paramount to give bidders certainty and meet probity requirements. Refer to the National PPP Guidelines Volume 3: Commercial Principles for Social Infrastructure (section 36).

The *Integrity and Accountability Legislation Amendment (A Stronger System) Act 2015* amended the *Audit Act 1994* to extend the power of the Auditor-General during a performance audit to take into account information called for from non-government entities delivering government services on behalf of an authority.

The amendments introduces explicit 'follow-the-dollar' audit powers. The Auditor-General can examine the effectiveness, economy and efficiency of activities performed on behalf of the public sector by non-public sector entities in the course of performance audits.

The existing safeguards, procedural fairness requirements and protections to non-public sector entities are extended. The Auditor-General is prevented from publishing information in an audit report that could unfairly damage the commercial interests of a provider.

When drafting contracts, government must ensure that appropriate information on the project's performance is available for release during the service period.

Partnerships Victoria projects must also publish a project summary within two months of financial close.

### 5.3 Affected individuals and communities

**Have those affected been able to contribute effectively at the planning stages, and are their rights protected through fair appeals processes and other conflict resolution mechanisms?**

The term 'planning stages' here encompasses the initial stages of a project, prior to government going to the market, through to the stage where the contracted private party receives final planning approvals.

Any need for a prior economic, environmental, social and regional impact analysis should be considered. Advice may be sought on the impact of any environmental and planning laws or regulations.

Planning for public consultation must allow ample time for special interest groups to voice their opinions or concerns. It must also allow ample time for working with special interest groups to ameliorate their grievances and seek solutions, which can be set out in the contract.

### 5.4 Equity

**Are there adequate arrangements to ensure that disadvantaged groups can effectively use the infrastructure or access the related service?**

These needs may be identified, in part, in the public consultation process referred to above. In planning infrastructure and service delivery, disadvantaged groups – such as the elderly, the disabled, non-English speaking and indigenous Victorians, and other minority groups – must be considered. It may be necessary to plan a process for resolving complaints. Consideration will also need to be given to the Government's obligations under the *Charter of Human Rights and Responsibilities Act 2006*.

### 5.5 Consumer rights

**Does the project provide sufficient safeguards for consumers, particularly those for whom government has a high level of duty of care, and/or those who are most vulnerable?**

Best practice contract management procedures must be used, especially in those areas that involve non delegable duties, such as hospitals and educational facilities. Regardless of any legal obligation on government in respect of such duties — and all other services it is obliged to provide or has committed to provide — government also has a broad responsibility to the community and the service recipients. That is, a political accountability applies, whether government is providing the service directly or indirectly through a private party. Independent regulatory bodies with comprehensive regulatory functions may be required to ensure that the public interest is protected.

Consumers' first line of remedy should be the private party, as in most instances the private party is best placed to provide immediate relief, and appropriate provisions in the contract should be considered. Statutory protection may be contemplated (for example, the Energy and Water Ombudsman of Victoria) to provide an independent channel of redress with powers to hear, investigate and resolve consumer grievances.

Where legislation is enacted in respect of a proposed contract, consideration should be given to whether the legislation would limit the application or action of other statutes and due process to the detriment of public interest.

## 5.6 Public access

### **Are there safeguards that ensure ongoing public access to essential infrastructure?**

It is particularly important to ensure ongoing, continuous supply of services to the public despite any breach of the contract by the private party, or if the private party is replaced. This is addressed by providing adequate safeguards in the contract. Coordination and integration with existing infrastructure and services must also be considered. Accessibility of essential services in rural areas may be an issue.

## 5.7 Security

### **Does the project provide assurance that community health and safety will be secured?**

Each project has distinctly different issues. Particular areas to consider are corruption, crime, public health risk, quality and security of supply.

## 5.8 Privacy

### **Does the project provide adequate protection of users' rights to privacy?**

Relevant legislation and government policy and how this matter has been handled in previous projects should be considered.

# 6. Template instructions

This template sets out the required form and content of the public interest test. Content for each public interest test is determined according to each project's circumstance and characteristics. Content evolves as new areas of public interest emerge.

The estimated length of public interest test is up to five pages.

The following pages outline the template headings and content for the public interest test.

The template presents the public interest test in table format. The columns cover:

- (a) Public interest element: This lists each of the eight elements of the public interest test;
- (b) Standard: This lists the government standard to apply for each public interest element. These standards may derive from government policy, legislation or regulation, current practice, or may be developed specifically for the project; and
- (c) Assessment: For each identified public interest issue, an assessment is made of whether appropriate mechanisms are available to provide an adequate level of protection. The mechanisms to be used need to be identified.

Consistent application and presentation of the public interest test is important. For examples of public interest considerations in past projects please refer to the published Partnerships Victoria project summaries on the Partnerships Victoria website [www.partnerships.vic.gov.au](http://www.partnerships.vic.gov.au).

## Protecting the public interest

Public interest element	Standard	Assessment
<p><b>Effectiveness</b></p> <p>Is the project effective in meeting government objectives?</p>	<p>List government's output/service delivery requirements for the project:</p> <ul style="list-style-type: none"> <li>consider government's output/service delivery requirements in similar projects delivered previously, either under public procurement or another PPP; and</li> <li>identify any minimum government standards (in quality or quantity etc.) to be met for each output/service delivery requirement identified above, whether a legislative or policy requirement.</li> </ul>	<ul style="list-style-type: none"> <li>Which of the output/service delivery requirements identified in the previous column are met by the project?</li> <li>How effectively are the requirements met, i.e. what are the mechanisms used to achieve the requirements? Are they fully met, or only partly met?</li> <li>What are the deficiencies, i.e. which of the identified requirements, or what part of a particular requirement, does the project not meet and what are the consequences? Can this be addressed?</li> </ul>
<p><b>Accountability and transparency</b></p> <p>Do the partnership arrangements ensure that:</p> <ul style="list-style-type: none"> <li>the community can be well-informed about the obligations of government and the private sector partner; and</li> <li>they can be overseen by the Auditor-General?</li> </ul>	<ul style="list-style-type: none"> <li>Identify government's current policy on disclosure and transparency during both the bidding and negotiation stages, and after contract signing</li> <li>Identify legal disclosure requirements and government obligations, e.g. <i>Freedom of Information Act 1982</i>.</li> <li>If there is no policy or there are no legal requirements, identify the disclosure requirements under previous, similar projects.</li> <li>Identify the Auditor-General's obligations to oversee government/private party obligations. Consider any legal duties the Auditor-General may have (e.g. under specific legislation).</li> <li>Consider government's policy on the Auditor-General's role: are there specific compliance requirements/standards under this policy?</li> </ul>	<ul style="list-style-type: none"> <li>Which of the transparency/disclosure requirements (of a legal or policy nature) identified in the previous column are met by the project?</li> <li>How is each requirement met (i.e. what are the mechanisms used to achieve the requirements)? Are they fully met or partly met?</li> <li>What are the deficiencies? That is, which of the identified requirements – or what part of a particular requirement – may not be met for the length of the project and what are the consequences? Can they be addressed, e.g. through contractual or regulatory means?</li> </ul>
<p><b>Affected individuals and communities</b></p> <p>Have those affected been able to contribute effectively at the planning stages, and are their rights protected through fair appeals processes and other conflict</p>	<p>Identify:</p> <ul style="list-style-type: none"> <li>Those individuals/sectors in the community who will be affected by the project; and</li> <li>how they will be affected.</li> </ul> <p>(The analysis referred to below will assist in this identification process.)</p>	<ul style="list-style-type: none"> <li>Which of the identified individuals/sectors have had some form of involvement in the process? What was their level of involvement? Does it meet the identified legal and policy standards?</li> <li>Where the planning stages have not been concluded by</li> </ul>



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Public interest element	Standard	Assessment
resolution mechanisms?	<ul style="list-style-type: none"> <li>Conduct:               <ul style="list-style-type: none"> <li>an appropriate public consultation process;</li> <li>as appropriate, an environmental impact analysis (consisting of an environmental effects statement). Identify all other requirements under environmental and planning laws and regulations; and</li> <li>a social and regional impact analysis.</li> </ul> </li> <li>Identify relevant rights of affected individuals and communities:               <ul style="list-style-type: none"> <li>any legal requirements;</li> <li>current government policy requirements; and</li> <li>minimum requirements from previous similar projects.</li> </ul> </li> </ul>	<p>government, how does the contract/regulatory regime protect the rights identified in the previous column and/or how does it accommodate the required redress avenues? What are the mechanisms?</p> <ul style="list-style-type: none"> <li>What are the deficiencies? That is, which of the identified requirements (or what part of a particular requirement) does the project not meet and what are the consequences? Can this be addressed, e.g. through contractual or regulatory means?</li> </ul>
<p><b>Equity</b></p> <p>Are there adequate arrangements to ensure that disadvantaged groups can effectively use the infrastructure or access the related service?</p>	<ul style="list-style-type: none"> <li>Identify disadvantaged groups who will use the infrastructure or access the related service and how they will be using it. (It may be useful to refer to consultations/analysis conducted previously.)</li> <li>Identify any specific rights of the groups identified:               <ul style="list-style-type: none"> <li>at law (e.g. anti-discrimination laws);</li> <li>under government policies; and/or</li> <li>from standards agreed to in previous projects.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>Which of the 'usage' rights (of a legal or policy nature) identified in the previous column are met by the project?</li> <li>How is each identified right satisfied, i.e. what are the mechanisms used to provide and protect these rights? Are these rights fully or only partly met?</li> <li>What are the deficiencies? That is, which of the identified rights are not provided for or protected for the duration of the project and what are the consequences? Can this be addressed (e.g. through contractual or regulatory means)?</li> </ul>
<p><b>Public access</b></p> <p>Are there safeguards that ensure ongoing public access to essential infrastructure?</p>	<ul style="list-style-type: none"> <li>Identify what kind of public access is required, i.e. when the public needs access to the infrastructure and to which parts.</li> <li>Are there any legal or policy access requirements?</li> </ul>	<ul style="list-style-type: none"> <li>Which of the identified access requirements are met by the project, (i.e. those of a legal or policy nature, or otherwise identified as being required by the public under the project)?</li> <li>How is each identified access requirement satisfied? That is, what are the mechanisms used to provide and protect these access requirements? Are these rights fully or only partly met?</li> </ul>

## Protecting the public interest

Public interest element	Standard	Assessment
		<ul style="list-style-type: none"> <li>• What are the deficiencies? That is, which identified access requirements are not provided or protected throughout the project and what are the consequences? Can they be addressed (e.g. through contractual or regulatory means)?</li> </ul>
<p><b>Consumer rights</b></p> <p>Does the project provide sufficient safeguards for service recipients, particularly those for whom government has a high level of duty of care, and/or the most vulnerable?</p>	<ul style="list-style-type: none"> <li>• Identify:               <ul style="list-style-type: none"> <li>– those recipients to whom government owes a high level of duty of care (either at law, under government policy or simply as appropriate); and</li> <li>– those who are most vulnerable (the consultations/analysis conducted previously will assist in this process.)</li> </ul> </li> <li>• Do any rights or needs of these recipients need to be provided for or protected by government:               <ul style="list-style-type: none"> <li>– at law (consider statutory/regulatory bodies); or</li> <li>– under government policy?</li> </ul> </li> <li>• Identify how previous similar projects protected the recipients identified above.</li> </ul>	<ul style="list-style-type: none"> <li>• Which of the special needs and rights identified in the previous column are met by the project?</li> <li>• How are each of the identified needs and rights satisfied (i.e. what are the mechanisms used to provide for/protect these requirements)? Are these rights fully met, or are they only partly met?</li> <li>• What are the deficiencies i.e. which of the identified needs or rights are not provided for or protected throughout the project and what are the consequences? Can they be addressed (e.g. through contractual or regulatory means)?</li> </ul>
<p><b>Security</b></p> <p>Does the project provide assurance that community health and safety will be secured?</p>	<ul style="list-style-type: none"> <li>• Identify all public health and safety standards that government is required to meet:               <ul style="list-style-type: none"> <li>– at law (e.g. health and safety legislation);</li> <li>– under government policy; or</li> <li>– from government's political accountability to the public.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Which of the health and safety standards identified does the project meet?</li> <li>• How is each identified standard satisfied? That is, what are the mechanisms used to protect the public's health and safety to the identified standards? Are these standards fully or partly met?</li> <li>• What are the deficiencies? That is, which of the identified standards are not provided for or protected throughout the project and what are the consequences? Can they be addressed, e.g. through contractual or regulatory means?</li> </ul>

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Public interest element	Standard	Assessment
<p><b>Privacy</b></p> <p>Does the project provide adequate protection of users' rights to privacy?</p>	<ul style="list-style-type: none"> <li>• Identify the users' rights to privacy (whether at law or otherwise).</li> <li>• Identify government's obligations to the public:               <ul style="list-style-type: none"> <li>– under law;</li> <li>– under government policy;</li> <li>– that arise from government's political accountability to the public; or</li> <li>– that arise from any other undertaking by government to the public, to protect the rights to privacy identified above.</li> </ul> </li> </ul>	<p>Which of the rights identified in the previous column are protected under the project?</p> <ul style="list-style-type: none"> <li>• How is each identified right protected? That is, what are the mechanisms used to protect the public's privacy rights and hold government accountable for its obligations?</li> <li>• What are the deficiencies? That is, which of the identified rights are not provided for or protected throughout the project and what are the consequences? Can they be addressed, e.g. through contractual or regulatory means?</li> </ul>