REVIEW OF IMPLEMENTATION
OF THE NATION BUILDING AND JOBS PLAN
IN NSW AND POTENTIAL APPLICATIONS FOR
OTHER PROJECTS

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Dr Neil Shepherd AM (4cast Consulting Pty Ltd)
Dr Peter Abelson (Applied Economics Pty Ltd)
EXECUTIVE SUMMARY .................................................................................. viii

1. INTRODUCTION .......................................................................................... 18
   1.1 Review Framework .................................................................................. 18
   1.2 Review Methodology .............................................................................. 18
      1.2.1 Submissions .................................................................................. 18
      1.2.2 Initial briefings .............................................................................. 19
      1.2.3 Interviews with stakeholders ......................................................... 19
      1.2.4 Formal questions to NSW government agencies ......................... 19
      1.2.5 Primary source documents .......................................................... 19
      1.2.6 Other major reviews of the stimulus package and major programs under the Nation Building and Jobs Plan ............................................. 20
         1.2.6.1 NSW Upper House Inquiry ...................................................... 20
         1.2.6.2 Commonwealth BER Implementation Taskforce .................. 20
         1.2.6.3 Australian Senate Inquiry into P21 ....................................... 20
         1.2.6.4 Australian National Audit Office audit of P21 ...................... 21
         1.2.6.5 Business Assurance Review (Joint) ........................................ 21
         1.2.6.6 Australian Senate Economics Committee .............................. 21
         1.2.6.7 Other .................................................................................. 21
   2. TERM OF REFERENCE (a) ........................................................................ 22
      2.1 Introduction ....................................................................................... 22
      2.2 The Nation Building and Jobs Plan ................................................... 22
      2.3 The NSW Act .................................................................................... 27
         2.3.1 Introduction .............................................................................. 27
         2.3.2 The Framework of the Act ........................................................ 28
      2.4 What was the intended role of the Act in the Plan? ......................... 31
         2.4.1 Introduction .............................................................................. 31
         2.4.2 Second Reading Speech and Parliamentary Debates ............... 31
         2.4.3 The intended roles of the Act .................................................... 32
      2.5 Did the Act perform the intended roles? ........................................ 32
         2.5.1 Introduction .............................................................................. 32
         2.5.2 Use of the Act .......................................................................... 33
         2.5.3 The Role of Influence ............................................................... 39
         2.5.4 Risks in the Statutory Framework ............................................. 42
      2.6 Could modifications have improved the functionality of the Act? ...... 43
      2.7 Findings and Recommendations in relation to Term of Reference (a) ............................................................................................. 43
         2.7.1 Findings .................................................................................. 43
         2.7.2 Recommendations ................................................................... 44
   3. TERM OF REFERENCE (b) ......................................................................... 46
      3.1 Introduction ....................................................................................... 46
      3.2 The overall approach taken by ICG ................................................ 47
      3.3 Constraints affecting the ICG’s capacity to implement the NBJP in NSW .................................................................................. 49
      3.4 Management of the ICG and NSW NBJP Taskforce Office .................. 51
         3.4.1 Introduction .............................................................................. 51
         3.4.2 Establishment Phase ............................................................... 51
Table of Tables

Table 1. ICG Role in infrastructure projects to which the Act notionally applied .................34
Table 2. Approvals undertaken by the ICG ........................................................................37
Table 3. Planning approval pathways for BER projects .........................................................38
Table 4. Planning approval pathways for housing projects ....................................................39
Table 5. Probity Timeline ..................................................................................................52
Table 6. Audits and reviews by NBJP Taskforce Office as at June 2010 .................................53
Table 7. Audits and reviews by DET and DET IPO as at June 2010 .......................................54
Table 8. Audits and reviews by Housing NSW and Housing NSW PMO as at June 2010 .......54
Table 9. Audits and reviews by Commonwealth agencies as at June 2010 .........................55
Table 10. Audits and reviews by NSW Audit Office as at June 2010 .....................................55
Table 11. The BER program in government schools as at end July 2010 .........................61
Table 12. Employment in the BER program in government schools to June 2010 ..........61
Table 13. Responsibilities under business-as-usual delivery of assets ..............................64
Table 14. BER and DET business-as-usual methods compared ........................................68
Table 15. Time for major capital works under business-as-usual and BER (months) ........73
Table 16. Analysis of management costs .........................................................................80
Table 17. The social housing program as at 9 August 2010 .............................................95
Table 18. Planning approval process .................................................................................100

Table of Figures

Figure 1. Outline of governance structure for BER program .............................................64
Figure 2. Outline of governance structure for social housing program ...........................97
<table>
<thead>
<tr>
<th>Acronyms</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACS</td>
<td>Actual Construction Sum</td>
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<tr>
<td>AIS NSW</td>
<td>Association of Independent Schools of NSW</td>
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<td>ANAO</td>
<td>Australian National Audit Office</td>
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<td>APPA</td>
<td>Australian Primary Principals' Association</td>
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<tr>
<td>AHSEPP</td>
<td>State Environmental Planning Policy (Affordable Rental Housing) 2009</td>
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<tr>
<td>BAU</td>
<td>business-as-usual</td>
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<tr>
<td>BER</td>
<td>Building the Education Revolution program</td>
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<td>BGA</td>
<td>a Block Grant Authority, representing non-government schools</td>
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<td>BMV</td>
<td>benchmark value</td>
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<tr>
<td>CEC</td>
<td>Catholic Education Commission</td>
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<tr>
<td>CEO</td>
<td>Chief Executive Officer</td>
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<td>CEO</td>
<td>Catholic Education Office</td>
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<tr>
<td>COAG</td>
<td>Council of Australian Governments</td>
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<tr>
<td>COLA</td>
<td>covered outdoor learning area</td>
</tr>
<tr>
<td>Commerce</td>
<td>Department of Commerce NSW, now DSTA</td>
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<tr>
<td>DECCW</td>
<td>Department of Environment, Climate Change and Water</td>
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<tr>
<td>DEEWR</td>
<td>Department of Education Employment and Workplace Relations</td>
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<tr>
<td>DET</td>
<td>Department of Education and Training (NSW)</td>
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<tr>
<td>D-G</td>
<td>Director-General</td>
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<td>DoP</td>
<td>Department of Planning NSW</td>
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<td>DPC</td>
<td>Department of Premier and Cabinet (NSW)</td>
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<tr>
<td>DSTA</td>
<td>Department of Services, Technology and Administration (NSW), previously Department of Commerce</td>
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<tr>
<td>ECCSEPP</td>
<td>State Environmental Planning Policy (Exempt and Complying Code) 2009</td>
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<tr>
<td>ECS</td>
<td>Estimated Construction Sum</td>
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<tr>
<td>EEC</td>
<td>Endangered Ecological Community</td>
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<tr>
<td>EP&amp;A Act</td>
<td>Environmental Planning and Assessment Act 1979 NSW</td>
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<tr>
<td>FAHCSIA</td>
<td>Department of Families, Housing, Community Services and Indigenous Affairs (Cth)</td>
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<tr>
<td>FPCA</td>
<td>Federation of Parents and Citizens’ Associations NSW</td>
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<tr>
<td>FSR</td>
<td>floor space ratio</td>
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<tr>
<td>GFC</td>
<td>Global Financial Crisis</td>
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<tr>
<td>GST</td>
<td>Goods and Services Tax</td>
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<td>ICAC</td>
<td>Independent Commission against Corruption</td>
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<td>ICG</td>
<td>Infrastructure Coordinator General (NSW)</td>
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<td>IPO</td>
<td>Integrated Program Office in DET NSW</td>
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<td>ISEPP</td>
<td>State Environmental Planning Policy (Infrastructure) 2007</td>
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<td>JRPP</td>
<td>Joint Regional Planning Panel</td>
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<td>LCP</td>
<td>Local Control Plan</td>
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<td>LGA</td>
<td>Local Government Area</td>
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<td>LGA</td>
<td>Local Government Association</td>
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<td>LEP</td>
<td>Local Environment Plan</td>
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<tr>
<td>LGSA</td>
<td>Local Government &amp; Shires Associations</td>
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<tr>
<td>MC</td>
<td>Managing Contractor</td>
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<tr>
<td>MDR</td>
<td>modular design range</td>
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<tr>
<td>NBESP</td>
<td>Nation Building Economic Stimulus Plan</td>
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<td>NBJP Act</td>
<td>Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009 NSW</td>
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<td>NBJP Taskforce</td>
<td>NSW Nation Building and Jobs Plan Taskforce, also described as the Taskforce Office</td>
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<td>NSP</td>
<td>National School Pride program</td>
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<tr>
<td>NSROC</td>
<td>Northern Sydney Regional Organisation of Councils</td>
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<tr>
<td>NSW PPA</td>
<td>NSW Primary Principals’ Association Inc</td>
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<tr>
<td>P&amp;C Federation</td>
<td>The Federation of Parents and Citizens’ Associations of NSW</td>
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<tr>
<td>P21</td>
<td>Primary Schools for the 21st Century program</td>
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<tr>
<td>PCE</td>
<td>Preliminary Cost Estimate</td>
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<td>PMO</td>
<td>Program Management Office in Housing NSW</td>
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<td>PSA</td>
<td>Public Service Association of NSW</td>
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<td>PSPF</td>
<td>Public Schools Principals’ Forum NSW</td>
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<tr>
<td>PWC</td>
<td>Price Waterhouse Coopers</td>
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<td>RFS</td>
<td>Rural Fire Service NSW</td>
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<tr>
<td>SEPP</td>
<td>State Environmental Planning Policy</td>
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<td>SFS</td>
<td>Schools Facilities Standards</td>
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<tr>
<td>SLC</td>
<td>Science and Language Centres for 21st Century Secondary Schools program</td>
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<tr>
<td>UDIA NSW</td>
<td>Urban Development Institute of Australia, NSW</td>
</tr>
<tr>
<td>VFM</td>
<td>value-for-money</td>
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<tr>
<td>WSROC</td>
<td>Western Sydney Regional Organisation of Councils</td>
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EXECUTIVE SUMMARY

In late 2008 and early 2009 the threat of the Global Financial Crisis prompted an economic stimulus from the Commonwealth Government. One part of this response was the Nation Building and Jobs Plan (NBJP). Endorsed by the Council of Australian Governments (COAG) on 5 February 2009, the NBJP was a suite of programs designed to expend $42 billion of Commonwealth funds rapidly and maintain employment across the country. The suite of programs included Building the Education Revolution (BER), the Social Housing Initiative, Higher education initiatives, some small transport initiatives and a local government infrastructure program. The COAG agreement also mandated a management framework of Commonwealth and State Coordinators-General to drive the NBJP agenda.

NSW responded by appointing an Infrastructure Coordinator-General (ICG) on 5 February 2009 and by enacting the Nation Building and Jobs Plan (State Infrastructure Delivery) Act (the Act) on 13 March 2009. The ICG was given overall responsibility for delivery of the NBJP in NSW.

This report is concerned with implementation of the NBJP in NSW. It has two purposes. The first is to review the performance of the ICG in accordance with s.30 of the Act (Term of Reference (b)). The second is to assess the effectiveness of the Act in implementing the NBJP and whether there would be benefit in extending the principles and/or the method of operation to other significant projects or classes of projects (Terms of Reference (a), (c) and (d)).

A large amount of information was available to the Review, including over 50 public and agency submissions, detailed responses from government agencies to formal questions from the Review, results of interviews with government officials and stakeholders, briefings from the ICG and relevant agencies, numerous public documents and reports from other reviews.

Given the magnitude of the expenditure, the political controversy about that expenditure and the spread of projects in thousands of locations across Australia it was inevitable that there would be substantial public interest in the NBJP. This has led to multiple reviews of aspects of the program at both Commonwealth and State levels, including Parliamentary inquiries, reviews by Auditors-General and other reviews and audits. The primary focus of these reviews has been the BER program.

Term of Reference (a)

‘the effectiveness of NSW Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009 in facilitating the implementation of the Nation Building Economic Stimulus Plan in NSW’

The Act was intended to provide NSW with a platform for the mandated management arrangements and to ensure that, if required, there were statutory mechanisms available to the ICG to avoid obstacles to meeting Commonwealth deadlines. There was only one Object in the Act – to ensure the timely delivery of the NBJP. The Act was only applicable to Commonwealth-funded NBJP programs and was to be repealed once these programs were completed.
Parts 2-5 of the Act enable the ICG to coordinate State government agencies, take direct action on State government projects where necessary and undertake the planning assessment and approval function where existing systems could not guarantee to meet the required timeframes. There was limited formal use of the coordination powers (Part 3) and the direct action powers (Part 4). This does not mean the powers were redundant. The fact that they existed was sufficient to encourage constructive dialogue and resolution of problems between the ICG and the service delivery agencies (primarily Department of Education and Training (DET) and Housing NSW) on important program governance and implementation issues.

Part 5 of the Act contains the ICG’s powers for development consent. However, consistent with the government’s original commitment that Part 5 was a set of reserve powers to be used where there was a risk that Commonwealth timeframes would not be met, planning assessment and approval for the majority of NBJP projects occurred under the existing EP&A Act provisions and not under Part 5. Even so, a substantial number of projects were assessed and approved under Part 5 (over 1000 as at 30 June 2010).

The Act provides no guidance as to how these Part 5 powers are to be exercised. This vacuum was filled by the ICG essentially duplicating the issues normally considered under the EP&A Act, publishing guidelines and procedures, publishing all assessments and auditing internal compliance with the procedures. This approach enabled the ICG to argue that a merit assessment has been carried out on all projects considered under Part 5. Whilst some stakeholders remain opposed to the Part 5 provisions, and raised concerns with some aspects of their use, the Review concludes that the NBJP programs would not have been delivered on time without these powers and that they were used appropriately.

Part 6 of the Act contains expansive protections for the actions of the ICG and Ministers under the Act. These provisions prevent challenge, review, etc in any proceedings by a court or administrative review body. Specifically they exclude procedural compliance with the provisions of the Act itself and the rules of natural justice. The provisions go further to exclude the operation of any other aspect of statutory or common law, any of the prerogative writs and the inherent jurisdiction of the Supreme Court. The only agency that appears to have jurisdiction is the Independent Commission Against Corruption (ICAC). The Review considers that, with the benefit of hindsight, these protections went beyond what was necessary to secure the NBJP and that careful attention should be paid to this issue in any future legislation of this kind.

The Act is an unusual statute designed to deal with a perceived ‘national emergency’. As such it contains features that would not be acceptable generally in a statutory framework. Some of those features carry a significant level of risk, principally because the accepted checks and balances on power and the exercise of power are not present. However, the use of this legislation was confined to the NBJP projects and the nature of these projects was such that the risk of significant negative impacts on a broad scale was low.

It appears to have been assumed that the gaps in the Act would be filled by development of systems, procedures and policies by the ICG. This relies on the good intentions and actions of the ICG in developing appropriate practices. The fact is that had the ICG chosen to operate in an ad hoc and/or non-transparent fashion
the ICG could have done so until such time as the Premier intervened under the *Public Sector Employment and Management Act 2002*.

Overall, the Review considers that the Act was necessary for delivery of the NBJP in NSW and clearly facilitated delivery of NBJP projects.

**Term of Reference (b)**

> ‘the exercise by the Coordinator General of the functions conferred by the Act in accordance with section 30 of the Act’

Assessment of the performance of an individual has to be undertaken in the context of the circumstances prevailing at the relevant time. The relevant context for the key decisions that determined the implementation strategies in NSW is the period February-March 2009 and the relevant factors were:

- the overwhelming priority of the NBJP as conceived by, and agreed with, the Commonwealth was to stimulate the economy and generate jobs;
- the funding was a one-off capital injection. The State was liable for maintenance of whatever was constructed;
- the State had to continue to meet its existing capital commitments (i.e. no substitution was allowed);
- the financial penalties laid down by the Commonwealth for not meeting its timetable were severe;
- the timetable for producing funding applications and commencing projects was very short;
- while the NBJP contained several programs, there were two large ones (the Social Housing Initiative and BER). Both of these programs involved specialised markets with a substantial client interface that would need to be managed during construction.

From these factors the ICG considered that:

- the size of the task was very large (similar money and construction to the Olympics but in one third of the time and with thousands of projects across the State) and the timelines and expenditure targets would be difficult to achieve;
- an expanded business-as-usual model would not deliver the outcomes in either of the major programs in NSW;
- establishing a separate construction authority under the direct control of the ICG (e.g. the Sydney Olympics model) would take too long to establish and would have difficulty in operating successfully in the existing contexts for the two major programs.

The best option for the two major programs appeared to be:

- Department of Education and Training (DET) and Housing NSW to deliver the respective programs using dedicated teams separate from business-as-usual (business-as-usual had to continue to deliver its existing capital and maintenance programs).
close supervision by the ICG of the program management and timelines with the possibility of direct intervention if required.

- the ICG to develop alternative development control approval systems for use as required across all programs (not just BER and social housing).

- the ICG to assist with procurement if required, including identifying and managing industry-wide capability issues.

- the ICG to develop a communications system for the total NBJP in NSW.

Although the ICG had considerable influence and power to shape delivery of the NBJP within the State, there were also substantial constraints on the extent to which the programs could be tailored to deliver optimal outcomes for NSW. These constraints arose primarily from the Commonwealth guidelines and interpretation of those guidelines by Commonwealth officials. From the NSW perspective this was a much greater problem with BER than with the Social Housing Initiative. Numerous examples are given in the body of this report.

In assessing the performance of the ICG across all NBJP programs the Review concluded that in the context of the inter-governmental agreements and the NSW Act the ICG’s emphasis on timely delivery of projects and therefore not exposing NSW to the risk of serious Commonwealth-imposed penalty regimes was appropriate. The ICG’s assessment of the options for delivery of the two main NBJP programs in NSW was also reasonable in the circumstances prevailing in February-March 2009 and the chosen delivery models have delivered the programs in accordance with the NBJP objectives agreed with the Commonwealth and laid down in the Act.

The two main NBJP programs in NSW have been subjected to a very high level of reviews and audits. The agencies delivering the two main programs (DET and Housing NSW) have also conducted rigorous audit programs at the program and individual project levels. However the Review notes that there has not yet been an audit of the Managing Contractors in the BER program.

The NSW NBJP Taskforce Office supporting the ICG was established rapidly and has functioned effectively. There has been an appropriate focus on probity, quality assurance and transparency. In terms of transparency, although NSW has by far the greatest number of individual projects, it appears to provide the benchmark for transparency across the jurisdictions. The planning assessment and approval processes for NBJP projects were also managed well overall, even if some parties disagree with some individual decisions.

The outcomes of the BER and Social Housing Initiative programs are highly relevant to assessment of the ICG’s performance and examination of these programs comprises a substantial part of the Review. There is no doubt that a range of views exists about the performance of these two programs in NSW. The conclusions in this Review are based on analysis of a substantial volume of material in the context of the original objectives for the programs set by the Commonwealth and the States and Territories in February 2009.
Building the Education Revolution

Assessed against the objectives of the NBJP and the Commonwealth timelines, delivery of BER projects has been outstanding. NSW is the only major jurisdiction to come close to achieving on-time delivery of the whole program to date, despite having the largest number of projects.

The delivery model chosen by the ICG (using Managing Contractors) was a logical choice in the circumstances prevailing in February-March 2009. The model has advantages and disadvantages. The principal advantages are its capacity to deliver large programs on time and on budget and that it transfers the risk from the State to the Managing Contractor for cost over-runs and defects in workmanship. The main disadvantages are that there may be a cost premium paid over the equivalent business-as-usual cost and that stakeholder management in a complex stakeholder environment may not be optimal.

The estimated average premium paid for using the Managing Contractor model in BER in NSW is of the order of 4%, although for some individual projects it may have been higher. This average is subject to review and may be found to be higher or lower on completion of the projects. However, in the circumstances of the NBJP, a premium in the order of 4% for on-time delivery to meet the NBJP objectives and for transfer of risks from the State to Managing Contractors is considered reasonable.

The Managing Contractor model is considered integral to the success in on-time delivery against the NBJP objectives in NSW. It would not be appropriate to change the model at this stage of the program.

The issue of 'value-for-money' has been considered extensively. The Review has defined the term as including suitable project selection, fit-for-purpose design of projects and cost-effective delivery of projects.

In many cases the choice of school project was sub-optimal because of the constraints imposed by the Commonwealth for project selection. First, in the major program known as the P21 program the restrictions on the type of facility and the bias against refurbishments ensured that many NSW schools could not meet their highest priority needs within the notional school allocation, and, similarly, the insistence on new facilities for the Science and Language Centres program meant that only a small proportion of the schools needing upgraded facilities received them. Second, allocation of P21 funds to schools based on existing enrolment meant that funds were not always allocated to the schools with greatest needs and no allowance was made for the site-specific difficulties that could severely affect the scope of works achievable for a fixed allocation. Third, the initial inability for NSW to move money between schools without a principal's consent severely limited the ability to match school needs and site constraints across regions.

Use of the Schools Facilities Standards (SFS) has been the subject of much debate. The Review concluded that the ICG’s decision to use the existing SFS was the only feasible option in the circumstances prevailing in the first half of 2009. However, rigid application of these standards has resulted in unsatisfactory outcomes in some projects, particularly small, stand-alone facilities. There have been sufficient questions raised about the SFS for a thorough review of the SFS to be undertaken. Two key issues are whether the construction premium is justified by offsetting future
maintenance costs and whether the standards are optimum for all types of facilities to which they are applied.

The percentage of NSW schools registering complaints about the BER projects (7.5%) was higher than that for other jurisdictions. The majority of complaints concerned high costs for the projects (i.e. lack of cost-effectiveness). Overall it appears that the P21 projects incurred small cost premiums compared with business as usual practices (the most appropriate comparator). However, there is not yet sufficient data to determine this finally. Also labour market pressures may have created cost inflation in some locations in 2010. Given the reliance on the SFS and the speed of the program, a result for BER that approximates business-as-usual should be considered acceptable. The real question is whether business-as-usual is cost-effective. That issue is beyond the scope of this Review.

The Interim Report of the Commonwealth BER Implementation Taskforce contains some key criticisms of NSW performance relating to costs of projects. These appear to be based on inadequate data and superficial analysis. Any future inter-jurisdictional comparisons for BER should be based on rigorous analysis of the full actual construction sum (including all variations) for all facilities, preferably on lifecycle costs, and account for differences in school size, facility size, regional costs of materials and labour and the costs of delayed completion.

This Review considers that the findings of the Interim Report in relation to NSW constitute a perverse outcome. The conclusions are not based on an accurate or reasonable interpretation of the factual and contractual basis for the inter-governmental arrangements for the BER program, which overwhelmingly emphasised the need for timely delivery of school projects. It is suggested that the real focus should be on the adverse consequences of the BER guidelines for achieving optimal outcomes from the BER program.

The Social Housing Initiative

Housing NSW, supported strongly by the ICG, has produced an outstanding result against the NBJP objectives. The objectives have been met in terms of timelines and exceeded in terms of units constructed for the allocated funds. During the peak construction period over 10,000 full-time equivalent jobs were created.

The delivery model - a specialised Program Management Office within Housing NSW containing public and private sector personnel - worked effectively. Overall, use by Housing NSW of the available planning assessment and approval pathways (i.e. existing EP&A Act mechanisms and the ICG’s Part 5 powers) ensured that NBJP projects were commenced on time. Compelling evidence was provided to the Review that this would not have been possible if local councils had been responsible for approving all projects that were unable to be self-approved by Housing NSW.

Social housing development remains a highly contentious issue in some residential areas and the NBJP projects were no exception. Apart from the usually unstated objection to social housing tenants per se, the other significant matters are alleged inadequate provision of car parking, ‘over-development’ of sites, lack of consultation and the non-payment of s.94 contributions for the first 20 units in any development.
The Review considers that the consultation requirements and the s.94 contributions policy need re-examination. It is also noted that Housing NSW is reviewing the provision of car parking. The Review was not able to examine in any detail the alleged issue of ‘over-development’ of sites within the scope of the Review.

**Terms of Reference (c) and (d)**

(c) ‘the legal and economic benefits and consequences of applying the principles of this legislation, and the manner in which it has been implemented, to other significant projects or classes of projects in NSW’

(d) ‘options and mechanisms for applying the principles should they be applied to such projects or classes of projects in NSW’

Five key ‘principles’ are considered relevant to these Terms of Reference:

- the ICG’s power to coordinate agencies;
- the ICG’s power to undertake or take over projects;
- the ICG’s power to modify administrative controls (e.g. procurement);
- the ICG’s power to bypass the *Environmental Planning and Assessment Act 1979* (EP&A Act) and other development control legislation in assessing projects; and
- the ICG’s immunity from review or challenge.

These principles fall into two broad classes: those designed to develop and deliver State projects and those designed to provide an alternative planning assessment and approval regime.

‘The manner in which it [the legislation] has been implemented’ refers to the approaches taken by the ICG in applying the principles. The Act itself did not specify implementation mechanisms, nor did it provide guidance as to the manner of exercise of the powers and functions given to the ICG. Many options were therefore open to the ICG for the overall implementation strategy (ranging from a self-contained construction authority approach, e.g. the Sydney Olympics model, to the coordination model chosen for the NBJP) and for the individual programs within the NBJP. The particular constraints of the NBJP largely determined the options selected. The precedent value of the approaches taken by the ICG must therefore be treated with caution: they are not necessarily transferrable to a different situation.

The Review considered carefully whether the planning and assessment powers in Part 5 of the Act should be extended to other significant projects or classes of development independent of the engagement of a Coordinator-General in the coordination or delivery of that project or class of projects. The Review concludes that use of the Part 5 powers in the NBJP does not provide a precedent for such an extension and that, while the significant risks inherent in the largely unfettered powers in Part 5 may have been manageable in the context of the NBJP, they could produce a very significant exposure with either a different class of projects or a decision-maker with a different approach to rigour and transparency.

In relation to the concept of a statutory Coordinator-General the Review concludes that there could be merit in establishing a Coordinator-General model based on the NBJP legislative principles to be used for improved coordination, development and/or
delivery of a limited range of critical state projects. The project selection criteria should ensure that the project is:

- incontestably for public benefit;
- exceptionally important (and clearly recognisable as such);
- for a specific purpose that is readily definable;
- of substantial value and complexity;
- involving multiple layers of government and/or multiple state agencies; and
- government-based.

The types of projects that the Review considers might fit within these criteria include:

- major transport infrastructure such as significant upgrade to the heavy rail system or rail freight system, major highway upgrades (e.g. Pacific and Hume) and major port developments;
- major energy infrastructure such as interstate gas pipelines;
- major complex water supply initiatives;
- major hospital complexes; and
- major place management initiatives such as Barangaroo.

A Coordinator-General model based on the NBJP legislative principles could be established using the ‘shell’ of the current Act to create a mechanism whereby specific projects could be added to a schedule and the relevant powers required for that project could be allocated to the Coordinator-General for managing that project. However, the Review considers that in view of the unequivocal assurances given to the Parliament and stakeholders that the Act would not be extended beyond the NBJP programs, simply extending the Act could negatively affect the credibility of such a proposal.

The Review recommendations are set out below.

**Term of Reference (a)** - see p.44 of this report.

**Recommendation 1.** That the NSW Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009 remain in force until the NBJP program is completed.

**Recommendation 2.** That if legislation of this kind were contemplated in future, a more targeted set of protections from challenges to decisions should be developed. If such legislation were designed to provide a standing capacity for coordination across government, rather than provide a special-purpose vehicle with a well-defined and narrow ambit, then the checks and balances would need to be revisited.
Term of Reference (b) - see pp.117-118 of this report.

Recommendation 3. That the current arrangements be maintained for oversight and administration of the Nation Building and Jobs Plan in NSW until the program is completed (i.e. the ICG, the Taskforce under s.7 of the Act and the NBJP Taskforce Office).

Recommendation 4. That the current arrangements be maintained for operational delivery of the Nation Building and Jobs Plan in NSW including the Integrated Program Office (IPO) within the Department of Education and Training and Program Management Office (PMO) within Housing NSW.

Recommendation 5. That the Managing Contractor model continue in place until the Building the Education Revolution (BER) program is completed in NSW.

Recommendation 6. That the current arrangements for planning assessment and approval remain in place until all Nation Building and Jobs Plan projects have been assessed. The current standards of assessment and transparency for Part 5 assessments should be maintained.

Recommendation 7. That DET’s Schools Facilities Standards (SFS) be reviewed to assess:
- whether any of the designs contain excessive requirements;
- whether there should be more flexibility in design for different types of schools; and
- whether the balance between construction and maintenance costs is optimum for each category of facility for each region.

Recommendation 8. That DET undertake its proposed review of the IPO model to determine whether parts of the model should be imported into its business-as-usual procurement of capital works.

Recommendation 9. That, to the extent possible, NSW should endeavour to ensure that any future inter-jurisdictional comparisons of NBJP programs are conducted using comparable data and rigorous analysis.

Recommendation 10. That Housing NSW review its car parking policy once the current comprehensive survey on utilisation of car parking spaces is completed. This Review recommends that comprehensive consultation be undertaken with local government as part of any such review.
Recommendation 11. That Housing NSW review its notification policy for proposed developments. This Review considers that notification limited to adjoining residents is inadequate and that a minimum standard of notification of adjoining owners, and residents reasonably likely to be affected, should be adopted as policy even if the statutory requirement is less onerous.

Recommendation 12. That Housing NSW review its current practice of not paying s.94 contributions for the first 20 units in multi-unit developments.

Recommendation 13. That Housing NSW should undertake its proposed review of the Program Management Office (PMO) model to determine what additional features of the model could be utilised effectively in business-as-usual capital procurement.

Terms of Reference (c) and (d) - see pp.134-135 of this report.

Recommendation 14. That the planning powers in Part 5 of the Nation Building and Jobs Plan (Infrastructure Delivery) Act 2009 not be extended to other projects or classes of projects.

Recommendation 15. That the Nation Building and Jobs Plan (Infrastructure Delivery) Act 2009 not be extended beyond the life of the NBJP program.

Recommendation 16. That consideration be given to establishing a Coordinator-General model based on the NBJP legislative principles to be used for improved coordination and/or delivery of a limited range of critical state projects.

Recommendation 17. That if a Coordinator-General model is to be implemented a framework is required that allows for clear identification of any project to be managed by the Coordinator-General and the appropriate suite of powers and checks and balances to be applied to it.
1. INTRODUCTION

1.1 Review Framework

The NSW Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009 (the Act) was assented to on 13 March 2009.

Section 30 of the Act required that the NSW Premier commission a review 12 months after its enactment:

‘The Minister is to ensure that the exercise of the functions of the Co-ordinator General under this Act are, as soon as practicable after the period of 12 months after the commencement of this Act, reviewed by:

(a) a joint committee of both Houses of Parliament, or
(b) if there is no joint committee that can undertake the review - such other appropriately qualified person as the Minister appoints for that purpose.’

A media release on 31 March 2010, announced the appointment of Dr Neil Shepherd AM and Dr Peter Abelson to conduct the Review (as required by s.30(b)).

The Terms of Reference for the Review (Annexure A) are:

‘The review is to examine and report by the end of July 2010 on:

• the effectiveness of NSW Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009 in facilitating the implementation of the Nation Building Economic Stimulus Plan in NSW;

• the exercise by the Coordinator General of the functions conferred by the Act in accordance with section 30 of the Act;

• the legal and economic benefits and consequences of applying the principles of this legislation, and the manner in which it has been implemented, to other significant projects or classes of projects in NSW;

• options and mechanisms for applying the principles should they be applied to such projects or classes of projects in NSW.’

In July 2010 an extension of time for reporting was sought until 30 September 2010. The government agreed to this extension.

1.2 Review Methodology

1.2.1 Submissions

When announcing the Review on 14 March 2010 it was also announced that submissions from interested parties were being sought by 14 May 2010. On 31 March the Acting Special Minister of State in NSW issued a media release inviting public comment on stimulus delivery. This received media coverage, including on the front page of the Sydney Morning Herald on 1 April.

Fifty-one submissions were received from a wide variety of sources including individuals, special interest groups, local councils and government agencies. Annexure B to this report is a Summary of Submissions received.
1.2.2 Initial briefings

An initial briefing by the ICG, members of the advisory Taskforce, and key staff of the Taskforce Office was held on Monday 22 March 2010.

1.2.3 Interviews with stakeholders

One or more interviews were held with one or more representatives of the following organisations:

- Catholic Archdiocese of Sydney
- City of Sydney Council
- Federation of Parents and Citizens’ Associations of NSW (FPCA)
- Housing NSW
- Infrastructure Partnerships Australia
- Local Government Association (LGA)
- Northern Sydney Regional Organisation of Councils (NSROC)
- NSW Department of Education and Training (DET)
- NSW Department of Planning (DoP)
- NSW Department of Premier and Cabinet (DPC)
- NSW Infrastructure Coordinator General (ICG)
- NSW Nation Building and Jobs Plan Taskforce (NBJP Taskforce)
- NSW Primary Principals’ Association Inc (NSW PPA)
- NSW Treasury
- Public Schools Principals’ Forum (PSPF)
- Ryde City Council
- Urban Taskforce Australia
- Western Sydney Regional Organisation of Councils (WSROC)

1.2.4 Formal questions to NSW government agencies

In May 2010 letters seeking responses to detailed questions relevant to the Terms of Reference were issued to the ICG, the CEO of Housing NSW, the Director-General of Education and Training and the Director-General of Planning. Responses were requested by 16 June. The letters and the responses are included as Annexures D-G and are referenced throughout this report as [Officer/Department], Response to Review Questions, -- 2010, p.[ ].

1.2.5 Primary source documents

The documents examined by the Review are numerous and many are listed as references at the end of this report. They include:

- Communiqué from the Council of Australian Governments (COAG) meeting, 5 February 2009
- National Partnership Agreement on the Nation Building and Jobs Plan: Building Prosperity for the Future and Supporting Jobs Now, February 2009
1.2.6 Other major reviews of the stimulus package and major programs under the Nation Building and Jobs Plan

1.2.6.1 NSW Upper House Inquiry

On 23 March 2010 the NSW Legislative Council General Purpose Standing Committee No. 2 self-referred an inquiry into the Building the Education Revolution Program. According to the Committee Chair:

"The purpose of this Inquiry is to review the BER program and consider whether the outcomes of its construction projects are of acceptable quality and suitable to the needs of schools in NSW. The Committee will also look at the effectiveness of government oversight and review of contracts between contractors and the NSW Government."

Submissions were invited and public hearings were conducted on 18 and 30 June 2010. The Committee reported in September 2010.1

1.2.6.2 Commonwealth BER Implementation Taskforce

In April 2010 the Commonwealth announced the establishment of The Building the Education Revolution (BER) Implementation Taskforce with four Terms of Reference briefly summarised as being to:

'receive, investigate and respond to complaints, ensure value-for-money, and recommend changes to policy, contracts or projects to ensure the objectives of the BER are realised'.

The Taskforce began operations on 3 May 2010 and was directed to report publicly, ‘after three months of operation’, on the nature, progress and results of investigations. It released its Interim Report in August 2010.

1.2.6.3 Australian Senate Inquiry into P21

The Senate Inquiry into the Australian Government’s Primary Schools for the 21st Century element of the Building the Education Revolution program commenced on 9 September 2009 when the Senate referred the matter to the Senate Education, Employment and Workplace Relations Committee for inquiry and report. The Committee was asked to consider (a) the Federal Government's Primary Schools for the 21st Century program, with particular reference to: (i) the conditions and criteria for project funding, (ii) the use of local and non-local contractors, (iii) the role of state governments, (iv) timing and budget issues, including duplication, v) requirements for school signs and plaques, (vi) the management of the program; and (b) other related matters. The inquiry is continuing but the committee majority provided an interim report to the Senate in June 2010.2

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1 NSW Legislative Council, General Purpose Standing Committee No 2, Inquiry into the Building the Education Revolution Program, September 2010. The report, transcripts of hearings, public submissions and tabbed documents are all available online on the NSW Parliament website.

1.2.6.4 Australian National Audit Office audit of P21

The Australian National Audit Office (ANAO) conducted an audit of the effectiveness of the Commonwealth Department of Education, Employment and Workplace Relations (DEEWR) in establishing the P21 element of the BER program. The audit focussed on: establishment of administrative arrangements for BER P21 in accordance with government policy; the assessment and approval of funding allocations; and the arrangements to monitor and report BER P21 progress and achievement of broader program outcomes. An examination of individual BER P21 projects was outside the scope of the audit. The ANAO’s report was tabled on 5 May 2010.3

1.2.6.5 Business Assurance Review (Joint)

The Nation Building Economic Stimulus Plan Business Assurance Review was undertaken by PricewaterhouseCoopers on behalf of the Commonwealth and State and Territory Coordinators-General and finalised in December 2009. The Review examined the governance arrangements put in place across the Commonwealth and across jurisdictions to deliver the outcomes of the Nation Building Economic Stimulus Plan.

1.2.6.6 Australian Senate Economics Committee

On 8 September 2009 the Australian Senate referred the Government’s economic stimulus initiatives to the Senate Economics Committee for inquiry and report. The inquiry examined the initiatives, including the efficacy of the spending measures and their environmental impact, the costs and benefits of continuing the measures, whether changed economic circumstances warranted changes to the initiatives and their impact on interest rates and taxpayer liabilities. The Committee reported on 29 October 2009.

1.2.6.7 Other

There are many other reviews and audits of aspects of the NBJP and its programs. These are discussed under the relevant sections of this report.

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3 Australian National Audit Office (ANAO), Building the Education Revolution - Primary Schools for the 21st Century, 5 May 2010
2. TERM OF REFERENCE (a)

‘the effectiveness of NSW Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009 in facilitating the implementation of the Nation Building Economic Stimulus Plan in NSW’

2.1 Introduction

In order to assess the effectiveness of the NSW Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009 (the Act) it is necessary to provide some background to its development and to outline the key issues it was intended to address.

An initial observation is that the time from recognition in mid-2008 that Australia was exposed to the effects of the Global Financial Crisis (GFC) to the initiation of the Nation Building Economic Stimulus Plan (NBESP) on 2 February 2009 was quite short. While some discussions occurred between the Commonwealth and State officials during late 2008 about a possible Commonwealth-funded stimulus package, there were no details available on either size or scope. Comments to this Review indicate that, whilst the general areas of expenditure may have been foreshadowed, the size of the package was much greater than the States had anticipated.

It should also be noted that the NBESP was initiated at the very depth of the financial crisis in Australia. By February 2009 the ASX 200 index had fallen to (a monthly average of) 3345. This was 50% below its peak in October 2007 and 35% lower than in June 2008. This was the lowest point to which the stock market would fall. The index had risen back to 3955 by June 2009 and to 4871 by December 2009. The NBESP was developed in response to what was perceived at the time to be a national emergency.

The Nation Building Economic Stimulus Plan (NBESP) was announced by the then Prime Minister on 2 February 2009, including that $5.6bn was to be spent in NSW on government schools and social housing over two years.

On 5 February 2009 the Council of Australian Governments (COAG) endorsed the NBESP.

Within the NBESP was a suite of programs collectively known as the Nation Building and Jobs Plan (NBJP). The NBJP involved a very large amount of expenditure ($42bn nationally) over very short timeframes. It was to be coordinated by a management structure of Co-ordinators General to be appointed at both State and Commonwealth levels.

Announcement of the appointment of the NSW Coordinator General, Mr Robert Leece AM RFD, was made by the then Premier on 5 February 2009. The NSW position, known as the Infrastructure Coordinator General, is referred to as the ICG throughout this report.

2.2 The Nation Building and Jobs Plan

The ‘Plan’ as it is known is anything but a plan in the usual sense of the word. It is a collection of decisions, announcements, legislation and documents that describe a complex interaction between the Commonwealth, the States and Territories, local
government and other stakeholders concerning the expenditure of large amounts of Commonwealth funds on a series of programs within very tight timeframes.

The Communiqué from the COAG meeting of 5 February 2009 is the key primary source document. It outlines the expected impacts of the GFC in Australia in 2009, the proposed policy response, and in broad terms the elements of the agreement between the three tiers of government. It makes clear that the NBJP was only one part of the total government stimulus effort and refers to previous (2008) initiatives and to additional programs announced concurrently with the NBJP.

For the NBJP the Communiqué sets out the areas of proposed national expenditure and the national funding levels for each as follows:

- **Building the Education Revolution (BER) Program** - $14.6b over three years for major and minor infrastructure projects for 9,540 schools including libraries, multi-purpose halls, secondary school science laboratories and language learning centres, and maintenance. The $14.6b was broken down into $12.4b for Primary Schools for the 21st Century (P21), $1.0b for Science Laboratory and Language Learning Centres (SLCs), $1.3b for the existing National School Pride (NSP) Program and $0.11b for accelerated funding of the existing Trade Training Centres Program.

- **Social Housing** - $6.4b was announced over 3.5 years for construction of 20,000 new social housing units ($6.0b) and repairs and maintenance to 2,500 more ($0.4b). (This program has subsequently been termed the Social Housing Initiative.)

- **Black Spots, Boom Gates, Repairing Regional Roads and Community Infrastructure** - $0.89b broken down as $0.09b (Black Spots), $0.15b (Roads), $0.15b (Level Crossings) and $0.5b (Community Infrastructure).

There was also a commitment to continued microeconomic reform in the following areas:

- Major city strategic plans including infrastructure planning;
- Planning reforms for individual infrastructure projects;
- Regulation of export-related infrastructure; and
- Reform of the legal profession.

The Communiqué did not just cover funding. It also outlined the broad purposes of the expenditure and the terms on which the funding would be provided. These elements provide critical context for subsequent decision-making by both the government and the ICG in NSW and are set out in some detail below.

(i) **Overall**

- Timely and effective delivery was paramount and a Coordinator General model was mandated as the mechanism for achieving this.
- No substitution of funding by States would be allowed (i.e. States must fully maintain existing capital expenditure commitments).
- No ongoing liability would accrue to the Commonwealth for administration and maintenance costs for NBJP projects. Such costs were to be borne by the States.
(a) Commitment to fostering the use of trainees and apprentices within a best-value approach for tendering.

(ii) BER P21 Program

- To enable rapid delivery, bilateral agreements were to be agreed by 13 February 2009 containing conditions, commitments, timeframes, consequences for non-compliance and reporting arrangements.
- There would be three funding rounds with strict deadlines for commencement of construction and completion of projects.
- By April 2009 Round 1 Applications (20% schools) were to be submitted to the Commonwealth with projects to commence by June 2009 and be completed by December 2010.
- A set of design templates was to be submitted to the Commonwealth by 16 February 2009. These templates were to be used by each project. The only exceptions were where there was an existing approval for a design for a project, or where a case-by-case exemption could be argued.
- Round 2 (40% schools) proposals were to be submitted by May 2009 with commencement by August 2009 and completion by January 2011. The same template design arrangements as for Round 1 applied.
- Round 3 (40% schools) were to be submitted by July 2009, with projects to commence by December 2009 and be completed by March 2011. The same arrangements for design templates applied as for Round 1.

(iii) BER Science and Language Centres

- Proposals were to be submitted to the Commonwealth by June 2009 with the same design template arrangements as for P21 Round 1 (i.e. submitted to the Commonwealth by 16 February 2009).
- Projects were to commence by July 2009 and be completed by June 2010.
- Funding was to be competitive, based on need and capacity to complete by June 2010.

(iv) BER National School Pride Program

- Round 1 (60% of schools) were to be submitted by March 2009, with projects to commence by May 2009 and be completed by December 2009.
- Round 2 (40% schools) were to be submitted by May 2009, with commencement by July 2009 and completion by February 2010.

(v) Social Housing

- Stage 1 required submission of projects that were already in train and could be accelerated ($0.692b). Submissions were required by 15 March 2009 and completion was required by June 2010.
- Stage 2 ($5.296b nationally) required submission of projects by June 2009 with decisions by August 2009 and completion of projects by June 2012.
- Proposals for repairs and maintenance to existing housing stock ($0.4b) were to be submitted by 15 February 2009 with decisions by 1 March 2009. Work was to be completed within two years.
• The two objectives of the social housing funding were to target homelessness and provide stimulus to the building and construction industry.

(vi) Black Spots, Boom Gates, Repairing Regional Roads and Community Infrastructure

• Black Spots funding applications were required by March 2009, Regional Roads funding arrangements were to be completed by 1 March 2009 and Boom Gates by end of February 2009.

• The additional $0.5b for Community Infrastructure was to be applied to previously submitted projects with emphasis on completion speed and co-investment.

The ‘National Partnership Agreement on the Nation Building and Jobs Plan: Building Prosperity for the Future and Supporting Jobs Now’ was also signed on 5 February by the First Ministers of the Commonwealth and the States and Territories. It formalised the mechanisms for delivery against the announcements in the Communiqué. The important features of the Partnership Agreement for this Review are:

(i) it specified that the primary objective was addressing the implications of the GFC, but that collateral objectives consistent with existing national agreements and partnerships would also be pursued in that context;

(ii) it reiterated the importance of timely delivery of projects;

(iii) it set out the sanctions that the Commonwealth would apply if State expenditure did not meet the benchmark, including:

• return of shortfall;
• halting further funding for the relevant initiative; and
• withdrawing an amount equivalent to the reduced effort from future Commonwealth payments to the State.

(iv) it set out the management arrangement (Co-ordinators General) and the decision-making delegations (relevant Ministers).

(v) it set out the broad reporting frameworks.

The Schedules to the Agreement for the specific project areas provide more detail in relation to Social Housing (Schedule C) and BER (Schedule D).

The relevant elements of Schedule C are:

(i) That the funding would provide an immediate stimulus to the building and construction industry but in the context of accelerated progression of the existing ‘National Affordable Housing Agreement’ including implementation of some key reforms that were not construction-related.

(ii) Some of the key housing-related reforms that were not strictly construction-related nevertheless had implications for construction activity under the Agreement:

• C7(b) housing location in relation to transport and facilities;

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4 The National Affordable Housing Agreement (NAHA) is an agreement by COAG that commenced on 1 January 2009, initiating a whole-of-government approach to the problem of housing affordability. Its aim was to ‘ensure that all Australians have access to affordable, safe and sustainable housing that contributes to social and economic participation’. It is supported by National Partnership Agreements.
C7(d) reducing concentrations of disadvantage through appropriate redevelopment;
C7(i) better matching of dwelling types to tenant profiles;
C7(l) better use of government-owned land to provide affordable housing.

(iii) The criteria for decision-making by the Commonwealth were set out in broad terms, but key elements such as the $300,000 maximum average across all dwellings are not included in this document.

(iv) Most of the Social Housing funding was based per capita across jurisdictions.

The relevant elements of Schedule D are:

(i) For P21 projects all Australian primary schools would be eligible to apply for funding for new iconic facilities such as libraries and multi-purpose halls or to upgrade existing facilities. Funding would be available based on a school enrolment formula.

(ii) The Science and Language Centres funding was for new facilities and was competitive.

(iii) The National School Pride funding was for minor capital works and maintenance and was open to all schools. The funding formula was based on existing school enrolment.

(iv) The outcomes, outputs and performance indicators were heavily biased toward economic stimulus objectives, i.e. number of facilities on time and on-budget, number of jobs and whether expenditure targets were met.

(v) BER guidelines were to be developed by the Commonwealth in consultation with the States.

(vi) Outlines of the monitoring, reporting and branding requirements were included (but there is no detail).

Taken together the Communiqué and the Partnership Agreement show clearly:

(i) The primary purpose of all programs under the NBJP was economic stimulus.

(ii) Secondary objectives were also relevant in some programs. These were clearest where the economic stimulus funding was being directed to accelerating an existing partnership arrangement (e.g. social housing).

(iii) The underlying design principles of the two major elements of the NBJP were fundamentally different. Social Housing was primarily per capita based across jurisdictions and accelerated an existing cooperative agreement between the Commonwealth and the States to increase the availability of social housing units and reform the way they were managed. BER was primarily new (P21) and tightly centrally controlled in terms of secondary objectives (new ‘iconic’ facilities) and the arrangements were to be between the individual schools and the

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Commonwealth, with an unclear role for the ‘owners’ of the facilities (i.e. the States and the Block Grant Authorities (BGAs) which represented non-government schools). Science and language centres were also to be new facilities and the funding was competitive across Australia.

(iv) There were several key issues for the States and Territories:

- The penalties for not achieving expenditure targets and completion dates were severe;\(^6\)
- The deadlines for applications and commencement were extremely tight;
- All ongoing maintenance costs for the constructed facilities would be borne by the States;
- The number of projects in each program was many times greater than business-as-usual (BAU) activity for such projects within the jurisdictions;
- The structure of the management arrangements was mandated and, in NSW at least, would require legislation to implement; and
- The P21 program posed difficulties because of inherent problems with the program design.\(^7\)

The Commonwealth issued subsequent planning documents for the major elements of the NBJP (Social Housing and BER) and multiple versions of the guidelines for the BER.

NSW issued its own detailed Implementation Plan in November 2009, although draft versions were in existence from August and key elements had been implemented from relatively early in 2009.

2.3 The NSW Act

2.3.1 Introduction

The NSW Government determined that special purpose legislation was required to establish the role, functions and powers of the ICG. This had several advantages:

- it meant that bipartisan support would be obtained – at least for the early stages of the program;
- it would make crystal clear the paramountcy of the NBJP over business-as-usual in government agencies; and
- it would limit process-based actions by disaffected parties.

Not all jurisdictions enacted special purpose legislation. It depended on their assessment as to whether their existing statutory and administrative arrangements could deliver the projects in the required timeframes.

\(^6\) In the National Partnership Agreement, for example, sanctions are set out at B8: ‘Under the agreement, if a state’s expenditure does not meet the benchmark, the Commonwealth will impose sanctions as follows: (a) making the assessment public; (b) requiring the state to return the shortfall in expenditure to the Commonwealth, noting that the Commonwealth will reallocate the amount to other states and/or use it for Commonwealth own-purpose programs; (c) halting further funding for that state for the relevant initiative; or (d) withdrawing an amount equivalent to the reduced effort from future Commonwealth payments to the state.’ (p.12)

\(^7\) See ANAO, *Building the Education Revolution - Primary Schools for the 21st Century*, 5 May 2010. This issue is also discussed in detail by this Review under Term of Reference (b).
The NSW Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009 (NBJP Act) received assent on 13 March 2009.

2.3.2 The Framework of the Act

The Object of the Act is explicit about timely delivery of infrastructure projects funded by the Commonwealth under the NBJP. There are no other statutory objects.

Section 5 describes the projects to which the Act applies. The only limitation is that the project must be funded under the NBJP. Whether such funding can be part funding is not explicitly provided for, but there is nothing in the COAG documents discussed above that would indicate that funding recipients could not augment the NBJP funds. In fact this was specifically encouraged for some programs in the COAG material.

Part 2. Infrastructure Co-ordinator General

Section 6 creates the position of Infrastructure Co-ordinator General (ICG) and describes the functions. These are important and are set out here in full:

‘(3) The Co-ordinator General has the following functions:

(a) to plan and oversee a program for the delivery of infrastructure projects within the timeframes required for Commonwealth funding,

(b) to advise on appropriate tendering and procurement procedures for the delivery of infrastructure projects within those timeframes,

(c) the functions under Part 3 relating to the co-ordination of State government agencies in delivering infrastructure projects,

(d) the functions under Part 4 of carrying out infrastructure projects on behalf of State government agencies,

(e) the functions under Part 5 of authorising the carrying out of infrastructure projects,

(f) such other functions as are conferred on the Co-ordinator General by or under this or any other Act or law.

(4) The Co-ordinator General must have regard to the project delivery timeframes required for Commonwealth funding of infrastructure projects when exercising his or her functions under this Act.’

The clear focus of the functions is on timely delivery of the projects within the funding envelopes determined by the Commonwealth. One provision, (s.3(b)) effectively enables the ICG to operate outside the standard procurement and tendering controls in the Public Sector (Goods and Services) Regulation 2000.

Section 7 creates the Taskforce, which is to be chaired by the ICG and contains nominees of the relevant agencies involved with project delivery and any other person deemed relevant by the Minister (the Premier is the Minister administering the Act). The Taskforce is advisory only. The powers and functions reside with the ICG.

The ICG is supported by a small number of staff employed by Department of Premier and Cabinet (DPC) in an Office referred to as the ‘Taskforce Office’. The Taskforce CEO is a senior executive who holds delegations from the ICG in relation to the ICG functions and who acts as the liaison point for NSW and Commonwealth agencies with the ICG.
Provision is also made for other Taskforces as required.

Part 3. Co-ordination of State government agencies in delivering infrastructure projects.

This Part provides a comprehensive suite of powers for the ICG to coordinate agencies or to gain cooperation from agencies in pursuit of NBJP projects. If the ‘persuasive powers’ of the ICG are not sufficient, the Premier has an explicit directive power to achieve the outcome.

Section 9 sets out the obligations of government agencies to cooperate with the ICG including exercising functions in a timely manner; and notifying the ICG if they believe any of their activities will impact adversely on the ICG’s functions.

Section 10 expands the powers of government agencies to use their functions so as to comply with a request, direction or decision of the ICG and to enter into agreements with the ICG.

Section 11 provides that the Minister may direct agencies to comply with a request, direction or decision of the ICG.

Section 12 exempts local councils and other local authorities from the operation of Part 3.

Part 4. Carrying out infrastructure projects on behalf of State government agencies.

This Part of the Act contains a necessarily complex set of arrangements designed to allow the ICG to undertake projects or to take over projects that were previously being undertaken by other agencies. The key elements are:

- s.14 establishes a system of project authorisation orders;
- s.15 authorises the ICG to carry out an infrastructure project specified in the order;
- s.16 authorises the ICG to take over projects specified in orders under s.14 and to undertake agency functions and give directions to agencies in relation to such projects;
- s.17 allows for the transfer of assets to the ICG where specified in the order; and
- s.18 allows for the transfer of assets to the ICG where necessary to carry out a project that is the subject of an order.

Also provided for in this Part (s.19) is the capacity for the ICG to divest projects to government agencies. The drafting of s.19 implies that the transfer will apply to completed projects, but the powers in s.20 allowing both authorisation and divesting orders to apply to projects in whole or in part would appear to allow for divestment of partially completed projects. This would appear to give the ICG the capacity to move in and out of projects if necessary to overcome temporary shortcomings in agency management of a project.

Section 21 exempts local councils and other local authorities from Part 4.
Part 5. Authorisation of infrastructure projects

Essentially this Part provides an alternative pathway for planning approvals, with the standard development control legislation able to be dispensed with to the extent the ICG considers it necessary to deliver a project. Development Control legislation is defined broadly to include provisions of the Environmental Planning and Assessment Act 1979 (EP&A Act), or any other Act that prohibits the carrying out of development or requires approval before development is carried out, including all legislation specified in s.75U of the EP&A Act.

Section 23. The scheme requires the ICG to declare in an order that a specified infrastructure project or a class of infrastructure projects is to be exempt from all or any of the Development Control legislation, either at all times or when authorised by the ICG under s.24.

Section 24 provides that a person wanting to carry out a project which is the subject of a s.23 order can apply to the ICG in writing for an authorisation to carry out the project. The application must contain details that would allow an assessment of the project on its merits. The ICG can approve the project with or without conditions. A list of possible issues that may warrant conditions is included in s.24(6) and covers the basic issues that would have been considered under the Development Control legislation that has been ‘turned off’ by the Part 5 mechanism.

Section 27(7) completes the picture by deeming an authorisation under s.24 to be a development consent under the EP&A Act.

The application of other aspects of the EP&A Act to projects exempted by orders under s.23 is controlled by s.25. Depending on the terms of the order it can remove the effect of environmental planning instruments, exempt projects from development contributions, exempt projects from Part 5 of the EP&A Act, prevent projects from coming within Part 3A of the EP&A Act and limit the effect of orders under Part 6 of the EP&A Act.

Section 29 allows the regulations to restore the operation of the EP&A Act in relation to an exempt infrastructure project so as to ‘normalise’ the development consent and continuance of existing uses under the planning laws.

Part 6. Miscellaneous

The NBJP Act also contains some unusual provisions designed to prevent challenge to key decisions (called ‘protected functions’) of the ICG and Ministers under the Act.

These provisions (in s.27) prevent challenge, review, etc in any proceedings by a court or administrative review body and prevent the protected function from being affected by any proceedings. Specifically they exclude procedural compliance with the provisions of the Act itself and the rules of natural justice.

The section goes further to exclude the operation of any other aspect of statutory or common law, any of the prerogative writs and the inherent jurisdiction of the Supreme Court.

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The only body specifically excluded from the operation of s.27 appears to be the Independent Commission Against Corruption (ICAC).

The provisions in s.27(2), (3) and (4) relate primarily to proceedings. However, the wording of s.27(4) suggests the possibility that investigations by the Ombudsman and the Auditor General might also be caught.\(^9\)

Review of the exercise of the functions of the ICG under the Act is covered under s.30. That section provides:

>'The Minister is to ensure that the exercise of the functions of the Co-ordinator General under this Act are, as soon as practicable after the period of 12 months after the commencement of this Act, reviewed by:

(a) a joint committee of both Houses of Parliament, or

(b) if there is no joint committee that can undertake the review - such other appropriately qualified person as the Minister appoints for that purpose.'

There is also an unusual provision in relation to repeal of the Act in that s.31 requires that:

(i) the ICG keep the need for the Act under review specifically with regard to the Object of the Act;

(ii) when the ICG is of the view that the Act is no longer required the ICG will provide the Minister (Premier) with a certificate to that effect; and

(iii) the Act is to be repealed after such certificate has been supplied.

2.4 What was the intended role of the Act in the Plan?

2.4.1 Introduction

The Review is asked to examine the effectiveness of the Act in facilitating the Nation Building Economic Stimulus Plan in NSW. As noted in 2.2 above, the NBJP (which the Act supports) is a significant part, but not the whole, of the NBESP. The Review will restrict its focus to how well the Act supported the NBJP.

The intended role of the Act can be determined using a variety of sources. These include the Act itself (see 2.3 above), the Second Reading Speeches and Parliamentary debates, Legislative reviews, and any documentation about events concerned with the problem the Act was seeking to address (e.g. the COAG documents discussed in 2.2 above).

2.4.2 Second Reading Speech and Parliamentary Debates

The points relevant to this Review from the Minister’s Second Reading Speech are:

- The primary focus of the legislation was to ensure rapid delivery of infrastructure projects funded by the Commonwealth as part of the NBJP. Meeting the construction timeframes was considered essential for NSW to receive the funding.

- The legislation would only apply to NBJP projects funded by the Commonwealth and would be repealed once the projects were completed.

\(^9\) The issue is probably of academic interest only. The ICG requested early in the life of the program that the Auditor General become involved in external audit of the NSW NBJP activities and also conducted early briefing sessions for the Ombudsman, ICAC Commissioner and Auditor General.
• The existing planning provisions would be used wherever these could provide for delivery of projects within the specified timeframes.

The relevant issues to arise from the debates in both the Legislative Assembly and the Legislative Council were:

• The legislation had qualified bipartisan support. The qualification was that the legislation would only remain in force for the period necessary to deliver NBJP projects (although there was limited discussion as to whether an ICG-type role may be necessary beyond this time).

• Concern was also expressed in both Houses about the breadth of the protections proposed for the ICG and Ministers from judicial and administrative review.

The Legislative Review Committee expressed concerns about the breadth of the protections in Part 6, the capacity of the regulations to amend other Acts and the possibility that the ICG’s proposed powers to exempt projects from development control legislation amounted to an exercise of legislative powers that was not subject to Parliamentary scrutiny.10

2.4.3 The intended roles of the Act

From the source documents on the NBJP, the Parliamentary material and the Act itself it is clear that the intended roles of the Act in the NBJP were to provide NSW with a platform for the mandated management arrangements (i.e. the ICG model and capacity to access information) and to ensure that, if required, there were mechanisms available to avoid any obstacles to meeting Commonwealth deadlines that might arise from legislative, administrative or management sources within the State’s administrative or service delivery systems. There was only one Object in the Act – to ensure the timely delivery of NBJP projects in NSW.

The Act was explicitly stated to be applicable only to Commonwealth-funded projects within the NBJP and would be repealed once these projects were completed.

The Act was not the sole source of legislative power, nor the only legislation governing implementation of the NBJP in NSW. It was also intended to provide some reserve powers to be used only where necessary to ensure project timeframes could be met. This is clear from the Minister’s Second Reading Speech in relation to the development control powers and from the structure of the powers allowing intervention in project delivery and coordination of government agencies.

2.5 Did the Act perform the intended roles?

2.5.1 Introduction

Normally a Review could simply look at whether the powers in the Act had been used, whether the use was appropriate, and whether the intended result(s) had been achieved. But this is an unusual piece of legislation containing extraordinary powers, many of which are intended to be kept in reserve unless required to achieve the Object of the Act. Under these circumstances the very existence of the powers may influence the behaviours of those who could be subject to their exercise and it becomes very difficult to assess whether limited use, or non-use, means that the powers were unnecessary or ineffective.

10 NSW Parliament, Legislation Review Digest No 2, 10 March 2009, pp.8-9
2.5.2 Use of the Act

Use of the Act is examined Part by Part below.

Part 1

Section 5 of the Act describes infrastructure projects to which the Act applies as being any development funded under the NBJP and gives examples including (a) BER, (b) social housing, (c) community infrastructure and (d) land transport infrastructure. However, the funding and management arrangements for some of these programs meant that the ICG had either no role in them or a reporting role only. Consequently the powers in the Act were not applied to them.\textsuperscript{11}

Table 1 on the following page shows the extent of the ICG role by program and class of project in terms of oversight and reporting. Note that the figures here are NSW figures.

\textsuperscript{11} Other than a few local council Community Infrastructure Projects, where the councils sought assistance from the ICG in terms of the Part 5 powers in the Act, and some non-DET schools which also sought to use the Part 5 powers.
Table 1. ICG Role in infrastructure projects to which the Act notionally applied\(^\text{12}\)

<table>
<thead>
<tr>
<th>Program</th>
<th>$M</th>
<th>No of Project</th>
<th>Responsibility</th>
<th>Oversight</th>
<th>Reporting</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Building the Education Revolution (NB: Government program only)</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>National School Pride</td>
<td>291.8</td>
<td>2,179</td>
<td>NSW DET</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Primary Schools for 21(^{st}) Century</td>
<td>3,029.9</td>
<td>2,433</td>
<td>NSW DET</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Science and Language Centres</td>
<td>153.1</td>
<td>118</td>
<td>NSW DET</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td><strong>New Social Housing</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New Constructions</td>
<td>1,763.6</td>
<td>6,300</td>
<td>Housing NSW</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Repairs and Maintenance</td>
<td>130.4</td>
<td>31,605</td>
<td>Housing NSW</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Defence Housing</td>
<td>19.5</td>
<td>68</td>
<td>NSW DET</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td><strong>Higher Education</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Education Investment Fund – Round 1</td>
<td>245.0</td>
<td>4</td>
<td>Cth</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Teaching &amp; Learning Capital Fund – Higher Education</td>
<td>161.4</td>
<td>33</td>
<td>Cth</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Teaching &amp; Learning Capital Fund – Vocational Education and Training</td>
<td>138.6</td>
<td>184</td>
<td>NSW DET</td>
<td>X</td>
<td>✓</td>
</tr>
<tr>
<td>Trade Training Centres – Round 2</td>
<td>44.3</td>
<td>38</td>
<td>NSW DET</td>
<td>X</td>
<td>✓</td>
</tr>
<tr>
<td><strong>Transport</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ARTC Rail Investment – 17 projects</td>
<td>-</td>
<td>-</td>
<td>ARTC</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>4 Road Projects</td>
<td>384.2</td>
<td>4</td>
<td>RTA</td>
<td>X</td>
<td>✓</td>
</tr>
<tr>
<td>Black Spot Program</td>
<td>48.0</td>
<td>197</td>
<td>RTA</td>
<td>X</td>
<td>✓</td>
</tr>
<tr>
<td>Boom Gates for Rail Crossings</td>
<td>42.8</td>
<td>55</td>
<td>ARTC and RailCorp</td>
<td>X</td>
<td>✓</td>
</tr>
<tr>
<td>Repairs for Regional Roads Program</td>
<td>48.0</td>
<td>-</td>
<td>Local Councils</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td><strong>Other</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Regional Local Council Infrastructure Program Allocation</td>
<td>84.9</td>
<td>1,162</td>
<td>Local Councils</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Regional Local Council Infrastructure Program for Strategic Projects</td>
<td>138.5</td>
<td>43</td>
<td>Local Councils</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>East Kimberley Development Package</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Energy Efficient Homes Package</td>
<td>-</td>
<td>-</td>
<td>Cth</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Home Insulation Program</td>
<td>-</td>
<td>-</td>
<td>Cth</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Solar Hot Water Rebate</td>
<td>-</td>
<td>-</td>
<td>Cth</td>
<td>X</td>
<td>X</td>
</tr>
</tbody>
</table>

\(^\text{12}\) Source: ICG, Response to Review Questions, June 2010, p.2
It is clear from Table 1 that most of the expenditure and most of the projects under the Act were in the social housing and government school education areas.

Part 2

Although the ICG appointment was announced on 5 February 2009 and the legislation was not assented to until 13 March, both sides of the political divide acknowledged the appointment and raised no concerns with it during debate on the Bill.

The Taskforce in s.7 was also appointed consisting of the ICG as Chair, the Deputy Director-General of Department of Premier and Cabinet (DPC), the Deputy Secretary of NSW Treasury, the Director-General of the Department of Education and Training (DET), and the CEO of Housing NSW.

Part 3

Once the ICG elected to deliver infrastructure projects for the two main programs through modified areas of existing organisations (i.e. Department of Education and Training and Housing NSW) it was inevitable that many of the interactions between the ICG and those two agencies would fall within the ambit of Part 3. However, there has been only sparing use of the formal powers in Part 3.

In response to a question from the Review about use of the Part 3 powers in relation to these two programs the ICG stated that:

the ICG and the Taskforce office have made many requests to the delivery agencies for information and for particular actions to occur. In the main these have not relied overtly on Part 3 of the Act but have simply been requests from one arm of government to another. There are however a number of instances where Part 3 has been used formally. These include:

(a) the appointment of some contractors to provide program management leadership and advice to the IPO in the DET;

(b) to grant exemption from the Gateway process for Social Housing projects; and

(c) the appointment of various planners to the Taskforce to assess projects under the Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009 (the NBJP Act) and other contracted services.\(^\text{13}\)

The formal exercise of Part 3 powers would not usually be necessary in this situation although the existence of the powers would encourage cooperation by the agency. The role of ‘influence’ will be considered further in 2.5.3 below.

An obvious question is whether increased use of the formal powers in Part 3 might have produced different outcomes than the chosen negotiated path. This question cannot be answered empirically – there can be no data where powers are not used. However, the question was put to both the ICG and the officers of the two agencies that would have been the subject of most of the possible formal Part 3 action (i.e. DET and Housing NSW) with a view to at least understanding their views as to how well the arrangements either did or did not work.

The responses from the ICG, DET and Housing NSW indicated that they were satisfied overall with the way the coordination function worked. The ICG has advised that he had no desire to use formal coercive powers where they did not appear necessary to

\(^{13}\) ICG, Response to Review Questions, June 2010, p.3
achieve program or project outcomes. The service delivery agencies had a clear preference to operate in a negotiated framework rather than one involving repeated formal directives.

In this context it is also worth noting that most of the basic framework for delivery of the NBJP in NSW was established between 5 February and 13 March 2009 when the Act came into force. Activity in that period had to rely on a cooperative model.

The nature of the NBJP itself also contributed to limited use of Part 3. The program consisted of a large number of similar small projects spread over a wide geographic area and, once the delivery frameworks were determined and the management and reporting arrangements were in place, the need for ongoing coercive action ought to be small unless there was evidence that projects were falling behind or that there were systemic problems either with classes of projects or geographic regions. Coordination across agencies was also unlikely to be a significant issue with multiple small projects. Development control matters were the cross-agency issues most likely to arise and these could be dealt with under Part 5.

Part 4

Part 4 enables the ICG to carry out a project or to take over a project from a government agency.

The powers in Part 4 were never used formally. Four reasons advanced for this in relation to BER and Social Housing are:

(i) that the ICG considered that a model where the two major service delivery agencies retained overall responsibility for projects within their area of expertise would be able to ramp up quickly, maintain cohesion with the other capital projects that were required to be undertaken by these agencies during the same period, integrate ancillary services more effectively during the project phase (schools had to remain functional and social housing tenants needed to move to allow refurbishments to occur) and be able to be integrated into the overall asset base more effectively;

(ii) that if the ICG took on a direct project management role it could not focus effectively on the coordination role across the whole program;

(iii) that the powers in Part 5 place the ICG in the position of consent authority for a wide range of matters. Although technically possible to achieve, it would be very difficult to demonstrate transparency in relation to Part 5 matters if the ICG were also the developer under the Part 4 powers; and

(iv) that there was no reason to consider as at February 2009 that the ICG would be able to deliver any better project outcomes than the substantive agencies, provided that internal management structures in those agencies could be aligned to provide the necessary focus on NBJP projects. In consultation with the ICG both agencies created stand-

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14 Compared with say, development of a major regional centre which raises issues of transport, basic infrastructure services, environment, and human services such as health, education and welfare.

15 Note that although the NBJP programs were very large one-off capital funding injections, they represent only a very small percentage of the total NSW social housing and government school assets.
alone structures (the Integrated Program Office (IPO) in DET and the Program Management Office (PMO) in Housing NSW) for this purpose.

In the case of projects other than those for social housing and BER the ICG took the view that these were small additions to established programs and that little value could be added through Part 4 intervention.

As with Part 3 of the Act the question arises whether use of Part 4 could have produced different outcomes. Again, any view on this must be classed as pure conjecture since there are no data. It is probably worth noting however that the basic decision as to whether the ICG would be the project delivery agency or whether the agencies would retain that responsibility had to be made at the outset of the program and before the Act came into force. It also had to be made on the information available as at February 2009.

Part 5

Part 5 powers provide the alternative pathway for environmental assessment of projects. While Parts 3 and 4 are directed solely to NSW government infrastructure projects, Part 5 has application to NBJP projects generally. These powers have therefore been used by a wider spectrum of bodies in order to meet project timeframes. Table 2 shows authorisations under s.24 of the Act by source of application to 16 June 2010. There were no applications in relation to transport projects. The ICG also advised the Review that up to 10 project applications had been refused as being outside the terms of the Act.

**Table 2. Approvals undertaken by the ICG**

<table>
<thead>
<tr>
<th>Application Type</th>
<th>Total Lodged</th>
<th>Under Consideration</th>
<th>Approved</th>
<th>Withdrawn</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public Schools</td>
<td>564</td>
<td>16</td>
<td>533</td>
<td>15</td>
</tr>
<tr>
<td>Catholic Schools</td>
<td>161</td>
<td>7</td>
<td>146</td>
<td>8</td>
</tr>
<tr>
<td>Independent Schools</td>
<td>87</td>
<td>6</td>
<td>78</td>
<td>3</td>
</tr>
<tr>
<td>Community Infrastructure</td>
<td>4</td>
<td>0</td>
<td>4</td>
<td>0</td>
</tr>
<tr>
<td>Housing NSW</td>
<td>105</td>
<td>0</td>
<td>103</td>
<td>2</td>
</tr>
<tr>
<td>Other</td>
<td>3</td>
<td>0</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>924</strong></td>
<td><strong>29</strong></td>
<td><strong>867</strong></td>
<td><strong>28</strong></td>
</tr>
</tbody>
</table>

**Notes:**
1. Data valid as at 16 June 2010.
2. Totals include applications for modification of authorisation conditions as follows: 139 lodged, 2 under consideration and 137 approved

The ICG has advised the Review that, in keeping with the Minister's commitments when the Act was introduced, use of the Part 5 powers was limited to situations where the normal planning processes could not guarantee that a project would be delivered on time.

For the two major programs the approval pathways are shown in Table 3 (BER) and Table 4 (Social Housing).
Table 3. Planning approval pathways for BER projects

<table>
<thead>
<tr>
<th>Program</th>
<th>No. Schools (total no. of schools in program)</th>
<th>No. Projects (total projects approved by DEEWR)</th>
<th>No. NBJP Act</th>
<th>No. Existing Acts</th>
</tr>
</thead>
<tbody>
<tr>
<td>P21 Govt(a)</td>
<td>1782</td>
<td>2366</td>
<td>798</td>
<td>1568</td>
</tr>
<tr>
<td>P21 Non-Govt</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Catholic(b)</td>
<td>529</td>
<td>725</td>
<td>120</td>
<td>409</td>
</tr>
<tr>
<td>Independent(c)</td>
<td>296</td>
<td>327</td>
<td>63</td>
<td>233</td>
</tr>
<tr>
<td>Science &amp; Language</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Govt(d)</td>
<td>118</td>
<td>118</td>
<td>32</td>
<td>86</td>
</tr>
<tr>
<td>Catholic(e)</td>
<td>29</td>
<td>29</td>
<td>5</td>
<td>24</td>
</tr>
<tr>
<td>Independent</td>
<td>12</td>
<td>12</td>
<td>0</td>
<td>12</td>
</tr>
</tbody>
</table>

(a) (NBJP = 573 (through NBJP (predicted)) + 225 BDR projects exempted under s.23 Order). Figures are projects with pathway and do not correlate with NBJP applications approved (one NBJP application may contain multiple projects). Source: DET planning pathway summary. Includes projects that are yet to gain approval.

(b) Excludes 7 withdrawn. Source applications lodged with NBJP. No. of existing Acts taken as (Number of Schools - NBJP Applications)

(c) Excludes three withdrawn. Source applications lodged with NBJP. No. of existing Acts taken as (Number of Schools - NBJP Applications)

(d) Source applications lodged with NBJP. No. of existing Acts taken as (Number of Schools - NBJP Applications)

(e) Source applications lodged with NBJP. No. of existing Acts taken as (Number of Schools - NBJP Applications)

Table 3 shows that 30% of school projects lodged were to be processed under Part 5. Again the picture is complicated by the introduction in 2007 of a State Environmental Planning Policy (SEPP) known as the Infrastructure SEPP, or ISEPP, under which certain categories of school buildings could be dealt with by DET rather than by councils. This SEPP was also modified in 2009 to further facilitate BER project approvals. However, most NBJP projects could be completed within the required timeframes using planning mechanisms other than those in Part 5.

For Social Housing Initiative projects, Table 4 shows that Part 5 authorisations accounted for only 17% of project approvals, but 31% of the total unit count. The issues of the interaction between Part 5 and the Affordable Rental Housing SEPP (AHSEPP) introduced in July 200916 and the obvious bias toward larger projects in the Part 5 authorisation group will be taken up in this Report under Term of Reference (c). The purpose of including the information here is to demonstrate that Part 5 was used,

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16 The AHSEPP repealed the housing provisions of the Infrastructure SEPP and placed all affordable rental housing provisions, including Housing NSW self-approval provisions, into a single document.
but use of other planning processes prevailed for the majority of projects even with the tight completion deadlines.

Table 4. Planning approval pathways for housing projects

<table>
<thead>
<tr>
<th>Planning process</th>
<th>Stage 1 NBESP</th>
<th>Stage 2 NBESP</th>
<th>Total NBESP</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Projects</td>
<td>Units</td>
<td>Projects</td>
</tr>
<tr>
<td>NBJP Act</td>
<td>23 (19%)</td>
<td>204 (24%)</td>
<td>65 (17%)</td>
</tr>
<tr>
<td>DA to Council</td>
<td>76 (62%)</td>
<td>528 (61%)</td>
<td>48 (13%)</td>
</tr>
<tr>
<td>Housing NSW Self-approval</td>
<td>22 (19%)</td>
<td>128 (15%)</td>
<td>268 (70%)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>121</strong></td>
<td><strong>860</strong></td>
<td><strong>381</strong></td>
</tr>
</tbody>
</table>

Several issues have been raised including:

(i) whether the decision by the ICG in July 2009 to accept all future applications for assessment of social housing projects that could not be processed by Housing NSW under the AHSEPP was premature;

(ii) whether projects that involved only part NBJP funding should have been assessed under Part 5; and

(iii) whether inappropriate conditions were applied to authorisations by the ICG because of lack of local knowledge.

Of these, (i) and (iii) will be addressed under Term of Reference (b). The issue of part-funded projects being assessed under Part 5 was mentioned under 2.3.2 above, noting that there is nothing that specifically excludes part-funded projects and that the COAG documentation specifically encourages co-contributions in some program descriptions. The ICG took the view that part-funding was sufficient. Only a few projects authorised under Part 5 contained major non-NBJP funding (these were projects in larger independent schools where substantial project funding was already available).

Part 6

Part 6 of the Act is designed to render the ICG and the ICG’s decisions and actions immune from suit or formal administrative review from almost any quarter. The only oversight mechanisms are the Independent Commission Against Corruption (ICAC) and the Premier. Part 6 is therefore not ‘used’ unless some challenge is made or some review is attempted. The ICG’s advice is that no such challenges have been made and that the ICG is unaware of any investigation by the ICAC.

2.5.3 The Role of Influence

Undoubtedly the existence of a power can influence the behaviour of those who might be subject to its exercise and whole regulatory systems are based on this premise. However, a formal legislative structure designed to influence the behaviour of

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17 The same immunity applies to decisions and actions of Ministers under the Act.
government agencies is less common in the administration of government. What Part 3 is really trying to achieve is good corporate behaviour across multiple agencies in the face of a threat to the State as a whole.

The comments above should not be interpreted as being critical of any individual agency or program. The situation in NSW is an inevitable outcome of a system made up of very large functionally-aligned agencies that may have as their primary function service delivery in a particular field (e.g. education, rail transport), policy development, or regulation (e.g. planning, environment) or some mix of these.

The success of these individual agencies (and therefore their Ministers and CEOs) is tied principally to how well they perform their particular function, not how well they combine with other agencies to deliver a major project that is primarily of interest to the State as a whole. Credit for corporate success does not accrue to the agencies equitably and for some, such as the environmental regulator, the corporate success can look like an agency failure. Not only are the incentive structures wrong for combined action, the statutory mandates of the individual agencies may also make such action difficult.

In the business-as-usual context in NSW there is little that ties the agencies together in a way that would ensure that the corporate interest is pursued for long enough to deliver a complex major project. In this context it should be noted that commencement of a corporate project is often possible, even if sustained commitment to delivering it is not. Theoretically, Cabinet arrangements could achieve the desired outcome, but in practice major projects are usually long-term and the political focus tends to shift to the issues of the current political cycle soon after the major project has commenced. This explains in part the various attempts to develop coordination mechanisms for major projects (since at least the early 1990s in the experience of one member of this Review) and the perceived need for special purpose vehicles and legislation to deliver major initiatives such as the Olympics, World Youth Day and the NBJP. 18

There are two major areas of influence for Parts 3 and 4 and more for Part 5. The two areas for Parts 3 and 4 are direct influence (e.g. on Ministers, CEOs, Senior Executives, the Integrated Program Office (IPO) in DET and the Program Management Office (PMO) in Housing NSW) and indirect influence (e.g. on the relationship between the IPO and the business-as-usual part of DET and between the PMO and the business-as-usual part of Housing NSW).

For Parts 3 and 4, their existence could conceivably influence the behaviours of Ministers, CEOs, Senior Executives, the IPO in DET and the PMO in Housing NSW. By ‘influence’ the Review means one (or both) of two things: the matter receives higher priority than it might otherwise have received and/or the response or action is designed to facilitate the NBJP program or project to a greater extent than might otherwise be the case. There is no suggestion of impropriety in either of these.

There are obviously no quantitative data available on ‘influence’. The Review therefore approached the issue in the most direct way possible: informal questioning of the ICG and the heads of the IPO and PMO; and formal questions to the ICG, the Director-General of DET and the CEO of Housing NSW.

18 The history of coordination mechanisms is outlined in 4.4.2
The informal responses indicated that the existence of the powers was crucial in establishing constructive management and liaison frameworks and an ongoing focus on NBJP projects. This view was expressed most strongly by the heads of the IPO/PMO structures within DET and Housing NSW who were the potential ‘victims’ of the exercise of the powers. In part this was due to the strengthened bargaining position within the agency that having a powerful external ally might entail, but it was also a thoughtful response based on a clear understanding of the difficulties of maintaining focus on a single program for a long period of time in a very high pressure environment.

The formal responses\(^{19}\) are equally straightforward. The powers in Parts 3 and 4 provided the necessary focus to ensure that the programs were soundly based and that there was a continued emphasis on delivery within the Commonwealth’s timeframes.

The powers in Parts 3 and 4 also created accountability for the ICG, since the statutory capacity to intervene implied that the ICG would implement systems to detect when intervention might be necessary and would then intervene. This point was acknowledged by Housing NSW which noted a decreased level of involvement by Treasury and DPC in decision-making for NBJP projects, with their usual central oversight roles apparently devolving to the ICG.

For Part 5 the position is different because of the wider range of agencies and non-State bodies (local councils) that might be influenced by the existence of the powers. The ICG has stated that the advice of consent authorities such as the Rural Fire Service (RFS), Department of Environment, Climate Change and Water (DECCW), and local councils was followed in assessing matters under Part 5 unless there were conflicting positions that needed to be resolved before a project could proceed.\(^{20}\) Examples of conflict include bushfire-prone sites where examples of Endangered Ecological Communities (EECs) exist, or sites where traffic issues involve both the Roads and Traffic Authority (RTA) and councils. The ICG’s approach in conflict situations was to negotiate with the various parties to reach an agreed position and this appears to have been successful in most cases. How much these agreements represent a genuine consensus and how much they represent reluctant acceptance of an ‘unsatisfactory’ outcome because of the existence of the Part 5 powers is unknown. Given the nature of the projects it is probably not of great significance since it was clear from discussion with officers of the NSW NBJP Taskforce Office that issues concerned with risk to safety (e.g. bushfire prone land) were not compromised.

Part 6 is so all-encompassing that no challenge to the ICG is likely. However, the possibility exists that this could encourage perverse behaviour in the staff supporting the ICG in that their advice on Part 5 matters could become biased or involve taking unacceptable risks in the interests of ensuring project authorisation.

To counter this the ICG put strict guidelines in place for Taskforce Office assessments under Part 5 and published the assessments. Informal advice from Council of the City of Sydney officers confirmed that their review of a substantial sample of these published assessments found that they were fairly described as being merit-based. This Review’s conclusion is that the risk certainly exists, but is adequately controlled at


\(^{20}\) ICG, Response to Review Questions, June 2010, pp.7-8
present. However, this kind of risk is unlikely to be managed uniformly over a long period without very close attention.

2.5.4 Risks in the Statutory Framework

This was an unusual statute designed to deal with a perceived ‘national emergency’. It contains features that would not be acceptable generally in a statutory framework. Some of those features carry a significant level of risk, principally because the accepted checks and balances on power and the exercise of power are not present. However, the use of this legislation was confined to the NBJP projects and the nature of these projects was such that there were unlikely to be large-scale disasters, even if the powers were to be used inappropriately on some occasions.21

Some of the risks are:

(i) The Act provides a non-elected official with extraordinary powers but without any procedures laid down for their exercise. The only ‘control’ is that the Premier must intervene on the ICG’s behalf for some of the actions to occur.

(ii) The Act has a single Object but it is clear from the NBJP that other factors are likely to be taken into account. There is no provision for considering these other factors and no procedures for their consideration.22

(iii) The ICG is accountable only to the Premier (the Minister administering the Act) for performance of the functions and exercise of the powers and that accountability is tied to the employment of the ICG under the Public Sector Management Act. Normal mechanisms for assisting with accountability for the manner of the exercise of functions or powers (i.e. administrative review, legal proceedings in administrative law, etc) are removed.

(iv) Except for the heads of consideration in s.24(6) for possible consent conditions under Part 5, nothing in the Act provides any guidance to the ICG as to how the functions are to be performed. There are no requirements for procedures, systems, etc in relation to project assessments and no requirements to approach assessments on a merits basis or for any transparency. The ICG may have elected to take a rigorous approach to the functions, but the statute certainly did not compel this course and in any event the immunity from review or suit would have made it difficult to identify potential problems and prevent their occurrence.

Some stakeholders consider these risks to be acceptable in the GFC context. In a written submission to the Review the ICG observed that the freedom from mandated process and appeals was a critical element in being able to construct a purpose-built system for assessment that delivered the required outcomes.

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21 The Review is not suggesting here that the powers were used inappropriately.
22 For example, some heads of consideration that included these secondary issues and value-for-money might have made it much clearer for the public and the ICG as to what Parliament intended the ICG to take into account in achieving the Object. As it is, some reviewers and commentators are importing their own views into this vacuum and judging the ICG accordingly. This is considered in more detail in Term of Reference (b).
The assumption appears to be that the legislative gap will be filled by development of systems, procedures, etc by the ICG. But this confounds the lack of any requirements to develop such systems with the apparently good intentions and actions of the ICG in developing some. The simple fact is that had the ICG chosen to operate in an *ad hoc* and/or non-transparent fashion the ICG could have done so until such time as the Premier intervened under the *Public Sector Employment and Management Act 2002*. The risk was certainly extant, but in the opinion of the Review it appears to have been managed appropriately.23

The risk could have been reduced (but not entirely eliminated since there was no opportunity for judicial or administrative external review) by including in the Act a requirement for the ICG to develop and publish systems and guidelines to govern the exercise of the powers and functions and setting out some heads of consideration for this purpose.

### 2.6 Could modifications have improved the functionality of the Act?

In terms of the achievement of the Object of the Act, the Review cannot suggest any modifications that might have made it perform its functions more effectively. Some risks inherent in the statutory framework may have been unnecessary, but there is no evidence that these risks led *per se* to poor outcomes.

The question of possible improvements to the Act to increase its effectiveness was put to the ICG and the two principal agencies (DET and Housing NSW) by the Review. No changes were recommended for application to the current NBJP projects. All three bodies endorsed the need for the Act and the broad powers in it in the particular circumstances of the NBJP. The Review also notes that the written submissions generally supported the existence of the Act *for the particular circumstances of the GFC*.

### 2.7 Findings and Recommendations in relation to Term of Reference (a)

Set out below are the main findings and recommendations for Term of Reference (a).

#### 2.7.1 Findings

(a) The Act was necessary for delivery of the NBJP in NSW and clearly facilitated the delivery of NBJP projects.

(b) Parts 2-5 of the Act provided a logical scheme for facilitation of NBJP projects in that the suite of powers and functions enabled:

- coordination of government agencies;
- direct action on projects where necessary; and
- appropriate opportunity for intervention in development control issues where these could not be dealt with by existing systems within the required timeframes.

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23 This is not to say that all parties were happy with all decisions of the ICG. However, as will become apparent under Term of Reference (b), the ICG did develop systems and operate them with a significant level of transparency.
(c) The limited formal use of Part 3 and the non-use of Part 4 do not imply redundancy. Their existence encouraged appropriate corporate behaviour across government in pursuit of the NBJP targets. They were essential elements of the ICG’s suite of powers.

(d) The ICG has given effect to the Minister’s undertaking in the Second Reading Speech that development control powers would be exercised where there was a risk that the existing legislative powers could not deliver projects within the Commonwealth’s timeframes.

(e) The lack of processes and procedures in Parts 3-5 created significant risks. However, exposure to these risks has been largely controlled by the actions of the ICG in developing, documenting and publishing guidelines and procedures and in pursuing a strong probity and audit focus.

(f) With the benefit of hindsight the provisions in Part 6 of the Act went beyond those necessary to secure the NBJP. The Review concurs that, under the circumstances of the NBJP, there should be no merits-based or process-based appeals from the ICG’s planning decisions under Part 5. However, the very broad immunity from suit or review contained in Part 6 is difficult to comprehend given the nature of the NBJP projects.

2.7.2 Recommendations

Recommendation 1. That the NSW Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009 remain in force until the NBJP program is completed.

Recommendation 2. That if legislation of this kind were contemplated in future, a more targeted set of protections from challenges to decisions should be developed. If such legislation were designed to provide a standing capacity for coordination across government, rather than provide a special-purpose vehicle with a well-defined and narrow ambit, then the checks and balances would need to be revisited.
3. TERM OF REFERENCE (b)

‘the exercise by the Coordinator General of the functions conferred by the Act in accordance with section 30 of the Act’

3.1 Introduction

There are two ways of looking at Term of Reference (b): a narrowly focussed review of the exercise by the ICG as an individual of the functions conferred by the Act, or a broader examination of the conduct of the NBJP in NSW with specific reference to the functions of the ICG under the Act. The former approach does not make much sense since the project delivery model involved the major agencies taking responsibility for delivery of most projects, even though the ICG was notionally accountable for the overall program. The Review has therefore opted for the second approach.

When reviewing the performance of an individual or agency based on the decisions they may or may not have made it is incumbent upon the reviewer to do two things:

(i) assess whether the decisions taken were reasonable in the circumstances prevailing at the time the decisions had to be taken and in the context of the information available to the decision-maker at that time; and

(ii) with the benefit of hindsight, assess whether there are lessons that could be applied in future to the current or new programs.

Reviewers sometimes confound these two tasks. The result is that the benefit of hindsight is applied to the first task and the decision-maker is assessed in the context of the information current at the time plus information that has come to light since. The reasonableness of the original decision is now assessed outside the context in which it was made and the decision-maker is at risk of an adverse finding based on an apparent inability to foresee the (now) obvious consequences of their decision(s).

A simple example will suffice to illustrate the point.

The Commonwealth made it abundantly clear in all early communications about the NBJP that failure to meet construction timelines would result in severe financial penalties for the State (including return to the Commonwealth of any shortfall in required expenditure, halting further funding, and withdrawing an equivalent amount from future payments). There was no other contextual information.

The NSW ICG therefore structured the project management process (consultation, design, etc) into the time available to meet the Commonwealth deadlines. NSW was very successful in meeting the targets for on-time delivery of projects. The other major jurisdictions were much less successful than NSW. But there has now been a relaxation in the Commonwealth position on penalties. This has translated into a view that NSW should also have tested the Commonwealth’s mettle on deadlines and that, if that position had been adopted, there would have been more time for consultation and design of projects.

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24 For example, for BER NSW met the 95% of the targets for projects commenced or completed, whilst Victoria had commenced only 64% and Qld only 60%. (BER Implementation Taskforce Interim Report, August 2010, p.12)

Not only is the ICG being taken to task for not having foreseen the possibility that the Commonwealth would change its position on penalties (a situation that emerged long after the ICG had to make the original decisions), but also that he was not prepared to take the issue up with the Commonwealth in direct contravention of the agreement signed only shortly before by First Ministers.

Whilst it is difficult to avoid hindsight, this Review has sought to keep the two tasks in (i) and (ii) separate and to assess performance of the ICG in the appropriate context.

### 3.2 The overall approach taken by ICG

The approach taken by the ICG was inevitably influenced by the ICG’s assessment of the environment in which the NBJP would operate in NSW. From a variety of sources, the key influencing factors were:

1. **the overwhelming priority of the NBJP was to stimulate the economy and generate jobs**;
2. **the funding was a one-off capital injection. The State was liable for maintenance of whatever was constructed**;
3. **the State had to continue to meet its existing capital commitments (i.e. no substitution was allowed)**;
4. **the financial penalties laid down for not meeting the Commonwealth timetable were severe**;
5. **the timetable for producing funding applications and commencing projects was very short**;
6. **while there were quite a few individual programs in the NBJP, there were two large ones (Social Housing and BER). Both of these programs involved specialised markets with a substantial client interface that would need to be managed during construction.**

In addition, most projects would involve construction on land owned and occupied by the government agency and to existing specialised construction standards tied to long-term maintenance requirements. Both programs also had substantial established stakeholder interfaces.

From these factors the ICG considered that:

1. **the size of the task was very large (similar money & construction to the Olympics but in one third the time & with thousands of projects across the state)** and the timelines and expenditure targets would be difficult to achieve;
2. **an expanded business-as-usual model would not deliver the outcomes in either program in NSW**;
3. **establishing a separate construction authority under the direct control of the ICG (e.g. the Sydney Olympics model) would take too long and**

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26 Drawn from: the ICG’s evidence to the Legislative Council on 30 June 2010; ICG’s submission to this Review, May 2010; ICG’s Responses to Review Questions, June 2010; and interviews with the ICG.

27 In the case of social housing substantial numbers of tenants would have to be re-located and in the case of schools they had to remain operational during the construction phase.

would have difficulty in operating successfully in the existing contexts for the two major programs.

The best option for the two major programs appeared to be:

(i) DET and Housing NSW to deliver the respective programs using dedicated teams separate from business-as-usual29 (business-as-usual had to continue to deliver its existing capital and maintenance programs).

(ii) close supervision by the ICG of the program management and timelines with the possibility of direct intervention if required.

(iii) the ICG to develop alternative development control approval systems for use as required across all programs (not just BER and social housing).

(iv) the ICG to assist with procurement if required, including identifying and managing industry-wide capability issues.

(v) the ICG to develop a communications system for the total NBJP in NSW.

Three other factors appear from the material:

(i) the ICG was strongly of the view that the NBJP provided a one-off opportunity to provide facilities for both education and social housing that would otherwise take many years to provide;

(ii) the ICG considered that within the program constraints imposed by the Commonwealth the legacy should be a valuable one without compromising quality, amenity or creating unacceptable social environmental impacts; and

(iii) the ICG was very concerned to obtain value-for-money within the overall context of the objectives of the NBJP.

In the circumstances prevailing in February and March 2009 – which is when most of the key framework decisions had to be taken – it is difficult to fault the ICG’s assessment of what might or might not work in the NSW context. The Review’s finding is that the ICG considered the relevant issues comprehensively and that the overall approach taken was both appropriate and reasonable.

If we apply the benefit of hindsight (i.e. the GFC impacted Australia less seriously than initially feared and the Commonwealth has reduced its emphasis on penalties for failure to meet timelines) then, as some commentators have argued,30 NSW should have ignored the program constraints and the threats of penalties to be imposed by the Commonwealth in the Intergovernmental Agreements and just applied the funding to projects as it saw fit and within the timelines that suited it. The ICG acknowledged in evidence to the Legislative Council31 that this could have resulted in an improvement in outcomes.32 However, it would have been a risky decision to take in February-March 2009.

29 These programs are dealt with at length, including the delivery models and reasons for selecting them, in 3.5 and 3.6 below
30 The Australian, ‘State covering BER shortfall’, 23 July 2010
31 This evidence was in relation to timelines only. If the option of ignoring both the report hierarchy and school allocation constraints for the BER program had been on the table, the ICG’s answers about increased overall value-for-money may have been different.
The broad approach taken by the ICG in NSW is similar in principle to that taken by other jurisdictions for the two main programs, i.e. delivery by the housing and education agencies with amendments to the planning systems to enable rapid development control decisions. The detail of how these broad principles were implemented varies across the jurisdictions. This is to be expected given that the normal government construction arrangements for schools and social housing vary, as do the arrangements for managing major infrastructure programs and the structure and implementation arrangements for development control legislation.

It appears that all jurisdictions modified their systems (but particularly the development control components) in order to meet the Commonwealth timeframes for project approval and construction. No particular inference can therefore be drawn about the comparative quality or complexity of the NSW systems from the perceived need to modify them to meet NBJP requirements.

However, analysing whether differences in approach adopted by various jurisdictions are responsible for any differences in performance against the program timelines laid down by the Commonwealth is beyond the scope of this Review to resolve.

In NSW the timelines have largely been met and the Review has been advised that this is not the case for any other large jurisdiction. The approach and systems put in place by the ICG must be given some credit for this outcome, as must the resolve shown by the ICG in dealing with issues as they arose. However, it is also clear that the political resolve to deliver the projects within the timeframes has not wavered in NSW.

### 3.3 Constraints affecting the ICG’s capacity to implement the NBJP in NSW

Delivery of the NBJP in NSW involved the ICG and many other individuals and organisations. When assessing the performance of the ICG under Term of Reference (b) it is therefore important to be clear about the context in which the ICG could operate. Table 1 sets out the broad arrangements in NSW for the significant NBJP projects and some of the key responsibilities for the ICG in relation to those projects. However, Table 1 does not outline some of the key constraints on the ICG’s capacity to deliver outcomes under these projects in NSW.

Principal among these constraints are the parameters laid down in the COAG Communiqué, the Partnership Agreement and the subsequent guidelines issued by the Commonwealth. Depending on the seriousness with which NSW viewed its obligations under the agreements (or the threats of penalties for tardiness in project delivery) these documents imposed substantial constraints on the ICG’s ability to tailor the two major NBJP programs to the NSW context.

Details of the constraints under the two programs and the specific impacts these may have had are discussed under the program headings in 3.5 and 3.6 below. However, some examples are outlined here to illustrate the point:

33 ICG, Response to Review Questions, June 2010, pp.9-12
34 The issue of perceived complexity of the planning controls in NSW will be dealt with in Term of Reference (c). The point being made here is that no inference should be drawn about the NSW system from the fact that it needed adjustments to meet NBJP timeframes since all jurisdictions needed to make such adjustments.
35 This is also evident for BER from the Interim Report of the BER Implementation Taskforce.
For the Science and Language Centres under BER new facilities were required to be constructed. This meant that, within the funding available, NSW could not achieve the optimum coverage across all secondary schools that would have been possible with a mixture of refurbishments and new facilities. This mixture was originally put to the Commonwealth as the NSW preferred position but rejected by the Commonwealth.

For P21 there was a strong bias against refurbishments and a very limited hierarchy of options for types of new facilities. This meant that many schools could not use the allocated funding to meet what they considered to be their highest priorities.

For P21 the fixed enrolment-based funding allocation led to inequities for small to medium schools. This caused particular problems for NSW because of its relatively high proportion of small schools.

For Social Housing, the cap of $300,000 maximum average across all dwellings meant that the proportion of units that could be constructed using private sector land in NSW was relatively small and confined to areas of low land value. To get an adequate spread of units and meet the construction targets therefore required use of existing government-owned sites at NSW cost.

These (and many more) externally-imposed constraints limited the ability of the ICG to tailor the programs to meet NSW conditions. There is ample evidence available to the Review that the IGC negotiated with the Commonwealth to modify constraints that were impacting on program outcomes in NSW. But the ICG could neither alter these constraints unilaterally, nor ignore them.

The delivery model chosen by NSW (the two major programs being delivered by the respective NSW government agencies) is also a significant element of the operating context for the ICG. Line control of the relevant program management offices in these two agencies is vested in the CEOs of those agencies, not the ICG. The ICG must operate either by negotiation or by use of the formal powers in Parts 3 and 4 of the Act in order to effect any changes in program delivery.

The Review has noted the reasons for adopting this model in NSW and has concurred that the alternatives were unlikely to be able to deliver the NBJP. However, in interviews with the ICG, Taskforce Office CEO and the heads of the two agency program offices it was evident that some compromises in management arrangements had been made and that all parties had to work to ensure that the required level of focus was maintained on the NBJP projects. This is an inevitable consequence of indirect management control without contractual or other formal underpinning. The reasons for the absence of formal underpinning (i.e. the use of negotiation rather than statutory directions) were discussed earlier at 2.5.2. The bottom line is that complex management interfaces carry risk. However, these risks appear to have been managed satisfactorily to date for the purposes of the NBJP and the model has delivered the programs within the required timeframes.

The Review notes that many of the criticisms levelled at the NBJP implementation in NSW are either not within the ICG’s control or only partially within the ICG’s control. It follows that care must be taken in apportioning either credit or blame for performance on NBJP projects across the various individuals and entities involved in the NBJP in NSW.
3.4 Management of the ICG and NSW NBJP Taskforce Office

3.4.1 Introduction

The ICG is supported by the Taskforce Office, which is a small group of professional and administrative staff drawn from the public and private sectors. Numbers have varied with workload (particularly for planning assessment specialists). The Office is notionally a part of Department of Premier and Cabinet, but is housed separately and has its own CEO. The ICG maintained a close supervisory role over the operation of the Taskforce Office and the statutory responsibilities under the Act. However, day-to-day operation and decision-making was carried out by the CEO of the Taskforce. No issues have been raised with the Review concerning management of either the Taskforce Office or the ICG. All requests by this Review for information have been met comprehensively and constructively and the relevant information has been available at short notice.

In considering the performance of the ICG the Review has explored many aspects of the management of the ICG function and the Taskforce Office.36 Of these, three are considered to warrant comment by the Review: the establishment phase, probity and risk management arrangements, and policies and procedures.

3.4.2 Establishment Phase

Some eighteen months on from the February 2009 announcement of the NBJP it is easy to forget that the ICG and the Taskforce Office had to be established very rapidly while at the same time organising how the major programs would be run in NSW and implementing the arrangements. The responses to the Commonwealth were also required in this period for Round 1 of the funding for both BER and Social Housing (as well as the details of templates, etc).

The complexity of the task facing the ICG in the establishment period was considerable:

- NSW was the biggest recipient of funds under the NBJP and could not operate under an expanded business-as-usual model and meet Commonwealth timelines. Alternative models had to be considered and implemented;
  - Program management structures had to be set up within DET and Housing NSW;
- Rapid employment of public and private sector staff was required within the Taskforce Office to meet the administrative requirements and to discharge the professional functions under Part 5;
- Policies, procedures and protocols needed to be established for various functions under the Act since there was little in the Act itself;
- Information pathways and systems had to be established to acquire the information for funding applications, provide information to the Commonwealth and manage the internal reporting in NSW; and
- Communications had to be established for the NBJP as a whole to ensure that key stakeholders remained informed of progress.

36 Including the formal questions to the ICG and multiple interviews with the ICG and the CEO of the Taskforce.
Given the magnitude of the task and the complexity of the operating environment, the establishment phase appears to have been accomplished rapidly and effectively. One of the useful legacies from the Taskforce Office would be a manual covering the key elements of establishing special purpose vehicles so that the next time this needs to be done there is a successful template to follow.

3.4.3 Probity and Risk Management

Probity and risk were major considerations for the ICG and the Taskforce Office. The Review pursued this issue at interview with the senior Treasury executive seconded to the Taskforce and with the ICG, Director-General of DET and CEO of Housing NSW by way of formal questions.

The overall approach to probity is set out in the NBJP Implementation Plan\(^{37}\) and the accompanying Probity Plan. These formal documents were issued relatively late in 2009, but there was considerable planned activity prior to that. The Probity Advisor was appointed on 2 March 2009 and the Probity Auditor was appointed on 19 March 2009.\(^{38}\) The timelines are reproduced here in Table 5.\(^{39}\)

**Table 5. Probity Timeline**

<table>
<thead>
<tr>
<th>Probity Activity</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appoint Probity Adviser</td>
<td>2 March 2009</td>
</tr>
<tr>
<td>Appoint Probity Auditor</td>
<td>19 March 2009</td>
</tr>
<tr>
<td>Brief ICAC, AO and Ombudsman</td>
<td>17 June 2009</td>
</tr>
<tr>
<td>Establish conflict of interest register</td>
<td>June 2009</td>
</tr>
<tr>
<td>Approval of Probity Plan by Taskforce</td>
<td>August 2009</td>
</tr>
<tr>
<td>Review of Planning Process Outcomes under the NBJP Act</td>
<td>September 2009</td>
</tr>
<tr>
<td>O’Connor Marsden first review of agencies</td>
<td>November 2009</td>
</tr>
<tr>
<td>O’Connor Marsden first review of Taskforce</td>
<td>November 2009</td>
</tr>
<tr>
<td>O’Connor Marsden second review of agencies</td>
<td>March 2010</td>
</tr>
<tr>
<td>O’Connor Marsden second review of Taskforce</td>
<td>April/May 2010</td>
</tr>
</tbody>
</table>

The ICG also established a Risk Register that was reviewed and updated regularly. This Review has examined the Register and noted that it appears to cover the risk profile adequately.

For the two major programs (BER and Social Housing) each delivery agency was required to develop and maintain probity and risk management systems that were oversighted by the ICG. The other NBJP programs in NSW were managed within the probity and risk management systems operated by their host agencies.

\(^{37}\) This was issued in early November 2009 and is available on the NSW NBJP Taskforce website: [http://www.more.nsw.gov.au/nationbuildingtaskforce](http://www.more.nsw.gov.au/nationbuildingtaskforce)

\(^{38}\) See ICG, Response to Review Questions, June 2010, p.30 for details of the probity timelines. Note that appointment of a Probity Auditor carries a substantially greater level of scrutiny than appointment of a Probity Advisor.

\(^{39}\) ICG, Response to Review Questions, June 2010, p.30. Note that O’Connor Marsden are Probity Auditors.
Audit is a key tool for the management of risk. The audit arrangements for the NBJP were therefore the subject of formal questions from the Review to the ICG, DET and Housing NSW.

In NSW as at June 2010 the Taskforce Office had commissioned nine external reviews, the DET IPO had commissioned a number of higher level reviews as well as commencing multiple site-specific audits of BER projects and the PMO of Housing NSW had commissioned nine reviews. Many of these had reported and responses to the Review indicate that recommendations had been implemented. The details as at June 2010 are set out in Tables 6-10.40

There was a significant early emphasis on higher level audits of process and assurance for both the Taskforce Office and the Program Offices. This was also the approach taken by the Commonwealth in its reviews (e.g. see the Australian National Audit Office review of the BER).

Table 6. Audits and reviews by NBJP Taskforce Office as at June 2010

<table>
<thead>
<tr>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. KPMG analysis of compliance of the DET submissions to the BER (P21 Round 3) program. Completed 2009.</td>
</tr>
<tr>
<td>7. Deloitte Forensics Round 2 of the Transaction Data Review of the IPO. Continuing.</td>
</tr>
</tbody>
</table>

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40 The purpose of Tables 6-10 is to demonstrate the overall level of audit activity rather than provide detailed results of the audits. Some of these audits will have been completed and some additional audits will have commenced in the period June-September 2010. For the purposes of this Review it is not necessary to explore this issue further. Note also that the material in Tables 6-10 is drawn from the ICG Response to Review Questions, June 2010. There is more detail for both BER and Social Housing Programs in the responses to Review questions from DET and Housing NSW (Annexures E and F).
### Table 7. Audits and reviews by DET and DET IPO as at June 2010

<table>
<thead>
<tr>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>5. BER Audit Program developed by DET IPO Governance Unit with oversight by the DET Audit Sub-Committee.</td>
</tr>
<tr>
<td>6. Audits of locally managed school projects with oversight by the DET Audit Sub-Committee. Continuing.</td>
</tr>
<tr>
<td>7. Audit of site management to review Managing Contractor Head Offices.</td>
</tr>
<tr>
<td>8. Audit of site management to review 9 Managing Contractor Regional Offices. Continuing.</td>
</tr>
<tr>
<td>9. 36 individual site audits. Continuing.</td>
</tr>
</tbody>
</table>

### Table 8. Audits and reviews by Housing NSW and Housing NSW PMO as at June 2010

<table>
<thead>
<tr>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. O’Connor Marsden probity review of Housing NSW PMO Land and Multi Unit Development RFT. Completed November 2009.</td>
</tr>
<tr>
<td>6. O’Connor Marsden probity review of Housing NSW PMO RFT for Multi-levels (Design and Construct) with RFT. Completed March 2010.</td>
</tr>
<tr>
<td>7. O’Connor Marsden Probity Audit of Housing NSW RFT for Community Housing Providers. Completed.</td>
</tr>
</tbody>
</table>
Table 9. Audits and reviews by Commonwealth agencies as at June 2010

<table>
<thead>
<tr>
<th>Description</th>
</tr>
</thead>
</table>

Table 10. Audits and reviews by NSW Audit Office as at June 2010

<table>
<thead>
<tr>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Review of the DET 2008-09 Financial Statements for BER projects. Results pending</td>
</tr>
<tr>
<td>2. Review of financial compliance at 72 schools Results due mid 2010</td>
</tr>
<tr>
<td>3. Review of the BER P21 component of BER projects. Completion due by 30 June 2010</td>
</tr>
</tbody>
</table>

Overall, the level of audit and probity examination has been extensive, even for a funding program of this magnitude. Much of the emphasis has been on systems and process. In tandem with strong procurement procedures incorporating competitive tendering this would normally be considered sufficient to provide assurance that outcomes would be satisfactory and value-for-money would be obtained.

However, for BER, as the Federal election approached the media and political interest in the program shifted from a focus on the success or otherwise of the program in terms of the objectives of the NBJP to a focus on individual projects where problems occurred or were perceived to have occurred. Some of the more difficult issues to get a clear perspective on were allegations of 'rorting' by sub-contractors and allegations of poor workmanship resulting in defects. The audit focus aimed at and above the Managing Contractor level could not provide quantitative evidence concerning the existence or extent of such problems at the project level and the allegations gained significant currency.

A focus on auditing Managing Contractors and above is logical from the State's perspective since the Managing Contractors carry the BER project-related risks for their region. Provided the State has assurance that (i) the Managing Contractors were selected competitively and their fee structures are competitive; (ii) all projects are competitively tendered; (iii) robust mechanisms are in place to establish project estimated costs and to check those estimates; and (iv) there is a rigorous process for handing over completed projects and rectifying defects; the State's interest should be adequately protected. Any problems with 'rorting' by sub-contractors are problems for the Managing Contractors and, provided handover includes adequate inspection by the State, rectification of defects due to poor workmanship is also an issue for the Managing Contractor.
Given the stage of the political cycle and the fact that many NSW schools were unable to get their highest priorities funded under the BER guidelines it may have been prudent to implement an early comprehensive audit program at the project site level. While DET has now done this, a strong factual base would have assisted with the debate on the extent of any problems at the project level in NSW.

For the Social Housing program, Housing NSW was in a different contractual position with its private sector partners. It employed project managers and retained overall project responsibility. Consequently, Housing NSW had a rigorous site inspection regime throughout the program involving weekly site inspections by the project managers, monthly site inspections by Housing NSW staff and thematic construction audits by an in-house team of five construction managers. The focus of these latter audits was on quality assurance and safety.

### 3.4.4 Policies, Procedures and Protocols

Within NSW government, business is generally conducted according to a hierarchy of controls and guidelines that emanate from the Parliament, the Executive, or the agencies themselves. Oversight occurs through the line management controls and through statutory bodies such as the ICAC, Ombudsman and Auditor-General, and through the Courts. Much of the business is guided by policies, procedures and protocols.

As noted previously, the Act provided the ICG with powers and functions, but no guidance concerning their use. The Act also removed some of the usual controls (e.g. for procurement and development consent) and allowed the ICG to modify others for the purposes of the NBJP. Part 6 of the Act notionally removed all forms of external scrutiny of the ICG’s activities other than by the ICAC. The ICG was essentially left with the prospect of using existing controls or inventing new ones and with little likelihood of unwanted external review.

The ICG generally used existing mechanisms wherever it was considered that they could deliver the NBJP outcomes within the Commonwealth timeframes. Modifications to existing mechanisms were generally designed to speed up the processes to the point where they could meet Commonwealth timelines, but to retain the intent of the existing process to the maximum extent possible.

This approach is evident from the ICG’s responses to the formal questions from the Review, the Taskforce Implementation Plan, evidence given by the ICG to the Legislative Council and the ICG’s submission to the Review.

Overall, the approach was applied to a wide range of activities including, *inter alia*, procurement, capital works approval procedures, recruitment of staff and planning assessments. The two areas of activity that created most interest were (i) some aspects of procurement (particularly the use of Managing Contractors in the BER program), and (ii) planning assessments and related matters such as s.94 contributions. The use of Managing Contractors in the BER program is dealt with in 3.5.7.4 and the planning-related matters are considered in some detail below as well as in 3.5.6.4.

Apart from these two areas the ICG’s approach to policies and procedures for implementing the NBJP does not appear to be controversial. The responses of the ICG, DET and Housing NSW indicated a clear understanding of the need to have robust
policy frameworks in place to guide activities and the need to comply with such policies. The Review is satisfied that the risks inherent in the legislative framework have been recognised and managed effectively. As such, there is little point in exhaustive documentation of every area in which the ICG elected to modify or depart from an existing government policy or process. The BER and planning examples will suffice to demonstrate that the ICG developed and followed purpose-specific policies and procedures (even if some stakeholders disagree with some decisions taken under these policies and procedures).

3.4.4.1 Planning-related Policies and Procedures

Under Part 5 of the Act and in the Minister’s Second Reading Speech the ICG was encouraged to utilise the project assessment mechanisms in the existing planning system wherever these could meet the Commonwealth timeframes. On the other hand, the ICG was provided with freedom under Part 5 to avoid the relevant planning controls for all NBJP projects.41 If some projects went via Part 5 then, depending on the systems (if any) that the ICG developed and applied to Part 5 projects, the assessment outcomes for essentially similar NBJP projects could be vastly different.

To deal with this the ICG developed a comprehensive assessment regime for the projects to be assessed under Part 5. The key elements of this scheme and its management are important to the assessment of the performance of the ICG under Term of Reference (b) and they are therefore set out below.

(i) Staffing

The Planning Director and Manager were appointed by May 2009 and continued work on the policies and procedures for Part 5 assessments that had been commenced by DPC and the Taskforce Office. Experienced planning assessment staff were drawn from the public and private sectors and the size of the assessment workforce was adjusted throughout the program based on the flow of applications. The education and housing assessment streams were operated separately once workflow increased.

A senior level advisory panel was established to assist with the assessment of projects. Both the ICG and Housing NSW provided advice to the Review that this panel had contributed significantly to the quality of designs, particularly for the housing projects. Housing projects were considered by the panel before submission to the ICG.

(ii) Access Rules for Projects to be Assessed under Part 5

The ICG developed and published a formal policy to determine whether projects were eligible for assessment under Part 5 or whether they should be assessed under the existing planning system. The key issues for consideration were whether the project fell within the ambit of NBJP (a decision was made that part-funded projects could be eligible) and whether assessment timeframes under the existing planning system would delay the project to the point where Commonwealth timelines could not be met. Part 5 was available for all classes of NBJP projects in NSW, not just BER and Social Housing.

41 See 2.3.2 above for discussion of the Part 5 provisions.
The ICG also set out requirements in the ‘Planning Approvals User Guide’ for consultation with local councils and relevant government agencies, for consent from the owners of the land and various other requirements before applications could be lodged with the ICG. The Guide was issued in early May 2009.

(iii) Assessment Principles under Part 5

The assessment principles are also set out in detail in the published ‘Planning Approvals User Guide’ and supported by an internal Procedures Manual which was developed before the first application was received and then modified as required over the life of the program. Examination of the ‘User Guide’ and statements in the submission by the ICG to this Review and in response to formal questions from the Review make it clear the ICG intended that each project would receive a comprehensive merit-based assessment. This included consideration of the significant environmental or other constraints of the site and any other significant impacts on the local area. The ICG’s process mimics most of the EP&A Act requirements in relation to merit assessment.

Referrals to government agencies were required in the same way as under the EP&A Act, but there were tight time constraints and conflict resolution strategies in place to resolve issues arising from referrals. The ICG has advised the Review that the expert advice from government agencies was accepted in all cases (e.g. regarding bushfire risk, threatened species, etc).

In the interests of transparency, the ICG published all assessments in the Sydney Morning Herald and on the website.

Although the ICG essentially mimicked key elements of the EP&A Act systems, there were some important differences:

- The ICG opted for a site-by-site assessment of the major constraints of each site without concern for the generic controls that occur in SEPPs, Local Environment Plans (LEPs) and Development Control Plans (DCPs).
- The ICG was not required to meet the notification requirements for applications either generally or specifically for potentially affected sites (e.g. neighbours).43
- Referrals were dealt with rapidly and relevant conditions were imposed as part of the ICG’s determination rather than requiring a separate process post approval of the Development Application (DA).
- NBJP projects could not be delayed unduly by local issues. This particularly applied to social housing projects where there is a long

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42 ICG, Response to Review Questions, June 2010, p.35
43 Although note that Housing NSW notified neighbours consistent with the requirements in the AHSEPP which are less onerous than for the same development when considered by councils under Part 4 of the EP&A Act. Applicants for education projects were ‘encouraged’ to notify neighbours prior to lodgement of their application.
history of opposition by some councils to the development of social housing in residential areas.  

- The short approval chain, adequate resources, use of senior planning staff, etc all assisted with speed. The tight focus on only two main types of development – neither of which is particularly complex – and the reduced range of issues to be considered for these two types assisted with both speed and quality of assessment.

- The significance of freedom from appeal is more difficult to characterise. The ICG’s assessment in response to a formal question was that it was not a ‘conscious factor in the assessment’. However, the Review questions whether this position is sustainable given the complexity of the current planning system and the frequent use of the Land and Environment Court processes, or threat of such use, by proponents of development. This comment does not impute a lack of professionalism in the ICG’s assessments – simply that the assessors could focus on the things they considered were material to the potential impact of the project rather than procedural or legal technicalities.

In September 2009 the ICG commissioned a review of the planning assessments under Part 5 to determine whether they complied with the requirements in the User Guide and Procedures Manual. Some were found to not comply and a comprehensive review of all assessment files was then commenced in November 2009. The ICG advised the Review that the non-compliance arose during the period of increased lodgement of applications and commencement of new staff. Balanced against this was advice at interview from Sydney City Council officers that planning staff reviewed a substantial sample of published assessments and found them to be consistent with merit assessment principles.

Most BER and Social Housing projects that were not assessed under Part 5 were considered under a recent SEPP, the Infrastructure SEPP (for BER) or under the Affordable Rental Housing SEPP (for social housing). These two SEPPs and their shortcomings are addressed elsewhere in this Review. The point here is that the majority of non-Part 5 assessments were not typical of local council requirements and procedures and therefore cannot be used to compare the perceived efficiency of the ICG’s processes and procedures with those of local councils generally.

It should also be noted that the planning capacity of local councils varies considerably. Sydney City Council officers suggested to the Review that a well-resourced and efficient council could meet or better the performance of the ICG in terms of meeting assessment timeframes (a point disputed by the Taskforce Office). However, local councils often find it hard to manage a development consent process that is unbiased in relation to locally controversial developments, such as social housing, even where

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44 This is consistent with interview responses by Ryde Council officers who stated that there had been much more controversy over the social housing NBJP projects in Ryde LGA than over much larger NBJP education projects with significantly greater environmental impact. The risk entailed in local council opposition to social housing projects that could not be approved by Housing NSW under the AHSEPP caused the ICG to make a decision in July 2009 that all social housing projects that could not be assessed for approval by Housing NSW would be assessed by the ICG under Part 5. Some comments to the Review by officers of local government suggested that this may have been premature, but comments by others suggested that such a move was inevitable if timelines were to be met.

45 ICG, Response to Review Questions, June 2010, p.41
such developments are considered to be in the State interest. Consequently most potentially controversial developments that could not be approved under the SEPPs were approved under Part 5.

Overall, the ICG appears to have managed the Part 5 process well. Some individuals may disagree with particular decisions made under Part 5, but there has been limited concern raised with the decision-making and the quality of the assessments. The ability to meet the tight timelines set by the Commonwealth indicates that the ICG struck a reasonable balance between accepting projects for assessment under Part 5 and processing projects either under the ISEPP or AHSEPP or by local councils under Parts 4 or 5A of the EP&A Act.

Although not required to do so, the ICG has adopted a transparent process involving publication of guidelines for assessments, publication of the assessments themselves and audit of compliance with the guidelines.

3.5 The BER Program

3.5.1 Introduction

Since s.6(3) of the Act gives the ICG overall responsibility for NBJP projects in NSW and the capacity to provide direction to NSW government agencies or carry out NBJP projects itself, the success or otherwise of the two main NBJP programs is relevant to consideration of the performance of the ICG under Term of Reference (b). BER is considered in this section and the Social Housing Initiative in 3.6 below.

In assessing the ICG’s performance in these two programs the Review remains conscious of the review principles set out in 3.1 above and the constraints imposed externally on the capacity of the ICG to implement the programs, set out in 3.3 above.

3.5.2 Outcomes, Costs, Timing and Employment

The BER program has three components:

- National Schools Pride (NSP) projects;
- Science Laboratory and Language Learning Centres (SLCs) for 21st century secondary schools; and
- Primary School projects for the 21st century (widely described as the P21 school program).

Table 11 provides summary data on the numbers of projects and schools involved and the total allocated and expected expenditures.

The NSP program provided up to $200,000 to every primary and secondary school in NSW to undertake refurbishment works or minor building projects. The 2,179 NSW projects were completed between March 2009 and May 2010. Of these projects, 2,120 were completed by January 2010 (the initial Commonwealth government target date) with the remaining 59 completed by May 2010 as agreed by the Commonwealth.

Under the SLC program, a new science laboratory or language learning centre was provided in 118 disadvantaged secondary schools. Of these projects, 114 were

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46 Review questions to the Department of Education on the BER program and the Department’s response can be found at Annexure E to this report.
completed and occupied by June 2010 (the initial Commonwealth government target date) with the remaining four projects completed by July 2010.

Under the P21 program the Commonwealth provided between $250,000 and $3.0 million to each primary school to build, or in some cases to refurbish, libraries, school halls, classrooms or other facilities. A total of 2,366 projects have been approved in 1,782 primary schools with a total budget of $2,985 million.

By end July 2010 construction had started on 2,282 P21 projects and 639 projects were finished and fit for use. As at end of June 2010 spending on the program totalled $1,694 million (56% of the total program funding). Under the initial Commonwealth-State agreement this program would be completed by June 2011. Under a revised agreement initiated by the Commonwealth a small amount ($107 million) would be carried over into 2011-12.

**Table 11. The BER program in government schools as at end July 2010**

<table>
<thead>
<tr>
<th>Program</th>
<th>Projects</th>
<th>Schools</th>
<th>Funding allocation per project</th>
<th>Total allocated expenditure to projects</th>
<th>Total expected expenditure</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No.</td>
<td>No.</td>
<td>($'000)</td>
<td>($m)</td>
<td>($m)</td>
</tr>
<tr>
<td>National Schools Pride</td>
<td>2179</td>
<td>2179</td>
<td>50– 200</td>
<td>288</td>
<td>288</td>
</tr>
<tr>
<td>Science and language learning centres</td>
<td>118</td>
<td>118</td>
<td>1300</td>
<td>151</td>
<td>146</td>
</tr>
<tr>
<td>P21 primary school projects</td>
<td>2366</td>
<td>1782</td>
<td>250 – 3,000</td>
<td>2985</td>
<td>2985</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>4663</td>
<td>2179</td>
<td>3424</td>
<td>3419</td>
<td></td>
</tr>
</tbody>
</table>

(a) Excludes general administrative overheads (initially 1.5% and now 1.3% of funding) and GST.

Source: Advice from Integrated Program Office, Department of Education and Training

**Table 12. Employment in the BER program in government schools to June 2010**

<table>
<thead>
<tr>
<th>Program</th>
<th>Average daily employment on site</th>
<th>Number of apprentices who have worked in program</th>
<th>Total apprentice hours of work in program</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No.</td>
<td>No.</td>
<td>No.</td>
</tr>
<tr>
<td>National Schools Pride</td>
<td>2820</td>
<td>unknown</td>
<td>unknown</td>
</tr>
<tr>
<td>Science and language learning centres</td>
<td>700</td>
<td>180</td>
<td>37,000</td>
</tr>
<tr>
<td>P21 primary school projects</td>
<td>7880</td>
<td>3000</td>
<td>612,000</td>
</tr>
</tbody>
</table>

Source: Advice from Integrated Program Office, Department of Education and Training

Overall under the BER program there are 4,663 projects in 2,179 schools in NSW. The total allocated expenditure is $3,424 million and total expected expenditure is $3,419 million. The P21 program accounts for 87% of this expenditure.

By end-June 2010, construction had started on over 4,500 of the total number of projects and 2,900 projects were completed and fit for use. Over $2,123 million had been expended (accounting for 63% of total Commonwealth BER funding to NSW).
This level of expenditure was some six times DET’s annual business-as-usual capital program.

Table 12 shows the employment on-site in construction generated by the program. At the peak, with all three programs operating together, over 11,000 jobs per day were generated.

3.5.3 Commonwealth Ground Rules for BER Projects

3.5.3.1 Introduction

The ground rules for the funding and delivery of BER projects were set out in various documents. These were the:

- COAG Communiqué and Attachments (February 2009);
- National Partnership Agreement on the Nation Building and Jobs Plan: Building Prosperity for the Future and Supporting Jobs Now (February 2009);
- Bilateral Agreement on the Nation Building and Jobs Plan signed by each State and Territory (the NSW agreement was signed in April 2009 with Variation signed in October 2009);\(^{37}\)
- Funding Agreement supporting the Building the Education Revolution: the National Partnership Agreement on Nation Building and Jobs Plan; and

The key elements of the main documents were set out in some detail under Term of Reference (a). The important points are reiterated here along with some additional material from the Guidelines. For convenience, Version 3 of the Guidelines is used although it should be noted that Version 1 was the relevant version for submission of projects for all three rounds of the main BER program (P21). The different rules for the three BER programs are described separately below.

3.5.3.2 P21 School Projects

P21 funding was to be used to deliver (in order of priority) new libraries, multi-purpose halls, classrooms or refurbishment works.

\(^{1}\)Funding can be used for capital expenditure on the following items (in order of priority):

1. construction of new libraries;
2. construction of new multipurpose halls (e.g. gymnasium, indoor sporting centre, assembly area or performing arts centre) or, in the case of smaller schools, covered outdoor learning areas;
3. construction of classrooms, replacement of demountables or other buildings to be approved by the Commonwealth; or
4. refurbishment of existing facilities.

\(^{37}\) Bilateral Agreement on the Nation Building and Jobs Plan. An Agreement between the Commonwealth of Australia (represented by Department of Employment, Education and Workplace Relations) and New South Wales (represented by Department of Education and Training), 14 April 2009, and Variation to that Agreement signed on 27 October 2009.
If a school applies for funding that is not the first funding priority (i.e. a library) it must provide reasonable explanation for why it is not seeking funding for a library or for any other capital item which is higher in the priority list above.\textsuperscript{48}

Importantly, moneys were to be spent as far as possible on construction of new buildings.

Schools were allocated prescribed ‘indicative funding caps’, which depended on their current enrolments.\textsuperscript{49} The caps varied from $250,000 for schools with 50 students or less, to $3.0 million for schools with over 400 students. These funds were allocated to school principals (via the NSW Treasury, then DET). Initially the Commonwealth proposed that these funds be fixed amounts which could not be reallocated without the principal’s consent. After negotiations with the States, the Commonwealth agreed that State governments could transfer up to 5% of the funds between schools but not more than 5% without written permission of the principal.

Construction of Round 1 P21 primary school projects had to commence no later than June 2009, Round 2 projects by August 2009 and Round 3 projects by 1 December 2009. All projects were to be completed by March 2011.

These targets had to be achieved. Failure to do so risked loss of funds. ‘Projects which are unable to demonstrate their ability to be completed within the specific timeframe will not be funded.’\textsuperscript{50} This meant that projects had to be ‘shovel ready’ or planned very quickly. It was also a condition of the agreement that the projects were not to replace or substitute for normal State capital works programs.

In each case the projects had to be based on a set of design templates submitted by each State and Territory to the Commonwealth for approval unless it could be shown that departure from the template could be justified.

Procurement models were expected to ensure that Commonwealth funding reached the community as quickly and broadly as possible.

3.5.3.3 Science Laboratory and Language Learning Centres

Like the P21 buildings, the SLCs were expected to be new buildings.

The COAG Communiqué of 5 February 2009 indicated that SLCs would be funded on a competitive basis where schools could demonstrate a capacity to complete construction by June 2010. However, this was modified and projects were selected primarily on a socio-economic basis with the projects allocated to schools in more disadvantaged areas. This could be based on various established indices of disadvantage as noted in the Guidelines (p.9).

3.5.3.4 National School Pride Projects

Sixty percent of NSP refurbishment projects were to commence in 2008-09 and the other 40% were to commence in 2009-10.

\textsuperscript{49} \textit{ibid.}, p.5
\textsuperscript{50} \textit{ibid.}, p.3
3.5.4 Method of BER Program Delivery in NSW

3.5.4.1 General Governance Structure for BER Program

As described under Term of Reference (a) the NSW ICG has powers to plan, approve and deliver all parts of the BER. Parts 3 and 4 of the Act establish a coordination role for the ICG with the added ability (with the concurrence of the Premier or in some cases a Minister) to step in and take over the infrastructure work of the agency previously undertaking the project. The provisions of Part 5 allow the ICG to assess and determine approvals outside the normal planning approval processes.

The governance structure for the delivery of the BER projects is outlined in Figure 1. As shown, an Integrated Program Office (IPO) was established within the Department of Education (DET) to deliver the BER program. The IPO reported through the Deputy Director-General Finance and Infrastructure in DET to the Director-General of DET. However, the statutory role of the ICG meant that in practice there was a second reporting line from the IPO to the ICG. Conflicts were resolved by negotiation between the ICG, DG DET and the CEO of the IPO. The ICG had no need to use the coercive powers in the Act for this purpose.

![Figure 1. Outline of governance structure for BER program](image)

In business-as-usual in DET, work involving asset capital works and maintenance is undertaken by three organisations: DET, Department of Services, Technology and Administration (DTSA, formerly the Department of Commerce) and private firms as shown in Table 13.

<table>
<thead>
<tr>
<th><strong>Table 13. Responsibilities under business-as-usual delivery of assets</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>DET Asset Management</strong></td>
</tr>
<tr>
<td>Facilities evaluation</td>
</tr>
<tr>
<td>Project selection</td>
</tr>
<tr>
<td>School consultation</td>
</tr>
<tr>
<td>Pre-construction</td>
</tr>
<tr>
<td>Administering facilities standards</td>
</tr>
<tr>
<td>Program administration</td>
</tr>
<tr>
<td>Reporting</td>
</tr>
</tbody>
</table>
The ICG considered that planning and delivery of the BER program would require a single focused project team with significant interaction with the schools. The ICG indicated to the Review that the dual and at times unclear accountability of DET and DSTA in their traditional ‘business-as-usual’ roles would be unsuitable for planning and delivering the large and highly time-constrained BER program.51

The ICG also considered that the likelihood of successful delivery of the program would be greater with a special purpose planning and delivery team working inside DET than with a similar team outside DET. Accordingly the IPO established in DET contained the three main sources of expertise required for delivery of the BER, namely DET Asset Management staff, staff from DSTA and expertise from the private sector.

As noted in 3.4.4 above, the Infrastructure SEPP (ISEPP) was to be used for assessment of BER projects wherever it was suitable. When the IPO was established, a number of statutory planning experts and education facility builders were brought together to ‘test drive’ the then ISEPP in the context of the BER. The work of this group led to certain recommendations to amend the ISEPP to respond to potential issues that had been identified. The NSW Department of Planning supported these recommendations and the ISEPP was amended prior to its use within the BER program.

3.5.4.2 Delivery of P21 Projects

Following announcement of the national BER Program on 5 February 2009, the IPO asked school principals to submit priority projects through a Zoomerang Survey in March 2009.52 Many school principals put forward preferred projects that involved refurbishment and/or facilities that were not on the hierarchy of acceptable facilities listed in 3.5.3.2 above. The results obtained from the school principals were forwarded to the Commonwealth which then rejected the proposals. NSW then sought clarification from the Commonwealth and the IPO worked with schools to arrive at projects that would meet the Commonwealth tests. Only projects approved by the school principal were submitted to the Commonwealth.

It should be noted that the original Commonwealth Guidelines (February 2009) provided little guidance to school principals. These Guidelines have since been described as vague by the Commonwealth Auditor-General. Moreover, given the tight timeframes some principals had less time to consult with their school community than they would have liked.

All P21 projects were initially designed to comply with the Schools Facilities Standards (SFS) which DET has developed and tested over many years. The SFS meet and often exceed the standards set by Building Code of Australia and regulations. The Building Code of Australia contains technical provisions for the design and construction of buildings and other structures, covering matters such as structure, fire resistance, access and egress, services and equipment, and energy efficiency, as well as certain aspects of health and amenity. The SFS has to meet complex safety and security

51 ICG, Response to Review Questions, June 2010, pp.13-14
52 Zoomerang is software that can be used for online surveys.
standards for all school children and be proof against many forms of accidental and potentially damaging incidents to persons and property.\textsuperscript{53}

In order to deliver the projects on time and with least risk to the government, the IPO appointed Managing Contractors (MCs) to nine regions in NSW.\textsuperscript{54} The appointments were made by a detailed competitive process under a purpose-designed tender sent to the 14 largest construction companies in Australia. Each tenderer was asked to submit four ‘prices’ on two bases.

- The four prices were fee percentages for site supervision (program administration and management on site); overall project management (subject to the Commonwealth maximum of 4%); a profit margin; and a Managing Contractor incentive fee (a bonus for early delivery or cost savings in a project).
- The two bases were (A) contracting a builder to supervise the project and (B) acting as the builder and directly contracting all the trades for the projects.
- The tenderers also had to nominate the proportion of the projects that would be undertaken with the (A) or (B) methods.

The following process was used to obtain cost estimates and to finally approve costs for each project.

- The IPO provided the Managing Contractor with a rudimentary sketch plan and typically a two-page project brief. The MC then prepared a Preliminary Cost Estimate (PCE) and submitted this to the IPO.
- After some discussion with the IPO about the project scope and costs and in some cases checks by a quantity surveyor, the MC provided a fully documented project and a new Estimated Construction Sum (ECS). Once approved by the IPO, in some cases with a revised scope to meet budget constraints,\textsuperscript{55} this represented the scope approval.
- The MC then competitively tendered every school project either to at least three builders or directly to trades. If the latter was done, the MC produced a sub-contract award report.
- The IPO then established a benchmark price (value) for the project. The IPO compared the tender costs of the project to the tendered costs of similar projects within the BER program. The benchmark value (BMV) equals 80\% of the project tender price plus 20\% of the average price of a similar project.
- Throughout the project the MC provides details of actual construction costs (ACS) incurred.
- On project completion the IPO pays the MC the lesser of 105\% BMV or an audited ACS. In most cases the audited ACS has been below 105\% BMV.
- If during construction all expected funds including contingency allowance were not required, principals were invited to nominate additional or de-scoped items to be funded.

\textsuperscript{53} The SFS are discussed further in 3.5.6.4 below.
\textsuperscript{54} There are actually 10 education regions in NSW but two (New England and North Coast) were grouped together for the purpose of tendering.
\textsuperscript{55} The capped funding levels provided by the Commonwealth.
Importantly the MC bears all the risk of cost overruns unless variations have been agreed with the IPO.
Variations can occur between the BMV and ACS stages due to (i) unexpected latent conditions on site, or (ii) errors and omissions. However the contract between DET and the Managing Contractors requires projects to be defect free before they can be accepted as contractually complete.

The IPO withholds 5% of the budget (contingencies) for each school to enable it to move funds from under-budget schools to over-budget schools mainly through the reduction of allowed contingencies.

The NSW Cabinet agreed that 400 schools could get more than their Commonwealth allowance if they would agree that any unspent funds could be transferred.

All procurements were required to follow NSW Government procurement guidelines for contracts as per the *NSW Code of Practice and Code of Tendering for NSW Government Procurement*. Revision of the Code was not an option in the time available.

Cost control and value-for-money checks were embedded into each stage of the process. Table 14 shows the additional checks on value-for-money compared with a DET business-as-usual approach.

**Table 14. BER and DET business-as-usual methods compared**

<table>
<thead>
<tr>
<th>Value-for-money check</th>
<th>DET ‘BAU’</th>
<th>BER</th>
</tr>
</thead>
<tbody>
<tr>
<td>Competitive tender to appoint Managing Contractor</td>
<td>X</td>
<td>√</td>
</tr>
<tr>
<td>Pre-tender estimate (preliminary cost estimate, PCE)</td>
<td>√</td>
<td>√</td>
</tr>
<tr>
<td>Estimated construction sum (ECS)</td>
<td>√</td>
<td>√</td>
</tr>
<tr>
<td>Project tendered</td>
<td>√</td>
<td>√</td>
</tr>
<tr>
<td>Estimated benchmark value</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Actual construction sum</td>
<td>X</td>
<td>√</td>
</tr>
<tr>
<td>Audit of actual construction sum</td>
<td>X</td>
<td>√</td>
</tr>
</tbody>
</table>

The IPO publishes summary cost information for every school on the NSW BER website at [www.ber.nsw.gov.au/index.php/find-your-school](http://www.ber.nsw.gov.au/index.php/find-your-school) at three stages: at estimated construction sum (ECS) stage; benchmark value (BMV) stage; and at completion (the ACS) once final project costs are known. In each case the information is provided to school principals before it is published online.

The published information is broken down into 13 headings. These include a network substation allowance, Managing Contractor’s project management cost and incentive fee, the modular building cost, design documentation and site management, preliminaries, substructure and superstructure, site works and site services, design and price risk contingency. In addition there is the 5% contingency withheld and a 1.3% allowance for IPO project management cost.

As at end June 2010, the BER website showed cost breakdowns at the ECS stage for some 1,900 P21 school projects. School principals have been advised though a number of avenues that at any time they may request more detailed breakdowns of their ECS. A similar process is undertaken for BMVs and ACSs.
A program of this value, size and speed combined with delivery by a newly established management team and procurement model posed significant risk in delivery. To ensure these risks were appropriately managed, the following internal and external steps were undertaken for delivery of the BER program:

- Establishment of an IPO Governance Unit with the advice of an independent probity and governance adviser, Procure Group.
- Establishment of a sub-committee of DET’s Audit and Risk Committee for the IPO.
- Consultation with the Independent Commission against Corruption (ICAC).
- Early preparation of an IPO Risk Register by senior management in consultation with the Department’s Internal Audit Unit, the NSW NBJP Taskforce and the independent probity and governance adviser. This Risk Register is reviewed regularly by senior management of the IPO and the Audit and Risk sub-committee.
- An audit plan overseen by the Audit and Risk sub-committee to coordinate audits by the NSW Audit Office, the NBJP Taskforce, DET’s Audit Directorate and the IPO’s Governance Unit.

3.5.4.3 Delivery of Science Laboratory and Language Learning Centres

SLCs were delivered by DET’s business-as-usual process, i.e. by provision of new contracts and by variation of existing contracts, but managed by the IPO. All new contracts were issued via a competitive process. (Existing contracts had usually been won via competitive tender.)

3.5.4.4 Delivery of National School Pride Projects

NSP projects for $50,000 to $250,000 were also carried out by DET under business-as-usual processes, again managed by the IPO. Thus NSP projects were delivered through existing Asset Management contracts or by locally managing school principals. Where delivery is by the Asset Management Contractor, the contractor has been assessed by DET to be able to provide value-for-money. Where a school principal is locally managing the works, the principal is required to meet all DET procurement guidelines.

3.5.5 Evaluation Framework

An evaluation of the BER program must be based on objectives of the program. The criteria used by the Review for this purpose are set out below.

The evaluation needs to deal with both outcomes and processes. Arguably what matters is outcome rather than process. The process matters in so far as it affects the outcome. Nevertheless a review of process is appropriate both as an indirect check on outcomes and as an indicator of the robustness and sustainability of the process for future programs.

The September 2009 Guidelines (p.2) outlined the Commonwealth objectives as follows:

'Through the BER, the Commonwealth aims to:

1. Provide economic stimulus through the rapid construction and refurbishment of school infrastructure.
2. Build learning environments to help children, families and communities participate in activities that will support achievement, develop learning potential and bring communities together.

Thus the first objective was speed or timeliness. As the ICG observed in evidence to the Legislative Council Inquiry on 30 June 2010, ‘the overwhelming priority [of the NBESP] was to stimulate the economy and to generate jobs’. This is reflected in the NSW Act where the sole Object is the timely delivery of the Commonwealth-funded projects.

The second objective in the guidelines is a rather high level one. It is directed to providing education infrastructure while at the same time improving community access to schools and integrating communities around schools. There were specific requirements for community access to some types of facilities constructed with BER funds.

‘Value-for-money’ has become an important focus for public debate and also a focus for some reviews. In some of those reviews it has been raised to the status of an objective of the BER program. As has been noted, value-for-money was not a formal objective in the COAG documents, Version 1 of the BER Guidelines or in the NSW Act. The Australian National Audit Office records that ‘value-for-money’ was not mentioned until Version 2 of the BER Guidelines was issued by the Commonwealth on 26 August 2009.

Although ‘value-for-money’ was not a formal objective of the program, the ICG was clearly of the view that value-for-money was an important consideration along with the opportunity to leave a lasting positive legacy from the NBJP projects. This Review has therefore included it in the evaluation criteria.

The term ‘value-for-money’ is defined or used in different ways by different people. In this Review we adopt a broad definition of value-for-money which is consistent with the use of this concept in standard welfare economics analysis. Under this broad view, value-for-money in BER has three main components:

- selecting projects that meet the highest priorities and greatest needs of the school community;
- providing fit-for-purpose projects (i.e. projects with appropriate design and quality); and
- delivering a specified project or product at least cost (cost-effectiveness).

Thus in evaluating the BER program below, the Review considers timeliness (and related employment generation) and these three elements of value-for-money.

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56 NSW Parliament, Report of Proceedings before General Purpose Standing Committee No. 2, 30 June 2010, p.64
57 ANAO, Building the Education Revolution - Primary Schools for the 21st Century, 5 May 2010
58 ICG, Submission to the Review, May 2010. See Annexure C to this report.
59 It may be noted that the Commonwealth BER Implementation Taskforce (Interim Report, August 2010, p.7-8) has defined value for money as timeliness, quality (fit-for-purpose) and cost (relative to historical cost benchmarks). The Taskforce did not nominate project selection.
Turning to process or governance issues, these include appropriate dealings with local councils, consultations with local school communities, appropriate procurement methods (usually by competitive tender), transparency of costs and other processes and auditing of the process.

Two further points about the assessment of the program should be made. First, any assessment of this nature has to establish a comparator or counterfactual. In particular, what would have been the likely outcomes if another process had been chosen? The natural counterfactual is ‘business-as-usual’ methods of project selection, approval and delivery within the State. While it is doubtful that such methods could have delivered the BER projects on the required timescale, this is considered a reasonable comparator for projects in the longer term.

Second, there are inevitably trade-offs between the criteria. This is especially between timeliness and the other criteria. It would be very hard to achieve high scores against all criteria simultaneously. As the BER Implementation Taskforce observed, there would be clear trade-offs between its three value-for-money criteria (timeliness, quality and cost). Any final scorecard has to recognise these trade-offs.

### 3.5.6 Assessment of Outcomes of the BER Program

#### 3.5.6.1 Introduction

The main focus of the Review is on the P21 program as this was the largest BER program and the major departure from business-as-usual practices. As has been seen, the works under the SLC and NSP programs were much smaller and were procured through standard business-as-usual competitive tendering processes.

In making the assessments below this Review draws on various existing data sources as well as on submissions to the Review and responses to formal questions put to the ICG and to agencies. Given the number and scope of other inquiries, including the Commonwealth BER Implementation Taskforce Review and the NSW Legislative Council Inquiry, and other surveys being undertaken concurrently, the Review considered it more appropriate to work with available data sources than to burden schools with more requests for information.

DET has provided a detailed analysis of the complaints about BER projects of which it is aware. These complaints have come mainly from the schools directly or through the NSW Primary Principals’ Association (PPA) which represents all 1,782 primary schools in the State. As at 23 July DET had recorded issues in 133 schools. The BER Implementation Taskforce received 143 complaints concerning NSW schools – a similar number.

Nearly all issues relate to the P21 program. Some schools raised more than one issue. However considering the main issue in each case, the following is an approximate breakdown of the issues by major concern:

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61 The Association has a membership of 1800 Principals and describes itself as the peak advisory body to the DG DET on matters relating to primary education in NSW. Note that there is a second, much smaller association representing principals (the Public Schools Principals’ Forum) which often takes a different position on issues to that taken by the PPA.
Poor cost-effectiveness includes alleged high cost for the facility provided and de-scoping of the project. Nearly half of the issues in this general category concerned a reduction in the expected or planned scope of the works due to budget constraints. Poor delivery includes both alleged late delivery and poor quality work. In some cases (about 10) there were also concerns about the lack of consultation.

The submission by the NSW Teachers Federation to the Review also described 27 cases of significant problems in the P21 program.

Overall these data suggest that some issues occurred in around 7.5% of government primary schools in NSW. As at end July 2010, DET advised the Review that 27 of these issues were fully resolved, 54 issues were resolved pending confirmation from the school principal, 19 were under consultation and 33 required further research.

It should also be noted that this Review received 27 submissions from local councils. Of these, six raised concerns about planning approvals in BER projects. This is less than 5% of all councils in the State.

Undoubtedly there have been some problems which are discussed further below along with some other survey results. However, overall the figures represent a small proportion of schools relative to the size of the BER program. This conclusion is consistent with the evidence of officers of the NSW Primary Principals’ Association (PPA) in evidence to the Review and to the NSW Legislative Council Inquiry. As the Chairperson of the PPA Asset Management Reference Group, Ms. Colquhoun, stated in evidence to the Legislative Council, ‘The majority of principals are happy with the projects they have and [that] are being built at the moment or nearing completion’. Ms. Colquhoun also told the Review in interview that there are only a minimal number of outstanding issues.

3.5.6.2 Timeliness and Employment Generation

As noted above, by end July 2010 construction had started on 2,282 NSW P21 projects out of a total of 2,366 projects and 639 projects were completed as fit for use. By end of June 2010 spending on the P21 program totalled 56% of the total P21 program. Nearly all projects were completed within Commonwealth timelines.

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63 The enrolment-based funding allocations for P21 took no account of regional or site-specific constraints that could significantly affect the capacity of a school to deliver an equivalent facility to one delivered by another school with different constraints.

64 NSW Parliament, Report of Proceedings before General Purpose Standing Committee No. 2 [uncorrected proof], 18 June 2010, p.63
By contrast the ANAO\textsuperscript{65} reported that across Australia, as at February 2010, only 78% of BER P21 projects had met commencement targets. Further, construction on P21 projects over the country had been much slower than targeted. Of the 10,700 approved BER P21 projects, only 1,995 projects (18.6\%) met the construction commencement milestones originally agreed by the Commonwealth government for each funding round. Based on these observations it is clear that NSW out-performed other jurisdictions in timeliness of delivery.

This conclusion is confirmed by the Interim Report of the BER Implementation Taskforce, using data up to July 2010. In the words of the Taskforce, 'NSW has performed impressively against the required implementation timeframes (95\% of projects completed or commenced versus 64\% and 60\% for the Victorian and Queensland Governments respectively)'.\textsuperscript{66}

It is clear from the ICG's submission to this Review, evidence to the Legislative Council Inquiry and interviews with the members of this Review that the timeframes and potential penalties for non-compliance were taken very seriously. The capacity for business-as-usual to deliver within these timeframes was therefore relevant to any decision that the ICG might make about service delivery models for BER.\textsuperscript{67} Table 15 shows typical timetables for the BER and business-as-usual. In BER major capital works were undertaken in under 18 months as per the Commonwealth’s requirements. Under business-as-usual the works would typically have taken four years.

Recently the Australian Government has relaxed their delivery deadlines for the program and has not penalised jurisdictions that failed to deliver to targets. This has led some stakeholders to question the IPO and Managing Contractors’ insistence to schools on timeframes.\textsuperscript{68} However the Review considers that to perform on time as per the agreement with the Commonwealth and thereby ensure the availability of funds for the schools was the prudent and appropriate course of action.\textsuperscript{69}

Overall the NSW building program was time efficient. Of the 133 schools raising issues, only seven schools have highlighted delays in the projects. This is a very small proportion of the total 1,782 schools in the P21 program.

This timely construction process was largely responsible for the employment of over 11,000 workers per day over most of the BER programs to date.

\textbf{Table 15. Time for major capital works under business-as-usual and BER (months)}

<table>
<thead>
<tr>
<th>Work program</th>
<th>DET BAU</th>
<th>BER</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nomination and budgeting</td>
<td>18</td>
<td>2.0</td>
</tr>
<tr>
<td>Pre-construction</td>
<td>12</td>
<td>1.5</td>
</tr>
<tr>
<td>Construction and commissioning</td>
<td>18</td>
<td>12.0</td>
</tr>
<tr>
<td><strong>Total time</strong></td>
<td><strong>48</strong></td>
<td><strong>15.5</strong></td>
</tr>
</tbody>
</table>

\textsuperscript{65} ANAO, \textit{Building the Education Revolution - Primary Schools for the 21st Century}, 5 May 2010, p.15

\textsuperscript{66} BER Implementation Taskforce, \textit{Interim Report}, August 2010, p.12

\textsuperscript{67} Including consideration of an augmented or modified version of business-as-usual

\textsuperscript{68} For example, Mr. Chudleigh, Deputy Chairperson of the Public Schools Principals Forum, in evidence to the NSW Legislative Council Inquiry. NSW Parliament, \textit{Report of Proceedings before General Purpose Standing Committee No. 2 [uncorrected proof]}, 18 June 2010, p.57

\textsuperscript{69} See 3.5.3 above
3.5.6.3 Project Selection

Determining whether schools obtained their priority project is complex for two reasons. First, different stakeholders (DET, principals and local parents and citizens’ associations) often have different views on priorities. DET often seeks to make maximum use of under-used assets and to minimise long-term maintenance and liabilities. School communities sometimes have a more immediate focus on more space and alternative uses with less consideration for the impact on recurrent costs. There will always be some differences of opinions on priorities.

Second, whether school communities got the primary asset they wanted depends on the way the question is asked: did schools receive their first choice assuming no Commonwealth constraints on type of project or their first choice within these constraints?

If there had been no Commonwealth constraints on choice of projects, undoubtedly many schools would have chosen a different project. In the words of the Program Director of the IPO in DET, ‘nearly every school would have wanted something different’. In many cases the first priority would have been a major refurbishment or upgrade of an existing asset, but this was not allowed by the Commonwealth in P21 projects unless it could be demonstrated that the facilities in the program hierarchy above refurbishments (i.e. libraries, halls and classrooms) were not required at that school. For SLCs the facilities had to be new.

These views were strongly supported in interviews undertaken by this Review. For example, the Federation of Parents and Citizens’ Associations in NSW (FPCA) contended that much more could have been achieved by targeted recycling of assets. The emphasis on new buildings has left some structures under-maintained and under-used. Because of these constraints some usable buildings were reportedly knocked down to make way for new ones.

In evidence to the Legislative Council, the Chairperson of the Public Schools Principals’ Forum (PSPF), Ms. McBride, stated that many principals and school communities recognise that ‘the children are in classrooms 90 per cent of the time and would actually have preferred refurbishment, if not rebuilding, of classrooms rather than halls etcetera’. In survey responses from some 220 schools the PSPF found that 70% of the schools received one of their top four priorities but that 30% believed they had been totally ignored.

In other evidence to the Legislative Council Inquiry, the Deputy President of the NSW Teachers Federation, Mr. Zadkovich, pointed out that DEEWR refused to accept a ‘sensible’ cost-effective proposal from public school stakeholders in NSW for the refurbishment of science and language facilities in over 250 secondary schools in the State instead of constructing new facilities. According to other evidence from Ms.

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70 This conclusion is reinforced by the responses of school principals to the initial Zoomerang survey seeking project proposals in March 2009. These initial proposals contained a proportion of refurbishments that was not acceptable to the Commonwealth and the proposals were rejected by the Commonwealth.

71 NSW Parliament, Report of Proceedings before General Purpose Standing Committee No. 2 [uncorrected proof], 18 June 2010, p.53

72 Summary of survey responses supplied by PSPF to the Review.

73 NSW Parliament, Report of Proceedings before General Purpose Standing Committee No. 2 [uncorrected proof], 18 June 2010, p.40, referring the Committee to Attachment C to the Federation’s submission to that inquiry.
Zadkovich and the view of the ICG provided to the Review, instead of constructing new SLCs in 118 schools it would have been possible to refit and refurbish facilities to achieve effective SLC standards in over 400 schools in NSW.

The Australian Government’s guidelines for project priorities and expenditure allocations meant that the highest priority needs within available funding were not always met in schools. In its report on the BER, the ANAO noted that the Australian Government approach:

‘unduly constrained Education Authorities’ ability to exercise their judgement about funding priorities across school systems within overall objectives for the program. This flowed from the strong emphasis on point-in-time student numbers as a basis for determining funding allocations and constraining the ability of education systems to allocate funding according to need: for example to account for growing or diminishing enrolments or with above or below average education facilities.’

‘Requiring Education Authorities to obtain agreement from school principals to allocate funding less than the funding amounts indicated by their enrolments, or to reallocate unneeded funding to other schools reduced the ability of school systems (such as government schools) to establish appropriate priorities for the investment across their systems.’

Furthermore, funding allocations were made known to schools before projects were designed or procurement undertaken. This created a risk that project designs and building contracts would be structured to ensure approved funding allocations could be fully used in a way that was inconsistent with value-for-money principles.

Undoubtedly, these Commonwealth constraints created some sub-optimal outcomes. In some cases, the outcomes were significantly sub-optimal.

If we turn instead to a restrictive view of school priorities (i.e. within the constraints of the Commonwealth’s Guidelines) a more positive conclusion can be reached. In March 2010 the Australian Primary Principals Association (APPA) ran a survey on the P21 and NSP programs. It surveyed 7,200 primary schools and received and reported on 2,411 responses, including 801 responses from NSW schools. About three-quarters of the national responses were from government schools. Within NSW 692 schools (87%) said that they were getting the projects they wanted within the Commonwealth guidelines and 104 (13%) said they were not.

In the ANAO’s national survey of schools over 95% of principals responding to the survey indicated that they considered BER P21 funding would improve their school and be an ongoing benefit to the school community.

It may be inferred that the IPO within DET did generally deliver projects with a relatively high priority within the Commonwealth Government’s constraints on choice of asset and deadlines for decision-making. There is also strong evidence via submissions to various inquiries, including the submission of the NSW Teachers Federation to the Review, that the school projects would have benefited from more time and more community consultation. However these consultations were also subject to time constraints imposed by the Commonwealth.

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74 ANAO, Building the Education Revolution - Primary Schools for the 21st Century, 5 May 2010, p.17
75 ibid., p.22
76 See Australian Primary Principals Association, Building the Education Revolution Survey Report, (undated), tendered to the NSW Legislative Council Inquiry and available on the NSW Parliament website.
3.5.6.4 Fit-for-Purpose Projects

Fit-for-purpose issues arise from both over-provision or over-design of services and from under-provision of services. Over-design creates a value-for-money issue with monies being spent on apparently inessential features. Under-provision may occur through de-scoping due to budget constraints or poor quality work with inferior finishes or other negative features.

The risks regarding delivery of high quality fit-for-purpose buildings were managed in the following ways:

- All P21 projects are delivered in accordance with DET’s Schools Facilities Standard (SFS).
- Standard design templates have been used in accordance with the SFS and Commonwealth guidelines.

The SFS is a high standard and highly detailed set of requirements. For example, halls have sprung timber floors rather than concrete floors and the suitable timber species are specified. To maximise life and limit damages, buildings have quality steel frames, heavy gauge roofing, thick glass windows, and plumbing with top-of-the-range enware taps. Small self-standing buildings are constructed to be vandal-proof and low maintenance. As the Director-General of DET pointed out in evidence to the Legislative Council Inquiry, soap dispensers are affixed deeply into walls to ensure that they are not ripped off by young boys swinging on them. He added that:

"We specify the type of mortar between bricks so bricks can be recycled at the end of the building’s life, so that the mortar can be replaced — the ratios of lime, cement and sand and the water. A briefing for a school hall will be a document like that, incredibly detailed, referencing Australian standards for the composition of top soil, the mix of fertilisers." 77

The minimum quality requirements set by the SFS mean that school projects can initially be significantly more expensive than domestic or commercial projects. However, DET maintains that the SFS is intended to provide good value-for-money over the life of the building and mean that schools are not only safe but also durable and cost-effective to maintain and clean throughout their life. 78 The SFS is a tried and tested system based on many years of professional experience. The underlying philosophy is to mitigate recurrent maintenance costs to ensure future funding is not diverted from teaching.

In any event, there was no time to overhaul SFS standards prior to commencement of the BER. The ICG took the view that, given the SFS had been developed by an iterative process involving extensive consultation and feedback, a set of ad hoc decisions by the ICG in lieu of using the SFS would not produce a good outcome.

The Review understands that DET does depart from the SFS from time-to-time on a case-by-case basis. Managing Contractors were permitted to vary the SFS for BER projects if this could be shown to be acceptable, but this did not happen often.

77 NSW Parliament, Report of Proceedings before General Purpose Standing Committee No. 2 [uncorrected proof], 18 June 2010, p.23
78 This is reinforced by a study conducted in 2010 by the ‘Procure Group’ of the 19 Public Private Partnership Schools constructed between 2002 and 2006 by Axiom Education. Axiom elected to use the SFS after detailed assessment of the potential life cycle costs.
Several submitters to the Review, as well as the ICG, NBJP Taskforce and IPO, suggested that the SFS standards could be inappropriate or excessive in some cases, especially for simple structures such as storage sheds, and that works were not always appropriately designed. Some small constructions had galvanised steel frames. Also, some of the concerns about the high costs of covered out-door learning areas (COLAs) could reflect unnecessarily high standards of structures and roofs. COLAs started life as shade structures with four poles and a ‘sail’ and gradually acquired tin roof, lights, beams and insulation, acoustic treatment and drop-down sides for weather protection: indeed all the attributes of a classroom except for walls. They were also often over a large area such as a basketball court.

In contrast to this, in evidence to the Legislative Council, the Director of Resources, Policy and Capital Programs in the Catholic Education Commission (CEC) Mr. Walsh, who is also Executive Officer of the NSW Catholic Block Grant Authority, observed that the CEC does not have fixed school building standards but builds according to local needs and resource availability. It has been said that this produces substantial cost savings, at least in procurement.

It is not the task of this Review to comment in detail on the suitability of the SFS. However, on the evidence presented to the Review by both the ICG and the IPO it seems that some works may have been over-designed, for example the ducting of fibre optic cable to canteens, or reflect an overly risk-averse position. In some cases shortages of materials, for window extrusions or preferred timber flooring, could perhaps have led cost-effectively to variations in standards.

On the other hand various submissions from school principals and school communities to the DET IPO raised such issues as lack of air-conditioning (several submissions), unflued gas heaters (now to be removed), insufficient shelf space in a library, a COLA too low for a basketball court, a lack of water tanks for a library in a drought area, a lack of drop down screen and projector, a canteen too small and so on. Some of these issues arose from de-scoping under budget constraints. Also a small number of submissions to the DET IPO suggested that finishes were of inadequate standard.

A further issue that has been raised is that some of the multi-function halls are too small to fit the entire school population. However, the halls are primarily curricular learning areas for activities such as dance, musical performances, drama and games and are not designed for chair-based seating for the entire school population given that primary school children are between five and 12 years of age and can be accommodated satisfactorily using floor-based seating on the sprung timber floors.

The Review concludes that:

(iv) The ICG had no realistic alternative to the SFS given the purpose of the BER program (spending within timeframe). The risks to the State from ad hoc deviation from carefully developed standards that could be applied from Day 1 were also unacceptable.

(v) There appear to be some problems with the SFS for some types of buildings and possibly a tendency to over-expensive, risk-averse design standards. A review would be appropriate. However, given the current progression of the BER program in NSW that review can be undertaken.

79 NSW Parliament, Report of Proceedings before General Purpose Standing Committee No. 2 [uncorrected proof], 18 June 2010, p.9
in a structured way that should produce a sound outcome for future business-as-usual projects.

(vi) The evidence to hand suggests that a relatively small number of facilities were not provided to an adequate standard. In some cases these were due to de-scoping under budget constraints. But in a small number of cases these may have been due to poor workmanship. The relevant Managing Contractors are responsible for rectification of such defects.

3.5.6.5 Cost-Effectiveness

The following discussion of cost-effectiveness includes some general observations and a brief comment on process, cites and critiques various pieces of evidence and draws some conclusions.

To estimate cost-effectiveness, like-by-like comparisons and data are required. The closest comparison is between the BER program and business-as-usual. The BER program and DET’s normal capital program share important elements, namely, adoption of the SFS and the design templates; work undertaken in operating schools (on live sites) with consultation; and a high level of public accountability.

However there are also major differences. Under business-as-usual, school communities are usually provided with only the post-tender construction cost of a project. In BER, school cost information represents the full cost of the project, including program and project management, design and documentation, statutory planning, site investigation, engineering, site supervision, construction, services such as electricity and plumbing and fit-out, finishing and handover. Also, estimated costs have contained conservative contingencies due to the absolute budget regime of the program.

Under the P21 program there were absolute budget constraints (risks had to be handled), and over 2,000 projects to be managed concurrently compared with 20 to 30 projects a year under business-as-usual.

As the ANAO noted, there was a high level of elaborate Commonwealth oversight and monitoring arrangements. "The administrative decisions taken by DEEWR in establishing BER P21 have unduly constrained the flexibility of authorities to determine how the program will be delivered within their jurisdictions to achieve the intended objectives." 80 This may also have increased general administration costs. An alternative to comparing BER with business-as-usual would be to compare government and private school costs if the data were available. In evidence to the Legislative Council Mr. Walsh of the Catholic Education Commission, observed that the CEC builds classrooms at a base building rate of $1,733 per square metre and allowing an extra 40% for ‘everything else’ completes classrooms on average at a total cost of $2,426 per square metre. 81 This appears to be lower than the estimated costs in the BER program. However, to make a meaningful comparison, the size and quality of buildings would have to be similar and comparable costs included in the estimates.

This difficulty with valid comparability not only confounds comparisons between public and private school costs, but also between and within jurisdictions, and between regions and sites within regions. The procurement criteria (and therefore construction

80 ANAO, Building the Education Revolution, 5 May 2010, p.17
81 NSW Parliament, Report of Proceedings before General Purpose Standing Committee No. 2 [uncorrected proof], 18 June 2010, p.4
costs) vary substantially depending on whether the focus is on minimising construction costs or minimising whole-of-life costs. Substantial variation in site preparation costs means that a fixed budget allocation based on enrolments can cause differences in the scope of works able to be undertaken across sites for essentially similar facilities. The most reliable comparator is therefore between BER and business-as-usual within the public school system within a jurisdiction. This is a similar position to that arrived at by the Commonwealth BER Implementation Taskforce.\(^{82}\)

The current set of cost comparisons are also mostly based on estimated costs, not actual costs of the completed projects. The NSW Managing Contractor model should ensure that these estimated costs are not exceeded since the risks normally associated with variations have largely\(^{83}\) been transferred to the Managing Contractors. This is different to the situation where program managers are employed and the risks stay with the State. Any final analysis of comparative costs must be based on actual full costs of completed projects, including all variations.

*Prima facie* the competitive tendering process adopted by the ICG and DET IPO should produce a cost-effective result. Each stage of the BER program in NSW was subject to a competitive tender process which complied with the NSW Code of Practice and Code of Tendering for NSW Government Procurement. The applications ranged from the competitive appointment of the Managing Contractors to individual contracts in schools. The Code provides for market testing for the services and/or products provided. Accordingly, the costs of the BER program are a competitive market response to the program, the Commonwealth Government’s requirements and the procurement requirements of the NSW government.

Turning now to the evidence available on cost-effectiveness, the most complete survey data is that from the March 2010 survey by the Australian Primary Principals’ Association (APPA). As noted above, there were 801 responses from NSW schools with about three-quarters from government schools. Within NSW only 7% of respondents said that the process was inefficient and only 10% that it was too costly/not value-for-money. These responses suggest that most schools perceived that they received fair value-for-money for the expenditure incurred.

On the other hand, Ms. McBride told the Legislative Council Inquiry that half of the ‘over 200’ respondents to the Public Schools Principals’ Forum (PSPF) survey conducted in the same month said they believed that their school had not received value-for-money.\(^{84}\) And most of the 27 case studies submitted to the Review by the NSW Teachers Federation contained complaints about high costs. It is also possible, as the Teachers Federation observed to the Legislative Council Inquiry, that some school communities did not voice their concerns in public complaints.\(^{85}\)

In its Interim Report the Commonwealth BER Implementation Taskforce produced estimates of costs per m\(^2\) for multi-purpose halls, classrooms and libraries which showed that NSW had the highest per m\(^2\) cost for each type of building compared with other states. However these cost comparisons made *no* allowance for the size of

\(^{82}\) BER Implementation Taskforce, *Interim Report*, August 2010, p.8. However, in practice the Taskforce gave weight to interstate comparisons.

\(^{83}\) The DET IPO did authorise a very limited number of contract variations for unforeseen events for some projects.

\(^{84}\) NSW Parliament, *Report of Proceedings before General Purpose Standing Committee No. 2* [uncorrected proof], 18 June 2010, p.53

\(^{85}\) *ibid.*, p.40
school or facility. At 307m², the average classroom in NSW in the sample was nearly 40% smaller than the average in Victoria and half the size of the average in WA (Queensland was not shown here). At 379m² the average multi-purpose hall in NSW in the sample was less than half the size of those in Victoria and Queensland (WA was not shown). With the wide ranges evident in the data sets and the small sample sizes it is unlikely that the differences shown in the Interim Report would withstand statistical analysis. Much more data and analysis is required to show that costs per facility are higher in one jurisdiction than another, including allowances for the locations and sizes of schools and facilities. A further analysis would be required to determine whether, compared with business-as-usual, costs had risen more in some jurisdictions than in others.

DET has undertaken a review of the overhead, administration and management costs of the P21 program compared to the Department’s business-as-usual capital works program. The Managing Contractor’s costs as tendered for P21 projects are summarised in Table 16:

**Table 16. Analysis of management costs**

<table>
<thead>
<tr>
<th>Cost area</th>
<th>State-wide average</th>
<th>Range</th>
</tr>
</thead>
<tbody>
<tr>
<td>Site supervision (regional program management)</td>
<td>6.6%</td>
<td>1.3% - 17.4%</td>
</tr>
<tr>
<td>Project management</td>
<td>2.3%</td>
<td>0% - 10.1%</td>
</tr>
<tr>
<td>Profit margin</td>
<td>2.8%</td>
<td>1.0% - 3.8%</td>
</tr>
<tr>
<td>Incentive fee</td>
<td>1.6%</td>
<td>1.0% - 3.3%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>13.3%</strong></td>
<td><strong>9.5% - 26.0%</strong></td>
</tr>
</tbody>
</table>

In addition to the cost shown in Table 16, the IPO retains 1.3% of project budgets for project management costs and the NBJP Taskforce Office retains 1.5% paid by the Commonwealth Government for program administration.

When the percentages of each Managing Contractor are applied against the approved project funding, the estimated total overhead, administration and management costs for P21 projects amount to 15.85% of expenditures. This compares with estimated costs for the same elements in DET’s normal major capital works program of 11.5% of project expenditures.

This comparison has to be treated cautiously. The increase in management costs could be offset by a reduction in other costs. The ICG maintains that any wastage in the model is only at the margins and probably more than offset by economies of scale in materials and trades, at least in the early stages of the BER program. There are also financial savings and benefits associated with faster project delivery. In evidence to the Review the ICG argued that the DET estimate of a 3-5% premium does not take into account warranty, time and cost guarantees and strict adherence to the SFS standards (which are cost risks borne by the State under program manager models).

Assuming that there is a management premium of the order of 4% for the P21 program, this may be explained by:

- transfer of time and cost risks to the Managing Contractors;
- 2,370 P21 projects to be completed within the limited time period with work underway on over 2,000 projects simultaneously at peak;
• a greatly shortened planning and procurement process;
• high levels of reporting and transparency; and
• lack of program flexibility due to the Commonwealth’s BER Guidelines.

In another analysis, the DET IPO found that under DET’s capital works program the average cost of building, designing, delivering and installing a modular design range (MDR) building project is $337,700 and that the average cost under the P21 program is $403,900. However, additional works to complete the building generally include:

• Project management (e.g. the cost of tendering and appointing contractors, administering the contract, scheduling all works on-site, monitoring the project program and reporting on progress, expenditure and risk management).
• Site supervision (e.g. occupational health and safety management on-site and trade license and working with children checks).
• Preliminaries (e.g. site establishment and disestablishment), site accommodation, site labour, temporary works, site fencing, security etc).
• Superstructure works (e.g. stairs, ramps, landings, foundations, handrails, building skirt, furniture and shelving, window security grills, internal wall partitions, internal floorings and painting, power wiring and data cabling, internal gas, water and sewerage infrastructure and fixtures etc).
• Site works (e.g. site clearing works, removal of fill or dirt, make-good works, external ground works, landscaping, including covered walkways).
• Site services (e.g. provision of gas, water, sewerage services, power and data cabling infrastructure to the new building location).

The average cost of these additional works under DET’s capital works program is $414,300. The average estimated cost under the P21 program is $409,165.

This means that the average total cost of all the works required to complete an MDR building project under the DET’s capital works program is $752,000. The average estimated total cost under the P21 program is $813,155. This represents an increase of 8%.

Turning to another analysis of costs, the IPO has compared the average Estimated Construction Sum (ECS) cost based on 84 projects with four capital works modular design range (business-as-usual) projects at The Junction, Ebleana, Byron Bay and Hallidays Point in a paper entitled ‘P21 ECS Comparison vs Capital Works – MDR Double Homebase Building’.

In this analysis, the average ECS for BER MDRs is $826,448. The average cost for the four business-as-usual projects is $752,058, a difference of $74,390 or about 10% per project. This includes project management fees four times greater in BER MDR projects than in business-as-usual but does not include IPO project management cost and Managing Contractor incentive payment. However this is a small sample.

Importantly these studies do not allow for finance costs. For a private developer these would manifest in lower holding costs. In the public sector the benefit of early completion is increased services. If a project costing $800,000 comes on stream a year earlier under the BER program than under business-as-usual the value of early
completion at NSW Treasury's standard 7% return on capital is in the order of $56,000.

The IPO has also provided the Review with an audit of the proposed COLA project in Hastings (Port Macquarie) which attracted some media attention. In 2010 dollars, the estimated construction cost for the COLA was $941,563 (excluding GST). The subsequent subcontractor awarded construction sum was $810,442 (excluding GST). However in 2003 the school had constructed a COLA for $78,133 (excluding GST) in 2003 dollars.

The audit estimated that the 2003 COLA would have cost $101,209 in 2010 dollars. On the other hand the new COLA was 281m² larger, had an extensive custom-built roof structure, bored piers, perforated soft metal lining, perforated metal screens, submain lighting and power, required various site-specific costs and Aboriginal participation and training. Taking these and various smaller extras out, the 2010 COLA would have cost an estimated $106,719. The difference was $5,509 or about 5.5%.

This exercise helps to explain an apparently very large cost differential and shows that there may have been little, if any, cost inefficiency in tendering and production. However it may be contended that some of the extra fittings in the 2010 COLA were not priority expenditures compared with other school needs and that this was either poor project selection or a poor fit-for-purpose project.

In terms of overall findings on costs, the IPO advised the Review that in its opinion excellent prices were achieved generally in Round 1 and mostly in Round 2. Also Round 3 tenders provided good value in most areas, especially in the metropolitan area, but there were some cost increases due to trade shortages and some hot spots in some regions where there was a shortage of tenderers.

Overall it appears that the P21 projects incurred small cost premiums compared with business-as-usual practices. This may have been due in small part to project management costs including the Managing Contractors. However, insofar as there was a cost penalty this was largely due to market responses to the size and speed of the program, which could not have been delivered with business-as-usual practices.

Offsetting these slightly higher costs are the benefits of early completion and the absence of any significant risk to the State of non-performance and cost over-runs due to the employment of the Managing Contractors. Typically many costs in public sector delivery, including time costs, are not fully accounted for, especially when cost and time over-runs occur.

As the Hastings COLA shows, it is important to distinguish between design inflation and cost inflation. Also costs must be compared on a completed and whole-of-project basis, including finance costs, or its corollary, the benefits of early completion, and not just on the basis of post-tender construction costs.

The statistical inter-state cost analysis by the BER Implementation Taskforce is at a preliminary stage and considerably more data and rigorous analysis is required before valid inter-jurisdictional comparisons can be made. These comparisons need to be made on the actual full costs of projects and account for the differing objectives of education authorities in terms of initial construction costs versus whole-of-life costs of a facility. Given these constraints, this Review has focussed on a comparison of the BER program with business-as-usual.
3.5.6.6 Conclusions on Outcomes

The BER program was designed primarily as an economic stimulus package with the benefit of improving infrastructure in individual schools. Injecting money into the economy through a school infrastructure program ensured that economic benefits would flow into individual communities across the country, directly through trades and materials on projects and indirectly through services provided locally as the infrastructure was built.

The stated Commonwealth BER objectives were: (i) timely performance, (ii) employment, and (iii) production of useful education and community assets.

The BER program had to be delivered:
- along with the Department’s business-as-usual capital works program,
- within absolute budgets,
- within absolute project timeframes which are less than half the usual,
- in all schools in NSW simultaneously.

Overall, about 7.5% of schools have raised issues and it appears that most of these issues have been resolved. As the Chairperson of the NSW Primary Principals’ Association (PPA), Asset Management Reference Group, Ms. Colquhoun, stated in evidence to the Legislative Council, ‘A lot of schools are now getting their projects started … A lot of perceptions are changing. … I think schools are now seeing, and they are very, very happy with the project’.86

At the time of this Review, the DET IPO with the assistance of the NBJP Taskforce has delivered most of the BER program within very tight time schedules and within budgets, effectively meeting objectives (i) and (ii).

In terms of value-for-money, Commonwealth Government constraints on the choice of projects, especially on improvements to existing assets, meant that funds were often spent on relatively low priority needs. Within these constraints, the IPO in consultation with the school principals generally delivered buildings which the schools considered useful although with more time available improved consultation with principals and school communities could have improved some outcomes.

Under the time constraints, project designs were based unavoidably on the established School Facility Standards. In some cases these standards, especially for small buildings, may have involved over-design. In a small number of other cases workmanship standards have been criticised as defective. Based on the small numbers of complaints relative to the size of the program, and in the absence of independent research evidence to the contrary, the Review is of the view that fit-for-purpose objectives were generally met. However a review of the SFS would be appropriate to ensure that it will provide optimum value-for-money in future DET programs.

It also appears that the cost of some individual P21 projects may have been as much as 10% higher than equivalent business-as-usual projects. Given that there was an audited competitive bidding process for all P21 projects, to a large extent this cost inflation was the result of undertaking a program four times the size of business-as-usual which increased the market power of builders and tradesmen bidding for work.

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86 ibid., p.72
It may also have reflected in small part the use of Managing Contractors. However, the Managing Contractor contracts protect the NSW government from time and cost over-runs, and from liability for defective work. Also there are significant economic and community benefits from completing projects within 18 months rather than in four years, the likely timeframe in business-as-usual.

### 3.5.7 Assessment of Processes of the BER Program

#### 3.5.7.1 The Integrated Program Office

The evidence suggests to the Review that the ICG and IPO performed the planning and approval processes expeditiously and professionally. In the public submissions to this Review, there were very few criticisms from schools, local councils or other interested parties of the way that the ICG or DET IPO performed.

The Review agrees with the observation made by the Federation of Parents and Citizens’ Associations (FPCA) to the Review that the IPO model ‘made lot of sense’ for delivery of the BER school projects. Setting up a single authority within DET rather than relying on the business-as-usual model involving DET and DSTA as separate entities under separate Ministers facilitated project control and delivery. This avoided any ambiguity that could arise with dual control. The IPO was able to attract high quality staff both from DSTA and, importantly, from the private sector. Government salary levels are not always high enough to retain strong professional staff and the capacity to contract staff on a temporary basis from the private sector was considered crucial to success by both the ICG and the IPO.

The total numbers of complaints recorded for NSW schools by both the IPO and the Commonwealth BER Implementation Taskforce are similar and, according to the FPCA, most complaints to the IPO were dealt with promptly and full explanations were provided. However, the possibility remains that some principals and/or communities did not pursue complaints with either the IPO or the Commonwealth Taskforce.

#### 3.5.7.2 Dealings with Councils

The planning approval processes were discussed under 3.4.4.1 above. To recap, the bulk of the BER projects were assessed and approved using the Infrastructure SEPP (ISEPP) which had been modified specifically to accommodate some aspects of the BER program. Some projects that could not be assessed under the ISEPP, or where delay was possible due to complex site issues, were assessed and approved by the ICG under Part 5. Some projects were assessed by local councils.

According to evidence from the DET IPO, the ISEPP was basic to getting timely approvals. Before the ISEPP was introduced, some DET project approvals would take 12 months. Based on recent experience, some councils would have held up approvals for some halls and gyms for several months or even a year because of issues such as height, noise and interference with views.

However, as previously noted, 27 local councils made submissions to the Review on various matters. Of these submissions, six raised issues about aspects of the BER approvals. The issues included:

- minimal complying provisions did not ensure that design and location of the building were appropriate;
- inadequate attention was paid to heritage items;
issues associated with loss of trees, stormwater and car parking were not dealt with adequately;

- projects limited access to a neighbouring building and/or reduced its commercial value; and

- local community and council input was limited and/or ignored.

Given that there were over 2,000 projects, the limited response suggests that the approval process generally worked satisfactorily for BER projects. However, any review of the ISEPP should take account of the nature of the objections to see whether modification could reduce the concerns without impacting on provision of essential community facilities.

3.5.7.3 Consultations with Principals and School Communities

In business-as-usual, conflicting objectives within a community are resolved over time. DET nominates and determines projects over a 12 month period when integrated facility planning for a school is undertaken and budget priorities are set. This work is often done in parallel with a school facility master plan. Once the project is selected, the Department and its project manager, usually DSTA, discuss the commissioning process with the school. This generally involves another 12 months of iterative consultation with the school and its community. During this consultation, the project manager will undertake the technical data-gathering (soil mechanics, services connections, etc) and document the project for both statutory planning and tender.

The BER program was fundamentally different both in the way it was set up and in the time constraints. As set up by the Commonwealth, the schools were entitled to certain monies depending on their size but funding was contingent on tight timelines being met. This was unprecedented. When schools were advised against managing their projects (see below), did not always get the priority projects they wanted and believed in some cases that they did not get the projects at reasonable cost, this not surprisingly (and reasonably) led to concerns and complaints.

Project selection was limited to an eight-week time frame and only six weeks were allowed for project commissioning, post-selection consultation, data-gathering and documentation, instead of the 12 months in business-as-usual. These shortened timeframes necessarily limited the opportunities for stakeholder consultations. However, in evidence to the Review the NSW Teachers Federation observed that the school principals were generally very prompt in submitting their project proposals but that they were often frustrated by the changing BER personnel dealing with these proposals. The DET IPO recognises, and the Review concurs, that clearer and more direct communication of these timeframes and the reasons for them, along with more efforts at communication with school principals would have reduced uncertainty around the program.

One of the selection criteria for the Managing Contractors was their approach to stakeholder management. The Managing Contractors have had varied success in this area. While the IPO considers that most Managing Contractors managed stakeholder relations adequately, there were two regions (New England/North Coast and Western NSW/Riverina) where Managing Contractors had more difficult stakeholder issues. These regions were very large and had the highest proportion of small schools with under 150 enrolments.
The large numbers of P21 projects and schools meant that a lot of management capacity was required in very short timeframes. Accordingly, as has been described above, the IPO tendered for Managing Contractors to contract for the works to be done, to manage the contracts and to take full responsibility for budgets and for completion of the works. Establishing Managing Contractors (not just contractors to do the work) put within one contract arrangement both the project management and the delivery management, thus attempting to minimise interface issues and stakeholder confusion. Under a Managing Contractor model, the Managing Contractor takes the risk of cost over-runs. There are also payment incentives for timely delivery and cost savings.

In evidence to the Review, the ICG contended that the Managing Contractor model is the only feasible one for this size and timing of program and that there was no systemic problem in the costing or in the Managing Contractor process. Essentially, Managing Contractors retain the financial and reputational risk until handover of completed facilities and rectification of any defects. The Managing Contractor model provided certainty that government could proceed with the projects and meet the Commonwealth deadlines.

In a few cases the Managing Contractors have had to step in where sub-contractors were in trouble. For example, Bovis Lend Lease had to re-tender the Mosman and Middle Harbour Public School contract. They did so because of their own reputational and contractual risks if projects were not completed on time and to standard.

Under the alternative project manager model, project managers are agents for the government. The government is the contractor, not the project manager. Thus incentives and accountability are lower than with the Managing Contractor process and project managers bear fewer risks than Managing Contractors. Also, with a few exceptions, project management firms do not have the skills or resources to manage regional-size BER programs. However, program managers could have been employed, as in the social housing program, if DET or the IPO had the resources to manage the extra number of contractors.

The NSW Teachers Federation in its submission to the Review and Ms. McBride speaking for the Public Schools Principals’ Forum (PSPF) have suggested that the schools themselves, and particularly the principals, could have been the project managers. The IPO told the Review that it adopted a gateway process to review school principals as possible managers for the P21 program. Only a few principals applied to self-manage and only four were approved. Of these only one principal actually delivered. On the other hand, both the NSW Teachers Federation and Ms. McBride, in evidence to the Legislative Council, 87 argued that the lack of applications reflected the strong dissuasion exercised by the IPO which stressed all the risks and liabilities that would legally accrue to principals if they undertook management of a major building project.

In contrast to this, in an interview with this Review members of the FPCA Executive stated that school principals should not be required to manage projects of this type.

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87 ibid., pp.41 and 54
and that the Managing Contractor model was the appropriate one in their view even if they had reservations about some aspects of its implementation. Other school principals interviewed by the Review also expressed a view that they did not wish to be distracted from their primary task of running a school to undertake a task for which they were not professionally equipped.

The key management issues for the BER program were the complex assembling of resources, the incentives for meeting construction completion deadlines and the handling of risk. If the school principals had issued contracts directly or through DSTA or DET, the government would have been ultimately liable for any cost over-runs. Accordingly, for the main BER programs (P21 and SLC), the Review concurs that school principal management of actual construction was generally inappropriate.

It has been suggested that the Catholic School system managed their projects without a Managing Contractor model. This is incorrect. The largest Catholic school system in NSW, the Sydney Archdiocese, adopted a Managing Contractor model and employed one of the seven Managing Contractors used by DET. In an interview with the Review the Archdiocese representative made it clear that they saw the Managing Contractor model as the only realistic option available to deliver their BER projects. In evidence to the Legislative Council Inquiry, Mr. Walsh of the Catholic Education Commission noted that ‘we do not expect our principals to be builders and contract managers’.

However, three caveats on the Review’s support for the Managing Contractor model should be noted. First, although all projects have been audited, to date there has not been a specific audit of the Managing Contractors. Second, some Managing Contractors are not experienced in community consultations and their performance of this function has been of mixed quality. Third, in smaller and less urgent projects, there may well be a case for greater involvement of school principals or local firms in some project management.

3.5.7.5 Procurement Methods

As noted above, all procurements followed NSW Government procurement guidelines for contracts as per the NSW Code of Practice and Code of Tendering for NSW Government Procurement. This ensured full public accountability and reduced risk of fraud or inadequate practices.

In a meeting with the Review some members of the P&C Federation observed that there was excessive documentation, paperwork and detail for minor works, such as sheds and even for some classrooms, which increased costs unnecessarily.

There is a risk that general procedures, especially those designed to eliminate fraud or poor practices, may be unnecessarily complex for small projects. But the adoption of standard procedures for such a large program in such a short time is a safeguard against poor administration.

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88 The P&C Federation firmly made this point in its submission of June 2010 to the Legislative Council Inquiry (available on the NSW Parliament website).
89 NSW Parliament, Report of Proceedings before General Purpose Standing Committee No. 2 [uncorrected proof], 18 June 2010, p.7
3.5.7.6  Transparency

As has been noted there has been considerable concern about lack of access to information about costs – see for example the evidence of Mr. Chudleigh, the Deputy Chairperson of the Public Schools Principals’ Forum (PSPF), to the Legislative Council Inquiry.\textsuperscript{90}

Under business-as-usual principals would not normally receive detailed costs for DET projects on school sites. Nor would there be a notional allocated sum of money for construction of unspecified facilities at a school. In fact for BER projects DET is publishing three sets of costs: the Estimated Construction Sum (ECS), Benchmark Value (BMV) and Actual Construction Sum (ACS). The intention is to be transparent and to allow school communities to review and question the published information. This decision was made in early 2009 but not apparent until the IPO website was launched in August 2009. Information to schools and on the website was available only after the IPO accepted the ECS. ECSs were not available for most schools until late 2009.

In the Australian Primary Principals Association (APPA) survey of primary schools, in March 2010, 44% of NSW respondents said they had been able to access specific cost information for the projects and 55% said they had not.

It appears that despite advising principals through both IPO and APPA communiqués, many principals remained unaware of the IPO’s publication policy and the availability of information. An issue may have been the amount of detail provided. Many principals wanted a breakdown of costs into major built components that was not readily available. Since then, the availability of information has been reinforced through the IPO Principal Liaison Officers, further communiqués and publicly through the media. The relevant cost information now appears to be available (see submission and evidence of Mr. Scott, President of NSW Primary Principals’ Association, to the Legislative Council Inquiry).\textsuperscript{91}

In summary, the BER program was the first time that principals and local P&C Associations had regular access to building and ancillary costs in significant detail on school sites. This partly reflected the ‘ownership’ of the monies by the schools. DET was sometimes slow to provide the information and to convey the availability of that information to schools. However, despite these issues, the Review understands that NSW has been more transparent, complete and timely in presenting costs than most other jurisdictions.

3.5.7.7  Auditing

To date the following organisations and units have conducted or are conducting audits and reviews of the delivery of the BER program:

- The Australian National Audit Office
- The BER Implementation Taskforce
- The NSW Auditor General

\textsuperscript{90} ibid., p.55
\textsuperscript{91} ibid., p.66 and Submission No 88 to the Inquiry: NSW Primary Principals’ Association Inc., 7 June 2010
O’Connor Marsden (on behalf of the NSW NBJP Taskforce)
Deloitte Forensics
The Department’s Audit Directorate
The IPO’s Governance Unit
A Fraud and Corruption Risk Audit is currently being tendered.

The IPO’s Governance Unit is undertaking a rolling program of audits and assurance checks. These are listed below. The numbers in brackets beside the audit description are the numbers of audits finalised by June 2010/underway/to be done):

**Site management audits (279/ongoing/ongoing)** to assess site conditions, project scope, time, safety and child protection management and quality (these are often referred to as the ‘audit squad’).

**Environmental site inspections (4/4/ongoing)** to determine whether environmental conditions are met.

**Audits of Managing Contractors’ Procurement Methodology (7/0/0)** to ensure a framework is in place that is consistent with expectations for private partners working with government.

**Audits of Managing Contractors’ tendering and procurement practices (2/6/ongoing)** that examine a sample of projects in each region to identify any concerns in relation to project cost, fraud or corruption; help assess value-for-money; establish compliance with NSW Government tendering guidelines; and ensure original tender documentation is consistent with information provided to BER Program Office.

**Cost-based audits (5/4/ongoing)** of specific projects for which significant concerns over costs have been raised.

**Regional Asset Management Unit audits (2/2/0)** which are concerned with establishing compliance with the Department’s policies and the *Public Finance and Audit Act 1983*.

### 3.5.7.8 Conclusions on Processes

Meeting the Commonwealth’s timeframe for delivery of so many projects across such a large area by March 2011 presented challenges. The Review finds that:

- The IPO was a successful initiative.
- The planning approval process was efficient at the program scale with relatively few problems with individual projects.
- Improved consultation with school communities could have improved outcomes for some projects. However, the Commonwealth timetable and the initial rejection of NSW schools’ preferred priorities in Round 1 of P21 limited the scope for improved consultation within the BER program.
- The use of large corporate Managing Contractors was an efficient way to manage and deliver the projects given the size and time imperatives of this program, but may not be for business-as-usual projects or other ‘campaign’ programs.
• Using the SFS and standard procurement methods may sometimes have been costly but ensured clean delivery of projects.
• Project costs have been transparent but their publication was sometimes tardy.
• The program has been heavily audited with the apparent exception of the Managing Contractors.

3.5.7.9 Lessons from BER for business-as-usual in DET

The Review put this question specifically to DET. The response was that this issue would be examined in detail toward the end of 2010. However, DET indicated some areas that would receive specific attention.92

The Review supports a thorough examination of the issues identified by DET, in particular:

• whether DET could adopt an IPO-type structure for delivery of its capital works instead of the current DET:DSTA arrangement;
• whether greater use could be made of the private sector in the management arrangements of any such structure;
• whether a more decentralised decision-making model would improve efficiency at the regional level; and
• whether improved reporting could be imported into the business-as-usual process.

However, the context for business-as-usual is quite different to BER and any examination must recognise that the planning horizons are longer and the annual program is much smaller.

The Review considers that one additional matter should be considered and that is whether up-to-date master plans should be available for all government schools in NSW.

3.5.8 Interim Report of Commonwealth BER Implementation Taskforce

The Interim Report makes a number of observations about approaches to the BER program taken by NSW that require comment in the context of this Review.

On p.39 the Interim Report notes:

‘the weighting given to the stimulus objective by different education authorities has influenced the cost outcomes achieved and requires consideration in assessing whether individual school buildings constructed represent value-for-money as compared to a similar building constructed by another education authority.

As outlined in the earlier section on value-for-money, there is a trade-off required between the quality, time and cost elements of value-for-money. In some jurisdictions it appears that education authorities placed a lower relative emphasis on cost and quality, in order to achieve a very rapid implementation program and associated economic stimulus. For example, evaluation of the NSW Government’s BER implementation must be framed in the context of its emphasis on delivering rapid implementation.’

92 See DET, Response to Review Questions, June 2010, pp.2-3
This effectively equates value-for-money as an objective equivalent to on-time delivery. The justification for including value-for-money in this way is found on p.12:

‘A value-for-money (VFM) requirement was embodied in the initial arrangements by virtue of reliance on existing state procurement processes and was expressly included for education authorities in the BER Guidelines in August 2009.’

The statement about reliance on existing procurement processes does not fit with this Review’s understanding of the facts. In NSW the Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009 and the Parliamentary Debates (including the Minister’s Second Reading Speech) make clear that the ICG had statutory authority to operate outside the NSW procurement guidelines. These debates occurred on the 4th and 11th March 2009. The ICG has advised the Review that the Commonwealth was made aware of the NSW Act and its provisions. There is no evidence that the Commonwealth subsequently objected to these provisions. There is also no evidence in the primary source documents for the NBJP that the Commonwealth was relying on value-for-money being embodied as a formal objective within any such arrangements.93 As the Interim Report acknowledges, the first formal mention of value-for-money in Guidelines for BER occurred in late August 2009. This is more than six months and many activities and agreements after the original signing of the Partnership Agreement by First Ministers on 5 February 2009.

The above quotes from the Interim Report suggest that jurisdictions had a choice between on-time delivery and value-for-money.94 This ignores both the perceived imperatives of the period that rapid expenditure was absolutely essential to avert a spiralling out-of-control economic recession and the severity of the penalties for States and Territories for failure to meet strict timetables. These penalties are laid out very clearly in the inter-governmental agreement and communications regarding the NBJP. Moreover, the formal agreements between the Commonwealth and the States and Territories specify penalties only for failure to meet delivery targets. They make no mention of trade-offs involving value-for-money.

There is clearly a relationship between a focus on meeting the primary objective of the NBJP (i.e. on-time delivery of NBJP projects) and performance of the jurisdictions in meeting that objective. Of the three eastern states only NSW delivered on BER project timeframes. Perversely, NSW is the only jurisdiction now ‘penalised’ by the Commonwealth under BER. These penalties have NOTHING to do with the terms of the original agreements. This Review considers it unreasonable to compare the performance of jurisdictions on a revised version of the original agreements, particularly when most of the important decisions and actions occurred well before the August edition of the Guidelines and the later (October) Commonwealth adjustments to some timeframes to accommodate value-for-money concerns.

As this Review has noted, even though ‘value-for-money’ was not included as an objective in any initial Commonwealth documentation, inter-governmental agreements or the NSW Act, the ICG incorporated strong procurement procedures aimed at maximising value-for-money within the overall context of the primary objective of the NBJP being to provide a rapid economic stimulus.

93 The only mention of ‘value’ occurs at the very end of the COAG Communiqué at p.11 in relation to a preference being given to businesses which would use apprentices and trainees ‘within a best-value approach’ to tendering and contracting. This was clearly designed to achieve a desired policy outcome for apprentices without distorting procurement practices, not to make value-for-money a co-objective with on-time delivery of NBJP projects.

94 See also Figure 13 of the BER Implementation Taskforce Interim Report.
Accordingly, this Review has examined value-for-money under Term of Reference (b). However, it has undertaken this examination in the context of the approach to reviewing the performance of individuals and programs as set out in 3.1 above. That approach requires that the assessment of the reasonableness of decisions or actions be based on the context in which they were made, not with the benefit of hindsight. Hindsight has a different purpose: to examine the outcomes of a program to see whether different approaches might be applied in the future to the same or different programs.

As discussed in 3.5 above, there is insufficient information available to conclude whether there is a real value-for-money issue with the business-as-usual model and the Schools Facilities Standards (SFS) in NSW. Based on our assessment, as well as on the preliminary data presented in the Interim Report, this Review considers that both the business-as-usual model and the standards should be subject to rigorous external review to ensure that the optimum arrangements apply. The expanded data set collected for the Final Report of the BER Implementation Taskforce could provide valuable context for such a review provided the analyses are robust.

The second significant issue in the Interim Report is the discovery of a new level of ‘flexibility’ in the Commonwealth documentation of the BER guidelines. This is not apparent in any normal interpretation of those documents. Nor is it supported by the evidence to this Review of the difficulties encountered by NSW in trying to negotiate changes to the guidelines with the Commonwealth.

Turning to the primary source documents:

1. Attachment A to the COAG Communiqué of 5 February 2009 sets out in some detail the timelines for the BER program. For Round 1 these state:

   ‘No later than June 2009 – Projects commence.

   This will be on the basis of a set of design templates that must be used by each project to be submitted by the States to the Commonwealth no later than 16 February 2009, unless a school has a pre-approved design available, or can demonstrate within a specified timeframe that non-use of the template is reasonable, appropriate and that the building process can still be expedited and achieved in the prescribed timeframes.’

   The material above is repeated for each of Rounds 2 and 3. The ‘flexibility’ relates only to pre-approved designs for individual schools (which is not relevant in the NSW government school context) and to non-template designs provided the prescribed construction timeframes could be met (emphasis added). There is no flexibility explicit or implied to move funds between schools.

2. The National Partnership Agreement for the NBJP was signed by First Ministers on 5 February 2009 and Schedule D covers matters specific to BER. The two objectives are set out at D4 and D5 and the Performance Indicators are set out at D8. None of this material mentions value-for-money explicitly or impliedly.

   ‘Objectives

   D4. To provide economic stimulus through the rapid construction and refurbishment of school infrastructure.'
D5. To build learning environments to help children, families and communities participate in activities that will support achievement, develop learning potential and bring communities together.

...  

D8. Performance Indicators

(a) The key performance indicator is the number of new or refurbished facilities, including libraries and multipurpose halls in primary schools and science and language laboratories in secondary schools.

(b) Progress measures include:

(i) funding application rounds undertaken;

(ii) construction milestones met and milestone payments made;

(iii) completion of projects on time;

(iv) amount of funding spent; and

(v) number of jobs created through BER projects.’

There is nothing on value-for-money elsewhere in Schedule D either. However, a new constraint on State ‘flexibility’ appears under D11 and is repeated under D14 along with another version of the timeframe requirement.

‘D11. The states will:

... (d) adhere to the Commonwealth’s BER program guidelines;’

and

‘D14. Funding is conditional on the states agreeing to:

... (d) adhere to the Commonwealth’s BER program guidelines;

... (g) ensure that government schools can begin and complete projects within prescribed time frames;’

3. The original version (Version 1) of the BER Guidelines is the relevant document for the critical period covering submission to the Commonwealth of project proposals under Rounds 1, 2 and 3 of the P21 component of BER and for commencement of projects under Rounds 1 and 2. Version 2 of the Guidelines is dated 26 August 2009 – nearly seven months after the COAG agreement.

Version 1 simply reiterates the ‘flexibility’ provisions noted under (i) above. There is no mention of a capacity to move money between schools and no mention of value-for-money either express or implied. However, the following appears on p.3:

‘To ensure that the BER has the greatest impact on job support, it is essential that construction on as many projects as possible commences quickly. Projects which are unable to demonstrate their ability to be completed within the specified timeframe will not be funded. Commencement of a project is defined for the purposes of BER as the undertaking of any action, post any design phase, that incurs an expense covered by BER funding for that project.’

Based on this incontrovertible evidence from the source documents it is very difficult to understand comments concerning application of the BER program guidelines being ‘flexible’.\(^{95}\) For example, the Interim Report states that the WA Government used the variation provisions to move money between schools (whereas the documents contain

\(^{95}\) BER Implementation Taskforce, Interim Report, August 2010, p.37
no variation provisions to move money) and that those education authorities which maximised the use of the flexibility provisions achieved a lower level of dissatisfaction. However, based on examination of the actual 'flexibility' provisions it might be more accurate to record that those jurisdictions who both ignored the agreement provisions and failed to deliver on the primary objective of the NBJP were rewarded with fewer complaints and no financial penalties. It is also worth noting that the strict caveat that 'flexibility' must not jeopardise on-time delivery appears to have been ignored by the Taskforce in its Interim Report.

It may be that the Commonwealth either negotiated variations or gave interpretations of the guidelines on a bilateral basis that were more flexible than provided for in the source documents. However, the NSW ICG has advised the Review that if such bilateral arrangements or interpretations existed, they were not communicated to all jurisdictions. The ICG also noted that it was exceedingly difficult to negotiate with the Commonwealth to increase the flexibility of the BER guidelines and that, if changes were eventually won, they came too late to be of much value in implementing the BER in NSW.96

The third significant concern with the Interim Report is that many of the inter-jurisdictional comparisons in it are drawn from small sample sizes with large variances. No statistical analyses have been presented to support the interpretations made and it is possible that the variances evident would preclude findings of significant differences between jurisdictions. Robust analyses would also require that differences in school size, facility size, regional costs of materials and labour, and costs of delayed completion are properly accounted for and that the comparisons are based on identical costing methodologies for each jurisdiction (i.e. on the actual construction sum including all preliminary costs and any variations). For school buildings, the life cycle costs of the buildings should also be calculated (i.e. construction plus maintenance costs).

This Review can only conclude that the findings of the Interim Report in relation to NSW constitute a very perverse outcome. The conclusions are not based on an accurate or reasonable interpretation of the factual and contractual basis for the inter-governmental arrangements for the BER program. The Interim Report significantly distorts the agreed objectives of the BER program and interprets a small data set beyond its capacity to support such interpretations. This Review suggests that, rather than criticising the performance of jurisdictions that followed the guidelines and met the program objectives and delivery targets laid down by, and agreed with, the Commonwealth, the real focus should be on the adverse consequences of the guidelines themselves and on the initiating body for those guidelines.

### 3.6 Social Housing Program

#### 3.6.1 Social Housing Outcomes, Costs, Timing and Employment

Housing NSW (Housing NSW) expects to complete 6,330 new social housing units under the Social Housing Initiative component of the National Building and Jobs Plan (NBJP). This includes 5,878 dwellings funded directly under the NBJP and 452 dwellings funded by accessing GST credits. These credits are available because all the newly created housing will be turned over to Community Housing Groups who can claim the credits.

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96 e.g. Version 2 of the Guidelines in August 2009 and adjustment to delivery timeframes in October 2009
Approximately half of the dwellings are in the Sydney metropolitan area and half in other areas. Just over half (about 52%) will be one-bedroom units.

Table 17 provides some summary statistics for these new dwellings. Between the start of the program in mid-2009 and August 2010, Housing NSW commenced 6,302 dwellings (99% of the planned total) and completed 1,090 dwellings.

The agency expects to complete just over 4,408 units by the end of 2010. This would meet the Commonwealth target of 75% completions for directly Commonwealth-funded dwellings by that date.

In addition over 800 public housing units which would otherwise have been unavailable are now fit for occupation as a result of repair and maintenance funding through the NBJP.

The total expenditure budget is $1,755 million from the Commonwealth plus $128 million contributed by the State Government. By end-July 2010, Housing NSW had spent $1,296 million on the program (69% of the combined Commonwealth and State budget).

The Project Management Office (PMO) in Housing NSW estimates that the program generated directly 5,128 full-time equivalent jobs and 512 apprenticeships. Further employment would have been generated as a result of purchases of building materials and related housing materials. Expenditure at a rate of $1.0 billion per annum would generate over 10,000 jobs.

Table 17. The social housing program as at 9 August 2010

<table>
<thead>
<tr>
<th>Region</th>
<th>Total housing dwellings planned</th>
<th>1 bed</th>
<th>2 bed</th>
<th>3 or more beds</th>
<th>Progress as at 09/08/10</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Construction started</td>
</tr>
<tr>
<td>Sydney metro</td>
<td>3132</td>
<td>1522</td>
<td>1469</td>
<td>141</td>
<td>3114</td>
</tr>
<tr>
<td>Regional</td>
<td>3198</td>
<td>1796</td>
<td>1337</td>
<td>63</td>
<td>3188</td>
</tr>
<tr>
<td>Total</td>
<td>6330</td>
<td>3320</td>
<td>2806</td>
<td>204</td>
<td>6302</td>
</tr>
</tbody>
</table>

Source: Program Management Office, Housing NSW.

3.6.2 Commonwealth Ground Rules for Social Housing Projects

The basic ground rules for the funding and delivery of social housing units under the Social Housing Initiative were established in the:

- COAG Communiqué and Annexures,
- National Partnership Agreement on the Nation Building and Jobs Plan: Building Prosperity for the Future and Supporting Jobs Now, and the
- Bilateral Agreement on the Nation Building and Jobs Plan signed by each State and Territory in February 2009.

The Commonwealth committed $6.4 billion nationally, to be allocated to the States and Territories on an approximate per capita basis. The specific agreed national targets were:
The upgrade of 2,500 existing social housing dwellings by 30 June 2010 that would otherwise have been unfit for occupation, and

The construction of 20,000 new social housing dwellings by June 2012, including:
- construction of 2,300 dwellings that were already in the development pipeline by 30 June 2010 (Stage 1), and
- construction of 15,000 dwellings (cumulative) by 30 December 2010 (Stage 2).

NBJP funding was conditional on the maximum average across all new dwellings being no more than $300,000.

In each case the projects had to be based on a set of design templates submitted by the States and Territories to the Commonwealth for approval unless it could be shown that departure from the template was justified.

States and Territories were required to submit proposals for Stage 1 developments by 15 March 2009 and proposals for Stage 2 developments by 30 June 2009, i.e. in less than five months from the COAG agreement. The Commonwealth Minister for Housing was responsible for approving all proposals for funding under the Social Housing Initiative.

Jurisdictions had to spend or commit by 30 June each year all funding allocated to the jurisdiction for that year. Where this was not achieved the Commonwealth reserved the right to reallocate the funds to other proposals.

All proposals had to show that the housing would be allocated to homeless and other persons with the highest needs on public housing waiting lists. In NSW this meant allocating 40% of the new units to homeless persons, 30% to new tenants and 30% to existing (re-housed) tenants. Around 325 new housing units are being allocated to the Aboriginal Housing Office for use as Aboriginal housing.

As far as possible these new dwellings would be owned and managed by the not-for-profit sector, which would leverage off these assets to create more public housing dwellings.

All proposals would have to meet:
- the National Building Code of Practice for the Construction Industry,
- universal design principles that facilitate better access for persons with disability and older persons where appropriate,
- minimum environmental standards, and
- be located close to relevant services.

Twenty percent of the Stage 2 buildings had to meet the higher accessibility standards embodied in the Australian Standard for Adaptable Housing AS4299-1995 Class C.

Most of these requirements are met under business-as-usual new social housing dwellings in NSW. But some requirements are additional and add to business-as-usual costs. The higher level accessibility elements included hobless showers and specially designed ovens. The extra (non-business-as-usual) environmental requirements included six star energy rating with solar or gas heating, windows with high levels of
thermal glazing and 2,000 litre water tanks to capture 80% of roof water if possible, which also had to be plumbed into the dwellings.

Procurement models were required to be competitive (but this is no different from business-as-usual) and to ensure that Commonwealth funding reached broad sections of the construction community as quickly as possible.

3.6.3 Method of Social Housing Program Delivery in NSW

3.6.3.1 General Governance Structure for the Housing Program

Under the Act, the ICG has powers to plan, approve and deliver all parts of the social housing program. Parts 3 and 4 of the Act establish a coordination role for the ICG with the ability (with the concurrence of the Premier or in some cases a Minister) to step in and take over the infrastructure work of that agency. The provisions of Part 5 allow the ICG to determine approvals outside the approval process provided under the Environmental Planning and Assessment Act (EP&A Act).

The ICG considered that planning and delivery of the social housing program would require a single focused project team.

The ICG also considered that delivery of the program would be more likely to be timely and successful with a special purpose planning and delivery team working within Housing NSW rather than outside it. Indeed it was considered essential that such a special purpose project team would work closely with other sections of Housing NSW. Accordingly, in discussion with the Chief Executive Officer (CEO) of Housing NSW, the Program Management Office (PMO) was established within Housing NSW to plan and deliver the social housing under the NBJP.

The broad governance structure for the delivery of the social housing projects is outlined in Figure 2.

![Figure 2. Outline of governance structure for social housing program](image)

The PMO has accountability within Housing NSW for the program and contains the main sources of expertise required for delivery, including significant planning and management expertise from the private sector. The Program Coordinator, who is the head of the PMO, reports direct to the CEO of Housing NSW.

97 The provisions of the NBJP Act are covered in detail under Term of Reference (a)
Under this governance structure, Housing NSW must still meet ‘any reasonable request’ from the ICG. With the concurrence of the Premier, the ICG can theoretically make any decisions with regard to the social housing program. As discussed under Term of Reference (a), resort to formal mechanisms was not necessary: in practice any differences between the ICG and the PMO have been dealt with by discussions between the ICG, the CEO of Housing NSW and the PMO Program Coordinator.

The PMO model was chosen because it allowed:

- A dedicated focus on the specific objective of delivering social housing under the NBJP, without distraction from business-as-usual matters and without impacting on the normal operations of Housing NSW which had to continue uninterrupted while the NBJP program was delivered.
- Direct reporting to the CEO of Housing NSW in order to streamline decision-making.
- Development of different business rules and practices appropriate for a time-limited project working under short timeframes.
- Development of a self-contained culture in which the private sector had a greater influence than is normal under business-as-usual.98

However, the PMO was linked closely to the rest of Housing NSW in two ways. First the PMO was part of a Project Control Group which included most of the senior members of Housing NSW including the Executive Directors of Housing Services, Community Housing and Assets Division. Thus every relevant executive was aware of the main developments under the NBJP and able to factor them into their work plans. Second, the Program Coordinator heading up the PMO was already an Executive Director in Housing NSW and retained that status as head of the PMO.

Importantly, the work of the PMO was (and is) only part of Housing NSW’s work under the NBJP effort. For example:

- The critical task of relocating 1,200 tenants for Stage 2 was co-ordinated from the PMO, but undertaken by Housing Services staff.
- Stage 1 was delivered by Resitech, an in-house project management arm which is now called the Assets Delivery Project Delivery Team.
- Housing NSW Legal set up over 700 contracts.
- In-house asset experts gave advice on town planning requirements and construction materials.
- Housing NSW’s media section dealt with what was at times a large volume of media inquiries.99

3.6.3.2 Project Selection

Housing NSW sought dwelling proposals from both the private sector and the internal Housing Services Division. Under a request for tender process, the private sector provided 1,459 proposals for Land and Multi-Unit Development Packages. Housing Services Division provided some proposals already in the pipeline for Stage 1 and new proposals for Stage 2.

98 Housing NSW, Submission and Response to Review Questions, June 2010, p.12
99 ibid., p.13
Projects were selected on the basis of both Commonwealth guidelines and State criteria of need, balance, economic viability and local suitability. Each private site which came through the tender was reviewed by a local committee and a central steering committee for fitness for purpose. Each public redevelopment site was reviewed by the Regional General Manager for fitness for social housing.

There was then a process to secure value-for-money from the land which involved obtaining an independent market valuation and negotiation. A purchase from the private sector was concluded only when value-for-money would be achieved based on the estimated market value of the completed project.

As a result of this process nearly three-quarters of the new social housing dwellings would be based on redevelopments of publicly owned land and buildings. Some 4,764 new dwelling units would be redevelopments and 1,566 dwellings would be produced from 91 privately tendered projects. Housing NSW was able to accept only just over 6% of the private proposals because most proposals did not fit under the $300,000 per dwelling constraint set by the Commonwealth. In effect, Housing NSW provided land free for most of the public redevelopments in order to fit under the Commonwealth funding cap.

3.6.3.3 Social Housing Approvals

Under business-as-usual, there are now four main forms of approval process for social housing projects:

- Specified minor and complying works can be approved by private certifiers.
- Projects of up to 20 units and no more than two storeys can be self-approved by Housing NSW under the Affordable Rental Housing State Environmental Planning Policy (AHSEPP).
- For larger developments, or for developments that do not come within the AHSEPP, Housing NSW may seek Council approval, Joint Regional Planning Panel (JRPP)\(^\text{100}\) approval or a Part 3A approval.
- For Part 3A applications, master plans are lodged with the Department of Planning for determination by the Minister for Planning.\(^\text{101}\)

Table 18 on the following page shows the planning approval processes used for works under the NBJP. Approvals under Part 5 of the Act accounted for only 17% of project approvals but these contained 31% of the total unit count.

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\(^{100}\) Joint Regional Planning Panels were created under the EP&A Act in 2008 as independent bodies to determine regionally significant development.

\(^{101}\) Housing NSW, Submission and Response to Review Questions, June 2010, p.3
Table 18. Planning approval process

<table>
<thead>
<tr>
<th>Planning approvals</th>
<th>Stage 1 NBJP</th>
<th></th>
<th>Stage 2 NBJP</th>
<th></th>
<th>Total NBJP</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Projects</td>
<td>Units</td>
<td>Projects</td>
<td>Units</td>
<td>Projects</td>
<td>Units</td>
</tr>
<tr>
<td>NBJP Act</td>
<td>23 (19%)</td>
<td>204 (24%)</td>
<td>65 (17%)</td>
<td>1792 (31%)</td>
<td>88 (17%)</td>
<td>1996 (31%)</td>
</tr>
<tr>
<td>DA to council</td>
<td>76 (62%)</td>
<td>528 (61%)</td>
<td>48 (13%)</td>
<td>646 (12%)</td>
<td>124 (25%)</td>
<td>1174 (18%)</td>
</tr>
<tr>
<td>Housing NSW Self-approval</td>
<td>22 (19%)</td>
<td>128 (15%)</td>
<td>268 (70%)</td>
<td>3052 (55%)</td>
<td>290 (58%)</td>
<td>3180 (50%)</td>
</tr>
<tr>
<td>Total</td>
<td>121</td>
<td>860</td>
<td>381</td>
<td>5490</td>
<td>5012</td>
<td>6350</td>
</tr>
</tbody>
</table>

Housing NSW has self-approved nearly 300 projects under the AHSEPP, most of which are NBJP projects. Most of these were villas and townhouses in single house zones where they would not normally be permitted by the relevant LEP but had been made permissible by Division 1 of AHSEPP (the ‘Infill Housing’ provisions).

Before Housing NSW business-as-usual projects are considered for self-approval, they are subject to separate merit review by external independent town planning consultants. The review process is independent of the development arms of the organisation and accountable directly to the CEO. Housing NSW considers that this process is as rigorous that that undertaken by local councils.

NBJP projects were planned in the PMO and approved separately at a senior officer level in Housing NSW after assessment by independent planners in 14-day reviews. All projects were designed to comply with the standards which Housing NSW has developed. The PMO advised that some 20 projects required negotiation using this senior officer review mechanism, generally resulting in substantial design amendments to unit numbers, layouts, levels, parking provision and landscaping.

Projects to be considered under Part 5 of the Act were then reviewed again by planners in the NBJP Taskforce. Occasionally the Taskforce CEO over-ruled the planners. The ICG also engaged a high level expert advisory panel to provide advice on Housing NSW proposals that were to be considered under Part 5.

As an overall result of this assessment process, in addition to the 80-90 standard conditions typically proposed in each project application, special conditions were applied to 78% of NBJP projects, notably for privacy (screening, glazing, deleted balconies), car parking, landscaping, eaves and awnings, position of garbage stores, etc.

At 30 April 2010, the ICG had issued 70 planning approvals for social housing projects under the NBJP Act. These projects could not be approved by Housing NSW under the AHSEPP for reasons such as having more than 20 dwellings or being prohibited under relevant planning instruments.\(^{102}\)

\(^{102}\) ibid.
In its submission to the Review (see Annexure F), Housing NSW has expressed the view that if these projects had been submitted to local councils, approval would have taken between six months and two years and in some cases approval may not have been obtained. This would have put the program at risk.

3.6.3.4 Delivery of Social Housing

Delivery of the social housing dwellings required three main activities:

- development management, including concept design, preparation of development applications, preparation of delivery documentation and managing the tender process;
- project management, including managing and administering construction, managing interfaces with councils, utilities and other statutory authorities and managing the handover; and
- building works.

In business-as-usual, Housing NSW generally provides the development and project management in-house and contracts private firms to construct new social housing units. Housing NSW sometimes contracts project management to a private firm.

Under this project management model, the project managers are agents for the government. The government, not the project manager, is the contractor for the building works.

To provide outputs in the large and time-constrained NBJP program, more external assistance was required. Most of the Stage 1 projects were program managed by Resitech or the PMO. However for the Stage 2 projects, the PMO contracted with 14 agencies including 12 private firms, Resitech and Landcom to provide development and project management. The PMO is also managing three builders directly.

Housing NSW had four principal strategies for securing value-for-money:

- Tight control over the design of projects to ensure they met Housing NSW design guidelines, but did not exceed them. Each project was individually designed. Some guidelines resulted in more expensive components than is normal in residential housing – for example, the use of semi-commercial grade windows. However, such inclusions were designed to reduce long-term maintenance costs. A PMO architect and cost accountant reviewed the design of all Stage 2 projects (some 400 of them) to ensure that designs were aesthetically appropriate as well as meeting the guidelines.

- Every main element of the NBJP has been competitively tendered. The project management firms were selected via a competitive tender. Every building project was subject to a competitive tender with 300 pre-approved firms of builders competing for work and only one in three of those being successful. If no builder offered value-for-money, as happened for example in Moree, projects were re-tendered.

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103 This position was confirmed in discussion with some officers involved in Local Government organisations, although the point was made that not all local councils delayed or opposed social housing developments.
Fixed price contracts provided financial security in case the construction cost escalated as a result of unexpected growth in the economy or trade shortages triggered by the stimulus plan.

Tight control over quality and strict management of variations by builders. The project management firms review all cost variations by builders. The PMO also scrutinises these and does not pay variations which belong to the builder. Sites were visited weekly and up to daily if a builder was not performing well in terms of timeliness, safety or quality.\textsuperscript{104}

All procurement was required to follow NSW Government procurement guidelines for contracts as per the \textit{NSW Code of Practice and Code of Tendering for NSW Government Procurement}.\textsuperscript{105} Revision of the code was not an option in the time available.

A program of this value, size and speed combined with delivery by a newly established management team and procurement model posed significant risk in delivery. To ensure these risks were appropriately managed, the following audit and review processes were put in place:

- The Commonwealth Department of Families, Housing, Community Services and Indigenous Affairs (FAHCSIA) collects a range of financial and performance measures and track these with Housing NSW.
- The NSW NBJP Taskforce has held performance management meetings with Housing NSW, initially weekly and now fortnightly, receives and analyses a large amount of data and undertakes spot visits to sites.
- Housing NSW's audit program includes audits of the PMO and PMO activity by Deloitte.
- The NBJP Taskforce, through O'Connor Marsden, undertakes audits of a range of aspects of NBJP.
- The PMO itself has an audit program of aspects of the program.
- Deloitte undertakes a monthly review of financial transactions using data mining techniques to highlight any payments that merit further investigation.\textsuperscript{106}

Some other audit activities are mentioned in 3.6.5.6.

\textbf{3.6.3.5 Evaluation Framework}

The evaluation below focuses on outcomes and processes. Arguably what matters is outcome rather than process. Process matters in so far as it affects the outcome. However a review of process provides an indirect check on outcomes and is an indicator of the robustness and sustainability of the process for future programs.

As noted previously, the Commonwealth’s prime objective was timeliness of expenditure and related job creation. However, in the case of the social housing program there were ancillary objectives designed to progress the previously agreed national reform agenda for social housing and to decrease the incidence of homelessness. These objectives (including the procurement improvement objective)

\textsuperscript{104} Housing NSW, Submission and Response to Review Questions, June 2010, p.19
\textsuperscript{105} With some specified exceptions granted by the ICG on a case-by-case basis.
\textsuperscript{106} Housing NSW, Submission and Response to Review Questions, June 2010, p.19
and the approach of the ICG in aiming to ensure that dwellings were provided at least cost subject to design quality requirements were entirely consistent.

As noted under 3.5 above, this Review views value-for-money as having three main components:

- selecting projects that meet the highest priorities and greatest needs of the community,
- providing fit-for-purpose projects (with appropriate design and quality), and
- delivering a specified product at least cost (cost-effectiveness).

In terms of social housing this means producing housing in appropriate locations and with appropriate size and finishes for the users and at least cost. From a broader perspective, the successful production of social housing also means providing housing of an appropriate location, size and design so as not to adversely affect other local households, streets and neighbourhoods. Therefore, as far as the data will allow the evaluation below considers timeliness (and related employment generation), project selection, fit-for-purpose needs, cost-effectiveness and impacts on local areas.107

It is also necessary to examine governance and process issues. For the social housing program these include appropriate dealings with local councils, consultations with communities, appropriate procurement methods and auditing of the process.

Finally, it should be noted that assessment will benefit considerably from establishing a benchmark or counterfactual (i.e. what would have been the likely outcomes if another process had been chosen?). The natural counterfactual is business-as-usual methods of project selection, approval and delivery.

In the program, most of the social housing dwellings were approved under the AHSEPP which is part of business-as-usual. Also most projects were delivered using project management and building methods that are often employed under business-as-usual, albeit on a smaller scale. Thus, unlike the BER program, the differences between many of the NBJP and business-as-usual processes may be viewed as matters of degree and incremental change rather than as systemic alternatives.

### 3.6.4 Assessment of Outcomes of the Social Housing Program

#### 3.6.4.1 Introduction

In assessing the outcomes of the social housing program, the Review draws principally on data provided by Housing NSW along with submissions in response to the Review’s call for public submissions as well as interviews with key stakeholders.

In all, the Review received 27 submissions from councils. Most of these submissions concentrated on the general principles of the Act and future implications of a potential extension of the Act or the ICG’s functions. Only five submissions from councils108 expressed significant criticisms of the social housing program. The main message of these criticisms was that the residential units were being constructed in inappropriate locations or out of scale or character with their locations.

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107 A comprehensive evaluation of the impacts of social housing on local areas is a complex exercise and a detailed examination of these issues is beyond the scope of this Review.

108 The councils expressing concern about the social housing program were: Armidale Dumaresq, Bathurst, Lake Macquarie, Wollondilly and the Northern Sydney Regional Organisation of Councils (NSROC) specifically with respect to the City of Ryde.
Housing NSW has acknowledged to the Review that it received a large number of comments from councils. However in its view only some 25 out of the 503 public housing sites have been significantly controversial. In the view of Housing NSW, notwithstanding significant media coverage of public housing developments, the selection of sites and stakeholder engagement and communications have been uncontroversial in the other 95% of locations.

Given the number of other assessments and surveys being undertaken concurrently with respect to the NJBP, the Review decided to work with existing data sources rather than burden councils and other parties with requests for further data.

3.6.4.2 Timeliness and Employment Generation
As noted in 3.6 above, construction has started on virtually all planned social housing dwellings and it is anticipated that some 4,400 dwellings out of the 6,302 planned dwellings will be completed by end 2010. As at August 2010, nearly 70% of the combined Commonwealth and State funds allocated to the programs had been expended. These achievements met Commonwealth guidelines and anecdotal evidence suggests that NSW has achieved a faster rate of approvals, completions and expenditure than most, if not all, other States and Territories.

Expenditure in the order of $1.0 billion per annum would generate over 10,000 full time equivalent (FTE) jobs. This expenditure on housing along with other NBJP expenditure contributed substantially to the preservation of jobs in NSW and to the low increase in the unemployment rate in the potential recession.

In the NBJP most projects were planned and designed in 2-3 months, the median time for planning approval was 32 days, and the median time from approval to completion is about 330 days.

Some comparisons for approval times in business-as-usual are provided in 3.6.5.3. However the PMO believes that it is not appropriate to compare planning and delivery times in the NBJP with those under business-as-usual. In business-as-usual projects often sit in a three to five year supply pipeline and detailed planning occurs as needed and subject to the availability of funding for actual works. Data held on completion of housing is based on the contracted weeks from ‘letter of acceptance’ to completion and Housing NSW advises that this is not a comparable benchmark to completion times in the NBJP program.

3.6.4.3 Project Selection
Under ‘Reshaping Public Housing’, announced in 2005, the NSW Government is currently undertaking a comprehensive reform of public housing. A key component of this is the redevelopment and realignment of social housing properties to better meet client need. This need has various components: improved housing, more smaller dwellings and single bedroom units, improved accessibility and a general geographic spread, but with reduced concentration.

The NBJP has facilitated these changes. Under the NBJP, about 40% of the new housing units were allocated to homeless persons so that over 2,000 homeless or at-

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109 The stated aim of the Reshaping Public Housing program is to ensure a fair public housing system that promotes responsibility and can meet needs now and into the future. It includes changes to rent, water and eligibility tenure, and initiatives such as the NSW Housing and Human Services Accord.
risk persons will have access to housing. Stage 2 dwellings have contributed to appropriate housing for people with a disability and older people by incorporating minimum universal design guidelines elements into their construction.

The new supply of public housing is contributing significantly to the reconfiguring of the NSW social housing portfolio toward one- and two-bedroom housing units, with half of the new dwellings being one-bedroom units. This aligns the housing portfolio more closely with current and anticipated future client demographics.

However most of the new social housing under the NBJP has been developed on publicly-owned land due to the Commonwealth funding constraint of $300,000 average per new dwelling unit. This constraint could be met only by developing mainly on public land which in effect involves a NSW subsidy to the NBJP program.

Consistent with current NSW policy for public housing, most NBJP dwellings will be transferred to, and owned by, the community housing sector. This sector currently owns 18,000 housing units and Housing NSW aims to increase this to 30,000 homes by 2016. The transfer to the community housing sector enables Housing NSW to claim GST rebates and develop more housing. More fundamentally the community housing sector can leverage off its properties to develop a viable and independent not-for-profit housing sector in NSW that will deliver more housing for people in need.

3.6.4.4 Fit-for-Purpose Projects

The dwellings were designed to meet both Commonwealth criteria and Housing NSW design standards for public housing. No evidence has been supplied to the Review that suggests that the completed projects will not be fit-for-purpose.

The Housing NSW standards indicate certain guidelines for such things as bedroom size, bathrooms, verandahs, etc. They also dictate the use of some materials such as commercial grade metal window frames. However there are no external design standards and each public housing dwelling was designed individually subject to the overall NSW design requirements.

One issue that has been raised with the Review is car parking. Housing NSW has carried out a number of surveys of car parking usage in its multi-unit projects in metropolitan and non-metropolitan areas. These do not provide a comprehensive result but indicate that in the urban centres surveyed approximately one in eight units uses a car parking space for themselves or their visitors and in more rural settings about one in five units uses a car parking space.

The AHSEPP specifies a minimum of one car space per five units. Housing NSW generally provides this amount in metropolitan areas and town centres where there is public transport. Outside those areas more car parking, generally up to one parking space per unit, may be provided depending on the circumstances. The average amount provided in NBJP projects self-approved by Housing NSW was two car spaces per five units. Housing NSW considers that the parking provided in the NBJP is appropriate overall and that money is better spent on providing affordable housing and landscaped area than on potentially unused car parking spaces.

While recognising the obvious trade-off between car parking spaces and living accommodation, the Review notes that this is a major source of objection to social housing developments and that community hostility to such developments is unlikely to
assist with effective integration of social housing into the broader community. The Review notes that Housing NSW is reviewing its design requirements and will be undertaking comprehensive parking surveys in multi-unit projects to identify the appropriate level of parking provision for particular locations and project types. This improved evidence base should assist discussions on future projects between Housing NSW and councils and their communities.

3.6.4.5 Cost-Effectiveness

Housing NSW reports that it delivered more than the required number of dwellings at an average cost of $295,000 per dwelling, including in some cases land purchase, design costs, construction certification, engineering, construction environmental features and features for disabled persons. While half of these units were one-bedroom units, the cost quoted above includes some extra features such as solar heating and water tanks. Housing NSW considers that, given these additional features, it is not possible to compare the $295,000 cost with the costs of providing private housing. As noted earlier Housing NSW does not consider business-as-usual costs are comparative either.

Assessment of cost-effectiveness for the NBJP projects is therefore reliant on ensuring that the process maximised competitive market rates for materials and labour. In that context the process was competitive. Each project was subject to competitive tender. A large number of builders had a chance to win a job but had to win on a commercial basis. Housing NSW considers that the prices were in fact highly competitive because of the shortage of work in the building industry at the beginning of the NBJP. However, there is anecdotal evidence that as the effects of the GFC reduced not all trades were under-employed (e.g. the cost of bricklaying rose between April and July 2010 due to shortage of bricklayers). Lead times also increased. Most construction prices were fixed and so the cost to government did not rise (at least for these contracts).

Some Commonwealth decisions entailed additional costs, for example for additional environmental measures such as solar heating and water tanks. However, these policy decisions were achievable within the funding provided. The cost of projects could have been reduced by excluding them, but that would not necessarily provide value-for-money. Some would argue that excluding such features would result in poorer value-for-money for society as a whole.

3.6.4.6 Impacts on Local Areas

The notion of what constitutes an adverse effect of social housing on a local area is a complex one. The factors may include:

- higher density housing than would otherwise be permitted;
- poor design of housing in relation to the local houses or neighbourhood creating loss of amenity;
- poor maintenance of social housing compared with private housing;
- inadequate parking;
- inadequate section 94 contributions;
- fear of social dysfunction especially, but not only, when social housing is concentrated.
The Review has limited evidence on these issues and it is outside the scope of the Review to comment in detail on the actual outcomes of the NBJP program for social housing in local communities. However some general observations may be made.

The first observation relates to impacts of higher density. Under the AHSEPP affordable rental housing receives a floor space bonus of up to 0.5:1 for developments with an existing floor space ratio (FSR) of less than 2.5:1 and up to 20% for an existing FSR greater than 2.5:1 compared with what would otherwise be allowed. This means that a medium density development may occur in an area which would not otherwise allow medium density (i.e. town houses may be permitted in areas that would otherwise be detached houses and so on). This is similar to the Seniors Housing SEPP\textsuperscript{110} that developers have taken advantage of and that is now effectively business-as-usual. Undoubtedly issues such as overlooking and possible loss of privacy are real issues for neighbours of such developments.

Second, there is the issue of Section 94 contributions, which are normally levied by councils for the provision of public amenities and services which may be required as a result of a development taking place. Housing NSW is not legally required to pay s.94 contributions when it self-approves a housing project. However, Housing NSW has adopted a policy of making an ex-gratia payment to the relevant council, equivalent to the normal s.94 contribution, for self-approved business-as-usual projects (subject to satisfying the usual tests of nexus and reasonableness).

However under the NBJP, ICG policy was to pay s.94 fees only on the 21st and subsequent units and to make no contribution for projects of up to 20 units. To ensure consistency across projects approved by Housing NSW or the ICG, Housing NSW adopted a similar policy of not paying contributions for NBJP projects with 20 or fewer units. Housing NSW did pay other council fees for NBJP projects such as water and sewerage augmentation and connection charges.

Housing NSW argued to the Review that the policy of not paying s.94 contributions for NBJP projects self-approved by Housing NSW was appropriate because:

- Any contributions paid would have been held in council s.94 accounts and not have been immediately available for employment generating construction work.
- A higher proportion of the program could be allocated for Seniors Housing which is in significant undersupply and has been exempt from s.94 contributions for many years.
- NBJP projects were approved in over 54 local council areas. The contributions foregone in any one area would constitute a small proportion of the total contributions receivable over the lifespan of the typical council s.94 Contributions Plan. In some areas this shortfall would have been offset by works undertaken in the area under the Community Infrastructure component of the NBJP.

There may have been a temporary justification for these decisions in the context of the NBJP. However, the Review considers that in the longer run if a development imposes additional infrastructure or service costs on a local community these costs should be borne by the developer (or in the case of social housing by the taxpayer) rather than

\textsuperscript{110} State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004
by the local community. As Ryde Council officers pointed out to the Review, social housing tenants are likely to be high-end users of local council facilities and services.

3.6.4.7 Conclusions on Outcomes

The social housing program was designed as both an economic stimulus package and a means to provide social housing.

Judged by the criteria of timeliness, project selection, fitness-for-purpose and cost-effectiveness, the available evidence suggests that the criteria were well met. At the time of this Review, the PMO with the assistance of the ICG Taskforce has delivered most of the social housing program within very tight time schedules and within budgets.

There is insufficient evidence available to the Review to judge whether the social housing developments had unduly adverse impacts on local communities. Overall, significant complaints have been received from fewer than 10% of all councils where the developments were located. In any case, most of these same issues would arise under business-as-usual. This does not make the issues unimportant; but they are not solely the product of the NBJP program.

3.6.5 Assessment of Processes of the Social Housing Program

3.6.5.1 The Role of the ICG

The ICG performed both an approval role and several operational roles. Housing NSW advised the Review that, *inter alia*, the ICG:

- Challenged Housing NSW to consider a wide range of strategies for delivery of the program and influenced the choice of strategies.
- Encouraged Housing NSW to undertake contingency planning, which was important when there was a shortage of sites to achieve target unit numbers.
- Established a rigorous performance management system, which operates in considerable depth and breadth, from state-wide performance monitoring down to tracking the detailed construction milestones for each project, each builder, each project manager, and each risk.
- Monitored performance and challenged Housing NSW to improve.\(^\text{111}\)

Housing NSW believes that the ICG had to have these roles of challenging and performance monitoring, as this contributed to the confidence of other stakeholders, especially the Commonwealth Government and the NSW government central agencies (i.e. Department of Premier and Cabinet and Treasury). It also had to have the right to step in if Housing NSW failed to deliver.

The ICG’s procurement powers allowed Housing NSW to depart from some constraints in the normal procurement process. For example, under normal procurement processes for land purchase, Housing NSW should not exceed the market price provided by the independent valuation. There are obvious prudential reasons for this. However, the PMO contends that a reluctance to pay over valuation in some cases would have stopped some projects that have turned out to be viable with the valuation of the finished project exceeding the cost of the land plus the proposed building.

\(^{111}\) Housing NSW, Response to Review Questions, June 2010, pp.17-18
The ICG also enabled the PMO to act with some operational independence. Almost certainly the PMO would have been set up to operate semi-autonomously within Housing NSW (as the CEO set it up that way), but it would not have been allowed a broader level of operational independence within the NSW government. Under business-as-usual, central agency scrutiny of expenditure of this magnitude involves processes of submissions, meetings, scrutiny of detail and referral for decision. In business-as-usual this can work because the timeframes are generally longer. But for the NBJP, it would have taken too long to reach a resolution on each major decision under this sort of process and meant that essential NBJP deadlines would have been missed. Housing NSW believes that the existence of the ICG gave both central agencies sufficient comfort to step back from detailed oversight.

3.6.5.2 The Program Management Office
 Establishment of the PMO and its operational arrangements were discussed in 3.6.3 above. The evidence suggests that the ICG and PMO performed jointly the planning, approval and delivery processes expeditiously and professionally. Measured against the scale of the exercise there have been relatively few complaints about the outcomes. In the public submissions to this Review, few councils or other parties made substantive criticisms of the way in which the ICG or PMO performed.

3.6.5.3 Approval Process
 Most of the discussion about approvals relates to time taken. Housing NSW reports that between 2007 and 2009 the average gross mean time for development approval for public housing was:

- 99 days for single dwellings
- 224 days for less than 20 dwellings
- 340 days for more than 20 dwellings.

In some cases the time taken was three to four times the average taken for comparable private sector projects. The delay and unpredictability of the approvals process seriously hampered planning and delivery of capital works.

According to Housing NSW local councils not only slowed down the delivery of Housing NSW’s asset programs but also:

- restricted supply of Housing NSW sites zoned for medium and high density residential development;
- set unreasonable site area and floor space requirements for residential development; and
- applied unreasonable and inconsistent development standards across the State.

Housing NSW describes councils generally as ‘obstructive and slow’ and as ‘repeatedly finding reasons for not approving development’.

Housing NSW has been reluctant to use the Crown development provisions of the EP&A Act which enable stalled Development Applications (DAs) to be referred to the Minister for Planning for determination. It has used this process for only one or two projects per year. This reluctance reflects a desire to maintain positive relations with...
local councils\textsuperscript{112} and avoid the time-consuming and resource-intensive nature of the Part 3A process which typically takes 15-18 months due to the many steps involved.

Introduction of the AHSEPP mid-2009 and the availability of the Part 5 approvals powers meant that there were adequate avenues available for assessment and approval of NBJP projects to ensure that timelines would not be compromised. The ICG could bulk-approve a program of minor works as an efficient alternative to requiring an individual application, consultation and environmental assessment for each site. This was used to expedite NBJP demolitions and bedsit conversions. The bulk approvals are subject to works meeting prescribed standards, verified by completion of a compliance checklist for each site prior to works commencing.

Compelling evidence was provided to the Review (including from local government sources) that delivery of the NBJP social housing program would not have been possible if local councils had been the approval authorities for the projects.

### 3.6.5.4 Consultation on Planning Proposals

In business-as-usual for social housing, conflicting objectives within a community are generally resolved over time. Housing NSW is in dialogue with the local council while it plans social housing projects and seeks approvals. Once a project is approved there may still be consultation on details with the local community.

Under the AHSEPP, Housing NSW undertakes a formal 21-day consultation on all projects. Residents in adjacent buildings receive formal notification of proposed developments as does the council, but notification of adjoining owners is not mandatory. Other interested parties can review the plans which are placed in council offices. Under the NBJP the project selection process was limited to an eight-week time frame with correspondingly limited opportunity for stakeholder consultations.

Housing NSW undertook both a formal and informal consultation process. Housing NSW reported to the Review that, for every NBJP development, it met at least once with the council and offered to meet at least twice. In some cases, several meetings were held. These meetings were held at the outset when only concept designs had been completed, which provided an opportunity for councils to give initial feedback. Often there were significant changes in design and yield at this stage. In addition, Housing NSW attended meetings with groups of residents where appropriate. Initially in the NBJP process, Housing NSW attended public meetings. According to Housing NSW, these meetings were rarely productive and often acrimonious. Housing NSW subsequently offered to meet with numerous representative groups of residents, often in the offices of local MPs, which it considers has been more productive.

Housing NSW report that the independent planner’s Environmental Impact Assessment prepared for each project addressed every objection and demonstrated a high degree of consideration for comments made during consultation. The Housing NSW CEO specifically instructed the independent assessment team to check that this was done before a project was submitted for final approval.

Nevertheless, the PMO recognises that clearer and more direct communication of these timeframes and the reasons for them would have assisted the communication process and should be applied to similar programs in the future.

\textsuperscript{112} The Review recognises the potential inconsistency between this statement and the quotes in the previous paragraph.
The ongoing review of the AHSEPP will consider whether other or wider forms of notification should be given. One option might be to require a similar level of consultation to that normally carried out by the local council for that type of development, which would generally include notification of owners, not just occupiers, and probably direct notification of the proposed developments to more residents in the vicinity of the development.

While Environmental Impact Assessment reports for approved projects have been provided on request, consideration could be given to online publication as soon as projects are approved. This demonstrates an open, transparent approach. Demonstrating objective, professional consideration to submissions may also reduce community anxiety regarding the consultation process.

3.6.5.5 Procurement Methods

Housing NSW has long experience in managing and contracting for building work. As noted above, all procurement followed NSW Government procurement guidelines for contracts as per the NSW Code of Practice and Code of Tendering for NSW Government Procurement unless specific exemption was obtained from the ICG. This ensured full public accountability and reduced risk of fraud or inadequate practices.

There was competition for both project management and for building works. According to advice from the PMO the project manager fees for NBJP work were lower than for business-as-usual projects, though the Review has not seen the data.

The PMO also described the tendering process as 'extremely competitive'. There were over 300 builders on a competitively selected panel. Usually there were four or five builders competing for any particular item of work.

3.6.5.6 Auditing

There was a comprehensive audit program agreed between Housing NSW and the NBJP Taskforce, and undertaken by O'Connor Marsden, Deloitte and the PMO. Audits so far have included:

- The selection of project managers
- The operation of the PMO
- The operation of AHSEPP planning submission and approval process
- Safety audits of sites
- Quality audits of sites
- PMO systems
- Payments to contractors
- Review of maintenance spend
- PMO complaints handling system
- Audit of project management firms’ readiness for the construction phase
- Certificates of demolition
- Select tender process
- Project management firm tendering procedures
Audits are planned on the following topics:

- Review of financial governance
- Value-for-money
- PMO management of service providers
- Allocations of houses
- Payments for variation
- Taskforce reporting framework
- Builders panel

Overall the NBJP social housing program is a highly audited program.  

3.6.5.7 Conclusions on Processes

Meeting the Commonwealth’s timeframe for delivery of so many projects across such a large area by March 2011 presented challenges with regard to processes. The Review finds that:

- The ICG provided valuable input to the process of project delivery;
- The PMO was a successful and efficient initiative;
- The ICG’s power to approve projects was essential in the context of the NBJP;
- Standard competitive procurement methods were generally cost-effective;
- The program has been substantially audited;
- Consultations with local communities were compromised partly due to the timetable, but could have been improved even within that timetable.

The notification requirements under the AHSEPP are narrowly based and should be reviewed.

3.6.5.8 Lessons from the NBJP for business-as-usual in Housing NSW

There are two levels of issues: (i) managerial improvements in administrative efficiency broadly in keeping with business-as-usual models, and (ii) systemic reforms.

In comparing the business-as-usual and PMO models, it should be noted that the business-as-usual capital works program is more complex, including estate regeneration, maintenance and upgrading as well as redevelopment. Also the business-as-usual delivery model has recently been reformed partly due to the experience under the NBJBP. The main reform is tighter central control of asset planning, policy and delivery through a corporate Assets Division.

The PMO model does include some significant differences from business-as-usual:

- A three-gate decision-making process which set out what decisions were to be made at each gate and did not allow for excessive re-visiting of decisions.
- A stronger partnership with the private sector. The PMO is headed by a public servant, but the other management positions including senior ones

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113 Housing NSW, Submission and Response to Review Questions, June 2010, p.19-20. The PMO also maintained and regularly reviewed a live Risk Register.
are a mix of public and private sector managers. This has allowed more innovation and implementation of private sector practices (such as the three-gate process described above). It has also allowed a stronger commercial culture to develop – for example, imposing liquidated damages for builders who are late in delivery. It is generally perceived that the ICG’s request for private sector personnel within the PMO and facilitation of these appointments through its powers under the Act resulted in a dynamic mix of management from middle to senior level. This is different from the normal interaction with the private sector where they operate as consultants at arms’ length to the delivery organisation.

- **Autonomy in decision making.** The head of the PMO reports to the CEO directly and was given the right by the CEO, in extreme cases where agreement with executive colleagues could not be reached, to have the final decision on NBJP projects (with a right for those executives to ask the CEO to intervene). This allowed for a more speedy decision making process. It also enabled the PMO to enforce the use of Housing NSW design guidelines.

- **The PMO outsourced nearly all project management, architectural services, engineering design and related construction services.** In business-as-usual much of this work is done in-house.

- **The PMO provided, both directly and through project management firms, a higher level of monitoring of safety and quality in construction projects than is generally undertaken by the smaller residential building sector used for business-as-usual.** External experts in building defects were used to educate builders and architects in the early stages of projects.

- **The inclusion of a program management function.** This position ensured that a full program was kept in the pipeline. If proposed projects fell over, substitute projects from the business-as-usual pipeline were slotted in. Where projects ran late, the program manager could re-schedule other projects to make-up the shortfall. The Assets Division has made the adoption of a stronger program management focus for business-as-usual a priority for the next 12 months.

- **The ability to change staff as the project went through its phases.** Initially the PMO had a significant team of town planners to resolve planning issues and drive projects through the planning approval process. By April 2010 most of these had gone, but the PMO then had a team of experienced construction managers to review and audit the work of project management firms and builders in delivering the projects. In real terms business-as-usual programs are also delivered flexibly using a combination of in-house and external resources to respond to varying workload demands.

Overall a key issue has been explicit personnel contracts. Poor or non-existent contracts were described to this Review as a chronic weakness of traditional internal business-as-usual management.

Housing NSW considers that few changes to the PMO model would be appropriate if similar circumstances were to arise. The main change for the future would be to embed a legal capacity directly into the PMO from the outset. Some time was lost in the movement of issues between the PMO and Legal Section of Housing NSW. Further, a very large amount of legal work (land and building contracts) was required in a short period of some eight weeks, which was disruptive to business-as-usual.
In terms of importing NBJP systems and practices into business-as-usual, some elements worked well for the PMO but are not proposed for business-as-usual. For example, in business-as-usual it is useful to have some permanent in-house expertise in architectural services, engineering design and related construction services to tackle specialist projects which may be unique to social housing and to ensure that the organisation has the expertise to work with and manage external suppliers of these same services, inform asset policy development and maintain corporate memory.

Housing NSW has established a project to draw out all of the lessons learned from the PMO and NBJP more generally. This includes changes in practice as well as lessons learned from the use of the Housing NSW PMO model. The first tranche of lessons learned (about relocating tenants) has been published and is being implemented.

The three-gate decision making process is being investigated to help streamline internal decision making and result in less revisiting of decisions, leaving the project delivery arm greater certainty in progressing projects.

There may be scope for developing a more commercial approach through rotating private sector commercial managers into the business-as-usual organisation to keep in touch with best practice in the commercial sector.

The emphasis on quality and safety demonstrated in NBJP could be adopted in business-as-usual through a stronger focus on key milestones, closer monitoring and the use of building experts at the start of projects to make sure that essential items such as water-proofing (which cause severe maintenance problems later if not done properly) are done to standard.

A clear program management function, with the same authority as exists in the PMO to substitute projects and drive the program as a whole, was a key aim of establishing the central Assets Division in Housing NSW. This function has previously been fragmented, with each of four Housing Services regions and Community Housing Division managing its own program, leaving the project delivery arm with disruptive stops and starts and unreasonable pressure to complete delayed projects.

Assets Division will be able to enforce the NSW design guidelines in a similar manner to PMO, and this role will be supported by its core responsibility for reviewing, updating and obtaining executive approval of the guidelines.

3.7 Findings and Recommendations in relation to Term of Reference (b)

The findings and recommendations for Term of Reference (b) fall into two main groups: those associated with the overall assessment of performance of the ICG and those specific to BER and the Social Housing Initiative. They are dealt with separately. Only the main findings and recommendations are set out below. Minor matters are included within their relevant sections in 3.1 to 3.6 above.

3.7.1 Findings
3.7.1.1 Performance of the ICG across all NBJP Programs
(a) In the context of the inter-governmental agreements and the NSW Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009 the ICG’s emphasis on timely delivery of projects and therefore not exposing NSW to the risk of serious Commonwealth-imposed penalty regimes was appropriate.
(b) The ICG’s assessment of the options for delivery of the two main NBJP programs in NSW (BER and the Social Housing Initiative) was reasonable in the circumstances prevailing in February-March 2009 and the chosen delivery models have delivered the programs in accordance with the NBJP objectives agreed with the Commonwealth and laid down in the Act.

(c) The NSW NBJP Taskforce Office supporting the ICG was established rapidly and has functioned effectively. There has been an appropriate focus on probity, quality assurance and transparency. In terms of transparency, although NSW has by far the greatest number of individual projects, it appears to provide the benchmark for transparency across the jurisdictions.

(d) The NBJP programs in NSW have been subjected to a very high level of reviews and audits. The planning and follow-up of these reviews and audits by the ICG and NBJP Taskforce appear rigorous and are well-documented. The agencies delivering the two main programs (DET and Housing NSW) have also conducted rigorous audit programs at the program and individual project levels. However, the Review notes that there has not yet been an audit of the Managing Contractors in the BER program.

(e) The planning assessment and approval processes for NBJP projects have been managed well overall, even if some parties disagree with some individual decisions. The Review concludes that:

- in keeping with the intent of the Minister’s commitment in the Second Reading Speech on the NSW Nation Building and Jobs Plan (State Infrastructure Delivery) Act (the Act) the majority of the NBJP projects have been processed using existing mechanisms under the EP&A Act and not by the ICG under Part 5 of the Act;
- for Part 5 assessments there were published guidelines, the ICG conducted merit-based assessments and each assessment was published; and
- performance of the NBJP Taskforce Office under Part 5 cannot be compared with local council performance under the EP&A Act because most BER and Social Housing Initiative projects that were not assessed under Part 5 were assessed and approved either by DET using the Infrastructure SEPP (ISEPP) or by Housing NSW using the Affordable Rental Housing SEPP (AHSEPP).

3.7.1.2 The Major NBJP Programs: BER and the Social Housing Initiative

There have been a number of reviews of these programs at national and state level (mostly focussed on BER) with various different conclusions being drawn. In reaching its own findings this Review has had the benefit of access to the reports of most of these reviews (some are ongoing) as well as information gathered in its own investigations. One difference between this Review and other reviews is that, consistent with our Terms of Reference, this Review has examined the performance of the programs as measured against the original objectives set for them in the intergovernmental agreements, Commonwealth guidelines and the NSW Act.

The political process has dealt extensively with the programs at both State and Commonwealth levels for party political purposes. It should be stressed, however, that in its assessment of these programs the Review had no interaction with any member of either government or opposition parties at the State or Commonwealth level.
There is evidently a range of views about the performance of these two programs in NSW. However the differences become much narrower when the programs are assessed against the original formal objectives set for them.

A. Building the Education Revolution

(a) Delivery of BER projects against the Commonwealth timelines has been outstanding. NSW is the only major jurisdiction to come close to achieving on-time delivery of the whole program to date, despite having the largest number of projects.

(b) The delivery model chosen by the ICG (using Managing Contractors) was a logical choice in the circumstances prevailing in February-March 2009. It was integral to the success in on-time delivery against the NBJP objectives in NSW.

(c) The Managing Contractor model has advantages and disadvantages. The principal advantages are its capacity to deliver large programs on time and on budget and that it transfers the risk from the State to the Managing Contractor for cost over-runs and defects in workmanship. The main disadvantages are that there may be a cost premium paid over the equivalent business-as-usual cost and that stakeholder management in a complex stakeholder environment may not be optimal.

(d) On the basis of evidence to date, the ICG has estimated that the average premium paid for using the Managing Contractor model in BER in NSW is of the order of 4%, although for some individual projects it may have been higher. This average is subject to review and may be found to be higher or lower on completion of the projects. This Review considers that, in the circumstances of the NBJP, a premium in the order of 4% for on-time delivery to meet the NBJP objectives and for transfer of risks from the State to Managing Contractors was reasonable.

(e) Abandoning the Managing Contractor model at this stage of the program in NSW would entail significant risk. No analysis has been presented of the risks of such a decision in terms of financial cost or the risks for management and completion of individual projects.

(f) In this Review, value-for-money means suitable project selection, fit-for-purpose design of projects and cost-effective delivery of projects. The Review finds that project selection was seriously compromised by the Commonwealth’s priorities and requirements, but that within these constraints the IPO generally tried to implement the priorities of the schools. There is ample evidence that three key Commonwealth constraints created significant problems for project selection:

- constraints on project selection and insistence on new facilities. In P21 the restrictions on project type and the bias against refurbishments ensured that many NSW schools were not able to meet their highest priority needs within the notional school allocation, and the insistence on new facilities for the SLC program meant that only a small proportion of the schools needing upgraded facilities received them;
- allocation of P21 funds to schools based on broad enrolment categories. This meant that funds were not always allocated to the schools with greatest needs and that no allowance was made for the site-specific difficulties that could severely affect the scope of works achievable for a fixed allocation;
- Commonwealth inflexibility concerning moving money between schools. The inability for NSW to move money between schools without a principal’s consent severely limited the ability to match school needs and site constraints across regions.

(g) The ICG’s decision to use the existing Schools Facilities Standards (SFS) was the only feasible option available in the circumstances prevailing in the first half of 2009. However, rigid application of these standards has apparently resulted in unsatisfactory outcomes in some projects, particularly small, stand-alone facilities.

(h) There have been sufficient questions raised about the SFS for a thorough review of the SFS to be undertaken. Two key issues are whether the construction premium is justified by offsetting future maintenance costs and whether the standards are optimum for all types of facilities to which they are applied.

(i) A small percentage (7.5%) of NSW schools registered complaints about the BER projects, but this was higher than the percentage for other jurisdictions. The majority of complaints concerned high costs for the projects provided (lack of cost-effectiveness). The Review considers that the competitive tendering processes should have produced cost-effective outcomes subject to market pressures. Overall it appears that the P21 projects incurred small cost premiums compared with business as usual practices (the most appropriate comparator). However, there is not yet sufficient data to determine this finally. Other sources of complaints were the impacts of the Commonwealth constraints mentioned under (e) above (particularly where those constraints resulted in de-scoping of projects) and initially poor communication from DET about project cost information.

(j) The Interim Report of the Commonwealth BER Implementation Taskforce contains some key criticisms of NSW performance relating to costs of projects. These appear to be based on inadequate data and superficial analysis. Any future inter-jurisdictional comparisons for BER should be based on rigorous analysis of the full actual construction sum (including all variations) for all facilities, preferably on life-cycle costs, and account for differences in school size, facility size, regional costs of materials and labour and the costs of delayed completion.

(k) DET should be encouraged to undertake its proposed review of the IPO model to determine whether parts of the model could be utilised in business-as-usual to improve capital works procurement.

B. The Social Housing Initiative

(a) Housing NSW, supported strongly by the ICG, has produced an outstanding result against the NBJP objectives. The objectives have been met in terms of timelines and exceeded in terms of units constructed for the allocated funds.
During the peak construction period over 10,000 full time equivalent jobs were created.

(b) The delivery model, with a specialised PMO containing public and private sector personnel working within and with the close support of Housing NSW, worked most effectively. Overall, use by Housing NSW of the available planning assessment and approval pathways for NBJP projects (principally self-assessment and approval under the AHSEPP and Part 5 assessment and approval by the ICG) ensured that proposed projects were commenced on time. Compelling evidence was provided to the Review that this would not have been possible if local councils had been the approval authorities.

(c) Social housing development remains a highly contentious issue in some residential areas and the NBJP projects were no exception. Apart from the (generally) unstated objection to social housing tenants per se, the other significant matters are alleged inadequate provision of car parking, ‘over-development’ of sites, lack of consultation and the non-payment of s.94 contributions for the first 20 units in any development.

Housing NSW is currently investigating parking space utilisation. The data will provide information for a policy review and/or for future negotiations with local government and residents.

The Review cannot comment on the issue of ‘over-development’ as examination of this matter was beyond the scope of the Review.

(d) Consultation under the AHSEPP is currently required only for neighbouring residents, not for owners of neighbouring properties or other residents potentially affected by the development. The Review considers this sub-optimal.

(e) The ICG and Housing NSW provided the Review with some justifications for non-payment of s.94 contributions for the first 20 units of NBJP projects, such as that the councils would not have expended the funds expeditiously in line with NBJP objectives. The Review considers these justifications to be generally unconvincing and can see no justification for continuing this practice beyond NBJP projects.

### 3.7.2 Recommendations

The Review recommends:

**Recommendation 3.** That the current arrangements be maintained for oversight and administration of the Nation Building and Jobs Plan in NSW until the program is completed (i.e. the ICG, the Taskforce under s.7 of the Act and the NBJP Taskforce Office).

**Recommendation 4.** That the current arrangements be maintained for operational delivery of the Nation Building and Jobs Plan in NSW including the Integrated Program Office (IPO) within the Department of Education and Training and Program Management Office (PMO) within Housing NSW.

**Recommendation 5.** That the Managing Contractor model continue in place until the Building the Education Revolution (BER) program is completed in NSW.
Recommendation 6. That the current arrangements for planning assessment and approval remain in place until all NBJP projects have been assessed. The current standards of assessment and transparency for Part 5 assessments should be maintained.

Recommendation 7. That DET’s Schools Facilities Standards (SFS) be reviewed to assess:

a. whether any of the designs contain excessive requirements;
b. whether there should be more flexibility in design for different types of schools; and
c. whether the balance between construction and maintenance costs is optimum for each category of facility for each region.

Recommendation 8. That DET undertake its proposed review of the Integrated Program Office (IPO) model to determine whether parts of the model should be imported into its business-as-usual procurement of capital works.

Recommendation 9. That, to the extent possible, NSW should endeavour to ensure that any future inter-jurisdictional comparisons of NBJP programs are conducted using comparable data and rigorous analysis.

Recommendation 10. That Housing NSW review its car parking policy once the current comprehensive survey on utilisation of car parking spaces is completed. This Review recommends that comprehensive consultation be undertaken with local government as part of any such review.

Recommendation 11. That Housing NSW review its notification policy for proposed developments. This Review considers that notification limited to adjoining residents is inadequate and that a minimum standard of notification of adjoining owners, and residents reasonably likely to be affected, should be adopted as policy even if the statutory requirement is less onerous;

Recommendation 12. That Housing NSW review its current practice of not paying s.94 contributions for the first 20 units in multi-unit developments.

Recommendation 13. That Housing NSW should undertake its proposed review of the Program Management Office (PMO) model to determine what additional features of the model could be utilised effectively in business-as-usual capital procurement.
4. TERMS OF REFERENCE (c) and (d)

(c) ‘the legal and economic benefits and consequences of applying the principles of this legislation, and the manner in which it has been implemented, to other significant projects or classes of projects in NSW’

(d) ‘options and mechanisms for applying the principles should they be applied to such projects or classes of projects in NSW’

4.1 Introduction

These two Terms of Reference have aspects in common and (d) flows directly from any conclusions in (c). To avoid unnecessary repetition they are considered together in this section.

Term of Reference (c) is a complex Term of Reference. The key elements and approach the Review has taken to them are set out below.

‘principles of the legislation’

The legislation was described under Term of Reference (a) (see 2.3 above). Whilst ‘principles’ is not defined in Term of Reference (c), the Review considers that there are five key ‘principles’ that are relevant:

(i) the ICG’s power to coordinate agencies;
(ii) the ICG’s power to undertake or take over projects;
(iii) the ICG’s power to modify administrative controls (e.g. procurement);
(iv) the ICG’s power to bypass the Environmental Planning and Assessment Act 1979 (EP&A Act) and other development control legislation in assessing projects; and
(v) the ICG’s immunity from review or challenge.

In the case of the NBJP, (i) and (ii) were specifically restricted to State agencies and their projects, (iii) was restricted by its nature to State projects, and (iv) and (v) were applicable to all NBJP projects, not just those undertaken by the State.

The five principles fall into two broad classes: those designed to develop and deliver State projects and those designed to provide an alternative planning assessment and approval regime. The second class could be further split into State developments and non-State developments.

‘the manner in which it has been implemented’

This refers to the approaches taken by the ICG in applying the principles. This is dealt with in Term of Reference (b). However, it is important to remember that the Act itself did not specify implementation mechanisms, nor did it provide guidance as to the manner of exercise of the powers and functions given to the ICG.

There were many options theoretically open to the ICG for the overall implementation strategy (ranging from a self-contained construction authority approach, e.g. the
Sydney Olympics model, to the coordination model chosen for the NBJP)\textsuperscript{114} and for the individual programs within the NBJP. In fact, the ICG used a different model for project delivery for each of the main programs in the NBJP (e.g. Managing Contractors in P21, Project Managers in Social Housing and business-as-usual in National Schools Pride).

The particular constraints of the NBJP largely determined the options selected. The precedent value of the approaches taken by the ICG must therefore be treated with caution. They are not necessarily transferrable to a different situation.

‘significant projects or classes of projects’.

These are not defined. As a starting point the Review considered that ‘significant projects’ might be equivalent to the ‘major projects’ identified in the NSW Department of Planning submission to the Review, i.e. those eligible for consideration under Part 3A of the EP&A Act. However, since this currently averages about 125 per year, some refinement was obviously required.\textsuperscript{115} One possible option considered was the ‘critical infrastructure’ projects (a sub-set of the major projects under Part 3A) which are deemed to be essential to the State for economic, social or environmental reasons.\textsuperscript{116} ‘Classes of projects’ could capture any projects with sufficiently similar characteristics to be capable of being legally defined and can encompass a much wider range of projects than ‘significant projects’.\textsuperscript{117}

‘legal and economic benefits and consequences’

These will be specific to any options presented (a point also made by the Department of Planning in their submission to the Review\textsuperscript{118}).

4.2 Submissions

Many submissions from local government, industry bodies and one government agency (Department of Planning) focussed on Terms of Reference (c) and (d). Interviews with these submitters usually had a similar focus. For contextual purposes the Review has distilled what it considers to be the key messages to come from these sources.\textsuperscript{119} They include:

(i) The life of the current NBJP Act should not be extended

There are multiple reasons given, including:

- Extension would be a breach of trust - support for the legislation from local government and State Opposition was based on the grave nature of the potential crisis and explicit undertakings to repeal the legislation when the NBJP concluded. These undertakings were given by the then Minister for Planning (now Premier) in the Second Reading Speech on the Bill and in the

\textsuperscript{114} ICG, Submission to the Review, 14 May 2010, p.4
\textsuperscript{115} Department of Planning, Submission and Response to Review Questions, July 2010, p.12 (Annexure G to this report)
\textsuperscript{116} e.g. Kurnell desalination plant, Pacific Highway upgrade, Hunter to Queensland gas pipeline, etc
\textsuperscript{117} e.g. the NBJP projects, various types of residential or commercial development, etc.
\textsuperscript{118} Department of Planning, Submission and Response to Review Questions, 19 July 2010, p.14
\textsuperscript{119} As this section presents an overview, specific attribution is minimal. However, the summary of public submissions is at Annexure B and the Review has been advised that the submissions themselves will be published once this report has been released (http://www.more.nsw.gov.au/nationbuildingtaskforce). The government agency submissions and responses to Review questions are at Annexures D-G.
Parliamentary debates. They were repeated many times during the debates by government members.

- The legislation is unnecessary to deal with NBJP-type projects in a business-as-usual context as evidenced by the fact that the majority of NBJP planning approvals were processed under the EP&A Act rather than the NBJP provisions.
- While it was acknowledged that jobs were generated and the economy stimulated, some submitters stated that in the process environmental and social impacts, strategic planning, good design, heritage protection, and management of unique local issues, were actually or potentially prejudiced. While these problems were (reluctantly) tolerated in the exceptional circumstances of the GFC they are not acceptable consequences of a long-term planning system.

(ii) The planning powers in the legislation should not be extended to other classes of development

Again, there were multiple reasons given, including:

- This is simply creating another path for development approvals in what is already a very complex approval system. Most submissions were negative about the NSW planning system (some extremely so) and their focus was a reform of the system as a whole rather than something perceived as another ‘band-aid’.
- The characteristics of the NBJP projects are variously described as low risk, low impact, for public (or social) benefit, primarily on publicly owned land, relatively small and geographically spread. The context is described as a major expenditure of Commonwealth funds over a very short timeframe to deal with an emerging national crisis.

The combination is viewed as unlikely to be repeated\(^\text{120}\) and there is therefore no justification for setting aside the ‘planning, consultation and appeal provisions to deal with ‘normal’ classes of development’.\(^\text{121}\) Other submissions highlighted the same characteristics and combination of circumstances to emphasise that there was no precedent in the NBJP projects for extension of Part 5 powers to private residential or commercial developments.

- Centralising power in the hands of a non-elected official as is inherent in the ICG model disenfranchises local government and communities in terms of consultation, proper consideration of local planning controls and the capacity to appeal to the courts.
- If any extension of the principles was to be contemplated it should be constrained to very large complex State projects with a clear public benefit purpose. There were some variations on this theme (e.g. only on State-owned land currently zoned appropriately). There was generally very strong opposition expressed to including private developments in such a scheme although some critics of the current planning system (such as the Urban Taskforce) favoured including private development.

\(^{120}\) Department of Planning, Submission and Response to Review Questions, July 2010, p.2

\(^{121}\) ibid.
4.3 The ICG as a possible alternative for assessment and approval of developments

Many criticisms were levelled at the structure and operation of the NSW planning system including:

- it lacks strategic focus;
- with multiple modifications over time it has become very complex and is difficult to navigate even for experienced professionals;
- it has both merit and process appeals for most types of development;
- local councils may not have sufficient resources (either numbers or skills) to process either high volumes of developments or complex developments;
- some local councils appear to oppose certain classes of development routinely (e.g. social housing);
- the process is often very slow and process-focused; and
- overall, the system produces substantial uncertainty for investors.

The ICG’s use of Part 5 of the Act for assessment and approval of some NBJP projects overcame a number of these (i.e. speed, complexity, council controls, council capacity and appeals)\(^ {122} \) and thus ensured certainty and timeliness for commencement of these projects. Most, but not all, of these projects were delivered by State agencies.

However, although this Review has found that the ICG’s powers under Part 5 were used appropriately and were necessary for delivery of some NBJP projects, these projects were from very restricted classes of development and did not generally entail complex assessments. As noted in 4.1 above there is no real precedent value in these projects for extending the ICG’s planning powers to any other classes of development.

There is also an inherently high level of risk in the Part 5 powers (i.e. there are no procedures laid down for their exercise, no appeals and oversight is limited to corruption)\(^ {123} \). This was identified during the Parliamentary debates on the bill and was of significant concern. However, it was ultimately considered acceptable in the context of the GFC.

As noted previously, the nature of the NBJP projects (a large number of mostly small, low-impact developments) spread this risk and partially controlled its magnitude. Further mitigation was provided by the actions of the ICG in publishing procedures and implementing those procedures in a transparent manner. However, the risk may become unmanageable if applied to a different classes of development, or by an ICG with a less rigorous approach. In either case the risk would become unacceptable.

It is also doubtful that use of these powers for business-as-usual projects in schools or social housing can be justified. There are at least three reasons:

(a) the absolute imperative for speed is not present in either school developments or social housing developments under normal circumstances;

(b) there have been changes to the planning system to facilitate these types of development (mainly the ISEPP and the AHSEPP) and more changes are planned; and

\(^{122}\) See this Review’s report on Term of Reference (a) for detail.

\(^{123}\) The risks were discussed under Term of Reference (a) at 2.5.4
(c) the majority of BER and social housing projects were approved under the existing mechanisms and not under Part 5.\footnote{124}

In the absence of major reform of the planning system\footnote{125} the Department of Planning (DoP) has instituted multiple modifications and has others planned. These are set out in detail in the DoP Submission and Response to Review Questions (Annexure G).\footnote{126}

Two of these reforms, the ISEPP and the AHSEPP, are directly relevant to the NBJP context since they were used for most assessments and approvals for projects in the BER (ISEPP) and Social Housing Initiative (AHSEPP) programs. Both SEPPs are recent initiatives (ISEPP 2007 and AHSEPP 2009) and the ISEPP was also amended in 2009 to improve its applicability to BER projects. Other relevant reforms are the Complying Development provisions and the recent introduction of the Joint Regional Planning Panels (JRPPs).\footnote{127} The ‘existing system’ as applied to BER and Social Housing Initiative projects was therefore highly modified from ‘normal’ development under Part 4 of the EP&A Act.

The ICG, DET and Housing NSW have advised the Review that without these reforms it would not have been possible to process the majority of BER and Social Housing projects under the EP&A Act and meet the required timeframes. This position was confirmed in some of the discussions with local government – at least for social housing.

The advantages of the reforms for both NBJP projects and their business-as-usual counterparts are set out in some detail in the submissions and responses to questions from Housing NSW, DET and Department of Planning. It is not necessary to re-state them here. Of more importance is the fact that substantial numbers of projects still required assessment by the ICG under Part 5. The Department of Planning sets out the reasons for processing under Part 5 as follows:\footnote{128}

\textit{One of the main reasons projects were "called in" under the NBJP Act for determination was because the development proposal did not meet criteria in the Infrastructure SEPP or Affordable Rental Housing SEPP. For housing, the primary reason for use of the NBJP Act was because the projects exceeded the scale criteria under the Affordable Rental Housing SEPP. For education projects, the NBJP Act was used principally where schools sites were affected by either heritage, bushfire or flooding constraints.}

\textit{Table 6 list the key factors resulting in "call-ins" based on an analysis of NBJP projects on the website. The "development related constraints" are being considered in the review of the Infrastructure SEPP and the Affordable Rental Housing SEPP. In a number of cases, additional criteria are likely to be included so that in the future, these classes of development can be determined under the streamlined processes under the EP&A Act. The "site related constraints" issues may relate to important hazard or environmental matters which deserve careful examination. With matters such as bushfire risks, the Department and Department of Education and Training are working with the Rural Fire

\begin{footnotesize}
\begin{itemize}
\item \footnote{124}{But note that more complex or controversial projects were usually dealt with under Part 5 to avoid potential delays.}
\item \footnote{125}{An issue raised strongly in submissions from and interviews with (i) local government at both elected representative and senior officer level and by the peak bodies, (ii) industry organisations, and (iii) government agencies.}
\item \footnote{126}{It is not the function of this Review to comment on these in detail. However, their ability to deal with the range of issues set out at the commencement of this section remains an open question.}
\item \footnote{127}{But note that JRPPs have not yet had time to have an impact on social housing approvals.}
\item \footnote{128}{Department of Planning, Submission and Response to Review Questions, July 2010, p.11}
\end{itemize}
\end{footnotesize}
Services to develop protocols to apply at school sites so that facilities are appropriately located and designed to deal with different levels of bushfire risk.

Table 6 – Reasons for “call-in” of projects for determination under the NBJP Act

<table>
<thead>
<tr>
<th>Development related constraints</th>
<th>Site related constraints</th>
</tr>
</thead>
<tbody>
<tr>
<td>Type of development not covered</td>
<td>Bushfire risk area</td>
</tr>
<tr>
<td>Not permissible under zoning</td>
<td>Heritage area/item</td>
</tr>
<tr>
<td>Development not meet boundary setbacks</td>
<td>Flood liable</td>
</tr>
<tr>
<td>Development exceed scale</td>
<td>Coastal hazards</td>
</tr>
<tr>
<td>Development not comply with design issues</td>
<td>Native vegetation/tree removal/riparian zone</td>
</tr>
<tr>
<td>Development not comply with parking</td>
<td>Threatened species</td>
</tr>
<tr>
<td></td>
<td>Aircraft noise impact</td>
</tr>
<tr>
<td></td>
<td>Contaminated land</td>
</tr>
</tbody>
</table>

The Department then went on to describe some further proposed changes:129

The “development related constraints” are being considered in the review of the Infrastructure SEPP and the Affordable Rental Housing SEPP. In a number of cases, additional criteria are likely to be included so that in the future, these classes of development can be determined under the streamlined processes under the EP&A Act.

The provisions in s76A(6) of the EP&A Act which currently prevent the application of complying development in heritage areas and in certain environmentally sensitive areas are to be removed shortly. The complying development provisions can then be tailored for particular classes of developments and for particular locations, making the system more efficient while delivering appropriate environmental and heritage controls. These types of initiatives will assist in streamlining the delivery of projects in risk zones under the EP&A Act. Once these provisions have been commenced, many of the projects dealt with under the NBJP Act will be able to be considered under the efficient complying development process.

The bottom line is that nearly all the NBJP projects could have been managed under the SEPPs if the proposed changes were in place. Although there is some debate around appropriate thresholds (particularly for social housing) it would appear that if a school or housing project does not fit within the proposed modified SEPP provisions then it is probably too big or too complex for self-assessment and approval by DET or Housing NSW.

It is possible that assessment and approval of other classes of development similar in nature to NBJP projects could be streamlined using similar approaches to those applied to schools and social housing. The DoP submission mentions several proposed initiatives of this kind, including additional SEPPs. However, not all submissions favoured this path and there were serious reservations expressed about SEPPs, including:

- SEPPs are yet another way to remove local control over decision-making about developments;
- there is no mandatory requirement to exhibit SEPPs publicly, nor to assess their impact;

129 ibid., p.11-12
• SEPPs usually amend or override local planning controls and each council must therefore determine how the SEPP will interact with its strategic planning objectives and development controls and also how the new or amended SEPP will interact with other SEPPs in relation to the same site;

• Amendment or introduction of new SEPPs creates the need for changes to practice and systems at local councils and also a need for training. This is not trivial – in 2009 four new SEPPs were gazetted and 30 amendments made. By June 2010 12 more amendments had been made and advice provided of two new SEPPs and one major amendment to come later in 2010;

• Development of SEPPs is usually slow and the rate of amendment suggests they may not succeed in meeting their objectives when first introduced.

The Review considers that, although SEPPS cannot deal with all possible issues relevant to a particular class of development (such as zoning and referrals) it is possible over time to strike a balance between the public policy imperative behind the SEPP (e.g. the AHSEPP) and the imposition of unreasonable developments130 on local communities. However, continual introduction and modification of SEPPs will further complicate an already complex system and will impose costs on councils.

The Review therefore concludes that:

• Part 5 powers should be retained for NBJP projects for the duration of the program;

• Part 5 powers should not be extended to similar projects in the 'business-as-usual stream' for DET or Housing NSW;

• the use of Part 5 for NBJP projects does not set a precedent for extension of these powers to other classes of development;

• the significant risks inherent in the largely unfettered powers in Part 5 may have been manageable in the context of the NBJP, but could produce a very significant exposure with either a different class of projects or an ICG with a different approach to rigour and transparency;

• no compelling arguments have emerged to warrant retention of Part 5 as an alternative pathway for assessment and approval of non-NBJP projects generally.

4.4 Possible application of the ICG model for delivery of significant projects and other classes of projects

In 4.3 the issue of whether the planning principles in the Act should be applied more broadly than NBJP projects was considered. In this section consideration is given to the coordination and project delivery components of the Act.

4.4.1 Submissions

Submissions from outside the State government were generally in favour of better coordination of state agencies, but were usually not explicit about the precise ambit of such coordination (i.e. it is inherently a ‘good’ thing). However, the submission from the City of Sydney did explore the issue in more detail:

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130 The Review recognises the subjectivity of ‘unreasonable’ in this context.
The main aspects of the Act which would greatly assist in achieving potential benefits in relation to other government funded (not-for-profit) projects, specifically relate to Parts 3 and 4 of the Act. These Parts enable the Coordinator General to effectively manage the obligations and required cooperation of other government agencies, public authorities and state owned corporations to achieve a coordinated outcome.

Publicly funded projects which might benefit from the coordination functions of the Act include:

- multi-jurisdictional public interest transport projects, in particular light rail, heavy rail and metropolitan-wide networked cycle ways (extending the City of Sydney network now under construction)
- complex multi-agency decentralised electricity master plans and projects faced with entrenched regulatory barriers
- hospital projects which may flow from the 20 April 2010 COAG National Health and Hospitals Network Agreement.\footnote{131}

The interview with Infrastructure Partnerships Australia also explored the issue and provided some useful insights including the importance of restricting the model to unambiguously public benefit projects, limiting the number of projects to a few in any one year and ensuring that credibility in the model was developed over time by rigorous project selection.\footnote{132}

Some other submissions sought a focal point for negotiation with government on major private sector development proposals with that focal point being able to produce (and maintain) a clear whole of government position on the proposal and control the demands of agencies with statutory roles in the consent process. This has been a consistent demand from industry for at least 30 years and has been the genesis of a number of Coordinator-General models.\footnote{133}

From within government the principal contributors on this issue were DoP and the ICG. The DoP submission identified three possible stages of involvement of a Coordinator-General in projects and suggested some types of developments to which a model might be applied:

'Major developments and infrastructure programs of works would benefit from continuing the ICG’s role in project coordination and delivery, including:

- in co-ordinating and ensuring timely and efficient formulation of development project proposals with a whole of government approach.
- in the timely post approval delivery of major infrastructure projects to deliver the program as a whole on time / on budget - particularly when tight timeframes are to be met.
- in co-ordinating and ensuring the appropriate provision of infrastructure and integration with other projects in the area.

Other types of major programs of works could include the implementation of regional freight strategies including in relation to freight to the Port Botany and the Sydney

\footnote{131}{City of Sydney, Submission to the Review, May 2010, p.8}
\footnote{132}{Infrastructure Partnerships Australia (and others) expressed concern that the number of projects being considered under Part 3A was undermining public confidence in the Part 3A process and they were anxious to avoid this potential consequence for any Coordinator-General model. The Review can make no comment on the Part 3A issue, but recognises the risks inherent in a Coordinator-General model that acquires a large number of projects.}
\footnote{133}{See 4.4.2 below for a brief history.}
International Airport, the delivery of the light rail projects identified in the Transport Blueprint and the delivery of the North West and South West Rail projects. This approach would be similar to the delivery role undertaken by the Queensland Co-ordinator General (QCG) in planning, delivering and co-ordinating programs of works and major developments.\(^{134}\)

It should be noted that DoP is firmly opposed to the ICG having a role in their own domain (the assessment and approval process). However, their argument that proposed projects ‘can and should be assessed efficiently under the existing EP&A Act system’ was not generally supported in submissions or interviews with industry bodies and some local government organisations. Since the Review did not receive submissions from other State agencies that might be impacted by any Coordinator-General model (e.g. transport agencies, health, environment, etc) their views on being the subject of improved coordination are unknown.

Summarised:

- Some State projects could benefit from being managed within a Coordinator-General model (i.e. those with a clear public benefit and complex agency interactions);
- There are three possible stages of involvement – project development, project assessment and approval, and project implementation;
- There is greater agreement about project implementation than either project development or project assessment and approval;
- The issue of an effective coordination mechanism for considering and managing State involvement with major private investment projects remains unresolved.

4.4.2 Previous Coordinator-General arrangements in NSW

The problem of coordinating NSW State agencies on major projects or events is not new. One member of the Review recalls the Hon. John Hannaford MLC (when he was Minister for State Development in 1990-91) lamenting the fragmentation of state inputs to major projects and the difficulty of maintaining a coordinated position during negotiations with major private sector investors. The Transport Administration Act 1988 (designed to facilitate development and delivery of major rail infrastructure projects) is an even earlier recognition of the problem.\(^{135}\)

The Review sought advice from the Department of Premier and Cabinet (DPC) on the history and models used for Coordinator-General arrangements. The response indicates that there are two basic types of arrangement:

(i) special-purpose vehicles - for specific types of infrastructure, e.g. the rail example above; specific projects, e.g. NBJP; or specific events, e.g. Sydney Olympics and World Youth Day;

(ii) coordination of major infrastructure projects generally - usually above defined thresholds or specified classes, e.g. the various non-statutory coordinators general and the statutory arrangements under the Infrastructure Implementation Corporation Act 2005.

\(^{134}\) Department of Planning, Submission and Response to Review Questions, July 2010, p.13

\(^{135}\) In this context note that the Queensland Coordinator General was established by statute in 1938!
These two main types have been supported by a variety of statutory and non-statutory models depending on the tasks to be performed. Examples are:

- **Agency Administrative Unit** (i.e. a new agency or unit within an existing agency established under the *Public Sector Employment and Management Act 2002*).
  
  The Health Infrastructure Board and the former Ministry for Urban Infrastructure Management are examples. By their very nature the level of government control is high, they are usually operating within existing systems and paradigms and they will not be supported by special purpose legislation. Their capacity to drive change is effectively limited by the relative power of the Minister in Cabinet.

- **Public Authority** (i.e. a statutory body which is subject to the *Public Sector Employment and Management Act 2002* and the *Public Finance and Audit Act 1983* but otherwise operates within its own statutory powers). The Olympic Coordination Authority and World Youth Day Authority are examples. Depending on their statutes they can have substantial power and independence.

- **Coordinator-General** (i.e. an entity designed to provide coordination across a range of agencies or functions or delivery of complex projects. This can be based statutorily or administratively). The ICG under the *Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009* is an example that is statutorily based. Alternatively, the Infrastructure Coordinator General appointed by the then Premier in 2007 was originally established administratively but subsequently acquired statutory powers by way of delegation under the *Infrastructure Implementation Corporation Act 2005*).

- **Statutory SOC** (i.e. a statutory State-owned corporation usually with wide powers to carry out the complete range of functions in relation to major projects, but subject to the relevant provisions of the EP&A Act. The governance mechanism is a Board, and the Treasurer and one other Minister are shareholders). An example is the former Transport Infrastructure Development Corporation established under the *Transport Administration Act 1988*.

While DPC in its advice to the Review characterised only one of these arrangements as a ‘Coordinator-General’, they are all capable of being used by a Coordinator-General if the particular situation required it (although the Review considers that the statutory SOC is an unlikely candidate given that there are simpler models available that would meet most needs).

Some special purpose vehicles have been successful in delivering the desired outcome, e.g. Sydney Olympics and World Youth Day. The common characteristics underpinning success appear to be: a time-critical project or event that cannot be allowed to fail; power to do what is necessary to ensure delivery (or access to that power); and adequate resources. The success of the ICG in delivering the NBJP is similarly based.

On the other hand, the number of attempts and the variety of approaches to general coordination of major projects indicate that this has been a much less fruitful area. It would appear that the further away a Coordinator-General arrangement is from the characteristics listed in the previous paragraph the less effective it is likely to be. Given the calibre of some of the Coordinator-General participants this would suggest that the State agencies in NSW demonstrate great resilience in the face of attempts to
make them cooperate effectively. As noted in 2.5.3, there is also little incentive in NSW for State agencies to cooperate on major infrastructure projects.

4.4.3 Possible models for extending the Coordinator-General function

The outline of previous NSW models in 4.4.2 above suggests that Coordinator-General models designed to coordinate major projects generally are less successful than specific-purpose models. It is not clear why this should be the case. Theoretically it should be possible to construct and maintain a workable major projects model, but the limited success and the high turnover rate for these initiatives indicates otherwise. It is not that such a model isn’t needed. Industry is often faced with conflicting positions from State agencies on major investment proposals at both central and regional levels with little prospect of either speedy resolution or certainty of outcome. There has also been limited delivery of major public projects in recent years.

This Review considers mainly the delivery of public benefit projects because the principles in the NBJP legislation are associated with such projects, funded by government and, in most cases, carried out either by or on behalf of government. Most submissions that addressed Terms of Reference (c) and (d) also restricted their comments to government activity. The Review will therefore focus mainly on whether the principles in the Act relevant to coordination and delivery of NBJP projects could be transferred to other state-based projects.

Starting with the types of projects that might be considered, the relevant criteria appear to be:

(i) incontestably for public benefit;
(ii) exceptionally important (and clearly recognisable as such);
(iii) for a specific purpose that is readily definable;
(iv) of substantial value and complexity;
(v) involving multiple layers of government and/or multiple state agencies; and
(vi) government-based.

Rigorous selection based on these criteria should result in very few projects being managed by a Coordinator-General in any year.136 This was considered critical for credibility by some submitters137 and is also an important consideration for a range of management reasons. The types of projects that might fit these criteria include:

- major transport infrastructure such as a significant upgrade to the heavy rail system or rail freight system, major highway upgrades (e.g. Pacific and Hume) and major port developments;
- major energy infrastructure such as interstate gas pipelines;
- major complex water supply initiatives;
- major hospital complexes; and
- major place management initiatives such as Barangaroo.

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136 The obvious risk is that pressure will arise to use the model on any political problem of sufficient magnitude that is likely to be intractable in the short term.
137 e.g. Infrastructure Partnerships Australia, Submission to the Review, May 2010
These examples are not exclusive: they are indicative of the nature and scale of project that would fit comfortably within the criteria and may benefit from coordination across government. That doesn’t mean that all projects fitting within the criteria should be managed by a Coordinator-General. The key issue is whether a substantial improvement in outcomes is likely from such intervention.

As is evident from the different models used for Sydney Olympics, World Youth Day and NBJP the delivery model can vary substantially for projects that fall within the criteria and a Coordinator-General electing to manage service delivery directly as in the Olympic Coordination Authority will have a fundamentally different set of implementation tasks to a Coordinator-General who elects to coordinate across existing service delivery agencies as in the NBJP. Their resource requirements will also vary substantially.

This variability raises the question of whether a permanent Coordinator-General arrangement or a series of special purpose vehicles would be a better option. At this point the Review can only point out the general pros and cons of both options and make suggestions as to how these might be evaluated. Definite conclusions can be reached only once decisions are made as to: (i) whether any coordination or delivery function based on Parts 3 and 4 of the NBJP Act is necessary; (ii) whether the suggested project selection criteria (and hence types of projects) are appropriate; and (iii) what stages of the project development, approval and implementation cycle would be included in the role of a Coordinator-General.

For the permanent Coordinator-General arrangement the principal advantages are:

- leadership on whole-of-government interest in major projects;
- expertise in the complexities of coordination and delivery of major projects in NSW is developed and retained;
- new projects can be added when necessary with shorter ramp-up times;
- systems, protocols and procedures relevant to the various provisions in the Act can be developed and refined;
- provided credibility is established there should be relative freedom from political intervention.

The principal disadvantages are:

- lack of specialised expertise in the project areas;
- there may be costs associated with maintenance of idle capacity (conversely there may be considerable pressure to over-utilise the capacity);
- permanence may see decreased innovation;
- the wide variety of possible projects does not favour permanent capacity.

For the special purpose vehicle arrangements the principal advantages are:

- the special purpose vehicle itself can be tailored to the project;
- the Coordinator-General and resources can be chosen to meet the requirements of the project;
- innovative approaches to project-specific problems are more likely to develop;
- there is no fixed overhead; and
the effort required to establish the special purpose vehicle is itself a barrier to over-use.

The principal disadvantages are:

- each new project requires a ‘cold start’ in terms of staff, systems, etc;
- expertise is not necessarily developed or retained in the key areas of coordination and delivery in the NSW context;
- a system based on repeated appointments is vulnerable to political manipulation and credibility problems;
- there is no guarantee that the Parliament will agree to all special purpose vehicles that the government wishes to establish (although this hasn’t proved insurmountable for projects such as Sydney Olympics and NBJP).

Both models have significant potential weaknesses in governance, particularly if the current provisions in Part 6 are part of any new arrangements. But these risks are inherent in giving any unelected official wide-ranging and largely unfettered statutory powers over one or more projects of great significance to the State.\(^{138}\) The anticipated payback is that the project will be delivered more efficiently and/or to a higher standard.

Some ‘intermediate’ options may avoid some of the problems inherent in the pure models and aggregate some of their advantages. Conceptually they would be based on a version of the Act that is not program specific (i.e. provisions specific to the NBJP are replaced by generic provisions) that retained the powers in Parts 3, 4, 5 and 6. Such an Act would allow for the appointment of a Coordinator-General for a specific project that would be annexed to a schedule and the suite of powers necessary to coordinate and deliver that project would be ‘drawn down’ from those available in Parts 3-6.

There are various options for identifying the project, the Coordinator-General and the powers. These will need to be debated if the concept is considered viable.

An alternative version of this intermediate model is that the Coordinator-General would be appointed for a period rather than to specific projects and would be supported by a small permanent staff. Other aspects of the model would not change.

As noted earlier, the DoP submission identifies three stages of a project to which intervention by a Coordinator-General might be directed (project development, assessment and approval, and implementation) and recommends against the involvement of any Coordinator-General in assessment and approval. However, the Review considers that involvement of a Coordinator-General in any of the stages (and the extent of that involvement) will depend upon assessment of the nature of the project\(^{139}\) and the potential need for intervention to effect coordination or delivery.

In relation to project development, the Review considers that for complex projects there may well be a need for input from central agencies early on in development to ensure that the likely interactions across (and outside) government are identified and managed and that adjustments are made before project development is too far advanced. However, it is probably unnecessary and undesirable to establish a

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138 The risks were discussed under Term of Reference (a) at 2.5.4
139 ‘project’ is used broadly here to mean project, program or event
Coordinator-General with prime responsibility for initiating major projects or to move project development away from the agencies with subject expertise.

The Coordinator-General's need for access to planning powers is more complex. Access to planning powers has been integral to the success of at least two major projects managed under a Coordinator-General model (Sydney Olympics and NBJP). In the case of the NBJP, although the decision to proceed with the various sub-programs was made by the Commonwealth and States and Territories in February 2009, many individual projects within those programs subsequently required separate planning approval. Some of these assessments and approvals were conducted by the ICG under Part 5 and there is general agreement that the Part 5 powers were necessary and appropriate to deliver the NBJP program within its time constraints. Based on this the Review does not accept that at this stage the EP&A Act systems and procedures are capable of providing a complete planning and assessment framework for all major projects, particularly where time constraints are critical.

Some of the types of projects proposed for inclusion in any new model, such as major highway upgrades, may have similarities to the NBJP in that even after the concept is approved there are many smaller decisions to be made involving responsibilities of agencies other than the construction authority. It may therefore be appropriate for a Coordinator-General with overall responsibility for delivery of such a project to have access to the same kind of reserve powers as those available to the ICG under Part 5 for NBJP projects. Ideally the need for access to all or part of the Part 5 powers for an individual project would be considered carefully before access was provided and any necessary constraints could be applied at that time. The key is to get the balance right and then manage the residual risks inherent in the model.\footnote{Regarding balance: it would not be appropriate, for example, for the Coordinator-General to have unfettered power to direct that a major highway upgrade be routed through a National Park or Nature Reserve.}

The issue of a Coordinator-General having power to assess and approve the whole concept plan or major project application for a large, complex project is different. At this level of decision the Review considers that the procedures in the EP&A Act provide the necessary checks and balances to ensure that an appropriate level of consideration is given to the risks and benefits of the proposal. The Review does not support a Coordinator-General having decision-making power of this kind.

### 4.5 Findings and Recommendations

Only the main findings and recommendations for Terms of Reference (c) and (d) are included here.

#### 4.5.1 Findings

(a) Use of the Part 5 powers in NBJP projects does not provide a sound precedent for extension of these powers to the assessment and approval of other projects or classes of projects. However, the Part 5 powers may be appropriate for application on a case by case basis to specific projects managed under any future Coordinator-General.

\footnote{The residual risks were discussed in 2.5.4. They are dependent on a range of factors including the model chosen, the extent of the ‘drawdown’ of both the Part 5 powers and the Part 6 protections from appeal or review.}
(b) There is merit in establishing a Coordinator-General model based on the NBJP legislative principles to be used for improved coordination, development and/or delivery of a limited range of critical state projects. The project selection criteria should ensure that the project is:

- incontestably for public benefit;
- exceptionally important (and clearly recognisable as such);
- for a specific purpose that is readily definable;
- of substantial value and complexity;
- involving multiple layers of government and/or multiple state agencies; and
- government-based.

(c) The types of projects that the Review considers might fit within these criteria include:

- major transport infrastructure such as significant upgrade to the heavy rail system or rail freight system, major highway upgrades (e.g. Pacific and Hume) and major port developments;
- major energy infrastructure such as interstate gas pipelines;
- major complex water supply initiatives;
- major hospital complexes; and
- major place management initiatives such as Barangaroo.

(d) A Coordinator-General model based on the NBJP legislative principle could be established using the ‘shell’ of the current Act to create a mechanism whereby specific projects could be added to a schedule and the relevant powers required for that project could be allocated to the Coordinator-General for managing that project.

(e) There were unequivocal assurances given to the Parliament and stakeholders that the Act would not be extended beyond the NBJP programs. The Review considers that simply extending the Act in order to achieve the purpose outlined in (b) above would threaten the credibility of the proposal.

4.5.2 Recommendations

The Review recommends:

Recommendation 14. That the planning powers in Part 5 of the Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009 not be extended to other projects or classes of projects.

Recommendation 15. That the Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009 not be extended beyond the life of the NBJP program.

Recommendation 16. That consideration be given to establishing a Coordinator-General model based on the NBJP legislative principles to be used for improved coordination and/or delivery of a limited range of critical state projects.
Recommendation 17. That if a Coordinator-General model is to be implemented a framework is required that allows for clear identification of any project to be managed by the Coordinator-General and the appropriate suite of powers and checks and balances to be applied to it.

4.6 Benefits and Consequences

Term of Reference (c) requested that the Review identify ‘the legal and economic benefits and consequences of applying the principles …’. The legal and economic benefits and consequences associated with the specific legislative and project management models used in the NBJP have been explored in detail in this report. Based on analysis of this material the Review has recommended that consideration be given to establishing a Coordinator-General model based on the NBJP principles and that there be no extension of Part 5 planning powers to other projects or classes of development outside of that function. However, attempting to define or calculate legal and economic benefits and consequences beyond this is dependent on decisions as to whether the recommendations are acceptable and the detail of any model chosen.
References:
The documents examined by the Review are numerous and will not be recorded here in detail but included the following:


Australian National Audit Office, *Building the Education Revolution - Primary Schools for the 21st Century*, 5 May 2010

Commonwealth letter of offer to New South Wales regarding Black Spot Program funding, 24 February 2009.

Commonwealth letter of offer to New South Wales regarding funding for boom gates and other active rail crossing mechanisms at high risk level crossings), 9 February 2009.

Commonwealth letter of offer to New South Wales regarding funding for the Heavy Vehicle Safety and Productivity Program (HVSPP), 6 April 2009.

Commonwealth of Australia and NSW, *An Agreement between the Commonwealth of Australia (represented by Department of Employment, Education and Workplace Relations) and New South Wales (represented by Department of Education and Training)*, 14 April 2009, and Variation to that Agreement signed on 27 October 2009.


Council of Australian Governments, *Communiqué from COAG meeting, 5 February 2009*
Housing NSW (Program Management Office), *Program Management Implementation Plan in response to the Nation Building Economic Stimulus Plan*, 24 April 2009 to 13 August 2010


*Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009*

NSW Nation Building and Jobs Plan Taskforce, *NSW Taskforce Implementation Plan*, November 2009 and the accompanying Probity Plan

NSW Legislative Council, General Purpose Standing Committee No 2, *Inquiry into the Building the Education Revolution Program*, September 2010


ANNEXURE A: Terms of Reference

Review of Implementation of the Nation Building and Jobs Plan in NSW and Potential Applications for Other Projects

Terms of Reference
March 2010
Purpose

Section 30 of the Nation Building and Jobs Plan Act 2009 (the Act) provides for a review of the exercise of the NSW Coordinator General’s functions. The Minister (the Premier) is required to ensure that the exercise of the functions of the Coordinator General under the Act are, as soon as practicable after the period of 12 months after the commencement of the Act (i.e. after 13 March 2010), reviewed by:

(a) a joint committee of both Houses of Parliament, or
(b) if there is no joint committee that can undertake the review - such other appropriately qualified person as the Minister appoints for that purpose.

As there is currently no appropriate joint committee that can undertake the review, the Premier has decided that the review is to be undertaken by a panel chaired by an appropriately qualified person.

The Premier wishes to also more broadly assess the effectiveness of the Act and to evaluate the benefits of applying the principles of this legislation to other significant infrastructure projects in NSW.

Background

On 3 February 2009, the Prime Minister announced the Nation Building – Economic Stimulus Plan to reduce the impact on Australia of the global economic recession. The Plan includes funding for four broad infrastructure programs across education, social/defence housing, transport infrastructure and energy efficient homes.

On 5 February 2009, COAG members signed a National Partnership Agreement covering the infrastructure elements of the Plan.

Legislative Provisions

The NSW Nation Building and Jobs Plan (State Infrastructure Delivery) Act was enacted on 13 March 2009. The object of the Act is to ensure the timely delivery in NSW of the infrastructure projects funded by the Commonwealth under the Nation Building and Jobs Plan to implement the COAG partnership agreement of 5 February 2009.
The Act seeks to ensure the fast tracking of projects and the subsequent expenditure of the Commonwealth funds so that a steady flow of jobs is secured – without liability to the State down the track. Developments falling under the Act are:

a) multi-purpose halls and libraries, science and language centres and maintenance and minor building works for government and non-government schools,

(b) social housing,

(c) community infrastructure provided by local councils (such as halls, community centres and sport and recreation facilities), and

(d) land transport infrastructure (such as the repair of roads, the installation of railway boom gates and road safety ‘black spots’ projects).

Infrastructure Coordinator General

Section 6 of the Act requires the appointment of a NSW Infrastructure Coordinator General. The functions of the Coordinator General are to:

(a) plan and oversee a program for the delivery of infrastructure projects within the timeframes required for Commonwealth funding;

1. advise on appropriate tendering and procurement procedures for the delivery of infrastructure projects within those timeframes;

2. coordinate the delivery by government agencies of infrastructure projects;

3. subject to Ministerial authorisation, carry out infrastructure projects; and

4. exempting infrastructure projects from development control legislation (e.g. the *Environmental Planning and Assessment Act 1979*) and authorising infrastructure projects under Part 5 of the Act.

Section 23 of the Act provides that the Co-ordinator General may, by order in writing, declare that a specified infrastructure project (or an infrastructure project of a specified class):

(a) is exempt from all or any specified development control legislation, or

(b) is exempt from all or any specified development control legislation if the carrying out of the project is the subject of an authorisation of the Co-ordinator General under section 24.
Terms of Reference

The review is to examine and report by the end of July 2010 on:

(b) the effectiveness of NSW Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009 in facilitating the implementation of the Nation Building Economic Stimulus Plan in NSW

(c) the exercise by the Coordinator General of the functions conferred by the Act in accordance with section 30 of the Act;

(d) the legal and economic benefits and consequences of applying the principles of this legislation, and the manner in which it has been implemented, to other significant projects or classes of projects in NSW;

(e) options and mechanisms for applying the principles should they be applied to such projects or classes of projects in NSW.