

Project Autumn

Industry Consultation Report PPP Handback and Expiry (UK)

SEPTEMBER 2022



Introduction and Scope

“PFI has been a powerful procurement method whose benefits have been overlooked – there is going to be a media war if the exit process is not carefully managed. The infrastructure will exist after expiry so let’s change the narrative around hand back.”

Industry Commentator

“It is widely acknowledged that ‘battle lines are being drawn – we do not need a decade of disputes.’”

Industry Commentator

The success of the expiry phase of the UK’s £57 billion (capital value) Private Finance Initiative portfolio is critical to the future of private investment in public infrastructure in the UK.

When we look back in years to come, the impending wave of “handbacks” is likely to be recognised as having been a pivotal point for investments and the infrastructure investment industry more generally.

At DLA Piper, we are committed to engaging with the industry in discussion, consultation and collaboration with the aim of maximising successful handback and minimising the negative impact of the process on current and future projects and the stakeholders of the future.

To deliver this objective, we launched our “**Project Autumn**” consultation in 2021. This report records the outcomes of the consultation process and our exclusive recommendations for a way forward.

The consultation process involved key stakeholders from across the PPP industry engaging in a series of confidential discussion sessions utilising the DLA Piper Design Thinking Methodology.

We spoke with over 200 participants, including those from the following stakeholder groups:

- Government Departments
- Public Sector Clients
- Investors
- Fund Managers
- Contractors
- Facilities Managers
- Technical Advisers
- Funders
- Lawyers
- Futurists
- Politicians; and
- Industry Specialist Consultants

In open forum we discussed:

- Current trends and experiences of handback.
- The potential impacts of wave one handback.
- The political constraints and impacts on the process.
- The client and end user perspective.
- Creative solutions for maximising handback effectiveness.
- The high risk areas or issues known about at this point.
- What the industry would like to deliver next and how that may be achieved through and as part of the handback process.

We secured up to date, market relevant information from a 360 degree perspective and contributions were aimed at maximising opportunities and minimising the challenges which face us all in the coming years. The discussions were varied, colourful, engaged and, at times, surprising.

Three key themes emerged:

1

There is a short termism at play where parties are simply focusing on surviving the process of expiry and handback.

There are limited outputs which look beyond the here and now and truly address “big picture” strategies. It is apparent the lack of certainty on “what comes next” is hampering progress and creativity around handback. The limited focus on medium and long term practical realities of the handback process at a practical level and the lack of use of tangible data to assist is concerning.

2

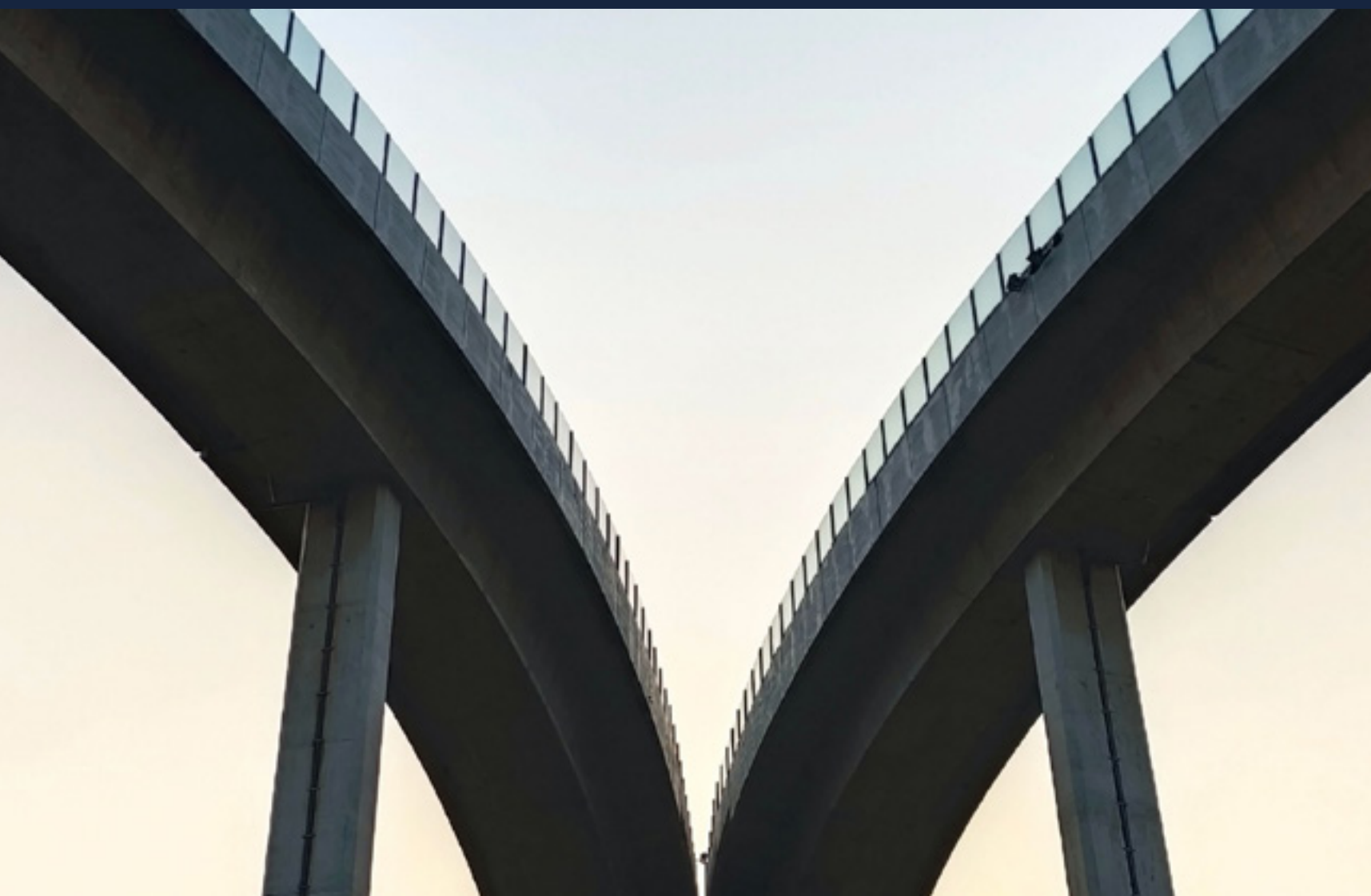
Linked but distinct from (1) is the lack of certainty on what a successful end point looks like for the industry and the key stakeholders.

This is driving inconsistent and, at times, aggressive contractual behaviours as there is limited insight into what is a “win” for each stakeholder in 10 years’ time. This is limiting and minimising the possibility for creative and positive solutions and curtailing dynamic industry development. Worryingly, this approach is also damaging the expertise pool and investors’ willingness to commit to the industry long term.

3

There is a certainty that the industry will face a slue of disputes and that adversarial process will become operating practice.

All stakeholders are braced for disputes. Advisory teams are on standby and the ripple effects of increasing litigation is already being felt “on the ground” and is hampering performance and delivery of PPP projects.



Project Autumn was underpinned by our commitment to the ongoing improvement and development of the infrastructure industry in the UK and we are excited to be involved in the process of securing a positive transition through handback and into the next phase of development.

In this Report, we focus primarily on social infrastructure but many of the themes apply across infrastructure forms.

As a result, this document records 10 recommendations for the industry that have evolved as a direct result of Project Autumn and seeks to address the key themes that emerged through the process.

Our recommendations are wide ranging, ambitious, complex and challenging (much like the projects themselves). They are intended to provoke debate, inspire discussion and, ultimately, create alignment. We look forward to engaging with the industry on these points.

We have purposefully not commented on the many initiatives which are already being developed by industry and started instead with a “blank sheet”. Where our recommendations can be incorporated into evolving or existing structures to expedite outcomes, that would be a superb outcome.

1



A forward investment plan

“Without a future investment focus, we fear that the prospects of significant private investment being available for UK public infrastructure will be severely impacted as a direct result of the expiry and handback process – the potential for industry damage caused by a ‘hostile government client’ is significant and will be difficult to undo. Global infrastructure opportunities are drawing focus already.”

Investor Liaison Director

“We are looking to the private sector to offer future solutions to us but see that they are reticent due to wider industry and economic pressures.”

Local Authority Finance Director

The Challenge:

The future of infrastructure delivery must underpin the approach to the expiry and handback process. In an environment where the public purse is increasingly constrained and leadership uncertainty abounds, the UK needs an infrastructure policy and environment that attracts and secures private investment in the medium to long-term, to ensure that world class infrastructure projects can continue to be delivered at scale.

At the 2018 Budget, the then Chancellor Philip Hammond announced that he would abolish the use of private finance initiatives (PFI and PF2) for future building projects. Whilst other funding models have been readily available for economic infrastructure (including the Regulated Asset Based model and Contracts for Difference), the UK Government has been unable to promote a large scale funding model for private investment in social infrastructure, to replace PFI/PF2 while at the same time providing positive messages about the importance of the investor model.

Government must tell the market what comes next for private investment to incentivise the right behaviours during handback and reinforce the ‘relational’ contracting approach. The lack of policy support for private finance funding models has led to a general feeling of uncertainty on the long-term role of private investment in UK social infrastructure. Our consultation participants overwhelmingly commented that this lack of clarity

about the future is driving destructive behaviour, short-term positioning and stakeholder mistrust on current projects. This view was shared by both private and public sector participants, many of whom considered it critical to promote an environment that enabled private finance to sit in the procurement “toolbox”.

Faced with a lack of large scale pipeline, investor (equity and debt) focus is being drawn away from the UK infrastructure market as they look to develop their medium to long-term investment strategies in more engaging markets elsewhere.

This will only widen the current UK “infrastructure gap” between the infrastructure investment needed and the resources required to address it.

Government has stated in its National Infrastructure Strategy that it is open to “new ideas” from the market in relation to developing new revenue support models. However, it is evident from our consultation that opportunities for collaboration and joined up policy changes which would support delivery and promote value for money are not being developed and exploited in a commercial manner and at scale.

The sector urgently needs reassurance from Government that there is a commercial matrix in which private and public stakeholders work in collaborative models to deliver cutting edge social infrastructure.

A forward investment plan

Our Recommendation:

We recommend that Government commissions a market engagement exercise (including with the Handback Stakeholder Council (see [Recommendation 2](#))) and an independent report to consider new revenue support models and other models to:

- (i) facilitate private sector investment and expertise in the delivery of the UK's infrastructure; and
- (ii) safeguard the medium to long-term delivery of future public infrastructure needs, on a value for money basis.

It will be crucial to protect the independence of this piece of work, to evidence the depoliticization and credibility of recommendations for policy direction.

Ultimately, the report must provide the public and private sector with far greater clarity about what future funding models for private investment in social infrastructure are (or are not) likely to be available for investment.

The report should address the following key questions as a minimum:

- Who is best placed to manage asset condition long term and how will this be resourced and funded?
- What comparators can be drawn from the condition of privately funded and publicly funded assets across the public sector estate and how does this play into the sustainability agenda and the case for retaining revenue funded models in the procurement “toolbox”?
- What “new ideas” exist in the market for future revenue support or other models?
- What lessons can be learned from previous models?
- What changes to standard principles of risk allocation would support market appetite and drive value for money?
- Are contractors able to manage long-term risk? How much risk-pricing will push the value for money argument?

Clarity, certainty and positivity about future delivery is much needed by public and private stakeholders alike.



2

PPP Stakeholder Council

“I know that there are groups and meetings – but they are exclusionary and not inclusive – they do not build trust and there is a lack of good information cascade across the sector. It would be good to see true engagement, transparency and problem solving at the heart of discussions and that can only happen with everyone in the room.”

Services Provider

The Challenge:

The one piece of feedback we have heard most consistently throughout this consultation process is that there is a lack of formal communication channels for stakeholders to engage through on an industry level.

None of the stakeholders we consulted were satisfied with their ability to thoughtfully engage with others on key matters, including handback, in an open and transparent forum.

Current engagement routes were perceived to be too ad hoc, reactive and very much tied down to specific projects with the consequent risk of the bigger picture being lost. It was felt that some initiatives were not communicated effectively and that industry did not receive sufficient notice to be able to properly contribute to them. Almost all consultees spoke of the need for all stakeholders to collaborate and, when challenged on what that meant in practice, we heard very different ideas and solutions which were very conceptual in nature and lacked practical application.

Notwithstanding this, there was a clear desire for there to be a more permanent, structured and proactive forum in which all stakeholders could contribute their thoughts and share their experience and specialist skill-sets. There was also a recognition that this forum could be used as an effective listening tool to ensure that all stakeholders could set out their respective concerns, whilst enabling the combined strength of the group to identify and recommend solutions – thereby delivering true, tangible collaboration.



PPP Stakeholder Council

Our Recommendation:

A PPP Stakeholder Council should be established.

The following groups should be represented on the Council:

- ministers from the UK and Devolved Governments;
- Government Departments;
- key public sector partners such as the NHS and local Government, the Infrastructure and Projects Authority (IPA) and Scottish Futures Trust;
- investors;
- fund managers;
- construction companies;
- Facility Management (FM) providers; and
- advisory firms.

Specifically in relation to handback, the Council should meet quarterly to discuss specific stakeholder concerns/challenges, identify trends and develop evidence-based practical delivery solutions for the expiry and handback process.

The Council should issue public guidance notes (in the form of practical evidence-based recommendations) to be read as persuasive authority and provide clear aims and objectives to assist the industry with transition.

As an independent body, the Council should provide an open forum for discussion which should prevent disputes and marginalisation of any one stakeholder, and ensure that there is increased consistency of solutions and efficiency of delivery. Supporting in the delivery of consistency across the expired projects will be key to ensuring efficiency and fairness of the process, in a way that supports the industry and future-proofs it.

Evidently, handback would be one of its remits, but there is so much more that the Council could consider. It should, therefore, be established with short, medium and long-term goals to assist more generally in relation to PPP projects (including Net Zero and sustainability – [see Recommendation 10](#)).



Conduct Charter

3

“Are talented people going to stay involved in public sector – does anyone want to be in UK infra?”

Advisor

“The environment is turning toxic and recruiting is incredibly difficult just at the time when we should all be stepping up to tackle this challenge – there is already an exodus away from contracts with public sector counter parties.”

FM Provider

“A proper handback should be more technical and “boring” than disputes over money and emotive arguments.”

Local Authority

The Challenge:

The conduct of the parties delivering project handback and expiry is going to be, in our opinion, the determining factor in the success or failure of the UK's £57 billion investment programme and for the future of the UK infrastructure industry more generally.

There is no room for aggression, bullying and/or disruptive behaviour and parties must communicate, collaborate and prioritise delivery over tactical, strategic or financial gain.

Worryingly, consultation participants from across the industry identified multiple instances where undesirable behaviours had been witnessed and noted a general undercurrent of combative and antagonistic practice which was, in the view of many participants, growing stronger. Examples included the issue of circa 200 emails to a single individual in a single day on one project; “saving” issues to be communicated at the end of a working day or working week to cause maximum anxiety and disruption; and shouting and the use of inappropriate language in project meetings.

It is vitally important for the industry to protect the future workforce and skills base in the UK. People are leaving the sector in droves and retention and recruitment of talent is a critical risk for a number of the businesses that took part in the consultation.

We believe that consistent confrontation within the industry will prevent diversification, stifle partnering and creativity and limit the quality of end product infrastructure. However, perhaps the biggest risk of all is the risk to the delivery of such a significant investment programme, arising from the future skills gap that will exist as a result of poor behaviours now.

Conduct Charter

Our Recommendation:

To counter this damaging trend and preserve the high quality and committed expertise which has been nurtured and developed through the delivery of projects to this point, our recommendation is the adoption of a “Conduct Charter”.

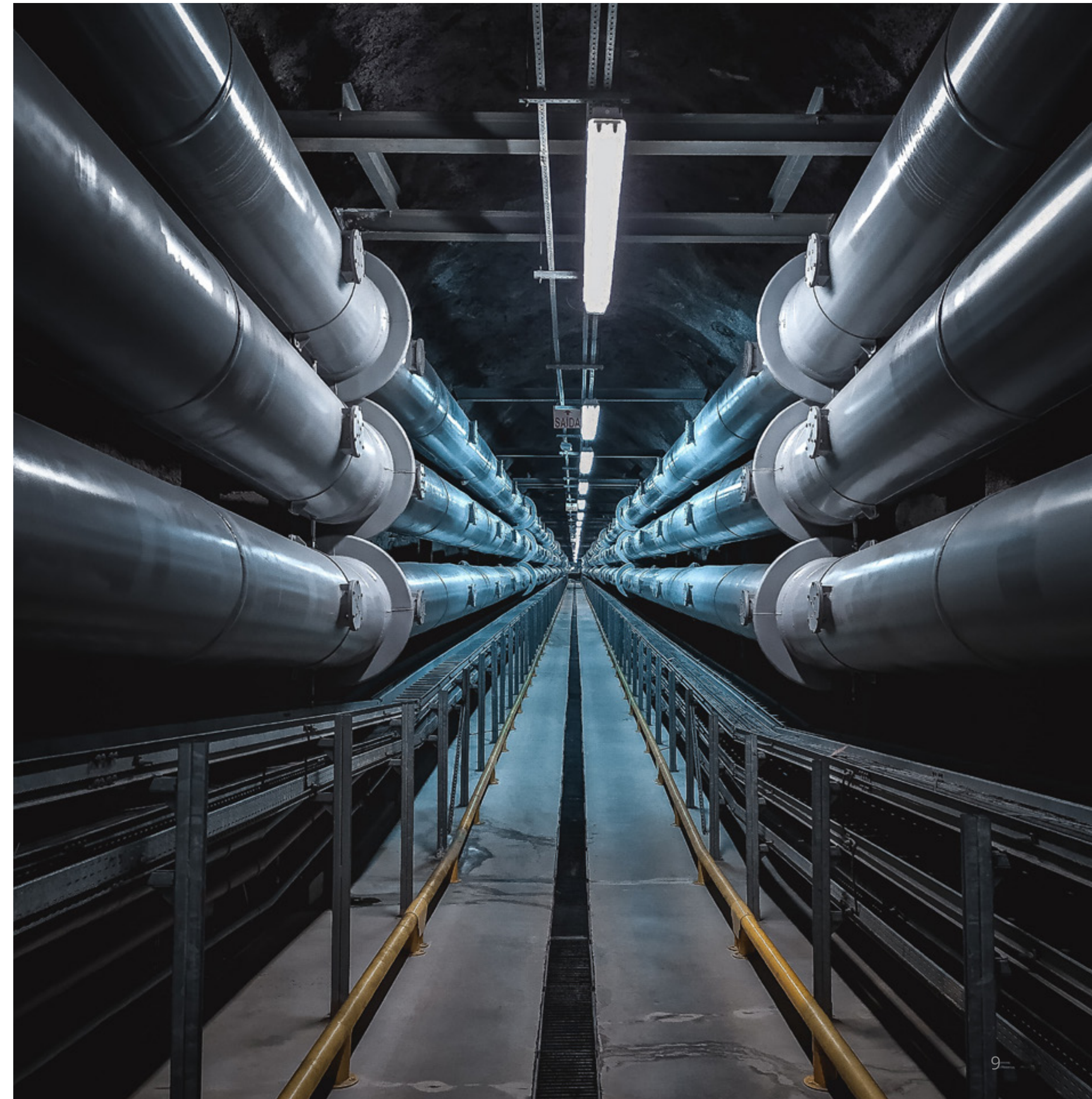
The Conduct Charter should be developed by the Handback Stakeholder Council ([see Recommendation 2](#)) and endorsed by the industry at large, with appropriate Ministerial support from the UK and Devolved Governments.

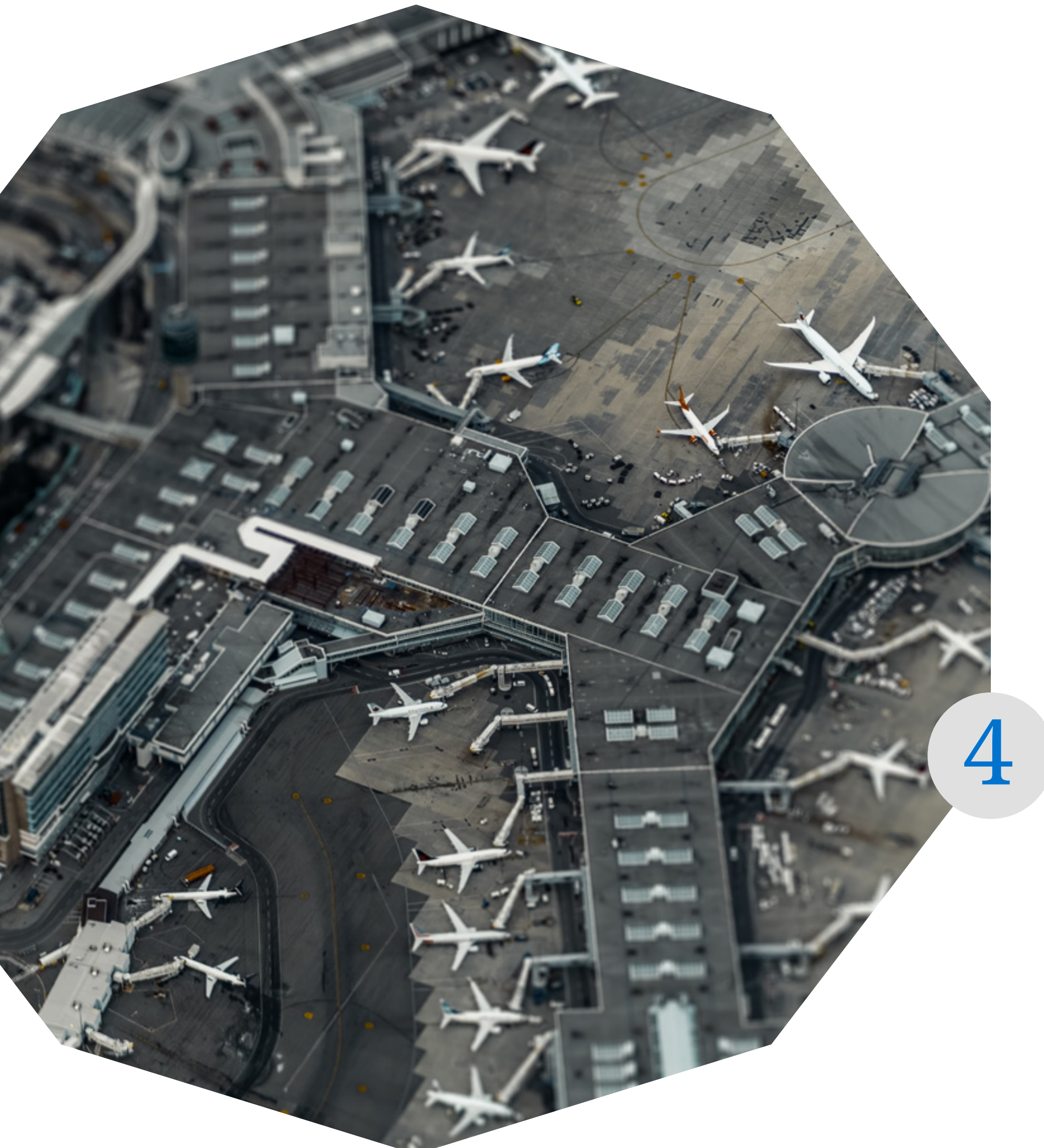
The Conduct Charter should include an overarching duty to act in good faith and in an ethical and accountable manner in all dealings.

Specific requirements would include a requirement for people at all levels of an organisation to act professionally and without placing undue burden on or directing aggression towards other stakeholders. Fair dealing and behaviours should be at the heart of all actions taken during this process.

Problem behaviours or actions which are inconsistent with the Conduct Charter should be immediately reported and promptly escalated and addressed at the most senior levels. Individuals should be able to make anonymous notifications to an appointed project representative or Government Minister if they experience or witness problematic incidents.

Enforcement remains a significant challenge and one where we would welcome detailed debate.





Expiry and Handback Forum

“The PPP forum was more active during procurement – it was effective and had more influence – we need it back as there are no unified voices on either side at the moment.”

NHS Trust Director

“There is not much “optioneering” going on at the moment – surely win/win post expiry options exist?”

FM Provider

The Challenge:

Consultation participants identified a “secretive” approach to experience sharing and limited cross pollination of people outside of an organisation or project as a barrier to success. Sharing of project experience is generally ad hoc, piecemeal and within traditional groupings (i.e. public sector or private sector only forums). This creates discord, suspicion and limits creativity and solutions focused behaviour.

The industry at large and, critically, the individuals working within it will benefit from a forum through which they can find support, engage in open dialogue and exchange their views, problems, experiences and, importantly, solutions on the subject of handback and expiry.



Expiry and Handback Forum

Our Recommendation:

We recommend that an Expiry and Handback Forum is launched.

The Forum would comprise an overarching structure which should incorporate a tech platform (to include memos and note boards), a schedule of standing meetings and “drop box” of discussion points, as well as a social events calendar and a training hub.

It is critical that the forum is open to all (at all levels) and not limited to a group of participants or a specific stakeholder focus.

The forum should be a place for people to connect, communicate and collaborate in a collegiate environment. It should be focussed on building relationships and the provision of guidance and support as the expiry and handback process evolves and develops to adapt to the challenges that the industry will face.

It is critical to build trust and links in the industry that transcend “traditional lines” in order to prevent interest groups and divisive behaviour. Our consultation emphasised the fact that there is far more that unites than divides stakeholders and the forum should provide a safe environment in which to build on lines and areas of consensus.

Unsurprisingly we see the same and/or similar issues arising on these types of projects and the current silo mentality of dealing with problems in isolation is inefficient, expensive (time and cost) and counterproductive to industry progress.

Some of the most insightful and creative solutions are, in our experience, developed where positive engagement and information sharing is encouraged and where true collaboration can flourish.

Discussion should focus on how this forum should be established, structured, funded, monitored and enhanced.



Expiry Protocol and Project Plan

“Good partnering ensures the best outcomes for all – it’s more important than following the contract every time. We need constructive dialogue to protect all parties and boost the economy.”

Investment Fund Manager

“There is an important education piece to be done about what having an asset back means and what needs to be done practically to get there and we need to remember what the original expectation was. We shouldn’t go into the process expecting to be disappointed.”

Local Authority Lead

The Challenge:

Steps have already been taken to develop a form of protocol to prepare projects for the expiry and handback process and these initiatives should be applauded. However, the overwhelming consensus from our consultation was that the protocols need to be refined, developed and enhanced to ensure that they are not overly partisan and can therefore secure industry-wide support and adoption. Current structures are not seen to be balanced or reflective of relative risk positions such that, at present, all parties stand braced for a slew of disputes, and the disruption that arises as a direct result.

Expiry Protocol and Project Plan

Our Recommendation:

We recommend the development of an Expiry Protocol and Project Plan adopting the work already completed to date but refining it to address issues and areas of tension directly and in advance of implementation.

By way of specific example, we consider that the friction between payment mechanism consequences of flaws or degradation of assets and the need and desire for a clear understanding of the condition of the asset is a consistently divisive barrier to success. We suggest a “standard form” protocol where the payment mechanism is disappplied for a set period of time for specific issues whilst full investigations are conducted and remedial schemes (where required) are devised and implemented. This would limit combative discussions around risk positions and protect all parties involved whilst simultaneously presenting a clear route to improving asset condition and providing certainty regarding the financial consequences of any issues.

This protocol should be coupled with a survey scope and appointment terms agreed with a group of approved, independent surveyors. The key here is that the approach should be fair, reasonable and balanced and account for the organic nature of built infrastructure if it is to be adopted on an industry wide basis. Again, “standard” positions on information provision from private to public sector should be set (especially in respect of commercially sensitive issues such as lifecycle reconciliation accounts) to close down disputes in advance.

We would also advocate for the application of “design thinking” methods for this process. This form of collaboration guides participants towards problem solving behaviours (rather than positioning) and will allow parties to critically consider future requirements where mutually beneficial solutions could be developed.

In essence, there needs to be a less adversarial process adopted with, at its core, an understanding that structures or processes which overly favour one party or another will simply lead to more disputes and more industry damage. Long term value will be delivered more successfully with collaboration at the heart of the process.

Involvement and engagement with all stakeholders is key. Balance and fairness must prevail and, critically, there must be wide, cross stakeholder support for any solution to be successful or the reality will be an increase in court intervention.





6

Transition Advisory Teams

“Government should announce to the industry that all handback should be dealt with by separate teams to business as usual groups who then run handback processes with reference to framework positions.”

Technical Advisor

“Some people are just willing to write a cheque to walk away in the least worst way as the effort required to address issues is so great – that can’t be good for the industry.”

Fund Manager

The Challenge:

The transition through expiry and handback to optimised service delivery in any new or evolving partnership model is going to be complex – a fact unanimously accepted in consultation.

The contractual provisions that will guide the process can only assist to a point and the “lived experience” of individuals and teams is going to be critical to delivering an efficient and successful evolution from the PFI model to new private finance models fit for the modern era, built upon lessons learned and unscathed by adverse associations and public perception.

Whilst sector, assets and projects undoubtedly suffer different challenges, the quicker the industry can learn from experience on expiry and deliver consistent and clear practice, the more efficient the process will become, and the more likely that creative and collaborative solutions can be developed and implemented at scale.

Transition Advisory Teams

Our Recommendation:

Our recommendation (which aligns with and builds on some suggestions already circulating in the industry) is that Transition Advisory Teams are established that can be called upon to draw on their experience of project transition and provide open and transparent reflections to project teams going through the process.

The Transition Advisory Teams would move from project to project sharing their expertise and solutions to deliver optimal outcomes, balancing stakeholder needs and taking into account the long term value and importance of the project model.

The teams would include a group of individuals who are drawn from across stakeholder groups and who have demonstrable experience of successful and collegiate delivery of transition on other projects. They should not be partisan structures.

The teams should be mixed disciplinary teams (akin to “bid teams”) focussed on collaborative delivery of transition – with relationship management at their core. Project based delivery should be central rather than maximising commercial value on any one side.

Any party should be able to call upon the teams and, where appropriate, joint appointments or instructions should be encouraged and agreed.



Dispute Resolution Council/Court

“Building jurisprudential precedent in this area would be a significant benefit to all parties and to the global infrastructure industry at large.”

Barrister

“Inconsistent or ‘rogue’ decisions are just a waste of time and money for everybody involved.”

Local Authority

The Challenge:

The inclusion in standard form drafting of Adjudication as, often, a mandatory first step dispute resolution procedure was intended to provide stakeholders with a short form, efficient and cost effective way in which to resolve disputes, avoiding the need for lengthy and costly Court processes.

However, whilst Adjudication as a method of dispute resolution provides many advantages, mandating its adoption for all disputes has resulted in the subversion of the process such that it is now often used for complex and strategically significant disputes without being set up to deal adequately with them. As the Adjudication decisions themselves are confidential (in contrast to Court Decisions, which are publicly available), it has not been possible to develop consistent legal “precedent” or to identify a consistent understanding of the way in which complex contractual provisions should be interpreted and applied by the sector. Virtually identical issues and disputes are adjudicated multiple times on different projects with increased cost, inconsistency of decisions and uncertainty arising as a result.

This will present a particular problem for the industry through handback and expiry where inconsistency and uncertainty will hamper the efficient execution of solutions and where swift, collaborative action to unblock or prevent disputes will be a huge advantage.





Dispute Resolution Council/Court

Our Recommendation:

We recommend the establishment of an Expiry and Handback Resolution Council which would be mandated to determine disputes relating to expiry and handback.

The Council would consist of 5 leading adjudicators/arbitrators with experience of PPP and PFI Projects. A “Chair” would be elected to manage referrals and to advise on structure and format. By agreement of the parties on a project, disputes will be referred to a member (or members) of the Council to ensure that an element of consistency can be developed and monitored across the board. Some standard practice protocols should be developed to short circuit issues around process, timetable and submissions/provision of evidence or to provide creative ideas on the form of the process most suited to a given question or dispute.

Decisions would be redacted for commercially sensitive information (and project specific details, where relevant) but would otherwise be published in full and could be used as persuasive precedent by other stakeholders in the industry who face the same/similar questions of interpretation on disputes with the same or similar technical and/or factual matrix.

Ultimate recourse to the Courts for final determination would need to be retained but the Council reference process would be able to flex and evolve to meet the needs of the parties as the Expiry and Handback programme progresses and new challenges are identified.

Projects being dragged down into a quagmire of disputes is not conducive to preserving relationships, delivering quality service and transitioning projects successfully.

This is a radical approach which is contrary to some well accepted “norms” of dispute resolution but we consider that only a radical solution will avoid a level of conflict and dispute arising which will irreparably damage the UK infrastructure industry.

From Lenders to Commercial Stakeholders

“Any additional lending would only be considered with ‘good’ projects – good relationships/ good experiences/ good counterparties but in those circumstances we can work from a basis of trust.”

Global Investment Lead – Bank

The Challenge:

Lenders are an important stakeholder in PPPs and will have a crucial role to play during the handback process. However, in exercising their extensive controls over Project Cos, they can at times stifle the parties’ ability to react to issues and to act quickly to agree and implement creative solutions.

It doesn’t take a significant level of adversity to put projects into “lock-up” (i.e. preventing financial distribution), something generally accepted to be an appropriate tool in the lenders’ overall security package. However, extensive and continued lock-up is damaging and prevents the successful resolution of disputes and issues, particularly at a time (approaching expiry) in which, ordinarily, outstanding senior debt is reducing.

Time is not a luxury in the context of handback. Industry cannot afford for lenders to block and slow down progress through the consent / waiver process during this critical stage of the project. Expedited and dynamic negotiations can save significant time and cost in the future avoidance of disputes.

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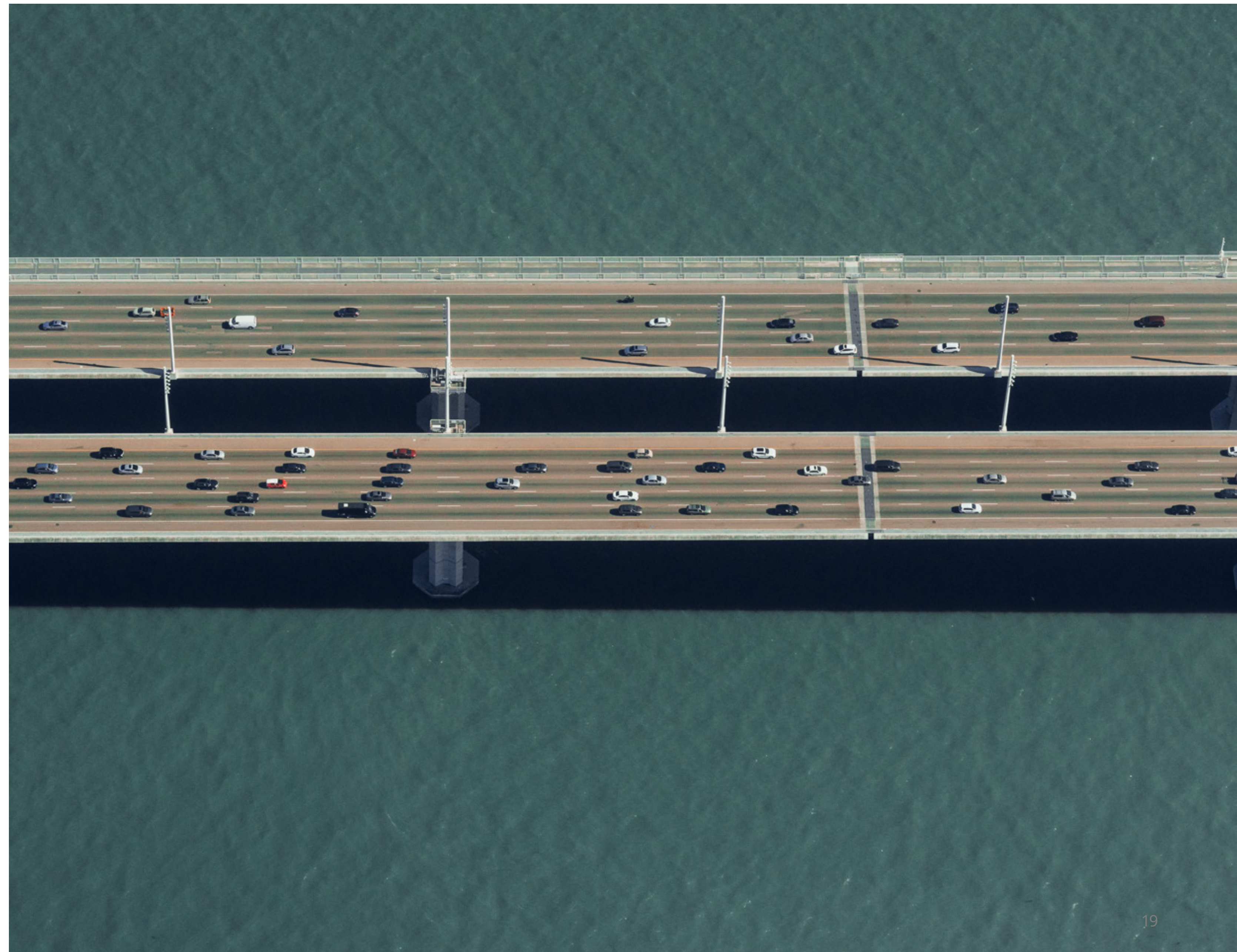
From Lenders to Commercial Stakeholders

Our Recommendation:

We recommend that lenders agree at an industry level to either engage on a commercial basis with handback negotiations (akin to shadowing) or to delegate decision-making within authority limits to asset managers. This should be effective for the period of handback negotiations / process and within a clearly defined (and agreed) scope that ensures any lender redlines are not crossed.

Lenders engaging as a commercial party will deliver a more efficient and likely more successful long-term position than when a restrictive and 'hands off' approach is adopted. With many lenders currently considering how to prioritise their resources in the context of a decreasing debt risk (and in a market in which they potentially no longer see a long-term future), this approach will obviously need to be adopted by consent from lenders.

Industry will need to clearly define the benefits for lenders in adopting this approach, in the sense of a mitigation of potential losses or higher returns against their investment.



Information Exchange Certainty

“The focus should be on ‘smart tech’ to manage data and equip and prepare the public sector for transition – this is lost in the noise at the moment and current systems and processes are antiquated.”

Commercial Advisor

“Am I getting back what I should – bricks and mortar but also licencing, software etc. How do I know what I need at this point?”

Local Authority

The Challenge:

“Data is the new oil” – it matters, it’s important and it’s controversial.

In the lead up to expiry and handback, the commercial information held by the parties (and how it is used) is the subject of increasing focus and conflict. There has been an increasing political drive from the public sector for transparency on PFI/PPP projects in recent years, however lifecycle and expenditure reconciliation accounts are fertile grounds for dispute, particularly when viewed in isolation and without context. Linked to this, there is a loud call for the public sector to lift the veil that exists over public sector consultant appointments. Their fee structures have become of key interest to private sector partners, to provide insight into the motives and actions taken by the public sector. This friction is already evident on projects and is hindering positive outcomes.

Transparency of information is a complex subject and one which has gained more focus in the more modern forms of standard form. However, as we approach expiry based on early forms of contract, with little or no express provision on transparency of information, there is inconsistency in the provision of information and how it is handled, which is the direct cause of cynicism, scepticism and conflict on all sides. At present, there is a lack of certainty about which information should be provided, how it should be used and the classifications and definitions of what is confidential vary project by project.

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Information Exchange Certainty

Our Recommendation:

Guidance should be issued which establishes a set of “norms” for information exchange and provision through the expiry and handback process.

The guidance should balance the impact of the information, the risk of disclosure for all parties and the commercial and risk parameters embedded in the PFI deal structure at inception. It should be given careful and specific consideration following consultation with all stakeholders given the import of the same.

As the expiry and handback process is implemented, data and information remain as important as (if not more important than) during the commercial discussions leading to that point.

The private sector has generated a wealth of important and specific information about asset operation and maintenance and how and when that information is transferred will be critical to the success of the future delivery of service and the seamless transition that will be required to limit impact on end users.

Guidance should also be issued to ensure that the value of this information is secured and that it is transferred in an efficient manner.

The Net Zero Opportunity

“Can there be a ‘new PFI’ focussed on delivering Net Zero with a run off out of current projects into new ones?”

Energy Advisor

The Challenge:

The overarching reason that DLA Piper has commissioned and developed this report is to help future-proof the infrastructure industry in the UK. Whilst the handback process presents many challenges, it also clearly presents many opportunities.

Net Zero and the sustainability agenda is defining the future of infrastructure.

Governments that work closely with the private sector will be better placed to define how the infrastructure of the future is designed, built, financed and maintained; and how existing infrastructure is retrofitted to meet sustainability goals. There are important challenges in this context: climate change urgency requires speedy and large-scale action; fiscal pressures on governments around the world limit the public funding available to tackle the issues and complex pricing assumptions and associated risk allocation factors can hinder appetite. Ensuring that the private sector is at the heart of these discussions and solutions will make it easier to tackle objectives quickly and affordably.

Our consultation identified that the industry has its own unique challenges in terms of its adaptability to sustainable initiatives and innovative solutions. Stakeholders will need to grapple with complexities around future asset use planning, pricing assumptions, risk allocation impacts and procurement considerations, in a world in which they simultaneously risk losing bandwidth and capability. And, circling back to our first Recommendation, there is an important discussion to be had in terms of how such solutions are paid for, on an affordable and fair basis.

It was, however, overwhelmingly the consensus of the participants we consulted that the Net Zero agenda presents a unique opportunity, for industry to reaffirm its relevance by successfully delivering on key policy objectives.

10



The Net Zero Opportunity

Our Recommendation:

We recommend setting up a single cross-stakeholder working group to explore options for delivery, lobby for political change and support the industry where necessary with options appraisals and guidance.

It will be important to ensure the expert nature of this working group and the consistency of objectives and approach, as well as ensuring that implementable creativity is secured. Transparency will be key and creativity of solution development should be encouraged.

This working group will support Government to consider how long-term infrastructure asset planning plays into the delivery of policy objectives in its national infrastructure programmes; and where efforts are best focussed to achieve objectives across the infrastructure programme in a sustainable, speedy and affordable manner.



Concluding Remarks from the Authors

“Why can’t we continue to promote the right way – intelligent management of contracts to the end ‘stay with us, stay with the contract, hit NetZero – let’s do it right.’”

Industry Consultant

“The model has a legacy and we would like it to be a good one in order to protect and support future procurement – expiry and handback is relevant to that.”

Government Department

In this Project Autumn Report, we provide 10 recommendations to provoke debate, discussion and, we hope, assist in the quest to build tangible and practical solutions to the issues faced by the UK infrastructure industry at this critical juncture.

In some areas, parties will need to move from contractually agreed and mandated positions. In other areas, significant improvement in project performance and delivery will be required.

Transparency and trust will be key and should be at the heart of every step taken by each and every stakeholder.

Radical creativity and change will be needed.

It will, and should, feel uncomfortable and different but, in our view, it is the only way that the UK infrastructure sector as a whole can move into a post “PFI” phase which builds on the benefits provided by the model, learns from the weaknesses and moves forward to build increasingly high quality, sustainable, infrastructure blending public and private investment, sector specific expertise and ensures that UK infrastructure remains at the forefront of global development.



Quotes from the Consultation

“A sensible interpretation/ definition of what good contract management is will be critical for managing handback and expiry expectation.”

Fund Manager

“Some contractors need to ‘up their game’ but if they are too pushed they will give up forcing the industry into a bad place.”

Fund Manager

*“Do we know what termination looks like?
Do we know what hand back looks like?”*

Local Authority



“Historically, the public sector wanted lenders ‘not to speak’ – it’s now surprising that they want direct involvement.”

Lender

“There is a toxicity in appetite to support infrastructure in the UK – Government does not understand the risk and damage being done already.”

Advisor

“A radical one – remove off balance sheet restriction – it’s a policy driver which is destructive.”

Academic Advisor

Quotes from the Consultation

“There is a win/lose mentality, which is driving the wrong behaviours. This is a real opportunity to demonstrate the success of the PPP model through handback, but it feels like the dial is pointing more towards failure right now. Behaviours need to change.”

FM Contractor

“Covid brought to light how you can actually make potentially challenging projects work – where you work together to find solutions.”

Investor

“Bad headlines stick and politicians are happy to jump on the bandwagon – despite the challenges we all know exist in terms of funding the UK’s critical infrastructure. With no discernible pipeline, contractors and investors are losing the incentivisation to go the extra mile. [...] It is a vicious circle and the industry is not doing enough to share the good news stories and defend the benefits of the PPP model, or to look at lessons learned as a collective.”

Investor

“The biggest challenge will be resource, capacity and experience – which varies widely in the public sector. Experience is needed down in the weeds, not just at a high level.”

Public sector participant





Quotes from the Consultation

“A lack of bidders on projects is not to do with appetite for the sector. Why do we need to pass so much risk to private sector?”

Contractor

“We need better data for future procurement to reduce risk and uncertainty.”

Local Authority

“We do not have much sympathy for investors – the risks were transferred.”

Advisor

“The Public Sector is muddled at the moment, depending on the consultants involved.”

MSA Provider

“The view that the public sector must be forceful to get something is the exact thing that destroys trust – we are proud that we have custody of high quality assets.”

Fund Manager

“We are pulling good people out of the PFI element of our business to protect and keep them.”

FM Provider

We have chosen to anonymise all quotes in this report to maintain the integrity of the process and encourage more engaged and constructive dialogue.

Authors



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Alison Fagan provides contractual, practical, operational and risk management advice on distressed, high value or strategically critical infrastructure projects.

Alison regularly acts for procuring authorities, private sector partners, secondary market investors, project funders and delivery contractors. She has a wide perspective in the sector which can be utilised when advising parties within complex contractual chains.

Alison is known to provide clear, commercial and direct advice to clients to allow them to achieve their objectives on complex, long term concession projects. She has a particular focus on distressed projects requiring innovative and strategic solutions to return limit or mitigate investor risk.

Alison is the international head of our Infrastructure Funds Sector Group.

Alison was recently awarded Leading Woman in Infrastructure at the Partnerships Awards 2022.



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Maria Pereira practices in the area of infrastructure projects and procurement law, with extensive experience of a range of commercial contracts, including large scale complex PPP and PFI infrastructure transactions.

Her clients include public and private entities in a range of sectors including defence, emergency services, nuclear, transport and education.

Maria's key strength lies in the depth and understanding of the commercial and legal issues affecting each party in a transaction and finding solutions acceptable to the parties to ensure the successful delivery of the transaction.



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Lillian Mackenzie heads up the UK Projects practice at DLA Piper and is experienced in advising on complex, high value infrastructure projects from all sides of the transaction, having advised a mix of sponsors, key supply chain members, funders and procuring authorities in the infrastructure sector, over 20 years.

Her experience encompasses projects under a number of different procurement models, including PFI, PPP, NPD and MIM procurement models and spans a range of sectors. Lillian's experience is particularly strong in the social infrastructure sector, including health and education. She deals primarily with the finance, corporate and project agreement aspects of transactions.

Many of the transactions Lillian has worked on have been innovative pathfinders in the relevant sector.



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Robin Jack has been advising clients on high value and strategically significant matters in the PPP/PFI market for over 10 years.

He provides dispute resolution, dispute avoidance, strategic and risk management advice to public and private sector entities on distressed PPP/PFI projects across all sectors including healthcare, education, social housing and transport. Robin acts for infrastructure investors, local authorities, NHS Trusts, financial institutions, employers and contractors.

Robin is experienced in all forms of dispute resolution including litigation, arbitration and ADR (including adjudication and mediation) and works closely with technical experts and Counsel from leading construction and engineering sets to deliver excellent advice and successful outcomes for clients.

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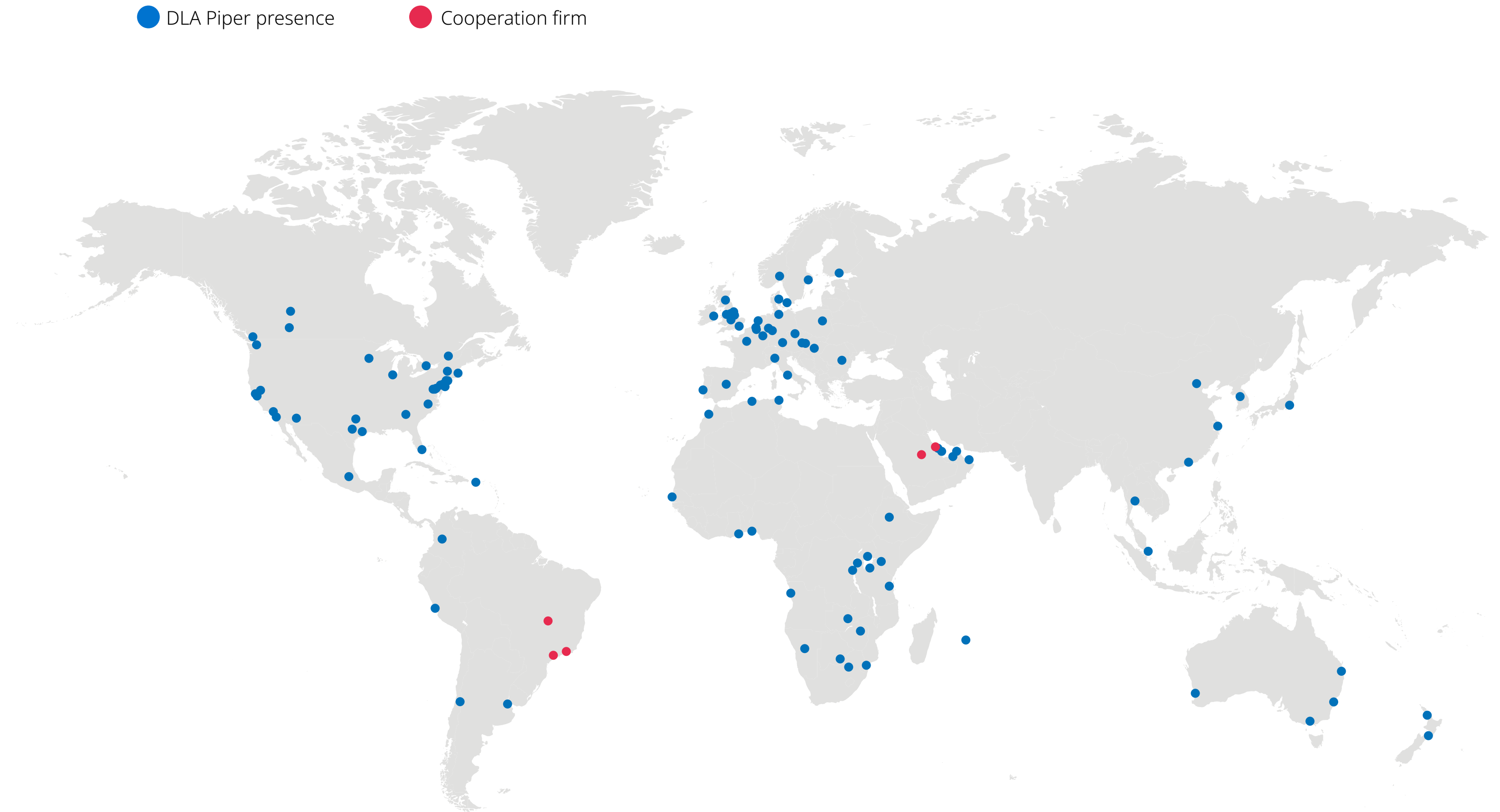
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