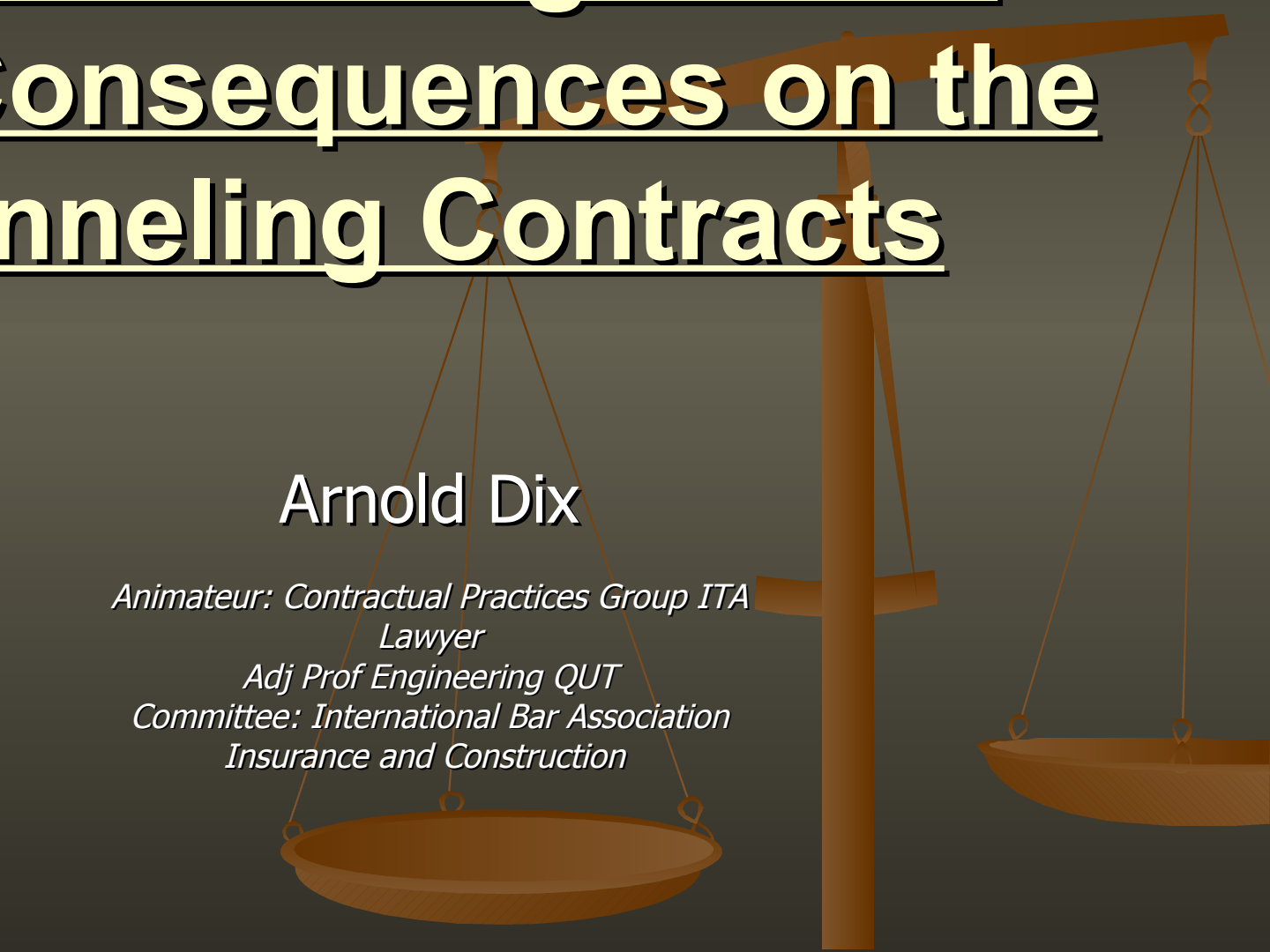


New Financing Trends and Consequences on the Tunneling Contracts



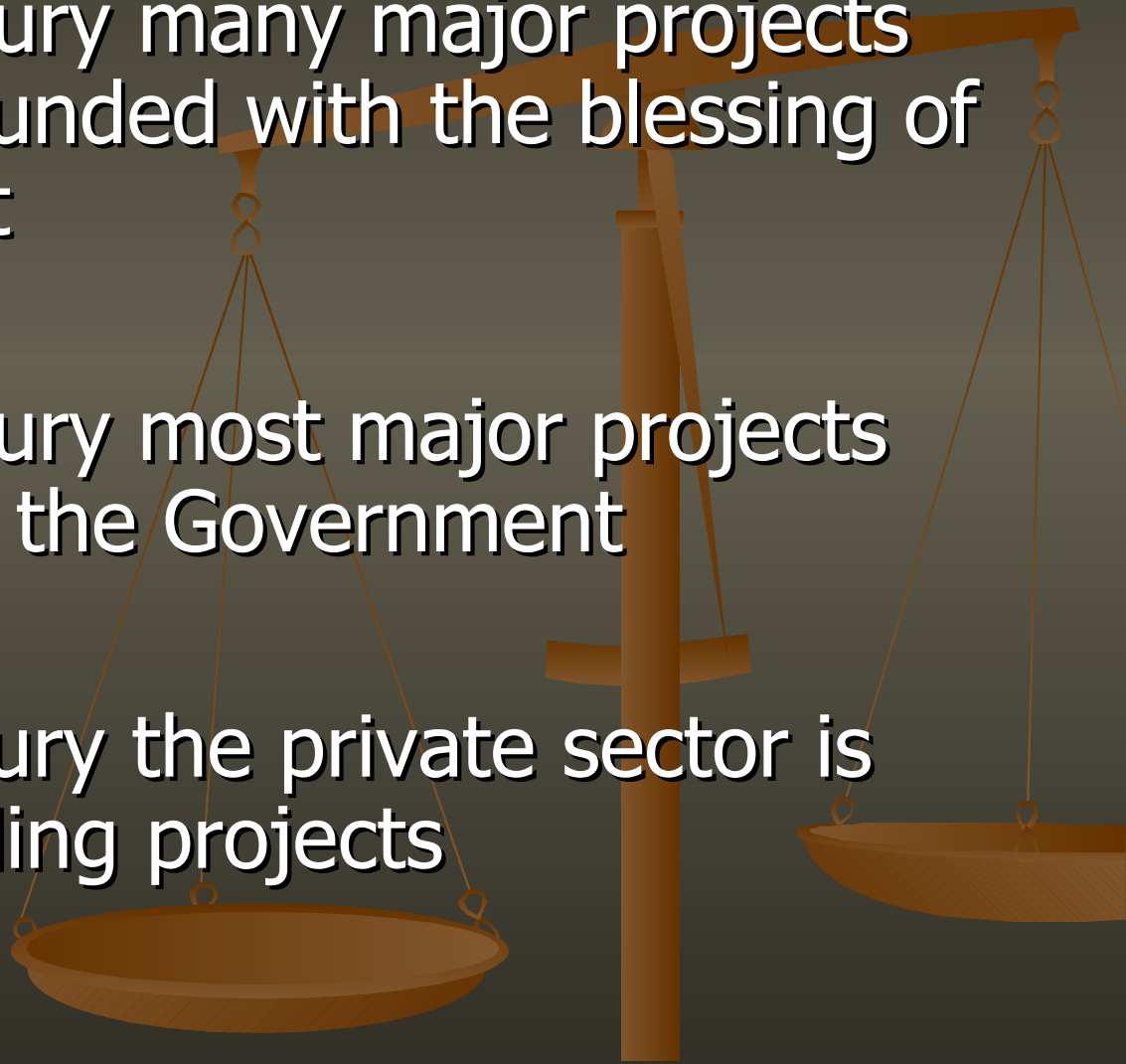
Arnold Dix

*Animateur: Contractual Practices Group ITA
Lawyer*

*Adj Prof Engineering QUT
Committee: International Bar Association
Insurance and Construction*

What's Old is New

- In the 19th Century many major projects were privately funded with the blessing of the Government
- In the 20th Century most major projects were funded by the Government
- In the 21st Century the private sector is once again funding projects



SAME PLAYERS

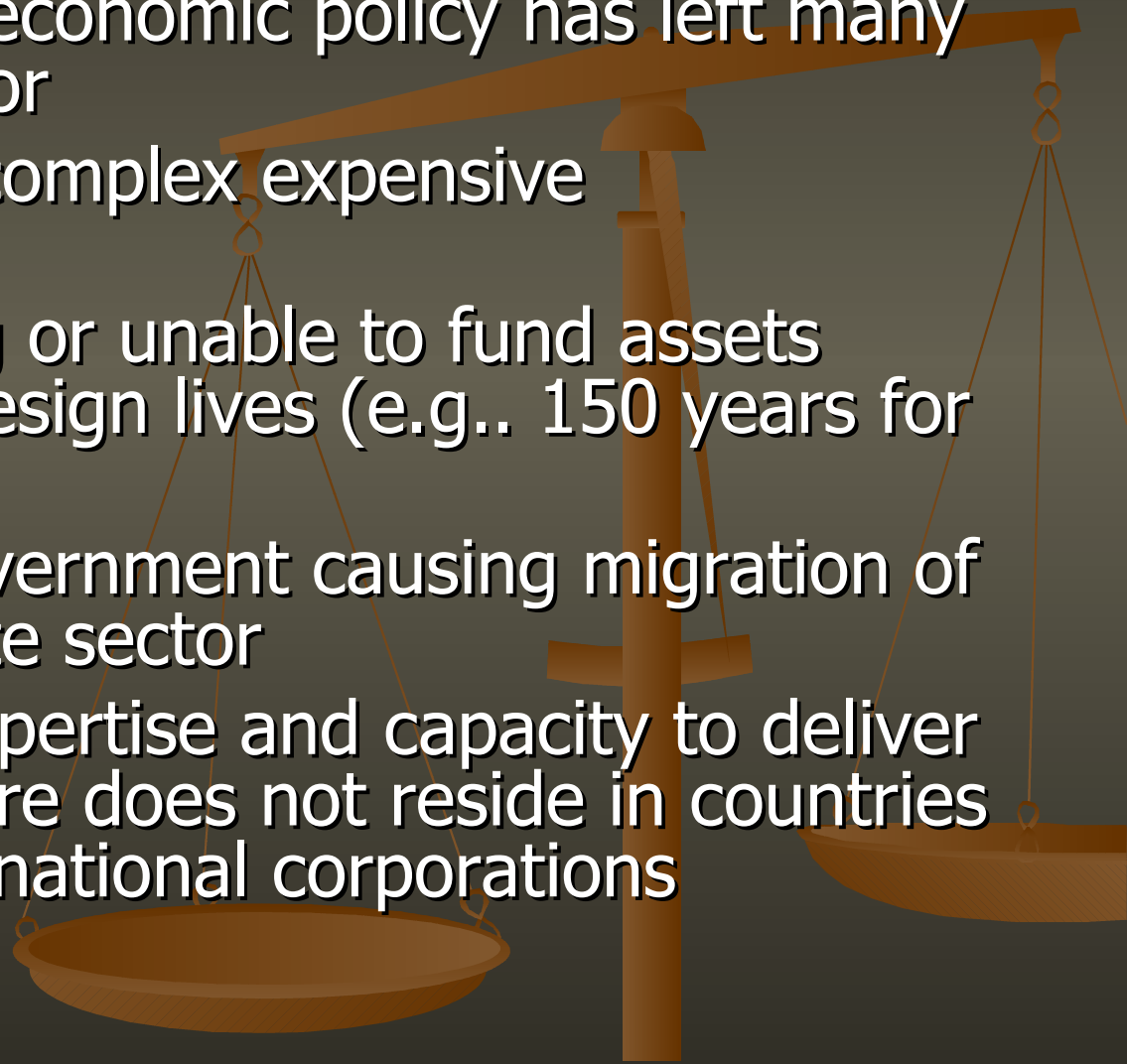
- Politicians
- Engineers
- Lawyers
- Banks
- Insurers





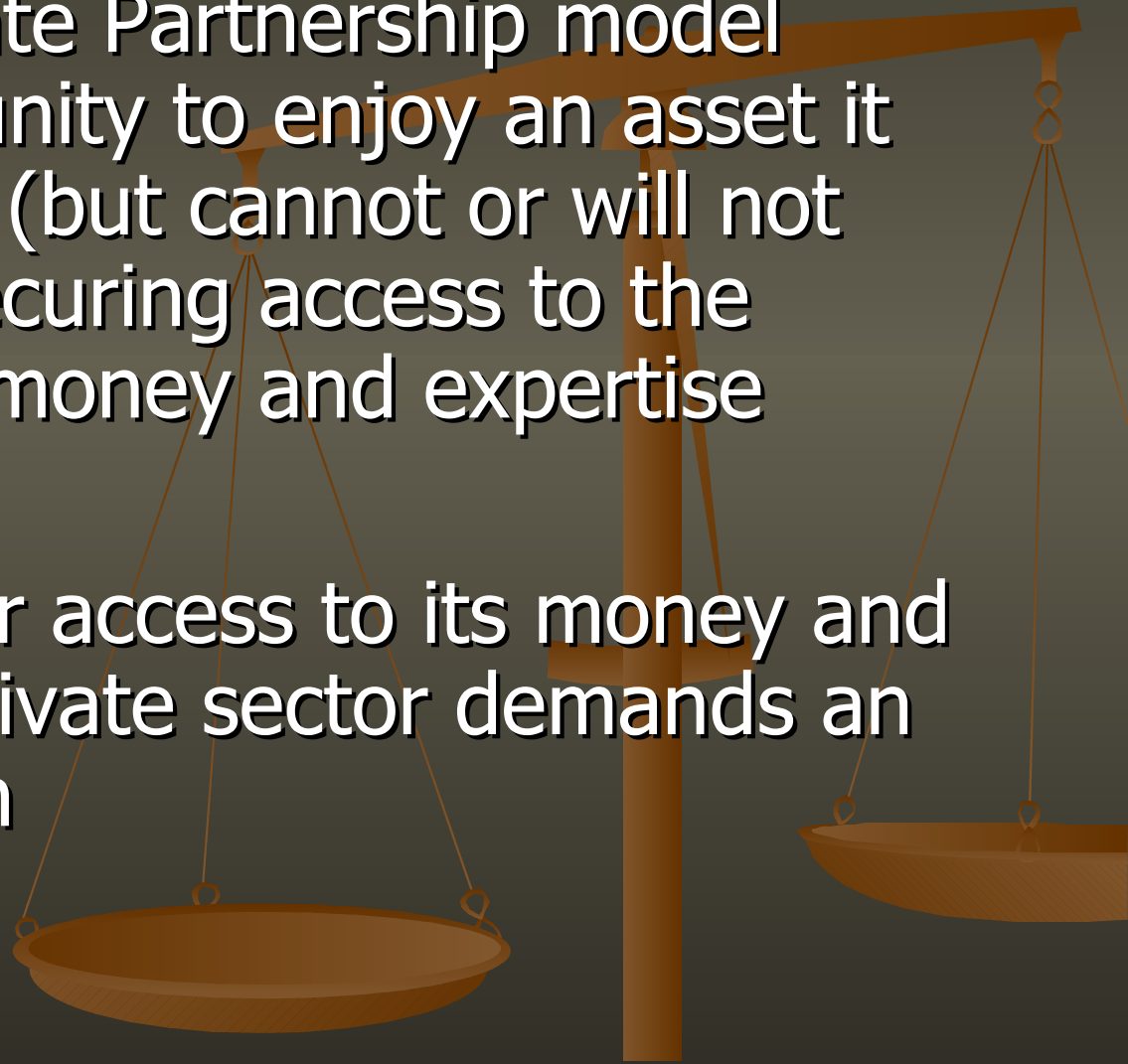
The Problem

- Late 20th century economic policy has left many countries cash poor
- Citizens demand complex expensive infrastructure
- Societies unwilling or unable to fund assets today with long design lives (e.g.. 150 years for a tunnel)
- Downsizing of Government causing migration of expertise to private sector
- Globalisation - expertise and capacity to deliver major infrastructure does not reside in countries its found in trans-national corporations



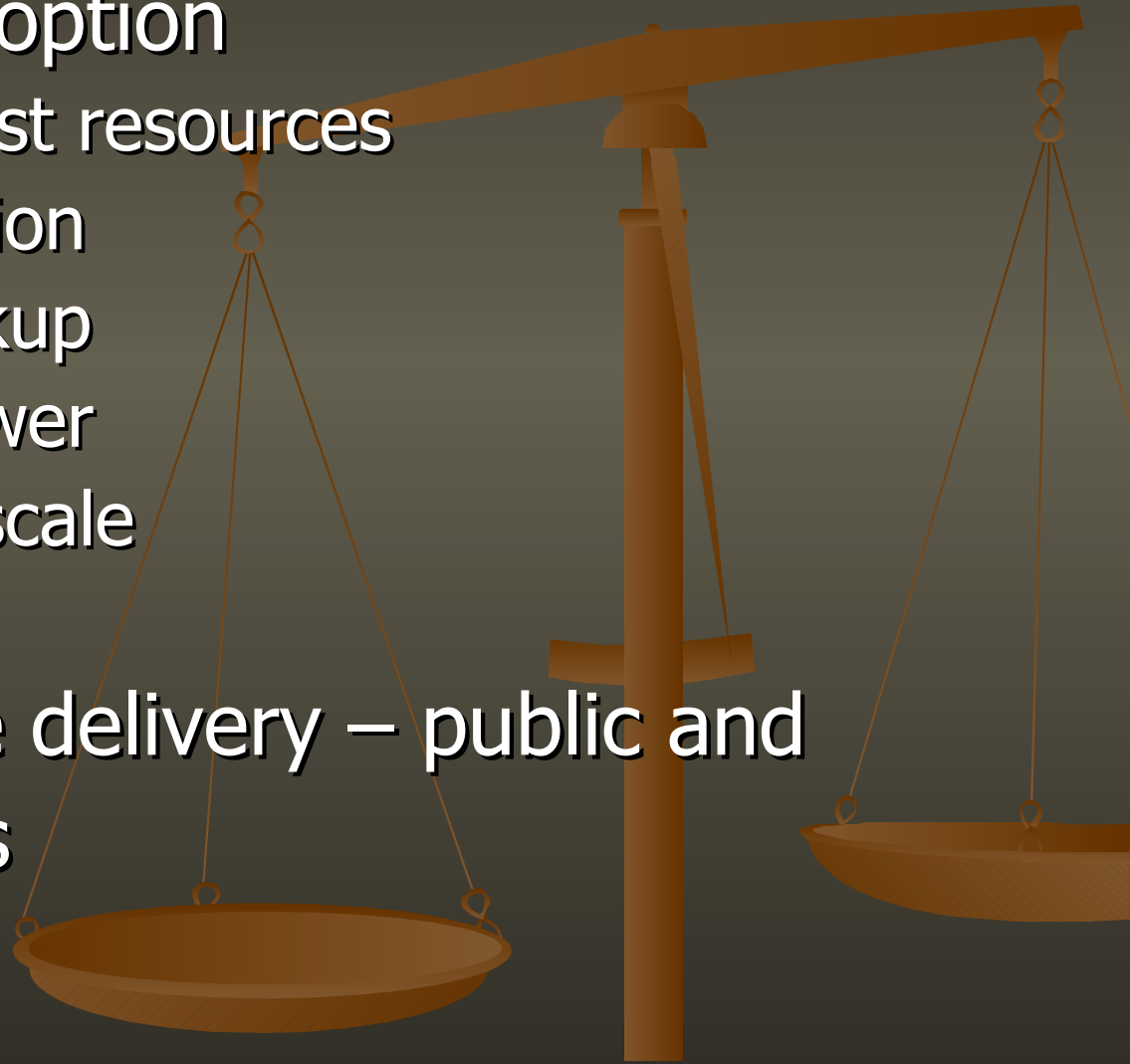
A Solution? - PPP

- The Public Private Partnership model allows a community to enjoy an asset it demands today (but cannot or will not purchase) by securing access to the private sectors money and expertise
- In exchange for access to its money and expertise the private sector demands an economic return



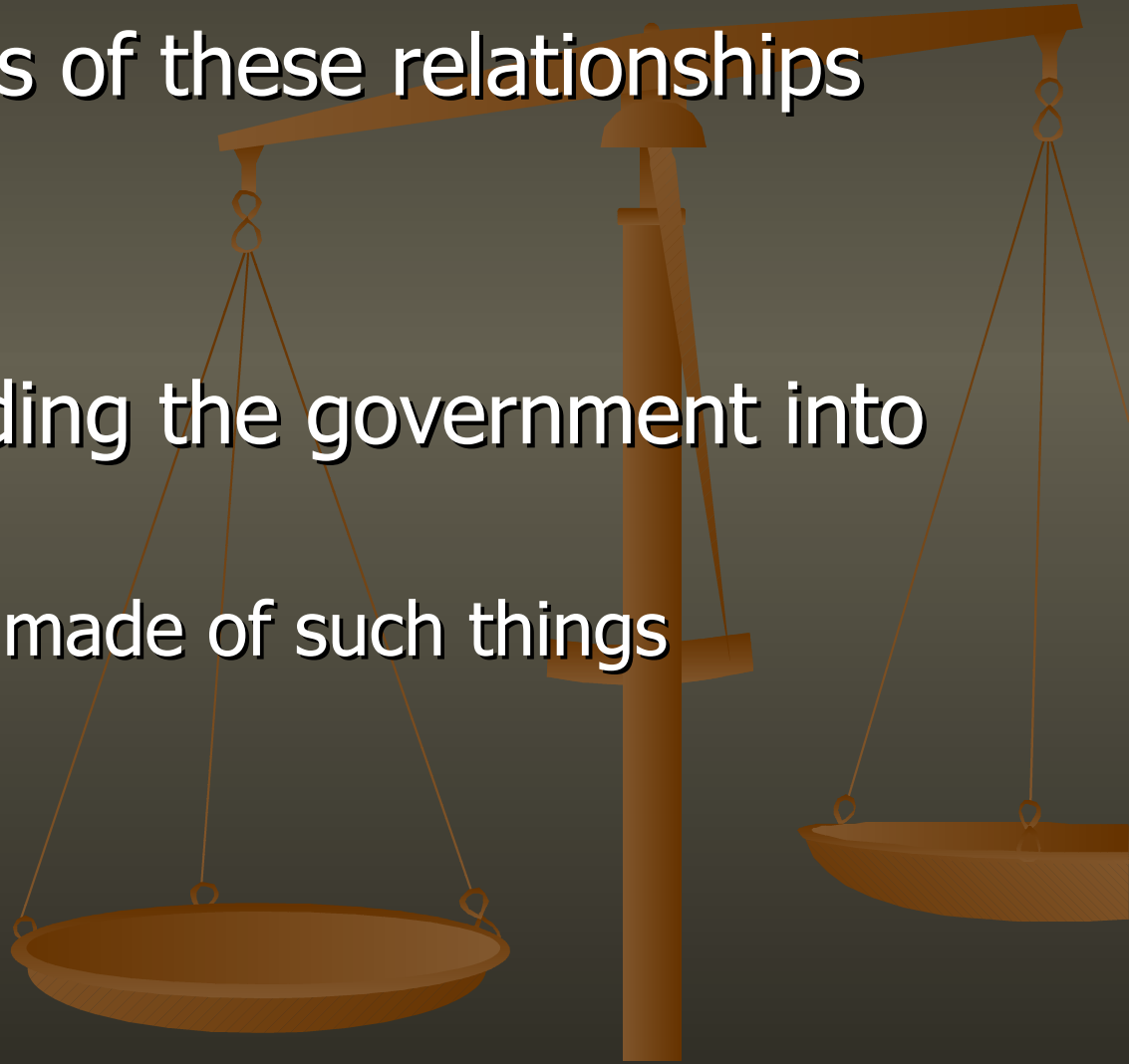
Multi billion dollar projects

- PPPs are a real option
 - Attracts the best resources
 - Early mobilisation
 - Corporate backup
 - Purchasing power
 - Economies of scale
- Earliest possible delivery – public and economic benefits



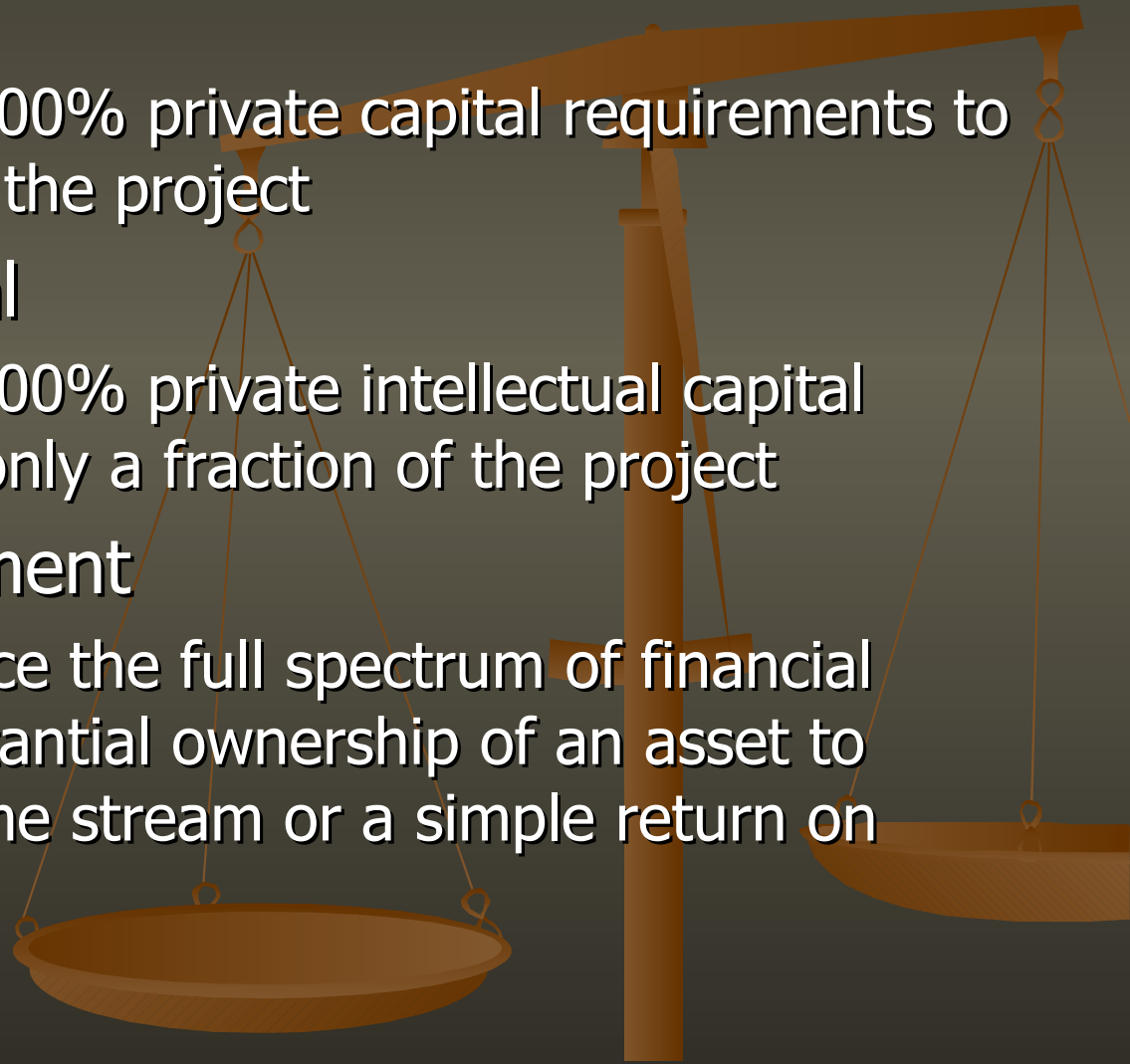
PARTNERSHIP

- Legal dimensions of these relationships are critical
- State Laws (binding the government into the future)
 - Revolutions are made of such things



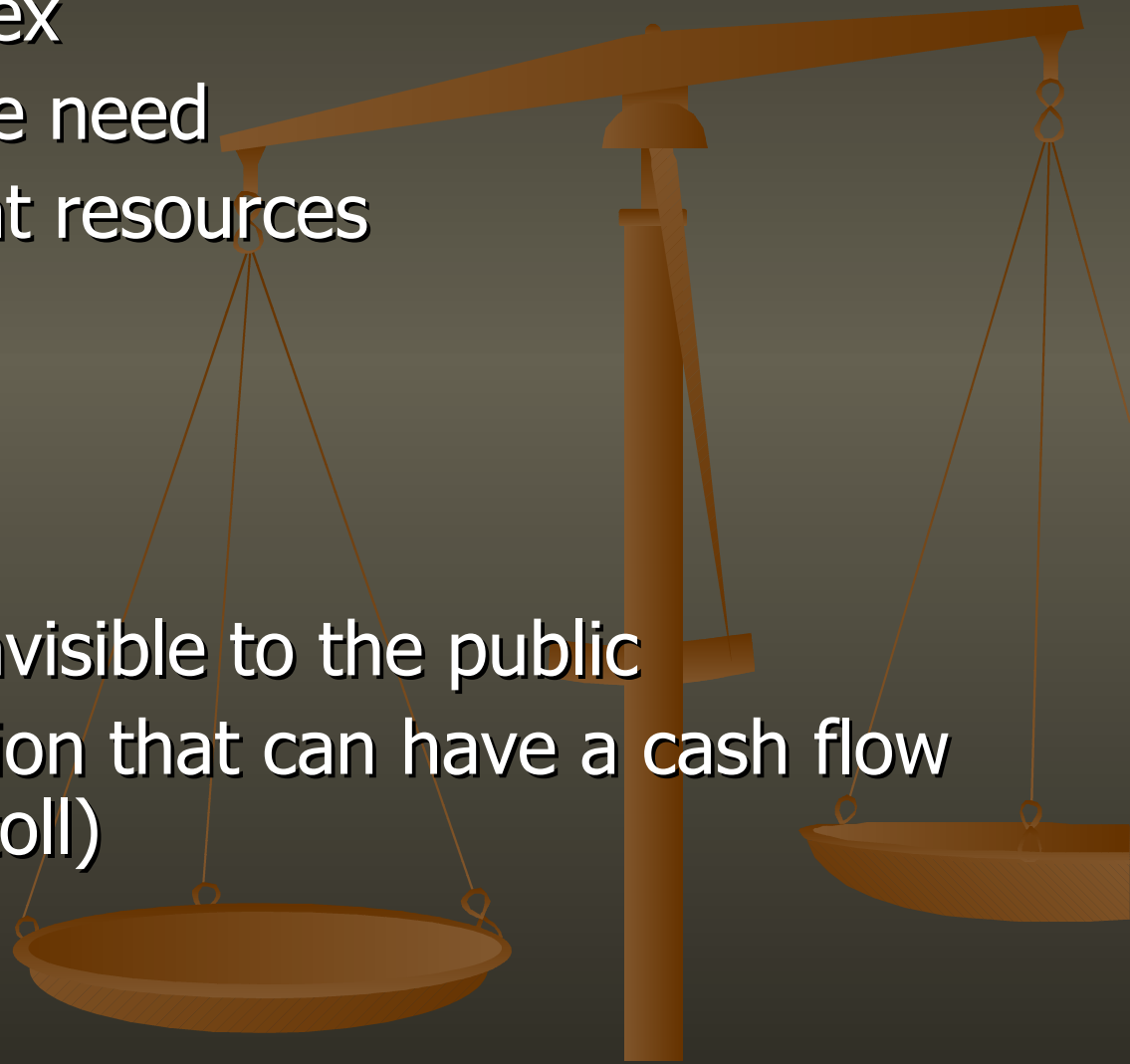
Striking the Balance

- Financial capital
 - A PPP can span 100% private capital requirements to only a fraction of the project
- Intellectual capital
 - A PPP can span 100% private intellectual capital requirements to only a fraction of the project
- Return on investment
 - A PPP can embrace the full spectrum of financial return from substantial ownership of an asset to rights to an income stream or a simple return on investment



Projects Delivering Underground Space

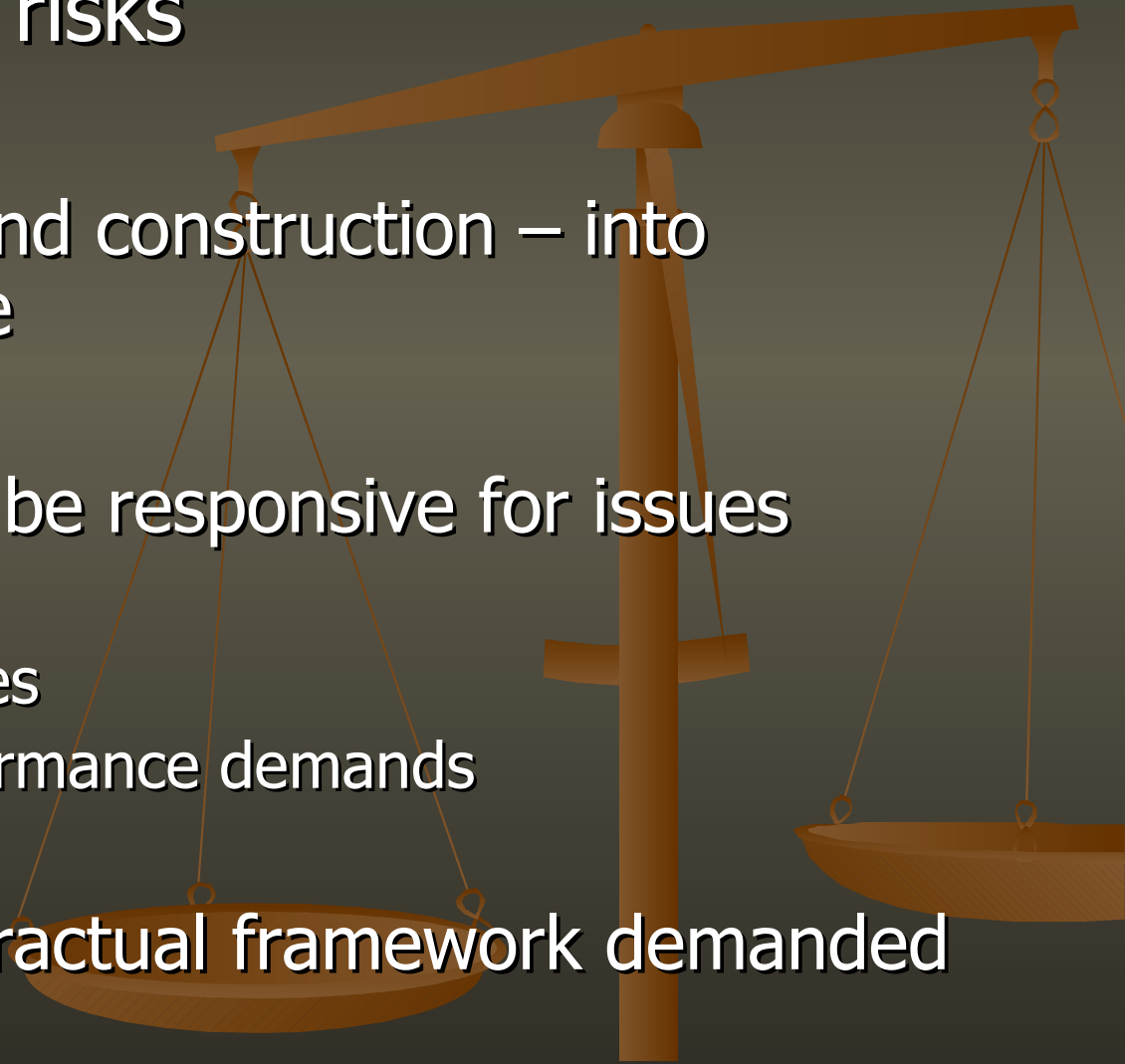
- Technically complex
- Satisfying an acute need
- Demand significant resources
 - Financial
 - Technical
 - Intellectual
 - Organisational
- Progress mostly invisible to the public
- May serve a function that can have a cash flow attached (e.g. a toll)



Challenges

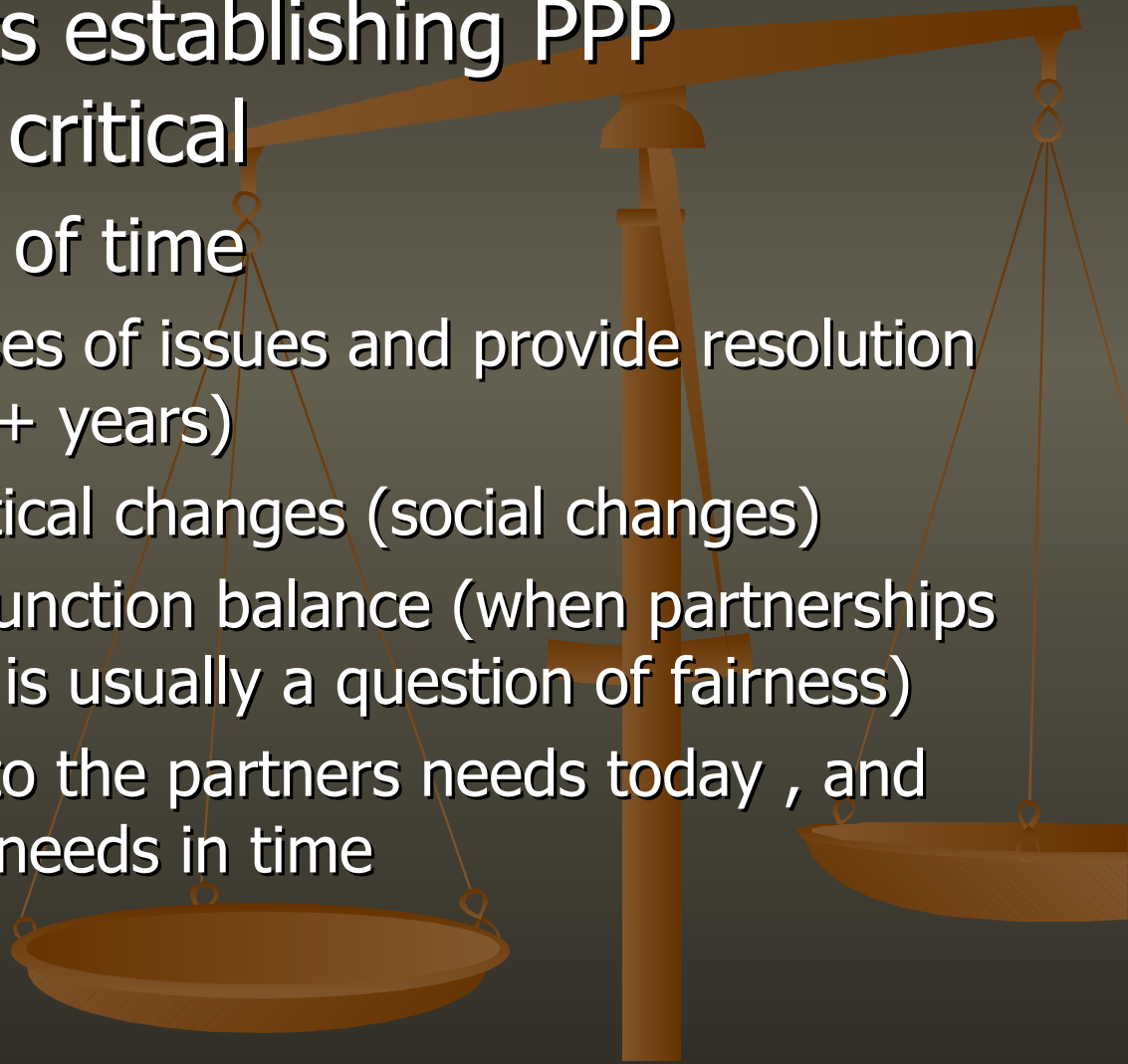
- Management of risks

- Continues beyond construction – into operation phase
- Contracts must be responsive for issues
 - over long time
 - changing phases
 - changing performance demands
- Long term contractual framework demanded



Marriage

- Legal documents establishing PPP relationship are critical
 - Must stand test of time
 - Anticipate classes of issues and provide resolution of disputes (30+ years)
 - Transcend political changes (social changes)
 - Reflect Profit/Function balance (when partnerships breaks down it is usually a question of fairness)
 - Be responsive to the partners needs today , and their changing needs in time

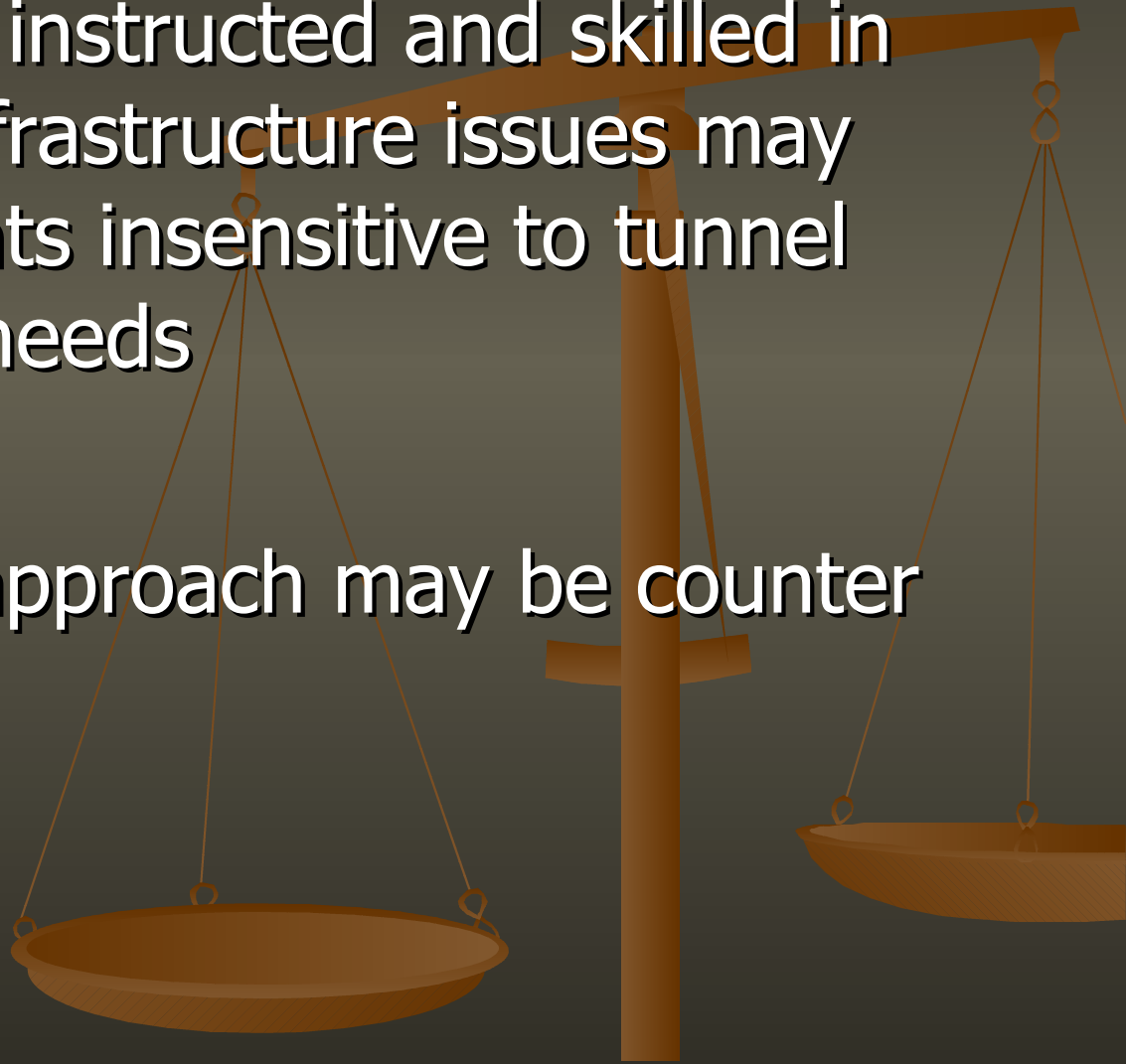


Be Careful of your wishes



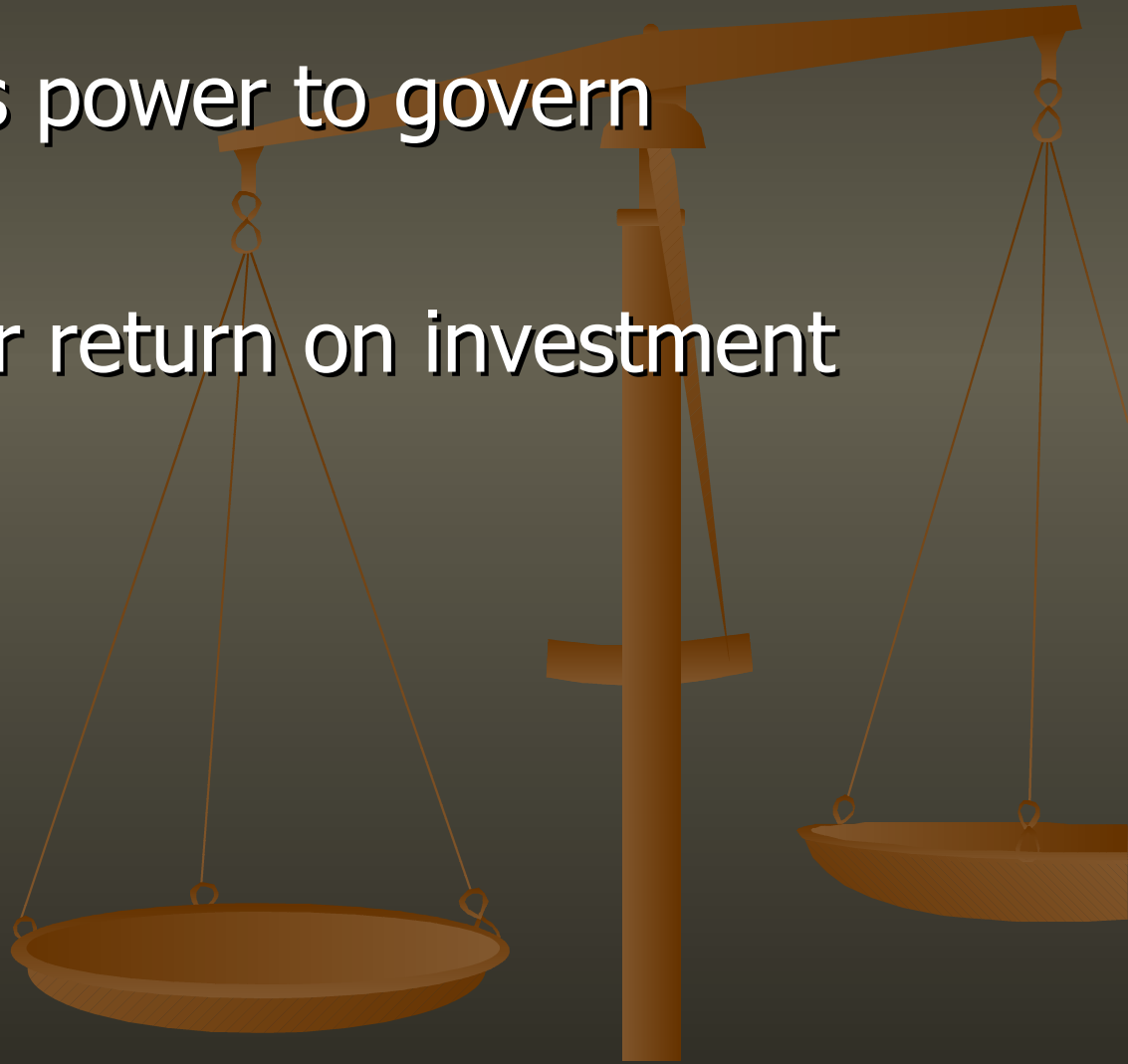
Lawyers

- Unless properly instructed and skilled in underground infrastructure issues may create documents insensitive to tunnel project special needs
- An adversarial approach may be counter productive



Legitimate Tensions

- Governments power to govern
- Private sector return on investment



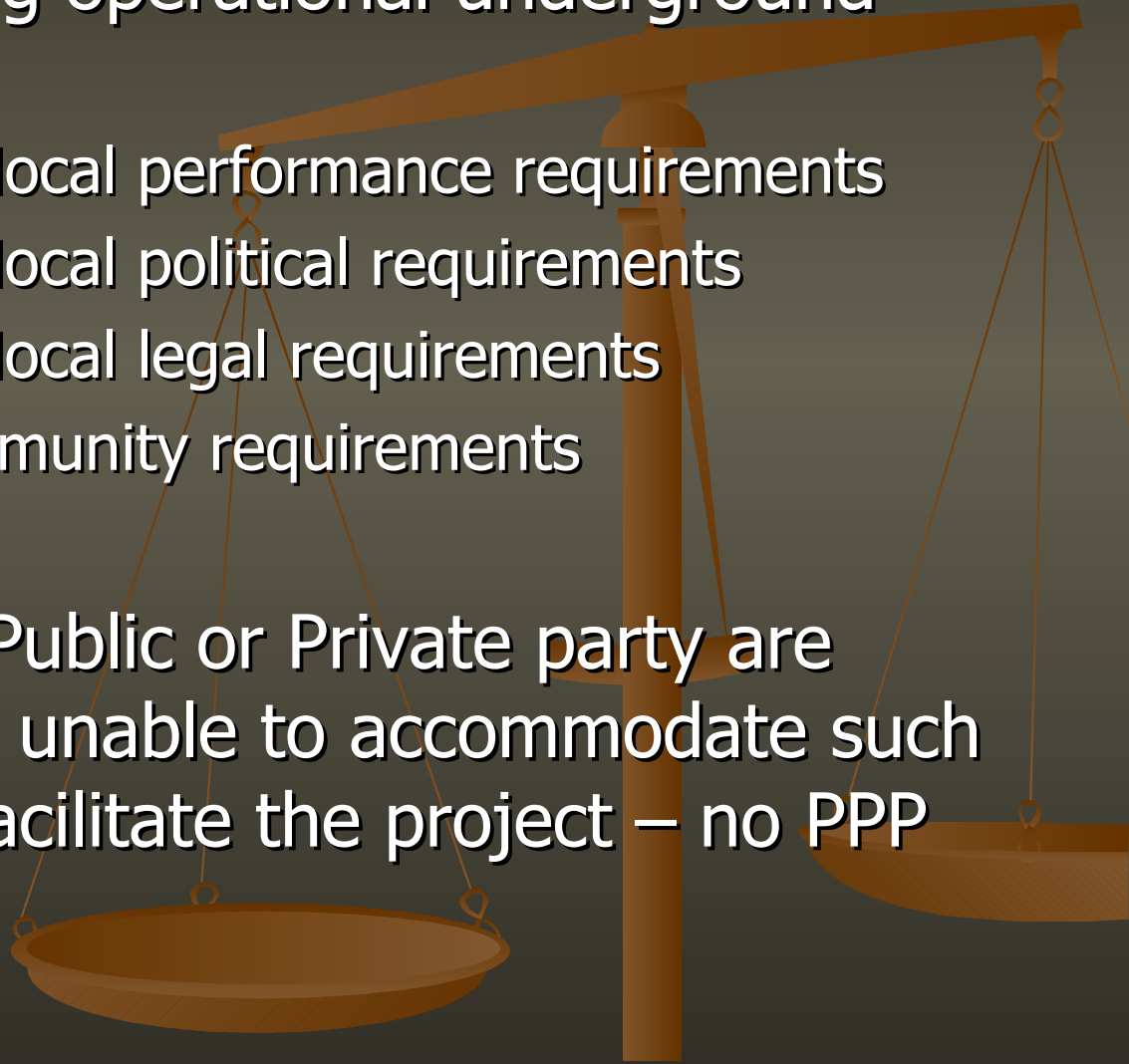
Culture

- No “Standard” PPP
- People, Governments, Companies are all different



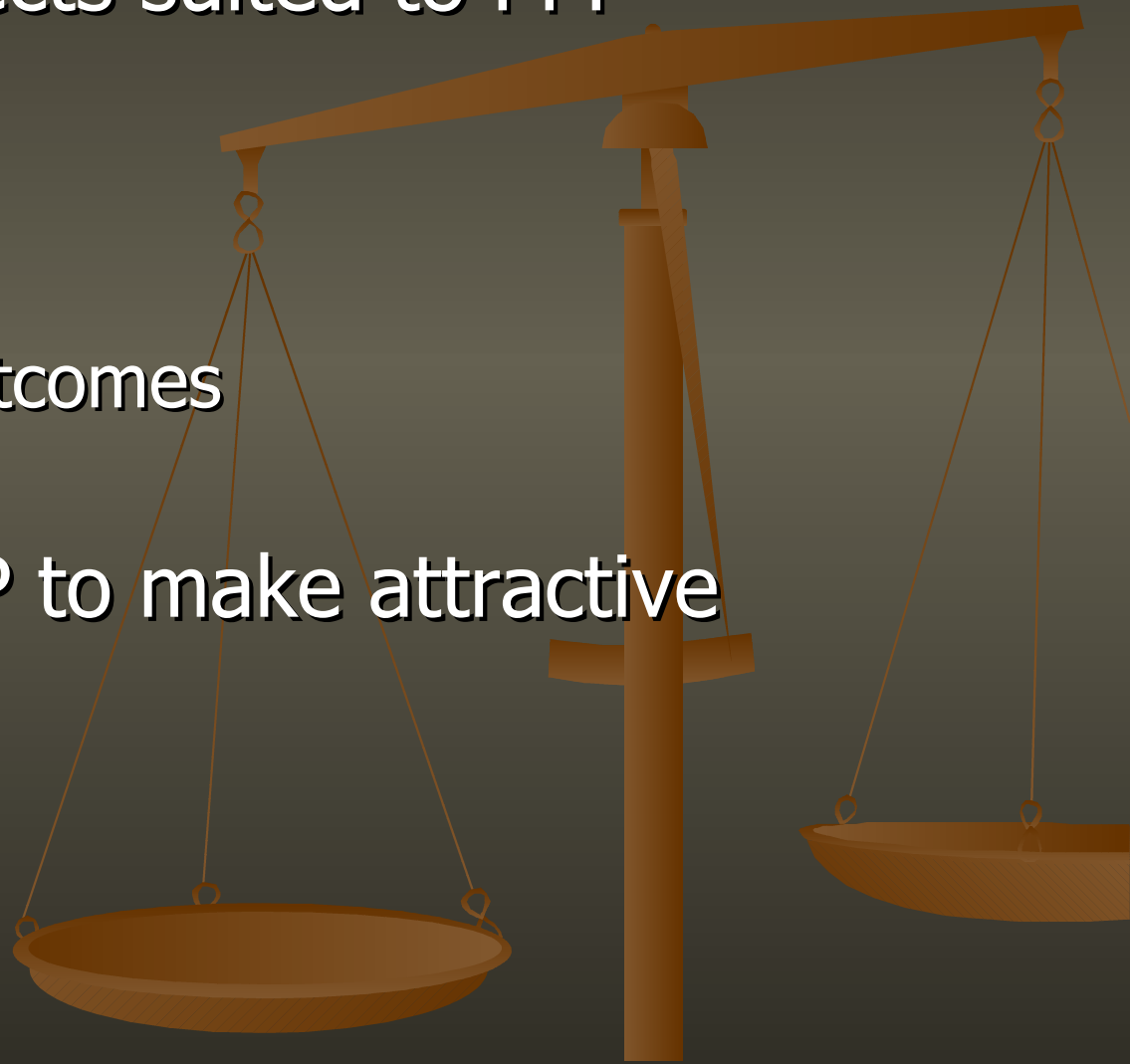
Challenge

- Delivery of ongoing operational underground infrastructure
 - Meeting changed local performance requirements
 - Meeting changed local political requirements
 - Meeting changed local legal requirements
 - Meeting local community requirements
- Where either the Public or Private party are either unwilling or unable to accommodate such a relationship to facilitate the project – no PPP



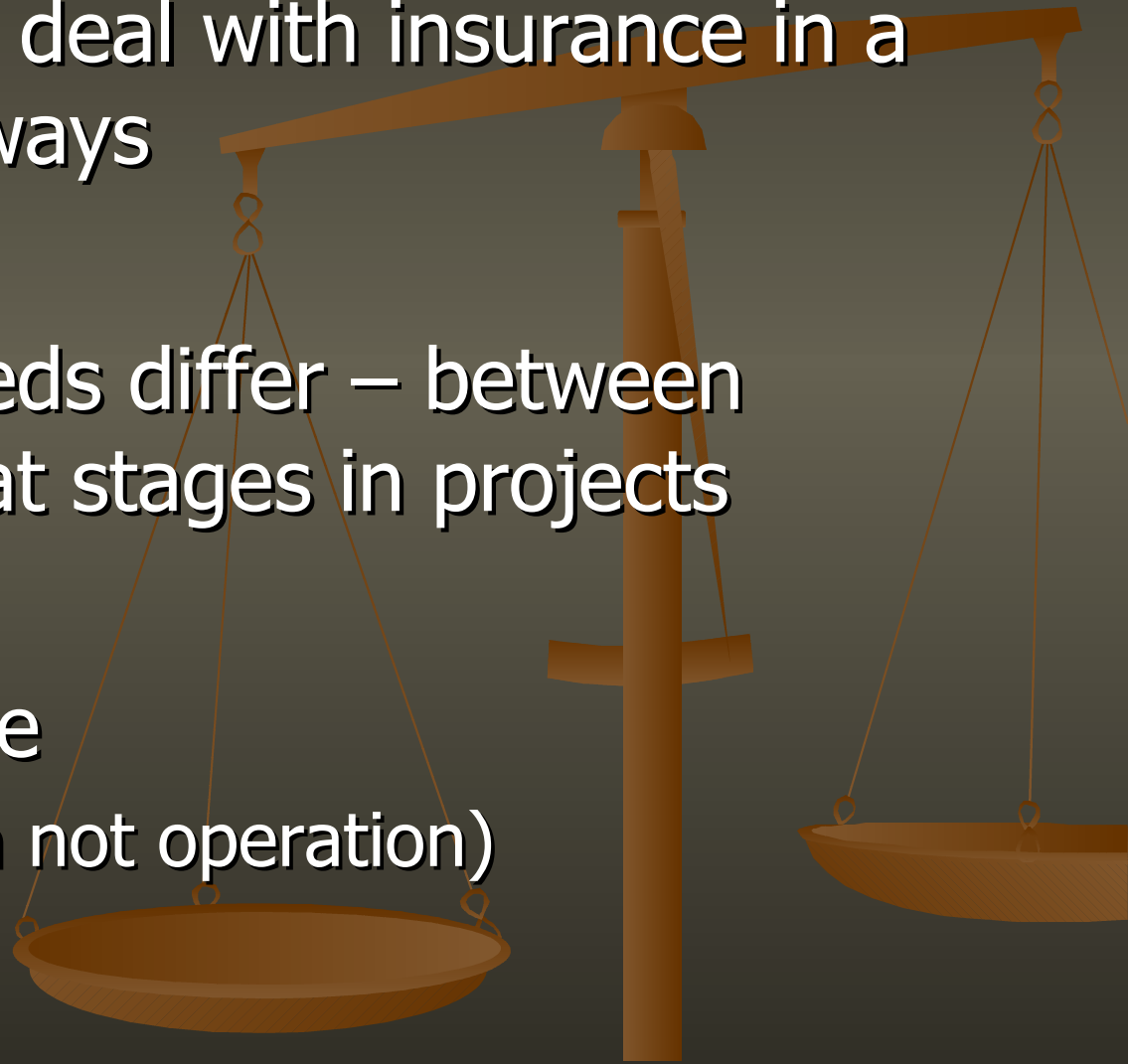
PPP

- Identify projects suited to PPP
 - Costs
 - Returns
 - Performance
 - Expected outcomes
- Structure PPP to make attractive
 - Public/
 - Private



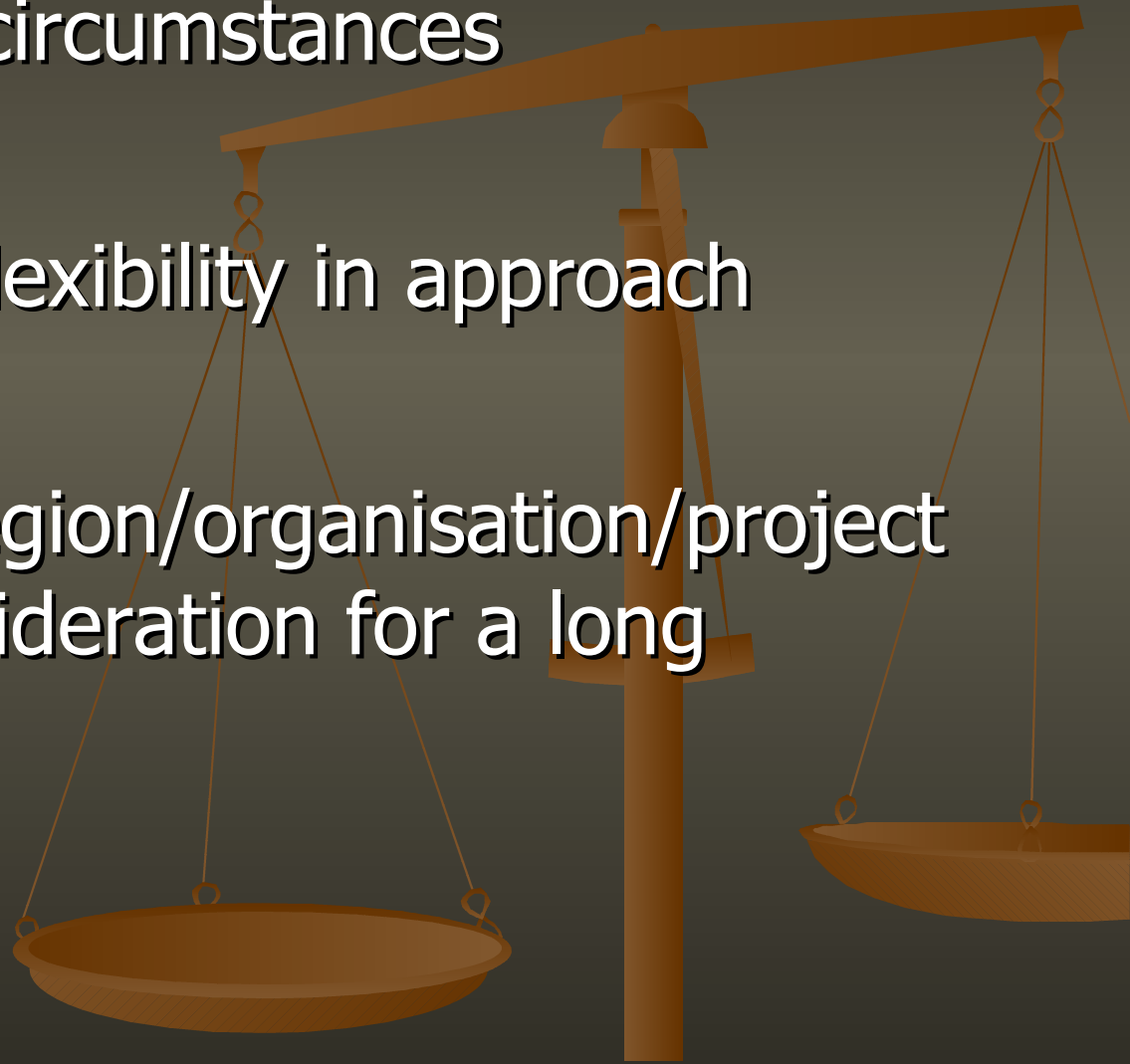
Insurance

- Contracts can deal with insurance in a multitude of ways
- Insurance needs differ – between projects and at stages in projects
- E.g. ITIG Code
 - (Construction not operation)



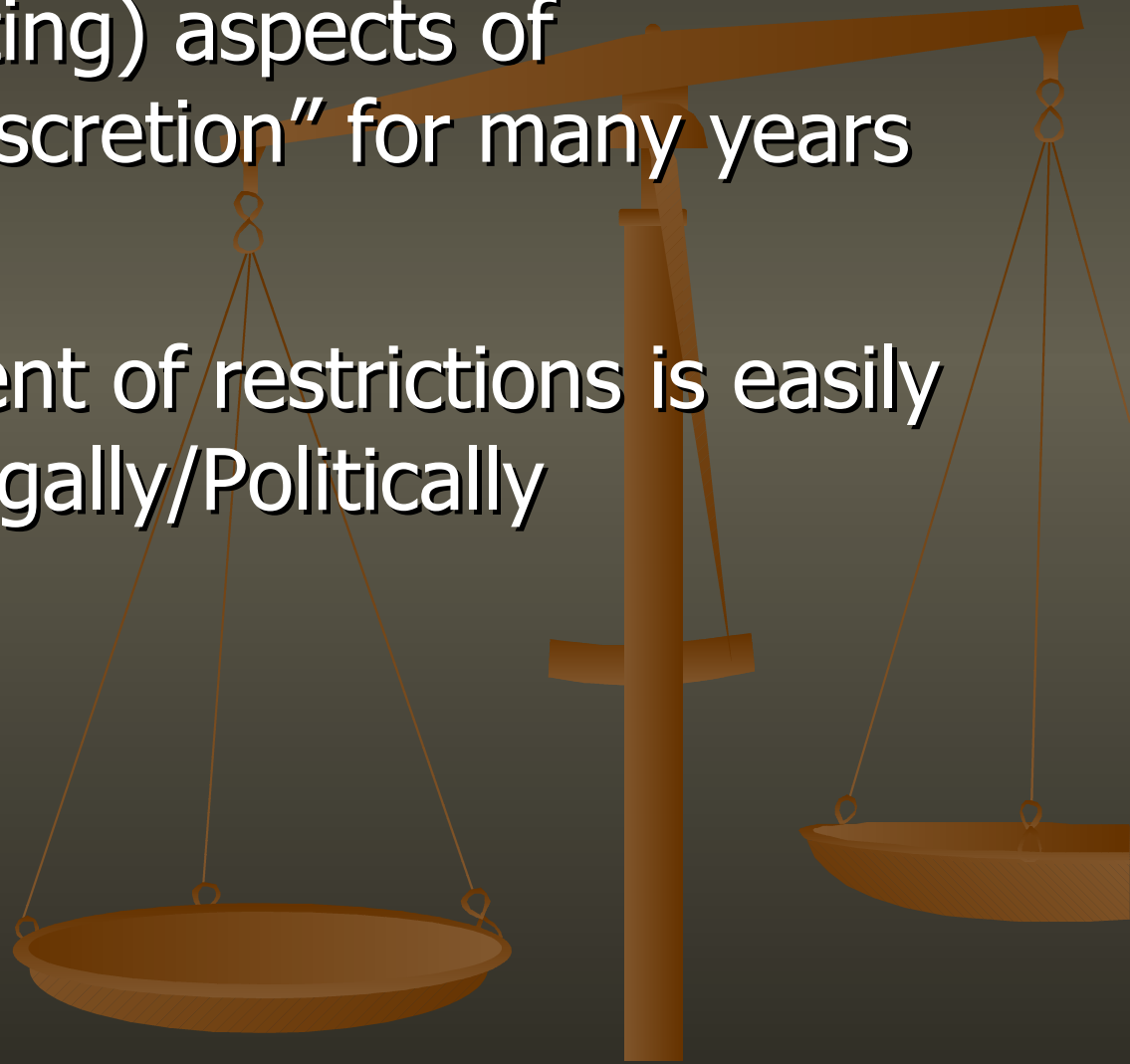
Standardised PPP documents?

- Depends upon circumstances
- PPP's demand flexibility in approach
- Each country/region/organisation/project needs PPP consideration for a long marriage!



Legal

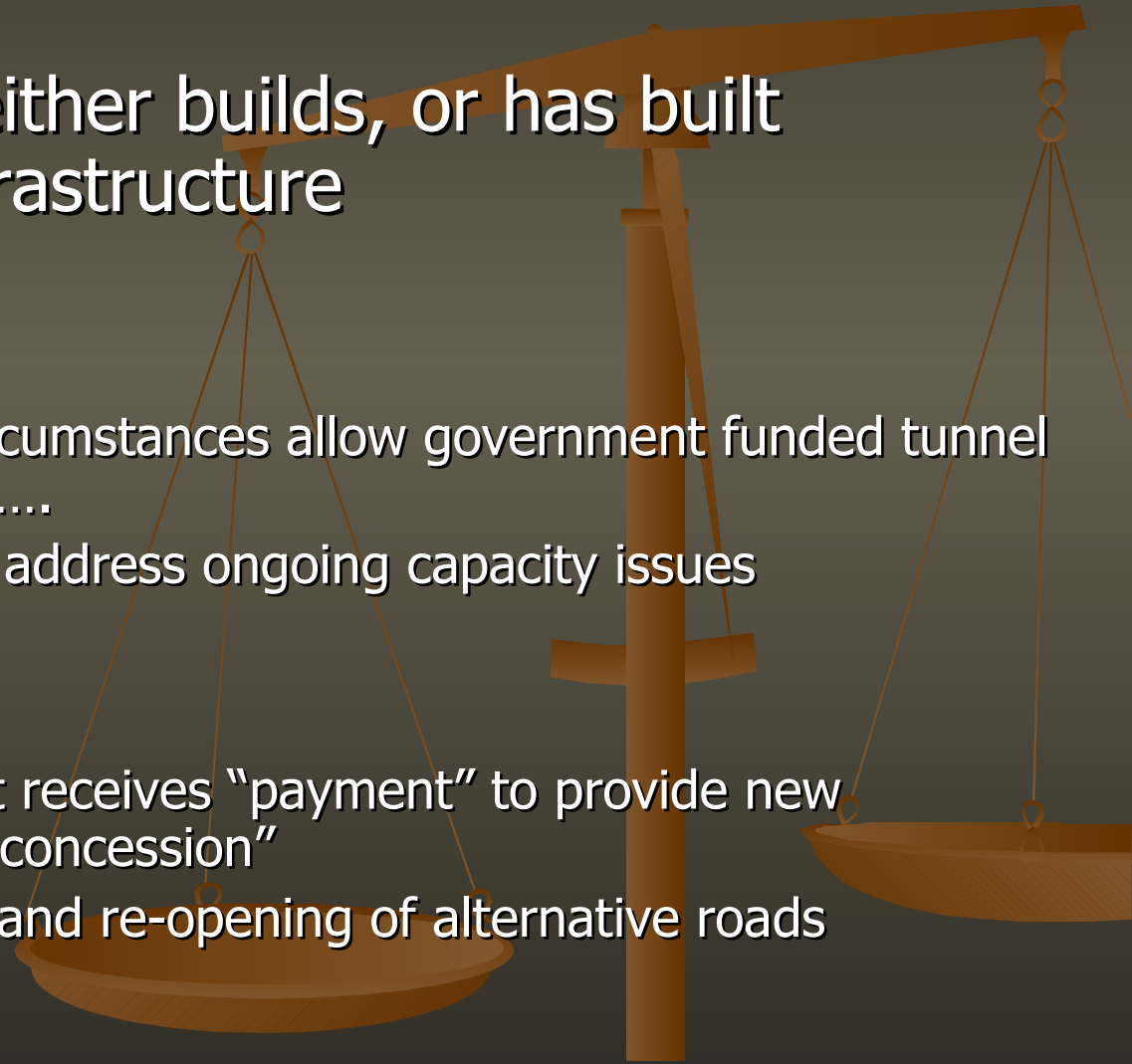
- Binding (restricting) aspects of Government “discretion” for many years
- Nature and extent of restrictions is easily mishandled – legally/Politically



Failures

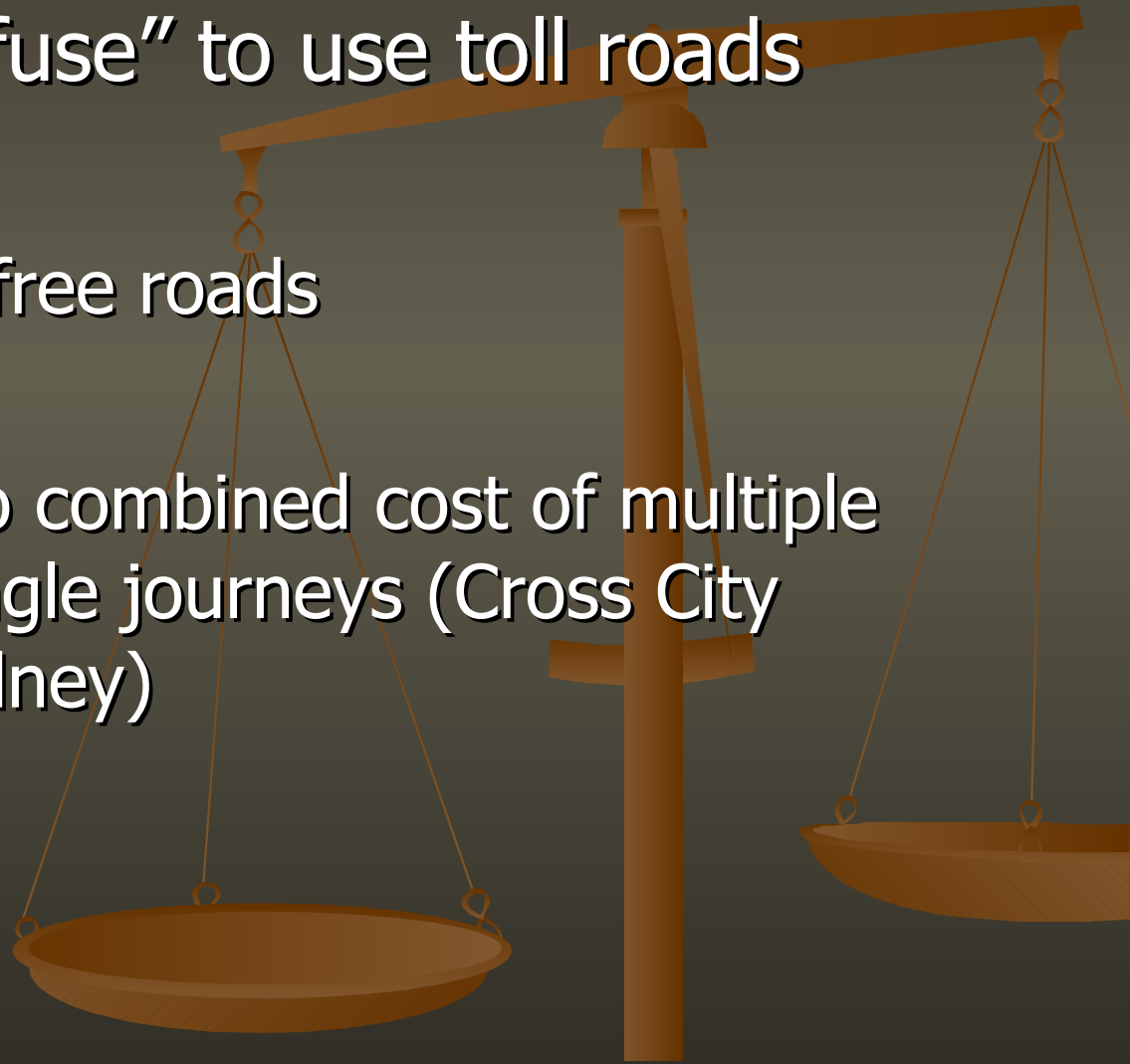
■ Tolls

- Government either builds, or has built competing infrastructure
 - Legitimately
 - Changed circumstances allow government funded tunnel or bridge or....
 - New PPP to address ongoing capacity issues
 - Wrongly
 - Government receives “payment” to provide new “competing concession”
 - Politics demand re-opening of alternative roads



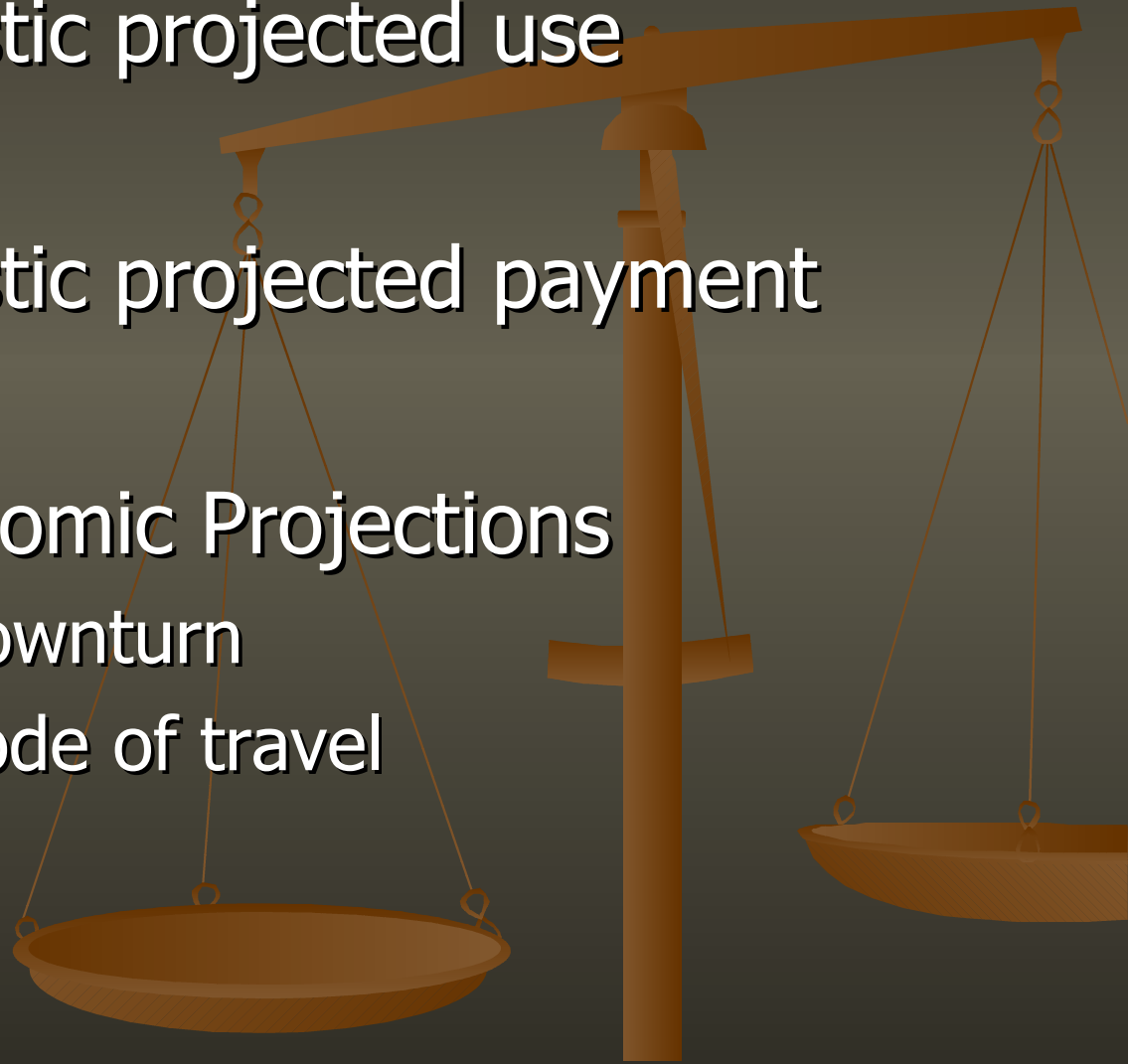
Social Rejection

- Citizens “refuse” to use toll roads
 - Culture of free roads
 - Reaction to combined cost of multiple tolls for single journeys (Cross City Tunnel Sydney)



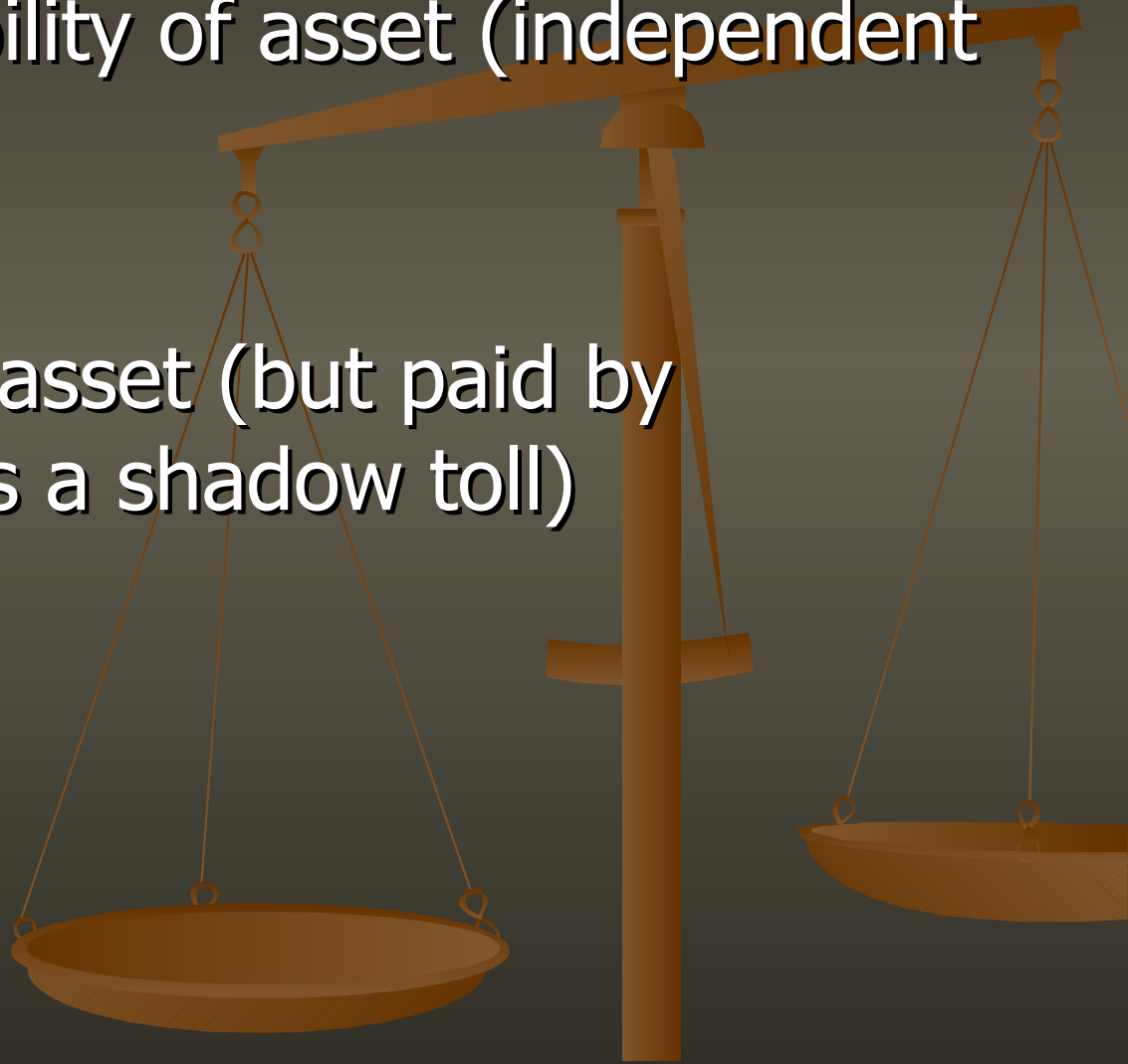
Failed Projections

- Over Optimistic projected use
- Over Optimistic projected payment
- Floored Economic Projections
 - Economic downturn
 - Changed mode of travel
 - etc



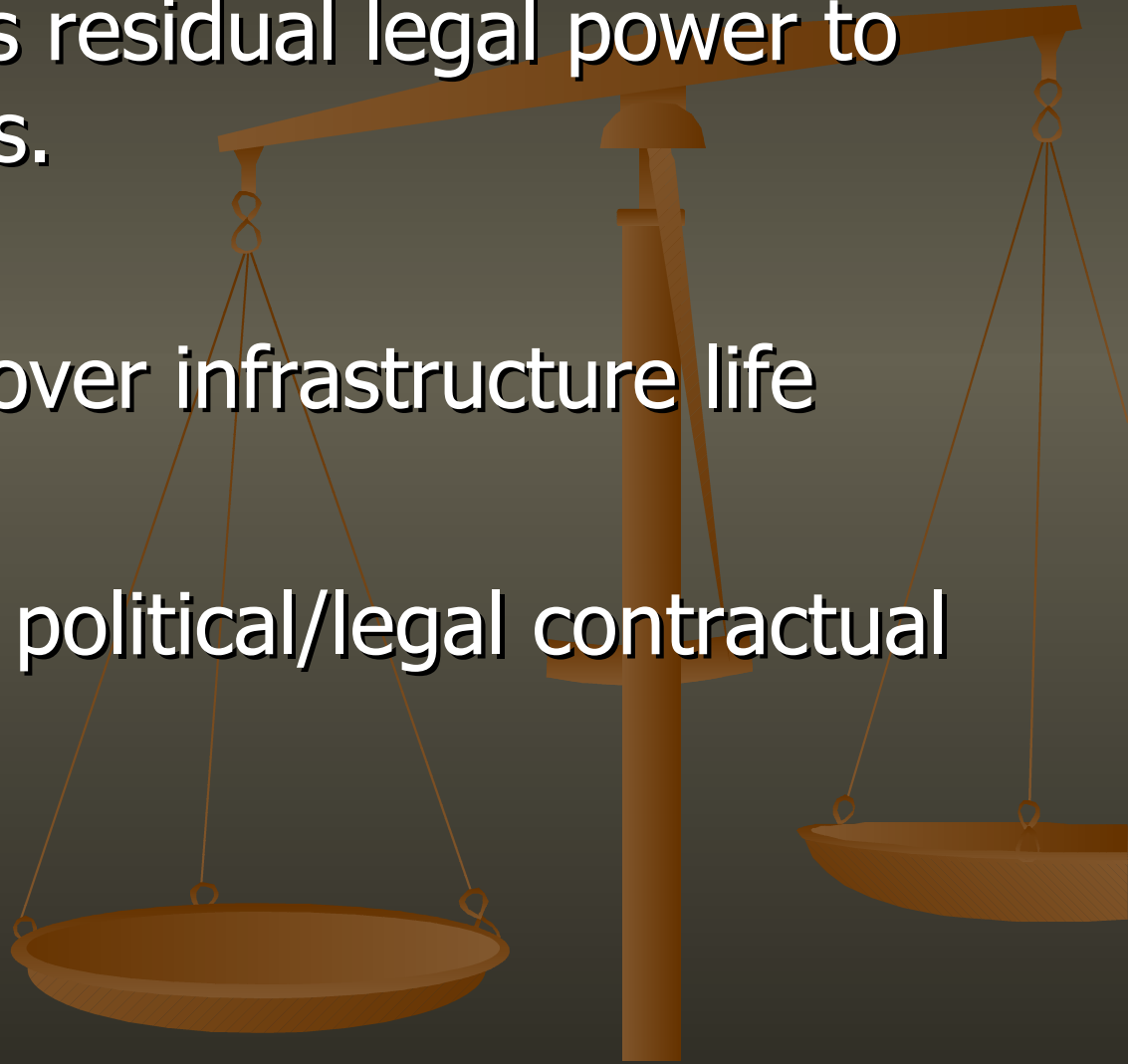
Alternatives?

- Fee for availability of asset (independent of use)
- Fee for use of asset (but paid by Government as a shadow toll)
- etc

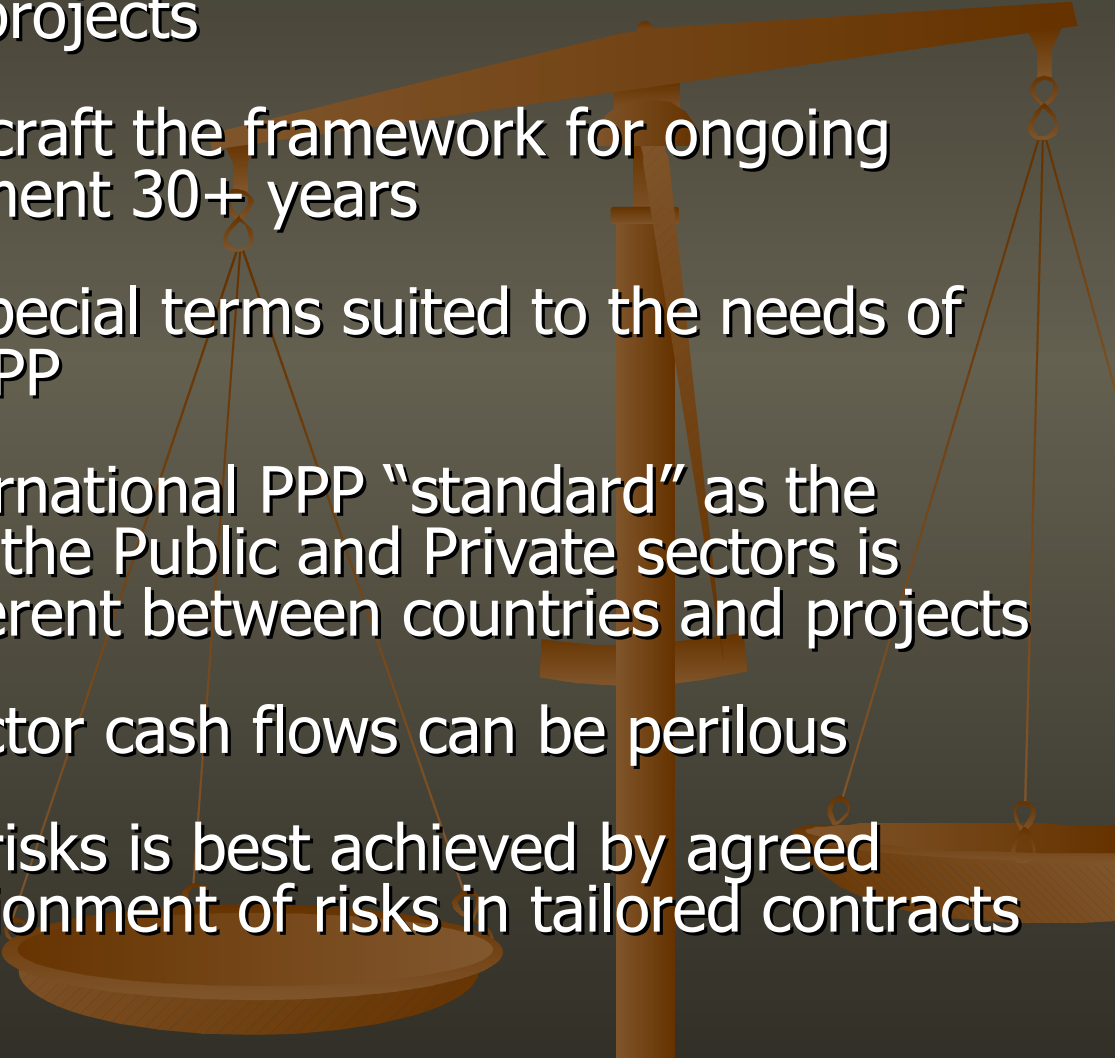


General Legal Proposition

- Government has residual legal power to change the rules.
- Politics change over infrastructure life
- Always a risk of political/legal contractual intervention



Conclusion

- PPP delivers excellent outcomes for *some* projects
 - *Not* a Solution to all projects
 - Legal provisions can craft the framework for ongoing relationship management 30+ years
 - Lawyers must craft special terms suited to the needs of the “Partners” in a PPP
 - There can be no International PPP “standard” as the relationship between the Public and Private sectors is necessarily quite different between countries and projects
 - Tolling for Private sector cash flows can be perilous
 - Management of PPP risks is best achieved by agreed “process” and apportionment of risks in tailored contracts
- 

Thank you for your attention

