

## Alliancing in Australia – No Litigation Contracts; a Tautology?

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### **Abstract**

A project alliance is a business strategy whereby client and commercial participants' objectives are aligned. This paper takes an alliance project between public and private organisations in Queensland, Australia as a case study and reports the critical factors identified that influence the success of the alliance project. Alliancing is a system that provides a collaborative environment and which provides a framework for them to adapt their behaviour to project objectives. It is about sharing resources and experiences, exposing the 'hidden' risks. The case study suggests that leadership has a strong influence on the alliance climate. Commitment and action by the Project Alliance Board (and, so, parent organisations) has a strong impact on the team and alliance culture, indicating alliancing has a high chance of failure when there is inadequate support from top management. Like all relational contracting approaches, trust between alliance partners is important. This case study project takes a further step towards reinforcing the trust element by placing a *No Dispute* clause in the alliance agreement. A review of the effects of the no litigation clause upon the project

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team is presented. The authors conclude that without a positive approach to relationship management a *No Dispute* approach is impossible. So, the authors postulate that a 'no litigation' contract is essentially tautological and go on to argue that a no litigation contract cannot exist without the help of a clear relational vision, that leads to both soft and hard infrastructure to assist decision making and relationship building.

**KEYWORDS:** Relational contracting, alliancing, litigation, case study, Australia.

## ***Background***

Relational contracting approaches, such as partnering and alliancing, were introduced into the construction industry in the 20<sup>th</sup> century. Alliancing is generally assumed to be a long term business strategy linking together client, contractor and supply chain (Rowlinson and Cheung, 2002). It is categorised into two main types by scholars, namely strategic alliancing and project alliancing. The most common definition of strategic alliances adopted is to establish inter-organisational relations and to engage in collaborative behaviour for a specific purpose (Love and Gunasekaran, 1999) whereas project alliances are described as project delivery strategies, several participants joining together to share risks and outcomes on a project (Hutchinson and Gallagher, 2003, Manivong and Chaaya, 2000). Sponsor and commercial participants' objectives are aligned to maximise performance, proactively manage risk, reduce cost and achieve outstanding results in attaining client's objectives.

Hutchinson and Gallagher (2003) put forward a clear definition of a project alliance:

“... an integrated high performance team selected on a best person for the job basis; sharing all project risks with incentives to achieve gamebreaking performance in pre-aligned project objectives; within a framework of no fault, no blame and no dispute; characterised by uncompromising commitments to trust, collaboration, innovation and mutual support; all in order to achieve outstanding results.”

The formation of alliances has enabled a diversified approach to construction projects that has received mixed responses from the industry. Many are wary and unsure about new project management ‘ideas’, while some are willing to enter into alliance contracts with limited knowledge of the concept but with a desire to perform as a participant (Jefferies *et al.*, 2001).

The alliance project studied was set up between a multi-faceted public sector organisation (the client) and a number of organisations from the private sector, to carry out upgrades to three existing wastewater treatment plants located in three different city sites. During the course of research, the project was at its design stage. The alliance approach was chosen by the client for the project, with the aim at creating mutually beneficial relationships between all parties involved so as to produce outstanding project outcomes. Under an alliance, all parties to the alliance take collective ownership of all risks associated with delivery of the project, with equitable sharing (fixed pre-agreed ratios) of the pain or gain depending on how the outcomes compare with pre-agreed targets. This commercial alignment is consistent with a ‘no-blame, best for project’ alliance philosophy that focuses all participants on achieving common objectives. In this instance, a no-claim clause was embodied in the contract.

This alliance project is a unique government project which involves large capital outlays and involves many private sector organisations, and so a different approach to planning and execution was deemed. Flexibility and innovation were seen being critical for the success of the project. In order to take advantage of the strengths of the individual alliance partners to meet the project challenges, the selection of the alliance project team was crucial and selection criteria included:

- Capability and capacity to complete the full scope of works
- Proposed approach to projects
- Affinity with project alliance culture
- Relationship management capabilities

## ***Methodology***

The research methodology adopts a grounded, triangulated approach. The basic concepts and variables relating to cooperation, collaboration, organisational issues and performance were investigated initially through the interview process. The measurement instruments used were clearly defined and validated (please see Cheung, Rowlinson and Jefferies, 2005 and Rowlinson and Cheung, 2004b for details), and formed the basis of a holistic model of the needs required in setting up a relational based project team. The second phase of the research was data collection using these instruments and validation of the scales and concepts being used. Once this process had been undertaken, the outcome was validated in two ways. One approach was by a second set of interviews in which the findings of the research are presented and debated with interviewees. The second approach was to use the concepts and

instruments on a series of case studies identified during the course of the research and to make use of the data collected to explain and understand the outcome emanating from these real life projects. This paper, *inter alia*, presents initial findings captured from one of the case studies in the research. Information collection includes conducting a questionnaire survey and face-to-face interviews, collection of archival data such as meeting minutes and written material documenting the purpose and nature of the alliance team and observation of a number of team meetings. The response rate for the questionnaire survey was thirty-two of a total of fifty staff members, which represents a sixty-four percent representation of the whole alliance team. Eleven one-hour interviews were conducted with key members from a variety of positions including Design, Services, Alliance Management and Construction. Interviews were also conducted with an external facilitator and a Project Alliance Board Member. Team dynamics and communication processes in the Alliance Management Team (AMT) were examined by sitting in and observing team meetings.

### ***Alliance Organisational Structure***

The alliance organisational structure is made up of mainly three levels – Project Alliance Board, Alliance Management Team and Integrated Project Team.

Table 1 to be inserted here

**Table 1 Alliance Organisational Structure**

The driver of this alliance is the client. However, although the client has good design skills, the organisation has only experience in traditional lump sum project delivery methods. There

is clearly a need for sharing knowledge and resources between the alliance partners, including the top management level. Skills identified in this project as essential in an alliance include:

- The ability to work as part of a team – it is important for team members to participate in group decision making and be comfortable with group consensus. This is exemplified in the esprit de corps generated that allows member to work together to solve the problem, rather than taking the easy option and pulling out from the project;
- The importance of communication skills – highly relevant to group decision making skills. Communication skills emerged as particularly important when interacting with people from different disciplines but also when dealing with stakeholders and the community, to members from other organisations and these involved day-to-day plant operations; and
- The ability to think broadly and creatively –thinking outside of one’s own discipline, thinking outside the box, and being open to new ideas. The consequences include encouragement of creative thinking and brainstorming, which leads to moving people out of their comfort zone to foster innovation.

### ***Senior Management Role***

The study indicated strong top-down support being received for the alliance relationships. The PAB provides overall direction and continuous support to the alliance team. The high level of support from senior management has been reflected in the questionnaire survey result; with an overall mean score of 5.48 (the maximum score is 7). Bresnen and Marshall (2000) point out that senior management support is vital in making a collaborative approach both

credible and legitimate. Alliancing is generally championed at the highest level of the organisation, where goal alignment and good relationships are crucial. Both individual and group flexibility also are seen as important. However, results indicate bottom-up support for alliance relationships, group resilience and coordination are slightly weaker until all members can be convinced of the benefits of buying in. Observations showed that both individuals and groups are able to adapt to necessary shifts in opinion, plans and behaviours (when planned and clearly communicated). Furthermore, the role of leaders and project managers is critical to maintaining relationships and direction in the alliance project. On the other hand, group resilience, defined as ability to handle unpredicted or unexpected change, was found to be low, suggesting individuals would be more adversely impacted and less likely to be effective if an unexpected change was to occur. This underlines the principle that strong commitment and support from all levels are required for an alliance to be successful.

### ***The Alliance Infrastructure***

Alliancing is a system put in place which provides a collaborative environment between people and which provides a framework for them to adapt their behaviour to project objectives. It is about sharing resources and experiences, exposing the 'hidden' risks. The case study suggests that leadership has a strong influence on the alliance climate. Analysis of the questionnaire survey indicates the overall mean of Work Unit Leadership is above 5 (the maximum score is 7), with little variation across the variables (vision, intellectual stimulation and inspirational communication). Commitment and action by the PAB (and parent organisations) has a strong impact on the team and alliance culture, indicating alliancing has a high chance of failure when there is inadequate support from top management. The inter-organisational rivalries and barriers must be quickly knocked down and open communication

and trust developed and maintained. The questionnaire survey results also reveal relatively lower ratings on the group coordination measure (an overall mean of 4.91, with a median of 4), suggesting work units can find it relatively difficult to work well together, particularly without the presence of leaders (managers). This again reinforces the important role of the leader in an alliance project. Leadership is especially important in construction projects to facilitate and encouraging timely decisions and dispute resolution, as well as clarifying issues. Leaders need to act as mentors of AMT and, nurture a team culture. Leaders need to be visible, available and attentive, showing respect to AMT processes which motivate employees. Another crucial role of leaders is constant communication with their subordinates on wider goals.

The alliance project involves professionals from various organisations, who are put in the same office and work on the same project for the following 18 months. Team building is crucial in this project environment, for the project team will be working with each other for the next 1-2 years, project charter was set up during the initial workshop which team building activities took place and these were facilitated by a third party facilitator. (During the alliance project, there is a continuous 'health check' on the alliance project by an alliance psychologist and an alliance coach in order to maintain team spirit.) A set of strategic objectives was formed for measurement.

- Safety;
- Performance;
- Quality;
- Cost;
- Time;



- Risk;
- Environment;
- Stakeholders and Community.

Performance in non-cost areas was not disregarded but was measured based on a program performance score, global performance score and operating expenditure. It was pointed out by one of the professionals that “Key Results Areas are not normally measured on a traditional hard money contract and it was left to the Alliance to develop their own plan to measure these traditional non-cost areas (i.e. schedule, environment, community, legacy and lifestyle)”. The framework adopted is similar to a relationship management or partnering project, where individuals from the project team would score themselves against the list of Charter Objectives at the end of each period, before the next relationship/partnering meeting. It was pointed out by an interviewee in the alliance project that the alternative solutions devised during the alliance process for both large and small problems have produced great results for the team and confidence in their ability to deliver against the odds. A number of alliance project issues identified by interviewees as important influences an effectiveness include the values of the alliance team, the work environment, team building workshops, the project specific merchandise and equipment, informal social occasions such as barbecues (enhancing informal communication) and induction processes. Induction processes are extremely important, not only in an alliance project, but also in any project carried out using a relational contracting approach. Staff turnover in a construction project is not uncommon. New comers should be given an induction to both the project and alliance processes.

## ***No Blame – the Role of Trust***

Like all relational contracting approaches, trust between alliance partners is important because it creates an opportunity and willingness for further alignment, reduces the need for partners to continually monitor one another's behaviour, reduces the need for formal controls, and reduces the tensions created by short-term inequities. Various interviewees expressed the view that alliancing is about sharing resources and experiences, with risks placed on the table, focusing on the results rather than on 'who to blame' when an incident arose. This alliance project takes a further step towards reinforcing the trust element by placing a *No Dispute* clause in the alliance agreement. The *No Dispute* clause states "... there will be no arbitration or litigation between the Participants on any Alliance Disagreement..." and "Each of the Participants waives its rights of action against each of the other Participants arising out of any act or omission in connection with this PAA (Project Alliance Agreement)...".

Agreements between participants are reached in conjunction with commercial drivers (Ross, 2003). Alliancing is based on a totally different legal platform where there is to be no blame, no dispute, developing a win-win culture. There is a total ownership between all alliance partners by sharing of risk and outcome. Decision making focuses on 'best for project': such an approach leads to individuals from the project team having a sense of ownership and focusing on solutions/outcomes. Interviewees also expressed the view that decisions are encouraged to be made at the lowest possible level within the team and escalated to higher levels only if the team cannot arrive at a decision. It is the project team at operational level which has hands-on experiences and deals with the everyday issues such as design and materials. By bringing in sub-contractors and designers into the alliance project team, a more direct communication between the frontline staff (contractor, sub-contractor and designer) is obtained. Rather than working through layers and layers of contract procedures, all key

personnel are bound together and talk, rather than generating back and forth communication, sometimes leading to miscommunication. In an alliance project, everyone puts his/her personal interests aside and focuses on 'best for project' during discussions; a focus on outcome rather than immediate responsibility.

Before establishing an alliance, a risk/reward model should be built and evaluated by the client organisation. Studies (for example Black *et al.*, 2000; Bresnen and Marshall, 2000) point out that successful partnering or alliancing relationships are built upon trust and commitment. Both trust and commitment seem to be the dominant factors for a successful contracting relationship. Yet comments received from contractors often have equitable risk sharing and commercial alignment highlighted. One of the interviewees commented that although alliancing is found to be very successful in the project and allows the project team to drift away from adversarial relationships, it is still the contractor's responsibility to bear the project risk. An alliancing relationship is based on a commercial model (Halberg, 2002), where interests are aligned and there is high probity and transparency between all parties. Probity and transparency should not only be focused at PAB, it should be infused at all levels, which again highlights the important role of the Alliance Manager.

Open-book access to financial records is one of the key features of alliancing. It is crucial for the alliance parties to be open and honest while communicating, exposing the possible risks in the project and there should be no hidden agenda. Studies (ANAO, 2001) show in an alliance contract, as the project's risk/reward outcome was tied to the collective performance of the alliance partners, the 'no blame, no dispute' clauses ensured each partner maintained an interest in maximising the performance of the other partners rather than simply serving their own best interest. Insurances and indemnities need to be altered to suit the alliance

environment. It is found in the ANAO report that alliance partners and their insurers agreed to waive their rights to pursue legal action against one another for any project-related event except 'wilful default' (as defined in the alliance agreement – “such wanton and reckless act or omission as amounts to a wilful and utter disregard for the harmful and unavoidable consequences thereof...but shall not otherwise include any error of judgement, mistake, act or omission, whether negligent or not, made in good faith...”). Trust and alignment of objectives are built without needing to worry about either side falling back onto the contract for protection when misfortune (such as problems resulting from a poor decision) happens.

Other possible risks arising from the *No Dispute* clauses may be apparent lack of incentive to perform due to the absence of liability. There are a number of ways that can be implemented in order to overcome such problems, for instance, by ensuring commercial interests are aligned well with the risk/reward model and that commercial interests have a longer life than the project i.e. commercial interests and the relationship do not end once the project finishes. A crucial success factor is to ensure that an appropriate mix of people exists on the PAB; they must be seen to understand the fundamental values and beliefs of alliancing. By embracing an alliance culture and through demonstrating a continuous high commitment at PAB level, both AMT and project team members can be encouraged to buy into the alliance environment with the PAB acting as the 'role model'. An important role of the PAB is to monitor performance and provide high level leadership, at times putting pressure on the AMT, if the team is found not to be working along alliance principles. This strategic role is crucial to the success of *No Dispute* contracts and the diverse yet representative nature of the PAB enables it to play this role.

One of the immediate issues raised from the inclusion of *No Dispute* clauses is legal jurisdiction in court. Once the PAA is drafted and signed, enforceable rights are very limited (Ross, 2003). There is no clear solution for overcoming such 'risk'. Alliance participants are expected to have careful discussions of their rights and which clearly identify any which are enforceable. The intention of an alliance is to keep the project running by solving problems, rather than developing a dispute resolution model. Dispute resolution is not considered as for a dispute to evolve marks a failure of the alliancing principles. Few studies have been conducted comparing project success between alliance projects with *No Dispute* clauses and those with formal dispute resolution models developed. Indeed, developing a formalised dispute resolution model in an alliancing project might well put pressure on and bind the alliance participants in a legal framework, reducing participants' incentive to work with a 'best for project' philosophy, contradicting the fundamental philosophy of alliancing.

### ***Intellectual Property***

Intellectual property has become a major concern in the construction industry, for both contractors and sub-contractors alike. Two of the main themes of alliancing are sharing of resources and continuous improvement. Software systems are often developed requiring ongoing delivery of data from parties (and consequent collaborative discussions and informal meetings). Also, innovative ideas are sought after and their cooperative development encouraged. In such circumstances, ownership of intellectual property needs to be clearly defined in the agreement to avoid conflict in the future and to ensure that there is no discouraging of innovation by vested interests during the project.

## ***The Tautology of No-Claims Contracts***

It is undoubtedly tautological to enter a construction contract and enshrine in that contract the principle of no claims. The construction industry has for many years been recognised as one of the most disputatious of all the world's industries. The idea of no blame, no claim is undoubtedly an interesting and relevant issue which needs to be properly addressed and is one which can be addressed, basically, in terms of relationship management. There is absolutely no possibility of a no claims contract being undertaken under any traditional form of contracting in which the fixed price, lump-sum bid accepted almost inevitably leads to an adversarial scenario. However, when one moves into an alliance in a relationship management type approach the concept of no claim, no blame can be much more readily managed. In the case study that is reported here a considerable amount of transaction costs were actually accrued due to the fact that a relationship manager, an alliance psychologist, a team manager and an innovation manager were all part of the production process. These individuals did not contribute directly to the growth of the project but in fact contributed to managing and maintaining relationships and by maintaining these relationships encouraged the development of a no blame culture in all team members. There was an ability instilled in participants to freely and openly discuss problems; there was no concealing of issues and there was open and frank discussion of problems and, more importantly, solutions. On this basis the concept of a no claim contract can be developed.

## ***Conclusions***

The 'no-claim' alliance contracting approach presented in this paper demands the buy in of all members of the project team, including the client side of the process by educating, perhaps re-educating, the project participants to ensure that a no-claim contract can be successful. The principles of relationship management are documented widely but few commentators have addressed the issue of linking the relationship to a no claims contract. The infrastructure required to develop and maintain this no claims approach is expensive; for instance, in this US\$98M contract there was a sum of about 5% of the project manpower budget set aside for relationship management issues. Without a positive approach to relationship management a no claims approach is impossible. So, one might conclude that the 'alliancing' and 'no claims contract' terminology is essentially tautological. A no claims contract cannot exist without the help of a clear relational vision, that leads to both soft and hard infrastructure to assist decision making and relationship building. As a minimum, such an approach requires a facilitator who regularly returns to re-facilitate the project as the project progresses and as team members enter and leave. An agreement to an ongoing commitment of personnel within the organisation is necessary to ensure that the no-claims culture is maintained throughout the life of the project. An innovation manager and an alliance psychologist are also pre-requisites for the maintenance on a day to day basis of positive relationships. To conclude, if a no claims contract with a relationship management infrastructure is fully implemented at the outset of a project then success can be achieved, albeit with an upfront cost. Further discussion on the nature of relationship management can be found at Cheung *et al.*(2005) and Rowlinson and Cheung (2004a, 2004b, 2002) and the CRC for Construction Innovation.

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## Appendix

**Table 1 Alliance Organisational Structure**

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|--|--|--|
| <p><b>Project Alliance Board (PAB)</b></p>   | <ul style="list-style-type: none"> <li>○ Senior executive from all alliance partners</li> </ul>  | <ul style="list-style-type: none"> <li>● Provide governance</li> <li>● Set policy and determine delegation</li> <li>● Monitor performance of the AMT</li> <li>● High level leadership/support</li> </ul>                     |
| <p><b>Alliance Management Team (AMT)</b></p> | <ul style="list-style-type: none"> <li>○ Alliance Manager*</li> <li>○ Deputy Alliance Manager</li> <li>○ Project Managers from each site</li> <li>○ Design co-ordinator</li> <li>○ Alliance communication co-ordinator</li> <li>○ Environment manager</li> <li>○ Risk/Opportunities and Innovation Manager</li> <li>○ Alliance Coach</li> <li>○ Alliance Psychologist</li> <li>○ Services Manager</li> </ul> | <ul style="list-style-type: none"> <li>● Provides overall management for all three projects</li> <li>● Ensures effective integration into public sector organisation operations</li> <li>● Performance management</li> </ul> |
| <p><b>Integrated Project Team</b></p>        | <ul style="list-style-type: none"> <li>○ Project staff at operational level</li> </ul>   | <ul style="list-style-type: none"> <li>● Individual project work</li> </ul>  |

\* The alliance is run by the Alliance Manager who coordinates all three projects