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Over the past five years, his practice has had a particular focus on alliancing and he has been associated with the establishment of over 20 project, program and strategic business alliances for both the public and private sector. Those alliances include Brisbane's Inner Northern Busway, Anglo's Dawson Project, the North Queensland Gas Pipeline and Queensland Rail's SEQIP Rail Program.

He has also worked with several brokers and insurers in the development of specific products for project alliances.

Ian is married and has two teenage children, but has given up any hope of achieving a collaborative, no blame / no dispute environment at home.

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LAWYERS



Alliancing contracting: overcoming insurance challenges

Presented by Ian Briggs

AILA Insurance Law Intensive

Noosa, 17 May 2007



Outline

1. Alliance risk profile
2. 'No blame'
3. Internal and external liabilities
4. Proportionate liability legislation
5. Alliance insurance



Outline

- An explanation of alliancing
- The ‘drivers’
- Dispute resolution / termination
- Suitability for projects
- Use in non-project contexts



A definition

‘an agreement between 2 or more entities who undertake to work cooperatively and share project risk and reward to achieve agreed outcomes based on good faith, transparency and trust’



Some characteristics

Non-adversarial

- Best for project focus
- No blame culture
- Win/win or lose/lose
- Collaborative
- Incentive driven



A 'pure' alliance includes

- A 'one team' structure – for leadership, management and performance
- Collective risk sharing
- 'No blame' / 'no sue' covenants
- Collective insurance



Collective risk sharing

‘We will share all risks and opportunities associated with the delivery of the Project except those we have agreed will be retained by the Owner’



Collective risk sharing

Typical project risks:

- Cost escalation
- Site access / stakeholders / cultural heritage
- Design risk
- Latent defects
- Legislative risk
- Financial losses
- Third party financial claims



‘No blame’

‘We acknowledge that a critical element in the foundation of our Alliance is that we will not allocate blame to Participants for errors, mistakes, negligence and poor performance made under the PAA.’



‘No blame’ (cont)

‘Each of us releases and discharges all other Participants from liability on any legal basis for any expense, loss or damage we may incur as the result of any act or omission by a Participant done or not done in connection with this Agreement, or a Project except to the extent that:

- (a) the act or omission gives rise to a liability under this PAA to indemnify another Participant; or
- (b) the act or omission is a Wilful Default.’



‘No blame’

The bottom line:

- Negligence, poor performance is collectively shared through pain / gain sharing matrix
- Exposure is usually capped at margin for profit and overhead



The 'carve outs'

1. Wilful Default

- Fraud and intentional or reckless behaviour
- Failure to pay
- Failure to insure
- Breach of confidentiality
- Breach of statutory duty



The 'carve outs'

2. Indemnities – third party claims

- Property damage and injury
- IP infringements
- Employee entitlements



Third party claims

Without the 'carve out', there is no opportunity to:

- Seek contribution from other participants (particularly where post-completion)
- Access other insurance policies
- The sued party is left holding the baby



Typical Insurance Program

Assets – Own Damage (1 st Party)	Liabilities – (3rd Party Only)
<ul style="list-style-type: none"> • Contract Works – Material Damage • Goods in Transit <p>Business Interruption – Delay in Start Up</p>	<ul style="list-style-type: none"> – Public & Products Liability
1 st & 3 rd Party Liability	Covered by Participants Own Insurance
<ul style="list-style-type: none"> • Alliance Professional Indemnity 	<ul style="list-style-type: none"> – Workers Compensation – *Plant & Equipment – Motor Vehicles <p>* Alliance may wish to cover equipment purchased or hired specifically for the Alliance Project</p>



Contract works – usual exclusion

London Engineering Group (LEG) 2/96 Design Materials & Workmanship Exclusion

*Does not cover defect,
but will cover resultant
damage to property*

The Insurer(s) shall not be liable for

All costs rendered necessary by defects of material workmanship design plan or specification and should damage occur to any portion of the Insured Property containing any of the said defects **the cost of replacement or rectification which is hereby excluded is that cost which would have been incurred if replacement or rectification of the Insured Property had been put in hand immediately prior to the said damage.**

Insured Property shall not be regarded as damaged solely by virtue of the existence of any defect of material workmanship design plan or specification.



Contract works – reduced exclusion

Solution

LEG 3/06 – better cover

The Insurer(s) shall not be liable for

All costs rendered necessary by defects of material workmanship design plan or specification and should damage occur to any portion of the Insured Property containing any of the said defects **the cost of replacement or rectification which is hereby excluded is that cost incurred to improve the original material workmanship design plan or specification.**

Insured Property shall not be regarded as damaged solely by virtue of the existence of any defect of material workmanship design plan or specification.

Covers defective and non defective property that has been damaged but excludes 'betterment'



Alliance PI – a new product

- Includes ‘first party’ cover for internal losses
- Insures all participants against third party claims
- Project-specific cover
- Run off cover available
- Residual ie only if no other policy



Policy interaction (where defective design)

	Works	PL	PI
Rectification Costs			
- Damage to works	✓ <small>(Note 1)</small>	X	✓ <small>(Note 2)</small>
- No damage	X	X	✓
Owner financial losses	X	X	✓
Third Party claims			
- Property, Injury	X	✓ <small>(Note 3)</small>	✓ <small>(Note 2)</small>
- Financial	X	X <small>(Note 4)</small>	✓

Notes:

1. Based on LEG 3 cover and damage occurring during Period of Insurance (POI)
2. Whilst covered – only responds if Works/PL exhausted or outside Period of Insurance
3. Based on full Property/Injury write back
4. Covers loss of use following Property Damage but not financial loss where no property damage

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Consequential losses – a can of worms for alliances

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Many alliance participants assume that the inclusion of a 'no blame' principle in their alliance agreements is the complete protection required by their corporate masters.

Many alliance projects are intrinsically complex and present high risks to the participants and, just as importantly, other stakeholders and third parties.

Unfortunately, too many alliances are giving too little attention, in preparing project documentation, to the treatment of potential claims by third parties arising from alliance activities.

The starting point – 'no blame'

Many alliance participants assume that the inclusion of a 'no blame' principle in their alliance agreements is the complete protection required by their corporate masters.

Not so.

A typical no blame clause is along these lines:

'We agree that any act of omission of an Alliance Participant in performing the work under our Alliance Agreement which:

(a) amounts to Wilful Default or an Act of Insolvency will give rise to enforceable obligations at law and/or in equity; or

(b) does not amount to a Wilful Default or an Act of Insolvency will not give rise to any enforceable obligations at law or in equity;

and we agree to release each other from any effects at law or in equity of any act or omission in performing our obligations under our Alliance Agreement that do not amount to a Wilful Default that we may have had but for this No Dispute clause.¹

A no blame covenant along these lines certainly means that, in the absence of wilful default or insolvency, no alliance participant can sue another participant for loss they suffer from alliance activities. So, for example, an owner cannot claim any financial losses it suffers from late completion or lack of fitness for purpose from the other participants

Many agreements are not clear as to whether these losses are 'owner alliance costs' and to be brought to account in assessing performance against the TCE. However, the worst case for a non owner participant is that the owner's losses are treated as alliance costs and effectively become a shared cost through the operation of performance adjustments, and are subject to the downside pain' cap.

But what about loss suffered by a non-alliance or third party? The 'no blame' clause certainly does not bind third parties and cannot prevent them bringing claims against any of the alliance participants.

Injury and property damage

Generally claims by third parties for death, injury and property damage arising from alliance activities will be covered by the project's public liability insurance.

As with construction projects generally, public liability insurance cover extends to all project participants and there is little need for either the participants or the insurer to be particularly concerned about the respective contributions to liability of any of these parties.

However, the policy will not respond in some circumstances:

- (a) where the loss suffered by the claim occurs after the policy expires (normally at practical completion, with limited cover stretching into rectification periods);
- (b) where the policy excludes the claim (for example, many policies exclude cover where the cause of the accident was defective design).

Most alliances now deal with these circumstances by 'carving out' from the no blame principle, liability for death, injury and property claims by third parties.

¹ This example comes from the Project Alliancing Practitioners Guide (April 2006) published by the Victorian Government.

The 'no blame' clause certainly does not bind third parties and cannot prevent them bringing claims against any of the alliance participants.

One question which often is not specifically addressed in the alliance agreement or alliance commercial discussions is who should take the risk of the various insurance policies not responding.

For example:

- (a) Each Participant (**the Indemnifier**) agrees to indemnify each of the other Participants (each an **Indemnified Participant**) against:
 - (i) claims by a third party; and
 - (ii) liability to a third party,
for damages to property or death or bodily injury arising out of or as a consequence of any act, error or omission of the Indemnifier in the performance of its Work under the Alliance whatever the cause, including breach of this Agreement, tort (including negligence) or breach of statute or otherwise.
- (b) The Indemnifier's liability to indemnify an Indemnified Participant under clause (a) shall be:
 - (i) reduced proportionately to the extent that an act or omission of the Indemnified Participant, or its employees or agents, contributed to the loss or damage suffered by the Indemnified Participant or the claim or liability to the third party; and
 - (ii) limited to the amount which is paid or payable to or on behalf of the Indemnifier under insurance held by the Indemnifier '.

A clause along these lines preserves access to all non-alliance public liability insurance policies held by the participants (including the public liability component of a professional indemnity insurance policy) .

The cross indemnities also ensure that each participant can be sued for contribution by a participant who is sued by the third party

This regime is consistent with proportionate liability legislation recently introduced across Australia. That legislation is dealt with in more detail below.

One question which often is not specifically addressed in the alliance agreement or alliance commercial discussions is who should take the risk of the various insurance policies not responding. Implicitly, the answer is that the alliance takes the risk but only up to the cap on painshare. After that cap is reached, the risk transfers to the owner solely.

Perhaps that is an appropriate outcome, but it is one that needs to be discussed and agreed, rather than being a default outcome because it has not been consciously addressed by the participants.

Third party financial losses

The cross indemnities for injury and property damage does not usually extend to third claims for financial losses. For example, an adjacent landowner may claim for loss of business revenue because of alliance activities.

Generally that is because public liability policies do not respond to financial loss claims and access to insurance is generally the primary driver behind the carve out.

So even if the carve out is extended to financial losses, the usual limitation of the operation of the clause to available insurance poses a significant issue where no such insurance exists.

In those circumstances, the no blame principle prevails and a participant who is sued by a third party for financial loss cannot seek any contribution or indemnity from any other participant irrespective of who may have been at fault

The risk can be partly mitigated by a 'first party' professional indemnity policy which covers all alliance participants for claims by third parties for losses arising from design and professional negligence, however, that type of policy will not extend to construction activities.

Most often it will be the Owner who is sued by a third party , however, there is no legal impediment to a third party selecting another participant eg the constructor, to pursue for recovery.

How should this exposure be dealt with? Some case studies provide alternative approaches adopted by several alliances.

Two case studies

1. Inner Northern Busway Stage 1, Brisbane

The INB project has a significant interface with the Roma Street railway station and adjacent track. QR will not agree to grant track possessions and overhead isolations unless it receives an indemnity for any loss it suffers during construction activities including disruption to its network.

The project owner, Queensland Transport, has given QR the appropriate indemnity, and the alliance has agreed to absorb, as alliance costs, any amount QT pays to QR pursuant to the indemnity. In order to make that commitment, the alliance first assessed the risk and how it would be managed, and allocated an appropriate contingency allowance in the TCE for the risk.

2. Trackstar Rail Alliance, SE Queensland

The alliance is delivering a program of rail projects for QR in South East Queensland, including the duplication of several busy lines. QR has a potential exposure to rail haulage customers and other corridor users for disruption to the operating rail network.

If the alliance were to absorb this exposure as an alliance cost, the concomitant risk allowances built in to each TCE would have been significant. Accordingly, QR elected to solely absorb the risk of those third party claims.

Either solution (or indeed neither solution) may be appropriate for different projects. The important message is that the issue should be openly discussed and an aligned position reached.

In that context, the possible impact of proportionate liability legislation should not be overlooked.

Proportionate liability legislation

Proportionate liability legislation² has been enacted in all Australian states. The legislation is primarily directed to overcoming the perceived unfairness of the consequences of joint and several liability.

The objective of the legislation is to apportion responsibility for property damage or economic loss (including consequential losses) suffered by a claimant between the responsible parties. For example, the key section of the Queensland legislation is section 31 which provides:

'In any proceeding involving an apportionable claim ... the liability of a defendant who is a concurrent wrongdoer in relation to the claim is limited to the amount reflecting that proportion of the loss or damage claimed that the court considers just and equitable having regard to the extent of the defendant's responsibility for the loss or damage ...'

The principle contained in section 31 applies where:

1. legal proceedings have been commenced by a party which has suffered property damage or economic loss;
2. the claim in the proceedings arises out of a breach of a duty of care by the defendant³; and
3. the court considers that more than one party is 'responsible' for the property damage or economic loss (including a party who may not have been joined as a defendant to the court proceedings)⁴.

The Queensland legislation specifically prohibits any attempt, in a contract, to exclude or prevent the operation of the legislation⁵. So, for example, if a contract provides an unqualified indemnity in relation to property damage or economic loss, the liability of a party pursuant to that indemnity will still be read subject to the proportionate liability provisions in the legislation.

Unfortunately, the legislation that has been enacted is anything but 'uniform.' There are significant (and, frankly, illogical) differences in terminology, structure and effect between the various State Acts.

In Queensland, one confusing aspect of the legislation is the terminology used. Although Section 31 applies to a claim which is based on a breach of a duty of care (ie. a legal liability), the apportionment to be conducted by the court is on the basis of 'responsibility', not legal liability.

This leaves open the possibility that a plaintiff might be denied full recovery from a defendant because of an apportionment against a party who is responsible, but who has no legal liability to the plaintiff and cannot be sued.

Another confusing aspect is whether the legislation will apply where a claim for breach of a contract term (ie. failure to comply with specification) is made rather than a claim for breach of a duty of care. The conservative view is that, if a claim can be construed as being based on a breach of a duty of care, the legislation will apply.

Unfortunately, the legislation that has been enacted is anything but 'uniform.' There are significant (and, frankly, illogical) differences in terminology, structure and effect between the various State Acts.

² Civil Liability Act 2003 (Qld), Civil Liability Act 2002 (NSW), Wrongs Act 1958 (Vic), Civil Law (Wrongs) Act 2002 (ACT).

³ **Civil Liability Act 2003** (Qld) s28(1)(a). Other states require failure to take reasonable care, rather than a breach of duty of care - **Civil Liability Act 2002** (NSW) s34(1)(a), **Wrongs Act 1958** (Vic) s24AF(a)(a); **Civil Law (Wrongs) Act 2002** (ACT) s107B(1)(a).

⁴ **Civil Liability Act 2003** (Qld) s31(3); **Civil Liability Act 2002** (NSW) s35(3) **Civil Law (Wrongs) Act 2002** (ACT) s107F(4). C.f **Wrongs Act 1958** (Vic) s24A(3), which states that regard is not to be had to comparative responsibility of a party who is not a party to the proceedings unless that person is dead, or is a company which has been wound-up.

⁵ **Civil Liability Act 2003** (Qld) s7(3); **Civil Liability Act 2002** (NSW) s3A(2). Legislation in most other states is silent on the issue. The inference to be drawn is that the legislation will override contract provisions.

Only time will tell whether the courts will give the legislation a literal interpretation where to do so cuts directly across the commercial agreement on risk allocation voluntarily reached by parties to a contract.

Application to third party claims

As recorded above, most alliancing agreements include a 'carve out' to the no blame principle which requires each participant to fully indemnify the other participants with respect to their proportionate liability for third party personal injury and property damage claims. Each indemnity is usually limited to the insurance available to the relevant party. The intention of these clauses is to enable each party to have access to public liability insurance maintained by each other party to the alliance.

The proportionate liability legislation is consistent with the operation these clauses and will enable a court to allocate responsibility between the alliance participants for property damage suffered by a third party. Of course, the court's findings are not restricted by the availability of insurance to any party.

Similarly, the legislation will enable apportionment between Participants (and other 'responsible' parties) of financial losses suffered by a plaintiff. So, even if the alliance agreement does not specifically address the risk of those claims, the legislation will automatically apportion the risk.

It may also be the case that the legislation will override any different allocation of the risk contained in the alliance agreement. So, for example, where the Owner agrees to accept the full risk of these claims by providing the others with an indemnity, the legislation will negate the effect of that agreement.

Only time will tell whether the courts will give the legislation a literal interpretation where to do so cuts directly across the commercial agreement on risk allocation voluntarily reached by parties to a contract.

Owner Participant Losses

(a) Claim against a participant

The effect of a no blame clause is that each participant releases each other participant from any liability which arises out of alliance activities (subject only to wilful default, the indemnity in relation to third party claims discussed above and the indemnity in relation to claims by workers).

Accordingly, an owner participant has no claim against any alliance participant in the event that it suffers loss as the result of negligence in carrying out alliance activities and the legislation is not triggered. However, the participants can share the collective responsibility for the rectification of negligent work through the insertion of a 3 limb compensation model and the operation of a pain / gain mechanism in limb 3 of the compensation framework.

(b) Claim against a third party

An owner participant may seek to recover property damage loss and economic losses from a third party. In those circumstances, the proportionate liability legislation may enable the third party to partially avoid liability to the owner by establishing the responsibility of a non owner participant for some part of the loss that has been suffered by the owner participant (even though there is no legal liability for the loss).

In that circumstance, the responsible participant will have the protection of the 'no blame' clause. Accordingly, that participant's proportionate share of the loss will not be recoverable by an owner participant from any party.

A worked example might help illustrate the point:

- (a) pipes supplied by a subcontractor fails because the pipe supplied was defective and the subsequent protection and storage of it by the alliance was inadequate;
- (b) the rectification costs are \$100,000;
- (c) a court finds the pipe supplier 70% responsible and the constructor participant 30% responsible;
- (d) the owner will be able to recover \$70,000 from the supplier;
- (e) the remaining \$30,000 will be taken up as a reimbursable cost without adjustment to the TCE.

Conclusion

There is no right or wrong way to deal with potential exposure of an alliance to claims from third parties.

However, it is critical that those risks are identified, assessed and transparently dealt with in the alliance agreement.

A robust alliance depends on a full understanding by all participants of their own risk profiles.

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