



MinterEllison

LAWYERS

Project Delivery Through Alliancing

Ian Briggs

Partner

29 March 2004

Outline

- An explanation of alliancing
- The 'drivers':
 - formation
 - documentation
 - management
 - financial model
 - risk treatment
- Insurance issues
- Dispute resolution
- Suitability for projects

A definition

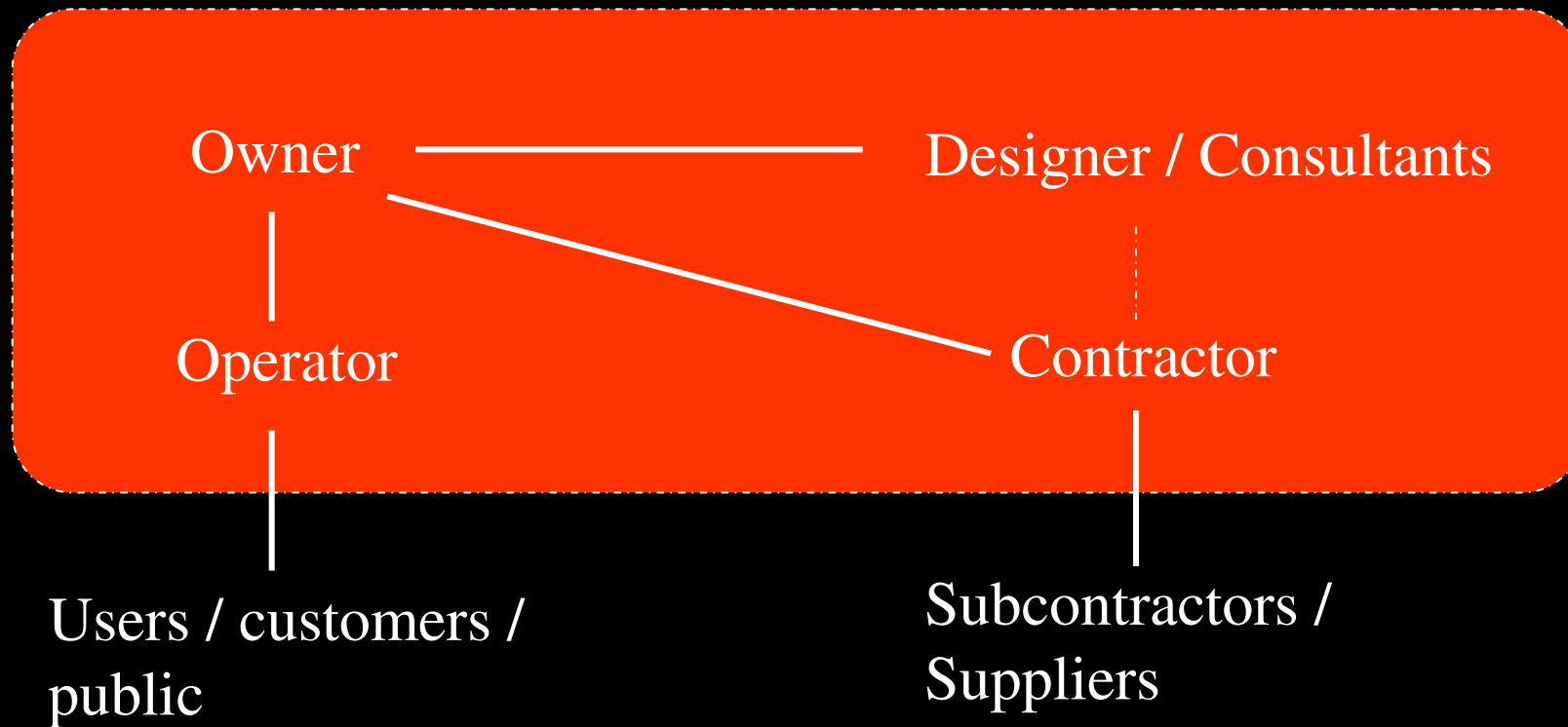
‘an agreement between 2 or more entities who undertake to work cooperatively and share project risk and reward to achieve agreed outcomes based on good faith, transparency and trust’

Some characteristics

Non-adversarial

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

The Stakeholders



Underpinning the alliance

The major drivers:

1. The formation of the Alliance
2. The project documents
3. The management / leadership structure
4. The financial model
5. The treatment of risk

Driver 1 - Forming the alliance



Alliance documents

Usual features:

- Not prescriptive or comprehensive
- Owner surrenders 'control' to the Board
- Little risk allocation

Driver 3 - Collective approach

A 'one team' structure at two levels:

- project team
- alliance board

'One team' means:

- commitment to alliance principles
- good faith
- fiduciary obligations (?)

Driver 4 - The usual financial model

Contractor / designer recovers:

1. Actual costs (limb 1)
- +2. Agreed margin (limb 2)
- +3. Incentive (limb 3)
 - can be positive or negative
 - based on performance against KPIs
 - usually capped at amount of limb 2

Driver 5 - Treatment of risk

Conventional approaches:

- (1) transfer as much as possible to the Contractor
(for a price)
- (2) allocate each risk to the party best able to
manage it

Alliance approach: the parties jointly share all risks (to a point)

Risk management in alliancing contracting

- Risk management is driven jointly
- Alliance management team has to assess and manage risk
- ‘No blame’ principle - focus on fixing problem rather than apportioning blame

A typical liability release

'A failure by any Alliance Participant to perform any obligation under this agreement will not give rise to any enforceable obligation at law or in equity whatsoever unless the failure is a Wilful Default.'

The insurance overlay

- Traditionally, risk management = insurance
- Insurance markets have dramatically changed
- Where are the gaps?

Insurance matrix

Phase	Works Damage Fortuitous Event	Works Damage Construction Defect	Works Damage Design Defect	Third Party Claim (Injury / Damage)
iPAA	N/A	N/A	N/A	Individual PL and PI policies
PAA	Contract Works Policy	No cover available	PI?	Project PL policy (defective design and work excluded)
Defects Liability Period	Works Policy or ISR policy	No cover available	PI?	Project PL policy / individual PL policies (defective design and work excluded)
Operation	ISR Policy	No cover available	PI?	Individual PL policies (defective design and work excluded)

Alliance risk profile - internal liabilities

- Internal liabilities are extinguished
- No cover for defects
- Project PI insurance **was** the safety net
- The owner is most at risk

External liabilities

- PL policies will cover these unless there is a defective design
- Project PI insurance **was** the answer
- Prior to completion, an alliance cost?
- Post completion, what are the risks to participants / their insurers

Dispute resolution

- No dispute resolution procedure
- The Board is the final arbiter
- Unanimous resolution required
- Is a deadlock breaker advisable for some disputes?

Fiduciary duties in alliance contracting?

- Duty of good faith - does it exist?
- Traditional reluctance of courts to impose fiduciary duties on parties to contracts
- But possible for contractual and fiduciary relationship to co-exist in 'reliance relationships':
 - one party relies on the other for advice
 - reasonable expectation the other party will not have contrary interest
 - look at level of disclosure that parties have made during formation of alliance

Positive outcomes - alliancing works well where:

- Project is complex
- Budget needs additions/deletions which cannot be foreseen at time of contract
- Project needs continuing refinement
- Principal's requirements not adequately defined
- Funding allocation requires Principal's detailed involvement

Positive outcomes - alliancing works well where:

- Unacceptable risk placed on single contractor where staging requirements are complex
- Unreasonable to expect a contractor to bear risk of disruption during construction

Alliancing is unlikely to deliver cost benefits where:

- Clients, consultants and contractors cannot work as a team
- Project is relatively small
- Project is straightforward and fully designed
- Where one party has an inappropriate culture eg. highly adversarial

The last word

- Alliancing is not the universal panacea
- For some projects, alliance drivers should produce the best outcomes
- It is essential for all participants to understand the different legal framework at the outset

WINTEREJISON

Г В М Л Е В 2