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Standard

Journal: Australian construction law newsletter
Citations: v.113():38-57 2007
Author: Davies, John Paul
Title: Alliance contracts and value for money in the public
ISSN: 10320288

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ALLIANCES, PUBLIC SECTOR GOVERNANCE AND VALUE FOR MONEY

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INTRODUCTION

Debate rages upon the relative merits of pure alliances, competitive target cost alliances and other forms of relational contract for the delivery of outcomes for government.²

Whilst alliances offer a credible alternative to traditional contracts for the delivery of high risk projects, these same alliance contracts exacerbate the challenge for the demonstration of value for money in the public sector. This paper advances the debate by exploring how the Australian public sector defines value for money and selects procurement strategies. More specifically I examine the tensions created by alliances and the achievement of value for money especially considering the absence of price competition in some alliance models. Though this paper focuses primarily on the risks of alliances, I would be remiss if I failed to acknowledge the significant benefits alliances have provided over alternate contracting vehicles. A comment from an alliance manager summarises this sentiment:

*Alliances allow me to do things quicker and cheaper than any other method.*³

Several articles have appeared in *ACLN* and other journals describing the format, risks and benefits of alliances.⁴ From these sources, I briefly summarise the various formats of alliance arrangements used in Australia and provide a demographic analysis of these contracts.

Following this, I explore how the public sector defines value for money in light of procurement options/acquisition strategies. I subsequently draw upon several case studies to explore how alliances attempt to demonstrate value for money. I conclude by stating that the inconsistent definitions of 'value' and poorly defined decision-making

... Value is determined by value and this tautology means that, in fact, we know nothing about value.¹

processes of government dilute the justification of value for money determinations and that consequently any government decision can be justified, independent of the acquisition strategy selected. Thus the arguments that pure alliances are superior to competitive target cost alliances, and vice versa, cannot be substantiated.

WHAT ARE ALLIANCES?

The conventional method by which government procures goods and services is with a fixed price contract. This method is typically adversarial in nature, comprising a 'win-lose' approach between parties.⁵ By way of contrast, an alliance is a collaborative approach where parties jointly work together to deliver the outcomes of a project. The alliance is characterised by risk sharing and a no-disputes regime. Here are two useful definitions:

*A 'project alliance' may be defined as an agreement between two or more entities, which undertake to work cooperatively, on the basis of a sharing of project risk and reward, for achieving agreed outcomes based on principles of good faith and trust and an open-book approach towards costs.*⁶

*A 'project alliance' is where an owner (or owners) and one or more service providers (designer, constructor, supplier etc.) work as an integrated team to deliver a specific project under a contractual framework where their commercial interests are aligned with actual project outcomes.*⁷

Notwithstanding any fixed definitions of an alliance contract, the general characteristics of these contracts comprise the following:

(a) Risk is shared equally between customer and supplier;

(b) The alliance contract typically contains a 'no-disputes clause' with no liability between participants;

(c) The customer and supplier share common goals for project success; and

(d) All transactions are of an 'open book format' coupled with the sharing of all cost escalations or savings between the parties.⁸

The underlying theme of an alliance is of 'teaming' with common goals between the parties. The following clauses from an alliance contract illustrate this point.

- The Alliance participants will commit to work together to achieve the successful delivery of the Project.
- The Alliance Participants will, for the duration of the project, collectively develop and deliver the Project.⁹

It is important to contrast an alliance contract to other non-traditional forms of contract such as strategic alliances, joint ventures, and partnering. Whilst all these mechanisms involve greater risk sharing than traditional contracts, the pure alliance embarks on an explicit 'no-disputes', 'no-liability' framework, and a far greater emphasis on teaming than these other relationships.

VARIATIONS ON THE PURE ALLIANCE CONTRACT MODEL

There is no fixed format of an alliance contract. There has, however, been an evolution of 'classes' of alliance to cater for the unique needs of projects and the specific risk management strategies of government. The most common class of alliance is the pure alliance.¹⁰ The pure alliance adopts unanimous decision making processes (with no deadlock breaking

mechanisms),¹¹ retains no process for distribution of liability between alliance partners (except for wilful default), relies on development of target costs after tender selection and requires all project risks to be shared. Though the pure alliance has enjoyed substantial use in Australia, government has pursued deviations from this model to cater for some of the shortcomings of this contracting vehicle, such as:

(a) Incorporating price competition into target cost development;

(b) Maintaining a regime of liability between alliance participants to facilitate the acquisition of project insurance;

(c) Incorporating deadlock breaking mechanisms into the alliance; and

(d) Allocation of specific risks to alliance participants consistent with the principle that risk should be allocated to the party best able to manage them.¹²

The incorporation of price competition into alliances has created a class of competitive alliance dubbed the 'Competitive Target Outturn Cost (TOC) Alliance'.¹³ Other deviations from the pure alliance model comprise 'impure', 'hybrid' or 'project alliances'.¹⁴

WHERE ARE ALLIANCES USED?

Federal, state, and local governments use alliances extensively for the delivery of projects. During the initial stages of my research, I sought access to all Australian alliance contracts be they completed, in-progress or in concept development stage.

At time of writing, I have identified 80 public sector alliance contracts in Australia totalling over \$13 billion in value. The following provides a brief summary of the

demographics of alliances by state.¹⁵

Queensland	37
New South Wales	14
Victoria	7
Western Australia	9
South Australia	2
Tasmania	2
Federal ¹⁶	9

Queensland has adopted alliancing principles enthusiastically, in terms of number of alliances, while the federal government has the largest share of alliances by dollar value. Chronologically, the adoption of alliancing has increased dramatically since Australian government first used alliances in 1998. The use of alliances peaked in both 2005 and 2006 with the initiation of 16 alliance contracts in each.

Governments' reported successes with alliances coupled with continued growth in high value construction projects suggests a trend for continued growth in alliances.¹⁷

THE PUBLIC SECTOR GOVERNANCE ENVIRONMENT AND VALUE FOR MONEY

Prior to examining the suitability of alliancing in public sector projects, it is useful to summarise the public sector environment and the importance of value for money. Fundamentally, governments' charter is to provide services and infrastructure for the 'good of the nation', utilising taxpayer's dollars for best value for money through 'the proper management of public money and public property'.¹⁸ The public sector governance framework encapsulates the rules by which government operates to achieve this objective. A common theme between federal, state, and local government governance

principals is the need to achieve value for money.¹⁹

Value for money demands effective use of government assets. This includes financial sustainability and the efficient and effective management of resources.²⁰ Some definitions of value for money adopted by government include:

- Value for money is the core principle underpinning Australian government procurement ... Officials buying goods and services need to be satisfied that the best possible outcome has been achieved taking into account all relevant costs and benefits over the whole of the procurement cycle.²¹
- Value for money is defined as the benefits compared to the whole-of-life costs.²²
- Ensuring value for money is one of the three objectives of the state purchasing policy. government purchasing must achieve the best return and performance for the money being spent. Price is not the sole indicator of value.²³
- Whether stakeholders are receiving value for the money spent on systems, services and projects ... is the audit committee ask[ing] if the council is doing what it said it would do and for the cost which was anticipated.²⁴

The above definitions incorporate vague concepts such as the terms: 'benefits', 'best possible outcome' and 'anticipated cost'. A common theme to the majority of the definitions is that value for money incorporates all project life cycle costs and achievement of the best outcome compared to the alternatives. The latter criterion implies that value for money can only be measured in qualitative terms, as the 'alternative' options can never be quantified with complete certainty. At best, government can only guess as to what the project cost may have

been if an alternative acquisition option had been selected.

The decision making processes of government also exacerbates the challenge of measuring value for money. In selecting between competing procurement options, government may adopt risk taking, risk neutral or risk averse strategies. This manifests itself in the 'maximin', 'maximax', 'expected value', or 'least regret' decision making options²⁵, each of which will provide different perceptions upon value for money. For example, if a decision maker adopts expected value selection criteria, then the option that has the lowest likely cost must be selected. Not all government departments have the luxury of adopting expected value decision criteria as infrequent projects or capped budgets may preclude the selection of outcomes that may result in cost overruns. Local governments typically face such challenges and are more likely to adopt minimax decision making criteria, i.e. they will select options that minimise the maximum loss. Thus, independent of how value for money is defined, the selection of an acquisition strategy or procurement option will be dependent on the risk profile of government and how that public body makes decisions.

The inclusion of non-price criteria in the definition of value, consequently drives this definition to be more nebulous and less measurable. This is especially so when considering the political and social values of decisions.²⁶ Hence, whilst the definitions of value for money are legion, these definitions provide little certainty, as there is no robust framework by which government measures 'value for money'. My research has revealed that the public sector applies no consistency in defining value for money, and that the decision making strategies

of government are poorly defined and applied irregularly.²⁷ This results in government being able to exploit the definition of value for money to justify the selection of any procurement option. This is especially true for alliances where the benefits and costs of such contracting vehicles are difficult to quantify.

VALUE FOR MONEY AND THE TENDER SELECTION PROCESS

During tender evaluation, government selects contractors, which are best able to deliver value for money. The various facets of value for money should manifest themselves in the tender selection criteria. Though a fixed price contract tender selection process unsurprisingly places substantial emphasis on cost, the pure alliance relies exclusively on non-price selection criteria.²⁸ The manner in which government measures value is therefore crucial in developing the tender selection criteria for pure alliances, as the absence of price information in the selection process exposes government to the risk that the selection process results in the 'wrong tenderer'²⁹ being selected or the tender selection process is perceived as unfair. For example, consider the following typical pure alliance selection criteria:

- (a) demonstrated technical capabilities relevant to the proposed project;
- (b) leadership and alliance affinity;
- (c) demonstrated ability to work with other alliance partners;
- (d) demonstrated ability to achieve safety, environmental, quality and community relations objectives; and
- (e) preliminary ideas on innovation and strategies to deliver exceptional outcomes.³⁰

This emphasis on these 'soft' selection criteria has resulted in the unfortunate moniker of this pure alliance selection process being labelled as a 'beauty parade'.³¹ By way of contrast, the competitive target cost alliance places more emphasis on the competitively developed Target Outturn Cost and hence reliance on non-price selection criteria is minimal.³²

Another key difference between fixed price contracts/competitive TOC alliances and pure alliances is the point in time at which government becomes aware of the final costs and schedule for the project. During a fixed price or competitive TOC tender process, the final project cost and schedule is apparent in the tender responses. After selection of the preferred tenderer, some negotiations may vary this final fixed cost, though government has substantial certainty as to what the final cost of the project will be.³³ By way of contrast, when adopting a pure alliance, the final project cost and schedule is unknown until after selecting the preferred tenderer and even this target cost or schedule may vary substantially over the life of a project.

In defence of pure alliance contracts, the alliance selection process is substantially faster and cheaper than the selection process associated with a competitive TOC alliance, and hence the delay in developing the final alliance target cost and target schedule may not be worse than for a competitive TOC tender. The key difference, however, is that government has locked itself into a sole supplier relationship before the full extent of the project costs and schedule is realised. government must therefore ask the question of whether the risks of selecting the 'wrong' tenderer and delays in gaining insight into

the project costs and schedules represents good value when using pure alliances, especially since tenderers in a pure alliance, 'promise everything but guarantee nothing'.³⁴

ALLIANCE COMPENSATION—THE TARGET COST

Alliances incorporate benefits and costs that are typically more difficult to quantify than those associated with traditional contracts. This exacerbates the challenge of demonstrating value for money in alliances. The alliance benefits and costs are difficult to quantify because of the unique model employed to calculate and verify project compensation. For pure alliances, the process for developing target costs is consistent and well documented.³⁵ To summarise, the alliance participants generate a target outturn cost for the project which represents a business as usual estimate for the project. Non-owner alliance participants are compensated for all direct project costs associated with the project, independent of project performance. Some elements of compensation are at risk. For example, normal profit and corporate overheads are compensated against the alliance's performance against the TOC. Similarly, an equitable share of compensation is available to non-owner participants based on project performance and adjusted against non-price performance criteria (this prohibits the pursuit of cost savings at the expense of quality, safety, environmental, performance criteria etc.)

For government, this pure alliance compensation framework therefore results in a situation where project costs are uncapped,³⁶ as government must reimburse all direct project costs to non-owner participants.

This situation is in contrast to a fixed price arrangement whereby there is a set contract value that limits government's liability for reimbursement. The importance of getting the alliance TOC right is therefore fundamental for the delivery of value for money.

VALIDATING THE ALLIANCE TARGET COST

The TOC usually represents a 'business as usual' estimate for delivering the project. The business as usual estimate for the TOC incorporates costs associated with delivering the project, including contingencies, for identified and unidentified risks.³⁷ A requirement in TOC development is for open book reporting and collaboration in developing this estimate. Transparency provides some degree of confidence in the veracity of the TOC³⁸ but this may not be sufficient. Often, government may not have the requisite skills or resources to contribute significantly to the TOC development; hence government typically pursues the following strategies to facilitate confidence in the TOC:

(a) Have the alliance owner conduct robust cost modelling before selecting alliance participants. This may include the use of Monte-Carlo simulations³⁹ to develop a realistic range for the TOC. Alliance candidates may be asked to critique the owner's estimate;⁴⁰

(b) Appoint an independent estimator, akin to a quantity surveyor, to either audit the TOC development process and/or audit the TOC itself including contingencies;⁴¹

(c) Appoint a financial auditor to review the limb 1 and limb 2 fees (the reimbursement model) as well as general financial and cost accounts;⁴² and

(d) Rely on previous project costs to demonstrate actual rates for specific tasks. This provides a proven baseline with which to benchmark the TOC.⁴³

The above processes assist government in validating the target outturn cost of the project but there are several challenges associated with these processes that need further consideration, including: how to make comparisons to fixed price values,⁴⁴ allocation of reimbursement against soft dollar criteria and reliance on the alliance owner to validate costs.⁴⁵ Furthermore, these validation processes does not come free and government must consider this a 'cost of doing business' with pure alliances.

IS AUDITING EFFECTIVE?

Auditing will prove to be a significant challenge for the auditor in a pure alliance as greater reliance is placed on subjective assessment criteria to the extent that it is most difficult to state that a project has delivered value for money but far easier to state that a project has not delivered value for money.⁴⁶ The following comment suggests that auditing plays a substantial role in pure alliances:

There are examples of alliancing which have occurred in this country where contractors have been able to declare very significant profits as a consequence of the project while the project suffers overruns in cost by hundreds of millions of dollars.⁴⁷

Acknowledging that auditing is mandatory in a pure alliance, how effective will that auditing be? The criticisms of the main auditing options employed in pure alliances are as follows.

Open Book Reporting

One of the common features of an alliance contract is the open book

compensation for all associated alliance costs. Whilst government may have full disclosure of hourly rates and the hourly estimates for work packages, the ability to validate these estimates may be limited.⁴⁸ Even if robust labour rates and bills of material are available, great uncertainty may lie in the actual estimates for the number of hours to complete tasks and the quantity of materials needed to complete the project. If government does not have the core competencies in the project at hand and the resources to contribute to or validate project work breakdown structures, then mere open book reporting may be insufficient to prove that the TOC is a robust 'business as usual' estimate of the work at hand.

Owner Developed Project Estimates

Developing a budget estimate for the project before selecting alliance participants provides some level of confidence in the range in which the TOC should lie.⁴⁹ The use of Monte-Carlo analyses and comparison to similar projects will help the owner establish a rough order of magnitude or 'best guess' for the TOC but only if the owner has the competencies and resources to undertake such an activity. This is often not the case, especially for local government when design activities are required.⁵⁰ Such an endeavour may be invaluable for budgeting purposes and developing project business cases, but will not normally provide for robust validation of the TOC developed by the alliance participants.⁵¹

Exploiting Independent Estimators

Where government does not possess the core skills or resources to validate or assist in the development of the TOC then a 'quantity surveyor' may validate the TOC. This estimator must be

both intellectually and financially independent of the non-owner alliance participants to ensure that this 'second opinion' is at arms length. The independent estimator is able to provide a broad assessment of the veracity of the TOC but most likely this will be a ballpark estimate.⁵² The development of the TOC may involve many thousands of man-hours using many subject matter experts. The independent estimator may not have the skills or resources to validate all aspects of the TOC, even if a team of independent estimators is used.

Reliance on Previous Projects to Benchmark the TOC

This process relies on the comparison of the alliance project to similar projects delivered under competitive arrangements. Where relevant projects exist for comparison, this offers a substantial means to not only validate hourly rates and bills of material but also the work breakdown structure of the project. The challenge in adopting this method is in finding projects that are similar to the alliance project at hand. The comparison of projects may need to consider geographic similarities (e.g. remote versus urban projects), the effects of variations on the project costs, the application of novel techniques or technology and changes in labour costs/expected profits as a function of time, market conditions, inflation etc. Benchmarking the TOC to similar projects may offer substantial confidence in the integrity of the TOC but only if an 'apples to apples' comparison can be made between the projects. Thus, this technique will be ideally suited to the more common construction and engineering tasks such as development of roads, waste water treatment plants and the like but not so

valuable for one-off projects such as the design of an air warfare destroyer or the development of a unique human resource information system. Furthermore, if a proposed alliance is so similar to a previous project with known risks and technological challenges, then the argument for using an alliance in the first place is weakened.

The auditing methods discussed above attempt to ensure value for money by validating the TOC. These processes are substantially more complex for a pure alliance than for fixed price tendering arrangements. Furthermore, there is substantially greater emphasis on the competencies of government to support this validation process. I therefore find it difficult to accept that auditing alone of pure alliances demonstrates value for money for the following reasons:

(a) Audits are typically 'process-centric', in that they focus upon whether correct procedures were followed or not. Little emphasis is placed upon effectiveness;

(b) Whilst audits can validate the hourly rates applied to a contract (via comparison to commercial best practice), audits are unlikely to explore whether better value could have been achieved with an alternate acquisition strategy;

(c) Auditors will most likely adopt the selection criteria and associated weightings developed by the government contract team rather than revisit these elements. The government contract team are arguably subject matter experts and an audit team would be exceedingly brave to suggest that the 'technical' selection criteria were erroneous; and

(d) With a pure alliance, primarily the non-owner participants determine the scope of work. In the absence of price competition, there will be greater emphasis

on auditors to validate the scope of work. The auditors will likely have neither the resources nor competence to fully validate the project work breakdown structures used to develop the TOC.

Should government elect to address the above issues by improving the amount of audits and breadth of skills of auditors, then substantial costs will result. My interview and survey results neither confirmed nor rejected the proposition the auditors offer confidence in assessing value for money, however, even when government exploited external auditors, many respondents acknowledged that integrity of target costs were a significant risk when pursuing pure alliances. My interviews with pure alliance managers also revealed that the government never accepted the initial TOC at first instance; rather the alliance constantly made iterations to drive the TOC down. This suggests that government, as the alliance owner is usually suspicious of the first iteration of the TOC.

VALUE FOR MONEY AND HIDDEN COSTS/BENEFITS

Developing an accurate TOC and demonstrating that the TOC provides a fair estimate of the cost for completing project works is crucial to demonstrating value for money, but alliances also raise other value for money challenges. When determining value for money, government considers many elements. For example, the costs of litigation/disputes, management of variations, contract administrative costs, and non-price outcomes such as safety and quality also warrant consideration.

Some of these 'costs' translate to benefits in some contracting vehicles. For example, alliances generally offer improved innovation, safety and quality⁵³

rather than this being a 'hidden cost' as is the case in fixed price contracts. Value for money considerations therefore must consider all project costs holistically and attempt to place measurable criteria on these elements so that government can thoroughly compare the costs and benefits of contractual vehicles, and, just as importantly, government is provided with a realistic estimate of what the project will cost and how long it will take to deliver. The following aspects in particular require careful consideration when assessing the value of alliances.

- (a) cost of administration;
- (b) sharing the costs of mistakes;
- (c) cost effective insurance; and
- (d) loss of incentives.

The above list encompasses the costs or disadvantages of alliancing. Other sources thoroughly document the benefits of alliancing such as innovation, collaboration, reduced disputes etc.⁵⁴ and there is no need to revisit these. In my research, I examine the costs of alliancing with the particular aim of examining whether they are actually any worse than the costs associated with fixed price contracts.

COST OF ADMINISTRATION

It is generally acknowledged that the management of alliance contracts involves substantially more effort than that associated with traditional contracts.⁵⁵ For an ideal traditional design and construct contract, government develops a specification, selects a tenderer (primarily against quantitative criteria), provides some limited supervision during construction and finally accepts the end product. This process ideally involves little input from government, as the prime contractor is solely responsible for delivery of the project works.

By way of contrast, the alliance requires substantially more involvement from government including:

- (a) maintaining government employees in the alliance team;
- (b) continuing involvement of government in the alliance leadership and management teams;
- (c) facilitating relationships and aligning cultures;⁵⁶
- (d) additional training;⁵⁷ and
- (e) developing and validating the TOC.⁵⁸

Using teams that are already conversant with alliancing principles can reduce the costs of alliancing.⁵⁹ However, for 'greenfield' alliance projects, government will be required to fund initial alliance training and fund alliance setup costs.

To this end, alliances are not recommended for low value projects where the cost of administration cannot be amortised over the value of the project.⁶⁰ The true cost of administering alliance contracts thus appears to be substantially larger than for a 'perfect' traditional contract i.e. a traditional contract that is devoid of variations, disputes and the need for management intervention. Such a traditional contract is rare. The cost of monitoring contractor performance, administering variations and other costs associated with the adversarial behaviour in traditional contracts may be substantial to the extent that these costs rival or even exceed the administrative costs of alliances. Notwithstanding, the administrative costs associated with traditional contracts largely stem from poor specifications,⁶¹ which are capable of being managed. The alliance is therefore more likely to place greater demands on government

resources and have greater associated administrative costs than for well managed traditional contracts. It will only be for large projects that have undefined or variable project requirements that alliance administrative costs may become comparable to the administrative costs of traditional contracts.

SHARING THE COST OF MISTAKES

A further criticism with respect to value for money in alliances is that government pays for a substantial component of contractor mistakes.⁶² Where an alliance participant is negligent, resulting in rework, government pays a portion for the costs of these mistakes. The gainshare/painshare arrangements of the pure alliance discourage poor performance and the likelihood of rework. The presence of a no-disputes clause, however, disenfranchises government of a means to recover substantial losses suffered from gross negligence or inefficient work practices.⁶³ These costs or loss of value are offset somewhat as government is afforded the same protection from their own negligence and poor performance such as the delivery of poor specifications or providing inappropriate site access.

Considering the majority of the design and construction responsibilities of an alliance project will be assigned to non-owner participants, government will most likely be exposed to the 'costs' of the no-disputes framework, rather than the 'benefits' in the context of value for money. The no-disputes clause does have benefits associated with alignment of culture and reduced costs of litigation, though establishing whether this value exceeds the cost of paying for other's mistakes remains unanswered. The emphasis on the need for

a no-disputes clause in most alliance arrangements suggests that the benefits outweigh the costs, though no direct evidence is available to support this premise. Conversely, there is no evidence to suggest that preservation of some form of liability between alliance participants will substantially degrade the collaborative nature of alliancing.

INSURANCE UNDER AN ALLIANCE

Associated with the cost of 'paying' for contractor mistakes and a framework of 'no liability' is the fact that professional indemnity insurance⁶⁴ is very difficult to obtain or may not be available for work conducted under a pure alliance. The presence of a no-disputes clause in the pure alliance results in no alliance partners being liable for any losses (except for wilful default). Thus liability-based insurance will be ineffective as no liability arises.⁶⁵ Standard insurance will therefore offer the alliance owner little comfort and either special insurance must be obtained or deviation from the pure alliance, 'no liability' regime must be pursued.⁶⁶ Obtaining project specific professional indemnity insurance within a no-liability framework has proved a challenging task in Australia⁶⁷ and where such insurance can be sought, it is likely to be prohibitively expensive.⁶⁸ Ross recommends the following strategies be considered in obtaining professional indemnity insurance under an alliance:⁶⁹

- (a) adopt a very large excess for the insurance cover (e.g. \$1m);
- (b) implement robust risk management practices; and
- (c) provide insurer representation at key project milestones.

These strategies will increase the likelihood of obtaining

professional indemnity insurance but will not guarantee the availability of cost effective cover. Rather, in the absence of professional indemnity insurance, the alliance may have to self-insure or modify the pure alliance framework to impose some level of liability.

Self-insurance may be desirable where design risks are manageable. Furthermore, the reimbursement model of the alliance inherently manages this risk with the designer's limb 3 compensation being at risk from design errors. The challenge for government with self-insurance is with respect to insurance coverage after final completion of the project (post award of all limb 1, 2 and 3 fees). If latent defects in the design or construction elements of the project are discovered after final completion then government's options for recovery are limited, as no liability exists between alliance participants. This may prove highly undesirable where the integrity of delivered project is unable to be fully verified at final completion. Hence, where self-insurance is inappropriate, the alliance relationship must be modified to provide some liability with the design and/or construction elements such that insurance may be sought.

A response for the need to obtain insurance with alliance style contracts has been the development of the 'project alliance'.⁷⁰ The 'project alliance' deviates from the pure alliance model by maintaining strict liability between government and the alliance contractor. This alliance model provides access to insurance post-alliance⁷¹ where latent defects may be discovered in the project works. It should be recognised that where liability is maintained between alliance participants, there is increased risk that the collaborative nature

of the alliance may be diluted⁷² as well as reduced pressure on the drive toward innovation.⁷³ The acceptance of these costs need to be considered in the context of project risk (the likelihood and consequence of latent defects occurring) as well as government's obligations to support the delivered works after final completion.

Also worthy of consideration is government insuring against the risk of alliance participants becoming insolvent. The author is aware of two alliance projects where an alliance participant became insolvent. It is inconceivable to imagine the liquidator of an insolvent alliance participant adopting 'best for project' principles, hence government may wish to insure against such an outcome.

LOSS OF INCENTIVES

A final consideration of alliances and the achievement of value for money is the risk that non-owner participants may abandon the alliance once all potential incentive payments are lost. The alliance gainshare/painshare arrangements result in a situation where potentially a non-owner participant may only recover direct costs and project specific overheads. Should the outcomes of an alliance project drop to such low levels of performance then non-owner alliance participants have little incentive to achieve project outcomes other than to preserve their reputation (which by this stage is probably quite tarnished!) Once a non-owner participant is limited to limb 1 reimbursement (or a value close to it), there is little motivation to achieve key performance areas or deliver future cost savings. As one commentator states:

One of the critical issues uncovered is that contract alliances work well when progress is good. However,

Rather than complete a project using a single alliance agreement, larger ventures may be broken up into discrete projects. This facilitates the adoption of an alliance program, whereby a government decomposes a large project into smaller alliance projects.

when a contract falls behind and any bonuses (or penalties) have been used up, the incentive for a contractor to perform at optimum pace is lost.⁷⁴

The claimed success⁷⁵ of most alliance contracts in Australia suggests that losing incentives is not a great risk, though it is foreseeable that should an alliance fail markedly then value for money may not result as the non-owner alliance participants are unlikely to pursue 'breakthrough results', nor deliver excellence in outcomes. Rather, the non-owner alliance participants will want to complete the project as quickly as possible (most likely at the expense of all non-economic key result areas), so that their resources can be employed on more profitable endeavours.

DELIVERING VALUE FOR MONEY WITH PRICE COMPETITION

Substantial debate surrounds the concept of value for money in pure alliances. Many commentators are polarised on this issue, either arguing that 'pure alliances offer the best value for money for appropriate projects'⁷⁶ or that 'only price competition can provide value for money'.⁷⁷ Several government policy documents and guidance papers recognise the need for competition in achieving value for money at state⁷⁸ and federal government level.⁷⁹ The absence of price competition in pure alliances thus appears contrary to this guidance. This sentiment is reflected in a recent pure alliance audit report that raised concerns with 'the demonstration of value.'⁸⁰

In a pure alliance there are no competitive forces dictating the value of the TOC. Arguably government selects a team on a competitive basis that is perceived as the best capable of delivering

value with the lowest TOC. This is an invitation for criticism as one alliance manager summarises:

We cannot win...if we deliver above the TOC then we are seen as a failure. If we deliver under the TOC we are deemed as being soft in setting realistic targets.⁸¹

To address these criticisms and concerns several government agencies have incorporated price competition into the selection of alliance participants with the Competitive Target Outturn Cost alliance. In a competitive TOC alliance, the processes for developing final costs are generally hidden from scrutiny by government. Hence the argument proposed is that market forces demonstrate good value for money and government is kept at arms length from TOC development.

In a competitive TOC alliance, usually, two alliance participants are short listed to develop a TOC for the delivery of the work.⁸² The alliance owner normally funds this activity.⁸³ The owner is therefore able to select a preferred tenderer based on price competition as well as the qualitative selection criteria used for selecting pure alliance partners. The presence of price competition thus reduces the importance of independent auditors and robust owner cost estimates. The competitive alliance will result in sunk costs as government has paid for the TOC development effort of the losing tenderer. The costs of such an endeavour may be up to 3% of the total project budget.⁸⁴

Critics of the competitive alliance model state that such sunk costs actually misrepresent the true cost to government because based on a 50:50 gainshare, the alliance must deliver a saving of 6% below the TOC to recover this 3% sunk cost.⁸⁵ This is a valid criticism of the competitive TOC

process, though the competitive TOC offers reduced costs in auditing and validation of the TOC by government.⁸⁶ Hence, for every additional dollar expended in validated the TOC in a pure alliance, that same alliance must generate a saving of two dollars below the TOC to recoup this cost. Furthermore, as government pays for the development of the TOC, all foreground intellectual property of the losing tenderer may be exploited by government to refine and amend the winning alliance tenderer's preliminary design. To this end, claims that competitive TOC alliances must deliver savings 6% below the TOC to be comparable to pure alliances are erroneous.

In addition to price issues, there are substantial differences in the qualitative benefits of competitive alliances. The competitive alliance model is subject to great criticism as such a model may diminish the alliance culture of collaboration, and add to the project schedule (increased tender evaluation duration) when compared to pure alliances.⁸⁷ On the other hand, competitive alliances are more likely to promote innovative solutions earlier so that the alliance tenderers drive the TOC as competitively low as possible.⁸⁸

The competitive TOC model also allows the owner to see each tenderer operate 'in action' so that a more robust assessment can be made of the capabilities of each contractor before selection. Thus government has the opportunity to 'try before you buy'.⁸⁹ The competitive TOC also satisfies the political imperative of setting the project cost in an arms length environment, thus absolving government from the criticism that the TOC is not a fair estimate of the project cost.

The competitive alliance model may also reduce the risk of a legal challenge from losing

tenderers. With greater reliance upon quantitative selection criteria, government will be better able to demonstrate fairness in the tender selection process when compared to the pure alliance selection process. For the federal and state government, this also facilitates alignment to the Australia/US Free Trade Agreement principles.⁹⁰

DELIVERING VALUE FOR MONEY WITH AN ALLIANCE PROGRAM

Rather than complete a project using a single alliance agreement, larger ventures may be broken up into discrete projects. This facilitates the adoption of an alliance program, whereby a government decomposes a large project into smaller alliance projects. For each project, however, the program must be conducted by the same alliance team to generate benefits. At time of writing, there is only one example of an alliance program in Australia and that is the Barkly Highway upgrade in Northern Queensland. I conducted a case study of this alliance program to investigate the arrangements used on this endeavour. A complete version of this case study is available at: http://s21.quicksharing.com/v/9727965/Split_rock_Case_Study_v5.pdf.html

CASE STUDY—BARKLY HIGHWAY ALLIANCE PROGRAM

The Barkly Highway links the city of Mt Isa with the township of Camooweal on the Northern Territory Border. Situated on the Barkly Tableland, the 210 km highway provides the main conduit for road traffic between Queensland and the Northern Territory. Despite the strategic significance of the highway, 90 km of the road was single lane with many sections of the road subject to flooding. In

2003, the federal government funded a rehabilitation of the road with several pure alliance contracts subsequently awarded for construction of a dual lane highway stretching from Mt Isa to Camooweal. Queensland Department of Main Roads (DMR) awarded three of these alliances to a single prime contractor, Seymour Whyte Construction (SWC). A summary of each of these alliances is as follows:

- (a) Johnson Creek Alliance 2004, Target Outturn Cost \$21.4m
- (b) Buckley Creek Alliance 2005, Target Outturn Cost \$15.5m
- (c) Split Rock Inca Creek Alliance 2006, Target Outturn Cost \$33.8m

All of these alliances involved substantial risks, more specifically; the risks of adverse weather, operating in area of cultural significance and working in remote locations were extreme as discussed below.

Weather

The Barkly Highway is subject to extremes of weather. During the wet season it is impractical to conduct construction work as the road itself is prone to flooding and working in high rainfall is both hazardous and unproductive. The commencement and cessation of the wet season is unpredictable. For example, during the start of the Split Rock Inca construction, cyclones Larry and Monica caused the Inca Creek to rise by over 1.8 and 0.8 meters respectively. 204 mm of rain fell in the construction area in what was supposed to be the end of the wet season. This caused closure of the Barkly Highway⁹¹ and a six day delay to the project. The wet season also provides an imperative to complete the work during a single annual cycle before commencement of the next wet season.

Cultural Significance

The Barkly Highway alliances operate in an area of substantial cultural significance. The Highway crosses land subject to native title claims from both the Kalkadoon and Indjilandji-Dithanoi groups. In addition, the highway follows the original track employed by indigenous groups and the surrounding area contains an abundance of artefacts as used by the traditional landowners. To date, over 37,000 unique items of cultural significance have been recovered from the Barkly Highway. Thus, not only must the alliance operate within the ambit of respective state⁹² and federal legislation,⁹³ the alliance must also consider the broader stakeholder needs of the indigenous community. The presence of areas of cultural significance places considerable constraints on the work methods available for road construction as well as introducing considerable schedule risk as the construction team cannot foresee where exactly areas of cultural significance will occur during construction.

Remote Construction

The two stretches of Barkly Highway constructed under the Split Rock Inca Alliance are located more than 150 km away from the township of Mt Isa. This introduces considerable constraints on the materials available and the cost effectiveness of purchasing local supplies. The remote nature of the project also provides risks associated with the availability of labour, both in terms of labour skills and quantity. The remoteness of the project also necessitated the construction and maintenance of fully contained base camps for workers. This introduces risks associated with mobilisation and demobilisation durations, project logistics, and management oversight. For the

Split Rock Inca Alliance, two camps were utilised to support over one hundred staff engaged on the project.

The presence of these extreme project risks raised challenges for the alliance team to demonstrate that the TOC was fair. DMR and SWC adopted an innovative approach to address this concern by using the actual outturn costs of the previous alliance as the target costs for subsequent alliances. This resulted in a continual 'raising of the bar' for subsequent alliances with significant stretch targets incorporated into the TOC. This process dubbed, 'an alliance program', was a resounding success.

Between alliances, there was substantial improvement in the target cost drivers for the project (for example paving, earthworks and preparation). For each of the main target cost drivers, a 10% improvement was incorporated into subsequent alliance target costs. Whilst this compounding improvement may seem ambitious, the actual outcomes for the Barkly Highway alliances demonstrate that these stretch targets are realistic. In each alliance project, the alliance team delivered below the target costs.

Thus by adopting a alliance program, the alliance owner, DMR was provided with substantially greater confidence in the veracity of target costs and the non-owner alliance participant, SWC was afforded realistic stretch targets. Non cost outcomes were also superior in the alliance program. The alliances delivered indigenous training and employment substantially above agreed targets and 'excellent' scores awarded to product quality.

For the Barkly Highway alliance program, the selection and award of several contracts to a single

tenderer may seem at odds with government's aim of pursuing competition. In this case, iterative TOC developments (through benchmarking) and aggressive stretch targets support the delivery of value for money. Whilst awarding multiple contracts to a single tenderer may be perceived as anti-competitive, the inherent gains driven into the project target costs coupled with open book reporting negates the need to pursue competitive tendering for the purposes of 'testing the market' on subsequent alliances.

Unlike the pure alliance, subsequent projects in an alliance program demonstrate greater confidence in the TOC with a 'bootstrapping' of project costs against actual performance. This overcomes many of the criticisms of both the pure alliance and competitive TOC alliance as both positive alliance behaviours and improved demonstration of value for money will result. The disadvantage of the alliance program approach is that government must commit to a single alliance team for the duration of the program. This arguably lessens competition and does not relieve government from the challenge of selecting tenderers from soft/qualitative criteria in the initial stages.

COMPARISON OF COMPETITIVE ALLIANCES AND PURE ALLIANCES

The public sector employed pure alliances in Australia two years before the use of the first government competitive TOC alliance. Unsurprisingly, Australian governments have used pure alliances more often. My interview results show substantial correlation between the alliance type employed and respondent's attitudes toward that form of alliance as most respondents claim that their alliance form was suitable

(whether it be a pure, hybrid or competitive TOC alliance). From an alliance participant perspective there appears to be no evidence to suggest that there is a trend supporting the preference of either pure or competitive TOC alliances. What my interviews and surveys did reveal is that for pure alliances, participants were far more concerned with the challenge of demonstrating value for money compared to competitive TOC alliances.

My interviews also explored some of the costs of competitive alliances and in particular the sunk costs associated with funding multiple bids. No competitive alliance participants identified this as problem; rather they acknowledged the sunk cost as an investment cost as government typically reused the losing bidder's design effort to refine the winning tenderer's proposal. Based on alliance participant responses, I am unable to state whether the pure or competitive alliances offer best value for money. Competitive TOC alliances may demonstrate better value for money than pure alliances, from the perspective of government's goal in pursuing price competition in an arms length environment.⁹⁴ Whether this translates to actually delivering the best outcome for a project remains a separate question.

As I previously acknowledged, the term 'value for money' is a nebulous concept, the definition of which is easy to manipulate to justify the selection of any procurement option or acquisition strategy. For example, a government organisation can successfully argue that value for money results from eliminating disputes, alignment of goals, catering for complex stakeholder issues, sharing risks, supporting fast tender selections and providing open

book costing information. In this case the pure alliance is the obvious choice for progressing a project. That same government organisation; however, could also argue that value for money is defined as pursuing open and fair competition, maintenance of robust insurance cover, providing government with a capped total project cost and the elimination of the need for complex external auditing and validation. The adoption of this approach would result in the selection of a competitive TOC/Hybrid alliance or even a fixed price contract. Both arguments are defensible from criticism, as there appears to be little science, in the author's opinion, in government decision-making, especially in light of political and social considerations. I therefore conclude that it is a fool's errand to argue that the pure alliance delivers better value for money than a competitive TOC alliance or vice versa.

CONCLUSION

Value for money is a key component of public sector governance both from a policy and expectation management perspective. Notwithstanding, the nebulous nature of 'value' and the inconsistent methods by which value is measured makes any value comparison between acquisition strategies or procurement options difficult. Thus, whilst the debate between the relative merits of competitive TOC alliances, pure alliances, and traditional contracts rages on, the wily project manager can simply adopt selection criteria that justify any decision they make. Furthermore, independent of the selection criteria used, the same decision maker can adopt expected value, least regret, or minimax decision making rules to justify whatever outcome they wish. To this end, value for money decisions are very

easily manipulated and any final decision can be justified without criticism.

From a stakeholder perspective, the need to demonstrate value for money is vital. The proponent of pure alliances has a more difficult task in demonstrating value is being delivered as there are no competitive tensions proving that the 'price is right'. Competitive TOC alliances address this shortcoming but these same competitive tensions may dilute the value of alliancing and such strategies may be unsuited to regional projects with limited competition. A compromise between pure and competitive alliances is the use of an alliance program, which involves the bootstrapping of the alliance target costs between projects. In this arrangement the first alliance project may not adequately demonstrate value for money; however, subsequent alliances in the program provide greater certainty that the target cost is set fairly.

Whilst the NSW government has adopted selection guides for various acquisition strategies, other state governments, the federal government, and local governments do not appear to apply consistent principles for project decision-making. To better demonstrate value for money, governments will need to consider the value associated with the various elements used in tender selections and the decision-making processes used so that they promote consistency and certainty. Not only will this facilitate demonstration and achievement of value for money but also support fairness in tender selection.⁹⁵

REFERENCES

1. Karl Marx *Value, Price and Profit* (1898) at 52 Transcripts of a speech by Marx to the First

International Working Men's Association, June 1865

2. See e.g. Andrew Chew 'Alliancing—Some Practical and Legal Considerations when Bidding and Structuring Alliance contracts' (2006) *ACLN* #106 at 20; Owen Hayford 'Ensuring your Alliance Contract is Legally Sound' (2004), *ACLN* #99 at 45; Andrew Chew 'Alliancing in Delivery of Major Infrastructure Projects and Outsourcing Services—An Overview of Legal Issues' (2005) http://www.mallesons.com/publications/Construction_update/7840741w.htm; Brad Cowan & John Davies 'Development of the 'Competitive TOC' Alliance—A Client Initiative' (2005) at http://www.alliancetwork.com.au/white_papers.html; Alchimie 'Target Outrun Cost: Demonstrating and Ensuring Value for Money' (2004) <http://www.alchimie.com.au/index.cgi?tid=14>; Andrew Stephenson, 'Alliance Contracting, Partnering, Cooperative Contracting—Risk Avoidance or Risk Creation' (2000) Paper presented to Clayton Utz Major Projects Seminar, October 2000 [5.2] at <http://www.claytonutz.com/downloads/project2.pdf>; J Ross 'Introduction to Project Alliancing' (2003) Alliance Contracting Conference Sydney October 2003 1 at <http://www.pci-aus.com>

3. Comment from an alliance manager during my research interviews.

4. Hayford above n2; Chew 'Alliancing in Delivery of Major Infrastructure Projects and Outsourcing Services—An Overview of Legal Issues' above n2; Ross above n2; James Forrest, 'Legal Considerations of Alliance Contracts' (2005) IIR Alliance Contracting Conference, Brisbane, 7–9 Dec 2005

5. D Walker & K Hampson *Procurement Strategies: A*

Relationship-based Approach (2003); Australian Constructors Association, *Relationship Contracting—Optimising Project Outcomes* (1991)

6. A Cullen, P Davenport, B Donovan *Building Contracts Australia* (2005) [64,020]

7. Ross above n2 at 1

8. Chew 'Alliancing in Delivery of Major Infrastructure Projects and Outsourcing Services—An Overview of Legal Issues' above n2 at 2

9. Clause from a government alliance contract.

10. See esp Ross above n2 at 1

11. Arguably, the alliance owner's ability to 'terminate for convenience' is a pseudo-deadlock breaking mechanism.

12. See esp Max Abrahamson 'Risk Management' (1984) 2 *ICLR* 241 who argues that risk should be allocated to the party best able to manage this risk. This tenet is tacitly acknowledged by government vide NPWC/NBCC Joint Working Party, 'No dispute: Strategies for improvement in the Australian building and construction industry' (May 1990) Dickson ACT.

13. Cowan et al above n2

14. Ibid Forrest above n4 at 6

15. A more comprehensive summary of my demographic analysis of alliances is available at http://s26.quicksharing.com/v/1593044/Alliance_demographics.pdf.html

16. Federal government alliances typically span multiple states, hence I allocated a separate category for these alliances.

17. David Fabian 'Seachange in the Construction Industry?' (2005) #105 *ACLN* 17; See also Construction Forecasting Council online forecasting data at <http://www.cfc.acif.com.au>

18. Financial Management and Accountability Act 1997 (Cth) iii.

19. ANAO Better Practice Guide, Public Sector Governance and the Individual Officer (July 2003); Queensland Government Managing Outcomes: Strategic Governance Principles and Indicators (May 2003). NSW Auditor General on Board: Guide to Better Practice for Public Sector Governing and Advisory Boards (1998) at http://www.audit.nsw.gov.au/publications/better_practice/better_practice.htm; Victorian Good Governance Advisory Group, 'Good Governance Guide' (2004) at www.dvc.vic.gov.au at 11 October 2005; Chartered Practising Accountants Australia 'Excellence in Governance for Local Government' (2005) at 4–5.

20. ANAO Better Practice Guide above n17 at 8

21. Australian Government, Department of Finance and Administration 'Commonwealth Procurement Guidelines' (2005) 4.1 at http://www.finance.gov.au/ctc/principle_of_value_for_money.html

22. NSW Government, Department of Treasury 'Code of Practice for Procurement' (2005) 11 at http://www.treasury.nsw.gov.au/procurement/pdf/code_of_prac-curr.pdf; See also Victorian Government Purchasing Board 'Procurement Policies' (2002) 28 at <http://www.vgpb.vic.gov.au/CA256C450016850B/0/9090B9B69A953C1BF1CA256C770003E65?OpenDocument#introduction>. See also Defence Materiel Organisation, Business Rules (2001) 10 which states 'value for money has primacy in deciding the method of procurement for goods and services'.

23. Queensland Government, Department of Public Works 'Better Purchasing Guide—Value for Money' (2000) 2 at http://www.qgm.qld.gov.au/00_downloads/bpg_value.pdf

24. Chartered Practising Accountants Australia, above n17 at 23

25. The aforementioned selection strategies will be adopted as a function of the level of risk aversion of the decision maker, vide John Wiley Decision and Control (1966) at 222.

26. John Benton *Managing the Organizational Decision Process* (1980) 117

27. For example, the Victorian Government Department of Treasury and Finance, 'Project Alliancing Practitioner's Guide' (2006) 23-25, includes a robust process for developing the business case for alliancing but developing the selection criteria and weightings is left to the imagination. Similarly, no guidance is provided as to whether least regret, minimax, maximax, or expected value decision making should be adopted.

28. In some pure alliance tender selections, hourly rates can be used to as a means to discriminate between tenderers; however, most tenderers adopt standard, industry benchmark rates to represent a business as usual hourly rate.

29. Determining whether the wrong tender is selected is difficult to quantify. There is no practical means of demonstrating that a loosing tenderer could have delivered better value for money after completion of a project.

30. J Ross above n4 at 10; Ian McIntyre 'Project Alliance Contracts Harness Commercial Imperatives' (2005) IPCQ Conference Nov 2005; John Gallagher 'Project Alliancing—Creating the Possibilities' (2003) in *The Building Economist* September 2000 3 at 19-21.

31. This term appeared frequently in my interviews with industry (non-owner) participants involved in alliances.

32. For example, on one competitive alliance, the tender selection weightings were assigned as 85% on target cost, with the remaining 15% assigned to 'soft dollar' criteria.

33. This stance is subject to challenge as the instances of variations can substantially alter the final price. See e.g. Engineers Australia, 'Getting it right first time: A plan to reverse declining standards in project design documentation within the building and construction and industry' (2005) 3; NPWC/NBCC Joint Working Party 'No dispute: Strategies for improvement in the Australian building and construction industry' (May 1990) Dickson ACT

34. Only to the extent that breaches of s52 of the *Trade Practices Act 1997* (Cth) occurs.

35. Victorian Government Department of Treasury and Finance, 'Project Alliancing Practitioner's Guide' (2006); Ross above n2 at 4-9

36. Costs are uncapped to the point where government elects to invoke 'termination for convenience' (albeit this would be a drastic measure).

37. Andrew Hutchison & John Gallagher 'Project Alliancing—An Overview' (2003) 23

38. Ross above n2 at 6.

39. Monte-Carlo simulations are numerical methods using random numbers to explore possible outcomes for an event. Monte-Carlo simulations are used to generate probability distribution curves for schedules and cost estimates.

40. Victorian Government above n33 at 40

41. Hutchison et al above n35 at 24

42. See e.g. Victorian Government above n33 at 41

43. Ibid. This selection process requires contenders to submit cost/performance data on two relevant projects that were bid competitively.

44. Hayford above n2 at 53

45. Victorian Government above n33 at 40-1

46. Warren Cochrane, ANAO 'Defence Project Management An Auditor's Perspective' (2000) Defence Project Management Conference at <http://www.anao.gov.au/WebSite.nsf/Publications/4A256AE90015F69B4A25693D00156F23>

47. Stephenson above n2 at [5.2].

48. The premise here is that independent evaluators cannot confidently validate supplier cost estimates see e.g. Cowan above n2 at 5

49. See e.g. Victorian Government above n33 at 40

50. Cowan above n2 at 3

51. For example, the Port of Brisbane motorway alliance TOC was double the owner's estimate. Ibid at 5

52. Ibid. The authors argue that independent assessors are either ineffective or used improperly; Contra Alchimie above n3 where the authors states from their experience that independent estimators arrive at an estimate very close to the TOC (within 2% and 4%). The authors do not qualify whether the estimator had visibility of the TOC prior to developing their estimate nor the risk profile of the projects.

53. See Victorian Government above n33 at 17

54. See e.g. Walker et al above n5; Ross above n2; Alchimie above n2

55. NSW Government CACC 'Procurement Methodology Guidelines for Construction' (2005) 3.1.4.; Victorian Government above n33 at 18; Ross above n3 at 21

56. Ross above n2 at 21; NSW Government CACC above n53 at 3.1.4

57. Building Contracts Australia above n6 at [64.185]

58. See esp. Victorian Government above n33 at Ch 5

59. Ross above n2 at 21

60. Victorian Government above n33 at 19

61. Engineers Australia 'Getting it right first time: A plan to reverse declining standards in project design documentation within the building and construction and industry' (2005) 3 at www.qld.engineersaustralia.org.au

62. Hayford above n2 at 49

63. Ibid 50

64. Public liability insurance also presents unique challenges with alliances though this is manageable and far less a concern than the issue of professional indemnity insurance, Victorian Government above n33 at 63; See also Chew 'Alliancing in Delivery of Major Infrastructure Projects and Outsourcing Services—An Overview of Legal Issues' above n2 at 11–12, who describes the benefits of a project specific public liability insurance policy.

65. Hayford above n2 at 50; Chew, 'Alliancing in Delivery of Major Infrastructure Projects and Outsourcing Services—An Overview of Legal Issues' above n2 at 11; Stephenson above n2 at [5.3]

66. Ross above n2 at 13–4

67. Stephenson above n2 at [5.3]

68. Victorian Government above n33 at 62; Ross above n2 at 14; Chew, 'Alliancing in Delivery of Major Infrastructure Projects and Outsourcing Services—An Overview of Legal Issues' n2 at 11

69. Ross above n2 at 14

70. Cowan et al., above n2, 3

71. Ibid at 4

72. Ross above n3 at Appendix 2

73. Hayford above n2 at 50

74. Chew 'Alliancing in Delivery of Major Infrastructure Projects and Outsourcing Services—An Overview of Legal Issues' above n2 at 17

75. Claims of alliance successes rely on the fact that alliances typically deliver outcomes 5% below the TOC. 'Success' is therefore contingent on proving the TOC was a fair estimate.

76. See e.g. Ross above n2; Alchemie above n2 at 9–10

77. Cowan et al. above n2

78. NSW Independent Commission Against Corruption, 'Direct negotiations in procurement and disposals: Dealing directly with proponents' (1 June 1997) at <http://www.icac.nsw.gov.au/index.cfm?objectid=E29C341E-FDD6-9884-BC5D2EBE09297D8D> 6 January 2006

79. Commonwealth Government above n19 at [4.2]

80. NSW Audit Office, Performance Audit: 'Sydney Water Corporation: Northside Storage Tunnel Project' (2003)

81. Government alliance board representative's comment provided during my interviews.

82. Cowan above n2 at 5

83. Alchemie above n2 at 10

84. Ibid

85. Ibid

86. Conversely, government must increase resources to manage the two bidding teams during the competitive process.

87. See e.g. Ross above n2; Alchemie above n2 at 9–10; Contra M Montefiore 'The Burnett Dam Alliance' (2005) IPQC Conference, who argues that pure alliances may introduce conflict in the TOC

negotiation phase as price tension is between owner and non-owners. Whereas in a competitive alliance, price tension is between industry participants.

88. Victorian Government above n33 at Appendix 3

89. Ibid

90. Australia–United States Free Trade Agreement, Chapter 15—Government Procurement 15.6.4 at www.dfat.gov.au/trade/negotiations/us_fta/final-text

91. Flooding Cuts Barkly Highway, ABC News Online at <http://www.abc.net.au/news/australia/qld/longr/200603/s1598039.htm>

92. *Aboriginal Cultural Heritage Act 2003* (Qld) *Torres Strait and Islander Cultural Heritage Act 2003* (Qld), *Land and Resource Tribunal Act 1999* (Qld), *Queensland Heritage Act 1992* (Qld)

93. *Native Title Act 1993* (Cth), *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth)

94. Competitive prices obtained in an open market objectively demonstrate 'best value', see e.g. Commonwealth Procurement Guidelines above n19 at 4.2

95. Federal government may be forced into this regime as a result of the Australia–United States Free Trade Agreement, above n88 at 15.6.4 and 15.7.2

John Davies' paper draws on preliminary research by the author in fulfilment of a Doctor of Philosophy degree at the Griffith University Law School, Socio-Legal Research Centre.
