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# Alliancing in Hong Kong

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In recent years there has been a significant shift from traditional adversarial contracting towards project delivery based on proactive, collaborative relationships. Alliance contracting has become increasingly common in Australia and the United Kingdom and now there is growing interest in Hong Kong.

Alliance contracting is an attempt to align the objectives of all parties and encourage 'best for project' behaviour. Some of the main characteristics of an alliance include:

- the parties assume collective ownership of the risks associated with project delivery
- a joint group with members from all the alliance participants (Project Alliance Board or Alliance Leadership Team) drive the leadership and management of the alliance
- the compensation framework is structured on an 'all win – all lose' basis. The developer will normally pay the non-owner participants their direct project costs and overheads regardless of project outcome, although the non-owner participants' right to profit is linked directly to project performance against a set of pre-agreed indicators
- the parties agree to resolve all issues and disputes within the alliance without recourse to litigation or arbitration, except in the case of 'wilful default' or insolvency.

For an alliance to function properly, alliance participants must move beyond self-interest and be open, committed and cooperative to meet the project's objectives. It is equally important for the legal arrangements to positively reinforce these collaborative behaviours. Finally, the objectives of the alliance and the establishment of relevant criteria to measure project outcomes must be carefully considered.

## Why alliancing?

Alliancing is generally suited to projects which benefit from innovation. For this reason, alliancing is often considered an appropriate model for projects which lack design certainty, face significant time constraints, or involve technical complexity and interface issues.

The alliancing model challenges traditional expectations, attitudes and practices. When alliancing was first introduced in Australia, it was often rejected on the basis that the model had limited application and was, for some, unworkable.

This scepticism was driven as much by unfamiliarity as it was with the prevailing risk transfer mentality in the construction industry. It was difficult for people to contemplate 'no dispute' against established tendering practices, risk allocation, contract terms and claims management. However, as the appetite for 'soft dollar' contracting has grown in Australia over the last decade, so too has enthusiasm for alliancing, with some former industry doubters becoming alliancing evangelists.

Properly understood, alliancing can be considered for appropriate projects, which will add to the range of project delivery methods available to the public and private sectors.

Equally, parties should remain cautious about entering into an alliance arrangement if this is not what they intend. The recent Australian case of *Doric Building Pty Ltd v Marine & Civil Construction Co Pty Ltd* [2006] serves as a timely reminder of the importance of ensuring that the terms of the contract reflect the parties' intentions.

## *Doric Building Pty Ltd v Marine & Civil Construction Co Pty Ltd* [2006] WASC12

In June 2001, the Shire of Busselton invited tenders for the design, construction and installation of an underwater observatory at the Busselton Jetty. Prior to submitting their tender, Doric Building Pty Ltd (Doric) and Marine & Civil Construction Co Pty Ltd (Marine & Civil) agreed that – in order to avoid doubling up on overheads, contingencies and profits – the project should be administered as an 'alliance or joint venture'.

The tender submission specified that Doric proposed to lead an alliance team including Marine & Civil and Worley Infrastructure Pty Ltd. Doric was subsequently engaged as the preferred tenderer for the project and entered a design and construct contract with the Shire of Bussleton incorporating the AS4300-1995 General Conditions of Contract (head contract).

Doric also entered into a subcontract agreement with Marine & Civil, which contained some unusual features:

- the subcontract price was stated as '$.00'
- the subcontract expressly stated that the parties formed an 'alliance' and would share all profits or losses equally. However, the subcontract annexed the AS4303-1995 General Conditions of Subcontract for Design and Construct (AS4303) which was inconsistent with this approach
- clause 4.1 of AS4303 required Marine & Civil to warrant that it would execute the work under the subcontract in accordance with the design documents, so that the subcontracted works, when completed, would be fit for their stated purpose
- the subcontract stated that Marine & Civil had carefully checked that any preliminary designs in the main contractor's project requirements were suitable, appropriate and adequate for the purpose stated in those project requirements
- the subcontract stated that Marine & Civil was liable for liquidated damages for late completion of the works at a rate of AUD1,000 per day.

Prior to construction commencing, the design of the marine ground anchors connecting the underwater observatory to the sea bed was found to be inadequate, resulting in extensive design changes and increased overall construction costs by approximately AUD1 million.

A dispute ensued over liability, and the matter was referred to arbitration under the terms of the head contract. Doric argued that the arrangement with Marine & Civil was a straightforward subcontract arrangement and accordingly, Marine & Civil was liable for breach of its design warranties under AS4303. Marine & Civil contended that the parties had formed an 'alliance' or 'joint venture agreement', with the result that any profit or loss on the contract would be shared equally between them.

The arbitrator ruled in favour of Marine & Civil, holding that the agreement was not a subcontract, but a joint endeavour or joint venture agreement. Doric sought leave to appeal against the arbitrator's award pursuant to s38(5) of the *Commercial Arbitration Act 1985* (WA).

The Supreme Court of Western Australia rejected the appeal. It confirmed the arbitrator's decision and found the arrangement between Doric and Marine & Civil should be characterised as a joint venture at law. In reaching this decision, Hasluck J referred to the comments of Mason, Brennan and Deane JJ, in *United Dominions Corp Limited v Brian Pty Ltd*, that the definition of a joint venture 'may on occasion be blurred'.

The judge concluded that the absence of a subcontract price (denoted by the entry $.00) and the provision for sharing profits and losses precluded the agreement from being characterised as a conventional subcontract. He confirmed that the warranties set out in AS4303 could not be read in isolation and were therefore of limited application. The liquidated damages provisions in the subcontract were also found to be unenforceable on the basis that they were inconsistent with the concept of a joint venture.

The presence of general and specific statements in a construction contract which are at variance with each other will often lend themselves to disputes. It is therefore imperative that all parties to a construction contract understand the form of delivery model to be adopted and ensure that the underlying contract reflects those intentions.

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