

Project Alliancing and Relationship Contracting –  
Conflict Embracing Project Delivery Systems

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### Abstract

Project Alliancing and Relationship Contracting have been used as project delivery systems for a number of major projects in Australia over the last 10 years including the Pacific Motorway in Queensland and the National Museum in Canberra.

These commercial contracts are based on the following principles:

- A change in culture from a 'master-servant' to a peer relationship.
- All risks and rewards are shared on an agreed equitable basis. Sharing the pain and the gain.
- Outcomes where all parties either win or lose.
- A collective responsibility for the project.
- All parties have an equal say and all decisions must be ones that are the best for the project.
- A 'no-blame' integrated team culture.
- Full access to the resources, skills and expertise of all parties.
- A philosophy of delivering optimum commercial benefits and outstanding outcomes to all parties.
- A high performance culture with encouragement for innovative thinking.
- Open and honest communication with no hidden agendas.
- Support rather than blame and the honouring of all commitments made.
- An express commitment to resolve all issues within the alliance without recourse to litigation except in the case of wilful default.

This paper will examine the creative role that conflict plays within these systems.

## Project Alliancing and Relationship Contracting –

### Conflict Embracing Project Delivery Systems

The commencement of a commercial venture or the entering into an alliance between existing organisations provides a unique opportunity for the parties to plan an effective system to manage and resolve conflict.

Organisations can no longer afford to use the adversarial court system to resolve conflict. It is not just that the litigation costs are prohibitive; it is the disruption to the commercial relationship that causes the greatest commercial damage to organisations. It is the risk of the loss of commercial opportunity that is forcing organisations to reappraise how they deal with conflict.

The development of project alliances in Australia over the last ten years has provided examples of how organisations working on a common project can design effective ways to relate to each other and to resolve differences on the spot and without recourse to litigation and external mediation. All parties are required to immediately face and resolve conflicts without any delay.

There is a growing trend to use project alliances in the oil, gas and construction industries in Australia. The Queensland and the Australian Federal Governments have started using the project delivery systems for major infrastructure projects. The Pacific Motorway in Queensland, which involved both relationship contracts and project alliances, and the new National Museum in Canberra are recent examples.

The unique aspect of these project delivery systems are that there are no dispute resolution clauses nor are there and conflict management systems written into the contractual arrangements. These contractual arrangements are developed over a number of meetings and focus on risk sharing and relationship building strategies. They are built on the foundations of a fair days pay for a fair days work, a no blame culture, a proportional share of the risks and rewards, that all parties either win together or lose together and that all parties must perform to a standard that is better than “business as usual”.

#### THE PROJECT ALLIANCE PROCESS

There are a number of steps in the formation of a project alliance. The first is at the tender stage of the project where the parties are required, in no more than 30 pages, to nominate how they will manage their relationships with all other parties involved in the project. The tender documents make no mention of money nor do they seek lowest price tender bids. Parties are chosen only on the quality of their personnel and their ability to work in a team culture.

Money and price is excluded as criteria for selection. The only criterion is that the best people are chosen for the project.

Once the preferred alliance partner is selected they enter into an interim project alliance agreement with the owner in which the real costs of the project is determined. Everything including 'risers and falls', the weather and any other variables have to be factored into the total cost, as once the figure is set it cannot be changed. The parties are then bound to bring the project in at that cost with rewards for coming in under the amount and penalties for exceeding it.

The parties are then guaranteed 100% repayment for their full costs of the project plus an amount for profit based on a pre-agreed percentage of the total cost.

The benchmark for performance is what would be considered as normal good practice performance. The term that is used is "business as usual".

The next step is to agree to perform better than average (better than business as usual) in a number of key areas. These will often include bringing the project in under the agreed cost, by a certain date, causing no environmental damage, deaths or injury, creating good public relations, overcoming difficult site conditions and any thing else that is important to the project. These are called stretched goals or key performance indicators (KPI's). All parties agree on these KPI's and agree to receive an extra reward if they better them or lose some of their profit if they do not.

What makes this process unique is that the owner will accept half of the risk of meeting or not meeting the KPI's. The owner will take 50% of this risk with the remaining 50% being shared by the contractors, designers and sub-contractors. This creates a true alignment between all parties and the project outcomes.

At the completion of these negotiations the parties will then sign the project alliance agreement.

The result is the creation of a virtual company incorporating the owner and all the project participants. All decisions by the group have to be unanimous. Everyone is forced to focus on the project and trying to better the KPI's. There is no point competing with each other because the contract provides that everyone either wins or loses together.

Project alliancing is an approach that seeks to counter the traditional approach of trying to pass the commercial risks onto someone else. This is risk avoidance and leads to a misalignment of commercial interests. It is this inbuilt misalignment that leads to defensive tactics, self-interested decision-making and a breakdown in trust and human relationships. People forget about the project and start concentrating on strategic manoeuvres (and the black letter law contract) designed to preserve their own commercial position.

Project alliancing is based on an agreement that the risks will be borne by the party best able to manage those risks. This is a risk embracing strategy. Risks can be better

managed if they are identified and embraced. The owner taking on half of the risk reinforces this risk embracing strategy.

## THE ROLE OF LAWYERS

It is becoming common for organisations to want their commercial relationships to be relationship driven rather than being driven by their legal advisors' need to create fixed and binding agreements. There is a view at the executive level of organisations that the tradition of commercial lawyers designing complex legal agreements to avoid future litigation (and a professional negligence claim) hinders the creative fluidity that is needed to sustain commercial alliances and to produce outstanding results.

Increasingly we are seeing situations where there is pressure to exclude lawyers from the process of creating these commercial relationships. Corporations are voting with their feet and seeking ways that will ensure that their contract arrangements are relationship driven rather than lawyer driven. Unless lawyers embrace the concept of allowing the contractual formalities to be driven by relationship building imperatives rather than litigation imperatives they will find themselves isolated from this important area of commercial law.

Commercial lawyers of the future will need to become skilled in the process of human relationship building. The process skills developed by mediators and dispute systems designers will assist corporate lawyers, change managers, industrial psychologists and human resource managers in helping organisations create the dynamics that can lead to conflict resolution systems that are site specific and effective.

## RELATIONSHIP CONTRACTING

When a commercial relationship breaks down the parties are often left with a choice of either seeking a compromise or pursuing litigation. The decision about which path to take involves an exercise in risk assessment.

For the litigation option the risk assessment includes not only assessing the chances of success, factoring in the costs in time and lost opportunity, but also, more importantly, whether the likely decision is going to advance the commercial objective that the original agreement sought to achieve.

Seeking compromise has the advantage of being a circuit breaker of unproductive conflict. However, if the breakdown is over fundamental core issues, has been continuing for a substantial period of time and involves a significant breakdown in personal relationships then compromise might be nothing more than a simple patch up job.

Relationship contracting is an alternate approach. Put simply, it requires all parties to agree to place their existing agreement, together with all rights and obligations that flow

from it, into the top drawer and shut it. The parties then enter into a without prejudice renegotiation of their commercial relationships using the principles of project alliancing.

These negotiations take place in the shadow of the existing contract with all parties free at any time to take the existing agreement out of the drawer and pursue their rights.

The advantage of this approach is that it shifts the focus away from the parties expending time and energy defending a particular version of the agreement back to a focus onto the object of the commercial venture. It is directing the focus away from the past and onto the future.

An essential feature of relationship contracting and project alliancing is that the commercial arrangements are relationship driven rather than black letter contractual law driven. It is therefore important to engage in a robust selection process to get the right people for the job. The emphasis is on finding people who can complement each other and work in a team culture with a total focus on achieving outstanding outcomes and stretched goals. The aim is to create a high performance culture with outcomes beyond the ordinary. The people selected must not only have the technical capacity and understanding of alliance principles but most importantly they need to accept that having good interpersonal relationships is essential for success.

Once this new agreement has been presented then the parties can agree to reopen the top drawer and novate the old agreement or, if they choose, leave the agreement in the drawer and proceed in the shadow of the old agreement.

The following are examples of the core principles of most project alliances and relationship contracts:

- A change in culture from a 'master-servant' to a peer relationship.
- All risks and rewards are shared on an agreed equitable basis. Sharing the pain and the gain.
- Outcomes where all parties either win or lose.
- A collective responsibility for the project.
- All parties have an equal say and all decisions must be ones that are the best for the project.
- A 'no-blame' integrated team culture.
- Full access to the resources, skills and expertise of all parties.
- A philosophy of delivering optimum commercial benefits and outstanding outcomes to all parties.
- A high performance culture with encouragement for innovative thinking.
- Open and honest communication with no hidden agendas.
- Support rather than blame and the honouring of all commitments made.
- An express commitment to resolve all issues within the alliance without recourse to litigation except in the case of wilful default.
- All transactions to be fully open book.

- Unconditional and visible support from the top level of the participating organisations.

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ABSTRACT