OH&S considerations in alliancing

Awareness of the importance of OH&S has improved in recent years. Penalties for breaches of OH&S laws now include fines of up to $1,650,000 or 'naming and shaming' in the press for corporations and fines and/or imprisonment for individuals.[1] In addition, directors and persons concerned in the management of corporations may also be held to be individually liable where their corporation breaches OH&S laws.[2] Accordingly, alliance participants should not underestimate the impact that breaches of OH&S can have on their legal liability, project costs and profit.

OH&S - Basic duties

In all states and territories, employers and owners of land have duties (both statutory and at common law) in relation to the health and safety of employees and third parties at the workplace. In any alliance, it is important that these duties are satisfied by all the alliance participants they apply to. Examples of the types of duties that may apply include:

- a duty to ensure the health, safety and welfare of its employees at work;[3]
- a duty to ensure that non-employees are not exposed to health or safety risks at the place of work;[4] and
- as controllers of land/premises used as a place of work, or of plant or substances used at work, a duty to ensure that the land, plant and substances are safe and without risks to health when properly used (including providing adequate information to the user).[5]
- When considering the type of alliance to be used and when drafting the alliance contract itself, alliance participants should consider what are the potential consequences/risks associated with these and other OH&S duties/obligations. These consequences/risks will vary depending on the type of alliance used.

Pure and hybrid alliances

Both pure and hybrid alliances contain the same type of basic payment structure. This structure requires the owner to reimburse the non-owner participants for all properly incurred direct costs on an 'open book' basis but where the non-owner participants' profits and overheads are put at risk depending on the project outcomes.[6]

The main difference between these two types of alliances is that, in a pure alliance, alliance participants have collective ownership of all the risks (except in cases of wilful default[7]). As a result, pure alliance participants have no recourse to litigation or remedies against the other alliance participants (even if they are in breach or are negligent) other than through the painshare/gainshare regime.[8] In contrast, in hybrid alliances non-owner participants retain discrete liability for breaches of their individual or joint obligations under the alliance contract.

Principal contractor

In NSW, Queensland, Western Australia (and commencing 1 July 2008, Victoria), the owner of land is required (despite any risk sharing provisions in the alliance contract) to appoint someone to be the 'principal contractor' responsible for OH&S in relation to the construction work. A principal contractor, in addition to complying with any other provisions to which it is subject under the relevant OH&S laws, must comply with specific duties (such as ensuring induction training has been carried out)[9] associated with the construction work. In the event that no appointment is made, or where the owner chooses, the owner will be deemed to be, or will be, the principal contractor.

In alliance contracts involving the owner and one non-owner participant, the owner generally appoints that

participant as principal contractor. However, issues can arise in multi-party alliances. In multi-party alliances, the owner should identify the party best able to manage the OH&S risks (in terms of both the capacity to avoid/mitigate the risks and to do so cost effectively) and nominate it as the principal contractor. Nevertheless, simply nominating a party as principal contractor does not remove the exposure to liability for the owner, especially in pure alliances.

Owner's risks

Delays in completion or additional costs being incurred to remedy the works (as a result of damage or where improvement/prohibition notices are issued by the relevant authority[10]) may occur where the principal contractor fails to discharge its duties as principal contractor under the alliance (or equally, where a non-owner participant breaches any OH&S provisions). Under the discrete risk allocation in a hybrid alliance arrangement, these consequences would be the responsibility of the party which is the principal contractor. However, this is not the case for pure alliance arrangements.

As a result of the 'no blame, no dispute' clauses in pure alliances, even if the breach of OH&S or failure to discharge the duties of a principal contractor is a result of negligence or defective work practices, the owner would be unable to recover compensation from the offending alliance participant/principal contractor for any loss (unless there was wilful default). The offending alliance participant/principal contractor's loss would be (usually) capped at its profit and overheads.[11]

In both pure and hybrid alliances (absent wilful default), the owner would also be required to pay the direct costs to the other alliance participants despite any breach. These costs may include any fines issued to the offending alliance participant or claims made by injured third parties.

Principal contractor's risks in multi-party alliances

In multi-party alliances (whether pure or hybrid alliances), one needs to consider the interaction between the different non-owner participants and its effect on the principal contractor's obligations under the alliance contract and at law. A failure to follow the instructions of the principal contractor or another OH&S breach by other alliance participants may result in the principal contractor being considered to have failed to have discharged its duties as principal contractor. In both pure and hybrid alliances, this could result in loss or reduction in the principal contractor's ability to earn its 'gainshare'. Further, in a pure alliance there would be no means for recovering contribution for this loss from the offending alliance participant unless the breach is considered to be a wilful default.

In order to mitigate such risks, any non-owner participant appointed by the owner as principal contractor should consider entering into a separate agreement with the other non-owner participants requiring the other non-owner participants to comply with the instructions of the principal contractor as they relate to OH&S. However, there would also need to be consequences for the other non-owner alliance participants in failing to comply with instructions otherwise there is no incentive for compliance (as the other alliance participants would be aware the risk would predominantly lie with the principal contractor). Accordingly, a principal contractor should also consider including the following provisions in its separate agreement with the other non-owner alliance participants:

- allocating legal risks relating to OH&S between the non-owner participants in respect of any liability incurred as a result of breaches of OH&S laws by any non-owner participant; and
- providing that each non-owner participant will indemnify the principal contractor for its breaches of OH&S.

Further issues for consideration

No matter what type of alliance structure is chosen, in order to reduce risks to safety and possible costly breaches of OH&S laws, all alliance participants should cooperate in identifying risks and eliminating/controlling hazards to health and safety in the workplace. The owner should ensure that appropriate risk management procedures or protocols are in place[12], and further, that relevant insurances have been effected for such risks.

In hybrid alliances, owners can allocate risks to the principal contractor (and other non-owner participants). However, in pure alliances, owners may consider including the following to ensure increased compliance with OH&S laws (and a reduction in the exposure to liability for the owner):

- Adjust the weighting of the KPIs. In other words, if the owner increases the weighting of the KPI relating to health and safety, the potential for a higher reduction in profits and overheads under the alliance may act as an incentive for the non-owner participant/principal contractor to focus more attention on safety issues.
- Amend the definition of wilful default to provide that serious breaches of OH&S laws may be an exception to the 'no blame, no dispute' provisions. However, alliance participants need to be careful when drafting any such exception. If it is framed too broadly it may increase the risk of disputes occurring between the alliance participants (even if only to determine whether any breach was 'serious'). This in turn may result in an increase in costs (associated with any dispute) and put the cooperative nature of the alliance in jeopardy. Further, parties should consider agreeing what constitutes 'serious breaches' of OH&S laws on a quantitative rather than qualitative basis. For example, a

serious breach could be *"consistent breaches of OH&S laws"* or *"breaches with cost consequences in excess of $X"*. Parties should avoid 'controversial' issues resulting from placing arbitrary importance on one injury over another (that is, it would be difficult if not impossible to put a value on whether a loss of a limb is more important than loss of sight, or even loss of life).

Conclusion

There is no simple solution for an owner wanting to reduce its exposure to risks associated with breaches of OH&S laws. Essentially, it is a commercial decision whether the owner would prefer to accept the risks in a pure type alliance for potential OH&S breaches (in the hope that they may never materialise) or opt for a hybrid style alliance and leave OH&S risks contractually with the principal contractor (and other non-owner participants). Whatever approach is decided upon, alliance participants must recognise that they all have specific statutory OH&S obligations with which they must comply.

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(Endnotes)

1 See sections 12, 32A and 115, *Occupational Health and Safety Act 2000* (NSW). Note: This article refers to NSW OH&S laws, however similar duties exist in the other states and territories and under Commonwealth law. Alliance participants need to be aware of the specific OH&S laws that apply to their project.

2 Section 26, *Occupational Health & Safety Act 2000* (NSW).

3 Section 8(1), *Occupational Health and Safety Act 2000* (NSW).

4 Section 8(2), *Occupational Health and Safety Act 2000* (NSW).

5 Section 10, *Occupational Health and Safety Act 2000* (NSW). This duty can apply equally to both owner and non-owner alliance participants as there is no limitation on the number of persons considered to be in "control" at any one time.

6 [6] The risk to the non-owner participant's profits and overheads is as a result of the 'painshare/gainshare' mechanism in alliance payment provisions. This mechanism adjusts the entitlement to payment for profits and overheads either up or down depending on whether the project and the non-owner participants meet predetermined outcomes or 'KPIs'.

7 Wilful default is generally defined as containing (at least) three elements:

1 it is wanton or reckless;

2 it has foreseeable consequences which are harmful and unavoidable; and

3 it amounts to a wilful or utter disregard for those consequences.

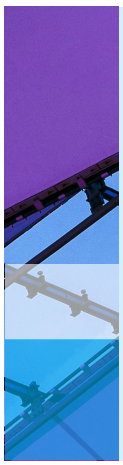
8 Note: detailed analysis and discussion on the legal validity of "no blame, no dispute" clauses except in the case of willful default is beyond the scope of this article. Note that nothing said in the alliance contract can exclude certain statutory rights (eg to sue for false and misleading conduct under the Commonwealth Trade Practices Act and State Fair Trading legislation).

9 Clauses 213-222 *Occupational Health* and *Safety Regulations 2001* (NSW).

10 See sections 91-94 *Occupational Health and Safety Act 2000* (NSW). An improvement notice can be issued by a WorkCover inspector and is a notice requiring the offending person to remedy the contravention or the matters occasioning it within the period specified in the notice. A prohibition notice is a notice prohibiting the carrying on of a specified activity which involves or will involve an immediate risk to the health or safety of any person (whether occurring or about to occur) until the matters which give or will give rise to the risk are remedied.

11 In accordance with the painshare/gainshare provisions within the alliance payment provisions.

12 Ensuring that appropriate risk management strategies are in place and that such strategies are implemented and continued to be utilised throughout the project may assist owners in defending alleged breaches of OH&S laws (by going towards satisfying the defence requirements in section 28 *Occupational Health and Safety Act 2000* (NSW).



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