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Construction Contracts
(LAWS: 730-806)

Research Assignment

'Is the no dispute clause in a project alliance agreement necessary and enforceable?'

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Introduction

The purpose of this paper is to determine whether or not the 'no dispute' clause in a project alliance agreement is necessary and enforceable.

Project alliancing is a distinct, project specific form of relationship contracting.[1] It was first developed by British Petroleum in the North Sea oil and gas projects during the early 1990's and has since matured as an execution tool for delivering major construction projects throughout Europe, and, increasingly in Australia.[2]

The concept of a 'project alliance' has been defined as "an agreement between two or more entities which undertake work co-operatively, on the basis of sharing project risk and reward, for the purpose of achieving agreed outcomes based on principles of good faith and trust and an open-book approach towards costs"[3].

Of all the new approaches on offer, project alliancing is said by some commentators to be the 'most innovative, it challenges many attitudes and practices which have long been entrenched in the industry.'[4] In essence, project alliancing attempts to overcome the adversarial approach to traditional contracting by offering a non-adversarial, incentive-based environment for project participants.[5]

Unlike traditional risk-transfer approaches to project delivery, project alliancing adopts a risk-embrace approach. The underlying rationale for this approach is that, in certain circumstances, "the owner can better manage its risks by embracing them (rather than

[1] Graham Thompson, 'Alliance Partnering as a Tool for Project Delivery' (Paper presented at the Building for Growth Innovation Forum, Sydney, 4-5 May 1998) 1-2. Note, Thompson distinguishes 'project alliancing' from other forms of relationship contracting such as 'partnering' and 'strategic alliancing'.
[2] GrahamThompson, 'Alliance Contracting in Construction – An International Perspective' (Paper presented at the The Earthmover and Civil Contractor Conference, Sydney, 11-12 December 2000) 2.
[3] J Prately, 'Project Alliancing: Does it work?' (1999) 15 *Building Australia* 2, 33. Citing presentation by Tony Abrahams, Director, Construction and Infrastructure, KPMG Legal.
[4] Graham Thompson, above n 1, 6.
[5] Doug Jones, 'Keeping the options open: alliancing and other forms of relationship contracting with Government' (Paper presented at The Earthmover and Civil Contractor Conference, Sydney, 11-12 December 2000) 1. For a detailed discussion on the limitations of 'traditional' contracting, refer to Bob Scott, *Partnering in Europe: Incentive based alliancing for projects* (2001), 10.

trying to transfer them) and then managing them with a flexible project delivery environment"[6].

While there is 'no rigid formula for the contractual structure of a project alliance,'[7] there are several common features inherent in a typical project alliance agreement. This paper focuses on the 'no blame, no dispute' clause which is an inherent feature in the contractual terms establishing the alliance.[8]

The no dispute clause imposes a severe limitation on having access to take a dispute beyond the Project Alliance Board. It challenges traditional adversarial attitudes, by restricting access to the courts for breaches of contract, unless the conduct amounts to a defined 'Event of Default.' The intention of such a clause is to encourage team participants to find solutions to problems within the alliance.[9]

An 'Event of Default' is generally limited to insolvency situations and 'wilful default'.[10] The term 'wilful default' is often given a very narrow meaning, such as 'an intentional act or omission carried out by an Alliance Participant without regard for the harmful consequences, but does not include errors or mistakes (including negligent acts or omissions), made in good faith by that Alliance Participant.'[11]

Although these express exceptions may not be exhaustive, the innocent party will often be left without any remedy for damages or losses resulting from other participants' negligent conduct or other breaches of its performance obligations under the contract.[12]

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[6] Robert Peck, 'Construction Law & Alliancing' (Paper presented at the University of Melbourne Graduate Studies, 20 March 2002) 14.
[7] Graham Thompson, above n 1, 8.
[8] Anthony Abrahams and Alan Cullen, 'Project Alliances in the Construction Industry' (1998) 62 *Australian Construction Law Newsletter* 31, 35.
[9] Jim Ross, 'Introduction to Project Alliancing (on engineering & construction projects)' (Paper presented at the Defence Partnering & Alliances Conference, Canberra, November 2001) 13.
[10] Ibid, 12.
[11] James Bremen, 'Alliance Contracting – Why Choose Alliancing?' (Paper presented at The Earthmover and Civil Contractor Conference, Sydney, 11-12 December 2000) 9.
[12] Doug Jones, above n 5, 11. Jones comments that the 'wilful default' exception generally 'impacts much harder on the owner than it does with the other participants, because most of the work is often carried out by non-owner participants'.

To date, there does not appear to have been a case which has specifically dealt with a dispute arising outside a project alliance agreement. This paper raises a number of issues which may potentially challenge the operation of the no dispute clause.

Your intro needed to set out how you intend to answer the question + the conclusion you will reach.

1. Is the no dispute clause void?

A no dispute clause expressly imposes an obligation on the parties to refer **any Alliance Disagreement** to the Project Alliance Board ("PAB") for a **final and binding** decision. If the PAB cannot resolve the dispute, there is a **bar upon any arbitration or litigation.**[13]

Some commentators argue that a clause requiring a reference for a 'final and binding' determination by a third party in respect of 'any' dispute, attempts to oust the jurisdiction of the Court, is contrary to public policy, and therefore void or unenforceable.[14] This issue has been considered, with regards to expert determination clauses, in two significant decisions.[15]

1.1 The decision in Baulderstone Hornibrook Engineering Pty Limited v Kayah Holdings Pty Limited (1997)[16]

In *Baulderstone's*[17] case, the Western Australian Supreme Court held that the expert determination clause was void on the basis that it purported to oust the jurisdiction of the court.

The parties entered into a sub-contract, whereby Kayah Holdings agreed to supply workshop drawings for the structural steel fabrication on a construction project managed

[13] An example of a no dispute clause is provided in appendix 'A'.
[14] Brad McCosker, 'Managing Conflict Within The Alliance' (Paper presented at The Earthmover and Civil Contractor Conference, Sydney, 11-12 December 2000) 12.
[15] The cases were *Baulderstone Hornibrook Engineering Pty Limited v Kayah Holdings Pty Limited* (1997) 14 BCL 277; and *Fletcher Construction Australia Limited v MPN Pty Limited* (Unreported, Supreme Court of New South Wales, Rolfe J, 14 July 1997).
[16] *Baulderstone Hornibrook Engineering Pty Limited v Kayah Holdings Pty Limited* (1997) 14 BCL 277 (*'Baulderstone's Case'*).
[17] Ibid.

by Baulderstone. Clause 20 of the agreement provided that if the parties could not resolve **any** dispute arising out of the contract:

> *"... then, either party may [request that] the dispute be resolved by the determination of an independent third party (the 'Referee')... If the parties cannot agree on the Referee... then either party may request the Chairman of the Institute of Arbitrators Australia to nominate the Referee...[The Referee] shall* ***act as an expert*** *and not as an arbitrator... The decision of the Referee shall be* ***final and binding****".*

A dispute arose between the parties, and Kayah sought to have the dispute referred to an independent third party. Baulderstone sought a declaration from the Court to have Kayah restrained from proceeding with the expert determination.

Justice Heenan observed that, as a general rule, the Court would recognise any procedure to which the parties have agreed to settle the dispute. His Honour referred to the enforceability of arbitration clauses under the *Commercial Arbitration Act* 1985, and held that even where the parties have not agreed to refer disputes to arbitration, such agreements may nevertheless be enforceable under contract law.[18]

The Court, however, reasoned that the main limitation imposed on contracting parties attempting to prescribe their own rule is that they cannot contractually oust the jurisdiction of the Court.[19]

In his reasoning, Heenan J referred to the approach taken by Justice Drummond in *Novamaze Pty Ltd v Cut Price Deli Pty Ltd* (1995)[20]. In *Novamaze*[21], Drummond J found that clause 13 of a franchise agreement was void and unenforceable, because it purported to give the franchisor powers which would prevent the franchisee from having recourse

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[18] Ibid (Heenan J).
[19] Ibid.
[20] *Novamaze Pty Ltd v Cut Price Deli Pty Ltd* (1995) 128 ALR 540.
[21] Ibid.

to the Courts for any cause of action, including any cause unrelated to the franchise agreement. Justice Drummond cited the following passage from *Dobbs v National Bank of Australasia Ltd* (1935)[22]:

> "No contractual provision, which attempts to disable a party from resorting to the Courts of Law, was ever recognised as valid. It is not possible for a contract to create rights and at the same time to deny the other party in whom they vest the right to invoke the jurisdiction of the court to enforce them"[23].

Applying this approach, Heenan J held that clause 20 operated to oust the jurisdiction of the Court for two reasons. First, the clause purported to make the referee's decision **final**, rather than making the determination nothing more than a condition precedent to a legal right capable of enforcement by action through the Court. Second, by giving the expert power to determine **any** dispute, this extended to matters of both fact and law, which fell beyond the allowable scope of the expert's expertise. His Honour took the view that it was impossible for a referee acting as an expert to determine such matters. By its very nature, the task was one for an arbitrator and not an expert.[24]

1.2 The decision in Fletcher Construction Australia v MPN Pty Limited (1997)[25]

The approach taken by Heenan J in *Baulderstone's*[26] case, is to be contrasted with the decision in *Fletcher Construction Australia Limited v MPN Pty Limited* (1997)[27], where the Supreme Court of New South Wales held that a similar dispute resolution clause did not purport to ouster the jurisdiction of the court.

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[22] *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643 (*'Dobbs' Case'*).
[23] Ibid.
[24] Above n 16 (Heenan J).
[25] *Fletcher Construction Australia Limited v MPN Pty Limited* (Unreported, Supreme Court of New South Wales, Rolfe J, 14 July 1997).
[26] Above n 24.
[27] Above n 25.

In *Fletcher's*[28] case, a dispute arose between Fletcher and MPN, an engineering consultant, under a novated contract. Fletcher sought to refer the dispute to expert determination pursuant to the expert determination clause which provided:

> *"If the Proprietor and the Engineer are in dispute regarding* ***any*** *matter arising from the performance, or as to the meaning of the Agreement, then either party shall... require that such a dispute be resolved by... an independent third party... The third party who has been agreed upon or appointed shall act as an* ***expert*** *and not as an arbitrator and that party's decision shall be* ***final and binding****".*

Justice Rolfe preferred the reasoning in *Dobbs v National Bank of Australasia Ltd* (1935)[29], and held that the parties may agree that a person, other than the Court, may determine disputes. He concluded that there was no ouster simply because the determination is described as final and binding. The Court will give effect to the expert's decision, provided that he or she has acted within the scope of the dispute resolution clause, or if there is some other vitiating circumstance that might make the decision ineffective.[30]

On this basis, Justice Rolfe concluded that the expert determination clause applied to the dispute in question and he dismissed MPN's cross claim. Unlike *Baulderstone's*[31] case, however, Rolfe J did not address the issue of whether an expert could determine matters of law.

Which decision - do you think is the right one ?

[28] Ibid.
[29] Above n 22.
[30] Above n 25 (Rolfe J).
[31] Above n 16 (Heenan J).

1.3 How might the decisions in Baulderstone's[32] case and Fletcher's[33] case impact upon the no dispute clause?

While the two Courts reached different conclusions, they were consistent in finding that a clause which purports to oust the jurisdiction of the Court is contrary to public policy and therefore void.

Further, the fact that a clause requires an independent third party to make a 'final and binding' decision in respect of 'any' dispute will not, in itself, ouster the jurisdiction of the Court. Rather, the issue to be determined is whether or not the dispute in question falls outside the discretion of the independent third party. Both Courts imposed limitations on this discretion.

In *Baulderstone's*[34] case, the Supreme Court of Western Australia held that an expert determination will be enforced, provided that the expert has acted within the allowable scope of his or her expertise. In *Fletcher's*[35] case, the Supreme Court of New South Wales held that even though the parties cannot exclude the jurisdiction of the Court, the expert's decision is susceptible of attack in Court if the expert has failed to comply with the terms of the agreement, or there is some other vitiating factor relevant to the decision.

Applying either approach, it therefore seems that the discretion of an independent third party to determine 'all' disputes is limited. Even where a clause has been deemed valid, there may be circumstances where a particular dispute either falls outside the expertise of the expert, or falls outside the terms of the agreement.

should Law been done, the first time you used the term

Accordingly, in an alliance agreement, it may be argued that the discretion of the Project Alliance Board (PAB) to determine 'any alliance disagreement' is subject to the limitations expressed in *Baulderstone's*[36] case and *Fletcher's*[37] case.

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[32] Ibid.
[33] Above n 25.
[34] Above n 16 (Heenan J).
[35] Above n 25 (Rolfe J).
[36] Above n 16 (Heenan J).
[37] Above n 25.(Rolfe J).

1.4 To what extent is the PAB's discretion limited?

To determine the limitations that might be imposed on the PAB's discretion, it is necessary to examine both the role and composition of the PAB, as well as the contractual terms which govern the alliance.

The PAB has been described as 'an entity, charged with managing the project. It is **not a legal structure** but constitutes a **group of people.**'[38] The PAB is comprised of one or two senior representatives from each participant,[39] and 'typically includes representatives from:

(a) the designer;
(a) the contractor; and
(b) the owner.'[40]

The relevant contractual terms governing the discretion of the PAB, typically include:

(a) that the PAB shall make a 'final and binding', 'unanimous' decision in respect of 'any alliance disagreement';
(b) the term 'any alliance disagreement' encompasses 'all disputes between alliance participants', except for 'events of default';
(c) the parties agree that the option of litigation is not available in respect of 'breach, act error or omission' which would otherwise give rise to an 'enforceable obligation at law or in equity'.[41]

Arguably, applying the approach taken in *Baulderstone's*[42] case, it seems that the discretion of the PAB should be limited to the overall expertise of each representative. More specifically, even though there are conflicting views as to whether or not an *expert*

[38] Andrew Stephenson, 'Alliance Contracting, Partnering, Co-operative Contracting Risk Avoidance or Risk Creation' (Paper presented at the Clayton Utz Major Projects Seminar, October 2000), 13.
[39] Jim Ross, above n 9, 2.
[40] Andrew Stephenson, above n 38, 13.
[41] Brad McCosker, above n 14, 8-11.
[42] Above n 16 (Heenan J).

can determine issues of *law*,[43] it is clear that such issues do not fall within the scope of the PAB's expertise. Indeed, even if we apply the approach taken in *Fletcher's*[44] case, it appears that the express terms of the agreement do not empower the PAB to determine issues of law.

what do you think? what is your opinion about how a court should rule on this?

Accordingly, if a dispute arises, involving matters of law or matters which fall beyond the scope of the PAB's expertise, it would be open to argue that the no dispute clause operates to ouster the jurisdiction of the Court, is contrary to public policy, and therefore void or unenforceable. The remainder of this paper will focus on the extent to which a party might be able to litigate a dispute and claim a remedy outside the alliance agreement.

2. The Implied Duty of Good Faith

An alliance agreement typically imposes an express or implied obligation upon the parties to perform their activities in **good faith**.[45] Some commentators argue that the promise of good faith is likely to be instrumental to the prospect of a no dispute clause being tested.[46] There is much debate as to what good faith in the performance of contracts actually means.

Justice Cole has commented that "there does not appear to be one universally accepted definition. As Professor Lucke has observed 'good faith has not just one but many

[43] Justice Heenan in *Baulderstone's case* (1997) 14 BCL 277 firmly took the view that it is impossible for an expert to determine issues of law. However, this approach is to be contrasted with cases where is has been held that experts can make decisions in respect of questions of law, for example: *Triano Pty Limited v Triden Contractors Limited* (Unreported, Supreme Court of New South Wales, Cole J, 22 July 1992); *Dobbs' case* (1935) 53 CLR 643, 651-654.
[44] Above n 25 (Rolfe J).
[45] Doug Jones, above n 5, 13.
[46] Brad McCosker, above n 14, 15.

meanings, as well as an unusual capacity to acquire expanded and altogether new meanings'...it is impossible... to formulate a single theory of good faith"[47].

Furthermore, in the context of a partnering arrangement, it has been suggested that due to the "uncertainty of the meaning of 'good faith', it is possible that a contractual inclusion of a requirement that the parties contract and conduct themselves in good faith might import an undesirable uncertainty into the contract with respect to the nature and ambit of that obligation"[48].

The implied duty of good faith is well recognised in the United States, and a number of civil law systems in Europe. While the United States has not yet settled on one particular definition, it is firmly established that the obligation of good faith includes a standard of **reasonableness** in the performance of contractual obligations. – authority for this?

Although the implication of good faith has not been accepted to the same extent in Australia, there are many indications that the time may be fast approaching, when the idea will gain explicit recognition in the same way that it has in Europe and the United States.[49]

Since the two New South Wales Court of Appeal decisions in *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992)[50], and *Hughes Bros Pty Ltd v Trustees of the Roman Catholic Church for the Archdiocese of Sydney and Anor* (1993)[51], there has been much debate concerning the extent to which Australian Courts might be willing to imply a term of 'reasonableness' upon parties to a construction contract.[52]

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[47] Justice Cole, 'Law – All in Good Faith' (1995) 10 *Building and Construction Law* 18, 19; Citing H K Lucke, 'Good Faith and Contractual Performance' in Finn (Ed), *Essays on Contract* (The Law Book Co Ltd, 1987), 160.
[48] John Tyrill, 'The Dark Side of Partnering' (1997) *Australian Construction Law Newsletter* 56, 36.
[49] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 264 (Priestley JA).
[50] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234.
[51] *Hughes Bros Pty Ltd v Trustees of the Roman Catholic Church for the Archdiocese of Sydney and Anor* (Unreported, Supreme Court of New South Wales, Priestley JA, 15 July 1993).
[52] Justice Cole, 'The Concept of Reasonableness in Construction Contracts' (1995) 10 *Building and Construction Law* 7, 7-17.

2.1 To what extent will a Court imply a term of 'reasonableness' upon parties to a construction contract?

In *Renard's*[53] case, the Court upheld an implied duty on the principal to act **reasonably** when exercising its contractual rights under cl 44.1 of NPWC Edition 3 (1981). Justice Priestley acknowledged the experience in the United States and took the view that the developments in America were important for Australian purposes. His Honour stated:

> "When the broad similarity of economic and social conditions in Australia and the United States is taken into account the foregoing matters all seem to me to argue strongly for recognition in Australia of the obligation similar to that in the United States"[54].

Priestley JA held that the principal had an obligation to act reasonably when exercising its power to issue a show cause notice, and a further obligation to act reasonably when deciding whether or not to terminate a contractor's work. His Honour imposed the obligation of reasonableness on the basis that the requirements for implication of a term noted in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977)[55] were satisfied, including the requirement that such a term was necessary to give **business efficacy** to the contract.

Priestley JA mentioned two instances where an implication of reasonableness may apply. First, where it is "necessary for the working" of a particular class of contracts which require the parties to act reasonably towards each other in the performance of their contractual obligations.[56] Second, where there is a "contractual intent" (not the parties' mental state), that the parties have a reasonable expectation to one another to act reasonably in the performance of their contractual obligations.[57]

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[53] Above n 50.
[54] Ibid 268 (Priestley JA).
[55] *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 52 ALJR 20.
[56] Above n 50, 261C (Priestley JA).
[57] Ibid 263 (Priestley JA).

Applying this test, Priestley JA held that the principal had acted unreasonably in the way it had used the show cause procedure, and was therefore in breach for wrongful termination of the contract.

The approach taken in *Renard's*[58] case was subsequently followed in *Hughes Brothers Pty Ltd v Trustees of the Roman Catholic Church for Archdiocese of Sydney and Anor* (1993)[59], and in *McIntosh v Dylcote Pty Ltd* (1999)[60]. Both cases concerned the obligations of parties when exercising their contractual rights to terminate the contract.

The facts of *Hughes'*[61] case involved the principal exercising its rights under NPWC Edition 3 (1981) to terminate a building contract. While the Court followed the decision in *Renard*[62], Priestley JA expressed a different approach towards the implied duty of good faith.

His Honour referred to 'practical commercial need of the principal to have the works completed in accordance with the contract,' yet found that 'it would not be difficult in ordinary circumstances for the principal to fulfil the reasonableness obligation.'[63] Priestley JA stated:

> "... it seems to me that the general expectation of commercial people would be that the principal **should** take into account any knowledge it has of the circumstances"[64].

On this basis, His Honour concluded that 'implying a term of reasonableness would not cause any undue or unacceptable inconvenience to principals in contracts adopting NPWC Edition 3 (1981).'[65]

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[58] Ibid.
[59] Above n 51.
[60] *McIntosh v Dylcote Pty Ltd* [1999] NSWSC 230 (Bryson J).
[61] Above n 51.
[62] Above n 50.
[63] Above n 51, 12 (Priestley JA).
[64] Ibid.
[65] Ibid.

While *Hughes'*[66] case and *Renard's*[67] case expressed sharply differing views about the implied duty of good faith, some commentators have dismissed the approach taken in *Hughes*[68], claiming that "the test of implication of a term... is whether it was necessary to give **business efficacy** to the contract...[not] whether there was a general expectation of commercial people that a principal... 'should' take such case knowledge into account"[69].

Indeed, the approach taken in *Renard's*[70] case was recently applied in *McIntosh v Dylcote Pty Ltd* [1999][71]. The facts of *McIntosh's*[72] case concerned a lease of a hotel which gave both parties the power to terminate the lease where the building was rendered *"unfit for habitation"*. Following the Woollongong floods, extensive damage was caused to the hotel, and the landlord gave notice of termination. Bryson J held that there was implied into the clause:

> 'there must be an implication that termination would only happen if the damage was such as to make termination appropriate, otherwise the lease would be futile, liable to be defeated by either party in relatively slight circumstances. It would lack **business efficacy** as a lease.'[73]

2.2 How do these decisions impact upon the standard of conduct required by alliance parties in the performance of their good faith obligations?

Applying the approach in *Renard's*[74] case, it seems that a court, particularly in New South Wales, may be willing to imply a term of 'reasonableness' upon parties in the

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[66] Ibid.
[67] Above n 50 (Priestley JA).
[68] Above n 51 (Priestley JA).
[69] Justice Cole, above n 52, 14.
[70] Above n 50.
[71] Above n 60, 14 (Bryson J).
[72] Ibid.
[73] Ibid, 14 (Bryson J).
[74] Above n 50 (Priestley JA).

performance of their good faith obligations, if it is necessary to give 'business efficacy' to the contract.

The difficulty with this, however, is that the implication of such a term is likely to introduce a considerable level of uncertainty into the contract. Parties need to know the nature and ambit of their contractual obligations. The implied term of 'reasonableness' is similar to the doctrine of 'good faith' in that it does not have a definitive meaning.

According to Justice Cole, the standard of reasonableness is "entirely subjective and probably indefinable. Judges have not sought to define reasonableness, and nor did either Priestley or Handley JJA in *Renard*. Rather, discussion has focussed upon the operation and application of the concept in particular circumstances, it being assumed that judges know what it means or at least how to apply its meaning in the given circumstances"[75].

Therefore, if a Court implies a term of 'reasonableness' upon parties to an alliance contract, it is likely to result in an interesting legal argument about the nature and ambit of their good faith obligations. For example, it 'may result in an obligation upon the parties to do all things within their power to give effect to the agreement's spirit of good faith, or, less widely, to act reasonably in all the circumstances.'[76]

In addition, recent case law suggests that parties to a partnering contract, which is based upon 'risk-sharing' principles, may be held liable for breaching their good faith obligations if they 'deliberately make false representations of cost estimates'[77] (this case is further discussed below in relation to fiduciary obligations).

Conclusively, if a Court finds that a party has breached its obligation of good faith (for example, by acting 'unreasonably' or by 'deliberately making false representations'), this would no doubt entitle the other alliance parties to claim a wide range of remedies which

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[75] Justice Cole, above n 52, 10.
[76] Doug Jones, above n 5, 13.
[77] *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd* (Unreported, Supreme Court of Western Australia, Ipp, Steyler and Wheeler JJ, 14 April 2000) (*Thiess' Case*).

would not otherwise be available under the no dispute guise. It may also result in an interesting legal argument about whether or not what would be regarded as 'unreasonable' (as in *Renard's*[78] case) is also 'unconscionable' within the meaning of s 51AC of the *Trade Practices Act 1974* (Cth) (discussed below).

3. Fiduciary Obligations

Fiduciary obligations are another example of courts imposing equitable duties upon parties to a contractual relationship. The standard imposed by fiduciary obligations is higher than the standard imposed by a duty of good faith.[79] In broad terms, a fiduciary is one who holds a position of trust and confidence in relation to another in such circumstances that the fiduciary is bound, to act in the best interests of the other party to the fiduciary relationship, over his or her own personal interests.[80] More specifically, the fiduciary must:

1. not misuse its fiduciary position to make an unauthorised profit; and
2. avoid any conflict of interest between its duty and its self interest.[81]

There is much debate as to whether parties to an alliance contract owe fiduciary duties to one another. It has been suggested that "project alliances may have the potential to inadvertently create fiduciary obligations owed mutually between the participants, because such arrangements rely on participants' acting in each others' interests"[82].

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[78] Above n 50.
[79] Justice Cole, above n 47, 27.
[80] Ibid; Citing Sir Anthony Mason, 'Contract and its Relationship with Equitable Standards and the Doctrine of Good Faith' (Paper presented at the Cambridge Lectures, 8 July 1993), 36.
[81] *Hospital Products Ltd v United States Surgical Corp and Ors* (1984) 156 CLR 41, 102 (Mason CJ) (*'Hospital Products' Case'*).
[82] Doug Jones, above n 5, 1; Citing M Misko and M Fielding, 'Performance-based Contracts: Some Legal and Contractual Issues' (Paper presented at FMA Australia, Performance Contracting Workshop, May 1999) 13.

Traditionally, Australian courts have been reluctant to impose fiduciary duties upon parties to commercial contracts, particularly where the parties are acting at arm's length, and are acting in their own interests and not in the interests of another party.[83]

In recent years, however, Australian courts have demonstrated an increasing willingness to extend the situations in which they have found fiduciary relationships to exist.[84] It appears that courts will generally impose fiduciary obligations upon parties if their relationship indicates that they are putting themselves in a position where they are placing **reliance upon each other to act in each other's interests over their own.**[85]

Indeed, there is authority in Australia for the proposition that fiduciary duties could arise in joint venture arrangements, where it can be found that the parties have put themselves in a position where they are placing **reliance** upon the undertakings of each other to serve exclusively the interests of the joint venture.[86]

For example, in *Schipp v Cameron & Others* (1998)[87], the Supreme Court of New South Wales emphasised the need to establish that the parties have made an undertaking to further their joint interests in the venture and to act so as to not prejudice that joint interest. The Court stated that the correct approach is to consider whether or not the relationship is based in some degree upon mutual confidences and co-operation, that each party is **reliant** on the other party to perform its role in good faith, each was vulnerable to abuses of power by the other, and that the parties engage in some kind of activity or transaction for their joint venture advantage only.

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[83] For example, Justice Gibbs in *Hospital Products' case* (1984) 156 CLR 41, 70 commented "[t]he fact that the agreement between the parties was of a purely commercial kind and that they had dealt at arm's length and on equal footing has consistently been regarded by this Court as important, if not decisive, in indicating that no fiduciary arose...".

[84] *Breen v Williams* (1996) 138 ALR.

[85] Andrew Komesaroff, 'An Overview of Business Structures for Resource Projects' (Paper presented at the AMPLA Victorian Branch Seminar, Victoria, 1 September 1999) 17-18.

[86] *Idemitsu Queensland Pty Ltd v Agipcoal Australia Pty Ltd* (Unreported, Supreme Court of Queensland, 24 March 1993); See also, L. Griggs, 'Joint Ventures, Partnerships and Fiduciary Obligations' (1994) 24 *The Queensland Law Society Journal* 1, 81.

[87] *Schipp v Cameron & Others* (Unreported, Supreme Court of New South Wales, 9 July 1998).

Indeed, the concept of fiduciary obligations in joint venture agreements, has also been considered in the context of partnering arrangements. It has been suggested that parties to a partnering arrangement who put themselves in a similar position to joint venturers, may be held bound by fiduciary obligations. The parties, "in identifying the respective goals for the project and mutually developing objectives for the partnering charter may be putting themselves in a position where the court will hold that they are placing **reliance** on each other, and will therefore be bound by fiduciary obligations"[88].

3.1 Is the concept of fiduciary obligations likely to extend to an alliance agreement?

By analogy, it seems that a Court may be willing to impose fiduciary obligations upon parties to an alliance agreement. Such a finding would, however, depend upon 'the facts and circumstances of the relationship, the form of the agreement, and the nature of the obligations undertaken by the parties. Put simply, the agreement acts as the foundation for the fiduciary relationship.'[89] It appears that two key elements must be shown:

1. that the parties have undertaken to serve **exclusively the interests of the alliance as a whole**, over their own personal interests; and
2. that the parties have placed **reliance** upon that undertaking.

There are a number of significant contractual features contained in an alliance agreement, which indicate that the parties have put themselves in a position where fiduciary obligations are imposed.

For example, it has been suggested that 'the Alliance Charter, despite it being a *broad motherhood* statement, has the potential to impose fiduciary duties upon the alliance participants.'[90] The alliance charter (otherwise know as the 'alliance mission statement'), in effect, sets out the respective goals and mutual objectives of the parties. 'Goals that are typically included in the alliance charter, encompass principles such as:

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[88] Doug Jones, *Building and Construction Claims and Disputes* (1996) 149.
[89] Andrew Komesaroff, above n 85, 18.
[90] James Bremen, above n 10, 4.

(a) working together towards the parties' common objectives;
(b) building on a relationship of trust, openness and fair dealing;
(c) ensuring delivery of the project to meet or exceed the performance criteria set in relation to key performance indicators;
(d) managing the delivery of the project in a way acceptable to the principal and to achieve satisfactory commercial outcomes for all alliance partners.'[91]

Collectively, principles such as 'working together', 'common objectives', 'relationship of trust', and 'outcomes for all alliance partners', clearly indicate that the parties have committed themselves to serving the interests of the alliance as a whole.

In addition, there are a number of other significant contractual clauses contained in a typical alliance agreement, which further suggest that the parties have undertaken to **exclusively** serve the interests of the alliance, over their own personal interests. For example:

(a) the parties "shall give as much weight to the interests of the project as to ones self interest"[92]. It has been suggested that 'even though this clause does not necessarily impose a fiduciary obligation upon the contractor (i.e. to '*act in the interest of another party over one's own*'), it indicates that the contractor may be unable to act in its own self interest in respect of its exercise of a right under the contract;'[93]
(b) the parties "shall commit themselves to a best-for-project approach"[94]. This clause, according to one commentator, requires the "parties to commit to acting in a way which is best for the project, putting the company's self interests second to those of the project"[95].

[91] Geoff Wood and Andrew Chew, 'Alliance Contracts – A Partnership In Business' (1998) *Australian Construction Law Newslettter* 60, 12.
[92] James Bremen, above n 10, 4.
[93] Ibid.
[94] Graham Thompson, above n 2, 7.
[95] Ibid.

Finally, given the fact that the overall alliance agreement is structured upon painshare/ gainshare principles, which operate to ensure that 'any pain or gain flowing from the alliance is shared between the alliance participants,'[96] it is clear that the parties are **relying** on each other to serve exclusively the interests of the alliance as a whole. That is, "we all win or we all lose together"[97]!

It therefore seems that the overall scope of the alliance agreement to give rise to fiduciary obligations is potentially higher than was the case in joint venture arrangements. Indeed, one commentator has gone so far as to suggest that, regardless of the finer legal points, the participants fully understand and intend those obligations to exist.[98]

3.2 How might fiduciary obligations impact upon the standard of conduct required by parties to an alliance contract?

It has been suggested that "if the concept of fiduciary obligations is applicable to alliancing, it would render the respective obligations of the participants significantly more burdensome. Participants would be obliged to disclose all relevant acts and circumstances, and not permit their own interest to conflict, or potentially conflict, with the interests of the other participants"[99].

The recent decision in *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd* [2000][100] is somewhat instructive as to how a court might interpret the standard of conduct required by parties who owe both fiduciary and good faith obligations to one another.

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[96] Note, Ross provides an excellent discussion on the painshare/gainshare structure of an alliance agreement, including risk reward/reward curves and ratios, alignment of goals, etc: Refer to, Jim Ross, above n 9, 6-9; See also, Graham Thompson, above n 2, 6.
[97] Jim Ross, above n 9, 13.
[98] Ibid.
[99] Doug Jones, above n 5, 14.
[100] *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd* (Unreported, Supreme Court of Western Australia, Ipp, Steyler and Wheeler JJ, 14 April 2000) ('*Thiess Case*').

In *Thiess*'[101] case, the Supreme Court of Western Australia had to determine a number of issues, including whether or not the contractor, had breached its contractual obligation of good faith, by deliberately giving the principal false estimates of plant costs under a partnering contract.[102]

The facts of the case, so far as relevant, involved a mining contract which was structured as a 'partnering contract' and incorporated 'risk-sharing' principles. The contract required the contractor, Thiess, to provide the principal, Placer, with a genuine estimate of its costs for the purpose of agreeing the rates in accordance with the contract. In the course of agreeing upon variations as to rates, Thiess knowingly gave Placer a false estimate of costs which contained elements of profit.

Placer terminated the contract in reliance on the termination for convenience clause. Thiess alleged that Placer's termination was unlawful, and that Placer should be estopped from relying on the termination clause. Placer counter-claimed alleging that Thiess had breached its obligation of good faith by deliberately providing a false estimate of mining costs. The Court found in favour of Placer, on the basis that the requirement for the contractor to provide a genuine estimate of its costs was an important element of the agreement.[103]

This decision indicates that Courts may recognise fiduciary duties in painshare/gainshare arrangements (i.e. not to make a secret profit) where parties have undertaken to perform their obligations in good faith. It also indicates that an owner may be able to seek a remedy outside the agreement where an alliance party has deliberately made false estimates of costs.

Do you agree with the decision?

[101] Ibid.
[102] The other issue which arose was 'whether or not the principal was estopped, by its conduct during pre-contractual negotiations, from relying on the termination clause contained in the partnering contract.'
[103] Above n 100, 172.

4. The Trade Practices Act 1974 (Cth)

4.1 Is the no dispute clause effective in excluding the application of the *Trade Practices Act 1974* (Cth)?

There is much debate as to whether Courts will "turn a blind eye to the efforts of draftsmen to exclude the operation of the TPA" in an alliance agreement.[104] While there is some authority for the proposition that a narrowly drafted **disclaimer clause** may be effective in limiting liability under the Act, by preventing the relevant conduct from being construed as misleading or deceptive,[105] it is firmly established that an **exclusion clause** which purports to exclude liability under the *Trade Practices Act 1974* (Cth) will not be not be effective to defeat a claim based on section 52.[106] A detailed discussion on the reasoning behind this stringent approach is beyond the scope of this paper.[107] However, in short, the following objections have been raised:

(a) an exclusion clause cannot break the causal nexus between the conduct in contravention of section 52 and the making of the agreement in issue;[108]

(b) if in fact, misleading or deceptive conduct has induced a contract, that fact cannot be negated by the mere circumstance that in a contract there is a clause stating the contrary;[109]

(c) the Act is a public policy statute which should not be ousted by private agreement so as to deny or prohibit a statutory remedy for offending conduct;[110]

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[104] Brad McCosker, above n 14, 16.

[105] *Karawi Constructions Pty Ltd v Bonefind Pty Ltd* (1993) ATPR 41-265, 41-265; *Abundant Earth Pty Ltd v R & C Products Pty Ltd* (1985) ATPR 40-532, 46, 289; *INXS v South Sea Bubble Co Pty Ltd* (1986) ATPR 40-667, 47,378 (Wilcox J). Note, for the United Kingdom position permitting disclaimers to be effective in limiting contractual liability, see *Norman v Bennett* [1974] 3 All ER 351.

[106] *Waltip Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) ATPR 40-975 (Pincus J); *Bryers v Dorotea Pty Ltd* (1987) 69 ALR 715, 725.

[107] For a detailed discussion on the reasoning behind this approach, refer to CCH, *Trade Practices Law Looseleaf*, vol 1 (at 67-2001) 5673 – 5686.

[108] *Dibble v Aidan Nominees Pty Ltd* (1986) ATPR 40-693, 47,619.

[109] *Burg Design Pty Ltd v Wolki* (1999) 45 IPR 201, 210-212 (Burchett J); *Bowler v Hilda Pty Ltd* (1998) 80 FCR 191, 207 (Heerey J).

[110] *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) ATPR 40-850, 49, 156 (Lockhart J) (Burchett and Foster JJ concurring).

(d) if the clause actually has the effect of excluding misleading or deceptive conduct, the clause will be effective, not by any independent force, but by actually modifying the conduct.[111]

Australian Courts appear to be particularly reluctant to limit liability under the Act where parties have engaged in misleading or deceptive conduct prior to entering into the contract. For example, in *Clark Equipment Australia Ltd v Covcat Pty Ltd* (1987)[112], it was found that during negotiations leading up to the lease of tree cutting equipment, the owner of the equipment represented orally and in a written brochure that the equipment could cut timber of a particular type at a particular rate. The capacity of the equipment was substantially less than was represented. The lessor relied on a clause in the lease agreement which provided that prior to signing the agreement, the lessee had examined the goods, relied on its own skill and judgement, and was satisfied that the goods were fit for the purpose required. The lessor's defence failed. Justice Sheppard stated:

> "The remedy conferred by s52 of the Trade Practices Act will not be lost **whatever the parties may provide in their agreement.** If a vendor of goods has engaged in misleading or deceptive conduct, the law makes that person accountable for loss or damage suffered as a result of the unlawful conduct. That conduct will usually have been committed, as in the case, prior to the signing of the contract. If, as a result of the conduct, a person is induced to enter into a contract and suffers a loss, an action to recover lies. The terms of the contract are irrelevant"[113].

The Court applied the reasoning of Justice Wilcox in *Petera Pty Ltd v EAJ Pty Ltd* (1985)[114] who stated that such clauses:

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[111] *Bentlist Pty Ltd v Olivetti Australia Pty Ltd* (1990) ATPR 41,043, 51,590 (Burchett J).
[112] *Clark Equipment Australia Ltd v Covcat Pty Ltd* (1987) 71 ALR 367
[113] Ibid, 371 (Sheppard J).
[114] *Petera Pty Ltd v EAJ Pty Ltd* (1985) 7 FCR 375.

"should not be allowed to defeat a claim based upon s52...", and that to do so "... would be to accept the possibility that a vendor might exacerbate his deception by actively misleading a purchaser as to the existence or nature of such an exclusion, and thereby ensure that he would escape liability" [115].

Applying this approach to an alliance agreement, therefore, it seems unlikely that the no dispute clause will be effective in excluding the application of the *Trade Practices Act 1974* (Cth).

4.2 Is the application of the *Trade Practices Act 1974* (Cth) likely to provide alliance parties with an avenue for statutory relief outside the contract?

4.2.1 Misleading and Deceptive Conduct: s 52[116]

It is arguable as to whether the conduct of alliance parties would attract liability for misleading or deceptive conduct under section 52 of the *Trade Practices Act 1974* (Cth). The relevant provisions of section 52 provide that:

"(1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive"[117].

While section 52 is expressed only to apply to the conduct of 'corporations,' each State has now passed similar legislative provisions to sections 51A-53 of the *Trade Practices Act 1974* (Cth), which are expressed to apply to individuals, not just corporations.[118] Indeed, Australian courts have adopted an expansive view towards the operation of section 52, holding that 'the interpretation of s52 should not be limited by its heading

[115] Ibid, 377-378 (Wilcox J); followed in *Bateman v Slatyer* (1987) 71 ALR 553, 561-562.
[116] *Trade Practices Act 1974* (Cth) s 52
[117] *Trade Practices Act 1974* (Cth) s 52.
[118] For example, the relevant provisions under the *Fair Trading Acts* for Victoria are ss11, 11A and 12, and in New South Wales, ss 11, 11A, and 12. These Acts apply to 'corporations' and 'individuals' engaged in supplying goods and services in the course of business.

'Consumer Protection.'[119] In short, to bring an action under section 52, it must be shown that the person or corporation has:

1. *"engaged in conduct"*
2. *"in trade or commerce"*
3. which is *"misleading or deceptive or likely to mislead or deceive"*[120].

A detailed discussion of these elements, is beyond the scope of this paper. However, it is important to note the following comments which highlight the broad application of section 52.

"engaging in conduct"

This provision includes positive conduct, for example, written or oral representations, providing advice, etc. It may also include deliberate inactivity, that is, failing to disclose information. There are strong grounds for accepting that silence may, in appropriate circumstances, constitute misleading or deceptive conduct. Indeed, section 4(2) provides that a reference to "engaging in conduct" shall be read as a reference to 'doing or refusing to do any act' which includes 'refraining from doing that act.'[121] At common law, the position is that mere silence will not amount to misleading or deceptive conduct unless, in the circumstances, there is an obligation to divulge.[122]

"in trade or commerce"

This phrase encompasses a wide range of activities which are of a 'commercial nature.' The section "is concerned with the conduct of a corporation towards persons, be they

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[119] *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594; *Hornsby Building Information Centre Pty Ltd v Sydney Information Centre Ltd* (1978) CLR 140 CLR 216; *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* (1993) ATPR 41-269.

[120] *Hornsby Building Information Centre Pty Ltd v Sydney Information Centre* (1978) ATPR 40-067 (Stephen J) (*'Hornsby's Case'*).

[121] *Trade Practices Act* (Cth) s 4(2).

[122] *Henjo Investments Pty Ltd v Marrickville Pty Ltd* (1988) ATPR 40-850, 49, 156 (Lockhart J) (Burchett and Foster JJ concurring).

consumers or not, with whom it... has or may have dealings in the course of those activities or transactions which, of their nature, bear a trading or commercial nature"[123].

"misleading or deceptive or likely to mislead or deceive"

The Act does not define *"misleading or deceptive conduct"*. What constitutes misleading or deceptive conduct is a question of fact to be objectively determined on the basis of the surrounding circumstances.[124] There are, however, a number of important matters relevant to the scope of the provision:

(a) the applicant does not have to establish **intent** upon the part of the corporation whose conduct is in question;[125]

(b) the applicant does not have to establish that a **contract** existed between the parties;[126]

(c) the words *"likely to mislead or deceive"* make it clear that there is no need to prove that anyone was **actually** misled by the conduct in question.[127] Rather, the court must consider the class or persons who are misled or deceived, or who are 'likely' to be misled or deceived;

(d) it is unnecessary to prove that any person has suffered a loss or damage as a result of the misleading or deceptive conduct. However, evidence of such a loss will be relevant in determining the quantum of damages, if any, to be awarded under section 82 or the relevant State *Fair Trading Act;*[128]

(e) in order to succeed in a claim for loss or damage, the applicant must show a **causal link** between the conduct and the loss suffered.[129]

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[123] *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594, 197.
[124] *Prospero Publishing Pty Ltd v Rumcoast Holdings Pty Ltd* (2000) ATPR 41-762.
[125] *Hornsby's case* (1978) ATPR 40-067; *Keehn v Medical Benefits Fund* (1977) ATPR 40-047.
[126] *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* (1993) 42 FCR 470, 41,647.
[127] *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) ATPR 40-307.
[128] In Victoria, section 37 of the *Fair Trading Act* provides that an action in damages may be brought.
[129] *Bond Corporation Pty Limited v Thiess Contractors Pty Ltd & Ors* (1987) 71 ALR 615 (*'Bond's Case'*).

Given the broad application of the above factors, it is clear that section 52 has wide ranging implications for the building and construction industry generally. Indeed, some commentators claim that section 52 is now part of the "staple diet"[130].

It is therefore foreseeable that an aggrieved party to an alliance agreement may seek to assert that the conduct of another party constitutes misleading or deceptive conduct under section 52. There are a number of reasons for this:

First, 'project alliancing' has been described as "strictly a business relationship" which is built upon "commercial" principles.[131] Therefore, there can be little doubt that most of the conduct between alliance participants in relation to their 'commercial' dealings, will be caught by the phrase *"in trade or commerce"*.

Second, it is likely that a claim based upon section 52 will arise out of the pre-contractual conduct of parties to an alliance agreement. The construction industry has increasingly used section 52 to provide a remedy in relation to conduct arising outside the contract. For example, misrepresentations made during pre-contractual negotiations, quantity surveyor reports, geotechnical reports, advice given at pre-tender meetings, etc.[132]

The case of *Bond Corporation Pty Limited v Thiess Contractors Pty Ltd & Ors* (1987)[133] is a good example of how section 52 can apply to representations made outside the contract. In *Bond's*[134] case, it was held that the giving of professional advice by a consulting engineer, prior to the principal engaging the contractor, fell within the class of conduct engaged *"in trade or commerce"* under section 52.

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[130] Kieran Tapsell, 'Uncertainty Creep in Building Cases' (2001) 17 *Building and Construction Law*, 87.
[131] Graham Thompson, above n 1, 8; Citing Bob Scott, 'Partnering and Alliance Contracts: A Company Viewpoint' (1994).
[132] For a detailed discussion on how section 52 might apply to the representations made by parties outside a construction contract, refer to John McMullan, 'Remedies Outside the Contract' (Paper presented at the Engineering Contracts Course, Engineering Education Australia, Victoria, 2001); Citing *Bond Corporation Pty Limited v Thiess Contractors Pty Ltd & Ors* (1987) 71 ALR 615.
[133] *Bond's case* (1987) 71 ALR 615; applied in *Johnson Tiles Pty Ltd v Esso Australia Ltd* [1999] FCA 569.
[134] Ibid.

The principal, Bond Corporation, had engaged a firm to act as consulting and supervising engineers for road, earth and drainage works. Following the calling of tenders, and acting on the advice of the consulting engineers, Bond entered into a contract with the contractor to carry out the works.

Bond brought an action against the consulting engineer, claiming that the firm had misrepresented its experience and expertise in the design and supervision of the works, and had failed to provide competent engineers with sufficient expertise to provide accurate estimates of work and subdivisional costs. Bond claimed that as a result of it relying on the consulting engineer's advice, it would have to pay more than $5.4M in excess of the estimated total cost of the development. While the Court held that the consulting engineer had misrepresented its experience and expertise, Bond failed to establish a causal link between the misleading conduct and the damage complained of.

In light of this decision, it seems that s52 would similarly apply to the conduct of alliance parties outside the contract. For example, a claim for misleading or deceptive conduct may arise:

(a) during the selection process, where prospective alliance participants are required to make representations about their level of 'expertise, experience, resource capabilities, etc in order to meet the rigorous selection criteria.'[135] If these representations are deemed to be *"misleading or deceptive"*, then such conduct may, depending on the circumstances, give rise to a claim under section 52; or

(b) where an alliance party has made pre-contractual representations about the design, quality, or scope of the works, but has not followed through in practice by actually producing these benefits.

[135] Jim Ross, above n 9, 9-10.

While some commentators claim that "to make the designer or contractor liable for damages in the event of non-performance, is destructive of the team"[136], the cost consequences for defective or late design can be significant.[137] In such circumstances, an aggrieved alliance party (often the owner) may well seek to claim a remedy under section 52 in order to compensate for the loss and damage suffered;[138] or

(c) where a party has led the other party to believe that it has made full disclosure prior to entering into the alliance agreement, but it subsequently transpires that there existed other relevant information which it has not disclosed. Indeed, according to the experience of one commentator, the failure to disclose all issues and information has been a problem in project alliance contracting.[139]

The case of *Abigroup Contractors Pty Limited v Peninsula Balmain Pty Limited* (2001)[140] is a recent example of how section 52 can apply to the failure to disclose information during pre-contractual negotiations. In that case, the Supreme Court of New South Wales held that the principal, Peninsula, was liable for misleading and deceptive conduct under section 52, for failing to disclose to the contractor that it had entered into a separate, pre-contractual agency agreement with the superintendent company.

The agency agreement provided that the superintendent company was to act as the principal's agent 'in all matters relating to the design and construction of the project', including the functions of the superintendent under the construction contract.

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[136] Graham Thompson, 'Project Alliances' (Paper presented at the 21st AMPLA Conference, 24 July 1997) 8; Citing Bob Scott, 'Partnering and Alliance Contract: A Company Viewpoint' (1994).
[137] Andrew Stephenson, above n 38, 14; Note, Stephenson provides a detailed discussion on the difficulty in claiming design liability insurance in project alliancing, and comments that PI insurers "will not pay unless the designer is liable"; See also, Jim Ross, above n 9, 12: who suggests that 'it is necessary to make a legal claim against a design consultant in order to trigger a conventional PI insurance policy.'
[138] Ibid 14; Stephenson suggests that due to the risk associated with design liability insurance, the risk 'rests firmly with the owner.'
[139] Graham Thompson, above n 2, 8.
[140] *Abigroup Contractors Pty Limited v Peninsula Balmain Pty Limited* [2001] NSWSC 752 (*'Abigroup's Case'*).

The Court, in considering whether or not the principal had engaged in misleading or deceptive conduct, referred to a number of earlier cases dealing with the duty to disclose,[141] and found that 'silence' is 'unacceptable' where there is a 'reasonable expectation' that 'relevant' or 'material' information will be disclosed.[142]

The court also referred to the principles of 'fairness and justice' adopted by Justice Macfarlan in *Perini Corporation v Commonwealth* [1969][143], and found that that the construction contract had envisaged a 'dual role' of the superintendent to perform its functions "fairly and with a due measure of impartiality" [144].

It was held that Peninsula had led the contractor into 'an erroneous understanding about the central feature of what was to become the contract between them, and that the contractor would not have entered into the construction contract, had it known of the undisclosed agency agreement.'[145]

On this basis, the court awarded damages to the contractor equal to the amount it would have been entitled to under a *quantum meruit* claim, for the work it had carried out, had the contract been void from the start.

This case suggests that the *Perini*[146] principles of 'fairness and justice' will play an important role in determining whether or not the parties have engaged in misleading or deceptive conduct during pre-contractual negotiations. It also suggests that terms in which parties engage one another must operate fairly towards the interests of all parties to the agreement. This issue is further addressed below in relation to section 51AC of the *Trade Practices Act 1974* (Cth).

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[141] The Court cited the following cases, 90:*Winterton Constructions Pty Ltd v Hambros Australia Ltd* (1992) 39 FCR 97 (Hill J) (Handley JA, Sheller and Stein JJA concurring); *Australian Development Perini Corporation Pty Ltd v White Constructions Ltd* [2001] NSWCA 9; *Lam v Austinel Investments Pty Ltd* (1990) 97 FLR 458; *Fraser v NRMA Holdings Ltd* (1995) 55 FCR 452.
[142] *Abigroup's case* [2001] NSWSC 752, 90, 92.
[143] *Perini Corporation v Commonwealth* [1969] 2 NSWR 530 (*'Perini's Case'*).
[144] *Abigroup's case* [2001] NSWSC 752, 79, 80; Citing *Perini Corporation v Commonwealth* [1969] 2 NSWR 530 (Macfarlan J).
[145] *Abigroup's case* [2001] NSWSC 752, 108.
[146] *Perini's case* [1969] 2 NSWR 530.

Overall, it is clear that the scope of section 52 has wide ranging implications to the conduct of parties to an alliance arrangement. The section can be used by parties to seek statutory relief which would not otherwise be available under the alliance guise.

4.2.1.1 Promissory Estoppel

In addition to section 52, and for the purposes of this discussion, it is possible that the conduct of parties to an alliance agreement might also attract relief under the equitable doctrine of promissory estoppel.

The fundamental purpose of all estoppels is to afford "protection against the detriment which would flow from a party's change of position if the assumption that led to it were deserted"[147]. Promissory estoppel is one member of the estoppel family. It is concerned with enforcing representations or promises as to future conduct, including promises not to enforce contractual rights, in circumstances where it would be unconscionable to do so. The doctrine has broadly extended itself to conduct, not just representations, and to commercial relationships where there is no contract.[148]

In short, the doctrine of promissory estoppel by conduct arises where:

1. there is a representation or promise by one person to another that it will not insist upon its strict legal rights; and
2. the other party reasonably relied on the representation or promise; and
3. detriment would be suffered if the party making the representation or promise were permitted to resile from it.[149]

If these elements can be shown, the party making the representation will generally be estopped from resiling from its representation that it will not insist upon its strict contractual rights. Similar issues arise under the doctrine of waiver, which is concerned

[147] *Commonwealth v Verwayen* (1990) 170 CLR 394, 330 (Mason CJ).
[148] *Waltons Stores (Interstate) Limited v Maher* (1988) 164 CLR 387, 520-521, 524 (Mason CJ and Wilson J).
[149] Above n 147, 429 (Brennan J); Citing *Waltons Stores (Interstate) Limited v Maher* (1988) 164 CLR 387.

with the unilateral release or abandonment of a legal right, which may be express or implied.[150]

In the context of a partnering arrangement, it has been suggested that the doctrines of promissory estoppel and waiver are likely to arise out of the conduct of parties during pre-contractual negotiations and Partnering workshops, where:

(a) the principal has verbally represented that it will not insist on compliance with certain contractual provisions; or
(b) the principal, by its conduct, has not previously insisted on strict contractual compliance; or
(c) the principal, by its conduct, has allowed the contractor to proceed on the assumption that it would not insist on its strict contractual rights.[151]

By analogy, and in light of the previous discussion under section 52, it is likely that the doctrine of promissory estoppel (and possibly waiver) could arise out of the pre-contractual representations made by alliance parties.

For example, prior to entering into the alliance agreement, the alliance candidates are required to attend a series of development workshops and interviews. During this time, the owner will outline the overall scope of work and discuss the project objectives. 'It is important that the owner behaves in a manner which clearly demonstrates the alliance principles in action. For instance, the owner should:

(a) always do what it says it is going to do;
(b) show respect and consideration to the needs and concerns of proponents;
(c) communicate openly, honestly and effectively; and
(d) send consistent signals at all times.'[152]

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[150] Ibid, 423 (Brennan J); Citing Lord Hailsham in *Banning v Wright* [1972] 1 WLR 972, 979.
[151] Michael Thompson, 'The Australian Environment and The Future of Partnering' (1994) *Australian Construction Law Newsletter* 38, 47.
[152] Jim Ross, above n 9, 10.

Therefore, if an owner, by its conduct:

(a) makes representations which indicate that it will not insist on compliance with certain contractual provisions (for example, scope variation provisions); and
(b) these representations are subsequently relied upon; and
(c) detriment would be suffered by the other alliance parties if the owner were permitted to refrain from its representation; then
(d) it would be open to a party to assert that the owner should be estopped from enforcing its contractual rights under the alliance agreement.

In conclusion, if it is found that the doctrine of promissory estoppel applies to the conduct of parties to an alliance, this would not only entitle a party to seek equitable relief, but may also trigger a claim for misleading or deceptive conduct under section 52 of the *Trade Practices Act 1974* (Cth).

4.2.2 Unconscionable Conduct: s 51AC[153]

It has been predicted that, in time, section 51AC of the *Trade Practices Act 1974* (Cth) is likely to grow to cover a field as broad as section 52, and that it will eventually become a 'remedy of choice' in commercial matters, including the building and construction industry.[154]

Section 51AC was inserted into *Trade Practices Act 1974* (Cth) in 1998. The section prohibits a 'corporation' or 'person' from engaging in 'unconscionable conduct' in commercial transactions involving the supply of goods or services of a value of less than $3,000,000.[155] The relevant provisions of section 51AC provide:

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[153] *Trade Practices Act 1974* (Cth) s 51AC.
[154] Peter Merity, 'The Return of Conscience: Section 51AC of the Trade Practices Act 1974' (1999) 15 *Building and Construction Law*, 313.
[155] Note, the transactional limit in s51AC was recently increased from $1 million to $3 million by the *Trade Practices Amendment Act* (No 1) 2001.

"(1) A corporation must not, in trade of commerce, in connection with:

(a) the supply or possible supply of goods or services to a person (other than a listed public company) or;

(b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company);

engage in conduct that is, in all the circumstances, unconscionable"[156].

Note:

- the same provision is expressed in section 51AC(2)(a)(b) with regards to *"person(s)"*;
- the person to whom the goods are supplied is referred to as a *"business consumer"* and the supplier as a *"small business supplier"*.

The purpose of section 51AC is to prevent dominant parties in commercial transactions from taking unfair advantage of small business consumers.[157] While the section does not appear to have yet been used in a building or construction matter, some commentators claim that the section 'immediately extends the reach of unconscionable conduct to many building disputes,'[158] by offering protection to weaker parties such as 'some contractors' and 'most subcontractors.'[159]

The Act does not define *"unconscionable conduct"*, rather, it draws upon decided cases for its common law or equitable meaning.[160] However, the expression *"unconscionable"* is given further meaning by the factors contained in section 51AC(3) which set out a non-exclusive list of considerations to which the court may have regard.

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[156] *Trade Practices Act 1974* (Cth) s51AC.
[157] *Monroe Topple & Assocs Pty Ltd v Institute of Chartered Accountants in Aust* (2001) ATPR (Digest) 46-212.
[158] Kieran Tapsell, above n 130, 87.
[159] Guy Solling, 'Construction Industry Contract (CIC-1) Edition 2 Commentary' (1999) 15 *Building and Construction Law*, 112.
[160] Peter Merity, above n 154, 305.

Many of these considerations appeared in the earlier section, s51AB, which attempted to clarify the doctrine of unconscionability by prescribing a list of factors, which went beyond the traditional categories of 'special disadvantage' previously identified in cases such as *Blomley v Ryan* (1956)[161] and *Commercial Bank of Australia Ltd v Amadio* (1983).[162]

Some of the factors contained in section 51AC (3) include:

- the relative bargaining strength of the parties;[163]
- whether any undue influence or pressure was exerted on, or any "unfair tactics" were used by one party against the other;[164]
- the requirements of any applicable industry code;[165]
- the failure to disclose some future conduct which might affect the interests of the other party;[166]
- the extent to which the stronger party was willing to negotiate the terms and conditions of any contract for supply of the goods or services with the weaker party;[167]
- The extent to which the stronger party and the weaker party acted in good faith.[168]

Prior to these sections, courts would have relied upon equitable concepts such as mistake, duress, undue influence, forfeiture, penalty, unjust enrichment, estoppel, and possibly good faith in determining whether something was *"unconscionable"*.[169]

To date, however, section 51AC has expanded the doctrine of unconscionability to include factors such as industry codes, the bargaining position of the supplier, and the

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[161] *Blomley v Ryan* (1956) 99 CLR 362, 405 (Fullagar J).
[162] *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 462 (Mason J).
[163] *Trade Practices Act 1974* (Cth) s 51AC(3)(a).
[164] *Trade Practices Act 1974* (Cth) s 51AC(3)(d).
[165] *Trade Practices Act 1974* (Cth) ss 51AC(3)(g)(h).
[166] *Trade Practices Act 1974* (Cth) s 51AC(3)(i).
[167] *Trade Practices Act 1974* (Cth) s 51AC(3)(j).
[168] *Trade Practices Act 1974* (Cth) s 51AC(3)(k).
[169] Peter Merity, above n 154, 309.

extent to which the supplier was willing to negotiate the terms and conditions of the contract. It has been suggested that the 'shopping list' of factors to which the Court may have regard under section 51AC 'means that parties to litigation will have a far greater range of inquiry for the presentation of evidence in order to show that there was unconscionable conduct.' [170]

The potential scope of the provision was recently considered in *Australian Competition & Consumer Commission v C G Berbatis Holdings Pty Ltd* (2000).[171] In that case, the ACCC brought proceedings against a landlord who refused to renew various leases except on terms that the tenants withdrew legal proceedings which they had already commenced. Although this case only dealt with the issue of whether or not s51AA was unconstitutional (s51AA deals with 'unconscionable conduct within the unwritten law of the States and Territories'), Justice French stated:

> "There is no reason to suppose that the unconscionable conduct prohibited by ss51AB and **51AC** is limited by reference to specific equitable doctrines. The factors to which the court may have regard for the purpose of determining whether there has been a contravention of those sections include undue influence and duress and other issues falling outside the equitable doctrines to which reference has been made. And even then, the listed factors in those section do not limit the matters to which the Court may have regard... The **categories of unconscionable conduct for the purposes of ss51AB and 51AC will never be closed"**[172]. (emphasis added ?)

[170] Kieran Tapsell, above n 130, 87, 90.
[171] *Australian Competition & Consumer Commission v CG Berbatis Holdings Pty Ltd* [2000] FCA 2
[172] Ibid, 24, 25 (French J).

4.2.2.1 How might section 51AC apply to the building and construction industry generally?

One significant factor which has attracted much debate in the construction industry is section 51AC(3)(j) which provides that the Court may have regard to 'the extent to which the stronger party was willing to negotiate terms and conditions of the contract with the weaker party.'[173] It has been suggested that this factor may apply in a number of standard form construction contracts such as CIC-1[174] and PC-1[175] where one party has refused to negotiate the terms. Two arguments have been raised:

First argument:

(a) if an owner refuses to negotiate terms with a contractor (that is, the contractor must accept the job based on the standard terms contained in CIC-1 or PC-1 on a 'take it or leave it basis');
(b) then there has clearly been no negotiation of terms, either at the time of the standard form contract's preparation or at the time of its use in the field.

Accordingly, the owner may be exposed to a claim for 'unconscionable conduct' if the contractor is a *"small business"*.

Second argument:

(a) even if the owner is not a *"big business"*, if the contractor is a *"big business"* and fails to negotiate terms with its subcontractors (which are much more likely to be *"small businesses"*) by simply passing on risks assumed under the standard terms contained in CIC-1 or PC-1;
(b) then this may result in the contractor being engaged in the 'unconscionable conduct' instead. Put simply, the owner will have transferred any liability on to its *"big business"* contractor.[176]

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[173] s 51AC(3)(j).
[174] Guy Solling, above n 159, 131, 112.
[175] Guy Solling, 'Project Contract (PC-1) Commentary' (1999) 15 *Building and Construction Law*, 241.
[176] Ibid; Guy Solling, above n 159.

In light of these arguments, however, it is important to note that the fact that one party (*"big business"*) has refused to negotiate terms with a weaker party, does not, in itself, constitute 'unconscionable conduct'; it is merely an indication to which the Court may *"have regard"*.[177]

Recent case law suggests that 'something more' has to be shown before there is *"unconscionability"*. What is the 'something more' is the uncertainty. The case of *Hurley v McDonald's Australia Ltd* [1999][178] is somewhat instructive on this issue.

In *Hurley's*[179] case, the Full Court of the Federal Court was dealing with a competition by McDonalds in which the plaintiffs claimed they had ~~one~~ won prizes. McDonalds relied on the competition terms to reject the claim. The plaintiffs alleged that it was unconscionable to do so. The Court stated that the term 'unconscionable' referred to in ss51AB and 51AC carries the meaning given by the Shorter Oxford English Dictionary, namely:

> "actions **showing no regard for conscience,** or that are **irreconcilable with what is right or reasonable...** the term import[s] a **pejorative moral judgement"**[180];

and concluded:

> "Before sections 51AA, 51AB or 51AC will be applicable, there must be some circumstance other than the mere terms of the contract itself that would render **reliance on the terms of the contract 'unfair' or 'unreasonable' or 'immoral' or ' wrong'... [m]ere reliance on the terms of a contract cannot, without something more, constitute unconscionable conduct"**[181]. emphasis added?

[177] The expression "have regard" in s51AC(6) means no more than to take into account or to consider: *Australian Competition and Consumer Commission v Leelee Pty Ltd* (2000) ATPR 41-742, at 40,602.
[178] *Hurley v McDonald's Australia Ltd* [1999] FCA 1728, at 31.
[179] Ibid.
[180] Ibid, 22.
[181] Ibid, 31.

This passage clearly suggests that courts will focus on the **conduct** of parties to determine whether or not it would be 'unfair, unreasonable, or immoral' for parties to insist on their strict contractual rights. In this sense, it seems that even if the contract is replete with potentially unfair terms, so long as the dominant party does not attempt to enforce those terms in an unconscionable way, no unconscionable conduct has occurred.[182]

An example of unfair contractual terms, which may potentially be exercised in an 'unconscionable' way, can be found in the case of *Abigroup Contractors Pty Limited v Peninsula Balmain Pty Limited* (2001)[183] which involved the undisclosed agency agreement between the principal and the superintendent (discussed earlier). Although that case involved a claim under section 52, it has been suggested that s 51AC will 'become ideally adaptable to the building industry where a superintendent exercises its unfettered discretion in an unconscionable way.'[184]

4.2.2.2 How might section section 51 AC apply to an alliance agreement?

In the context of project alliancing, it is unlikely that the alliance parties could be held liable *towards one another* for unconscionable conduct under sections 51AC and 51AC(3)(j). There are two reasons for this:

- first, the terms of the contract are based upon principles of equitable risk-sharing, fairness, open and honest communications, trust, integrity etc.[185] It is therefore unlikely that such terms could be exercised in an unconscionable way; and
- second, project alliance contracting, to date, has typically been used to deliver major construction projects[186] such as the National Museum, which are likely to fall outside the $3M limitation imposed by section 51AC.[187]

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[182] Peter Merity, above n 154, 311; Citing *Cook v Bank of New South Wales* (1982) 2 BPR 9580; *Westpac Banking Corp v Sugden* (Unreported, Supreme Court of New South Wales, Brownie J, 21 October 1987).
[183] *Abigroup Contractors Pty Limited v Peninsula Balmain Pty Limited* [2001] NSWSC 752.
[184] Peter Merity, above n 154, 311; Merity claims that s51AC is "ideally adaptable to the building and construction industry where contracts often give unfettered discretion to superintendents or architects to determine such things as progress claims, where such a discretion is, as a general rule, desirable. It merely means however that, in the exercise of that unfettered discretion, they must not act unconscionably".
[185] Graham Thompson, above n 2, 5-7.

However, it is foreseeable that sections 51AC and 51AC(3)(j) might offer protection to some subcontractors (non-alliance participants) who are supplying goods or services to contractors within the alliance. For example:

- if a contractor refuses to negotiate its contractual terms with its subcontractors (non-alliance partipants) for the supply of goods and services of a value of less than $3M; and
- the contract contains potentially unfair terms, which are subsequently exercised by the contractor in an 'unconscionable' way;
- it would be open to a subcontractor to assert that the contractor was liable for 'unconscionable conduct' under section 51AC.

Conclusively, section 51AC appears to have wide ranging implications to the construction industry generally, and may similarly gain application in the context of project alliancing. The section could potentially be used by an owner to *transfer* its liability for 'unconscionable conduct' on to its contractors who are dealing with *"small business"* subcontractors (non-alliance parties). This, no doubt, would be contrary to the *risk-embrace* principles which form the basis of the no dispute clause.

[186] Ibid.
[187] A detailed discussion on small alliance projects (of a value of less than $3M) is beyond the scope of this paper.

Conclusions

It is unlikely that the no dispute clause will be effective in restricting parties from taking a dispute beyond the alliance board. The rights of parties to claim a remedy outside the contract are clearly not limited to defined 'events of default.' While there has not yet been a case which has specifically dealt with a dispute arising outside an alliance agreement, it cannot be assumed that parties will always reach an agreement.

There are several key issues which are likely to be instrumental to the 'no dispute' clause being tested:

1. The discretion of the PAB is limited. If a dispute arises, involving issues of law, it may be open to a party to argue that the no dispute clause purports to ouster the jurisdiction of the Court, is contrary to public policy, and is therefore void or unenforceable.
2. The promise of good faith introduces an undesirable uncertainty into the contract as to the nature and ambit of that obligation. If a party has acted unreasonably or has deliberately concealed a profit margin in the performance of its good faith obligations, this may well influence a party to seek equitable relief outside the alliance agreement.
3. The relationship between the parties and the scope of the alliance agreement is likely to give rise to fiduciary obligations. The standard imposed by fiduciary obligations is significantly more burdensome than the standard imposed by the duty of good faith. A claim for breach of fiduciary duty may well arise if the alliance model breaks down.
4. The no dispute clause cannot exclude the application of the *Trade Practices Act 1974* (Cth).
5. The pre-contractual representations made by parties could potentially give rise to a claim for misleading or deceptive conduct under section 52. An aggrieved party who has suffered a loss or damage may well seek to claim statutory relief under section 52. The pre-contractual representations or promises made by parties might

also give rise to a claim for equitable relief under the doctrine of promissory estoppel.

6. Section 51AC could potentially be used by an owner to *transfer* its liability for 'unconscionable conduct' on to its contractors.

In light of the above, it cannot be assumed that all conflicts will be resolved within the alliance. Given the broad range of legal and equitable remedies which might be available outside the contract, it is foreseeable that a party may seek to challenge the enforceability of the no dispute clause.

Is it then worth having a no dispute clause at all? Project alliancing is 'relationship driven.' It is about people working together in the 'spirit of alliancing', and does not depend on a 'legalistic interpretation of the contract documentation.'[188] In this sense, the no dispute clause is not necessary to determine the success of the alliance, it is only necessary to give effect to the 'relationship' between the parties.

Recommendations

It is difficult to make recommendations. If the no dispute clause is modified, it may undermine the concept of a 'true' project alliance. Perhaps parties entering into a project alliance agreement should be made aware (perhaps, expressly?) that their contractual rights may not necessarily be limited to the express terms of the agreement. Contract drafters should also keep in mind that the 'spirit of alliancing' prevails.

A well researched paper. Good writing style + structure. You should consider having this published.

81

[188] Graham Thompson, above n 1, 8.

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