

5-29-2014

Standard project alliance agreements

Chris Slocombe

Follow this and additional works at: <http://epublications.bond.edu.au/pib>

 Part of the [Business Organizations Law Commons](#), [Construction Law Commons](#), and the [Organizations Law Commons](#)

Recommended Citation

Slocombe, Chris (2014) "Standard project alliance agreements," *Public Infrastructure Bulletin*: Vol. 1: Iss. 9, Article 2.
Available at: <http://epublications.bond.edu.au/pib/vol1/iss9/2>

This Journal Article is brought to you by the Institute of Sustainable Development and Architecture at ePublications@bond. It has been accepted for inclusion in Public Infrastructure Bulletin by an authorized administrator of ePublications@bond. For more information, please contact [Bond University's Repository Coordinator](#).

STANDARD PROJECT ALLIANCE AGREEMENTS

- A New Approach

CHRIS SLOCOMBE, SPECIAL COUNSEL, CLAYTON UTZ

ABSTRACT

Alliancing, as a project delivery model, has come a long way since its beginnings in the North Sea oil & gas industry, and its subsequent uptake in Australia in the mid 1990s. Now, almost 20 years after the Wandoo Alliance, Australia's first alliance project, alliancing has created for itself a place in the project delivery model armoury of most procurers of significant works, both public and (to a lesser extent) private. Between 2004 and 2009, the total value of alliance projects in the road, rail and water sectors in New South Wales, Victoria, Queensland and Western Australia was \$32 billion.¹ This represented 29% of the total infrastructure spend of \$110 billion in the same sectors across the whole of Australia.²

Before comparing the approaches of the two Project Alliance Agreements (PAAs), it is useful to briefly examine the contextual background to each. The publication of the National Alliance Contracting Guidelines³ followed a 2009 research study commissioned by the state treasuries of Victoria, New South Wales, Queensland and Western Australia. The findings of the study may not have been well received by the state treasuries. One of the key findings of the study was that on average, alliance projects experienced an increase from business case cost estimate to actual outturn cost in the order of 45-55%. Perhaps in response to this finding, the National Alliance Contracting Policy Principles (NACPP), Guide to Alliance Contracting and the NACG PAA appear to be heavily influenced by a desire to achieve value for money (VFM), and these documents adopt certain approaches which might not be considered to align with the principles of a "pure alliance".

This article examines and compares the treatment by the two forms of key features common to the standard alliance agreements.

1. INTRODUCTION

Historically, most PAAs have been bespoke instruments,

or have at least (in later years) been based upon documents which were originally bespoke instruments. In his 2007 article,⁵ Ian Briggs spoke of the possibility of an Australian Standard form PAA, and that a number of government agencies were moving to standardise their own PAAs.

In its 2009 research study, an Inter-Jurisdictional Alliancing Steering Committee (IJASC)⁶ made a rallying call for the production of a standard PAA:

The range of the PAAs in use in Australia is neither efficient nor effective for government or industry. Now that alliancing is a mature delivery method, there is a need for government to establish a standard form of contract that is robust, tested and clearly understood by all parties. This would improve legal certainty and transaction efficiency for government and non-owner participants (NOPs).

No form of alliance agreement has yet been produced by Standards Australia, but interestingly the call of the IJASC for standardisation was answered in 2010, with the release of two standard form PAAs:

- the Project Alliance Agreement published by the Victorian Department of Treasury & Finance (the Victorian Model PAA); and
- the Alliance Association of Australasia Reference Model PAA (the AAA Model PAA).

The Victorian Model PAA was subsequently adopted by the Commonwealth Department of Infrastructure and Transport as the "National Alliance Contracting Guidelines Template PAA"⁷ (referred to herein as the NACG PAA).

So, after many years of having to choose between varied bespoke forms of PAA, project owners now have the choice of two standard form PAAs for use on alliance projects. How then do the two new standard form PAAs compare? What are their key features and differences, and which of the two (if either) should be preferred as

the starting point for a PAA?

In contrast to the public policy influenced NACG PAA, the AAA PAA was drafted by a committee of lawyers and alliance advisors experienced in preparing and negotiating PAAs. The cover page of the AAA PAA states that the document aims to represent “a common approach amongst AAA members to the core features and principles of a project alliance agreement”.

2. COMPARATIVE ANALYSIS⁸

2.1 PROJECT OWNER / OWNER PARTICIPANT DISTINCTION

NATIONAL ALLIANCE CONTRACTING GUIDELINES PROJECT ALLIANCE AGREEMENT FORM

The NACG PAA clearly establishes the distinction between the “project owner” in its capacity as the client for the performance of the alliance works and the “owner participant” when the entity is acting as one of the participants in the alliance.

The terms “project owner” and “owner participant” are used throughout the PAA to signify the role in which that entity is acting. Importantly, when acting in its capacity as “client for the performance of the works”, the project owner is not subject to the commitments in the alliance charter, the alliance objectives or the duty of good faith (referred to collectively hereafter as the “Alliance Commitments”). What this means is that the project owner can act in its own interests, which may not align with the interests of the alliance, when permitted to do so by the PAA.

ALLIANCE ASSOCIATION AUSTRALASIA PROJECT ALLIANCE AGREEMENT FORM

The AAA PAA does not refer to the owner⁹ separately in its distinct capacities - the owner is referred to as the “owner” throughout the PAA. Clause 3.3 of the AAA PAA does, however, identify that the owner has two roles: as a participant, and as the ‘client’.

The AAA PAA distinguishes between the owner’s two roles through the use of the “owner’s independent officer”, who is a person named in the AAA PAA and is appointed to make determinations regarding the owner’s reserved powers. In making such determinations the AAA PAA acknowledges that the owner’s independent officer may act in a manner not consistent with the interests of the alliance. The AAA PAA further states that when discharging its role, the owner’s independent officer may act with an absolute and unfettered discretion and may act in the interests of the owner only.

ANALYSIS

The rationale for the separation of the project owner into its two roles is generally understood and accepted. On the one hand the project owner is a participant in the alliance, and should generally be bound to allow the alliance to succeed in its objectives, and allow the sharing of the results of the alliance with the NOPs. On the other hand, however, it is generally accepted that there are certain matters for which the final say ought properly be retained by the project owner. In a “pure alliance” these matters are generally limited to the exercise of reserved powers, which are discussed in more detail below.

The NACG PAA goes one step further. It provides that wherever the “project owner” (as opposed to the “owner participant”) is referred to as having an obligation or a right under the PAA, it may perform or exercise that obligation or right without being subject to the alliance commitments. A simple word search of the body of the NACG PAA identifies 467 instances of the term “project owner”, compared to only 69 instances of the term “owner participant”. Without going into each instance of either term, the dominance of the use of the term “project owner” suggests that the vast majority of the project owner’s obligations and rights may be performed or exercised without reference to the alliance commitments.

2.2 RESERVED POWERS

Most PAAs include a list of so-called “reserved powers” which are powers reserved to the project owner in its capacity as “client” (as opposed to a participant in the alliance), which may be exercised in the project owner’s interests only (as an exception to the general requirement to always act in the interests of the alliance).

NATIONAL ALLIANCE CONTRACTING GUIDELINES PROJECT ALLIANCE AGREEMENT

Clause 6.10(a) of the NACG PAA expressly reserves the following matters for the unilateral determination of the project owner:

- the decision to suspend all or part of the works under clause 22;¹⁰
- any decisions, directions or actions the project owner determines are necessary following any event which significantly impacts on the whole or any part of the works or the achievement of the project owner’s VFM statement;
- any decision, direction, matter, approval or thing expressed under the PAA as being at the discretion, or the like, of the Project owner; and
- unless otherwise specified, the decision to terminate the PAA where the project owner has such a right.



ALLIANCE ASSOCIATION OF AUSTRALASIA PROJECT ALLIANCE AGREEMENT

Clause 4.4(a) of the AAA PAA provides that the following matters comprise “owner reserved powers”:

- directing a scope variation under clause 9.1 or deciding to proceed with a scope variation which is “material or substantial” under clause 9.2;
- urgent protection of the work under our alliance or the environment;
- suspension of the work under our alliance pursuant to clause 14.2;¹¹
- termination of the agreement under clause 15.1;¹²
- reinstatement of the work under our alliance following destruction or substantial damage;
- media communications;
- site access arrangements; and
- any other matter on which the owner is expressly given an exclusive right or power under the agreement to direct, determine or decide.

2.3 ADJUSTMENT EVENTS

It is also common in PAAs for there to be a list of events which, if they occur, will trigger adjustments to the target outturn cost (TOC), target dates and perhaps the key result areas (KRAs) relevant to the risk and reward regime in the PAA. These events are generally expressed

by way of a list in the relevant PAA, together with a set of guidelines or examples which give assistance to the Alliance Leadership Team (ALT) as to how the relevant events may occur in practice, and guidance as to what adjustments to the relevant targets (if any) ought to occur as a result of the events.

NATIONAL ALLIANCE CONTRACTING GUIDELINES PROJECT ALLIANCE AGREEMENT

“Adjustment event” is defined in the NACG PAA to mean any of the following:

- a Scope Variation;
 - a change to a statutory requirement after the date of the PAA which substantially and materially affects the Works;
 - any suspension by the project owner of all or part of the works under clause 23 (other than as a result of a breach of the PAA by a non-owner participants (NOP), where the suspension is necessary to ensure that the works comply with the requirements of this agreement or in the circumstances set out in clause 22.5); and
 - any event or circumstance identified in the adjustment event guidelines (prepared as part of the project proposal) as an adjustment event.
- Alliance Association Australasia Project Alliance Agreement



“Adjustment event” is defined in the AAA PAA as “a circumstance or event which the ALT determines, pursuant to clause 10.1, is a circumstance or event which justifies an adjustment to the performance targets specified in the relevant schedule”. Clause 10.1(d) states that the ALT may determine that a scope variation or other adjustment event justifies an “adjustment”. Clause 10.2 then states that, in making a determination under clause 10.1(d), the ALT must take the following considerations into account:

- the adjustment guidelines;
- a suspension or deceleration of the work under our alliance pursuant to clause 14 may be grounds for an adjustment; and
- the exercise by the owner of an owner reserved power may be grounds for an adjustment
- Determination of Commercial Consequences

Probably the most significant difference between the NACG PAA and the AAA PAA is the level of control the project owner retains under the NACG PAA over the commercial consequences of the exercise of reserved powers and the occurrence of adjustment events.

RESERVED POWERS

Under the AAA PAA, the impact of reserved powers and adjustment events upon the TOC and the other targets

under the commercial model is left for determination by the ALT. Such determinations are required to be unanimous.

The NACG PAA, however, takes a different approach. In the case of project owner’s reserved powers, clause 6.10 states that the impact of the exercise of such a power has on the TOC, KRAs or the date for practical completion will be calculated in the manner prescribed by the agreement, and if no manner is prescribed, as determined by the project owner following a recommendation from the ALT. If, however, the ALT cannot agree on the recommendation to be made to the project owner, the participants must comply with the prescribed dispute resolution procedure.

While the dispute resolution procedure exists to resolve disputes at the ALT level, the ALT in any event is only entitled to recommend a course of action to the project owner. The impact of the exercise of the project owner’s reserved power is ultimately a decision for the project owner, in its capacity as client. In making this decision the project owner will not be bound by the alliance commitments, and can make such a determination purely in its own interests.

Under clause 4.4 of the AAA PAA, the ALT must abide by and implement the owner’s decisions, determinations



and directions in relation to owner's reserved powers (which are given by the owner's independent officer), but that the decision on what impact, if any, the exercise of an owner reserved power has on the TOC or other targets must be made by the ALT, not unilaterally by the owner.

ADJUSTMENT EVENTS

A similar approach is taken in the NACG PAA to the commercial consequences of the impact of adjustment events. Clause 12 empowers the ALT to determine whether an adjustment event has occurred, and may also determine the reasonable adjustment to be made to the TOC, the KRAs and the date for practical completion. The ALT's determination is not, however, binding. The ALT may make a recommendation to the project owner, but the project owner can approve or reject the recommendation in its absolute discretion. If the project owner rejects the ALT's recommendation the ALT must consider the project owner's reasons for rejecting the recommendation, and must resubmit its recommendation for approval. This process will continue until the project owner accepts the ALT's recommendation.

The AAA PAA takes a different approach to these matters. Under clause 10.3, if the ALT determines that an adjustment is justified, TOC will be adjusted by cost

of the adjustment (with an allowance for additional fees), and the date for practical completion and other performance targets will be adjusted as the ALT considers appropriate.

2.5 RESOLUTION OF DISAGREEMENTS

NATIONAL ALLIANCE CONTRACTING GUIDELINES PROJECT ALLIANCE AGREEMENT

Clause 5 of the NACG PAA provides that the participants agree to use their best endeavours to avoid issues arising between them and, to the extent an issue arises, agree to try to resolve issues within the alliance internally in good faith in a manner consistent with the alliance principles (with the final place for resolution of disputes being the ALT).

If an issue remains unresolved and there is a deadlock at the ALT level, schedule 14 of the NACG PAA provides for a deadlock resolution mechanism to ensure contractual certainty. Under this procedure if the authorised officers of each participant are unable to resolve the issue, then the project owner must determine the manner in which the issue is to be resolved subject to the overriding agreement that the parties will not litigate or arbitrate except in very limited circumstances. In effect therefore, the project owner may nominate expert determination in all

circumstances where the no litigation/no arbitration principle applies and in the limited exceptions to this principle the project owner may refer the issue to arbitration or litigation.

ALLIANCE ASSOCIATION AUSTRALASIA PROJECT ALLIANCE AGREEMENT

Clause 2.1 of the AAA PAA similarly states that the participants are committed to avoid disputes in bringing the project to final completion, and must as soon as practicable notify each other of any dispute or disagreement when it arises, and if it cannot be resolved by the Alliance Management Team (AMT) to elevate it to the ALT for resolution. The ALT is empowered to resolve the dispute, and its decision is final and binding. The ALT may determine whatever action it believes is necessary to achieve unanimous resolution of the disagreement, including enlisting the assistance of a mediator or consultant.

The AAA PAA does not, however, contain any pre-agreed deadlock resolution mechanism.

ANALYSIS

The approach of the AAA PAA is aligned with a “pure alliance” model, that is, that all matters should be dealt with collaboratively within the alliance, and that decisions should be owned by the participants.

The NACG PAA approach identifies the reality, however, that sometimes parties simply cannot agree on difficult issues, despite the best intentions of all concerned.

It is submitted that a pre-agreed deadlock resolution mechanism is important to allow for the resolution of disputes at the ALT level that cannot be resolved by agreement. A preferable dispute resolution mechanism in the context of an ALT deadlock is the so-called “swing man” process, under which an expert is appointed and each alliance participant makes a written submission as to how the dispute should be resolved. The expert must then choose which of the submissions it prefers, having regard to the alliance principles. The expert is not allowed to impose its own separate solution. The rationale of the so-called swing man process is that each party will be discouraged from proposing an extreme decision for fear that the expert will prefer the other submission. It is also thought that the presence of the independent third party will facilitate a resolution of the deadlock which all parties can live with, minimising ongoing damage to the alliance relationship.

2.6 TIME OBLIGATIONS/PRACTICAL COMPLETION

NATIONAL ALLIANCE CONTRACTING GUIDELINES PROJECT ALLIANCE AGREEMENT

The NACG PAA obliges the Participants to use their best endeavours to perform the Works to the stage of practical completion by the date for practical completion.

Clause 10.6(a) of the NACG PAA provides that if practical completion has not been reached by the date for practical completion, the project owner may treat any losses, damages, costs and expenses to be suffered by the project owner arising out of the delay in reaching practical completion as reimbursable costs for the purposes of calculating the actual outturn cost (AOC).

Clause 10.6(b) then provides a place marker for a list of specific losses which are to be recoverable by the project owner in the event of delay, which should be noted are expressed as exceptions from the definition of “consequential loss”.¹³ The list is blank in the standard form.

Delays to practical completion will therefore impact on the painshare/gainshare calculation to the detriment of the NOPs. Significantly, categories of loss which might otherwise fall within the definition of “consequential loss” will be counted towards the AOC if they are listed in clause 10.6(b).

ALLIANCE ASSOCIATION AUSTRALASIA PROJECT ALLIANCE AGREEMENT

The AAA PAA obliges the participants to bring the project to practical completion by the date for practical completion.

There are no consequences in the standard terms of the AAA PAA for any delay in reaching practical completion by the date for practical completion.

ANALYSIS

The approach of the NACG PAA to delays in completion is interesting. Given that clause 10.6, together with the definition of “consequential loss”, combine to allow the project owner to count certain categories of loss (some of which might otherwise be properly categorised as excluded “consequential losses”) towards the AOC, serious consideration should be given to this provision by NOPs given its potential to erode the NOPs’ entitlement to gainshare, or increase its exposure to painshare.

2.7 SUSPENSION

NATIONAL ALLIANCE CONTRACTING GUIDELINES PROJECT ALLIANCE AGREEMENT

Under clause 22 of the NACG PAA, the Works can only be suspended in three circumstances:

- (a) by the Participants with the prior written agreement of the Project owner (except where there is a real risk of injury to persons or damage to the environment in breach of law, in which case presumably the project owner's prior written agreement is not required);
- (b) by direction of the project owner (for any reason); or
- (c) in circumstances where the project owner determines either that:
 - the AOC of the works will or is likely to exceed the TOC by X% of the TOC; or
 - the date of practical completion will or is likely to be delayed by more than [X] business days after the date for practical completion.

Where the suspension arises under paragraph (a) or (b) (except where the suspension arose as a result of a NOP breach or where the suspension is necessary to ensure the works comply with the agreement), the project owner must continue to pay any reimbursable costs incurred and corporate overhead and profit in respect of those costs, and the suspension will be an adjustment event for the purposes of the PAA.

If the project owner suspends work under paragraph (c), the project owner will be free to continue with and complete the works and any painshare / gainshare amount payable by or to the NOPs will be calculated as if the costs incurred by the project owner in continuing the works under the clause were reimbursable costs incurred by the NOPs, and the NOPs were paid corporate overhead and profit in respect of those costs.

2.8 SUSPENSION OF CORPORATE OVERHEAD AND PROFIT

Distinct from the ability to suspend the performance of the works, clause 16.6 of the NACG PAA entitles the project owner to another "look ahead" test, this time only in respect of the potential cost of performing the works. Where "it is evident" to the project owner that the AOC of performance the works has exceeded or will exceed the TOC, the project owner may immediately suspend payment of (but not entitlement to) corporate overhead and profit to the NOPs to the extent necessary to cover the NOPs' potential liability to pay any 'painshare amount' under Schedule 7. This is, however, an interim measure, and is to be reconciled

as at the final completion date in the final wrap-up of painshare/gainshare.

ALLIANCE ASSOCIATION AUSTRALASIA PROJECT ALLIANCE AGREEMENT

Clause 14 of the AAA PAA allows suspension of the work under our alliance in two circumstances (in addition to the NOPs' entitlement to suspend for non-payment and any statutory entitlement to suspend):

- where the alliance manager, ALT or owner determines suspension is necessary to prevent:
- personal injury, death or loss or damage to property;
- adverse impact upon the environment, public health or safety or the community; or
- a breach of a statutory requirement,
- and the alliance manager directs a suspension; and
- where the owner suspends the whole or any part of the work under our alliance for any reason.

In the latter case, the ALT may determine that the suspension constitutes an adjustment event.

ANALYSIS

Both the NACG and AAA PAAs allow the project owner a unilateral right of suspension, and for a participant-led suspension in somewhat limited circumstances.

Additionally the NACG PAA allows the project owner to look ahead to the "likely" outcome of the project, and suspend the works indefinitely if the project owner determines that the project is likely to be too late or too costly (judged against pre-agreed thresholds).

The NACG PAA includes a guidance note with the relevant provision which, in summary, states that:

- the project owner has this further entitlement as a recognition that when a project goes materially wrong there is not an 'equal sharing of pain', rather the owner participant bears a greater degree of pain; and
- the mechanism is not intended to shift a greater degree of the pain to the NOPs, but to give the project owner greater flexibility in managing the situation.

The first of these points is accurate - NOPs generally have an upper limit of "pain" under most PAAs. However this provision may cause NOPs some concern given that the project owner (not being bound by the alliance commitments) can look ahead and determine, subjectively, that it is 'likely' that the project will

be too costly or too late, and the consequences of this determination are quite severe: the NOPs are suspended and the project owner's costs of completion will be counted as if they were reimbursable costs in the ultimate painshare/gainshare wrap-up.

These are matters that will require consideration in each alliance, however it is submitted that the principle of a 'look-ahead' test of this nature would be more likely to be accepted by NOPs if the outcome of the look ahead test was either determined by the ALT or by a jointly appointed expert, rather than being determined subjectively by the project owner with its "client" hat on.

The project owner's further "look ahead" test - with respect to cost overruns - and the related right to suspend payment of corporate overhead and profit, is an attempt by the draftspersons of the NACG PAA to ensure that there is no overpayment made to the NOPs which will need to be recovered at final completion. The rationale for this seems reasonable, however NOPs may again find the subjective nature of the test to be concerning.

CONCLUSION

It is too early to assess the degree of uptake of either of the two PAAs, and their relative levels of success (or otherwise) in delivering projects procured under the alliance model. This is particularly the case given the current slowdown in the construction industry. Notwithstanding this, the standardisation of PAAs represents a positive step towards the continued growth in the use of project alliances as a project delivery model in Australia.

While the two PAAs differ in key aspects - most notably the level of control granted to the project owner under the NACG PAA, project owners now have a choice

between two considered and well drafted forms of PAA to use as the starting point for their alliance projects.

ENDNOTES

1. In Pursuit of Additional Value - A benchmarking study into alliancing in the Australian Public Sector, Victorian Department of Treasury and Finance 2009 ([http://dtf.vic.gov.au/CA25713E0002EF43/WebObj/InPursuitofAdditionalValue/\\$File/InPursuitofAdditionalValue.pdf](http://dtf.vic.gov.au/CA25713E0002EF43/WebObj/InPursuitofAdditionalValue/$File/InPursuitofAdditionalValue.pdf)) at 8.
2. Ibid at 9.
3. http://www.infrastructure.gov.au/infrastructure/nacg/files/National_Alliance_Contracting_WEB.pdf
4. n 1.
5. Alliancing: Reshaping Infrastructure Delivery in Australia, [2007] AMPLA Yearbook 69.
6. with membership from the Department of Treasury and Finance of Victoria, Treasury New South Wales, Treasury Queensland, the Department of Treasury and Finance, Western Australia, and the Commonwealth Department of Infrastructure and Transport.
7. <http://dtf.vic.gov.au/CA25713E0002EF43/pages/project-alliancing>
8. The two forms of PAA sometimes use slightly different terminology to describe the same general concepts. In discussions of each form of PAA, the defined terms used in the relevant form of PAA are used in this article.
9. The AAA PAA uses the defined term 'Owner' to describe the project owner party.
10. the general suspension provision, which includes various rights of suspension - discussed below at paragraph 2.7
11. Owner-directed suspension (as opposed to mutually agreed suspension)
12. the termination for convenience provision
13. liability for which is excluded mutually in the NACG PAA



CHRIS SLOCOMBE

Chris Slocombe is a Special Counsel in the Construction and Major Projects group at Clayton Utz. Chris advises construction industry participants on the legal aspects of construction and engineering projects with a particular focus on the construction aspects of major infrastructure and mining projects. Chris is well-versed with various forms of standard Australian, British and international construction and engineering contracts, and has a particular interest in project alliancing. Chris has recently advised on the use of the standard form project alliance agreements referred to in this article on some of Queensland's major mining and infrastructure projects.