

**Department of Treasury and Finance, Western Australia  
Strategic Projects**

**Department of Treasury and Finance, Victoria  
Commercial Division**

## **Guidance Note N° 3**

# **Key Risk Areas and Trade Offs**

**March 2010**

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## 1 Preamble

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This guidance note has been prepared with the aim of giving public sector participants in project alliances greater clarity regarding the value proposition of using alliance contracting.

Governments have a very broad range of social, environmental and economic objectives that they wish to achieve on behalf of the community. This normally results in an equally broad diversity of capital and infrastructure projects. Today there are a number of mature and emerging project delivery methodologies that can cater well to this project diversity on a “fit-for-purpose” basis with selection through a careful and knowledgeable analysis of project characteristics and risks.

Increasingly, alliance contracting is being used by Government agencies to procure significant infrastructure. Under this project delivery model, there is no allocation of risk or assignment of responsibilities for delivery of all or even part of the capital or infrastructure project between the participants. The participants agree to be jointly responsible for the delivery of all aspects of the project and to share the risks and rewards of delivering the project which make it impossible to assign blame.

The alliance relationship between the participants is based on a framework of cooperation and mutual adherence to agreed relationship (or alliance) principles. These relationship (or alliance) principles, together with the alliance objectives and alliance purpose for the project, are contained in the alliance charter which forms part of the alliance contract. The alliance charter contains the high level commitments or rules of engagement for the participants. The commitments relate to the manner in which the participants will work together to deliver the project. They are unique to each alliance.

Finally, alliance contracting sets up a model of agreed decision-making processes and incentives which seek to align the participants’ objectives in relation to the project and it is hoped, in that way, reduce the risk of disputes and remove the possibility of litigation between the participants.

The relationship created by alliance contracting is embodied in the alliance contract. An alliance contract is very different, in many ways, from the more traditional contracting models used by Government agencies to deliver capital and infrastructure projects.

Like all contracting methodologies, alliancing must also make continual improvements, and this guidance note aims to identify where alliance arrangements can be improved to further demonstrate their value to the State.

## 2 Overview

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A fundamental cornerstone of alliancing is that traditional contractual legal protections (as in the Australian Standard 4300 'General Conditions of contract for design and construct contracts') are traded by the State (or by the State through its Government agency) in exchange for non-owner participants bringing to the project their Good Faith\* in acting with the highest level of "integrity" for the "best interests of the project".

Government agencies require a thorough understanding of the key risk areas they are exposed to when entering into alliance contracts. That is, those areas where the Government agency may be viewed as "trading off" its usual rights under traditional project delivery models in return for the actual or perhaps perceived benefits of an alliance arrangement. This guidance note seeks to raise awareness in relation to these trade offs.

As with any procurement strategy, various trade offs (of a legal and/or commercial nature) are to be expected in response to changing circumstances, however, these must be understood in specific projects in order for:

- an informed decision to be made in relation to the appropriateness of a proposed procurement strategy; and
- to consider whether those trade offs can be or should be avoided, managed or mitigated.

### 2.1 Introduction

#### (a) Comparative Table – Alliance contracting and traditional contracting

The objective of the comparative table set out in section 3 of this guidance note is to identify the differences between traditional contracting and alliance contracting.

The comparative table sets out the standard position under each of:

- a traditional contract (using the Australian Standard 4300 'General conditions of contract for design and construct contracts' as a reference document); and
- a representative sample of alliance contracts used by various Government agencies,

in the key areas of those contracts where there is a difference in risk allocation/treatment under alliance and traditional contracting. The comparative table also summarises the implications of those differences in risk allocation/treatment and related "trade off" considerations for the client or owner of the project.

The following questions have been considered as part of the preparation of the comparative table:

- Is there a material difference between the position under an alliance contract and a traditional contract? If so, what is the difference?
- Is the difference in the nature of a trade off between alliance contracting and traditional contracting? If yes, what is the alliance behaviour or principle that is appropriate to counter the foregone traditional 'right' and vice versa?
- What should the client or owner of the project be aware of, and plan for, to ensure that the trade off is effective?

The comparative table can be used as a reference document by Government agencies as part of making a decision as to whether or not to deliver a project by way of alliance contracting (as opposed to other project delivery models). Government agencies should be aware that, whilst the comparative table sets out the standard positions in each of the key areas of an alliance contract, there may be project specific circumstances which justify a departure from any of these standard positions when entering into an alliance

contract for a project. Government agencies should have regard to project specific issues when finalising the risk positions adopted under an alliance contract.

**(b) Template form of alliance charter**

Section 4 of this guidance note sets out a template form of a standard or generic alliance charter.

The template form of alliance charter contains sample provisions which may be included in, or attached to, an alliance contract and which detail:

- the commitments which the participants make to each other in entering into the alliance contract, including commitments to:
  - act in Good Faith\*;
  - establish and maintain a Best For Project, results orientated and no blame culture;
  - maintain open book reporting under the alliance contract; and
  - achieve a value for money outcome in respect of the works performed under the alliance contract (i.e. a commitment to achieve the owner’s value for money proposition at the lowest cost); and
- the alliance principles, alliance objectives and alliance purpose for the alliance contract.

The template form of alliance charter can be used by Government agencies as a starting benchmark when developing an alliance charter to apply to a specific project to be delivered by way of alliance.

**2.2 Commonly used terms**

In this guidance note, the following words and expressions have the meanings set out in this section 2.2.

In addition, please note that:

- Words or expressions marked with an asterisk (“\*”) in this guidance note are defined or explained further in the Guidance Note No.1 “Language in Alliance Contracting: A Short Analysis of Common Terminology” December 2009.
- Words or expressions in the comparative table set out in section 3 of this guidance note which are defined in the Australian Standard 4300 ‘General conditions of contract for design and construct contracts’ have the same meaning in this guidance note.

Term	Meaning
Actual Direct Costs	the total verified sum of all Direct Costs reasonably and actually incurred by the Participants to bring the Works to final completion (i.e. following completion of the defects liability period) under the alliance contract.
Alliance Charter	the charter (including alliance principles and alliance objectives) developed by the Participants for the performance of the Works and which underpins the relationship between the Participants under the alliance contract.

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Alliance Leadership Team or ALT	the alliance leadership team which is established by the Participants to provide leadership, governance and accountability and ensure that the alliance contract runs as smoothly and efficiently as possible for the benefit of the Participants.
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Alliance Management Team or AMT	the alliance management team which is established by the Participants to provide day-to-day leadership and management of the performance of the Works.
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Changes	<p>any direction made by the Owner under the alliance contract to increase, decrease or change the Works.</p> <p>Please note that, in some instances, the ALT may also direct Changes under the alliance contract. Government agencies need to carefully consider the appropriateness (or otherwise) of entitling the ALT to direct Changes to the Participants under the alliance contract (particularly in the context of the effect a Change may have on the Owner's value for money proposition for the project).</p>
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DCT Report	<p>the direct costs target report developed by the Participants and approved by the Owner under the alliance contract.</p> <p>Please note that, in some instances, this is referred to as a "Project Proposal".</p>
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Direct Cost Target or DCT	<p>a specific sum approved by the Owner as being the pre-estimate of Direct Costs and Risk Provisions for bringing the Works to final completion (i.e. following completion of the defects liability period) as set out in the DCT Report.</p> <p>Please note that, in some instances, the alliance contract will include a "Target Outturn Cost" (or "TOC") rather than a DCT. The TOC is a pre-estimate of the Direct Costs and Risk Provisions, as well as the Non-Owner Participants' corporate overhead and profit, for completing the Works.</p>
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Direct Costs	the costs of performing the Works as defined in the alliance contract (excluding any corporate overhead component not specific to the Works, any profit or mark-up of any kind and any costs incurred by the Owner in its capacity as client for the Works).
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Excepted Risk (where used in Australian Standard 4300 'General conditions of contract for design and construct contracts')	<p>the excepted risks causing loss or damage, for which the Principal is liable, which are:</p> <ol style="list-style-type: none"><li>1 any negligent act or omission of the Principal, the superintendent or the employees, consultants or agents of the Principal;</li><li>2 any risk specifically excepted in the contract;</li><li>3 war, invasion, act of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection or military or usurped power, martial law or confiscation by order of any government or public authority;</li><li>4 ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel not caused by the Contractor or the Contractor's consultants or subcontractors or the employees or agents of any of these;</li><li>5 use or occupation by the Principal or the employees or agents of the Principal, the Principal's consultants or other contractors of the Principal</li></ol>
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(not being employed by the Contractor), of any part of the work under the Contract; and

- 6 defects in such part of the design of the work under the Contract, including defects in any of the design for the work, other than design the suitability of which the Contractor has warranted under the contract

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Force Majeure Event

an event set out in paragraphs 1 to 9 below which is beyond the reasonable control of the Participants:

- 1 war, invasion, act of foreign enemies, hostilities (whether war is declared or not), civil war, rebellion, revolution, insurrection or military or usurped powers, martial law or confiscation by order of any Government agency or public authority;
- 2 ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel not caused by a Participant;
- 3 an act of a public enemy;
- 4 industrial dispute which is not confined to the Participants, any subcontractor, or to the site or the Works;
- 5 pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds;
- 6 earthquake, cyclone, or other physical disaster or act of God;
- 7 fire, explosion (including radioactive and toxic explosion) provided that it is not caused by the negligence or breach of the alliance contract by a Participant;
- 8 aviation disaster, not caused by the negligence or breach of the alliance contract by a Participant; and
- 9 a Terrorist Act as defined in the *Terrorism Insurance Act 2003 (Cth)*, but does not include:
  - 10 any event which could have been prevented or overcome by the exercise by the Participants of the standard of a reasonable and prudent person;
  - 11 any event which was caused by the Participants or contributed to by the Participants, to the extent of the contribution;
  - 12 lack of funds for any reason or inability to use available funds for any reason (which is not itself caused by a Force Majeure Event).

Please note that, in some instances, an industrial dispute (as described in paragraph 4 above) will not constitute a Force Majeure Event under the alliance contract.

In addition, please note that, in some instances, the alliance contract will not include a Force Majeure Event regime. Rather, there will be an "adjustment event" regime under which the occurrence of any "adjustment event" (which events will be workshopped and agreed between the Participants prior to entry into the alliance contract) will entitle the ALT to recommend an adjustment to any part of the commercial framework for the Owner's approval.

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Latent Conditions

the physical conditions on and off the site including the weather, soil and rock conditions, geotechnical conditions, contamination, pollution and artificial things.

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Legislative Requirements includes:

- 1 Acts of Parliament;
- 2 authorisations;
- 3 directions given under a statutory power which affect the performance of the Works; and
- 4 all other laws, regulations, conventions, orders, directions, guidelines and policies given by or on behalf of any Government agency which may apply to the Works.

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Non-Owner Participants or NOPs the non-owner participants in the performance of Works under the alliance contract.

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Open book the commitment of each participant under the alliance contract to:

- 1 maintain all of the records and other documentation that relate to the Works in accordance with, where applicable, good accounting practices, standards and procedures and Legislative Requirements (including the public records legislation applicable in the alliance's jurisdiction);
- 2 make the records and other documentation available to each other (or each other's nominated auditor) on request; and
- 3 make available to each other (or each other's nominated auditor) any existing documentation or information in whatever form relating to the Works.

Please note that the open book commitment will include a commitment of each Participant to maintain and make available to each other Participant all documentation and information in respect of the Direct Costs incurred by the Participant and the other costs incurred by the Participant which are not Direct Costs under the alliance contract.

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Owner the owner in its capacity as [*insert specific role e.g. the Commissioner of Main Roads*], being the client for the Works under the alliance contract.

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Owner Participant the owner in its capacity as one of the participants in the performance of the Works under the alliance contract.

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Participants the participants in the performance of Works under the alliance contract, being the Owner Participant and the NOPs.

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Principal has the meaning given to it in the Australian Standard 4300 'General Conditions of contract for design and construct contracts'.

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Reward Amount a payment to the NOPs by the Owner which will be calculated and paid under the risk/reward\* regime under the alliance contract.  
Please note that, in some instances, this is referred to as a "Gainshare" payment.

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Risk Amount a payment by the NOPs to the Owner which will be calculated and paid under the risk/reward\* regime under the alliance contract.  
Please note that, in some instances, this is referred to as a "Painshare" payment.

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Risk Provisions	the provision for all possible Direct Costs associated with risks that may arise in carrying out the Works that are to be included in estimating the DCT, including items such as Latent Conditions, Changes (excluding Variations), foreign exchange fluctuations, cost of living increases, rise and fall events, availability of utility services, costs of coordinating the Works with other works and services undertaken by the Owner or its contractors (other than the NOPs) and the cost of rectifying any defects.
Variations	any Change directed by the Owner under the alliance contract which amounts to either: <ol style="list-style-type: none"> <li>1 a significant change, amendment or alteration to the Works; or</li> <li>2 a change to the fundamental requirements of the Works.</li> </ol>
Wilful Default	a deliberate and purposeful act or omission carried out, or real and substantial evidence of a deliberate and purposeful act or omission carried out, with a reckless disregard or calculated regard, for the consequences of the act or omission, but does not include any error of judgment, mistake, act or omission, whether negligent or not, which is made in Good Faith* by that Participant or by any director, officer, employee, agent or subcontractor of that Participant.
Works	the whole of the works and services which the Participants are or may be required to carry out under the alliance contract. Please note that this guidance note refers to "Works" (in the context of alliance contracting) and "work under the contract" (in the context of traditional contracting) for the purpose of distinguishing the usage of the terms.

## 2.3 Other guidance notes

Please note the other guidance notes in respect of project alliancing which have been published by the sponsors as at the date of this guidance note:

- Guidance Note No.1 "Language in Alliance Contracting: A Short Analysis of Common Terminology" December 2009;
- Guidance Note No.2 "Insurance in Alliancing Contracting: Selling Insurable Risks" December 2009; and
- Exposure Draft Guidance Note No.4 "Reporting VFM Outcomes in Alliance Contracting" February 2010.

In addition, in October 2009, a benchmarking study in respect of project alliancing in Australia was published by the sponsors and titled "In Pursuit of Additional Value: A benchmarking study into alliancing in the Australian Public Sector".

### 3 Comparative Table – Alliance contracting and traditional contracting

No.	Subject	Traditional contract	Alliance contract	Material difference and trade off between traditional contract and alliance contract
1	Performance of the Works	The Contractor is solely responsible for executing and completing the work under the Contract in accordance with the requirements of the contract (as prescribed by the Principal in the Principal's Project Requirements).	<p>The Participants are jointly responsible for performing the Works.</p> <p>In performing the Works, the Participants must act in Good Faith* and in accordance with the Alliance Charter. The Alliance Charter sets up a model of agreed decision-making principles which relate to the manner in which the Participants will work together to deliver the project and therefore seek to align the Participants' objectives in relation to the Project. It is hoped that alignment will reduce the risk of disputes and largely remove the possibility of litigation between the Participants. The Participants also agree to a no blame/no suit principle* (i.e. that there will be no litigation or arbitration between them under the alliance contract, except in limited circumstances including Wilful Default by a Participant).</p> <p>The AMT(on which the Owner Participant and the NOPs are jointly represented) will prepare a DCT Report which sets out its recommendations for the Project as to:</p> <ul style="list-style-type: none"> <li>• the Basis for Design and Construction;</li> <li>• the Direct Cost Target (<b>DCT</b>);</li> <li>• the Project management and reporting</li> </ul>	<p><b>Responsibility for the Works</b></p> <p>Unlike under a traditional contract, the Owner will not allocate full responsibility for the performance of the Works to the Contractor. Rather, the Participants will be jointly responsible for the performance of the Works. However, the Participants agree that they will not sue each other in respect of the performance of the Works (with limited exceptions) with the effect that the adversarial or 'claims based' culture of the traditional contract does not pervade the alliance contract.</p> <p>There are also commercial implications for the Participants to an alliance contract as a consequence of the joint responsibility for executing and completing the Works. Unlike under a traditional contract, the Owner under an alliance contract will pay all Direct Costs actually and reasonably incurred by the Participants – even over and above the DCT. However, all payments of Direct Costs by the Owner will be reflected in the final outcome of the risk/reward* regime in the payment of a reduced Reward Amount or the payment by the NOPs of a Risk Amount.</p> <p><b>Requirements for the Works</b></p> <p>Unlike under a traditional contract, the requirements for the Works will not be solely determined by the Owner under an alliance contract. Rather, the requirements for the Works will be jointly developed by the Participants and approved by the Owner. However, the requirements for the Works will be based on the Owner's project requirements (as reflected in the Owner's Government approved business case) and</p>

No.	Subject	Traditional contract	Alliance contract	Material difference and trade off between traditional contract and alliance contract
2	Warranties and commitments	<p>The Contractor warrants that it:</p> <ul style="list-style-type: none"> <li>and its Consultants will be suitably qualified and experienced and will exercise due skill, care and diligence in the execution and completion of the work under the Contract;</li> <li>has examined and carefully checked any Preliminary Design provided by the Principal and that such Preliminary Design is suitable, appropriate and adequate;</li> <li>will execute and complete its Design Obligations in accordance with the Principal's Project Requirements; and</li> <li>will execute and complete the work under the Contract so that the Works when completed will be fit for its stated purposes and comply with all the requirements of the contract and</li> </ul>	<p>systems; and</p> <ul style="list-style-type: none"> <li>the Date for Practical Completion.</li> </ul> <p>The DCT Report must be approved by the ALT (on which the Owner Participant and the NOPs are jointly represented) and the Owner.</p> <p>Once the DCT Report is approved by the Owner, the Participants must perform the Works in accordance with the DCT Report.</p>	<p>the Participants must act in Good Faith* and in accordance with the Alliance Charter in developing those requirements for the Works for the ultimate approval of the Owner.</p>
		<p>The requirements of an alliance contract relating to the manner in which the Participants will perform the Works are more limited than under a traditional contract.</p> <p>Under the alliance contract, the Participants make 'commitments' to each other (consistent with assuming joint responsibility for the Works) to:</p> <ul style="list-style-type: none"> <li>act in Good Faith* in performing their obligations under the alliance contract;</li> <li>work together to meet the alliance objectives and to produce outstanding and innovative results;</li> <li>establish an alliance culture based on the Alliance Charter and acting at all times with a Best For Project* approach;</li> <li>establish a 'no blame' culture in relation to disputes, errors and mistakes which</li> </ul>	<p>Under a traditional contract, the Contractor provides warranties to the Principal as to the manner in which the Works will be performed. A breach by the Contractor of the warranties under a traditional contract will confer on the Principal a possible right to terminate the contract and/or sue the Contractor for damages.</p> <p>Under an alliance contract, the requirements relating to the manner in which the Works will be performed by the Participants are more limited than under a traditional contract . Under the alliance contract, the Participants provide each other with 'commitments' in respect of the performance of the Works (consistent with assuming joint responsibility for the Works). These commitments include acting in Good Faith* and doing all things necessary to complete the Works (with due skill, care and diligence) in accordance with the alliance contract. The key trade off is that the Participants agree that they will not sue each other in respect of the performance of the Works, with limited exceptions including a breach of the relevant 'commitments' by any of the Participants. Any poor performance by the Participants will be reflected in the risk/reward* regime. The Owner may exercise its right to</p>	

No.	Subject	Traditional contract	Alliance contract	Material difference and trade off between traditional contract and alliance contract
		Legislative Requirements.	<p>may arise under the alliance contract; and</p> <ul style="list-style-type: none"> <li>maintain an 'open book' system for allowing access to documentation and information relating to the Works (including documentation and information in respect of the costs incurred by the Participants).</li> </ul>	terminate for convenience, but will be obliged to make a termination payment to the Non-Owner Participants.
3	Payment	<p>The Principal will pay the Contractor:</p> <ul style="list-style-type: none"> <li>a fixed lump sum amount;</li> <li>an amount ascertained by reference to a schedule of rates; or</li> <li>a combination of both of the above,</li> </ul> <p>for the performance of the work under the Contract (<b>Contract Sum</b>).</p> <p>The Contract Sum may be adjusted in accordance with the provisions of the contract, including for any Latent Conditions (refer to Item 6), variations (refer to Item 7) and changes in Legislative Requirements (refer to Item 8).</p> <p>The Contract Sum will not include the cost of rectifying any defects in the work under the Contract during the Defects Liability Period. The cost of rectifying defects in the work under the Contract will be borne solely by the Contractor.</p>	<p>The Owner will pay the NOPs:</p> <ul style="list-style-type: none"> <li>any Direct Costs reasonably and actually incurred in performing the Works;</li> <li>the Corporate Overhead and Profit (as a percentage of the NOPs' Actual Direct Costs or as a percentage of the NOPs' estimated Direct Costs in the DCT); and</li> <li>a Risk or Reward Amount (if one is payable under the risk/reward* regime),</li> </ul> <p>for performing the Works.</p> <p>The DCT which is developed by the Participants and approved by the Owner will contain a pre-estimate of:</p> <ul style="list-style-type: none"> <li>the Direct Costs to bring the Works to final completion; and</li> <li>the Direct Costs associated with any risks that may arise in performing the Works (<b>Risk Provisions</b>). The Risk Provisions will include a pre-estimate of</li> </ul>	<p><b>Fixed price for the Works</b></p> <p>Unlike under a traditional contract, the Owner will not pay the NOPs a fixed price for the performance of the Works. Rather, the Owner will reimburse the NOPs for all of the Direct Costs reasonably and actually incurred in performing the Works. In addition, the Owner will pay the NOPs the Corporate Overhead and Profit.</p> <p>However, the operation of the risk/reward* regime incentivises the Participants to complete the Works on or under the DCT. Following final completion of the Works, the Participants' performance against the DCT will be assessed. The Participants will share any cost underrun (i.e. a Reward Amount will be payable by the Owner to the NOPs) or any cost overrun (i.e. a Risk Amount will be payable by the NOPs to the Owner). Any Risk Amount payable under the alliance contract is often capped at all or some of the Corporate Overhead and Profit payable to the NOPs.</p> <p><b>Adjustments to price for the Works</b></p> <p>Under an alliance contract, the DCT may be adjusted in fewer circumstances than the Contract Sum under a traditional contract. The reason for this is that the</p>

No.	Subject	Traditional contract	Alliance contract	Material difference and trade off between traditional contract and alliance contract
			<p>the cost of rectifying defects during the defects liability period under the alliance contract.</p> <p>The Participants' Actual Direct Costs in bringing the Works to final completion (i.e. including during the defects liability period under the alliance contract) will be assessed against the DCT for the purposes of the payment of the Risk or Reward Amount. If the Participants' Actual Direct Costs are less than the DCT, the Participants will share the cost underrun (i.e. a Reward Amount will be payable by the Owner to the NOPs). If the Participants' Actual Direct Costs are greater than the DCT, the Participants will share the cost overrun (i.e. a Risk Amount will be payable by the NOPs to the Owner).</p> <p>The DCT may be adjusted in limited circumstances under the alliance contract (given that the Risk Provisions are included in the DCT). These circumstances include Variations (refer to Item 7) and Force Majeure Events (refer to Item 9).</p> <p>However, please note that, in some instances, the alliance contract will not include a Force Majeure Event regime. Rather, there will be an "adjustment event" regime under which the occurrence of any "adjustment event" (which events will be workshopped and agreed between the Participants prior to entry into the alliance contract) will entitle the ALT to recommend an adjustment to any part of the</p>	<p>Participants include as part of the DCT a pre-estimate of the Direct Costs associated with any risks that may arise in performing the Works (i.e. the Risk Provisions). This provides for transparency as to the NOPs' expectations in respect of those items (in contrast to contingencies for those risks being "hidden" in the Contract Sum under a traditional contract and/or becoming the incentive for the Contractor to make claims for adjustment to the Contract Sum as those contingencies are used up). The Risk Provisions will be approved by the Owner as part of approval of the DCT.</p> <p>It must be noted that as the Risk Provisions are pre-agreed under the alliance contract, if those risks do not eventuate, the NOPs will potentially share the benefit of a cost underrun under the risk/reward* regime (and therefore a Reward Amount will be payable to the NOPs). For example, the Risk Provisions will include a pre-estimate of the cost of rectifying defects during the defects liability period under the alliance contract. If there are no defects in the Works, then a Reward Amount will potentially be payable to the NOPs. In contrast, under a traditional contract, if there are no defects in the work under the Contract, no reward payment will be made to the Contractor (it will simply be entitled to payment of the Contract Sum).</p> <p>Conversely, if the Risk Provisions are not adequate to cover all of the risks which eventuate on the Project, then the DCT will not be adjusted and the NOPs will potentially share the detriment of a cost overrun under the risk/reward* regime (and therefore a Risk Amount will be payable by the NOPs).</p>

No.	Subject	Traditional contract	Alliance contract	Material difference and trade off between traditional contract and alliance contract
			commercial framework for the Owner's approval.	
4	Provision of documentation	<p>In a general sense, the Contractor's obligation to make available to the Principal its records and documentation in respect of the contract is limited to:</p> <ul style="list-style-type: none"> <li>• documents in respect of the work under the Contract (including the Design Documents and as constructed drawings);</li> <li>• documents evidencing the insurances taken out by the Contractor under the contract; and</li> <li>• documents to accompany claims for payment under the contract.</li> </ul>	<p>The Participants commit to maintaining an 'open book' arrangement under the alliance contract allowing access to any documentation and information relating to the Works.</p> <p>This commitment includes:</p> <ul style="list-style-type: none"> <li>• maintaining all records and other documentation relating to the project; and</li> <li>• making the records and other documentation available to each other (or each Participant's auditor).</li> </ul> <p>The alliance contract also contains broad access and audit rights for each Participant.</p>	<p>Under a traditional contract, the Contractor's obligation to make available to the Principal its records and documentation in respect of the contract is limited.</p> <p>Under an alliance contract, the Participants commit to an 'open book' arrangement and have much broader and mutual access and audit rights. However, the NOPs may have reciprocal access and audit rights in respect of the Owner's records and documentation (in circumstances where the Owner's costs are recorded as Direct Costs under the alliance contract). The effect of these provisions is that there is open book transparency under the alliance contract which complements the Participants' commitments to act in Good Faith* and in accordance with the Alliance Charter. The provisions are also important for the Owner given the cost reimbursable nature of an alliance contract.</p>
5	Achievement of Practical Completion	<p>The Contractor must execute and complete the work under the contract to Practical Completion by the Date for Practical Completion.</p> <p>If there is a delay in achieving Practical Completion, the Superintendent must determine whether or not to grant the Contractor an extension of time to the Date for Practical Completion.</p> <p>An extension of time will only be granted to the Contractor if the cause of the delay</p>	<p>The Participants must use their best endeavours to complete the Works by the Date for Practical Completion.</p> <p>The ALT will decide any appropriate extension of time if there is a delay in achieving Practical Completion caused by:</p> <ul style="list-style-type: none"> <li>• a Variation (refer to Item 7);</li> <li>• a Force Majeure Event (refer to Item 9);</li> <li>• an abnormal cause beyond the reasonable control of the Participants;</li> </ul>	<p><b>Determination of extensions of time</b></p> <p>Unlike under a traditional contract, the Owner will not solely determine whether or not extensions of time are granted under an alliance contract. Rather, the Participants will make those determinations. However, the Participants must act in Good Faith* and in accordance with the Alliance Charter in making those determinations.</p> <p><b>Qualifying causes of delay</b></p> <p>There are fewer qualifying causes of delay under the alliance contract than under the traditional contract. This is</p>

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		<p>is one of the 'qualifying causes of delay' under the contract, including:</p> <ul style="list-style-type: none"> <li>• industrial conditions;</li> <li>• inclement weather;</li> <li>• any act or omission of the Principal or Superintendent;</li> <li>• Latent Conditions (refer to Item 6);</li> <li>• variations (refer to Item 7); and</li> <li>• changes in Legislative Requirements (refer to Item 8).</li> </ul> <p>Where the Contractor is entitled to an extension of time as a result of an act or omission of the Principal or Superintendent (but not the other qualifying causes of delay), the Principal will be liable to pay the Contractor delay damages.</p> <p>If the Contractor fails to reach Practical Completion by the Date for Practical Completion, the Contractor will be liable for liquidated damages.</p> <p>If the Contractor achieves Practical Completion before the Date for Practical Completion, the Principal may pay the Contractor a bonus for early completion.</p>	<p>or</p> <ul style="list-style-type: none"> <li>• suspension of the Works by the Owner (refer to Item 13).</li> </ul> <p>However, please note that, in some instances, the alliance contract will not include an extension of time regime. Rather, there will be an "adjustment event" regime under which the occurrence of any "adjustment event" (which events will be workshopped and agreed between the Participants prior to entry into the alliance contract) will entitle the ALT to recommend an adjustment to any part of the commercial framework (including the Date for Practical Completion) for the Owner's approval.</p>	<p>because the cost of overcoming delays is included in the Risk Provisions in the DCT. However, the consequence of this is that if these costs are not incurred, then the NOPs will potentially share the benefit of a cost underrun under the risk/reward* regime (and therefore a Reward Amount will be payable to the NOPs). On the other hand, if the Risk Provisions are not adequate to cover all of the costs to overcome delays, then the NOPs will potentially share the detriment of a cost overrun under the risk/reward* regime (and therefore a Risk Amount will be payable by the NOPs).</p> <p><b>Delay damages, bonus for early completion and liquidated damages</b></p> <p>Unlike under a traditional contract, no delay damages, bonus for early completion (except in some instances) or liquidated damages are payable under the alliance contract. Some alliance commercial models will incorporate the costs of delayed completion as part of the Actual Costs when calculating the Risk or Reward Amount. The Participants will be incentivised to complete the Works on or ahead of schedule by the risk/reward* regime (and the Risk or Reward Amount which may become payable under the risk/reward* regime).</p>
6	Latent Conditions	<p>If, during the execution of the work under the Contract, the Contractor becomes aware of a Latent Condition, it must notify</p>	<p>If the Participants become aware of a Latent Condition, the Participants will be jointly responsible for overcoming the</p>	<p>Unlike under a traditional contract, the Participants will not be entitled to a time or cost allowance (i.e. extension of time or adjustment to the DCT) for Latent Conditions under</p>

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		<p>the Superintendent.</p> <p>A Latent Condition is a qualifying cause of delay entitling the Contractor to an extension of time under the contract.</p> <p>In addition, any additional costs incurred by the Contractor as a result of the Latent Condition will be reflected in an adjustment to the Contract Sum. The additional costs will be valued as a variation under the contract.</p>	<p>Latent Condition as part of the performance of the Works.</p> <p>The Participants will not be entitled to any time or cost allowance for a Latent Condition. That is because the Risk Provisions in the DCT will include the cost of overcoming Latent Conditions and any delays associated with Latent Conditions.</p>	<p>an alliance contract. However, allowance for the cost of overcoming Latent Conditions and any delays associated with Latent Conditions will be made by the Participants when setting the DCT (which is approved by the Owner). Given that the allowance will be made as Risk Provisions, the Participants will make a gain or loss under the risk/reward* regime depending on whether or not the Direct Costs incurred for Latent Conditions are less than or exceed those Risk Provisions. These gains or losses will be shared equally between the Owner and the NOPS under the risk/reward* regime.</p> <p>Scope does exist, however, for certain Latent Conditions which carry a low risk of materialising to be excluded from the Risk Provisions, and therefore the DCT.</p>
7	Changes and Variations	<p>The Superintendent may direct the Contractor to vary the work under the Contract.</p> <p>The Contractor will be entitled to an extension of time for any variation (but not delay damages).</p> <p>The Contractor will be entitled to its additional costs of executing any variation (either agreed between the parties or valued in accordance with the provisions of the contract).</p>	<p>The Owner may direct the Participants to change the Works (<b>Change</b>). In some instances, the ALT may also direct Changes to the Participants. Government agencies need to carefully consider the appropriateness (or otherwise) of entitling the ALT to direct Changes to the Participants (particularly in the context of the effect a Change may have on the Owner's value for money proposition for the project).</p> <p>If the ALT determines that the Participants will be delayed in reaching Practical Completion as a result of a Change directed by the Owner, the ALT must decide on an appropriate extension of time.</p> <p>Unless the ALT determines that a Change</p>	<p><b>Ability to direct Changes</b></p> <p>Unlike under a traditional contract, in some instances, the Owner will not have the sole right to direct Changes under an alliance contract. Rather, in some instances, the ALT may also direct Changes. However, the Owner will be represented (albeit by representatives of the Owner Participant) on the ALT and all decisions of the ALT must be unanimous. In addition, the ALT must act in Good Faith* and in accordance with the Alliance Charter.</p> <p><b>Time allowance for Changes</b></p> <p>Unlike under a traditional contract, the Owner will not have the sole right to determine whether or not the Participants are entitled to a time allowance for Changes under an alliance contract. Rather, it will be determined by the ALT. However, the Owner will be represented (albeit by representatives of the Owner Participant) on the ALT and all decisions of the ALT must be unanimous. In addition,</p>

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8	Changes in Legislative Requirements	<p>The Contractor must satisfy all Legislative Requirements in completing the work under the Contract.</p> <p>If there is a change in a Legislative Requirement, the Contractor must comply with it.</p>	<p>If the Participants become aware of a change in Legislative Requirement, the Participants will be jointly responsible for complying with the changed requirements as part of the performance of the Works.</p> <p>The Participants will not be entitled to any</p>	<p>Unlike under a traditional contract, the Participants will not be entitled to a time or cost allowance (i.e. extension of time or adjustment to the DCT) for changes in Legislative Requirements under an alliance contract. However, allowance for the cost of complying with changes in Legislative Requirements and any delays associated with complying with changes in Legislative Requirements will be</p>

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		<p>A change in Legislative Requirement is a qualifying cause of delay entitling the Contractor to an extension of time under the contract.</p> <p>In addition, any additional costs incurred by the Contractor as a result of a change in Legislative Requirement will be reflected in an adjustment to the Contract Sum. The additional costs will be valued as a variation under the contract.</p>	<p>time or cost allowance for a change in Legislative Requirement as the Risk Provisions in the DCT will include the cost of complying with changes in Legislative Requirements and any delays associated with complying with changes in Legislative Requirements.</p> <p>However, please note that, in some instances, changes in Legislative Requirements will not be included as Risk Provisions in the DCT. Rather, they will be subject to an “adjustment event” regime under which the occurrence of any “adjustment event” (which events will be workshopped and agreed between the Participants prior to entry into the alliance contract) will entitle the ALT to recommend an adjustment to any part of the commercial framework for the Owner’s approval.</p>	<p>made by the Participants when setting the DCT (which is approved by the Owner). Given that the allowance will be made as Risk Provisions, the Participants will make a gain or loss in the risk/reward* regime depending on whether or not the Direct Costs incurred for changes in Legislative Requirements are less than or exceed those Risk Provisions. These gains or losses will be shared equally between the Owner and the NOPs under the risk/reward* regime.</p>
9	Force Majeure	<p>The concept of Force Majeure is not used in a traditional contract. However, certain elements of the concept of Force Majeure appear in the traditional contract as events or circumstances that may give rise to claims by the Contractor for time, cost or both. The commercial risk allocation under the contract differs according to the nature and circumstances of the event in question.</p> <p><b>Reinstatement of damage</b></p>	<p>If loss or damage is caused to the Works by a Force Majeure Event, then the Participants will be jointly responsible for rectifying the loss or damage. The Participants’ costs of rectifying the loss or damage will be Direct Costs. The loss or damage may be covered under the Contract Works insurance policy taken out under the alliance contract. Any excesses applicable to that policy will be Direct Costs. If the ALT determines that the DCT should be adjusted as a result of the Force</p>	<p><b>Assessment of Force Majeure</b></p> <p>Under a traditional contract, the method by which extension of time or cost claims are evaluated for ‘force majeure’ type events is strictly regimented and therefore fairly predictable.</p> <p>Assessment of such claims under an alliance contract, however, is more imprecise, as the consequences of a Force Majeure Event are determined by the ALT. In making decisions, the ALT, including the Owner as Owner Participant, is bound to comply with the Alliance Charter and to act in Good Faith*, thereby reducing the risk of decisions adverse to the Owner’s interests.</p>

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		<p>The cost of reinstatement of damage to the work under a traditional contract will be borne by the Contractor, unless an Excepted Risk has eventuated in which case the Principal will bear associated costs.</p> <p>Where the cause of damage can only partly be attributed to an Excepted Risk, the Contractor will be entitled to costs proportionate to the extent that damage was caused by the Excepted Risk.</p> <p>The Contractor will only be entitled to an extension of time if the requirements of the extension of time provisions in the contract have been met – notwithstanding that the damage to works have been caused by an Excepted Risk.</p> <p>The loss or damage may be covered under the Contract Works insurance policy taken out under the contract.</p>	<p>Majeure Event (for the purposes of the risk/reward* regime), then it will recommend an adjustment to the DCT for the approval of the Owner.</p> <p>If the ALT determines that the Participants will be delayed in reaching Practical Completion as a result of a Force Majeure Event, the ALT must decide any appropriate extension of time.</p> <p>The Owner will not have the right to terminate the alliance contract for a Force Majeure Event. However, the Owner may terminate the alliance contract for convenience, but would be obliged to make a termination payment to the NOPs (refer to Item 15).</p> <p>Please note that, in some instances, the alliance contract will not include Force Majeure Event and extension of time regimes. Rather, there will be an “adjustment event” regime under which the occurrence of any “adjustment event” (which events will be workshopped and agreed between the Participants prior to entry into the alliance contract) will entitle the ALT to recommend an adjustment to any part of the commercial framework (including the Date for Practical Completion) for the Owner’s approval.</p>	<p><b>Responsibility for rectifying loss or damage</b></p> <p>Under a traditional contract, the Contractor will be responsible for the cost of loss or damage to the work under the Contract caused by events of a ‘force majeure’ nature (which may be covered by insurance) other than Excepted Risk events.</p> <p>Unlike under a traditional contract, if loss or damage is caused to the Works by a Force Majeure Event under an alliance contract, the Participants will be jointly responsible for rectifying the loss or damage. The Participants must act in Good Faith* and in accordance with the Alliance Charter in rectifying the loss or damage.</p> <p><b>Time allowance for Force Majeure</b></p> <p>Unlike under a traditional contract, the Owner will not have the sole right to determine whether or not the Participants are entitled to a time allowance for Force Majeure Events under an alliance contract. Rather, it will be determined by the ALT. However, the Owner will be represented on the ALT and all decisions of the ALT must be unanimous. In addition, the ALT must act in Good Faith* and in accordance with the Alliance Charter.</p> <p><b>Cost allowance for Force Majeure</b></p> <p>Unlike under a traditional contract, the Participants will be entitled to a cost allowance (i.e. adjustment to the DCT for the purposes of the risk/reward* regime) for Force Majeure Events under an alliance contract. The cost allowance will be recommended by the ALT and approved by the Owner. Under a traditional contract, the Contractor will only be entitled to a cost allowance for these events where there is loss or damage caused to the work under the Contract and in certain circumstances where variations are directed.</p>

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		<p>reasonable control of the Contractor' occurring on or before the Date for Practical Completion.</p> <p><b>Variations</b></p> <p>The superintendent may direct a variation under the contract . An extension of time and/or additional costs may be granted by the superintendent in that process.</p> <p><b>Frustration</b></p> <p>If the contract is frustrated, then the contract will terminate and the Principal must make a termination payment to the Contractor</p>		
10	Insurance	<p>Either the Principal or the Contractor will be responsible for taking out and maintaining contract works and public liability insurance for the contract. In most instances, the Contractor will take out those insurances.</p> <p>In addition, the Contractor will be responsible for taking out and maintaining professional indemnity and workers' compensation insurance under the contract.</p> <p>To the extent that the Contractor is responsible for taking out and maintaining insurances for the contract, the Contractor's costs of the insurances will be included in the Contract Sum.</p>	<p>In some instances, the Owner will be responsible for taking out and maintaining contract works, professional indemnity and public liability insurance for the Project. The insurances taken out by the Owner will generally be project specific and will also name the NOPs and all of the Subcontractors as insureds (where applicable). As part of developing its project requirements, the Owner will undertake a risk analysis (with input from its insurance adviser) to determine whether it is desirable for the Owner to take out and maintain these insurance policies for the project.</p> <p>In addition, each of the Owner and the NOPs will take out and maintain their own workers' compensation, motor vehicle and</p>	<p>Under a traditional contract, in most instances, the Contractor will take out their own insurances for the purposes of the contract. The Contractor's costs of the insurances will be included in the Contract Sum. Claims made against those insurances will be managed by the Contractor.</p> <p>In some instances and unlike under most traditional contracts, the Owner will, where a risk analysis shows this to be the most desirable option be responsible for taking out the key insurances for the Project under an alliance contract. These insurances will be project specific. However, given this responsibility for taking out the key insurances, the Owner will be entitled to manage any claims made under those insurances. The cost of the insurances (including any excesses applicable to those insurances) will be reimbursed as Direct Costs under the</p>

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		<p>Claims made against the insurances taken out under the contract will be managed by the party taking out that insurance.</p> <p>Any insurance proceeds will be dealt with in the following manner:</p> <ul style="list-style-type: none"> <li>if the work under the Contract needing reinstatement has been the subject of an amount payable by the Principal to the Contractor and the Contractor has not completed reinstatement, the insurance proceeds will be paid into a joint account and the Contractor's cost of reinstatement will be certified by the Superintendent; and</li> <li>if the work under the Contract needing reinstatement has not been the subject of an amount payable by the Principal to the Contractor, the insurance proceeds will be paid directly to the Contractor.</li> </ul>	<p>construction plant and equipment insurances for the Project.</p> <p>The cost of the insurances taken out and maintained by the Owner and the NOPs will be included in the DCT and reimbursed as Direct Costs under the alliance contract. Any excesses applicable to those insurance policies will also be reimbursed as Direct Costs under the alliance contract and the DCT may be increased to reflect the additional Direct Costs incurred by the Participants (in circumstances where the Owner agrees to take the sole risk of the cost of insurance claims under the alliance contract). However, if the Owner does not agree to take the sole risk of the cost of insurance claims under the alliance contract, then the DCT will not be adjusted in these circumstances and the Owner and the NOPs will share the additional costs as part of the risk/reward* regime.</p> <p>Claims made against the insurances taken out by the Owner for the Project will be managed by the Owner.</p> <p>To the extent that a NOP receives insurance proceeds that reimburse any amounts that were or are reimbursable under the alliance contract, the NOP must pass on those insurance proceeds to the Owner. The Owner may otherwise require its insurer to make payment of any insurance proceeds directly to the Owner.</p> <p>The ALT will regularly review and make</p>	<p>alliance contract.</p>

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11	Liability	<p>The Contractor indemnifies the Principal against:</p> <ul style="list-style-type: none"> <li>• loss or damage to property of the Principal; and</li> <li>• claims by any persons against the Principal in respect of personal injury or death or loss or damage to property,</li> </ul> <p>arising out of the Contractor carrying out the work under the Contract.</p> <p>The Contractor's indemnities are reduced proportionally to the extent that the Principal or Superintendent contributed to the loss, damage or claim.</p> <p>In turn, the Principal indemnifies the Contractor against claims in respect of the right of the Principal to have the work under the Contract carried out.</p>	<p>recommendations to the Owner as to the insurances required for the Project and the adequacy and appropriateness of the insurances taken out for the Project.</p> <p>The Owner (whether as the client for the Works or the Owner Participant) and the NOPs indemnify each other against loss or damage or claims suffered by them as a result of:</p> <ul style="list-style-type: none"> <li>• non-compliance with the insurance requirements of the alliance contract; and</li> <li>• any Wilful Default by the Owner or the NOPs (respectively).</li> </ul> <p>The indemnities given by the Owner and the NOPs are reduced proportionally to the extent that the other Participant contributed to the loss or damage or claim.</p>	<p>Under a traditional contract, the Principal has the benefit of a broad indemnity from the Contractor.</p> <p>Under an alliance contract, whilst the Owner and the NOPs each provide reciprocal indemnities, those indemnities are very much narrower in application than under a traditional contract. The reason for this is based on the no blame/no suit* principle meaning that the Participants agree that there will be no litigation or arbitration between them under the Agreement (except in limited circumstances).</p>
12	Limits of liability	<p>The liability of the Principal and the Contractor to each other is not limited under the standard form of the contract. However, limits of liability may be negotiated between the parties.</p>	<p>The liability of the Owner and the NOPs to each other is limited under the alliance contract.</p> <p>However, there are circumstances in which</p>	<p>Under the standard form of traditional contract, there is no general limit of liability of each party.</p> <p>Under an alliance contract, there is a limit of liability on each of the Owner and the NOPs. However, given that the Participants are jointly responsible for the performance of</p>

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		<p>However the standard form of the contract does set up separate caps imposed on specific liabilities under the contract. For example, the Contractor's liability to the Principal for liquidated damages may be capped.</p>	<p>the limits of liability will not apply, including:</p> <ul style="list-style-type: none"> <li>• non-compliance with the insurance requirements of the alliance contract (this being covered by the indemnities referred to in Item 11);</li> <li>• any Wilful Default by the Owner or the NOPs (respectively) (this being covered by the indemnities referred to in Item 11); and</li> <li>• non-payment of any amounts due under the Agreement.</li> </ul> <p>Please note that, in some instances, the limit of liability of the NOPs under the alliance contract will also not apply in circumstances where a NOP is subject to an insolvency event.</p> <p>In addition, the limit of liability under the alliance contract does not apply to any caps on the NOPs' liability to pay a Risk Amount to the Owner under the risk/reward* regime.</p>	<p>the Works and the Participants agree to the no litigation principle, the circumstances in which the Owner may make a claim against the NOPs under the alliance contract are limited in any event. Further, many of the circumstances in which the Owner may make a claim against the NOPs under the alliance contract are carved out from the limit of liability. Finally, whilst the NOPs' liability to the Owner is limited under an alliance contract, the Owner's liability to the NOPs is similarly limited.</p>
13	Suspension of Works	<p>The work under the contract may be suspended by:</p> <ul style="list-style-type: none"> <li>• the Superintendent, if the Superintendent considers such suspension is necessary: <ul style="list-style-type: none"> <li>– because of an act or omission of the Principal, the Superintendent or the Contractor;</li> </ul> </li> </ul>	<p>The Participants may only suspend the Works:</p> <ul style="list-style-type: none"> <li>• with the approval of the Owner; or</li> <li>• if there is a real risk of injury to persons or damage to the environment.</li> </ul> <p>In addition, the Owner may suspend the Works at any time it considers it necessary or appropriate.</p>	<p><b>Right to suspend the Works</b></p> <p>Under a traditional contract, the work under the Contract may only be suspended by the Superintendent or with the approval of the Superintendent.</p> <p>Unlike under a traditional contract, there are circumstances under an alliance contract in which the Participants may suspend the Works without the separate approval of the Owner. However, in making any decision to suspend the Works, the Participants (being the Owner Participant and</p>

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		<ul style="list-style-type: none"> <li>– for the protection or safety of any person or property; or</li> <li>– to comply with a court order; or</li> <li>• the Contractor, if it wishes to do so and provided that the Superintendent has approved the suspension.</li> </ul> <p>The costs of any suspension will be borne by the Contractor, unless the suspension is due to an act or omission of the Principal or the Superintendent, in which case any additional costs will be valued as a variation under the contract.</p>	<p>The Owner must reimburse the NOPs the Direct Costs incurred during the period of any suspension (unless the suspension is caused by a breach of the Agreement by the NOPs). In addition, unless the suspension is caused by a breach of the Agreement by the NOPs, the DCT will be adjusted by that amount for the purposes of the risk/reward* regime (in circumstances where the Owner agrees to take the sole risk of the cost of any suspension under the alliance contract). However, if the Owner does not agree to take the sole risk of the cost of any suspension under the alliance contract, then the DCT will not be adjusted in these circumstances and the Owner and the NOPs will share the additional costs as part of the risk/reward* regime (unless the ALT recommends and the Owner otherwise approves adjustment to the DCT in these circumstances).</p>	<p>the NOPs) must act in Good Faith* and in accordance with the Alliance Charter.</p> <p><b>Cost of suspension of the Works</b></p> <p>Unlike under a traditional contract, the NOPs under an alliance contract do not bear the costs of the suspension. Rather, the Owner must reimburse the NOPs the Direct Costs incurred during the period of any suspension (unless the suspension is caused by a breach of the alliance contract by the NOPs) and the DCT will be adjusted by that amount for the purposes of the risk/reward* regime. Therefore, unless the suspension is caused by a breach of the alliance contract by the NOPs, the Owner will bear the costs of the suspension in the form of reimbursing the NOPs the Direct Costs incurred during the period of any suspension and making allowance for those additional costs in the risk/reward* regime.</p>
14	Termination for default or insolvency	<p><b>Default by the Contractor</b></p> <p>If the Contractor commits any substantial breach of the contract, the Principal may:</p> <ul style="list-style-type: none"> <li>• give the Contractor a written notice to show cause why the Principal should not exercise its rights to take over the work under the Contract or terminate the contract;</li> <li>• suspend payment to the Contractor until the Contractor has showed</li> </ul>	<p>If the Owner (whether as the client for the Works or Owner Participant) or a NOP:</p> <ul style="list-style-type: none"> <li>• commits a Wilful Default;</li> <li>• commits a material breach of an essential provision of the alliance contract; or</li> <li>• is the subject of an insolvency event,</li> </ul> <p>and, in respect of any material breach, the ALT has in writing allocated responsibility for the relevant obligation to that</p>	<p><b>Default by the Contractor/NOPs</b></p> <p>Under a traditional contract, if the Contractor commits any substantial breach of the contract which is not remedied, the Principal may take over the work under the contract or terminate the contract.</p> <p>Under an alliance contract, the events of default entitling the non-defaulting Participants to terminate or exclude a defaulting NOP are limited to Wilful Default and material breaches of provisions of the alliance contract which are fundamental to the operation of the alliance (i.e. access</p>

No.	Subject	Traditional contract	Alliance contract	Material difference and trade off between traditional contract and alliance contract
		<p>cause; and</p> <ul style="list-style-type: none"> <li>if the Contractor fails to show cause, then the Principal may take over the work under the contract or terminate the contract by written notice.</li> </ul> <p><b>Default by the Principal</b></p> <p>If the Principal commits any substantial breach of the contract, the Contractor may:</p> <ul style="list-style-type: none"> <li>give the Principal a written notice to show cause why the Contractor should not exercise its rights to suspend the work under the contract or terminate the contract; and</li> <li>if the Principal fails to show cause, the Contractor may first suspend the work under the Contract and, if the Principal continues to fail to remedy the breach within 28 days of the suspension, terminate the contract by written notice and recover damages from the Principal.</li> </ul> <p><b>Insolvency</b></p> <p>If either party suffers an insolvency event, the other party may, without giving notice to show cause, exercise its rights to:</p> <ul style="list-style-type: none"> <li>if it is the Principal, take over the work under the Contract; and</li> <li>if it is the Contractor, suspend the work under the Contract.</li> </ul>	<p>Participant, then the non-defaulting Participants may:</p> <ul style="list-style-type: none"> <li>where the relevant breach is capable of remedy, give the defaulting Participant a notice to remedy the relevant breach;</li> <li>suspend payment to the defaulting Participant until the breach has been remedied; and</li> <li>terminate the alliance contract by written notice if the defaulting Participant fails to remedy the default within the remedy period. If the defaulting Participant is a NOP, then the non-defaulting Participants will require the approval of the Owner to terminate the alliance contract.</li> </ul> <p>In addition, if the defaulting Participant is a NOP, then the non-defaulting Participants may, with the approval of the Owner, exclude the defaulting NOP from further participation in the alliance contract.</p>	<p>and audit, insurance, indemnities and intellectual property).</p> <p>This is the case because the Participants assume joint responsibility for the Works which makes it difficult to assign blame for any error or mistake arising under the alliance contract. In addition, the Participants agree to the no litigation principle. The purpose of this principle is to refocus the Participants from acting in a 'best for self' manner and incentivise acting in a 'Best For Project'* manner.</p> <p><b>Default by the Principal/Owner</b></p> <p>As above, the material difference between a traditional contract and an alliance contract in respect of rights on default of the Principal/Owner is that the events of default entitling the NOPs to terminate are quite limited, comprising only Wilful Default of the Owner and material breaches by the Owner of provisions of the alliance contract which are fundamental to the operation of the alliance.</p> <p><b>Insolvency</b></p> <p>Under a traditional contract, if either party suffers an insolvency event, the other party may:</p> <ul style="list-style-type: none"> <li>if it is the Principal, take over the work under the Contract; and</li> <li>if it is the Contractor, suspend the work under the Contract.</li> </ul> <p>The other party does not have the right to terminate the contract.</p> <p>Under an alliance contract, if a Participant suffers an Insolvency Event, then the other Participants may terminate the alliance contract. Whilst this right is conferred on each of the Participants, an insolvency event is much more likely</p>

No.	Subject	Traditional contract	Alliance contract	Material difference and trade off between traditional contract and alliance contract
15	Termination for convenience	The standard form of the Contractor does not provide the Principal with a right to terminate the contract for convenience. However, rights to terminate for convenience may be negotiated between the parties.	<p>The Owner may at any time terminate the alliance contract by written notice to the NOPs, in which case it must make a termination payment to the NOPs which will include:</p> <ul style="list-style-type: none"> <li>• payment for work carried out until termination and entitlement to compensation;</li> <li>• the cost of materials reasonably ordered by the NOPs which the NOPs are legally liable to accept, but only if the materials become the property of the Owner;</li> <li>• the reasonable costs of demobilisation; and</li> <li>• the reasonable cost of complying with any directions given by the Owner upon, or subsequent to, termination.</li> </ul> <p>The termination payment will not include any allowance for any losses of the type of loss of profit or anticipated profit or loss of opportunity.</p>	<p>to be suffered by a NOP than the Owner (where it is a Government agency). In these circumstances, the Owner, together with the other NOPs, may elect to terminate the alliance contract or exclude the relevant NOP from the alliance contract.</p> <p>Under the standard form of traditional contract, the Principal does not have a right to terminate the contract for convenience.</p> <p>Under an alliance contract, the Owner may at any time terminate the alliance contract for convenience. However, in doing so, the Owner must act in Good Faith* and in accordance with the Alliance Charter (including by being open and transparent with the NOPs and giving the NOPs the opportunity to respond). In addition, if the Owner terminates the alliance contract for convenience, it must make a termination payment to the NOPs (however the termination payment will not include any allowance for any losses of the type of loss of profit or anticipated profit or loss of opportunity).</p>

No.	Subject	Traditional contract	Alliance contract	Material difference and trade off between traditional contract and alliance contract
16	Dispute resolution	<p>If a dispute or difference arises under the contract, either party may deliver a notice of dispute in writing to the other party and the parties will:</p> <ul style="list-style-type: none"> <li>• attempt to resolve the dispute by conferral and, failing resolution by conferral, submit the dispute to arbitration (Alternative 1); or</li> <li>• submit the dispute to the Superintendent for a decision and, if either party is dissatisfied with the decision, submit the dispute to arbitration (Alternative 2).</li> </ul> <p>Either party may institute proceedings to seek injunctive or urgent declaratory relief for any dispute arising under the contract.</p>	<p>The Participants are jointly responsible for performing the Works. In performing the Works, the Participants must act in Good Faith* and in accordance with the Alliance Charter. The Alliance Charter sets up a model of agreed decision-making processes and incentives which seek to align the Participants' objectives in relation to the Project and, in that way, reduces the risk of disputes and, it is hoped, removes the possibility of litigation between the Participants. Further to this, the Participants agree that there will be no litigation or arbitration between them under the alliance contract, except in limited circumstances (i.e. Wilful Default by a Participant).</p> <p>Each Participant must immediately notify the others of any issue which may amount to a dispute under the alliance contract. The ALT must deal effectively with any differences of opinion and conflicts of interest which may arise and will agree on a dispute resolution procedure, consistent with the no litigation principle, for the alliance.</p>	<p>Under a traditional contract, there is a formal dispute resolution procedure which will apply to resolving disputes arising under that contract.</p> <p>Unlike under a traditional contract, the alliance contract does not contain a formal dispute resolution procedure. This is because the Participants must act in Good Faith* and in accordance with the Alliance Charter under the alliance contract which sets up a model of agreed decision-making processes and incentives which seek to align the Participants' objectives in relation to the Project and, in that way, reduce the risk of disputes and remove the possibility of litigation between the Participants. The ALT must deal effectively with differences of opinion and conflicts of interest which may arise under the alliance contract – and develop a procedure for that purpose. In addition, the Participants agree to the no litigation principle under the Agreement (with limited exceptions). This has the effect that the adversarial or 'claims based' culture of the traditional contract does not pervade the alliance contract.</p> <p>The ALT must resolve all issues which arise under the alliance contract in a unanimous manner and in accordance with the procedure developed for that purpose. The Participants may not resort to litigation to resolve issues under the alliance contract.</p>

## 4 Template form of alliance charter

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The following sample provisions may be included in or attached to an alliance contract as an alliance charter for that alliance contract.

### 1 Definitions

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In this Agreement, the following words have the following meanings:

<b>Term</b>	<b>Meaning</b>
Alliance Charter	the charter (including the Alliance Principles, Alliance Purpose and Alliance Objectives) developed by the Participants for the performance of the Works and which underpins the relationship between the Participants under this Agreement and which is included as Schedule 1 of this Agreement.
Alliance Leadership Team	the alliance leadership team which is established by the Participants to provide leadership, governance and accountability and ensure that this Agreement runs as smoothly and efficiently as possible for the benefit of the Participants.
Alliance Management Team	the alliance management team which is established by the Participants to provide day-to-day leadership and management of the performance of the Works.
Alliance Objectives	are set out in Schedule 1.
Alliance Principles	are set out in Schedule 1.
Alliance Purpose	is set out in Schedule 1.
Best For Project	an approach, decision, method, solution, interpretation, outcome or resolution that is consistent with both the Alliance Principles and the Participants' undertaking and commitment to work together in a way that produces outstanding outcomes in relation to all aspects of the performance of the Works.
Legislative Requirements	includes: <ol style="list-style-type: none"><li>1 Acts of Parliament;</li><li>2 authorisations;</li><li>3 directions given under a statutory power which affect the performance of the Works; and</li><li>4 all other laws, regulations, conventions, orders, directions, guidelines and policies given by or on behalf of any Government agency which may apply to the Works.</li></ol>
Participants	the participants in the performance of Works under the alliance contract.

Relevant Period the period commencing on the date of this Agreement and ending on:

- 1 a date agreed by the Alliance Leadership Team; or
- 2 failing agreement, the date necessary to ensure that all Participants comply with any Legislative Requirement relating to record keeping.

Works the whole of the works and services which the Participants are or may be required to carry out under this Agreement.

## 2 Commitments

### 2.1 Good Faith

In exercising their rights and performing their obligations under this Agreement, the Participants agree at all times to act in Good Faith, which for this Agreement means:

- (a) acting fairly and reasonably;
- (b) being honest in performing the Participants' obligations under this Agreement; and
- (c) doing all things reasonably expected of the Participants to give effect to the spirit and intent of this Agreement.

**Guidance Note** – The Participants' commitment to acting in Good Faith is the overriding commitment made by the Participants to each other when entering into the alliance contract. In a general sense, acting in Good Faith encompasses the Participants acting fairly and reasonably and openly and honestly with each other in everything they do under the alliance contract and doing all things necessary to give effect to the intent of the alliance contract. In respect of fairness and reasonableness, the Participants must make "Best For Project" (rather than "best for self") decisions with the aim of producing outcomes where all Participants will win equally or lose equally, based on the objectives of the Project (e.g. the materials required for the Works must be purchased on a cost and quality basis only).

In respect of openness and honesty, the Participants must have a "communication culture" and be transparent in all of their dealings with each other in respect of the Project, share all information and not hold back ideas (e.g. during the development of the DCT, if a Participant has a idea regarding innovation or cost reduction, this should be communicated to the other Participants prior to the DCT being settled, not later).

Finally, each of the Participants must formally commit to the spirit and intent of the alliance contract, do all things to deliver the Project and achieve its objectives and not use the words of the alliance contract to attempt to absolve itself of responsibility and in a manner which is "best for self".

The Non-Owner Participants' commitment to acting in Good Faith is also demonstrated by ensuring that their nominated Non-Owner Participant team members are made available to the project, for the duration of the project, as per their bid offer.

### 2.2 Results orientated

The Participants commit to working together to meet the Alliance Objectives and to produce outstanding results in carrying out the Works.

**Guidance Note** – Establishing a "results orientated" culture requires the Participants to have a clear understanding of the objectives of the Project and to work together and collaborate in respect of all aspects of the performance of the Works (from designing the Works, preparing the DCT for the Works, obtaining all of the authorisations required to deliver the Project and to preparing a project management system for the Project). With a clear understanding of the objectives of the Project, each endeavour of the Participants under the alliance contract must be made with the aim of producing outstanding results as against the objectives of the Project.

“Best-in-class” resources must be utilised and innovation must be encouraged. Given that the Participants will collaborate in all aspects of the performance of the Works, all of the Participants will have complete “buy in” in respect of the Project and any outstanding results will be achieved by the Participants as a whole (rather than any one Participant). Outstanding results will be recognised by the Participants as a team effort.

## 2.3 Best For Project

The Participants commit to establishing an alliance culture based on the Alliance Charter and to act at all times in a manner that is consistent with a Best For Project approach.

**Guidance Note** – To satisfy this commitment, each approach, decision, solution or resolution that is taken or made by the Participants under the alliance contract must be developed collaboratively and agreed by the Participants on the basis that it is consistent with:

- the Alliance Principles; and
- producing an outcome where all Participants will win equally or all Participants will lose equally, based on the objectives of the Project.

Any approach, decision, solution or resolution taken or made by the Participants which would result in a win-loss outcome for the Participants will not be acceptable. There is no concept of “best for self” decision-making under an alliance contract.

To achieve this, the Participants must establish a peer relationship where each Participant has an equal say in decisions for the Project, all communications between the Participants must be open, straight and honest so as to enable informed decision making and each of the Participants must have a clear understanding of the objectives of the Project.

## 2.4 Open book commitment

- (a) Each Participant commits to:
- (1) maintaining, for at least the Relevant Period, all of the records and other documentation referred to in this Agreement that relate to the Works in accordance with, where applicable, good accounting practices, standards and procedures;
  - (2) making the records and other documentation available to each other (or each other’s nominated auditor) on request; and
  - (3) making available to each other (or each other’s nominated auditor) any existing documentation or information in whatever form relating to the Works.
- (b) The obligation to make records and documentation available does not apply to records or documentation that may be the subject of legal professional privilege or are confidential lawyer/client communications.

**Guidance Note** – To satisfy this commitment, the Participants must fully document their involvement in the Project (including all Direct Costs incurred by the Participants in performing the Works) and be transparent in all of their dealings with each other in respect of the Project. For this purpose, the Participants must agree record-keeping and accounting practices and procedures which will be implemented by the Participants.

The Participants must give a real commitment to ensuring that the Owner is able to understand any information, analysis and methodology contained in the documentation prepared by the Participants in respect of the Project. In turn, the Owner must ensure that it has allocated adequate professional resources to properly understand that documentation.

As part of the preparation of the Direct Cost Target, the Non-Owner Participants must have been fully transparent in respect of each of the cost components of performing the Works and ensure that no cost components have been hidden from the Owner (either by absence from, or aggregation in, the Direct Cost Target).

**2.5 Commitment to “no-blame” culture**

The Participants acknowledge and agree that a key purpose of this Agreement is, and they will commit themselves to:

- (a) the promotion and maintenance of a "no-blame" culture between the Participants in relation to disputes, errors, mistakes, poor performance and other issues which may arise; and
- (b) the prompt and mutual resolution of all disputes, differences and other issues by all Participants within the framework created by this Agreement.

**Guidance Note** – The establishment of a “no-blame” culture involves a commitment from each of the Participants that, where there is an error, mistake or poor performance under the alliance contract, the Participants will not attempt to assign blame but rather accept joint responsibility for that error, mistake or poor performance and its consequences (financial and otherwise) and agree a course of action to remedy the error, mistake or poor performance which is Best For Project.

In addition, if there is any dispute, difference of opinion or other issue between the Participants under the alliance contract, the Participants must immediately notify each other of that dispute, difference of opinion or issue and work together to resolve it in accordance with the resolution procedures agreed between the Participants and in a Best For Project manner.

A Participant must not act in a unilateral and best for self manner and without consultation with the other Participants.

**2.6 Value for Money**

The Participants acknowledge and agree that a key purpose of this Agreement is, and they will commit themselves to achieving, a Value for Money outcome in respect of the Works performed under this Agreement. For this Agreement, Value for Money means achieving the Owner’s VFM proposition at the lowest cost.

**Guidance Note** – To satisfy this commitment, the Participants must have a clear understanding of the Owner’s objectives of the Project (and must formally commit to achieving those objectives) and the nature of the project asset being delivered under the alliance contract.

The Participants must work collaboratively to develop and agree a methodology or approach in designing, costing (as part of development of the DCT) and constructing the Works which will produce an outstanding “Value for Money” outcome having regard to the Owner’s State VFM proposition. The “Value for Money” outcome must be able to be demonstrated to the Owner, the State and other stakeholders of the Project. The Participants must give a real commitment to ensuring that the Owner is able to understand the methodology or approach used by the Participants in designing, costing and constructing the Works so that the “Value for Money” outcome can be demonstrated to the Owner.

The Owner has a responsibility to provide the Participants with a statement of its VFM proposition that is consistent with the Government approved Business Case.

## Schedule 1 - Alliance Principles, Alliance Purpose and Alliance Objectives

### Alliance Principles

The Alliance Principles are:

- (a) all Participants win, or all Participants lose, based on achieved project outcomes. Win-lose outcomes are not acceptable;
- (b) Participants have a peer relationship where each Participant has an equal say in decisions for the project;
- (c) risks and responsibilities are shared and managed collectively by the Participants, rather than allocated to individual Participants;
- (d) disputes are avoided by adopting a no blame culture;
- (e) risks and rewards are shared equitably among Participants;
- (f) Participants must provide 'best-in-class' resources;
- (g) Participants act consistently according to espoused values;
- (h) Participants are committed to developing a culture that promotes and drives collaboration, innovation and outstanding performance;
- (i) the Alliance Leadership Team and the Alliance Management Team are developed towards empowered decisions and actions;
- (j) all transactions are fully open book;
- (k) communication between all Participants is open, straight and honest so as to enable informed decision making;
- (l) ethical and responsible behaviour at all times;
- (m) learnings of the Participants are identified and shared and capability is developed; and
- (n) important decisions are made, and processes and systems are adopted, on a Best For Project basis,

or as otherwise agreed by the Alliance Leadership Team from time to time.

### Alliance Purpose

The primary purpose of the project is to [*insert from the Owner's Government approved business case*].

### Alliance Objectives

The Alliance Objectives are: [*insert from the Owner's Government approved business case*].