

Governing in a collaborative environment: Defining responsibility between multiple stakeholders

- ✓ Allocating accountability between public and private sector interests: Why the current absence of guidelines is making life tough
- ✓ Making shared ownership work in practice
- ✓ Case studies of best practice models including Public Private Partnerships (PPP)

Tom McDonald,
Director, Legal and Insurance Policy,
ACT Treasury

Colleagues, good afternoon

Well folks here we are at 4 PM on day one of the conference and I'm here to present subject matter which to some is dry as the dust on the profit column of the Cross City Tunnel project in Sydney, dust that began to accumulate the day it was prepared. It is also heavily ploughed ground. My contention is the ground might as well be fallow without effective guidelines.

Another issue that may not have escaped one's mind is what in the hell is an ACT Government guy doing here talking to us about government and private collaborative arrangements when the ACT Government presently has no public-private partnerships. There are of course suitable words and epithets that could be used to associate with the three P's acronym in and around the ACT bureaucracy.

As the bio outlines, I am head of Treasury legal and insurance policy in the ACT Government and that includes whole of government risk, the ACT insurance authority as well as other issues in relation to structural reform, particularly in the compulsory statutory insurance space, liability and other areas of need (my job is to fix intractable problems).

So now, the necessary disclaimers. I am known as a pretty frank speaker and a lot of what I do and say in my civil service capacity has direct, sometimes immediate political implications, some of it in this space. So, I appear today as vice president of the Australian risk policy institute, not in my Treasury capacity. Consequently, and in addition, while you have my PowerPoint in your folders, I have a prepared text which will be published on the ARPI website later in the week.

I want to make some prefatory observations by way of history and context as to why, in my view there are no useful guidelines allocating accountability and responsibility between public and private sector interests before we get into the specifics of the subject matter.

I have enjoyed a long and fruitful Association with procurement on both sides of the aisle since the 1970's and particularly, large project procurement and with specific reference to collaborative relationship governance and relationship management.

However, it was in the capacity as a trial lawyer representing clients involved for the most part in high dollar sophisticated collaborative relationships with the United States government where those relationships needed a particular set of skills guys like me could provide that I got really focussed on the lack of effective relationship management, governance and guidelines with respect to such relationships. Now, in those endeavours, I tried to remain just another expert trial lawyer, but for those sins and some others, I guess, I became known as “that guy,” as in “we’d better get that guy in,” or from I guess the bureaucrat’s perspective, “oh lord, it’s that guy.”

Don’t be misled; there were guidelines aplenty, and colleagues one might find it a pretty perverse thing to think about things this way, but the clients considered it a very good day in court or tribunal, watching bureaucrats being turned into a quivering mass of jelly. And the truth is it was as easy as it was pleasurable because in every case, at least those in which I participated, irrespective of following established procedures, procurement guidelines and management guidelines or things of that nature, none of the arrangements that came my way ever had a pertinent, dynamic, flexible and serious set of guidelines that dealt with collaborative arrangements generally or the one in dispute that allowed the responsible manager to have an empirical referent by which they could measure the performance and function of the entity or the activity and with respect to which they could manage it effectively. Those charged with governance were always remote from the arrangement and naturally, the government was anxious to keep those people away from the witness box in case the truth set them free.

Thus, the government entities were almost always exposed to the point where people like me would come along and be able to find the flesh still on their bones, rip it off and eat it in front of them. That was the essence of part of what I used to do for a living: turning honest (well, for the most part) mistakes into cash.

I formed the view that the problems, being endemic across government agencies stemmed from ideology, in the sense that many precipitous decisions were taken in president Reagan’s first term and early in his second term that were not underpinned by structured policy

development. For example, the sudden abolition of the Federal Energy Regulatory Commission spawned the capital breakout of Enron Corporation, the monster that ultimately ate Texas. The challenger disaster was indirectly a by-product of the president's policy agenda on numeracy and literacy. "The leader has spoken; we must obey and meet his schedule."

Both Reagan and Thatcher genuinely believed that it was always more efficient for outside industry or private corporations to deliver what were once traditionally government provided services than it was for governments so to do. Thus, both of them began almost immediately to privatise various functions, turning government bureaucracies from being service providers into managers of services provided externally. It was a grand idea and properly implemented, in my view, collaborative arrangements provide the most balanced interaction between private and public expectations with a higher quality of service delivery than can be achieved by either of them acting alone.

The idea was great, but in my view, its implementation was both precipitous and not well understood (I must at this point share with you my wife's mantra, whenever she sees me working on risk policy stuff: "bring back the meat inspector!"), so the various bureaucracies attempted to shoehorn the new policy into existing guidelines and processes without really seeking to comprehend the foundations of the principle. That's why there were no initiating guidelines that referred to allocation of responsibility, relationship management, collaborative management and governance. I will share some recent attempts to articulate what such guidelines ought to contain, but as we will see, they fall short, too.

That ideology and the, dare I say as a disinterested observer from afar, its blind application in Australia now brings us all to this venue today. I speculate that the lack of guidelines here had another dimension, similar to what happened in the UK. Those who I can euphemistically describe in economics terms as the friction people had excellent procedures and guidance internally but they are proprietary. How ridiculous: governments lay out palm grease and get friction back.

The last explanation I posit for consideration is that there are so many variations in the collaborative organism, making decisions about generic or specific guidance was and remains too daunting a task. I will deal with that issue later but in terms of acronyms, my personal favourites are BBO (as in Bobo the clown) and BLOT (on the landscape).

I'm going to deal with the first two items on my agenda today in a single cohort because they are intertwined. The final topic is problematic in the sense that in this country at least, best practice and collaborative arrangement/PPP success depends on who won the fees jackpot. But I'll take a shot if time permits.

Other speakers today have defined governance and have stressed its importance. No doubt it is important. In addition, what is also important is to accept the fact that once responsibilities are allocated, management and governance of them need to be both sides of the same coin.

Naturally, one cannot manage or govern a collaborative arrangement efficiently without an effective allocation of responsibilities and in respect of that issue, those who will be responsible for management and governance need to be a part of the allocation process.

Traditional thinking would lead us to conclude that responsibilities ought to be allocated by reference to which of the parties (and there may be several) is best placed to assume the risk in relation to each element of the relationship. But that does not work if the parties have a different vision of risk or if they seek actively to shift risk as part of the allocation process. What happens if they just don't consider risk? See below.

AS4360 provides a useful tool and the lack of its use is ably demonstrated by the following example: I know it is always convenient to use the New South Wales government as a whipping post when one wants a convenient victim but this example is really useful. The Association of Consulting Engineers Australia (ACEA) recently gave out their awards for excellence and those awards included a student project award to a student at Sydney University whose project was the effect of risk quantification on the performance of cost estimates for infrastructure projects in New South Wales. The student's task was to understand why costs were underestimated in some 90% of infrastructure projects.

The ACEA reported there appeared to be over confidence and underestimation of risk quantities in the projects and according to the ACEA, the student's analysis pointed to four major categories of explanation for such errors including technical error, cognitive or psychological bias, economic pressure and political pressure. The student apparently looked at 61 Water and Road infrastructure projects and naturally enough his findings were that the use of quantitative risk modelling usually gave improved cost estimates.

Colleagues, for all of us here today it's as plain as the nose on your face but the point is that this young gentleman got first class honours for this as a result of his engineering studies and no doubt this particular thesis is apposite because one must be led to believe that if analysis of this type is being done within the New South Wales government itself, it is not done elegantly.

On the other hand, in my view, a strict application of, say the AS4360 risk matrix can lead to perverse outcomes, such as project inertia and cost build-up. Collaborative arrangements are dynamic, sometimes fluid and have risk parameters that can vary from week to week. You can't waste time constantly reassessing a risk equation in such a way. One must identify the risks of course, but can I suggest a better way of allocating responsibility is not to start just with a risk matrix but concentrate on overall project benefits and vulnerabilities, particularly modelling impact analysis in case vulnerabilities manifest, seeking to maximise the former and minimise the latter.

In this regard the first thing to do is look at the values and goals of participants, from that one derives context, intentions and objectives. Allocation follows those objectives. It is different from strict risk management in that responsible parties can each take more subtle steps to deal with incremental issues. It also allows allocated responsibilities to be part of the overall benefit dynamic in the case of a shared goal. Let's look at it this way.

First, the endemic problem generator: risk versus reward. Collaboration or partnership necessarily implies that risks and rewards are shared. How does one achieve that outcome if the goal of government is to shift

risk and shift cost off budget and the goal of the private partners or collaborators is to maximise profits, or worse, lock in the deal so they can ramp their gearing for more speculative projects and use the collaborative deal as the steady flow cash cow that pays the freight.

Second, the problem of management and governance. I'd like to make a plea for peace love and understanding on behalf of collaboration managers in relation to this because it is with their performance that governance begins and ends. Governance doesn't come from auditors, albeit I assure you, in the best tradition of southern gubernatorial candidates, I ain't prejudiced; some of my best friends are auditors general. It doesn't come from people like me who march in downstream of an agreement and inevitably at least in my experience in the case of the United States, follow the red carpet to the errors in the way that collaborative arrangements are being managed or governed. It comes from the managers who implement the program.

What effective guidelines will do is put auditors and people like me out of a job so consequently, I'm a very firm proponent of guidelines in relation to collaborative arrangements because unless you've got specially skilled people with no skin in the project for whom you can pay significant funds to govern and manage these types of arrangements there will never be a situation where there is sufficient on the ground expertise available to manage them and government auditors simply don't understand collaborative governance, only compliance. Consequently, the bureaucracy must have the benefits of the empirical referent to guide management and governance.

Another reason guidelines are necessary is that without them one can never be certain with the best of intentions that expectations will always be in sync: from the government side or from the private side and so in my respectful view the first order of business in allocating accountability between public and private sector interests is to coalesce those accountabilities and develop workable guidance for management and governance. I contend it is not hard to do because in reality a collaborative project is like a simple English sentence: subject, verb, object, predicate. It has an overall mutual objective which both parties wish to achieve. Unfortunately for the overwhelming majority of

collaborative arrangements particularly public-private partnerships the concepts of accountability may be very different for each party and so the mutuality never takes hold. Collaborative arrangements suffering divergent perspectives *ab initio* never end well.

Let's look at the fundamentals of allocation and guidance.

In my view, there are three key elements that need to be at the front end of the process. I formed my view as to these elements following a study of the Herculean effort Dan Golden put in at NASA over 10 years to reform its contracting processes after the 1986 Challenger disaster, coupled with the approach the US department of energy takes in relation to its massive research grants program, particularly in relation to the University of California cluster of schools. Those values, goals, applications, ideas and principles formed the basis of my earlier observations, as did my litigation and business advisory experience.

I am advised this found interest with the OECD in terms of underlying principle. The principles are geared to PPP's but have general application to collaborative arrangements.

Now, to what the guidelines in question ought to contain. One might think it's strange but as the Secretary General has observed, most important in addition to those elements outlined above, is political will.

You cannot have governments undertake collaborative arrangements without the political will to carry them through. The reason is that irrespective of whatever the objectives of bureaucracy has when entering into one of these collaborative arrangements and whatever objective a private partner takes into one of these collaborative arrangements; no matter how much risk is transferred no matter how much financial pressure is removed; no matter how far from the budget bottom line the costs are allocated; the political or reputation risk never leaves the project. It is always a government that carries the can if something goes wrong.

Accordingly, it is my contention that it is an essential role of government to foster and support adequate governance perspectives in relation to these types of undertakings, make the judgement calls, approve the

guidelines in Cabinet if necessary, stand by them and back the hard work of cash strapped bureaucracy by adequate resourcing. In my view, without any disrespect to colleagues from other governments, political will does not encompass the ability to extract upfront payments in relation to particular collaborative projects because all that does is restrict capital adequacy for the downstream end and it makes life very difficult for the private side of the collaboration. At the basal ganglia end of the food chain, it results in the private parties chanting the alien contagion theme “one of us! one of us!”

From the private side, the result is, one is hamstrung from the start with a budget that started out as manageable and now is something that needs very close attention. The project budget should be an automatic function. Making a fair return on a deal should never have to depend upon luck, a mistake by the other party or clever drafting and it must never rely for its financial efficacy upon any of those externalities or worse, success in court.

I know there has been talk in some circles that private entities ought to look at collaborative arrangements as “sweeteners” or loss leaders in anticipation or hope of more business from governments. With respect, that is an absurd notion. There is no such thing as a loss leader if shareholders have the power of ultimate judgment. Private collaborators must enjoy a fair rate of return or their priorities will change or be changed for them. Thus, the collaboration will fail and the last thing we want to commission or oversee is systemic and continued failure. It is bad for business and bad for the taxpayer.

In terms of the technical structure of how the guidelines ought to look, one must seek to access the views of an objective inquirer. There are no shortage of pundits who might offer proprietary guideline designs and governance options, but in my experience these reflect the broader needs of a client base, not the generic needs of projects generally.

One needs to have guidelines designed by those who are never going to be the beneficiaries of their promotional efforts. In this regard, I turned to the UN for guidance, specifically the United Nations Economic Commission for Europe its publications. Particularly its guidebook on

promoting good governance in public-private partnerships. And of course I acknowledge their copyright.

The Commission recognises, admittedly via a comprehensive glossary of terms that there is a plethora of possible entities and combinations of entities. Designing a single set of guidelines to cover all those risk, vulnerability and accountability variables before even looking at deliverables and expectations would be daunting, to say the least.

Having said that, the UN views collaborative guidance, it's the peeling the onion technique to be sure and it's of course slanted toward building trust, confidence and fidelity in third world collaborative projects (mainly PPP's, acknowledging the infrastructure gap) but the approach makes good sense.

You will see how they approach the issues, set the overarching principles, drill down, distil and produce a set of functional principles that can form the basis of good guidance for any collaborative arrangement. Naturally, being good bureaucrats, they want to do more work on the subject matter but discounting that natural disposition, one sees how the strata of values, goals, context, intentions, objectives and allocation I mentioned at the start of this talk, unfolds.

There are gaps, to be sure, but overall, for an engaged but objective group, the foundations are there; goals, accountability, structure, management and guidance and not a service fee in sight. I commend them to colleagues as a useful, objective and non self-serving array of possible building blocks from which guidelines might flow.

Now I turn to the hard part: successful collaborative arrangements including PPP's. In this regard, I can't help remembering that poor Canadian guy with little social life who chronicled 100 PPP's, finding 99 to have been duds and 1 to have been a break even proposition. One's mind turns to the UK and rail track, the air traffic control fiasco and others. In America, in Richmond Virginia there is a privately run toll road to nowhere, not to mention the recent bail out of the banks and AIG where the US government suddenly found itself in various partnership arrangements. One thing is certain; I bet none of my US treasury colleagues got bonus trips to Jackson Hole, Pebble Beach golf resort or

Palm Springs last year!

I like to think the Anzac bridge project was successful, as was the national museum and more recently the NSW desalination plant . They were all collaborative arrangements, well managed and fair to all.

Having said that, I was intrigued to see “PPP Projects in England, Scotland, Canada and New South Wales: A Comparative Report” by Sally Edsall for the New South Wales Teachers Federation. There was much fear and loathing there. Frankly, if one was not a natural optimist, one might think collaborative arrangements were headed for the scrapheap like the dot com boom.

Colleagues, overall it's hard to find anything positive to be said about collaborative arrangements outside the blandishments of those who stand to make money without putting any risk on the table that can't be bailed out by panicked governments.

I take the view they are here to stay because they present a broadening of structural options for things that might otherwise not get done but unless they are supported by workable, objective guidelines and friction is minimised, taxpayers will not tolerate them. As that guy whose responsibilities include the autopsy and wind up of Totalcare, the once shining light of previous ACT privatisation, sitting on \$32 million in accumulated tax losses I can't use, \$11-17 million in superannuation liabilities that came to light in our first forensic sweep of the carcass and \$22 million in accumulated losses of taxpayers' funds that can't be earned back, I speak from bleak experience. I watch Silent Witness every week for new clues.