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Precontractual negotiations and new concepts in contracting

St John Frawley

It is trite to say that identifying and managing the legal and commercial project risks during the precontractual period is fundamental to the prospects of delivering successful project outcomes.

In Australia (as elsewhere) the industry continues to enjoy a reputation as a high risk/low return industry beset by time and/or cost blow outs, an adversarial culture and an unhealthy predisposition towards lengthy, complex, 'lose even when you win' litigation.

It was that perception (and experience), combined with the severe downturn in the industry during the late 1980s-early 1990s that fuelled the enthusiastic adoption of new concepts in contracting in Australia in the early 1990s. *Partnering* and *alliance (or co-operative) contracting* have, however, done little to overcome the adverse perception of the industry, or to deliver lasting improvements in performance within the industry.

This article seeks to identify and comment upon some of the critical areas of risk inherent in the precontractual phase with a particular focus upon the special risks associated with the new relationship models. A *Precontractual Project Risks Checklist* is provided at Annexure 1 — it is by no means exhaustive, but provides a framework for the identification and management of precontractual risks.

Before commencing upon a consideration of the special risks associated with the new relationship models it is necessary to briefly establish the key features of partnering and alliance (or co-operative) contracting.

New relationship models: key features

Philosophy and objectives

The underlying principles driving the support of, and approach to, the new relationship models are familiar:

- early involvement of key project participants;
- 'open book' communication among participants combined with mutual commitment to dispute avoidance;
- early identification and mutual recognition of participants' individual and ➢

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➢ shared project objectives, together with mutual commitment to achieve desired outcomes;
- risk sharing; and
- mutual commitment to conducting project relationships in a facilitative, co-operative and good faith manner.

The potential benefits are also well known to those in the industry:
- enhanced project outcomes when measured against time, cost and quality objectives;
- substantially increased opportunity for mutually pleasing financial outcomes; and
- substantially reduced prospects of on-site differences of opinion escalating into disputes either during the course of the project, or once the project is completed.

However, despite the apparent uniformity of the philosophies and objectives, partnering and alliance (or co-operative) contracting are quite different creatures.

Partnering

In Australia, the partnering model has typically been an arrangement superimposed upon a traditional relationship model such as:
- build only (with separate engineering consultants) agreements;
- design and construct; or
- construction management.

The traditional relationship models are characterised by:
- rigorous 'push down' risk allocation between participants (that is, risk shedding); and
- highly defined rights, obligations and liabilities in respect of workscope, time, cost and quality.

The tension between a superimposed partnering arrangement and the underlying contractual regime is immediately apparent. Proponents of partnering resolve that tension in theory by referring to the partnering arrangement as a management tool (regulating the conduct and attitudes of the participants), while the underlying contractual regime documents the parties' legal rights, obligations and liabilities.

The key features of partnering in Australia may be summarised as follows.

1. The partnering conference or workshop prior to commencement of the project (and then as needed during the course of the project) leading to the creation of the project charter or mission statement. This usually involves the primary project participants, and on certain projects may include representatives of critical trades or subcontractors (but not often enough).
2. The formal commitment to the well known principles and objectives referred to above. A particular feature of the partnering arrangement is the commitment to refrain from resort to legal rights set out in the underlying contractual regime — that is, the contract as absolute last resort.

Alliance contracting

Similarly, in alliance (or co-operative) contracting the participants formally commit to the well known philosophies of conduct/attitude, and to the mutual pursuit of individual and shared project objectives.

However, in contrast to partnering, in alliance contracting the participants seek to give those commitments meaning in the contract.

The key features of alliance contracting may be summarised as follows.

1. The creation of an alliance board and its delegate, the project management team. The alliance board is the primary decision making body for the project. The alliance board typically requires unanimity (supported by anonymity) in its decision making. ➢

2. Contractual recognition of risk sharing: for example, 'pain share/gain share' with GMP provisions whereby participants place profit (and possibly recovery of off site overheads) at risk for the opportunity of making 'super profits' if time, cost and quality objectives are met or exceeded.
3. Contractual recognition of a commitment to 'no blame' between alliance members: 'no liability for default' clauses in alliance contracts will typically exclude the parties from liability from all defaults of whatever nature (including, for example, gross negligence) subject only to, possibly, a 'wilful default' exception.

Conclusion

Experience in Australia to date demonstrates that when projects using new relationship models work, the results for participants can be spectacularly good. The reverse is also all too frequently the case. Identification of some of the critical legal and commercial risks is necessary and has, it is suggested, not been given sufficient attention by participants (including advisors) in the industry to date.

What are the risks?

This article is concerned primarily with the special risks associated with the new forms of contracting, and for convenience will consider the following:

- the tender process;
- precontractual negotiations generally (and in particular in the post award/precommencement period); and
- precontractual investigations.

The first two are primarily concerned with *what a party does*, while our discussion of pre-contractual investigations is concerned with *what a party needs to know*.

Tender process: probity good faith, adherence and 'process contracts'

Since the celebrated Federal Court decision in the *Hughes Aircraft Systems* case,[1] ensuring that the conduct of the tender process and treatment of tenderers is transparent, fair and conducted in compliance with the represented 'rules' of the tender process is a minimum requirement.

In that case, the Court held in part that:

- a 'process contract' was formed when a complying tender was submitted in answer to a request for tender (RFT); and
- terms could be implied into the process contract obliging the principal to conduct the tender evaluation fairly, and to treat tenderers fairly in the performance of the bid contract.

Such emphasis has been placed upon the significance of those findings that the fact that the Court:

- found that the principal had breached s 52 of the *Trade Practices Act 1974* (Cth) (TPA) by its conduct in the tender process; and
- commented favourably upon the prospect — in law at least — that the principal was exposed also to potential liability for claims in negligence and equitable estoppel (although the Court did not find it necessary to make findings in respect of those issues),

has often been overlooked.

Hughes Aircraft Services serves to emphasise that for principals the:

- formulation of the RFT; and
- subsequent conduct of the tender process,

is an area fertile with legal and commercial risk.

For present purposes it may be sufficient to note the variousness of the legal (and commercial) risks associated with the tender process which may include the following.

1. Liability pursuant to s 52 of the TPA (and Fair Trading legislation equivalents) — for example, such liability may arise in circumstances where:
   - the criteria for evaluation set out in the RFT is not adhered to in the evaluation process;[2] or
   - a tenderer performs tasks during the tender period prior to award which go beyond those which it would normally undertake and therefore it incurs costs beyond that which it might be expected to bear in reliance upon representations made by the principal;[3] or
   - representations made during the tender period or in the RFT mislead the tenderer into either underpricing the job or incurring substantially more costs than could be anticipated during the course of the project.[4]
2. Actions for *injunctive or other relief* under the TPA — for example, this may arise in circumstances where the principal's internal 'Purchasing Guidelines' or 'Purchasing Manual' is at odds with the form of tender process undertaken, or there are other representations made to potential tenderers at or prior to issue of the RFT upon which prospective tenderers rely.

   In *Willow Grange*[5] the defendant Council went to public tender in circumstances where the existing lessee had a contractual right to conduct negotiations with the Council (which were well advanced). The Court of Appeal, upon finding that the conduct of the Council was in breach of s 52 of the TPA, injuncted the Council from either awarding the lease to the different party or from pursuing the quit premises proceedings it had instituted against the existing lessee.

3. The possibility of *estoppel* being granted to prevent departures from the advertised tender process — for example, a principal may be stopped (prevented) from awarding a contract following upon the conduct of a tender process in circumstances where it has previously represented that it would not seek tenders — which representation has been relied upon.[6]
4. Liability in *negligence* — for example, in circumstances where:
   - a tender is lost or a prospective tenderer is excluded because of a mistake; and/or
   - inaccurate information is provided to tenderers.[7]

The above examples are illustrative — the legal risks are various and the consequent commercial risks significant.

Much of the case law addresses the duties, obligations and standards of conduct to be expected in public sector projects. However, while it may be public policy considerations that support increased vigilance and standards of conduct for public sector participants, there is little doubt that the participants to a partnering or alliance contracting project in the private sector are exposed to the same variety of legal and commercial risks, and will be held accountable to the same standards of conduct and procedural integrity as have to date been demanded in the public sector.

Bearing this in mind, a consideration of the standards to which partnering and/or alliance contracting participants might be held in the conduct of precontractual negotiations generally follows.

Precontractual negotiations: 'mainly concerned with "consensual" adults'

In the area of precontractual negotiations generally there are special risks which participants in partnering or alliance contracting projects should consider.

While in traditional relationship models precontractual negotiations inevitably focus upon the risk shedding game, by contrast, participants in projects adopting new relationship models engage in substantially different types of negotiations: project mission statements, partnering workshops, alliance boards and alliance project management teams are driven by a different philosophy and language, with the result that the commercial and legal project risks profile is significantly different.

The legal and commercial risks include the following.

Potential 'liability for representations' made under ss 51A and 52, and potential 'liability for unconscionable conduct' under ss 51AA, 51AB and 51AC of the TPA

The representations and conduct of participants during the course of partnering workshops and/or alliance conferences concerning:

- frank and honest communication;
- co-operation and mutual endeavour to achieve project goals; and
- in the partnering context particularly, willingness to either 'step back' from strict contractual entitlements and obligations governing the parties legal relationship (for example, as to notification requirements for example),

provide fertile ground for disputes.

Liability for *misleading and/or deceptive conduct* either as to present matters (s 52) or future matters (s 51A), is not dependant upon proof of intention to mislead or deceive the other party, and a representation may be made by way of silence. For example, if you have information which in the normal course of events you would choose not to provide (for example, as to site conditions or problems encountered by other contractors on previous stages of the same project), the failure to provide that information may be considered misleading or deceptive in the context of a partnering or alliance contracting project.[8]

The prospect of liability for *unconscionable conduct* is perhaps less concerning generally. However, in the context of the environment in which projects are undertaken using new relationship models, such risk cannot be discounted.

Sections 51AA, 51AB and 51AC are all concerned with unconscionable conduct in business transactions. Annexure 2 (at the end of this article) extracts the factors which a court may have regard to for the purposes of determining whether a party has engaged in unconscionable conduct under the TPA. It should be noted that the factors under s 51AC are more extensive than those under s 51AB (which only include criteria (a)-(e)), and that liability under s 51AC is only for transactions up to a value of $3 million and does not apply to publicly listed companies.

It is well settled law since at least the High Court decision in *Amadio's* case[9] that parties to a commercial transaction must not behave towards each other in a manner which is unconscionable. The doctrine developed by the courts requires the complaining party to demonstrate some 'special disability' in the context of the transaction as well as knowledge of that special disability on the part of the other party which was used to its advantage.

It is suggested that the TPA has expanded the concept of what may be unconscionable. For example, how will the courts define what might be a party's 'legitimate interests' or what may constitute 'unfair tactics'? (See criteria (b) and (d) at Annexure 2.)

Perhaps some comfort can be

➢ drawn from the views expressed by Bryson J in *Burt v ANZ Banking Group Ltd* when he said:

> ... the Courts enforce legal rights (under contract) except in circumstances which are so far out of the ordinary course so much an enormity and a departure from ordinary standards of conduct that the position of a party who relies on legal rights should rightly be judged unconscionable.[10]

Conducting negotiations and performing the contract in 'good faith'

The proposition that parties to an ordinary commercial transaction are under an obligation to act towards each other in good faith is:

> ... inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his or her own interest so long as he avoids making misrepresentations.[11]

However, parliament and the courts have identified standards of behaviour which are prohibited — for example, misleading and deceptive and/or unconscionable conduct.

Further, since at least *Renard Constructions*,[12] the courts have been prepared to impose a duty upon parties to act reasonably when exercising powers under a contract. The courts in ascertaining whether or not such a term can be implied, rely upon the High Court's test in *Codelfa Constructions*.[13] The High Court there held that for a term to be implied into a contract it must:

- be necessary to give business efficacy to the contract;
- be reasonable and equitable to imply such a term;
- be capable of clear expression; and
- not contradict any express terms.

Perhaps most significant is the recent decision of the West Australian Court of Appeal in *Thiess v Granny Smith*.[14] In that case, the parties entered into a 'partnering agreement'. Thiess was to be paid its genuine costs plus a fixed percentage of costs on a gain-share/pain-share basis. The Court of Appeal upheld a finding that Thiess had included provision for the recovery of profit and overheads in its costs estimates. This amounted to misrepresentations in breach of Thiess' obligation to act in good faith in respect of the derivation and mutual assessment of costs.[15]

Significantly, the precontractual negotiations were expressly incorporated in the partnering contract by way of a specific clause, which the Court found had been breached — it seems a short step to imply such terms in their absence!

Therefore, in the context of partnering and alliance contracting, there is a genuine risk that the participants will be held to a 'good faith' standard of conduct both in precontractual negotiations and also during the performance of the contract which is higher than the standard to which participants in traditional (adversarial) contractual relationships are held.

Fiduciary obligations between participants?

The hallmark of a fiduciary relationship is a relationship of trust between parties in circumstances where one relies upon the other, who in turn has the capacity to affect the interests of that party.

Once a fiduciary relationship exists, the fiduciary must:

- not misuse that position to his or her own advantage; and
- positively avoid conflicts of interest between his or her own interests and the interests of the party to whom the fiduciary obligations are owed.

The current state of the law suggests parties to new relationship model projects may be under such obligations.

This goes beyond merely having regard to the 'legitimate interests' of other parties or even beyond an obligation to act in 'good faith'. It is the highest standard of conduct to which a party can be held.

There has been some suggestion that parties to a joint venture agreement may be under fiduciary obligations.[16] More significantly, in *Thiess v Granny Smith* the Court found that the express contractual obligation of good faith did establish a fiduciary relationship between the parties.[17]

The proposition, therefore, that participants in a partnering or alliance contracting relationship could assume similar obligations in the absence of express contractual obligations of good faith must be considered likely.

Estoppel and waiver

Again, these risks are special risks inherent in the new relationship models and are driven by the very matters which make them different. For example, commitments to refrain from resorting to contractual rights may later mean that a party will either:

- be stopped from relying upon contractual provisions which run contrary; or
- be found to have waived the requirement for strict compliance with contractual obligations.

The classic example arises in relation to reliance upon notification requirements under the contract.

Claims for contractual variations

For the same reasons that claims for misrepresentation and/or arguments of estoppel/waiver may be promoted by the nature of the pre-contractual 'environment', the prospect that precontractual conduct and documentation may give rise to claims that the strict contractual obligations have been varied is very real. ➢

What do I need to know? Precontractual investigations

➢ The discussion above is largely focused upon the legal and commercial risks associated with the *conduct of parties* towards each other. However, the overall commercial risk on any project will be substantially reduced by adopting a *careful, analytical and curious approach* to the proposed project. In no particular order or priority, a series of important questions that participants need to ask follows.

1. Who are we doing business with?

For all participants, careful selection and auditing of potential project participants is imperative. Although it is typical for the principal to require tenderers to provide information concerning 'track record' and financial capacity, in projects employing new relationship models this process assumes even greater importance (for all participants).

For example, investigation of:

- an organisation's appetite (culture) for risk and capacity to absorb commercial risk;
- an organisation's reputation for and track record in resolving disputes; and
- the experience and attitudes of the key individuals that organisations bring to a project,

are matters of interest to all participants.

2. Is the proposed project delivery method appropriate?

This is trite — however, experience suggests some of the biggest problems facing the successful use of new relationship models arise where, for one reason or another, such a model is not suited to the type of project or relationship mix.

3. What is the appropriate risk coverage program?

It is possible to achieve greater financial security (and therefore feasibility) for a project by carefully crafting the risk coverage program. Given the approach underlying the new relationship models, project specific risk coverage with premium sharing and/or 'exotic' products, as well as consideration of alternative risk transfer mechanisms, should be investigated.

Indeed, in alliance contracting arrangements it may well be the case that traditional insurance products do not respond. For example, if there is to be no liability except for 'wilful default' then it is almost certain that standard liability policies of insurance will not respond.

4. Whose financial interests are at stake?

Since *Perre v Apand*[18] the prospect of liability in negligence to third parties who suffer pure economic loss only has achieved increased significance.

It is suggested participants should, on balance and as a matter of commercial prudence, ascertain whether there are parties other than those with whom they are contracting who may suffer financial harm as a result of failures to perform to required standards. This may be particularly so in an alliance contracting scenario where sub-consultants and sub-contractors are contracting with a member of the alliance in circumstances where the existence of the alliance may not be made explicit.

5. Have you adequately 'tested' information provided to you?

Often, a party may be entitled to rely upon information provided. However, to do so unquestioningly may lead to later disappointment and potential loss. A telling example is the *Thiess v Granny Smith* case — testing the costs information against the market from the outset would almost certainly have avoided the outcome in that matter.

6. Have you adequately 'audited' the project risk profile?

This is really the 'big question' — how good is your legal risk and compliance risk management program? The benefits of early involvement of professional advisors in identifying and strategically managing project risks cannot be overstated.

Where to from here: conclusions and comments

For participants in projects undertaken pursuant to new relationship models such as partnering and alliance (or co-operative) contracting there are special risks which:

- are inherent given the fundamental philosophies attitudes and commitments that underpin those relationships;
- create a substantially different risk profile for the project — which in some respects greatly increases the risk profile of the project overall; and
- are often promoted by or associated with the inconsistency between the commercial/relationship commitments of the parties and the legal obligations of the parties — which inconsistency has to date not been sufficiently addressed within the industry.

The nature of new relationship concepts also imposes the need for a greater degree of awareness and curiosity in the precontractual phase on all participants.

Experience to date demonstrates that, as with the requirement for clear concise and precise drafting when using traditional forms of contracting, early and rigorous attention to defining the intentions of the parties in the contract documentation is essential, but too often not addressed.

Some commentators have suggested that for new ➢

➢ relationship model projects those obligations which govern the behaviour and attitude of the parties (rather than the legal relationship) should be set out in a separate document which does not give rise to binding legal obligations.[19] However, it is difficult to see how the integrity of the process or the potential benefits can be preserved and enhanced if that were to be the case.

Rather, it is suggested that if the parties intend to create obligations upon each other to behave in a certain manner, then those obligations should form part of the document which regulates their legal rights. In some senses, alliance contracts adopt this philosophy.

Whether it be partnering or alliance contracting, there are effective drafting solutions to achieve the objectives that proponents of such project delivery methods seek.

1. The principles of dispute avoidance/minimisation, rapid escalation of disputes and an obligation to continue to perform despite disputes are rational and persuasive. They can also be addressed by careful drafting — and are now a feature of many forms of traditional relationship models.
2. The principles of risk sharing rather than risk shedding again are rational and persuasive. Again, the objective can be met by careful drafting. 'Gain share/ pain share' clauses, together with GMP modifications to standard remuneration regimes, offer the potential for an effective and lasting improvement.
3. The commitment to open and honest communication in an atmosphere of joint effort to achieve mutual project objectives while meeting individual goals is also not beyond the reach of careful ➢

ANNEXURE 1

Precontractual Project Risks Checklist

Precontractual Negotiations

1. What is the most appropriate project delivery method? How are key project risks — scope, time, quality, cost — to be valued and allocated?
2. Have you sufficiently considered the intangible and tangible qualities of prospective project participants — appetite and capacity to bear risk, track record, dispute history?
3. Do you have appropriate risk management and compliance programs in place (for example, for industrial relations, OH&S, environment, planning, and trade practices)?
4. Have all relevant procedural and probity issues been properly addressed in the tender process? Does the process comply with internal 'purchasing guidelines'?
5. Have you selected an adequate and appropriate risk coverage program?
6. Are the relevant persons in your organisation adequately prepared to manage and administer your interests and obligations under the contractual regime?

Project Documentation

7. Have you got the project documentation 'right'? Does it achieve what you intend? Is it consistent with 'extra-contractual' representations?
8. Have you considered critical areas of potential liability and/or financial risk, which may arise outside the contractual regime — liability to third parties; liability under statute; enforceability and/or recoverability of securities provided?
9. Have you effectively addressed those risks in the project documentation?

ANNEXURE 2

Trade Practices Act 1974 Sect 51AC

51AC Unconscionable conduct in business transactions

(a) the relative strengths of the bargaining positions of the supplier and the business consumer; and
(b) whether, as a result of conduct engaged in by the supplier, the business consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and
(c) whether the business consumer was able to understand any documents relating to the supply or possible supply of the goods or services; and
(d) whether any undue influence or pressure was exerted on, or any unfair tactics business consumer by the supplier or possible supply of the goods or services; and
(e) the amount for which, and the circumstances under which, the business consumer could have acquired identical or equivalent ➢

➢ goods or services from a person other than the suppliers; and
(f) the extent to which the supplier's conduct towards the business consumer was consistent with the supplier's conduct in similar transactions between the supplier and other like business consumers; and
(g) the requirements of any applicable industry code; and
(h) the requirements of any applicable industry code, if the business consumer acted on the reasonable belief that the supplier would comply with that code; and
(i) the extent to which the supplier unreasonably failed to disclose to the business consumer:
  (i) any intended conduct of the supplier that might affect the interests of the business consumer; and
  (ii) any risks to the business consumer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the business consumer); and
(j) the extent to which the supplier was willing to negotiate the terms and conditions of any contract for supply of the goods or services with the business consumer; and
(k) the extent to which the supplier and the business consumer acted in good faith.

➢ drafting. Project management teams, staged project reviews and progressive measurement of performance against mutual goals provide an opportunity to deal with thorny issues such as notification requirements and claims management in a different more efficient manner without unduly compromising participants' interests.

Ultimately, whatever direction the industry heads in participants at all levels will be forced to confront the challenge of rendering the commercial objectives, the relationship/behavioural objectives and the legal obligations into a whole consistent and workable contractual relationship. Understanding and managing the risks identified in this article form part of that process. ❖

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This article is an edited version of a paper presented in June 2001 at 'A practical guide to effective contract management', organised by IES Conferences.

Endnotes

1. *Hughes Aircraft Systems International v Air Services Australia* (1997) 146 ALR 1 per Finn J.
2. Above note 1. Deane J in *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 commented positively upon the possibility of recovering damages for loss of the chance to be a successful tenderer.
3. *Sabemo Pty Ltd v North Sydney Municipal Council* [1977] 2 NSWLR 880.
4. The classic example, and possibly the most litigated type of misrepresentation claim, is that relating to geotechnical information provided.
5. *Willow Grange Pty Ltd and Rantack Pty Ltd v Yarra City Council*, unreported, Supreme Court Victoria 1 December 1997 per Byrne J at first instance and Winneke P, Phillips and Charles JJA in the Court of Appeal.
6. *Metropolitan Transit Authority v Waverley Transit Pty Ltd* [1991] 1 VR 181, a decision of the Victorian Court of Appeal.
7. *In the Contract between Commonwealth and Citra Construction Ltd* (1985) 2 BCL 235. The Commonwealth was held liable for negligence for errors contained in a geotechnical report provided at tender.
8. *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd* (2000) 16 BCL 130 at first instance per Tempelman J and (2000) 16 BCL 255, WA Court of Appeal: the failure to provide all information relevant to costs was held to be an actionable misrepresentation.
9. *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.
10. [1994] ATPR (digest) 46-123.
11. *Walford v Miles* [1992] 2 AC 128 per Lord Ackner at 138.
12. *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234. Renard was followed in *Hughes Brothers Pty Ltd v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (1993) 31 NSWLR 91. Both were decisions of the Full Court of the Court of Appeal.
13. *Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales* (1982) 194 CLR 337.
14. Above note 8.
15. Above note 8 at 275-277.
16. *Pacific Coal Pty Ltd v Idemitsu Queensland Pty Ltd*, unreported, QLD Supreme Court per Ryan J 21 February 1992.
17. Above note 8 per Tempelman at first instance.
18. [1999] HCA 36 (12 August 1999).
19. See Critchlow J 'We don't need a contract, we're partnering' (2000) 12(3) ACLB 21.

CONTRIBUTIONS

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