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# THE DARK SIDE OF PARTNERING

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*The purpose of this article is to identify problems and pitfalls in the manner in which some projects are partnered so that such difficulties might be avoided or minimised. Partnering is a form of business relationship used to assist in implementing a contract. It regards conventional contractual obligations and expectations as a baseline from which to improve returns to all partners by improved communication, co-operation and teamwork.*

## Introduction

The claimed benefits of partnering<sup>1</sup> include:

- project procurement by co-operation, teamwork and trust rather than by adversarial relationships;
- facilitation of decision-making;
- the fostering of innovation;
- improved buildability;
- delivery of a better-quality product;
- improvements in co-ordination;
- expedition of construction time;
- reduction of cost overruns and delays;
- reduction, or elimination, of conflict; and
- avoidance, or reduction, of claims and disputes.

Not all partnered projects deliver these benefits. Arguably, it does partnering a disservice to oversell it. Where partnering does not deliver all the espoused benefits, there is a risk that the actual, reduced benefits derived from partnering might not be adequately valued and partnering might be regarded as unworthwhile. By identifying inadequacies, and risks, in partnering approaches and implementation, partnering of commercial relationships can be enhanced.

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## ATION SERVICES

## Problems

### Win-Win or Win-Lose

Partnering is about finding win-win solutions to problems. However, it should be recognised that some circumstances, whatever their resolution, will involve degrees of win-lose, which might strain the partnering relationship.

### Short-term, One-off Relationships

Partnering is being applied to short-term competitively tendered, one-off projects, where the issues of cultural fit, understanding, communication, co-operation and collaboration might not exist sufficiently for success, or where there is not the time span available for these successful partnering ingredients to develop. Partnering might work best where there is repeat business and the opportunity for long-term relationships to develop. It is also possible that partnering might work best for negotiated contracts.

### Additional Resources and Time

Anecdotally, there is some evidence of a reduced incidence of claims and disputes through partnering and, perhaps, of reduced cost overruns. Yet anecdotally there is also converse evidence that partnering requires additional resources, costs more and takes longer.

Potentially, the post-contract overlay approach to partnering might put the contractor at some jeopardy with respect to its tendered price and the contractual time-frame for the risk of additional resources and time required for partnering.

### "No Dispute" Too Hard — Let's Try Partnering

It is unreasonable to expect partnering to resolve all ills. To the extent there are problems inherent in the contract strategy; the terms of the contract; strategies such as the use of bills of quantities and nominated subcontractors; the design and documentation; the quality of project staff; and in contract administration, it is naive to expect that partnering will resolve them.

The recommendations of the "Strategies" and "No Dispute" reports<sup>2</sup> were intended to assist in the resolution of underlying causes of claims and disputes, but they require work and discipline to implement. To the extent that clients and project administrators look instead to the partnering arrangements as an overlay to resolve or suppress problems, to gain a greater, unpaid contribution from their contractors and to suppress or avoid claims, their expectations might be unrealistic. Contractors' and subcontractors' margins are usually inadequate to absorb problems over which they have no control.

### Low Expectations

It has been suggested that in Australia the expectations of partnering have been reduced to better communication.<sup>3</sup> Even if that is the limit of the benefits of partnering, it can be significant for project efficiency and issue resolution.

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However, it is submitted that horizons should be raised and all the potential benefits of partnering sought.

### Lack of Commitment

By its nature, partnering requires a positive approach and commitment. However, there are participants who, when quizzed about their partnering experiences, will respond with non-specific, negative comments.

There is often a lack of real commitment to partnering the project. For some potential partnering participants, the issue is reduced to ticking the partnering box, that is, to be able to say to senior management, "Yes, we are partnering the project. Yes, we have held a partnering workshop." This approach involves a lack of the commitment necessary to enable real benefits to be derived from holding a partnering workshop and from partnering the project.

### Absence of Authority

For effective partnering, appropriate levels of authority need to be delegated to operational levels of management so that decisions can be made at the lowest possible managerial level in order to avoid delays in decision-making, issues festering and disputes arising which require senior management resolution. Delegating adequate authority seems difficult for some organisations and individuals.

### Partnering Workshops — Lost Opportunities

Frequently, the objective seems to be to get the partnering workshop out of the way. Often, it is held after the project is well under way and is programmed to occur in too limited a time-frame to enable adequate exploration of the issues and to enable relationship building.

Some partnering facilitators focus on group exercises and team building and miss the opportunity to focus on project issues, risk identification and risk management. Whilst partnering facilitation is often carried out by engineers or professional facilitators, there is no reason why partnering facilitation cannot benefit from lawyer-mediators experienced in dispute resolution. Such dispute-experienced persons can lead the parties to identify the major risks inherent in the project and assist them to identify strategies to avoid, minimise or manage those risks.

Unfortunately, at project commencement, the parties are often too polite and deferential to raise the high-risk issues with the other party. Such failure to explore risk identification and risk management in the workshop context is a significant opportunity lost.

### Adversarial Management — Cultural Fit — Trust and Confidence

It is perhaps axiomatic that the best "fighters" of the 1980s inherited senior management positions on the basis of the successes they achieved for their companies by the aggressive pursuit of self-interested positions and by the pursuit of claims and disputes. Yet frequently the same people are now

required to be partnering champions, committed to open communication, co-operation and finding non-adversarial, win-win solutions. The marketing imperatives of the times require that partnering platitudes are mouthed, but not all those promoting their organisation's partnering expertise and commitment have experienced the requisite conversion on the partnering road to Damascus. For successful partnering, it is essential that the organisation's key personnel responsible for partnering implementation have the appropriate personality, attitude, understanding and commitment.

Partnering works well where there is a good cultural fit between the partnering participants' organisations. Organisational mismatches occur where the cultures do not fit. Partnering of small organisations with large, where the participants of the small company have the capacity to make decisions on the spot, but the large organisation is obliged to go through a bureaucratic process before partnering decisions can be made is an example.

The past shared history of some contracting parties renders it difficult to develop the open relationships of trust, communication, co-operation, shared objectives and mutual problem-solving which characterise partnering at its best. At worst, there are some contracting parties who might consider this baggage and relationship of distrust too great to attempt partnering. In some instances, this problem might be resolved by a joint commitment to make partnering work. In other cases, bringing in new personnel who do not have this shared negative baggage might be the essential success ingredient.

In an article entitled "Five Steps to Assess Partnering Readiness",<sup>4</sup> Bonita Thompson QC (the first Executive Director of the British Columbia Commercial Arbitration Centre in Vancouver and now a partnering consultant) proposes five steps to assess partnering readiness. These may be generally described as follows:

- (1) ensure the appropriateness of the corporate culture for partnering, including matters such as whether the organisation is open, communicative, encourages teamwork, collaborative efforts, risk taking and whether it empowers members;
- (2) determine whether the personnel taking part in the partnering have appropriate personal skills — whether they are approachable or argumentative and whether they prefer to collaborate or dictate;
- (3) delegate appropriate authority to members of the partnering team so that they might resolve problems and disputes, without the need for them to be resolved at a higher management level within a bureaucratic organisation;
- (4) ensure there is a commitment to partnering at all levels of the participant organisations; and
- (5) ensure the contract terms reflect partnering principles.

#### Top-tier Partnering

Frequently, partnering is attempted at the top contractual tier between the principal and the contractor, with consultants, subcontractors and suppliers excluded from a place at the table. Indeed, sometimes lower-tier contractors are purposely excluded by either the principal or the head contractor, perhaps

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#### Regular Monitoring

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due to the fear that participation will empower them. Yet this approach limits the benefits and, in some instances, will cause problems.

Whilst some design professionals might be defensive about their design and become problematic participants, the project benefits of continuous improvement and enhanced buildability should be balanced against any sectional self-interest of concealment or suppression of problems arising from the design or documentation. It is better that the key consultants be involved.

For full benefits to be derived from partnering, all of the main project participants should be involved, including design consultants, the major subcontractors and the important suppliers of major components or equipment. Co-operative partnering at the level of the head contract but head-kicking down the line of subcontractors is unlikely to produce a uniformly co-operative approach to project procurement.

### Incentives for Successful Partnering

Successful partnering should be its own reward with respect to efficient performance of the contract, enhanced reputation and the potential for repeat business. Nevertheless, it might be worth providing for performance rewards and incentives, such as a share of savings for increased efficiencies or for the resolution of problems; bonuses for early completion; and, importantly, preferential status for future tenders.

### Regular Monitoring and Repartnering

Concomitant with a lack of commitment to partnering is a view that partnering can be agreed and it will then look after itself. However, if partnering expectations are not met or the partnering relationship breaks down, embittered behaviour, claims and disputes can arise. Consequently, there should be regular review of the project and monitoring of the relationship.

Where the arrangements are not delivering project efficiency or the partnering approach has broken down, attempts should be made to refoster and refocus the partnering approach by conducting further (and, perhaps, regular) partnering workshops. This could involve a partnering facilitator, whose role might be more akin to that of a mediator in resolving problems and assisting the parties to agree upon actions to ensure that problems do not recur.

Progress in repartnering the project might be achieved by gaining a managerial recommitment by each participant organisation. Where the people are the problem, it might be necessary to gain senior management agreement to change the key personnel running the project and to bring in fresh people with a problem-solving focus and who lack the baggage of damaged relationships.

### Alignment of the Contractual Terms

Perhaps the most common problem with implementing partnering is the failure to align the contract terms and procedures with the partnering

procedures. If it is intended the contracting parties will meet regularly to, for example:

- discuss and monitor progress;
- identify potential problems and solutions;
- identify actual problems, consider and decide upon remedies; or
- plan and program activities and events,

then the contract should contain a requirement for the contractor to attend project control group meetings and to include provisions in its subcontracts and supply contracts requiring the attendance of representatives of those lower-tier contractors, if necessary.

Consideration should be given to the role and status of the partnering meetings. Are they intended to be without-prejudice discussion sessions? Or are they intended to produce binding decisions? If the latter, how are these decisions to be recorded and implemented?

Presumably, the project will be dependent on the role of "key people". Query whether the contract should contain an obligation that "key people" promised at tender time have a continuing involvement in the project?

If it is intended that the partnering process will enable alternative solutions to directions to remedy defective work, then the contract should contain potential alternatives such as conditional variations, or acceptance of the defective work subject to a revaluation and compensation.

If it is intended that the contractor, or its subcontractors, might make positive contributions by proposals for continuous improvements in the design, specification, materials, or methods of construction and, perhaps, to gain some incentive share of the benefits derived therefrom by the principal, then the contract should so provide. The contract might also make provision for conditional variations for the convenience of the contractor. Consideration might be given to including provisions in the contract to deal more flexibly with issues such as delays by provision for acceleration, rather than extensions of time. Consideration might be given to a bonus for early completion, if that is regarded as a desirable incentive.

It is usually regarded as imperative in partnering that problems, differences and disputes be speedily referred up the management chain for consideration, decision and resolution rather than letting them bog down and fester at lower, operative levels of management. However, the contracts are infrequently modified to reflect the partnering procedures for communication, decision-making and dispute resolution.

Consideration might be given to the inclusion of provisions for quick reference of disputes to senior management for negotiation or mediation and, if necessary, for reference to a Disputes Board of Review (including an independent neutral) for interim binding decisions. Finally, there is the issue of whether the dispute is to be referred to an expert for a final and binding determination, to expedited arbitration or to litigation, in the event the Board of Review's deliberations or decisions do not finally resolve the dispute.

If the parties intend to have a joint review and evaluation process at project completion to assess project performance and the achievements of the partnering approach, then the contract should so provide.



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There is a difficult policy issue regarding draconian notice requirements, notification time limits and barring provisions. The benefit of such provisions can be to ensure quality contract administration through timely notification and resolution of problems. However, there is the question whether such provisions are compatible with a co-operative partnering approach to project procurement. Interestingly, Dorter and Sharkey state: "The drafting team must remove or reduce 'adversarial' clauses, such as time bars and draconian, forfeiture and 'non-constructive' provisions".<sup>5</sup>

So far as Thompson's fifth step in assessing partnering readiness is concerned, she states: "Partnering should not be used to cover up a 'bad' contract. If the contracts between the partnering organisations are considered to be unreasonable or unfair in their allocation of risks, partnering should not be used to overcome these issues."<sup>6</sup>

## The Negative Aspects of Partnering

### Contract Formation and Partnering

Sometimes, the intention to enter into a partnering arrangement leads to a lack of diligence with respect to contractual risk allocation between the parties and contract formation, with the inadequacies or hard issues glossed over in the hope that the partnering approach will look after these matters. This lack of quality in setting up the contract is often the root cause of later problems during the partnering phase of the project. Indeed, in researching this article, several lawyers commented that they had experience of situations where engineers or managers had entered into arrangements with only the vaguest of provisions and motherhood statements, which failed to satisfy any criteria of contractual certainty. Certainly, partnering is not a replacement for the contract.

### Blurring of Contractual Rights and Obligations

The contract sets the terms and conditions of the parties' legal relationship. Usually, in partnering there is an intention that the partnering charter will be the parties' *moral* agreement and set the working relationship for the project. However, due to the regard given by the law to conduct (for example, regarding statutory remedies under the *Trade Practices Act 1974* (Cth) or the *Fair Trading Act* of a State, and equitable remedies), there is the potential for the legal rights and obligations established by the contract to be blurred or affected by the partnering agreement and conduct.

### Collateral Contract

Usually, partnering is agreed post-contract and some care is taken to ensure that the parties' agreement in the form of the "partnering charter" does not create new obligations, or obligations at odds with the terms of the contract. In most instances, the partnering charter would not meet the criteria of offer, acceptance and consideration to constitute a collateral or supplementary contract, which might amend the existing contractual rights and obligations or

create new, enforceable rights and obligations. But that potential is there if the partnering charter is mishandled.

### **Conflict Between Partnering and the Contract — Reversion to the Contract**

Alignment of the partnering approach to the terms of the contract should enable partnering to proceed in accord with contract administration. However, the approach often taken of applying a partnering overlay inconsistent with the terms of the contract creates the potential for conflict between the partnering approach, the contract terms and contract administration. Should the problem, difference or dispute be resolved in the context of partnering, or in accordance with the terms of the contract? In the event of a contract aligned with the partnering approaches and methods, there should be no difference, but in practice this dilemma frequently arises. The concept of reversion to the contract and compliance with its terms and procedures, if and when partnering breaks down, should be an anathema.

### **Misuse by Clients**

As stated above, partnering is no panacea for a badly set up project. However, some principals perceive (or hope) that partnering equals no claims or disputes. They think the partnering arrangement is a method of acquiring extra input of resources, work and time from contractors to resolve problems which arise, at no extra expense to themselves. Projects where such a no-cost input is expected of contractors can result in claims and disputes over variations, delays and disruption, recompense for extra resources provided, or restitutionary claims.

Some contractors have become suspicious of clients and their motives in partnering projects and about partnering as a process.

### **Things Put Forward in the Name of Partnering . . .**

Project participants should be wary of proposals put forward in the name of partnering which do not deserve that description. Consider a project (not in this country) where the contractor represented that the project would be conducted in a co-operative, partnered manner, that the client would not need resources for contract administration and that the project would be conducted without disputes. Yet, a detailed examination of the contract revealed the underlying foundation for these assertions. The project was to be carried out on a design and construct basis, but the contract provided for the contractor to determine the client's needs and to design and construct the project to standards set by the contractor to meet those needs, rather than in accordance with criteria set by the principal. There were no contractual criteria or benchmarks of quality or performance against which the contractor's design and construction might be measured. The usual warranties about skill and care and fitness for purpose of design and construction were missing. There was no process for submission of design for comment, approval or rejection. The principal had no control, protections or express remedies in relation to these matters. The contractor could require of the principal that it issue instructions



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in response to proposals by the contractor. In addition, there were provisions enabling the contractor to give notice that the instruction constituted a variation and requiring it to be confirmed or withdrawn.

There was provision for automatic adjustment of the contract price for the costs of complying with statutory obligations, whether or not there had been a change in those requirements and whether or not such a change necessitated a variation. The contractor had the capacity to amend the construction program at any time for any reason, including altering key dates, even completion dates, and requiring earlier performance of the principal's obligations — thus setting up the potential for claims. Even worse, when one looked elsewhere in the contract, any change in the duration of the work under the contract was expressed to constitute a variation, despite judicial condemnation of such an approach.<sup>7</sup>

The contract lacked the usual provisions for security and retention. Payment was on a cost-plus basis for staff, labour, resources and materials. Anomalously, in addition to the contract price, the D&C contractor was to be paid an additional "management fee". Simply put, this contract was a licence for abuse or rape — but it was put forward and marketed in the name of partnering.

Another problematic project involved a major client who had been sold on a partnering approach by a contractor. When the lawyers later perused the "contract" it was full of motherhood statements about partnering and its benefits and was non-specific in all but the payment terms. Effectively, this was a cost-plus deal, with a reasonable time to complete. The principal found that it was significantly disadvantaged by the terms of the contract in the lack of the usual controls and protections. Ultimately, this client sought to solve these problems by terminating the contract.

Contractors who put forward such "contracts" in the name of partnering do partnering a disservice. Arguably, they also thereby act against their own long-term interests. Whether or not they put themselves in a position of exposure to the client for misrepresentation or misleading and deceptive conduct in breach of the *Trade Practices Act* would depend on the particular facts and circumstances. Caveat emptor. Clients faced with partnering-based marketing beware.

**Contractors' Claims and Contractual Break-out Attempts**

Anecdotally, some contractors attempt to use partnering to:

- resolve problems of compliance with the contract where that might be difficult or expensive;
- obtain a sympathetic response to claims;
- convert the contract into a softer commercial deal than that agreed; or
- at the extreme, break out of the contract and renegotiate its terms and conditions.

Thompson states in relation to assessing partnering readiness:

"Partnering is not a process to change a contract already made. Partnering is designed to enhance the working relationship of the parties — it is not a method or technique to get around tough contractual provisions."<sup>8</sup>

### Shoddy Contract Administration

Often the worst projects for lawyers and dispute resolvers are those where the parties have taken an oral, ad hoc approach to contract administration, with a lack of documentation about issues, problems, decisions, directions and claims. The apparent lack of an adversarial climate in a partnering project can lead to a dropping of the guard and of self-protection. Indeed, it can lead to a lack of diligence in contract administration. Yet if problems are not resolved and claims and disputes arise, this lack of protective documentation can lead to real problems for the parties in putting, or protecting, their positions and in later putting evidence in dispute proceedings. It can also render difficult proper decisions by dispute resolvers. Furthermore, in some instances, independent contract administrators have misunderstood or misused partnering as a reason for not properly monitoring the project and for not properly discharging their functions under the contract.

### Fiduciary Obligations

Jones suggests that the partnering charter and the relationships of the parties might be regarded as constituting a fiduciary relationship, whereby the law of equity would require that the fiduciary not misuse the fiduciary position to make an unauthorised profit; and to avoid any conflict of interest between its fiduciary duty and its self-interest. Jones states:

"There is authority in Australia for the proposition that parties to a joint venture may put themselves in a position where fiduciary obligations are imposed.

By analogy, parties to a partnering arrangement who put themselves in a similar position may be held bound by such obligations. Thus, parties, in identifying the respective goals for the project and mutually developing objectives for the partnering charter may be putting themselves in a position where the court will hold that they are placing reliance on each other, and will therefore be bound by fiduciary obligations."<sup>9</sup>

### Full and Frank Disclosure — Admission of Liability

Partnering is dependent upon open relationships of trust and full and frank disclosure so that problems might be identified and then resolved or minimised (whether by direction, joint agreement, individual or joint action, depending upon what is appropriate), rather than being concealed and allowed to turn into significant issues which might result in claims and disputes. However, the very disclosure might involve admissions of liability upon which the other party might later rely in dispute proceedings. There is also the potential that casual correspondence, which is not carefully framed to protect rights, might later be used in dispute proceedings. Sometimes, these potentialities mitigate against the interests of full and frank disclosure in the

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partnering context. Where appropriate, the alternative of making disclosures  
on a "without prejudice" basis may provide some answer.

### Estoppel

A party making a representation which is relied upon by the other party may  
lose contractual rights to require strict compliance with the contract through  
waiver and estoppel. There is potential the partnering charter or conduct in  
contract administration could be relied upon to found such a contention. Thus,  
there is a risk that the contractual regime of notices and time limits for claims  
for the timely notification of problems and for the good management of the  
project will be subverted if agreement is reached in the partnering workshop,  
the partnering charter or subsequently that matters should be dealt with  
informally in the partnering context rather than in accordance with the terms  
of the contract.

A partnering approach of forgetting about the contract might result in either  
side losing rights for non-compliance or as a consequence of waiver and  
estoppel.

### Partnering Representations: Misleading and Deceptive Conduct

To the extent that conduct departs from pre-contractual representations about  
the manner in which a project will be administered, there is potential for  
remedy and relief, such as damages for misleading and deceptive conduct, or  
for representations about future matters, in breach of the *Trade Practices Act*  
1974 (Cth) or the *Fair Trading Act* of a State. Alternatively, such conduct  
might be contended as founding action for negligent advice or misrepresentation  
in breach of a duty of care.

Circumstances in which the parties might contend they are entitled to  
remedy and relief include:

- (1) where the principal or contractor has engaged in pre-contractual represen-  
tations about partnering the project and the benefits of partnering, but has  
not followed through by actually partnering and producing these benefits;
- (2) where a party has led the other party to understand that it has made full  
disclosure prior to contract, but it subsequently transpires that there  
existed other relevant information or documents which it had not  
disclosed; and
- (3) perhaps, where a party acts in reliance upon representations made at a  
partnering workshop or in partnering meetings and subsequently suffers  
detriment thereby.

### Restitutionary Remedies

Following the High Court decision in *Pavey and Mathews Pty Ltd v Paul*,<sup>10</sup> in  
the event the contractor was provided additional resources and incurred  
additional expenditure in resolving problems but was no contractual  
entitlement therefor, the contractor might assert that it is entitled to restitution  
for unjust enrichment for the benefits derived by the principal from the  
additional resources and work provided by the contractor.

### Partnering Failures

Unfortunately hard data do not presently exist to enable a proper assessment of the extent of successes in partnering. It has been suggested by one author that around 50 per cent of partnering ventures fail.<sup>11</sup> Dorter and Sharkey state:

"In at least three Australian States . . . and on an off-shore, Australian-based project, there have now emerged fundamental and serious problems in respect of the contracts, conduct and claims. Probably, the most significant shortcoming lies in partnering's (and, for that matter, good faith's) promotion of the parties' expectations and other reasonable benefits. It is also significant that in a number of the major failures the aggrieved party is complaining that the present partnered project has gone so badly and differently from their previous, happy one."<sup>12</sup>

Dorter comments on a distressed partnered project:

"The situation continued to deteriorate. The contractor made a formal claim, alleging, inter alia:

- (a) a collateral contract, particularised as to the partnering charter;
- (b) breaches of contract, particularised as to:
  - (i) an implied term to cause the contract administrator to co-operate where difficulties were encountered; . . .
- (c) misrepresentation;
- (d) misleading representations and misleading and deceptive conduct, particularised (allegedly without limitation) as to the workshop and the 'charter';
- (e) frustration, particularised as to contradictions between the construction contract and the partnering relationship;
- (f) waiver of the contractual provisions for the benefit of the principal, including especially time bars on claims; and
- (g) estoppel, including as a sword."<sup>13</sup>

It is noted that the relief claimed by the contractor included an order to set the contract aside and an entitlement on a quantum merit basis and, in the alternative, damages.

In fairness, it is worth noting that it is probably a misnomer to categorise the worst of partnered projects as "partnering". Arguably, either such projects were not properly partnering at all or, if they commenced as partnering, the partnering approach broke down.

### Recommendations

It is recommended that parties considering, or implementing, partnering ensure that:

- there is a real commitment to partnering the project;
- the parties' respective corporate cultures are conducive to partnering;
- the personnel responsible for partnering the project are appropriate in terms of personal values and attitudes, skills and commitment;

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- the terms of the contract are conducive or, at least, not contrary to partnering;
- the partnering workshop involves a real endeavour to set the project up for successful partnering;
- partnering is given a real opportunity to succeed and every reasonable effort made to make it work;
- communication is encouraged about issues and problems for decision or resolution;
- proper consideration is given in decision-making and problem-solving to the parties' respective rights and interests under the contract;
- problem-solving and dispute resolution occur properly in the context of partnering, including by speedy elevation up the management line for consideration and decision;
- the partnering approach is continually monitored and evaluated;
- if necessary, projects are repartnered using workshop facilitators or mediators;
- where the partnering approach has broken down, consideration is given to changing the personnel responsible for the project and making a senior management recommitment to partnering.

## Conclusion

There are benefits to be derived from partnering of building projects, engineering construction, mining, shipping construction, defence procurement, supply contracts, maintenance contracts and even contracts for professional services. However, there are traps and pitfalls for the unwary, and it is suggested that it be avoided where the essential ingredients are not there to ensure it has a chance to work.

Definitely, there is a dark side of partnering. Hopefully, this article will help partnering participants identify some of the potential pitfalls and ensure they are avoided. As Roger Gyles QC (the Royal Commissioner who conducted the New South Wales Royal Commission into Productivity in the Building Industry in New South Wales and who recommended partnering as a solution to some of the problems of project inefficiencies and construction claims and disputes) recently said: "It is early days yet, we have decades to work it out and the yeast is still bubbling."<sup>14</sup>

## REFERENCES

1. For descriptions of the co-operative management approach to project procurement described as "partnering", see "NSW Government's Partnering Guidelines" (1993) 33 *Australian Construction Law Newsletter* 43; and T Uher, "What is Partnering" (1994) 34 *Australian Construction Law Newsletter* 49. Whilst partnering was initially employed in building and engineering construction projects, its use has been extended to other commercial

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relationships, eg, defence procurement, aircraft maintenance, provision of professional services.

2. *Strategies for the Reduction of Claims and Disputes in the Construction Industry — a Research Report*, an Australian public and private sector research project, published in November 1988; *No Dispute: Strategies for Improvement in the Australian Building and Construction Industry*, a report by the National Public Works Conference and National Building and Construction Council Joint Working Party, May 1990.
3. Comment by Ms Pamela Jack, partner, Phillips Fox, at a Building Science Forum seminar on Partnering, Sydney, August 1997.
4. (1997) 54 *Australian Construction Law Newsletter* 35.
5. J Dorter and J Sharkey, *Building and Construction Contracts in Australia* (2nd ed, The Law Book Co, Sydney, 1990), para 7.70 (p 3523).
6. Op cit n 4, p 36.
7. *In the Matter of an Arbitration between Taylor-Woodrow International Ltd and the Minister for Health* (1978) 19 SASR 1.
8. Op cit n 4, p 36.
9. D Jones, *Building and Construction Claims and Disputes* (Construction Publications Pty Ltd, 1996), para 6.3.2 (excluding footnotes).
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12. Op cit n 5, para 7.70.
13. J Dorter, "Partnering — Think it Through" (1997) 13 BCL 23.
14. Statement at a Building Science Forum seminar on Partnering, Sydney, August 1997.

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