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# Commercial notes

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## Focus on procurement

**Procurement is a dynamic area of government activity in which new trends and requirements are constantly evolving. It is an area that is increasingly subject to challenge and scrutiny.**

Those responsible for managing procurement and contract management need to understand a wide range of matters such as legal process (also known as probity) considerations, applicable government policies such as the procurement guidelines, what approvals they require for their projects and the implications of impending policy changes (such as changes to the procurement guidelines as a result of the Australia – United States Free Trade Agreement).

Each of these matters can impact on the tender and contracting strategy for a particular project. As tender processes become more complex, there is an increased risk of dispute or litigation – agencies need to know what information they will be required to disclose in the event of litigation.

In this edition of Commercial Notes, we highlight some recent cases which impact on government tendering and contracting.

## Indemnity clauses – are you protected?

**In addition to process and strategy considerations, risk management is a critical consideration for all procurement projects. Risk allocation, indemnities and insurance are more relevant than ever whether in the context of a major infrastructure project, an outsourcing or a more standard procurement.**

*Andar Transport Pty Ltd v Brambles Ltd* [2004] HCA 28; (2004) 206 ALR 387 demonstrates the importance to clients of ensuring that indemnities in their contracts provide the protection they are seeking.

In this case the High Court considered whether an indemnity provided by a company subcontracted to provide drivers to Brambles Ltd (Brambles) applied to a claim by an employee driver of that company against Brambles for an injury suffered by the employee.

The majority found that Brambles could not claim an indemnity against liability for negligence for this claim under the contract. The Court did, however, find that Andar Transport Pty Ltd (Andar) was liable to make a contribution under the Wrongs *Act 1958* (Vic) (the Wrongs Act).

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### This issue

## Background

Brambles provides laundry delivery services to hospitals, including the delivery by truck of trolleys of linen. Andar was contracted by Brambles to provide laundry delivery services by employing drivers to load, deliver and unload the linen as directed by Brambles. Mr Daryl Wail was a driver employed by Andar. He was also one of two directors and one of two shareholders of Andar.

While unloading laundry, Mr Wail damaged his lower back attempting to move one of the trolleys. He successfully sued Brambles for negligence for failing to ensure that the trolleys could be manoeuvred without risk of injury and having regard to their excessive weight when fully laden.

During the proceeding, Brambles joined Andar as a third party, seeking to rely on an indemnity in the contract between Brambles and Andar (the Brambles contract), or alternatively, contribution under the *Wrongs Act* on the basis of Andar's alleged negligence as Mr Wail's employer. The trial judge dismissed Brambles' claims against Andar.

Brambles appealed to the Victorian Court of Appeal, which held that Andar was obliged under clause 8 of the Brambles contract to indemnify Brambles against all sums payable by Brambles in the principal proceeding.

The Court of Appeal also held that Brambles was entitled to a contribution under the Wrongs Act but that the existence of the indemnity made it unnecessary to further consider the contribution claim. Andar argued that as a result of its corporate structure (i.e. that Mr Wail was a director) it was not liable to Mr Wail, or to Brambles for contribution under the Wrongs Act.

*The Court held that Andar did not indemnify Brambles in respect of liability arising as a result of Mr Wail's injury.*

Andar appealed to the High Court, which considered two issues:

— whether the Court of Appeal erred in concluding that Andar was contractually obliged to indemnify Brambles for liability incurred as a result of Mr Wail's injury

— whether the Court of Appeal erred in concluding that Brambles was entitled to seek contribution from Andar under the Wrongs Act.

## The indemnity

### *The Brambles contract*

Andar provided two indemnities under the Brambles contract:

— clause 4.6 provided that Andar agreed:

> [to] assume sole and entire responsibility for and indemnify [Brambles] against all claims liabilities losses expenses and damages arising from operation of the Vehicle by reason of any happening not attributable to the wilful negligent or malicious act or omission of [Brambles].

— clause 8 provided that Andar indemnified Brambles from and against (amongst other things) all actions, claims, damages, proceedings and costs in respect of or arising from:

  – loss, damage, injury or accidental death from any cause to property or person caused or contributed to by the conduct of the Delivery Round by Andar (clause 8.2.2)

  – loss, damage, injury or accidental death from any cause to property or person occasioned or contributed to by any act, omission, neglect or breach or default of [Andar] (clause 8.2.3).

The High Court considered the application of the indemnity in clause 8.

### *Construction of clauses 8.2.2 and 8.2.3*

The Court, by a 6–1 majority, held that Andar did not indemnify Brambles in respect of liability arising as a result of Mr Wail's injury.

Andar submitted that clauses 8.2.2 and 8.2.3 were limited to the indemnification of Brambles against any vicarious liability which Brambles might incur against third parties – thereby preventing recourse to the clauses in respect of injuries suffered by Mr Wail.

Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ agreed with Andar's submission. They found:

— A primary aim of the Brambles contract was to ensure that Brambles could present to the public a seamless delivery operation. For example, all trucks were required to be painted with Brambles' livery and name. As a result there was a real possibility that a suit would be brought against Brambles for the wrongdoing of Andar – clauses 8.2.2 and 8.2.3 were designed to protect against this possibility.

— Clause 8.2.2 was limited to liability arising in connection with the 'conduct of the Delivery Round by Andar'. Under clause 2 of the Brambles contract, Andar could conduct the round only through a driver. In the absence of an express provision to the contrary, it was unlikely the indemnity extended to liability arising in respect of injuries suffered by a driver as a result of the conduct of the Delivery Round by that same person.

— Clause 8.2.3 contains two elements: first, there must be an injury suffered by a 'person' and second, that injury must be occasioned, or contributed to, by the conduct of Andar. The conduct of Andar is the conduct of the driver. The structure of the clause therefore suggests that the person in the first element is different to the person in the second element (the driver).

*Any ambiguity in the operation of an indemnity should be read in favour of the party giving the indemnity*

This construction was considered to be consistent with clause 4.6.

To the extent that the indemnity was ambiguous, the majority applied the principle regarding indemnities as set out in *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549 (*Ankar*) that any ambiguity in the operation of an indemnity should be read in favour of the party giving the indemnity (in this case, Andar).

Kirby J, in a separate judgment, agreed with this construction on the basis that it was consistent with clause 4.6 and the rule in *Ankar*. Kirby J also indicated that the Court may, one day, revisit *Ankar.*

Callinan J dissented, finding that the Brambles contract effected a radical change in the legal relationship between Mr Wail and Brambles; that is, from employee and employer to independent contractors. His Honour held that to read the Brambles contract so that Andar was not obliged to indemnify Brambles for the liability arising as a result of Mr Wail's injury would be to put Mr Wail back in a position of employee to Brambles, thus subverting the whole intention of the parties.

## Wrongs Act claim

In respect of the application of the Wrongs Act, the question to be decided was whether Andar was liable to Mr Wail for the injury suffered by him. If so, Andar was liable to make a contribution to Brambles under the Wrongs Act. The majority (Callinan J dissenting) found that Andar had failed in its duty to take reasonable care and that Mr Wail was injured as a result, and

was therefore liable to Brambles under the Wrongs Act to make a contribution. The question of quantum of contribution was remitted to be determined by the Court of Appeal.

In the course of the proceedings, Andar sought to exclude its liability to contribute under the Wrongs Act by arguing:

— Mr Wail's responsibility for the day-to-day operation of Andar's laundry service business prevented his recourse to Andar (as employer) for breach of the common law duty to take reasonable care; and

— that it should not be liable to Mr Wail, in his capacity as employee, for a breach of duty committed by him in his capacity as a director.

The majority rejected Andar's argument on the basis that Andar continued to be a separate legal entity (they referred to *Salomon v Salomon & Co* 1897 [AC] 22), although its actions were carried out by natural persons. Therefore, the duty to take reasonable care for the safety of employees was imposed on Andar (as employer) directly and not on the individual directors. It was irrelevant that Mr Wail had day-to-day control of the part of Andar's business which related to its obligations under the agreement. Kirby J agreed with this analysis.

Callinan J dissented, finding that Mr Wail's negligence was the appellant's negligence. His Honour based his finding on the fact that Mr Wail was the director responsible for the day-to-day operation of the business and was the employee injured. In other words, His Honour found that there were no other natural persons acting on behalf of Andar to make Andar responsible for Mr Wail's actions.

*Andar continued to be a separate legal entity although its actions were carried out by natural persons.*

Andar also argued that, since the contributory negligence of Mr Wail was 'precisely equivalent' to the fault of Andar, it would be inappropriate to require Andar to contribute to Brambles if the damages owed by Brambles to Mr Wail had already been reduced due to Mr Wail's contributory negligence.

For the same reasons as above, the majority held that the apportionment of liability between Mr Wail and Brambles was a distinct and separate inquiry to the apportionment of liability between Andar and Brambles. The majority refused to consider the apportionment of liability between Mr Wail and Brambles when determining the quantum of contribution owed by Andar.

Kirby J held that it was a matter for the Court of Appeal to decide. However, he considered the decision on Mr Wail's contributory negligence to be relevant to any decision on the apportionment of liability between Andar and Brambles.

## Conclusion

The majority of the High Court stated that the fact that 'the Agreement is a standard form document . . . is a significant circumstance for questions of construction of the document.' As noted, the majority found that the relevant indemnity provision (clause 8) was ambiguous and applied the principle in *Ankar* that any ambiguity in the operation of an indemnity should be read in favour of the party giving the indemnity.

The case reinforces the fundamental point that the parameters of an indemnity need to be clear and certain if the indemnity is to be readily enforceable. That is, does the indemnity provision in its terms clearly define the categories of damage, the range of acts, and the parties covered by the indemnity?

## Tips for clients

- Prior to contract execution clients should review the parameters of an indemnity, in the context of the specific goods or services being delivered under the contract, to ensure it confers the protection they require. This exercise, which is essentially a risk assessment, should be done irrespective of whether an indemnity is a standard provision in a standard form document.
- If an FMA agency is considering giving an indemnity rather than being the beneficiary of an indemnity, careful consideration must also be given to the requirements of Regulation 10 of the Financial Management and Accountability Regulations 1997, Finance Circular 2003/02 and Financial Management Guidance No. 6: 'Guidelines for Issuing and Managing Indemnities, Guarantees, Warranties and Letters of Comfort'. That policy sets out a range of risk management considerations.

Text of the decision is available at: <http://www.austlii.edu.au/au/cases/cth/high_ct/2004/28.html>.

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## *Legal professional privilege and commercial transactions*

**Agencies have many issues to consider in a large project. It is always to be hoped that nothing goes wrong and that the end game is not litigation. However, if it is, a key issue will be whether documents are protected by legal professional privilege (the privilege).**

Where an agency has a number of different advisers (for example, a team of lawyers, accountants, investment bankers or others), information and documents are likely to circulate freely within the team over a long period. There may also be regular team meetings in which minutes are taken. In litigation these documents can be a goldmine for the other side.

The privilege is jealously protected by the Courts. The High Court sees it as 'a practical guarantee of fundamental, constitutional or human rights . . . ensuring unreserved freedom of communication with professional lawyers'. [1] However, it is also true that loss of the privilege is final. In the words of Kirby J:

> The genie cannot be returned to the bottle. The privilege is effectively lost. It cannot be retrieved. [2]

The privilege applies to confidential communications between a client and the client's legal adviser for the *dominant purpose* of giving or receiving legal advice (advice privilege) or for use in anticipated litigation (litigation privilege): *Esso Australia Resources Limited v Commissioner of Taxation* (1999) 201 CLR 49. Some jurisdictions provide for the privilege by statute, notably the federal jurisdiction. [3] In the context of commercial transactions, advice privilege will generally be the most relevant consideration unless litigation is anticipated at the time the communications occur.

### Where a third party creates a document

The Federal Court has recently considered if the privilege applies where a third party creates the document which is then used by the lawyer.

In *Pratt Holdings Pty Ltd v Commissioner of Taxation [2004] FCAFC 122*; (2004) 207 ALR 217, Pratt Holdings (Pratt) sought advice from Arnold Bloch Leibler (ABL) about the consequences of significant losses incurred by an entity in the Pratt Group and how this affected a balance sheet reconstruction. ABL advised Pratt to obtain a valuation of assets from an independent accounting firm to assist in determining the amount of the losses. PricewaterhouseCoopers (PWC) was engaged and produced a report. PWC did not deal directly with ABL in the process. The ATO sought production of the report by PWC under section 263 of *Income Tax Assessment Act 1936*.

*Does the privilege apply where a third party creates the document which is then used by the lawyer?*

At first instance Kenny J ruled that the report was not privileged, drawing a sharp distinction between advice privilege and litigation privilege. She held that advice privilege is in issue here, and as a third party is involved the privilege does not apply. It could only apply, Kenny J held, where the third party is acting as a means of communicating with the solicitor to obtain or receive legal advice.

On 12 May 2004 the Full Federal Court (Finn, Stone and Merkel JJ) set aside the decision of Kenny J. Finn and Stone JJ, delivered separate judgments, although their reasoning is similar. Merkel J said that he agreed with both Judges. The Full Court emphasised that the key question is whether when Pratt commissioned the report its dominant purpose was to communicate it to ABL for the purpose of obtaining legal advice. [4] Kenny J did not make a finding as to purpose and the case has been remitted back to her so that this question can be determined.

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Both Finn and Stone JJ noted that there is a controversy in the cases as to whether the privilege should be divided into advice privilege and litigation privilege. Stone J pointed out that when the High Court adopted the 'dominant purpose' test in *Esso,* there was no suggestion that there was more than one rationale for the privilege. [84] However, the Judges did not need to resolve the controversy as they were able to decide the case on the basis of advice privilege.

Finn J noted that the important consideration is not the nature of the expert's relationship with the client but rather the function performed. He said there are clear policy reasons to extend the privilege to third party authored documents; to deny a party access to expert advice would be to disadvantage a party who lacked in-house resources. He noted that use of experts is commonplace in complex and technical matters. [43]

Finn J emphasised that particular care must be taken to evaluate Pratt's purpose in commissioning the report. In determining a preferred business structure a person may seek advice from accountants and others for business reasons. It does not follow that just because a document is then lodged with a lawyer it attracts immunity. [46, 47] Stone J made similar comments saying the difficulties in proving purpose 'cannot be underestimated' and noted that advice on commercially advantageous ways to structure a transaction is extremely unlikely to attract privilege. [107]

Finn J pointed out:

> The less the principal performs the function of a conduit of the documentary information to the legal adviser, the more he or she filters, adapts or exercises independent judgment in relation to what of the third party's document is to be communicated to the legal adviser, the less likely it is that that document will be found to be privileged in the third party's hands. [48]

This is because if the document is really intended for use by the lawyer in providing legal advice, it can be inferred that the client should not need to change it.

*Advice on commercially advantageous ways to structure a transaction is extremely unlikely to attract privilege.*

Stone J noted in the context of the advice privilege that where the lawyer rather than the client commissions work from a third party, the privilege may not be attracted: the reason being that any purpose is that of the lawyer and not the client. [92–96]

## Where a lawyer gives 'commercial' advice

Where a lawyer is engaged to primarily provide *legal* advice and some commercial or other advice is also provided as part of that retainer, the courts have taken a common sense approach and held that all of the advice is privileged.

In the case of *DSE Holdings Pty Ltd v InterTAN Inc* (2003) 203 ALR 348 InterTAN engaged Allen Allen & Hemsley (AAH), which later became Allens Arthur Robinson, as solicitors and Solomon Smith Barney (SSB) as financial advisers to assist it with the sale of shares in its Australian subsidiary. Implicit in AAH's retainer was a request to advise the client on all matters 'great and small'. Inevitably AAH provided advice at various times that was of a general commercial or administrative nature. Allsop J said:

> What legal advice is, however, goes beyond formal advice as to the law. The recognition does not see the privilege extend to pure commercial advice. In any given circumstance, however, it may be impossible to disentangle the lawyer's views of the legal framework from other reasons that all go to make up the "advice to what should prudently and sensibly be done in the relevant legal frame work." [5]

## Where advisers use each other as 'sounding boards'

There may be occasions where a lawyer and another advisor use each other as 'sounding boards'. Following the Full Court decision in *Pratt,* if such communications are to be privileged it will be necessary to show, as a matter of fact, that the dominant purpose test is satisfied. Allsop J considered a similar situation in *DSE Holdings*. He said that:

> . . . where information is passed by lawyer to the client's agent or vice versa as part of the continuum *to keep the lawyer informed* so that advice may be given as required, privilege will attach. [100] (emphasis added)

Allsop J noted that it is open to a client to appoint a third party to communicate with a lawyer on their behalf and the appointment may include 'the duty to give information and instructions to the lawyer in discussions with the lawyer and to receive the lawyer's views'. If so, he found it difficult to understand why the third party would not be in the same position as the client. [94]

### Tips for clients

- Remember that if a commercial matter ends in litigation it is likely that you will want to claim privilege in relation to legal advice received in the course of the transaction.
- Be cautious. Remember always that to attract the privilege the dominant purpose test must be satisfied as a question of fact and the onus of proof is on the party seeking to establish the privilege.
- Large commercial matters often involve a range of advisers. In some cases, other advisers may interact directly with lawyers or at the very least be privy to legal advices. Where this is expected to be the case, ensure that at the start of a project retainers are carefully drafted, making clear the role of all in the team.
- Consultants and lawyers may be appointed to communicate with each other on behalf of the client so that instructions may be provided and legal services provided. [6]
- In order to attract the privilege, the retainer of the lawyer should be expressed to be for a legal purpose (including where the lawyer is engaged to provide 'probity' or 'legal process' advice).
- Written and oral reports intended to support legal advice (and thus attract the privilege) should be communicated by the expert directly to the lawyer, or with minimum filtering by the client.
- Direct communications between the client and their lawyers remain the safest (from the point of view of privilege) and you may wish to consider this for the most sensitive advice.
- If a lawyer is a party to correspondence and present at meetings and conversations between the client and the expert this will assist in establishing the privilege, but it is not conclusive.
- Some documents are obviously covered by the privilege, for example, an advice on the letterhead of a legal practice or an opinion by counsel. Another document may be less clear and to maximise the chances of attracting the privilege you may wish to mark it 'confidential and subject to legal professional privilege'.

- Communications between a client and a third party are often copied to the lawyer and the lawyer asked to comment. This will only attract the privilege if the dominant purpose test is satisfied.
- If a lawyer is asked to chair or attend meetings at which other advisers are present, and the lawyer makes comments which are recorded in the minutes, it may be difficult to attract the privilege. It may assist if the minutes record comments by the lawyer as being legal advice (and confidential). Again you may wish to obtain the legal advice outside the meeting.

Text of the decision in *Pratt Holdings* can be viewed at: <http://www.austlii.edu.au/au/cases/cth/FCAFC/2004/122.html>.

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## Notes

1 Per McHugh J in *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 161. See also *DSE (Holdings) Pty Ltd v InterTAN Inc* (2003) 203 ALR 348 at paragraph 27 where Allsop J states the underlying policy is to encourage 'free and frank expression facilitating the representation of the client in and about the due administration of justice'.

2 *Ampolex Ltd v Perpetual Trustee Company (Canberra) Ltd* (1996) 70 ALJR 603 at 606.

3 Section 118 of the *Evidence Act 1995* (Cth) provides for the privilege, calling it 'client legal privilege'. The dominant purpose test is used. Section 118 applies only where privileged documents are sought to be 'adduced' in evidence and not at the discovery stage.

4 Finn J at paragraph 42, Stone J at paragraph 87.

5 Paragraph 45. This decision confirms earlier conclusions in 'Is Probity Advice Privileged?', *Commercial Notes*, Number 7, 23 April 2003.

6 Given the comments of Stone J about the lawyer commissioning work from a third party, at paragraphs 92 to 96 of *Pratt Holdings*, particular care should be taken in drafting this section of the retainer.

## STOP PRESS

The recent case of *Bennett v CEO of Customs* [2004] FCAFC 237 (25 August 2004) holds another important reminder for agencies handling commercial work. Where the substance of legal advice is disclosed to another party, that party may be able to obtain that advice in discovery on the basis that the privilege has been waived. For example, this might occur where an agency seeks to justify its position to an unsuccessful tenderer and writes advising it has obtained legal advice and quotes the conclusion or substance of the legal advice.

## *Confidentiality of tender documents*

**Following the Federal Court's decision in *ACCC v Baxter Healthcare Pty Ltd* [2003] FCA 994 government agencies should be aware that documents produced in connection with tender processes may become available to third parties in the course of litigation. Such documents will not be protected simply because of their relationship to a tender process.**

**Rather a court will determine whether documents are confidential based on the information which they contain and the effect that access to that information will have on the commercial entities involved.**

This case also demonstrates that in regard to discovery, the typical practice of marking tender related documents as 'commercial-in-confidence' will have no effect unless the information contained in them is *in fact* commercially sensitive. Before any attempt is made by an agency to restrict access to any document whether or not it is marked as commercial-in-confidence, the document should be reviewed in order to determine whether in fact it contains commercially sensitive information. Depending on the facts, this may involve consulting the party who produced the document.

Finally, government agencies should be aware that the confidential status of tender documents can change over time. Though a document may have been confidential at the time it was produced, as time passes it will not necessarily remain so. As a result, the later litigation is commenced, the more likely it is that third parties will be granted access to tender related documents in the course of discovery.

### Background

Between 1998 and 2001, Baxter Healthcare Pty Ltd successfully tendered for government contracts to provide sterile fluids and peritoneal dialysis products in the Australian Capital Territory, New South Wales, Queensland, South Australia and Western Australia. In 2002, the ACCC commenced court action against Baxter alleging that Baxter had bundled products in these tenders in breach of section 46 (misuse of market power) and section 47 (exclusive dealing) of the *Trade Practices Act 1974*.

A number of the documents relevant to this case related to the tender processes that Baxter had been involved in and had been obtained by the ACCC from state government agencies such as the NSW Department of Health. The ACCC sought, at the request of such third parties, to obtain undertakings from Baxter that access to these documents would be restricted to certain nominated parties such as legal representatives and expert witnesses. Baxter provided undertakings in regard to some of the documents, however after reviewing a sample of them came to the conclusion that they were not in fact confidential and sought to be released from the undertakings.

### Decision

Whitlam J, having examined a sample of the documents over which confidentiality had been claimed, held that all but one of the documents in dispute were not confidential. He did not accept the argument put by the ACCC on behalf of third parties that the documents should be protected because of their connection with the tender process, commenting that:

> . . . the claims to concerns over the integrity and probity of the tender process rang hollow. Contracts in the public sector for the supply of goods

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over a period of time are for good reason subject to laws such as the Public Sector Management (Goods and Services) Regulation 2000 (NSW). However, there is no entitlement to keep evaluation processes secret.

Baxter was released from the undertakings and Whitlam J declared that the ordinary inspection regime would apply to the documents.

## Documents

The documents that the ACCC unsuccessfully sought to protect on behalf of third parties included tender evaluation reports and associated file notes and minutes and correspondence of the contract management committee for one of the contracts which Baxter was awarded. The ACCC also claimed confidentiality over emails and letters of complaint it had received regarding Baxter's actions in the tender processes and the identity of individuals it had interviewed when investigating a particular complaint. The basis of the claim of confidentiality varied from document to document, with certain documents being categorised by the ACCC as being subject to legal professional privilege or public interest immunity or as being claimed by third parties to be commercially sensitive or commercial-in-confidence.

Whilst Whitlam J rejected all of the confidentiality claims based on the commercial nature of the documents, he did note that at least one of them (an evaluation report that set out the cost per treatment basis of a particular proposal) would have been confidential at the time it was produced. However, as the report was prepared in 2000, Whitlam J took the view that it no longer contained any commercially sensitive information.

Whitlam J did however accept that access to the appendices of a set of purchase recommendations for a pharmaceutical products tender should be restricted to Baxter's legal advisers on the basis that they contained information about certain companies that may be of benefit to their competitors.

Text of the decision can be viewed at: <http://www.austlii.edu.au/au/cases/cth/federal_ct/2003/994.html>.

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