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The Executive Director
Australian Law Reform Commission
GPO Box 370
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Email: freedoms@alrc.gov.au

Dear Sir/Madam

Traditional Rights and Freedoms – Encroachments by Commonwealth Laws

The Australian Institute of Company Directors (AICD) is pleased to provide a submission to the Australian Law Reform Commission (ALRC) in relation to its Freedoms Inquiry.

The AICD is the nation's leading organisation for directors, dedicated to making a positive impact on society and the economy by promoting professional director education and excellence in corporate governance. We have a significant and diverse membership of more than 35,000 from across a wide range of industries, commerce, government, the professions, private and not-for-profit sectors.

It is not our intention to comment on all of the questions that have been raised in the most interesting and challenging issues paper titled *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (Issues Paper). Instead, we confine our comments in this submission to issues which have been of particular concern to directors for some time, the reversal of the onus of proof and strict liability provisions.

Summary

In summary, the key comments of the AICD are as follows:

(a) As a matter of principle there is no justification, ever, for the onus of proof to be reversed and for directors not to have available to them one of the most fundamental protections afforded by the common law, the presumption of innocence. The reversal of the onus of proof and the use of strict liability offences is an issue which not only impacts on Commonwealth laws but equally on the laws of the States and Territories. Section 8Y of the Taxation Administration Act 1953 (C'th) is an example of a Commonwealth law that denies directors the presumption of innocence. We are of the view that this provision should be amended;

(b) Strict liability offences (or elements of offences) should not apply in circumstances where directors must make complex judgments or where the penalties applied as a result of a breach are significant;

(c) In response to calls that the Australian Securities & Investments Commission (ASIC) requires additional powers, we are of the view that any impediments to ASIC's effectiveness are more likely to be caused by a lack of adequate funding and resources rather than a lack of powers; and

(d) Provisions in tax legislation which make new directors of a company personally liable for the misconduct of the company at a time when they were not a director should be removed or amended.

Introduction

The AICD has strongly advocated for many years against the prolific use by Parliaments throughout Australia of provisions that reverse the onus of proof for directors. We have also raised concerns about the use of strict liability contraventions for directors on matters where the director may have no involvement in the misconduct or in circumstances where the subject matter involves complex questions of judgment for directors.

While we understand that this inquiry relates only to Commonwealth laws, the AICD notes that the matters raised in this submission (which we believe should be central to the ALRC's report in due course) impact not only on Commonwealth laws but equally on the laws of the States and Territories.

The year 2015 is a signature year in the context of this inquiry. This year witnesses the 800th anniversary of the Magna Carta which is a cornerstone in the Australian legal system. It is also a cornerstone in many countries that have adopted the traditional British common law approach to the issues surrounding the freedom of individuals and the various rights noted in the Issues Paper published by the ALRC.

Importantly, a person is to be treated as innocent unless proven guilty in a court of law. Regrettably, in too many instances, that particular proposition is ignored in the drafting of laws and is sometimes done so with quite a disconcerting lack of appreciation of the significance of this proposition in the framework of Australian law and justice.

Our specific comments on the use of provisions which reverse the onus of proof and which impose strict liability are set out below. We also draw the ALRC's attention to calls for ASIC to have more powers and to provisions in our tax laws which render new directors in breach of the law for acts done by others.

1. Reversal of the Onus of Proof

The AICD has continued to raise concerns about the extraordinary and excessive use of provisions which reverse the onus of proof for directors in commercial statutes around the country. In 2011 there were over 700 State and Territory statutes which imposed personal criminal liability on directors for acts of the company, regardless of the directors' culpability. While there has been improvement, pursuant to the laws which remain, directors can still be found guilty of a criminal offence in circumstances where they had no knowledge of, and were not involved in, the misconduct.

As a result of the arguments which the AICD pursued in its various submissions to Australian governments, significant reform in some jurisdictions has occurred. Australian governments have been persuaded, to a certain extent, as a result of submissions and the leadership and important work of the Council of Australian Governments (COAG), to conduct a review of many pieces of legislation and to remove the reversal of the onus of proof in many of them. However, there is still much more work to be done in this context.

In the event it assists the ALRC, we provide some background to these reforms below.

1.1 Background to the COAG Director Liability Reforms

The issue of personal director liability for corporate fault is a longstanding one and has been a key part of the AICD's policy and advocacy work for many years. Many provisions imposing personal liability for corporate fault in legislation around the country reverse the legal burden of proof and impose liability on a strict or absolute basis.

In 2008 the issue of director liability became of such economic concern that it was included as a reform stream in the COAG *National Partnership Agreement to Deliver a Seamless National Economy*. The purpose of the COAG reforms as they relate to director liability was to reduce the number of legislative provisions making directors "automatically" liable for the criminal conduct of the company, an outcome that is inappropriate and disproportionate given that the acts of the corporation can be carried out by a large range of individuals without the director's knowledge or involvement.

We continue to be of the view that a regulatory regime which allows directors to be criminally liable for acts of the company outside circumstances where they are accessories or they have knowingly authorised or recklessly permitted a contravention, fosters an approach to business which is overly risk averse and which stifles economic growth and innovation. In addition, such a regulatory regime is morally questionable because it may lead to the conviction and punishment of persons for wrongs with which they had no actual involvement and in respect of which they are, morally speaking, innocent.[1]

The AICD, while supportive of efforts to reform these derivative liability laws and for all jurisdictions to conduct an audit of their statute books, expressed concerns about the principles endorsed by the Ministerial Council for Corporations (MINCO) in November 2009.

We stated that the principles were disappointing and exceptions in the principles provided a "wooly approach to defining what should be very exceptional circumstances and leaves open a potentially very wide range of situations where directors could be personally liable for the misconduct of a corporation."[2] We were particularly concerned about allowing criminal liability for corporate fault based on a wide interpretation of "compelling public policy reasons" because it was ill defined, subjective and thus open to a variety of interpretations that would defeat the purpose of harmonisation.

Despite our concerns the MINCO principles were endorsed by COAG in December 2009. We refer to the agreed principles in this document as the COAG Agreed Principles.

By February 2011, the COAG Reform Council identified several risks to the achievement of the director liability reform. As a result, the AICD developed a set of rigorous principles and a model provision which could be used to achieve the intended outcome of the reform. In 2011, the AICD model for reform was presented to State, Territory and Commonwealth Governments and representatives of the COAG Business Regulation and Competition Working Group (BRCWG) Director Liability Working Group. Although there was keen interest in the alternative approach, there was reluctance from those working on the reform to move away from the COAG Principles, despite their flaws.

In August 2011 the Commonwealth Government announced that there would be a 'new way forward' for the director liability reforms under the COAG process. The announcement stated that "all states and territories will be required to re-audit their laws against COAG's Agreed

[1] For further discussion on this point, see A.P. Simester, 'Is Strict Liability Always Wrong' in A.P. Simester (ed) *Appraising Strict Liability* 2005 at 128

[2] Media Release: "*MINCO Liability Reform Principles a Disappointment*", Australian Institute of Company Directors 6 November 2009.

Principles and more specific and detailed guidelines and will then have to amend their individual laws."[3] We refer to these guidelines as the COAG Guidelines.

In response, the AICD questioned the benefit of re-auditing legislation on a still flawed set of underlying principles with additional guidelines added. However, we have continued to work with State, Territory and Commonwealth Governments to improve existing provisions imposing personal criminal liability on directors, within the constraints of the COAG process.

It is important to note that pursuant to the COAG Agreed Principles and COAG Guidelines the imposition of individual criminal liability on directors as a consequence of the corporation having committed an offence goes beyond the normal liability that applies to a person who is directly responsible for the underlying offence. For this reason the COAG Guidelines clearly state that;

> "the usual and default position is that there should be no directors' liability provision. Accordingly any existing directors' liability provision that is not justified in accordance with the COAG Principles ... should be repealed."[4]

For this reason, even where the COAG Agreed Principles are applied, the insertion of *any* director liability provision is contrary to the default position and must be thoroughly examined.

While work continues in some states and territories, significant reform has been achieved by Queensland, New South Wales and Victoria. The Australian Capital Territory, South Australia and the Commonwealth have also implemented reforms. As the focus of the ALRC Freedoms inquiry is on Commonwealth laws we draw the attention of the ALRC to one provision which was not reformed by the previous Federal Government as part of the COAG director liability reforms. Our concerns about section 8Y of the Taxation Administration Act are set out below.

1.2 Section 8Y of the Taxation Administration Act 1953 (C'th)

In 2012, as part of the COAG Reform process the previous Commonwealth Government passed the Corporate Fault Reform Act 2012 (C'th). The AICD was disappointed that the Commonwealth Government, in that package of reforms, decided not to amend section 8Y of the Taxation Administration Act. We continue to be of the view that section 8Y should be amended.

Section 8Y provides, in part, as follows:

"(1) Where a corporation does or omits to do an act or thing the doing or omission of which constitutes a taxation offence, a person (by whatever name called and whether or not the person is an officer of the corporation) who is concerned in, or takes part in, the management of the corporation shall be deemed to have committed the taxation offence and is punishable accordingly.

(2) In a prosecution of a person for a taxation offence by virtue of subsection (1), it is a defence if the *person proves* that the person:

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[3] Media Release: *New Way Forward for Directors' Liability Reforms*, Senator Nick Sherry and David Bradbury MP, 19 August 2011

[4] Personal Liability for Corporate Fault – Guidelines for applying the COAG Principles at 4.1.

(a) did not aid, abet, counsel or procure the act or omission of the corporation concerned; and

(b) was not in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the act or omission of the corporation.

Note 1: A defendant bears a *legal burden* in relation to the matters in subsection (2), see section 13.4 of the *Criminal Code*.

....."

The effect of section 8Y of the Taxation Administration Act is that if a corporation commits a taxation offence, a director of the corporation will be deemed to be guilty of the same offence. In other words, the provision reverses the fundamental legal principle that a person is innocent until proven guilty.

A director deemed to be guilty under this section, in order to avoid punishment, must prove that they were not involved in the corporation's offence. A director must prove, for example, that they did not aid or abet the corporation's offence or that they were not in any way knowingly concerned in or party to the offence. The director bears the legal burden in proving these matters.

The Explanatory Notes to the Corporate Fault Reform Bill 2012 stated: "As such section 8Y operates, in substance, as an accessorial liability provision." At the time, we expressed our disagreement with this analysis. We continue to be of the view that section 8Y is not a true accessorial liability provision, as accessorial liability provisions require the *prosecution to prove* an individual's involvement in the corporation's offence, rather than the individual being required to prove their *lack of involvement* in the corporation's offence (as is the case in section 8Y).

The purpose of the AICD seeking an amendment to section 8Y of the Taxation Administration Act is not to absolve those directors who are personally involved in a corporation's taxation offence but rather, to restore the normal principles of justice and fairness that apply to all other citizens prosecuted for criminal offences.

We refer the ALRC to the Corporations & Markets Advisory Committee (CAMAC) report *Personal Liability for Corporate Fault* which states:

- "The reversal of the onus of proof inherent in such provisions is contrary to the general presumption of innocence in criminal law;

- The fact that someone is a corporate officer should not subject that person to criminal liability in a way that an individual in other circumstances, or an individual in a responsible position in a non-corporate organization would not be so subject;

- The fact that a corporate officer may be able, in the circumstances of a particular case, to make out a relevant defence and thereby avoid conviction does not remove the seriousness of the risk to reputation and the apprehension, effort and expense to which he or she is subject by being exposed to criminal liability on a prima facie basis."[5]

Section 8Y is contrary to the approach recommended by CAMAC and the COAG Agreed principles. We are of the view that the retention of this provision has not been sufficiently

[5] CAMAC *Personal Liability for Corporate Fault* 2006 at 34.

justified pursuant to the COAG approach. Further, and more importantly, no justification has been provided as to why it is appropriate to undermine the Rule of Law by deciding to retain this provision.

The Explanatory Notes to the Corporate Fault Reform Bill suggested that the retention of section 8Y was necessary because the ATO relies on the section to prosecute those directors "who repeatedly and seriously neglect their company's tax obligations. If the ATO is unable to prosecute these individuals it could significantly undermine the public's confidence in the fairness of the tax system and the ATO's ability to enforce the law."

The AICD made the following comments in relation in this statement:

- As drafted section 8Y can be used to prosecute any director whose company does or omits to do, an act or thing which constitutes a taxation offence. As drafted, section 8Y is not confined to serious and repeated offences, it is a broad provision that renders directors guilty of any taxation offence of the corporation without the prima facie need for the involvement of the director in that offence;

- If, as the explanatory notes suggest, the ATO only uses this provision to prosecute those "directors who repeatedly and seriously" neglect their company's tax obligations, this does not mean that the provision will continue to be used in this way going forward (as set out above, the provision is not in any way limited to repeated and serious offences);

- If the ATO uses this provision to target "those directors who repeatedly and seriously neglect their company's tax obligations" there is presumably evidence available to the ATO to show that the directors have been involved in the taxation offences of their companies. On this basis, there is no reason why the prosecution should not have to prove that a director was an accessory to the corporation's taxation offence;

- We are of the view that public confidence is unlikely to be harmed by requiring the ATO to adhere to commonly accepted and recognised principles of criminal law, given that the public accepts the application of the same principles in more serious criminal prosecutions involving loss of life, liberty and personal safety. Public confidence in the ATO may in fact be enhanced if the ATO was required to prove criminal taxation offences according to commonly accepted and recognised principles of criminal law. Conversely, continuing to retain or introduce provisions that give wide powers to the ATO to enforce the law but which are unnecessarily onerous and operate harshly, may cause a loss of public confidence in the ATO's ability to regulate fairly and justly; and

- The Explanatory Notes suggest that if the ATO is "unable to prosecute these individuals" it would undermine public confidence in the tax system. Amending section 8Y to make it a true accessorial liability provision would not prevent the ATO from prosecuting these individuals. Rather, it would mean that in a prosecution, the ATO would need to establish the director's involvement in the offence in accordance with recognised principles of criminal law. We are hopeful that this statement was not intended to imply that it is easier for the ATO to secure convictions, by placing the legal burden for proving the defence on the director. Such an approach would be contrary to the fundamental principle that a person is innocent until proven guilty, would not reflect good regulatory policy and would not be an appropriate basis for failing to comply with the COAG Agreed Principles or the Rule of Law in respect of section 8Y.

In addition, the Explanatory Notes also provided that the "ATO does not prosecute directors who repeatedly and seriously neglect their company's tax obligations as a matter of course....the ATO has a range of compliance strategies available, such as the imposition of administrative penalties and the initiation of civil recovery processes, as alternatives to prosecutions." We are of the view that the ATO's range of available compliance strategies is also not sufficient justification for retaining criminal liability provisions that fail to comply with recognised and fundamental principles of criminal law such as the presumption of innocence.

We strongly suggest that the ALRC recommend that the Commonwealth Government amend section 8Y of the Taxation Administration Act to restore the presumption of innocence in that section.

2. Strict & Absolute liability

The AICD has already referred to the extensive use of strict and absolute liability provisions in State, Territory and Commonwealth legislation that impose liability on directors for offences committed by the corporation, even in circumstances where the director was not aware of, or involved in the breach. We referred to these provisions in our discussion of the COAG director liability reforms and the reversal of the onus of proof above.

There are also numerous provisions in the Corporations Act 2001 (C'th)(the Act) that create strict liability offences for directors. We note that the Issues Paper refers to some justifications for encroaching traditional rights and freedoms by inserting strict liability offences into legislation. One of the grounds suggested by Professor Richard Singer is that the "imposition of strict liability is not inconsistent with the moral underpinnings of the criminal law generally because the penalties are small, and conviction carries no social stigma."[6] The Issues Paper also refers to the use of strict liability provisions in circumstances where the infractions are 'minor.'

It is important for the ALRC to be aware that in some instances throughout the Corporations Act, strict liability is applied to elements of offences in circumstances where the infractions are not minor and where the penalties are significant. In some circumstances, strict liability applies to offences, or elements of offences, where a director is required to make complex commercial judgments without access to full information and where the time to make a decision, or to obtain further information, is limited.

In our view, the most notable example is section 588G of the Act – the directors' duty to prevent insolvent trading. A breach of section 588G meriting criminal prosecution, can lead to a fine of up to $340,000, imprisonment for five years or both. In particular, we note that for an offence based on section 588G(3) of the Act strict liability applies to sub-paragraph 588G(3)(b). Sub-paragraph 3(b) provides that a person commits an offence if among other criteria "the company is insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt."

We have continued to explain in numerous contexts[7] that the question of whether a company is solvent is extremely complex and time-dependant.[8] Although only elements of

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6 ALRC Issues Paper at 87

7 See *The Honest & Reasonable Director Defence: A reform proposal*, August 2014 at section 1.4 and AICD submission to the Productivity Commission inquiry: Business, Set-Up & Transfer dated 17 February 2014, both available at www.companydirectors.com.au

the 588G(3) offence impose strict or absolute liability, the offence could not be described as a 'minor infraction' given that a criminal offence for insolvent trading leads to a substantial fine and potential imprisonment. There is also substantial social stigma attached to a breach of this provision.[9]

We are of the view that the ALRC should recommend that strict or absolute liability offences should not apply (including elements of offences) in circumstances where directors must make complex judgments or where the penalties applied as a result of a breach are significant.

3. Powers of ASIC

Associated with the reversal of onus of proof and strict liability legislative regime is a parallel development which the AICD believes has not received sufficient recognition by our political leaders and by our Parliaments, that is the creation of administrative regimes allowing regulators to sanction behaviour by companies that are accused of potential breaches of the law without proceeding through the courts. In addition there are continued calls for regulators to be given increased powers to carry out their responsibilities. The AICD believes that this approach to the regulation of important commercial behaviour through provisions in the many statutes that are the subject of the current ALRC inquiry is not satisfactory.

It is the AICD's view that this question becomes even more significant in anticipation of the Commonwealth Government's response to the report by the Murray Panel on the Australian Financial System Inquiry (the FSI Report). In particular, Chapter 5 of the FSI Report contains a significant recommendation for reform of the way in which certain business practices, the development of products and services, and related matters, should be regulated by ASIC. The broad proposals contained in the FSI Report include giving ASIC a product intervention power and to vest powers in ASIC so that in effect it can become a 'market player'. The implementation of these proposals would effectively enable ASIC to define (and structure) relevant products and services that may be offered in the financial services regime (or markets) with the stated aim of eliminating the type and size of financial losses that have recently been suffered in the Australian financial markets as a result of some market failures.

It is not necessary here to discuss in detail the relevant recommendations in the FSI Report. However, we note that the proposed regime would depend too much on the regulator becoming involved in structuring market behaviour without the necessity of obtaining a relevant court order to provide guidance to the community on particular practices, documentation and related matters. This type of regulation will be problematic as far as the law is concerned in our view.

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[8] In *Lewis v Doran* (2004) 50 ACSR 175 Palmer J at 198-199 recognised the difficulties of assessing the exact point at which a company becomes insolvent and referred to the Court's "inestimable benefit of the wisdom of hindsight." Justice Palmer stated: "Where the question is retrospective insolvency, the court has the inestimable benefit of the wisdom of hindsight. One can see the whole picture, both before, as at and after the alleged date of insolvency. The court will be able to see whether as at the alleged date of insolvency the company was, or was not, actually paying all of its debts as they fell due and whether it did, or did not, actually pay all those debts which, although not due as at the alleged date of insolvency, nevertheless became due at a time which, as a matter of commercial reality and common sense, had to be considered as at the date of insolvency." Unfortunately directors do not have the benefit of hindsight when assessing insolvency.

[9] We have expressed our wider concerns about the insolvent trading provisions in other submissions and in our paper *The Honest & Reasonable Director: A proposal for reform,* August 2014 available at www.companydirectors.com.au

We note that recently there have also been increased calls for ASIC to be given more powers in a range of areas. In our view, it is unlikely that ASIC requires additional powers. ASIC already has broad investigation and enforcement powers available to it to carry out its mandate. For example, there are laws in place that provide ASIC with extensive powers to investigate suspected breaches of the law (including requiring people to produce books or answer questions at an examination), issue infringement notices in relation to alleged breaches of law, ban people from engaging in credit activities or providing financial services, seek civil penalties from the courts and to commence enforcement proceedings.

We are of the view that consideration should first be given to how ASIC can better utilise its existing powers before additional powers are given. In our view, any impediments to ASIC's effectiveness are more likely to be caused by a lack of adequate funding and resources to allow ASIC to fulfil its role as a corporate regulator rather than any lack of powers. Being well-funded and resourced is essential for a regulator to be able to effectively use its powers and discharge its duties. Relevantly, being adequately resourced allows a regulator to be more pro-active and therefore maximise the chances of ASIC being able to properly enforce existing legislation. The AICD has long called for and supported moves to provide appropriate funding to ASIC and other regulators to meet the increasing demands that they face.

On this basis, we request the ALRC to consider in this inquiry whether the erosion of traditional rights and freedoms may in part be stemmed, or avoided, by ensuring that regulators are appropriately funded to carry out their responsibilities. This may reduce the pressure on Australian parliaments to pass laws which reverse the onus of proof, insert strict or absolute liability provisions or to adopt administrative regimes which aim to make the under-funded regulator's role easier.

4. Other Issues

We would also like to take this opportunity to draw the ALRC's attention to provisions in Commonwealth law which make new directors to a company personally liable for the misconduct of the company at a time when they were not a director.

The Tax Laws Amendment (2012 Measures No 2) Act 2012 amended the law to:

- make directors personally liable for the company's unpaid superannuation guarantee amounts and PAYG withholding amounts regardless of the directors' culpability; and
- make new directors personally liable for the actions of the company even when the person was not a director at the time of the company's breach.

The provisions, while not criminal offences, still reverse the onus of proof so that directors are deemed to be liable for the amounts unless they can prove otherwise.

Aside from being another example of where directors must prove that they are not liable for a contravention, the AICD is particularly concerned that these measures apply to new directors. In summary, the measures extended the law to make new directors liable for any superannuation guarantee charge or PAYG withholding amount that:

- should have been paid by the company; and
- which is overdue at the date of the director's appointment; and
- which the company does not pay within 30 days of the director's appointment.

We are of the view that new directors should not be made personally liable for breaches of the company's PAYG withholding amount or superannuation guarantee entitlement obligations, where the company's breach occurred prior to the director's appointment. We are of the view that these types of provisions offend a fundamental tenet of the rule of law. In these circumstances, regardless of whether the amount remains outstanding when a new director is appointed, the fact is, the breach occurred at a time when the new director had no actual or legal ability to influence the conduct of the corporation.

Making anyone liable to a penalty for the actions of another (whether it be a corporation or a natural person) in circumstances where the person was not involved in the breach and had no ability to influence the conduct leading to the breach is entirely contrary to the principles upon which our legal system is based.

Section 269-35 of Schedule 1 to the Taxation Administration Act 1953 (C'th) includes the following defence:

> "You are not liable to a penalty under this Division if, because of illness or for some other good reason, it would have been unreasonable to expect you to take part in the management of the company at any time when:
>
> (a) you were a director of the company; and
> (b) the directors were under the relevant obligations under sub-section 269-15(1)."

The 'illness' defence recognises that there will be circumstances when a director is not involved in the management of the company and should therefore not be liable for conduct that has occurred during that period. Yet this same reasoning is not applied to new directors, who have no capacity whatsoever to be involved in being a director, let alone to participate in the management of the company at a time prior to their appointment.

If it is unreasonable to expect a director to take part in the management of the company at a time when they are ill or have some other good reason, surely it is unreasonable to expect a person to take part in the management of a company when they are not even appointed as a director? Aside from the issue of whether a new director should be liable at all for a corporation's breach which occurred prior to their appointment, it seems illogical to have a defence for when a person is a director and did not take part in the management of a company but not to have a defence for a person who was not a director and could not have taken part in the management of a company at the time of the company's breach.

While new directors should apply themselves to fixing past or continuing company issues of which they become aware, we consider it contrary to the rule of law to subject new directors to a penalty for corporate misconduct which first occurred at a time when they were not a director.

We hope our comments will be of assistance to you. If you would like to discuss any aspect of our views, please contact us on (02) 8248 6600.

Yours sincerely

JOHN BROGDEN
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