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Migration Legislation Amendment (Application of
Criminal Code) Bill 2001

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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No. 136 2000–01

Migration Legislation Amendment (Application of Criminal
Code) Bill 2001

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31 May 2001

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Migration Legislation Amendment (Application of Criminal Code) Bill 2001

Date Introduced: 5 April 2001

House: House of Representatives

Portfolio: Immigration and Multicultural Affairs

Commencement: The effect of the commencement provision is that, with one possible exception, the Act commences 28 days after Royal Assent.¹ The exception is **item 98** which will not commence if the *Migration Legislation Amendment (Immigration Detainees) Act 2001* commences first.²

Purpose

To revise criminal offence provisions in three statutes in the Immigration and Multicultural Affairs portfolio so that they harmonise with the principles of criminal responsibility found in Chapter 2 of the Criminal Code. Chapter 2 is scheduled to apply to all pre-existing Commonwealth offences from 15 December 2001.³

Background

For an account of the background to the Criminal Code and a brief description of Chapter 2 of the Code, see the Bills Digest for the Environment and Heritage Legislation Amendment (Application of Criminal Code) Bill 2000 (Bills Digest No.92, 2000-2001). Chapter 2 of the Criminal Code contains principles of criminal responsibility. Since 1995 there has been a staggered program of applying those principles to Commonwealth criminal laws. Chapter 2 applies to all offences against the Code. From 1 January 1997 it applied to all new Commonwealth offences. From 15 December 2001 it will apply to pre-existing Commonwealth offences. In order to meet this deadline, the Commonwealth has been reviewing pre-existing offence provisions with a view to harmonising them with Chapter 2, modifying the application of Chapter 2 where necessary or clarifying how Chapter 2 will apply.

The Parliament has passed the following laws which apply Chapter 2 to legislation in a range of portfolios—*Communication and the Arts Legislation Amendment (Application of*

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Criminal Code) Act 2001, Environment and Heritage Legislation Amendment (Application of Criminal Code) Act 2001, Foreign Affairs and Trade Legislation Amendment (Application of Criminal Code) Act 2001, Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001, Treasury Legislation Amendment (Application of Criminal Code) Act (No.1) 2001, and Veterans' Affairs Legislation Amendment (Application of Criminal Code) Act 2001. Currently before the Parliament are the Finance and Administration Legislation (Application of Criminal Code) Bill (No.1) 2001, Prime Minister and Cabinet Legislation Amendment (Application of Criminal Code) Bill 2001, Treasury Legislation Amendment (Application of Criminal Code) Bill (No.2) 2001 and the present Bill.

Some major aspects of criminal responsibility relevant to the Migration Legislation Amendment (Application of Criminal Code) Bill 2001 are described below.

Offences—Physical elements and fault elements

The Criminal Code provides that an offence consists of physical elements and fault elements. Physical elements relate to external events such as conduct or the result of conduct. Fault elements relate to a person's state of mind eg intention, knowledge, recklessness and negligence.

The Criminal Code defines the physical elements of an offence to be conduct, the circumstances in which it occurs and the results of conduct.⁴ An omission to act can be a physical element if there is appropriate statutory provision or if it is the result of a breach of duty to act.⁵ Each offence must contain at least one of these physical elements, but any combination of physical elements may be present in an offence provision.

In general, for every physical element of an offence, the prosecution must also prove a corresponding fault element. The Code establishes four fault elements—intention, knowledge, recklessness and negligence—in descending order of culpability. Where the physical element of an offence consists of conduct, intention is the default fault element. However, if the physical element is a circumstance or a result of conduct the default fault element is recklessness.⁶ The Code does not prevent an offence from specifying an alternative fault element, but indicates that the default fault element will apply in the absence of a specified fault element.

Proof of criminal responsibility

It is the duty of the prosecution to prove the guilt of the accused person.⁷ The prosecution bears the legal burden of proving every element of an offence. The legal burden means 'in relation to a matter, the burden of proving the existence of the matter'.⁸ The prosecution bears the legal burden of proof beyond reasonable doubt, unless the law creating the offence provides otherwise.

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Generally, where a burden of proof is placed on a defendant it is an evidential burden only.⁹ The evidential burden can be discharged by the defendant pointing to evidence suggesting there was a reasonable possibility that a matter existed or did not exist.¹⁰ The Code provides that a defendant will have a legal burden of proof only if the law creating the offence so provides. When a legal burden is placed on the defendant it must be discharged on the balance of probabilities.¹¹

The Bill places legal burdens on the defendant in some cases and identifies evidential burdens.¹²

Corporate criminal responsibility

In general, the Bill applies Chapter 2 to all offence provisions in relevant legislation administered by the Department of Immigration and Multicultural Affairs. However, in some cases, the application of Chapter 2 is modified. For example, where a statute contains its own scheme relating to corporate criminal responsibility this is retained and Chapter 2 principles of corporate criminal responsibility are expressly excluded. This is in keeping with policy expressed when the Criminal Code Bill 1994 was introduced. At that time, the responsible Minister said, 'Part 2.5 [of the Criminal Code dealing with corporate criminal responsibility] concerns general principles suitable for ordinary offences. It will be the basis of liability if no other basis is provided.'¹³

Strict liability

At common law there is a presumption that every offence contains a mental element. However, an increasing number of statutory offences dispense with fault elements.¹⁴ Whether an offence is a strict liability offence depends on the interpretation of the offence provision. However, if a defence of honest and reasonable mistake of fact is available, such offences are called strict liability offences. Working from common law principles, Chapter 2 of the Criminal Code requires offences of strict liability to be expressly identified as such.¹⁵ Failure to do so means that fault elements are applied to all the physical elements in the offence.

The Criminal Code supplies a defence of mistake of fact to strict liability offences.¹⁶ The Bill retains additional defences to some strict liability offences. For example, the Bill relocates and re-phrases defences of reasonable excuse where they presently exist in offences identified as strict liability offences.

Absolute liability

An absolute liability offence is one where the prosecution does not have to prove any fault elements and where no defence of mistake of fact is available. 'Guilt is established by proof of the objective elements of the offence'.¹⁷ The *Criminal Code* provides that an

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offence which is an absolute liability offence must be identified as such.¹⁸ While mistake of fact is not available as a defence¹⁹, the *Criminal Code* recognises that other defences may be provided in particular statutes.

The Bill identifies two absolute liability offences and retains existing statutory defences to those offences.

Defences

Defences to criminal offences are usually external to the physical and fault elements of offences and to offences themselves.²⁰ Possibly for this reason, and to clearly identify defences as defences and not as elements of offences which have to be proved or disproved by the prosecution, the amendments relocate defences from provisions which set out the physical elements of an offence into their own separate subsections. The Bill relocates and re-phrases defences to both strict liability offences and offences which have a fault element.

Removing and replacing inappropriate fault elements

The Bill amends a number of offence provisions so that their constituent fault and physical elements correspond with the scheme supplied by the Criminal Code. For example, amendments ensure that the Code fault element of knowledge does not apply to the physical element of conduct in an offence. In the process of applying appropriate fault elements, some of the amendments also restructure offence provisions so that their constituent physical elements are clearly identified and the Code's default fault elements can be applied to them.

Non-Code fault elements

Many offence provisions in Commonwealth statutes do not specify fault elements. In other cases, a variety of expressions may be used including 'a purpose intended to be', 'wilfully', and 'for the purpose of'. The meaning of many of these expressions is uncertain.

As stated above, the Criminal Code uses four fault elements (intention, knowledge, recklessness and negligence).²¹ It does not prevent other fault elements being used in a particular offence provision.²² However, the Bill replaces non-Code expressions such as 'for the purpose' and 'purpose' with the Code fault element of 'intention' in order to remove ambiguity.

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Ancillary offences

Many Commonwealth statutes contain references to provisions in the *Crimes Act 1914* which deal with ancillary offences such as attempts to commit offences, incitement and conspiracy. These Crimes Act provisions are being disapplied and will be replaced by equivalent provisions in the Criminal Code. The Bill thus contains amendments removing references to the Crimes Act and replacing them with references to the Criminal Code.

Additionally, some Commonwealth statutes themselves contain provisions creating ancillary offences. These provisions will no longer be necessary once the Criminal Code is applied as it contains ancillary offence provisions. The Bill therefore removes ancillary offence provisions from statutes administered by the Department of Immigration and Multicultural Affairs. Equivalent Criminal Code provisions will take their place.

Main Provisions

Clause 4 applies each amendment made by the Act to acts and omissions that occur or commence after the amendment commences.

Schedule 1—Amendment of the *Migration Act 1958*

Application of the Criminal Code

Item 1 applies Chapter 2 of the Criminal Code, with the exception of principles of corporate criminal responsibility, to all offences (**new section 4A**). The Migration Act contains its own regime for corporate criminal responsibility in section 493. A note to **new section 4A** explains that Chapter 2 of the Criminal Code sets out the general principles of criminal responsibility.

Ancillary offences

Item 2 replaces the definition of ‘offence against [the Migration] Act’ with a new definition. The existing definition refers to sections 5, 6, 7, 7A and subsection 86(1) of the Crimes Act and to ancillary offence provisions in the Criminal Code. The Crimes Act imports the ancillary offences of aiding and abetting, being an accessory, attempt, inciting, and conspiracy into the Migration Act. With the exception of section 6 of the Crimes Act, these provisions are scheduled for repeal in December 2001 when the Criminal Code will supply ancillary offences to all Commonwealth offences. The new definition retains the reference to section 6 of the Crimes Act and incorporates references to relevant sections of the Criminal Code.

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Section 203 of the Migration Act provides for the deportation of non-citizens who have been convicted of certain serious primary offences including treason and treachery or ancillary offences supplied by sections 6, 7 and subsection 86(1) of the Crimes Act. **Item 10** repeals and replaces subparagraph 203(1)(c)(ii) of the Migration Act to remove Crimes Act references²³ and substitute references to ancillary offences in the Criminal Code.

Item 98 amends subsection 491(1) of the Migration Act which states that ‘A person who is being kept in lawful immigration detention in accordance with a relevant provision of this Act shall not escape or attempt to escape from that immigration detention’. The amendment removes the underlined words which are not needed because ancillary offences such as attempt will be supplied by the Criminal Code. However, **item 98** will not commence if the *Migration Legislation Amendment (Immigration Detainees) Act 2001* has already commenced—see **subclause 2(2)**.²⁴ This is because the Migration Legislation Amendment (Immigration Detainees) Act will repeal section 491 in its entirety and create a new offence of escaping from immigration detention.²⁵

Strict liability offences

The Bill identifies a number of offences against the Migration Act as strict liability offences. These are offences lacking a fault element where a defence of mistake of fact is supplied by the Criminal Code. The Criminal Code does not prevent other defences being available for a strict liability offence—a defence commonly found in Commonwealth law is that of reasonable excuse. In a number of instances, the amendments restructure strict liability offence provisions to ensure that words such as ‘without reasonable excuse’ are clearly identified as defences to those offences and not as elements of the offence which would have to be proved or disproved by the prosecution.

For example, section 21 of the Migration Act creates an offence of refusing or failing to comply, ‘without reasonable excuse’, with a section 18 notice²⁶ ‘to the extent that the person is capable of complying with it’. The penalty is 6 months imprisonment. **Items 3-6** amend section 21 in the following ways:

- they relocate and re-phrase the words ‘without reasonable excuse’ and ‘to the extent that the person is capable of complying with it’. The purpose of these amendments is to ensure that the words are interpreted as defences.
- they identify the offence as one of strict liability.

Items 7, 8, 19-24, 52, 53, 84, 85, 88, 89, 91-96 make similar amendments with respect to the expression ‘reasonable excuse’ in a number of other Migration Act offences and also identify them as strict liability offences. In other words, these strict liability offences will have a defence of mistake of fact supplied by the Criminal Code and a defence of reasonable excuse supplied by the Migration Act. The penalties for these offences range from fines of 100 penalty units²⁷ to imprisonment for 6 months.²⁸

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Items 11, 12, 17, 25, 35, 60, 61-64, 67, 70, 77, 80, 82 identify other offences of strict liability in the Migration Act. In relation to these offences, a defence of mistake of fact is supplied by the Criminal Code but no additional defence—such as ‘reasonable excuse’—is supplied by the Migration Act. Examples are offences against subsections 217(2) and 218(2) which require a person to remove certain removees (**items 11 and 12**). Penalties range from 100 penalty units²⁹ to a fine of \$30 000.³⁰

Placing the legal burden of proof on the defendant

The Bill stipulates that a defendant bears a legal burden of proof in relation to matters in:

- section 219—dealing with defences to a prosecution under section 218 for failing to comply with a notice to transport a non-citizen (**item 14**). An example of a defence is that the defendant was prevented from complying due to ‘stress of weather’.
- subsection 229(5)—dealing with defences to a prosecution for bringing a non-citizen to Australia on a vessel (**item 27**). An example of a defence under subsection 229(5) is that the non-citizen had a current visa that did not appear to have been cancelled.
- section 232(2)—dealing with the defences available to a ship’s master or owner who is charged with an offence of bringing an unlawful non-citizen into Australia (**item 32**). An example of a defence is that the vessel entered Australian waters due to the illness of one of its passengers.
- subsection 240(3)—dealing with the defence to a prosecution of arranging a marriage to obtain permanent residence (**item 39**). It is a defence to believe that the marriage would result in a genuine and continuing relationship.
- subsection 247(5)—dealing with defences to prosecutions for unlawfully landing an aircraft in Australia (**item 59**). An example of a defence is ‘stress of weather’.

Relocating and re-phrasing defences

Items 15 and 16 amend subsection 222(8) of the Migration Act. Subsection 222(8) is an offence of contravening an order restraining the disposal of property. This offence is not identified as a strict liability offence possibly because it carries a penalty of 2 years imprisonment. The amendments relocate and re-phrase the expression ‘without reasonable excuse’ found in subsection 222(8) so it is clear that the words are a defence and not an element of the offence which would have to be proved by the prosecution.

Items 54 and 55 relocate and re-phrase defences in subsection 247(1) and paragraph 247(2)(b) so it is clear they are not elements of the offences.

Absolute liability

Subsection 229(2) of the Migration Act creates an offence of bringing an unlawful non-citizen into Australia. The penalty is a fine not exceeding \$10 000. **Item 26** identifies this

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offence as one of absolute liability—that is, no fault elements attach to the physical elements of the offence and no defence mistake of fact is available. The Criminal Code does not prevent defences other than a defence of mistake of fact applying to an absolute liability offence [subsection 6.2(3)]. Existing defences under subsection 229(5) are unaffected by the Bill.

Subsection 232(1) prohibits the master, owner, agent or charterer of a vessel bringing an unlawful non-citizen into Australia. The penalty is 100 penalty units.³¹ **Item 31** identifies an offence against subsection 232(1) as an absolute liability offence. As with an offence against subsection 229(2), existing statutory defences will continue to apply.

Aligning fault elements in the Migration Act with fault elements in the Criminal Code and restructuring offence provisions

Section 233(2) of the Migration Act provides that ‘A person must not knowingly or recklessly harbour an unlawful non-citizen, a removee or deportee’. As currently worded, the fault elements of ‘knowledge’ and ‘recklessness’ are applied to the physical element of conduct in the offence. The Criminal Code provides that the fault element of intention applies to conduct. As a result, **item 33** repeals and replaces subsection 233(2) to identify the constituent physical elements of the offence—conduct and circumstance. The default fault elements of intention and recklessness, respectively will apply as a result of the operation of the Criminal Code. The Criminal Code applies the fault element of ‘knowledge’ to circumstances or results. Further, the Explanatory Memorandum notes that ‘[a]pplying “knowingly” to a physical element of conduct in the pre-*Criminal Code* environment is equivalent to applying the *Criminal Code* fault element of intention.’³²

Subsection 371(3) of the Migration Act creates an offence of ‘knowingly’ giving evidence to the Migration Review Tribunal that is false or misleading. Subsection 433(3) creates an offence of ‘knowingly’ giving false or misleading evidence to the Refugee Review Tribunal. These are offences involving the physical element of conduct. As a result, **items 90 and 97** substitute the fault element of intention for the pre-Code fault element of knowledge in the offences.

Items 36 and 83 re-structure offence provisions in order to clearly identify their constituent physical elements. The default fault elements for each physical element will be supplied by the Criminal Code. For example, as well as removing non-Code fault elements **item 36** repeals and replaces section 236 of the Migration Act in a way that clearly separates the physical elements of circumstance, conduct and result in the offence.

Replacing non-Code fault elements

Section 236 of the Migration Act creates offences relating to visas. Sections 241 and 242 create offences of arranging pretended de facto and interdependence relationships to obtain permanent residence. **Items 36, 40-43** replace non-Code fault elements such as ‘for the purpose’ in sections 236, 241 and 242 with the Code fault element of intention. The

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Explanatory Memorandum comments that, as presently expressed, the meaning of these sections is ambiguous.³³

Repeals of sections and notes

Items 65 and 75 are housekeeping amendments which repeal sections 268AC and 279A of the Migration Act. These sections apply the Criminal Code to Divisions 14A and 15 of the Migration Act. Division 15—relating to migration agents—was inserted into the Migration Act by the *Migration Legislation Amendment (Migration Agents) Act 1997*. Division 14A—relating to monitoring compliance with student visas—was inserted into the Migration Act by the *Migration Legislation Amendment (Overseas Students) Act 2000*. The Criminal Code was designed to be applied to all new Commonwealth offences from 1 January 1997. As a result, the 1997 and 2000 Acts applied the Criminal Code to the new offences contained in Divisions 14A and 15. When **new section 4A** is inserted into the Migration Act (see **item 1**), sections 268AC and 279A will become redundant.

Items 66, 68, 69, 71, 72, 73, 74, 76, 78, 79 and 81 repeal a number of notes in the Migration Act. The notes that are repealed state that ‘Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility’. These notes will become redundant because a general note to this effect is supplied by **item 1**.

Item 99 is said to repeal subsection 493(9). There does not appear to be a subsection 493(9) in the Migration Act. **Item 99** may be intended to repeal subsection 493(8) which states that, ‘A reference in this section to engaging in conduct includes a reference to failing or refusing to engage in conduct’. This provision could be regarded as redundant because section 4.1 of the Criminal Code defines ‘conduct’ as ‘an act, an omission to perform an act or a state of affairs’.

Schedule 2—Amendment of the *Australian Citizenship Act 1948*

Item 1 applies Chapter 2 of the Criminal Code to all offences against the Australian Citizenship Act.

Section 49 of the Australian Citizenship Act creates an offence of altering a citizenship certificate ‘without lawful authority’. **Item 2** omits the words ‘without lawful authority’ from section 49 of the Act. These words will be redundant because a defence of lawful authority will be supplied by the Criminal Code.³⁴

Schedule 3—Amendment of the *Immigration (Guardianship of Children) Act 1946*

Item 1 applies Chapter 2 of the Criminal Code to all offences against the Immigration (Guardianship of Children) Act.

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Concluding Comments

Like its companion Bills, the Migration Legislation Amendment (Application of Criminal Code) Bill 2001 identifies a number of strict liability offences in portfolio legislation. One difference in approach that has emerged between portfolios relates to offences identified as strict liability offences which contain the words 'refuse or fail'. For instance, subsection 433(1) of the Migration Act creates an offence of refusing or failing to be sworn or answer questions when required by the Refugee Review Tribunal. The penalty is 6 months imprisonment. The amendments identify this offence as a strict liability offence. The Explanatory Memorandum says that the presumption that an offence will contain a fault element is displaced in the case of subsection 433(1) for a number of reasons including 'the offence does not have an express fault element nor can one be necessarily implied'.³⁵ The word 'refuses' is retained.

The Prime Minister and Cabinet Legislation Amendment (Application of Criminal Code) Bill 2001 also identifies a number of offence provisions in the legislation it amends as strict liability offences. Among their number are provisions which include the words 'refuses or fails'. For example, subsection 18(7) of the *Inspector-General of Intelligence and Security Act 1986* provides that it is an offence to refuse or fail to provide information or documents to the Inspector-General. The penalty, in the case of a natural person, is a fine of \$1000 or 6 months imprisonment, or both. The Prime Minister and Cabinet Legislation Amendment (Application of Criminal Code) Bill 2001 removes the word 'refuses' from these offences. The Explanatory Memorandum for that Bill remarks that the word 'refuses' suggests that 'some fault on the part of the defendant is required and [is] inconsistent with the strict liability nature of the offence'.³⁶

Endnotes

- 1 Clause 2 provides that the Act commences on the later of the following two days—28 days after it receives Royal Assent or 28 days after the day on which the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001* receives Royal Assent. The latter statute received Royal Assent on 6 April 2001.
- 2 At the time of writing the Migration Legislation Amendment (Immigration Detainees) Bill 2001 was before the Parliament.
- 3 See *Criminal Code Amendment (Application) Act 2000*.
- 4 Criminal Code, section 4.1.
- 5 Criminal Code, section 4.3.
- 6 Criminal Code, section 5.6.

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- 7 This is the ‘golden thread’ of English criminal law referred to in *Woolmington v. DPP* (1935) AC 462.
- 8 Criminal Code, subsection 13.1(3).
- 9 Criminal Code, subsection 13.3(1).
- 10 Criminal Code, subsection 13.3(6).
- 11 Criminal Code, sections 13.4 and 13.5.
- 12 In relation to evidential burdens see **items 5, 8, 16, 20, 22, 24, 29, 30, 34, 36, 49, 53, 56, 85, 87, 89, 92, 94, and 96**.
- 13 Second Reading Speech, Senate, *Parliamentary Debates (Hansard)*, 30 June 1994, p. 2381.
- 14 *He Kaw Teh v R* (1985) 157 CLR 523.
- 15 Criminal Code, subsection 6.1(1).
- 16 Criminal Code, paragraph 6.1(1)(b).
- 17 *Halsbury’s Laws of Australia*, 130-7965.
- 18 Subsection 6.2(1).
- 19 Paragraph 6.2(1)(b).
- 20 Matthew Goode, ‘The Modern Criminal Code Project’, *Australian Law Librarian*, 5(4), December 1997, pp.267-76 at p.267.
- 21 Criminal Code, subsection 5.1(1).
- 22 Criminal Code, subsection 5.1(2).
- 23 Except to section 6 of the Crimes Act—see previous paragraph.
- 24 At the time of writing the Migration Legislation Amendment (Immigration Detainees) Bill 2001 was before the Parliament.
- 25 See Bills Digest No.131, 2000-2001.
- 26 A section 18 notice is a Ministerial notice requiring a person to provide information about the identity or whereabouts of an unlawful non-citizen.
- 27 Subsection 245F(15). A penalty unit = \$110.
- 28 For example, subsection 370(1).
- 29 For example, subsection 217(2).
- 30 Subsection 223(7).
- 31 One penalty unit = \$110.
- 32 Explanatory Memorandum, p.16.
- 33 Explanatory Memorandum, pp.17-18.

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- 34 As amended by section 10.5 of the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*.
- 35 Explanatory Memorandum, p.34.
- 36 Explanatory Memorandum, p.6.

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