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Commercial Law Cram Notes

1st Edition



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1. INTRODUCTION

A. HOW TO USE CRAM NOTES

The Commercial Law Cram Notes are formatted into a step-by-step guide, which you can use as a checklist in your exams to ensure that every element of the exam question is answered. You may find the Table of Contents to be a quick and useful overview of the law to be applied.

You should also answer the exam question using the ILAC method, which will ensure your answer is comprehensive.

- Issue** State the legal issue relevant to the problem
- Law** Identify the relevant case law and legislation
- Analysis** Analyse and apply the law to the legal issue. This is the most important part, so ensure your legal analysis is very thorough.
- Conclusion** Form a conclusion based on your analysis and application of the law, giving some practical advice to the hypothetical client.

It is very important to spend time perfecting your analysis section, as this is the part that examiners are most interested in. Do not worry if you reach the correct conclusion (there often isn't one clear answer) – examiners will give more weight to your legal analysis, and sometimes may even reward answers that propose an innovative and unconventional answer!

B. ABBREVIATIONS

The Commercial Law Cram Notes will refer frequently to the following legislation by using abbreviations.

Legislation	Abbreviation
<i>Sale of Goods Act 1923</i> (NSW)	SOGA

Although the NSW Act is used, vastly similar legislation is used in each Australian jurisdiction.



2. SALE OF GOODS AND IMPLIED TERMS

A. THRESHOLD QUESTION – DOES THE SALE OF GOODS ACT APPLY?

i. IS IT A SALE OF GOODS?

The SOGA provisions only apply to contracts of sale for a money consideration, that is, a price (s 6(1)). In addition, the SOGA does not apply to any transaction which is intended to operate as a mortgage, pledge, charge, or other security (s 4(4)). In this way, the relevant sale of goods or services must be for a monetary sum, but must not be in the way of a loan or mortgage.

1) Definition

Under s 5(1) of the SOGA:

- Contract of sale is defined as an agreement to sell as well as a sale
- Goods include chattels personal (i.e. personal property that is not real property) but does not include an action or money. Notably, goods include things attached to or forming part of the land which are agreed to be severed.

2) Distinction between sale of goods, and provision of services

The sale of goods, as stated above, requires the sale of personal property. On the other hand, the provision of services involves the expending of work and labour. There is a fine line between the sale of goods and provision of services where services are provided on a chattel, that is agreed to be delivered to the buyer.

The test is whether, if the contract is carried out, the end result is the sale of a chattel. If the result of the contract is that the party has done work and labour on some chattel, but the chattel itself is not the subject of a sale (i.e. work and labour is subject matter of the contract, not the chattel that work and labour is applied to), then the party cannot sue for goods sold and delivered (*Deta*)

3) Examples

The following list provides an indicia of the sale of goods (*Deta*)

- The completion of the contract by delivery into the buyer's hands of a completely new article of goods
- It is irrelevant that the value of the work and labour exceeds the value of chattel.
- A house is "goods" if it is agreed to be severed (*Symes v Laurie*)
- A computer system comprising of both software and hardware is a sale of goods (*Toby Constructions*)

The following has been held not to be goods:

- Work and labour is not "goods", including a work of art in which the existence of the underlying chattel is a mere unavoidable incidence of the existence of the creation itself (*Deta*)
- A computer program itself is not a "good" (*St Albans*)
 - o However, if the program is sold with the computer hardware, it may constitute goods (*Toby Constructions*)
- The supply of electricity is not a supply of goods (*Telstra*)
- The supply of information, such as electromagnetic waves, are not goods, but are services (*Telstra*)



iv. WERE THE GOODS SUPPLIED IN THE COURSE OF A BUSINESS?

The goods must be of the kind that the seller supplies in the course of business.

Ashington Piggeries

- It is in the course of the seller's business if the seller agrees to supply the goods when ordered. This applies orders for new goods.
- By holding out the seller as a manufacturer or dealer in goods of that kind, the seller leads the buyer reasonably to understand that he is capable of exercising sufficient skill or judgment to make or to select goods which will be fit for the particular purpose
 - o It does not matter that the seller does not actually possess the necessary skill or judgment.

v. ARE THE GOODS REASONABLY FIT FOR THE PARTICULAR PURPOSE?

To determine whether the goods are reasonable for the particular purpose, this is a factual question. However, the following cases provide guidelines as to the level of fitness for purpose for which the seller is responsible.

Henry Kendall

- The reliance on the seller extends to latent defects that even with the utmost skill and judgment, the seller would not have detected them.
 - o This is a high burden.
- If a purpose is stated so widely as to cover different qualities of goods, whether it will be reasonably for purpose will be a question of fact and degree.
 - o The rarity of the unsuitability of the goods would be weighed against the gravity of the consequences.
- Any term excluding responsibility of latent defects is only partially effective.
 - o It is only effective to extent that the latent defect does not prevent the goods from being reasonably fit for their purpose.

Ashington Piggeries

- The absence of complaint from other buyers who received the same goods does not establish the suitability of the goods.
- The buyer need not show that the goods were not reasonably fit for purpose for other customers as well.

vi. DOES THE PROVISIO APPLY – DID THE BUYER RELY ON THE PATENT OR TRADE NAME?

The proviso applies where the buyer requests to purchase a specific good using its patent or other trade name (e.g. Kleenex, Panadol and so on)

Baldry v Marshall

- The fact that the goods are merely described with reference to a trade name does not activate the proviso.
- It is only when the buyer specifically asked for the goods using the trade name so as to indicate that he is satisfied, rightly or wrongly, that it will answer his purpose, and that he is not relying on the skill or judgment of the seller.



G. HAS THE BUYER SIGNALLED ACCEPTANCE OF GOODS?

i. HAS THE BUYER EXAMINED THE GOODS?

Under s 37, the buyer will not be deemed to have accepted goods unless and until the buyer has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract. Likewise, the seller must give the buyer such a reasonable opportunity to examine the goods (s 37(2)).

ii. HAS THE BUYER INTIMATED ACCEPTANCE, DONE ANY ACT INCONSISTENT WITH SELLER'S OWNERSHIP, OR RETAINED THEM WITHOUT INTIMATING REJECTION?

The buyer will be deemed to have accepted the goods where the buyer (s 38):

- intimates to the seller that the buyer has accepted the goods, or
- does any act inconsistent with the seller's ownership of the goods, or
- retains the goods without intimating acceptance within a reasonable time

Note that intimation can only happen if there is actual communication. This cannot be inferred from conduct.

H. REMEDIES

Where there has been a failure of an implied condition, the buyer can rescind the contract of sale by returning the goods and claiming for the purchase price paid. Where there is a failure of a warranty, the buyer can claim damages for the loss suffered (expectation loss/loss of bargain).

However, note that under s 16(3), breach of a condition may be treated as breach of a warranty once the buyer has accepted the goods or part thereof. Note that this does not mean that a condition becomes a warranty upon acceptance of goods by the buyer. The consequence is that the legal remedies for breach become limited to remedies which exist for warranties only, that is, suing for damages.

3. THE PASSING OF RISK, POSSESSION AND TITLE TO GOODS

A. BACKGROUND - TYPES OF GOODS

i. FUTURE GOODS

Under s 5(1), future goods are defined as goods to be manufactured or acquired by seller after the making of the contract. This would encompass goods which are not currently in existence.

ii. SPECIFIC GOODS

Specific goods are those that are identified and agreed upon at time of contract.

Kursell

- A sale of trees by reference to their height at the time of felling was not considered to be specific goods because it couldn't be determined which trees were part of the contract until the time for felling.



iii. ASCERTAINED GOODS

Ascertained goods are those that are identified in accordance with the agreement after the contract has been made. For example, in the *Kursell* case above, the sale of trees with reference to their height at the time of felling would be ascertained goods.

iv. UNASCERTAINED GOODS

Unascertained goods are those that cannot be identified with sufficient certainty, or those which are not agreed upon at the time of contract.

v. EXISTING GOODS

Existing goods are those that are currently owned or possessed by the seller (s 10(1)).

B. HAS TITLE PASSED? PRESUMPTIONS AS TO WHEN TITLE PASSES

Title to the property can pass whether or not delivery, possession or payment has taken place. Therefore, it is important to determine when title has passed to the buyer.

The implication of the passing of title is that:

- Risk of the goods passes when title passes (s 25)
- If title to the goods have passed to the buyer, the buyer will have good title even if the seller becomes insolvent before delivery of the goods to the buyer.
- Where specific goods, without fault of the seller or buyer, perish before risk passes to the buyer, the agreement is avoided (s 12). That is, the loss lies where it falls.

i. DEFINITIONS

- Delivery is the act of the transfer of possession.
- "Goods passing" describes the transfer of title and ownership of the goods
- Risk is the liability for the loss of the goods (s 25)
- Deliverable state
 - o Defined in s 5(4) as the state of the goods that the buyer would, under the contract, be bound to take delivery of.
 - o Deliverable state does not depend on mere completeness of the subject matter. Rather, it depends on the actual state of the goods at date of contract and the state in which they are to be delivered under the terms of contract (*Underwood*)
 - o The expending of time, money and effort to deliver the goods meant that it was not in deliverable state (*Underwood*).

ii. GENERAL RULE

The general rule for determining whether title has passed is that property to specific or ascertained goods passes to buyer at such time as the parties to the contract intended it to pass (s 22). The intention of the parties will be drawn from the terms of contract, the conduct of parties, and the circumstances of case.

McPherson

- The words "Goods to be at buyer's risk after fall of hammer" is an express and emphatic declaration of the intention of the parties that property passes at the time of contract.
- A provision for resale of the goods did not count against a view that property passed when the contract was made.

Note that where there is a contractual agreement as to when property is to pass, s 22



provides that this contractual intention is to be given effect. However, if there no intention is apparent in the contract, the rules in s 23 (described in the following sections) will be relevant in determining the time when title passes.

iii. SALE OF SPECIFIC GOODS

The following rules are provided under the SOGA for ascertaining the intention of the parties as to the time at which the property in specific goods are to pass to the buyer.

1) Unconditional contract

Where there is an unconditional contract for the sale of specific goods in a deliverable state, property in the goods passes to the buyer at the time of contract (s 23 Rule 1). There are two parts to this rule-

- The contract must be unconditional
- The goods must be in a deliverable state (see s 5(4) in the Definitions section above)

In addition, it is immaterial whether the time for payment or delivery is postponed.

Bodilongo

- As the goods were specific, and there was a warranty that the goods was to be in deliverable state, property passed on the making of the contract (s 23 Rule 1) notwithstanding postponement of the payment or delivery.

2) Seller is bound to do something to put goods into deliverable state

Under s 23 Rule 2, where the seller is bound to do something to the goods for the purpose of putting them in a deliverable state, property does not pass until the seller does what is required and the buyer has notice of this. The main difference from s 23 Rule 1 is that the goods in question are not currently in a deliverable state. Therefore, the operative requirement is that the goods be placed in a deliverable state by the seller. Upon informing the buyer that the goods are placed in a deliverable state, the goods would pass to the buyer.

Underwood

- Deliverable state does not depend on mere completeness of the subject matter. Rather, it depends on the actual state of the goods at date of contract and the state in which they are to be delivered under the terms of contract.
- The expending of time, money and effort to deliver the goods meant that it was not in deliverable state.

Section 23 Rule 3 is similar in the sense that the seller must weigh, measure, test or do some other act with reference to the goods for the purpose of ascertaining the price.

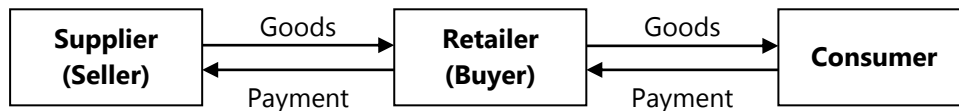
iv. GOODS ON SALE OR RETURN BASIS

Under s 23 Rule 4, where goods are delivered to the buyer for sale on a "sale or return" basis, property to the goods passes to the buyer when:

- The buyer signifies approval or acceptance or does any other act adopting the transaction; or
- The buyer retains the goods without giving notice of rejection of the goods, upon expiration of the time fixed for the return of goods or the expiration of a reasonable time.



Generally, this provision would apply to goods sold on consignment with the retailer (the buyer). The intended transaction is that the buyer (the retailer) offers goods for sale to a consumer. Where the consumer purchases the goods, the buyer in turn buys the goods from the seller (the supplier), so that the buyer has good title to sell to the consumer.



Under the SOGA, the relevant transaction under s 23 Rule 4 is that between the supplier (seller) and the retailer (buyer). The transaction between the retailer and the consumer is not relevant.

1) Is it on a sale or return basis?

Goods will be held by the buyer on a sale or return basis where the seller delivers the goods to the prospective buyer who may either elect to buy the goods or return them. Until such an election to buy, the buyer is not obliged to buy the goods and property does not pass from the seller.

Weiner

- Indicia of goods not being on a "sale or return" basis
 - Where the buyer is remunerated for the sale (e.g. commission for sale)
 - ◆ As the retailer will need to buy goods from the supplier when selling the goods in a particular transaction, they will become an owner of the goods for the purposes of that particular sale. An owner is not generally remunerated on a commission basis for selling his or her own goods.
 - Where an agency relationship exists between the supplier and the retailer (i.e. duty of the agent to sell)
 - Where the purchase price of goods is not determined until they have been on-sold by the agent.
- In this case, there was an explicit displacement of s 23 Rule 4 because the property remained that of the supplier throughout the whole transaction.

Re Ferrier

- Where the buyer has not made a decision to buy or return the goods, property would not have passed to the buyer, and the goods remained at the seller's risk.

2) Time when title passes

Kirkham v Attenborough (1897)

- In the case of a contract on sale or return, the buyer is entitled to retain the goods for a time on credit, but if he/she deals with the goods in a way which is inconsistent with his/her rights to return them, then title passes to the buyer at that time.
- If the buyer sells or pledges them, he/she loses the right to return them and the property in the goods passes to him/her.

3) Has there been a return of goods?

Atari v Electronics Boutique Stores

- Any notice of rejection of the goods given before the time fixed for return is sufficient
 - The notice need not be in writing and it need not identify the goods precisely, as long as it allows the goods to be identified



The lien is terminated where (s 45):

- the seller delivers the goods to a carrier for the purpose of transmission to the buyer without reserving the right of disposal of the goods,
- when buyers obtain possession with sellers consent (i.e. buyer in possession under s 28(2))
- it is waived by the seller.

2) Stoppage in transit

Under s 46, where the buyer is insolvent and the unpaid seller has parted with the possession of the goods, the seller may resume possession of the goods as long as they are still in course of transit, and may retain them until payment or tender of the price.

The goods will be deemed to be in the course of transit from the time they are delivered to a carrier for the purpose of transmission to the buyer, until the buyer takes delivery of them (s 47).

To exercise the seller's right of stoppage, the unpaid seller may either take actual possession of the goods or by giving notice of the seller's claim to the carrier or other bailee who currently possesses the goods (s 48).

3) Right of resale

Where an unpaid seller exercises their right of lien or stoppage in transitu and resells the goods, the buyer to whom they resell the goods acquires a good title as against the original buyer (s 50(2)).

B. BUYER'S RIGHTS & OBLIGATIONS

i. RIGHT TO REJECT

Where the buyer has accepted the goods delivered, their right to reject the goods is lost (s 16(3)). The buyer has a right to reject in relation to breaches of condition, whether implied by the SOGA or expressly stated in the contract. The buyer may also reject goods where the wrong quantity is delivered or the goods delivered are mixed with goods of a different description to that in the contract (s 33). Where the buyer rejects goods which are delivered to the buyer, the buyer is not bound to return them to the seller. It is sufficient if the buyer intimates to the seller that the buyer refuses to accept them (s 39). The right to reject must be communicated within a reasonable time (*Hammer v Coca Cola*).

E&S Ruben

- Facts: the buyer told the seller to send goods directly to sub-buyer. The sub-buyer rejected the goods. The question was whether the buyer had a right to reject as well.
- If there is no relationship of agency between the sub-buyer and the buyer, the sub-buyer is treated as separate to the buyer.
- If there is no agency relationship with the sub-buyer, the buyer would have taken constructive delivery of the goods at the seller's premises, as the seller is acting as agent for the buyer in dispatching goods directly to the sub-buyer. The buyer would have lost the right to reject the goods.
- If there is an agency relationship with the sub-buyer, the sub-buyer can exercise the buyer's rights on behalf of the buyer, such as the act of examination and rejection.

Where goods are delivered to the buyer's carrier, the buyer will not have lost their chance to reject until the buyer has a reasonable opportunity to reject the goods (*Hammer v Coca Cola*).



1) Instalment deliveries

Under s 34, the buyer is not bound to accept delivery by instalments unless as specified in the contract.

Where the goods are to be delivered in instalments, and the seller makes defective deliveries in respect of one or more instalments, consider whether the breach gives rise to a repudiation of the whole contract (s 34(2)).

In *Maple Flock*, the test was stated as follows:

- Consider the proportionality of breach to whole of the performance that is contracted for
- Consider secondly the probability of repetition of the breach by the seller
 - Determine the quantity of the total contract that is affected, as well as whether the breach is a grossly disproportion to what the contract is worth.

ii. RIGHT TO EXAMINE

The buyer has a right to examine the goods (s 37) in relation to goods delivered which have not been previously examined. The buyer will not be deemed to have accepted the goods until the buyer is afforded a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

iii. REMEDIES

1) Action for price

The buyer can recover the price paid to the seller under normal contractual principles where there is a failure of consideration.

2) Damages for non-delivery

The buyer may maintain against the seller where the seller wrongfully neglects or refuses to deliver the goods to the buyer (s 53(1)). The damages will be the estimated loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract (s 53(2)).

To calculate damages, it is important to determine if an available market exists for the goods in question. If not, the loss naturally resulting is calculated in accordance with the principles in *Hadley v Baxendale* (as discussed previously).

Available market

Under s 53(3), where an available market exists for the goods, the measure of damages is the difference between the contract price and the market price at the time the goods ought to have been delivered. If no time was fixed for acceptance, the relevant time is the refusal to deliver the goods. Alternatively, where a wrongful anticipatory repudiation occurs, the measure of damages is assessed with reference to the market value of the goods at the time for delivery (*Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory* [1979])

For an available market to exist, there must be sufficient traders in the market to absorb demand and supply in a fair market (*Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd (No 2)* [1990]).

3) Damages from sub-sale

According to the rule in *Hadley v Baxendale* as discussed previously, the buyer can recover for subsales which were in the within contemplation of parties, as well as damages paid to the



subbuyer (*Wong v Hutchison*).

The seller is liable to the buyer for reimbursement for the buyer's reasonable costs in mitigating their loss. For example, if a premium price is paid to purchase goods which the seller failed to deliver in order to satisfy the buyer's subsale, the buyer will be able to recover such reasonable mitigation costs from the seller (*Joseph v Harvest*).

4) **Breach of warranty**

Where the seller is in breach of a warranty, the buyer may (s 54)

- Set off damages against the seller for the breach of warranty in diminution of the price paid, or
- maintain an action against the seller for damages for the breach of warranty.

The damages for the breach of warranty is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty (s 54(2)). As such, the same rules in *Hadley v Baxendale* applies (as discussed previously). Where there is a breach of warranty as to quality, the loss is the difference between the value of goods at the time for delivery and the value they would have had if they were of the contracted quality (s 52(3)).

5) **Special damages**

In addition, s 55 allows the buyer to recover interest or special damages in certain cases.

McWilliams

- Section 55 special damages only arise according to facts that are peculiar to the case.
- In this case, the buyers were buying the corks for bottled wine, with the intention to sell the bottled wine.
- The court held that it was within the reasonable contemplation of the seller (cork supplier) that the wine would be contaminated if the cork contained poisonous materials. It was also in contemplation of the seller that the cork would be ultimately used to bottle the wine for resale. This justified special damages being paid by the seller in relation to the buyer's loss due to the defective goods (the cork) affecting the wine.

5. **AGENCY, MERCANTILE AGENTS, AND AUTHORITY**

A. **CREATION OF AGENCY RELATIONSHIP**

An agency relationship may arise where there is actual consent from the principal and the agent that the agent will exercise have actual express authority to act for the principal (*Garnac*). Alternatively, there may be implied consent as to an agency relationship arising from a course of dealing (*Equiticorp*).

Ostensible agency or agency by estoppel may arise where there is a holding out of the agency by the principal to the third party, and the third party is induced by that representation.

Freeman and Lockyer v Buckhurst

- There must be a holding out or representation made by the principal, which is intended to be relied on by the third party, that the agent has the authority to act on behalf of the principal
- The representation may be made by
 - A person with actual authority (e.g. the board of directors, managing director)



- Conduct of the principal in permitting the agent to act in the management or conduct of the principal's business (*Brick and Pipe*)
- There is no valid holding out where the representation is made by the agent himself as to his own actual authority.
- A person with ostensible authority cannot hold out another to have ostensible authority (*Crabtree*)
- The third party must be induced by the representation made.
- The scope of authority granted may be limited. Therefore, it is useful to check the scope of authority represented to the third party to determine whether the sale was within the scope of the authority.
- The representation itself acts as an estoppel in preventing the principal from asserting that they are not bound by the purported agent's conduct.

Crabtree-Vickers

- A person with ostensible authority can give actual authority to another to exercise their ostensible authority, i.e. X can give actual authority to Y to exercise X's ostensible authority in X's name.
- However, a person with ostensible authority cannot make a representation or hold out another person as having the same ostensible authority.

The mere position of directorship does not suggest that the person had ostensible authority, unless board of directors has represented as such (*Northside*).

Where an act was purportedly done under an agency relationship which did not exist, the unauthorised act may be subsequently ratified by the principal. In this way, the validity of the transaction with the third party is not affected (*Davison*), although the principal may have rights as against the purported agent (*Suncorp*). However, note that the act of ratification cannot lead to the transfer of property from the third party (*Hughes, Secunda*).

B. MERCANTILE AGENTS

Under s 3 of the *Factors (Mercantile Agents) Act* 1923, a mercantile agent is defined as one who, in the customary course of business, has authority either to sell goods or to buy goods.

Where a buyer deals with a mercantile agent, the buyer can treat the mercantile agent as expressly authorised by the owner of the goods to sell them (s 5 Factors Act). However, the mercantile agent must be entrusted with the possession of goods or documents of title, and the sale must take place in the ordinary course of business. In addition, the buyer must be one in good faith, without notice that the purported mercantile agent does not have adequate authority.

i. ENTRUSTMENT

The following list provides the indicia of the elements that constitute entrustment by the owner to the mercantile agent.

- Entrustment requires the authorizing of the mercantile agent to sell as the owner (*Lloyds*)
 - This requires more than merely putting the mercantile agent in possession of the goods.
- There must be a representation of apparent authority by the mercantile agent to the buyer (i.e. a right to sell) (*Pacific Motors*)
 - In this case, the owner allowed the mercantile agent to represent to customers that they were either owners or had the right to sell.
- Where an owner of goods entrusts a mercantile agent with possession of goods with



- instructions to sell, the agent cannot barter the goods (*Guerriero v Peile*).
- The mercantile agent cannot deposit goods with another agent to sell. Only the true owner has the power to entrust goods with another (*Guerriero v Peile*).
 - There must be entrustment to a mercantile agent at the time of transfer of possession (*Heap*)
 - The Factors Act requires that the mercantile agent be "entrusted as such"
 - ◆ It does not matter if the person with possession later turns into a mercantile agent.
 - Bailees are not mercantile agents (*Astley*)
 - They are not entrusted with possession for sale of the goods in their capacity as mercantile agent
 - Bailees are only authorised to return goods to the bailor, and no disposition to a third party is permitted.
 - As such, entrustment as an agent to sell is required.
 - There must be consent of the true owner (*Cook*)

ii. ORDINARY COURSE OF BUSINESS

The buyer must have purchased the goods from the mercantile agent in the ordinary course of business. A broad approach to "ordinary course of business" is taken by the courts, as the precise details of the business are not examined. Rather, the court only inquires as to the point of view of the purchaser to determine if there appears to be suspicious conduct (*Magnussen*).

iii. BUYER IN GOOD FAITH

The buyer must act in good faith, without notice of the purported mercantile agent's want of authority. In this respect, a real suspicion of want of authority is sufficient (*Sanderson*).



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