

**Report under Section 49(1) of the  
*Surveillance Devices Act 2007***

**for the period ending 30 June 2016**

**October 2016**



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# Contents

## Introduction

Legislative Changes .....	1
Reporting requirements.....	1
Scope of the inspection.....	1

## Overview of records inspected.....3

### NSW Police Force.....5

Warrant requirements .....	5
Emergency authorisation requirements .....	6
Compliance and monitoring requirements .....	6
Evidentiary Certificates.....	7
Notifications to the Attorney General .....	7
Concluding Comments .....	7
Recommendations .....	7

### NSW Crime Commission.....8

Warrant requirements .....	8
Emergency authorisation requirements .....	8
Compliance and monitoring requirements .....	9
Evidentiary Certificates.....	9
Notifications to the Attorney General .....	9
Concluding Comments .....	9
Recommendations .....	9

### Independent Commission Against Corruption.....10

Warrant requirements .....	10
Emergency authorisation requirements .....	10
Compliance and monitoring requirements .....	11
Evidentiary Certificates.....	11
Notifications to the Attorney General .....	11
Concluding Comments .....	11
Recommendations .....	11

### Police Integrity Commission.....12

Warrant requirements .....	12
Emergency authorisation requirements .....	12
Compliance and monitoring requirements .....	13
Evidentiary Certificates.....	13
Notifications to the Attorney General .....	13
Concluding Comments .....	13
Recommendations .....	13

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# Introduction

The *Surveillance Devices Act 2007* (NSW) (the Act) allows for the use of surveillance devices to investigate crime and to enable evidence to be obtained of the commission of such crime or the identity or location of the offender(s). The Act covers the installation, use and maintenance of listening, optical, tracking, and data surveillance devices and restricts the communication and publication of private conversations, surveillance activities, and information obtained from their use.

The Act also establishes an accountability regime. Reporting and record keeping obligations are imposed on the law enforcement agencies eligible to use surveillance devices as are provisions for the safe keeping and destruction of information obtained from the use of surveillance devices.

The Act requires the NSW Ombudsman to conduct inspections of the surveillance device records of law enforcement agencies to determine the extent of compliance by those agencies and their officers with the Act.

Four law enforcement agencies<sup>1</sup> are currently the subject of these inspections:

- NSW Police Force
- NSW Crime Commission
- The Police Integrity Commission
- The Independent Commission Against Corruption

## Legislative Changes

The NSW Government has prepared a Draft Bill to create the NSW Law Enforcement Conduct Commission (LECC) and an Inspector of the LECC. Provisions within that Bill propose to remove all inspection functions, including the inspections conducted under this Act from this office and place all with the Inspector of the LECC. The NSW Ombudsman has made submissions to the Government for all inspection functions to remain with this office to ensure the independence of those functions. At the time of this writing, those submissions appear to have been rejected.

## Reporting requirements

The Ombudsman is required by section 49(1) of the Act to report to the Minister at six monthly intervals on the results of inspections. The Minister is required by section 49(2) to lay the report or cause the report to be laid before both Houses of Parliament within 15 days after receiving the report.

This report is for the period 1 January 2016 to 30 June 2016

## Scope of the inspection

The aim of the Act is to enable law enforcement agencies to utilise surveillance devices to assist in the successful investigation and prosecution of certain offences. Such use is, of course, subject to meeting certain procedural and record keeping requirements. The inspection and monitoring by the Ombudsman aims to foster agency compliance with the Act and to provide public accountability through regular reporting to the Minister and Parliament. The approach taken in the inspections conducted by the Ombudsman is to examine the records of each agency for compliance with the record and document keeping requirements, while at the same time considering such other aspects of compliance as can be determined from those records and from questions asked of relevant officers.

Inspections focus on compliance outlined in three main areas of the Act:

- Part 3 dealing with warrants and emergency authorisations.
- Part 5 covering compliance and monitoring, including dealing with records obtained by use of surveillance devices, the use, communication or publication of protected information, reporting and record keeping.
- Part 6 requiring notification to the Attorney about warrants sought, as well as notification to the subject of surveillance if directed by the eligible Judge.

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<sup>1</sup> Note: The Act also empowers the use of surveillance devices by the Australian Crime Commission but the inspection and reporting of that agency's use of surveillance devices is carried out by the Commonwealth Ombudsman.

Surveillance device warrants are issued by eligible Judges of the Supreme Court or eligible Magistrates in the case of a surveillance device warrant authorising the use of a tracking device only, or for a retrieval warrant in respect of a tracking device. Applications must include certain information and be accompanied by an affidavit setting out the grounds for seeking the warrant. While the inspection of the records includes an examination of the matters required to be specified, it does not examine the sufficiency or otherwise of the information provided in support of the application. That is for the relevant judicial officer to determine.

The Ombudsman inspects each individual surveillance device warrant file at each agency. The inspection includes examining the application, warrant, notice to the Attorney General and the report to the issuing judicial officer and the Attorney General, and any other information contained on the file.

The inspection involves checking that:

- the application is made to an eligible Judge or, in appropriate cases, an eligible Magistrate
- the application includes the name of the applicant and the nature and duration of the warrant including the kind of device sought and is supported by an affidavit
- the warrant contains the information required by section 20
- any extension or variation to the warrant complies with section 22
- the revocation of a warrant complies with section 23
- the appropriate law enforcement officer notifies the chief officer immediately they are satisfied the use of the warrant is no longer necessary, and the chief officer takes steps to discontinue the use of the device or devices as soon as practicable
- where a warrant has been revoked the use of the device is discontinued immediately
- the section 51 notice contains the required information and has been provided to the Attorney General before the warrant has been issued, and that the Attorney General has been given an opportunity to be heard on the application if so desired
- the report under section 44 has been provided to the eligible judge and the Attorney General within the time specified in the warrant
- the report complies with the requirements of section 41
- the application for continued use of an authorised surveillance device in an emergency situation complies with sections 31-32
- where a surveillance device is used without a warrant, that an application for approval is made within two business days to an eligible judge and that such approval complies with section 33
- the register of warrants and emergency applications contains the information required by section 47
- that any directions under section 52 have been complied with.

Records relating to the use of protected information obtained by the use of surveillance devices, and the security of those records at various locations, are also inspected.



# Overview of records inspected

During the period 1 January 2016 to 30 June 2016 we conducted inspections across the four NSW law enforcement agencies over 28 days. The following tables set out the total number of warrants issued, warrant reports received, warrants revoked, emergency uses of devices and retrieval warrants issued.

**Table 1. Surveillance device warrants issued 1 January 2016 to 30 June 2016**

	No. of warrants issued
NSW Police Force	378
NSW Crime Commission	58
Independent Commission Against Corruption	1
Police Integrity Commission	4
<b>Total</b>	<b>441</b>

**Table 2. Surveillance device warrant reports received 1 January 2016 to 30 June 2016**

	No. of warrant reports received
NSW Police Force	392
NSW Crime Commission	61
Independent Commission Against Corruption	2
Police Integrity Commission	4
<b>Total</b>	<b>459</b>

**Table 3. Surveillance device warrants revoked 1 January 2016 to 30 June 2016**

	No. of warrants revoked
NSW Police Force	68
NSW Crime Commission	15
Independent Commission Against Corruption	1
Police Integrity Commission	0
<b>Total</b>	<b>84</b>

**Table 4. Emergency use of surveillance devices 1 January 2016 to 30 June 2016**

	No. of emergency uses of surveillance devices
NSW Police Force	4
NSW Crime Commission	0
Independent Commission Against Corruption	0
Police Integrity Commission	0
<b>Total</b>	<b>4</b>

**Table 5. Retrieval warrants issued 1 January 2016 to 30 June 2016**

	No. of retrieval warrants issued
NSW Police Force	1
NSW Crime Commission	0
Independent Commission Against Corruption	0
Police Integrity Commission	0
<b>Total</b>	<b>1</b>

**Table 6.** Applications refused period 2010 to 2016

	2010	2011	2012	2013	2014	2015
NSW Police Force	0	0	2	0	10	10
NSW Crime Commission	1	0	0	0	7	1
Police Integrity Commission	0	0	0	0	0	0
Independent Commission Against Corruption	0	0	0	0	0	0
<b>Total</b>	1	0	2	0	17	11

# NSW Police Force

During the reporting period 378 surveillance device warrants were issued and one retrieval warrant was also issued. There were four emergency uses of surveillance devices which were subsequently approved. There were 68 revocations in this period.

The majority of records are located at Police Prosecutions, Covert Applications Unit, including applications, warrants, section 51 notices and section 44 reports. In relation to the protected information received as a result of surveillance device warrants, this information is kept with the officer responsible for the warrants at the relevant operational command or local area command. The law enforcement officer responsible for the warrant is responsible for recording the use, communication or publication, and destruction of protected information obtained under their warrant.

Any exceptions we have identified with the NSW Police Force's compliance with the Act are detailed below.

## Warrant requirements

### ***Section 17 Applications for a surveillance device warrant***

All applications during the period were made to eligible Judges. No applications for a surveillance device authorising the use of a tracking device only were made to eligible Magistrates.

### ***Section 18 Remote Application***

Eight (8) applications were made remotely.

All remote applications were notified to the Attorney General and affidavits were provided to the issuing judicial officer within the legislative time frame

### ***Section 22 Extension and variation of surveillance device warrant***

Twenty eight (28) warrants were extended during the reporting period, two of these warrants were also varied and three of the warrants were extended twice. There were two warrants which were varied.

### ***Section 23 Revocation of surveillance device warrant***

There were 68 revocations during the reporting period, all of which were revoked by an eligible Judge.

### ***Section 24 Discontinuance of use of surveillance device under warrant***

Section 24 (2)(a) requires that a surveillance device which is no longer necessary must be discontinued as soon as practicable. The NSW Police Force uses a Notification of Discontinuation form to record such action. Section 24 (2)(b) further requires that when an application for discontinuation is made, an application is also made for the revocation of the warrant under section 23. Two warrants - SD 15/0510 and SD 16/0675 - were not discontinued nor revoked when it was clear that they were no longer required. This was an error on behalf of the officer's responsible for these individual warrants despite clear written instructions.

All other warrants which were revoked had been discontinued as soon as practicable.

While the Act requires that a surveillance device be discontinued as soon as practicable after the chief officer of the law enforcement agency is satisfied that the use of the device is no longer necessary, there is no time limit specified for making an application for the revocation of the warrant.

### ***Section 25 Application for retrieval warrant***

There was one (1) application for a retrieval warrant, which was granted.

### ***Section 26 Remote application for retrieval warrant***

No remote applications were made for retrieval warrants.

### ***Section 30 Revocation of retrieval warrant***

No retrieval warrants were revoked.

## Emergency authorisation requirements

### ***Section 31 Emergency use of surveillance devices – threat of serious personal violence or substantial property damage***

There were four (4) emergency uses of surveillance devices under this section. The uses of these surveillance devices were subsequently approved.

### ***Section 32 Emergency authorisation - continued use of surveillance devices in participating jurisdiction***

There was no emergency use of surveillance device warrants in participating jurisdictions.

### ***Section 33 Application for approval after use of surveillance device without warrant or under emergency authorisation***

All four (4) applications for the emergency use of the surveillance devices were approved in accordance with the Act.

## Compliance and monitoring requirements

The law enforcement officer responsible for the warrant is responsible for recording the use, communication or publication, and destruction of protected information obtained under their warrant. We test the compliance of these individual law enforcement officers by conducting 'field' inspections at specialist commands or local area commands throughout metropolitan and regional areas.

In this reporting period, regional field inspections were conducted at Lake Illawarra, Shoalhaven, and Far South Coast Local Area Commands. Metropolitan field inspections were also conducted at Campsie, Burwood, North Shore Local Area Commands and at Chatswood Child Abuse Squad.

### ***Section 40 Prohibition on use, communication or publication of protected information***

The NSW Police Force developed 'Protected Information' Registers to record the use and communication of protected information, as well as to record the destruction of protected information no longer required for the purposes set out in section 40 (4) or (5) of the Act.

As noted in our last report the use of these registers has been sporadic, and many commands use other means to record this information. The Commissioner has agreed that protected information registers should be used in all commands and has established a working group to:

- assess the education/training currently available to investigators on their obligations under the Act
- review the current policies/guidelines about the storage and destruction of protected information
- make recommendations to improve awareness of, and compliance with, the requirements under the Act regarding protected information.

Our senior compliance and investigation officer has provided advice to this working group and some progress has been made. The working group's report should be available in the next reporting period.

### ***Section 41 Dealing with records obtained by use of surveillance devices***

The field inspections at the above-mentioned regional and metropolitan commands found a general willingness among the officers concerned to be compliant with the Act. Most of the commands had established a Surveillance Device Register which allowed the officers at each of the inspection sites to easily account for the protected information obtained in relation to each warrant. Most of these commands were also using the Protected Information Registers to record the movement of this information in relation to each warrant. North Shore Local Area Command had been proactive in destroying protected information no longer required in keeping with the destruction requirements of the Act.

### **Section 44 Reports to eligible Judge or eligible Magistrate and Attorney General**

The section 44 Report for warrants SD 15/0513, SD 15/0578, SD 15/0628, SD 15/0663 and SD 15/0682 did not accurately specify the actual period for which the devices were used. These errors were notified to the Commissioner.

Section 44 reports were received within the time specified in the warrant for all the warrants which were issued during this reporting period, with the following exceptions.

Warrant Number	Expiry Date	Report Dated	Delivered to eligible judge	Delivered to Attorney General
SD16/0109	7/04/2016	9/05/2016	5/08/2016	5/08/2016
SD16/0021	13/04/2016	13/07/2016	15/07/2016	15/07/2016
SD16/0079	24/04/2016	19/05/2016	22/07/2016	22/07/2016
SD16/0115	19/04/2016	6/06/2016	15/07/2016	15/07/2016
SD16/0047	28/04/2016	13/07/2016	15/07/2016	15/07/2016
SD16/0129	7/05/2016	14/07/2016	22/07/2016	22/07/2016
SD16/0046	7/05/2016	12/07/2016	15/07/2016	15/07/2016
SD16/0107	8/05/2016	8/06/2016	15/07/2016	15/07/2016

### **Section 47 Register of warrants and emergency authorisations**

The Act requires the chief officer of the law enforcement agency to keep a register of warrants and emergency authorisations. The register is required to specify certain particulars.

The NSW Police Force register contained the required particulars, and was accurate.

## **Evidentiary Certificates**

### **Section 50 Provision for the issue of evidentiary certificates**

No evidentiary certificates were checked during this reporting period.

## **Notifications to the Attorney General**

### **Section 51 Particulars of warrants sought under Part 3 to be notified to the Attorney General**

The report for the period ending 31 December 2015 noted several errors in Section 51 reports prepared during that period. The NSW Police Force has changed their procedures in relation to the preparation of these notices and the compliance has subsequently improved.

### **Section 52 Requirement to inform subject of surveillance**

No orders were made requiring the subject of the surveillance to be informed.

## **Concluding Comments**

The NSW Police Force was generally compliant with the requirements of the Act during this reporting period apart from the exceptions discussed above.

## **Recommendations**

No specific recommendations are made.

# NSW Crime Commission

During the reporting period 58 surveillance device warrants were issued and two applications were refused, these applications were amended and subsequently approved. Fifteen (15) surveillance device warrants were revoked. No retrieval warrants were issued.

We were satisfied the NSW Crime Commission had complied with its obligations under the Act.

## Warrant requirements

### ***Section 17 Applications for a surveillance device warrant***

All applications were made to eligible Judges. No applications were made to an eligible Magistrate for a warrant authorising the use of a tracking device only.

### ***Section 18 Remote Application***

There were no remote applications made.

### ***Section 22 Extension and variation of surveillance device warrant***

Nineteen (19) warrants issued during this reporting period were extended. A further four (4) warrants issued during the previous reporting period were extended during this reporting period and two of these were extended a total of three times.

### ***Section 23 Revocation of surveillance device warrant***

There were fifteen (15) revocations of surveillance device warrants during the reporting period.

### ***Section 24 Discontinuance of use of surveillance device under warrant***

Section 24 of the Act requires the use of a surveillance device to be discontinued as soon as practicable after the chief officer of the law enforcement agency is satisfied that the use of the device is no longer necessary.

All warrants which had been used were discontinued in a timely manner. Some warrants were never used and were subsequently revoked.

### ***Section 25 Application for retrieval warrant***

There were no applications for a retrieval warrant.

### ***Section 26 Remote application for retrieval warrant***

There were no remote applications for a retrieval warrant.

### ***Section 30 Revocation of retrieval warrant***

There were no revocations of retrieval warrants.

## Emergency authorisation requirements

### ***Section 31 Emergency use of surveillance devices – threat of serious personal violence or substantial property damage***

There was no emergency use of a surveillance device during the reporting period.

### ***Section 32 Emergency authorisation - continued use of surveillance devices in participating jurisdiction***

There was no emergency use of surveillance device warrants in participating jurisdictions.

### ***Section 33 Application for approval after use of surveillance device without warrant or under emergency authorisation***

There was no emergency use of a surveillance device during the reporting period.

## Compliance and monitoring requirements

### *Section 40 Prohibition on use, communication or publication of protected information*

While protected information was obtained through the use of surveillance devices, the information may be used in the future and the records of each use, communication and publication will be inspected in the future.

### *Section 41 Dealing with records obtained by use of surveillance devices*

The Commission has established guidelines for dealing with protected information. Protected information is stored at the Commission premises with those officers authorised to access and manage it.

Destructions of protected information in relation to one warrant were carried out during the reporting period.

### *Section 44 Reports to eligible Judge or eligible Magistrate and Attorney General*

Reports were provided to the eligible Judge and Attorney General within the time specified in the warrant and the reports contained all the required information.

### *Section 47 Register of warrants and emergency authorisations*

The Act requires the chief officer of the law enforcement agency to keep a register of warrants and emergency authorisations. The register is required to specify certain particulars.

The register of warrants at the NSWCC contained all the particulars required and was accurate.

## Evidentiary Certificates

### *Section 50 Provision for the issue of evidentiary certificates*

No evidentiary certificates were checked during this reporting period.

## Notifications to the Attorney General

### *Section 51 Particulars of warrants sought under Part 3 to be notified to the Attorney General*

Section 51 notifications were provided in relation to all warrant applications. The notifications contained the information required.

### *Section 52 Requirement to inform subject of surveillance*

No orders were made requiring the subject of the surveillance to be informed.

## Concluding Comments

For the reporting period the NSW Crime Commission was compliant with the Act.

## Recommendations

No specific recommendations are made.

# Independent Commission Against Corruption

During the reporting period one (1) surveillance device warrant was issued and two reports were received one of which was in relation to a warrant issued during the previous reporting period.

We were satisfied that the Independent Commission Against Corruption had complied with its obligations under the Act.

## Warrant requirements

### ***Section 17 Applications for a surveillance device warrant***

The application was made to an eligible Judge.

### ***Section 18 Remote Application***

There were no remote applications made.

### ***Section 22 Extension and variation of surveillance device warrant***

No surveillance device warrants were extended or varied.

### ***Section 23 Revocation of surveillance device warrant***

There was one surveillance device warrant revoked during the reporting period.

### ***Section 24 Discontinuance of use of surveillance device under warrant***

No surveillance devices were used under the warrant and hence no discontinuance was required.

### ***Section 25 Application for retrieval warrant***

There were no applications for a retrieval warrant.

### ***Section 26 Remote application for retrieval warrant***

There were no applications for a retrieval warrant.

### ***Section 30 Revocation of retrieval warrant***

No retrieval warrants were issued and consequently none were revoked.

## Emergency authorisation requirements

### ***Section 31 Emergency use of surveillance devices – threat of serious personal violence or substantial property damage***

There was no emergency use of a surveillance device during the reporting period.

### ***Section 32 Emergency authorisation - continued use of surveillance devices in participating jurisdiction***

There was no emergency use of surveillance device warrants in participating jurisdictions.

### ***Section 33 Application for approval after use of surveillance device without warrant or under emergency authorisation***

There was no application for approval after use of a surveillance device



## Compliance and monitoring requirements

### *Section 40 Prohibition on use, communication or publication of protected information*

While protected information was obtained through the use of surveillance devices, the information may be used in the future and the records of each use, communication and publication will be inspected in the future.

### *Section 41 Dealing with records obtained by use of surveillance devices*

The Commission has established guidelines for dealing with protected information. Protected information is stored in the Commission premises with those officers authorised to access and manage it.

There were no destructions carried out of protected information at the time of these inspections.

### *Section 44 Reports to eligible Judge or eligible Magistrate and Attorney General*

The reports were provided to the eligible Judge and Attorney General within the time specified in the warrants and the reports contained all the required information.

### *Section 47 Register of warrants and emergency authorisations*

The Act requires the chief officer of the law enforcement agency to keep a register of warrants and emergency authorisations. The register is required to specify certain particulars.

The register of warrants at the ICAC contained all the particulars required and was accurate.

## Evidentiary Certificates

### *Section 50 Provision for the issue of evidentiary certificates*

No evidentiary certificates were checked during this reporting period.

## Notifications to the Attorney General

### *Section 51 Particulars of warrants sought under Part 3 to be notified to the Attorney General*

The section 51 notification was provided in relation to all warrant application. The notification contained the information required.

### *Section 52 Requirement to inform subject of surveillance*

No orders were made requiring the subject of the surveillance to be informed.

## Concluding Comments

For the reporting period the Independent Commission Against Corruption was compliant with the Act.

## Recommendations

No specific recommendations are made.

# Police Integrity Commission

During the reporting period three surveillance device warrants were applied for and granted.

We were satisfied that the Police Integrity Commission had complied with its obligations under the Act.

## Warrant requirements

### *Section 17 Applications for a surveillance device warrant*

The applications were made to an eligible Judge. No applications were made to eligible Magistrates in the case of applications for a surveillance device authorising the use of a tracking device only.

### *Section 18 Remote Application*

There were no remote applications made.

### *Section 22 Extension and variation of surveillance device warrant*

One (1) of the warrants issued during this reporting period was extended.

### *Section 23 Revocation of surveillance device warrant*

There were no revocations during the reporting period.

### *Section 24 Discontinuance of use of surveillance device under warrant*

There were no situations where the use of any surveillance device was discontinued during the reporting period and therefore no requirement to seek revocations of any warrants.

### *Section 25 Application for retrieval warrant*

No applications were made for retrieval warrants.

### *Section 26 Remote application for retrieval warrant*

No remote applications were made for retrieval warrants.

### *Section 30 Revocation of retrieval warrant*

No retrieval warrants were issued and consequently none were revoked.

## Emergency authorisation requirements

### *Section 31 Emergency use of surveillance devices – threat of serious personal violence or substantial property damage*

There were no emergency uses of surveillance devices.

### *Section 32 Emergency authorisation - continued use of surveillance devices in participating jurisdiction*

There was no emergency use of surveillance device warrants in participating jurisdictions.

### *Section 33 Application for approval after use of surveillance device without warrant or under emergency authorisation*

There were no emergency uses of surveillance devices.

## Compliance and monitoring requirements

### *Section 40 Prohibition on use, communication or publication of protected information*

Where protected information was obtained through the use of surveillance devices, the records of each use, communication and publication are contained in a register for this purpose.

### *Section 41 Dealing with records obtained by use of surveillance devices*

The Commissioner has established guidelines for dealing with protected information. The protected information is stored on the Commission premises and restricted to those authorised to access and manage it.

There were no destructions carried out of protected information at the time of these inspections.

### *Section 44 Reports to eligible Judge or eligible Magistrate and Attorney General*

There were four reports provided to the Attorney General or Eligible Judge during the reporting period. One report did not specify in sufficient detail the period the device was used and a second report did not specify where the device was used. We wrote to the Commissioner and suggested the report be amended appropriately and be provided to the eligible Judge.

### *Section 47 Register of warrants and emergency authorisations*

The Act requires the chief officer of the law enforcement agency to keep a register of warrants and emergency authorisations. The register is required to specify certain particulars.

The register of warrants contained all the particulars required and was accurate.

## Evidentiary Certificates

### *Section 50 Provision for the issue of evidentiary certificates*

No evidentiary certificates were checked during this reporting period.

## Notifications to the Attorney General

### *Section 51 Particulars of warrants sought under Part 3 to be notified to the Attorney General*

All notifications were provided to the Attorney General in relation to each application and contained all the required particulars.

### *Section 52 Requirement to inform subject of surveillance*

No orders were made requiring the subject of the surveillance to be informed.

## Concluding Comments


For the reporting period the Police Integrity Commission was compliant with the Act.

## Recommendations

No specific recommendations are made. *This page is intentionally blank.*







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