


LCR 2018/D4 - Housing affordability measures: contributing the proceeds of downsizing to superannuation

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This document has been finalised by LCR 2018/9.



Housing affordability measures: contributing the proceeds of downsizing to superannuation

Relying on this draft Ruling

This draft Law Companion Ruling is a draft for consultation purposes only. When this Ruling is published as a final version, it will have the following preamble:

This Ruling describes how the Commissioner will apply the amendments made by the [Treasury Laws Amendment \(Reducing Pressure on Housing Affordability Measures No.1\) Act 2017](#). To the extent the content of the Ruling is public ruling, if you rely on this Ruling in good faith, you will not have to pay any underpaid tax, penalties or interest in respect of matters covered by the Ruling if it does not correctly state how a relevant provision applies to you.

To the extent the content of the Ruling cannot be the subject of a public ruling (for example, where it concerns the application of the Superannuation Industry (Supervision) Regulations 1994), it is not legally binding on the Commissioner. However, if you act in accordance with the view expressed in good faith, the Commissioner will endeavour to stand by these statements in applying the law.

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What this draft Ruling is about

1. The downsizing measure¹ introduces a new contribution type, a 'downsizer contribution', into the superannuation system. This allows individuals to contribute the proceeds of the sale of their home into superannuation where certain requirements are satisfied.
2. This draft Ruling discusses these contributions and how the measure interacts with other income tax and superannuation concepts including:
 - contribution caps
 - fund acceptance rules, and
 - capital gains tax (CGT).
3. This draft Ruling does not provide guidance on whether a capital gain or loss arising from a disposal can be exempted under Subdivision 118-B of the *Income Tax Assessment Act 1997* (ITAA 1997). It also does not address the consequences of making a non-compliant contribution, including where the fund may retain these contributions under existing acceptance requirements for other contribution types.
4. All legislative references in this draft Ruling are to the ITAA 1997 unless otherwise stated.

Downsizer contribution

5. Generally, a contribution made by an individual is treated as a non-concessional contribution unless they have claimed a deduction for it, or it is subject to an exclusion from treatment as a non-concessional contribution.
6. Downsizer contributions are excluded from the definition of a non-concessional contribution² and if an election is made to treat a contribution as a downsizer contribution, and it is reported as such, a deduction cannot be claimed for it.³
7. A work test is not required to be satisfied by the individual nor are they required to be under a specified age to make these contributions, or have them made on their behalf.⁴

¹ As introduced in Schedule 2 to the Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No.1) Bill 2017: Contributing the proceeds of downsizing to superannuation.

² Subparagraph 292-90(2)(c)(iia).

³ Section 290-167.

⁴ Subregulation 7.04(1) of the *Superannuation Industry (Supervision) Regulations 1994*.

8. For a contribution made to a complying superannuation plan to be a downsizer contribution, the following conditions must be satisfied:

- the individual must be aged 65 years or older at the time the contribution is made⁵
- the contribution must be an amount equal to all or part of the capital proceeds of the sale of an interest in a qualifying dwelling in Australia⁶
- the 10-year ownership condition⁷
- any capital gain or loss from the disposal of the dwelling must have qualified (or would have qualified) for the main residence CGT exemption in whole or part⁸
- the contribution must have been made within 90 days of disposing of the dwelling, or such longer time as allowed by the Commissioner⁹
- a choice is made to treat the contribution as a downsizer contribution, and the complying superannuation plan provider is notified in the approved form of this choice at or before the time the contribution is made¹⁰
- the contributing individual has not previously made downsizer contributions, or had one made on their behalf, in relation to an earlier disposal¹¹, and
- the maximum amount of the contributions is the lesser of either \$300,000, or the proceeds from the sale of the interests in the dwelling.¹²

9. Individuals are not required to purchase another dwelling following the sale of the relevant dwelling interest to be eligible to make a downsizer contribution.

10. These rules apply where the contract for the disposal of the relevant dwelling interest is entered into on or after 1 July 2018.

Compliance with existing caps

11. A downsizer contribution is neither a concessional nor a non-concessional contribution¹³ and therefore is not counted towards the respective contribution caps.

12. The total superannuation balance of the individual will not affect their eligibility to make a downsizer contribution. Note, however, that any downsizer contribution amount will still be counted towards their total superannuation balance.

Disposal of an ownership interest in a dwelling

13. To make a downsizer contribution, an individual or their spouse¹⁴ must have 'disposed' of an 'ownership interest' in a 'dwelling'¹⁵ which is located in Australia.¹⁶

⁵ Paragraph 292-102(1)(a).

⁶ Paragraphs 292-102(1)(b) and (f).

⁷ Subsection 292-102(2) and paragraph 292-102(1)(e).

⁸ Paragraph 292-102(1)(d).

⁹ Paragraph 292-102(1)(g).

¹⁰ Paragraph 292-102(1)(h) and subsection 292-102(8).

¹¹ Paragraph 292-102(1)(i).

¹² Subsection 292-102(3).

¹³ Subparagraph 292-90(2)(c)(iia).

¹⁴ Paragraph 292-102(1)(c). Spouse is defined in section 995-1.

¹⁵ Paragraph 292-102(1)(b).

¹⁶ Paragraph 292-102(1)(f). See section 960-505 for the prescribed meaning of Australia for the purposes of the ITAA 1997.

14. In respect to this measure, the definition of the term ‘dwelling’¹⁷ is modified to exclude caravans, houseboats and other mobile homes.¹⁸ The effect of this modification is that a ‘dwelling’ includes¹⁹:

- (a) a unit of accommodation that:
 - (i) is a building or is contained in a building; and
 - (ii) consists wholly or mainly of residential accommodation; and
- ...
- (c) any land immediately under the unit of accommodation.

15. A disposal occurs when ownership of the interest changes from the individual to another entity by an act or event, or by operation of law.²⁰ For the vast majority of eligible contributions, this will occur at the date of settlement of the sale of the property.²¹

16. The meaning of ‘ownership interest in a dwelling’ includes legal and equitable interests²² and includes an interest as a joint tenant or an interest as a tenant in common. Other parties may hold interests in the dwelling but this does not prevent the individual or their spouse from making a contribution, or contributions, based on the interests which they dispose of.

17. If the interest disposed of was owned by only one spouse, the spouse who does not hold an ownership interest may also make a downsizer contribution, or have one made on their behalf, provided they meet all other requirements.²³

Example 1: Interest as a tenant in common

18. *Philippa and Charles, both 70, own a dwelling as tenants in common with Charles’ brother Lucas. Philippa and Charles are married and both own shares of 40% each in the property, and Lucas has the remaining 20% share.*

19. *Philippa and Charles have owned and lived in the dwelling for 20 years, and have treated the dwelling as their main residence for this time. In 2020 the dwelling is sold for \$700,000. They are eligible for the main residence exemption on the sale of their interests.*

20. *Philippa and Charles are able to make downsizer contributions from the capital proceeds of the disposal of their combined interests. Their combined ownership share is 80% so, the capital proceeds, from which their downsizer contributions can be made, are \$560,000.²⁴*

Ten year ownership test

21. To make an eligible contribution, the ownership interest in the dwelling that is disposed of, or an ownership interest in the land on which the dwelling is situated, must have been held at all times during the 10 years prior to the disposal.²⁵

¹⁷ See sections 995-1 and 118-115.

¹⁸ Paragraph 292-102(1)(f). These exclusions are not terms defined in the ITAA 1997 and are to be interpreted in accordance with their ordinary meaning.

¹⁹ Subsection 118-115(1).

²⁰ Sections 995-1 and 104-10.

²¹ Subsection 118-130(2).

²² As defined in section 118-130.

²³ Paragraph 292-102(1)(c).

²⁴ The quantification of individuals’ available maximum downsizer contribution amount is discussed at paragraphs 62 to 67 of this draft Ruling.

²⁵ Subsection 292-102(2).

22. This ownership period is calculated from the day the ownership interest in the dwelling commenced to the day it ceased. Generally this will be from the date of settlement of the purchase, to the date of settlement of the sale.

23. An individual is not required to have held an ownership interest for the whole of the ten year period, provided that an ownership interest has been held by some combination of:

- the individual
- their spouse
- their former spouse

at all times during the 10 years preceding the disposal.²⁶

24. This allows for changes in ownership between spouses to account for circumstances such as death and relationship breakdown.

Ten year ownership test – death of spouse

25. Where the spouse who holds an ownership interest dies, the surviving spouse may subsequently gain the ownership interest as a beneficiary of the deceased estate. In this situation, the surviving spouse is able to count the period of ownership of their deceased spouse towards the 10 year ownership test.

26. There may be circumstances where the administration of the deceased estate is delayed. This may mean that the surviving spouse is not listed on the title for some time after the death of their spouse. For the purposes of the 10 year ownership test, continuity of ownership is maintained between the spouses during this period.²⁷

27. Where this occurs, the surviving spouse who holds the ownership interest just prior to disposal is able to include the ownership period of their deceased spouse and is eligible to make a downsizer contribution, subject to the other requirements being met.

Ten year ownership test – interest in the land

28. As stated in paragraph 21 of this draft Ruling, the 10 year holding requirement can relate to the land on which the dwelling is situated which allows for cases where a property is knocked down and another is built in its place, or where a dwelling is built on a vacant block.²⁸

29. In these circumstances, an individual must have owned an interest in the land for at least 10 years prior to the disposal of the dwelling interest. All other requirements, including that the disposal must relate to a dwelling and that the main residence requirement is satisfied, continue to apply.

30. Where the land on which the dwelling is situated has been subdivided within the last 10 years, the 10 year ownership test may also still be satisfied.

31. An ownership interest in the land is deemed to have been held for the period from its commencement, generally settlement for the contract to purchase, until the settlement for the contract for sale.

32. Subdividing land does not necessarily give rise to a CGT event, it merely splits the interest into separate assets in their own right.²⁹ An ownership interest in the land on which

²⁶ Subparagraph 292-102(2)(a)(i).

²⁷ Subparagraph 292-102(5).

²⁸ Subparagraph 292-102(2)(a)(ii).

²⁹ Paragraph 2 of Taxation Determination TD 97/3 *Income tax: capital gains: if a parcel of land acquired after 19 September 1985 is subdivided into lots ('blocks'), do Parts 3-1 and 3-3 of the Income Tax Assessment Act*

the dwelling is situated is treated as being held from the time that the ownership interest in the original parcel was first held.³⁰

33. Where a subdivision has occurred, it is important to note that the ownership interest in a dwelling requirement and the main residence exemption requirement must be satisfied for the contribution to be eligible to be treated as a downsizer contribution.

Example 2: Vacant block purchased

34. *Akira purchased a vacant block of land in 2010 when she was aged 58. In 2017 she built a dwelling on the property and resided in that property for four years, treating that property as her main residence for CGT purposes.*

35. *In 2021 Akira sold the dwelling and is able to partially disregard the resulting capital gain made upon this disposal. Akira is able to make a downsizer contribution as she satisfies the 10 year ownership test even though at the time she purchased the property it did not have a dwelling on it.*

Example 3: Subdivided property

36. *Chris owns a house on a large block that has been his main residence for 10 years. He later subdivides this property into two lots. He then sells the lot on which his dwelling is situated.*

37. *Chris is able to make a downsizer contribution, provided he meets the other acceptance requirements, as he has held an interest in the land on which the dwelling is situated for 10 years and is able to disregard some of the resulting capital gain under the main residence exemption.*

Ten year ownership test – substitute property interests

38. In special circumstances, the 10 year ownership rule can be met if the dwelling disposed of is a substitute dwelling that has not been owned for 10 years or more.³¹

39. This would occur where a dwelling that was an individual's main residence, or was treated as such, had been compulsorily acquired, lost or destroyed.³² Where this is the case, and they acquired a substitute property interest in accordance with subsection 118-147(1), the 10 year ownership test can be met if the ownership interest in the initial dwelling was held at least 10 years before the disposal of the substitute dwelling.

Contribution when interest held by trustee of deceased estate

40. Where a spouse dies, they are considered to continue to hold their ownership interest while the interest is held by the trustee of the deceased estate.³³ If the trustee disposes of the interest, the surviving spouse is able to make a downsizer contribution, or have one made on their behalf.³⁴

1997 treat a disposal of a block of the subdivided land as the disposal of part of an asset (the original land parcel) or the disposal of an asset in its own right (the subdivided block)?

³⁰ The acquisition date of the new assets is the acquisition date of the original parcel. See paragraph 2 of TD 97/3.

³¹ Paragraph 292-102(2)(b). A substitute dwelling is given meaning in subsection 118-147(1).

³² Or another event giving rise to a roll-over described in subsection 124-70(1) occurs.

³³ Subsection 292-102(5).

³⁴ Paragraph 292-102(1)(a). Note that whilst a trustee may make the contribution on behalf of the individual in these cases, the individual is still personally required to fulfil the requirements for making a choice to make a downsizer contribution as per subsection 292-102(8).

Example 4: Trustee of deceased estate disposes of the interest

41. *In 2019 Norma and Harold are both 74 years old.*
42. *They are married and have lived in their home for the past 25 years. The title for their home is solely in Norma's name.*
43. *Norma passes away in mid-2019. She does not leave the family home to Harold and on 1 November 2019 the trustee of Norma's estate disposed of the house. Harold is able to make a downsizer contribution, or have one made on his behalf, equal to all or part of the proceeds of this disposal, up to a maximum of \$300,000.*
44. *Harold satisfies the 10 year ownership test for the purposes of the downsizer rules because at all times over the 10 year period preceding 1 November 2019, the ownership interest in the home was held by Norma. Subsection 292-102(5) operates to ensure that the interest is taken to be held by Norma when it is in the possession of the trustee of her deceased estate.*

Main residence requirement

45. To make a downsizer contribution the dwelling must have been the individual's main residence, at some point during the period of ownership, for the purposes of the main residence exemption.³⁵ Specifically, the capital gain or loss relating to the disposal of the old interest must be wholly or partially disregarded because the property has been treated as their main residence.³⁶ In this context, this requirement will be satisfied where the capital gain or loss made by an individual is effectively exempted under the main residence provisions.
46. This test must apply to the individual for whom the contribution is made, or would otherwise apply if the old interest was held by them, and not their spouse, prior to disposal.³⁷
47. If the interest was acquired prior to 20 September 1985, an individual is able to make a downsizer contribution only if they would have been able to claim this exemption had the dwelling been acquired after this date.³⁸
48. A partial main residence exemption for the purposes of downsizer contribution eligibility may apply in a variety of situations, including where the dwelling:
- was not the main residence for the entire period of ownership
 - was used to produce assessable income (in whole or part) for a period of time during ownership, or
 - is on land greater than two hectares.
49. The property does not need to be treated as the contributing individuals' main residence at the time of disposal, as long as a partial main residence exemption under the main residence provisions applied, or would have applied if the interest was held by them and not their spouse.
50. If an interest in the dwelling is held in a trust or company structure, the capital gain made by the trustee or company, resulting from the disposal will not qualify for a main residence exemption.
51. For the purposes of making a downsizer contribution, it is not relevant how the main residence exemption is calculated or apportioned. The downsizer contribution amount available relates to the proceeds from the disposal of the interest in a dwelling,

³⁵ Subparagraph 292-102(1)(d).

³⁶ Under Subdivision 118-B.

³⁷ Subparagraph 292-102(1)(d)(ii).

³⁸ Subparagraph 292-102(1)(d)(i).

and does not depend on the extent to which the amount is exempt as a main residence for CGT.³⁹

52. The main residence condition is not interrelated with the 10 year ownership condition. That is, the dwelling does not have to have been the contributors main residence within the preceding 10 year period prior to disposal, provided an effective partial exemption of the capital gain is available under the main residence provisions, or would have been available had the interest been held by the individual and not their spouse, on the basis of main residency.

Example 5: Dwelling interest on land over two hectares

53. *James purchases a house on four hectares in 2006 for \$300,000. He lives in the house with his spouse, Joyce. For the entire period of ownership it is their main residence and has not been used to produce assessable income. They have not previously made a downsizer contribution.*

54. *In 2019 James sells the property for \$750,000. They are both 66 years old. Under existing CGT rules relating to main residences, James is entitled to disregard the capital gain on the main residence and its adjacent land, up to two hectares, which is not used to produce income. As the land of the dwelling interest is greater than two hectares, the main residence exemption does not apply to the entire capital gain from the disposal and only a partial exemption to CGT is available.*

55. *James and Joyce wish to make a downsizer contribution from the sale proceeds.*

56. *They do not need to apportion the proceeds of the sale to make their downsizer contribution. They can consider the total proceeds from the disposal to determine the amount available for the contribution.*

57. *As Joyce would have been able to partially disregard the capital gain on the basis of main residency had she held the ownership interest herself, she is able to make a downsizer contribution as James' spouse. James and Joyce are each eligible to make a contribution of up to \$300,000 to their complying superannuation plan.*

Example 6: Main residence partial exemption by time

58. *Brian purchased a property in 2003 ('the first house') which he rented out from the time of purchase for five years. During this time the property was not his main residence for the purposes of CGT.*

59. *In 2008 Brian purchased another residential rental property and started residing in the first house, purchased in 2003. He chose to treat the first house as his main residence.*

60. *In 2019, at age 65, Brian decided to sell the first house. Under the existing CGT rules⁴⁰, Brian is able to partially disregard the capital gain by the proportion of ownership time that the first house was his main residence.*

61. *He can make a downsizer contribution relating to the total proceeds received from the sale up to a maximum of \$300,000.*

Contribution amounts

62. Downsizer contributions are limited to the lesser of \$300,000, or the total capital proceeds that the individual, their spouse, or they both, receive from disposing of their ownership interests in the dwelling.⁴¹

³⁹ Paragraph 292-102(1)(b).

⁴⁰ Section 118-185.

63. Capital proceeds are defined in the ITAA 1997, and for most cases is the money received, or entitled to be received, from the sale of the interest in the dwelling.⁴² For the purposes of making a downsizer contribution, there is a requirement that the contribution must have a relationship with the capital proceeds received. This means where a disposal for no consideration occurs and accordingly does not involve any capital proceeds being received, no downsizer contributions can be made.

64. Where an individual uses the capital proceeds to discharge a mortgage, the individual is still able to make a downsizer contribution up to the lesser of \$300,000 or the total capital proceeds.

65. More than one downsizer contribution may be made to one or more superannuation plans from the sale of interests in a dwelling, provided that an individual's total contributions do not breach their maximum contribution amount. However, this does not extend to contributions from the proceeds of other properties, or of ownership interests in the same dwelling that are disposed of at a later time (for example, because of the sale of part of the ownership interests in a dwelling, or where there has been a sale and re-acquisition of the same dwelling).

66. Spouses may make downsizer contributions from the proceeds of their own and their spouse's interests in a dwelling. To do so, both ownership interests must relate to the same dwelling, and have been disposed of under the same contract. The total downsizer contributions cannot exceed the lesser of the combined capital proceeds from the sale of these interests or \$300,000 for each individual.

67. Where individuals use their spouse's interest in the property to calculate their own available maximum contribution amount, it is not a requirement that their spouse is eligible to make a downsizer contribution.

Example 7: Available contribution amounts divided between spouses (less than \$600,000)

68. *Stuart and Shirley are married and own a house as tenants in common, each with a 50% share in the property. They are both eligible to make a downsizer contribution from the capital proceeds from the sale of this house.*

69. *In 2019 they sell the property for \$500,000. The capital proceeds attributable to each individual's interest are \$250,000.*

70. *As an individual is able to contribute the capital proceeds derived from the disposal of both their interest and their spouses' interest, as long as they are sold under the same contract, Stuart and Shirley are able to access each other's proceeds to make a downsizer contribution.*

71. *Stuart and Shirley can choose how to allocate the total available contribution amount, as long as neither individual contributes more than \$300,000 in total, and the sum of their respective contributions does not exceed the capital proceeds of \$500,000.*

72. *They choose to make \$300,000 of contributions to Shirley's complying superannuation plan, and a \$200,000 contribution to Stuart's complying superannuation plan.*

⁴¹ Subsection 292-102(3).

⁴² Subsection 116-20(1).

Example 8: Using an ineligible spouse's interest to calculate maximum contribution amount

73. *Elizabeth and Philip are spouses, and have lived together in a house that they purchased in 1990. They own the house as joint tenants. In 2020 they decide to sell this house. At the time of disposal, Elizabeth is aged 67 and Philip is 62.*

74. *The total capital proceeds from the sale are \$500,000, and, accordingly as joint tenants, each ownership interest has capital proceeds of \$250,000.*

75. *Assuming that Elizabeth has not made a downsizer contribution previously, she is eligible to make a downsizer contribution. Philip, being under 65 at the time of the proposed contribution, does not meet the eligibility requirements to make a downsizer contribution.*

76. *Both of the spouse's ownership interests are in the same dwelling and disposed of under the same contract.*

77. *This means that in calculating her total available maximum downsizer contribution amount, Elizabeth is able to include the capital proceeds from her interest, as well as the interest of Philip. This amounts to \$500,000. As this amount is greater than the total maximum contribution amount of \$300,000, Elizabeth is able to make downsizer contributions up to \$300,000.*

Treating a contribution as a downsizer contribution

78. As with all types of contributions, a superannuation provider does not have to accept a contribution if it does not meet their trust deed rules.

79. The individual for whom the contribution is made must make a choice to treat a contribution as a downsizer contribution.⁴³ This choice must be provided in the approved form to the complying superannuation plan provider.⁴⁴ This gives the provider evidence of the contributor's intentions and eligibility. The approved form must be submitted before, or at the time, the contribution is made.

80. The correct form must be submitted each time a downsizer contribution is made to a provider.

Contribution made within 90 days after disposal of interest

81. A downsizer contribution must be made within 90 days (or such longer time as the Commissioner allows), after the change of ownership of the old interest.⁴⁵ This is the time of settlement of the contract of sale in most cases. This date may be different to the relevant date for the CGT event, which is the date the contract is entered into.⁴⁶

82. The Commissioner may grant an extension of time to make a contribution in some circumstances. An extension of time can be requested by the individual at any time, however it must be granted by the Commissioner before the individual makes a contribution to their fund outside of the 90 day period.

Commissioner of Taxation

24 May 2018

⁴³ Paragraph 292-102(1)(h).

⁴⁴ Paragraph 292-102(8).

⁴⁵ Paragraph 292-102(1)(g).

⁴⁶ Subsection 104-10(3).

Your comments

83. You are invited to comment on this Draft Law Companion Ruling. Please forward your comments to the contact officer by the due date.

84. A compendium of comments is prepared for the consideration of the relevant Public Advice and Guidance Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments
- be published on the ATO website at www.ato.gov.au.

85. Please advise if you do not want your comments included in the edited version of the compendium.

Due date: 21 June 2018

Contact officer details have been removed following publication of the final ruling.

References

ATO law topic(s)	Superannuation ~ Income tax - individuals (superannuation) ~ Other
Legislative references	ITAA 1997 ITAA 1997 Pt 3-1 ITAA 1997 Pt 3-3 ITAA 1997 104-10 ITAA 1997 104-10(3) ITAA 1997 116-20(1) ITAA 1997 Subdiv 118-B ITAA 1997 118-115 ITAA 1997 118-115(1) ITAA 1997 118-130 ITAA 1997 118-130(2) ITAA 1997 118-147(1) ITAA 1997 118-185 ITAA 1997 124-70(1) ITAA 1997 290-167 ITAA 1997 292-90(2)(c)(iii)a) ITAA 1997 292-102(1)(a) ITAA 1997 292-102(1)(b) ITAA 1997 292-102(1)(c) ITAA 1997 292-102(1)(d) ITAA 1997 292-102(1)(d)(i) ITAA 1997 292-102(1)(d)(ii) ITAA 1997 292-102(1)(e) ITAA 1997 292-102(1)(f) ITAA 1997 292-102(1)(g) ITAA 1997 292-102(1)(h) ITAA 1997 292-102(1)(i) ITAA 1997 292-102(2) ITAA 1997 292-102(2)(a)(i) ITAA 1997 292-102(2)(a)(ii) ITAA 1997 292-102(2)(b) ITAA 1997 292-102(3) ITAA 1997 292-102(5) ITAA 1997 292-102(8) ITAA 1997 960-505 ITAA 1997 995-1 Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 1) Act 2017 Superannuation Industry (Supervision) Regulations 1994 7.04(1)
Related Rulings/Determinations	TD 97/3
ATO references	1-CPOHQS0
BSL	SPR

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