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EDITOR'S NOTE

This is an additional issue of the Corporate Law Electronic Bulletin. The recent judgments section of the Bulletin will return in the February issue.

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1. RECENT CORPORATE LAW DEVELOPMENTS

(A) PROFESSIONAL ACCOUNTING BODIES MOVE TO IMPLEMENT RAMSAY REPORT RECOMMENDATIONS ON AUDITORS' INDEPENDENCE

In a media release dated 18 December 2001 the Institute of Chartered Accountants of Australia (ICAA) and CPA Australia announced that they had worked together to produce the 'Professional Independence Exposure Draft' on auditors' independence. It is based on the recent Ramsay Report on auditor independence and the International Federation of Accountants (IFAC) professional independence standard released last month but strengthens a number of the key IFAC guidelines. Both organisations are calling for members' feedback before the standards are formally adopted.

On 4 October 2001 the then Minister for Financial Services and Regulation, the Hon Joe Hockey, released a report by Professor Ian Ramsay on audit independence in Australia. Professor Ramsay is the Director of the Centre for Corporate Law and Securities Regulation at The University of Melbourne and had been commissioned by Minister Hockey to prepare the report for the Government.

Key recommendations in the Ramsay Report include:

- inserting in the Corporations Act, which currently has several provisions dealing with auditors' independence, a requirement for auditors to be independent;
- strengthening, and bringing into line with best practice internationally, those provisions in the Corporations Act which deal with employment relationships between auditors and their clients and financial relationships between auditors and their clients;
- improved disclosure of non-audit services provided by auditors to their client so that the dollar value of all non-audit services is disclosed, divided by category of service, with appropriate discussion of those services;
- preventing a former partner of an audit firm who is directly involved in the audit of a client becoming a director of the client within a period of two years of resigning as a partner of the audit firm;
- requiring all listed companies to have an audit committee;
- establishment of an auditor independence supervisory board; and
- measures to improve the operation of the Companies Auditors and Liquidators Disciplinary Board.

Upon its release, the Report was welcomed by the Minister for Financial Services and Regulation, the Hon Joe Hockey; the Shadow Minister for Financial Services and Regulation, Senator Stephen Conroy; the Australian Democrats' Business and Corporate Affairs spokesperson, Senator Andrew Murray; the Australian Institute of Company Directors and the major accounting bodies.

In the joint ICAA and CPA media release of 18 December 2001, Stephen Harrison, ICAA Chief Executive Officer, said, 'The Professional Independence Exposure Draft released jointly for comment includes a mandatory two-year waiting period before a retired audit partner involved in the audit of a client can become a director of that client'.

'That is tougher than the IFAC recommendations which did not set a specific exclusion period. This measure was raised in the Ramsay Report, which took into account the ongoing international debate within the profession on the issue of independence', Mr Harrison said.

Greg Larsen, CEO of CPA Australia, said 'The joint CPA Australia/ICAA recommendations set a new benchmark in international best practice on professional independence for the majority of auditors in Australia. They take into account the IFAC guidelines and upgrade these for the Australian environment.

'For example, this Exposure Draft states that assurance fees from a single client should not exceed 15% of total fees so as to avoid the perception that self-interest may impair audit independence. This trigger level does not exist in the IFAC standard where, instead, members are required to determine whether a 'substantial proportion' of their total fees come from a single client. This extra clarity provides a yardstick for members.'

Once accepted, the exposure draft will be binding on all CPA Australia and ICAA members, some 130,000 professionals in total. It also stipulates that where a partner or employee of the firm is a liquidator, provisional liquidator, controller, and scheme manager, official manager or administrator of the assurance client no safeguard can reduce the self-interest and self-review threat to an acceptable level. Therefore that firm is excluded from taking on assurance roles for the same client.

The Professional Independence Exposure Draft is available on the ICAA website at <http://www.icaa.com.au> and on the CPA Australia website at <http://www.cpaonline.com.au>. Members of both organisations, and other interested parties, are invited to submit feedback on the recommendations by 28 February 2002.

The Ramsay Report is available on the website of the Department of the Treasury at <http://www.treasury.gov.au> and on the Centre for Corporate Law and Securities Regulation website at <http://cclsr.law.unimelb.edu.au> under "What's New".

For reviews of the Ramsay Report, see the following articles:

Robert Ward, Head of PricewaterhouseCoopers audit practice and past President of the ICAA, in The Australian Financial Review (<http://www.pwcglobal.com/Extweb/manissue.nsf/docid/11CCF871F1476C42CA256AF600178BBA>)

Bryan Frith in The Australian newspaper ([http://www.careerone.com.au/common/channel\_story/0,6353,executive|news^2992836,00.html](http://www.careerone.com.au/common/channel_story/0%2C6353%2Cexecutive%7Cnews%5E2992836%2C00.html))

Tom Ravlic in Chief Financial Officers magazine (<http://www.cfoweb.com.au/stories/20011101/12456.asp>)

Henry Bosch, former Securities Commission Chairman, in Shares magazine (<http://cclsr.law.unimelb.edu.au/news/shares-article.html>)

(B) REVIEW OF THE MANAGED INVESTMENTS ACT

On 19 December 2001 the Parliamentary Secretary to the Treasurer, Ian Campbell, announced the release of the Review of the Managed Investments Act 1998.

The review was conducted by Mr Malcolm Turnbull, at the request of the Government, to fulfil the requirement of the Managed Investments Act 1998 (the MIA) that its operation be reviewed as soon as possible after the third anniversary of its commencement on 1 July 1998. Submissions to the review were invited from the public, and a total of 31 submissions was received.

The findings of the review indicated that, overall, the regulatory arrangements for the managed investment industry are working effectively.

A copy of the Review is available on the Treasury website at <http://www.treasury.gov.au> under "What's New".

Following is an extract from the Review's Executive Summary.

The purpose of the Review is to examine the effectiveness of the regulatory arrangements for the managed investment industry put in place by the MIA.

When conducting the Review, consideration was given to the fact that, up until relatively recently, the financial sector had been growing particularly strongly, and as a result, the industry had not faced significant stresses or pressures for large-scale rationalisation. Furthermore, given the two-year transitional period for the MIA, a large part of the industry had not operated under the new arrangements until well into 2000.

Notwithstanding this, several proposals emerged as warranting changes to the MIA and related provisions of the Corporations Act 2001, and these are contained within the report's recommendations.

A number of submissions identified perceived shortcomings with the legislation that raised more complex issues or were likely to have significant ramifications. With regard to these proposals, definitive conclusions have not been reached. In these circumstances, it is proposed that the issues be examined more fully, with further consultation by Treasury with ASIC, the industry, and investors and their representatives.

The report consists of five chapters.

Chapter 1: Background to the MIA and the Review

The opening chapter gives a brief history of the events leading to the development and introduction of the MIA, along with some comments on ASIC's role as the regulator of managed investment schemes, and a snapshot showing the diversity and structure of the industry.

Chapter 2: Investor protection

This chapter looks at issues dealing with those aspects of the MIA which are intended to protect investors' interests from inappropriate or poor management practices of scheme operators and the risk of fraud or dishonesty.

The chapter examines submissions concerning the licensing requirements of responsible entities (REs) and whether, for example, the net tangible asset (NTA) levels required under the MIA and ASIC policy serve a practical investor-protection function. Connected with this is the debate over the role of independent custodians - whether their use should be mandatory and what their obligations should be generally and to scheme members in particular.

The chapter also looks at matters surrounding the removal of the RE including whether extraordinary or special resolutions should be required, and whether difficulties in finding suitably qualified and willing replacements can be overcome. A number of other issues are considered. These relate to the question of scheme members' liability in the event of a scheme's winding up and the rights of scheme members ¾ their voting rights, voting power and whether schemes should be required to hold Annual General Meetings.

Chapter 3: Compliance

Compliance is an area that attracted considerable comment, ranging from praise for the compliance 'culture' that the MIA had engendered in the managed investment industry, to claims that the MIA's compliance arrangements were totally inadequate. Given the short time in which the MIA has applied across the whole industry, it has not been possible to state categorically whether compliance has been strengthened or weakened with the advent of the MIA, although there are encouraging signs that the profile of compliance has been raised.

Nevertheless, there are areas where ASIC has identified weaknesses in the compliance performance of a number of REs, including their monitoring of contracts with service providers, and the degree to which senior management of REs are committed to the compliance process. These matters will need to be carefully watched in the coming years.

Recommendations for improvements to existing compliance arrangements have been made, including:

- the development of standards relating to the qualifications and experience of compliance committee members;
- requiring the RE to notify ASIC and scheme members about changes to compliance committee membership;
- providing ASIC with power to remove a compliance committee member in certain circumstances; and
- a clearer application of compliance functions to the board of the RE, where the RE relies on its board to conduct compliance monitoring, rather than establishing a compliance committee.

Chapter 4: Costs

Claims made prior to the introduction of the MIA regarding the likely increase or decrease in costs that would result, have proved extremely difficult to verify. Although surveys and statistical analyses are helpful in monitoring the level of costs, they cannot give a definitive picture as to whether movements in costs are attributable to the introduction of the MIA, or due to extraneous factors.

An important point made in this chapter is that the level of costs cannot be considered in isolation, but must be viewed in conjunction with the quality of compliance and investor protection that are achieved.

Recommendations aimed at delivering modest cost savings are made, including some relaxation of the requirement to treat scheme members equally, such that there will be increased scope for REs to offer differential fee structures to members.

Chapter 5: Other law reform proposals

This chapter deals with proposals for law reform of a minor and/or technical nature, and those that do not fit easily into the categories discussed in previous chapters. It contains recommendations for legislative amendment on a number of matters, generally involving issues that are clear-cut and uncontroversial.

The chapter also covers several proposals which have been recommended for further consultation. These include proposals to:

- amend the definition of managed investment scheme to clarify the position of redundancy funds and to expand the definition in certain respects, for example, to apply to bodies corporate that carry on investment businesses;
- amend the definition of scheme property to facilitate its application to primary production schemes;
- revise the application of provisions relating to continuous disclosure and related-party transactions to ensure they are appropriate for managed investment schemes; and
- revise the framework within which forfeiture of members' interests are regulated.

(C) TREASURY PORTFOLIO - ALLOCATION OF MINISTERIAL FUNCTIONS

In a press release dated 14 December 2001 the Treasurer, the Hon Peter Costello MP announced that due to the recent appointment of Senator the Hon Helen Coonan as Minister for Revenue and Assistant Treasurer and Senator the Hon Ian Campbell as Parliamentary Secretary to the Treasurer, it has become necessary to re-organise responsibilities between Ministers in the Treasury Portfolio.

Senator Coonan will assist the Treasurer in the development, implementation and administration of taxation policy, administration of the Australian Prudential Regulation Authority (APRA) and the prudential regulation of superannuation and insurance.

Senator Campbell, as Parliamentary Secretary, will assist the Treasurer in handling matters in relation to financial market conduct, disclosure and supervision, corporate governance, consumer affairs, foreign investment, and the Australian Competition and Consumer Commission and the Productivity Commission.

Following are the general areas of responsibility. Areas not mentioned are handled by the Treasurer.

(1) Minister for Revenue and Assistant Treasurer (Senator Coonan)

Assist the Treasurer in the development, implementation and administration of policies, including in the following areas:

(a) Taxation

(i) Taxation policy including the design of taxation laws.

(ii) Implementation of the business tax reforms.
- Administration of taxation laws and administrative matters relating to the Australian Taxation Office.
- Taxation proposals in relation to compliance.

(b) Superannuation

(i) Taxation policy and administration in relation to superannuation.

(c) Prudential regulation and financial institutions

(i) Administration of APRA.
- Prudential regulation of superannuation and insurance but
not the banking system.

(ii) Government response to the HIH Royal Commission.

(iii) HIH Claims Support.
- Safety of superannuation review.
- Levies on financial institutions; cheques and bills of exchange.

(d) Other responsibilities other responsibilities

(i) Representational duties, correspondence and administrative matters in general Portfolio matters as referred by the Treasurer.

(2) Parliamentary Secretary to the Treasurer (Senator Campbell)

Assist the Treasurer in the development, implementation and administration of policies in the following areas:

(a) Financial markets

(i) Financial market conduct, disclosure and supervision issues (excluding prudential, monetary and foreign exchange policy) including the design, implementation and administration of legislation relating to markets, services and products.

(ii) Securities market linkages between Australia and overseas.

(b) Corporate governance

(i) Design of law and regulations for corporate governance.

(ii) Administration of ASIC and representation on MINCO.

(c) Foreign investment

(i) Dealing with individual cases, other than major and/or sensitive cases.

(d) Competition and structural reform

(i) Australian Competition and Consumer Commission and the Productivity Commission.

(e) Consumer affairs

(i) Responsibility for implementation and administration of consumer protection policy, including education and consumer product safety, and consultative arrangements with the States and industry bodies.

(f) Other responsibilities

(i) Representational duties, correspondence and administrative matters in general Portfolio matters as referred by the Treasurer.

(ii) ABS, HLIC and RAM; currency and coinage and Office of Regulation Review.

2. RECENT ASIC DEVELOPMENTS

(A) ASIC PROJECT TO LOOK AT DISCLOSURE OF FEES AND CHARGES

On 20 December 2001 ASIC announced the first stage of a new project to foster better disclosure of fees and charges in the product disclosure statements for investment products.

This new project follows the release on 28 November of ASIC Policy Statement 168: Disclosure - Product disclosure statements (and other disclosure obligations) which foreshadowed further work to promote product comparability through the use of the new product disclosure statements.

'ASIC is keen to see the new product disclosure statement regime lead to better consumer understanding of investment products', Malcolm Rodgers, ASIC's Executive Director, Policy and Markets Regulation, said. 'This first project will look at the disclosure of fees and charges because research shows that consumers want to be able to compare fees for investment-linked products. We will work with industry and consumer groups to make sure that the new product disclosure statements, part of the financial services reforms that commence on 11 March 2002, deliver clearer disclosure to consumers', he said.

The first stage in the project will be the preparation of an options paper on how ASIC, industry and consumer groups can work together to produce effective disclosure of fees and charges for investment-linked managed investments, superannuation and life insurance products.

The options paper will be prepared in consultation with industry and consumer bodies and with the assistance of Professor Ian Ramsay, Director of the Centre for Corporate Law and Securities Regulation at the University of Melbourne. It will include a review of disclosure practices in other countries.

The options paper is due by the end of March 2002.

(1) Background

Product disclosure statements (PDSs) are the new kinds of product disclosure offer documents required under Part 7.9 the Corporations Act 2001 (as amended by the Financial Services Reform Act 2001).

In general, the PDS provisions apply immediately to new product issuers and apply to current product issues upon their decision to opt-in to the new retime during the two-year transition period commencing on 11 March 2002.

For an explanation of the commencement of the PDS provisions, see Section 2 of ASIC's guidance paper: Licensing and Disclosure: Making the transition to the FSR regime (issued in October 2001).

PDSs are required for all financial products, except securities such as shares and debentures. Prospectuses will still be required after 11 March 2002 for offers of securities.

For more information on ASIC's policy on product disclosure statements, see ASIC Policy Statement 168 Disclosure: Product disclosure statements (and other disclosure obligations) (issued in November 2001).

For more information:

Copies of the relevant ASIC papers are available from the FSR page of the ASIC website on at <http://www.asic.gov.au>, by emailing ASIC's Infoline on infoline@asic.gov.au, or by calling 1300 300 630.

The FSR legislation is available from <http://scaleplus.law.gov.au> and copies of the FSR regulations, contained in the Corporations Amendment Regulations 2001 (No 4), can be obtained from <http://www.treasury.gov.au/fsr_regs>

For further information contact:

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(B) ASIC RELEASES POLICY STATEMENT ON FINANCIAL REQUIREMENTS

On 20 December 2001 ASIC released Policy Statement 166: Licensing - Financial requirements. This policy statement deals with the financial resource requirements for financial service providers.

It completes the set of ASIC's policy statements issued for the administration of the new financial services licensing provisions under the FSR legislation and was developed after two rounds of public consultation.

A financial service provider regulated by APRA is not subject to ASIC's financial requirements as APRA sets any financial requirements for those entities.

For more information:

Copies of PS 166 may be obtained from the FSR page of the ASIC website on <http://www.asic.gov.au>, by emailing ASIC's Infoline on infoline@asic.gov.au, or by calling 1300 300 630.

To obtain the FSR legislation, go to <http://scaleplus.law.gov.au>. Copies of the FSR regulations, contained in the Corporations Amendment Regulations 2001 (No.4), can be obtained from <http://www.treasury.gov.au/fsr_regs>

Related information:

By proclamation on 8 October 2001, 11 March 2002 was fixed as the day on which the markets licensing provisions of the FSR legislation will commence.

The FSR legislation comprises the Financial Services Reform Act 2001 and the Financial Services Reform (Consequential Provisions) Act 2001.

ASIC's earlier package of policy statements on the administration of the new financial services licensing provisions under the FSR legislation was issued on 28 November 2001: see ASIC Media Release 01/418 'ASIC releases policy statements and guidance paper for FSR legislation'.

The media release of 28 November contains a summary of the main contents of these other policy statements and a summary of ASIC's timetable for issue of all key publications related to the implementation of the FSR legislation (including the markets provisions).

Information on these papers, and previous media releases in relation the FSR legislation are available on ASIC's website at <http://www.asic.gov.au>

For further information contact:

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(C) ASIC ADDRESSES TAKEOVER ANOMALIES AND ISSUES

On 13 December 2001 ASIC released Policy Statement 171 on anomalies and issues in the takeover provisions of the Corporations Act.

This policy statement addresses anomalies and issues that have emerged since the rewriting of takeover provisions in March 2000 by the Corporate Law Economic Reform Program (CLERP) Act. Addressing these issues is consistent with the purpose of the CLERP reforms to streamline the rules for takeover bids.

'Our aim is to promote certainty and efficiency for bidders, investors and target companies; to help them apply the takeover rules and to reduce compliance costs', ASIC Director Corporate Finance, Richard Cockburn said.

This policy statement maintains the principles behind takeovers regulation in section 602 of the Corporations Act 2001, including:

- That the acquisition of control over a company should take place in an efficient, competitive and informed market;
- That shareholders should have enough information and time to assess the bidder's proposal; and
- That all shareholders should have the opportunity to participate in the benefits of the proposal.

ASIC prepared this policy statement after industry consultation over a Policy Proposal Paper released in September 2000. ASIC also consulted with the Takeovers Panel.

Submissions received during the consultation period were overwhelmingly supportive of ASIC's proposals. ASIC has been giving case-by-case relief consistent with the Paper since that time.

Some of the issues identified in the earlier Policy Proposal Paper are addressed in the Financial Services Reform Act 2001. As a result the policy statement does not cover those issues. (For example, the Act amended the definition of "associate".)

Significant policies explained in Policy Statement 171 include:

(1) That the members of a listed managed investment scheme may call a meeting to change a responsible entity by ordinary resolution: section 601FM(1);

(2) That a bidder may risk a declaration of unacceptable circumstances for a downstream acquisition where:

(a) the bidder relies on the exception in item 1 of section 611 from the main takeover prohibition for a takeover bid; and

(b) the downstream acquisition is not merely incidental to the upstream acquisition;

(3) That in a scrip bid, the bidder must disclose prospectus information where the bidder is authorised by the issuer to offer the securities under the bid. This is even if the bidder does not control the issuer: section 636(1)(g);

(4) That in determining whether a bidder meets the second limb of the test for compulsory acquisition in section 661A(1), the 75% test, securities in which the bidder and its associates have a relevant interest are excluded from the calculation; and

(5) That a registered managed investment scheme or a mortgagor of securities may meet the 90% test for compulsory acquisition although their interest in securities may not constitute 'a full beneficial interest'.

Much of the policy discussed in the policy statement is implemented by class orders.

Copies of Policy Statement 171 are available from the ASIC Infoline on 1300 300 630 or through the website at <http://www.asic.gov.au>. Copies of the class orders are available from Infoline.

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3. RECENT ASX DEVELOPMENTS

(A) ASX-SGX CO-TRADING LINK GOES LIVE

On 20 December 2001 the international trading, settlement and custody system between Australian Stock Exchange Ltd (ASX) and Singapore Exchange Ltd (SGX) went live.

The new trading arrangement - the first time that two exchanges anywhere in the world have entered into such a facility - is designed to deepen the pool of investors by providing direct links for Singapore investors into Australia, and vice versa.

Investors in each country are able to gain easy access to the securities of the top companies listed on the other exchange, as easily as they currently can the securities of companies in their home market.

4. RECENT TAKEOVERS PANEL MATTERS

(A) PANEL DECISION IN RELATION TO MAGIC MILLIONS LEAGUE TAKEOVER BID FOR BRISBANE BRONCOS AND BB SPORTS BID CONDITION

On 3 January 2002 the Takeovers Panel advised that it had reached a decision in relation to the application concerning the announcement by Magic Millions League Pty Ltd that its proposed takeover offer for the Brisbane Broncos Ltd will not proceed (Brisbane Broncos No 1) and the cross-application concerning a condition of BB Sports Pty Ltd takeover offer for the Brisbane Broncos Ltd (Brisbane Broncos No 2).

The effect of the decision is that the BB Sports bid will proceed, but with an alteration to a condition. Magic Millions is under an obligation to continue with its bid by 29 January, and its failure to do so by that time may give rise to unacceptable circumstances and to liability in damages.

The Panel decided, however, not to make orders requiring it to proceed.

Both applications concern sections 631 and 670F of the Corporations Act (Act), which apply to a person who announces that they will make a takeover bid. They require the person to make that bid within 2 months, unless they show that it would be unreasonable to require them to bid, because of a change of circumstances which the person did not cause, or because of pre-existing circumstances which had not been disclosed and of which the person was unaware.

(1) Brisbane Broncos No 1

Based on the policy of those sections and the particular facts of this matter, the Panel considers that Magic Millions is obliged to dispatch offers to Brisbane Broncos shareholders in accordance with its announcement of 29 November 2001. The Panel considered that unacceptable circumstances are likely to exist, and that it will be prepared to make a declaration to that effect, if Magic Millions fails to dispatch its offers by 29 January 2002 (in accordance with the timetable set out in the Act). Magic Millions may also incur liability in damages to persons who acquired shares in Brisbane Broncos in reliance on its announcement. It would not be practical, however, to compel Magic Millions to take the steps needed to make that bid.

The Panel does not consider that the grounds relied upon by Magic Millions in support of its decision not to proceed with its bid were of the kind contemplated by section 670F of the Act or ASIC Practice Note 59. By making its announcement, Magic Millions undertook the risk of having to buy shares in Brisbane Broncos, without obtaining control. The bid later announced by BB Sports did not substantially alter this situation. It was open to Magic Millions, when it announced its intention to bid for Brisbane Broncos, to protect its position by including a minimum acceptance condition or a condition that no higher bid be made.

(2) Brisbane Broncos No 2

During the course of these proceedings, ASIC made a further application to the Panel. It sought a declaration of unacceptable circumstances in relation to a condition of the BB Sports bid. Under that condition BB Sports could abandon its bid, if any act of ASIC or the Panel or any other event took place before the BB Sports bid closed, which would permit Magic Millions to withdraw its bid or make its bid otherwise than in accordance with the Act.

The Panel considers that the parts of the condition relating to ASIC and the Panel performing their proper functions under the law are unacceptable and have the potential to fetter the performance of each regulator's functions.

Accordingly, the Panel considers that BB Sports should dispatch its offers in accordance with its announcement of 14 December but omitting these parts of the condition or waiving the condition.

Like Magic Millions, BB Sports is committed to proceed with its bid, unless something makes it unreasonable to expect it to do so. The Panel considers that it would be unacceptable for BB Sports to rely on its condition being triggered by Magic Millions' abandonment of its bid. The decision in Brisbane Broncos No 1 means that none of these events permits Magic Millions to withdraw. If anything had happened which permitted Magic Millions to withdraw, it was the making of BB Sports' bid, an event on which BB Sports cannot rely, as it was entirely within BB Sports' control.

The Panel is advised that BB Sports will revise the condition to a form that is acceptable to the Panel while ensuring that BB Sports will dispatch offers in accordance with its obligations under section 631(1) of the Act.

The sitting Panel in this matter was Ms Jennifer Seabrook (sitting President), Mr Denis Byrne (sitting Deputy President) and Mr Peter Young.

The Panel's reasons for decision will be posted shortly on its website at <http://www.takeovers.gov.au>

5. ARCHIVES

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