IN THE FAIR WORK COMMISSION

Matter No: AM2023/28

Applicant: Australian Industry Group

AI GROUP'S OUTLINE OF SUBMISSIONS IN REPLY

1. This proceeding concerns an application brought by the Australian Industry Group (**Ai Group**) to vary the *Social, Community, Home Care and Disability Services Industry Award 2010* (**Award**) pursuant to s 160(1) or, alternatively, s 157(1)(a), of the FW Act.

2. The subject matter of the application relates to the terms of the Award relating to "sleepovers", which are primarily contained in sub-clause 25.7. A sleepover occurs "*where an employer requires an employee to sleep overnight at premises where the client for whom the employee is responsible is located*".[1] The nub of the Ai Group's application is that a sleepover should be treated as a break between shifts, such that ordinary hours of work are capable of being rostered as separate shifts on either side.

3. There is a similar application made by **Parkerville** Children and Youth Care Inc, which is being heard jointly with Ai Group's application.

4. The ASU, HSU, AWU, UWU and CPSU, the Community and Public Sector Union (**Unions**) have also jointly filed an application to vary the Award in relation to sleepovers.

   (a) item 1 of that application seeks variations to clause 25.4 relating to breaks between shifts, including the wording of the break requirement, a penalty rate where a break is not received and a clarification that a sleepover does not constitute a break;

[1] Sub-clause 25.7(a) of the Award.

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(b) item 2 seeks changes to clause 25.7 relating to sleepovers, namely that: employees will not be required to sleepover if it is unsafe or unreasonable to do so; sleepovers will occur in a separate, lockable room on the premises; the allowance payable for the performance of sleepovers be significantly increased;

(c) item 3 inserts the word *"or shift"* after the word *"day"* in the first sentence of clause 28.1(a); and

(d) item 4 inserts the word *"or shift"* after the word *"day"* in the first sentence of clause 28.1(b)(ii).

5. On 1 August 2024, Hatcher J ordered that items 1, 2 and 4 of the Unions' application would be heard together with Ai Group and Parkerville's applications, but item 2 would be listed separately.

6. On 3 September 2024, the following material was filed in response to the material filed by Ai Group and Parkerville in support of their respective application:

(a) the ASU, AWU, HSU and UWU (**Joint Unions**) filed **Joint Submissions** and 22 witness statements; and

(b) the CPSU (NSW branch) filed a submission (**CPSU NSW Submissions**) and two witness statements.

7. These submissions reply to the matters raised in the Joint Submissions and the CPSU NSW Submissions. Where a submission made by the Unions is not addressed below, Ai Group joins issue on that matter. Ai Group otherwise relies on its **Primary Submissions** dated 11 June 2024.

A. SECTION 160 APPLICATION (REMOVING AMBIGUITY OR UNCERTAINTY)

A1. Joint Submissions

8. At paragraphs [8], [15] and [16], the Joint Unions submit that theirs is the one and only reasonably arguable construction of the sleepover provisions in clause 25.7 of the Award, and that therefore, the provisions are not ambiguous as to the manner in which the work performed on either side of a sleepover is to be treated. That submission, which is comprised almost entirely of assertion, is not sustainable.

9. As mentioned in the Primary Submissions, clause 25.7 is silent as to how a sleepover is to be treated for the purposes of the Award. That is significant in the context that the Award clearly contemplates the sleepover as being something other than work, as work may be rostered on either side of a sleepover (clause 25.7(f)), or performed during it (clause 25.7(e)), and an employee must be paid accordingly for that work. The sleepover period is expressly distinguished from those periods of work, and the rate of the sleepover allowance indicates that what is being compensated for is the disutility associated with sleeping on the employer's premises (*i.e.* rather than any work being performed).

10. In the context of this self-contained regulation of sleepovers vis-à-vis work in clause 25.7, the Unions' submission that the treatment of the period of the sleepover is clear on the construction they urge must be rejected. That construction rests largely upon an implication from silence, and the notion that: a sleepover is not quite work, but is not a break, and yet it automatically joins two periods of work on either side into a single shift. The Joint Unions offer no authority to support that novel contention, as there is none. Indeed, they understandably fail to even identify any provision in the Award that either expressly or directly requires that work on either side of a sleepover must be structured as a single shift, as the there is none.

11. At paragraph [19], the Joint Unions submit that hours of work performed during a sleepover are not overtime under clause 28 of the Award "*because they are not performed 'between the termination of their ordinary work on any day or shift and the commencement of ordinary work on the next day or shift'*". It is not clear what clause the Joint Unions are referring to in the quoted passage, but in any event the submission is not correct (and entirely self-fulfilling). Contrary to the Joint Unions' submission, work performed during a sleepover will usually be performed between the termination of ordinary hours on any day or shift and the commencement of ordinary work on the next day or shift.

12. At paragraph [20], the Joint Unions refer to clause 25.7(d) (by which it is assumed they mean 25.7(f)) and submit that, because the clause refers to "*periods of work*" but not "*shifts*", the "*logical starting point*" is that the relevant periods of work are part of the same shift. That does not follow. The reference to "*periods of work*" must be read in the context of the broader clause, which is providing for the rostering of separate periods of work on either side of a non-working period. The starting point

from that scenario is that what is being described are shifts (that is, separate periods of rostered work).[2] It is a long bow for the Joint Unions to draw when they submit that, because the clause does not use the word "shift" specifically, it means that any two periods of work broken by a sleepover must necessarily constitute a single shift. That submission should be rejected.

13. Of course, had the drafters of the Award intended that two periods of work separated by a sleepover automatically constitute a single shift, it should be expected that they would have said so expressly. If anything, the phrase "periods of work" rather than "shifts" is more likely to be an accounting for the fact that such a scenario is capable of being rostered as a single shift (but is not necessarily a single shift).[3]

14. At paragraph [25], the Joint Unions argue that the reference to "*include*" in clause 29.4 "*is significant*" because "*[i]t means that a sleepover does not break the continuous block of hours*". That submission is incomplete. Clause 29.4 does not authorise an employer to roster a sleepover — clause 25.7 does. Therefore, the purpose of the reference to sleepovers in clause 29.4 can only be to provide a facility to employers to roster blocks of hours of work to include a sleepover, hence the use of the word "may". That supports rather than undermines a construction of clause 25.7 to the effect that the default position is that a sleepover acts as an interregnum between two separate shifts of work.

15. Further, the Joint Unions' argument that a sleepover is necessarily included in a shift is rendered unworkable by their submission at paragraph [18] (by reference to the NSW CPSU Submissions) that the sleepover itself constitutes work (or at least necessarily forms part of the one shift with the hours on either side of it). If that were so, the maximum daily shift length in clause 25.1 (being eight hours, or ten by agreement) would be automatically and routinely contravened. This tells against the Unions' construction.

16. At paragraph [29], the Joint Unions submit: "*Clause 25.4(b)(ii) clearly applies to the break between end of a shift that includes a sleepover and the following shift*". That is by no means clear. On the contrary, clause 24.4(b)(ii) (which provides: "*the break between … a shift commencing after the end of a shift contiguous with a sleepover*

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2 C.f. Joint Submissions at [24].

3 See Primary Submissions at [25(c)].

may not be less than eight hours") expressly differentiates between the shift itself and the sleepover, destroying the Joint Unions' argument that it is not arguable that those two periods do not necessarily form part of one shift. And the reduced minimum break just happens to exactly coincide with the continuous eight hour span of a sleepover provided for in clause 25.7(c).

17. The Joint Unions go on in paragraph [29] to submit: "*Significantly, clause 25.4 refers to breaks between 'shifts' and not 'periods of work'*". Having regard to the words used in clause 25.4, the significance of that distinction is that a sleepover, and a shift of work contiguous with it on either side, are separate periods (unless rostered as part of the shift under clause 29.4).

18. As to paragraph [32] of the Joint Submission, the Joint Unions argue that the Commission should not be satisfied that disputes about the construction of the sleepover provisions are widespread, because the Applicants have only adduced evidence of seven employers and a labour hire provider who have operated using a model of rostering shifts of ordinary hours on either side of a sleepover. *First*, the embedded assumption that the Ai Group represents and is in contact with the universe of employers who are covered by the Award, need only be stated to be rejected.[4] *Second*, the Commission ought not be surprised that more employers have not come forward to detail their implementation of a practice that the Fair Work Ombudsman (**FWO**) has taken the (erroneous) view amounts to multiple contraventions of the Award.

19. In relation to paragraph [33] of the Joint Submission, there is an additional, unrelated, employer, Jats Joint Pty Ltd, who has been issued with a compliance notice by the FWO.[5] The Ai Group is only aware of this compliance notice being issued by the FWO because the company has sought to challenge the validity of the notice in the Federal Court, and it is therefore a matter of public record. There are no doubt many more compliance notices that have been issued and not challenged. What the compliance notices against All Care, Parkerville and Jats Joint (which were all issued at around the same time) demonstrate is that the FWO has adopted a particular enforcement policy in relation to sleepovers under the Awards in the disability and

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4 24 employees out of many thousands covered by the Award is far more insignificant.

5 Statement of Dean Keep dated 10 June 2024, [62].

youth care sectors. Contrary to the submissions made in the Joint Submission, there is no inference to be drawn from the fact that Ai Group has not "*identified*" further employers who are the subject of compliance notices. The Joint Unions fail to identify the basis for an assumption that such employers would be known to, or would be willing cooperate with, Ai Group, such as to give rise to the inference, which in any event could only be to the effect that the evidence they would give would not have assisted Ai Group's case (rather than "harmed" it).

20. In paragraph [34] of the Joint Submissions, it is argued that "*a retrospective variation would create a material risk that employers would seek to recover payments to employees that they were no longer entitled to*". The Joint Unions have either overlooked or ignored the proposition stated at footnote 31 to the Primary Submissions of Ai Group that the Commission could, in retrospectively varying the Award in the manner it seeks, include an order to the same effect as imposed by Lawler VP in *The Australian Industry Group* [2010] FWA 8933. In that matter, when ordering retrospective variation of the *Telecommunications Services Award 2010*, his Honour held (at [4]):

> "*I am concerned that the retrospective variation should not be used as a basis for any employer making a claim for restitution of an overpayment of wages where a 'trainee' was employed in a substantive classification under the Award and received wages and other wage related payments in excess of those due under the National Training Wage schedule in the period between 1 January 2010 and the date the variation determination was made. Such employees should not be obliged to repay wages and other wage related payments solely because the present variation has a retrospective effect (of course, an employer should be free to pursue the recovery of overpayments arising for other reasons). I have included an additional paragraph 14.4(b) designed to achieve that outcome.*"

21. Clause 14.4(b) was in the following terms:[6]

> "*(a) See Schedule E.*
>
> *(b) Whereas Schedule E was inserted on 22 November 2010 but with effect from 1 January 2010, clause 14.4.1 and Schedule E do not take effect so as to require any employee engaged as a trainee to repay any wages paid in respect of the period 1 January 2010 to 22 November 2010 because the amount of the employee's legal entitlement to wages and wage related payments in that period was greater than the employee's entitlement to wages and wage related payments under Schedule E.*"

22. If the Commission has concerns about the impact of a retrospective variation on employees which subsist beyond the matters raised by Ai Group in paragraph [55] of the Primary Submissions, a clause to similar effect could be implemented together with the variation.

A2. CPSU NSW Submissions

23. At paragraph [23], the CPSU NSW submits, contrary to the Joint Unions, that a sleepover may be rostered to occur <u>contiguous</u> with a shift (that is, as distinct from being "contained within" the shift, and therefore not forming part of the shift). So much is consistent with the wording of clause 25.4. Ai Group agrees with that aspect of the CPSU NSW Submissions. However, the other shoe does not drop as to the impact that this must have on the work performed contiguously on the other side: it is also capable of being rostered as a separate shift.

24. At paragraphs [25]-[26], the CPSU NSW appears to apply the correct analysis to clause 25.4 (at least as it relates to clause 25.4(b)(ii)); namely that clause 25.4(b)(ii) would have the effect of lessening by agreement the break between a shift that has a sleepover contiguous with the end of it. However, the CPSU NSW submits that it is not reasonably arguable that the sleepover itself can constitute a break because the clause distinguishes between sleepovers and breaks. While that distinction is acknowledged, it is explicable by the fact that the clause is primarily concerned with

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6 PR504196, [3].

the provision of a break between shifts. Conceptually, the break and the sleepover are separate, but they operate in parallel. That explains the relationship between the two eight hour periods.

25. From paragraphs [31] to [36] of the CPSU NSW Submissions, the CPSU NSW sets out what it claims to be "*the position at general law*" as to the treatment of sleepovers in circumstances where an industrial instrument contains no specific sleepover clause. In doing so, the CPSU NSW cites ***Warramunda*** *Village Inc v Pryde*,[7] which it says is the "*seminal*" case in that regard. *Warramunda*, which concerned an on-call versus ordinary hours analysis, does not provide a statement of any "general law" position — it specifically involved a question of the proper construction of two health services awards and their application to sleepover arrangements, in circumstances where such an arrangement was not specifically dealt with in the awards. The findings in the case do not apply at large, do not define "work" (for purposes unclear), do not define a "break" (for purposes unclear), and say nothing about whether, in the context of the present Award, being in the service of the employer during a sleepover, constitutes "work", a "break" or something different.

26. The submission then moves on to discuss (with frequent unhelpful references to "*the position at general law*") several other irrelevant authorities from different jurisdictions about forms of duty being found to have constituted "work" (though none of them seemingly concerned a clause like 25.7 in the Award, which specifically regulates the duty). Whether a sleepover be called "work", merely begs the question, rather than answers it. The assertions at paragraph [45] do the same thing.

27. The entire purpose of these submissions appears to culminate in the argument made by the CPSU NSW at paragraph [46], that:

> "*… the Commission should be satisfied that whilst the SCHADS Award did not alter the position at general law that an employee performing a sleepover is working and not on a break (even if they are not actively performing work). The SCHADS Award merely modified the remuneration an employee is entitled to receive for performing a sleepover. Viewed in that light, there is no ambiguity as to whether a sleepover is a break between two shifts.*"

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7 (2002) 116 FCR 58.

28. This conclusion is simplistic and fails to grapple with the full scope of the issues bearing upon the interpretation of the Award, and whether it contains a relevant ambiguity or uncertainty (which go beyond whether a sleepover constitutes, or should be varied to clearly constitute, "work" or a break between shifts for the purposes of clause 25.4).[8] There is no question that during a sleepover an employee is in the service of their employer. Beyond that, whatever one seeks to label it as does not assist greatly. The real question is "whatever it is" (or more correctly, whatever you might choose to call it), what is (or if not ambiguous, should be) the position regarding work before and after it.

29. At paragraphs [51] to [57], the CPSU NSW Submission continues on the same path by arguing in the alternative that, if the Award is ambiguous or uncertain, it should be varied to include a sub-clause in 25.4 in the following terms: "*For the avoidance of doubt, a period of sleepover in accordance with clause 25.7 does not constitute a break within the meaning of this clause*". For the reasons developed in Ai Group's Primary Submissions, that is overly simplistic. The ambiguity and uncertainty in the Award's treatment of the sleepover period (and how it interacts with other work) is more complex than whether clause 25.4 expressly contemplates (or ought expressly contemplate) a sleepover as being a break between shifts. The CPSU NSW's proposed variation is therefore not appropriate as it would do little or nothing to ameliorate the ambiguity or uncertainty in the Award.

30. As to paragraph [62] of the CPSU NSW Submissions, Ai Group refers to and repeats the submission made as to the risks of employee repayments at paragraphs 20-22 above.

B. SECTION 157 APPLICATION (ACHIEVING MODERN AWARDS OBJECTIVE)

B1. Joint Submissions

31. At paragraph [39], the Joint Submissions state that the "*logical starting point for the Commission's consideration is that 'but for' clause 25.7, a sleepover would be treated as working time and would be paid as ordinary hours or overtime*". That submission elides the role of the Commission in its making of the Award, and the compromise position reflected in clause 25.7 as it was made. The submission only makes sense

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8 See Primary Submissions at [25].

in a world where employers would choose to pay their employees night shift rates or excessive amounts of overtime to sleep, as opposed to working an active night shift. Accepting (as the evidence of all parties makes clear) that there is somewhere between far less and almost no work for employees in the relevant sectors to perform overnight, as opposed to during the day, the sleepover clause reflects a reasonable and appropriate arrangement where employees are able to be relieved of performing their duties at night (while sleeping), unless duty calls, in which case they are paid at overtime rates. The Joint Unions' argument that the starting point should be payment of the sleepover as ordinary hours is artificial and tendentious, and ought to be rejected.

32. At paragraph [40], the Joint Unions argue that the working arrangements "*permitted*" under Ai Group's proposed variation are "*extraordinary*", before setting out the most extreme possible working arrangements which could be provided. The submission is misconceived and overstated: the present application is concerned with whether employers should be able to feasibly provide continuous care through the rostering of shifts of ordinary hours of work on either side of a sleepover without the routine reliance on the performance of overtime. There is no reason why such an arrangement would automatically be unhealthy or unsafe,[9] and such matters are in any event for the realms of occupational health and safety law.

33. As to paragraph [42] of the Joint Submissions, clause 32.14 of the *Manufacturing and Associated Industries and Occupations Award 2020* does not provide a useful comparison, because it deals with "standing by in readiness" (which on no view would allow an employee to go to sleep for up to eight hours).

34. At paragraphs [44] to [46], the Joint Unions argue for alternatives on the spectrum of continuity of care. *First*, there is the submission that continuity of care can be achieved in a "*one-day cycle*", with a handover in the morning. However, the Joint Unions fail to acknowledge the benefits of limiting handovers in the course of a day, which their proposal does not achieve. *Second*, the Joint Unions argue that "*longer term*" continuity of care is equally, if not more, important. By this, Ai Group understands the Joint Unions to mean that attrition in the relevant sectors caused by fatiguing conditions is less preferable to the benefits of the continuous care model

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9 Reply statement of Michelle Black dated 11 October 2024, [10].

put forward by Ai Group. There is no evidence to satisfy the Commission that Ai Group's model has caused or would cause any such attrition. And there is no real basis to make a rational comparison between the two issues (*i.e.* shift-to-shift continuity versus longer term continuity). Again, the requirement on employers to manage fatigue-related health and safety risks in their workplaces, including in their rostering practices, is an obligation imposed by occupational health and safety law.

35. At paragraph [48], the Joint Unions submit that the evidence which they will seek to adduce demonstrates that Ai Group's proposal is not desirable to employees. While the Joint Unions' evidence and submissions are largely curated to that effect, it is not so straightforward. For instance, they seek to adduce evidence from Susan Miller, a disability sector veteran of 18 years with a wide variety of experience, including as an AWU delegate and who holds a Certificate IV in Disability, Community Services, who states, in relation to "*24-hour shifts*":[10]

> "*I preferred them to the less hours as it meant I had more family time. Worker preference as to 24-hour shifts also varies from person to person and shift to shift. …*
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> *I would consider 24-hour shifts beneficial from a worker perspective in that I would have more home time and not have to travel to and from work as much. My travel time is approximately an hour each shift. …*
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> *Overall, I believe staff my prefer to work 24-hour shifts to get their shift over with and not have to return to work too many days in a row. …*"

36. This evidence is entirely consistent with the evidence lead by Ai Group as to the feedback received from some employers in response to proposals to change from their 24-hour proposals.[11] While the Joint Unions would disregard Ms Miller's preference (and, curiously, deny its existence while seeking to adduce it in evidence), and that of the other workers that she speaks about, Ai Group's proposal accounts for it and for employers to have the option to roster in this way without incurring prohibitive overtime and penalties.

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10 Statement of Susan Miller dated 2 September 2024 at [39], [45] and [50].

11 See Primary Submissions at [68] and the references to evidence therein.

37. At paragraph [49], the Joint Unions submit that Ai Group has not called evidence to enable the Commission to make findings about the financial impact on employers. That submission should be rejected — there is ample evidence to the effect that operators in these sectors are commonly not-for-profit and largely rely on government funding, which does not account for the payment of large amounts of overtime or shift penalties.

38. At paragraph [50], the Joint Unions make various arguments in response to the Ai Group's submission that there is no industrial rationale in the notion that the entire period of an 8 hour (afternoon/night) + sleepover + 8 hour (day) roster should be compensated as a night shift. None of the submissions proffer any such rationale. Rather they seek, ineffectively, to distinguish and deflect to other matters, such as this being a highly feminised, low paid industry. The Joint Unions have no answer because there is no sound industrial rationale for employees being paid night shift rates to work what would otherwise be a day shift.

39. As to paragraph [53] of the Joint Submissions, it is noteworthy that the Joint Unions do not submit that work after a sleepover should not be permitted. Rather, it submits that allowing such work to occur by way of ordinary hours would have a negative impact on the remuneration of employees in terms of shift penalties and overtime. As to shift penalties, as mentioned above, the Joint Unions have not made out a case for why night shift penalties should be paid during a day shift that occurs after an employee has had a sleepover. As to overtime, just as employers should not rely on the routine performance of overtime to staff their operations,[12] nor should employees expect to receive, or depend upon, payment of their agreed hours of work at overtime rates. The question of the adequacy of the remuneration that employees receive for performing a sleepover is a separate issue, and not presently the subject of this proceeding.

40. As to [57]-[65] of the Joint Submissions, the Unions' proposal is that clause 25.4 be varied such that, in the event that the allotted break is not received, there be a penalty that is even higher than the overtime rate. Including this term in the Award would only

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12 Primary Submissions at [49].

compound Ai Group's concerns about the cost impact of the Unions' interpretation of the Award as it relates to the rostering of shifts on either side of a sleepover.

41. Further, the Joint Unions' submission at paragraph 61 that the penalty is needed to discourage employers from providing employees with extended hours of work is inconsistent with the modern conception of a penalty rate; rather, the imposition and rate of any penalty should be to appropriately compensate employees.[13]

42. Finally, at paragraph 64, the Joint Submission takes the form of a bald assertion as to its proposal reflecting *"existing employment practices in the industry"*. There is no evidence to that effect.

B2. CPSU NSW Submissions

43. The CPSU NSW Submissions argue that the Unions' proposed variation to clause 25.4 (namely that it be varied to stated: "*For the avoidance of doubt, a period of sleepover in accordance with clause 25.7 does not constitute a break within the meaning of this clause*") is necessary to achieve the modern awards objective. Again, the CPSU NSW fails to appreciate that the interaction between clause 25.7 and 25.4 (*i.e.* whether a sleepover constitutes, or runs parallel with, a break) is only one issue causing the relevant ambiguity and uncertainty in the Award.

44. At paragraphs [86] to [89], the CPSU NSW Submissions fall into the same error as its submissions on the s 160 application, in seeking to argue that a sleepover constitutes work, and are of no real assistance for that reason.

45. As to paragraphs [90] to [94] of the CPSU NSW Submissions, see the submissions made at paragraph 33 above.

46. At paragraph [96], the CPSU NSW refers to the Full Bench's decision in *4 yearly review of modern awards – Group 4 – Social, Community, Home Care and Disability Services Industry Award 2010 – Substantive claims* to the effect that government funding in a sector does not provide a sound basis for differential treatment in the setting of minimum terms and conditions.[14] It argues that the Commission's statement applies with equal force in this case. That misunderstands Ai Group's

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13 *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001, [903].

14 [2019] FWCFB 6067 at [138]-[142].

submission: it is not said that the limits of government funding provide a reason not to properly set minimum terms and conditions. The submission is that government funding accounts largely for the rates of employees performing ordinary hours of work, but naturally does not account for disproportionate and inexplicable levels of overtime and shift penalties that would be caused if the Unions' interpretation of the Award were to be correct (or otherwise adopted).

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Dated: 11 October 2024