This background paper was authored by the Service Priority Review secretariat in consultation with, and to inform the work of, the Service Priority Review Panel. Every effort has been taken to ensure accuracy, currency and reliability of the content. The paper is not intended to be a comprehensive overview of the subject nor does it represent the position of the Western Australian Government. Changes in circumstances after the time of publication may impact the quality of the information.

The following background papers are published in full on the Department of the Premier and Cabinet website: [www.dpc.wa.gov.au](http://www.dpc.wa.gov.au)

1. Agency capability reviews
2. Best practice regulation
3. Overview of the budget process
4. Counterproductive rules and processes
5. Digital transformation
6. Engaging with the community
7. Functional leadership
8. Government boards and committees
9. Government trading enterprises
10. Leader performance management and accountability
11. One sector workforce
12. Privacy and information sharing
13. Procurement of goods and services
14. Public sector employment framework
15. Role of the centre
16. Service design and delivery
17. Successful implementation of reform
18. Whole-of-government targets
Introduction

Stakeholders have expressed to the Service Priority Review panel that opportunities for improvement exist within the legislative and governance frameworks applying to Western Australian government trading enterprises (GTEs). In view of the complexities of the current GTE governance arrangements for a disparate set of entities, the Department of Treasury (Treasury), in particular, has suggested that the State Government should review its commercial and quasi-commercial entities to identify appropriate governance; introduce legislation to standardise and strengthen governance arrangements; and establish an oversight unit within Treasury to implement the reforms and monitor performance.

Publicly owned commercial corporations

General principles

Government decisions to corporatise publicly held commercial entities (or create new statutory corporate entities) are made in order to introduce private sector discipline and practices to their activities, and to separate commercially based, revenue-generating activities undertaken by government from the public service-based operations of the general government sector.

However, the existence of commercial objectives in place of public interest considerations, and governing boards with fiduciary responsibilities, does not position government commercial entities in an operating or authorising environment that is perfectly (or even nearly) analogous to the private market. The establishment of government corporations as separate legal entities by individual Acts of Parliament, rather than following registration by Australian Securities and Investments Commission (ASIC), means they operate in a different risk environment, and are subject to different incentives, from incorporated bodies in the private sector. GTEs are not exposed to factors generally ensuring private sector governance discipline – these include the consequences of share price performance, the availability and cost of capital, reputational factors, shareholder inputs, and the interplay of commercial tensions inherent in a genuinely competitive market. GTEs are not subject to takeover or insolvency, the two principal risks encouraging sound management in private sector corporations.

However, unlike private sector corporations, GTEs are not always able to operate in a purely commercial manner, despite the requirements of their Acts, due to the need to also reflect the needs or aspirations of government.

The 1993 McCarrey Commission¹ specified five ‘principles of corporatisation’ that should guide decision making around GTE design to realise the benefits of the model and to

recreate more closely the effects of some elements of the commercial environment in a public sector context. These included:

- **clear and non-conflicting objectives**, principal among which should be a requirement to operate commercially, and which may include community service obligations
- an **arm’s-length relationship** between the governing board and the government of the day, moderated by way of an agreed statement of corporate intent and ultimately allowing for ministerial intervention by way of direction
- external (Treasury) **performance monitoring** to ensure boards are not the sole source of information and advice to government on the entity’s performance
- appropriate **rewards and sanctions**
- **competitive neutrality** to provide a level regulatory playing field.

Arguably, those principles have not always been rigorously applied when establishing and addressing GTEs in WA.

In all jurisdictions reviewed in the course of preparing this paper, arrangements for the establishment and governance of GTEs\(^2\) represents a balance between the Government’s desire to closely manage its business portfolio, while allowing the individual business interests constituting it the freedom to operate effectively in a commercial or quasi-commercial environment. In WA and elsewhere\(^3\), the proper scope of government control of or intervention in GTEs is not always transparent or clear. Surrounding this tension is the ongoing need to justify, on competitive neutrality grounds, the Government’s decision to retain an interest in a particular business that could otherwise be operated by the private sector.

**GTEs in Western Australia**

**Establishment of GTEs**

A range of statutory corporations carry out commercial activities in WA, operating under a range of governance models. Due to a lack of clear criteria on what constitutes a GTE in the State, different regulators and areas of government use different definitions for their own purposes. Common to all definitions is that the entity:

- operates at least partially in a commercial environment
- is primarily self-financing through charging for the goods and services it provides
- has a degree of independence from government
- is established under a statute.\(^4\)

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\(^2\) Different jurisdictions use different terms; GTE is used for convenience in this paper.  
\(^3\) Department of Premier and Cabinet, NSW Treasury, Department of Finance and Services. 2013. Review of the Legislative Framework that provides for the Governance and Accountability of State Owned Corporations – Issues Paper. Sydney, Australia.  
\(^4\) The exception is the Keystart Housing Trust, established as a trust in the Minister for Housing’s portfolio. Many of the statements in this paper about the establishment and governance of GTEs are not applicable to Keystart.
Treasury identifies 20 entities that at least partially meet these criteria. These are listed in Column 1 of the table in Appendix 1. There are other statutory corporate entities in the State that could arguably be included. The list in Appendix 1 reflects those with a significant operational or asset scale. For the purposes of this paper, it is an adequately representative list of commercial or quasi-commercial entities in the State.

Column 3 of the table in Appendix 1 indicates whether each entity is established under schedule 1 to the Public Sector Management Act 1994 (with the effect that it is outside the public sector) or schedule 2 (in which case, it is a SES organisation within the public service). Relevantly, entities outside the public sector are not bound by the State’s wages policy, the Public Sector Management Act 1994 employment framework or Premier’s circulars and Public Sector Commissioner’s circulars.

Functions and objectives of agencies change over time, both through changing government objectives and changes to the market that they operate in. Entities that were originally established to be public service-based operations may now operate in a more competitive market and therefore have evolved into a more commercial entity. The opposite is also true, that entities considered commercial may now be more public service-based entities.

In addition, enabling Acts of organisations are changed by the Government of the day. As a consequence, the distinction between some commercialised entities and some more typical government service-providing agencies have become blurred in terms of the responsibilities that were envisaged for corporatised entities. This confusion is added to when the governance design of other types of agencies, such as statutory authorities, borrow from the framework leading to commercialised general government agencies with a hybrid of governance requirements.

Treasury has suggested a review of each of the 20 entities to identify appropriate and consistent governance arrangements. A review would identify the entities that may be more appropriately treated as general government agencies, corporatised entities and/or entities requiring structural reform to separate commercial and public service functions.

**Scope and economic impact**

GTEs are major participants – sometimes the only participant – in economically significant markets for the State and represent a significant public asset.

The category of public non-financial corporations is used in the State budget to describe State Government entities “engaged mainly in the production of goods and services for sale in the market and whose objective is to recover at least a significant proportion of operating costs through charges for their goods and services”. The category includes the utilities and port corporations, as well as some of the other GTEs listed in Appendix 1. It excludes public financial corporations (e.g. the Insurance Commission of WA, Keystart and WA Treasury

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Corporation) but is generally a reasonable proxy measure for GTEs. As of 30 June 2017, public non-financial corporations:

- have a collective estimated net worth of around $54.1 billion
- annual turnover in excess of $20 billion
- contribute significantly to both government revenue (around $2.2 billion in 2017-18) and expenses (around $2.0 billion in 2017-18)
- are a significant component of total capital works spending (around $4.4 billion in 2017-18)\(^6\).

**Governance and accountability**

Generally, the GTEs are governed by boards of management, accountable to the responsible minister who is, in turn, accountable to Parliament. Each GTE board must act in accordance with the entity’s statutory objectives, which can include a combination of commercial and other policy objectives. Under the *Statutory Corporations (Liability of Directors) Act 1996*, or within a schedule of a GTE’s enabling Act, directors of statutory corporations (a category including the GTEs) have the same fiduciary duties\(^7\) as directors of companies incorporated under the *Corporations Act 2001*. When the *Statutory Corporations (Liability of Directors) Act 1996* and GTE’s enabling Acts were originally enacted, clauses mirrored clauses in the *Corporations Act 2001* rather than referring back to the Act. Clauses can quickly become misaligned if changes are made to any one of these Acts.

In terms of accountability, GTEs are generally required under their originating statute to provide business-oriented accountability documents for ministerial and Treasurer approval. These include statements of corporate intent (SCIs), which are public documents setting out financial and non-financial targets for the coming year, and strategic development plans (SDPs), which are not made public and which set out business strategies, objectives and broad targets for up to five years (some GTE statutes give these documents different names). Column 4 of the table in Appendix 1 indicates the spread of these requirements. Notably, some of the listed GTEs do not operate subject to any SCI or SDP requirements.

Many of the GTEs are capital intensive and operate large-scale, complex assets. GTE asset investments account for a substantial proportion of the State’s asset investment program and accordingly have a significant impact on the State’s net debt and financial targets. For this reason, GTEs are expected to submit 10-year strategic asset plans to their minister and the Treasurer, consistent with the State’s Strategic Asset Management Framework.

**State Trading Concerns Act 1916**

The *State Trading Concerns Act 1916* requires the Government to obtain parliamentary approval to establish or carry on a trading concern— that is, a concern “carried on with the view to making profits or producing revenue, or of competing with any trade or industry now

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\(^7\) Duties to act honestly, to exercise reasonable care and diligence, and not to make improper use of information or of the director’s position.
or to be hereafter established, or of entering into any business beyond the usual functions of State Government” (s.4(3)). Such a concern is covered by the State Trading Concerns Act 1916 if Parliament has expressly declared that there is such a concern (s.4(1)(b)).

The application of the State Trading Concerns Act 1916 is limited, under ss.4 and 4A, to entities listed in the schedule to that Act and departments and entities within the public sector that are prescribed in the regulations. The State Trading Concerns Act 1916 has the effect of authorising entities that are identified in the schedule to the Act to provide certain types of goods and services for profit, regulating the fees and charges that can be imposed for those goods and services and the contracts that each can enter into. It is unclear to what extent the State Trading Concerns Act 1916 applies, in practice, to schedule 2 (public sector) GTEs.

Identified issues with GTEs in WA

Board appointments and remuneration

Appointments to government boards and committees for Public Sector Management Act 1994 schedule 2 agencies (i.e. within the public sector) are subject to the requirements of Premier’s Circular 2017/08: State Government Boards and Committees. The circular requires board appointments to be considered by Cabinet. Premier’s circulars do not apply to Public Sector Management Act 1994 schedule 1 agencies (i.e. outside the public sector) and board appointment processes are generally established within each entity’s enabling Act. These can be quite inconsistent across different Acts. An example of this is whether the minister or Governor appoints and dismisses board members, with only those appointments of directors made by the Governor required to be considered by Cabinet. Furthermore, board appointments are ordinarily proposed by the GTEs (that is, ultimately directed by the boards themselves) with little or no input from portfolio or central agencies. Stakeholders have suggested that the process would benefit, and may attract more varied skill-sets to boards, if wider input were required to be sought during the nomination process.

Recent changes to the Salaries and Allowances Act 1975 have allowed remuneration of chief executives of most GTEs to be determined by the salaries and allowances tribunal (under section 7C of the Salaries and Allowances Act 1975). However, arrangements for board member remuneration ordinarily depend on specific provisions of the Act establishing the relevant entity. These provisions vary, but generally allow for ministerial determination of salaries, either with or without the advice of the Public Sector Commissioner. Premier’s Circular 2017/08 makes board members who are ‘on the public payroll’ ineligible to receive fees.

Multiplicity of arrangements

As Appendix 1 partially illustrates, there is little consistency between the operating arrangements applying to GTEs. While there are similarities between each regime, each establishing statute sets out separate provisions about the entity’s relationship with its responsible minister and, in some cases, the Treasurer; the application of the Financial Management Act 2006 and the Auditor General Act 2006; and the entity’s capacity to
undertake commercial actions including borrowing money or entering into business arrangements, such as forming companies or entering into partnerships. The differences cannot be attributed to differences in each entity’s core functions but, instead, more likely reflects changes in preferred policy approach, and government’s fluctuating risk appetite, over time.

Although inconsistency between individual GTEs may not cause issues on a day-to-day operational level, the inconsistency makes comparison across the sector difficult and is an impediment to rigorous external performance monitoring and oversight.

Governance roles and responsibilities

One of the key issues is the lack of understanding and application of the appropriate roles and relationships between the key players in the governance of GTEs.

A shareholder minister is accountable to Parliament for the performance of the GTE. Currently in WA the portfolio minister is the sole shareholder minister. The portfolio minister is also responsible for the regulatory and market policy in which the GTEs operate. The policy agency supports the portfolio minister in this role.

The Treasurer also has an ‘approval’ or ‘concurrence’ role in some GTEs’ enabling Acts. This role is under-defined and inconsistent across the various Acts. However, the Treasurer’s role is generally for accountability provisions (i.e. SCI and SDP provisions) and financial provisions (i.e. borrowing, dividend and significant transaction provisions). This recognises the need to ensure oversight of the financial impacts of investment decision making by GTE boards, and assisting the Government in meeting its broader financial objectives. The Department of Treasury supports the Treasurer in this role.

The directors of the board of a GTE are responsible for overseeing the management of a GTE on behalf of the shareholder ministers. The directors should consider government objectives and policies provided by the minister in making its decisions. Appropriate governance dictates that the shareholder ministers should not engage in the day-to-day operations of the GTE. The more involved a minister is in the operation of a GTE, the less they will be able to hold the board accountable for its decisions.

There is evidence that a lack of definition and understanding of the various roles in GTE governance has led to both duplication of effort and dilution of accountability for decisions by GTEs. In addition, the under-defined and inconsistent role of the Treasurer has led to decisions being made by GTEs and portfolio ministers that have had large unintended financial impacts to the State.

Unclear and conflicting objectives

Stakeholders have suggested that the statutory objectives of GTEs do not always give governing boards clear direction, particularly in the case of conflicts that may arise between competing commercial and other objectives.
Stakeholders have also suggested there is often misalignment between GTEs’ statutory objectives and the objectives of government. As discussed above, some of the GTEs listed in Appendix 1 do not operate subject to any SCI or SDP requirements, meaning there is no immediate mechanism for goal realignment in those cases.

Also, stakeholders have commented that the degree of scrutiny applied to SCI and SDP instruments by responsible ministers varies. To the extent that insufficient rigour is applied, this would represent a failure of government to properly manage its key assets.

Since the early 2000s, both the office of the Auditor General and the State Parliament have expressed ongoing concern about the inability of successive governments to agree upon and table SDPs and SCIs in Parliament within the legislative prescribed timeframes. The requirement to table SCIs before the end of the financial year needs to be weighed against the importance of ensuring the documents meet their purpose and exhibit sufficient quality and rigour. Issues that have been identified in the SCI/SDP processes include the poor content and quality of draft documents, limited time to ensure high quality final documents, lack of understanding of the roles and responsibilities of the ministers and agencies and lack of incentives for GTEs to create documents that are able to be approved by government. In its 2015-16 audit results report, the Auditor General recognised that there have been ongoing efforts to resolve these issues through pursuing both administrative and legislative changes.

More general observations

The absence of clearly articulated and rigorously applied principles governing the establishment and governance of and relationship between government entities is not limited to GTEs. Similar observations can be made about boards and committees established for advisory, governance and other purposes, as well as a range of other administrative entities within the public sector.

Eliot Jaques proposes that almost all organisational dysfunction is a consequence of poor structure and systems. Addressing and improving organisational design – including structure, roles, policies, work systems and management practices – can generate efficiency and effectiveness gains. Carefully designed organisations, at system level, can both support desired behaviours and culture, and can generate better results. A system without an overarching organising framework and identifiable principles to guide its future growth is liable to become inefficient.

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The 2009 Economic Audit Report\textsuperscript{10} made a number of recommendations relating to GTEs. Although some of these have been implemented or partially implemented (including the implementation of a utilities policy office in respect of energy markets (recommendation 32), and the application of the Strategic Asset Management Framework to GTE investment decisions (recommendation 19)), the following remain outstanding:

- Introduce umbrella legislation to:
  - standardise, strengthen and clarify governance arrangements for all GTEs
  - establish remuneration policy for GTE board members and their executives administered by the Salaries and Allowances Tribunal (recommendation 28).
- Establish a GTE advisory and monitoring unit (recommendation 29).
- Review GTEs to ensure governance and ownership is appropriate for delivering the Government’s objectives, addressing specified issues including the need for continued government involvement; what policy outcomes the Government is seeking from the entity and from the market in which it operates; and the relative merits of other possible arrangements to achieve those outcomes (recommendation 30).

Substantial work has been undertaken over a number of years to improve the governance and oversight of GTEs, including:

- laying the groundwork for ‘umbrella’ legislation
- improving administrative arrangements, e.g. SCI process improvements, application of SAMF and remuneration of chief executives
- agency or sector-specific reforms, e.g. Electricity Corporations Act 2005 dividend provisions (2015), Port Authority Act 1999 amalgamation and dividend provisions (2014), and executive officer remuneration (omnibus bill 2016).

However, there are limitations to further improvements that can be made without comprehensive legislative amendment.

\textbf{Arrangements in other Australian jurisdictions}

An overview of GTEs and applicable governance arrangements in some Australian jurisdictions is set out below. Notably, each of the other jurisdictions:

- have an overarching statutory framework, the existence of which entails consistent, principle-based decision-making when deciding whether and how to establish a new government business
- expressly deal with the existence and identity of shareholders in certain types of public corporation, enabling a degree of government control over the external management of the entity which is absent in WA.

New South Wales

NSW now has seven State-owned corporations with functions relating to energy, water, urban development, forestry products and one port. Each of these is governed by its own enabling Act and is subject to the *State Owned Corporations Act 1989*. Additionally, the State of NSW is the shareholder of two non-statutory corporations established under the *Corporations Act 2001* (Cobborra Holding Company and Sydney Motorway Corporation). The *State Owned Corporations Act 1989* contains the overall governance framework for State-owned corporations (SOCs), which can be modified or overridden by specific enabling Acts. It contains:

- Provisions about the internal governance and day-to-day management and operation of statutory SOCs, including provisions about staff, directors, chief executives and general management, dividends, taxation, and acquisition and disposal of assets and liabilities. Many of these matters are subject to determination by the ‘voting shareholders’, who are the Treasurer and a minister nominated by the Premier – currently, the Minister for Finance, Services and Property in all cases.
- Requirements about accountability, including preparation and tabling of statements of corporate intent, half-yearly reports, annual reports and financial reports, and setting out the functions of the Auditor General in respect of SOCs.

As well as being responsible to shareholder ministers, the SOCs are often subject to decisions of the relevant portfolio minister affecting the markets in which they operate.

NSW Treasury’s commercial policy framework applies to NSW SOCs. These include governance policies, performance policies, competitive neutrality policies and other general policies.

Victoria

The *State Owned Enterprises Act 1992* defines four types of State-owned enterprise:

- State bodies – these are established by executive order made by the Governor, and are flexible and versatile, as the order can specify the body’s purpose, functions and powers. This device is generally used for entities that do not need a full range of commercial freedom or discipline.
- State business corporations – these are statutory corporations or State bodies declared to be State business corporations under the *State Owned Enterprises Act 1992*. This entails requirements to operate efficiently as possible and to maximise economic return to the State. This form is generally used for entities where skills-based boards of government enterprises must make complex operational decisions.
- State-owned companies – these are ordinary Corporations Act companies declared as State-owned companies under the *State Owned Enterprises Act 1992*. Again, this entails requirements about efficient operation and maximal economic return.

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• Reorganising bodies – these are public entities declared as reorganising bodies to facilitate their transition to a different constitutional, governance or capital structure.

State-owned enterprises in Victoria include water and natural resources management, land and property, and general trading entities. GBEs are primarily accountable to their portfolio minister and Parliament for performance, but are also accountable for financial performance to the Treasurer as stakeholder minister.

Commonwealth

Commonwealth Government business enterprises (GBEs) (and other Commonwealth Government entities) are subject to the Public Governance, Performance and Accountability Act 2013. Corporatised GBEs include Australian Postal Corporation, Defence Housing, Australian Rail Track Corporation, Moorebank Intermodal Corporation, NBN Co, Airservices Australia, and Snowy Hydro Limited. The Act includes overarching duties around governance, cooperation and accountability, including as to strategic planning and performance reporting.

Options for reform

1. Require, as a matter of policy, appropriately wide consultation and input into recommendations for GTE board appointments and reappointments.

2. Require, as a matter of ministerial practice, rigorous consideration of SCIs and SDPs, and input where relevant from portfolio ministers who are decision makers in the markets in which the GTE operates. SCIs and SDPs should be considered in light of the Government’s immediate and longer-term policy goals for the sector or market in which each GTE operates.

3. Consider recommending new legislation governing GTEs in WA, incorporating common governance principles and expressly providing for the role of a minister or ministers as shareholder. In establishing any legislation and determining its scope, consideration should be given to the alignment, or lack of alignment, between the Government’s longer-term policy goals for the sector or market in which each GTE operates and the objectives of each GTE. Legislation should be clear about the extent of State involvement in the operation of each GTE and perhaps account for arrangements under which the degree of involvement could be varied if necessary.

4. In the absence of new legislation, consider the need to review individual GTE statutes and:
   • consider the need for ongoing public ownership of the GTE
   • where the need is established:
     - consider whether to revise the objectives of the GTE so they continue to align with the Government’s strategic imperatives for the applicable sector or market
     - revise the policy and accountability framework to achieve consistency across GTEs as a whole.

5. Consider the need to establish a rigorous external performance oversight system as a conduit of independent information to government about the performance of its GTE assets.
References


### Appendix 1. WA GTES

<table>
<thead>
<tr>
<th>Entity</th>
<th>Enabling Act</th>
<th>PSMA status</th>
<th>SCI/SDP</th>
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<tr>
<td>TAB WA (Racing and Wagering WA)</td>
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<td>PSMA Sch 1 (outside public sector)</td>
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<td>WA Treasury Corporation</td>
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<td>Port authorities:</td>
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<tr>
<td>- Fremantle Port Authority</td>
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<td>- Kimberley Ports Authority</td>
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<td>- Mid West Ports Authority</td>
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<td>LandCorp (WA Land Authority)</td>
<td>Western Australian Land Authority Act 1992</td>
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<td>- Horizon Power (Regional Power Corporation)</td>
<td>Electricity Corporations Act 2005</td>
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<td>- Synergy (Electricity Generation and Retail Corporation)</td>
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<td>- Western Power (Electricity Networks Corporation)</td>
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<td>Chemistry Centre (WA) Act 2007</td>
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<td>Landgate (WA Land Information Authority)</td>
<td>Land Information Authority Act 2006</td>
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<td>Metropolitan Redevelopment Authority</td>
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<td>State Superannuation Act 2000</td>
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<td>Insurance Commission of WA</td>
<td>Insurance Commission of Western Australia Act 1986</td>
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<td>Animal Resources Authority</td>
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