

Balancing Act

Issue 16

Legal and tax affairs for the non-profit industry

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Modern Awards & National Employment Standards AND NOT-FOR-PROFIT SECTOR EMPLOYERS

*Traps for FBT Exempt
& Rebatable Employers*

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Modern Awards & National Employment Standards AND NOT-FOR-PROFIT SECTOR EMPLOYERS

“the referral of IR powers means that you will automatically transition into the Federal Industrial Relations system...”

1 January 2010 saw the commencement of:

1. **Modern Awards;**
2. **National Employment Standards (NES); and**
3. **All States (except WA) referring their industrial relations powers to the Federal government.**

These changes are aligned with provisions of the *Fair Work Act* (Clth) 2009, along with other significant changes such as new arrangements for Collective Agreement making and unfair dismissal laws.

Important message to State based employers

If you are a State based employer in QLD, SA, NSW or Tasmania (ie you are **NOT** a constitutional corporation), then the referral of IR powers means that you will automatically transition into the Federal Industrial Relations system and the *Fair Work Act*, Modern Awards and NES **now apply** to your workplace from

1 January 2010 (although there are transitional provisions that may apply to Modern Award application until 31 December 2010).

This article will discuss:

1. What are Modern Awards?
2. Who they apply to
3. What all Not-for-Profit employers need to know
4. What happens from 1 January 2010?
5. What happens from 1 July 2010?
6. What will happen to rates of pay under Modern Awards?
7. What if your workplace is covered by an enterprise agreement?
8. What you need to do to comply moving forward
9. What are the National Employment Standards?
10. A special note about the Federal SACS Award
11. What can Employer Assist do to assist you?

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Modern Awards & National Employment Standards and Not-for-profit sector employers

1. What are Modern Awards?

Modern Awards are new industry specific Awards that replace all existing Federal Awards from 1 January 2010 (except for rates of pay which will take effect from 1 July 2010).

Modern Awards include terms and conditions of employment such as coverage, minimum wages and classifications, penalty rates, ordinary hours, allowances, types of employment, breaks, flexibility arrangements, consultation and dispute settlement.

They also include other terms that *supplement* the NES (the NES override Awards on some matters). Modern Awards **and** the NES together operate as the 'safety net' from 1 January 2010.

2. Who do they apply to?

Modern Awards will cover all employers and employees in the Federal workplace relations system.



Modern Awards are industry or occupation-based, and will apply to employers and employees who perform work covered by the Award.

However, managers or higher income employees may not be covered by a Modern Award even if one applies to the industry in which they work. Seek advice about your management and higher income employees (ie. those earning < \$ 108K per annum).

3. What all Not-for-Profit Employers should know

Firstly you must confirm which Modern Award(s) will have coverage over your workplace.

While Modern Awards commenced operation on 1 January 2010, the AIRC has allowed for transitional arrangements over a five year period to assist affected employers and employees in the move to the Modern Award system.

The AIRC determined that any increases

(or decreases) in wages, loadings and penalty rates would be phased in from 1 July 2010.

This includes:

- minimum wages;
- casual and part time loadings;
- Saturday, Sunday and public holiday penalty rates;
- evening and other penalty rates; and
- shift allowances.

This period provides time for the parties affected by a Modern Award to make the required changes.

The legislation provides that an employee's take-home pay should not reduce via this process – if it does they can apply to FWA for a take-home pay order.

4. What happens from 1 January 2010 – 1 July 2010?

During the period between 1 January 2010 and 1 July 2010, the pre-Modern Award pay-related entitlements remain in effect. That means wages entitlements contained within a pre-Modern Award (e.g. a Federal Award, NAPSA or pre-reform Award) regarding any of the above continue to apply.

All other entitlements under Modern Awards and the NES apply from 1 January 2010.

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Traps for FBT Exempt & Rebatable Employers Preparation season is now upon us

Fringe Benefits Tax (FBT) return preparation season is now upon us and it is timely to highlight potential traps for FBT-exempt and rebatable employers when completing the FBT return.

Broadly, the FBT exemption allows employers to provide benefits to their employees without having to pay FBT in respect of these benefits. The exemption may be available for public and non-profit hospitals and ambulance services (subject to a capping threshold of \$17,000 per employee), and to public benevolent institutions and health promotion charities (subject to a capping threshold of \$30,000 per employee). The thresholds apply to the grossed-up taxable value of benefits provided.

Rebatable employers (such as religious institutions and trade unions), may be entitled to the FBT rebate of 48% of the employer's FBT liability. The rebate is subject to a cap of \$30,000 per employee (grossed-up taxable value).

Trap 1: Disclosure requirements for FBT-exempt employers

These are different to those for most employers, specifically:

Where the relevant capping threshold has been exceeded for an employee, only item 13C must be completed with the aggregate grossed-up value of benefits in excess of capping amounts. Many exempt entities incorrectly disclose figures in items 13A and /or 13B.

Where a capping threshold has been exceeded for an employee, item 22 requires the disclosure of the total value of taxable benefits provided (with the exception of benefits to be excluded from the capping

amounts noted above, including meal entertainment, entertainment facility leasing expenses and car parking benefits).

Trap 2: The payment or reimbursement of an employee's car parking expenses and grocery bills are not excluded from the concessional caps

The payment or reimbursement of an employee's car parking expenses is an expense payment fringe benefit, and is to be distinguished from an employer providing a car parking benefit. The taxable value of car parking benefits are excluded from the concessional cap.

Similarly, the payment or reimbursement of an employee's grocery bill is an expense payment fringe benefit, and is to be distinguished from the provision of meal entertainment. The taxable value of meal entertainment is also excluded from the concessional cap.

Trap 3: Reportable Fringe Benefit Amount requirements mutually exclusive to lodging requirements for FBT returns

We hope the above will be of assistance to you in preparing your 2010 FBT returns.

All employers (including FBT exempt and rebatable employers) are required to include a value for reportable fringe benefits on the employee's payment summary where the notional taxable value of reportable fringe benefits received by an employee during the FBT year is more than \$2,000. Accordingly, it is possible to have reportable fringe benefit amounts without having to complete a FBT return.

Allan Mortel, Director & James Robson,
Manager, Moore Stephens Sydney Pty Ltd ■

* Aggregate non-exempt amount (hospitals, ambulances, public benevolent institutions and health promotion charities only)
† Type 1 aggregate amount
‡ Type 2 aggregate amount
§ Details of fringe benefits provided

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“the FBT exemption allows employers to provide benefits to their employees without having to pay FBT in respect of these benefits”

Co-ordinating Co-operatives: *the new Co-operative National Law*

Introduction

In recent years the number of co-operatives registered in Australia has been steadily declining. In September 2009 there were 1,726 of these mutual organisations spread across the country (with three quarters being established as not-for-profit, or non-distributing, co-operatives). This represents a 26% decline in the number of co-operatives registered in Australia over the past nine years.

What they lack in number, they do not necessarily make up for in size, either. The average size of a co-operative in terms of turnover and assets is not large: 98% of co-operatives have annual revenue of less than \$25 million, and 99% have assets of less than \$12.5 million. This may be a reflection of the fact that nearly all co-operatives operate in only one jurisdiction; less than 1% engage in operations that cross state or territory boundaries. In fact, there are only twenty-six registered "foreign co-operatives" (that is a co-operative that is registered as carrying on business in another state or territory), and in real terms the number is less than this as each foreign co-operative is counted in each jurisdiction in which it is registered.

One explanation for the declining numbers of co-operatives and their relatively small turnover and asset holdings may be found in the competitively disadvantageous nature of having eight jurisdictions, each with their own laws governing co-operatives.



¹ This article is a summary of the Regulatory Impact Statement issued by the Ministerial Council on Consumer Affairs

Whilst there are significant similarities between the statutes, impediments to achieving efficiencies and competitive advantages are created by the existence of this fragmented legislative framework. For example, the consent of the local Registrar of Co-operatives is required to be granted in each jurisdiction a co-operative wishes to carry on business and onerous and duplicitous financial reporting requirements are imposed upon these organisations (which are often more extensive than those imposed on small companies under the *Corporations Act 2001 (Cth)* (**Act**)).

There is, then, a clear imperative for an overarching, national legislative framework to be introduced in order to provide incentives to, and remove the barriers faced by, incorporated bodies that choose to implement co-operative principles. The *Co-operatives National Law* is the latest attempt to address the problems that exist under the current framework.

Objectives of the Co-operatives National Law

The proposed new context has as its objectives the following:

1. providing the vehicle to deliver, apply and maintain nationally consistent co-operatives legislation;
2. applying the relevant provisions of the Act consistently across the states and territories with pertinent modifications;
3. simplifying reporting and auditing requirements, particularly for small co-operatives;
4. removing barriers to carrying on business across jurisdictional borders; and
5. implementing a national regulatory structure to facilitate uniform administration and the

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Co-ordinating Co-operatives: the new Co-operative National Law

The Options

The Ministerial Council on Consumer Affairs (**Ministerial Council**) presented three models for consideration in its recent Regulatory Impact Statement.

These were:

OPTION 1: encouraging incorporation under the Act;

OPTION 2: maintaining the status quo, but with the removal of existing variations between the jurisdictions; and

OPTION 3: introducing the proposed *Co-operatives National Law*.

Option 1 does not require any changes to be made to the existing legislative structure as this option is currently available to co-operatives. In this sense, it does not remove a need for a national legislative framework, particularly where a co-operative elects not to incorporate under the Act. As it currently exists, this option is regarded as a complement to a national system rather than an alternative to it. All the objectives of the Co-operatives National Law can be achieved by co-operatives under this option, albeit at greater cost.

The following table summarises **options 2 and 3** in light of each of the five objectives of the proposed *Co-operatives National Law*, listed above, as considered in the Regulatory Impact Statement.



Objective	Option 2 - Status Quo	Option 3 - Co-operatives National Law
1	<ul style="list-style-type: none"> would not deliver, apply and maintain nationally consistent co-operatives legislation not feasible to co-ordinate changes across eight jurisdictions 	<ul style="list-style-type: none"> legislation enacted and maintained in one jurisdiction (NSW) on behalf of all states and territories regulations made by Governor of New South Wales which apply in all states and territories ongoing national uniformity low familiarisation costs would be incurred initially no other costs identified reduced legislative maintenance costs elimination of duplication of costs of policy assessment, legislation development and Parliamentary processes

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Modern Awards & National Employment Standards and Not-for-profit sector employers

5. What happens from 1 July 2010?

From 1 July 2010, if a Modern Award results in an increase (or decrease) in wages or penalty rates, some Modern Awards will allow for the incremental phasing-in of changes to minimum wages or penalty rates over a five-year period.

All employers and employees should consult their relevant Modern Award for specific transitional arrangements, including state-based differences.

6. What will happen to rates of pay under Modern Award(s)?

Commencing on 1 July 2010, minimum rates, loadings and penalties will be adjusted by a percentage of the difference between the current rate, loading or penalty and the Modern Award rate, loading or penalty (called the 'transitional amount').

This adjustment will occur on 1 July each year, with the last adjustment being effected on 1 July 2014, at which time the full Modern Award rate will apply.

You may, at your discretion, pay the applicable full rate of pay from 1 July 2010.

Employer Assist recommend that you seek advice on the phasing in of wage increases from 1 July 2010.



“Employer Assist recommend that you seek advice on the phasing in of wage increases from 1 July 2010”

7. What if your workplace is covered by an enterprise agreement?

Base rates of pay will override wage rates in Enterprise Agreements. As such, Enterprise Agreement rates of pay must be equal to or higher than those provided for in the applicable Modern Award(s) across the entire 5 year phasing in period.

NES will override specific terms and conditions within Enterprise Agreements.

Employer Assist recommend you undertake a benchmarking exercise to ensure wage rates comply with applicable Modern Award transitional arrangements over the next 5 years.

8. What do employers need to do to comply from 1 January 2010?

- Ensure you are operating under the correct Award from 1 January 2010.
- Ensure employees are classified correctly under the applicable Award.
- Be aware of the new Modern Award provisions that have application in your workplace from 1 January 2010.
- Prior to 1 July 2010 – reclassify all positions under the new Modern Award.
- Ensure you are paying correctly.
- Ensure all current agreements and arrangements comply with the National Employment Standards from 1 January 2010.
- If you have an enterprise agreement, ensure base rates are no less than the Modern Award for the life of the agreement.

9. What are the National Employment Standards?

Modern Awards apply in conjunction with the NES to create a new safety net for employees.

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*(Continued from page 6)***Modern Awards & National Employment Standards and Not-for-profit sector employers**

“Determine which workplace policies and procedures need to change to comply with the Fair Work Act (Clth) 2009, the applicable Modern Awards and the NES”

The NES are:

- Hours of Work (max 38 ordinary plus reasonable additional hours);
- Parental Leave;
- Flexible Work for Parents;
- Annual Leave;
- Personal(Sick)/Carers and Compassionate Leave;
- Community Service Leave (includes jury service);
- Public Holidays;
- Information in the Workplace;
- Notice of Termination and Redundancy; and
- Long Service Leave.



10. A special note about the Federal SACS Award

Deputy Prime Minister Julia Gillard and the Rudd Government have agreed to support the Australian Services Union (ASU) in a major test case that seeks pay rises of between 18 - 37% for the 200,000 mostly female workers in the Community Sector.

The case is set to be heard by the new industrial umpire, Fair Work Australia, and will involve the presentation of an appropriate equal remuneration principle for the federal jurisdiction. The Government, whilst throwing its support behind the case, has reserved the right to argue for less than the 37% increases requested by the ASU.

The results of the test case will have a direct impact on the Federal SACS Modern Award. As such, the Moderns SACS Award was released without rates of pay. Rates of pay applicable to your organisation (if you are a respondent to the old Federal SACS Awards) will apply until such time as the pay equity case is decided. State based employers transitioning into the Federal jurisdiction as a result of the Fair Work Amendment (State Referrals and Other Measures) Bill (Clth) 2009 will continue to pay under current rates of pay until 1 July 2011, or until resolved.

The ASU are also lobbying state and federal governments to increase funding agreements to cover increased wages costs to funded services.

11. How Employer Assist can assist you to comply

To ensure compliance with the Modern Award(s) and NES, Employer Assist recommend as follows:

- Determine which Modern Award(s) are applicable to your workplace;
- Determine which workplace policies and procedures need to change to comply with the Fair Work Act (Clth) 2009, the applicable Modern Awards and the NES;
- Determine which wage rates will apply in advance of the 1 July 2010 commencement of transitional wages provisions;
- Review your current common law contracts, policies, HR procedures and practices for compliance with the Fair Work Act, Modern Awards and NES;
- Or, if necessary, create new common law contracts, Enterprise Agreements, policies and procedures etc to comply with Fair Work

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Act, Modern Awards and NES;

- Re classify positions where necessary to comply with the new Modern Award.

- 1 Award \$695.00
- 2 Awards \$795.00
- 3 Awards or more on application

12. Employer Assist Modern Award Package Offer

We will:

1. Determine which Modern Award(s) apply to your workplace;
2. Advise re phasing-in of rates of pay in your workplace;
3. Review your existing contracts of employment, policy docs, letters of offer etc and provide written compliance advice on compliance requirements with the Fair Work Act, Modern Award(s) and NES.

This offer is valid until 30th June, 2010.

Gwen Mclroy

Gwen Mclroy is the Managing Director of Indigo Field Industrial Relations the home of Employer Assist. Employer Assist provide specialist NFP HR & IR advice and support to all Not-for-Profit sector employers across Australia.

Simply call 1300 153 154 or go to

www.indigofield.com.au ■



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Co-ordinating Co-operatives: the new Co-operative National Law



Objective	Option 2 - Status Quo	Option 3 - Co-operatives National Law
2	<ul style="list-style-type: none"> would not apply relevant provisions of the Act consistently across states and territories state and territory legislation often not updated when Act is updated - references made the repealed or amended sections of the Act location of equivalent provisions vary across jurisdiction requiring each state or territory Act or Regulation to be reviewed to identify, interpret and modify relevant provision process repetitive and time-consuming if rights or obligations in more than one jurisdiction are to be established 	<ul style="list-style-type: none"> one off identification of provisions of Act to be modified and applied to co-operatives consistent application across jurisdiction provisions easier to understand due to restructured manner of modification and application no increased compliance costs reduced costs associated with information gathering

Objective	Option 2 - Status Quo	Option 3 - Co-operatives National Law
3	<ul style="list-style-type: none"> financial and auditing requirements would be neither simplified nor consistent with small proprietary companies compliance similar to that of public companies continued inconsistencies where some jurisdictions provide modest exemptions whilst others offer none high costs would continue 	<ul style="list-style-type: none"> simplified financial reporting and auditing similar requirements to small proprietary companies available to small co-operatives prescribed definition of "small co-operative" determine cost of reductions arising from exemptions

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Co-ordinating Co-operatives: the new Co-operative National Law

Objective	Option 2 - Status Quo	Option 3 - Co-operatives National Law
4	<ul style="list-style-type: none"> continued high costs to register in other jurisdictions continued uncertainty as to whether registration will be approved new notification system planned to replace registration system - reduces costs but still creates competitive disadvantage to companies where no restrictions are imposed on conducting business across jurisdictions notification procedure reduces costs and procedural difficulties associated with carrying on business across borders no approval necessary no notification to a regulatory body necessary 	<ul style="list-style-type: none"> incorporation of the proposed notification procedure for foreign co-operatives same as if status quo retained similar to registration as a company or Registrable Australian Body (RAB) with ASIC only needs to be done once alternative: no prohibition on carrying on business in foreign jurisdiction if registered in a jurisdiction that applies the Co-operatives National Law or where co-operative holds an RAB number
Objective	Option 2 - Status Quo	Option 3 - Co-operatives National Law
5	<ul style="list-style-type: none"> variations in application forms and fees would continue no enforceable undertakings no compliance mechanism available to Registrar of Co-operatives in any jurisdiction 	<ul style="list-style-type: none"> nationally uniform provision for supervision of co-operatives (based on current provisions in Queensland) template can be modified by each jurisdiction if necessary eg in relation to use of search warrants national regulations can be establish standard forms for applications and returns and can set default fees enforceable undertakings equivalent to those currently available to ASIC no effect on compliance costs expected

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(Continued from page 10) **Co-ordinating Co-operatives: the new Co-operative National Law**



Chapter	Summary
1 - Preliminary	<ul style="list-style-type: none"> • provides principles used by a co-operative organisation • these principles are agreed by international Co-operative Alliance and incorporated into Recommendation 193 of the International Labor Organisation • specifies definitions and interpretation • sets limits on application of the Act
2 - Formation, powers and constitution of co-operatives	<ul style="list-style-type: none"> • provides mechanism for incorporation and transfer to another form of corporate body • specifies legal powers of incorporated body • identifies matters to be included in rules • authorises Registrar of Co-operatives to publish model rules • establishes provisions for membership • provides for issuing shares
3 - Management and operation co-operatives	<ul style="list-style-type: none"> • establishes requirements for directors and officers (more consistent with the Act) • minimum requirements for voting and holding member meetings • provides requirements for financial reporting which are more streamlined for small co-operatives (more consistent with the Act) • provides for fundraising from public through securities eg debentures • enables co-operatives to issue special type of security (Co-operative Capital Unit) • sets out disqualification of directors and officers • restrictions on acquisition of interests in a co-operative

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(Continued from page 11) **Co-ordinating Co-operatives: the new Co-operative National Law**

Chapter	Summary
4 - Structural and other events for co-operatives	<ul style="list-style-type: none"> • deals with circumstances where co-operative is restructured or ceases to exist • applies provisions of Act related to co-operatives under administration, receivership or that are insolvent or being wound up • simplifies process for winding up where no longer in operation • regulates mergers and transfers • deals with compromises and arrangements with creditors • sets out the de-registration process and requirements

Chapter	Summary
5 - Foreign co-operatives	<ul style="list-style-type: none"> • simplifies existing administrative arrangements for co-operatives that conduct business in more than one state or territory • authorises Registrar of Co-operatives to wind up foreign co-operative has been de-registered in their home jurisdiction

Chapter	Summary
6 - Supervision and protection of co-operatives	<ul style="list-style-type: none"> • establishes powers of Registrar of Co-operatives, inspectors and special investigators • provides procedure for conducting investigations • provisions able to be modified by particular jurisdictions to account for local circumstances • establishes general offence provisions eg making false statements, falsification of records, fraud, offering and accepting commissions

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(Continued from page 12) Co-ordinating Co-operatives: the new Co-operative National Law



Chapter	Summary
7 - Legal proceedings and other matters	<ul style="list-style-type: none"> establishes nationally consistent provisions for offences, appeals against administrative decisions and use of evidence in proceedings
8 - General	<ul style="list-style-type: none"> miscellaneous administrative matter eg service of documents, making of national regulations

Chapter	Summary
Schedule 2	<ul style="list-style-type: none"> terms used in provisions regulating interests in shares and property
Schedule 3	<ul style="list-style-type: none"> provisions for receivers and controllers of property when under administration or being wound up
Schedule 4	<ul style="list-style-type: none"> transitional provisions
Schedule 5	<ul style="list-style-type: none"> interpretation provisions
Schedule 6	<ul style="list-style-type: none"> registration of charges against co-operative property redundant when proposed national property security legislation comes into effect

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(Continued from page 13) Co-ordinating Co-operatives: the new Co-operative National Law

It is anticipated that this new piece of legislation will be enacted in New South Wales during 2010, with the other jurisdictions applying the legislation within twelve months, so that a fully national co-operatives law is implemented in 2011.

Conclusion

The closing date to submit comments on the Ministerial Council's Regulatory Impact Statement was 26 February 2010. We must now wait for the preparation and publication of the decision making Regulatory Impact Statement that will contain the results of further analysis of the expected impacts of introducing the *Co-operative National Law*, taking into account submissions from stake holders. It is clearly imperative that a change to the current legislative framework is required to quell the declining numbers of co-operatives, and to improve the regime within which these organisations operate by removing barriers to competition and reducing the costs of complying with administrative requirements.

Naturally, co-operatives must also help themselves. Whether or not a national scheme is introduced, co-operatives should be reviewing their constituent documents and managerial and operational processes and procedures to ensure that they too are encouraging competition and efficiency. All organisations meander off track, away from their initial objectives, from time to time, or even just go stale. The possible introduction of a whole new framework under which to operate signals a prime time for a spring-clean or thorough audit.

It will be interesting to analyse the success of any national legislative framework over the coming years. One obvious measure of its success will be the rate of atrophy within the sector; if it continues on its current course, the costs, in time and money, spent on introducing and implementing a national system may all be too little, too late. ■

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Back issues

All issues of *Balancing Act* are available online at www.makdap.com.au. Articles in the last two issues include:

Issue 15, December 2009

- Watch out ... don't get sidetracked
- Reducing the administrative burden - GST and salary sacrifice arrangements
- PPF regime gets a makeover
- Where there's no will, is there a way?

Issue 14, September 2009

- Prescribed Private Funds - legislative changes
- ATO areas of focus for the not-for-profit sector
- When is a time limit not a time limit?
- Is cause-related marketing a fundraising activity?

Please feel free to circulate this newsletter to others who may be interested. If you would like to receive future issues of *Balancing Act* via email, please register at http://www.makdap.com.au/resources_registration.cfm.

Disclaimer: This publication is a non-comprehensive general outline of the law as at 31 March 2010. You should not act upon or rely on any information contained in this newsletter without obtaining specific legal advice.

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