COMMERCIAL LITIGATION: 10 SIGNIFICANT DEVELOPMENTS IN AUSTRALIA IN 2016

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Legal Briefings – By **Andrew Eastwood** and **Simone Fletcher**

As 2016 winds down and we look towards the New Year, we have reflected on the key takeaways of ten significant commercial litigation developments from the year that has been that will have lasting implications going forward:

1. *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* affirmed the long-standing principle that ambiguous statements made during contract negotiations will not give rise to a collateral contract or a claim for estoppel;

2. *Paciocco & Anor v Australia and New Zealand Banking Group Limited* clarified the broad range of circumstances that can be taken into account when determining whether a fee is a penalty;

3. *Simic v New South Wales Land and Housing Corporation* demonstrates that equity will intervene to rectify errors in documents made due to common mistake;

4. *HIH Insurance Limited (in liquidation) & Ors* provided a precedent for the successful application of market based causation in the shareholder class action context;

5. *Money Max Int Pty Ltd (trustee) v QBE Insurance Group Limited* indicated that claimants in a shareholder class action may be required to contribute a court-determined amount to a 'common fund';

6. *Hastie Group Ltd (in liq) v Moore and Cantor v Audi Australia Pty Ltd* underlined that courts will not necessarily find that legal professional privilege has been impliedly waived in circumstances where privileged material is disclosed to a third party;

7. *Attwells v Jackson Lalic Lawyers Pty Limited* significantly curtailed the ambit of

advocate's immunity in Australia;

8. *Australasian Centre of Corporate Responsibility v Commonwealth Bank of Australia* emphasised the divergence between Australian and United States corporate law in terms of shareholder power;

9. *State of Victoria v Tatts Group Limited* and *Tabcorp Holdings Limited v State of Victoria* highlighted the complexities of contracting with the State; and

10. *IMC Aviation Solutions Pty Ltd v Atlain Khuder LLC, Ye v Zeng (No 5)* and *Sino Dragon Trading v Noble Resources International (No 2)* grappled with the question of indemnity costs awards following unsuccessful attempts to challenge arbitral awards.

These developments are addressed in further detail below. A number of these developments will continue to take shape in 2017. In particular:

- the High Court appeal of the Victorian Court of Appeal's judgment this year in *Gee Dee Nominees Pty Ltd v Escosse Property Holdings Pty Ltd* [2016] VSCA 23 will provide further guidance as to the effect of deleted words in a contract, in particular whether the mutual intention of parties can be considered when approaching questions of construction in the context of a commercial contract;

- the hearing of ASIC's cases against the major retail banks in relation to the alleged rigging of the BBSW will raise important issues in relation to, among other things, the market misconduct and unconscionable conduct provisions;

- a number of significant High Court judgments are anticipated in the competition space. Indeed, in the last week of term the High Court issued its judgment in *ACCC v Flight Centre*, which addresses issues including whether services such as 'booking' services are ancillary services to international air travel and whether agents can be acting in competition with their principal. The High Court will also hear the appeal in *Air New Zealand and PT Garuda v ACCC*, raising significant issues in relation to alleged price fixing, and the meaning of a 'market' in Australia. Further, significant reforms have been proposed to the misuse of market power provisions in the *Competition and Consumer Act 2010* (Cth).

2017 will also see Justice Susan Kiefel become Australia's first female High Court Chief Justice. The implications of recent changes to court processes will also become apparent following the implementation of revised practice notes in the High Court (especially concerning the determination of special leave applications, with the Court indicating it will determine the majority of applications on the papers without an oral hearing) and in the Federal Court with the commencement of the National Court Framework and the resulting consolidation of 60 practice documents into 26 national practice notes.

HIGH COURT REMINDS OF THE PERILS OF EMPTY PROMISES

In *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* (2016) 90 ALJR 770, a majority of the High Court affirmed the long-standing principle that statements made during contractual negotiations that are ambiguous, or 'vaguely encouraging', will not give rise to a collateral contract or a claim for estoppel.

The alleged collateral promise was an assurance given by a landlord in the context of lease negotiations that upon the expiration of a 5 year lease the tenants would be "looked after at renewal time". The majority of the Court considered that this statement could not possibly have been interpreted as a contractual promise to offer a further lease and, even if the statement could be considered a contractual promise, it was so vague as to be unenforceable.

Further, the majority held that the landlord was not estopped from denying that such a collateral contract existed. Their Honours echoed the long standing principle that a claim for estoppel could only be made out if the assumption reasonably induced is the same assumption that is relied upon.

This case also re-enlivened the ongoing debate surrounding the different forms of estoppel. The tenants sought to characterise their claim as proprietary estoppel on the basis that it was more easily established than promissory estoppel. Ultimately, the Court did not resolve this debate and merely held that the tenants were procedurally barred from re-characterising their claim. However, Justice Nettle's detailed analysis of the issue will be insightful for future cases.

The case indicates that parties must be careful when relying upon statements made during the course of contractual negotiations, as statements that are vague or ambiguous will generally be unenforceable. Parties should seek to clarify any such representations and have them formally included in the contract if necessary.

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HIGH COURT CONSIDERS TEST IN PENALTIES CLASS ACTION

Paciocco & Anor v Australia and New Zealand Banking Group Limited (2016) 90 ALJR 835 (***Paciocco***) considered two key questions: first, whether provisions for various bank fees were unenforceable as penalties and, second, whether their inclusion in customer contracts contravened statutory provisions relating to unconscionable conduct, unjust and unfair contract terms.

In dismissing the appeal, the majority (French CJ and Kiefel, Gageler and Keane JJ; Nettle J in dissent) considered the commercial interests of ANZ seeking to uphold the clause, including the recovery of operational costs, loss provisioning and increases in regulatory capital.

The majority reasoned that although the fee imposed by ANZ was greater than what could be recovered in a claim for damages, this did not (of itself) render the fee a penalty. A fee stipulated for payment on default may "protect an interest that is different from, and greater than, an interest in compensation for loss caused directly by the breach of contract", provided that the fee charged is not out of proportion to the interests said to be damaged in the event of the default. Importantly, ANZ's admission that the late payment fees were not genuine pre-estimates of damage did not affect the characterisation of the fee. As such, the majority held that the contractual late payment fee was not used to 'penalise' customers for late payments.

By clarifying the broad range of circumstances that can be taken into account when determining whether a fee is a penalty, the decision provides banks, utility providers and other providers of financial services with increased confidence when including late payment fees within their contracts. It is now unlikely that a Court will accept a challenge to payment default fees, unless the fees themselves are out of proportion to the losses suffered.

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EQUITY RECTIFIES A MISNAMED PRINCIPAL

Simic v New South Wales Land and Housing Corporation [2016] HCA 47 is an important reminder of the utility of the equitable remedy of rectification, with the High Court confirming that while at law a written instrument which contained an incorrect name and ABN would be construed as a reference to that (incorrect) entity, the parties will in equity be taken to have intended that the correct party be named.

Nebax Constructions Pty Limited (**Nebax**) had contracted with New South Wales Land and Housing Corporation (the **Corporation**) for certain demolition and construction work. ANZ issued two performance bonds, which incorrectly referred (by name and ABN) to New South Wales Land & Housing Department rather than the Corporation. Since the principal named in the bonds did not exist, ANZ refused to honour them.

At first instance and before the NSW Court of Appeal, ANZ was ordered to pay the amounts owing to the Corporation on the basis that an incorrect name and ABN of the beneficiary did not preclude the fulfilment of the bonds, because it could be construed that the Corporation was the intended entity.

On appeal, the Court held that the lower courts' construction was not open because the Corporation and a 'department' of the New South Wales Government are legally distinct. References to the underlying contract in the bonds were irrelevant for the purposes of construction since ANZ was not required or intended to be concerned with the terms of the underlying contract, given the nature of performance bonds and guarantees. The Court endorsed the principle of 'autonomy'.

However, the Court held that recourse could be had to the equitable remedy of rectification in order to make a written instrument conform to the true agreement of the parties where the writing by common mistake fails to accurately express that agreement (which, in this case, was clearly that the Corporation be the stated principal under the bonds).

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A DIRECT DECISION FOR INDIRECT MARKET BASED CAUSATION?

Last year, we considered the Full Federal Court decision in *Caason Investments Pty Ltd v Cao* (2015) 236 FCR 322 (***Caason***), which supported the idea that market based causation is reasonably arguable in shareholder class actions.

The 2016 New South Wales Supreme Court decision in *HIH Insurance Limited (in liquidation) & Ors* (2016) 335 ALR 320 has significance as the first Australian authority to accept indirect market causation as sufficient grounds for causation in a misrepresentation case. Taken together with *Caason*, there now seems to be tentative judicial encouragement to proponents of market based shareholder class actions, potentially signalling further cases that rely on an indirect causation argument.

Market based causation contends that the market will efficiently price the value of any material information into the price of a security - meaning that a failure to disclose adverse material information can lead to an inflation of the price of the security. On this theory, damages can be claimed for share price inflation without needing to prove direct reliance on a specific disclosure failure made by a company.

In *HIH,* Justice Brereton accepted that, in the context of misrepresentation, causation could be established by evidencing the purchase of shares on the market at an inflated price due to misleading or deceptive conduct.

The plaintiffs were multiple investors who acquired shares in HIH Insurance Limited (**HIH**) between October 1998 and March 2001 (when HIH ceased trading). During 1999 and 2000, HIH released three financial results that materially misrepresented the true financial position of HIH. HIH admitted that these results contained misleading or deceptive representations in contravention of the (then) *Trade Practices Act* 1974 (Cth) and Corporations Law.

The key issue before Justice Brereton was whether causation could be established not by the plaintiffs' direct reliance on the misleading financial results, but by the indirect distortion to the price of the securities in the market caused by the misleading representations. His Honour held that proof of reliance on the contravening conduct is not an essential element of a cause of action for damages for misleading conduct, and that a sufficient causal connection can be established in ways that do not involve direct reliance. Importantly, his Honour found that previous authorities did not deny recoverability on the basis of indirect market causation, so the plaintiffs were able to recover the difference between the inflated price paid and true value of the shares as damages.

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OPEN CLASS ACTIONS ON THE RISE WITH THE ESTABLISHMENT OF THE "COMMON FUND"

In *Money Max Int Pty Ltd (trustee) v QBE Insurance Group Limited* [2016] FCAFC 148, the Full Federal Court of Australia held that all claimants in a class action funded by a litigation funder were obliged to contribute to the "common fund" (regardless of whether they had entered into the funding agreement) and that the contribution amount was to be determined by the Court and not the funder.

Money Max Int Pty Ltd (the **Applicant**) commenced proceedings on behalf of an "open class" of persons who had acquired shares in QBE Insurance Group Limited (the **Respondent**), during a defined period, and had suffered loss as a result of its conduct. The action was funded by International Litigation Funding Partners Pte Ltd (the **Funder**), although claimants were not required to sign a litigation funding agreement to participate.

The Applicant sought orders from the Court requiring that all claimants, regardless of whether they had entered into a litigation funding agreement with the Funder, contribute a fixed percentage of all money they received to the Funder. The Court agreed that this was reasonable as it would encourage open class actions, promoting access to justice.

The Court also stated that it would exercise its supervisory role and it would be the Court, not the funder, that would determine how much the funders would receive, noting that this judicial oversight was central in making its final decision as approval of the commission rate at a later stage in the proceedings would protect the interest of class members. In determining the rate of commission to be paid to the Funder, it is likely that the Court will consider the:

- market rate for funding similar class actions;
- nature and scope of the risks assumed by the funder; and
- result obtained for the claimants in the litigation.

Going forward, the Court's intervention will mean funders will not know in advance the rate of return they are likely to receive. Parties to a class action will be required to conduct settlement discussions with an understanding that agreements made in light of an expected rate of return to funders may be altered following court determination of what is fair and reasonable for claimants.

However, the establishment of the common fund model has removed a primary obstacle for litigation funders (namely, the requirement to enter into funding agreements with every claimant). As a result, it is expected that there will be more (and larger) class actions with fewer competing proceedings against a defendant in relation to the same conduct. Further, proceedings are likely to be commenced more quickly, as there is no longer a need to sign up a minimum number of claimants to a funding agreement.

Our briefing on the *Money Max Int Pty Ltd (trustee) v QBE Insurance Group Limited* case is available online.

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COURTS ENDORSE INSTANCES OF DISCLOSURE NOT CONSTITUTING WAIVER OF PRIVILEGE

Considerable care must be taken when providing privileged documents to a third party, given the risk of waiver. However, two cases this year have confirmed that courts will not readily find that legal professional privilege has been impliedly waived in circumstances where privileged material is disclosed to a third party. These decisions should reassure clients and their lawyers that mere disclosure to a third party, in the absence of any unfair or inconsistent conduct, will not jettison the privileged status of a document.

The case of *Hastie Group Ltd (in liq) v Moore* [2016] NSWCA 305 (***Hastie***) concerned a claim for privilege in litigation involving the Hastie Group (in liquidation) (**the Applicant**) and its former auditors (the **Respondents**). The Respondents served notices to produce documents which related to attempts to secure litigation funding. At first instance, Justice McDougall found that the documents were, with very limited exceptions, not privileged.

The Applicant sought leave to appeal, claiming privilege over an expert report provided to a prospective litigation funder by the liquidators' solicitors (the **Report**). The Court of Appeal held that the Report was privileged because both parties accepted that the engagement letter to which the Report was attached was privileged. Further, the Court held that the disclosure of the Report to a litigation funder on a confidential basis had not waived privilege, as waiver only operates where the *contents* of a privileged document are relied upon.

In *Cantor v Audi Australia Pty Ltd* [2016] FCA 1391 (***Cantor***), lawyers for Volkswagen AG (the **Respondent**) prepared documents that were later disclosed to the German motor transport authority (the **regulator**). The Applicants, who were Australian purchasers or lessees of various models of Volkswagen, Audi or Skoda cars, sought these documents by notices to produce issued in the course of five parallel class actions arising out of the widely-publicised Volkswagen 'emissions scandal'. Justice Bromwich of the Federal Court held that the documents were privileged, being confidential and prepared for the dominant purpose of providing legal advice.

As in *Hastie,* the Court found that privilege had not been impliedly waived by Volkswagen providing the documents to the regulator, given they were provided within a tight legislative regime for the limited purpose of the regulator's administrative review functions, with confidentiality being preserved at all times. Justice Bromwich emphasised that the Respondents had only broadly referred to correspondence with the regulator in the substantive proceedings. Crucially, the Respondents had not relied on any *specific* aspect of the privileged communication to unfairly advance their position.

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HIGH COURT CHIPS AWAY AT ADVOCATE'S IMMUNITY

In May, the High Court in *Attwells v Jackson Lalic Lawyers Pty Limited* (2016) 90 ALJR 572 significantly curtailed the ambit of advocate's immunity, which has traditionally shielded Australian lawyers against lawsuits arising from work 'intimately connected' with courtroom litigation. While it is now clear that chinks exist in advocates' armour, it is surprising that the Court declined to follow the lead of New Zealand, England, Canada, South Africa and the United States, where the immunity has been discarded entirely.

The majority in *Attwells* said that the scope of the immunity is "confined to conduct of the advocate which contributes to a judicial determination". As a result, it does not extend to the respondent's negligent advice pertaining to an out of court settlement.

The appellants were two guarantors of a company loan provided by ANZ. After the company defaulted on the loan, ANZ commenced proceedings against the guarantors and the company, which were settled when the parties agreed to a consent order in favour of ANZ. The consent order contained a conditional non-enforcement agreement between the parties to the effect that ANZ would not enforce the judgment if an amount of $1.75 million was paid by a prescribed deadline. When payment was not made by the deadline, the guarantors and the company became indebted to ANZ for $3.399 million. Mr Attwells, one of the guarantors, brought proceedings against his solicitors, Jackson Lalic Lawyers, alleging that they were negligent in advising him to enter into the consent order, given that the agreed debt was only $1.856 million. Jackson Lalic argued that advocate's immunity was a complete answer to the claim.

The High Court notably refused to overrule its own previous decisions recognising the immunity in 1988 (*Giannarelli v Wraith*) and 2005 (*D'Orta-Ekenaike v Victorian Legal Aid*). This determination reflects the Court's desire to preserve the "certainty and finality of the resolution of disputes by the judicial organ of the State," and its view that the abolition of the immunity should be left to the legislature. Nevertheless, the legal advice in *Attwells*, which related to a voluntary agreement between the parties, lacked the "intimate connection" to a judicial determination required to attract the immunity.

Australian lawyers must now be aware that they will not be entitled to rely upon advocate's immunity as a 'catch-all' defence against liability. Time will tell whether this apparent 'settlement exemption' to advocate's immunity will be confined to circumstances where there was no judicial involvement in the settlement, a question specifically left open by the majority.

This uncertainty may have particular significance in the class action space and in civil penalty proceedings. The Court in *Attwells* expressly acknowledged that the settlement of class actions requires the exercise of judicial power, but declined to consider whether the immunity would therefore necessarily apply.

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WORDS OF ADVICE TO 'ADVISORY' SHAREHOLDERS FROM THE FULL FEDERAL COURT

Last year, we reported on the Federal Court decision in *Australasian Centre of Corporate Responsibility v Commonwealth Bank of Australia* (2015) 107 ACSR 489 concerning the ability of the Australasian Centre of Corporate Responsibility (**ACCR**) (representing 100 shareholders of the Commonwealth Bank of Australia (**CBA**)) to move a set of non-binding resolutions regarding matters that fell within the responsibility of CBA's board of directors at CBA's annual general meeting (**AGM**).

At first instance, Justice Davies confirmed that the resolutions did not need to be put to the shareholders at the AGM, as shareholders cannot control or direct the management of a company in circumstances where the company's constitution vests responsibility for that management exclusively with the directors.

On appeal to the Full Federal Court in *Australasian Centre of Corporate Responsibility v Commonwealth Bank of Australia* (2016) 113 ACSR 600, the focus was primarily whether two of the non-binding resolutions could be validly moved at CBA's AGM. The Full Court held that because the first resolutions went directly to matters concerning CBA's management, and management of CBA was vested exclusively in the directors, CBA was not required to put the resolutions to its AGM. The Full Court also rejected arguments that the shareholders had either an implied or plenary power to require the resolutions to be moved.

This decision emphasises the divergence in shareholder power under Australian and United States corporate law. In the US, shareholders often pass non-binding resolutions (similar to those proposed by the ACCR) in order to advise management of their opinion on managerial issues. This decision has emphatically denied this right in Australia, providing little scope for advisory (or activist) shareholders to impact managerial issues in a company. The timing of this decision following the recent repeal of provisions of the *Corporations Act* which allowed 100 or more shareholders to force a company to call a general meeting (the rule now requires at least 5% of shareholders entitled to vote to call a general meeting) serves to further limit the scope of advisory activism by shareholders.

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SOVEREIGN RISK AND PROTECTION FROM UNFORESEEABLE GOVERNMENT CONDUCT

Last year we discussed the related decisions of the Victorian Supreme Court in *Tabcorp Holdings Limited v The State of Victoria* [2014] VSCA 312 and *Tatts Group Ltd v State of Victoria* [2014] VSCA 311. At that stage, the Victorian Court of Appeal had dismissed Tabcorp Holdings Limited (**Tabcorp**)'s claim for compensation in both contract and statute for the State's failure to make a terminal payment to Tabcorp upon the expiry of its licence and grant of new licences to other entities. In contrast, Tatts Group Limited (**Tatts**)'s contractual claim for compensation was upheld, as the Court of Appeal found that the State and Tatts had negotiated a written agreement which included the State's promise to pay a terminal payment.

To recap, in 1994 Victoria granted Tabcorp and Tatts a duopoly in the ownership and operation of gaming machines. The legislation granting Tabcorp its licence provided for a terminal payment to Tabcorp upon the expiry of its licence and the grant of new licences. This was provided for contractually in Tatt's case (together the '**1994 Regime'**). In 2008, the State amended the relevant legislation and established a new regime that allowed for allocations of 'gaming machine entitlements' (**GMEs**), which Tabcorp and Tatts argued amounted, in effect, to the issuance of new licences.

This year, the High Court held in *State of Victoria v Tatts Group Limited* (2016) 90 ALJR 392 and *Tabcorp Holdings Limited v State of Victoria* (2016) 90 ALJR 376 that neither Tabcorp nor Tatts was entitled to compensation under the new licensing regime.

In relation to Tabcorp, the High Court found that the Act did not contemplate licences other than the one issued to Tabcorp under the 1994 Regime, and Tabcorp's entitlement to compensation was predicated upon the issuing of 'new licences' that continued the duopoly enjoyed by both Tabcorp and Tatts. For these reasons, the Court found that it was 'unmistakable' that 'new licences' was a specific reference to the licence issued to Tabcorp under the 1994 Regime.

Similarly, in the Tatts' case the High Court found that compensation was only payable where a licence of the same kind that was issued to Tatts was issued to another party. The Court noted that the contractual arrangement between Tatts and Victoria was predicated on the assumption that Tatts would continue to participate in the duopoly, and would receive compensation if removed from that duopoly in favour of another party. As the new regime removed the duopoly entirely and created a relatively competitive market, compensation would not be payable.

These cases highlight the complexities involved when companies contract with the State, particularly the vulnerabilities created by changing legislative regimes. They also demonstrate the importance of considering whether legislative and contractual benefits granted under one regime can survive regulatory changes.

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AUSTRALIAN COURTS CONTEND WITH INDEMNITY COSTS AND THE ENFORCEMENT OF ARBITRAL AWARDS

Australian courts are grappling with the question of whether to follow the lead of Hong Kong, where indemnity costs orders are made by default against a party who unsuccessfully seeks to set aside or resist enforcement of an arbitral award in the absence of special circumstances. Supporters of the approach contend that it would act as a deterrent to unmeritorious challenges to awards and further entrench Australia as a 'pro-arbitration' jurisdiction. The issue, which remains unsettled, received increasing judicial attention throughout 2016.

The Victorian Court of Appeal in *IMC Aviation Solutions Pty Ltd v Atlain Khuder LLC* [2011] VSCA 248 declined to follow the Hong Kong approach, finding that a decision to award indemnity costs should be determined by the facts of the individual case.

In contrast, in *Ye v Zeng (No 5)* [2016] FCA 850 Chief Justice Allsop awarded the applicant its costs on a full and complete indemnity basis by 'applying entirely conventional and unremarkable authority'. Although the case did not mandate the application of any default rule, his Honour stated in obiter that there were 'powerful considerations' in favour of the Hong Kong approach.

Most recently in *Sino Dragon Trading v Noble Resources International (No 2)* [2016] FCA 1169, Justice Beach rejected any rule requiring that costs be awarded on a *prima facie* basis against a party that fails to successfully set aside an award. His Honour did, however, note that an award of indemnity costs would be justified where a party fails to set aside an award where the claim had 'no reasonable prospects of success', although the burden of proving this should remain on the successful party in the arbitration.

The limitation of the Australian approach appears to be the premise on which it is founded. As demonstrated in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248 at [55], a decision to award indemnity costs against an unsuccessful party requires the existence of special circumstances. However, an unsuccessful application to resist enforcement of a foreign arbitral award is not considered to be an established category of special circumstances in Australia.

It is worth monitoring any further developments in the context of Australia's push to establish itself as a 'pro-arbitration' jurisdiction. It may be that as Courts become more alive to unmeritorious challenges, as a practical matter, indemnity costs will be awarded more often, even if no general rule is adopted.

Our briefing on the *Ye v Zeng (No 5)* case is available on our website.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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