

Submission on the Short-term Rental Accommodation Planning Framework

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Director, Housing Policy

NSW Department of Planning and Environment

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The NSW Young Lawyers Environment and Planning Law Committee makes the following submission in response to the Expression of Intended Effect for the proposed amendments to the Short-term Rental Accommodation Planning Framework.

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 16 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The NSW Young Lawyers Environment and Planning Law Committee (**Committee**) comprises of a group of approximately 50 members interested in our environment. The Committee focuses on environmental and planning law issues, raising awareness in the profession and the community about developments in legislation, case law and policy. The Committee also concentrates on international environment and climate change laws and their impact within Australia.

Glossary of Abbreviations

Code of Conduct– Mandatory Code of Conduct to be brought in under the *Fair-Trading Act 1987*

EIE - Explanation of Intended Effect for the Short-term Rental Accommodation Planning Framework

EPA Act - *Environmental Planning and Assessment Act 1979* (NSW)

EPA Reg - *Environmental Planning and Assessment Regulation 2000* (NSW)

STRA – Short Term Rental Accommodation

Standard Instrument - Standard Instrument (Local Environmental Plans) Order 2006

Summary of Recommendations

1. The intersection between the definitions of STRA, 'bed and breakfast accommodation' and 'serviced apartments' should be considered closely. The exclusion of 'tourist and visitor accommodation' in the definition of STRA should be drafted in a way that makes it clear that uses that could be characterised as both 'tourist and visitor accommodation' or STRA must be characterised as 'tourist and visitor accommodation' to prevent commercial tourist and visitor accommodation operators from circumventing existing requirements to obtain development consent.
2. STRA should be expressly permissible in zones where shop top housing is permissible.
3. Compliance with the constraints on STRA could be enforced by use of development control orders under the EPA Act, however adequate resourcing of Councils would be needed to ensure that enforcement action could be carried out.
4. Further clarity should be given to why differences in community needs within the Greater Sydney Area are not accommodated in the framework, while those in 'regional NSW' are. In the absence of a sound rationale for this distinction, all Councils should be able to set the number of days from 180 to 365 days based on the local information available as to community needs, amenity impacts and enforcement ability.
5. Further clarification should be given as to what "offensive noise" in the STRA context means. This should be defined in the Code of Conduct as it will likely be a trigger for reporting of the host or tenant of STRA.
6. Local councils should be permitted to introduce guidelines on what constitutes "offensive noise" in the STRA context for their local areas if the Code of Conduct is silent on the issue, or which can deal with locality specific regulation of amenity impacts.
7. The Code of Conduct should set out the obligations of guests to avoid creating offensive noise prior to making a booking by the industry participant providing the booking service, and that guests are informed of their obligations to avoid creating offensive noise either prior to the commencement, or at the commencement, of the stay by the accommodation provider.
8. The Code of Conduct should inform industry participants of their personal obligations and liability with regard to the creation of offensive noise.
9. Under the penalties provisions in the Regulations, a loading system should be introduced which allows for greater penalties to be ordered against Industry participants who have previously contravened the same or similar provision of the Code of Conduct.
10. To reduce congestion on local streets, accommodation providers should be required to make off-street parking available to STRA guests.
11. Owners Corporations in strata premises should be allowed to have by-laws that deal with visitor parking, including by requiring visitors to pay a levy to access visitor parking spaces.

12. Local councils should be encouraged to consider whether a parking permit based scheme is relevant within their local areas in an effort to reduce the number of vehicles on local streets as a result of STRA visitors.
13. The Code of Conduct should specify that additional waste generated by STRA is to be kept within residential levels as defined by local councils.
14. The Code of Conduct should advise accommodation providers that they remain responsible for waste management at the property.
15. Local councils should be encouraged to make information available to STRA accommodation providers about the recycling programs that can either be distributed to guests or displayed within the accommodation.
16. STRA accommodation providers should have an obligation to inform their guests about the local council waste and recycling programs.
17. The definition of STRA should be revised to ensure consistency with the definition of short-term rental accommodation arrangement in the *Fair Trading Act 1987* (NSW) i.e. by limiting the land use definition to occupation of not more than 3 months at any one time.
18. Details of the proposed appeal mechanism for the listing of a person on the exclusion register should be released and be subject to public consultation before the *Fair Trading Amendment (Short-term Rental Accommodation) Act 2018* comes into effect in 2019.
19. The Committee recommends that during the transitional phase of the implementation of the amendments to the STRA framework, the Code of Conduct and the approach to managing inconsistencies between planning instruments and the new land use definition, should be addressed.
20. The draft Code of Conduct should be made available for public consultation prior to the legislative amendments coming in effect.
21. In the event that a Code of Conduct has not been made available within 12 months of the STRA legislation and regulations coming in effect, local councils should be empowered to make their own Code of Conduct applicable to STRA industry participants that operates on an interim basis in their local government area.
22. The Department of Planning and Environment should implement a two-phased approach to the timeframe for implementing the new framework, with matters deemed of economic impact having a later implementation date than those which deal with environmental and community aspects.
23. Where local councils already have planning instruments which address STRA, an additional 6 months should be allowed for the transition to the new NSW-wide approach. After such time, the NSW-wide approach should prevail.

Introduction

The Committee welcomes the opportunity to comment on the Explanation of Intended Effect for the proposed amendments to the Short-term Rental Accommodation Planning Framework (EIE).

On balance, the Committee supports the changes to the planning framework set out in the EIE and notes that the EIE takes a number of important steps towards creating a state wide and government wide approach to novel issues raised by the share economy.

However, the Committee notes that the definition of STRA as a land use requires further clarification to ensure it complements the existing suite of land uses associated with tourist and visitor accommodation and the definition of STRA arrangements in the *Fair Trading Act 1987*. Further, the precise impact that this framework and associated legislation will have will be dictated by the Code of Conduct will have on online platforms, managing agents, hosts and guests remains largely unknown until the proposed Code of Conduct is released.

This submission adopts the headings in Part 4 of the EIE - the proposed changes to the planning system.

4.1 Proposed amendments to the Standard Instrument Order 2006

The Committee has considered the proposed amendment to the Standard Instrument by the inclusion of a new land use definition for STRA, being:

“the commercial use of an existing dwelling, either wholly or partially, for the purposes of short-term accommodation, but does not include tourist and visitor accommodation.”

Conflict with existing definitions

The Committee submits that it is important to consider existing definitions within the Standard Instrument. One relevant definition is that of ‘bed and breakfast accommodation’, which is a form of ‘tourist and visitor accommodation’. Bed and breakfast accommodation is defined to mean:

“... an existing dwelling in which temporary or short-term accommodation is provided on a commercial basis by the permanent residents of the dwelling and where:

(a) meals are provided for guests only, and

(b) cooking facilities for the preparation of meals are not provided within guests’ rooms, and

(c) dormitory-style accommodation is not provided”

Some STRA operators are carrying out their activities from several dwellings that they own (or otherwise

lawfully occupy) within the same building without residing in the same dwellings – this is apparent when one finds two or more listings within the same building advertised by the same person. Such an operation is similar to that of ‘serviced apartment’, another form of ‘tourist and visitor accommodation’, which is defined to mean:

“a building (or part of a building) providing self-contained accommodation to tourists or visitors on a commercial basis and that is regularly serviced or cleaned by the owner or manager of the building or part of the building or the owner’s or manager’s agents”

‘Bed and breakfast accommodation’ is generally permitted with consent in most residential zones as well as most commercial zones (either as nominate use or under the chapeau of ‘tourist and visitor accommodation’). Serviced apartments are permissible with development consent in a number of commercial zones (either as a nominated use or under the chapeau of ‘tourist and visitor accommodation’) but generally prohibited in residential zones.

The Committee notes that STRA is proposed to be exempt or complying development in all zones where dwellings are permissible or where a dwelling is permitted to be used. The proposed definition of STRA is similar to the definitions of ‘bed and breakfast accommodation’ if the resident of the dwelling is the provider of the accommodation service, particularly if meals are available (either formally or informally). On the other hand, the proposed definition of STRA is essentially identical to that of ‘serviced apartment’ if an operator has a number of dwellings within the same building available.

The Committee envisages situations where potential bed and breakfast operators, or those seeking to carry out a serviced apartment use, may rely on the new provisions to circumvent the existing requirements for obtaining development consent as tourist and visitor accommodation.

As an example, a serviced apartment operator may obtain development consent for the construction of multi-dwelling housing or residential flat building (noting that multi-dwelling housing may also be permissible as complying development under the new Low Rise Medium Density Housing Code under the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 in certain residential zones). Following construction, it is then permissible for some form of STRA to be carried out from those premises by the letting of the dwellings, whether wholly or in part.

The example highlights the potential for STRA to be operated with minimal regulatory approvals, where normally a consent authority would impose onerous conditions of consent on the use of premises as tourist and visitor accommodation, including requirements to submit and operate in accordance with a plan of management.

Despite the proposed definition of STRA to deliberately be excluded from 'tourist and visitor accommodation', the proposed definition will create doubts in land use characterisation and add burden to the enforcement of land uses by regulatory authorities. Further, conflicts may arise where the particular zoning does not envisage a land use that is, having regard to the activities and transactions being conducted, essentially that of tourist and visitor accommodation.

The Committee submits that each of the species of Tourist and Visitor Accommodation, and their interaction with Short Term Rental Accommodation, should be considered separately. For example, it is not unusual for serviced apartments, of which there is a surplus in the City of Sydney, to be let via Airbnb.

Recommendation: The intersection between the definitions of STRA, 'bed and breakfast accommodation' and 'serviced apartments' should be considered closely. The exclusion of tourist and visitor accommodation in the definition of STRA should be drafted in a way that makes it clear whether uses that could be characterised as either tourist and visitor accommodation or STRA must be characterised as tourist and visitor accommodation to prevent commercial tourist and visitor accommodation operators from circumventing existing requirements to obtain development consent.

The EIE notes that the STRA land use will be permitted in all zones where dwellings are permissible. The Committee submits that it is not clear whether STRA will be permitted in business or mixed use zones where shop top housing is permissible but residential dwellings are otherwise prohibited (i.e. *Zone B1 – Botany Bay Local Environmental Plan 2013*).

Recommendation: STRA should be expressly permissible in zones where shop top housing is permissible.

4.2. Proposed amendments to the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008

Enforcement

The Committee submits that further guidance on the enforcement of the following limitations and requirements should be provided:

1. the various limitations on the days per year that short-term rental accommodation (STRA) can occur in properties where the host is not present;
2. the additional fire safety measures required for properties on mapped 'bushfire prone land'; and

3. the minimum fire safety and evacuation requirements for individual premises used for STRA.

The Committee notes that the proposed exempt and complying development approval pathways based on different levels of risk may be considered as general mechanisms of enforcement. For example, the Explanation of Intended Effect provides that a landowner will need to obtain a Complying Development Certificate for properties where the host is not present and the property is on mapped 'bushfire prone land'. However the Committee questions whether the enforcement of any of the above matters, and particularly the limitations on the days of operation, will be addressed in the mandatory Code of Conduct for participants in the STRA industry that will be provided for under the *Fair Trading Act 1987* (by virtue of the *Fair Trading Amendment (Short-Term Rental Accommodation) Act 2018*). The Committee notes that the amendments to the *Fair Trading Act 1987* will introduce certain offences and penalties for STRA industry participants who contravene the Code of Conduct. Nevertheless, the Committee submits that it may be suitable to implement other mechanisms of enforcement in addition to the measures that may be implemented under the Code of Conduct.

For example, development control orders under section 9.34 of the EPA Act may be appropriate. For example:

1. A Stop Use Order in accordance with the table to Part 1 of Schedule 5 of the EPA Act;
2. A Fire Safety Orders in accordance with the table to Part 2 of Schedule 5 of the EPA Act; and/or
3. A new development control order drafted specifically for STRA.

The Committee submits that such development control orders could complement the provisions of the Code of Conduct. For example, the Code of Conduct will provide a registration system for the registration of residential premises used for the purposes of STRA arrangements including details as to when the premises will be used for such purposes. Therefore, an existing Stop Use Order under point 1 of the table to Part 1 of Schedule 5 of the EPA Act could be made if it is found that a STRA-participant has contravened the Code of Conduct and their exempt or complying development approval by using premises for STRA purposes for more days than are permitted.

Further, a Fire Safety Order under point 1 of the table to Part 2 of Schedule 5 of the EPA Act could be made when it is found that the minimum fire safety and evacuation requirements for individual premises used for STRA are not being complied with. Such an order could be applied together with a Stop Use Order that provides that the use should cease until, for example, the upgrades relevant to meeting the requirements have been implemented.

The Committee submits that the effective implementation of such measures would require control of

premises used for STRA to be added to the enforcement actions of Councils. This is subject to resourcing constraints and this should be considered in conjunction with the likely effect of the STRA framework.

Recommendation: Compliance with the constraints on STRA should be enforced by use of development control orders under the EPA Act, however adequate resourcing of Councils would be needed to ensure that enforcement action could be carried out.

Restrictions on Greater Sydney

The proposed changes allow councils outside Greater Sydney to decrease the number of days STRA is permissible as exempt development per year from 365 days to no lower than 180 days to recognise the local differences and communities' needs in regional NSW. The Committee queries whether this intention is justified as an approach distinct from that in the Greater Sydney area, especially in circumstances where the reforms to the planning framework in this regard are intended to create parity of STRA planning controls across the State.

As summarised in the EIE, the public response to the NSW Department of Planning's 2017 Options Paper on short-term holiday letting provided that, 'from a planning perspective, feedback included support for a state-wide definition and a standard approach to planning controls, but with provision to respond effectively to the specific local context.' In line with this feedback, the Committee supports a standard approach to the issue of limiting the number of days that STRA can occur, with provision made for the specific local context including within the Greater Sydney area.

The Committee acknowledges that within the Sydney metropolitan area STRA occurs throughout the year and is not necessarily prevalent only during holiday periods unlike a number of other areas in NSW. However, there is insufficient explanation in the EIE as to why there is a need to place greater restrictions on the Greater Sydney area. The Committee maintains that each local government area should be able to restrict STRA according to the specific impact on amenities and the locality, to address one of the main concerns that have been raised by community groups and local residents.

The Committee suggests that the impact of STRA within Greater Sydney is uneven and the regulatory approach should be flexible and in line with the rest of the state. The Committee notes also the comment in the Options Paper that the 'majority of Airbnb hosts (in Sydney) rent their primary residences occasionally 37 nights per year' and suggests on this basis that stronger regulation is not necessary and has not been justified in the Greater Sydney Area.

Recommendation: Further clarity should be given to why differences in community needs within the Greater Sydney Area are not accommodated in the framework, while those in

'regional NSW' are. In the absence of a sound rationale for this distinction, all Councils should be able to set the number of days from 180 to 365 days based on the local information available as to community needs, amenity impacts and enforcement ability.

4.3. Noise and amenity impacts

The Committee supports the careful examination of noise, parking and waste management impacts of STRA in balancing the economic value of the industry and managing impacts upon the community in the amendments to planning instruments, and strata and Fair-Trading legislation.

Noise impacts

The Committee notes that there are no proposed changes to the powers that local councils or NSW Police have under the *Protection of the Environment Operations Act 1997* in relation to noise and amenity impacts. Under the existing legislative framework, “offensive noise” is defined as noise which “by reason of its level, nature, character or quality, or the time at which it is made, or any other circumstances” is “harmful” or interferes with comfort of others. There are several issues which arise from this approach, one of which is lack of clarity as to what “offensive noise” means. This uncertainty can make it difficult to manage the competing interests and expectations which may arise between guests, hosts and neighbouring properties. This is particularly the case where an offensive noise incident may be limited to the short term stay of one guest.

Recommendations:

- ***Further clarification should be given as to what “offensive noise” in the STRA context means. This should be defined in the Code of Conduct as it will likely be a trigger for reporting of the host or tenant of STRA.***
- ***Local councils should be permitted to introduce guidelines on what constitutes “offensive noise” in the STRA context for their local areas if the code of Conduct is silent on the issue, or which can deal with locality specific regulation of amenity impacts.***

The current difficulties with regard to the retrospective nature of the action to enforce noise control concerns is also noted, for example either reporting to the Police, Department of Planning and Environment or seeking noise abatement orders in the local court. With a view to minimising the creation of offensive noise in the first instance, it is recommended that the Code of Conduct mandates that guests must be informed of offensive noise restrictions both prior to booking STRA and at the commencement of their stay. This

obligation would apply to industry participants who receive revenue from the provision of STRA, such as booking agents and those providing the premises.

Recommendation: The Code of Conduct should set out the obligations of guests to avoid creating offensive noise prior to making a booking by the industry participant providing the booking service, and that guests are informed of their obligations to avoid creating offensive noise either prior to the commencement, or at the commencement, of the stay by the accommodation provider.

If the above steps are introduced and subsequently followed by the host, and offensive noise is generated during a stay, it is proposed to allow the legislative framework to enable orders to be made against both the host and the guest (for example, to allow fines and costs orders to be made against both parties) to encourage compliance and responsible STRA use. It is noted however, that this measure will be less effective where guests reside outside of NSW.

Recommendation: The Code of Conduct should inform industry participants of their personal obligations and liability with regard to the creation of offensive noise.

The Committee supports the concept of an exclusion register for industry participants who commit multiple offences under the Code of Conduct. To give greater effect to this approach, the penalties should allow for an additional loading for those who have previously contravened the Code of Conduct.

Recommendation: Under the penalties provisions in the Regulations, a loading system should be introduced which allows for greater penalties to be ordered against Industry participants who have previously contravened the same or similar provision of the Code of Conduct.

Parking

It is reasonably foreseeable that additional guests will generate additional vehicles in the surrounding area of the accommodation, particularly where the accommodation provider also resides at the premises during the STRA stay. This then presents additional challenges to manage, such as availability of parking spaces and congestion to local roads where off-street parking is not available. Enforcement of such issues also becomes another aspect of this amenity issue.

Recommendations

- ***To reduce congestion on local streets, accommodation providers should be required to make***

off-street parking available to STRA guests.

- *Owners Corporations in strata premises should be allowed to have by-laws that deal with visitor parking, including by requiring visitors to pay a levy to access visitor parking spaces.*
- *Local councils should be encouraged to consider whether a parking permit based scheme is relevant within their local areas in an effort to reduce the number of vehicles on local streets as a result of STRA visitors.*

Waste

Waste management is an important issue for all local councils. Accordingly, the Committee recommends that the Code of Conduct specifically deal with both the volume of additional waste generated at residential properties and how it is to be disposed of.

Local council areas, whilst all operating waste recycling programs, have differing recycling systems. In an effort to reduce landfill, it is proposed that providers of the STRA accommodation must inform guests, many of whom may not be familiar with that local council recycling program, of the requirements of that area's recycling program.

The Committee recommends that compliance with local council waste management requirements remain the STRA accommodation provider's responsibility, which should also be reflected in any legislative instruments.

Recommendations:

- *The Code of Conduct should specify that additional waste generated by STRA is to be kept within residential levels as defined by local councils.*
- *The Code of Conduct should advise accommodation providers that they remain responsible for waste management at the property.*
- *Local councils should be encouraged to make information available to STRA accommodation providers about the recycling programs that can either be distributed to guests or displayed within the accommodation.*
- *STRA accommodation providers should have an obligation to inform their guests about the local council waste and recycling programs.*

4.4. Additional elements of the Government policy

The definition of 'short-term rental accommodation arrangement' which is included in the *Fair Trading Amendment (Short-term Rental Accommodation) Act 2018* defines a 'short-term rental accommodation

arrangement' as:

1. A commercial arrangement for giving a person the right to occupy residential premises for a period of not more than 3 months at any one time; and
2. Other arrangements as provided for or excluded by the *Fair Trading Regulation 2012* (NSW).

This definition differs from that proposed to be introduced for the land use of STRA, particularly in that the Fair-Trading definition construes 'short term' as a maximum of 3 months at any one time.

Recommendation: The definition of STRA should be revised to ensure consistency with the definition of short-term rental accommodation arrangement in the Fair-Trading Act 1987 (NSW) i.e. by limiting the land use definition to occupation of not more than 3 months at any one time.

The *Fair Trading Regulation 2012* (NSW) may also provide for appeal rights against the listing of a person on the exclusion register, for the Secretary to recover from STRA participants the costs of enforcement and administration of the Code of Conduct and the power to exclude a participant or type of participant from the operation of the Code of Conduct. Further clarification as to the grounds of appeal and onus in proving the basis for listings should be released, and submissions invited, before the Amendment Bill comes into effect.

Recommendation: Details of the proposed appeal mechanism for the listing of a person on the exclusion register should be released and be subject to public consultation before the Fair Trading Amendment (Short-term Rental Accommodation) Act 2018 comes into effect in 2019.

STRA in Strata Schemes

The *Fair Trading Amendment (Short-term Rental Accommodation) Bill 2018* also contains amendments to the *Strata Schemes Management Act 2015* (NSW) (**SSM Act**) to allow for the creation, by special resolution of an owners committee, of by-laws that prohibit the use of a lot for STRA where:

1. the lot is not the principal place of residence of the owner; or
2. the lot is not the principal place of residence of the tenant (however, where a tenant is using the lot for STRA, they will be required to obtain owner's consent).

This amendment to the SSM Act will overturn in part the result of the NSW Civil and Administrative Tribunal decision of *Estens v Owners Corporation SP 11825* [2017] NSWCATCD 52 where it was held that the owner's corporation did not have power under section 139(2) of the SSM Act to make a special by-law

prohibiting short term letting as such a by-law prevented dealing in relation to a lot by prohibiting or restricting the lease (albeit short term) of a lot. The Committee supports this in the context of the planning framework as a way in which amenity issues associated with STRA can be managed privately, rather than in reliance on public authorities.

4.5. Transitional arrangements

The Committee notes that the Department of Planning and Environment will work with councils to amend any existing planning instruments which apply to STRA as part of transitional arrangements associated with the proposed changes. The Committee recommends that during the transitional phase of the implementation of the new STRA framework, additional issues should be addressed being:

1. the Code of Conduct; and
2. the approach that will be taken in the event of any inconsistency between planning instruments and the new land use definition.

Recommendation: The Committee recommends that during the transitional phase of the implementation of the amendments to the STRA framework, the Code of Conduct and the approach to managing inconsistencies between planning instruments and the new land use definition, should be addressed.

Code of Conduct

A significant amount of detail around noise and amenity will be covered in the yet to be released Code of Conduct, rather than in the legislation or regulations. Outlining the obligations of all parties in the Code of Conduct is essential for the balancing of interests, informing parties of their rights and responsibilities, and managing the expectations of STRA participants and communities where STRA occurs. For these reasons, it is recommended that a Code of Conduct is available as soon as practicable.

Recommendations:

- ***The draft Code of Conduct should be made available for public consultation prior to the legislative amendments coming in effect.***
- ***In the event that a Code of Conduct has not been made available within 12 months of the STRA legislation and regulations coming in effect, local councils should be empowered to make their own Code of Conduct applicable to STRA industry participants that operates on an interim basis in the local government area.***

Appropriate transitional periods

The STRA changes cover a vast range of issues associated with a number of industry participants, and has impacts in communities across NSW. For this reason, it may be beneficial to have a two-stream approach to the introduction and implementation of any STRA industry changes: one stream being for 'economic' issues (for example, where the number of days of a stay or the number of days in a year available for STRA are being reduced) and the other stream being for 'environmental' matters (for example, noise and amenity issues which have been aimed at reducing community and environmental impact).

Additionally, in the local council areas where LEPs already address STRA, a greater transition period may be desirable to enable complaint operators additional time to adjust their business practices to a new legislative framework.

Recommendations:

- ***The Department of Planning and Environment should implement a two-phased approach to the timeframes in the new approach, with matters deemed of economic impact having a later implementation date, than those which deal with environmental and community aspects.***
- ***Where local councils already have planning instruments which address STRA, an additional 6 months should be allowed for the transition to the new NSW-wide approach. After such time, the NSW-wide approach should prevail.***

Concluding Comments

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

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