Supplementary Submission to Review of Legal and Administrative Costs In Dust Diseases Compensation Claims

This Supplementary Submission has been prepared in response to the Issues Paper "Review of Legal and Administrative Costs in Dust Diseases Compensation Claims" released by the Attorney General's Department of New South Wales and the Cabinet Office following an announcement by the Honourable Bob Carr MP on 18 November 2004 to review legal and administrative costs in dust diseases compensation claims.

The Submission supplements the joint submissions of Amaca/UADFA and has been prepared on behalf of the following parties hereinafter referred to as UADFA:

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Introduction

1. All compensation systems have administrative and legal costs associated with the processing of claims.

2. The current common law damages system that operates in New South Wales through the Dust Diseases Tribunal of New South Wales (the Tribunal) has been acknowledged as "world's best practice" by numerous commentators. Accordingly, extensive reform of the existing system for compensating victims of dust disease through the Tribunal is in UADFA's submission both unnecessary and inappropriate.

3. Necessary reforms should be directed to improving the delivery of damages to victims of dust disease in the most timely and cost effective manner possible. Procedures should be streamlined so as to reduce legal costs. The reduction of legal costs in the processing of compensation claims is a fundamental principle that UADFA supports. A reduction in legal costs, long term, maintains the pool of money available to compensate victims of dust disease. UADFA's primary aim is to ensure that the pool of money necessary to compensate victims remains available indefinitely into the future.

4. UADFA has no empirical data available that could assist in assessing the current legal and administrative costs of claims in the Tribunal. Some guidance is available from material submitted to the Jackson Inquiry. Exhibit 85 to the Jackson Commission of Inquiry was an internal memorandum from Peter Shafron to Peter MacDonald dated 9 November 2001. At page 3 of the memorandum Shafron says the following:

   > *"There were other 'raw' figures available in January 2001… Those figures showed an upward trend in total damages payouts, a trend that appears to have commenced in 1999. On the other hand, legal costs are showing a clear trend in the other direction (i.e. getting smaller)."*

5. In relation to Amaca/Amaba litigation there is no evidence to suggest that legal costs increased after 2001 and there is every reason to believe that legal costs continued to trend in a downward direction.

6. On 21 November 2004 a major actuarial study by KPMG was released by James Hardie Industries NV being an assessment of Hardie liability as at 30 June 2004. Whilst the

actuaries found an increase in overall Hardie liability the amount assessed as legal costs declined by $55.7 million when compared to the previous assessment as at 30 June 2003.

7. The Tribunal utilises procedures that when instituted in 1989 were viewed as innovative and radical. Those procedures are largely driven by timetables with issues and listings conferences at the end of timetables. If matters are unsettled a date for trial is appointed.

8. The Tribunal has been in operation for over 15 years. During that time it has decided difficult and hard fought cases on questions of foreseeability, breach of duty and causation. These cases ran for many weeks and in most instances were appealed to the New South Wales Court of Appeal and on occasions to the High Court. The decisions of the Tribunal and the Appellate Court have laid down basic principles which are applicable to most claims now brought in the Tribunal. While there will always be a small number of test cases in the Tribunal, most cases at present do not involve contentious issues in relation to foreseeability and causation.

9. Existing Tribunal procedures are directed to providing expedition within the litigation process. This reflects the history of litigation. As the nature of cases has changed and liability issues have declined, the focus of the Tribunal's work has also changed. Claims where the only issues are exposure and damages have increased and the procedures of the Tribunal should be varied to promote early resolution of these issues outside the litigation process.

10. UADFA submit that early resolution of claims should become the dominant principle of future Tribunal litigation. UADFA say that the early resolution of claims is the key factor when looking to reduce legal costs. The earlier a claim is resolved the lower the administrative and legal costs involved.

11. Early resolution greatly benefits claimants as they will recover their damages earlier than would otherwise be anticipated.

12. UADFA submit that any intended reforms should be based on the following principles:

    (i) The system must be workable on both sides.

    (ii) Each side must have the opportunity to put their case fairly and properly so that justice is done.

(iii) There is no point in preserving the rights of claimants to recover common law damages if the claimants cannot obtain legal representation in order to pursue their rights.

(iv) A balance must be struck whereby the system is affordable and legal costs are minimised wherever possible without affecting the capacity of claimants to put their cases fully and properly.

13. Annexure A hereto is a copy of Exhibit 311 from the Jackson Commission of Inquiry. As at 30 June 2004 claims against James Hardie represented 52% of all claims before the Tribunal.

14. Any reform of the existing system for compensating victims of dust disease in the Tribunal must have due regard to the fact that Amaca/Amaba claims account for more than one half of all claims. Reforms to the existing system that are embraced by Amaca/Amaba are likely to be reforms with a high probability of success and reforms which will reduce legal and administrative costs in Amaca/Amaba claims.

15. Following the release of the Jackson Report, UADFA instructed its solicitors Turner Freeman to consult with Amaca/Amaba with a view to developing a Protocol proposal that had been placed jointly before the Jackson Inquiry by the UASG and MRCF. Thereafter lawyers from Turner Freeman representing UADFA and lawyers from Clayton Utz and Holman Webb representing Amaca/Amaba engaged in discussions with a view to establishing a Protocol for the more efficient and expeditious disposal of Amaca/Amaba claims. UADFA recognised at the time that a fundamental requirement of any settlement with Hardie would need to be a reduction of the costs of administering and litigating claims.

16. A Protocol was prepared in draft form and subjected to extensive discussion and amendment until both sides were satisfied that the document reflected the best alternate practice that could be developed for the benefit of claimants and Amaca. The Protocol is a radical innovative document that:

(i) Requires the early production and exchange of claim information;

(ii) Requires early admission of liability;

(iii) Requires early offers of settlement to be made;

(iv) Requires compulsory alternative dispute resolution;

to facilitate the early settlement of claims.

17. Only those matters that do not resolve under the Protocol or where liability is in issue will require the intervention and determination by the Tribunal.

18. Only a small number of matters have proceeded under the Protocol to date. Each has resulted in an early settlement of the claim with considerable cost savings.

19. UADFA submit that the means for achieving reform with consequential legal and administrative cost reductions is by adoption of the Amaca/Amaba Protocol.

20. Claims must however continue be conducted within the auspices of the Tribunal.

21. Litigation in the Tribunal is conducted by specialised groups of practitioners. The large body of expertise that has been developed by practitioners on both sides places those practitioners into a unique position to adapt to change in practice and procedure.

Key Background Material

22. Statistics in relation to filings in the Tribunal for the 2004 calendar year are now available. The statistics reveal the following:

    (i) Total claims filed – 485

    (ii) Filings in disease categories were as follows:

        (i) Mesothelioma – 180

        (ii) Carcinoma of the lung – 15

        (iii) Asbestos related pleural disease – 80

        (iv) Asbestosis – 179

        (v) Silicosis – 6

        (vi) Compensation to Relatives Act claims – 17

        (vii) Occupational asthma – 4

        (viii) Other - 4

23. Some key factors in understanding the nature of dust disease claims include:

    (i) A large number of claims involve malignant disease, pleural and peritoneal mesothelioma and carcinoma of the lung where the claimant is invariably dead within twelve (12) months of diagnosis.

    (ii) The largest component of the Tribunal's filings involve benign disease claims including asbestos related pleural disease, asbestosis, silicosis and progressive massive fibrosis.

    (iii) Other types of dust disease claims are insignificant in the workload of the Tribunal.

    (iv) The factual scenarios that form the subject matter of each claim took place 30 to 60 years prior to the filing of the Statement of Claim.

(v) Instructions are invariably taken from the claimant, their family, co-workers and other witnesses.

(vi) Claimants involved in dust diseases litigation are elderly men and women, usually over the age of 65.

(vii) In some cases a wide ranging search of documents in different locations is carried out to assist to identify exposure.

(viii) The circumstances of exposure and the claimant's medical history requires investigation in each claim.

(ix) Certain industrial environments present claims with similarities, thereby requiring less factual investigation.

(x) Claims outside industrial environments, eg. home renovation cases, tailings cases, clothes washing cases, other bystander cases require significant investigation of the claimant's specific exposure history.

24. An analysis of Annexure A reveals that the Tribunal has been dealing with an increasing number of public liability claims, predominantly product liability in nature. Nearly all of these claims involve exposure to fibro during employment, self-employment or in a domestic environment.

25. The "third wave" claims are increasing in number. The bulk of these claims are Amaca/Amaba claims. They involve exposure in domestic situations either through home renovations or tailings. Many of these claims involve younger persons. Almost all claims involving women fall within this category of claim.

26. The "third wave" claims require considerable individual investigation. The material necessary to establish these claims is obtained through intensive investigation work. It cannot be located on any broad based database.

27. Different considerations apply in relation to the various diseases that broadly make up dust diseases claims in the Tribunal. Those considerations include:

(i) Silicosis and progressive massive fibrosis are diseases contracted mainly by migrant jackhammer workers in the construction industry;

(ii) Asbestos related pleural disease and asbestosis (both benign conditions) are contracted invariably as a consequence of significant exposure to asbestos dust in industrial environments.

(iii) Mesothelioma and carcinoma of the lung are malignant diseases, always fatal.

(iv) Mesothelioma can result from minimal and transient exposure to asbestos dust.

(v) The principles that govern causation of each of the injuries referred to above are different.

(vi) In relation to silicosis, asbestos related pleural disease and asbestosis those diseases are divisible diseases and all exposures are relevant. This affects the manner in which the claims are investigated and conducted.

(vii) In contradistinction progressive massive fibrosis, mesothelioma and carcinoma of the lung are indivisible injuries and different considerations apply to the manner in which those claims are investigated and conducted.

28. Malignant mesothelioma claims in employment situations are often the most straightforward claims.

29. Asbestos related pleural disease, asbestosis and silicosis cases, whilst usually smaller in terms of quantum, can often be much more difficult to litigate than large malignant cases. These claims usually involve multiple parties in different factual situations where the exposure levels are different. Contribution issues arise. Defendants invariably argue between themselves more than they do with the claimant. They are factually more complex and invariably more difficult to resolve than malignant claims.

30. Silicosis cases have inherent problems of their own in that they invariably involve migrant workers (predominantly Greek and Italian) with a poor command of English, employment with numerous employers, over numerous construction sites and over many years. Legal costs increase in these cases as each defendant focuses on its individual liability. It is not unusual to have up to ten (10) defendants in a silicosis case.

31. The overwhelming consideration in malignant claims is expedition. Claimants suffering from mesothelioma can deteriorate dramatically due to complications including pneumonia, pulmonary embolism and other factors. The type of malignant condition also has a bearing

on prognosis and life expectancy. Some types of mesothelioma are known to be far more aggressive than other types of mesothelioma. Prognosis in all malignant cases is unpredictable and uncertain.

32. Whilst general damages survive death once proceedings have been commenced in the Tribunal it is the natural desire of most claimants to complete claims in their lifetime so that they have the security of knowing that their loved ones and dependents have been cared for financially.

33. The practice that has developed in other jurisdictions of filing large amounts of damages and other material contemporaneous with the filing of the Statement of Claim is not a practical consideration in dust diseases litigation and nor is it desirable. The commencement of the claim is the critical factor.

34. Unlike other personal injury claims where a catastrophic event occurs and then over time the condition of the claimant stabilises and in most instances improves so that the claimant ultimately lives as close to a normal life as is possible, in dust diseases litigation the reverse occurs. The claimant suffers a catastrophic incident, i.e. they are diagnosed with a malignant condition. The condition deteriorates until such time as they die, in many instances an appalling death.

35. The factors that accordingly determine claim procedures in other jurisdictions where personal injury has occurred in an employment accident or motor vehicle accident are not applicable to claim procedures in the Tribunal.

36. Comparisons with procedures in other non personal injury jurisdictions is also not helpful. Claimants in the Tribunal when diagnosed with a malignant condition invariably die within a period of twelve months from diagnosis. Time is of the essence.

37. The nature of claims has steadily changed from multiple defendant to single defendant claims. This reflects the changing nature of claims, from employment based claims to “third wave” product liability claims.

38. The number of malignant claims (both mesothelioma and carcinoma of the lung) are likely to outnumber asbestosis, asbestos related pleural disease and silicosis claims that are filed over the next forty (40) to fifty (50) years, reflecting lower exposure levels from the 1980s.

39. As most benign disease cases involve elderly persons the filing of proceedings in the Tribunal is vital to preserve general diagnosis.

40. It is an accepted fact that the costs and disbursements incurred by claimants are greater than those incurred by defendants. The claimants drive the litigation. They are the proactive party. They acquire and accumulate evidence, medical records, expert reports and provide that evidence to the defendants. The defendants react and respond to material as required. The claimant's solicitor does considerably more legal work than the defendant's solicitor in the investigation of the claim. The claimant's solicitor incurs a greater number of disbursements than the defendant's solicitor.

41. The nature in which instructions are taken and investigations are conducted vary widely. Claimant lawyers do not necessarily take instructions in an office. In many instances they are required to travel to the home of the claimant or to a hospital to take instructions. Claimants take large quantities of opiate based medication to control pain. This affects lucidity. A number of conferences may be required over a series of days to obtain a complete set of instructions. In certain instances claimants are too ill to provide sufficient instructions and those instructions must be consolidated by interviewing other witnesses. The categories of documents that must be searched and investigated can vary from tax returns to local council searches, searches at the Land Titles Office and public library searches. The sources of primary material are wide and varied.

42. The quantum of costs in cases before the Tribunal varies widely. The cause of the wide variation is not necessarily the type of claim. The cause can often be associated with the defendant itself and the manner in which it litigates claims, the instructions that it gives to its lawyers, and its general defence strategy. That strategy can include a blanket refusal to make admissions in relation to all factual matters other than the fact of incorporation of the defendant. It is not an uncommon procedure in the Tribunal for some defendants to put all matters in issue to the first day of trial and then to make some or total admissions at trial. This dramatically increases the costs of litigating claims, it causes claimants to continue investigating claims for the purpose of locating witnesses to corroborate exposure and it requires claimants to retain experts on liability issues.

43. The failure to make admissions by defendants is done against a background of the Tribunal, during active case management, seeking admissions from defendants during the course of final directions hearings. The Tribunal also actively seeks to identify issues in cases. Some

defendants frustrate the process by refusing to make any admissions and leaving all matters in issue, even in the face of costs orders.

44. It must be recognised that common defendants, defending multiple numbers of cases, with a number of insurers standing behind them will often fear making admissions because of the potential effect that admissions may have on indemnity under their insurance policies. Moreover, there is a perception that an admission made in one matter may be forced in another matter and accordingly a blanket refusal to make any admissions is adopted. These types of defence strategies frustrate the work of the Tribunal and increase costs.

The Amaca/Amaba Protocol

45. UADFA refer to and adopt the matters under this heading in the Joint Submission.

46. UADFA seek to supplement the matters referred to in the Joint Submission by reference to the following matters:

    (i) Hardie asserts legal costs at 36% to 40% of total claim costs. UADFA does not accept the Hardie's estimate of legal costs. Assuming the Hardie's figure to be correct then effective use of the Protocol would appear to result in a dramatic reduction in legal costs as against overall claim costs. As previously submitted this is clearly evidenced by the matters that have been completed to date under the draft Protocol where average total costs were less than 15% of total claim costs.

    (ii) UADFA supports the extension of the Protocol from Amaca/Amaba mesothelioma non-economic loss claims to all mesothelioma single defendant non-economic loss claims before the Tribunal.

    (iii) UADFA supports the gradual introduction of the Protocol in multiple defendant claims, on the basis that a claims manager is appointed to conduct the litigation on behalf of the defendants. Initially UADFA would say that only mesothelioma multiple defendant claims should be included in an extended Protocol.

    (iv) UADFA submits that the extension of the Protocol to benign disease cases should be contemplated after the Protocol has been operating for a period of time and any problems that arise have been remedied. Clearly any Protocol that applied in single defendant or multiple defendant benign disease claims would need to take into account that expedition is not a pre-eminent factor in such claims. Accordingly the time periods specified for events to occur under any modified Protocol in benign disease cases would need to be extended.

The Issues Paper

47. UADFA adopt the submissions made in the Joint Submission and seeks to supplement the Joint Submission by the following:

    (i) UADFA welcome the commitment of the Government to not consider any proposal:

        (i) For the introduction of a statutory scheme to resolve dust diseases compensation claims; or

        (ii) To consider any proposal which would adversely affect claimants' compensation rights.

    (ii) UADFA similarly welcomes the Government's endorsement of the common law system as being the appropriate means by which to compensate victims of dust disease.

    (iii) UADFA further welcomes the Government's commitment to the continuation of the work of the Tribunal. UADFA unequivocally supports the work of the Tribunal and is committed to reform of the existing common law system within the auspices of the Tribunal.

Issue 2: Investigation of Exposure

Should a centrally maintained database be established? If so, by whom? What information should be included on the database? Who should be able to use the database and under what conditions?

48. UADFA refer to and adopt the matters contained in the Joint Submission. UADFA seeks to supplement the matters in the Joint Submission by reference to the following matters:

    (i) Many trade unions have maintained significant historical databases.

    (ii) The archival records of the Maritime Union of Australia were of critical importance in the establishment of liability on the part of the Stevedoring Industry Finance Committee in the seminal cases of *Gibson –v- The Stevedoring Industry Finance Committee* (2000) 20NSW CCR 417 and *Crimmins –v- The Stevedoring Industry Finance Committee* 200 (1999-2000) CLR 1.

    (iii) Similarly, the AMWU and the CFMEU maintain historical archives. From time to time material contained within those archives is accessed by claimant solicitors in order to litigate claims on behalf of current and former Union members.

    (iv) UADFA say that it would be inappropriate to require of trade unions that they provide their archival records for placement onto a database that would be generally available to unknown third parties. The maintenance of those records has been and will continue to be for the benefit of the membership including the former membership of each Union.

Issue 6: Exchange of Information

Should parties be required to exchange some or all of the information they have before the hearing in a case? At what point should they be required to exchange information – before filing, at the time of filing, within a fixed period after filing?

If so, what information should be disclosed? Should it be limited to medical reports or other expert reports? Should the claimant be required to prepare witness statements or affidavit evidence outlining their claim and also provide that material?

What should be the consequences of failing to disclose information? Should a party be prevented from relying on material later in the proceedings which they have failed to produce?

49. UADFA refer to and adopt the submissions made in the Joint Submission. UADFA seek to supplement the matters in the Joint Submissions by reference to the following matters:

    (i) The Protocol requires the claimant to provide his or her affidavit at an early stage of the proceedings.

    (ii) The Protocol makes no reference to the defendant supplying its witness statements.

    (iii) The current practice of the Tribunal is to require parties to exchange affidavits and witness statements at the same time, usually 21 days prior to an issues and listings conference.

    (iv) UADFA submit that in those cases that are not resolved under the Protocol the defendant should be required to exchange its witness statements on issues including exposure by a date fixed by the Tribunal at the first directions hearing.

    (v) UADFA rejects any proposal requiring the claimant to serve his or her affidavit in the absence of a reciprocal order requiring the defendant to serve their witness statements in all matters where liability is in issue. Moreover, UADFA say that where it is clear that liability will be in issue in a matter orders should be made requiring the exchange of those statements at an early stage of the proceedings.

Issue 16: Regulating Legal Costs

Should legal costs in the dust diseases jurisdiction be regulated? If so, what system should be used?

50. UADFA refer to and adopt the submissions made in the Joint Submission. UADFA seeks to supplement the matter in the Joint Submissions by reference to the following matters:

    (i) A suggestion that costs for small claims should be capped is opposed as being unduly unfair to particular classes and categories of claimants. Smaller claims will invariably be silicosis or benign asbestos disease cases. These are divisible injuries and therefore almost always involve multiple defendants, in some instances up to ten defendants. The preparation of the case against each defendant requires substantial quantities of legal work to be performed. Many claimants with benign conditions have other medical problems. Reports must be obtained from a number of experts to ascertain the extent of disability from the benign condition.

    (ii) An excellent example is the matter of *Gibson –v- The Stevedoring Industry Finance Committee* (2000) 20NSW CCR 417 (SIFC), a test case as to the liability of the SIFC. Mr Gibson was awarded $100,000 in damages. The hearing of his case proceeded for six weeks and involved five parties. Hundreds of cases for former waterside workers with asbestos diseases have been run post *Gibson*. The SIFC has not put in issue in these cases the existence of a duty of care or breach of duty and most claims have proceeded as assessment of damages only. Under the proposed caps Mr Gibson's legal fees would be limited to $10,000.

    (iii) It is not possible to properly prepare a claim of less than $100,000 for a former jack pick operator suffering from silicosis where there are five defendants and where the claimant does not speak English, for $10,000. If caps were introduced the rights of this claimant and many other former construction workers, factory workers and waterside workers would be adversely affected.

    (iv) Any proposal to extend the current provisions under that *Legal Profession Act* in general liability claims to Tribunal claims should not be considered. At the time that the *Legal Profession Act* was amended so as to impose cost caps the Government, after consideration, quite properly excluded claims for dust diseases in the Tribunal. The factors that led to the Government excluding those claims have

not changed. They continue to be the appropriate principles that should be applied when assessing these claims.

(v) Moreover the number of these claims will decline in future years. There does not appear to be any justification for singling out this group of claimants by way of capping the legal costs that can be recovered in their cases.

(vi) Should the Government contemplate the capping of legal costs in these classes of cases then costs should be capped for all parties, claimants, defendants, cross-claimants and cross-defendants. Where there are multiple defendants the cap on legal costs should apply to the combined defendants' costs.

NOMINAL DEFENDANT

Issue 18: Reducing Legal Costs for Extremely Difficult Claims

Should a nominal defendant scheme be introduced to fund some asbestos related compensation claims? In what cases would this be beneficial for claimants? How often is the complexity of the case an issue for claimants?

51. We assume that the suggestion of appointing a Nominal Defendant applies to those cases where no relevant exposure to asbestos dust can be identified or no viable defendant can be identified. We are not aware of instances where eligible claimants have missed out on compensation because cases are too difficult to prove. If such claims exist, then the relative scarcity of such claims would not make them contributors to escalating legal and administrative costs.

52. While we would not oppose a proposal that will compensate a person suffering from a dust disease we are not aware at present of the need for such a proposal.

Conclusion

53. UADFA supports the work of the Tribunal. It deserves the recognition that it has in the broad community for the work that it does in the expeditious handling of dust diseases claims.

54. The procedures that have served the Tribunal well since its inception need to be considered in a changing litigation environment.

55. UADFA submit that the focus of the Tribunal's work needs to be shifted and that greater attempts must be made to achieve early resolution of claims through new and innovative means, encompassing alternative dispute resolution. These types of practices have been used in other jurisdictions with considerable success. UADFA support the use of such processes in proceedings before the Tribunal.

56. UADFA commend to the Government consideration of the Amaca/Amaba Protocol and the institution of the Protocol by way of a Practice Note with a gradual expansion of the Protocol to cover all claims that come before the Tribunal.

57. UADFA submits that there are some areas of the Tribunal's current work that continue to require the attention of the Judges to determine the jurisdiction of the Tribunal to entertain the claim. Judicial time is expended in determining whether exposure to a particular substance is a dust. Judicial time is expended in determining whether a particular disease can be defined as a dust disease within the provisions of the *Dust Diseases Tribunal Act*, 1989. UADFA submit that the Government should take this opportunity to redefine the diseases in the Schedule to the Act so as to include personal injury arising from exposure to welding fumes, enzymes, wood dust, coal dust, tobacco and other substances that are inhaled and that cause injury to the lung.

58. Occupational asthma has numerous causes, from welding fumes to flour dust. The debate as to whether a fume is a dust should be eliminated. This could be done by way of a simple amendment to bring all cases of occupational asthma within the definition of "dust disease". Similar considerations apply to diseases caused by exposure to coal dust including, chronic bronchitis, emphysema and coal miners pneumoconiosis. Similar considerations arise in relation to occupational asthmas and other similar respiratory conditions that arise as a consequence of exposure to timber dust.

59. At present certain classes of workers who suffer respiratory disease are excluded from the work of the Tribunal. UADFA submit that it is illogical to permit a situation to continue where respiratory conditions caused in an occupational environment are compensated under different compensation regimes.

60. UADFA submit that all occupational diseases of the lung should be compensated under the provision of the *Workers Compensation (Dust Diseases) Act*, 1942 with consequential common law rights available, jurisdiction vesting exclusively in the Tribunal.

Dated this 14th day of January 2005.

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Bernie Banton, Vice President
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Paul Bastian, State Secretary
For and on behalf of the AMWU (NSW Branch)

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