

Guide

Company Law & Company Formation

Small Business Guide



Introduction

The laws applying to Australian companies are substantial and complex. Most are contained in the legislation Corporations Act 2001 (Cth) as amended from time to time. It is a delight that a recent amendment created a “plain English” guide to company formation in Australia and company law as it relates to proprietary companies. Proprietary companies are the choice for small to medium business in Australia and account for approximately 98% of all companies in Australia.

This Small Business Guide is replicated in this document. We urge our clients and others registering and operating companies in Australia to read this document in full. Company law has many obligations on companies, its shareholders and the directors who control it. Not understanding your rights and responsibilities is asking for trouble. The guide is not exhaustive by any means; but it provides an excellent overview of the important things.

The Small Business Guide – Pt 1.5 of the Corporations Act

This guide summarises the main rules in the Corporations Act (the Corporations Act 2001) that apply to proprietary companies limited by shares—the most common type of company used by small business. The guide gives a general overview of the Corporations Act as it applies to those companies and directs readers to the operative provisions in the Corporations Act.

The notes in square brackets at the end of paragraphs in the guide indicate the main provisions of the Corporations Act, the regulations made under the Corporations Act, and ASIC Practice Notes that are relevant to the information in the paragraphs.

Other Commonwealth, State and Territory laws also impose obligations on proprietary companies and their operators.

1. What registration means

1.1 Separate legal entity that has its own powers

As far as the law is concerned, a company has a separate legal existence that is distinct from that of its owners, managers, operators, employees and agents. A company has its own property, its own rights and its own obligations. A company’s money and other assets belong to the company and must be used for the company’s purposes.

A company has the powers of an individual, including the powers to:

- own and dispose of property and other assets
- enter into contracts
- sue and be sued.

Once a company is registered, its separate legal status, property, rights and liabilities continue until ASIC (Australian Securities and Investments Commission) deregisters the company.

[sections 119, 124–125, 601AA–601AD]

1.2 Limited liability of shareholders

Shareholders of a company are not liable (in their capacity as shareholders) for the company’s debts. As shareholders, their only obligation is to pay the company any amount unpaid on their shares if they are called upon to do so. However, particularly if a shareholder is also a director,

this limitation may be affected by other laws and the commercial practices discussed in 1.3 and 1.4.

[section 516]

1.3 Director's liability for company's debts

A director of a company may be liable for debts incurred by the company at a time when the company itself is unable to pay those debts as they fall due.

A director of a company may be liable to compensate the company for any losses the company suffers from a breach of certain of the director's duties to the company (see 5.3).

In addition to having liability for the company's debts or to pay compensation to the company, a director may also be subject to a civil penalty.

If a company holds property on trust, a director of the company may be liable in some circumstances for liabilities incurred by the company as trustee.

[sections 197, 344, 588G, 588J, 588M, 1317H]

1.4 Director's liability as guarantor/security over personal assets

As a matter of commercial practice, a bank, trade creditor or anyone else providing finance or credit to a company may ask a director of the company:

- for a personal guarantee of the company's liabilities; and
- for some form of security over their house or personal assets to secure the performance by the company of its obligations.

The director of a company may, for example, be asked by a bank to give a mortgage over their house to secure the company's repayment of a loan. If the company does not repay the loan as agreed with the bank, the director may lose the house.

1.5 Continuous existence

A company continues to exist even if 1 or more of its shareholders or directors sells their shares, dies or leaves the company. If a company has only 1 shareholder who is also the only director of the company and that person dies, their personal representative is able to ensure that the company continues to operate.

[sections 119, 224A]

1.6 Rules for the internal management of a company

The Corporations Act contains a basic set of rules for the internal management of a company (appointments, meetings etc.).

Some of these rules are mandatory for all companies. There are a few special rules for single shareholder/single director companies.

Other internal management rules in the Corporations Act are replaceable rules. The replaceable rules do not apply to:

- a single shareholder/single director company; or
- a company that had a constitution before the introduction of the replaceable rules regime and has not repealed it.

A company does not need to have a separate constitution of its own; it can simply take advantage of the rules in the Corporations Act. The company will need a constitution only if it wants to displace, modify or add to the replaceable rules.

[sections 134-141 and 198E]

1.7 How a company acts

A company does not have a physical existence. It must act through other people.

Individual directors, the company secretary, company employees or agents may be authorised to enter into contracts that bind the company (see 7).

In some circumstances, a company will be bound by something done by another person (see 1.8).

1.8 Directors

The directors of a company are responsible for managing the company's business. It is a replaceable rule (see 1.6) that generally the directors may exercise all the powers of the company except a power that the Corporations Act, a replaceable rule or a provision of the company's constitution (if any) requires the company to exercise in general meeting.

The only director of a company who is also the only shareholder is responsible for managing the company's business and may exercise all of the company's powers.

The Corporations Act sets out rules dealing with the calling and conduct of directors' meetings. Directors must keep a written record (minutes) of their resolutions and meetings.

There are 2 ways that directors may pass resolutions:

- at a meeting; or
- by having all of the directors record and sign their decision.

If a company has only 1 director, the sole director may also pass a resolution by recording and signing their decision.

[sections 198A, 198E, 202C, subsection 202F(1), sections 248A-248G, 251A]

1.9 Shareholders

The shareholders of a company own the company, but the company has a separate legal existence and the company's assets belong to the company.

Shareholders can make decisions about the company by passing a resolution, usually at a meeting. A "special resolution" usually involves more important questions affecting the company as a whole or the rights of some or all of its shareholders.

There are 2 ways that shareholders may pass a resolution:

- at a meeting; or
- by having all of the shareholders record and sign their decision.

If a meeting is held, an ordinary resolution must be passed by a majority of the votes cast by shareholders of the company entitled to vote on the resolution at the meeting in person or by proxy (if proxies are allowed). A special resolution must be passed by at least 75% of the votes cast by shareholders of the company entitled to vote on the resolution and who vote at the meeting in person or by proxy (if proxies are allowed).

The sole shareholder of a company may pass a resolution by recording and signing their decision.

A company must keep a written record (minutes) of the members' resolutions and meetings.

[sections 9 (special resolution), 249A, 249B, 249L, 251A]

1.10 What others can assume about the company

Anyone who does any business with the company is entitled to assume that the company has a legal right to conduct that business unless the person knows, or suspects, otherwise. For example, an outsider dealing with the company is entitled to assume:

- that a person who is shown in a notice lodged with ASIC as being the director or company secretary of a company has been properly appointed and is authorised to act for the company; and
- that a person who is held out by the company to be a director, company secretary or agent of the company has been properly appointed and is authorised to act for the company.

[sections 128–130]

2. The company structure for small business

2.1 Proprietary company for small business

Generally, a proprietary company limited by shares is the most suitable company for use by small business. Such a proprietary company must have a least 1 shareholder but no more than 50 shareholders (not counting employee shareholders). It may have 1 or more directors.

[sections 112–113]

3. Setting up a new company

The operators of small businesses can either buy “shelf” companies or set up new companies themselves.

3.1 “Shelf” companies

The operator of a small business may find it more convenient to buy a “shelf” company (a company that has already been registered but has not traded) from businesses which set up companies for this purpose or from some legal or accounting firms.

3.2 Setting up a company

To set up a new company themselves, the operator must apply to ASIC for registration of the company.

A proprietary company limited by shares must have at least 1 shareholder.

To obtain registration, a person must lodge a properly completed application form with ASIC. The form must set out certain information including details of every person who has consented to be a shareholder, director or company secretary of the company.

The company comes into existence when ASIC registers it.

[sections 117–119, 135–136, 140]

3.3 ACN and name

When a company is registered, ASIC allocates to it a unique 9 digit number called the Australian Company Number (ACN). (For use of the ACN see 4.1).

In practice, a new company must have a name that is different from the name of a company that is already registered. A proprietary company limited by shares must have the words “Proprietary Limited” as part of its name. Those words can be abbreviated to “Pty Ltd”.

A proprietary company may adopt its ACN as its name. If it does so, its name must also contain the words “Australian Company Number” (which can be abbreviated to “ACN”). For example, the company’s name might be “ACN 123 456 789 Pty Ltd”.

[sections 119, 147–161]

3.4 Contracts entered into before the company is registered

A company can ratify a contract entered into by someone on its behalf or for its benefit before it was registered. If the company does not ratify the contract, the person who entered into the contract may be personally liable.

[sections 131–133]

3.5 First shareholders, directors and company secretary

A person listed with their consent as a shareholder, director or company secretary in the application for registration of the company becomes a shareholder, director or company secretary of the company on its registration.

The same person may be both a director of the company and the company secretary.

See 5.1 and 5.2 for directors and 5.4 for company secretaries. See 6.1 for shareholders.

[section 120]

3.6 Issuing shares

It is a replaceable rule (see 1.6) that, before issuing new shares, a company must first offer them to the existing shareholders in the proportions that the shareholders already hold. A company may issue shares at a price it determines.

[sections 254B, 254D]

3.7 Registered office

A company must have a registered office in Australia and must inform ASIC of the location of the office. A post office box cannot be the registered office of a company. The purpose of the registered office is to have a place where all communications and notices to the company may be sent.

If the company does not occupy the premises where its registered office is located, the occupier of the premises must agree in writing to having the company’s registered office located there.

A proprietary company is not required to open its registered office to the public but this does not affect its obligation to make documents available for inspection.

The company must notify ASIC of any change of address of its registered office.

[sections 100, 142, 143, 173, 1300]

3.8 Principal place of business

If a company has a principal place of business that is different from its registered office, it must notify ASIC of the address of its principal place of business and of any changes to that address.

[sections 117, 146]

3.9 Registers kept by the company

A company must keep registers, including a register of shareholders and a register of charges. A company must keep its registers at:

- the company's registered office; or
- the company's principal place of business; or
- a place (whether on premises of the company or of someone else) where the work in maintaining the register is done; or
- another place approved by ASIC.

A register may be kept either in a bound or looseleaf book or on computer.

If a register is kept on computer, its contents must be capable of being printed out in hard copy.

[sections 172, 1300–1302, 1306]

3.10 Register of shareholders

A company must keep in its register of shareholders such information as:

- the names and addresses of its shareholders; and
- details of shares held by individual shareholders.

[sections 168–169]

3.11 Register of charges

A company must keep a register of charges if the company gives a bank, trade creditor or anybody else a charge over company assets.

[section 271]

4. Continuing obligations after the company is set up

The Corporations Act and other laws impose obligations on companies themselves and on their directors and company secretaries. Some of the more important obligations imposed under the Corporations Act are discussed below.

4.1 Use of company name and ACN

The name of a company must be shown at all the company's business premises (including its registered office) that are open to the public. The company's name and its ACN or ABN (if the last 9 digits are the same, and in the same order, as the last 9 digits of its ACN) must appear:

- on some of its public documents; and
- on its cheques and negotiable instruments; and
- on all documents lodged with ASIC; and
- if it has one, on its common seal.

[sections 123, 144, 147–156,

ASIC Practice Note 47]

4.2 Extract of particulars

Each year, ASIC issues each company with an extract of particulars within 2 weeks of the company's review date (which is generally the anniversary of the company's registration). The extract includes details recorded on ASIC's database such as:

- names and addresses of each director and company secretary;

- issued shares and options granted;
- details of its shareholders;
- address of its registered office;
- address of its principal place of business.

If any of the details are not correct as at the date the extract is received, the company must correct those details.

The correction may be lodged with ASIC on a printed form or, if an agreement is in place to lodge electronically, in accordance with the agreement.

[Sections 346A and 346C, 352]

4.3 Review fee

A company must pay a review fee to ASIC each year.

[Corporations (Review Fees) Act 2003]

4.4 Notification to ASIC of changes

The company must notify ASIC if certain basic changes to the company occur. The following table sets out these notification requirements.

Notification requirements			
	If...	the company must notify ASIC of the change...	see section...
1	a company issues shares	within 28 days after the issue	254X
2	a company changes the location of a register	within 7 days after the change	172, 1302
3	a company changes the address of its registered office or principal place of business	within 28 days after the change	142, 146
4	a company changes its directors or company secretary	within 28 days after the change (unless the director or company secretary has notified ASIC of the change)	205B
5	there is a change in the name or address of the company's directors or secretary	within 28 days after the change	205B
6	a company creates certain kinds of charges	within 45 days after the charge is created	263
7	a company has a new ultimate holding company, or details about the ultimate holding company change	within 28 days after the change happens	349A

Notification requirements			
	If...	the company must notify ASIC of the change...	see section...
8	any of the changes in items 1 to 7 means that:	within the time determined under the table in section 178D	178A 178C
	(a) the company must add or alter particulars in its member register kept under section 169; or		
	(b) the company must add or alter particulars in its member register kept under section 169, and as a result, details about the number and class of shares on issue, or the amount paid and unpaid on the shares, alter.		

5. Company directors and company secretaries

5.1 Who can be a director

Only an individual who is at least 18 years old can be a director. If a company has only 1 director, they must ordinarily reside in Australia. If a company has more than 1 director, at least 1 of the directors must ordinarily reside in Australia.

A director must consent in writing to holding the position of director. The company must keep the consent and must notify ASIC of the appointment.

In some circumstances, the Corporations Act imposes the duties and obligations of a director on a person who, although not formally appointed as a director of a company, nevertheless acts as a director or gives instructions to the formally appointed directors as to how they should act.

The Court or ASIC may prohibit a person from being a director or from otherwise being involved in the management of a company if, for example, the person has breached the Corporations Act.

A person needs the Court's permission to be a director if the person has been convicted of certain offences or is, in some circumstances, unable to pay their debts as they fall due.

Generally, a director may resign by giving notice of the resignation to the company. A director who resigns may notify ASIC of the resignation. If the director does not do so, the company must notify ASIC of the director's resignation.

[sections 9, 201A, 201B, 201D, 205A, 205B and 206A-206G, 228-230 and 242 and subsection 1317EA(3)]

5.2 Appointment of new directors

It is a replaceable rule (see 1.6) that shareholders may appoint directors by resolution at a general meeting.

[section 201G]

5.3 Duties and liabilities of directors

In managing the business of a company (see 1.7), each of its directors is subject to a wide range of duties under the Corporations Act and other laws. Some of the more important duties are:

- to act in good faith
- to act in the best interests of the company
- to avoid conflicts between the interests of the company and the director's interests
- to act honestly
- to exercise care and diligence
- to prevent the company trading while it is unable to pay its debts
- if the company is being wound up—to report to the liquidator on the affairs of the company
- if the company is being wound up—to help the liquidator (by, for example, giving to the liquidator any records of the company that the director has).

A director who fails to perform their duties:

- may be guilty of a criminal offence with a penalty of \$200,000 or imprisonment for up to 5 years, or both; and
- may contravene a civil penalty provision (and the Court may order the person to pay to the Commonwealth an amount of up to \$200,000); and
- may be personally liable to compensate the company or others for any loss or damage they suffer; and
- may be prohibited from managing a company.

A director's obligations may continue even after the company has been deregistered.

[Sections 180, 181, 182, 183, 184, 475, 530A, 588G, 596, 601AE, 601AH, 1317H]

5.4 Company secretaries

A company other than a proprietary company must have a company secretary. However, a proprietary company may choose to have a company secretary. The directors appoint the company secretary. A company secretary must be at least 18 years old. If a company has only 1 company secretary, they must ordinarily reside in Australia. If a company has more than 1 company secretary, at least 1 of them must ordinarily reside in Australia.

A company secretary must consent in writing to holding the position of company secretary. The company must keep the consent and must notify ASIC of the appointment.

The same person may be both a director of a company and the company secretary.

Generally, a company secretary may resign by giving written notice of the resignation to the company. A company secretary who resigns may notify ASIC of the resignation. If the company secretary does not do so, the company must notify ASIC of the company secretary's resignation.

The company secretary is an officer of the company and, in that capacity, may be subject to the requirements imposed by the Corporations Act on company officers.

The company secretary has specific responsibilities under the Corporations Act, including responsibility for ensuring that the company:

- notifies ASIC about changes to the identities, names and addresses of the company's directors and company secretaries; and
- notifies ASIC about changes to the register of members; and
- notifies ASIC about changes to any ultimate holding company; and
- responds, if necessary, to an extract of particulars that it receives and that it responds to any return of particulars that it receives.

A company secretary's obligations may continue even after the company has been deregistered.

[sections 83, 142, 178A, 178C, 188, 204A-204G, 205A, 205B, 346C, 348D, 349A, 601AD, 601AH]

6. Shares and shareholders

A proprietary company limited by shares must have a share capital and at least 1 shareholder. ASIC may apply to a Court to have a company wound up if it does not have any shareholders.

[sections 461–462]

6.1 Becoming a shareholder and ceasing to be a shareholder

A person may become a shareholder of a company in several ways, including the following:

- the person being listed as a shareholder of the company in the application for registration of the company
- the company issuing shares to the person
- the person buying shares in the company from an existing shareholder and the company registering the transfer.

Some of the ways in which a person ceases to be a shareholder are:

- the person sells all of their shares in the company and the company registers the transfer of the shares
- the company buys back all the person's shares
- ASIC cancels the company's registration.

[sections 117, 120, 601AA–601AD]

6.2 Classes of shares

A company may have different classes of shares. The rights and restrictions attached to the shares in a class distinguish it from other classes of shares.

[sections 254A–254B]

6.3 Meetings of shareholders

Directors have the power to call meetings of all shareholders or meetings of only those shareholders who hold a particular class of shares.

Shareholders who hold at least 5% of the votes which may be cast at a general meeting of a company have the power to call and hold a meeting themselves or to require the directors to call and hold a meeting. Meetings may be held regularly or to resolve specific questions about the management or business of the company.

The Corporations Act sets out rules dealing with shareholders' meetings.

A shareholder of a company may ask the company for a copy of the record of a meeting or of a decision of shareholders taken without a meeting.

[sections 249A–251B]

6.4 Voting rights

Different rights to vote at meetings of shareholders may attach to different classes of shares. It is a replaceable rule (see 1.6) that, subject to those different rights, each shareholder has 1 vote on a show of hands and, on a poll, 1 vote for each share held.

[sections 250E, 254A–254B]

6.5 Buying and selling shares

A shareholder may sell their shares but only if the sale would not breach the company's constitution (if any). It is a replaceable rule (see 1.6) that the directors have a discretion to refuse to register a transfer of shares.

[sections 1091D–1091E]

7. Signing company documents

A company's power to sign, discharge and otherwise deal with contracts can be exercised by an individual acting with the company's authority and on its behalf. A company can deal with contracts without using a common seal.

A company may execute a document by having it signed by:

- 2 directors of the company; or
- a director and the company secretary; or
- for a company with a sole director who is also the sole secretary—that director.

If the document is to have effect as a deed, it should be expressed to be a deed.

[sections 126–127]

A company is not required to have a common seal. If it does, the seal must show the company's name and its ACN or ABN (if the last 9 digits are the same, and in the same order, as the last 9 digits of its ACN). The seal is equivalent to the company's signature and may be used on important company documents such as mortgages.

[sections 123, 127(2)]

8. Funding the company's operations

The shareholders may fund the company's operations by lending money to the company or by taking up other shares in the company. Except if it is raising funds from its own employees or shareholders, a proprietary company must not engage in any fundraising activity that would require disclosure to investors under Chapter 6D (for example, advertising in a newspaper inviting people to invest in the company).

The company may also borrow money from banks and other financial organisations.

Anyone who has lent money, or provided credit, to the company may ask for a mortgage or charge over the company's assets to secure the performance by the company of its obligations.

[sections 113, 124]

9. Returns to shareholders

Shareholders can take money out of the company in a number of ways, but only if the company complies with its constitution (if any), the Corporations Act and all other relevant laws. If a company pays out money in a way that results in the company being unable to pay its debts as they fall due, its directors may be liable:

- to pay compensation; and
- for criminal and civil penalties.

[sections 588G, 1317E, 1317G, 1317H, 1317P]

9.1 Dividends

Dividends are payments to shareholders out of the company's after tax profits. It is a replaceable rule (see 1.6) that the directors decide whether the company should pay a dividend.

[sections 254T, 254U]

9.2 Buy-back of shares

A company can buy back shares from shareholders.

[sections 257A–257J]

9.3 Distribution of surplus assets on winding up

If a company is wound up and there are any assets left over after all the company's debts have been paid, the surplus is distributed to shareholders in accordance with the rights attaching to their shares.

10. Annual financial reports and audit

10.1 The small/large distinction

The accounting requirements imposed on a proprietary company under the Corporations Act depend on whether the company is classified as small or large. A company's classification can change from 1 financial year to another as its circumstances change.

A company is classified as small for a financial year if it satisfies at least 2 of the following tests:

- gross operating revenue of less than \$10 million for the year
- gross assets of less than \$5 million at the end of the year
- fewer than 50 employees at the end of the year.

A company that does not satisfy at least 2 of these tests is classified as large.

[section 45A]

As the great majority of proprietary companies are small under these tests, the discussion below deals mainly with the accounting requirements for small proprietary companies.

[sections 286–301]

10.2 Financial records

Under the Corporations Act, all proprietary companies must keep sufficient financial records to record and explain their transactions and financial position and to allow true and fair financial statements to be prepared and audited. Financial record here means some kind of systematic record of the company's financial transactions—not merely a collection of receipts, invoices, bank statements and cheque butts. Financial records may be kept on computer.

[sections 286–289]

10.3 Preparing annual financial reports and directors' reports

The Corporations Act requires a small proprietary company to prepare an annual financial report (an annual profit and loss statement, a balance sheet and a statement of cash flows) and a directors' report (about the company's operations, dividends paid or recommended, options issued etc.) if:

- the shareholders with at least 5% of the votes in the company direct it to do so; or
- ASIC directs it to do so.

Unless the shareholders' direction specifies otherwise, the company must prepare the annual financial report in accordance with the applicable accounting standards.

Although the Corporations Act itself may not require a small proprietary company to prepare a financial report except in the circumstances mentioned, the company may need to prepare the annual financial reports for the purposes of other laws (for example, income tax laws). Moreover, good business practice may also make it advisable for the company to prepare the financial reports so that it can monitor and better manage its financial position.

Large proprietary companies must prepare annual financial reports and a directors' report, have the financial report audited and send both reports to shareholders. They must also lodge the annual financial reports with ASIC unless exempted.

[sections 286—301, 319—320]

11. Disagreements within the company

11.1 Special problems faced by minority shareholders

There are remedies available to a shareholder of a company if:

- the affairs of the company are being conducted in a way that is unfair to that shareholder or to other shareholders of the company; or
- the affairs of the company are being conducted in a way that is against the interests of the company as a whole.

A Court may, for example, order the winding up of a company or the appointment of a receiver.

[sections 232-235, 461]

11.2 Buy—back of shares

A company may buy back the shares of a shareholder who wants to sever their relationship with the company.

[sections 257A—257]

11.3 Selling shares

A shareholder in a company who wants to sever their relationship with the company may decide to sell their shares. However, the shareholder may not be able to sell their shares readily—particularly if they want to sell their shares to someone who is not an existing shareholder. Some of the difficulties they may face in that case are:

- under the replaceable rules the directors have a discretion to refuse to transfer the shares; and
- restrictions in the company's constitution (if any) on transferring shares.

[sections 995, 707, 1091D—1091E]

12. Companies in financial trouble

12.1 Voluntary administration

If a company experiences financial problems, the directors may appoint an administrator to take over the operations of the company to see if the company's creditors and the company can work out a solution to the company's problems.

If the company's creditors and the company cannot agree, the company may be wound up (see 12.3).

[Part 5.3A]

12.2 Receivers

A receiver, or receiver and manager, may be appointed by order of a Court or under an agreement with a secured creditor to take over some or all of the assets of a company. Generally this would occur if the company is in financial difficulty. A receiver may be appointed, for example, because an amount owed to a secured creditor is overdue.

[Part 5.2]

12.3 Winding up and distribution

A company may be wound up by order of a Court, or voluntarily if the shareholders of the company pass a special resolution to do so.

A liquidator is appointed:

- when a Court orders a company to be wound up; or
- the shareholders of a company pass a resolution to wind up the company.

[Parts 5.4, 5.4B, 5.5].

12.4 Liquidators

A liquidator is appointed to administer the winding up of a company. The liquidator's main functions are:

- to take possession of the company's assets; and
- to determine debts owed by the company and pay the company's creditors; and
- to distribute to shareholders any assets of the company left over after paying creditors (any distribution to shareholders is made according to the rights attaching to their shares); and
- finally, to have the company deregistered.

[Parts 5.4B, 5.6]

12.5 Order of payment of debts

Generally, creditors who hold security over company assets are paid first.

[Division 6 of Part 5.6]

12.6 Cancellation of registration

If a company has ceased trading or has been wound up, it remains on the register until ASIC cancels the company's registration. Once a company is deregistered, it ceases to exist.

[sections 601AA—601AB, 601AH]

About us:

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