FAIRNESS, THE *WORK CHOICES ACT* AND HR PRACTICES

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Although difficult to define, Fairness has nevertheless been a central concept in the last 100 years of employment relations in Australia. Moreover, fairness has long had a pluralist dimension having been established within a tradition of vigorous public debate and intellectual and industrial interaction. This transparent process has also informed and created the context within which the practice of HRM has evolved. In discussing fairness this paper offers a working definition developed from Agnes Heller which will be applied to evaluate the impact on fairness of the *Workplace Amendments (Work Choices) Act 2005*. It is concluded that this Act was created without recourse to full public debate and is based on a new and radical notion of fairness. It is also argued that this will impact on the practice of HR in ways which will either complicate or drastically simplify the role of the HR manager.
Introduction

Is the *Workplace Relations Amendment (Work Choices) Act 2005* fair or unfair? The Australian Council of Trade Unions (ACTU), most church leaders, many academics and even, according to polls, the majority of Australians think it is unfair (*The Australian* 11 July 2005; Morgan Poll 25 July 2005; Newspoll 25 Oct. 2005; *The Age* 22 Nov. 2005). On the other hand the federal Coalition government and the Business Council of Australia (BCA) argue it is not unfair (Hansard, 10 Nov. 2005; *The Age* 9 Nov 2005). Who is right? Indeed, what is fairness? In raising these important questions and in attempting to answer them this paper will be broadly reflective and speculative rather than a legislatively descriptive one.

In reflecting on the fairness of the new Act this paper will firstly argue that the concept of fairness is an illusive one, but that historically it has been central to the regulation of industrial relations and human resource management (HRM) in Australia. Second, this paper notes that because fairness has been a central concept in employment relations its definition has been highly contested. The third task of this paper will be to develop and offer a philosophical and working definition of what fairness can be taken to mean. In this respect, we adopt a view that fairness is about justice and we provide an approach to conceptualising justice that, we think, helps to analyse the government’s legislative changes. Fourthly and finally, this paper will argue that the loss of the concept of fairness or its radical redefinition as a guiding principle in employment relations as well as the destruction of public forums of interaction will present HR managers with a new and potentially complex dilemma. Essentially, we ask how HR managers will construct and implement policies and practices which are fair when there is no longer a public and pluralist forum in which to debate or inform such an issue.
An Historical View of Fairness in Australian Employment Relations

The concept of fairness has been a key one in the evolution of a distinctive Australian industrial relations system. However, defining what is fair in Australian industrial relations has long been viewed as problematic by industrial relations academics (Isaac 1992; Provis 2004). In practical terms fairness in the details of employment is, as Sorrell (1981) reminds us, ‘a codification of power …and … a legitimation of the existing balance of power …’ Nevertheless there has been an explicit cultural and political attachment to the concept of fairness in industrial relations in Australia for over 100 years. It generating this sentiment the Great Strikes of the 1890s has probably had the most impact on the concept of fairness in employment relations. The social conflict unleashed by these strikes provoked wide discussion, judgement and reform. They were not simply viewed as a victory to employers and a defeat to the unions but increasingly came to be seen as unfair to all (Svenson 1995). The point is not so much whether such a view is logical but that there was a public discussion in which the concept of fairness was applied to clashes between employers and employees. It was this sentiment that stimulated the idea that fairness could be established or maintained by state intervention in and regulation of the relations between employers and employees.

Similarly, the suffering that arose from the Depression of the 1890s also encouraged a highly explicit articulation of fairness in the employment relationship. The public’s concern about poverty, or the wages and conditions of workers in industries such as clothing manufacturing also helped firmly place the concept of fairness on the political agenda (Report of Chief Inspector 1890). The wages and conditions struck by free market contracts in the ‘sweated’ trades were seen as so low
as to be immoral and unfair (*Age* 1893 & 1896). There ensued a long public debate about the plight of Victoria’s sweated workers and the need to introduce reforms which would alleviate their situation. Of paramount concern was the establishment of standards of remuneration and conditions that were fair to employees and to respectable employers. Implicit in the discussion of sweated labour was the notion that there was a fair living wage, a fair price and a fair level of profit. In this way, industrial reformers on either side of the employment relationship were engaged in an attempt to define fair and just. The debate ultimately led to the Factory Act reforms and to the establishment of the Wages Board system in 1896; a collection of autonomous tripartite boards which fixed wages and conditions in specific trades (Robbins 1980).

This concern with fairness in the relations between employers and employees was not an exclusively Australian colonial concern: there were other, more international sources of opinion (Hammond 1914 & 1915; Webbs, 1965). For example, the socialist movement in its many forms articulated a response to what it saw as the inequality caused by industrial capitalism. Another source of reformist opinion was Pope Leo XIII (1891) who issued an encyclical which addressed industrial relations (Abbott 2006) by demanding a living wage which offered ‘frugal comfort’ (Leo XIII 1891). The Pope argued (like the Socialists) that low, sweated wages might be good for profits but they were not good for the individual human condition nor for the stability of the body politic.

Perhaps no where was the public’s concern for fair industrial relations more apparent than in the establishment of the federal system of industrial relations in 1904. This arose from the long decade of debate about federation and the Constitution (Hirst 2000). Within the constitutional debates was the notion that fairness in employment
relations could be determined through legislation. This also reflected the fact that fairness, regardless of its illusiveness, was important to the majority of the population. In establishing tariff protection for Australian industry the *Excise Tariff Protection Act 1906* was explicitly concerned to protect businesses which paid ‘fair and reasonable’ wages. In this way a key economic development policy was firmly located within a doctrine of fairness.

Defining fair and reasonable was an early task given to the Arbitration and Conciliation Court established in 1904 and the 1st President of this body, Justice O’Connor, ruled piece-meal in a number of cases (Harvester Transcript 1907). The more systematic and fundamental approach to defining fairness was left to the 2nd President, Justice Higgins, which he did in 1907 in what became know as the Harvester case (Harvester Decision 1907). This arose from an application by H.V. McKay, proprietor of the Sunshine Agricultural Harvester plant, for protection under the Excise Act (Macarthy 1969). Protection under this Act was only available to employers who paid fair and reasonable wages. McKay argued that he did pay fair wages while the unions, curiously, argued not for a living wage but a share of the profit windfall protection would give (Robbins, Harriss & Macklin 2005). In contrast, Higgins demanded a Needs based approach and insisted some statistical estimate of the cost of living be presented. In reality these figures were crude estimates but they allowed Higgins to set a wage of 7/- per day.

In this case we see all the common arguments regarding wages being put; a share of profit, the bargaining process, supply and demand, employer calculation of productivity of individuals as well as the social and physical needs of workers. The Higgins’ view prevailed and although it was challenged he was able to construct it into the universal principle of a living Basic Wage. This concept was prominent in
federal wage fixing for much of the twentieth century although there were numerous
times from the 1930s Depression onwards when the Higgins concept was challenged
by more pressing economic considerations. Over time Need and industry’s Capacity
to Pay became the twin criteria used by the federal tribunal in determining fair wages.

Success in finding fairness is not the issue here. Indeed the federal tribunal has
not always actively sought equity and fairness in all of its considerations (Ryan 2005).
For example, Higgins and the Arbitration tribunal played a central role in hampering
and delaying equal pay for women workers. However, what is important is that the
wages of Australian workers and the labour costs of Australian businesses were
established by tribunals as fair within a pluralist framework of interaction. The
balance of power, although not extinguished, was at least mitigated. The centrality of
fairness did not begin to fade from the scene until the concept of comparative wage
justice was abolished by the Accord and award restructuring in the late 1980s.
However the Accord (a bipartite agreement between the federal Labor government
and the ACTU) was deeply concerned with fairness (Accord Mark VIII 1995-1999). It
was an extension of many previous attempts to articulate a sense of fairness in
industrial relations. In this way, for over 100 years Australian industrial relations has
paid explicit attention to the fairness.

In contrast, in the new industrial relations system introduced by the Workplace
Relations Amendment (Work Choices) Act 2005 the concept of a pluralist fairness has
little presence. This Act accelerates the trend from collective bargaining to individual
bargaining begun by previous legislation. In doing this it restricts the participation of
trade unions in industrial relations by strengthening organisational controls over them,
tightening control over strike action, curtailing union entry into workplaces and
removing access to union training and meetings (Stewart 2006; Mackin 2006). In
addition, the new Act dismantles further the role of the Australian Industrial Relations Commission (AIRC) by restricting award content, curtailing it’s arbitral powers in disputes and by establishing a new wage setting body, the Fair Pay Commission, to set minimum standards (Sappy et al 2006).

Further, while this legislation introduced some of the most fundamental changes to employment relations seen since 1904, there has been little sustained public debate (Peetz 2005). Indeed the government reduced debate in Parliament to essentially a week (Hansard 10 Nov. 2005). Moreover, the level of debate which did occur was mostly engineered by an opposing ACTU media campaign. That this was successful is apparent from opinion polls (The Australian, 19 Dec 2005) and by the fact the government launched in response the most sustained and expensive advertising campaign in Australian political history in order to ‘sell’ its package of reforms. This saturation was also complimented by a pro-reform advertisement campaign funded by the BCA. Both the government and the BCA were forced to argue that the new industrial relations system would be fair both in terms of process and likely outcomes. Indeed the government was so stung by the ACTU campaign that it pulped thousands of copies of its free brochures on the legislation in order to insert the word ‘fair’ in the title (Age, 7 Nov 2005).

It can also be argued that the advertisement campaigns mounted by both sides represent a quantitative and qualitative degradation in the nature of the debate over fairness. In comparison to earlier reforms in the history of Australian employment relations (Saunders 2004: 4-5; Macintyre 1981) the concept of fairness was not vigorously or extensively debated in 2005-06. Rather, the current reforms were largely marketed through advertising campaigns. The quality of debate in a printed format or formal debate is quite different when compared to the 30 second media
‘grab’. In the latter persuasion is about impact rather than facts or analysis and, more importantly, it is about repetition rather than logic or accuracy. In the current reforms the extent and quality of debate has been short and extremely limited.

**Defining Fairness**

The problem with trying to use ‘fairness’ as an evaluative tool is that it is ambiguous, vague and flexible. As a consequence the word ‘fairness’ is a political resource that any side in a political debate can call on for conformation or reassurance (Sorrell 1981). For our purposes we define fairness as being about justice. To be fair is to be just, to be unfair is to be unjust (Patemen 1981). Adopting this strategy does not solve our definitional problems although it focuses the discussion on a more philosophically analysed concept. ‘Justice’ has been scrutinized and defined by a great many philosophers, sociologists, political scientists and psychologists and thus enables commentators to be more precise in their usage. Here we adopt a definition articulated by the political and moral philosopher Agnes Heller (Macklin 2006 forthcoming; Macklin 2004).

Heller outlines two understandings of justice: *static* and *dynamic* (1987). Static justice is about consistently and continuously applying existing norms and rules to everyone in the social cluster to whom the norms and rules apply. By ‘social cluster’ she means people who can be identified as a group because their behaviour and relations are governed by the same norms and rules. By ‘consistent and continuous’ she means that the norms and rules must be applied to everyone in the social cluster unfailingly until the norms and rules are changed (Heller, 1988: 5). Thus for example under the old award system the distribution of wages across people covered by the same award classification was ‘just’ if everyone clustered under that classification was
consistently and continuously remunerated in accordance with the norms and rules governing the payment of wages for people on that wage classification.

The important point here is that static justice is about the application of existing norms and rules. That is, it is not, at its most fundamental level, about the identical treatment of different individuals. Rather it is about whether or not the norms and rules covering such things as how people should be rewarded for hard work or punished for transgressions are being consistently and continuously applied impartially to all individuals covered by the norms and rules. This naturally raises questions about what we do if we don’t like a particular set of norms and rules. Here we enter the realm of what Heller calls ‘dynamic justice’, which is about the justness of the norms and rules themselves and refers to a process whereby existing norms and rules can be devalidated and alternative norms and rules proclaimed just.

Broadly speaking, Heller (1987) suggests that norms and rules can be devalidated if critics rely upon the observance of normative criteria contradicting the norms and rules; if the injustice of the norms and rules follows from observing the normative criteria; and if critics can suggest alternative norms and rules that accord with the normative criteria. This last point is important, Heller suggests, because one can reject a norm or rule as bad, wicked or inhuman without suggesting alternative norms and rules but to de-validate them as unjust requires us to suggest alternatives.

While Heller (1987) identifies four kinds of normative criteria: particular principles; moral norms and maxims; pragmatic maxims; and substantive values she does not specify a limited set of normative criteria that people can appeal to because from her perspective the criteria will frequently vary depending on people’s positions and perspectives. Consequently one person may seek to de-validate a norm or rule in terms of one set of criteria, while another person may simultaneously seek to validate
the norm in terms of criteria they select: the views of workers and managers, for example, may be divided in this way. However, Heller does appeal to two ultimate normative criteria as a base for challenging the justice of norms and rules in western democratic societies. She argues that regardless of whether de-validation involves particular principles, moral values or maxims, or pragmatic maxims, rejecting norms or rules as unjust in countries such as Australia is ultimately grounded in the *substantive values* of freedom and life-chances. Here she argues that freedom has become such an important value that its opposite cannot be appealed to as a normative criteria (Heller, 1987: 251).

Heller nevertheless argues that freedom and life-chances can be defined in different and possibly conflicting ways, and she appears to point approvingly to the suggestion that in socio–political contexts freedom and life-chances are about a person’s *right* and *ability* (chance or opportunity) to participate in community decision-making (democratic freedom) and to decide their own fate, to choose a way of life and to do anything that does not prevent others from doing what they like doing (liberal freedom). For Heller, life-chances is a *substantive value* requiring freedom to be more than just about abstract rights. All individuals should have an equal right to participate in decision making and an equal right to decide their own fate etc. However rights are not enough. Everyone should also have an equal chance or opportunity to be involved in decision-making processes and all individuals should have an equal chance or opportunity to pursue their own way of life.

The two claims may be linked: improved freedoms can lead to improved life-chances and vice versa, but this need not necessarily be the case. Heller suggests that the substantive values of freedom and life may clash or at least not be capable of equal support. That is, in some concrete situations the actor must give priority to one
substantive value over another. She argues that we must live with the awareness that “even if we uphold both universal principles, we cannot observe both of them unconditionally in many highly sensitive situations” (1987, p126).

Because of this, because static justice is sometimes breached and because norms and rules can be challenged, potential conflict is an inevitable facet of modern societies. Heller argues, such conflicts are social and political and can be settled by discourse, negotiation or force. Which procedure is appropriate or rational depends upon the norms and rules that cover the conflict resolution procedure involved. Moreover she suggests that the justness of a particular procedure can be challenged using static justice if it is not applied consistently and continuously and from the perspective of dynamic justice where the norms or rules prescribing it are de-validated using appropriate normative criteria and ultimately the values of freedom and life chances.

**Dynamic Justice and IR Change**

When examined through the prism of dynamic justice the shift to the arbitration system after the 1890 strikes is about a successful attempt to de-validate an existing set of industrial relations norms (freedom of contract) and to replace them with what was claimed to be a more just set of norms and rules (Arbitration system). It can be suggested that the normative criteria being appealed to by many of the parties was a pragmatic maxim concerned with improving substantive economic and nation building goals. But in terms of the ultimate substantive goals of freedom and life chances, we suggest the predominant normative criterion was life chances.

The claim for an arbitration system, it can be argued, derived from a claim on the part of the unions for a greater real level of democratic and liberal freedom for the
emerging nation’s workers. The failure of the 1890s strikes reveals they did not have a capacity equal to employers to exercise their democratic freedom. The arbitration system was an attempt to partially redress this inequality of life chances through the introduction and institutionalization of rules that required employers to meet and negotiate with workers under the auspices of an umpire who would ensure all parties were actually able to participate equally (Howard 1977). The return for employers was that workers could no longer engage in strike action.

With respect to liberal freedoms it can be argued that the levels of poverty in the colony at the time and the extent of sweated labour suggests that while the workers may have had extensive rights to liberty their actual capacity to exercise these rights was not equal to many employers. As a consequence, the arbitration system, largely through the efforts of Justice Higgins, can be portrayed as attempting to redress the imbalance. While Higgins refused to move towards an equal sharing of resources (Robbins Macklin and Harriss 2005) he did at least try to improve workers’ life chances so that they could live in ‘frugal comfort’. Higgins’ decision can criticised for not doing enough to redistribute life chances across the community and especially to women, but the direction he set was at least progressive with respect to people’s capacities to exercise their liberal freedoms.

Whilst it must be acknowledged that some employers remained unhappy with both the arbitration system and the Harvester Decision and felt vehemently that their rights and capacities to utilise their private property as they deemed fit had been assaulted, the actual process of change from the old to the new norms was quite open and democratic and thus, one might suggest, just. As discussed earlier, the threats and difficulties posed by the unsuccessful strikes were widely and extensively debated across the country as were proposed solutions.
In sum, the events of the 1890’s and early 1900’s can be depicted as an example of dynamic justice involving an attempt, through wide spread discussion and debate, to de-validate an existing set of industrial relations norms as unjust and validate in their stead a more just set of norms and rules. Moreover, the claim to greater justice was ultimately a claim to improve the capacity of workers to exercise their democratic and liberal freedoms. Moving forward to today, how can we understand the Coalition government’s legislative changes from the perspective of dynamic justice? Broadly, the government agenda is to free up the labour market. It is argued this will lead to greater levels of organisational efficiency and on from there to improved competitiveness and ultimately greater (or at least stable) levels of employment and wealth creation. Thus from the perspective of dynamic justice the changes can be seen as an attempt to replace an existing set of purportedly inflexible wage fixing and dispute resolution norms and rules with norms and rules that will increase flexibility. Like the changes of 100 years ago the normative criteria being appealed to by the government today is a pragmatic maxim concerned with improving economic growth and asserting nation building within a global context.

As stated above, however, we support the view that in western societies such as Australia political changes should be grounded in appeals for greater freedom or life chances. In this respect and in terms of democratic freedom (as defined by neo-liberalism), it can be argued that the government is seeking to increase employers and employees’ rights and capacities to participate in setting the terms and conditions of employment by removing the ability of unions and tribunals to interfere in discussions between an employer and his or her employer. In terms of liberal freedom it can also be argued that the government is seeking to increase both employers and employees’ rights and capacities to take control of their own fate and choose their own way of
life. Unions and tribunals, it might be suggested, interfere with this process and impose their view of what employees should want. This can be seen as unjust because it curtails individual people’s capacities and, because the tribunals and unions are protected by legislation, their rights to liberal freedoms.

Thus the Coalition Government’s actions can be depicted as an example of dynamic justice involving an attempt to devalidate an existing set of industrial relations norms as unjust and validate in their stead a more just set of norms and rules. We accept it is possible that democratic rights are theoretically enhanced by the government’s legislative changes to reduce the automatic role of third parties. In theory this gives employees a greater discretion to choose how involved they will personally be in the setting of their terms of employment, what this involvement will amount to and whether or not they will call upon others to represent them and if they do who these others will be. In terms of liberal rights, the government’s legislation also reduces the number of issues that must be covered in any contract to 5 and thus, in theory, increases the employee’s discretion to choose, in discussion with his or her employer, forms of remuneration and conditions of employment that suit his or her particular view of what makes for a good life.

In practical terms, however, we think that the government has missed the lessons of the 1890s and thereby ignored the impact of its reforms upon the distribution of power between employers and employees. All individuals should have an equal right to participate in decision making and an equal right to decide their own fate etc. However, everyone should also have an equal chance or opportunity to be involved in decision-making processes and all individuals should have an equal chance or opportunity to pursue their own way of life. Our view is that the government’s changes will not increase employees’ actual capacities to exercise their
democratic and liberal freedom. Indeed, as some research has already suggested actual opportunities, capacities and choices will decrease as a result of the government’s changes (Peetz 2005). The reason for this is that the changes will result in an increase in the power of employers and a consequent decrease in the power of employees to determine how conflicts are resolved, how the terms and conditions of employment are set and what these terms and conditions will be. Indeed early applications of the new Act also suggest this (CCH 2006).

This power shift will derive from the reality that individual employees must come to an agreement not with other individuals with more or less the same level of resources and capacities but with individuals who represent and who act with the full resources of an organisation or corporation behind them. As such, individual employees will most likely have to deal with a far more powerful ‘other’. In summary, employees will have a reduced capacity to exercise their rights to democratic and liberal freedom and employers a greater capacity because with the de-collectivisation of employee representation and the marginalisation of the tribunals the bargaining power of many employees will be reduced. While employees may experience an increase in their abstract rights this increase is very likely to be associated with a decrease in their capacity to exercise those rights. And, following Heller, rights without capacities are hollow and meaningless. In addition, if this unfair situation were to continue for some period of time then it can also be argued that employee rights as a whole will also decline. As employers exercise their bargaining power employees may be forced to accept fewer and deteriorating employment rights and conditions.
HR practices and the Demands of the New Fairness

The final issue examined by this paper is what impact the changes will potentially have on the practices of HR managers who seek to promote fairness as justice. The government argues that the de-regulation of industrial relations will demand the adoption of new processes of negotiation between employer and employee and the likelihood of new types of outcomes. It goes so far as to argue that individual contracts between an employee and his/her employer will generate greater flexibility and efficiencies. However, just how flexibility will be good for employees is not clearly articulated.

It is also the case that the practices of HR managers in Australia has evolved within the context of a regulated, compulsory and centralised industrial relations system (Wright 1995) and that the removal of this will have a dramatic impact on their roles. It is no exaggeration to point out that many HR policies in Australian industry have thus far been constructed on the broad principles of fairness as defined within the legal, political and social structures of federal and state systems of industrial relations. Even though the concept of fairness as articulated into guiding principles has varied over time there has nevertheless been a constant discussion of what fairness means to all parties and this discussion has occurred in a public and transparent manner. In this way HR managers in developing policies have had to respond to, anticipate or interpret the broader fruits of such discussions. An example of this is the principle of equal pay, now a cornerstone HR policy and practice, but in most cases was only embraced by employers after it was established in repeated cases by the federal and state systems of industrial regulation. The point is that the fairness, enshrined in equal pay, was not the product of HR policies but of industrial relations.
processes external to the firm. These processes, it should be noted are now the very ones so stridently dismantled by the federal government.

This raises the question of how fairness or more precisely justice will be determined, defined, articulated and promoted by HR processes within individual firms when there is no broader context within which the concept can be raised and discussed. The removal of forums for such discussion and the intellectual eclipse of the concept of fairness as though somehow it is old fashioned creates a vacuum for the discussion and negotiation of employment relations by HR departments. HR managers who wish to stand up for justice will therefore face a challenge to develop forms of consultation and interaction which will allow the articulation of differing views of what constitutes just norms and rules. This will not be an easy task. Their capacity to do so will be affected by a range of factors including their moral autonomy (Macklin 2004) but also broader ideological imperatives. As Gear et al (2006) have recently argued, HR strategy is now again firmly unitarist in orientation. Given this, it is hard to imagine an HR manager being able or willing to distil a compromise between the differing views expressed, for example, by the ACTU and the BCA. Any pluralist interaction will now have to take place in the media, union web sites or even pulpits. These will, however, be remote from the firm and the deliberations of over-stretched HR managers. In unionised workplaces a degree of pluralism may remain but the presence of unions in firms has weakened over the past 20 years (Peetz 1998) and it is no exaggeration to conclude that the restrictions placed on the operation of trade unions by the new Act (Stewart 2006) will further remove the trade union influence on the definition of fairness.

Some decent HR managers will seek to articulate their own views of justice. Might we see HR adopt a stronger alliance to Christian social doctrine (Abbott 2006),
or to broad secular ethics or to the construction of more elaborate consultative and participatory schemes which tolerate a pluralism of views? In either case, because the external and public debate and resolution of key components of fairness are removed by the new Act, HR may have to generate more elaborate and sophisticated principles.

Another alternative is much simpler and more likely. HR managers, even those with a concern for justice, may, in the absence of a workers’ collective voice and the tribunal’s concern for other perspectives, take as their guiding principle in the determination of just norms and rules and rights, those which are primarily in the interest of senior management or shareholders. And here the question must be asked, do either or many of these stake holders realistically value the expansion of freedom and life chances offered by an effective participatory process or the norms and rules established by broader social and ethical doctrines which are external to the values of the organisation? Despite the personal values and motives of HR practitioners the likelihood of such a concession to collective and pluralist industrial relations in the current climate seems alarmingly remote. Ironically, the government seems to have a greater faith than us in the power of ethical social values informing norms and rules or in the power of consultation and participation to genuinely expand workers’ capacity to exercise their democratic and liberal rights. If the Workplace Relations Amendment (Work Choices) Act 2005 is about enhancing fairness then the government has chosen a difficult and complex way of doing so.

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