INDUSTRIAL RELATIONS—THE FUTURE: THE WILCOX REVIEW—IS THIS THE END OF THE AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION?

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INTRODUCTION

The Government's election manifesto for industrial relations was in two parts: *Forward with Fairness*[1] and *Forward with Fairness: Policy Implementation Plan*.[2] In the second document a page is devoted to the building and construction industry. From those few words, a raft of measures are to be expected because the Labor Party in Government has followed the promises in the *Forward with Fairness* documents.[3] In the policies, it is made plain that until 31 January 2010 Labor will maintain the existing arrangements for the building and construction industry including keeping the Australian Building and Construction Commission (ABCC). After that date, responsibilities will be transferred to the specialist division of the inspectorate of Fair Work Australia.

Fair Work Australia is the new 'one stop shop' organisation that will bring together the functions of a number of existing workplace relations agencies, including the Australian Industrial Relations Commission (AIRC), the Australian Fair Pay Commission, the Workplace Authority and, obviously, the ABCC.[4] In a formal sense then, the epitaph for the ABCC is already written. The end will arrive on 31 January next year. Yet epitaphs can express messages that provide the living with hope or at least a smile such as appeared on the tomb of an English lawyer:

Sir John Strange.

Here lies an honest lawyer.

And that is Strange.

It is the ABCC successor body that we must concentrate on and the hopefully seamless transfer from the ABCC into that new entity. The Wilcox Inquiry[5] has been established by the Government so that it has advice about the structure, independence, powers, resourcing and other matters relating to the new specialist division that will take over from the ABCC.

The Honourable Murray Wilcox QC, a former Australian Federal Court judge,[6] will report to the Government by the end of March 2009. It will then, of course, be up to the Government to determine the extent to which it follows the Wilcox recommendations. This paper examines two crucial issues that the Wilcox inquiry is currently digesting and indicates Master Builders' preferences relating to outcomes. Before taking those steps, the current political climate is briefly mentioned.

THE EARLY ABOLITION CAMPAIGN

The future of the ABCC is all about politics: the lines have been clearly drawn between those who believe that the ABCC has unwarranted powers which it exercises unfairly against workers and therefore no successor should take its place, to those who applaud its work in restoring the rule of law and want to see its structure and powers exactly replicated in the future. Master Builders falls into the latter category.

The CFMEU falls into the category that wants there to be no special laws for the building and construction industry. It has spent considerable time and money pushing that position.

A campaign was begun in May 2008 by five unions, including the CFMEU, designed to pressure the Government to abolish the ABCC early.[7] The campaign has been advanced under the notion that it is the 'duty' of the Government to repeal all of the Howard Government's industrial relations laws.[8]

We find this concept strange; the better view is that the Government should do what it is doing: stick to its promises, and all the indications are that the Government has stood firm[9] even in the face of a radical Bill that was introduced by the Greens Party and referred to a Senate committee in November last year. Passage of the Bill would have meant the immediate closure of the ABCC.[10] Whilst acknowledging that the ABCC would remain in place until 31 January 2010, the Government majority on the Senate Committee dealing with the Bill's terms recommended that 'appropriate safeguards for the use of coercive powers by the ABCC be put in place as a matter of urgency'.[11] Obviously, the campaign to abolish and/or to completely re–shape the ABCC has gained momentum, including within the Government's own ranks.[12] The Government has not acted on the recommendation of the Senate Committee majority.

It is important that arguments which are put forward to support the case for abolition of a specialist agency for the building and construction industry are addressed in the context of the Wilcox Inquiry because the ABCC's successor must be the 'tough cop on the beat' promised. Indeed in November 2008 the Deputy Prime Minister was quite clear about maintaining the rule of law in the industry through this idea of a 'tough cop on the beat.' In her remarks the importance of the Wilcox Inquiry in assisting with how the new agency will work was also emphasised:

Well we've been very clear that whatever industry it is, people have to comply with the law. The building industry can be a tough game. In the building industry we have said people have to comply with the law. That's true of employers, of employees and of unions. And we've said that there would always be a tough cop on the beat in building and construction. That tough cop on the beat will be in our new specialist inspectorate in Fair Work Australia and His Honour Murray Wilcox is working through the process with all industry stakeholders to design the way in which that tough cop on the beat will work.[13]

It is imperative that this promise becomes a reality. In establishing the new 'tough cop on the beat' it is abundantly plain that there will be a number of internal problems for the Government, including an already existing finding by its own Senate Committee majority which calls for a watering down of the ABCC's powers.

THE COLE ROYAL COMMISSION AND UNACCEPTABLE CONDUCT

The Royal Commission into the building and construction industry was established in 2001 and its comprehensive reports were tabled in Parliament in March 2003.[14] The Royal Commission recommendations were derived from the highest form of inquiry that is capable of being held in this country, a Royal Commission. A significant number of the recommendations made by Commissioner Cole have been implemented and have formed the basis of a new start in industrial relations for the industry with the passage of the *Building and Construction Industry Improvement Act 2005* (Cth) (BCII Act). From September 2005 the BCII Act established the ABCC. The statute's provisions are based upon the findings of a Commission which reported widespread disrespect and disregard for the rule of law; instances where criminal, industrial and civil law were breached with impunity; that industrial muscle rather than entitlement usually determined outcomes; and that the laws of the land were generally inoperative on a number of commercial building sites.

Master Builders has strongly opposed any attempts to re–open the findings of the Cole Royal Commission or to in any way question the need for the current or future agency in the light of the conduct or findings of the Royal Commission. Indeed, as part of our submission[15] to the Wilcox Inquiry, we have shown how the unacceptable and illegitimate conduct that the Royal Commission identified has continued despite the activities of the ABCC. We wanted to show clearly that its work is not yet over and that some of the unacceptable conduct that Cole identified persists.

The Royal Commission found that unacceptable and unlawful behaviours of unions in the commercial sector were a systemic problem. There was and there remains a need to change the underlying culture that was widespread and is based upon the exercise of illegitimate power through threats and intimidation. Aspects of that behaviour remain; for example in the Master Builders' submission to the Wilcox Inquiry, amongst a number of other examples, we use the startling report from the *Melbourne Age* of 10 September 2008[16] that arising from an industrial dispute an executive of a major construction company received death threats, and that the relevant AIRC Senior Deputy President issued a number of formal warnings concerning intimidation of witnesses.[17] The industry executive was warned to quit his job 'or you will die'.[18] Obviously, whilst people talk about the 'rough and tumble' of the building and construction industry, this sort of conduct can never be acceptable.

Master Builders also called for the so-called secret volume[19] of the Royal Commission's report to be made public in order to eliminate speculation about what it did or did not say about criminal activity in the industry. Its release might not have the same impact as the screening of *Underbelly* but it is important that the historical record be complete.

In the Discussion Paper issued in order to stimulate feedback to Mr Wilcox,[20] he expressed the view that the Royal Commissioner was correct 'in pointing to a culture of lawlessness by some union officers and employees, and supineness by some employers, during the years preceding his report'.[21] This extract also gives you a flavour of the language and remarkable tone of some of the passages in the Wilcox Discussion Paper; the word supineness in this context means employers demonstrated lethargy, passivity, or blameworthy indifference. This is not how we would characterise the attitude of someone who sees their counterparts bring a baseball bat to the negotiating table, either literally or figuratively. The idea that building and construction industry employers are somehow inherently passive in the face of unlawful behaviour is a preliminary conclusion reached by Mr Wilcox that we hope he reverses in the light of the evidence presented.

The unions did not accept the Wilcox proposition about the culture of lawlessness. In submissions to the Wilcox Inquiry, the five unions involved with the campaign for the early abolition of the ABCC took the proposition as a catalyst to criticise the Royal Commission findings, particularly raising allegations about the manner in which the Commission was conducted, a tired and irrelevant approach. The Royal Commissioner's recommendations formed the basis of a large proportion of the law that was subsequently passed, laws designed to assist with the restoration of the rule of law. To deny that the findings are accurate is to spit in the face of history.

History shows that Cole was not the first Royal Commission to make adverse findings about the industry's industrial relations practices. The 1992 New South Wales Gyles Royal Commission[22] also found systemic problems in industrial relations:

The public and confidential submissions received by the Commission, with very few exceptions, identify and complain about various aspects of union militancy. The complaints were from so many disparate sources and are so consistent that they amount to a powerful body of evidence in themselves to establish the proposition that the conduct of the members and the officials of the former BWIU (New South Wales branch) very severely affect productivity and efficiency of the industry in this State, both because of the persistent disruption of projects and businesses and because of the restrictive work practices instituted and defended whilst work is actually proceeding.[23]

In short, it must be remembered that the ABCC was set up to address and prevent unlawful behaviour in the building industry following the recommendations of the Royal Commission into the building and construction industry. Other industries and occupations are also singled out for special treatment in various jurisdictions, in response to the specific nature of those industries or occupational circumstance and to protect consumers. This is what has happened with good effect in the building and construction industry.

POSITIVE CHANGE

Master Builders has presented a great deal of evidence about the positive changes in the industry which have occurred because of the new industrial relations rules under the BCII Act which have assisted with the restoration of the rule of law. In the Discussion Paper Mr Wilcox was adamant that evidence be provided about the industry's 'present happy position':

The only possible justification of having specially restrictive rules for the building and construction industry must be that this is necessary to provide industrial peace and an acceptable level of productivity. Many people assert that the industry's present happy position, in these respects, is attributable to the BCII Act and the activities of the ABCC. Is there any hard evidence that supports that assertion?[24]

Master Builders has provided a great deal of evidence about the contribution of the work of the ABCC to positive industry trends that builds upon independent economic analysis of industry productivity by Econtech which found building and construction reforms delivered a large dividend to the Australian community.

Labour productivity is one measure that has shown real improvement. As measured by gross value added per hour worked, labour productivity in the construction industry increased by 0.6 per cent per annum in compound growth terms over the 19 years from 1985/86 to 2004/05, compared with 1.6 per cent for all industries. Over the three years from 2004/05 to 2007/08 following the introduction of building and construction industry-specific reforms, productivity in the construction industry increased significantly, growing by 1.8 per cent (compound annual growth), well above the all industry figure of 1.0 per cent.[25]

That productivity benefit does not just flow on to employers: we estimate that construction industry employees have increased aggregate earnings by $24 million per annum via the benefits of fewer working days lost through industrial action since the ABCC was formed.

THE ABCC'S COERCIVE POWERS

A large element of the controversy surrounding the ABCC and the successor body derives from the allegations that the powers possessed by the ABCC are inappropriate and involve the breach of civil liberties.

In the Second Reading speech concerning the Greens Bill that I discussed earlier, Senator Siewert stated that:

Building and construction workers are being denied basic democratic rights to procedural fairness and natural justice that the rest of us take for granted. These workers—who have not been charged with anything and may only be suspected of knowing about an offence committed by someone else—are being treated with fewer rights than someone who has committed a very serious criminal offence. It is not appropriate to regulate the relationship between employers and employees in a quasi-criminal way. If there is criminality on a building site it should be dealt with by the criminal law.[26]

Section 52 of the BCII Act says, subject to certain criteria, that the ABC Commissioner may, by written notice, compel a person to produce information or documents or attend before the ABC Commissioner or Deputy ABC Commissioner and answer relevant questions. It is this provision that is under attack. The criteria are that the ABC Commissioner believes on reasonable grounds that the person:

- has information or documents relevant to an investigation into a contravention by a building industry participant; or
- is capable of giving evidence relevant to such an investigation.

As Mr Wilcox highlighted in his Discussion Paper, power to compel attendance may actually assist a witness. Some people, who are not unwilling to give evidence, ask to be served with a subpoena in order to avert criticism, even ostracism, by others.[27] It is not an attack on building workers to have a power vested in the ABCC which compels witnesses to provide information.

Importantly, and something that appears to be ignored by a number of media reports,[28] is that there are protections in the BCII Act preventing the information from being used in any other proceedings save for some limited exceptions such as where a person has provided false or misleading information or documents or where a Commonwealth official has been obstructed. Basically, you cannot have your own words used against you. Section 54 BCII Act cannot be ignored. Persons who provide information to the ABC Commissioner will have protection against civil or criminal proceedings in relation to the provision of the particular information.

Even though there is a limited intrusion on the common law right to silence, there are very important statutory protections about not being convicted on your own evidence, reinforcing the doctrine known as the privilege against self incrimination.

Commentators have emphasised that it is this protection against self incrimination that is at the

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nub of human rights not the right to silence:

The privilege in its modern form is in the nature of a human right, designed to protect individuals from oppressive methods of obtaining evidence of their guilt for use against them.[29]

In the context of the ABCC's powers that basic right is reinforced, not taken away.

In addition the powers are not unusual and are not unique to the ABCC. The ABCC's compliance power is modelled on that used by the Australian Consumer and Competition Commission (ACCC) and is similar to the power used by the Australian Securities and Investment Commission (ASIC). However, in relation to the ABCC's compulsory powers, it should be emphasised that the powers are exercised only at the level of Commissioner and Deputy Commissioner. The other organisations, such as ACCC or ASIC, utilise the powers much more readily and at a much lower organisational level. Section 13(2) BCII Act stipulates that the powers or functions under section 52 may only be delegated by the ABC Commissioner to a Deputy ABC Commissioner.

The ABCC in its previous form as the Building Industry Taskforce did not possess such powers, particularly the power to compel persons with information or documents about a building industry investigation to provide that material. The result was that the majority of complaints were not taken further:

A survey conducted on a number of clients who withdrew their complaint found that 52% had done so for fear of the ramifications they may face should they pursue the matter.[30]

As part of our submission to Mr Wlicox, Master Builders commissioned an opinion from one of the best industrial relations brains in Australia, Mr Harry Dixon QC. His conclusion was that the combined powers of the Commissioner and inspectors under the BCII Act simply provide them with the ability to make inquiries and also to obtain material and evidence to enforce the relevant workplace relations laws. He said that it is difficult to see how any one of the powers is not necessary to enable those persons to carry out the obligations they have under the legislation.

For the new specialist division, we have recommended that there be two further mechanisms to ensure the civil rights of those who appear before the successor body to provide evidence under compulsion. We have recommended that the current Deputy Commissioner roles being given a statutory basis so that formal recognition of a tripartite decision to use the coercive powers is provided. Second, there should be a more formal requirement to adhere to the principles set out by Government derived from a report called *The Coercive Information–Gathering Powers of Government Agencies* on the proper exercise of coercive powers, principles that the ABCC currently observes.[31] Obviously, with a structure that saw the retention of three Commissioners who would be required to decide to exercise the successor body's coercive powers, we believe that the new specialist division must have autonomy from Fair Work Australia and have its own governance structures.

It is highly likely that the successor will have a supervisory body with at least the function of overseeing the exercise of coercive powers; we say that the current Deputy Commissioners should be elevated to undertake that role sitting with the current Commissioner. Others, for example the Victorian Government, suggest a similar approach:

The Victorian Government supports the notion of a supervisory board charged with determining the Specialist Division's policies and programs as distinct from, and in addition to, an executive officer who supervises their implementation. As is rightly pointed out, the establishment of a supervisory board would have the added advantage of reviewing, or establishing concurrence for, a decision by the Divisional Manager to undertake a particular investigation and/or compulsorily interrogate a particular person.[32]

It is imperative that the coercive powers are retained by the successor agency.

THE NATIONAL CODE AND GUIDELINES

How many of the fundamental components of the current law relating to the building and construction industry will remain in place post 31 January 2010 is not yet known. However the *Forward with Fairness* policy states:

The principles of the current framework that aim to ensure lawful conduct of all participants in the building and construction industry will continue, as will a specialist inspectorate for the building and construction industry.[33]

The future role of the National Code of Practice for the Construction Industry and the related Implementation Guidelines[34] (Code and Guidelines) in establishing the current framework that delivers the rule of law to the sector is an unknown, although it does appear that these instruments will remain in place as part of the institutional structures of the

industry until 31 January 2010. We have argued that the Code and Guidelines carry a number of the principles that have assisted with the rule of law in the industry and that they should remain in place and continue to be administered by the successor body.

Mr Wilcox was uncertain about whether or not the future of the Code and Guidelines fell within his terms of reference.[35] He, however, made it clear that he was prepared to receive, and pass on to the Minister, any submissions about the Guidelines. It will be for the Minister to determine what course she should take in relation to them.

Master Builder supports the Code and Guidelines because they have enabled the practical flow on of the building industry specific reforms; they have been a catalyst for changes to agreements so that on ground arrangements reflect the reforms which the ABCC is then able to enforce, and it expends a great deal of its resources ensuring that the Implementation Guidelines in particular are adhered to. They assist with industry productivity because the 'sign up or else' tactics of the past cannot prevail in the face of their forceful principles about freedom of association and the specific terms about certain practices such as prohibiting employers providing to unions the names of new staff, job applicants, contractors or subcontractors and fundamental matters such as not permitting restrictions on categories of labour.

The Guidelines in particular enhance the efficiency of labour because they require freedom of association as well as open and transparent workplace relations arrangements. A number of State Governments have attacked the Code and Guidelines as being 'anti–competitive'. Master Builders has countered this argument by saying that the single most anti competitive behavior in the industry was the enforcement by unions of 'one size fits all' pattern agreements. However, the Victorian Government has suggested two reforms that Master Builders would support. The Victorian government has said if they are retained the Code and Guidelines should be:

- *re–written in plain English with less ambiguity and less scope for differing interpretation; and*
- *that in accordance with proper public administration, the Guidelines should be put on a more formal basis, with provision for disallowance by Parliament and/or access to judicial review.*[36]

This is one area where there is a potential fundamental change, not just these two welcome reforms. The provisions of the Fair Work Bill (currently before Parliament) relating to the content of agreements opens up the regulation of content to a whole new horizon of matters. The Bill will fundamentally overhaul the agreement making system and provides for new types of agreements, good faith bargaining, new approval processes and new content rules. The distinction between union and non union agreements is no longer recognised. Unions will have a statutorily protected role in the agreement making system.

Clause 172 of the Bill provides that enterprise agreements may be made about permitted matters as follows:

(1) An agreement (an enterprise agreement) that is about one or more of the following matters (the permitted matters) may be made in accordance with this Part:

(a) matters pertaining to the relationship between an employer that will be covered by the agreement and that employer's employees who will be covered by the agreement;

(b) matters pertaining to the relationship between the employer or employers, and the employee organisation or employee organisations that will be covered by the agreement;

(c) deductions from wages for any purpose authorised by an employee who will be covered by the agreement;

(d) how the agreement will operate.

The Code and Guidelines then will obviously either need specific statutory authority to override provisions about the content of agreements being able to deal with matters that relate to the relationship between an employer and a union, whatever that may mean in practice. This is because the Implementation Guidelines are designed to lessen third party involvement in agreements and have specific exclusions[37] that will clash with this aspect of the content of enterprise agreements into the future. The extent to which the Government is prepared to regulate the content of building and construction industry agreements in the face of this general opening up of content is one of the biggest unknowns.

Master Builders has submitted to the Wilcox Inquiry that tenders which call up the provisions of the Code and Guidelines that are now let should be permitted to run their course, despite any changes to workplace laws. This will provide the contractual certainty that builders need in order to properly cost their work and to operate under the appropriate conditions of tender. Accordingly, even if it were a Government decision to phase out the Code and Guidelines (a proposition not supported by Master Builders)

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the new Specialist Division would have responsibilities in relation to the contracts let and on foot at the transition date. They are not instruments that you can just rip up.

CONCLUSION

The work of the ABCC in assisting to restore the rule of law to the industry and to effect cultural change is not over.

We agree with the Deputy Prime Minister that there should be a 'tough cop on the beat'. The best way to ensure the maximum prosperity in the building and construction industry in the recently arrived downturn is to preserve the full powers of the ABCC in its successor organisation, so that it can continue to regulate the industry on the basis that all parties are equal before the law, to the ultimate benefit of all stakeholders. That is the message that we hope Mr Wilcox will provide to the Government.

REFERENCES

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2. Australian Labor Party, August 2007

3. The Hon Julia Gillard Speech: The Master Builders Australia industry dinner 29 May 2008:

Before last year's election, we made a number of commitments about the workplace relations reforms we would introduce to establish a fair and balanced workplace relations system for all. And we have stuck scrupulously to those commitments—something the MBA has publicly acknowledged.

http://mediacentre.dewr.gov.au /mediacentre/Gillard/Releases/TheMasters BuildersAustraliaIndustry Dinner.htm

4. Australian Labor Party Election 07 Fact Sheet Fair Work Australia http://www.alp.org.au /download/071026_fair_work_australia_xx.pdf

5. There is a dedicated web site for the inquiry at http://www.workplace.gov.au /workplace/Publications/PolicyReviews/WilcoxConsultationProcess/

6. Mr Wilcox appointment was not, however, controversy free: see for example S Scott Libs Challenge on Wilcox's Bias *Australian Financial Review* 4 June 2008

7. Outlined at http://www.cfmeu–construction–nsw.com.au/taabolabcc.htm and accessed in full at http://www.rightsonsite.org.au/

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10. The Building and Construction Industry (Restoring Workplace Rights) Bill 2008 introduced by Senator Rachel Siewert, would have had the effect of repealing both the *Building and Construction Industry Improvement Act* (BCII Act) 2005 and the *Building and Construction Industry Improvement (Consequential and Transitional) Act 2005* in their entirety. A consequence of the repeal of the BCII Act would be the abolition of the ABCC. See http://www.aph.gov.au/Senate/committee/EET_CTTE/building_and_construction/index.htm for the Senate Committee inquiry results re the Bill November 2008

11. Id p 19 of Report

12. See Nicholas Way Union Leaders on the Ropes Business *Spectator* 29 August 2008

http://www. businessspectator.com.au/ bs.nsf/Article/Uninon–leaders–on–the–ropes–HXTYJ?OpenDocument&src=is&cat= construction%20_%20engineering–al for a discussion of internal Caucus briefings on the operations of the ABCC

13. Transcript ABC Insiders programme 23 November 2008 http://www.deewr.gov.au/Ministers/Gillard/Media/Transcripts/Pages/Article_081128_133400.aspx

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16. Ben Schneider, 'Death Threat for Bovis Boss', *The Age*, 10 September 2008, p 3.

17. Id

18. Above note 3

19. See ABC Radio transcript AM programme Matt Brown Controversy Over Secret Volume On Building Royal Commission 18 September 2003 http://www.abc.net.au/am/content/2003/s948411.htm

20. Commonwealth of Australia Proposed Building and Construction Division of Fair Work Australia October 2008 http://www.workplace.gov.au/workplace/Publications/PolicyReviews/WilcoxConsultationProcess/DiscussionPaper.htm

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22. Final Report of Royal Commission into Productivity in the Building Industry in New South Wales, Sydney 1992

23. Id at p 18

24. Above note 20 at page 17

25. ABS Cat. No. 5204.0, released 31 October 2008

26. Senate Hansard 28 August 2008 http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=;db=;group=;holdingType=;id=;orderBy=;page=; query=BillId_Phrase %3As636%20Dataset%3Ahansardr, ansards%20Title%3A%22second%20reading%22;querytype=;rec=0;resCount= accessed 11 September 2008

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31. Commonwealth of Australia ABCC Email Alert, 'ABCC Compulsory Power Meets Administrative Law Tests', 2 October 2008, at http://www.abcc.gov.au/abcc/Newsletters/

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33. Supra note 2 ALP Forward with Fairness—Policy Implementation plan August 2007 p24 http://www.alp.org.au/media/0807/msdloploo280.php

34. http://www.workplace.gov.au/workplace/Publications/PolicyReviews/BuildingConstruction/GuidelinesPriorNov2005/AbouttheNationalCodeofPracticefortheConstuctionIndustrytheCode.htm

35. See esp note 20 at para 51

36. Above note 32 at para 50

37. Some of which are set out at para 44 of the Wilcox Discussion paper above note 20

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