

Re-working policy: Industrial relations in the Australian states

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ABSTRACT

Most industrial relations scholarship has considered the States in a limited and episodic way. This paper asks how and why different – and apparently contradictory – policies are pursued at different scales of government within Australia. From 1991 to 1996, with Labor in office nationally, all the States except one introduced legislation which reduced arbitral and union power, in some cases going further than the Workplace Relations Act would do in 1996. Thereafter, most States ‘re-collectivised’. Party politics alone do not explain these changes. Rather, the relationship between States and the national scale, as well as geographically-specific economic structures and forms of political influence explain this complex and little explored problem.

Introduction

Most teaching and scholarship has considered the States in a limited and episodic way, doing little to compare, far less explain, changes in industrial relations over time and across space. Further, when overviews are attempted, they are usually a story of the inevitable rise of the Commonwealth over the States. We suggest that this does some damage to the historical record, and, most importantly for our purposes in this paper, to the current complexities and future possibilities around the politics of the regulation of work.

This paper sets out to re-examine the legislative paths of the States since 1991 against the backdrop of long periods of national political stability under Labor, 1983-96, and the Coalition in the years since. It does not repeat the close studies of the State legislation passed since 1991 (see Nolan ed., 1998). The paper focuses on the relationships between the States’ policies and between the States and national changes, examining variations over time and across space. It is deliberately speculative rather than conclusive. It proposes that we rethink some aspects of how social forces exercise influence over the state and why variations occur as they do. We begin by painting a policy scene that is rather different from the usual picture.

A global, national, State conundrum

If we do not necessarily privilege the national over the States, we can make the recent history of industrial relations policy look very different from the received wisdom and we can begin to problematise the issues rather differently. A familiar story can certainly be told with reference solely to the national: in a context of ‘globalisation’, faced with the urgings of the powerful proponents of ‘deregulation’, there has been, since at least 1991 and markedly since 1996, a retreat from the comparative wage justice, arbitration and collectivism.

If we examine *all* the scales of government in Australia and their interaction with institutional forces, we can tell a rather different story: a series of significant contests over regulatory direction within the States, contests with quite a different temporal trajectory from the national scene. After all, we find that five of the six States had travelled down the path of decentralisation before the passage of the Commonwealth’s *Workplace Relations Act* in 1996. In some cases, they had travelled further than the national conservative coalition would do with that Act. Thereafter, the direction seems to have been reversed in most of the States. Comparing the trajectories of the States and Commonwealth, we can see that before and after 1996, the policies of State governments ran counter to those of the Commonwealth, be the latter governed by Labor or the Liberal-National coalition.

Most people would be familiar with the terrain just described, or at least 'their' State's part of it. We suggest, though, that these variations over time and space have not had as much attention as they might. This is more than a problem of mere description. Standard explanations of policy, usually an amalgam of pluralist and Marxist theories, suggest that changes in policy have happened because of global economic restructuring, national economic and trade policy, the emergence of individualistic values, the influence of particular class-based institutions like the Business Council of Australia and the Australian Council of Trade Unions (ACTU), shifts in political alignments of different groups amongst employers and changes in the bureaucracy. However, when we seek to explain the full range of government policies in Australia, that is, including the States as well as the Commonwealth, problems arise. The standard explanations do not work so well when pulled apart and examined at different scales, over time. The same context has not produced uniform outcomes. We can point to globalisation (whatever is meant by that), to the same forces arguing the same things about efficiency, the economy and union power; there are, broadly, the same institutional forces at work but, emerging from all this, different policies (cf Nolan, 1998 whose summary addresses contexts but not outcomes).

There is, of course, an obvious, one-word answer to this conundrum: politics. Different political parties win office, different policies are pursued, end of story. This explains change over time and differences at any one time. Or does it? There are two things to say about this and to lead into the rest of the paper. Firstly, to say that the answer is 'politics' is actually a significant claim to make. At the very least, it means that 'global forces', the economy, and the big business groups – all the things summarised in the standard model above – are not a sufficient explanation for policy-making (see Wailes, 2002 for a discussion of this at the national scale). Secondly, it suggests that State-specific structures and institutions play a role in the shaping of policy. If 'politics matter', then they are shaped differently from one State to another. We need, then, to pay more attention to local specificity than is usually the case.

Geographies of regulation

The argument that we are beginning to develop draws on existing industrial relations literature and, given the topic matter, on the work of a number of specialists in labour law in particular. There are also some implicit references to theories of the state as well, which in this short paper we cannot deal with. We want to address some work which is more novel, that derived from human geography. The language of the paper thus far, referring to 'scale' rather than 'level' and to 'space' as well as State and jurisdiction, while avoiding the usually ubiquitous word 'system', is a clue to one of the ways to re-think policy. We want to avoid the initial assumption that there is a system or even systems of industrial relations. It is the making of regulatory frameworks and how scales of action and argument constructed that are important. We argue that it is vital to think about this relationally, to see how what occurs in one space is related to processes in others in the same period. There is no space to recap on the relationship between industrial relations and human geography but we need to address two related issues: first, the concept of scale; second, spatial specificity and local regulation.

Explaining differences within one nation as its global relations change is, whatever else it may be, a matter of human geography. In industrial relations and much empirical geography, the issues dealt with in this paper are cast in terms of levels of government. We suggest that scale, by which we mean a relational and social construction is more powerful (Howitt, 1998; Marston, 2000). The problem with 'level' is not so much the term in itself but rather that it has become, for industrial relations scholars, hopelessly implicated in positivist, Dunlopian thinking. When we are trying to understand how regulation changes, then the idea of a pre-given 'system' and levels of that system is unhelpful. There is little recognition of the very issue we seek to address: that levels are actually made through human agency. The concept of scale, in the hands of its more sophisticated proponents, is neither a pre-given constraint upon social agents nor a product of a single social agent or physical geography (Herod and Wright, 2002, pp. 4-12; Sadler and Fagan, 2004).

We must also address the apparent paradox that in the era characterised as global, the local or the regional, become more, not less important, or at least that geographical variations become more pronounced. Geographers have long focused on the importance of the local; for instance Peck: *labor markets are socially regulated in geographically distinct ways* (1996, p. 106, original

emphasis), or put slightly they are 'locally constituted' (1996, p. 95). This leads to the question of how labour is regulated in these places. Using regulation theory, which emphasises the role of *national* frameworks for stabilising industrial relations, geographers argued that regulation at other scales was not only likely, but likely to increase with so-called 'deregulation' (Jonas, 1996). Even if there were a national scheme in Australia, this would not counter this argument because it would be not unitary at all. Rather, it would be thoroughly localised and individualised, a point hinted at by some very traditional industrial relations scholarship long ago (see Flanders and Fox, 1969). To address geographies of regulation, Jonas talks about a local labour control regime by which he means:

An historically contingent and territorially embedded set of mechanisms which co-ordinate the time-space reciprocities between production, work, consumption and labour reproduction within a local labour market (1996, p. 325).

In this, his attention is on the local and on how capital controls labour; ours is on the state and the States – but the explicit awareness of scales and spaces other than the national as sites of the making of regulation is helpful. In particular, it suggests that these inter-relationships do vary from place to place. We turn first to a treatment of recent legislation in the States.

The state of the States

State governments have more direct power than the Commonwealth over industrial relations. They have initiated important changes in employment conditions, including long service leave and sick leave and pay equity for female workers (Patmore, 2003). There have long been different rates of State and Commonwealth coverage of workers as between the States and quite considerable gender differences within this too. In New South Wales, women are more likely than men to be covered by State instruments (Nankervis *et al.*, p. 81)

This section of the paper focuses on the main pieces of legislation in each State, firstly, as the States reduced arbitral and union power while Labor held national office, and secondly, as they moved to some degree back towards collectivism with the coalition in power after 1996.

The States decentralise 1991-96

The process of change in the States began while national policies were being framed by the Prices and Incomes Accord of the Labor Government. Although shifting toward decentralisation itself, with the two-tier system of 1987 and more markedly with the Commission's reluctant endorsement of enterprise bargaining in 1991, the Accord and Labor's legislation retained arbitration and union rights. In all the States bar one (Queensland, examined in the next section), the changes were quite different: anti-unionism was core. In this period, we argue, the States, not the Commonwealth, were the scale of government where the supposedly inevitable policies of decentralism and individualisation played out.

New South Wales was the first State to undergo change. *The Industrial Relations Act*, 1991 was introduced by the Liberal-National coalition. Despite immense opposition, including the first general strike since 1917, the legislation was perhaps more truly 'liberal' than what followed in other States. The 'Objects of the Act' set out a desire to shift to what the Act called an 'enterprise focus' and to encourage equity at work. It was 'liberal' in that it the parties themselves would decide about a role of a third party. There was a right to strike, too, albeit limited to disputes over interests (that is, establishment of conditions) and not rights (interpretations). The key changes were that individual employees would be recognised before the Commission; non-union 'enterprise-based bargaining units' could be established – a union needed 50 percent of votes if already established, 65 if not (McCallum, 1998). The outcomes were less than expected. Although this matter is beyond the scope of this paper, it is important to note for subsequent developments in other places that the new processes did not usurp awards, arguably because of union resistance and employer apathy. Only 18.6 percent of New South Wales workers in the State jurisdiction had these enterprise agreements (1992-95) and 75 percent of these were only partial (Pragnell and O'Donnell, 1997a, 1997b).

Victoria's break from the collective, union-based model was more radical than that in New South Wales. In the 1890s, it had been the first colony to adopt tribunals, wages boards for the 'sweated trades', and a century later its policy-making remained significant and far-reaching not only for the State itself but beyond its borders. This was a profound policy change which ended in the abolition of State-specific regulation and became entangled in Commonwealth policy. It was an example of one particular approach to policy-making distinct from New South Wales. This was not for the faint-hearted; policies were changed quickly as well as thoroughly. The Liberals' *Employee Relations Act* 1992 cut off access to tribunals unless both parties agreed to it. It became fully effective on 1 March 1993, when all Victorian awards were abolished. Collective or individual agreements would take their place (Pittard, 1998). However, precisely because the Australian state is fragmented, there was a way out. If unions were able to 'flee' the Victorian jurisdiction, they could gain a federal award. This is precisely what happened. The Commonwealth Labor government facilitated the process by amending the federal legislation with the *Industrial Relations Reform Act*, 1993.

In Tasmania, the newly elected Liberal government, like so many others, cast its re-working of industrial relations law in economic terms. A review of the State's economy was followed by new industrial relations legislation in 1992. The legislation sat somewhere between that introduced in the two most populous States. Among other changes, this legislation removed all provisions for preference to unionists, restricted union right of entry to workplaces and allowed for enterprise agreements (Garnham, 1998).

In 1993 the Western Australian Liberal-National Party coalition government introduced a series of new industrial relations laws which radically curbed the power of unions and the industrial relations commission, continuing the mantra of decentralisation and 'deregulation' so common across the country. The changes were cast in terms of 'wealth creation' and cooperative workplace cultures – as in other jurisdictions – but the legislation had the *appearance* of retaining existing tribunals and so, unlike the Victorian legislation, could be sold as about open choice, not union and tribunal bashing, a clear case of learning from other sites. This legislation included the *Workplace Agreements Act* which allowed individual agreements to be made outside of the jurisdiction of the Industrial Relations Commission and to replace the terms and conditions set in collectively negotiated awards. The centrepiece was undoubtedly the individual contract, the Workplace Agreement (doomed to become known at least in some circles as the 'woppa') which, under the *Minimum Conditions of Employment Act* 1993 had to satisfy the Commissioner for Workplace Agreements. The Commission's powers were reduced: its powers of interpretation and settlement were to be constrained. So, the terms of agreements were merely registered – and that meant that the parties had successfully 'opted out' of the traditional system. It appears – and indeed could be – a very simple process. Typically, the agreements were very brief (Wallace-Bruce, 1998; Ford, 1999). In 1995 and 1997 many amendments were introduced – referred to as the second and third wave of reforms. These inspired very high profile and imaginative opposition (Bailey and Horstmann, 2000; Bailey and Iveson, 2000). But, as far as unions and many employers were concerned the damage – or the benefits – had largely been delivered already. The legislation was used by big employers in the key industries to de-unionise, notably in the Pilbara's iron ore industry beginning with Hamersley Iron in 1993.

The States' rolling back of arbitral and union power concluded in South Australia in 1994. Still faced with a national Labor government in office, the incoming conservative government in South Australia introduced new industrial relations legislation. This was by no means as extreme as the changes introduced in Victoria and Western Australia. The *Industrial and Employee Relations Act* 1994 combined elements of conciliation and arbitration with collective, workplace based agreement making. While it was not the objective of the act to provide for greater opportunity to individualise the employment relationship, the legislation did limit union power to organise and represent workers (Stewart, 1998).

Bringing back collectivism? The States since 1996

In 1996, the Liberal-National coalition won office in the Commonwealth election and the Workplace Relations Act, though heavily amended by the Senate was soon passed. The Act confirmed the importance of enterprise bargaining but went further, allowing for (individual) Australian Workplace Agreements, reducing the role of the Australian Industrial Relations

Commission, prohibiting compulsory unionism and preference in employment to union members, and making union access to workplaces more difficult. It also tightened up on industrial action. In short, as Peetz has put it, the legislation amounted to an ‘institutional break’ or a ‘paradigm shift’ in Australian industrial relations (Peetz, 1998, p. 23). Unlike the New South Wales legislation of 1991 and more in line with the conservatives’ laws in Victoria and Western Australia, the *Workplace Relations Act* does not simply call for new forms of regulation but seeks to promote them. It reinforces the workplace as the preferred scale at which negotiations take place. It encourages direct communication between employer and employee while restricting the roles and rights of trade unions, making it, ‘both harder to stay in and easier to leave a union’ (Bray and Waring, 1998). Against this backdrop, the Commonwealth government has of course been very interventionist in key industries from the waterfront to building and tertiary education while generally exhorting employers to make the most of the advantages handed to them. With Senate control from August 2005, this offensive will continue. But what of the States since 1996?

We begin in Queensland where, on the eve of the *Workplace Relations Act*, a National-Liberal coalition won office in Queensland. The *Workplace Relations Act* 1997 was thus the one piece of legislation which was in line with national policies. It closely followed the national *Workplace Relations Act*. Not only was the title of the Act replicated, but, like the Commonwealth legislation, the Queensland Act constrained the Industrial Relations Commission’s ability to rule on awards to 20 allowable matters, it introduced individual employment agreements (the Queensland Workplace Agreement, QWA), established an Employment Advocate and restricted union power and organising abilities (De Plevitz and Bamber, 1998). The Act had only a short life. Following the election of a Labor government in the State, new industrial relations legislation was again introduced. The *Workplace Relations Amendment Act*, 1998 and the *Queensland Industrial Relations Act* 1999 sought to restore some of the collective and union aspects removed by the previous legislation. Awards were no longer restricted to twenty matters, employees may be encouraged to join unions and while QWAs still exist, they have become more regulated and subject to greater scrutiny. (Unless otherwise noted, summaries in this section are from Nankervis *et al.*, 2004, pp. 81-86).

New South Wales was the first to change in 1991 and the first, with the coalition in national power, to change again. The Labor Government’s *Industrial Relations Act*, 1996 explicitly recognised the value of collective organisations of employees and employers. This legislation maintained awards as important instruments of regulation but also continued to allow for enterprise agreements to be made between employers and the relevant unions or employees directly. That the collective was preferred was clear by the reversal of the previous legislation in one important respect. In order to be certified, a union agreement requires 50 percent of employees to approve by secret ballot to the new terms and conditions, while a non-union agreement requires 65 percent of employees to be covered to agree. In contrast to the national, Victorian and Western Australian legislation, the New South Wales legislation does not actively promote the individualisation of employment agreements and arrangements. Collectivism is an explicit objective of the regime (Shaw, 1996, 1997; McCallum, 1998).

In Victoria, the key to understanding policy lay in the relationship between the national and the State scales. After Labor had lost office nationally, the Victorian government struck back. On 11 November 1996, the Victorian premier announced that the government would cede its powers over industrial relations to the Commonwealth – there would be *no* tribunals solely within the State of Victoria. In Victoria, as in Western Australia, developments since 1991 make no sense without understanding the national scale. Unions could escape from the Victorian jurisdiction; they could gain a federal award. The Commonwealth Labor government came to the aid of unions in that State with its amendments to the Industrial Relations Reform Act, 1993. Without a national Labor government there would have been no such escape. So it proved with the election of the coalition in 1996. The Victorian government simply ceded its powers to the Commonwealth.

When Labor won office in Victoria, there was change again, but it was some time in coming and it did not at all look like a return to the old framework. The *Federal Awards (Uniform System) Act* 2003 re-worked the link with the Commonwealth, giving the Australian Industrial Relations Commission the power to make industry or ‘common rule’ awards to apply to Victorian enterprises.

This means that federal awards covering Victorian workers can cover all employees in a particular industry, and not just those whose employers or unions named in an award, but this is still limited to the 20 allowable matters of federal awards. The government has tried to amend the laws in recent years but has failed to get its legislation through Parliament – another take on the importance of politics.

The Tasmanian framework was also altered after the election of a Labor government and again in opposition to national trends. In 2001, the legislation was amended to restore some right of entry to unions and to ensure that awards and union industrial agreements were central to the regime. Non-union agreements were retained but they now required the support of 60 percent of employees covered by them before they can be certified. Union agreements need approval from 50 percent of employees. There was no return to pre-1992 but there was some winding back of the trend towards non-union regulation.

If Western Australia had been the only jurisdiction to equal Victoria's attack on arbitration and unionism, it became the site of intense struggle again after the conservatives lost office. And like Victoria, events there could not be understood without thinking about the relationship to the national scale. The Labor Government's *Labour Relations Reform Act*, 2002 endeavoured to re-introduce a more collective approach to industrial relations and replaced Western Australian Workplace Agreements with Employer-Employee Agreements. These individual contracts cannot be made if an industrial agreement is already in place covering the relevant employee, thus limiting the extent of individualisation. The response from some employers, however, has been to seek individual agreement making under the federal jurisdiction instead of the state system, an issue to which we return below (Todd *et al.*, 2004).

Under a new Labor government, South Australia has recently reviewed this industrial relations legislation. If implemented, the recommendations of the Stevens' Review would extend the scope of the safety net of minimum employment standards and partially restore the power and authority of the South Australian Industrial Relations Commission to regulate minimum employment conditions and to oversee the bargaining process. The recommendations are regarded by employers as pandering to the union movement; and by the union movement as not providing enough protection for certain sectors of the labour market such as casuals and part-time employees. For its part, the Commonwealth government argues that the recommendations miss the opportunity to integrate the South Australian system more closely with their regulatory regime.

In late 2004, all States, (with the exception of Victoria) retain awards and, unlike the national scale, there is no restriction on the number of matters that can be included. All States have options allowing for union and non-union enterprise based agreements. Flexibility, efficiency and choice are buzzwords regardless of party or place. Perhaps only in New South Wales is individualism not a recurring theme. In addition to industrial relations legislation, a range of other Acts in each of the States requires compliance – unfair dismissal legislation, occupational health and safety legislation and anti-discrimination legislation being the obvious ones (Nankervis *et al.*, 2004, p. 86).

Drawing together this part of the paper, we reiterate these key points: the States' policies moved in one direction, towards decollectivism, well before the Commonwealth in 1996. Since 1996, most moved in the opposite direction and, once again, in opposition to that national direction. There were differences between the States too, even when the same party was behind legislation. We move now to some speculation on why all this might be so.

The geography of policy

To draw out the main themes of the paper, we concentrate on the most populous State, New South Wales and the quintessential resource State, Western Australia. They are different from each other and different from the Commonwealth. Policy-making in these States demonstrates the importance of relationships over time and across space as well as the fact of local variance. Both cases are also suggestive of how the power to shape industrial relations legislation is spatially specific.

In New South Wales, the first foray into decentralism was both limited and arguably unsuccessful. But was it unimportant? No, because the liberal qualities of the 1991 Act were not repeated by national policy-makers in 1996. It seems that the policy-makers learnt their lessons well. Were it not for a hostile Senate (again pointing to the importance of specific political frameworks), the changes would have gone still further. It is natural to want to compare, as we have, the legislation passed in the same year by a State Labor and a national conservative coalition, but to pursue the argument about State specificity further, we might also compare the Labor Party's legislation at different scales. Word limits preclude this question being answered but we might ask whether the general trajectory of New South Labor has been similar to the national policy to 1983. Specifically, what does a close examination of the NSW *Industrial Relations Act* 1996 in comparison not to the *Workplace Relations Act* but to national Labor's legislation in 1988 and 1993 reveal?

In Western Australia localised political influence and intersections with the national scale seem of most importance. Mining employers lobbied hard against Labor's changes and then found ways around them. The world's two biggest resource companies, Rio Tinto and BHP-Billiton, refused to utilise the new State individual contracts, shifting to the national scale to maintain local control of their worksites through AWAs or even a federal award – anything to escape the State's regulatory scheme (Ellem, 2004). Not only does this escape explain what the mining companies have done, it also explains a large part of the recent rise in the number of AWAs. Western Australia has contributed to this far beyond its weight. In this case, as most markedly too in Victoria in the 1990s, national policy cannot be understood without understanding local and State events.

This has taken us away from policy-making which is the paper's core, if most speculative, concern. We suggest that in explaining policy, attention should be directed to particular institutions and lobby groups which have different effectiveness in different places, more specifically at different scales.

In the 'resource State', Western Australia, some particularly powerful forces are, obviously enough, involved in influencing policy-making. We argue that here, and in general, differences in industrial relations policy can be explained in terms of the mobilisation of power at the intersection of economy and state. The mining companies and their employer association seem to have more power within Western Australia than they do in other States with more diverse economies. This might explain why Western Australia is different from other States and it might also explain why the coalition and Labor's laws were *each* different from that of their equivalents in, say, New South Wales. Finally, it will explain why the *Workplace Agreements Act* was different from the national scale, from the *Workplace Relations Act*.

What of the populous, diverse 'new' economy State of New South Wales? Here we suggest that part of the answer to explaining trends in New South Wales lies in relationships between the State Labor Party and the Labor Council of New South Wales and, on the other hand, on the countervailing power of employer groups in that State. Two things appear to have happened, though both may now be in flux. Once again, both point to comparisons at the same scale (that is, with other States) but also to comparison with national politics and policy-making. First, the Labor Council has had more impact upon Labor than, at the national scale, the ACTU has had on the national Labor. The lesser capacity of Labor to win federal as opposed to New South Wales elections is one factor but of greater importance is the link with the union movement. (Similar issues play out in Victoria with a united and relatively militant labour council unable to have much impact because of the party's dire record in 20th century elections. See Brigden, 2003.) The close ties between unions and Labor under the Accord were exceptional – and the jury is still out on where the power lay in that relationship. There are, of course, good institutional reasons to think that unions will have less impact given that affiliation to the party is at the State, not national, scale. As to employers, it could well be the case that, again compared to Western Australia, employer power, reflecting the structure of the economy is more fragmented. No one group, for instance, speaks with the power that the mining lobby does in that State.

Finally, and still more speculatively, we suggest that in addition to the well-documented ways in which the language of competition and individualism has shaped debate and policy in the recent past that a geographical component might be part of this, too. State leaders spend much energy constructing definitions of their States which invariably focus on competitiveness, but not solely in that. There is of course an *additional* element to this in the States, as they compete with each other for resources, investment and jobs.

This 'boosterism' plainly has industrial relations implications. However, we should go beyond this and ask if particular constructions around globalism, resources and knowledge economies affect deeper values about collectivism and individualism in ways which might be State-specific.

Conclusion

This paper asks how different scales of political activity are actually constructed in a federation such as Australia and questions the received wisdom about the shape of industrial relations policy over the last decade or so. A concentration on changes within and between the States poses problems for our standard explanations of policy-making. Looked at through the State scale, the story is much more uneven and contested than it is by reference to the national scale alone.

Examined in detail, the terrain becomes more, not less, complex because there are quite significant differences between the industrial relations legislation produced by the same political party but in different States. 'Labor legislation' is not the same everywhere, any more than the main Acts passed by the State conservative parties are alike. Finally, despite the attention focussed on Commonwealth governments, none of them, be they Labor or the coalition, can claim to be the author of the most comprehensive legislative changes of the recent past. This distinction surely must go to the conservatives in Victoria (1992) and Western Australia (1993) and to Labor in New South Wales (1996).

We suggest that these differences are important and that different places, including the States, appear to have distinct political-economies in which local institutions have locally-specific power in the political process. We also suggest that these local institutions mediate social and economic forces in ways which vary from one place to another. Comparisons between the States are common enough. We argue, more than this, that some explanation for the apparent differences is necessary and that the landscape cannot be fully appreciated without thinking about the relationships between State and national.

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