

Justice at Work: Industrial Citizenship and the Corporatisation of Australian Labour Law¹

By
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Distinguished guests, ladies and gentlemen. It is indeed a great honour to have been asked to deliver the 2005 Kingsley Laffer Memorial Lecture here at the University of Sydney. Kingsley Laffer was a pioneer of Australian industrial relations teaching and scholarship. He joined the University of Sydney in 1944 and for the next three decades he championed the discipline of Australian industrial relations. In my view, Kingsley's most enduring achievement was his foundation editorship of the *Journal of Industrial Relations* that lasted for some eighteen years. This journal that was cradled here at the University of Sydney, is undoubtedly Australia's premier industrial relations review that is read throughout the world. We all owe him an enormous debt that I hope I and the other twelve givers of this annual lecture that bears his name can repay through the distillation of our research and scholarship.³

Although I am by no means a labour law pioneer, for the last thirty or so years, the primary tasks in my working life have been to further teaching and research in the discipline of labour law. I chose the path of a teacher because the legal rules which govern our rights and obligations as workers and employers are of central importance to Australian society. I regard knowledge of these rules as an indispensable aspect of legal training in our nation. As a tertiary teacher, I have always strongly held the conviction that dialogue between teacher and student is the best way to transmit not simply knowledge of our labour laws, but of greater importance to explain to students the spirit of these laws. All of our laws and especially our indigenous labour laws possess a spirit that is the result of their formulation and application throughout Australian workplaces. For most adult Australians, the performance of paid work,

¹ I dedicate this lecture to my late friend, guide and mentor Mr Edward Keith Doery, 12 March 1927 to 28 February 2005. For more than thirty years, Keith Doery never wavered in his support of my developing academic career. By example, he taught me always to strive for excellence in my relationships with others, and in my labour law teaching and scholarship.

² Blake Dawson Waldron Professor in Industrial Law and Dean of Law, University of Sydney. I wish to thank Ron Callus and Russell Lansbury for inviting me to give the 2005 Kingsley Laffer Lecture. I also wish to thank Joel Butler, Joellen Riley and Sally Spence for assisting me with this lecture. Finally, may I thank my wife Mary Crock for her love, empathy, support and understanding.

³ For earlier outstanding Kingsley Laffer lectures that have been published in the *Journal of Industrial Relations*, see Shaw 1997, Kirby 2002 and Lansbury 2004.

whether as employees, consultants or contractors, hopefully gives us fulfilment, a broad social network, and remuneration to support ourselves and our families. In my view, the purpose of labour law in a democratic state is to ensure that the rights and obligations placed on workers and employers mandate just and fair outcomes with respect to remuneration, security of employment, leave, training, occupational health and safety and other terms and conditions of employment. This includes ensuring that workers and employers have the right to join and to participate in the activities of free trade unions and employer associations including engaging in collective bargaining, and that they refrain from unfair, unjust, arbitrary and discriminatory behaviour.

On Friday 1 July this year, for the first time in more than two decades, the Australian Government will have control of both houses of the Australian Parliament. Since 1980, no Government has had a majority in the Senate, that is, the upper house of the Australian Parliament. Over the last quarter century, in order to secure the passage of legislation, especially when it is contentious, governments of all complexions have had to negotiate with the minor parties and with independent Senators. For example, when the Howard Government introduced its workplace relations changes in May 1996,⁴ it was required to water down many of its provisions because of the demands of the Australian Democrat Senators. More especially over the last five years, many of the Howard Government's labour law bills have failed to be enacted into law because the government and the Senate were unable to compromise on their positions. However, after 1 July this year, the Howard Government will have control of both houses of the Parliament and will be able to enact whatever changes it wishes to make to federal labour law subject only to the constraints of the Australian Constitution.

As yet, the Howard Government's 2005 labour law program has not been fully unveiled. However, it does appear that the Government wishes to simplify collective and individual agreement-making, to make it more difficult for trade unions to take lawful industrial action through the introduction of secret ballots, to restrict the rights of trade union officials to enter workplaces, to further strip back federal awards to a narrow core of minimum rights, to immunise small businesses from the unfair dismissal laws, to free small businesses from the requirement to make redundancy payments, to more tightly regulate industrial relations in the construction industry, to develop new processes for establishing a national minimum wage, to enable private mediators to resolve workplace disputes and to create one national labour law system for our nation by the year 2010.⁵ While it is my surmisation that not all of these proposed changes will find their way onto the federal statute book, nevertheless, significant changes to our labour laws will occur certainly by the close of 2005. Now, I suggest, is the time to take stock and to examine our federal labour laws to see if they meet the standards of justice and fairness which are appropriate to our democratic and market economy nation.

⁴ *Workplace Relations and Other Legislation (Amendment) Bill 1996.*

⁵ See, *Workplace Relations Amendment (Agreement Validation) Bill 2004; Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004; Workplace Relations Amendment (Right of Entry) Bill 2004; Workplace Relations Amendment (Small Business Employment Protection) Bill 2004; Building and Construction Industry Improvement Bill 2005; Workplace Relations Amendment (Better Bargaining) Bill 2005; and Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2005; and see also Andrews 2005.*

This evening, I shall undertake this task in four stages. First, I shall unpack some of the writings on industrial citizenship to determine what are the appropriate rights and obligations that labour law should bestow on Australian citizens at work whom I shall call industrial citizens. Second, our labour laws do not operate in an historical or sociological vacuum. To determine how our laws have fared with respect to justice and fairness, an historical analysis of their operation over more than one hundred years will be undertaken. Third, I shall argue that labour law changes which do not meet the standards of justice and fairness will be found wanting by Australian industrial citizens and their families. Finally, and this is of crucial importance, I shall assert that the creation of one national labour law system through the use of the corporations' power will inevitably lead to the corporatisation of Australian labour law to the detriment of Australian industrial citizens. This is because such an approach will inevitably mean that labour law will become little more than a species of corporations' law and this will impact adversely upon Australian industrial citizens.

1. Industrial Citizenship: Three Portraits

Most people are familiar with the political rights and obligations of Australian citizens. However, in our social dialogue little discussion has taken place over the actual and aspirational rights and duties of Australian citizens at work, that is, of Australian industrial citizens. There is a growing body of writing on industrial citizenship, however, this evening time will only permit me to unpack the ideas surrounding industrial citizenship by sketching three portraits of industrial citizenship scholarship. I shall commence with writings of the 1890's, then from the 1930's and finally from our present time. First, I shall explore the writings of the husband and wife team of Sidney and Beatrice Webb whose seminal scholarship was published in the 1890's. Second, the political scientist Harold Laski wrote eloquently about industrial citizenship in the 1930's. Finally and in our present time, Professor Hugh Collins of the London School of Economics has written a blueprint of industrial citizenship for Tony Blair's Britain.

Sidney and Beatrice Webb were English social reformers who fought for the rights and aspirations of working people. Their scholarship, which was empirical in nature, heralded the beginnings of modern industrial relations research. They left the shelter of the library and examined trade unions in practice. In the last decade of the nineteenth century, they wrote two seminal volumes, *A History of Trade Unionism* in 1894 (Webb and Webb 1894), and in 1897 *Industrial Democracy* appeared on the shelves (Webb and Webb 1897). They saw the phenomenon of trade unionism as a necessary response to the industrial revolution with its accretion of capital. For the Webbs, the vital role of trade unions was to protect their members by engaging in collective bargaining. The function of the State was to assist this process through the enactment of protective industrial legislation covering minimum wages and maximum hours on an industry basis, together with occupational health and safety protection and adequate compensation for workplace death and/or injury and disease.

Sidney and Beatrice Webb praised the democratic structure of unions and applauded the manner in which collective bargaining indirectly gave worker members an input into the collective bargaining process. Although they did not use the term "industrial citizen", for the Webbs, the male trade union artisan was an industrial citizen engaged in furthering his employment rights for the benefit of himself and his family.

Harold Laski was an English political scientist who wrote about industrial citizenship in the 1930's and his writings were coloured by the great depression of that decade. He set forth his ideas in his book titled *A Grammar of Politics* which was published in several editions in the 1930's (Laski 1934). Laski saw the high unemployment of the 1930's as a failure of capitalism and he saw State intervention as a means of controlling the excesses which unchecked capitalism brings forth. For Laski, it was up to the State to guarantee minimum wages and maximum hours of British citizen workers (Laski 1934:106-112). This would enable workers to reach a standard of living "... [w]ithout which creative citizenship is impossible" (Laski 1934:107). Maximum hours would also liberate citizen workers from endless toil. While these labour laws represented a useful beginning, Laski wished to prevent the ownership of capital from degenerating into a type of dictatorship.

He argued that industrial dictatorship could be prevented through the establishment of participatory mechanisms that would compel dialogue between the owners of capital and their employees. Through the creation of participatory institutions where worker representation would be mandatory, the excesses of the owners of capital would be ameliorated by the voices of working women and men. In other words, Laski regarded industrial democracy as a right of industrial citizens.

Minimum wage and maximum hours legislation and provisions mandating occupational health and safety are supported by most labour law scholars and practitioners. However, the concept of industrial democracy is still the subject of vigorous debate in those market economy countries like Australia who adhere to the Common Law. Industrial democracy was a matter of vital importance to Sidney and Beatrice Webb and to Harold Laski, and these writers do have their present day adherents. Britain's Keith Ewing follows this socialist tradition with his approach to industrial citizenship (Ewing 1993, 1995 and see also Ewing 1996), and in his early writings Hugh Collins sees industrial democracy as an aspect of industrial citizenship (Collins 1987). The American scholar Clyde Somers and his adherents have long argued for American workers to be enabled to engage in decision-making with their employers through forms of co-determination via works councils and committees, upholding in our time the democratic aspects of industrial citizenship (Summers 1979). This democratic approach also resonates in my own work (McCallum 1997, 1998, McCallum and Patmore 2002) and in the scholarship of other Australian writers who at the present time have advocated the establishment of works councils and other consultative bodies in Australian workplaces (Gollan Markey and Ross 2002, Gollan and Patmore 2003). With the decline in trade union membership which will inevitably lead to a decline in trade union collective bargaining, I have long argued for the establishment of works councils as a means of bestowing upon industrial citizens rights to participate in rule making and in rule interpreting in their employing undertakings (McCallum 1997, 1998, McCallum and Patmore 2002).

The protection of employees from unfair, arbitrary and discriminatory terminations is a more recent development upon which neither the Webbs nor Laski made detailed comments. However, both Hugh Collins (Collins 1986) and Keith Ewing (Ewing 1993) argue that industrial citizens should have the right to be protected from unfair and discriminatory conduct even where it falls short of termination. Most labour law scholars in the Common Law world would be of the view that an indispensable right of industrial citizens is to obtain legal redress for workplace conduct that was unfair,

arbitrary and/or discriminatory, even where such conduct fell short of termination of employment.

The third portrait is from our own time and it concerns the scholarship of Professor Hugh Collins from the London School of Economics. In his recent book titled *Employment Law* that was published in 2003 (Collins 2003, and see also Collins 2001), Hugh Collins adopts a broader approach to citizenship and especially to industrial citizenship. This approach fits well with the objectives of Prime Minister Tony Blair's "New Labour" Government's employment and social welfare strategies (Giddens 1998, Collins 2002). In his little book, Hugh Collins examines the many actual and anticipated changes in the law that have resulted from the accession of the Blair government in 1997. In particular, he argues that the policy and legal changes in areas like education, social welfare and labour law fit within the emerging approach to social welfare and labour relations of the European Union as embodied in the Charter of Fundamental Rights of the European Union 2000 (Collins 2003:25). He argues that these laws are governed by the three themes of social inclusion, competitiveness and citizenship (Collins 2003:21). Social inclusion covers those persons who are unable to fully participate in society because they are unemployed and lack the means to obtain work. Work is seen as a central aspect of citizenship in a society that is seeking to enhance competitiveness. Social inclusion, that is obtaining work for adult citizens, can be achieved through the enactment of laws governing taxation, education, training and social welfare. Labour law can play its part by regulating employment terminations and by prohibiting those based upon discriminatory and other unlawful grounds (Collins 2003:22).

The second theme that Collins examines in this book is that of competitiveness. In his view, competitiveness can be achieved through systems of management and flexible and highly trained employees. For this flexibility to operate successfully, however, industrial citizen employees require guarantees of fair treatment. In the view of Collins, labour law can promote this type of fair treatment in a number of ways. First and foremost, there is collective bargaining that has played a significant role in British labour relations. Secondly and no less importantly, consultative committees and even works councils can play their part in ensuring employee participation in decision-making as a means of ensuring competitiveness (Collins 2003:23-24).

The final theme that Collins examines is citizenship (see generally Collins 2003 Part IV). Collins asserts that citizenship, and especially industrial citizenship, involves a series of rights and responsibilities. Citizens have the right to education, training and where appropriate social welfare relief, but they also possess the responsibilities to equip themselves for employment in a competitive society.

Collins adds that not only "... traditional civil liberties should be protected against the State but also that the State owes its citizens a duty to secure those liberties in other contexts such as the workplace" (Collins 2003:24). In the view of Collins, these new liberties include "rights to privacy, protection of whistle blowers, health and safety and even fair pay" (Collins 2003:25). The citizenship vision of Hugh Collins also recognises the changes in the labour force where employees, contractors and consultants all participate in remunerated work in the competitive economy.

Undoubtedly, the work of Hugh Collins is the most interesting example of a current attempt to develop a type of industrial citizenship for this present century and Australian policy-makers would do well to carefully consider this approach. For him, economic competitiveness goes hand in hand with justice and fairness at the workplace. As well as establishing minimum wages and conditions of employment, modern and competitive industrial citizenship also requires the enactment of measures to protect worker privacy, worker safety, arbitrary, capricious and discriminatory employer and employee conduct and even protection for whistle blowers. However, competitive workplaces can be achieved only through employer and employee dialogue and cooperation. This can occur through collective bargaining and also via consultative processes including the establishment of works councils and other consultative bodies.

2. Justice and Fairness in Australian Labour Law: The Last One Hundred Years

As is well-known, the origins of twentieth century Australian labour law can be traced back to the significant labour disputation in the early 1890's. In order to reduce industrial disruptions, the Australian colonial governments sought to minimise labour disputation through the creation of machinery to determine fair and reasonable wages and terms and conditions of employment. In the years straddling the turn of the nineteenth and twentieth centuries, a number of Australian colonial governments (and after 1901 they became States) and the Government of New Zealand experimented with legislative schemes to bring about industrial peace either via tripartite boards known as wages boards or through the establishment of labour courts possessing powers of compulsory conciliation and arbitration to settle labour disputes.

In the final decade of the nineteenth century, Australians were debating the shape of their forthcoming federal compact that on 1 January 1901 became the Constitution of the Commonwealth of Australia. At the 1898 convention held in Melbourne, Henry Bournes Higgins was successful in having placed into the Australian Constitution a compulsory conciliation and arbitration power which is now known as the labour power (Constitutional debates 1898:180, and for further detail see Kirby 2004:232-238). The labour power is now contained in section 51(xxxv) of the Australian Constitution which gives the Australian Parliament power to make laws with respect to "(xxxv) Conciliation and Arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State".

Interestingly, while proponents like Kingston and Higgins were concerned to bring about industrial peace especially after the labour turmoil of the 1890's, they were also desirous of ensuring that workers received fair outcomes if they submitted themselves to compulsory arbitration. For them, industrial peace could be achieved only if employees could receive adequate remuneration and fair terms and conditions of employment and they asserted labour courts possessing compulsory powers of conciliation and arbitration could bring this about. In the 1898 debates, Kingston said:

The leading feature of this Constitution is that the Federal Parliament should have power to legislate for the "peace, order, and good government of the Commonwealth." By what means are the peace and order of the various colonies most disturbed, and their good government threatened, at the present time? By strikes and lock-outs. Shall we not then be wanting in our duty if

we do not give to the Federal Parliament power to legislate in such a way as will prevent strikes and lockouts, and enable industrial questions of the greatest difficulty to be amicably settled between the parties, upon considerations of right and wrong rather than because of the relative strength of the disputants? (Constitutional debates 1898:186).

Not only in an endeavour to create industrial peace, but also I suggest to ensure justice and fair dealing between master and worker, the federal and most State governments chose in the early years of the twentieth century to establish labour courts (they are now styled industrial relations commissions) that were able to settle labour disputes by conciliation. More importantly, where conciliation failed the labour courts were empowered to utilise final and binding interest arbitration to impose fair and reasonable conditions of employment upon the employer and employee disputants.

The Australian federal Government was able to enact compulsory conciliation and arbitration legislation because of the labour power that is contained in section 51(xxxv) of the Australian Constitution. In 1904, the federal Parliament utilised this constitutional power and enacted legislation that created a labour court armed with powers of compulsory conciliation and arbitration.⁶ What Australian citizens sought from their federal Government was conciliation and arbitration machinery to bring about industrial peace by ensuring fair terms and conditions of employment for Australian workers.

While he did not use the term “industrial citizenship”, Henry Bournes Higgins who was the second President of the federal labour court from 1907 to 1921, perceived his mission as one of ensuring fair and reasonable outcomes for Australian workers. He first published a series of essays in the *Harvard Law Review* (Higgins 1915, 1919, 1920) and in 1922 he republished them with added material in a little book of essays that he titled *A New Province for Law and Order* (Higgins 1922) because he believed that his brand of compulsory conciliation and arbitration had brought a new form of law to Australian workplaces that would be the birthright of Australian industrial citizens.

In *A New Province for Law and Order*, Henry Bournes Higgins explained his view of the therapeutic aspects of compulsory conciliation and arbitration in the following words. He wrote:

[T]he process of conciliation, with arbitration in the background, is substituted for the rude and barbarous processes of strike and lock-out. Reason is to displace force; the might of the State is to enforce peace between industrial combatants as well as between other combatants; and all in the interest of the public (Higgins 1922:2).

For Higgins, it was in the interests of the public for the labour court to ensure that Australian industrial citizens received sufficient wages to sustain themselves and their families.

Australia’s industrial citizenship which sprang from compulsory conciliation and arbitration primarily focussed upon the fulltime breadwinner male employee, and saw the wage increases which were given to workers as flowing onto Australian families.

⁶ *Commonwealth Conciliation and Arbitration Act 1904* (Cth).

Justice Higgins made this clear in his famous 1907 Harvester decision,⁷ where he specified a minimum wage for an unskilled man which would enable him to support a wife and three children. Interestingly, the Harvester Man of Henry Bournes Higgins who supported his family resembled the male artisan who was so central to the thinking of Sidney and Beatrice Webb. Throughout the last hundred years, the setting of wage rates has been the pre-eminent function of Australia's industrial relations tribunals. In fact, throughout the twentieth century compulsory conciliation and arbitration was so successful in distributing productivity gains right across Australia through arbitrated general increases in wage rates that it remained the corner stone of Australian labour relations policy up until 1992 (For the history and the role of the labour courts and tribunals in fixing wages, especially from 1901 to 1950, see Hancock 1979, Hancock 1979A, Eggleston 1983 and Hancock and Richardson 2004). Even as late as 1990, 80% of Australian employees had their wage rates specified or underpinned by the awards promulgated by Australia's network of industrial relations commissions (Australian Bureau of Statistics 1990). The 1993 and 1996 changes to federal labour law relegated awards to the status of a safety net (Pittard 1994, 1997), however, the Australian Industrial Relations Commission made it clear in its 1997 Living Wage Case⁸ that it would still continue to prescribe minimum wage rates for all of the employees who were covered by federal awards.

There has always been a tension in the fixing of wages between the needs of employees and their dependents on the one hand, and on the other hand, the capacity of the economy to absorb these increases. Despite the pressures of economic globalisation, the Australian Industrial Relations Commission has continued to hand down decisions specifying minimum wage rates⁹ to the enormous benefit of employees at the lower end of the labour market. In fact, an overriding characteristic of our mechanisms of compulsory conciliation and arbitration has been the capacity of our tribunals to ensure through the precepts of fairness and justice, a reasonable standard of living to less fortunate employees. Of course our laws governing both taxation and social security have also played their roles in maintaining a decent standard of living for most Australian industrial citizens.

The Conciliation and arbitration systems, especially in the first half of the twentieth century, have been aptly described as fulltime male breadwinner regimes of industrial citizenship, because they focussed upon the role of men as workers and as the wage earners for their families. This meant that women fared less well (Bennett 1988, Hunter 1988, Whitehouse 2004) than did men. In the 1912 *Fruit Pickers Case*,¹⁰ for example, Justice Higgins asserted that as women were not generally responsible to maintain a family they should only be paid 54% of the basic wage. However, where female labour was in competition with male labour, then women and men should receive the same wage rate so that women would not undercut men and force men out of employment. It can be seen then that for the first six decades of the twentieth century, leaving aside the two world wars, the primary role of women was as homemakers and mothers, and when they undertook employment, the labour courts and commissions were keen to ensure that they did not undercut the terms and

⁷ *Ex Parte H V McKay* (1907) 2 CAR 1.

⁸ *Safety Net Review - Wages - April 1997 (the Living Wage Case)* (1997) 71 IR 1.

⁹ See, for example, *Safety Net Review - Wages - May 2004* (2004) 129 IR 389.

¹⁰ *Rural Workers Union v Mildura Branch of Australian Dried Fruits Association* (1912) 6 CAR 61.

conditions bestowed on full-time male workers. The Equal Pay Cases of 1969¹¹ and 1972¹² sought to grant women equal pay for work of equal or comparable value. Space does not permit a detailed discussion on the manner in which Australian industrial relations tribunals have sought to deal with female wage rates in recent times, however, at the State tribunal level further work has been done to narrow the male-female wage gap. For example, in its Equal Remuneration Case¹³ that was decided in 2000, the Industrial Relations Commission of the State of New South Wales has established an equal remuneration principle,¹⁴ which is designed to grant pay equity to female workers whose occupations have suffered long-standing under-valuation. Interestingly, the Full Bench of the New South Wales Commission made it clear that in establishing this principle, it was informed by human rights values emanating from International Labour Organisation conventions and other international covenants and instruments. In the State Librarians' Case that was decided in March 2002,¹⁵ State librarians had their wages increased under the equal remuneration principle because this female dominated profession had suffered long-term under-valuation. However, a recent report to the Government of the State of Victoria by the Victorian pay equity working party shows that despite these measures women still earn on average \$150 less than do men and that one third of working mothers are in casual employment (Victorian Pay Equity Working Party 2005).

In recounting the role of the industrial relations tribunals in fashioning Australian industrial citizenship, it is important to appreciate that Aboriginal Australians fared even worse than did women (Whitehouse 2004). The Commonwealth Court of Conciliation and Arbitration held in a number of early cases that it was not necessary to pay aboriginal rural workers the same wage rates as their white counterparts.¹⁶ It must be appreciated that it was not until 1967 that native Australians received full political citizenship, and that it was not until the late 1960's that aboriginal pastoral workers obtained the same wages and benefits as did white male pastoral workers.¹⁷

In the 1990's, the federal and State governments to varying degrees shifted their labour regulation from conciliation and arbitration to collective and individual bargaining. This meant that the powers of the Australian industrial tribunals were truncated. For example, the Australian Industrial Relations Commission lost its power to hand down arbitrated market rates awards, and is now confined to handing down minimum rates awards which are confined to a safety net of some twenty allowable award matters covering wages, hours of work, redundancy pay, various forms of leave etc.¹⁸ Yet, at the present time, the network of industrial relations tribunals perform two significant functions. First, they certify collective agreements, and second, they continue to play a role in determining and in updating award-based safety nets of terms and conditions of employment known as community standards.

¹¹ *Equal Pay Case 1969* (1969) 127 CAR 1142.

¹² *National Wage and Equal Pay Case 1972* (1972) 147 CAR 172.

¹³ *Re Equal Remuneration Principle* (2000) 97 IR 177.

¹⁴ The Queensland and Tasmanian Commissions have also established Equal Remuneration principles.

¹⁵ *Re Crown Librarians Library Officers and Archivists Award Proceedings, Applications under the equal remuneration principle* (2002) 111 IR 48.

¹⁶ See, for example, *Graziers' Association of New South Wales v Australian Workers' Union* (1932) 31 CAR 710; and *Australian Workers' Union v Abbey* (1944) 53 CAR 212.

¹⁷ *Re Cattle Industry (Northern Territory) Award* (1966) 113 CAR 651.

¹⁸ *Workplace Relations Act 1996* (Cth) section 89A.

Australia's network of industrial relations tribunals are required to certify collective agreements between trade unions and employers, or between employers and their workers in order that these collective agreements may become legally enforceable. At the federal level, for example, when certifying a collective agreement the Australian Industrial Relations Commission is required, amongst other matters, to determine that the collective agreement does not impermissibly undercut the relevant award safety net covering the employees of the undertaking (for details see Pittard 1997). In no other industrialised and market economy labour law system of which I am aware, is the approval of an industrial relations body required before a collective agreement between a trade union and an employer may come into operation. In my view, the Australian tribunals have been given this certification role because the concept of industrial fairness for which they have stood for a century is regarded by the Australian community as a necessary bulwark against unfair collective bargaining processes, especially when employers are negotiating directly with their employees.

The second function of Australia's industrial relations tribunals is to assist Australian industrial citizens to reshape their employment obligations through the establishment and updating of safety nets of community standards. Time will only permit me to focus upon the work of the Australian Industrial Relations Commission, although it must be appreciated that the State tribunals have played significant and innovative roles in this field. The area of leave for family responsibilities is a pertinent example of the fashioning and updating of community standards of employment. In 1979, the Australian Conciliation and Arbitration Commission (as it was then styled) granted twelve months unpaid maternity leave to a mother on the birth of a child.¹⁹ In 1990, these provisions were varied by the parental leave test case²⁰ which allowed couples to choose whether the man or the woman would be the recipient of the 12 months unpaid leave by virtue of her or him being the primary care giver of the child. The clauses giving the parents of adopted children similar rights were incorporated into this standard parental leave award clause.

In May 2001, the Commission handed down its casual employees parental leave test case²¹ in which the parental leave standard was altered in the following manner. Casual employees who were employed on a regular or systematic basis for at least 12 months, and who but for the pregnancy would have an expectation of further employment, were granted 12 months unpaid parental leave. In fact, this simply meant that they were given the right to reapply for this type of ongoing casual employment at the conclusion of their 12 months of unpaid parental leave. These parental leave measures have become a community standard and have now been enacted into law and are to be found in a number of the state labour relations statutes. In the *Family Leave Test Case* of 1994,²² the Australian Industrial Relations Commission gave employees the capacity to access periods of sick and/or annual leave to take care of family members, in particular of children and of elderly parents. Subsequently these provisions have been incorporated in awards and in collective agreements and are known as personal carer leave provisions.²³

¹⁹ *Maternity Leave Test Case* (1979) 218 CAR 121.

²⁰ *Parental Leave Test Case* (1990) 36 IR 1.

²¹ *Casual Employees Parental Leave Test Case*, Australian Industrial Relations Commission, PR904631, 31 May 2001.

²² *Family Leave Test Case* (1994) 57 IR 2121.

²³ *Personal-Carer's Leave Test Case Stage Two* (1995) 62 IR 48.

Finally, the network of industrial relations tribunals have also created community standards with respect to redundancy pay, superannuation and casual employment. In its 1984 *Termination, Change and Redundancy case*,²⁴ the federal Commission obliged employers to pay redundancy payments, known as severance payments, to employees who were made redundant, however, small businesses were exempt from this requirement. In its March 2004 Redundancy Case,²⁵ however, the Commission increased the amount of severance payments and the small business exemption was done away with in the following manner. Where employers who employ less than fifteen people make employees redundant, they will be required to pay up to eight weeks of severance pay depending upon the length of service of the employee. Access by most workers to superannuation schemes was set in train by the Australian Conciliation and Arbitration Commission in 1986,²⁶ and now superannuation for most employees is governed by collective agreements, some awards and by statutes (Creighton and Stewart 2005:347-352). The industrial relations tribunals are conscious of the plight of long-term casual employees, and they are endeavouring to lessen their plight by guaranteeing them minimum standards including rights to convert their positions into fulltime ones (see Owens 2002). However, tribunals are not parliaments, they are not legislators and they cannot bestow monetary benefits to assist employees at the bottom of the labour market. Although they can only play a limited role in assisting Australian industrial citizens in their working lives, even since the partial deregulation of Australian labour law they have operated and updated a dynamic safety net of terms and conditions of employment. Finally, what strikes me about this Australian safety net is that it has enabled governments to disengage from significant labour relations issues. For example, the safety net provisions on unpaid parental leave and redundancy payments have enabled Australian governments to largely limit their responsibilities to social security measures, and to disengage from their moral responsibilities in these significant matters which impact upon the lives of a majority of Australian industrial citizens.

Of course, the federal and State parliaments have played significant roles, especially over the last thirty years, but their approaches have been the traditional ones of enacting remedial statutes which are regarded as both appropriate and beneficial having regard to the major changes in the social attitudes of Australian industrial citizens. The parliaments have enacted favourable federal and State labour legislation including modern occupational health and safety statutes,²⁷ measures prohibiting discrimination in the workplace,²⁸ and provisions granting employees remedies for unfair, discriminatory and/or unlawful dismissals.²⁹

Although this historical and sociological analysis of the development of our labour laws necessarily has been brief, it does show that our labour relations regimes have

²⁴ *Termination, Change and Redundancy Case* (1984) 8 IR 34, and see also *Termination, Change and Redundancy Supplementary Decision* (1985) 9 IR 115.

²⁵ *Redundancy Case* (2004) 129 IR 155, and see also *Redundancy Case Supplementary Decision* (2004) 134 IR 57.

²⁶ *National Wage Case* 26 June 1986 (1986) 301 CAR 611

²⁷ See, for example, *Occupational Health and Safety Act* 1985 (Vic); and *Occupational Health and Safety Act* 2000 (NSW).

²⁸ See, for example, *Sex Discrimination Act* 1984 (Cth); and *Anti-Discrimination Act* 1977 (NSW).

²⁹ See, for example, *Workplace Relations Act* 1996 (Cth) Part VIA Division 3; and *Industrial Relations Act* 1996 (NSW) sections 83-90.

always focussed upon justice and fairness at work. These precepts of fairness and justice, I suggest, sprang from the conciliation and arbitration origins of our mechanisms. Yet, despite the labour law deregulation of the last decade and a half, the collectivist aspects of our system still adhere to this fairness and justice precept.

It is essential to appreciate three aspects of the operation of this fairness and justice precept in our labour laws. First, as I have demonstrated the conciliation and arbitration systems did for the first half of the 20th century, pay far less attention to the plight of women and native Australians than was warranted even in accordance with the standards of those times. Second, and of no less importance, there was always a healthy tension between doing fairness to employees and employers on the one hand, with on the other hand, the recognition that favourable employee outcomes had to be tempered by the economic capacity of the nation to absorb them. These tensions between economic capacity and fairness and justice can be seen clearly in the famous 1907 Harvester decision of Justice Henry Bournes Higgins.³⁰ In specifying a minimum wage for a worker to support his dependants, Higgins was mindful of the economic consequences of his decision. In fact, a central element of wage fixation in Australia has been this tension between the capacity of the economy and the fairness and justice precept.

Finally, the precept of fairness and justice became so ingrained in the Australian community that when conciliation and arbitration was jettisoned in favour of collective bargaining, the industrial relations tribunals were given powers of certification of collective agreements as a means of maintaining worker confidence in this new collectivist mechanism of union and non-union bargaining at the level of the undertaking.

3. Justice and Fairness at Work After July 2005

There is no doubt in my mind that the primary reason why our federal and State labour laws were partially deregulated in the 1990's was owing to the impact of economic globalisation. In truth, the expression "economic globalisation" simply refers to the transplantation of the principles of unbridled competition that operate in the international market place, to the local economic institutions of industrialised market economic countries like Australia. Of course, the spread of information technology coupled with the ascendancy of neo-liberal ideology added to these globalisation pressures. From the mid-1980's onwards, our labour relations mechanisms were required to pay more attention to economic market forces than had previously been the case.

As I have earlier recounted, the Australian government is currently planning further changes to our labour laws and after 1 July this year their majorities in both Houses of the Australian Parliament will allow them to shape our federal labour laws in accordance with their views, subject only to the strictures of the Australian constitution. As I recounted at the beginning of this lecture, the federal government's change proposals have not been fully revealed at this time. However, my fear is that if implemented, several of these proposed alterations will lead to a displacement of fairness and justice at work from centre stage by the economic imperatives of free market competition to the detriment of Australian industrial citizens. Time will only

³⁰ *Ex Parte H V McKay* (1907) 2 CAR 1.

permit me this evening to comment upon several of the more important proposed changes which have been foreshadowed either in the form of bills which already have been introduced into the Australian Parliament, or which appear to be contemplated as workable proposals by the Australian Government. My comments will be confined to proposals concerning the setting of the minimum or living wage, proposals to further contract the federal award-based safety net, proposals to immunise small businesses from the requirements to make redundancy or severance payments, proposals to exempt small businesses from the federal unfair dismissal laws, and proposals to further limit the right of employees to undertake protected industrial action when engaging in collective bargaining.

The central feature of our labour laws over the last century has been wage fixation. In particular, since the partial deregulation of our labour laws in the 1990's, the Industrial Relations Tribunals have primarily concerned themselves with the living or minimum wage appropriate for Australian industrial citizens. What stands out in our nation unlike a number of other market economy countries, is that our minimum wage not only gives the most unskilled employees a reasonable level of income and dignity, but the manner of its setting by our industrial relations tribunals has long standing community acceptance. Of course, minimum wages cannot be viewed in isolation from our laws governing taxation and social security payments. It is open for the Australian parliament to instruct the Australian Industrial Relations Commission with respect to ascertaining the minimum wage, and over the years the parliament has specified detailed criteria for our federal tribunal. However, I would caution the government from totally removing the power to set the minimum or living wage from the Australian Industrial Relations Commission and giving it instead to some form of recommendatory body. I am sure that the government has examined the work of the British Low Pay Commission that was established in 1998 to provide a minimum wage setting process for the United Kingdom (Simpson 1999, 1999a). Interestingly, the Low Pay Commission not only recommends a minimum wage for British employees, but this minimum wage is also applicable to labour only independent contractors who are not running businesses on their own account. The removal of the Commission's power to set a minimum or living wage would I suggest, have three consequences.

First, this type of removal would be a body blow to the Australian Industrial Relations Commission which would I believe eventually lead to its demise. Second, if the government replaced the Commission with a body having recommendatory powers, the government would be required to decide in every instance whether or not to accede to such recommendations. I venture to think that the power to determine a minimum wage would be a two-edged sword for any government that especially in the early years of such a system would face considerable lobbying from all sides. Finally, and perhaps of most importance, the removal of a minimum wage setting power would in my view destroy the carefully built up community consensus over the fixing of wages for those employees on the lower rungs of the labour market.

Under federal labour law, the Australian Industrial Relations Commission has established an award-based safety net of minimum terms and conditions of employment, which the Howard Government narrowed in late 1996. However, the Government has stated that at the very least it will further shrink this safety net. As I have shown above, the award-based safety net is not a static set of terms and

conditions of employment: rather it is a dynamic structure that can be and is updated when community standards alter. In my view, a case has not been made out for a further significant contraction of this safety net upon which so many employees are reliant for their actual terms and conditions of employment. If one of the reasons behind the suggestion to further shrink the safety net is to lessen the capacity of the Australian Industrial Relations Commission to continue its dynamic process of updating employee terms and conditions of employment, this would be to the detriment of Australian industrial citizens. Perhaps it may be the case that the contraction of the safety net is coupled with proposals to lessen the capacity of the Australian Industrial Relations Commission to determine whether collective agreements have undercut these award protections through its “no disadvantage” test. I would, however, urge the Government to retain the capacity of the Commission to determine the fairness of collectively agreed outcomes, especially when employees are given a proposed collective agreement by their employer without the involvement of a trade union. If the Commission lost its wage fixing powers and if the safety net was substantially contracted, then in my judgement these measures would lead to a diminution of fairness in the operation of our labour laws.

The government has already introduced legislation³¹ to overturn the 2004 decision of the Australian Industrial Relations Commission to grant up to eight weeks redundancy pay to employees of small businesses who are made redundant where their employer employs less than 15 employees.³² The arguments here are more finely balanced, especially having regard to the pressures placed upon small businesses. Yet, the reasoning of the Commission showed a careful approach whereby the extension of redundancy payments to employees of small businesses was recognised as a necessary measure in a time of business restructuring and downsizing. However, if this reversal does take place, then I suggest that the plight of small business employees being made redundant must be ameliorated in other ways such as through increased government social security assistance.

The Government has already introduced a bill to take away the unfair dismissal rights from terminated workers whose employers employ less than 20 employees.³³ I have been surprised by the tenacity of the Australian Government that has for a number of years sought to enact this small business exemption. Given the current flexibilities of the Federal unfair dismissal regime where employers are able to employ persons on contracts for specified periods of time or for specified tasks, or persons on periods of probation or on qualifying periods, or persons as casual employees for less than twelve months, or persons on traineeship agreements or approved traineeships without the fear of unfair dismissal litigation,³⁴ it does seem to me that this extra significant exclusion is unnecessary and inappropriate. If enacted into law after July 2005, this exemption will further distance our federal unfair dismissal laws from the precepts of justice and fairness at work which should be the rights of Australian industrial citizens.

³¹ *Workplace Relations Amendment (Small Business Protection) Bill 2004.*

³² *Redundancy Case (2004) 129 IR 155*, and see also *Redundancy Case Supplementary Decision (2004) 134 IR 57.*

³³ *Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004.*

³⁴ For details of these exemptions see *Workplace Relations Act 1996 (Cth)* sections 170CBA and 170CE(5A)-(5B).

Finally, it does appear that the Government is giving consideration to lessening the capacity of employees to take protected industrial action by requiring pre-strike secret ballots and mandatory cooling off periods.³⁵ Already, the capacity of employees and their trade unions to take lawful strike activities is hedged around by a tight circle of legal provisions. If the capacity of employees to bargain collectively is further weakened by making strike activity virtually impossible, workers and their trade unions will in time opt out of this bargaining mechanism and turn to Common Law collective agreements backed up by their own industrial muscle. Again, though strikes are inconvenient and have economic effects, they are a necessary element of a free workforce engaging in collective bargaining with their employing undertakings.

You will recall that one theme of industrial citizenship scholarship from the Webbs right through to Professor Hugh Collins is that of employee participation in the making and the interpretation of work rules at the employing undertaking. For Collins, the establishment of collective bargaining between trade unions and employers together with consultative mechanisms engenders employer and employee dialogue that enhances overall competitiveness throughout the economy. With respect to Australian labour law, however, employee participation and consultative measures are generally sadly lacking. When conciliation and arbitration tribunals determined market rates awards, it could be argued that this was an indirect method of employee participation because the Tribunals had regard to the submissions made by trade unions whose leaders were democratically elected by their membership. However, since conciliation and arbitration at the federal level has been largely confined to the setting of a minimum safety net of terms and conditions of employment, it no longer fulfils this role. Collective bargaining between trade unions and employers is an accepted and well-trying method of employee participation throughout the industrialised world, and in Australia this type of bargaining fulfils this function. However, in relation to non-union bargaining, that is where the employer puts forward a collective agreement for employee approval, it does not amount to employee involvement in the accepted sense. It would be possible under federal law to provide that where an employer negotiates directly with its employees, the workforce must be entitled to participate in the bargaining process via a duly elected works committee or similar body. Neither the government nor the Australian Labor Party are interested in going down this track. It is also the case that in its rush to build an individualised workforce via common law contracts of employment and Australian workplace agreements, the current Federal government has no interest in establishing consultative mechanisms for the purposes of sharing information and ideas between employees and employers. For its part, the Australian Labor Party has not embraced the establishment of such consultative mechanisms. I can only conclude that in the area of employee participation, Australian labour law is sadly lacking and is out of step with current arrangements operating throughout the majority of market economy countries, as embodied in the directives and laws of the European Union.

4. The Corporatisation of a National Labour Law Regime

Given the increased integration of the Australian economy, together with the relatively small size of our workforce, the establishment of a single national labour

³⁵ Mandatory pre-strike secret ballots and cooling off periods first surfaced in the Governments *Workplace Relations (More Jobs Better Pay) Amendment Bill 1999*. The *Building and Construction Industry Improvement Bill 2005* contains these measures that are restricted to the construction industry. Thirty years ago, I examined the use of secret ballots in Australia: McCallum 1976.

law system for Australia is a worthwhile goal (Williams 2003). In October 2000, Peter Reith who was then federal Minister for Workplace Relations and Small Business once again re-opened this debate by releasing a series of discussion papers under the catchy title “Breaking the Gridlock” which argued for the establishment of one national labour law system (Reith 2000). The issues for me are not whether we should have one set of national labour laws, but rather what type of system should we put in place and what are the appropriate political and legal means of achieving this end. Given the century of federal and State labour laws which have been developed in our nation, it does appear to me that a cooperative approach by all governments is the appropriate manner of working towards a unitary labour law mechanism.

As I understand the state of play, the Australian Government is considering legislating in a step-by-step approach to create a single national labour law system. Some in the Government believe that this can be achieved by utilising the corporations power which is contained in section 51(xx) of the Australian Constitution. Under this head of power, the Australian Parliament may legislate with respect to “Foreign, trading and financial corporations formed within the limits of the Commonwealth” which covers most incorporated bodies in our nation. In 2002³⁶ and again in 2003³⁷, the Australian Government took the first step along this path by introducing bills into the Federal Parliament where through utilising its legislative powers over corporations, Federal unfair dismissal law would become the exclusive mechanism for challenging unfair terminations for all employees of incorporated employers. In other words, where State unfair dismissal laws had previously applied to these employers, henceforth it would be supplanted by the federal termination laws by virtue of the corporations power.

Much has been written on the manner in which the corporations’ power may be used to establish a labour law mechanism that would cover approximately four fifths of the Australian workforce (Ford 1997, Williams 1998:104-125, Stewart 2001, Pittard and Naughton 2003:522-540, Williams 2003, Creighton and Stewart 2005:105-108). More than twenty years ago, Dr Graham Smith and I argued that the corporations power could supplement the labour power in order to enable federally registered trade unions to engage in collective bargaining (Smith and McCallum 1984). I fully comprehend how the corporations power together with other powers like the trade and commerce power³⁸ may fill in the gaps left because of the High Court’s somewhat narrow approach to interpreting the words “prevention” and “conciliation” in the first phrase of the labour power which speaks of “Conciliation and arbitration for the prevention and settlement of industrial disputes” etc. My deep concern with the current approach of the Australian Government is that it will use the corporations’ power not as a supplementary power, but as the primary and central power upon which it can enact a national labour law mechanism that will be applicable to most Australian industrial citizens. Let me explain my concerns in the following way.

In his 1997 book titled *From Subject to Citizen, Australian Citizenship in the Twentieth Century* (Davidson 1997), Alistair Davidson gave me new insights into the placing of the labour power into the Australian Constitution. He wrote that

³⁶ *Workplace Relations Amendment (Termination of Employment) Bill 2002.*

³⁷ *Workplace Relations Amendment (Termination of Employment) Bill (No 2) 2002* which received its second reading on 6 November 2003.

³⁸ The trade and commerce power is to be found in section 51(i) of the Australian *Constitution*.

[t]he real triumph of the founding fathers was the adoption of section 51(xxxv) of the new Constitution, giving the Commonwealth power over industrial disputes extending beyond any one state. This effectively put the major issue of social rights on a national scale – the relations between capital and labour – into the hands of a court (Davidson 1997:56).

For Davidson, the labour power can be viewed as an industrial citizen's constitutional charter as it ensured that whenever the federal Parliament used this constitutional provision, it would be confined to utilising independent machinery to settle labour disputes by conciliation and arbitration. Furthermore, to be valid enactments, the laws establishing courts and tribunals with respect to conciliation and arbitration had to focus upon the rights and obligations of employees and employers and their respective organisations. In other words, the hall marks of the labour power are independent machinery possessing broad powers of conciliation and arbitration for the benefit of employees, employers, trade unions and employer associations.

On the other hand, the focus of the corporations power is very different indeed. Let me illustrate this difference by examining the 2001 Federal Court of Australia decision of *Quickenden v O'Connor*.³⁹ In this case, the Federal Court held that the Corporations power applied to Universities incorporated under State statutes. Accordingly, they were able to validly enter into collective agreements with trade unions under federal labour law.⁴⁰ In the course of their joint reasons, Black CJ and French J examined the curial decisions on the reach and scope of the corporations power. Their Honours concluded that

... [A] law is a valid exercise of the power under s 51(xx) [the corporations power] if it confers rights or powers or imposes duties or liabilities peculiarly on such corporations or those who deal with them or engage in conduct effecting them in connection with those dealings or that conduct. It may be accepted that a law of general application which happens to apply to constitutional corporations among others is not a law with respect to such corporations for the purposes of s 51(xx).⁴¹

Put briefly, to be a valid law pursuant to the corporations power, the law must relate to the rights, duties, conduct and obligations of corporations and to those persons or bodies who either deal with corporations, or who engage in conduct with corporations. Thus for a labour law to be validly enacted under the corporations power, it must focus upon the rights and obligations of corporations and on the rights and obligations of those who deal with them such as their employees.

I can best explain the differing focuses of labour laws enacted in reliance upon the labour power and the corporations power with the following example. Suppose that section 51 of the Australian Constitution contained a paragraph enabling the Australian Parliament to enact laws with respect to men. Suppose further that in reliance on this head of power the Parliament enacted laws enabling men to enter into or to dissolve marriages with women. Such laws could be upheld, I suggest, because they would relate to the rights duties and obligations of men, and to the rights, duties and obligations of women who would engage in conduct with men in their marriages

³⁹ *Quickenden v O'Connor and Ors* (2001) 109 FCR 243.

⁴⁰ *Workplace Relations Act* 1996 (Cth) Part VIB Divisions 2 and 4.

⁴¹ (2001) 109 FCR 243, 257.

with men. In such a situation, women and men would cry out about the imbalance of such laws that treated women as little more than appendages of men. Similarly, I suggest that if the corporations power is utilised as the primary head of power under which national labour laws are enacted, eventually we would perceive an imbalance in our labour laws. In time, our labour laws would become a sub-set of corporations' law and employees would be regarded as little more than actors in the economic enhancement of corporations. For our labour laws to pass the test of "justice and fairness at work", they must focus equally upon the rights, duties and obligations of employees and of employers. This is why the Australian Constitution envisages that the primary heads of power to be utilised in enacting labour laws, family laws and corporations laws will be the labour power, the marriage, divorce and custody powers⁴² and the corporations power.

May I conclude this evening's lecture with a warning to the current Australian Government. About a decade ago, that is in 1993, the Keating Australian Labor Party Government utilised the mantra of the external affairs power to create a national labour law system which would override significant aspects of the labour laws of the States most of which were governed by Liberal Party and National Party governments. Section 51(xxix) of the Australian Constitution enables the Australian Parliament to make laws with respect to "external affairs", that is it may fashion laws to fulfil obligations in international instruments to which the Australian Government is a party (for details see Crock 1984). As the centrepiece of its national approach the Parliament enacted a series of laws granting employees remedies for unfair and/or for unlawful terminations. By virtue of the external affairs power these termination laws possessed the capacity to apply to most employers and employees in Australia.⁴³ However, the Keating Government over-reached itself by utilising an inappropriate international instrument to achieve this purpose. It relied upon the International Labour Organisation's 1982 Termination of Employment Convention.⁴⁴ However, this Convention did not say one word about granting remedies for unfair dismissals. Rather, it was a convention designed to encourage employment retention by limiting the rights of undertakings to make employees redundant through plant closures and/or outsourcing of functions during times of economic downturns. This is why these unfair termination laws that were mainly based on this convention were a wholly unsuitable vehicle to deal with unfair terminations in the Australia of the 1990's. Instead of primarily focussing upon granting remedies for unfair terminations, these laws lessened the capacity of employers to terminate labour in appropriate circumstances (McCallum 1998:47-53). Although these termination laws were upheld by the High Court of Australia,⁴⁵ albeit with a few qualifications, The dissatisfaction with these unsuitable laws was, I suggest, a significant factor in the Keating Government's defeat in the 1996 federal election.

If the current federal Government believes that through utilising the mantra of the corporations power it is able to enact a set of national labour laws and ride roughshod over the States, it may end up learning a few unpalatable lessons. Not only may such

⁴² Section 51(xxi) gives the Australian Parliament power to enact laws with respect to "Marriage"; while section 51(xxii) enables the Parliament to enact laws with respect to "Divorce and matrimonial causes; and in relation thereto, parental rights and the custody and guardianship of infants".

⁴³ See, *Industrial Relations Act 1988* (Cth) Part VIA Division 3, now repealed.

⁴⁴ *Termination of Employment Convention, International Labour Organisation Convention 158, 1982.*

⁴⁵ *Victoria v Commonwealth of Australia* (1996) 187 CLR416.

laws be seen as inappropriate by Australia's industrial citizens, but in order to ensure a balance in our federal compact the High Court may be obliged to draw a line in the sand and limit the relentless advance of the corporations power.

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