



## Archives Amendment Bill 2008

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## Archives Amendment Bill 2008

**Date introduced:** 17 September 2008

**House:** Senate

**Portfolio:** Cabinet Secretary

**Commencement:** On the day after the date of the Royal Assent

**Links:** The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

## Purpose

The purpose of the Bill is:

- to amend the *Archives Act 1983* (the Archives Act) to reflect various recommendations in the Australian Law Reform Commission's Report *Australia's Federal Record: A Review of Archives Act 1983* (ALRC 85) which have not yet been implemented, and
- to make consequential amendments to the *Copyright Act 1968* (the Copyright Act), the *Freedom of Information Act 1982* (the FOI Act) and the *Privacy Act 1988* (the Privacy Act).

## Background

The term 'archives' is defined in the Australian Records Management Standard as 'those records that are appraised as having continuing value'.<sup>1</sup>

The term 'archives' has traditionally been used to describe records no longer required for current use which have been selected for permanent preservation, that is, the 'permanent records' of an organisation or person.

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1. AS 4390, Part 1, Clause 4.5, quoted in State Records NSW, 'Glossary of Recordkeeping Terms', [http://www.records.nsw.gov.au/recordkeeping/glossary\\_of\\_recordkeeping\\_terms\\_a-c\\_4298.asp](http://www.records.nsw.gov.au/recordkeeping/glossary_of_recordkeeping_terms_a-c_4298.asp), accessed on 23 September 2008.

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Other uses for the word ‘archives’ refer to the building or place where archival material is kept, and to the organisation (or part of an organisation) responsible for appraising, acquiring, preserving and making available archival material.<sup>2</sup>

### National Archives of Australia: a brief history

The task of preserving the permanently valuable records of Australia’s federal government took some time to find a home. Records of the First World War were collected by what is now the Australian War Memorial, and a Public Archives Bill was considered by Cabinet in 1927. However, it was only in 1942 that Australia’s participation in the Second World War prompted steps towards the creation of a more general system, with the setting up of the War Archives Committee to deal with records of the war. In 1946, the task was expanded to include the preservation of all Commonwealth archives, and a fledgling archives organisation was established.<sup>3</sup> Since then, the body responsible for Commonwealth archives has undergone several changes of name and status:

- Archives Division, Commonwealth National Library (1940s–61)
- Commonwealth Archives Office (1961–74)
- Australian Archives (1971–98)
- National Archives of Australia (NAA) (1998–).<sup>4</sup>

The various archives of the federal government operated without legislative authority until 1983, with the system running on ‘conventions and contacts’ which enabled the archives to obtain and preserve records from other government departments.<sup>5</sup>

In 1984, the Australian Archives had a staff of 400, was storing 367 521 shelf metres of permanent and temporary material, and received 3 446 enquiries from the public. In 2007, the NAA had an average staffing level of 402, was storing 356 149 shelf metres of material, and received 123 734 enquiries from the public.<sup>6</sup>

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2. Judith Ellis (ed), *Keeping Archives, Second Edition*, Thorpe/Australian Society of Archivists, Port Melbourne, 1993, p. 463. See also State Records NSW, *ibid*.
  3. Australian Law Reform Commission, ‘Australia’s Federal Record: A Review of the Archives Act 1983’, *Report 85*, July, 1998, Chapter 2.
  4. Senator the Hon. Richard Alston, ‘Name change for Archives’, media release, Canberra, 27 February 1998. The *Archives Act 1983* was amended to reflect this name-change by Schedule 2 of the *Census Information Legislation Amendment Act 2000*.
  5. Hilary Golder, ‘Documenting a Nation. Australian Archives: the First Fifty Years’, Australian Archives with AGPS Press, Canberra, 1994, p. 43. An Archives Bill had been introduced in the Senate in 1978, but did not proceed.
  6. Australian Archives, *First Annual Report 1983–84*, pp. 15–16, and National Archives of Australia, *Annual Report 2006–07*, Canberra, 2007, pp. 31–39.

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The Archives Act established the Australian Archives as a statutory body. Amongst other things, it set out procedures for the preservation or destruction of Commonwealth records, for public access to records after 30 years, and for administrative review of decisions about access.

The NAA became an executive agency<sup>7</sup> in 2001, reporting directly to the federal Minister for the Arts, rather than to the Secretary of the Department of Communications, Information Technology and the Arts.<sup>8</sup>

### Basis of policy commitment

In April 1996, motivated especially by changes in community views on privacy and access to information, as well as the proliferation of electronic record-keeping, Australian Archives initiated a review of the Archives Act. The Australian Law Reform Commission (ALRC) began this review in August 1996, and tabled ALRC 85 in Parliament in July 1998.

The report found that recordkeeping in many Commonwealth agencies was in a parlous state that could only be overcome if the NAA were allowed to adopt a pro-active policy stance, and that there was a need for mandatory recordkeeping standards to be implemented by Commonwealth agencies.<sup>9</sup> One of the main problems facing archival organisations today is the predominance of electronic records, and the need to be involved in the design of electronic record-keeping systems if there is to be any realistic hope of continuing access to the records contained in those systems.

The report also recommended that:

- the NAA be an independent statutory authority (implemented in 2001)
- there be more effective supervision by the NAA of disposal of non-archival records
- the 15 existing categories under which records may be exempted from public access should be reduced to nine<sup>10</sup>
- there should be a legislative direction that records more than 30 years old are to be made available to the public unless there are compelling reasons for withholding them

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7. Executive Agencies are established in accordance with section 65 of the Public Service Act 1999. They are responsible to a Minister but have their own budget.

8. Hon. Peter McGauran, MP, Minister for the Arts, *'National Archives Awarded Executive Agency Status'*, media release, Canberra, 5 March 2001.

9. Australian Law Reform Commission, *'Urgent action needed to safeguard Australia's archives, ALRC warns'*, media release, 2 July 1998.

10. This recommendation is not put into effect by this Bill.

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- there should be a statutory obligation on all Commonwealth agencies to make records available at the earliest practicable time
- the NAA should issue guidelines to encourage and facilitate the early release of records, and
- the availability of records should be expanded, particularly through new technologies and public promotion of the availability of records.<sup>11</sup>

### Archives Amendment Bill 2006

The [Archives Amendment Bill 2006](#) (Cth) (the 2006 Bill) which was introduced in the Senate on 6 September 2006, sought to implement the recommendations in ALRC 85, including:

- inserting a new objects clause
- inserting various definitions, including a new definition of ‘record’, and
- imposing an obligation on Commonwealth institutions to transfer to the care of the NAA records which have ceased to be current Commonwealth records and have been designated as archival resources of the Commonwealth.

Senator Murray (Australian Democrats) sought to make further amendments to those provisions of the 2006 Bill which related to the FOI Act. His purpose was to overcome the difficulty arising from a judgment of the High Court in [McKinnon v Secretary, Department of Treasury](#),<sup>12</sup> and to make other improvements to the review jurisdiction of the Administrative Appeals Tribunal recommended by the Australian Law Reform Commission and the Administrative Review Council.<sup>13</sup>

The Bill lapsed when Parliament was prorogued in October 2007. The [Bills Digest](#) for the 2006 Bill provides background on archives and much of the above background has been taken from that Digest.<sup>14</sup>

The current Bill is in similar, but not identical terms, to the lapsed 2006 Bill.

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11. Australian Law Reform Commission, ‘*Media briefing paper*’, 2 July 1998.
  12. [2006] HCA 45, (2006) 228 CLR 423. The central issue in the appeal was the operation of subsection 58(5) of the FOI Act in relation to two certificates signed by the Treasurer of the Commonwealth, certifying that the disclosure of certain internal working documents would be contrary to the public interest.
  13. Archives Amendment Bill 2006, [Supplementary Explanatory Memorandum](#). Senator Murray’s proposed amendments are not reflected in the current Bill.
  14. Patrick O’Neill, ‘Archives Amendment Bill 2006’, *Bills Digest*, No. 58, Parliamentary Library, Canberra, 2006–07.

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## Position of significant interest groups/press commentary

The NAA welcomed the introduction of the 2006 Bill as the culmination of over ten years of effort.<sup>15</sup>

The Australian Society of Archivists also appear to be broadly supportive of the Bill.<sup>16</sup>

## Political party policy positions/commitments

There has been no political party commentary on the Bill. It should be noted that one of the first initiatives of the new Rudd Labor Government was to move the National Archives from the oversight of the Department of Finance and Deregulation to the Prime Minister's Department portfolio in May 2008. In August 2008 Senator, the Hon. John Faulkner, Cabinet Secretary and Special Minister of State gave this as the reason:

In the new Federal Government, for the first time, many integrity and governance functions are brought together under a single Minister – FOI, public service administration, codes of conduct, the register for lobbyists, transparency, accountability, electoral law, the guidelines and administration of tax-payer funded entitlements, government advertising and the National Archives.<sup>17</sup>

This means that it is Senator Faulkner who at the time of preparing this Digest, is the Minister responsible for the NAA.

## Committee consideration

At its meeting of 18 September 2008, the Selection of Bills Committee deferred consideration of the Bill until its next meeting.<sup>18</sup>

## Financial implications

According to the Explanatory Memorandum the Bill is not expected to have any financial impact on Commonwealth expenditure or revenue.<sup>19</sup>

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15. Diana Streak, 'Archives welcomes getting into the Act', *Canberra Times*, 7 September 2006, p. 6.

16. Personal communication with the Parliamentary Library, 23 September 2008.

17. The Hon. J. Faulkner, [Speech to Launch the Australian Law Reform Commission's Report on Privacy](#), Press Release, 11 August 2008.

18. Selection of Bills Committee, *Report No. 11 of 2008*, 18 September, 2008, paragraph 4.

19. Explanatory Memorandum, p. 1.

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## Main provisions

### Amendments to the Archives Act

**Items 1–40** of Schedule 1 to the Bill amend the Archives Act.

**Item 1** inserts **proposed section 2A** which contains an objects clause. The proposed objects of the Archives Act are:

- to provide for a National Archives of Australia which will be responsible for:
  - identifying the archival resources of the Commonwealth
  - preserving those archival resources and making them publicly available, and
  - overseeing Commonwealth record-keeping by determining standards and providing advice to Commonwealth institutions, and
- to impose record-keeping obligations in respect of Commonwealth records.

**Item 2** inserts a new definition of *‘care’* in existing subsection 3(1) which contains all the relevant definitions for the Archives Act. Under the proposed definition, a record will be in the *care* of the NAA if it is either in the custody of the NAA or it is in the custody of a person in accordance with existing section 64 of the Archives Act.<sup>20</sup>

**Item 3** of the Bill repeals the existing definition of the term *‘material of the Archives’* from the definitions in subsection 3(1) of the Archives Act. **Item 3** then substitutes a new definition so that *‘material of the Archives’* means records in the *‘care’* of the NAA, other than current Commonwealth records relating to the administration of the NAA.

**Item 4** also repeals a definition. In that case, the existing definition of *‘record’* is amended to mean a document, or an object, in any form (including any electronic form) that is, or has been, kept by reason of:

- any information or matter that it contains or that can be obtained from it, or
- its connection with any event, person circumstance or thing.

This is a very broad definition and would include such things as a photograph, film, map, plan, model or painting. It can also include a sound recording, coded storage device,

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20. Section 64 provides that where the Director-General considers it appropriate to do so, the Archives may make arrangements with a person for material of the Archives to be kept in the custody of that person. In such circumstances the material is still in the *care* of the Archives and is subject to regular inspection by the Archives.

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magnetic tape or disc, microform, and more modern technologies such as digital video discs and compact discs.<sup>21</sup>

Existing subsection 3(2) of the Archives Act provides that the archival resources of the Commonwealth consist of such Commonwealth records and other material as are of national significance or public interest. **Item 5** of the Bill inserts **proposed section 3C** which empowers the Director-General<sup>22</sup> to determine that a specified Commonwealth record or other material is part of the archival resources of the Commonwealth under subsection 3(2) of the Archives Act. Such a determination must be in writing, but is not a legislative instrument: **proposed subsection 3C(4)**. This means that it will not be put before the Parliament and will not be subject to disallowance.

**Item 6** contains a transitional provision which is consequential upon item 5. The effect of the transitional provision is that those records which have been classified as ‘Retain as National Archives’ immediately before the commencement of item 5, are taken to be part of the archival resources of the Commonwealth under **proposed section 3C**.

Existing section 5 of the Archive Act is about the establishment and functions of the NAA. **Items 7–21** are minor amendments to reflect, amongst other things, the NAA’s status as an executive agency, and to ensure that the functions of the NAA are read cumulatively and not in the alternative.

**Item 22** omits the term ‘*custody*’ from existing subsections 6(2) and 6(3) of the Archives Act and substitutes the term ‘*care*’. This amendment is consistent with the proposed definition of ‘*care*’ in subsection 3(1).

**Item 23** inserts **proposed section 6A** into the Archives Act. **Proposed subsection 6A(2)** provides that where a Commonwealth institution has transferred a Commonwealth record into the care of the NAA, but the record is not the subject of a determination under proposed section 3C, then the NAA can transfer the record back to the institution or to another institution which has taken over the functions of the originating institution. In either case, the NAA must transfer the record only in accordance with arrangements agreed to by the institution: **proposed paragraph 6A(2)(c) and (d)**.

**Item 24** provides that **proposed subsection 6A(2)** of the Archives Act will apply to Commonwealth records transferred to the care of the NAA before or after the commencement of the item.

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21. Explanatory Memorandum, p. 3.

22. The term *Director-General* is defined in subsection 3(1) of the Archives Act as the person for the time being occupying the office, or performing the duties of the office, of Director-General of the National Archives of Australia under the *Public Service Act 1999*.

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**Items 25 and 26** are minor amendments to substitute a reference to ‘*custody*’ with a reference to ‘*care*’. These amendments are consistent with the proposed definition of ‘*care*’ in subsection 3(1).

**Item 27** repeals existing section 27 and substitutes **proposed section 27** which deals with the transfer of certain Commonwealth records to the care of the NAA. **Proposed subsection 27(1)** applies to a Commonwealth record that is in the custody of a Commonwealth institution other than the NAA and has been determined to be part of the archival resources of the Commonwealth under proposed section 3C. The person responsible for the custody must transfer the Commonwealth record to the care of the NAA in accordance with arrangements approved by the NAA: **proposed subsection 27(2)**. That transfer must occur:

- as soon as practicable after the record ceases to be a current Commonwealth record: **proposed paragraph 27(3)(a)**, and
- within 25 years of the record coming into existence: **proposed paragraph 27(3)(b)**.

According to the Explanatory Memorandum, the requirement to transfer as soon as practicable will allow the NAA ‘to determine the particular conservation requirements for the records before records begin to deteriorate’.<sup>23</sup>

**Item 33** repeals existing section 30 and substitutes **proposed section 30** which requires the NAA to ensure that all Commonwealth records which are transferred into its care are made available for use by, or at the direction of, the originating institution or a Commonwealth institution that has succeeded to the relevant functions of the originating institution. However **proposed subsection 30(2)** qualifies that availability so that if a record has been in existence for more than 25 years, it must not leave the custody of the person who has the custody of the record, except as necessary for the ‘proper conduct’ of the institution.

Existing subsection 3(7) of the Archives Act provides that a record is in the ‘*open access period*’ if a period of 30 years has elapsed since the end of the year ending on 31 December in which the record came into existence. **Item 34** repeals existing subsections 31(1) and (2) and **inserts proposed subsections 31(1A), (1) and (2)** which deal with Commonwealth records that are in the open access period and in the care of the NAA or the custody of a Commonwealth institution. In that case the NAA must make the record available for public access if it is not an ‘exempt record’: **proposed subsection 31(1)**. However, if the record is in the custody of a Commonwealth institution, then that institution must make arrangements with the NAA which will allow the NAA to meet its access obligations.

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23. Explanatory Memorandum, p. 7.

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**Item 36** repeals the existing heading to Part VI, that is, ‘Objects of Archival Significance’, consistent with the repeal of existing section 61 by **item 37**. The reason for the repeal is that the expanded definition of ‘*record*’ and the insertion of **proposed section 3C** will allow for the inclusion of objects. **Item 36** inserts a new heading to Part VI, being ‘Samples of material for the Archives’.

**Item 39** repeals existing subsections 64(1) and (2) which relate to custody of material of the NAA other than by the NAA. In his second reading speech for the current Bill, Senator Faulkner has stated:

This Bill recognises the fact that there can be compelling reasons why archival records should be retained by their agency of origin, or in some other appropriate place. For example, records may be created or accessed through particular technologies not available at a central archives, or, similarly, specialised skills may be required to retrieve, interpret or manage data. For this reason, the Bill introduces the concept that archival records can be considered to be in the care of the Archives, and therefore subject to the provisions that apply to all archival material, even when they are not in the physical custody of the Archives.<sup>24</sup>

It is proposed to insert **new subsections 64(1) and (2)** which will allow the NAA to do the following:

- make arrangements for records to be transferred to the care of the NAA, or
- make arrangements for material of the NAA to be kept in the custody of a person.

**Proposed subsection 64(2)** requires that those arrangements must:

- provide for the care of the material
- allow for the NAA to inspect the materials regularly
- enable the NAA to meet its other obligations under the Archives Act and
- allow for the transfer of custody of the records to the NAA if the Director-General so directs.

## Amendments to the Copyright Act

**Items 41–71** amend the Copyright Act. **Item 41** replaces the reference to the ‘Australian Archives’ in subparagraph (a)(i) of the definition of ‘*archives*’ in section 10 of the Copyright Act with a reference to the NAA. **Item 42** inserts ‘or’ into the definition of archives so that the subparagraphs in the definition are read in the alternative. **Item 43** inserts **proposed subparagraph (aa)** into the definition of ‘*archives*’ so that the definition

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24. Senator the Hon. John Faulkner, ‘Second reading speech: Archives Amendment Bill 2008’, Senate, *Debates*, 17 September 2008, p. 1.

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includes material which is in the custody of a person other than the NAA in accordance with the provisions of section 64 of the Archives Act.

**Item 45** repeals existing paragraph 10(3)(b) and replaces it with **proposed paragraph 10(3)(b)** which contains a new description of the term ‘body administering a library or archives’. The term will include both a person having custody of the archives, and the body or person (including the Crown) who has ultimate responsibility for the library or archives.

**Item 48** inserts **proposed subsection 10(3A)** which provides that anything held in or forming part of any ‘archives’ according to **proposed subparagraph (aa)** of the definition is taken not to be held in or form part of the NAA.

**Items 49 and 50** amend subsections 47(5) and (6) respectively to update the name of the NAA and to reflect the amendments to the Archives Act which provide that the NAA has ‘care’ of records.

Existing section 51AA of the Copyright Act provides that the copyright in a work that is kept in the collection of the Australian Archives, where it is open to public inspection, is not infringed by the making or communication by, or on behalf of, the officer in charge of the Archives:

- making a single reference copy of the work for supply to a regional office of the Archives where a reference copy of the work has not been previously supplied to that regional office
- making a single replacement copy of the work where a reference copy of the work supplied to a regional office of the Archives is lost, damaged or destroyed
- making a single replacement copy of a work for supply to the central office of the Archives where a reference copy of the work supplied to the central office of the Archives is lost, damaged or destroyed.

**Item 51** amends subsection 51AA(1) to omit the reference to the Australian Archives and to insert a reference to the updated definition of ‘archives’ in the Copyright Act. **Items 54–55** and **items 57–60** are all in the same terms, that is, the reference to ‘Archives’ is omitted and a reference to ‘National Archives of Australia’ is substituted. This is consistent with the amendment to the definition which was made by **item 41**. Together these amendments extend the application of the various copyright exceptions that apply to libraries and archives to archival material in bodies with whom the NAA has an arrangement for retention of the records. In particular, copyright in a work which is in the collection of the NAA or held by a person under a section 64 of the Archives Act arrangement and open to public inspection will not be infringed by the making of a single working copy in the circumstances outlined above.<sup>25</sup>

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25. Explanatory Memorandum, p. 12.

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**Items 61–64** and **items 70–71** correct the title of the NAA and reflect the amendments to the Archives Act which provide that the NAA has ‘*care*’ of records.

**Items 65–69** amend various sections in Division 5 of Part V of the Copyright Act which deals with offences and summary proceedings. Each of the subsections which is to be amended contains a defence for the NAA to offences arising out of breaches of the Copyright Act. The amendments will extend the defences to a person who has custody of the relevant material under an arrangement made in accordance with section 64 of the Archives Act as long as the action taken would also be lawful for the NAA.

### Amendments to the FOI Act

**Items 72–78** amend the Freedom of Information Act (FOI Act).

Subsection 4(6) of the FOI Act deals with what happens to requests for information after an agency is abolished. In particular paragraph 4(6)(c) deals with circumstances where the documents of the agency have been deposited with the Australian Archives. **Item 73** proposes to omit the phrase ‘deposited with the Australian Archives’ and substitute the phrase ‘transferred to the care (within the meaning of the Archives Act) of the National Archives.’ This amendment corrects the title of the NAA and is consistent with other proposed amendments in the Bill in relation to the term ‘*care*’.

**Items 74–78** amend existing subsections 13(1), (2), (3) and (4) to omit references to documents being in the custody of the Australian Archives and substitute references to documents being in the ‘*care*’ (within the meaning of the Archives Act) of the NAA.

### Amendments to the Privacy Act

**Items 79–82** amend the Privacy Act.

**Item 79** amends the definition of ‘*record*’ in section 6 of the Privacy Act so that the existing reference to ‘custody of the Archives’ (as defined in the Archives Act) is substituted with a reference to ‘care (as defined by the Archives Act) of the National Archives’. This amendment corrects the title of the NAA and is consistent with other proposed amendments in the Bill in relation to the term ‘*care*’.

Existing section 6A of the Privacy Act relates to breaches of a National Privacy Principle. Existing subsection 6A(3) provides that it is not a breach of a National Privacy Principle if an organisation discloses personal information in a record for the purposes of enabling the NAA to decide whether to accept, or to arrange, custody of the record. Existing section 6B of the Privacy Act is in similar terms referring instead to breaches of approved privacy codes.

**Item 80** amends existing subsections 6A(3) and 6B(3) of the Privacy Act so that the reference to the Archives to deciding whether to accept, or to arrange, custody of a record

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is substituted with a reference to the NAA deciding whether to accept, or to arrange, *care* (as defined in the Archives Act).

**Items 81** amend existing paragraph 10(4)(a) to omit reference to records of personal information being in the *custody* of the Australian Archives and substitute references to those records being in the *care* of the NAA.

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