



Australian Capital Territory

# **Mercantile Law Act 1962**

**A1962-4**

**Republication No 4**

**Effective: 24 November 2005 – 10 January 2006**

Republication date: 24 November 2005

Last amendment made by A2005-54

Authorised by the ACT Parliamentary Counsel

## About this republication

### The republished law

This is a republication of the *Mercantile Law Act 1962* (including any amendment made under the *Legislation Act 2001*, part 11.3 (Editorial changes)) as in force on 24 November 2005. It also includes any amendment, repeal or expiry affecting the republished law to 24 November 2005.

The legislation history and amendment history of the republished law are set out in endnotes 3 and 4.

### Kinds of republications

The Parliamentary Counsel's Office prepares 2 kinds of republications of ACT laws (see the ACT legislation register at [www.legislation.act.gov.au](http://www.legislation.act.gov.au)):

- authorised republications to which the *Legislation Act 2001* applies
- unauthorised republications.

The status of this republication appears on the bottom of each page.

### Editorial changes

The *Legislation Act 2001*, part 11.3 authorises the Parliamentary Counsel to make editorial amendments and other changes of a formal nature when preparing a law for republication. Editorial changes do not change the effect of the law, but have effect as if they had been made by an Act commencing on the republication date (see *Legislation Act 2001*, s 115 and s 117). The changes are made if the Parliamentary Counsel considers they are desirable to bring the law into line, or more closely into line, with current legislative drafting practice.

This republication includes amendments made under part 11.3 (see endnote 1).

### Uncommenced provisions and amendments

If a provision of the republished law has not commenced or is affected by an uncommenced amendment, the symbol **U** appears immediately before the provision heading. The text of the uncommenced provision or amendment appears only in the last endnote.

### Modifications

If a provision of the republished law is affected by a current modification, the symbol **M** appears immediately before the provision heading. The text of the modifying provision appears in the endnotes. For the legal status of modifications, see *Legislation Act 2001*, section 95.

### Penalties

The value of a penalty unit for an offence against this republished law at the republication date is—

- (a) if the person charged is an individual—\$100; or
- (b) if the person charged is a corporation—\$500.



Australian Capital Territory

# Mercantile Law Act 1962

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Australian Capital Territory

## Mercantile Law Act 1962

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An Act relating to mercantile agents, guarantors and sureties, usury, written memoranda and warehouse persons' liens

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## Part 1 Preliminary

### 1 Short title

This Act may be cited as the *Mercantile Law Act 1962*.

### 2 Notes

A note included in this Act is explanatory and is not part of this Act.

*Note* See the Legislation Act, s 127 (1), (4) and (5) for the legal status of notes.

### 3 Offences against Act—application of Criminal Code etc

Other legislation applies in relation to offences against this Act.

*Note 1 Criminal Code*

The Criminal Code, ch 2 applies to all offences against this Act (see Code, pt 2.1).

The chapter sets out the general principles of criminal responsibility (including burdens of proof and general defences), and defines terms used for offences to which the Code applies (eg **conduct**, **intention**, **recklessness** and **strict liability**).

*Note 2 Penalty units*

The Legislation Act, s 133 deals with the meaning of offence penalties that are expressed in penalty units.

## Part 2                      Mercantile agents

### 4                      Definitions for pt 2

In this part:

*Note*            A definition applies except so far as the contrary intention appears (see *Legislation Act 2001*, s 155).

***advance*** includes a payment of money and the delivery of a bill of exchange or other negotiable security.

***document of title***—see the *Sale of Goods Act 1954*.

***mercantile agent***—see the *Sale of Goods Act 1954*.

***pledge*** includes a contract pledging or giving a lien or security on goods, whether in consideration of an original advance, a further or continuing advance or a pecuniary liability.

### 5                      Consignor and consignee

(1) Where—

(a) the owner of goods—

(i) has given possession of the goods to a person for the purpose of consignment or sale and the person has consigned the goods in his or her own name; or

(ii) has consigned the goods in the name of a person; and

(b) the consignee of the goods has not had notice that that person is not the owner of the goods;

the consignee has, in respect of advances made to or for the use of that person, the same lien on the goods as if that person were the owner of the goods.

(2) A consignee who has a lien on goods by virtue of subsection (1) may transfer the lien to any person.

- (3) Nothing in this section limits or affects the validity of a sale, pledge or disposition by a mercantile agent.

## **6                      Powers of mercantile agent**

Where a mercantile agent is entrusted as such with the possession of goods or the documents of title to goods—

- (a) a sale, pledge or other disposition of the goods made by him or her in the ordinary course of business of a mercantile agent to a person acting in good faith and not having at the time of the disposition notice that the mercantile agent had not authority to make the disposition is, subject to this part, as valid as if the mercantile agent were expressly authorised by the owner of the goods to make the disposition; and
- (b) a sale, pledge or other disposition of the goods to a person which would have been valid if the entrusting had continued is valid, notwithstanding the determination of the entrusting, unless the person had at the time of the disposition notice of the determination of the entrusting.

## **7                      Presumptions**

For this part—

- (a) a mercantile agent in possession of goods or of the documents of title to goods shall be deemed to have been entrusted with the goods or documents as a mercantile agent until the contrary is shown; and
- (b) a mercantile agent entrusted as a mercantile agent with, and possessed of, the documents of title to goods, whether derived immediately from the owner of the goods or obtained by reason of the agent having been entrusted with the possession of the goods or of any other document of title to the goods, shall be deemed to be entrusted with the possession of the goods; and



- (c) a mercantile agent shall be deemed to be possessed of goods or documents of title to goods whether the goods or documents, as the case may be, are in the actual custody or control of the mercantile agent or are held by another person subject to the control of, or for or on behalf of, the mercantile agent; and
- (d) a contract, whether made directly with a mercantile agent or with a clerk, or other person, on behalf of a mercantile agent, shall be deemed to be a contract with the mercantile agent; and
- (e) a pledge of the documents of title to goods shall be deemed to be a pledge of the goods; and
- (f) where—
  - (i) an advance is made in good faith to a mercantile agent entrusted as a mercantile agent with the possession of goods or documents of title to goods on the faith of an agreement in writing to consign, deposit, transfer or deliver the goods or documents; and
  - (ii) the goods or documents are received by the person making the advance without notice that the mercantile agent was not authorised to make the pledge;

the advance shall be deemed to be an advance on the security of the goods or documents within the meaning of this part although the goods or documents are not received by the person making the advance until after the advance is made.

## **8 Pledge by way of exchange**

Where a mercantile agent pledges goods in consideration of the delivery or transfer of—

- (a) other goods; or
- (b) documents of title to other goods; or
- (c) negotiable securities;

upon which the person so delivering or transferring the goods, documents or securities had at the time a valid and available lien and security for or in respect of a previous advance by virtue of an agreement made with the mercantile agent, the pledge shall, if the pledgee acts in good faith and without notice that the mercantile agent had not authority to make the pledge, be deemed to be in consideration of an advance within the meaning of this part as if there had been a present advance of money, but the pledgee does not acquire any right or interest in excess of the value of the goods, documents or negotiable securities when so delivered or transferred.

**9                      Pledge for antecedent debt**

Where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee does not acquire any further right to the goods than could have been enforced by the pledgor at the time of the pledge.

**10                     Saving for rights of true owner**

Nothing in this part—

- (a) authorises a mercantile agent to exceed or depart from his or her authority as between himself or herself and his or her principal or exempts him or her from any liability, civil or criminal, for so doing; or
- (b) prevents the owner of goods from recovering the goods from a mercantile agent or his or her trustee in bankruptcy at any time before the sale or pledge of the goods; or
- (c) prevents the owner of goods sold by a mercantile agent from recovering from the buyer the price agreed to be paid for the goods, or any part of that price, subject to any right of set-off on the part of the buyer against the agent; or
- (d) prevents the owner of goods pledged by a mercantile agent—

- (i) from having the right to redeem the goods at any time before the sale of the goods on satisfying the claim for which the goods were pledged and paying to the mercantile agent, if by him or her required, any money in respect of which the mercantile agent would by law be entitled to retain the goods or the documents of title to the goods, or any of them, by way of lien as against the owner; or
- (ii) from recovering from any person with whom the goods have been pledged any balance of money remaining in his or her hands as the produce of the sale of the goods after deducting the amount of the lien.

## **11 Saving for common law powers of mercantile agents**

The provisions of this part are in amplification and not in derogation of the powers exercisable by a mercantile agent independently of this part.

## Part 3                      Guarantors and sureties

### 12                      **Consideration for guarantee**

A special promise by a person to answer for the debt, default or miscarriage of another person which is in writing and signed by that firstmentioned person or some other person thereunto by him or her lawfully authorised shall not be deemed invalid to support an action, suit or other proceeding to charge that firstmentioned person therewith by reason only that the consideration for the promise does not appear in writing or by necessary inference from a written document.

### 13                      **Surety entitled to stand in place of creditor whose debt etc surety has discharged**

- (1) Subject to this section, a person who, being surety for the debt or duty of another or being liable with another for a debt or duty, pays the debt or performs the duty, is entitled—
  - (a) to have assigned to him or her or to a trustee for him or her every judgment, specialty or other security held by the creditor in respect of the debt or duty, whether the judgment, specialty or other security is, or is not, deemed at law to have been satisfied by the payment of the debt or the performance of the duty; and
  - (b) to stand in the place of the creditor and to use all the remedies, and, if need be and upon proper indemnity, to use the name, of the creditor in any action or other proceeding at law or in equity in order to obtain from the principal debtor or any co-surety, co-contractor or co-debtor, as the case may be, indemnification for the advances made or loss sustained by the firstmentioned person.

- (2) The payment of a debt, or the performance of a duty, in the circumstances referred to in subsection (1) does not prevent the bringing of any action or other proceeding by virtue of that subsection.
- (3) A co-surety, co-contractor or co-debtor is not entitled, by virtue of subsection (1), to recover from another co-surety, co-contractor or co-debtor more than the just proportion for which, as between the parties themselves, the other co-surety, co-contractor or co-debtor is justly liable.

## Part 4 Usury

### 14 Maximum rate of interest

Where the rate of interest for a loan of money or upon any other contract has not been agreed upon by the parties, the rate of interest for that loan or upon that contract that may be recovered in an action or suit shall not exceed 8% per annum.

## **Part 5                      Written memoranda**

### **15                      Debts and contracts of infants**

An action shall not be brought whereby to charge a person—

- (a) upon a promise made after full age to pay a debt contracted during infancy; or
- (b) upon a ratification after full age of a promise or simple contract made during infancy;

unless the promise or ratification is made in writing signed by the party to be charged.

### **16                      Representations of character etc**

An action shall not be brought whereby to charge a person upon or by reason of a representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of another person to the intent or purpose that the other person may obtain credit, money or goods upon the faith of the representation or assurance, unless the representation or assurance is made in writing signed by the party to be charged.

## Part 6 Warehouse persons' liens

### 17 Definitions for pt 6

In this part:

*Note* A definition applies except so far as the contrary intention appears (see *Legislation Act 2001*, s 155).

***court*** means the Magistrates Court.

***lien*** means a lien under this part.

***warehouse person*** means a person lawfully engaged in the business of storing goods as bailee for hire or reward.

### 18 Warehouse person to have lien on goods

Subject to this part, a warehouse person has a lien on goods deposited with him or her for storage.

### 19 Charges covered by lien

- (1) Such a lien shall be for the amount of—
- (a) all lawful charges of the warehouse person for storage and preservation of the goods; and
  - (b) all lawful claims of the warehouse person for insurance, transportation, labour, weighing, packing, coopering and other expenses in relation to the goods; and
  - (c) where default is made in satisfying the lien charged on the goods under paragraphs (a) and (b)—all reasonable charges of the warehouse person for notice and advertisement of an intended sale of the goods and, if the goods are sold, for the sale of the goods.



- (2) Where the charges referred to in subsection (1) (c) are incurred with respect to more than 1 item of goods, those charges shall, with respect to any 1 item, be deemed to be an amount that bears the same proportion to the total charges as the amount of the lien charged on the item by virtue of the other provisions of that subsection bears to the amount of the lien charged on all the items by virtue of those other provisions.

## **20 Notice by warehouse person**

- (1) Subject to this part, if a warehouse person fails, within the period of 3 months after the date of the deposit of goods, to give notice, in accordance with subsections (2) and (3), of the lien on the goods, the lien on the goods is void as against the persons to whom he or she failed to give notice.
- (2) Notice of a lien on goods shall be given to—
- (a) any person who has before the expiration of the period of 2 months after the date of the deposit of the goods served upon the warehouse person a notice of his or her claim to be the owner of the goods or an interest in the goods;
  - (b) the grantee, or, where a transfer by the grantee has, not later than 2 months after the date of the deposit of the goods, been registered in accordance with the *Instruments Act 1933* the transferee, of a bill of sale relating to the goods which—
    - (i) was granted by the person depositing the goods or by any other person of whose interest in the goods the warehouse person has knowledge; and
    - (ii) was, prior to the date of the deposit of the goods, registered in accordance with the *Instruments Act 1933*; and
    - (iii) has not become null and void or had a discharge registered in respect of it; and

- (c) any other person (not being the person who deposited the goods) of whose interest in the goods the warehouse person at any time before the expiration of the period of 2 months after the date of the deposit of the goods has knowledge.
- (3) Notice of a lien on goods—
  - (a) shall be in writing; and
  - (b) shall contain—
    - (i) a brief description of the goods; and
    - (ii) a statement showing the situation of the warehouse where the goods are stored, the date of their deposit with the warehouse person and the name of the person by whom they were deposited; and
    - (iii) a statement that a lien under this part is claimed by the warehouse person in respect of the goods.

## **21 Notice by person depositing goods**

- (1) A person commits an offence if—
  - (a) the person deposits goods with a warehouse person for storage; and
  - (b) the person fails to tell the warehouse person in writing the name and, if the person knows it, the address of everyone who the person knows has an interest in the goods.

Maximum penalty: 5 penalty units.

- (2) An offence against this section is a strict liability offence.

## **22 Power to sell goods**

- (1) Subject to this part, a warehouse person may, in addition to any other remedy provided by law for the enforcement of liens or for the recovery of warehouse persons' charges, issue a notice of intention to sell the goods.

- (2) Notice of intention to sell goods under this section shall be given by the warehouse person to—
- (a) the person liable as debtor for the charges for which the lien on the goods exists; and
  - (b) any person who has served upon the warehouse person a notice of his or her claim to be the owner of the goods or an interest in the goods; and
  - (c) the grantee or transferee of a bill of sale relating to the goods, being a person to whom notice of the lien has been given under section 20, unless the bill of sale has become null and void or a discharge has been registered in respect of it; and
  - (d) any other person of whose interest in the goods the warehouse person has knowledge.
- (3) Notice of intention to sell goods under this section—
- (a) shall be in writing; and
  - (b) shall contain—
    - (i) a brief description of the goods; and
    - (ii) a statement showing the situation of the warehouse where the goods are stored, the date of their deposit with the warehouse person and the name of the person by whom they were deposited; and
    - (iii) an itemised statement of the warehouse person's charges showing the sum due at the date of the notice; and
    - (iv) a demand that the amount of the charges as stated in the notice and such further charges as may accrue shall be paid on or before a day specified in the notice, being a day not less than 1 month after the delivery of the notice, if it is personally delivered, or after the time when the notice should reach its destination according to the due course of post, if it is sent by post; and

- (v) a statement that unless the charges are paid within the time mentioned the goods will be sold by a method, and at a time and place, specified in the notice.
- (5) This section applies only to cases in which some part of the charges in arrear are in respect of a period more than 12 months prior to the date upon which notice of intention to sell is given.

## **28 Service of notices**

- (1) A notice by a warehouse person under this part may be given to a person—
  - (a) personally; or
  - (b) by registered post addressed to the person at the last address of the person known to the warehouse person; or
  - (c) where the warehouse person does not know an address of the person—by advertisement published twice in a daily newspaper published in the ACT, with an interval of at least 7 days between the advertisements.
- (2) A notice given by advertisement in accordance with subsection (1) (c) shall, for this part, be deemed to have been given on the date of the second publication of the advertisement.

## **29 Notice provisions—substantial compliance**

Where—

- (a) a notice of lien or a notice of intention to sell purports to have been given under this part but the provisions of this part with respect to the giving of the notice have not been strictly complied with; and
- (b) a court before which a question respecting the notice is tried or inquired into considers that—
  - (i) those provisions have been substantially complied with; or

- (ii) it would be inequitable that the lien or sale should be deemed to be void by reason of the noncompliance;

an objection to the sufficiency of the notice shall not be allowed to prevail so as to release or discharge the goods from the lien or vitiate the sale.

### **30 Application of pt 6**

- (1) This part applies to cases in which the goods were deposited for storage before, as well as to cases in which the goods are deposited after, the commencement of this Act, but no notice under section 22 shall be given before the expiration of 3 months after the commencement of this Act.
- (2) In applying section 20 to a case in which goods were deposited for storage before the commencement of this Act, the goods shall be deemed to have been deposited for storage on the date of commencement of this Act.

### **31 Rights not to be affected**

Nothing in this part abrogates, limits or in any manner affects—

- (a) a lien, power of sale or other right (whether arising under contract or by operation of law) that a warehouse person may have apart from this part with respect to any goods stored by him or her; or
- (b) the enforcement of such a lien or the exercise of such a power or right.

**32 Sales otherwise prohibited are not authorised by pt 6**

- (1) This part does not authorise the sale by public auction by a warehouse person of any goods if the sale by public auction of those goods is prohibited by a law in force in the ACT.
- (2) This part does not authorise the sale by public auction by a warehouse person of any goods if the sale by the warehouse person of those goods is prohibited by any other law in force in the ACT.

## Endnotes

### 1 About the endnotes

Amending and modifying laws are annotated in the legislation history and the amendment history. Current modifications are not included in the republished law but are set out in the endnotes.

Not all editorial amendments made under the *Legislation Act 2001*, part 11.3 are annotated in the amendment history. Full details of any amendments can be obtained from the Parliamentary Counsel's Office.

Uncommenced amending laws and expiries are listed in the legislation history and the amendment history. These details are underlined. Uncommenced provisions and amendments are not included in the republished law but are set out in the last endnote.

If all the provisions of the law have been renumbered, a table of renumbered provisions gives details of previous and current numbering.

The endnotes also include a table of earlier republications.

### 2 Abbreviation key

am = amended	ord = ordinance
amdt = amendment	orig = original
ch = chapter	par = paragraph/subparagraph
def = definition	pres = present
dict = dictionary	prev = previous
disallowed = disallowed by the Legislative Assembly	(prev...) = previously
div = division	pt = part
exp = expires/expired	r = rule/subrule
Gaz = gazette	renum = renumbered
hdg = heading	reloc = relocated
IA = Interpretation Act 1967	R[X] = Republication No
ins = inserted/added	RI = reissue
LA = Legislation Act 2001	s = section/subsection
LR = legislation register	sch = schedule
LRA = Legislation (Republication) Act 1996	sdiv = subdivision
mod = modified/modification	sub = substituted
o = order	SL = Subordinate Law
om = omitted/repealed	<u>underlining</u> = whole or part not commenced or to be expired

## Endnotes

3 Legislation history

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### 3 Legislation history

This Act was originally a Commonwealth ordinance—the *Mercantile Ordinance 1962* (Cwlth).

The *Australian Capital Territory (Self-Government) Act 1988* (Cwlth), s 34 (4) converted most former Commonwealth ordinances in force in the ACT into ACT enactments. This allowed the ACT Legislative Assembly to amend and repeal the laws. This Act was converted into an ACT enactment on 11 May 1989 (self-government day).

As with most ordinances in force in the ACT, the name was changed from *Ordinance* to *Act* by the *Self-Government (Citation of Laws) Act 1989* No 21, s 5 on 11 May 1989 (self-government day).

Before 11 May 1989, ordinances commenced on their notification day unless otherwise stated (see *Seat of Government (Administration) Act 1910* (Cwlth), s 12).

#### Legislation before becoming Territory enactment

##### **Mercantile Law Act 1962 No 4**

notified 12 April 1962

commenced 12 April 1962

as amended by

##### **Ordinances Revision (Decimal Currency) Ordinance 1966 No 19**

notified 23 December 1966

commenced 23 December 1966

##### **Ordinances Revision Ordinance 1977 No 65**

notified 22 December 1977

commenced 22 December 1977

##### **Ordinances Revision Ordinance 1978 No 46**

notified 28 December 1978

commenced 28 December 1978

##### **Magistrates Court Ordinance 1985 No 67**

notified 19 December 1985

commenced 1 February (Cwlth Gaz 1986 No G3)



## Legislation after becoming Territory enactment

### **Magistrates and Coroner's Courts (Registrar) Act 1991 No 44 s 7, sch 1**

notified 20 September 1991 (Gaz 1991 No S95)  
 s 1, s 2 commenced 20 September 1991 (s 2 (1))  
 s 7 (2), sch 1 commenced 25 September 1991 (s 2 (2) and Gaz 1991 No S103)

### **Financial Management and Audit (Consequential and Transitional Provisions) Act 1996 No 26 sch pt 18**

notified 1 July 1996 (Gaz 1996 No S130)  
 commenced 1 July 1996 (s 2)

### **Uncollected Goods (Consequential Provisions) Act 1996 No 87 s 4**

notified 20 December 1996 (Gaz 1996 No S328)  
 s 1, s 2 commenced 20 December 1996 (s 2 (1))  
 s 4 commenced 19 March 1998 (s 2 (2) and see Gaz 1998 No 1997 No S71)

### **Statute Law Revision (Penalties) Act 1998 No 54 sch**

notified 27 November 1998 (Gaz 1998 No S207)  
 s 1, s 2 commenced 27 November 1998 (s 2 (1))  
 sch commenced 9 December 1998 (s 2 (2) and Gaz 1998 No 49)

### **Legislation (Consequential Amendments) Act 2001 No 44 pt 251**

notified 26 July 2001 (Gaz 2001 No 30)  
 s 1, s 2 commenced 26 July 2001 (IA s 10B)  
 pt 251 commenced 12 September 2001 (s 2 and see Gaz 2001 No S65)

### **Criminal Code Harmonisation Act 2005 A2005-54 sch 1 pt 1.31**

notified LR 27 October 2005  
 s 1, s 2 commenced 27 October 2005 (LA s 75 (1))  
 sch 1 pt 1.31 commenced 24 November 2005 (s 2)

## 4 Amendment history

### Notes

s 2 om 1977 No 65  
 ins A2005-54 amdt 1.223

## Endnotes

4 Amendment history

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### **Offences against Act—application of Criminal Code etc**

s 3 om 2001 No 44 amdt 1.2889  
ins A2005-54 amdt 1.223

### **Maximum rate of interest**

s 14 am 1966 No 19

### **Definitions for pt 6**

s 17 am 1985 No 67

### **Notice by person depositing goods**

s 21 am 1966 No 19; 1998 No 54 sch  
sub A2005-54 amdt 1.224

### **Power to sell goods**

s 22 am 1996 No 87 s 4

### **Sale of goods to be advertised**

s 23 om 1996 No 87 s 4

### **Stay of proceedings to sell**

s 24 om 1996 No 87 s 4

### **Payment of charges before sale**

s 25 am 1966 No 19  
om 1996 No 87 s 4

### **No action by reason of sale**

s 26 om 1996 No 87 s 4

### **Disposition of proceeds of sale**

s 27 am 1966 No 19; 1991 No 44; 1996 No 26 sch pt 18  
om 1996 No 87 s 4

### **Notice provisions—substantial compliance**

s 29 am 1978 No 46

### **Laws ceasing to be in force**

sch om 2001 No 44 amdt 1.2890

## 5 Earlier replications

Some earlier replications were not numbered. The number in column 1 refers to the publication order.

Since 12 September 2001 every authorised replication has been published in electronic pdf format on the ACT legislation register. A selection of authorised replications have also been published in printed format. These replications are marked with an asterisk (\*) in column 1. Electronic and printed versions of an authorised replication are identical.

Replication No	Amendments to	Replication date
1	Act 1991 No 44	30 September 1991
2	Act 1996 No 87	31 January 1998
3	A2001-44	4 January 2002

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