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# **Case for a Debt Audit**

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## **1. Introduction**

The details of sovereign debts owed to Australia are secret. Most are created and managed by the Export Finance and Insurance Corporation (EFIC), a Commonwealth owned statutory corporation with unclear public accountability obligations. Much is owed by developing countries who cannot sustain long-term growth under the strain of extreme indebtedness. There is evidence that some of this debt may be odious or illegitimate, and should be cancelled. However, such allegations cannot be confirmed or denied without access to the details of the debts' originating transactions, held by EFIC.

In addition to the moral imperative of cancelling odious debts, there are legal bases for publicly revealing the details of debts owed to Australia. The loans and related transactions are created or underwritten by Government, and are ultimately taxpayer funded. The constitutional principle of responsible government may require more detailed disclosure of EFIC's transactions than is currently made, in particular of those made under the National Interest Account (NIA). The major counter-arguments to disclosure – commercial and international sensitivity, are easily overcome. Continued resistance from EFIC and Government suggests the existence of transactions that, if revealed, would fall far below the standards of decency and due diligence expected by the Australia citizenry.

## **2. Background**

### **2a Export Credit as a source of Sovereign Debt**

Almost every country in the world now has an Export Credit Agency (ECA). Despite playing a critically important role, they are largely unknown. Few textbooks on international trade and finance give them more than a passing mention. Yet ECA activity exceeds all multilateral development bank (MDB) and overseas development agency activity, impacts on almost every international trade decision, and *directly* finances at least 1 in every 8 dollars of world trade.<sup>1</sup>

The ECA's primary role is to fill a gap in the market by providing insurance and finance to support and promote its countries exports in circumstances where the risk in the transaction is too high for commercial insurance or finance.<sup>2</sup> ECAs are also a mechanism through which some developed countries distribute loans and development assistance overseas.<sup>3</sup> Decisions made by and implemented through a nation's ECA form key components of that country's foreign relations and international trade policy.<sup>4</sup>

Export credit and insurance often becomes sovereign debt. ECAs may insure or lend to both the domestic exporter and foreign importer in a transaction, or reinsure the private institution that provided these services in the first instance.<sup>5</sup> As a precondition, ECAs often insist that the importer government provide a counter guarantee. If and when either party defaults, the ECA pays out the claim or loses the value of the loan repayments, and this amount becomes debt owed by the importing country's government.<sup>6</sup> In this way, a transaction between two private entities is transformed into bilateral public debt.

Australia's ECA is EFIC, the Export Finance and Insurance Corporation. EFIC's primary mission is to 'support the growth of Australian businesses internationally.'<sup>7</sup> EFIC operates two distinct accounts. The commercial account underwrites risks as a corporation, and operates at a profit.<sup>8</sup> While this is lauded by EFIC as a reflection of strong risk management policy,<sup>9</sup> this is also a basic requirement of an ECA under WTO rules.<sup>10</sup> If an ECA operates at a deficit, or is otherwise unviable without government assistance that is 'inconsistent' or 'incomparable' with commercially available packages, it becomes a prohibited and/or actionable subsidy.<sup>11</sup>

The NIA is more problematic, and is the central concern of this analysis. The minister can direct EFIC to enter the NIA into transactions considered to be in the national interest.<sup>12</sup> Where a loss results from following these directions, EFIC is indemnified by the Commonwealth.<sup>13</sup> The NIA is the means by which trade and development policy objectives, which are too risky even for EFIC's commercial account, are achieved. The ratio of exports supported to claims paid over the last four years averages approximately 3:1.<sup>14</sup> This is reflective of all activity since 1996.<sup>15</sup>

The NIA has been used less since 1996. Pre-1996 activity accounts for at least 90 percent of the NIA's current \$1.1 billion exposure. It is the content of this debt that is of most concern.

## **2b EFIC's Non-Disclosure**

Jubilee Australia ('Jubilee'), a debt-relief and financial justice advocacy organization, is concerned that some of the debts created or facilitated by EFIC may be illegitimate.<sup>16</sup> Its members believe that loans underwritten by the Commonwealth and owed to the state are matters of public concern, and that their essential details should be available for public scrutiny. In 2008, they launched a series of applications under the *Freedom of Information Act ('FOI Act')*.<sup>17</sup> Jubilee sought documents concerning loans they suspecting were illegitimate or odious.<sup>18</sup> Documents concerning anything done under Parts 4 or 5 (National Interest Account and Commercial Account) of the *Export Finance and Insurance Corporation Act (EFIC Act)*<sup>19</sup> are exempted under section 7 *FOI Act*. EFIC relied on this exemption to refuse access to over 800 identified documents. Jubilee argued that many of these documents do not concern Parts 4 or 5 within the meaning of the *EFIC Act*. EFIC stated additional *FOI Act* exemptions it believed applied to many of the documents. These include:

- Section 33(1)(a)(iii) – would or could reasonably be expected to cause damage to the international relations of the Commonwealth,
- Section 33(1)(b) - would divulge any information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organization,
- Section 34(1)(d) - would involve the disclosure of any deliberation or decision of the Cabinet, and
- Section 43(1)(c)(i) – would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organization or undertaking, which would, or could reasonably be expected to, unreasonably affect that person or organization in respect of those affairs.

Ultimately, Jubilee may be unsuccessful under the current *FOI Act*. However, EFIC's continued refusal to release the documents may constitute a breach of ministerial obligations under the constitutional principle of responsible government.

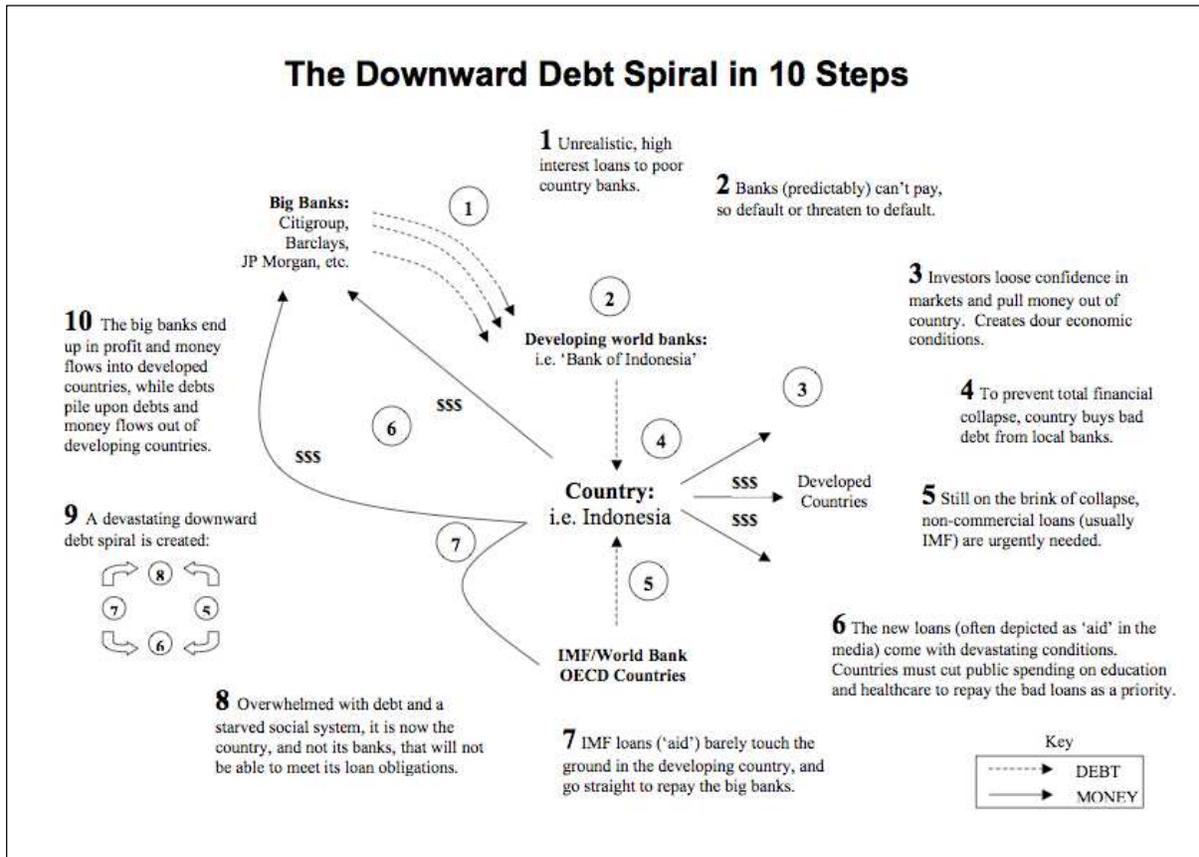
## **3. Contemporary Context**

### **3a Global Financial Crisis**

The global financial crisis (GFC) is forcing the first world to face the consequences of reckless and irresponsible lending.<sup>20</sup> In particular, the crisis reveals the inevitable failure of a system rife with 'moral hazards'.<sup>21</sup> Reckless and irresponsible lending is facilitated by a system that imposes little risk and no moral obligations on creditors. When proportionate risk and accountability are not born by the creditor, borrowers easily acquire unsustainable levels of debt.<sup>22</sup> It is a predictable consequence.

The 1980's debt crisis plunged the developing world into a downward spiral of debt. In 2008-9 leaders worked furiously to avoid another great depression in the developed world, while the developing world continued to suffer through their 25-year long depression. The catastrophic failure of international lending to promote long-term growth in the developing world is rooted in the same systemic issues as the GFC.<sup>23</sup>

Diagram: Debt trap in the developing world



As western citizens are outraged at stimulus packages that bailout culpable banks rather than transparently allocating funds to the worst hit investors, so Multilateral Development Bank (MDB) and bilateral lending is a stop gap that operates to indemnify first world lending institutions (See Diagram).<sup>24</sup> The real risk of default is born by those least able to bear it. In the developed world, the retirement funds of a generation are wiped out as investments lose their value. In the developing world, citizens lose basic public services: education, healthcare and social security.<sup>25</sup>

That the causes of and responses to debt-inflicted poverty and the current financial crisis are so similar is confronting. One might think this sufficient to bring developing world debt problems to mainstream attention. Instead, the consequence has been the opposite.

The majority of public attention brought to development in connection with the GFC has been calls for more aid. An op-ed in the Sydney Morning Herald on 11 March 2009 accurately declares: 'Poorest of the poor will be hit worst by crisis'.<sup>26</sup> In the article, chief executive of UNICEF Australia Carolyn Hardy describes the GFC fall-out factors that will contribute to the 'perfect financial storm' in the developing world. Her appeal is not to reform the financial architecture or to cancel debts, rather, she asks for major aid donors to hold fast. It is disappointing that the development sector largely ignores debt as a systemic cause of poverty.

Net financial flows from developing to developed countries have rapidly increased in the last ten years, reaching an all time high of \$933 billion in 2008.<sup>27</sup> Inflows to developing countries have not exceeded outflows since 1996.<sup>28</sup> The metaphor for aid in this environment is drip-feeding a bucket with a drain-sized hole in its bottom. It is the epitome of a losing battle. While this is recognised as an impediment to the achievement of the Millennium Development Goals by campaigns like Make Poverty History<sup>29</sup> (an affiliation of more than 60 development agencies and community groups in

Australia),<sup>30</sup> rarely is the campaign's energy spent on debt or financial reform. Very few organizations deal with debt and finance in proportion to their impact on development.

Despite public conceptions of aid as grants, calls for increased overseas development assistance are often answered with loans and other financial instruments that result in debts owed by the recipient country. In Australia, bilateral loans may be administered by Treasury and paid out of the Consolidated Revenue Fund.<sup>31</sup> EFIC has also played an important role in Australia's overseas development agenda.<sup>32</sup> The Development Import Finance Facility (DIFF) scheme was a mixed-credit aid program, ended in 1996. It provided on average a 35:65 mix of grants and EFIC financing to developing countries, enabling the recipient to afford the cost of Australian exports for consumption or use in their development projects.<sup>33</sup> Indonesia, by far the largest single recipient, still owes \$813 million from the DIFF scheme.<sup>34</sup> These loans have been rescheduled four times – three times in the Paris Club and once in the aftermath of the 2004 Tsunami.<sup>35</sup> With no further rescheduling they will be fully repaid in 2024.<sup>36</sup> As of 2008, \$29 million is also owed by the Philippines.<sup>37</sup>

DIFF was controversial because it blurred the line between development assistance and trade subsidies.<sup>38</sup> Jubilee Australia and INFID, the International NGO Forum on Indonesian Development, have reason to believe that some transactions under the DIFF scheme were made for the wrong purpose, without due diligence and/or may have engaged in or facilitated official corruption. Without access to details of these transactions, their suspicions can be neither confirmed nor denied. At the least, the uncertain nature and potential for abuse made the DIFF scheme an undesirable vehicle for development assistance.

The other significant portion of the NIA's \$1.1 billion exposure is \$115 million in rescheduled credit insurance debts owed by Egypt.<sup>39</sup> The original insurance was issued to Australian wheat exporters.<sup>40</sup> When the Egyptian importers defaulted, EFIC paid the Australian exporters' insurance claim, and the amount became debt owed by Egypt to Australia. Russia paid off its US\$311 million debt to the NIA, arising from similar credit insurance transactions with the then USSR, in two lump sums in 2005 and 2006.<sup>41</sup>

Since the end of the DIFF scheme, the NIA has been far less active. There was a surge in activity in 2002-3 related to a single transaction in Tanzania,<sup>42</sup> but otherwise exposure has not returned to pre-1996 levels. In addition to the controversial nature of the DIFF Scheme, DFAT cites 'efforts by EFIC and the government to avoid taxpayer exposure' as a reason for this decline.<sup>43</sup> The NIA may soon experience a revival.

In response to the GFC, ECAs are being invigorated. The G20 announced on 2 April 2009 that an additional \$250 billion will be made available through ECAs and MDBs over the next two years to support trade finance.<sup>44</sup> Australia's Treasurer is tasked with the implementation of this commitment.<sup>45</sup> The Treasurer has no power to instruct EFIC. The only Cabinet Member with this power is the Minister for Trade. As this Minister is only empowered to direct the NIA and not the commercial account,<sup>46</sup> significant use of the NIA should necessarily recommence. If the NIA is not used, it is likely that Australia will either not meet its G20 commitments or will be doing so via the improper exercise of ministerial power over the commercial account.

Stimulating trade is vital to a recession survival strategy.<sup>47</sup> However, funnelling \$250 billion through ECAs flies in the face of the first principle of reform agreed on by the G20 just six months earlier. In the outcome of the G20 Summit on Financial Markets and the World Economy in November 2008, member countries declared their commitment to strengthening transparency and accountability in financial markets.<sup>48</sup> Ministers were tasked with the full and vigorous implementation of this and four other reform principles.<sup>49</sup> While aimed primarily at private sector bodies, the language is inclusive of all 'financial institutions'. The unscrutinised operations of ECAs are incompatible with this principle.

The funding through ECAs represents just one quarter of a \$1.1 trillion global recovery package.<sup>50</sup> \$750 billion will be made available to the IMF to lend to the poorest countries. Much of it will return immediately to western banks in satisfaction of outstanding debts (see Diagram, step 7). The rest will compound the developing world debt burden. Debt-relief would be a far wiser form of

assistance. It was only last year that the IMF was in the doghouse of world leaders because of this pattern, as well as an increased awareness of the damage caused by forced Washington Consensus policies.<sup>51</sup> There is no indication that the new funds will be distributed in any less harmful a manner. The GFC has wiped the short-term memories of G20 leaders.

### **3b Freedom of Information & Transparency**

In Australia, ministers and government bodies have made overtures towards enhancing transparency. In a statement delivered at Australia's Right to Know – Freedom of Speech Conference in March 2009, Cabinet Secretary and Special Minister of State John Faulkner announced the release of draft freedom of information (FOI) reform legislation.<sup>52</sup> Australia's current FOI legislation is the least accessible in the world.<sup>53</sup> The proposed bill is key to delivering on Labor's election policy *Government Information: restoring trust and integrity*.<sup>54</sup> In addition to legislative reform, Labor has committed to creating a pro-disclosure government culture.<sup>55</sup> An independent statutory office of the Information Commissioner will be established, and a new Commonwealth Government publication scheme introduced.

Most promisingly, the bill will remove or restrict the grounds on which documents are exempt from disclosure and will include factors that should be considered in the *interest of* disclosure. Exemptions for 'Executive Council documents (section 35), documents arising out of companies and securities legislation (section 47), and documents relating to the conduct of an agency of industrial relations (paragraph 40(1)(e))' are removed.<sup>56</sup> The 'public interest test', which requires an agency to release a document *unless* it is contrary to the public interest, will be expanded to apply to documents relating to 'personal privacy, business affairs, the national economy and research'.<sup>57</sup> This brings the number of conditional exemptions (as opposed to absolute exemptions) from 4 to 8.

Factors to be considered in favour of disclosure include where disclosure would 'inform debate on matters of public importance [or] promote effective oversight of public expenditure'.<sup>58</sup> Reasons for non-disclosure including embarrassment to the Government, public confusion or misunderstanding, and the seniority of the document's author, have been removed.

Additional legislation introduced in 2008 seeks to revoke the ministerial power to issue conclusive certificates.<sup>59</sup> Conclusive certificates allow the minister to decide which disclosure exemptions may apply to a requested document. Where conclusive certificates are currently available the minister's decision is effectively unreviewable.<sup>60</sup>

If successfully passed, these reforms may change Australia's FOI regime from a laughing stock, to a legitimate feature of transparent and responsible government. Unfortunately, they will not directly diminish the secrecy of EFIC. The blanket disclosure exemptions in Part IV of the *FOI Act*, which include documents 'concerning anything done by it under Part 4 or 5' of the *EFIC Act*,<sup>61</sup> are expressly retained.<sup>62</sup>

However, these proposed reforms indicate a cultural shift in favour of disclosure. The bill emphasises that documents, including exempt document, may be published apart from the act.<sup>63</sup> Many of the individual exemptions EFIC has relied on in addition to section 7 will be rolled back. Given that an overriding purpose of the reform legislation is to promote Australia's representative democracy by 'increasing scrutiny, discussion, comment and review of the Government's activities', the Minister should direct EFIC to exercise its discretion to disclose certain information surrounding the use of the NIA.

EFIC became a member of Transparency International Australia in April 2009.<sup>64</sup> EFIC describes Transparency International's mandate as the eradication of international business corruption. The focus of their partnership will be raising awareness among exporters about 'the risk of corruption in the *overseas* countries they trade with' (emphasis added).<sup>65</sup> Within these limited parameters, EFIC may be excused for ignoring the spotlight this partnership shines on its own non-disclosure practices. However, in its own materials Transparency International declares its dedication to 'increasing government accountability'.<sup>66</sup> Without a commitment to improving its own transparency, EFIC's enthusiasm for this partnership appears hollow.

### **3c Australia & Debt Relief**

There has been a positive development on the Australian debt-relief front. The Australian Government will cancel \$75 million dollars of debt owed to it by Indonesia in exchange for a \$37.5 million dollar investment by Indonesia in anti-tuberculosis programs.<sup>67</sup> This represents a 50 percent inherent debt cancellation, and a 50 percent 'debt-swap.' Debt-for-development, or in this case debt-for-health, swaps are an effective way to reverse the crippling effects of debt in poor countries. Their use should be encouraged. Unfortunately, two factors impede complete success in this instance.

First, the relief of \$75 million is entirely eclipsed by new loans in the wake of the GFC. A unique \$5.5 billion loan facility has been made available to Indonesia to 'support government spending and external fundraising during the current market turmoil.'<sup>68</sup> In addition to \$2 billion from the World Bank, \$1.5 billion from Japan and \$1 billion from the Asian Development Bank,<sup>69</sup> \$1 billion was contributed by Australia in the form of a 'stand-by' loan.<sup>70</sup> Indonesia already owes Australia \$1 billion, 'much of which is a legacy of contracts between [the Australian] government and the Suharto dictatorship.'<sup>71</sup>

Second, the Australian Government will not disclose how the debt will be discounted. Without revealing the nature of the loans that will be cancelled, it is impossible to determine whether the swap is legitimate. If the debt forgiven was created by a despotic leader and was not incurred in the interests of the state, it is odious.<sup>72</sup> The doctrine of odious debt holds that transactions made in these circumstances do not fulfil the conditions of legality for debts of the state.<sup>73</sup> If the creditor had knowledge of the intended illegitimate use of borrowed funds, it is estopped from demanding payment from the nation when the regime has ended.<sup>74</sup>

The Australian Government was aware of the corruption of Suharto's regime at the time many of the loans, now due, were made.<sup>75</sup> It is reasonable to estimate that at least some of the debts owed by Indonesia to Australia are therefore odious. Odious debts cannot be swapped because they are void and so have no value. Debt-swaps that purport to exchange illegitimate or odious debt are therefore also illegitimate.

The effect of the odious debt doctrine in international law is controversial.<sup>76</sup> However, loans that could be classed as odious would likely fall well below the standards of decency and due diligence expected of the Government by the Australian population. The debt-swap may provide an opportunity to dispose of loans that, if disclosed, would embarrass EFIC and the Government. By not providing details of the loans that will be cancelled, EFIC, the Minister for Trade and the Australian Government ask citizens to trust that decisions made in private are legal and valid. This is in direct contrast to the 'culture of disclosure' the Government seeks to instil, and violates accountability and transparency obligations under responsible government.

### **4. Case for an Audit**

The moral argument for a public audit of debts owed to Australia is simple. An audit will identify debts that are illegitimate or odious, if they exist, so that they may be cancelled.<sup>77</sup> This will relieve the burden on developing countries and the precedent will encourage best practice lending and finance in future. The legal argument for a public debt audit, based on the constitutional principle of responsible government, is only slightly more complex.

### **4a Responsible Government**

In *Lange v Australian Broadcasting Corporation* ('*Lange*')<sup>78</sup> the High Court unanimously found the principles of representative and responsible government enshrined in sections 1, 6, 7, 8, 13, 24, 25, 28, 30, 49, 61, 62, 64, 83 and 128 of the *Australian Constitution*. Of particular note for this analysis is section 83, which 'requires parliamentary authority for the expenditure by the executive government of any fund or sum of money standing to the credit of the Crown in right of the Commonwealth,

irrespective of source.<sup>79</sup> And section 49, which provides authority for Parliament to summon witnesses and require the production of documents.<sup>80</sup>

The Court quotes Sir Samuel Griffith on the essential meaning of responsible government: 'that the actual government of the state is conducted by officers who enjoy the confidence of the people'.<sup>81</sup> This means that government ought to be carried on in an open and responsive manner, and involves minimum standards of accountability and transparency.<sup>82</sup> In *Egan v Willis*<sup>83</sup> the Court observed that to 'secure accountability of government activity is the very essence of responsible government'.<sup>84</sup>

In *Lange* the Court elaborated on the consequences for public access to information. '[T]he choice given by ss 7 and 24 must be a true choice... legislative power cannot support an absolute denial of access by the people to relevant information about the functioning of government in Australia'.<sup>85</sup> This does not create a positive right, but rather a freedom from 'denial of access by the people to relevant information'.<sup>86</sup> The constitutional provisions that prescribe the system of responsible government 'necessarily imply a limitation on legislative and executive power to deny the electors and their representatives information concerning the conduct of the executive branch of government throughout the life of a federal parliament'.<sup>87</sup>

*Lange* expressly applies the obligations of responsible government to statutory corporations like EFIC.<sup>88</sup> However, the consequences of this on ministerial disclosure requirements are not settled, especially where the finance of the corporation is not sourced solely from public moneys.<sup>89</sup> In *Airservices Australia v Canadian Airlines International Ltd ('Airservices')*,<sup>90</sup> Gummow J observed that the development of financially independent statutory corporations bears 'upon the nature of responsible government, in particular with respect to the position of the minister charged with the administration of the statute constituting the entity in question'.<sup>91</sup> He quotes Finn J in *Hughes Aircraft Systems International v Air Services Australia ('Hughes Case')*<sup>92</sup> who adds that it is not settled to what extent the commercial activities of a statutory corporation 'can or should be affected by the considerations that it nonetheless is a public body that is so acting and that in so doing it is exercising a public function'.<sup>93</sup> In both cases, a detailed examination of the relevant statutory corporation was conducted to determine its constitutional status and the application of responsible government principles.

#### **4b EFIC: A statutory corporation**

Australia pioneered the use of statutory corporations to conduct government business,<sup>94</sup> and has long benefited from their ambiguous nature. Statutory corporations occupy the grey area of accountability in responsible government. Created and regulated by Parliament, they report to the Executive,<sup>95</sup> but are a distinct branch of neither.<sup>96</sup> Between the two branches, they possess much autonomy. Parliament regulates this autonomy by prescribing communications between the board and the responsible minister.<sup>97</sup> Statutory corporations must submit annual reports, and may receive directions from the Minister.<sup>98</sup> They are audited in a confidential and limited manner by the Auditor General. That these measures satisfy the accountability requirements of responsible government is doubtful.<sup>99</sup> That they satisfy Australian power holders' desires to execute government business in a pragmatic and largely unscrutinised manner is more likely.

Statutory corporations and other non-departmental public bodies (NDPBs) pose a particular challenge to transparent government. The Coombs Royal Commission on Australian Government Administration in the mid-1970's demonstrated the difficulty of even identifying all Australian NDPBs<sup>100</sup>. The Department of Finance and Deregulation now publishes a list of public sector bodies. This list contributes 'importantly to our understanding of the federal public sector and so aid[s] government transparency'.<sup>101</sup> The double-sided information card is an excellent source of information on the organisation of Government. However, that merely identifying NDPBs is considered a significant step towards transparent government in Australia is cause for concern.

The *Commonwealth Companies and Authorities Act 1997* (Cth) ('CAC Act') was introduced in response to transparency and accountability problems raised by statutory corporations.<sup>102</sup> Its sister legislation, the *Financial Management and Accountability Act 1997* (Cth) applies a similar regime to non-corporate government agents. In addition to a statutory corporation's parent legislation, the CAC Act is the vehicle Parliament uses to enforce reporting requirements and ministerial directions.<sup>103</sup> It also imposes due diligence requirement on officers<sup>104</sup> and appoints the Auditor General as the authority's auditor.<sup>105</sup>

The *FOI Act* and the *Administrative Appeals (Judicial Review) Act 1977* (Cth) apply final measures of transparency and accountability to statutory corporations.<sup>106</sup> The cumulative effect of these regulatory mechanisms varies widely with each statutory body. A series of statutory exclusion clauses such as section 7 of the *FOI Act*, dual accounts (each with a distinct statutory regime), and a low public profile combine to make EFIC one of the most unscrutinised and least accessible statutory corporations in Australia.

Unlike the corporation in *Airservices*, EFIC is not financed entirely by its commercial activity. Any NIA loses, which annually average approximately one-third of the value of trade supported, are repaid by the Commonwealth. The commercial account is also 100 percent indemnified by the Commonwealth. On the Department of Finance and Deregulation information card the commercial and NIA accounts are classified separately. The commercial account is a public finance corporation, while the NIA is classified as a general government sector body. A higher standard of public accountability is likely to be made out for the NIA.

#### 4c Overcoming Exemptions

Traditionally, transparency and accountability requirements attributed to responsible government meant disclosure *to parliament*. Exemptions to disclosing documents in the legislative assembly, similar to public disclosure exemptions claimed by EFIC under the *FOI Act*, are considered by the High Court in *Egan v Chadwick* ('*Egan*').<sup>107</sup>

Protecting the confidentiality of Cabinet deliberations is the one of the most revered parliamentary disclosure exemptions.<sup>108</sup> This is also an FOI exemption invoked by EFIC.<sup>109</sup> In *Egan*, Spigelman CJ distinguishes between 'documents which disclose the actual deliberations within Cabinet and those that are described as "Cabinet documents", but which are in the nature of reports or submissions prepared for the assistance of Cabinet.'<sup>110</sup> The exemption is restricted to documents that directly or indirectly reveal the actual deliberation of Cabinet.<sup>111</sup> Reports such as those of the Auditor General, or the classes of information it contains, although potentially used by Cabinet in deliberations, do not reveal their content and so do not fall within this exemption.

Spigelman CJ assesses the application of public interest exemptions more generally. Parliamentary power to demand the disclosure of documents is limited where the exercise of the power would be inconsistent with other principles of ministerial responsibility.<sup>112</sup> This may include legal professional privilege requirements, a fiduciary duty similar to other ministerial duties requiring confidentiality. The test for disclosure is not whether documents are otherwise confidential under a fiduciary duty, but whether 'their disclosure would have a consequence which gives rise to a conflict with' ministerial responsibility.<sup>113</sup>

It may seem that the Minister for Trade has a prima facie responsibility to protect information that is commercially sensitive. Commercial sensitivity is the basis of EFIC's argued *FOI Act* exemptions not only for section 43, but also indirectly for section 33 (negative impact on Australia's foreign relations). It is argued that disclosing details of loans and related transactions, which are prima facie sensitive, may cause commercial disruption, discourage future business and embarrass foreign governments, thereby harming Australia's international relations.

This argument fails on two grounds. First, confidential commercial information was considered in *Hughes Case*. Finn J determined that '3<sup>rd</sup> parties who contract with government parties are taken to do so subject to such lawful rights of access to information in the agency's hands as our laws and

system of government confers to others.<sup>114</sup> His reasoning was expressly based on the principle of responsible government. Responsible government 'required a statutory corporation... to be publicly accountable.'<sup>115</sup> Other measures such as the Auditor General are secondary to ministerial responsibility to parliament. Commercial sensitivity does not override the statutory corporation's 'accountability to government, the parliament and the public via the minister.'<sup>116</sup> EFIC, despite its internal organisation, is a public body, and is answerable as such.

Second, there is little evidence that if certain transaction details were publicly disclosed it would result in the consequences outlined above. The information disclosed must be sufficient to answer four questions: how much is owed, by whom is it owed, for what is it owed, and is it really owed?<sup>117</sup> The determination of the final question requires the most information. This includes the essential terms of the contract and/or rescheduling such as rates of interest and off-balance sheet conditions such as buy-back agreements;<sup>118</sup> the benefit received by the foreign population; evidence of due diligence, in particular whether the capacity of the future debtor was meticulously examined<sup>119</sup> and the content of any environmental impact statements;<sup>120</sup> and the intended and actual use of project funds to evidence that funds were not used to bribe foreign officials. This information is needed to determine the character of the contracting parties at the time the contract was concluded, if procedural irregularities can be detected, if a lack of consent can be detected, if the debt is odious and if other sources of illegality and illegitimacy can be determined.<sup>121</sup> This information requires access to documents currently restricted to the public. EFIC published some basic details of NIA transactions in the *Gazette*, but is expressly prevented from publicly identifying parties.<sup>122</sup>

It would be easy to prescribe measures that would limit commercial interference. For example, a *short-term* disclosure exemption would prevent undue advantage to competitors or interference with on-going negotiations. Provided a disclosure exemption is limited to a few years, the minister and EFIC would still be held accountable by an eventual audit. Any necessary remedial action could be taken without the complication of long-term delay. It is only if the details reveal irresponsible lending practices, lack of due diligence or corruption that Australia's international relations might suffer. The FOI Reform Bill expressly excludes government embarrassment as a reason for non-disclosure.

#### 4d A Public Audit

*Egan* and *Airservices* concern disclosure to Parliament, not the public. Once disclosed, Parliament must 'prevent publication beyond itself of documents the disclosure of which will... be inimical to the public interest because the security of the State, relations with other governments or the ordinary business of government will be prejudiced.'<sup>123</sup> For similar reasons to those detailed above, it is unlikely that the disclosure required to conduct an audit would be 'inimical' to government relations and business. Nevertheless, *Egan* and *Airservices* cannot be read as making a case for *public* disclosure.

The dictates of responsible government are thought to govern disclosure to Parliament, while FOI legislation is thought to cover public disclosure. However, in practice responsible government extends more broadly, and FOI legislation is accordingly limited. As noted above, the freedom to access and communicate information, set out as a requirement of responsible government in *Lange*, is not a positive right; FOI legislation is not by right. However, denial of access to information may be an infringement of that freedom. The *FOI Act* is to be interpreted in a way compatible with the *Constitution*. Therefore, while it may set out exemptions to the access of information in accordance with the Act, it cannot prohibit access to information other than under that Act. The exemptions listed in the *FOI Act* do not exempt documents from public disclosure absolutely. Further, the legislation that enables parliament to treat Auditor General reports as confidential provides a similar discretionary ability to disclose such documents in spite of the Act.

A major feature of responsible government is the direct chain of accountability.<sup>124</sup> Officials are responsible to ministers, who are responsible to Parliament and the electorate. The rise of the Executive in Australia's 'Washminster' system has created a problem with this chain. The reality is that

Parliament no longer has meaningful control of the Executive. It is more often the other way around.<sup>125</sup> Parliament's apparent power to check public expenditure is especially problematic. The 'size, remoteness, and complexity of government [is] so great that... Parliament cannot be said to exercise control.'<sup>126</sup> In *Mulholland v Australian Electoral Commission*<sup>127</sup> Gleeson CJ stated that representative and responsible government has an 'irreducible minimum content, but community standards as to [its] most appropriate forms of expression change over time'.<sup>128</sup> Noting the particular content of responsible government in *our* time, the Court in *Lange* observed that 'the attitudes of electors to the conduct of the executive may be a significant determinant of the contemporary practice of responsible government.'<sup>129</sup> These judgments indicate a shift in the principal custodian of responsible government from Parliament to the electorate.

The public no longer indicates displeasure with government by voting against their local member. Most vote for or against a political party based on the profile of its leaders, who will form the Executive and control Parliament. The electorate cannot exercise its democratic oversight by freely electing representatives without 'relevant information about the functioning of government in Australia'.<sup>130</sup>

The information contained in EFIC's annual reports is insufficient to indicate whether or not the government agency is exercising its powers in accordance with the standards of responsibility, due diligence and equity expected by the Australian public. Nor do the annual report of the Auditor General answer these questions. The minister is therefore obliged, under the constitutional requirements of responsible government, to instruct EFIC not to deny access to this information.

## **5. Conclusion**

The *FOI Act* does not limit disclosure other than under the Act. The rise of the Executive in Australia's 'Washminster' system increases public disclosure requirements under the principle of responsible government. In particular, the details of sovereign debts owed to Australia, held by EFIC, should be revealed. Whether or not Australia's ECA is enforcing the repayment of odious debts, and thereby negatively affecting the development of regional neighbours like Indonesia and the Philippines, is highly 'relevant information' about the Australian Government within the meaning of *Lange*.<sup>131</sup> The significant role ECAs are playing in the G20 GFC response increases this relevance. Concealing these details interferes with the 'true choice' given by sections 7 and 24 of the *Constitution*.<sup>132</sup> Arguments for non-disclosure are ineffective, or easily overcome. Given these factors, Jubilee's FOI application, and increased public attention, continued resistance to disclosure from EFIC and Government is suspect.

## End notes

- 1 Delio E. Gianturco, *Export Credit Agencies: The Unsung Giants of International Trade and Finance* (2001) 1.
- 2 Ibid 2.
- 3 The now defunct EFIC DIFF loans, discussed below, are an example. See generally 'Tied Aid Credits' ibid 33-34.
- 4 Ibid 1-2.
- 5 Ibid 2-3.
- 6 Ibid 116-117.
- 7 Export Finance and Insurance Corporation ('EFIC'), Mission and Objectives <<http://efic.gov.au>> at 6 May 2009.
- 8 EFIC, Governance <<http://efic.gov.au>> at 6 May 2009.
- 9 Ibid.
- 10 Rodney Short, 'Export Credit Agencies, Project Finance, and Commercial Risk: Whose risk is it anyway?' (2001) 24 *Fordham International Law Journal* 1371, 1372.
- 11 Agreement on Subsidies and Countervailing Measures, Annex 1 to Marrakesh Agreement Establishing the World Trade Organization, Arts 1, 14, Parts II and III.
- 12 EFIC, Accountabilities <<http://efic.gov.au>> at 6 May 2009.
- 13 Export Credit and Insurance Corporation Act 1991 (Cth) ('EFIC Act') s 65. See also EFIC above n 8.
- 14 Value of exports supported on EFIC's National Interest Account to value of claims paid on National Interest Account Business: 2006-7 46.2:14.7, 2005-6 20.7:6.7, 2004-5 30.3:10.7, 2003-4 20.2:9.1 Department of Foreign Affairs and Trade (DFAT) Annual Report (2006-7), DFAT Annual Report (2005-6), DFAT Annual Report (2004-5), DFAT Annual Report (2003-4).
- 15 With the exception of 2002-3, discussed below.
- 16 See Jubilee Australia, 'Lift the Lid Project – Citizen's Audit' <[www.jubileeaustralia.org](http://www.jubileeaustralia.org)> at 4 June 2009.
- 17 Freedom of Information Act 1982 (Cth) ('FOI Act').
- 18 Jubilee Australia worked closely with INFID, The International NGO Forum on Indonesian Development, to identify irregular loans that, given the circumstances of their issue, were likely to be illegitimate or odious.
- 19 Export Finance and Insurance Corporation 1991 (Cth) ('EFIC Act').
- 20 Douglas W Arner, 'The Global Credit Crisis of 2008: Causes and Consequences' (Working Paper No 3, Asian Institute of International Financial Law, 2009) 3.
- 21 "'Moral hazard'" describes any system that protects parties from the consequences of their actions and thus holds out inducements to seek to profit from misbehaviour.' Ross Buckley, *International Financial Systems: Policy and Regulation* (2009) (Manuscript Part II) 104.
- 22 Ibid (Manuscript Part I) 40.
- 23 '...lenders lent too much.' Ibid 42.
- 24 Diagram based on information from Ross Buckley 'LAWS4420: International Financial System: Policy & Regulation', UNSW, March-April 2009.
- 25 See Buckley, above n 21 (Manuscript Part I) 39.
- 26 Carolyn Hardy, 'Poorest of the poor will be hit worst by crisis' *Sydney Morning Herald* (11 March, 2009). See also Make Poverty History 'Overseas aid budget holds steady as global economy falters' (Press Release, 13 May 2009).
- 27 UN DESA World Economic Situation and Prospects 2009 61-62.
- 28 Ibid.
- 29 Make Poverty History, Debt Relief <<http://makepovertyhistory.com.au>> at 15 May 2009.
- 30 Make Poverty History, Who We Are <<http://makepovertyhistory.com.au>> at 15 May 2009.
- 31 Email from Graeme Lawless to Ross Buckley, 27 May 2009. See also International Monetary Agreements Act 1947 (Cth) s8C.
- 32 EFIC Annual Report (2008) 8, 19.
- 33 NSW, Parliamentary Debates: Development Import Finance Facility Abolition Legislative Assembly, 30 October 1996 5563 (Sandra Nori).
- 34 EFIC, above n 32, 19.
- 35 Ibid 10.
- 36 Ibid.
- 37 Ibid.
- 38 NSW, above n 33.
- 39 EFIC, above n 32, 11.
- 40 Ibid.
- 41 EFIC Annual Report (2006) 135 and EFIC Annual Report (2007) 24.
- 42 A one-off \$52 million performance bond facilities was signed for Incat Tasmania, a fast ferry builder, in respect of a vessel being built for the US government. EFIC Annual Report (2003) 19-20.
- 43 DFAT (2005-6), above n 14, 151.
- 44 'Leaders' Statement The Global Plan for Recovery and Reform', (G20 Summit London, 2 April 2009) para 22. See also 'The Cavalry of Commerce', *The Economist* 8 April 2009.
- 45 'Leaders' Statement', above n 44, para 16.

- 46 EFIC Act 1991 (Cth) s 9.
- 47 See Buckley, above n 21, 59 and Arner, above n 20, 38.
- 48 'G20 Declaration' (G20 Summit on Financial Markets and the World Economy Washington DC, 15 November, 2008) para 3.
- 49 Ibid para 10.
- 50 'Leaders' Statement', above n 44, 1.
- 51 Ross Buckley, 'When cashed-up IMF offers to help, steer well clear' Sydney Morning Herald 2 May 2009.
- 52 Senator John Faulkner, 'Open and Transparent Government: The Way Forward' (Speech delivered at Australia's Right to Know Freedom of Speech Conference, Sydney, 24 March 2009).
- 53 S Lamble, 'Medial Use of FOI Surveyed: New Zealand puts Australia and Canada to Shame' FOI Review 109 (February 2004) 7 extracted in Robin Creyke and John McMillan Control of Government Actions: Text, Cases & Commentary (2005) 903.
- 54 Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008 (Cth), Second Reading Speech 1 and Explanatory Memoranda 1. See also Australian Government Freedom of Information (FOI) Reform Companion Guide (March 2009) 3.
- 55 Ibid Second Reading Speech 1 and Faulkner above n 52.
- 56 Australian Government, above n 54, 11.
- 57 Faulkner, above n 52.
- 58 Faulkner, above n 52.
- 59 Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008 (Cth).
- 60 On review the question of fact is not whether the exemption applies, but whether the minister issued a letter stating that it applies. Above n 51, Second Reading Speech 2.
- 61 Freedom of Information Act 1982 (Cth) Schedule 2.
- 62 Above n 51 Explanatory Memoranda 1.
- 63 Proposed FOI Amendment (Reform) Bill (Cth) Schedule 1, S3A(2). See also Australian Government, above n 54, 9.
- 64 EFIC, 'EFIC Joins Transparency International' (Press Release, 28 April 2009).
- 65 Executive Director of Transparency International Australia Michael Ahrens, quoted in *ibid*.
- 66 Transparency International <<http://www.transparency.org.au>> at 15 May 2009.
- 67 Stephen Smith MP, The Hon Bob McMullan MP, The Hon Duncan Kerr MP, '2009-10 International Development Assistance Budget' (Press Release, 12 May 2009).
- 68 John Aglionby, 'World Bank grants \$2bn loan to Indonesia' Financial Times, 4 March 2009.
- 69 *Ibid*.
- 70 'Rudd offers Indonesia \$1n loan', The Australian, 10 December 2008. See also Jubilee Australia 'Australia's \$1 billion Stand-by Loan to Indonesia: Help or Hindrance?' (Press Release, 11 December 2008).
- 71 *Ibid*, Jubilee. It is impossible to know exactly how much of Indonesia's debt was created during the Suharto regime, however, a citizens audit conducted in the UK found that nearly 3 quarters of debt owed by Indonesia related to arms sales during the Suharto regime. Jubilee, above n 16.
- 72 Patricia Adams, 'Chapter 17: The Doctrine of Odious Debts' *Odious Debt: Loose Lending, Corruption, and the Third World's Environmental Legacy* (1991) available online at <http://www.eprf.ca/probeint/OdiousDebts/OdiousDebts/chapter17.html>.
- 73 *Ibid*.
- 74 *Ibid*.
- 75 Details of suspect transactions and corruption within Suharto's Cabinet were widely publicised within and outside of Indonesia, see 'Illegitimate Debts in Indonesia' (Working Paper No 5, INFID, 2007) 29.
- 76 Jeff A. King 'The Doctrine of Odious Debt in International Law: A Restatement', (Working Paper, Balliol College University of Oxford, 2007) available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1027682](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1027682)>. See also Jeff A. King 'Odious Debt: The Terms of the Debate' (2007) 32(4) North Carolina Journal of International Law and Commercial Regulation 605.
- 77 How odious and illegitimate are defined is a matter for another paper.
- 78 *Lange v Australian Broadcasting Corporation* ('Lange') 145 ALR 96.
- 79 *Lange* 145 ALR 96, 105. See also *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 572-3, 590-1, 597-8.
- 80 *Ibid* Lange.
- 81 Samuel Griffith, Notes on Australian Federation: Its Nature and Probable Effects (1896) 17 quoted in *Lange* 145 ALR 96, 106.
- 82 Hugh Emy and Owen Hughes, *Australian Politics: Realities in Conflict* (2nd Ed, 1991) extracted in Tony Blackshield and George Williams (eds) *Australian Constitutional Law and Theory: Commentary and Materials* (4th Ed, 2006), 564.
- 83 *Egan v Willis* (1998) 195 CLR 424.
- 84 Un-attributed quote in *ibid*, 451.
- 85 *Lange* 145 ALR 96, 107.
- 86 *Ibid*.
- 87 *Ibid*, 107.
- 88 *Ibid*.

- 89 See *Airservices Australia v Canadian Airlines International Ltd* ('Airservices') 167 ALR 392.
- 90 167 ALR 392.
- 91 *Ibid* 481.
- 92 *Hughes Aircraft Systems International v Air Services Australia* ('Hughes Case') (1997) 76 FCR 151.
- 93 *Ibid* 179. See also Finn, "A Sovereign People, A Public Trust", in Finn (ed), *Essays on Law and Government* (Vol 1, 1995), 12-13 quoted in *Airservices* 167 ALR 392, para 377.
- 94 Roger Wettenhall, 'Non-departmental government bodies under the Howard governments' 66(1) *The Australian Journal of Public Administration* (2007) 62, 63.
- 95 See Finn J in *Hughes Case* (1997) 76 FCR 151, paras 24-25.
- 96 Darrell Barnett, 'Statutory Corporations and "the Crown"', 28(1) *UNSW Law Journal* (2005) 192.
- 97 Christos Mantziaris, 'Interpreting ministerial directions to statutory corporations: What does a theory of responsible government deliver?' 26(2) *Federal Law Review* (1998) 309, 309.
- 98 *Ibid*.
- 99 See Wettenhall, above n 94, Mantziaris, above n 97, Commonwealth, *Royal Commission on Australian Government Administration* ('Coombs Commission') Report (1976), and J Uhrig, 'Review of the Corporate Governance of Statutory Authorities and Officer Holders' ('Uhrig Report'), Department of Finance and Administration (2003).
- 100 Wettenhall, above n 94, 64.
- 101 *Ibid* 66.
- 102 *Ibid* 65.
- 103 *The Commonwealth Companies and Authorities Act 1997 (Cth)* ('CAC Act') ss 9, 17, 47A, 48A and Sch 1.
- 104 CAC Act ss 22, 23.
- 105 CAC Act s 8. The Auditor-General was re-instated in 1997 under the Auditor General Act 1997 (Cth), for this purpose. See Wettenhall, above n 94, 65.
- 106 Mantziaris, above n 97, 319. See also *Egan v Willis* (1998) 195 CLR 424, 451.
- 107 *Egan v Chadwick* ('Egan') (1999) 46 NSWLR 563.
- 108 *Commonwealth v Northern Land Council* (1993) 176 CLR 604, 615.
- 109 *FOI Act 1982 (Cth)* s 34(1)(d).
- 110 *Egan* (1999) 46 NSWLR 563, 574.
- 111 *Ibid* 576.
- 112 *Ibid* 578-9.
- 113 *Ibid*.
- 114 *Hughes Case* (1997) 46 ALR 1, 89. See also Mantziaris, above n 97, 330.
- 115 *Ibid Hughes Case* 88, Mantziaris 330.
- 116 *Ibid Hughes Case* 89.
- 117 AAJ, ATTAC (Uruguay), CADTM, DETIM, COTMEC, Auditoria Ciudadada Da Divida (Brazil), Emmaus International, Eurodad, Jubilee South Centre (Eds) *Let's Launch an Enquiry into the Debt! A Manual on How to Organise Audits on Third World Debts* (2006) 62.
- 118 For example, a transaction that finances the building of a power station may include a condition that the government enter into a future contract to purchase the power from the foreign corporation who built, owns and controls the station. This can represent billions of dollars of net financial flows out of the developing country that are not reflected on the ECAs balance sheet.
- 119 *Let's Launch an Inquiry* above n 117, 79.
- 120 On the environmental devastation caused by EFIC backed transactions see especially Scott Hickey, *Risky Business* 32(2) *UNSW Law Journal* (2009) forthcoming.
- 121 *Let's Launch an Inquiry*, above n 117, 70-77.
- 122 *EFIC Act 1991 (Cth)* s 30(4).
- 123 *Egan* (1999) 46 NSWLR 563, 594 (Priestley JA).
- 124 Emy and Hughes in *Blackshield and Williams*, above n 83, 564.
- 125 *Blackshield and Williams*, above n 83, 564.
- 126 Ken Turner, 'Parliament' in Rodney Smith (ed), *Politics in Australia* (2nd ed 1993), 78, extracted in *Blackshield and Williams*, above n 83, 565.
- 127 (2004) 209 ALR 582.
- 128 *Mulholland v Australian Electoral Commission* (2004) 209 ALR 582, 586.
- 129 *Lange* 145 ALR 96, 105-6.
- 130 *Ibid*, 106. Note that the relevant question is not 'what is required by representative and responsible government' it is 'what do the terms and structure of the Constitution prohibit, authorise or require?'
- 131 145 ALR 96, 107.
- 132 *Ibid*.

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