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WHITLAM AS INTERNATIONALIST

University of Western Sydney
Whitlam Lecture
25 February 2010.

The Hon. Michael Kirby AC CMG

UNIVERSITY OF WESTERN SYDNEY
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INTRODUCTION

Probably the greatest change in the law in my lifetime has been the increased impact of international law on Australia's domestic law. This includes, but is not limited to, international human rights law. A world of princes and empires has been replaced by a world of trade and shared commitments, however imperfectly these commitments are yet fulfilled. This change came about as a response to many forces – reactions to the Second World War; outcomes of new technology; the proliferation of global challenges; and the replacement of the imperial age by a time in which the people of the world may increasingly realise their rights and their shared destiny.

Edward Gough Whitlam ("Whitlam") has been a child of these global forces. But he has also contributed to them. He has been in sympathy with them. And he has helped to shape Australia's responses to them. He did not alone fashion Australia's adjustment to the new age. But his contribution was very great.

Whitlam served as Prime Minister of Australia from 5 December 1972 to 11 November 1975.¹ Soon after his dismissal from that office by the Governor

* Delivered as the Whitlam Lecture 2010, Sydney, 25 February 2010.

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General, Sir John Kerr, I delivered an address at the Australian National University on “Whitlam as Law Reformer”.² Now, I want to explore another facet of Whitlam’s career. I will examine his commitment to changing Australia’s perception of itself as a participant in international affairs – especially as international forces as they are expressed in international law.

I will explore Australia’s growing engagement with international treaty law under the Whitlam Government; the nation’s increasing acquaintance with international law more generally; and the use of international law that followed in the development of Australia’s domestic law. I will conclude with some reflections on Gough Whitlam and his father H.F.E Whitlam, who also played a part in Australia’s engagement with international law. Finally, I shall offer a few evaluative conclusions, ending the whole with an affectionate tribute to a man whose restless spirit helped Australians to adjust to new national and international realities. And to the challenges and opportunities that these realities present.

AUSTRALIA’S RATIFICATION OF INTERNATIONAL TREATIES

Introduction

When sworn as Prime Minister in December, 1972, Whitlam said of his newly elected Government:

“Our thinking is towards a more independent Australian stance in international affairs and towards an Australia which will be less militarily oriented and not open to suggestions of racism, an Australia which will enjoy a growing standing as a distinctive, tolerant, co-operative and well-regarded nation not only in the Asian and Pacific region but in the world at large”.³

¹ See generally, Jenny Hocking, *Gough Whitlam: A Moment in History*, The Miegunyah Press, Victoria, 2008.

² M.D. Kirby, “Whitlam as Law Reformer” (1979) 10 *Federal Law Review* 53.

³ Gough Whitlam., *Critical Years in Immigration: Canada and Australia Compared*, by Freda Hawkins, Kingston, Montreal, McGill-Queen’s University Press, 1989, p. 94.

Whitlam saw international law as an essential component of efforts to avoid conflict, resolve disputes, and restructure international relations.⁴ It was on this basis, in part, that the Whitlam Government embarked on a vigorous process of ratifying international law treaties. Under that government, over 133 international treaties entered into force for Australia, including 26 Exchange of Notes Agreements, 32 Bilateral Agreements, 16 Multilateral Agreements, 17 Protocols, 8 International Statutes, and 34 Treaties/Conventions.⁵ Commenting on the international engagement of his Government, Whitlam said:

“We have done a great deal more, I believe, than all previous governments. We have communicated to the world our commitment to international law and our eagerness to contribute to co-operative endeavours. We have displayed a breadth of legal skills. And Australia has come to be regarded as an independent voice”.⁶

Criminal law

Under Whitlam, three treaties were ratified specifically pertaining to criminal law. First, on 10 March 1974, Australia ratified the *Treaty between Australia and Sweden concerning Extradition*. Under this treaty both Australia and Sweden undertook to extradite to each other, subject to the provisions of the treaty, any person found in its territory who had been charged by a competent authority with, or had been convicted of, an offence against the law of the other Contracting Party.⁷ Secondly, on 5 February 1975, Australia ratified the *Treaty between Australia and the Republic of Austria concerning Extradition*, which was similar in nature to the *Treaty between Australia and Sweden concerning Extradition*.⁸ Thirdly, on 8 August 1975, Australia ratified the *Protocol amending*

⁴ Gough Whitlam, “Australia and International Law – Address by the Prime Minister to the Seminar on Public International Law”, Canberra, 26 July 1975, Whitlam Institute E-Collection, at 2: http://cem.uws.edu.au/R/F6TBHIGNYUKUV33HDQBGXS19MQKA6S2D429T1M6H6QA9KDNV6Y-00203?func=results-jump-full&set_entry=000001&set_number=000003&base=GEN01-EGW01 [Accessed 11/12/09].

⁵ Most of the treaties that entered into force in Australia between 5 December 1972 and 11 November 1975 are mentioned below.

⁶ Gough Whitlam, n 4 above, p. 4.

⁷ Article 1(1) of *Treaty between Australia and Sweden concerning Extradition*, Entry into force, 10 March 1974.

⁸ Articles 1 and 3 of *Treaty between Australia and the Republic of Austria concerning Extradition*, Entry into force, 5 February 1975.

the Single Convention on Narcotic Drugs, which made several changes to the *Single Convention on Narcotic Drugs*. The 1975 Protocol highlighted the need for treatment and rehabilitation of drugs addicts,⁹ obliging States Parties to take all practical measures for the prevention of the abuse of psychotropic substances and for the early identification, treatment, education, after-care, rehabilitation and social reintegration of the persons involved.¹⁰ The 1975 Protocol also expanded the International Narcotics Control Board from 11 members to 13 members.¹¹

Environment and nuclear power

Three important treaties of an environmental concern and five key treaties dealing with nuclear power and weaponry entered into force for Australia under Whitlam. The Ramsar Convention (*Convention on Wetlands of International Importance especially as Waterfowl Habitat*), which the Whitlam Government ratified for Australia, without any relevant reservation, on 8 May 1974, was one of the most important international environmental agreements signed by the Government.

The Ramsar Convention is an international treaty aimed at the conservation and sustainable utilisation of wetlands.¹² It is the only universal environmental treaty that deals with a particular ecosystem. The participating countries cover all geographic regions of the planet.¹³ Unlike most other global environmental conventions, the Ramsar Convention is not affiliated with the United Nations system of Multilateral Environmental Agreements (MEAs). Instead, it operates

⁹ Australian Bureau of Criminal Intelligence., “Australian Illicit Drug Report 1997-98”, Canberra, p. 9: http://www.crimecommission.gov.au/publications/iddr/_files/1997_98/aidr_1997_98_introduction.pdf [Accessed 09/12/09].

¹⁰ Christopher Gatto., “European Drug Policy: Analysis and Case Studies” edited by Allen St. Pierre, *NORML Foundation*, 1999: http://www.norml.org/index.cfm?Group_ID=4415 [Accessed 12/12/09].

¹¹ Article 2 Amendments to the Title of Article 9 of the *Single Convention* and its paragraph 1 and insertion of new paragraphs 4 and 5.

¹² Preamble and Article 1 of *Convention on Wetlands of International Importance especially as Waterfowl Habitat*, Entry into force for Australia and generally, 21 December 1975.

¹³ The Ramsar Convention on Wetlands., *Home Page*: http://www.ramsar.org/cda/ramsar/display/main/main.jsp?zn=ramsar&cp=1^7715_4000_0__ [Accessed 12/12/09].

very closely with the other MEAs and is a full partner among the “biodiversity-related cluster” of international treaties and agreements.¹⁴

In a statement that indicated his growing sense of the need for independence in relation to the United States-Australia alliance, Whitlam had suggested that the election that returned the Coalition to government by a smaller majority on 25 October 1969¹⁵ indicated that the Australian people wanted their government to sign the *Treaty on the Non-Proliferation of Nuclear Weapons* (NPT), on which the Gorton Government was prevaricating.¹⁶ On winning government in 2 December 1972, Whitlam, without delay, secured Australia’s ratification of the NPT. It entered into force for Australia on 23 January 1973.

The NPT is an important international treaty that represents the only binding commitment in a multilateral treaty to the goal of securing disarmament by the nuclear weapon States.¹⁷ It is commonly described as having three main “pillars”: non-proliferation, disarmament, and peaceful use.¹⁸ In relation to the non-proliferation component of the treaty, non-nuclear-weapon States (NNWS) agree not to import, build or otherwise acquire nuclear weapons or other nuclear explosive devices.¹⁹ States that have nuclear weapons are obliged not to transfer nuclear weapons or explosive devices to NNWS.²⁰ The disarmament aspect of the NPT obliges all States Parties to pursue negotiations in good faith towards effective measures for the cessation of the nuclear arms race at an early date and eventual complete disarmament under strict and effective

¹⁴ The Ramsar Convention on Wetlands., *About Ramsar Page*:

http://www.ramsar.org/cda/ramsar/display/main/main.jsp?zn=ramsar&cp=1-36^7804_4000_0__
[Accessed 12/12/09].

¹⁵ Australian Politics., “Federal Election Dates & Outcomes” at <http://www.australianpolitics.com/elections/dates/federal-election-outcomes.shtml> [Accessed 13/12/09].

¹⁶ “Swing a pointer on war – Whitlam” in the *Sydney Morning Herald*, 27 October 1969, p.4.

¹⁷ United Nations Department of Disarmament Affairs., *Brief Background*: <http://www.un.org/Depts/dda/WMD/treaty/> [Accessed 13/12/09].

¹⁸ Foreign Affairs and International Trade Canada., “The Nuclear Non-Proliferation Treaty”: <http://www.international.gc.ca/arms-armes/nuclear-nucleaire/npt-tnp.aspx> [Accessed 13/12/09].

¹⁹ Ibid.

²⁰ ibid.

international control.²¹ All States Parties to the Treaty agree to full exchanges of equipment, materials and scientific and technological information for the peaceful use of nuclear energy.²² The high relevance of this treaty for the world today continues to be evident in reported developments in Iran, Israel, Pakistan, India, North Korea and other States. It is the focus of important present work by the Hon Gareth Evans to strengthen and renew the global commitment to practical measures against nuclear proliferation.

Another significant treaty ratified by the Whitlam Government regarding nuclear weapons was the *Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof* (Seabed Arms Control Treaty). This was a multilateral agreement prohibiting the emplacement of nuclear weapons or weapons of mass destruction on the ocean floor beyond a 12-mile (22.2 km) coastal zone.²³ The Seabed Arms Control Treaty allows signatory States to observe all seabed “activities” of any other signatory State beyond the 12-mile zone, in order to ensure treaty compliance.²⁴

Human rights

Within the field of international human rights law, Whitlam secured the ratification of fifteen significant human rights treaties. It was his Government that ushered in the modern era in Australia’s engagement with enforceable international human rights law.

²¹ Article 6 of the *Treaty on the Non-Proliferation of Nuclear Weapons*, Entry into force for Australia, 23 January 1973.

²² Articles 3 and 4 of the *Treaty on the Non-Proliferation of Nuclear Weapons*, Entry into force for Australia, 23 January 1973.

²³ Articles 1 and 2 of the *Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof*, Entry into force for Australia, 23 January 1973.

²⁴ Article 2 of the *Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof*, Entry into force for Australia, 23 January 1973.

The *International Convention on the Elimination of all Forms of Racial Discrimination* (CERD) entered into force for Australia on 30 October 1975. This is one of the most significant human rights treaties ever joined by Australia for at least four reasons. First, CERD is the first United Nations human rights convention ever to be substantially enacted by Australia in domestic law, in the form of the *Racial Discrimination Act 1975* (Cth).²⁵ Secondly, the ratification of the CERD in Australian law indicated, for the first time, a clear parliamentary instruction, enforceable by law, that racial bigotry against members of a particular race would not be tolerated in Australia. Thirdly, CERD has gained near-universal acceptance by the international community, with fewer than twenty (mostly small) states yet to become parties to the Convention.²⁶ Most major states have also accepted CERD's individual complaints mechanism, signaling a desire to be bound by the Convention's provisions.²⁷ Fourthly, by ratifying CERD, the Whitlam Government sent a powerful message to the world that Australian law would no longer accept any lingering relics of the White Australia policy and would put in place measures designed to reverse the previous culture of racial inequality:

“One of the crucial ways in which we must improve our global reputation is to apply an aspiration for equality at home to our relations with the peoples of the world as a whole. Just as we have embarked on a determined campaign to restore the Australian aborigines to their rightful place in Australian society, so we have an obligation to remove methodically from Australian law's and practices all racially discriminatory provisions, and from international activities any hint or suggestion that we favour policies, decrees or resolutions that seek to differentiate between peoples on the basis of their skin. As an island nation of predominantly European inhabitants situated on the edge of Asia, we cannot afford the stigma of racialism”.²⁸

²⁵ Gough Whitlam., *Abiding Interests*, St Lucia, Qld, University of Queensland Press, 1997, p. 184.

²⁶ United Nations Treaty Collection., “International Convention on the Elimination of All Forms of Racial Discrimination”:

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en
[Accessed 16/12/09].

²⁷ Ibid.

²⁸ Gough Whitlam, n 3 above, p. 94.

Another significant human rights treaty ratified by the Whitlam Government was the *Protocol relating to the Status of Refugees* (Refugee Protocol).²⁹ This amended the United Nations 1951 *Convention relating to the Status of Refugees*, by removing both the temporal and geographic restrictions that had previously restricted entitlements to refugee status to those whose circumstances had come about as a result of events occurring before 1 January 1951, as well as giving States Parties to the Convention the option of extending the Convention to events occurring in Europe or events occurring in Europe or elsewhere.³⁰ The effect of ratifying the Refugee Protocol meant that, for the first time, Australia, without regard to racial origins, offered opportunities of protection to people displaced in Asia or Africa who otherwise had no identifiable connection with Australia.³¹

On 10 March 1975, the Whitlam Government ratified the *Convention on the Political Rights of Women* (CPROW). During question time in the House of Representatives regarding the status of ratification of CPROW, Whitlam noted that “previous Australian Governments took no action to either sign or ratify this Convention”.³² In explaining the objectives of CPROW, Whitlam elsewhere commented that the ratification of CPROW was evidence of the desire to ensure that Australia’s policies were decisively based on respect for, and protection and enhancement of, civil liberties and basic human rights for all people, regardless of their sex.³³ CPROW is important as it formally

²⁹ *Protocol relating to the Status of Refugees*, Entry into force for Australia, 13 December 1973.

³⁰ Refugee Review Tribunal, “Who is a refugee”, Australian Government: <http://www.mrt-rrt.gov.au/refugee.asp> [Accessed 17/12/09].

³¹ Gough Whitlam, “Vietnamese Refugees”, Press Statement No. 534, 23 July 1975, Whitlam Institute E-Collection, at 2:

http://cem.uws.edu.au/R/H925EHXY85J1YA4J2A3TBE2P6GKIASBA3QF9CKEIENUHDN98MX-01266?func=results-jump-full&set_entry=000016&set_number=000002&base=GEN01-EGW01 [Accessed 17/12/09].

³² Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 1974, 4403 (Mr. Gough Whitlam, Prime Minister).

³³ Gough Whitlam, “Political Rights of Women”, Press Statement No. 409, 9 December 1974, Whitlam Institute E-Collection, at 1:

http://cem.uws.edu.au/R/H925EHXY85J1YA4J2A3TBE2P6GKIASBA3QF9CKEIENUHDN98MX-01878?func=results-jump-full&set_entry=000001&set_number=000003&base=GEN01-EGW01 [Accessed 17/12/09].

recognized, on an “international stage”, that everyone has the right to take part in the government of their country directly or indirectly, through freely chosen representatives; the right to equal access to the public service in their country; and that men and women are to be equal in the enjoyment and exercise of political rights.³⁴

Another human rights treaty ratified by Australia was the *Convention relating to the Status of Stateless Persons* (Status Convention). This entered into force for Australia on 13 March 1974. A major purpose of the Status Convention was to ensure that stateless persons enjoyed the widest possible exercise of fundamental rights and freedoms.³⁵ In particular, the Status Convention aims at ensuring that States Parties to the Convention afford stateless persons the same rights and privileges as the state in question would give to its own nationals. For example, Article 4 of the Status Convention requires that all parties to the Convention must accord to stateless persons within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practise their religion and freedom with regards to the religious education of their children. Furthermore, Article 16(1) of the Status Convention provides that a stateless person shall have free access to the courts of law in the territory of all Contracting States.

During the Whitlam Government, the rights of employees within the context of human rights were also protected in a similar way. For example, on 28 February 1973, Australia ratified several conventions of the International Labour Organisation (ILO), including the *Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organise* (ILO Convention 87). The first ten articles of that Convention state the rights both of workers and employers to join organisations of their own choosing without

³⁴ Preamble, *Convention on the Political Rights of Women*, Entry into force for Australia, 10 March 1975.

³⁵ Preamble, *Convention relating to the Status of Stateless Persons*, Entry into force for Australia, 13 March 1974. See *Koroitama v The Commonwealth* (2006) 227 CLR 31.

previous approval. Rights are also extended to the organisations themselves to draft rules and constitutions; to provide for voting for officers; and to arrange administrative functions without obstruction from public authorities. Each State Party that has ratified the Convention must also take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.³⁶

ILO Convention 87 may be recognised as a human rights instrument, despite the employment setting of the treaty. This is so because many of the articles in the Convention are similar to the provisions expressed in Article 22 of the *International Covenant on Civil and Political Rights* (ICCPR).³⁷ For example, Article 22(1) of the ICCPR provides that everyone shall have the right to freedom of association with others, as well as the right to form, and join, trade unions for the protection of their interests.

Other ILO Conventions of a human rights character that were ratified by Australia during the Whitlam Government include *ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation*,³⁸ the *ILO Convention (No. 98) concerning the Application of the Principles of the Right to Organise and to Bargain Collectively*³⁹ and the *ILO Convention (No. 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*.⁴⁰

³⁶ Article 11 of the *ILO Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organise*, Instrument of ratification registered for Australia 28 February 1973.

³⁷ *International Covenant on Civil and Political Rights*, Entry into force 23 March 1976, in accordance with Article 49.

³⁸ *ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation*, Instrument of ratification deposited for Australia 15 June 1973.

³⁹ *ILO Convention (No. 98) concerning the Application of the Principles of the Right to Organise and to Bargain Collectively*, Instrument of ratification registered for Australia 28 February 1973.

⁴⁰ *ILO Convention (No. 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*, Instrument of ratification deposited for Australia 10 December 1974. See *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416.

Intellectual property

Three international treaties were ratified by the Whitlam Government concerning the regulation of intellectual property. The *Strasbourg Agreement concerning the International Patent Classification* (IPC) entered into force for Australia on 12 November 1975. It was probably the most important of the three intellectual property treaties accepted under Whitlam. The IPC established a common classification for patents of invention, inventors' certificates, utility models and utility certificates, commonly known as the "International Patent Classification".⁴¹ One of the main aims of the IPC was to establish closer international cooperation in the industrial property field, and to contribute to the harmonisation of national legislation in that context.⁴²

Secondly, another key treaty in this area, was the *Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms* (Geneva Phonograms Convention). This entered into force for Australia on the 22 June 1974. The Geneva Phonograms Convention is concerned with the widespread and increasing unauthorised duplication of phonograms and the damage that this occasions to the interests of authors, performers and producers of phonograms.⁴³ Under the Geneva Phonograms Convention, "phonogram" means any exclusively aural fixation of sounds of a performance or of other sounds.⁴⁴

Thirdly, the Whitlam Government, Australia also ratified the *Exchange of Notes constituting an Agreement between the Government of Australia and the Government of the People's Republic of China concerning the Registration of Trade Marks* (China Trademark Treaty). This entered into force on 12 October

⁴¹ Article 1 of the *Strasbourg Agreement concerning the International Patent Classification*, Entry into force for Australia, 12 November 1975.

⁴² Preamble of the *Strasbourg Agreement concerning the International Patent Classification*, Entry into force for Australia, 12 November 1975.

⁴³ Preamble of the *Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms*, which entered into force in Australia on the 22 June 1974.

⁴⁴ Article 1(a) of the *Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms*, which entered into force in Australia on the 22 June 1974.

1974 both for Australia and China (P.R.C). The China Trademark Treaty provided for the registration of trademarks on a reciprocal basis between the two countries.⁴⁵ In particular, a key term of the China Trademark Treaty was that:

“corporations, enterprises, and nationals of either country may, on the basis of equality and mutual benefit, apply for the registration of any trademark in the other country and, in accordance with the laws and regulations of that country, acquire the exclusive right to the use of trademarks so registered”.⁴⁶

In the Whitlam Government’s ratification of international treaties on behalf of Australia outside the area of human rights, such as intellectual property regulation, Whitlam demonstrated that his own curiosity for international affairs travelled far beyond accommodating human rights treaties. It was generic in its ambit. It involved a particular perception of the context in which the Australian Government and Parliament had henceforth to operate

International institutions

Seven key treaties were ratified by the Whitlam Government dealing with international institutions. These both regulated and assisted to resolve disputes of an international character. Thus, on 13 June 1974, Australia deposited its instrument of accession to the *Vienna Convention on the Law of Treaties* (VCLT). That is a treaty codifying and clarifying the customary international law on treaties between states, and applying to treaties concluded between states.⁴⁷ In the event of a dispute between states regarding the application of a treaty agreed upon by the parties, the International Court of Justice may have

⁴⁵ The Hon. J F Cairns., Minister for Overseas Trade of Australia, *Exchange of Notes constituting an Agreement between the Government of Australia and the Government of the People's Republic of China concerning the Registration of Trade Marks*, entered into force on 12 October 1974.

⁴⁶ The Hon. J F Cairns., Minister for Overseas Trade of Australia, *Exchange of Notes constituting an Agreement between the Government of Australia and the Government of the People's Republic of China concerning the Registration of Trade Marks*, entered into force on 12 October 1974.

⁴⁷ Article 2(1)(a) of the *Vienna Convention on the Law of Treaties*, Convention entered into force for Australia and generally 27 January 1980. See discussion *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225.

regard to the VCLT to assist the Court in resolving issues for consideration.⁴⁸ The VCLT has come to have an impact upon Australia municipal law in relation to the local meaning and application of measures of international law.

A further treaty signed by the Whitlam Government concerned consular relations. Australia ratified the *Vienna Convention on Consular Relations* (VCCR) on 12 February 1973. VCCR is a multilateral treaty designed to codify consular practices which had earlier evolved in customary international law, numerous bilateral treaties, and a number of regional treaties.⁴⁹ VCCR enumerates basic legal rights and obligations of signatory States, including the establishment and conduct of consular relations, by mutual consent.⁵⁰ It also covers privileges and immunities of consular officers under the laws of the country where the foreign consular office has been established.⁵¹

The Whitlam Government also ratified the *Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes*. This entered into force for Australia on 14 March 1973. States Parties that had ratified the *Optional Protocol* agreed that any disputes to which VCCR applied could be dealt with by the compulsory jurisdiction of the International Court of Justice.

The Whitlam Government was also responsible for depositing the instrument of acceptance in relation to the *Statute of the Hague Conference on Private International Law* (PILS). This Statute entered into force for Australia on 1 November 1973. PILS provides a working framework for signatory States

⁴⁸ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276* (1970) (Advisory Opinion) [1971] ICJ Reports 16 at 47.

⁴⁹ Preamble of the *Vienna Convention on Consular Relations*, Entered into force for Australia 14 March 1973.

⁵⁰ Article 2(1) of the *Vienna Convention on Consular Relations*, Entered into force for Australia 14 March 1973.

⁵¹ Article 4 of the *Vienna Convention on Consular Relations*, Entered into force for Australia 14 March 1973.

Parties to follow when participating in the Hague Conference. It was aimed at fostering the progressive unification of the rules of private international law.⁵²

International air services

Remarkably, during the Whitlam Government, Australia ratified fourteen treaties dealing with aspects of international air services. One of the most important of these was the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* (Civil Aviation Convention). This entered into force for Australia on 11 August 1973. The Civil Aviation Convention is aimed at dealing with unlawful acts against the safety of civil aviation that jeopardise the safety of persons and property, seriously affect the operation of air services, and undermine the confidence of the peoples of the world in the safety of civil aviation.⁵³

Other such treaties, ratified by the Whitlam Government, included the *Protocol relating to an Amendment to Article 56 of the Convention on International Civil Aviation of 7 December 1944*,⁵⁴ the *Protocol to amend the Agreement on North Atlantic Ocean Stations of 25 February 1954, as amended 13 May 1970*,⁵⁵ the *Agreement concerning the Continuing Relationship between Australia and the European Organisation for the Development and Construction of Space Vehicle Launchers*,⁵⁶ and the *Exchange of Notes constituting an Agreement between the Government of Australia and the Government of the United States of America relating to Reciprocal Acceptance of Airworthiness Certificates*.⁵⁷

⁵² Article 1 of the *Statute of The Hague Conference on Private International Law*, Instrument of acceptance deposited for Australia 1 November 1973.

⁵³ Preamble of the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, Entered into force for Australia 11 August 1973.

⁵⁴ *Protocol relating to an Amendment to Article 56 of the Convention on International Civil Aviation of 7 December 1944*, Entry into force for Australia and generally, 30 December 1974.

⁵⁵ *Protocol to amend the Agreement on North Atlantic Ocean Stations of 25 February 1954, as amended 13 May 1970*, Entry into force for Australia, 4 July 1973.

⁵⁶ *Agreement concerning the Continuing Relationship between Australia and the European Organisation for the Development and Construction of Space Vehicle Launchers*, Entry into force, 30 December 1974.

⁵⁷ *Exchange of Notes constituting an Agreement between the Government of Australia and the Government of the United States of America relating to Reciprocal Acceptance of Airworthiness Certificates*, Entry into force, 11 June 1975.

Labour standards

Australia also ratified fifteen treaties concerning labour standards during Whitlam's tenure. The Whitlam Government accepted that it was essential that Australia have a good record of ratifications so that, on labour and social matters, it might speak with authority and accepted respect in the international community.⁵⁸

Between 1972-5 Australia ratified nine ILO conventions. By way of contrast, the Fraser Government ratified only one in its seven years.⁵⁹ Australia's ratification of the nine ILO conventions under Whitlam was justified at the time by five primary arguments. First, both the acceptance and ratification of ILO conventions helped impart a favourable international image of Australia as a forward-looking progressive country that gives priority attention to vital areas of human relations.⁶⁰ Secondly, a good record of ratifications would underpin Australia's support for the work of the ILO, the tripartite character of which, (with representation of employers and workers as well as of governments) operated harmoniously with Australia's own industrial laws and practices and gave the ILO a unique local standing among international institutions.⁶¹ Thirdly, as an advanced economy in a region comprising mostly developing countries, the Whitlam Government expressed its belief that Australia should be in the vanguard of countries taking action to foster and develop sound labour and social policies, in accordance with accepted international standards.⁶² Fourthly, in the view of the Government, the ratification of ILO conventions helped stimulate Australia itself to improve its own labour standards.⁶³ Finally, at the time of the Whitlam Government's ILO ratifications, Australia still enjoyed a special responsibility for Papua New Guinea, although it was soon to be self-

⁵⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 12 April 1973, 1437 (Mr. Clyde Cameron, Minister for Labour).

⁵⁹ Gough Whitlam., n 25 above, p. 177.

⁶⁰ Commonwealth, *Parliamentary Debates*, n 58 above.

⁶¹ *Ibid.*

⁶² *ibid.*

⁶³ *ibid.*

governing and independent.⁶⁴ On that basis, the Whitlam Government believed that Australia should leave Papua New Guinea with industrial laws that accorded with the highest international standards.⁶⁵

Whitlam saw the approval and ratification of ILO conventions for Australia as a step towards the promotion and protection of the human rights of Australians:

“Over the years Australia has taken an increasingly active and responsible role in ILO affairs, particularly in the Asian region. My Government has moreover taken vigorous steps to apply international labour standards in Australia. It has ratified ILO Conventions dealing with equal pay, trade union rights and elimination of discrimination in employment, thereby ensuring Australians accord with all ILO Conventions in the field of fundamental human rights, Australia’s record, some 42 ratifications in all [as at 27 June 1975], compares favourably with that of other federal states”.⁶⁶

A key convention ratified by the Whitlam Government was the *ILO Convention (No. 2) concerning Unemployment* (ILO Unemployment Convention). The ILO Unemployment Convention placed an affirmative duty upon participating States to establish a system of free public employment agencies, under the control of a central authority;⁶⁷ to communicate to the ILO, at intervals as short as possible and not exceeding three months, all available information, statistical or otherwise, concerning unemployment, including reports on measures taken or contemplated to combat unemployment;⁶⁸ and to take steps to co-ordinate the operations of such agencies on a national scale.⁶⁹

⁶⁴ *ibid.*

⁶⁵ *ibid.*

⁶⁶ Gough Whitlam., “Australian Elected Chairman of ILO Governing Body”, Office of the Prime Minister, 27 June 1975, Press Statement No. 525, Whitlam Institute E-Collection, at 1: http://cem.uws.edu.au/R/6VJIHCIDIQ5E766FFF8C8AV92Y94SIIPSBQFXGLDNPXX4T21353-00334?func=results-jump-full&set_entry=000001&set_number=000002&base=GEN01-EGW01 [Accessed 23/12/09].

⁶⁷ Article 2(1) of the *ILO Convention (No. 2) concerning Unemployment*, Instrument of ratification registered for Australia 15 June 1972.

⁶⁸ Article 1 of the *ILO Convention (No. 2) concerning Unemployment*, Instrument of ratification registered for Australia 15 June 1972.

⁶⁹ Article 2(2) of the *ILO Convention (No. 2) concerning Unemployment*, Instrument of ratification registered for Australia 15 June 1972.

Another notable ILO convention ratified by Australia was the *ILO Convention (No. 131) concerning Minimum Wage Fixing, with Special Reference to Developing Countries*.⁷⁰ A key term of that Convention required all participating States to establish a system of minimum wages that covered all groups of wage earners whose terms of employment were such that coverage would be appropriate.⁷¹

The Whitlam Government also ratified the *ILO Convention (No. 86) concerning the Maximum Length of Contracts of Employment of Indigenous Workers*. This came into force for Australia on 15 June 1974. As the title indicates, the Convention is concerned with the adoption of proposals concerning the maximum length of contracts for the employment of indigenous workers.

Some other important treaties in this area included the *ILO Convention (No. 137) concerning the Social Repercussions of New Methods of Cargo Handling in Docks*,⁷² the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*⁷³ and the *Instrument for the Amendment of the Constitution of the International Labour Organisation of 28 June 1919, as amended*.⁷⁴

Science and technology

Whitlam's intellectual curiosity extended far beyond the law. He secured the ratification of at least six international treaties pertaining to science and technology. For example, Australia ratified an *Agreement between the Government of Australia and the Government of the Republic of India on*

⁷⁰ *ILO Convention (No. 131) concerning Minimum Wage Fixing, with Special Reference to Developing Countries*, Instrument of ratification deposited for Australia 15 June 1973.

⁷¹ Article 1(1) of the *ILO Convention (No. 131) concerning Minimum Wage Fixing, with Special Reference to Developing Countries*, Instrument of ratification deposited for Australia 15 June 1973.

⁷² *ILO Convention (No. 137) concerning the Social Repercussions of New Methods of Cargo Handling in Docks*, Instrument of ratification deposited for Australia 25 June 1974.

⁷³ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Entered into force for Australia 24 June 1975.

⁷⁴ *Instrument for the Amendment of the Constitution of the International Labour Organisation of 28 June 1919, as amended*, Entered into force for Australia and generally 1 November 1974.

Cooperation in the Fields of Science and Technology.⁷⁵ This concerned promoting opportunities for cooperation between Australia and India in the fields of civil scientific and technological research and development.⁷⁶ The Whitlam Government also signed an *Agreement between the Government of Australia and the Government of the Union of Soviet Socialist Republics on Scientific-Technical Co-operation*. This dealt with facilitating the growth of scientific-technological co-operation and exchanges between government, scientific, technical and industrial research organisations of both countries.⁷⁷

Some other notable treaties in this field, ratified by Australia during the Whitlam Government, included the *Exchange of Notes constituting an Agreement between the Government of Australia and the Government of the United States of America extending the Agreement relating to Scientific and Technical Co-operation of 16 October 1968*; ⁷⁸ the *Exchange of Notes constituting an Agreement between the Government of Australia and the Government of the United States of America concerning a Cooperative Scientific Program designated Hi Star South*; ⁷⁹ and the *Exchange of Notes constituting an Agreement between the Government of Australia and the Government of the Federal Republic of Germany concerning the Launching of a Skylark Vehicle and Payload at Woomera for Scientific Purposes*.⁸⁰

⁷⁵ *Agreement between the Government of Australia and the Government of the Republic of India on Cooperation in the Fields of Science and Technology*, Entry into force, 26 February 1975.

⁷⁶ Article 1 of the *Agreement between the Government of Australia and the Government of the Republic of India on Cooperation in the Fields of Science and Technology*.

⁷⁷ Article 1 of the *Agreement between the Government of Australia and the Government of the Union of Soviet Socialist Republics on Scientific-Technical Co-operation*, Entry into force: 15 January 1975.

⁷⁸ *Exchange of Notes constituting an Agreement between the Government of Australia and the Government of the United States of America extending the Agreement relating to Scientific and Technical Co-operation of 16 October 1968*, Entry into force, 30 July 1973.

⁷⁹ *Exchange of Notes constituting an Agreement between the Government of Australia and the Government of the United States of America concerning a Cooperative Scientific Program designated Hi Star South*, Entry into force, 23 August 1974.

⁸⁰ *Exchange of Notes constituting an Agreement between the Government of Australia and the Government of the Federal Republic of Germany concerning the Launching of a Skylark Vehicle and Payload at Woomera for Scientific Purposes*, Entry into force, 11 February 1975.

Taxation

Eight treaties were ratified by Australia on aspects of taxation. The *Convention on Nomenclature for the Classification of Goods in Customs Tariffs, as amended 16 June 1960* (Nomenclature Convention) entered into force for Australia on 18 April 1973. The aim of the Nomenclature Convention was to simplify international customs tariff negotiations and to facilitate the comparison of trade statistics so far as the data for such statistics are based on the classification of goods in customs tariffs.⁸¹

On 16 January 1975, Australia ratified the *Agreement between the Commonwealth of Australia and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to certain other Taxes* (German Taxation Treaty). In short, the German Taxation Treaty sought the avoidance of double taxation and the prevention of the evasion of taxes on income and capital.⁸² Australia also ratified a treaty to provide an *Agreement between the Government of the Commonwealth of Australia and the Government of New Zealand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*.⁸³ This was similar, in effect, to the German Taxation Treaty.

Other key taxation treaties ratified by Australia included the *Protocol for the Accession of Hungary to the General Agreement on Tariffs and Trade of 30 October 1947*;⁸⁴ the *Protocol for the Accession of the People's Republic of*

⁸¹ *Convention on Nomenclature for the Classification of Goods in Customs Tariffs, as amended 16 June 1960*, Instrument of accession to the Convention and Protocol deposited for Australia 18 April 1973.

⁸² Preamble of the *Agreement between the Commonwealth of Australia and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to certain other Taxes*, Instruments of ratification were exchanged at Bonn on 16 January 1975.

⁸³ *Agreement between the Government of the Commonwealth of Australia and the Government of New Zealand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*, Entry into force, 31 March 1973.

⁸⁴ *Protocol for the Accession of Hungary to the General Agreement on Tariffs and Trade of 30 October 1947*, Entry into force for Australia, 9 October 1974.

Bangladesh to the General Agreement on Tariffs and Trade of 30 October 1947; ⁸⁵ and the *Declaration on the Provisional Accession of the Philippines to the General Agreement on Tariffs and Trade of 30 October 1947*.⁸⁶

Arts and cultural exchanges

Nine treaties were ratified by the Whitlam Government dealing with “the arts” and aspects of “cultural excellence”. One of the most significant cultural treaties included the *Convention for the Protection of the World Cultural and Natural Heritage*. This placed a positive duty upon States Parties to recognise and ensure the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage of groups of buildings, monuments and sites in the territory of the State Party.⁸⁷

Also in the area of cultural affairs, the Whitlam Government ratified the *Statutes of the International Centre for the Study of the Preservation and Restoration of Cultural Property of 5 December 1956, as amended 24 April 1963 and 12 April 1973*. This was a treaty regulating the International Centre for the Study of the Preservation and Restoration of Cultural Property (the Centre).⁸⁸ The Centre has many functions. Two of them are to collect, study and circulate documentation concerned with scientific and technical problems of the preservation and restoration of cultural property,⁸⁹ and to give advice, and make recommendations on, general or specific points connected with the preservation and restoration of cultural property.⁹⁰

⁸⁵ *Protocol for the Accession of the People's Republic of Bangladesh to the General Agreement on Tariffs and Trade of 30 October 1947*, Entry into force for Australia, 25 June 1975.

⁸⁶ *Declaration on the Provisional Accession of the Philippines to the General Agreement on Tariffs and Trade of 30 October 1947*, Entry into force for Australia, 8 November 1974.

⁸⁷ Articles 1-3 of the *Convention for the Protection of the World Cultural and Natural Heritage*, Instrument of ratification deposited for Australia 22 August 1974.

⁸⁸ *Statutes of the International Centre for the Study of the Preservation and Restoration of Cultural Property of 5 December 1956, as amended 24 April 1963 and 12 April 1973*, Declaration of accession deposited for Australia 26 June 1975.

⁸⁹ Article 1(a) of the *Statutes of the International Centre for the Study of the Preservation and Restoration of Cultural Property of 5 December 1956, as amended 24 April 1963 and 12 April 1973*.

⁹⁰ Article 1(c) of the *Statutes of the International Centre for the Study of the Preservation and Restoration of Cultural Property of 5 December 1956, as amended 24 April 1963 and 12 April 1973*.

In the area of “the arts”, a key treaty ratified by Australia during the Whitlam Government was the *Convention relating to International Exhibitions and Protocol of Signature* (CIE). The purpose of CIE was to regulate the process of international art exhibitions and provide a clear definition of what is meant by the term ‘official or officially recognised international exhibitions’.⁹¹ CIE also provides for the resolution of differences where more than one country wishes to hold a similar international exhibition. For example, Article 6 of CIE provides that, if more than one country should be in competition with another for the right to hold an international exhibition in any period, such countries shall proceed to an exchange of views in order to determine which country shall secure the privilege.⁹² In the case of no agreement being arrived at, the countries are obliged to refer the matter to the arbitration of the International Bureau. That body is required to take into account the considerations submitted on behalf of each country, and particularly any special reasons of an historic or sentimental character; the period which has elapsed since the last such exhibition; and the number of displays already held by each country.⁹³

Other key treaties ratified by the Whitlam Government in this area included a *Cultural Agreement between Australia and Iran*⁹⁴, a *Cultural Agreement between the Government of Australia and the Government of Malaysia*⁹⁵, an *Agreement of Cultural Co-operation between Australia and Italy*⁹⁶ and the

⁹¹ Article of the *Convention relating to International Exhibitions and Protocol of Signature*, Notification of accession deposited for Australia 27 September 1973.

⁹² Article 6 of *Convention relating to International Exhibitions and Protocol of Signature*.

⁹³ Article 6 of *Convention relating to International Exhibitions and Protocol of Signature*.

⁹⁴ *Cultural Agreement between Australia and Iran*, Notes to this effect were exchanged on 2 June 1975, on which date the Agreement entered into force.

⁹⁵ *Cultural Agreement between the Government of Australia and the Government of Malaysia*, Entry into force: 16 October 1975.

⁹⁶ *Agreement of Cultural Co-operation between Australia and Italy*, Notes to this effect were exchanged on 28 May 1975, on which date the Agreement entered into force.

*Cultural Agreement between the Government of Australia and the Government of Thailand*⁹⁷.

Trade agreements

Like most modern Australian Governments, Whitlam recognised that Australia's economic, trade, development and industrial policies afforded an important foundation for the continuing growth of Australian prosperity.⁹⁸ Accordingly, under Whitlam, Australia ratified some 35 international treaties with other States related to trade.

The international trade treaties adopted by Australia during the Whitlam Government were most diverse. For example, Australia ratified a treaty related to an *Arrangement regarding International Trade in Textiles*. This endeavoured to take co-operative and constructive action, within a multilateral framework, to promote the development of production and the expansion of trade in textile products and to progressively achieve the reduction of trade barriers and the liberalization of world trade in these products.⁹⁹

Another significant trade treaty was the *International Sugar Agreement of 1973* (ISA). The three major objectives of ISA were to raise the level of international trade in sugar, particularly in order to increase the export earnings of developing exporting countries¹⁰⁰, to bring world production and consumption of sugar into closer balance¹⁰¹, and to provide for adequate participation in, and growing access to, the markets of developed countries for sugar from developing countries.¹⁰²

⁹⁷ *Cultural Agreement between the Government of Australia and the Government of Thailand*, Entry into force, 16 December 1974.

⁹⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 27 February 1973, 17 (Sir Paul Meernaa Caedwalla Hasluck, Governor-General).

⁹⁹ Preamble for the *Arrangement regarding International Trade in Textiles*, Accepted by signature for Australia 9 April 1974.

¹⁰⁰ Article 1(a) of the *International Sugar Agreement, 1973*, Instrument of ratification deposited for Australia 19 December 1973.

¹⁰¹ Article 1(e) of the *International Sugar Agreement, 1973*.

¹⁰² Article 1(g) of the *International Sugar Agreement, 1973*.

Another trade treaty ratified by the Whitlam Government was the *Agreement establishing the International Bauxite Association [IBA]*. The IBA was aimed at promoting orderly and rational management of the mining, processing and marketing of the bauxite resources of producing countries¹⁰³, and the promotion of the increased co-operation and concerted action on the part of bauxite producing countries, contributing to the maximization of economic and social benefits accruing to their peoples from the exploitation of bauxite resources.¹⁰⁴

Australia also ratified an assortment of bilateral treaties that were broadly aimed at encouraging the further development of trade and economic relations between Australia and another State. Some of the treaties ratified by Australia in this category were the *Agreement on the Development of Trade and Economic Relations between the Government of Australia and the Government of the Republic of Korea*¹⁰⁵, the *Agreement on Trade and Industrial and Technical Co-operation between the Government of Australia and the Government of the Socialist Republic of Romania*¹⁰⁶, the *Trade Agreement between the Government of Australia and the Government of the People's Republic of China*¹⁰⁷, and the *International Coffee Agreement of 18 March 1968*.¹⁰⁸

¹⁰³ Preamble of the *Agreement establishing the International Bauxite Association [IBA]*, Instrument of ratification deposited for Australia 9 October 1974.

¹⁰⁴ Preamble of the *Agreement establishing the International Bauxite Association [IBA]*.

¹⁰⁵ *Agreement on the Development of Trade and Economic Relations between the Government of Australia and the Government of the Republic of Korea*, Entry into force: 17 June 1975.

¹⁰⁶ *Agreement on Trade and Industrial and Technical Co-operation between the Government of Australia and the Government of the Socialist Republic of Romania*, The Agreement entered into force 26 June 1975.

¹⁰⁷ *Trade Agreement between the Government of Australia and the Government of the People's Republic of China*, Entry into force, 24 July 1973.

¹⁰⁸ *International Coffee Agreement of 18 March 1968 as extended*, Instrument of acceptance deposited for Australia 28 September 1973.

AUSTRALIA'S ENGAGEMENT WITH INTERNATIONAL LAW

Introduction

Apart from the foregoing remarkable record in Australia's ratification of international treaties, the Whitlam Government ensured that Australia was actively involved within the many organs of international affairs open to it. To this end, referring to his Government, Whitlam said:

“We see international law as an integral part of Australian policy formulation and the projection of those policies internationally. We believe that international law – and by that I include not only the rules of international law but also the law-making and law-applying processes and the formal and informal institutions – provides the only alternative to tension, chaos and destruction”.¹⁰⁹

Whitlam considered that the cultural heritage and geographic location of Australia made it desirable, and inevitable, that Australia should share global values, and throw off its previous isolated and closed approach that both limited the achievement of international co-operation and, potentially, presented dangers that should be avoided. On this basis, Australia set out to strengthen its international framework.¹¹⁰ With this objective in mind, Whitlam embarked on an energetic program of ensuring that Australia would engage in a very wide range of activities concerned with international affairs.

China

One of the fundamental policies promoted by Whitlam, even before his election to government, was that Australia should enter into diplomatic relations with the People's Republic of China. Professor Jenny Hocking has described the significance of the re-establishment of diplomatic links with China in the following terms:

“Whitlam's internationalist outlook can also be seen in specific actions taken as leader of the opposition, of which just one example was his visit in July 1971 to the People's Republic of China. With Labor's policy being to recognize Communist China after years of governmental denial, Whitlam visited Peking and met the Chinese leader Zhou Enlai. It was

¹⁰⁹ Gough Whitlam, n 4 above, p. 2.

¹¹⁰ Gough Whitlam, n 25 above, p. 171.

strategically brilliant, an irresistible photo opportunity that placed Whitlam firmly on the world stage”.¹¹¹

Members of the Coalition government at the time ridiculed Whitlam’s regional efforts in *Realpolitik*. Malcolm Fraser described Whitlam as having “clearly become the Chinese candidate for the next Australian elections”.¹¹² Yet Whitlam’s visit to China had coincided with that of United States Secretary of State, Henry Kissinger.¹¹³ Within days of these visits President Richard Nixon announced that he too would visit Peking.¹¹⁴ The Coalition Government was caught flat-footed. It was still locked in the cold-war politics of the Menzies era. It looked out of date and out of time.¹¹⁵

After Whitlam’s election to government in December 1972, the stage was set for a full restoration of ambassadorial relations between the People’s Republic of China and Australia. In January 1973 Australia re-opened its embassy in Peking. After 24 years, it established diplomatic relations with the People’s Republic of China.¹¹⁶ Thus began a relationship that, since 1972, has become a centerpiece of Australia’s foreign relations and trading arrangements. Whitlam’s approach was founded on realism, principle and Australian self interest.

Human rights

So far as international human rights law was concerned, Australia ratified a record number of international human rights treaties. The United Nations *International Covenant on Economic, Social and Cultural Rights* (ICESC) and *the International Covenant on Civil and Political Rights* (ICCPR), the two covenants intended to give effect to the principles outlined in the General

¹¹¹ Jenny Hocking., “Post-War Reconstruction and the New World Order: The Origins of Gough Whitlam’s Democratic Citizen” (2007) 53(2) *Australian Journal of Politics and History* 223, p. 232.

¹¹² Graham Freudenberg., *A Certain Grandeur: Gough Whitlam in Politics*, South Melbourne, 1977, p. 212.

¹¹³ Jenny Hocking., n 111 above, p. 232.

¹¹⁴ Ibid.

¹¹⁵ *ibid.*

¹¹⁶ National Archives of Australia., “Australia’s Prime Ministers – Gough Whitlam In Office”, *Australian Government*: <http://primeministers.naa.gov.au/primeministers/whitlam/in-office.aspx> [Accessed 30/12/09].

Assembly's 1948 *Universal Declaration on Human Rights*, had been adopted by the General Assembly on 18 December 1966. Australia had not become a signatory to either before Whitlam was elected to government.¹¹⁷ Whitlam signed both ICESCR and ICCPR as Prime Minister on behalf of Australia on their sixth anniversary. Astonishingly, this was only six days after his Government's election.¹¹⁸ It would be difficult to imagine a more dramatic demonstration of Whitlam's commitment to engagement with international human rights law.

In numerous other areas, the policy of the Whitlam Government had been to foster respect for aspects of human rights.¹¹⁹ For example, the Whitlam Government negotiated the prompt emergence of an independent Papua New Guinea. A driving force in this development, which had been set in train by the Coalition Government, was the Whitlam Government's support for the right of peoples to self-determination, including those living in the residue of colonial territories.¹²⁰ Papua New Guinea's status as an autonomous and independent state was, Whitlam argued, "just not negotiable".¹²¹

Whitlam's first step in endorsing change in Papua New Guinea also came in 1970, during his opposition years.¹²² The close Australian federal election of 1969 convinced Whitlam of the high likelihood of a Labor victory in 1972.¹²³ Instead of keeping the issue out of the public debate and wasting another three years before Australians could be brought to face reality, Whitlam placed Papua New Guinea on the national political agenda with a widely-publicised tour of the territory in January 1970.¹²⁴ That visit became a catalyst for

¹¹⁷ Jenny Hocking., n 111 above, p. 232-233.

¹¹⁸ *Ibid.*, p. 233.

¹¹⁹ Gough Whitlam, n 4 above, p. 6.

¹²⁰ *Ibid.*

¹²¹ Gough Whitlam., "Labor's Plan for New Guinea: Statement by the Leader of the Australian Labor Party", Port Moresby, 3 January 1971, NAA: M170/1, 71/1.

¹²² Rory Ewing., "The Papua New Guinea Constitution: Australia's Role in its Development, 1960-75", *Honours Essay*: <http://speedynail.com/pacific/png.html> [Accessed 28/12/09].

¹²³ Graham Freudenberg., *A Certain Grandeur: Gough Whitlam in Politics*, Rev. ed, Ringwood, Vic, Penguin Books, 1987, p. 189.

¹²⁴ *Ibid.*

change.¹²⁵ It was viewed, at the time, as possibly the most significant event in Australia's region.¹²⁶ This was so although Whitlam was not yet Prime Minister of Australia. His public statements during his tour of Papua New Guinea reiterated his earlier stated goal for prompt national independence, with a date now set to be, at the latest, 1976.¹²⁷ Whitlam's status as a likely future Prime Minister of Australia gave new force to virtually everything he said and did in this context.¹²⁸

The consideration that Whitlam paid to Papua New Guinean politics and politicians also had a large impact on the evolution of party politics in the territory, especially the newly established Pangu Pati.¹²⁹ By the time Whitlam returned to Papua New Guinea in January 1971, he could witness a new public understanding of the inevitability of self-government. On this occasion, he said:

“In the past year the political climate of Papua New Guinea has been transformed. A year ago proposals for early self-government were met with official hostility and public dismay..... Now the most significant leaders of Papua New Guinea and significant sections of the population accept that they must shortly come to terms with their own future as a self-governing nation”.¹³⁰

Whitlam restated his party's commitment to self-government and independent sovereignty in Papua New Guinea. The basis of that commitment was not, as such, Australia's obligations to the United Nations. It was his view that it was wrong and unnatural that a nation like Australia should continue to govern a colony in the 1970s.¹³¹ In the result, following Whitlam's election to government in December 1972, self-government arrived for the people of Papua New Guinea on 1 December 1973. At the time Australia's only remaining powers

¹²⁵ Rory Ewing., n 122 above.

¹²⁶ “Australia Political Chronicle January-April, 1970” (1970) 16(2) *The Australian Journal of Politics and History* 262.

¹²⁷ Rory Ewing., n 122 above.

¹²⁸ Graham Freudenberg., n 123 above, p. 193.

¹²⁹ Rory Ewing., n 122 above.

¹³⁰ Gough Whitlam., *The Whitlam Government 1972-1975*, Ringwood, Vic, Penguin Books, 1985, p. 90-91.

¹³¹ *Ibid*, p. 93.

related to the courts of law, the House of Assembly, electoral affairs, foreign affairs and defence.¹³² Within two years of 1 December 1973, Papua New Guinea evolved from a territory with substantial self-government to an independent State on Tuesday 16 September 1975.¹³³ The colonial link was severed shortly before the controversial dismissal of the Whitlam Government on 11 November 1975.

Whitlam's championship of full self-determination for Papua New Guinea also manifested itself in his support for the self-determination of Indo-China. Indeed, this point was made at a time when this was not an established political position, even within the Australian Labor Party.¹³⁴ During Whitlam's first year in government, he made an important speech on the issue during a debate on the then recent Australian New Zealand United States (ANZUS) Council meeting. At that meeting, he had argued a case against the use of Australian troops in Malaya; urged self-determination in Indo-China as he had previously done with respect to Papua New Guinea; advocated a greater role for the United Nations in the Pacific; and recommended that the provisions of the ANZUS treaty be reviewed.¹³⁵

Writing in the context of Whitlam's support for the principle of the peoples' right to self-determination, within the confines of international law, Professor Hocking observed:

“Support for the developing international institutions, liberal internationalism and a post-colonial understanding of the urgency of self-determination were emerging policy positions and international realities that held no fear for Whitlam. They were part of his background and political expectation, expressions of a sense of inter-nation equality that mirrored his support domestically for the pre-eminence of parliament, equality of opportunity and full franchise. For Menzies to continue with the distorted imperialism of pre-war Britain, in Whitlam's view, simply

¹³² *ibid*, p. 98.

¹³³ Rory Ewing, n 122 above.

¹³⁴ Jenny Hocking., n 1 above, p. 170.

¹³⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 15 September 1953, 211 (Gough Whitlam).

flew in the face of contemporary international politics; it was poor policy but, worse, it was impossible policy, the pursuit of which ensured Australia's international irrelevance and regional impotence".¹³⁶

International Court of Justice

In 1973, the interest that the Whitlam Government had shown for international law was translated into proceedings in the International Court of Justice (ICJ). Those proceedings concerned the French nuclear tests conducted in the Pacific.¹³⁷ It was another example of the Whitlam's Government's innovative use of international instrumentalities. At the ICJ, Attorney-General Lionel Murphy led a team of Australian advocates to success in a result in which the ICJ ruled against France's claimed right to continue above-ground nuclear testing in the Pacific.¹³⁸

As Prime Minister of Australia in July 1973, in the context of the ICJ proceedings regarding the French nuclear tests in the Pacific, Whitlam explained to the Perth Legal Convention:

"My Government places great emphasis on the extension and strengthening of international law – not only in questions of sheer peaceful matters but also questions of the environment such as are involved in this present proceeding before the World Court. In all matters of commercial intercourse between nations, trade, treaties and conventions are going to be of increasing significance. There must be some orderly method of determining the inevitable differences of opinion which will occur....."¹³⁹

Overseas engagements

Overseas visits by Australian Prime Ministers and other officials have always been politically controversial. The media have little difficulty in whipping up resentful attitudes towards the efforts of successive leaders to play a full part in international affairs. Because of advances in the speed and economy of

¹³⁶ Jenny Hocking, n 1 above, p. 170-171.

¹³⁷ M.D. Kirby, n 2 above, p. 20.

¹³⁸ Jenny Hocking., *Lionel Murphy: A Political Biography*, Melbourne, 2000, cited in Jenny Hocking., n 111 above, p. 233.

¹³⁹ Gough Whitlam., "The Seventeenth Legal Convention of The Law Council of Australia Perth 4-10th July, 1973 Opening Ceremony" (1973) 47 *Australian Law Journal* 416.

international travel this had, by 1972, become easier and more frequent. But Whitlam was probably the first modern Australian Prime Minister, willing, where he deemed it useful, to travel overseas to advance his perception of Australia's interests and its full engagement with the world. This was so despite its geographical isolation. Between 14 December 1974 and 21 January 1975, Whitlam, as Prime Minister of Australia, visited Sri Lanka, Belgium, the headquarters of the European Communities in Brussels, Britain, Ireland, Greece, the Netherlands, France, Italy, Yugoslavia, the Soviet Union, the Federal Republic of Germany, Pakistan and Bangladesh.¹⁴⁰ In justifying these missions abroad Whitlam offered several explanations.

First, he invoked his belief that an important responsibility of the Prime Minister of Australia was to promote the nation's place in the world.¹⁴¹ This duty, in Whitlam's view, was discharged by making direct contact with governments in states around the world. The objective was to create stronger ties between the states in question and Australia with respect to a variety of matters involving economics, the environment, human rights, intellectual property rights and trade, to name but a few.¹⁴² As Whitlam explained, "only a visit by a head of government obliges the countries visited to clarify and coordinate their policies towards us".¹⁴³

Secondly, Whitlam wanted to emphasise Australia's continuing and substantial interest in Europe and to strengthen Europe's awareness of Australia.¹⁴⁴ His view was that, by visiting Europe personally, he had accomplished this objective.¹⁴⁵ Specifically, he wanted to make clear to the world the important

¹⁴⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 1975, 61 (Mr. Gough Whitlam, Prime Minister).

¹⁴¹ *Ibid.*

¹⁴² *ibid.*

¹⁴³ Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 1975, 62 (Mr. Gough Whitlam, Prime Minister).

¹⁴⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 1975, 66 (Mr. Gough Whitlam, Prime Minister).

¹⁴⁵ *Ibid.*

changes that had occurred in Australia's policies in a number of areas following the first change of government in 23 years.¹⁴⁶

Thirdly, Whitlam sought to establish or strengthen personal contacts with the heads of government of important countries and to exchange opinions with them on issues such as common economic problems including inflation and unemployment.¹⁴⁷ In this respect, at first hand, Whitlam sought to discuss Australia's interest in long-term arrangements for access for Australia's commodities to established and new markets, especially in Europe.¹⁴⁸

Fourthly, Whitlam sought to do what many previous Prime Ministers of Australia had not done. This was to adopt an energetic internationalist outlook for Australia. To support this proposition, at least by inference, Whitlam said:

“No Australian Prime Minister had visited the Soviet Union in the 33 years since diplomatic relations were established between the Soviet Union and Australia. Many of the countries I visited had not previously been visited by an Australian Prime Minister”.¹⁴⁹

In Brussels, London, The Hague, Paris, Rome, Bonn and Moscow Whitlam repeatedly asserted Australia's intention to develop her own enrichment capability so that as much uranium as possible could be exported safely in an enriched form.¹⁵⁰ His prediction of Australia's role as a potential major supplier of uranium meant that Australia's importance within the international community could increase but within a framework that respected the United Nations non proliferation safeguards.¹⁵¹

¹⁴⁶ *ibid.*

¹⁴⁷ *ibid.*

¹⁴⁸ *ibid.*

¹⁴⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 1975, 61 (Mr. Gough Whitlam, Prime Minister).

¹⁵⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 1975, 63 (Mr. Gough Whitlam, Prime Minister).

¹⁵¹ *Ibid.*

Within the context of meat exports, Whitlam took up with the then European Economic Community (EEC) issues regarding the Community's import restrictions on Australian beef.¹⁵² He explained to the EEC the disruptive and harmful effects of its actions on the Australian meat industry. He indicated to European leaders the need for stable, long-term marketing arrangements.¹⁵³ According to Whitlam, the response of the individual governments was, in the main, "apologetic and sympathetic".¹⁵⁴

In a number of countries Whitlam discussed the energy crisis and the Middle East. Whitlam assured European leaders that, while Australia agreed that an increase in the price of crude oil was justified, it did not wish to see a confrontation developing between cartels of producers and consumers.¹⁵⁵ In relation to Whitlam's discussions concerning the Middle East, he repeatedly asserted the right of all countries in the Middle East, including Israel, to secure and recognised international boundaries.¹⁵⁶

As political leader of the Australian people, Whitlam took the opportunity of a number of visits to capitals, such as Paris, Bonn and Rome, to urge greater support for the Nuclear Non-Proliferation Treaty.¹⁵⁷ Australia wanted to see the Nuclear Non-Proliferation Treaty strengthened and for all states to accept the multilateral obligations that the Treaty creates.¹⁵⁸

In Sri Lanka and Yugoslavia Whitlam discussed Australia's interest in the Third World and the Non-Aligned Movement (NAM). NAM was an international organisation of states that did not consider themselves formally aligned with, or

¹⁵² *ibid.*

¹⁵³ *ibid.*

¹⁵⁴ *ibid.*

¹⁵⁵ *ibid.*

¹⁵⁶ *ibid.*

¹⁵⁷ *ibid.*

¹⁵⁸ *ibid.*

against, any major power bloc.¹⁵⁹ Although Australia was aligned with Western powers including the United States and Britain, Whitlam explained to non-aligned countries, such as Sri Lanka and Yugoslavia, that Australia would like to attend future meetings of the non-aligned group either as a guest or as an observer, on the basis that Australia had interests that overlapped with those of many countries in the Third World.¹⁶⁰

In several countries visited, Whitlam had discussions concerning issues arising in the Indian Ocean. In Whitlam's view, to support any further development of military bases in the Indian Ocean or any long-term naval deployments in the area was to support an escalation and heightening of tension in the region.¹⁶¹ He opposed this.

Whilst in Western Europe, Whitlam had discussions on the question of capital investment in Australia. He made it clear that the Australian Government continued to welcome foreign investment but that it wished "as far as possible" to control its own industries and resources.¹⁶² Whitlam had agreed to raise with Australian taxation authorities the strongly expressed interest of the Belgian, Netherlands and Italian governments in negotiating double taxation agreements with Australia.¹⁶³ In addition, Whitlam had agreed that a West German mission should visit Australia to discuss, in detail, all aspects of German investments in Australia.¹⁶⁴

In order to ensure that Australia's sovereignty was fully exercised in all judicial matters, Whitlam held talks with Prime Minister Harold Wilson of the United Kingdom extending to Australian constitutional issues. These included the need

¹⁵⁹ Grant Cedric., "Equity in Third World Relations: A Third World Perspective" (1995) 71(3) *International Affairs* 567.

¹⁶⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 1975, 64 (Mr. Gough Whitlam, Prime Minister).

¹⁶¹ *Ibid.*

¹⁶² *ibid.*

¹⁶³ *ibid.*

¹⁶⁴ *ibid.*

to limit the right of appeal to the Judicial Committee of the Privy Council.¹⁶⁵ The Whitlam Government secured the enactment of Bills to give effect to the Government's policy on Privy Council appeals.¹⁶⁶ That policy was to invest the High Court of Australia with final jurisdiction in all questions and matters decided by that court.¹⁶⁷ The *Privy Council (Appeals from the High Court) Bill* 1975 (Cth) had the effect of precluding further appeals from the High Court. This measure was in addition to the limitation of appeals in constitutional and federal matters, which had already been enacted by the *Privy Council (Limitation of Appeals) Act* 1968 (Cth), presented on the initiative of the Coalition Government.¹⁶⁸

It had been 33 years since a former Labor government had established diplomatic relations with the Soviet Union.¹⁶⁹ Invoking these credentials, during a visit to Moscow, Whitlam was able to raise a number of human rights issues with the government of the Soviet Union. Whilst the Soviet Union maintained that these were matters within its domestic jurisdiction, and thus not within the scope of outside interference, Whitlam contended otherwise:

“I raised the matter of ‘Operation Reunion’, that is, the scheme under which persons resident in the Soviet Union seek to join relatives or friends in Australia. Prime Minister Kosygin listened with courtesy to my presentation and replied in some detail on the question of Jewish emigration from the Soviet Union and on the question of ‘Operation Reunion’. The Soviet Government takes the view that these are matters of purely domestic concern. Australia, for her part, believes that on any matters involving broad humanitarian rights, nations have a duty to put their viewpoints strongly”.¹⁷⁰

¹⁶⁵ *ibid.*

¹⁶⁶ *ibid.*

¹⁶⁷ Gough Whitlam., “The Constitution versus Labor”, Chifley Memorial Lecture 1957, in E.G. Whitlam on Australia's Constitution, 1977, 15, p. 43-4. This resulted in the enactment of the *Privy Council (Appeals from the High Court) Act* 1975 (Cth). See also *Kirmani v Captain Cook Pty Ltd* [No 2] (1985) 159 CLR 461.

¹⁶⁸ Michael Kirby., n 2 above, p. 6-8.

¹⁶⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 1975, 65 (Mr. Gough Whitlam, Prime Minister).

¹⁷⁰ *Ibid.*

In Paris, Whitlam secured agreement that a French trade mission would visit Australia to explore the possibility of increasing commercial exchanges between the two countries.¹⁷¹ It was also agreed that negotiations should be opened on a Cultural Agreement between Australia and France and an Agreement between officials of the Australian Department of Foreign Affairs and the Quai d'Orsay.¹⁷² Most importantly, by undertaking successful talks with the highest levels of the French Administration, Whitlam was able to resolve strains that had developed between France and Australia in consequence of France's atmospheric testing in the Pacific, which concluded before the ICJ.¹⁷³

With respect to Whitlam's visit to Bangladesh, he set about expressing the sympathy which the Australian Government and people felt for the people of Bangladesh in their struggle to feed their population.¹⁷⁴ Whitlam suggested to Sheik Mujib, political leader of Bangladesh, international arrangements under which some of the developed countries with capital, such as the Federal Republic of Germany or Japan, might use a portion of their petrodollars to finance the purchase of wheat on credit from grain producers such as Australia.¹⁷⁵ For Whitlam, it was "not right that the whole burden for supply as aid, or selling on credit, of wheat for Bangladesh should fall on the relatively few countries which produce surplus grain".¹⁷⁶

United Nations

Recognising Australia's engagement with international law as a matter of great importance for the policy of the Australian Government, Whitlam emphasised that "it is through membership of the United Nations that Australia best asserts its national independence and international identity".¹⁷⁷ Under the Whitlam Government, Australia set about actively involving itself with the United

¹⁷¹ *ibid.*

¹⁷² *ibid.*

¹⁷³ *ibid.*

¹⁷⁴ *ibid.*

¹⁷⁵ *ibid.*

¹⁷⁶ *ibid.*

¹⁷⁷ Gough Whitlam., n 25 above, p. 171.

Nations. It embraced a multilateral approach to basic engagements with foreign countries. In Australia's political history, since at least the Second World War, this issue of multilateral as against bilateral engagement has often been a point of distinction between Labor and Coalition Governments.

On the initiative of Whitlam, Australia contributed, for the first time, to the United Nations funds established to assist the educational development and other aspirations of the people of Africa.¹⁷⁸ This policy was not only a further example of Whitlam's commitment to matters of international concern but a demonstration of practical engagement that had not always been a feature of the policies of his predecessors.

Whitlam set about ensuring that Australia was represented at an international conference of experts held in Oslo for the support of victims of colonialism and apartheid in southern Africa.¹⁷⁹ This was another example of his broad concern for human rights, namely, the right of peoples to exercise self-determination and to enjoy political independence. The purpose of the conference was to formulate a constructive program of peaceful action to facilitate and hasten the process of decolonisation and the elimination of apartheid.¹⁸⁰ These were very large themes in global foreign relations in the 1970s to the 1990s.

Another diplomatic conference convened by the Swiss Federal Council held several sessions in Geneva from 1974 to 1977 to negotiate the final text of Protocol I and Protocol II additional to the 1949 *Geneva Conventions*.¹⁸¹ Australian delegations, with instructions from the Whitlam Government, unsurprisingly took an active part in the drafting and adoption of the

¹⁷⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 24 May 1973, 2649 (Mr. Gough Whitlam, Prime Minister).

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

¹⁸¹ Gough Whitlam., "Australia and the UN commission on human rights" (1991) 45(1) *Australian Journal of International Affairs*, p. 51.

Protocols.¹⁸² Protocol I is concerned with the protection of victims of international armed conflicts. Protocol II concerns the protection of victims of non-international armed conflicts.¹⁸³

In June 1974, the Whitlam Government appointed a National Advisory Committee for the then proposed United Nations' International Women's Year of 1975.¹⁸⁴ The Chair of the Committee was Whitlam's wife, Margaret Whitlam. Elizabeth Reid, the Prime Minister's adviser on women, headed the Committee's Secretariat.¹⁸⁵ At several United Nations meetings, Australia gave support to non-racial voting at the General Assembly. It changed Australia's voting on the credentials of South Africa.¹⁸⁶ In addition, in Australia, the Federal Government banned racially-selected South African sporting teams from entering Australia while that country remained under an apartheid regime.¹⁸⁷

The Vietnam War was still being waged when Whitlam was elected to Government. Australian troops were fighting on the side of the forces of South Vietnam. Australian servicemen were, in part, conscripted by a ballot conducted pursuant to the *National Service Act 1951* (Cth). Whitlam saw the United Nations as a key player in the settlement of the dispute. In his view, an end to the war could only be achieved politically, not militarily, and only under the auspices of the United Nations Organisation.¹⁸⁸ Whitlam's condemnation throughout the Vietnam War had been addressed to the "damning record of Government's lack of interest in negotiations" and the failure of the government to use its influence with the United States and to work with the United Nations to bring about a negotiated resolution of the war.¹⁸⁹

¹⁸² Ibid.

¹⁸³ *ibid.*

¹⁸⁴ National Archives of Australia, n 116 above.

¹⁸⁵ Ibid.

¹⁸⁶ *ibid.*

¹⁸⁷ *ibid.*

¹⁸⁸ Jenny Hocking., n 1 above, p. 301.

¹⁸⁹ Gough Whitlam., "Extract from speech to Adelaide University ALP Club", cited in Jenny Hocking, n 1 above, p. 301.

Whitlam explained his travels to various countries by reference to the opening up of opportunities for Australia that had been neglected for many years:

“My visit to China ended a generation of lost contact with a quarter of the world’s people. My visits to the United States, Japan, Indonesia and India consolidated, improved and matured existing relationships of great importance to us. My visit to the Soviet Union has marked a new stage in the development of practical and realistic relationships with the other most powerful nation on earth. My visit to Europe has reasserted our strong and continuing interest in the European Community and, I believe, rekindled Europe’s interest in strong, progressive and independent Australia. Taken together, we have begun to fashion a more contemporary relationship with Europe-East and West- more appropriate to the changed conditions of our time. We can now say confidently that Australia has got her relations right, not just with the countries nearest to us, but also with most nations of importance, and regions of importance, in the world”.¹⁹⁰

USE OF INTERNATIONAL LAW IN EXPRESSING AND DEVELOPING AUSTRALIAN LAW

Introduction

Much of the legislation that was enacted in Australia between the reconvening of the Parliament early in 1973 and November 1975 was the result of Whitlam’s Government giving effect to Australia’s obligations, under the assortment of international law principles described above. Australia’s sovereignty was not undermined but exercised to accommodate Australian law to international legal principles.

Aboriginal and indigenous issues

By 1972, the neglect of the rights of Australia’s indigenous peoples was a serious national concern. It was one that Whitlam sought to address, in part encouraged by the growing treatment of such issues in international law. Professor Kenneth Maddock, commenting on Whitlam’s policies regarding the Aboriginal and Indigenous peoples, observed:

¹⁹⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 1975, 67 (Mr. Gough Whitlam, Prime Minister).

“The tendency has been to take sides, while offering only the barest justification. In 1972, for example, Gough Whitlam announced that his party would, if elected, ‘give Aborigines land rights – not just because their case is beyond argument, but because all of us as Australians are diminished while the Aborigines are denied their rightful place’. How could the case be beyond argument? Whitlam’s was, of course, a pioneering and prophetic statement. It soon bore fruit in the Woodward inquiry and the Land Rights Act. But unless the principles that might justify land rights are examined, support for the Aboriginal case – or opposition to it – seems arbitrary, a matter of emotion, intuition or party policy. The bystander is left as much in the dark as by conflicting cries of ‘Revolution rah!’ and ‘Revolution bah!’”¹⁹¹

Australia’s ratification of the *International Convention on the Elimination of all Forms of Racial Discrimination* (CERD) helped to alter the *Zeitgeist* within which Australia’s domestic law on this topic developed. For example, the ratification of CERD supported the passage of the *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975* (Cth) and the *Racial Discrimination Act 1975* (Cth).¹⁹²

In general terms, the *Racial Discrimination Act 1975* (Cth) makes racial discrimination unlawful in Australia. Pursuant to section 9(1) of the Act it is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life. Such a statutory provision means that Aboriginal and Indigenous peoples in Australia, who had been discriminated against based on the ground of their race, could seek redress by the enforcement of provisions of Australian law.

The enactment of the *Racial Discrimination Act 1975* (Cth) marked an important evolution in Australian law. Throughout Australia’s history, laws had worked to

¹⁹¹ Kenneth Maddock., *Your land is our land: Aboriginal land rights*, Penguin, 1983, p. 177-178.

¹⁹² *Ibid.*

discriminate *against* Aboriginal and Indigenous peoples. For years, many Aboriginal and Indigenous peoples could not vote in national elections. Some mandatory sentencing legislation had the effect of placing offenders of Aboriginal and Indigenous backgrounds in prison for crimes, that, without such laws, would not have warranted their incarceration. There were many other such laws.

On 15 December 1972, very soon after his appointment as Prime Minister, Whitlam responded to the failure of the Northern Territory Government to respond to the Land Rights Case in 1971 by setting in train a Royal Commission into Aboriginal land rights. Justice Edward Woodward was appointed as Royal Commissioner.¹⁹³ In the fullness of time, his report led to the enactment of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), implementing findings of the Royal Commission, and securing the establishment of an elected National Aboriginal Consultative Committee.¹⁹⁴ In 1972, the Whitlam Government established the Department of Aboriginal Affairs. This action responded to the 1967 referendum which had adopted the constitutional change which gave the Australian Parliament the power to make special laws for Aboriginal people.¹⁹⁵ All such moves by the Whitlam Government were consistent with international human rights conventions including CERD, ICCPR and the ICESCR.

The passage of the *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975* (Cth) gave effect, in part, to the ratification of CERD by Australia. It was an Act with respect to the peoples of the Aboriginal race of Australia and the race to which Torres Strait Islanders belong, with the

¹⁹³ *ibid.*

¹⁹⁴ *ibid.*

¹⁹⁵ National Museum of Australia., “Gough Whitlam”, cited on http://www.nma.gov.au/education/school_resources/websites_and_interactives/primeministers/gough_whitlam/ [Accessed 08/12/2009]. On the ambit of the added power, see *Kartinyeri v The Commonwealth* (1998) 195 CLR 337.

purpose of preventing discrimination in certain respects against those peoples under the laws of the State of Queensland.¹⁹⁶

In 1973 the *Migration Act* 1973 (Cth) was also passed. It was an Act to amend the *Migration Act* 1958-1966 (Cth) for the purpose of removing residual restrictions on the departure of Aboriginals from Australia.¹⁹⁷

Other statutes, enacted during the Whitlam Government to ensure that Aboriginal and Indigenous peoples were provided with equal treatment in Australia and not discriminated against, included the *Aboriginal Affairs (Arrangements with the States) Act* 1973 (an Act providing for arrangements with the States with respect to Aboriginal Affairs); the *State Grants (Aboriginal Advancement) Act (No. 2)* 1973 (Cth) (an Act to grant financial assistance to the States in connection with the Welfare and Advancement of the Aboriginal People of Australia); the *Aboriginal Land Fund Act* 1974 (Cth) (an Act to assist Aboriginal Communities to acquire Land outside Aboriginal Reserves); and the *Aboriginal Loans Commission Act* 1974 (Cth) (an Act relating to the provision of financial assistance for certain purposes conducive to the Advancement of the Aboriginal People of Australia).

On 16 August 1975, at Wattie Creek in the Northern Territory, Whitlam, as Prime Minister of Australia, formally handed to the Gurindji people title deeds to part of their traditional lands.¹⁹⁸ This was the conclusion of a decade of struggle after the Gurindji first walked off Wave Hill Station to assert their claim to their traditional lands at Daguragu.¹⁹⁹

¹⁹⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, *The Acts of the Session*, 1975, Second Session, xi (Hansard).

¹⁹⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, *The Acts of the Session*, 1973, First Session, x (Hansard).

¹⁹⁸ National Archives of Australia., n 116 above.

¹⁹⁹ *Ibid.*

Whitlam's concern to secure the enactment of laws that had the effect of protecting the rights of the Aboriginal people can be understood in the light of the policy speech he gave before the federal election in 1972. The speech represents one of the most important opinions that Whitlam ever expressed concerning the Aboriginal people of Australia:

“Let us never forget this: Australia's real test as far as the rest of the world, and particularly our region, is concerned [with] the role we create for our own aborigines. In this sense, and it is a very real sense, the aborigines are our true link with our region. More than any foreign aid program, more than any international obligation which we meet or forfeit, more than any part we may play in any treaty or agreement or alliance, Australia's treatment of her aboriginal people will be the thing upon which the rest of the world will judge Australia and Australians - not just now, but in the greater perspective of history. The world will little note, nor long remember, Australia's part in the Vietnam intervention. Even the people of the United States will not recall nor care how four successive Australian Prime Ministers from Menzies to McMahon sought to keep their forces bogged down on the mainland of Asia, no matter what the cost of American blood and treasure, no matter how it weakened America abroad and even more at home. The aborigines are a responsibility we cannot escape, cannot share, cannot shuffle off; the world will not let us forget that”.²⁰⁰

Communications and crime

In the area of corporate affairs and communications, a number of Acts were passed that were influenced by principles applicable beyond Australia's border. For example, the enactment of the *Foreign Takeovers Act 1975* (Cth) was aimed primarily at regulating the foreign control of defined business enterprises and of certain rights relating to minerals.²⁰¹ In the event of a breach of the provisions of the Act, foreign companies could be subjected to prosecution in Australia, notwithstanding the fact that their business was incorporated in another jurisdiction beyond Australia.²⁰²

²⁰⁰ Gough Whitlam., “It's Time for Leadership”, November 13, 1972, Blacktown Civic Centre, cited on http://whitlamdismissal.com/speeches/72-11-13_it's-time.shtml [Accessed 03/01/10].

²⁰¹ See section 1 of the *Foreign Takeovers Act 1975* (Cth).

²⁰² See sections 16, 30, 31 and 34 of the *Foreign Takeovers Act 1975* (Cth).

Another Act passed in Australia, influenced by international law principles, was the *Postal Services Act 1975* (Cth). This related to the provision of postal services within Australia and between Australia and places outside Australia. With respect to services between Australia and places outside Australia, the Act would be redundant unless Australia and the country in question had reached some formal agreement related to postal services between the two countries.

Also in 1975, the Whitlam Government enacted the *United States Naval Communications Station Agreement Act 1975* (Cth). This related to the United States Naval Communications Station established at North West Cape in Western Australia. The Act involved legislation developed as a result of international legal principles, namely, a bilateral international agreement reached between Australia and the United States of America expressed in the *Supplemental Agreement constituted by the Notes exchanged, on 21 March 1974, on behalf of the Government of Australia and the Government of the United States of America*.²⁰³

Within the area of international crime, the Whitlam Government procured the enactment of the *Crimes (Protection of Aircraft) Act 1973* (Cth). This was an Act to approve the ratification by Australia of the *Convention for the Suppression of Unlawful acts against the Safety of Civil Aviation*; to give effect to that Convention; and to provide for the punishment of unlawful acts of the kinds dealt with by the Convention in certain circumstances in which that Convention did not, in terms, apply.²⁰⁴ For example, the Act makes it an offence for a person unlawfully and intentionally to perform an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft.²⁰⁵

²⁰³ See section 3 of the *United States Naval Communications Station Agreement Act 1975* (Cth).

²⁰⁴ See section 1 of the *Crimes (Protection of Aircraft) Act 1973* (Cth).

²⁰⁵ See section 7(1)(a)(i) of the *Crimes (Protection of Aircraft) Act 1973* (Cth).

Employment and ADR

An important enactment adopted during the Whitlam Government was the *International Labour Organisation Act 1973* (Cth). That Act concerned the constitution of the International Labour Organisation (ILO). Its primary purpose was to enable the Federal Parliament to approve ratification by Australia of *Amendments to the constitution of the International Labour Organisation*.²⁰⁶ By enacting domestic laws to give effect to amendments to the constitution of the ILO, the Whitlam's Government was directly demonstrating Australia's continued support for the main functions of the ILO:

“The International Labour Organization (ILO) is devoted to advancing opportunities for women and men to obtain decent and productive work in conditions of freedom, equity, security and human dignity. Its main aims are to promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue in handling work-related issues”.²⁰⁷

Such initiatives did not stop there. The Parliament also enacted the *Arbitration (Foreign Awards and Agreements) Act 1974* (Cth). That was an Act to approve accession by Australia to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*; to give effect to that Convention; and for related purposes. One of those purposes was set out in section 8(1) of the *Arbitration (Foreign Awards and Agreements) Act 1974* (Cth). That sub-section made it clear that a foreign award was binding for all purposes on the parties to the arbitration agreement in pursuance of which it was made. Further, pursuant to section 8(2) of the Act, a foreign award could be enforced in a court of a State or Territory as if the award had been made in that State or Territory in accordance with the law of that State or Territory.

²⁰⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 12 April 1973,1436 (Mr. Clyde Cameron, Minister for Labour).

²⁰⁷ International Labour Organisation., “About the ILO”, cited on http://www.ilo.org/global/About_the_ILO/lang--en/index.htm [Accessed 03/01/10].

Whitlam was naturally alive to the fact that unemployment in Australia rose during his time in Government. However, he offered a few political rejoinders in an address in 1977 when he said, speaking of the then Coalition Government:

“They still seek to evade their responsibility by pointing to rising unemployment when Labor was in office. Everyone knows that unemployment in Australia increased between 1972 and 1975 when the world was first gripped by recession; but it increased in that time in every major western country. Between the end of 1972 and the end of 1975 unemployment went up in every OECD country. The difference is that while unemployment has since fallen in other western countries, in Australia it has steadily risen”.²⁰⁸

Australia’s future, in industrial relations and other areas, Whitlam said, “depends on the implementation of the best international practice”.²⁰⁹ Apart from the other uses that could be made by Aboriginal and Indigenous peoples of the *Racial Discrimination Act 1975* (Cth), applicants seeking employment might be able to look for redress for any failure to secure employment, in the event that actions were taken against them that constituted racial discrimination in contravention of the 1975 Act.

Environment

One of the key Acts concerning the environment passed during the Whitlam Government was the *National Parks and Wildlife Conservation Act 1975* (Cth). That Act makes provisions for the establishment of national parks and other parks and reserves and the protection and conservation of wildlife.²¹⁰ The Act established a service to plan and manage national parks in line with established international standards.²¹¹ In part because of his concerns about international human rights law principles, Whitlam ensured that the Act itself provided protections within such spaces for minority groups in Australia, such as

²⁰⁸ Gough Whitlam., “New Federalism or National Unity?”, *John Curtin Memorial Lecture*, 1977, cited on <http://john.curtin.edu.au/jcmemlect/whitlam1977.html> [Accessed 18/12/09].

²⁰⁹ Gough Whitlam., “Reflections: An Address to the Murdoch Student Law Society” (1998) 5(1) *Murdoch University Law*, cited on <http://www.murdoch.edu.au/elaw/issues/v5n1/whitlam51.html#t5> [Accessed 16/12/09].

²¹⁰ See section 1 of *National Parks and Wildlife Conservation Act 1975* (Cth).

²¹¹ National Museum of Australia., n 195 above.

Aboriginals. Thus, pursuant to section 70(1) of the Act, nothing in the Act could prevent Aboriginals from continuing, in accordance with law, the traditional use of any area of land or water for hunting or food-gathering (otherwise than for purposes of sale) as well as for ceremonial and religious purposes. Pursuant to section 18(2)(a) of the Act, the Director was not permitted to take any action with respect to land that would affect Aboriginals, except after consultation with the Aboriginals concerned.

Another Act passed during the Whitlam Government in this area was the *Environment Protection (Impact of Proposals) Act 1974* (Cth). This Act made provision for protection of the environment in relation to projects and decisions of, or under the control of, the Australia Government.²¹² One of the objects of the Act was stated to be to ensure that matters affecting the environment to any significant extent were fully examined and taken into account in relation to the incurring of expenditure, by, or on behalf of, the Australian Government and authorities, either alone or in association with the government of another country, as any authority, body or person.²¹³

Health

Within the context of international law, Australia has long been a party to international instruments concerned with the attainment of the highest possible level of health for persons of the signatory States. Pursuant to Article 25(1) of *The Universal Declaration of Human Rights*, everyone has the right to a standard of living adequate for the health and well-being of himself and his family. This includes access to food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. According to Article 12(1) of the *International Covenant on Economic, Social and Cultural Rights*, which the

²¹² See section 1 of *Environment Protection (Impact of Proposals) Act 1974* (Cth).

²¹³ See section 5(1)(e) of the *Environment Protection (Impact of Proposals) Act 1974* (Cth).

Whitlam Government signed shortly after being elected, States Parties to the ICESCR recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

Many of the Acts passed during the Whitlam Government with respect to healthcare services, were adopted so that Australia could give effect to its obligations under international law in the regulation and promotion of the “highest attainable standard of physical and mental health”. One of the most important of such enactments was the *Health Insurance Act 1973* (Cth). That Act established ‘Medibank’, a national health scheme. It was funded by a levy which provided free public hospital treatment and medical equivalent to at least 85 per cent of the cost of medical and hospital services.²¹⁴

Two other Acts adopted during the Whitlam Government included the *Health Insurance Commission Act 1973* (Cth), to constitute a Health Insurance Commission,²¹⁵ and the *Hospitals and Health Services Commission Act 1973* (Cth), to make provision for the establishment of a Hospitals and Health Services Commission.²¹⁶

In the 1974 Budget, the Whitlam Government commenced a five-year program of capital assistance for the provision, expansion and modernisation of public hospitals in Australia.²¹⁷ A joint Hospital Works Council was established in each State to co-ordinate the use of State and Federal funds for this purpose.²¹⁸ In the 1978 Budget the Fraser Government terminated the contribution of federal funds to these purposes. The Hawke and Keating Governments did not restore

²¹⁴ National Museum of Australia., n 195 above.

²¹⁵ See section 1 of *Health Insurance Commission Act 1973* (Cth). See *Wong v The Queen* (2009) 236 CLR 573 at 587 [43]-[57]; 599-600 [87]; 631-639 [203]-[226].

²¹⁶ See section 1 of *Hospitals and Health Services Commission Act 1973* (Cth).

²¹⁷ Gough Whitlam., “John Curtin: Party, Parliament, People”, Inaugural Anniversary Lecture to mark the 53rd anniversary of John Curtin's death, JCPML Patron, 5 July 1998, cited on <http://john.curtin.edu.au/events/speeches/whitlamlecture.html> [Accessed 03/01/10].

²¹⁸ Ibid.

a joint Works Council in any State. Nor did the Howard Government change course.²¹⁹

International jurisprudence

Even before Whitlam was appointed as Prime Minister of Australia, he was concerned with the development of Australian law to reflect the influence of jurisprudence from around the world. In 1960, some twelve years before he became Prime Minister, he urged the adoption of “anti-monopoly” legislation, by reference to transnational jurisprudence in the area:

“Anti-monopoly legislation has existed in the United States and Canada since last century. Great Britain, under the Attlee government, introduced anti-monopoly legislation in 1948, and New Zealand, under the Nash government, did so in 1958. Why will we not do something similar? If every party in this Parliament supports an amendment to the Constitution we will get it. Does any honourable member doubt that the people would endorse such a recommendation being carried out to assist them? The only people who would suffer under such legislation would be those who are skimming off the cream at the moment”²²⁰

During the Whitlam Government, the *Trade Practices Act* 1974 (Cth) was enacted. Although notably amended during the Fraser Government in 1977, it remains substantially the template for the Australian law on fair trade practices.²²¹ Whitlam sought to ensure that Australia was not significantly behind other developed countries in this area of law. The importance of the Act can be measured by reference to the fact that many of the substantive statutory provisions introduced by the Whitlam Government’s Act remain good law today.

A very significant legal institution conceived and inaugurated by the Whitlam Government was the Australian Law Reform Commission (ALRC). It was created, pursuant to legislation, on 1 January 1975.²²² A key function of the ALRC was to monitor overseas legal systems to ensure that Australia

²¹⁹ *ibid.*

²²⁰ Gough Whitlam., CPD, 1 June 1960, 2150, cited in Michael Kirby., n 2 above, p. 17.

²²¹ Michael Kirby., n 2 above, p. 17.

²²² Australian Law Reform Commission., “About the ALRC”, cited on <http://www.alrc.gov.au/about/index.htm> [Accessed 09/12/2009].

compared favourably with international best practice and specifically with the provisions of the ICCPR.²²³ Whitlam displayed a close interest in the work of the commission and in the achievement of law reform more generally.

International human rights

One of the most prominent areas of Australian law that was influenced by international law was the law of human rights. Many of the statutes enacted by the Federal Parliament, during the Whitlam Government, were adopted so that domestic laws in Australia would more readily reflect Australia's respect for, and promotion of, universal human rights.

The *Racial Discrimination Act* 1975 (Cth) was obviously one of the more important of such enactments. The Act made racial discrimination unlawful in Australia. It also provided an effective means to sanction racial prejudice.²²⁴ The Act introduced into Australian law, for the first time, affirmative obligations, expressed in the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD).²²⁵ The Act represented an important step in the Whitlam Government's programme to protect human rights.²²⁶ It afforded the basis upon which Australia might comply with the obligations imposed by CERD.²²⁷ When debating the introduction of the *Racial Discrimination Bill* in Australia, members of the Whitlam Government justified the enactment of such a law on the basis that similar legislation had been adopted by other common law countries:

“Yet in 1965 – 10 years ago – the Race Relations Act was passed in the United Kingdom. It forms the basis not only of the Bill we are discussing

²²³ Ibid.

²²⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 1975, 285 (Mr. Enderby, Attorney-General and Minister for Customs and Exercise).

²²⁵ See section 7 of the *Racial Discrimination Act* 1975 (Cth).

²²⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 1975, 286 (Mr. Enderby, Attorney-General and Minister for Customs and Exercise).

²²⁷ Ibid.

tonight but also of succeeding legislation in the United Kingdom, New Zealand, Canada and the United States of America".²²⁸

Whitlam's initiative in signing the *International Covenant on Civil and Political Rights* (ICCPR) became the basis on which his Government attempted to introduce a statutory *Human Rights Bill* to give effect to the ICCPR.²²⁹ However, the *Human Rights Bill* failed to pass the Senate.²³⁰ In terms, the *Bill* sought to overrule inconsistent State and Federal legislation.²³¹ The main opposition to the *Bill* was expressed by several of the States.²³² It thus became an early arrival in the graveyard of Australian measures designed to afford a modern human rights law for this nation. In time, that particular graveyard became heavily utilised. The conservative undertakers are now gleefully preparing a new plot and a fresh gravestone.

A measure presented by the Whitlam Government, influenced by international law principles, was the *Death Penalty Abolition Act 1973* (Cth). It abolished capital punishment under the laws of the Commonwealth and under certain other laws in relation to which the powers of the Federal Parliament extend.²³³ Various international law instruments influenced the passage of the Act. For example, Article 3 of *The Universal Declaration of Human Rights* (UDHR) provides that everyone has the right to life, liberty and security of person. Moreover, Article 1(1) of the *Second Optional Protocol to the International Covenant on Civil and Political Rights* (SOP) makes it plain that no one, within the jurisdiction of a State Party to the Optional Protocol, may be executed. In addition, Article 1(2) imposes a positive duty upon States Parties to the Convention to take all necessary measures to abolish the death penalty within

²²⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 6 March 1975, 1223 (Mr. Clayton).

²²⁹ Michael Kirby., n 2 above, p. 20.

²³⁰ Kirk McKenzie., "A Long History On The Right Side Of Rights" in *The New Matilda*, 8 December, 2008: <http://newmatilda.com/2008/12/08/long-history-right-side-rights> [Accessed 10/12/2010].

²³¹ John Harley., "Protecting Human Rights in the Age of Fear", 28 July 2004, cited on <http://www.opa.sa.gov.au/downloads/protecting%20human%20rights.pdf> [Accessed 02/01/10].

²³² *Ibid.*

²³³ See long title of the *Death Penalty Abolition Act 1973* (Cth).

their jurisdictions. As Australia is a party to both the UDHR and SOP, the passage of the *Death Penalty Abolition Act 1973* (Cth) gave effect to these international treaties. The measures also gave effect to a long standing policy of the Australian Labor Party. That policy dated back to the early years of the twentieth century when a Labor Government in Queensland secured the abolition of the death penalty – the first jurisdiction of the British Empire to do so.

With respect to Australia's support for Papua New Guinea's independence and sovereignty, the Parliament passed several laws to grant autonomy to the people of Papua New Guinea, to the full extent that Australian law could do so. The Whitlam's Government secured the enactment of the *Papua New Guinea Act (No 2) 1973* (Cth), to provide for the internal self-government of Papua New Guinea.²³⁴ In addition, the Government obtained the passage of the *Papua New Guinea Independence Act 1975* (Cth), relating to the attainment of full independence by Papua New Guinea.²³⁵ As a result, pursuant to section 4 of the latter Act, on the expiration of the day preceding Independence Day, Australia ceased to have any sovereignty, sovereign rights or rights of administration in respect of, or appertaining to, the whole or any part of Papua New Guinea.²³⁶ The foregoing Acts were influenced by several international law principles, none more important than that set out in the common Article 1(1) of ICCPR and ICESCR which provides that all peoples have the right of self-determination. By virtue of that right, they are empowered to determine freely their political status and freely to pursue their economic, social and cultural development.²³⁷

In the area of health and human rights, the Whitlam Government secured the enactment of the *Handicapped Persons Assistance Act 1974* (Cth). This

²³⁴ See section 1 of *Papua New Guinea Act (No 2) 1973* (Cth).

²³⁵ See long title of *Papua New Guinea Independence Act 1975* (Cth). See *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Ame* (2005) 222 CLR 439.

²³⁶ See sections 4 and 5 of the *Papua New Guinea Independence Act 1975* (Cth).

²³⁷ See further Article 1(2) of the *International Covenant on Civil and Political Rights*.

provided for assistance in the availability of facilities for handicapped children, disabled persons and other defined persons.²³⁸ The Act was evidence that Australia was taking steps to comply with Articles 12(2)(c)-(d) of the ICCPR. Under such provisions States Parties were required to take steps to achieve the full realization of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. According to Articles 12(2)(c)-(d) of the ICCPR, States Parties had to take all steps to prevent, treat and control all types of diseases and create conditions which would assure that medical attention was available in the event of sickness.

Upon his appointment as Prime Minister in 1972, Whitlam immediately fulfilled his unqualified electoral commitment to abolish conscription for military service; to release all imprisoned draft resisters; and to expunge any convictions for such offences relating to failure or refusal to take part in the Vietnam War.²³⁹ The Whitlam Government's policy in relation to the Vietnam War was important, because it was, at least in part, shaped by Whitlam's own concern that many conscripted Australians had been deprived of basic human rights by being obliged to participate in a war which they could not in conscience support.²⁴⁰ The abolition of conscription followed Whitlam's understanding of a number of international human rights principles.

For example, Article 3 of the UDHR provides that everyone has the right to life, liberty and security of person. Whitlam understood that conscripted Australians were having their liberty taken away without their consent, and possibly subjected to a grave risk to life and security of person, in the event they were obliged to serve unwillingly as combat troops. Conscription was also limited by law to defined members of the Australian *male* population, as opposed to

²³⁸ See section 1 of *Handicapped Persons Assistance Act 1974* (Cth).

²³⁹ Bob Scates., *Draftsman Go Free: A History of the Anti-Conscription Movement in Australia*, self-published, Richmond, Vic, 1988, p.102.

²⁴⁰ National Museum of Australia., n 195 above.

women and non-able bodied males who were exempted from conscription.²⁴¹ This principle appeared to violate Article 2 of the UDHR. That article provides that everyone is entitled to all of the stated rights and freedoms without distinction of any kind, such as one based upon the sex of the individual.

The Whitlam Government also secured the enactment of the *Commonwealth Electoral Amendment Act 1973* (Cth). This was an Act to lower to eighteen years the age qualification for enrolment, voting and candidature for federal parliamentary elections.²⁴² Although there is no evidence that the change of the *Commonwealth Electoral Act 1973* (Cth) was influenced by international law principles, it may have been, as there was no doubt Whitlam was a strong supporter and promoter of universal human rights. The implications of lowering to eighteen years the age qualification for enrolment in Australia was certainly consistent with Article 25(b) of the ICCPR. That provision makes it clear that all citizens shall have the right and the opportunity to vote and be elected at genuine periodic elections which shall be by universal and equal suffrage. Similar provisions are also found in Article 21 of the UDHR. Accordingly, by affording the opportunity to vote in political elections, Whitlam had allowed such persons, as legally adult citizens, the right to exercise voting opportunities and so to participate in the exercise of a basic human right.²⁴³

In line with his strong support for international human rights law, Whitlam was also concerned by the damage inflicted on Australia by the White Australia Policy. In opposition and then in government, he did all he could to change this.²⁴⁴ During his service as Prime Minister, he moved for the abolition of the last legal and policy vestiges of the White Australia Policy.²⁴⁵ Undoubtedly, these initiatives were influenced by Whitlam's view of human equality,

²⁴¹ *ibid.*

²⁴² See long title of *Commonwealth Electoral Act 1973* (Cth).

²⁴³ Gough Whitlam., "State Rights v World Values" (1995) 25 *University of Western Australia Law Review* 1, p. 7.

²⁴⁴ Gough Whitlam., quoted in Paul Kelly., *100 Years – The Australian Story*, Allen & Unwin, ABC Books, NSW, 2001, p. 196.

²⁴⁵ Absolute Astronomy., "Gough Whitlam", cited on http://www.absoluteastronomy.com/topics/Gough_Whitlam [Accessed 17/12/09].

specifically, that no one should be discriminated against on the basis of his or her race. This was a view that, no doubt, had support, in and outside Australia, but especially amongst minority groups that had been subjected to racial discrimination. Whitlam treated this issue as one of moral and legal imperatives. His opinions eventually evolved into the provisions of the *Racial Discrimination Act 1975* (Cth). That Act was designed to bury racial discrimination in the “bedrock of the seas”, never to rise again. Of course, this was easier said than done in Australia.²⁴⁶

State sovereignty

A number of federal acts, passed during the Whitlam Government, were directly influenced by Australia’s concern for assisting developing countries around the world. For example, the Government secured the enactment of the *Australian Development Assistance Agency Act 1974* (Cth), concerned with the provision by Australia of aid for developing countries. A similar Act was the *International Development Association (Further Payment) Act 1974* (Cth). It approved the making by Australia of further payments to the International Development Association (IDA).²⁴⁷ The IDA is the part of the World Bank that helps the world’s poorest countries.²⁴⁸ In a similar fashion, concerned with providing funds to an international institution, the Whitlam Government secured the enactment of the *Asian Development Fund Act 1974* (Cth). This authorised contributions by Australia to the Asian Development Bank (ADB) and for the purposes of an Asian Development Fund.²⁴⁹ The ADB is a regional development bank created in 1966 to encourage and support social development in Asian and Pacific countries through loans and technical

²⁴⁶ See *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 393-5 [210] – [215]; cf at 337 [14]; [2009] HCA 2.

²⁴⁷ See section 1 of *International Development Association (Further Payment) Act 1974* (Cth).

²⁴⁸ International Development Association., “What is IDA?”, cited on <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/IDA/0,,contentMDK:21206704~menuPK:83991~pagePK:51236175~piPK:437394~theSitePK:73154,00.html> [Accessed 17/01/10].

²⁴⁹ See section 1 of the *Asian Development Fund Act 1974* (Cth).

assistance.²⁵⁰ Before the Whitlam Government, nothing had been done to provide for Australia's full participation in this initiative.

A further law enacted during the Whitlam Government, influenced by international law, was the *Seas and Submerged Lands Act* 1973 (Cth). It addressed the Commonwealth's sovereignty over certain waters of the sea and of airspace over, and the sea-bed and subsoil beneath, those waters and sovereign rights in respect of the Continental Shelf and relating also to the recovery of minerals (other than petroleum) from the Sea-bed and subsoil beneath those waters and from the Continental Shelf.²⁵¹ The Act was influenced by international law in the sense that, by enacting the legislation in question, the Federal Parliament had sought to ensure that a fundamental principle of international law was upheld, namely, Australia's sovereign right to exercise control over the territorial sea that forms the subject of the Act.²⁵²

The Whitlam Government was also responsible for securing the enactment of the *International Monetary Agreements Act* 1974 (Cth), to authorize Australia to subscribe for additional shares of the capital stock of the International Bank for Reconstruction and Development.²⁵³ That Act was also obviously influenced by the international outlook pursued throughout the Whitlam Government. Thus, pursuant to section 4, the Treasurer could, on behalf of Australia, make an agreement or agreements with the *International Bank for Reconstruction and Development* providing for the purchase by Australia of 341 additional shares of the capital stock of the Bank, therefore cementing Australia's role and support for the Bank's international mission.

Anyone who reviews the foregoing chronicle fairly will acknowledge the energetic, consistent and substantially principled approach of Whitlam and his

²⁵⁰ Asian Development Bank., "Projects", cited on <http://www.adb.org/Projects/> [Accessed 18/01/10].

²⁵¹ See section 6 of *Seas and Submerged Lands Act* 1973 (Cth).

²⁵² See sections 7 and 10 of the *Seas and Submerged Lands Act* 1973 (Cth). See *New South Wales v The Commonwealth* (1975) 135 CLR 337.

²⁵³ See long title of *International Monetary Agreements Act* 1974 (Cth).

Government towards a new and fresh engagement of the Australian Commonwealth with the world around it. This was a turning point in Australia's relations with the world. Effectively, it has never been reversed. It demonstrates the power that ideas and the determination of a resourceful human being can still have in the course of a nation's affairs.

THE INFLUENCE OF H.F.E. WHITLAM

Introduction

Much has been written about Gough Whitlam and his life. However, comparatively few Australians today are acquainted with Harry Frederick Ernest Whitlam, ("Fred Whitlam") Gough's father. He had a large influence on his son, including on his view of Australia's place in the world.

Fred Whitlam was born on 3 April 1884 in Prahran, a suburb of Melbourne.²⁵⁴ To explain Gough Whitlam's international outlook, it is important to examine the opinions and influence that Fred Whitlam had upon his son. There is no doubt that he had a great influence on the future Prime Minister's international values and interests.²⁵⁵ Those values and interests were formed at an early age, whilst the father held very important positions in the service of the Commonwealth.

Background

At the beginning of the twentieth century, Fred Whitlam won first place in the Victorian Public Service clerical exams. Initially, he joined the Victorian Department of Lands and Survey.²⁵⁶ Following Federation, and seeing a fresh opportunity, he transferred to the Commonwealth Public Service, then substantially based in the temporary federal capital, Melbourne. Specifically, he joined the Commonwealth Crown Solicitor's Office.²⁵⁷

²⁵⁴ RBDM, Vic., Birth Certificate No. 1447, Castlemaine, Victoria, Henry Hugh Gough Whitlam, 3 April 1857, cited in Jenny Hocking., n 1 above, p. 17.

²⁵⁵ Jenny Hocking., n 1 above, p. 54.

²⁵⁶ Ibid, p. 22.

²⁵⁷ *ibid.*

By the time the First World War began, Fred Whitlam was a qualified accountant and lawyer. He graduated in law from the University of Melbourne in 1914.²⁵⁸ Like Fred Whitlam, Gough was also later to graduate with a law degree; but in his case from the University of Sydney.²⁵⁹ Despite the influence that Fred Whitlam may have had on his son to study law, Gough Whitlam, commenting upon why he first studied law, admitted, “I did Law because I realised that I was not good enough academically to become a university lecturer, so I said, ‘I might as well do Law’”.²⁶⁰

Promoted to senior clerk in the Crown Solicitor’s office in 1917, Fred Whitlam transferred to the Sydney Office in 1918.²⁶¹ By 1920, Fred Whitlam was admitted as a barrister and solicitor of the High Court of Australia.²⁶² Gough Whitlam was also later to be admitted as a barrister and solicitor, being admitted to the Bar of New South Wales on 14 February 1947.²⁶³

In 1921, Fred Whitlam was appointed Deputy Commonwealth Crown Solicitor, Assistant Crown Solicitor in 1927, and, finally, Crown Solicitor of the Commonwealth in December 1936.²⁶⁴ In this lastmentioned office, for 12 years Fred Whitlam was one of the most senior legal advisers to the government. His views were highly respected and influential.²⁶⁵ In his position as Commonwealth Crown Solicitor, Fred Whitlam was engaged in various roles that had a major bearing on federal law. As Cameron Hazlehurst explains:

“On the Lyons government’s controversial national insurance initiative, for example, he drafted legislation for the National Insurance Commission, recommended the appointment of J.B. Brigden as chairman, and drew up the agreement between the commission and the Australian branch of the British Medical Association. He also briefed

²⁵⁸ *ibid.*

²⁵⁹ *ibid.*, p. 67.

²⁶⁰ Gough Whitlam., interview with author, 16 March 2006, cited in Jenny Hocking., n 1 above, p. 67.

²⁶¹ Australian Dictionary of Biography, Online Edition., “Whitlam, Harry Frederick Ernest”, cited on <http://adbonline.anu.edu.au/biogs/A160643b.htm> [Accessed 17/01/10].

²⁶² *Ibid.*

²⁶³ *New South Wales Almanac for 1950*, p. 70, cited in Jenny Hocking., n 1 above, p. 115.

²⁶⁴ Jenny Hocking., n 1 above, p. 35-36.

²⁶⁵ *Ibid.*, p. 49.

W.R. Dovey, his son's future father-in-law, as counsel assisting the subsequent royal commission. Closer in political sentiment to John Curtin and J.B. Chifley than to their predecessors, Whitlam [Senior] was largely responsible for preparing the documentation for the 1944 referendum on Commonwealth powers and, with the solicitor-general, for advising H.V. Evatt during the bank nationalization litigation".²⁶⁶

Two points can be made. First, like Fred Whitlam, his son Gough was closer in political sentiment to the social democratic cause than to the conservative alternative.²⁶⁷ Secondly, the preparation of the documentation for the 1944 referendum on new federal powers by Fred Whitlam was his first major association with international law. In 1944, the Australian Government attempted to secure for the Federal Parliament the necessary powers for postwar reconstruction and development.²⁶⁸ The young Gough was a strong supporter of a 'yes' vote in the 1944 referendum because he saw the 1944 referendum as an opportunity for the Federal Parliament and Australia to enter a new national and international era with enlarged lawmaking powers.²⁶⁹ However, the so-called "Fourteen Powers Bill" failed to pass, being approved in only two States, South Australia and Western Australia.²⁷⁰

As a public servant, Fred Whitlam had no direct involvement in politics.²⁷¹ This represented the major difference between his career and that of his son.²⁷² Yet, in terms of the general socio-political outlook, Fred Whitlam and Whitlam Junior shared much common ground. In a 1973 interview, Gough Whitlam said that, had his parents been British born, they would probably have voted for the Coalition, but, in an Australian context, they would vote Labor as a party of change and public responsibility, and getting things done by elected

²⁶⁶ Cameron Hazlehurst., "Whitlam, Harry Frederick Ernest (1884-1961)", *Australian Dictionary of Biography*, Volume 16, Melbourne University Press, 2002, p. 540-541.

²⁶⁷ Gough Whitlam., n 209 above.

²⁶⁸ Ibid.

²⁶⁹ ibid.

²⁷⁰ Tony Blackshield and George Williams., *Australian Constitutional Law & Theory*, 3rd Ed, Federation, Sydney 2002, p. 1305.

²⁷¹ Jenny Hocking., n 1 above, p. 51-52.

²⁷² Ibid, p. 271-272.

representatives rather than by self-perpetuating directorates.²⁷³ Jenny Hocking concludes that “the greatest impact on the Whitlam household was political”.²⁷⁴

International connection

Early biographers of Gough Whitlam were quick to identify his father’s influence. In a 1973 book, the authors said:

“The key to Fred Whitlam’s character was tolerance – he loathed any form of prejudice on grounds of class, religion or race – and his overwhelming preoccupation was human rights... Related to his concern for fair treatment of minorities and individuals was a deep interest in foreign affairs. Fred Whitlam as the driving force in the Canberra branch of the Institute of International Affairs in its early years... All this rubbed off on his son”.²⁷⁵

Whitlam Senior became a pioneer of advocacy for a role for international human rights law in Australia. This was the area in which he probably exercised his most powerful influence over his son’s outlook.²⁷⁶ At the time such a view was undoubtedly legal heresy in Australia. As a member of the Australian delegation to the Paris Peace Conference in 1946, Whitlam Senior put forward Australia’s case for Dr Evatt’s idea of a permanent international human-rights court, an idea yet to come to fruition.²⁷⁷ The idea was Evatt’s. But the advocacy was by Fred Whitlam.

In 1948 Fred Whitlam was actively involved in advising the Australian delegation at the Human Rights Committee on the wide-ranging proposals and suggestions during considerations of the draft of *The Universal Declaration on Human Rights*.²⁷⁸ His impact was not only advisory, but can be found, for example, in the wording of the early drafts of Article 18 of the *Universal Declaration of Human Rights*, which, Hazlehurst suggests, “reflected his

²⁷³ Graham Freudenberg., n 112 above, p. 65.

²⁷⁴ Jenny Hocking., n 1 above, p. 51.

²⁷⁵ Laurie Oakes and David Solomon., *The Making of an Australian Prime Minister*, Cheshire, 1973, p. 49.

²⁷⁶ Cameron Hazlehurst., n 266 above, p. 541.

²⁷⁷ Ibid.

²⁷⁸ Jenny Hocking., n 111 above, p. 230.

advocacy of freedom to change religion or belief as well as to manifest and teach them”.²⁷⁹ In the context of contemporary debates over apostasy in Islamic countries, this has remained a controversial topic.

According to Annemarie Devereux, after the electoral defeat of the Labor Government in December 1949 and the formation of the Menzies Government, there was, to some extent, an element of flux in Australian policy with respect to *The Universal Declaration of Human Rights* (UDHR).²⁸⁰ Thereafter, a lack of consensus often emerged in the attitude of Australian delegations concerning the values underpinning human rights in the successive drafts of the *ICCPR* and *ICESCR*.²⁸¹ The peculiarities of the *UDHR*, from the point of view of “Anglo-Saxon jurisprudence”, were identified by Fred Whitlam in 1950, reporting on the Fifth Session of the Commission on Human Rights:

“.... in terms of Anglo-Saxon jurisprudence, the draft Covenant [developing the UDHR] has some unusual features.... [including] a tendency to turn to rather vague and impressive language... and a desire to utilise institutions of law beyond the limits normally set to them in Anglo-Saxon jurisprudence”.²⁸²

However, such differences did not stop Fred Whitlam showing his support for the *UDHR*, by undertaking a vigorous role in advising and assisting in the draft of the document. As James Curran describes it, Fred Whitlam welcomed the post-imperial era when the pursuit of peace would become the paramount goal of humanity. For Fred Whitlam, Australia stood for ‘international cooperation through the United Nations’. He hoped that Australia would take a ‘growing share in the building of a newer world’.²⁸³ It was this kind of ideological perspective and discourse that influenced the developing views of his son,

²⁷⁹ Cameron Hazlehurst., cited in Jenny Hocking., n 111 above, p.231.

²⁸⁰ Annemarie Devereux., cited in “H.V. Evatt & the UN After 60 Years”, *H.V. Evatt Lecture*, 2008, by Michael Kirby, cited on <http://evatt.labor.net.au/publications/papers/211.html> [Accessed 17/01/10].

²⁸¹ Michael Kirby., n 280 above.

²⁸² Fred Whitlam., cited in Michael Kirby., n 280 above.

²⁸³ James Curran., *The Power of Speech: Australian Prime Ministers and the National Image*, Carlton, 2004, p. 65.

Gough. They were very much in tune with the approach of Dr H V Evatt as Minister.

Fred Whitlam retired as Crown Solicitor in April 1949, just before the change of Government. He continued to be closely associated with matters concerning the United Nations, as an advisor to the Department of External Affairs.²⁸⁴ Indeed, he was an Australian representative at the United Nations Commission on Human Rights in 1950 and 1954.²⁸⁵ By the time of Fred Whitlam's death in Canberra of 1961, Gough Whitlam had been elected Deputy Leader of the Federal Labor Party.²⁸⁶ The time was set for the son to attempt to put into effect the "fervent internationalist outlook" his father had embraced many years earlier.²⁸⁷

Writing of the father's influence on Gough Whitlam, Graham Freudenberg noted:

"Whitlam's family background in Canberra and his father's career had three crucial influences on his thinking: on the role and nature of the Federal Government, the role and nature of the public service, and the problems of urban life in a new suburb".²⁸⁸

In his inaugural Sir Robert Garran Memorial Lecture, delivered in 1958, Fred Whitlam described himself as being "of the British tradition": a tradition that to Fred Whitlam (and later, Gough) was driven by key values of equality, tolerance and self-determination.²⁸⁹ Although it cannot be said that the "British tradition" had originally or always been concerned with permitting international institutions to resolve issues of domestic concern, by the 1950s the "British tradition", in the opinion of people like Fred Whitlam and also Dr Evatt, had evolved to support the importance of international human rights law principles.

²⁸⁴ Australian Dictionary of Biography, Online Edition., n 262 above.

²⁸⁵ Ibid.

²⁸⁶ *ibid.*

²⁸⁷ Jenny Hocking., n 111 above, p. 224.

²⁸⁸ Graham Freudenberg., n 112 above, p. 66.

²⁸⁹ H F E Whitlam., Sir Robert Garran Memorial Oration, 12 November 1973, cited on Jenny Hocking., n 111 above, p. 231.

In Evatt's campaign against the communism referendum in 1951, he repeatedly denounced Menzies' proposal as being the antithesis of 'British justice'. Evatt and Fred Whitlam knew well the profound impact upon the concepts of the UHDR of the jurisprudence of the Anglo-American legal tradition.

As Deputy Crown Solicitor and later Crown Solicitor of the Commonwealth, at a time of great constitutional and international change, Fred Whitlam maintained a perspective about the use of international instruments to protect rights and to expand powers of nationhood that was unusual for its time.²⁹⁰ In truth, he was ahead of his time. But his ideas and approaches were later to be given significant operation when his son was commissioned as Prime Minister. In matters of religion, politics, culture and interests, parents often have a profound effect upon their children. Nowhere more so than in the impact that Fred Whitlam's thinking had on the emerging aspirations and values of the young Gough Whitlam.

Writing in 1997, Paul Hasluck, recalled Whitlam Senior as "a public spirited, meticulous and dutiful man with an inquiring but cautious mind".²⁹¹ While "cautious" is not a word so readily applied to Gough Whitlam, father and son came together in H.C. Coombs' description of Fred Whitlam as having a "gentle, softly spoken style but as deep a commitment to social reform as his son".²⁹² In effect, the commitment to social reform, most marked in Gough Whitlam's political development and given practical expression in his government, reflected the powerful impact of internationalism and war-time experience that was felt both by father and son.²⁹³

As Prime Minister of Australia, Gough Whitlam was empowered to act beyond the calling of his father, the traditional public servant. And act he did. In the

²⁹⁰ Jenny Hocking., n 111 above, p. 223.

²⁹¹ Paul Hasluck., *The Chance of Politics*, Text Publishing, 1997, p. 198.

²⁹² Nugget Coombs., Jenny Hocking, n 111 above, p. 234.

²⁹³ Jenny Hocking., n 111 above, p. 234.

context of the greater engagement with the world, and specifically international law, that occurred during and after the Whitlam Government, Australians should remember the influence of Fred Whitlam.

CRITICISMS AND EVALUATION OF GOUGH WHITLAM

Criticisms

Too much too soon?: A comprehensive understanding of Whitlam's internationalist outlook would not be complete without examining some of the criticisms that have been expressed regarding some of the policies supported by Whitlam. They help to give a multi-dimensional view of Whitlam's outlook and achievements.

The most common criticism of the Whitlam Government is that it tried to do too much too quickly.²⁹⁴ Although a record number of Bills was enacted by the Federal Parliament during the Whitlam Government, in the three years that Whitlam was in office, the Senate rejected 93 Bills.²⁹⁵ This was more than the total number of Bills rejected during the previous 71 years of Federation, namely 68 Bills.²⁹⁶ At least in part, Whitlam's internationalist approach did not win the undivided support of the Senate or indeed of the nation. Whitlam's response to the criticism of attempting to achieve too much too soon can be found in a speech he gave as the *John Curtin Memorial Lecture* in 1985:

“The cry of *too much too soon* comes from those who want to be good, but not yet, much in the style of Saint Augustine—“give me chastity and continency but do not give it yet”. The cry of *too much too soon* comes from those who have forgotten that the great Labor victory of 1974 was based on the success of the broad range of reforms which the party had introduced since 1972, just as the great Labor victory of 1972 was based on the success of the broad range of reforms which the party had promoted since 1967. The Labor Party should realise that the lessons of my Government lie not so much in matters of careful administration and sound consultation, important as they may be, but in the means by which

²⁹⁴ Gough Whitlam., “Future Directions for Reform in Australia”, *John Curtin Memorial Lecture*, 1985, cited on <http://john.curtin.edu.au/jcmemlect/whitlam1985.html> [Accessed 21/12/09].

²⁹⁵ National Archives of Australia., n 116 above.

²⁹⁶ *Ibid.*

the party can effectively and expeditiously implement its plans for social reform".²⁹⁷

The Australian nation, with its rather complacent, self-satisfied, still racist, generally sexist and definitely homophobic society of 1972, needed a jolt. And that it certainly received from the Whitlam Government, with its social legislation and international embrace. There are, of course, those who never stop complaining. Doubtless some complaints and criticisms are warranted – as for example of the appointment of Senator Vince Gair (DLP) as Ambassador to Ireland in March 1974. An act too clever for its own good was destined to play a part in the series of steps that resulted in the dismissal of the government. But those who take the long view of history, if they are fair, will accept that the nation needed a readjustment. It came to embrace the change with vigour, in part because of the strong sustaining institutions of stable government, symbolised by the careers of people such as Fred Whitlam.

Economic Management: Another criticism of the Whitlam Government in media and political circles is that it was distracted by Whitlam's interests as a lawyer and social observer in human rights and internationalization. And inattentive to, even incompetent in, economic management which is clearly a central function of modern Australian governments.

No doubt some aspects of the nation's economic management between 1973-5 may be criticized, even allowing for international forces at work over which Whitlam, and Australia, had little control. Not least would this be so at the end of the government when it faced the crisis of the delay of supply by the Senate.

However, in an interesting speech in November 2009, Dr. Ken Henry, Secretary to the Treasury, made an important point concerning the role played by the Whitlam Government in increasing outlays on the size and shape of national government in Australia, to match those of other comparable developed

²⁹⁷ Gough Whitlam., n 294 above.

governments. In Dr. Henry's opinion, as one of the most important and respected professional economists in Australia, this shift in funding was beneficial. It contributed to national well-being. And it has proved enduring²⁹⁸:

“Australian Government expenditure grew from 18.9 per cent of GDP in 1971-72, the last full budget year before the Whitlam Government came to power, to 24.8 per cent of GDP in 1975-76, the last budget delivered by the Whitlam Government, representing spending growth of around 56 per cent in real terms.

In the three and a half decades since, while there have been significant annual fluctuations, the average level of spending by the Australian government has changed little, to be around 25¼ per cent of GDP.

The Whitlam Government was, therefore, responsible for an enduring increase in the size of government. That is, the close to 6 percentage points of GDP expansion in government expenditure during the Whitlam Government has never been reversed. And I think I can safely say that it never will be.”

Dismantling the legacy?: But did the economic crisis and political drama of 1975 reduce the long term impact of the Whitlam Government's program for reform?²⁹⁹ With respect to this criticism, Whitlam has said:

“The plethora of High Court cases on our legislation in 1975 demonstrated conclusively that the Australian Labor Party had overcome the constitutional barriers to reform which had earlier shackled it. No part of the program was ever invalidated by the High Court. No appeals against our legislation were ever upheld. Moreover and more urgently, in 1975 the great legislative and administrative endeavours of our first two years of government were beginning to come to fruition”.³⁰⁰

As this article has attempted to show, when the drama and bitterness of 1975 are put to one side, a major legacy of institutions and laws was put in place in a remarkably short space of time. The manner of the Whitlam Government's dismissal and the extent of the Labor defeats in the federal elections of 1975 and 1977, have contributed to a belief in some quarters that the achievements of the Whitlam Government were dismantled and its work nullified in the seven

²⁹⁸ Ken Henry, “Fiscal Policy” More than Just a National Budget”, address to the Whitlam Institute, 2009 Symposium ‘Governing the Economy’, 30 November 2009, m.s. page 8-9 (footnote deleted).

²⁹⁹ Ibid.

³⁰⁰ ibid.

years of Coalition Government that followed.³⁰¹ However, as Whitlam has observed, “any examination of the Government’s record clearly demonstrates that a great part of the work either survived intact or was sufficiently advanced...” It is true that some of the laws enacted during the Whitlam Government were changed. That is the character of any parliamentary democracy. There were, for example, substantial amendments to the *Trade Practices Act 1974* (Cth) in 1977. Still, many of the most important laws enacted between 1973-5 did survive. The *Racial Discrimination Act 1975* (Cth), for example, is still good law today.

Whitlam’s signing of the *ICCPR* shortly after being appointed Prime Minister in 1973, was neither “largely dismantled” nor “nullified” upon Whitlam’s dismissal from office. On the contrary, after Whitlam had signed the *ICCPR*, the Fraser Government, eight years later, ratified the two international conventions.³⁰² Further, there was no vigorous effort by Australian Governments after the Whitlam administration to dismantle Australia’s obligations under the many international instruments that Whitlam had ratified or signed.

Vietnamese refugees?: The Whitlam Government refused to allow many South Vietnamese refugees into the country following the fall of Saigon in 1975. The Government was clearly concerned that the refugees would have vehement anti-communist sympathies, antagonistic to the Australia Labor Party.³⁰³ On this basis, several critics of Whitlam’s policy, such as Nancy Viviani, journalist Denis Warner, and members of the Senate Standing Committee on Foreign Affairs, have argued that Whitlam did everything possible to prevent Vietnamese asylum seekers from reaching Australia without a justifiable basis.³⁰⁴

³⁰¹ *ibid.*

³⁰² Australian Human Rights Commission., “Australian Rights Timeline”, cited on http://www.hreoc.gov.au/human_rights/human_rights_dialogue/timeline.html [Accessed 20/01/10].

³⁰³ Absolute Astronomy., n 245 above.

³⁰⁴ Gerald Henderson., “How Whitlam closed the door on refugees”, *The Sydney Institute*, cited on <http://www.thesydneyinstitute.com.au/ghwcContent.php?ghwcID=3> [Accessed 20/01/10].

Some of the few South Vietnamese who reached Australia after the fall of Saigon were required, as a condition of their entry, to sign an undertaking that they would not engage in political activity in Australia.³⁰⁵ Refusing to permit South Vietnamese refugees entry into Australia on the basis of speculation of new anti communist sympathies, could be considered a violation of (or at least inconsistent with) the human rights of those South Vietnamese refugees who failed to reach Australia or who, on arrival, had been prohibited from engaging in political activity in Australia. Such human rights included, but were not limited to, the right of all people to take part in the conduct of public affairs within the meaning of Article 25(1) of the *ICCPR* and Article 18 of the *UDHR*, which provides the right for everyone to freedom of thought.

An arguable explanation of Whitlam's policy with respect to the South Vietnamese refugees may be found in the Australian Departmental files for 1975, now accessible. In effect, these reveal Whitlam's opposition to accepting asylum seekers from South Vietnam as being based on a national policy not to further upset the communist regime in Hanoi.³⁰⁶ A communication from Canberra to the embassy in Hanoi instructed it to advise the North Vietnamese government that Australia "would be very sorry to see the refugee question affect" relations involving the two nations.³⁰⁷ Still, in retrospect, it constituted a stand arguably inconsistent with the *Refugees Convention and Protocol*.

Opposing East Timor?: Similar concerns appear to have influenced the Whitlam Government's response to the early demands by the people of East Timor for self determination and the importance attached, in that respect, to the relations between Australia and Indonesia.

A contrast may be drawn between the Whitlam Government's refusal to act against the pro-separatist movement on Bougainville on 1 September 1975,

³⁰⁵ Ibid.

³⁰⁶ Gerald Henderson., n 303 above.

³⁰⁷ Ibid.

just two weeks before Papua New Guinea's independence on 16 September 1975,³⁰⁸ and the support it gave to the Suharto government's Indonesian invasion of East Timor.³⁰⁹ In September 2000, the Department of Foreign Affairs released previously secret files that appeared to reveal that the Whitlam Government encouraged East Timor's incorporation into Indonesia.³¹⁰ Two months after the Portuguese military began to leave East Timor, Whitlam suggested to Indonesia that it commence undercover operations to ensure East Timor's integration into Indonesia.³¹¹ An estimated 102,000 East Timorese died during the 27-year Indonesian occupation of East Timor that followed.

Members of the Whitlam Government regarded East Timor as "too small to be independent".³¹² However, history demonstrates that Whitlam was wrong in his view in this respect. In 1999, following the United Nations-sponsored act of self-determination, which paradoxically was a general policy of the Whitlam Government,³¹³ Indonesia surrendered control of the territory. On 20 May 2002, East Timor became the first new nation state of the 21st century.³¹⁴ In this regard, critics of Whitlam have argued that:

"People who admired Gough Whitlam wished, some passionately, he would acknowledge that the forced integration of East Timor was a mistake, that Indonesia had violated the two conditions of his support for integration and that the people of East Timor had suffered greatly. At no time in 30 years has he been able to acknowledge these realities".³¹⁵

No political leader in history has been flawless. Whitlam is a proud man with, to adapt Churchill's description of Attlee, much to be proud about. The events of

³⁰⁸ Absolute Astronomy., n 245 above.

³⁰⁹ Ibid.

³¹⁰ Ibid.

³¹¹ Ibid.

³¹² Ibid.

³¹³ Mercy International Justice Network., "Submission to Senate Inquiry into the Administration of Indigenous Affairs", p. 3, cited at

http://www.aph.gov.au/SENATE/committee/indigenouaffairs_ctte/submissions/sub104.pdf [Accessed 20/01/10].

³¹⁴ Central Intelligence Agency., "Timor-Leste Background", cited on <https://www.cia.gov/library/publications/the-world-factbook/geos/tt.html> [Accessed 20/01/10].

³¹⁵ NewMatilda., "Last Flight Out of Dili", 9 November 2005, cited on <http://newmatilda.com/node/1107?ArticleID=1107&HomepageID=112> [Accessed 20/01/10].

late 1975 in East Timor were unfolding as, in Australia, the Whitlam Government was facing daily crises and eventually the blow that finished it. Concern about the viability of a new and very small state on Australia's borders was legitimate. Yet, as events have shown, it was erroneous. Anxiety to have good relations with Indonesia was also a legitimate policy. But the stance on East Timor is the more surprising because of the consistent support that Whitlam gave over many decades to the principle of the peoples' right to self-determination enshrined in international law. The best that can be said is that this was an occasion when even Homer nodded.

Influences on Whitlam

His father: Various influences took Whitlam in the direction of an "internationalist approach". The first, as I have explained, were the values that Gough Whitlam derived from his father, Fred Whitlam. Fourteen years after his father delivered the inaugural Sir Robert Garran Memorial Lecture, Gough Whitlam himself delivered the 1973 oration as Prime Minister of Australia.³¹⁶ It was on that occasion that Whitlam acknowledged the significant influence of his father as a "great public servant", committed to doing his duty and developing the modern institutions of internationalism: "I am Australia's first Prime Minister with that particular background".³¹⁷ The "particular background" of which he spoke was one in which international participation was a predictable and unremarkable part of a national leader's political engagement.³¹⁸ Whitlam later described his father as "creating an environment in which I could follow up or gain ideas". Those ideas engendered in Whitlam an international perspective; a sense of Australia as a positive contributor to world developments; and as a country making autonomous foreign policy decisions, based on its own evaluation of its interests.³¹⁹

³¹⁶ Jenny Hocking., n 111 above, p. 232.

³¹⁷ Gough Whitlam., "Australian Public Administration under a Labor Government", cited in Jenny Hocking., n 111 above, p. 232.

³¹⁸ Jenny Hocking., n 111 above, p. 232.

³¹⁹ Ibid.

The role that Fred Whitlam played for several early years as Australia's representative to the United Nations Human Rights Commission,³²⁰ would have fuelled the interests of the younger Whitlam in international law, as well as in human rights and personal liberty under the law.³²¹ It was a propitious connection.

Military service: Following the Japanese attack on Pearl Harbour in December 1941, and, with the year remaining for his legal studies, Gough Whitlam volunteered for war service at the No. 2 Recruitment Centre, Sydney "for the duration of the War and a period of twelve months thereafter".³²² As a consequence, he did not return to finish his law degree until after 1946, following the end of hostilities.³²³

For Whitlam, war service undoubtedly encouraged his interest in international affairs. More importantly, it helped him to understand the significance of a sustained effort by humanity to remedy global problems. Whitlam cites his period in the armed forces as critical for the development of his ideas regarding citizenship, colonialism and constitutionalism: "My time in the RAAF gave me time to formulate my religious and political ideas, or at least my ecclesiastical and constitutional ones".³²⁴ Whilst most service personnel of that era might have described the impact of this engagement at a somewhat lower level of the social stratosphere, many Australians who served returned to civilian life with a like determination to work towards building a safer world, free from war and more concerned about the rights of all peoples.

Constitutional reform: Another often-overlooked influence on the "internationalist approach" that Whitlam demonstrated, stemmed from his view

³²⁰ Michael Kirby., n 2 above, p. 4.

³²¹ Ibid.

³²² Michael Kirby., "Personal Record of Service", *Pay History and Ledger Cards: Allotment history and ledger cards (Members of the RAAF)*, NAA SP504/1.

³²³ Jenny Hocking., n 111 above, p. 226.

³²⁴ Michael Kirby., 6 November 1946, *Letters 1936-1951*, NLA MS7653, cited in Jenny Hocking., n 111 above, p. 229.

that the Australian Constitution was outdated and needed to be changed. In his view, such change could be achieved, in part, by adopting international treaties that were then reflected in the domestic law of Australia:

“The Australian Constitution is the most archaic and the least amended in the world. It was framed by members of State Parliaments in the 1890s on the United States model of the 1780s. The American model has been altered more often and more extensively and more recently than the Australian. A record has now elapsed since the people were last given the opportunity to amend the Constitution. They can only amend it if the Federal Parliament passes a bill and the Federal Government presents the bill to them at a referendum. This has been one of the Menzies Government’s grossest derelictions”.³²⁵

For Whitlam, another path towards modernisation of the law was by recognition of the Australian Constitution as a legal document to be construed in its international context.³²⁶ Speaking of the Australian Constitution, Whitlam once said: “It is by accepting our international obligations, as responsible members of one world that we may aspire to be in truth one nation”.³²⁷ These remarks bear similarities to the view I later expressed in the High Court, although in dissent, in *Al-Kateb v Godwin*.³²⁸ The Australian Constitution speaks to Australians about their governance. But, today, it also speaks to the rest of the world about the character and values of the Australian nation in its relationships with other members of the world community.

A basic weakness of the Australian Constitution, as Whitlam saw it, was its failure to ensure the working of the democratic system and to guarantee the democratic rights of all Australians.³²⁹ For Whitlam, reforming the Constitution

³²⁵ Gough Whitlam., “Socialism Within the Australian Constitution”, *The John Curtin Memorial Lecture*, 1961, cited on <http://john.curtin.edu.au/jcmemlect/whitlam1961.html> [Accessed 09/12/09].

³²⁶ Gough Whitlam., n 217 above.

³²⁷ Gough Whitlam., n 217 above.

³²⁸ See further *Newcrest Mining (WA) v The Commonwealth* (1997) 190 CLR 513, 658; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337; and *Al-Kateb v Godwin and Others* (2004) 219 CLR 562, 624 [175] where I suggested that Australian courts can read the Constitution by reference to universal rights recognised in international law that have become accepted since the Constitution was adopted.

³²⁹ Gough Whitlam., n 209 above.

to safeguard democracy was the paramount duty for social democrats in the future.³³⁰ The way ahead as Whitlam put it, was:

“The Commonwealth could greatly enlarge its economic and social authority by exercising its constitutional right to make laws with respect to external affairs. The nations of the world now realise that an increasing percentage of their transport, commercial, industrial, scientific, cultural, health and social responsibilities cannot be discharged without making appropriate international arrangements. Australia has attended meetings of the General Assembly and the various agencies of the United Nations and other international conferences where scores of conventions have been concluded.... The more she becomes a party to international arrangements the easier it will be for the Commonwealth Government to plan her internal as well as her international affairs”.³³¹

The use of the external affairs power was never far from Whitlam’s mind as his interventions in Parliament indicate, even before he became Prime Minister.³³²

In my 1979 lecture on “Whitlam as Law Reformer”, I remarked:

“Whether in connection with international aviation regulation, international labour standards, enforcement of foreign judgments and awards, the role of the International Court of Justice or the implementation of the International Covenant on Civil and Political Rights, Whitlam advanced a decidedly internationalistic position”.³³³

John Curtin: His interests in modernising the Australian Constitution recognised the significant effort that former Prime Minister John Curtin and his government had upon his political views’ regarding the Constitution:

“My interest in constitutional matters stems from the time when John Curtin was Prime Minister. The Commonwealth Parliament’s powers were then at their most ample and it was constitutionally, if not always politically, more open to a Labor Government to carry out its policies than it is in peace time. John Curtin, however, saw that he was presiding over a passing phase. He was not content with the paradox that the Labor Party was free to enact its policies in times of war alone. Accordingly, in 1944 he sponsored a referendum to give the Federal Parliament postwar powers. His motives for holding the referendum were based on patriotism and experience. He argued the case with his full

³³⁰ Ibid.

³³¹ Gough Whitlam., n 324 above.

³³² Michael Kirby., n 2 above, p. 19.

³³³ Ibid.

logic and eloquence. The opposition to the referendum was spurious and selfish. The arguments were false. My hopes were dashed by the outcome and from that moment I was determined to do all I could to modernise the Australian Constitution".³³⁴

At least in part, Whitlam saw that a federal government could, in effect, modernise the operation of the Australia Constitution to some degree by invoking the external affairs power, so that Australia could ratify and become signatory to various international treaties, with the hope that, in the fullness of time, such international agreements would afford a proper basis for modernising federal legislation. This view of the external affairs power was heretical when first formulating in the young Gough Whitlam's mind. However, a series of decisions of the High Court has confirmed that his opinion was correct.³³⁵ The limitations on the ambit of the external affairs power are difficult to chart with any certainty. In this sense, Whitlam saw that the external affairs power was, in fact, a lawmaking power that could be used by the Federal Parliament to give effect to a large programme of legislative reform in Australia, which otherwise could have been hindered by the restrictive lawmaking powers of the Commonwealth as otherwise expressed in the Constitution.

Conclusions

Following his dismissal from the office of Prime Minister of Australia on 11 November 1975, Whitlam continued to advocate an internationalist outlook on the part of Australia, its institutions and people. It became part and parcel of his public *persona*.

In 1983, he was appointed Australia's Permanent Representative to the *United Nations Educational, Scientific and Cultural Organisation* (UNESCO) in Paris, a position he was to hold until 1986.³³⁶ There were two historical symmetries in

³³⁴ Gough Whitlam., n 209 above.

³³⁵ See *The Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1; *Ruhani v The Commonwealth* (2005) 222 CLR 489; *XYZ v The Commonwealth* (2006) 227 CLR 532; *Vasiljkovic v The Commonwealth* (2006) 227 CLR 614; *Thomas v Mowbray* (2007) 233 CLR 307.

³³⁶ Jenny Hocking., n 111 above, p. 234.

that appointment.³³⁷ First, he took up the post in the wake of the resignation of Sir John Kerr, as Ambassador-designate to UNESCO.³³⁸ Secondly, with his appointment as Australia's Ambassador to UNESCO, Whitlam joined one of the global organizations that his father had championed forty years previously.³³⁹

After completing his UNESCO assignment, Whitlam remained engaged with the international community in many ways. He frequently advocated the need for Australia to be multilateral in outlook, engaged with the United Nations and substantially independent in its foreign policy alignments.

The Whitlam Institute was created within the University of Western Sydney to collect the materials, provide the resources, encourage the civic discourse and maintain the attention of the Australian public towards the great themes of Gough Whitlam's life. Those themes are not confined to internationalism. Still less are they confined to international law or human rights. His fertile mind gave rise to very many projects: Australia's relations with Asia. Justice for the indigenous peoples. Institutional law reform. Better housing and services in suburban Australia. National environmental protection. Multiculturalism at home. Independence in foreign relations. Engagement with the Pacific. Concern for the arts and culture. Secularism in public life. Constitutional reform. Building a joyful, confident, healthy and well-educated, multicultural nation.

This article has addressed one facet of the broad political and intellectual interests of E.G. Whitlam. Yet it has been an important and influential element. It was one in harmony with the age. The chronicle demonstrates the great variety and number of the federal laws on international subjects proposed by the Whitlam Government that were enacted by the Parliament during the comparatively short period of Whitlam's Prime Ministership. The unprecedented numbers of treaties, conventions and agreements signed or ratified. The

³³⁷ Ibid.

³³⁸ *ibid.*

³³⁹ *ibid.*

significant engagement with international institutions and other nation states. The alteration in Australia's outlook and legal culture.

There were mistakes and failings, that is true. Although he might himself sometimes dispute the assertion, Gough Whitlam was, after all, just human like the rest of us. He made errors. And he was sometimes inconsistent. Yet beside the achievements and the nation-changing reforms that he helped to introduce, the errors and faults may be seen in proper perspective.

Whitlam was a change-agent, necessary to his times. The shift in Australia's perception of itself and of its place in the world was essential and indeed, by 1972, long overdue. The lives of millions of Australians were touched by Whitlam and his government. After Whitlam, it can truly be said, Australia was never quite the same country again. And, in the long eye of history, perhaps the most important change he brought about was the radical re-engagement he achieved with Australia's place in the world. And the confidence he instilled in Australians that they could play a useful part in securing a safer, more equitable and rights-respecting world and nation.
