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UNIVERSITY OF  
MELBOURNE  
LAW REVIEW

WHITLAM AS  
INTERNATIONALIST : A  
CENTENARY  
REFLECTION

The Hon. Michael Kirby AC CMG

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**ABSTRACT**

Edward Gough Whitlam, the twenty-first Prime Minister of Australia, was born in Melbourne in July 1916. This year is the centenary of his birth. It follows closely on his death in October 2014 when his achievements, including in the law, were widely reflected on. In this article, the author reviews

Whitlam's particular interest in international law and relations. It outlines the many treaties that were ratified by the Whitlam Government, following a long period of comparative disengagement by Australia from international treaty law. The range, variety and significance of the treaties is noted as is Whitlam's attraction to treaties as a potential source of constitutional power for the enactment of federal laws by the Australian Parliament. The article also reviews Whitlam's role in international relations with Australia's neighbours, notably China, Papua New Guinea, Indonesia and Indochina. The reconfiguration of geopolitical arrangements is noted as is the close engagement with the United Nations, its agencies and multilateralism. Whilst mistakes by Whitlam and his government are acknowledged, his strong emphasis on international law, and treaty law in particular, was timely. It became a signature theme of his Government.

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\* Based on the author's Whitlam Lecture 2010 delivered Sydney, 25 February 2010.

\*\* Justice of the High Court of Australia 1996-2009; President of the International Commission of Jurists 1995-1998. The author acknowledges the outstanding research assistance of Jason D. Donnelly, BA (Macq), LLB (Hons 1) (WSU), who wrote a first draft for the essay after ideas suggested by the author, and who subsequently took part in its development.

Edward Gough Whitlam was the twenty-first Prime Minister of Australia.<sup>1</sup> He served in that office from 5 December 1972 until, in controversial circumstances, he was dismissed from office by the Governor-General (Sir John Kerr) on 11 November 1975. He was born on 11 July 1916 in Kew, Melbourne. He died on 21 October 2014 in Sydney, at the age of 98. On 21 October 2014 a state memorial service to honour his contributions to public life in Australia, was held in the Sydney Town Hall. Two of the speakers at the service (his long time speech writer Graham Freudenberg and the Aboriginal leader Noel Pearson) singled out amongst his essential legacy, his contributions to the enlarged engagement of Australia with the international community and international law. This article examines the validity of that claim.

In January 1975 as the last year of the Whitlam Government opened, I commenced duties as chairman of the Australian Law Reform Commission. It was in that office that, in 1976, I delivered a lecture on Whitlam's contributions to law reform.<sup>2</sup> There was no doubt about his strong engagement with improvement, modernization and simplification of the law. This was natural enough given his family background in law, his professional training and university education.

Whitlam's father, Harry Frederick Ernest Whitlam (known as Fred Whitlam) had been a leading lawyer first in the Victorian public service in colonial times and then, after Federation, in the new Commonwealth public service. Fred Whitlam had risen through various offices to be appointed, in December 1936, as Crown

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<sup>1</sup> See generally, Jenny Hocking, *Gough Whitlam: A Memento in History*, The Miegunyah Press, Victoria, 2008 and E.G. Whitlam, *The Whitlam Government 1972-1975*, Viking, Melbourne, 1985.

<sup>2</sup> M.D. Kirby, "Whitlam as Law Reformer" (1979) 10 *Federal Law Review* 53.

Solicitor of the Commonwealth.<sup>3</sup> Whitlam himself had graduated in law after war service. As the Second World War was drawing to a close, he had become caught up in the controversies about the reform of the Australian *Constitution* and the frustrations that constitutional reform in Australia usually occasioned.<sup>4</sup> His marriage to Margaret Dovey, daughter of a leading Sydney barrister and later judge, reinforced Whitlam's intellectual and emotional engagement with the law. It made his interests in law reform, the legal profession and the courts (especially the High Court of Australia) readily understandable. Law reform was, therefore a predictable element in his political program. The large number of reforming statutes and institutions connected with law reform (including by the establishment of the Law Reform Commission)<sup>5</sup> made it natural to celebrate, in his lifetime and after his death, his commitment to law reform as a major interest.

But why Whitlam's commitment to internationalism? Part of the explanation for this further major theme in his life can be traced to the military service for which Whitlam volunteered after the Japanese attack on Pearl Harbour on 7 December 1941 and the danger this posed for Australia's peace and security as a nation.<sup>6</sup>

Upon demobilization from the Royal Australian Air Force Whitlam was, like many veterans, disillusioned with the world that had just emerged from a second global conflict. It was imperiled by grave international crimes that had been revealed; threatened by annihilation by nuclear weapons; and struggling to embrace a new world legal order in the form of the United Nations Organisation created by the *Charter* in 1945. But in his attraction to international law, Whitlam was greatly influenced by his father. Fred Whitlam had not only served the Commonwealth in high national legal offices. He had

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<sup>3</sup> M.D. Kirby, "Gough Whitlam: In his Father's Shadow" in Troy Bramston (ed) *The Whitlam Legacy*, The Federation Press, Sydney, 2013, 16 at 17.

<sup>4</sup> Because of the requirement of section 128.

<sup>5</sup> *Law Reform Commission Act 1973* (Cth).

<sup>6</sup> Kirby in Bramston, above n3.21.

also been delegated, because of his important national experience, to work with the United Nations in the development of the *Universal Declaration of Human Rights* (1948) (UDHR).<sup>7</sup> Fred Whitlam was assigned by the Menzies-Fadden Government, that replaced the Chifley Labor Government in December 1949, to participate in the many conferences that helped fashion the post-War global legal environment particularly in the field of human rights. As a result, Fred Whitlam became a “fervent internationalist”. Gough Whitlam embraced an identical approach. It was the more surprising and influential because it contrasted markedly with the rather isolationist attitudes of Australia to which the national reverted in the post-War decades. Those attitudes were not confined to the Coalition parties, then in government. Particularly after the resignation of Dr H.V. Evatt (who had been third President of the General Assembly of the United Nations in 1947-8) much the same attitudes affected the Australian Labor Party. They were fueled by the White Australia Policy, common to both major political groupings, which attracted much antagonism on the emerging international scene.

In an earlier essay, I described the impact of Fred Whitlam’s work and thinking upon the emergence of this second major theme in his son’s legacy.<sup>8</sup> I will not repeat what I wrote there for the son soon emerged from the father’s shadow. He took his father’s tendency to remarkable achievements. It is those achievements that I wish to describe in this article.

Whitlam was elected to the Australian Parliament in 1952. Throughout his parliamentary service he was the elected member of the House of Representatives for the seat of Werriwa that covers south western suburbs of Sydney. Later in 1967 he became the Leader of the Opposition. Australians, who are hard on their political leaders, need to be reminded of the major legacies that those leaders sometimes leave. In Whitlam’s case the legacy

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<sup>7</sup> C. Hazlehurst, “Whitlam Harry Frederick Ernest (1884-1961)”, *Australian Dictionary of Biography*, vol. 16 Melbourne Uni Press, 2002, vol. 16, 540-541.

<sup>8</sup> M.D. Kirby, above n.3.

certainly included a strong and sustained engagement with Australia's region and the world. This included a remarkable record of engagement with international law that took Fred Whitlam's contributions well beyond what even he could have imagined. In particular, this was the case in the ratification of many international treaties (including human rights treaties) after a long interval of comparative indifference and disengagement by Australia. After Whitlam, there would be differences of degree and emphasis in the international sphere. But never again would Australia revert to isolationism or indifference and disdain for the world beyond our continental borders.

## **AUSTRALIA'S RATIFICATION OF INTERNATIONAL TREATIES**

### Introduction

When sworn in as Prime Minister in December, 1972, Whitlam said of the 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”.<sup>9</sup>

Whitlam saw international law as an essential tool by which to avoid conflict, resolve disputes, restructure international relations and sometimes pursue domestic policies in order to ensure that Australia could conform with the requirements of international law.<sup>10</sup> It was on this basis, in part, that his Government embarked on a vigorous process of ratifying international treaties. During his government, over 133 international treaties entered into force for Australia, including by 26 Exchange of Notes Agreements, 32 Bilateral Agreements, 16 Multilateral Agreements, 17 Protocols, 8 International Statutes,

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<sup>9</sup> Gough Whitlam in Freda Hawkins, *Critical Years in Immigration: Canada and Australia Compared*, Kingston, Montreal, (McGill-Queen's University Press) 1989, 94.

<sup>10</sup> 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](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].

and 34 Treaties/Conventions.<sup>11</sup> 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”.<sup>12</sup>

### 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, subject to the provisions of the treaty, to extradite to each other, 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.<sup>13</sup> 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*.<sup>14</sup> Thirdly, on 8 August 1975, Australia ratified the *Protocol amending 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 drug addicted persons,<sup>15</sup> 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

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

<sup>12</sup> Gough Whitlam, n 9 above, p. 4.

<sup>13</sup> Article 1(1) of *Treaty between Australia and Sweden concerning Extradition*, Entry into force, 10 March 1974.

<sup>14</sup> Articles 1 and 3 of *Treaty between Australia and the Republic of Austria concerning Extradition*, Entry into force, 5 February 1975.

<sup>15</sup> 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](http://www.crimecommission.gov.au/publications/iddr/_files/1997_98/aidr_1997_98_introduction.pdf) [Accessed 09/12/09].

involved.<sup>16</sup> The 1975 Protocol also signified Australia's approval of the expansion of the International Narcotics Control Board from 11 members to 13 members.<sup>17</sup>

### Environment and nuclear power

Three important treaties dealing with the environment and five treaties dealing with nuclear power and weapons entered into force for Australia under the Whitlam Government. 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 which the Government joined.

The Ramsar Convention is an international treaty aimed at the conservation and sustainable utilisation of wetlands.<sup>18</sup> It is the only universal environmental treaty that deals with this ecosystem. The participating countries are from all geographic regions of the planet.<sup>19</sup> 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 very closely with the other MEAs. It is a full partner among the "biodiversity-related cluster" of international treaties and agreements.<sup>20</sup>

In a statement that indicated his growing commitment to the need for Australia's independence in relation to the United States-Australia alliance, Whitlam

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<sup>16</sup> 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](http://www.norml.org/index.cfm?Group_ID=4415) [Accessed 12/12/09].

<sup>17</sup> 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.

<sup>18</sup> 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.

<sup>19</sup> The Ramsar Convention on Wetlands., *Home Page*: [http://www.ramsar.org/cda/ramsar/display/main/main.jsp?zn=ramsar&cp=1^7715\\_4000\\_0\\_\\_](http://www.ramsar.org/cda/ramsar/display/main/main.jsp?zn=ramsar&cp=1^7715_4000_0__) [Accessed 12/12/09].

<sup>20</sup> 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\\_\\_](http://www.ramsar.org/cda/ramsar/display/main/main.jsp?zn=ramsar&cp=1-36^7804_4000_0__) [Accessed 12/12/09].



suggested that the election that returned the Coalition to government with a smaller majority, on 25 October 1969,<sup>21</sup> indicated that the Australian people wanted their government to sign the *Treaty on the Non-Proliferation of Nuclear Weapons* (NPT), about which the Gorton Government had hesitated.<sup>22</sup> On winning government in 2 December 1972, Whitlam, without delay, moved to ratify the NPT. That treaty entered into force for Australia on 23 January 1973. It is now an essential element in the response of the global community to the special dangers of nuclear weapons.

The NPT is the only binding commitment in a multilateral treaty by the nuclear weapon States to the goal of disarmament.<sup>23</sup> It is commonly described as having three main “pillars”: non-proliferation, disarmament, and peaceful use.<sup>24</sup> 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.<sup>25</sup> States that have nuclear weapons accept the obligation not to transfer nuclear weapons or explosive devices to NNWS.<sup>26</sup> 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 international control.<sup>27</sup> All States Parties to the Treaty agree to undertake full exchanges of equipment, materials and scientific and technological information for the peaceful use of nuclear energy.<sup>28</sup> The high relevance of this treaty for the world continues today because of

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<sup>21</sup> Australian Politics., “Federal Election Dates & Outcomes” at <http://www.australianpolitics.com/elections/dates/federal-election-outcomes.shtml> [Accessed 13/12/09].

<sup>22</sup> “Swing a pointer on war – Whitlam” in the *Sydney Morning Herald*, 27 October 1969, p.4.

<sup>23</sup> United Nations Department of Disarmament Affairs., *Brief Background*: <http://www.un.org/Depts/dda/WMD/treaty/> [Accessed 13/12/09].

<sup>24</sup> 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].

<sup>25</sup> *Ibid.*

<sup>26</sup> *ibid.*

<sup>27</sup> Article 6 of the *Treaty on the Non-Proliferation of Nuclear Weapons*, Entry into force for Australia, 23 January 1973.

<sup>28</sup> Articles 3 and 4 of the *Treaty on the Non-Proliferation of Nuclear Weapons*, Entry into force for Australia, 23 January 1973.

acknowledged or suspected developments in Israel, Pakistan, India, Iran, North Korea (DPRK) and other States.

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.<sup>29</sup> The Seabed Arms Control Treaty allows signatory States to observe and monitor all seabed “activities” of any other signatory State beyond the 12-mile zone, in order to ensure treaty compliance.<sup>30</sup>

### Human rights

Within the field of international human rights law, the Whitlam Government ratified fifteen human rights treaties. It was the Whitlam Government that ushered in the era of Australia’s engagement with international human rights law.

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 important human rights treaties ratified by Australia for at least four reasons. First, CERD is the earliest United Nations human rights convention to be substantially enacted by Australia in domestic law, in the form of the *Racial Discrimination Act 1975* (Cth).<sup>31</sup> Secondly, the ratification of CERD in Australian law indicated, for the first time, a clear parliamentary purpose, enforceable by law, that racial hostility against persons by reference

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<sup>29</sup> 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.

<sup>30</sup> 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.

<sup>31</sup> Gough Whitlam., *Abiding Interests*, St Lucia, Qld, University of Queensland Press, 1997, p. 184.

to their 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.<sup>32</sup> Most major states have also accepted CERD's individual complaints mechanism, signaling a desire to be bound in an effective way by the Convention's provisions.<sup>33</sup> Fourthly, by ratifying CERD, the Whitlam Government sent a powerful message to the world that Australian law would no longer accept any lingering elements of the previous White Australia policy. It would put in place measures designed to reverse the preceding 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”.<sup>34</sup>

Another significant human rights treaty ratified by the Whitlam Government was the *Protocol relating to the Status of Refugees* (Refugee Protocol).<sup>35</sup> This gave approval by Australia to the United Nations 1951 *Convention relating to the Status of Refugees*, by removing both the temporal and geographic restrictions that had previously limited the entitlement 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

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<sup>32</sup> 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](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en)  
[Accessed 16/12/09].

<sup>33</sup> Ibid.

<sup>34</sup> Gough Whitlam, n 9 above, p. 94.

<sup>35</sup> *Protocol relating to the Status of Refugees*, Entry into force for Australia, 13 December 1973.

elsewhere.<sup>36</sup> The effect of ratifying the Refugee Protocol meant that, for the first time, Australia, without regard to racial origins, accepted obligations of protection to people displaced in Asia, Africa or elsewhere who otherwise had no identifiable connection with Australia.<sup>37</sup>

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 ratification of CPROW, Whitlam noted that “previous Australian Governments took no action to either sign or ratify this Convention”.<sup>38</sup> 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 based on respect for, and protection and enhancement of, civil liberties and basic human rights for all people, regardless of their sex.<sup>39</sup> CPROW is important as it formally recognized, on the “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.<sup>40</sup>

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

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<sup>36</sup> Refugee Review Tribunal., “Who is a refugee”, Australian Government: <http://www.mrt-rrt.gov.au/refugee.asp> [Accessed 17/12/09].

<sup>37</sup> 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](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].

<sup>38</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 1974, 4403 (Mr. Gough Whitlam, Prime Minister).

<sup>39</sup> 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](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].

<sup>40</sup> Preamble, *Convention on the Political Rights of Women*, Entry into force for Australia, 10 March 1975.

ensure that stateless persons enjoyed the widest possible exercise of fundamental rights and freedoms.<sup>41</sup> 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 territory 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 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 any previous approval. Rights are also extended to the organisations themselves to draft rules and constitutions; to provide for voting for officers; and to arrange their own 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 their affairs.<sup>42</sup>

ILO Convention 87 is recognised as a human rights instrument, despite the employment setting of the treaty. This is so because many of the articles in the

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<sup>41</sup> Preamble, *Convention relating to the Status of Stateless Persons*, Entry into force for Australia, 13 March 1974. See *Koroitamana v The Commonwealth* (2006) 227 CLR 31.

<sup>42</sup> 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.

Convention are similar to the provisions expressed in Article 22 of the *International Covenant on Civil and Political Rights* (ICCPR).<sup>43</sup> 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 the *ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation*,<sup>44</sup> the *ILO Convention (No. 98) concerning the Application of the Principles of the Right to Organise and to Bargain Collectively*<sup>45</sup> and the *ILO Convention (No. 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*.<sup>46</sup> These conventions were a influence and stimulate Australia's own move towards the principle of equal pay for women.

### 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

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<sup>43</sup> *International Covenant on Civil and Political Rights*, Entry into force 23 March 1976, in accordance with Article 49.

<sup>44</sup> *ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation*, Instrument of ratification deposited for Australia 15 June 1973.

<sup>45</sup> *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.

<sup>46</sup> *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.

Classification”.<sup>47</sup> 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.<sup>48</sup>

Secondly, a 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 can occasion to the interests of authors, performers and producers of phonograms.<sup>49</sup> Under the Geneva Phonograms Convention, “phonogram” means any exclusively aural fixation of sounds of a performance or of other sounds.<sup>50</sup>

Thirdly, under 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 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.<sup>51</sup> 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

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<sup>47</sup> Article 1 of the *Strasbourg Agreement concerning the International Patent Classification*, Entry into force for Australia, 12 November 1975.

<sup>48</sup> Preamble of the *Strasbourg Agreement concerning the International Patent Classification*, Entry into force for Australia, 12 November 1975.

<sup>49</sup> 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.

<sup>50</sup> 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.

<sup>51</sup> 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.

regulations of that country, acquire the exclusive right to the use of trademarks so registered".<sup>52</sup>

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 concerns about international affairs travelled far beyond accommodating human rights treaties. It was extremely broad in its ambit. It involved a particular perception of the international 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 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.<sup>53</sup> 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 regard to the VCLT to assist the Court in resolving the issues for consideration.<sup>54</sup> 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.

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<sup>52</sup> 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.

<sup>53</sup> 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.

<sup>54</sup> *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.



Another 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, under several bilateral treaties, and in a number of regional treaties.<sup>55</sup> VCCR enumerates basic legal rights and obligations of signatory States, including the establishment and conduct of consular relations, by mutual consent.<sup>56</sup> It also covers privileges and immunities of consular officers under the laws of the country where the foreign consular office has been established.<sup>57</sup>

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 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 for signatory States Parties to follow a working framework when participating in the Hague Conference. It was aimed at fostering the progressive unification of the rules of private international law.<sup>58</sup>

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<sup>55</sup> Preamble of the *Vienna Convention on Consular Relations*, Entered into force for Australia 14 March 1973.

<sup>56</sup> Article 2(1) of the *Vienna Convention on Consular Relations*, Entered into force for Australia 14 March 1973.

<sup>57</sup> Article 4 of the *Vienna Convention on Consular Relations*, Entered into force for Australia 14 March 1973.

<sup>58</sup> Article 1 of the *Statute of The Hague Conference on Private International Law*, Instrument of acceptance deposited for Australia 1 November 1973.

### 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 affects the operation of air services, or undermines the confidence of the people of the world in the safety of civil aviation.<sup>59</sup>

Other related 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*,<sup>60</sup> the *Protocol to amend the Agreement on North Atlantic Ocean Stations of 25 February 1954, as amended 13 May 1970*,<sup>61</sup> the *Agreement concerning the Continuing Relationship between Australia and the European Organisation for the Development and Construction of Space Vehicle Launchers*,<sup>62</sup> 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*.<sup>63</sup>

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<sup>59</sup> Preamble of the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, Entered into force for Australia 11 August 1973.

<sup>60</sup> *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.

<sup>61</sup> *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.

<sup>62</sup> *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.

<sup>63</sup> *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 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 in the international community.<sup>64</sup>

Between 1972-5, Australia ratified nine ILO conventions. By way of contrast, the Fraser Government ratified only one in its seven years in office.<sup>65</sup> 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 perception of Australia as a forward-looking progressive country that gives priority attention to vital areas of human relations.<sup>66</sup> 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 in ways generally harmonious with Australia's own industrial laws and practices and gave the ILO a unique local standing among international institutions.<sup>67</sup> Thirdly, as an advanced economy in a region comprising mostly of developing countries, the Whitlam Government expressed its intention that Australia should be in the vanguard of countries fostering and developing sound labour and social policies, in accordance with accepted international standards.<sup>68</sup> Fourthly, in the view of the Government, the ratification of ILO conventions helped stimulate Australia itself to improve its own labour standards.<sup>69</sup> Finally, at the time of the Whitlam Government's ILO ratifications, Australia still enjoyed a special responsibility for Papua New Guinea, although that territory was soon to be self-governing and

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<sup>64</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 12 April 1973, 1437 (Mr. Clyde Cameron, Minister for Labour).

<sup>65</sup> Gough Whitlam., n 31 above, p. 177.

<sup>66</sup> Commonwealth, *Parliamentary Debates*, n 64 above.

<sup>67</sup> *Ibid.*

<sup>68</sup> *ibid.*

<sup>69</sup> *ibid.*

independent.<sup>70</sup> On that basis, the Whitlam Government believed that Australia should leave Papua New Guinea with labour laws that accorded with the highest international standards.<sup>71</sup>

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”.<sup>72</sup>

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;<sup>73</sup> 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;<sup>74</sup> and to take steps to co-ordinate the operations of such agencies on a national scale.<sup>75</sup>

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<sup>70</sup> *ibid.*

<sup>71</sup> *ibid.*

<sup>72</sup> 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](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].

<sup>73</sup> Article 2(1) of the *ILO Convention (No. 2) concerning Unemployment*, Instrument of ratification registered for Australia 15 June 1972.

<sup>74</sup> Article 1 of the *ILO Convention (No. 2) concerning Unemployment*, Instrument of ratification registered for Australia 15 June 1972.

<sup>75</sup> Article 2(2) of the *ILO Convention (No. 2) concerning Unemployment*, Instrument of ratification registered for Australia 15 June 1972.

Another ILO convention ratified by Australia was the *ILO Convention (No. 131) concerning Minimum Wage Fixing, with Special Reference to Developing Countries*.<sup>76</sup> A key term of that Convention required that all participating States establish a system of minimum wages that covered all groups of wage earners whose terms of employment were such that coverage would be appropriate.<sup>77</sup>

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

Other important treaties in this area included the *ILO Convention (No. 137) concerning the Social Repercussions of New Methods of Cargo Handling in Docks*,<sup>78</sup> the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*<sup>79</sup> and the *Instrument for the Amendment of the Constitution of the International Labour Organisation of 28 June 1919, as amended*.<sup>80</sup>

### Science and technology

Whitlam's international engagement extended far beyond treaties concerning the law. He secured the ratification of at least six international treaties pertaining to science and technology. This, Australia ratified an *Agreement between the Government of Australia and the Government of the Republic of*

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<sup>76</sup> *ILO Convention (No. 131) concerning Minimum Wage Fixing, with Special Reference to Developing Countries*, Instrument of ratification deposited for Australia 15 June 1973.

<sup>77</sup> 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.

<sup>78</sup> *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.

<sup>79</sup> *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Entered into force for Australia 24 June 1975.

<sup>80</sup> *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.

*India on Cooperation in the Fields of Science and Technology*.<sup>81</sup> This concerned promoting opportunities for cooperation between Australia and India in the fields of civil scientific and technological research and development.<sup>82</sup> 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.<sup>83</sup>

Other 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*; <sup>84</sup> 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*; <sup>85</sup> 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*.<sup>86</sup>

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<sup>81</sup> *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.

<sup>82</sup> 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*.

<sup>83</sup> 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.

<sup>84</sup> *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.

<sup>85</sup> *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.

<sup>86</sup> *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 during the Whitlam Government 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 were based on the classification of goods for customs tariffs.<sup>87</sup>

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 as between Australia and the Federal German Republic.<sup>88</sup> 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*.<sup>89</sup> 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*

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<sup>87</sup> *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.

<sup>88</sup> 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.

<sup>89</sup> *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.

October 1947;<sup>90</sup> the *Protocol for the Accession of the People's Republic of Bangladesh to the General Agreement on Tariffs and Trade of 30 October 1947*;<sup>91</sup> and the *Declaration on the Provisional Accession of the Philippines to the General Agreement on Tariffs and Trade of 30 October 1947*.<sup>92</sup>

### 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 was the *Convention for the Protection of the World Cultural and Natural Heritage*. This places an affirmative 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.<sup>93</sup>

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).<sup>94</sup> 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,<sup>95</sup> and to give advice, and

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<sup>90</sup> *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.

<sup>91</sup> *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.

<sup>92</sup> *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.

<sup>93</sup> 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.

<sup>94</sup> *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.

<sup>95</sup> 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*.



make recommendations on, general or specific points connected with the preservation and restoration of cultural property.<sup>96</sup>

Another treaty in this field, ratified by the Whitlam government, was the *Convention relating to International Exhibitions and Protocol of Signature* (CIE). The purpose of CIE is 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'.<sup>97</sup> 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 exhibiting rights.<sup>98</sup> 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 exhibits already held by each country.<sup>99</sup>

Other key treaties ratified by the Whitlam Government in this area included a *Cultural Agreement between Australia and Iran*<sup>100</sup>, a *Cultural Agreement between the Government of Australia and the Government of Malaysia*<sup>101</sup>, an

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<sup>96</sup> 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.

<sup>97</sup> Article of the *Convention relating to International Exhibitions and Protocol of Signature*, Notification of accession deposited for Australia 27 September 1973.

<sup>98</sup> Article 6 of *Convention relating to International Exhibitions and Protocol of Signature*.

<sup>99</sup> Article 6 of *Convention relating to International Exhibitions and Protocol of Signature*.

<sup>100</sup> *Cultural Agreement between Australia and Iran*, Notes to this effect were exchanged on 2 June 1975, on which date the Agreement entered into force.

<sup>101</sup> *Cultural Agreement between the Government of Australia and the Government of Malaysia*, Entry into force: 16 October 1975.

*Agreement of Cultural Co-operation between Australia and Italy*<sup>102</sup> and the *Cultural Agreement between the Government of Australia and the Government of Thailand*<sup>103</sup>.

### Trade agreements

Whitlam recognised that Australia's economic, trade, development and industrial policies afforded an important foundation for the assurance and growth of Australia's prosperity.<sup>104</sup> 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 amongst the most diverse. For example, Australia ratified a treaty related to an *Arrangement regarding the International Trade in Textiles*. This endeavoured to take co-operative and constructive action, within a multilateral framework, to promote the development and expansion of trade in textile products and to achieve progressively the reduction of trade barriers and the liberalization of world trade in these products.<sup>105</sup>

Another significant trade treaty was the *International Sugar Agreement of 1973* (ISA). The three major objectives of ISA were to raise the level of the international trade in sugar, particularly in order to increase the export earnings of developing exporting countries<sup>106</sup>, to bring world production and consumption of sugar into closer balance<sup>107</sup>, and to provide for adequate participation in, and

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<sup>102</sup> *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.

<sup>103</sup> *Cultural Agreement between the Government of Australia and the Government of Thailand*, Entry into force, 16 December 1974.

<sup>104</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 27 February 1973, 17 (Sir Paul Hasluck, Governor-General).

<sup>105</sup> Preamble for the *Arrangement regarding International Trade in Textiles*, Accepted by signature for Australia 9 April 1974.

<sup>106</sup> Article 1(a) of the *International Sugar Agreement, 1973*, Instrument of ratification deposited for Australia 19 December 1973.

<sup>107</sup> Article 1(e) of the *International Sugar Agreement, 1973*.

growing access to, the markets of developed countries for sugar supplied by developing countries.<sup>108</sup>

Another trade treaty that was ratified was the *Agreement establishing the International Bauxite Association* [IBA]. The IBA was aimed at promoting the orderly and rational management of the mining, processing and marketing of the bauxite resources of producing countries<sup>109</sup>, 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.<sup>110</sup>

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 these treaties were the *Agreement on the Development of Trade and Economic Relations between the Government of Australia and the Government of the Republic of Korea*<sup>111</sup>, the *Agreement on Trade and Industrial and Technical Co-operation between the Government of Australia and the Government of the Socialist Republic of Romania*<sup>112</sup>, the *Trade Agreement between the Government of Australia and the Government of the People's Republic of China*<sup>113</sup>, and the *International Coffee Agreement of 18 March 1968*.<sup>114</sup>

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<sup>108</sup> Article 1(g) of the *International Sugar Agreement, 1973*.

<sup>109</sup> Preamble of the *Agreement establishing the International Bauxite Association [IBA]*, Instrument of ratification deposited for Australia 9 October 1974.

<sup>110</sup> Preamble of the *Agreement establishing the International Bauxite Association [IBA]*.

<sup>111</sup> *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.

<sup>112</sup> *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.

<sup>113</sup> *Trade Agreement between the Government of Australia and the Government of the People's Republic of China*, Entry into force, 24 July 1973.

<sup>114</sup> *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

The foregoing record on Australia's ratification of international treaties during the Whitlam Government was remarkable by comparison with the earlier record of ratifications. It ensured that Australia could become actively involved in the many organs of international affairs open to it. To this end, 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".<sup>115</sup>

Whitlam considered that the cultural heritage and geographic location of Australia made it desirable, indeed essential, that Australia should contribute to, and share, global values reflected in international law, and throw off its previous isolated and parochial approach. That approach limited the achievement of international co-operation and, potentially, presented dangers to Australia that were to be avoided. Australia set out to strengthen its international framework.<sup>116</sup> With this objective in mind, the Whitlam Government 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 this step in 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

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<sup>115</sup> Gough Whitlam, n 10 above, p. 2.

<sup>116</sup> Gough Whitlam, n 31 above, p. 171.

strategically brilliant, an irresistible photo opportunity that placed Whitlam firmly on the world stage”.<sup>117</sup>

Members of the Coalition government at the time ridiculed Whitlam’s exercise in regional *Realpolitik*. Malcolm Fraser described Whitlam as having “clearly become the Chinese candidate for the next Australian elections”.<sup>118</sup> Yet Whitlam’s visit to China coincided with that of United States Secretary of State, Henry Kissinger.<sup>119</sup> Within days of these visits President Richard Nixon announced that he too would visit Peking.<sup>120</sup> These developments caught the Australian Government flat-footed. It was still substantially locked in the cold-war politics of the Menzies era. Increasingly, it looked out of date and out of time.<sup>121</sup> Whitlam appreciated that, in some respects, political perceptions became realities.

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.<sup>122</sup> 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 his Government’s perception of Australia’s 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

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<sup>117</sup> 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.

<sup>118</sup> Graham Freudenberg., *A Certain Grandeur: Gough Whitlam in Politics*, South Melbourne, 1977, p. 212.

<sup>119</sup> Jenny Hocking., n 117 above, p. 232.

<sup>120</sup> Ibid.

<sup>121</sup> ibid.

<sup>122</sup> 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].

*International Covenant on Economic, Social and Cultural Rights* (ICESC) and *the International Covenant on Civil and Political Rights* (ICCPR) were, the two covenants intended to give effect to the principles earlier stated in the *Universal Declaration on Human Rights*. These covenants had been adopted by the General Assembly on 18 December 1966. Australia had not become a signatory to either Covenant before Whitlam was elected to government.<sup>123</sup> Whitlam promptly signed both the ICESC and ICCPR as Prime Minister, on behalf of Australia, on the sixth anniversary of their coming into force. This step was taken only six days after the election of his Government.<sup>124</sup> It would be difficult to imagine a more dramatic demonstration of his commitment to engagement with international human rights law.

The general policy of the Whitlam Government was to foster respect for the international principles of human rights.<sup>125</sup> For example, the Whitlam Government negotiated the prompt emergence of an independent Papua New Guinea. A driving force in this development, which had been initiated but not completed by the Coalition Government, was the Whitlam Government's support for the right of peoples to self-determination, including those living in colonial territories.<sup>126</sup> Papua New Guinea's status as an autonomous and independent state was, Whitlam stated in opposition, "just not negotiable".<sup>127</sup>

Whitlam's first step in endorsing change in Papua New Guinea occurred in 1970, during his opposition years.<sup>128</sup> He placed Papua New Guinea on the national political agenda during a widely-publicised tour of the territory in January 1970.<sup>129</sup> That visit became a catalyst for change.<sup>130</sup> It was viewed, at

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<sup>123</sup> Jenny Hocking., n 117 above, p. 232-233.

<sup>124</sup> *Ibid.*, p. 233.

<sup>125</sup> Gough Whitlam, n 10 above, p. 6.

<sup>126</sup> *Ibid.*

<sup>127</sup> 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.

<sup>128</sup> 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].

<sup>129</sup> *Ibid.*

<sup>130</sup> *ibid.*

the time, as potentially one of the most significant events in Australia's region.<sup>131</sup> This was so although Whitlam was not yet Prime Minister. His public statements during the tour of Papua New Guinea reiterated his earlier stated goal of prompt independence, with a date set to be, at the latest, 1976.<sup>132</sup> Whitlam's status as a widely perceived future Prime Minister of Australia gave force to virtually everything he did in this context.<sup>133</sup>

The earlier attention that Whitlam had paid to Papua New Guinean politics and politicians also had an important impact on the evolution of party politics in the territory, especially through the newly established Pangu Pati.<sup>134</sup> By the time Whitlam returned to Papua New Guinea in January 1971, he could see 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”.<sup>135</sup>

Whitlam restated his party's commitment to self-government, independence and 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 that Australia should continue to govern a colony in the 1970s.<sup>136</sup> 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.

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<sup>131</sup> “Australia Political Chronicle January-April, 1970” (1970) 16(2) *The Australian Journal of Politics and History* 262.

<sup>132</sup> Rory Ewing., n 128 above.

<sup>133</sup> Graham Freudenberg., n 118 above, p. 193.

<sup>134</sup> Rory Ewing., n 128 above.

<sup>135</sup> Gough Whitlam., *The Whitlam Government 1972-1975*, Ringwood, Vic, Penguin Books, 1985, p. 90-91.

<sup>136</sup> *Ibid*, p. 93. Part of Papua New Guinea (Papua) was a colony. The other part (New Guinea), formerly a colony of Imperial Germany, became a Mandated Territory under the League of Nations and a Trusteeship Territory under the United Nations. To that extent, it rendered Australia answerable to the UN Trusteeship Council.

At the time, Australia's only remaining powers related to the courts of law, the House of Assembly, electoral affairs, foreign affairs and defence.<sup>137</sup> Within two years of 1 December 1973, Papua New Guinea, on Tuesday 16 September 1975, evolved from a territory with substantial self-government to an independent State.<sup>138</sup> The final colonial links were severed shortly before the dismissal of the Whitlam Government on 11 November 1975. They remain an important achievement of the Whitlam Government, signaled by the presence at Whitlam's funeral in Sydney of the current and a number of past Prime Ministers.

Whitlam's championship of entire self-determination for Papua New Guinea was reflected in his support for the self-determination of the peoples of Indo-China. This point was made at a time when this was not an established political position, even within the Australian Labor Party.<sup>139</sup> During the first year of the Whitlam Government, he made a speech on the issue during a debate on the then Australian New Zealand United States (ANZUS) Council meeting. At that meeting, he had argued a case against the use of Australian troops in Malaya and urged self-determination for Indo-China as he had previously done with respect to Papua New Guinea. He also advocated a greater role for the United Nations in the Pacific and recommended that the provisions of the ANZUS treaty between Australia, New Zealand and the United States be reviewed.<sup>140</sup>

Writing in the context of Whitlam's support for the principle of the people's right to self-determination, in accordance with international law, Jenny 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

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<sup>137</sup> *ibid*, p. 98.

<sup>138</sup> Rory Ewing, n 128 above.

<sup>139</sup> Jenny Hocking., n 1 above, p. 170.

<sup>140</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 15 September 1953, 211 (Gough Whitlam).



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 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".<sup>141</sup>

### The International Court of Justice

In 1973, the interest that the Whitlam Government had shown for international law was also translated into the commencement of proceedings before the International Court of Justice (ICJ). Those proceedings concerned the French nuclear weapons tests conducted in the Pacific.<sup>142</sup> This became another example of the Whitlam's Government's innovative use of international instrumentalities. At the ICJ, Attorney-General Lionel Murphy led a team of senior Australian lawyers to success in a result in which the ICJ ruled against France's claimed right to continue atmospheric nuclear testing in the Pacific.<sup>143</sup>

In the context of the ICJ proceedings concerning the French nuclear tests in the Pacific, and as Prime Minister of Australia in July 1973, Whitlam explained to a 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....."<sup>144</sup>

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<sup>141</sup> Jenny Hocking, n 1 above, p. 170-171.

<sup>142</sup> M.D. Kirby, n 2 above, p. 20.

<sup>143</sup> Jenny Hocking., *Lionel Murphy: A Political Biography*, Melbourne, 2000, cited in Jenny Hocking., n 117 above, p. 233.

<sup>144</sup> 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.

### Overseas engagements

Visits to overseas countries by Australian Prime Ministers have frequently been politically controversial. The Australian media often delight in encouraging resentful attitudes towards the efforts of successive leaders to engage with international affairs. Because of advances in international travel this had, by 1972, become such easier, less disruptive to national duties, and more frequent. But Whitlam was probably the first modern Australian Prime Minister, willing to travel overseas frequently to advance his perception of Australia's interests and its full engagement with its region and the world. He saw this as a proper response to nation's 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, the United Kingdom, Ireland, Greece, the Netherlands, France, Italy, Yugoslavia, the Soviet Union, the Federal Republic of Germany, Pakistan and Bangladesh.<sup>145</sup> In justifying these missions when tackled Whitlam offered several explanations.

First, he expressed his belief that an important responsibility of the Prime Minister of Australia was to promote the nation's place in the world.<sup>146</sup> This duty, in Whitlam's view, was sometimes best discharged by making direct contact with overseas governments. The objective was to create stronger ties involving a variety of matters involving economics, the environment, human rights, intellectual property rights and trade, to name but a few.<sup>147</sup> As Whitlam explained, "only a visit by a head of government obliges the countries visited to clarify and coordinate their policies towards us".<sup>148</sup>

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<sup>145</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 1975, 61 (Mr. Gough Whitlam, Prime Minister).

<sup>146</sup> Ibid.

<sup>147</sup> Ibid.

<sup>148</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 1975, 62 (Mr. Gough Whitlam, Prime Minister).

Secondly, Whitlam emphasised Australia's continuing and substantial interest in Europe and in strengthening Europe's awareness of Australia.<sup>149</sup> His view was that, by visiting Europe personally, he helped accomplish these objectives.<sup>150</sup> Specifically, he wanted to make clear to the world the important changes that had occurred in Australia's policies in a number of areas following its first change of government in 23 years.<sup>151</sup>

Thirdly, Whitlam sought to establish, or strengthen, personal contacts with the heads of government of countries important to Australia and to exchange opinions with them on issues such as shared economic problems, including inflation and unemployment.<sup>152</sup> In this respect, at first hand, Whitlam sought for example to discuss Australia's interest in long-term arrangements for access for its commodities to established and new markets, especially in Europe.<sup>153</sup>

Fourthly, Whitlam sought to do what many previous Prime Ministers of Australia had not done. This was to advance an energetic internationalist outlook for Australia. To support this proposition, 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”.<sup>154</sup>

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.<sup>155</sup> His prediction of Australia's role as a potential major supplier

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<sup>149</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 1975, 66 (Mr. Gough Whitlam, Prime Minister).

<sup>150</sup> *Ibid.*

<sup>151</sup> *ibid.*

<sup>152</sup> *ibid.*

<sup>153</sup> *ibid.*

<sup>154</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 1975, 61 (Mr. Gough Whitlam, Prime Minister).

<sup>155</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 1975, 63 (Mr. Gough Whitlam, Prime Minister).

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 that he strongly endorsed and led his government to ratify.<sup>156</sup>

Within the context of meat exports, Whitlam pursued with the then European Economic Community (EEC) issues regarding the Community's import restrictions on Australian beef.<sup>157</sup> He explained to the EEC the disruptive and harmful effects of its actions on the Australian meat industry. He explained to European leaders the need for stable, long-term marketing arrangements.<sup>158</sup> According to Whitlam, the response of the individual governments was, in the main, "apologetic and sympathetic".<sup>159</sup>

In a number of countries Whitlam discussed the energy crisis then facing developed economies and their Middle East suppliers. 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.<sup>160</sup> 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 enjoy secure and recognised international borders.<sup>161</sup>

As the 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.<sup>162</sup> Australia wanted to see that

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<sup>156</sup> Ibid.

<sup>157</sup> Ibid.

<sup>158</sup> Ibid.

<sup>159</sup> Ibid.

<sup>160</sup> Ibid.

<sup>161</sup> Ibid.

<sup>162</sup> Ibid.

treaty strengthened and for all states to accept the multilateral obligations that the Treaty creates.<sup>163</sup>

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 by treaty arrangements with, or against, any major power bloc.<sup>164</sup> Although Australia was aligned by treaty and tradition with Western powers, including the United States and the United Kingdom, 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.<sup>165</sup> Understandably, this proposal received a cool reception and got nowhere.

In several countries that he 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 would amount to support of an escalation and heightening of tension in the region.<sup>166</sup> He opposed this and made the Australian Government's position clear to the Permanent Members of the United Nations Security Council.

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. However, he insisted that Australia

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<sup>163</sup> *ibid.*

<sup>164</sup> Grant Cedric., "Equity in Third World Relations: A Third World Perspective" (1995) 71(3) *International Affairs* 567.

<sup>165</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 1975, 64 (Mr. Gough Whitlam, Prime Minister).

<sup>166</sup> *Ibid.*

wanted “as far as possible” to control its own industries and resources.<sup>167</sup> Whitlam had agreed to raise with Australian taxation authorities the strongly expressed interests of the Belgian, Netherlands and Italian governments in negotiating double taxation agreements with Australia.<sup>168</sup> In addition, Whitlam had agreed that a West German mission should visit Australia to discuss, all aspects of German investment in Australia.<sup>169</sup>

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 a number of Australian constitutional issues. These included his view as to the need to limit the right of appeal to the Judicial Committee of the Privy Council.<sup>170</sup> The Whitlam Government secured the enactment of Bills by the Australian Parliament to give effect to the Government’s policy on Privy Council appeals.<sup>171</sup> That policy was to invest the High Court of Australia with final jurisdiction in all questions and matters decided by that court.<sup>172</sup> The Privy Council (Appeals from the High Court) Bill 1975 (Cth) had the effect of precluding any further appeals from the High Court of Australia to their Lordships in London. 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), on the initiative of the Coalition Government.<sup>173</sup>

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<sup>167</sup> *ibid.*

<sup>168</sup> *ibid.*

<sup>169</sup> *ibid.*

<sup>170</sup> *ibid.*

<sup>171</sup> *ibid.*

<sup>172</sup> 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.

<sup>173</sup> Michael Kirby., n 2 above, p. 6-8.

It had been 33 years since a previous Labor government had established diplomatic relations with the Soviet Union.<sup>174</sup> Invoking that history, 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”.<sup>175</sup>

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.<sup>176</sup> 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.<sup>177</sup> 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 following France’s atmospheric testing of nuclear weapons in the Pacific. That issue would ultimately conclude before the ICJ in Australia’s favour.<sup>178</sup>

Whitlam expressed the sympathy that the Australian Government and people felt for the people of Bangladesh in their struggle to feed their population.<sup>179</sup> He suggested to Sheik Mujib, political leader of Bangladesh, international

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<sup>174</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 1975, 65 (Mr. Gough Whitlam, Prime Minister).

<sup>175</sup> *Ibid.*

<sup>176</sup> *ibid.*

<sup>177</sup> *ibid.*

<sup>178</sup> *ibid.*

<sup>179</sup> *ibid.*

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.<sup>180</sup> 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”.<sup>181</sup> He sought to expand assistance with aid supplied by other wealthy countries.

### 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”.<sup>182</sup> Under the Whitlam Government, Australia set about actively involving itself more closely with the United Nations. It embraced a multilateral approach to basic engagements with foreign countries. In Australia’s political history this issue of multilateral, as against bilateral, engagement has sometimes been a point of distinction between Labor and Coalition Governments.

On the initiative of Whitlam himself, 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.<sup>183</sup> This policy was not only a further example of Whitlam’s commitment to matters of international concern. It was also a demonstration of a practical engagement that had not previously been an important feature of Australian government policies.

Whitlam also set about ensuring that Australia was represented at an international conference of experts held in Oslo for the support of the victims of

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<sup>180</sup> *ibid.*

<sup>181</sup> *ibid.*

<sup>182</sup> Gough Whitlam., n 31 above, p. 171.

<sup>183</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 24 May 1973, 2649 (Mr. Gough Whitlam, Prime Minister).



colonialism and apartheid in southern Africa.<sup>184</sup> 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 irrespective of race; culture or other immaterial consideration. The purpose of the conference was to formulate a constructive program of peaceful action to facilitate and hasten the process of global decolonisation and the elimination of apartheid in Southern Africa.<sup>185</sup> These were very large themes in global foreign relations in the 1970s to the 1990s. At the time of this engagement few observers predicted that the end of such policies would come quickly or peacefully.

A 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*.<sup>186</sup> Australian delegations, with instructions from the Whitlam Government, took an active part in the drafting and adoption of the Protocols.<sup>187</sup> Protocol I is concerned with the protection of the victims of international armed conflicts. Protocol II concerns the protection of the victims of non-international armed conflicts.<sup>188</sup>

In June 1974, the Whitlam Government appointed a National Advisory Committee for the then proposed United Nations' International Women's Year of 1975.<sup>189</sup> The Chair of the Advisory Committee was Whitlam's wife, Margaret Whitlam, whom Gough Whitlam was often to describe as his best appointment. Elizabeth Reid, the Prime Minister's adviser on women, headed the Advisory Committee's Secretariat.<sup>190</sup> At several United Nations meetings, Australia gave support to non-racial voting at the General Assembly. It changed Australia's

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<sup>184</sup> Ibid.

<sup>185</sup> *ibid.*

<sup>186</sup> Gough Whitlam., "Australia and the UN commission on human rights" (1991) 45(1) *Australian Journal of International Affairs*, p. 51.

<sup>187</sup> Ibid.

<sup>188</sup> *ibid.*

<sup>189</sup> National Archives of Australia, n 122 above.

<sup>190</sup> Ibid.

voting on the credentials of South Africa.<sup>191</sup> In addition, in Australia, the Federal Government banned racially-selected South African sporting teams from entering Australia while that country remained under the apartheid regime.<sup>192</sup>

The Vietnam War was still being waged when Whitlam was elected to Government. Australian troops were fighting alongside of the forces of South Vietnam and the United States. At that time 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.<sup>193</sup> In Opposition, Whitlam's condemnation of the Vietnam War had been addressed repeatedly to the "damning record of the Government's lack of interest in negotiations" and the failure of the Australian Government to use its influence with the United States and to work within the United Nations to bring about a negotiated end to the war.<sup>194</sup>

In 1975, Whitlam surveyed before the Australian Parliament, what he saw as the overall objectives and achievements of his time in government in terms of international affairs:

"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

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<sup>191</sup> *ibid.*

<sup>192</sup> *ibid.*

<sup>193</sup> Jenny Hocking., n 1 above, p. 301.

<sup>194</sup> Gough Whitlam., "Extract from speech to Adelaide University ALP Club", cited in Jenny Hocking, n 1 above, p. 301.

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".<sup>195</sup>

## **IRREVERSIBLE ENGAGEMENT**

### International Law and Australian Legislation

Much of the legislation that was enacted during the Whitlam Government was consequential upon the steps taken by the Government to ratify long neglected treaties and to join a number of operating international institutions.

The ratification of the international *Convention on the Elimination of all Forms of Racial Discrimination* (CERD) provided an important source of constitutional power to sustain the validity of the *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975* (Cth) and the *Racial Discrimination Act 1975* (Cth). It marked an important evolution in Australian law affecting, not just Australia's relations with its own Aboriginal people but also with migrants and other entrants, influenced by the White Australia policy and racial discrimination.

Another field of national legislation that was to draw heavily on international engagement was in the field of employment law. Early in the life of the Whitlam Government it sought approval from the Parliament to approve amendments to the constitution to the International Labor Organisation in the *International Labour Organisation Act 1973* (Cth). The Whitlam Government was a strong supporter of the ILO, committed to ratification of ILO conventions, about which Whitlam spoke incessantly. But it was also committed to the process of international commercial arbitration which it saw as building on the model provided in employment law advanced by the ILO. Thus, reliant on the external affairs power in the *Constitution of the Constitution* (s 51(xxix)) the Parliament

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<sup>195</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 1975, 67 (Mr. Gough Whitlam, Prime Minister).

enacted the Convention on the Recognition and Enforcement of Arbitral Awards, in the *Arbitration (Foreign Awards and Agreements) Act 1974* (Cth). That measure was far sighted given the later expansion in more recent times of the engagement of Australian businesses with foreign arbitral arrangements.

The gradual engagement of the international community with environmental concerns was also reflected in legislation enacted to support such objectives within Australia. The relevant enactments included the *Environment Protection (Impact of Proposals) Act 1974* (Cth) and the *National Parks and Conservation Act 1975* (Cth). These measures opened the door to Australian initiatives to protect its unique environment, supported by newly established treaty law.

A further area of engagement with international institutions related to banking and finance. The Whitlam Government procured the enactment of a number of provisions designed to approve Australia's engagement with international and regional banks.<sup>196</sup> Australia also enacted a number of laws to approve ratification of conventions relating to extraterritorial crimes. Thus the *Crimes (Protection of Aircraft) Act 1973* (Cth) approved the ratification by Australia of the *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*. There were many such statutes during the Whitlam Government. They picked up international treaties in respect of which not a great deal had been done before for reasons that were never fully explained. It is unlikely that such laws would have been noticed in the years of the Whitlam Government, except for the passionate attention to the cause of internationalism held, and constantly expressed, by Whitlam himself.

### Criticism and assessment

A common criticism of the Whitlam Government was that it tried to do too much too quickly. Certainly, a record number of Bills for that time were enacted by

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<sup>196</sup> *International Development Association (Further Payment) Act 1974* (Cth); *International Monetary Agreements Act 1974* (Cth); *Asian Development Fund Act 1974* (Cth) and *Australian Development Assistance Agency Act 1974* (Cth).

the Australian Parliament during 1972-1975. However, 93 Bills were rejected by the Senate, more than the number (68) that had 'failed to pass' within the *Constitution* during the previous quarter century of Federation. No doubt the pace of legislation, with much Federal engagement beyond traditional and familiar subjects, helped to unsettle some electors. They may even have contributed to the big majorities adverse to the Australian Labor Party in the federal elections of 1975 and 1977.

In addition to the pace, some international steps taken by Whitlam were clearly regarded as too clever, even tricky, such as the appointment of Senator Vince Gair (DLP) as Ambassador to Ireland in March 1974. In the result, this provoked breaches of a parliamentary convention that were to contribute to the downfall of the government in 1975.

Another repeated criticism of the Whitlam Government was of the management of the economy, Whitlam would himself probably have agreed that economics (now so important to Australian domestic political fortunes) was not his special interest. However, his internationalist engagement undoubtedly pointed Australians in directions important for economic reasons. Some of the economic difficulties that arose during the Whitlam Government were the product of international forces over which Australia had little control. Whitlam's solution to inefficiencies of federalism was to expand the ambit of national law-making. Dr Ken Henry, long-time Secretary to the Treasury, pointed out in 2009 that the expansion in the size of federal government over which Whitlam presided has effectively never been reversed and in his view never would be.<sup>197</sup> This rather suggests that it found a new equilibrium which successors have substantially endorsed.

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<sup>197</sup> 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).

Inevitably, there were aspects of Whitlam's foreign policy also that have given rise to criticism, much of which appears justifiable. Thus, the refusal of the Whitlam Government to allow South Vietnamese refugees to seek asylum in Australia, following the fall of Saigon, was quickly reversed by the Fraser Government in 1976. That Government responded in a way that appears to have been more consonant with the language and objectives of the *Refugees Convention* and Protocol and with the principles of the *Racial Discrimination Act* 1975 (Cth) of which Whitlam was so proud. Ironically, it was the Fraser Government that ratified the *International Covenant on Economic Social and Cultural Rights* and the *International Covenant on Civil and Political Rights*, which Whitlam had signed but not taken further.

Another serious flaw in Whitlam's foreign policy was his strong resistance to self-determination and independence for the people of East Timor (Timor-Leste). It is estimated that 100,000 East Timorese died during the 27 year occupation of that country by Indonesia. Members of the Whitlam Government, including Whitlam himself, appear to have considered East Timor as "too small to be independent".<sup>198</sup> History demonstrates that Whitlam and his government were wrong on this matter. In 1999, following the United Nations-sponsored act of self-determination (which paradoxically had been a general policy of the Whitlam Government), Indonesia surrendered control of East Timor. On 20 May 2002 Timor-Leste became the first new nation state of the 21<sup>st</sup> century. Stubbornly, to the end, Whitlam resisted acknowledgement of his error in this respect.

### Conclusions

Following his dismissal from the office of Prime Minister of Australia on 11 November 1975, Whitlam continued to advocate an internationalist outlook on

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<sup>198</sup> Absolute Astronomy., "Gough Whitlam", cited on [http://www.absoluteastronomy.com/topics/Gough\\_Whitlam](http://www.absoluteastronomy.com/topics/Gough_Whitlam) [Accessed 17/12/09].

the part of Australia, its Government and people. It became part of his public *persona*.

In 1983, he was appointed by the Hawke Government as Australia's Permanent Representative to the United Nations Educational, Scientific and Cultural Organisation (UNESCO) in Paris, a position he was to hold until 1986.<sup>199</sup> There were two historical symmetries in that appointment.<sup>200</sup> First, he assumed the post in the wake of the resignation of Sir John Kerr, as Ambassador-designate to UNESCO.<sup>201</sup> Secondly, with his appointment as Australia's Ambassador to UNESCO, Whitlam joined one of the global organizations that his father had championed forty years earlier.<sup>202</sup>

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

Whitlam's fertile mind gave rise to very many projects. These included 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 Asia and the Pacific. Concern for the arts and culture. Secularism in public life. Constitutional reform. Building a confident, healthy and well-educated, multicultural nation, looking forward rather than backward.

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<sup>199</sup> Jenny Hocking., n 117 above, p. 234.

<sup>200</sup> Ibid.

<sup>201</sup> *ibid.*

<sup>202</sup> *ibid.*

This article has addressed one facet of the broad political and intellectual agenda of E.G. Whitlam and his Government. Yet it has been an important and influential element. It was one in harmony with the age in which he arrived in government. The chronicle demonstrates the great variety and number of the federal laws on international subjects proposed by the Whitlam Government and enacted by the Australian Parliament during the comparatively short period of Whitlam's Prime Ministership. The unprecedented numbers of treaties, conventions and agreements signed or ratified. The significant engagement with international institutions and with other nation states. The alteration in Australia's outlook and legal culture. The advance in the influence and reach of international law.

There were mistakes and failings, that is true. Although he might himself sometimes dispute the assertion, Gough Whitlam was, after all, only human. Like the rest of us, he made errors. He was sometimes inconsistent. Yet beside the achievements and the nation-changing reforms that he helped to introduce, his errors and faults can 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 and in its region was essential and indeed, by 1972, overdue. The lives of millions of Australians were touched by Whitlam and his government. After Whitlam, it can truly be said, that Australia was never quite the same country again. In the long eye of history, perhaps the most important change he brought about was the increased engagement he achieved with Australia's nationhood. And the confidence that he instilled in Australians that they could play a useful part in advancing a safer, more equitable and rights-respecting world and country. On his centenary, it is right that his fellow citizens should remember and reflect on, and acknowledge his legacy.

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