

# WHITLAM AS INTERNATIONALIST: A CENTENARY REFLECTION

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*Edward Gough Whitlam, the 21<sup>st</sup> Prime Minister of Australia, was born 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 debated. 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 are 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. This article also reviews Whitlam's role in the conduct of international relations with Australia's neighbours, notably the People's Republic of 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 and life.*

## CONTENTS

I	Introduction.....	852
II	Australia's Ratification of International Treaties.....	855
	A Introduction.....	855
	B Criminal Law .....	856
	C Environment and Nuclear Power.....	857
	D Human Rights.....	859

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E	Intellectual Property .....	863
F	International Institutions .....	864
G	International Air Services .....	866
H	Labour Standards .....	867
I	Science and Technology .....	869
J	Taxation .....	871
K	Arts and Cultural Exchanges .....	872
L	Trade Agreements .....	874
III	Australia's Involvement with International Law .....	875
A	Introduction .....	875
B	People's Republic of China .....	876
C	Human Rights .....	877
D	The International Court of Justice .....	881
E	Overseas Engagements .....	881
F	United Nations .....	887
IV	Irreversible Engagement .....	889
A	International Law and Australian Legislation .....	889
B	Criticism and Assessment .....	891
C	Conclusions .....	893



*Gough Whitlam and Michael Kirby as delegates to the United Nations Educational, Scientific and Cultural Organization General Conference, Paris, 1984.*

## I INTRODUCTION

Edward Gough Whitlam was the 21<sup>st</sup> 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 5 November 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 longtime 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 commitment to improvement, modernisation and simplification of the law. This was natural enough given his family background, professional training and university education.

Whitlam's father, Harry Frederick Ernest Whitlam (known as Fred Whitlam) had been a leading figure first in the Victorian public service in colonial times and then, after federation, in the new Commonwealth public service.<sup>3</sup> After obtaining a law degree in 1914, Fred Whitlam had risen through various offices to be appointed, in December 1936, as Crown Solicitor of the Commonwealth.<sup>4</sup> Whitlam himself 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 usually occasioned.<sup>5</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

<sup>1</sup> See generally Jenny Hocking, *Gough Whitlam: A Moment in History* (Miegunyah Press, 2009); Gough Whitlam, *The Whitlam Government: 1972–1975* (Viking, 1985).

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

<sup>3</sup> Michael Kirby, 'Gough Whitlam: In His Father's Shadow' in Troy Bramston (ed), *The Whitlam Legacy* (Federation Press, 2013) 16, 16–17.

<sup>4</sup> *Ibid.*

<sup>5</sup> Because of the requirements of *Australian Constitution* s 128.

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 the establishment of the Australian Law Reform Commission)<sup>6</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 theme can be traced to the military service for which Whitlam volunteered after the Japanese attack on Pearl Harbor on 7 December 1941 and the danger that this attack posed for Australia's peace and security as a nation.<sup>7</sup>

Upon demobilisation 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 imperilled by grave international crimes that had been revealed; threatened by annihilation from nuclear weapons; and struggling to embrace a new world legal order in the form of the United Nations created by the *Charter of the United Nations* in 1945. However, 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 also been delegated, probably because of his important national experience, to work with the United Nations in the development of the *Universal Declaration of Human Rights* ('UDHR').<sup>8</sup> Fred Whitlam was assigned by the Menzies-Fadden Coalition 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'.<sup>9</sup> Gough Whitlam embraced an identical approach. It was all the more surprising and influential because it contrasted markedly with the rather isolationist attitudes of Australia to which the nation reverted

<sup>6</sup> *Law Reform Commission Act 1973* (Cth).

<sup>7</sup> Kirby, 'In His Father's Shadow', above n 3, 21.

<sup>8</sup> Cameron Hazlehurst, 'Whitlam, Harry Frederick (Fred) (1884–1961)', *Australian Dictionary of Biography* (Melbourne University Press, 2002) vol 16, 540–1; *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948).

<sup>9</sup> Kirby, 'In His Father's Shadow', above n 3, 19, quoting Hocking, below n 156, 224.

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 the third President of the General Assembly of the United Nations in 1948)<sup>10</sup> much the same attitudes affected the Australian Labor Party. They were fuelled by the White Australia policy, common to both major political groupings, which attracted much antagonism on the emerging international scene.

In an earlier article, 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>11</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 on 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. He became the leader of the opposition in 1967.<sup>12</sup> 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 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 political 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.

<sup>10</sup> General Assembly of the United Nations, *Past Presidents*, United Nations <<http://www.un.org/pga/70/president/presidents-of-the-general-assembly/>>.

<sup>11</sup> Kirby, 'In His Father's Shadow', above n 3.

<sup>12</sup> See Australian Electoral Commission, *Prime Ministers and Opposition Leaders* (26 November 2013) <[http://www.aec.gov.au/elections/australian\\_electoral\\_history/pm.htm](http://www.aec.gov.au/elections/australian_electoral_history/pm.htm)>.

## II AUSTRALIA'S RATIFICATION OF INTERNATIONAL TREATIES

### A Introduction

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

Our thinking ... is towards a more independent Australian stance in international affairs and towards an Australia which will be less militarily oriented and not open to suggestions of racism, an Australia which will enjoy a growing standing as a distinctive, tolerant, co-operative and well-regarded nation not only in the Asian and Pacific region but in the world at large.<sup>13</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>14</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, and 34 treaties or conventions.<sup>15</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>16</sup>

<sup>13</sup> Freda Hawkins, *Critical Years in Immigration: Canada and Australia Compared* (McGill-Queen's University Press, 1989) 94.

<sup>14</sup> E G Whitlam, 'Australia and International Law' (Speech delivered at the Seminar on Public International Law, Canberra, 26 July 1975).

<sup>15</sup> Most of the treaties that entered into force in Australia between 5 December 1972 and 11 November 1975 are mentioned below.

<sup>16</sup> Whitlam, 'Australia and International Law', above n 14, 4.

### B 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*.<sup>17</sup> 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>18</sup> Secondly, on 5 February 1975, Australia ratified the *Treaty between Australia and the Republic of Austria concerning Extradition*,<sup>19</sup> which was similar in nature to the *Treaty between Australia and Sweden concerning Extradition*. Thirdly, on 8 August 1975, Australia ratified the *Protocol Amending the Single Convention on Narcotic Drugs*,<sup>20</sup> which made several changes to the *Single Convention on Narcotic Drugs*.<sup>21</sup> The 1975 protocol highlighted the need for treatment and rehabilitation of drug-addicted persons,<sup>22</sup> obliging states parties to take 'all practicable measures for the prevention of abuse of psychotropic substances and for the early identification, treatment, education, after-care, rehabilitation, and social reintegration of the persons involved'.<sup>23</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>24</sup>

<sup>17</sup> *Treaty between Australia and Sweden concerning Extradition*, signed 20 March 1973, 975 UNTS 13 (entered into force 10 March 1974).

<sup>18</sup> *Ibid* art 1(1).

<sup>19</sup> *Treaty between Australia and the Republic of Austria concerning Extradition*, signed 29 March 1973, 975 UNTS 37 (entered into force 5 February 1975) arts 1, 3.

<sup>20</sup> *Protocol Amending the Single Convention on Narcotic Drugs*, opened for signature 25 March 1972, 976 UNTS 3 (entered into force 8 August 1975).

<sup>21</sup> *Single Convention on Narcotic Drugs*, opened for signature 30 March 1961, 520 UNTS 151 (entered into force 13 December 1964).

<sup>22</sup> See, eg, *Protocol Amending the Single Convention on Narcotic Drugs*, opened for signature 25 March 1972, 976 UNTS 3 (entered into force 8 August 1975) arts 14(1)(b), 15.

<sup>23</sup> *Ibid* art 15.

<sup>24</sup> *Ibid* art 2.

### C Environment and Nuclear Power

Three important treaties dealing with the environment and five treaties dealing with nuclear power and weapons were entered into by Australia under the Whitlam government. The *Convention on Wetlands of International Importance Especially as Waterfowl Habitat* ('Ramsar Convention'),<sup>25</sup> which the Whitlam government signed 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>26</sup> It is the only universal environmental convention that deals with this ecosystem.<sup>27</sup> The participating countries are from 'all geographic regions of the planet'.<sup>28</sup> Unlike most other global environmental conventions, the *Ramsar Convention* is not affiliated with the United Nations system of Multilateral Environmental Agreements. Instead, it operates very closely with the other Multilateral Environmental Agreements — it is 'a full partner among the "biodiversity-related cluster" of [international] treaties and agreements'.<sup>29</sup>

In a statement that indicated his growing commitment to the need for Australia's independence in relation to the Australia–United States alliance, Whitlam suggested that the election which had returned the Coalition to government with a smaller majority on 25 October 1969,<sup>30</sup> indicated that the Australian people wanted their government to sign the *Treaty on the Non-proliferation of Nuclear Weapons* ('NPT'),<sup>31</sup> about which the Gorton government had hesitated.<sup>32</sup> After winning government on 2 December 1972,

<sup>25</sup> *Convention on Wetlands of International Importance Especially as Waterfowl Habitat*, opened for signature 2 February 1971, 996 UNTS 245 (entered into force 21 December 1975).

<sup>26</sup> *Ibid* Preamble, art 1.

<sup>27</sup> Ramsar, 'The Convention on Wetlands' (Leaflet, January 2008) <[http://ramsar.rgis.ch/pdf/about/about\\_brochure\\_2008\\_e.pdf](http://ramsar.rgis.ch/pdf/about/about_brochure_2008_e.pdf)>.

<sup>28</sup> *Ibid*.

<sup>29</sup> Ramsar, *About the Ramsar Convention*, (January 2008) The Ramsar Convention on Wetlands <[http://ramsar.rgis.ch/cda/en/ramsar-about/main/ramsar/1-36\\_4000\\_0\\_\\_](http://ramsar.rgis.ch/cda/en/ramsar-about/main/ramsar/1-36_4000_0__)>.

<sup>30</sup> Parliament of Australia, *Detailed Results: House of Representatives 1966–1987* (11 December 2011) About Parliament <[http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1112/12rp06/Copy\\_of\\_12rp06d](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1112/12rp06/Copy_of_12rp06d)>.

<sup>31</sup> *Treaty on the Non-proliferation of Nuclear Weapons*, opened for signature 1 July 1968, 729 UNTS 161 (entered into force 5 March 1970).

<sup>32</sup> Hocking, *A Moment in History*, above n 1, 340.

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>33</sup> It is commonly described as having three main ‘pillars’: non-proliferation, disarmament, and peaceful use.<sup>34</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>35</sup> States that have nuclear weapons accept the obligation ‘not to transfer nuclear weapons or explosive devices to NNWS’.<sup>36</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>37</sup> All states parties to the treaty agree to undertake full exchanges of equipment, materials and scientific and technological information ‘for the peaceful uses of nuclear energy’.<sup>38</sup> The high relevance of this treaty for the world continues today because of acknowledged or suspected developments in India, Iran, Israel, North Korea, Pakistan 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*’).<sup>39</sup> 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 kilometre) coastal zone.<sup>40</sup> The *Seabed Arms Control*

<sup>33</sup> United Nations Office for Disarmament Affairs, ‘Treaty on the Non-proliferation of Nuclear Weapons’ (Fact Sheet, July 2015) <<http://www.un.org/disarmament/factsheets/>>.

<sup>34</sup> See, eg, Global Affairs Canada, *The Nuclear Non-proliferation Treaty* (23 January 2014) <<http://www.international.gc.ca/arms-armes/nuclear-nucleaire/npt-tnp.aspx>>.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> *NPT* art VI.

<sup>38</sup> Ibid arts III–IV.

<sup>39</sup> *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*, opened for signature 11 February 1971, 955 UNTS 115 (entered into force 18 May 1972).

<sup>40</sup> Ibid arts I–II.

*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>41</sup>

#### D Human Rights

Within the field of international human rights law, the Whitlam government ratified 15 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*’)<sup>42</sup> 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>43</sup> Secondly, the ratification of *CERD* in Australian law indicated, for the first time, a clear parliamentary purpose, enforceable by law, that hostility against persons by reference to their race would not be tolerated in Australia. Thirdly, *CERD* has gained near-universal acceptance by the international community, with fewer than 20 (mostly small) states yet to become parties to the convention.<sup>44</sup> Most major states have also accepted *CERD*’s individual complaints mechanism, signalling a desire to be bound in an effective way by the convention’s provisions.<sup>45</sup> Fourthly, by ratifying *CERD*, the Whitlam government sent a strong 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

<sup>41</sup> Ibid art III.

<sup>42</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969).

<sup>43</sup> Gough Whitlam, *Abiding Interests* (University of Queensland Press, 1997) 184.

<sup>44</sup> United Nations, *Chapter IV Human Rights: 2. International Convention on the Elimination of All Forms of Racial Discrimination* (8 January 2016) United Nations Treaty Collection <[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)>.

<sup>45</sup> Ibid.

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 Australia's laws 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>46</sup>

Another significant human rights treaty ratified by the Whitlam government was the *Protocol Relating to the Status of Refugees* ('*Refugee Protocol*').<sup>47</sup> This gave approval by Australia to the United Nations 1951 *Convention Relating to the Status of Refugees* ('*Refugee Convention*'),<sup>48</sup> 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 elsewhere.<sup>49</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>50</sup>

On 10 December 1974, the Whitlam government acceded to the *Convention on the Political Rights of Women* ('*CPROW*').<sup>51</sup> During question time in the House of Representatives regarding the ratification of *CPROW*, Whitlam noted that '[p]revious Australian Governments took no action to either sign

<sup>46</sup> Hawkins, above n 13, 94, quoting Commonwealth, *Parliamentary Debates*, House of Representatives, 24 May 1973, 2649 (Gough Whitlam).

<sup>47</sup> *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967). The protocol entered into force for Australia on 13 December 1973.

<sup>48</sup> *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

<sup>49</sup> Administrative Appeals Tribunal Migration and Refugee Division, 'Guide to Refugee Law' (December 2015) ch 1, 1-24 <<http://www.aat.gov.au/migration-and-refugee-division/resources/guide-to-refugee-law>>.

<sup>50</sup> Office of the Prime Minister, 'Vietnamese Refugees' (Press Statement, No 534, 23 July 1975) 2.

<sup>51</sup> *Convention on the Political Rights of Women*, opened for signature 31 March 1953, 193 UNTS 135 (entered into force 7 July 1954).

or ratify this Convention'.<sup>52</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 soundly based on respect for, and on the protection and enhancement of, civil liberties and basic human rights for all its people, regardless of their sex'.<sup>53</sup> *CPROW* is important as it formally recognised, 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>54</sup>

Another human rights treaty ratified by Australia was the *Convention Relating to the Status of Stateless Persons* ('*Status Convention*').<sup>55</sup> This entered into force for Australia on 13 March 1974. A major purpose of the *Status Convention* was to ensure that stateless persons enjoyed 'the widest possible exercise of ... fundamental rights and freedoms'.<sup>56</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, art 4 of the *Status Convention* requires that all parties to the convention must

accord to stateless persons within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practise their religion and freedom as regards the religious education of their children.

Furthermore, art 16(1) of the *Status Convention* provides that a 'stateless person shall have free access to the Courts of Law on the territory of all Contracting States'.

During the Whitlam government, the rights of employees within the context of human rights were also protected in a similar way. For example, on 28 February 1973, Australia ratified several conventions of the International Labour Organisation ('ILO'), including the *Convention (No 87) concerning*

<sup>52</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 1974, 4403.

<sup>53</sup> Office of the Prime Minister, 'Political Rights of Women' (Press Statement, No 409, 9 December 1974).

<sup>54</sup> *CPROW* Preamble.

<sup>55</sup> *Convention Relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960).

<sup>56</sup> *Ibid* Preamble. See also *Koroitamana v Commonwealth* (2006) 227 CLR 31.

*Freedom of Association and Protection of the Right to Organise* ('ILO Convention No 87').<sup>57</sup> The first 10 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.<sup>58</sup> 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>59</sup>

*ILO Convention No 87* is recognised as a human rights instrument, despite the employment setting of the treaty. This is because many of the articles in the convention are similar to the provisions expressed in art 22 of the *International Covenant on Civil and Political Rights* ('ICCPR').<sup>60</sup> For example, art 22(1) of the ICCPR provides that '[e]veryone 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 *Convention (No 111) concerning Discrimination in Respect of Employment and Occupation*,<sup>61</sup> the *Convention (No 98) concerning the Application of the Principles of the Right To Organise and To Bargain Collectively*<sup>62</sup> and the *Convention (No 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*.<sup>63</sup> These conventions influenced and stimulated Australia's own move towards the principle of equal pay for women.

<sup>57</sup> *Convention (No 87) concerning Freedom of Association and Protection of the Right to Organise*, opened for signature 9 July 1948, 68 UNTS 17 (entered into force 4 July 1950).

<sup>58</sup> *Ibid* art 3.

<sup>59</sup> *Ibid* art 11.

<sup>60</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>61</sup> *Convention (No 111) concerning Discrimination in Respect of Employment and Occupation*, opened for signature 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960). The instrument of ratification was deposited for Australia 15 June 1973.

<sup>62</sup> *Convention (No 98) concerning the Application of the Principles of the Right To Organise and To Bargain Collectively*, opened for signature 1 July 1949, 96 UNTS 257 (entered into force 18 July 1951). The instrument of ratification was registered for Australia 28 February 1973.

<sup>63</sup> *Convention (No 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*, opened for signature 29 June 1951, 165 UNTS 303 (entered into force 23 May

### E 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')<sup>64</sup> entered into force for Australia on 12 November 1975. It was probably the most important of the three intellectual property treaties accepted under Whitlam. The IPC established a common classification for patents of invention, inventors' certificates, utility models and utility certificates, commonly known as the 'International Patent Classification'.<sup>65</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 harmonization of national legislation in that field'.<sup>66</sup>

Secondly, another key treaty in this area was the *Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms* ('Geneva Phonograms Convention').<sup>67</sup> This entered into force for Australia on 22 June 1974. The *Geneva Phonograms Convention* is 'concerned at the widespread and increasing unauthorised duplication of phonograms and the damage this ... [can occasion] to the interests of authors, performers and producers of phonograms'.<sup>68</sup> Under the *Geneva Phonograms Convention*, 'phonogram' means 'any exclusively aural fixation of sounds of a performance or of other sounds'.<sup>69</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').<sup>70</sup> This entered into

1953). The instrument of ratification was deposited for Australia 10 December 1974. See also *Victoria v Commonwealth* (1996) 187 CLR 416.

<sup>64</sup> *Strasbourg Agreement concerning the International Patent Classification*, opened for signature 24 March 1971, 1160 UNTS 483 (entered into force 7 October 1975).

<sup>65</sup> *Ibid* art 1.

<sup>66</sup> *Ibid* Preamble.

<sup>67</sup> *Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms*, opened for signature 29 October 1971, 866 UNTS 67 (entered into force 18 April 1973).

<sup>68</sup> *Ibid* Preamble.

<sup>69</sup> *Ibid* art 1(a).

<sup>70</sup> *Exchange of Notes Constituting an Agreement between Australia and the People's Republic of China concerning the Registration of Trade Marks*, 975 UNTS 73 (signed and entered into force 12 October 1974).

force on 12 October 1974 both for Australia and the People's Republic of China. The *China Trademark Treaty* provided for the 'registration of trade marks on a reciprocal basis between the two countries'.<sup>71</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 trade mark in the other country and, in accordance with the laws and regulations of that country, acquire the exclusive right to the use of trade marks so registered.<sup>72</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.

#### F *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* ('*Vienna Convention*').<sup>73</sup> That is a treaty codifying and clarifying the customary international law on treaties between states, and applying to treaties concluded between states.<sup>74</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 *Vienna Convention* to assist the Court in

<sup>71</sup> Ibid 75.

<sup>72</sup> Ibid.

<sup>73</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

<sup>74</sup> Ibid art 2.1(a). See also *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225; *Macoun v Federal Commissioner of Taxation* (2015) 326 ALR 452, 467 (French CJ, Bell, Gageler, Nettle and Gordon JJ).

resolving the issues for consideration.<sup>75</sup> The *Vienna Convention* has come to have an impact upon Australian municipal law in relation to the local meaning and application of measures of international law.

Another treaty signed by the Whitlam government concerned consular relations. Australia ratified the *Vienna Convention on Consular Relations* ('VCCR') on 12 February 1973.<sup>76</sup> The 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>77</sup> The VCCR enumerates basic legal rights and obligations of signatory states, including the 'establishment [and conduct] of consular relations ... by mutual consent'.<sup>78</sup> It also covers privileges and immunities of consular offices under the laws of the country where the foreign consular office has been established.<sup>79</sup>

The Whitlam government also ratified the *Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes* ('VCCR Optional Protocol').<sup>80</sup> This entered into force for Australia on 14 March 1973. States parties that ratified the *VCCR Optional Protocol* agreed that any disputes to which the VCCR applied could be dealt with by the 'compulsory jurisdiction of the International Court of Justice'.<sup>81</sup>

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').<sup>82</sup> 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

<sup>75</sup> See *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 Rep 16, 47.

<sup>76</sup> *Vienna Convention on Consular Relations*, opened for signature 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967).

<sup>77</sup> *Ibid* Preamble.

<sup>78</sup> *Ibid* art 2(1).

<sup>79</sup> *Ibid* art 4.

<sup>80</sup> *Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes*, opened for signature 24 April 1963, 596 UNTS 487 (entered into force 19 March 1967).

<sup>81</sup> *Ibid* Preamble.

<sup>82</sup> *Statute of The Hague Conference on Private International Law*, opened for signature 31 October 1951, 220 UNTS 121 (entered into force 15 July 1955).

was aimed at fostering 'the progressive unification of the rules of private international law'.<sup>83</sup>

### G *International Air Services*

Remarkably, during the Whitlam government, Australia ratified 14 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*').<sup>84</sup> 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] jeopardize the safety of persons and property, seriously affect the operation of air services, and undermine the confidence of the peoples of the world in the safety of civil aviation.<sup>85</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*;<sup>86</sup> the *Protocol to Amend the Agreement on North Atlantic Ocean Stations of 25 February 1954*, as amended 13 May 1970;<sup>87</sup> the *Agreement concerning the Continuing Relationship between Australia and the European Organisation for the Development and Construction of Space Vehicle Launchers*;<sup>88</sup> and the *Exchange of Notes Constituting an Agreement between the United*

<sup>83</sup> Ibid art 1.

<sup>84</sup> *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, opened for signature 23 September 1971, 974 UNTS 177 (entered into force 26 January 1973).

<sup>85</sup> Ibid Preamble.

<sup>86</sup> *Protocol Relating to an Amendment to Article 56 of the Convention on International Civil Aviation*, opened for signature 7 July 1971, 958 UNTS 217 (entered into force 19 December 1974).

<sup>87</sup> *Protocol to Amend the Agreement on North Atlantic Ocean Stations of 25 February 1954*, opened for signature 13 May 1970, [1971] ATS 10 (entered into force 1 July 1971).

<sup>88</sup> *Agreement concerning the Continuing Relationship between Australia and the European Organisation for the Development and Construction of Space Vehicle Launchers*, [1974] ATS 34 (signed and entered into force 30 December 1974).

*States of America and Australia Relating to Certificates of Airworthiness for Imported Aeronautical Products and Components.*<sup>89</sup>

#### H Labour Standards

Australia also ratified 15 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 it might 'speak with authority ... in the international community on labour and social matters'.<sup>90</sup>

Between 1972–75, Australia ratified nine ILO conventions.<sup>91</sup> By way of contrast, the Fraser government ratified only one in its seven years in office.<sup>92</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>93</sup> Secondly, 'a good record of ratification' 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>94</sup> Thirdly, 'as an advanced economy in a region comprising mostly developing countries', the Whitlam government expressed its intention that 'Australia should be in the vanguard of countries ... foster[ing] and develop[ing] sound labour and social policies in accordance with accepted international standards'.<sup>95</sup> Fourthly, in the view of the government, the ratification of ILO conventions helped

<sup>89</sup> *Exchange of Notes Constituting an Agreement between the United States of America and Australia Relating to Certificates of Airworthiness for Imported Aeronautical Products and Components*, 1006 UNTS 241 (signed and entered into force 11 June 1975).

<sup>90</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 12 April 1973, 1437 (Clyde Cameron, Minister for Labour).

<sup>91</sup> Whitlam, *Abiding Interests*, above n 43, 177.

<sup>92</sup> *Ibid.*

<sup>93</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 12 April 1973, 1437 (Clyde Cameron, Minister for Labour).

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*

stimulate Australia to improve its own labour standards.<sup>96</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 independent'.<sup>97</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>98</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 Australian 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>99</sup>

A key convention ratified by the Whitlam government was the *Convention (No 2) concerning Unemployment* ('ILO Unemployment Convention').<sup>100</sup> 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>101</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>102</sup> and to take steps 'to co-ordinate the operations of such agencies on a national scale'.<sup>103</sup>

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

<sup>99</sup> Office of the Prime Minister, 'Australian Elected Chairman of ILO Governing Body' (Press Statement, No 525, 27 June 1975) 1.

<sup>100</sup> *Convention (No 2) concerning Unemployment*, opened for signature 28 November 1919, 38 UNTS 41 (entered into force 14 July 1921).

<sup>101</sup> Ibid art 2(1).

<sup>102</sup> Ibid art 1.

<sup>103</sup> Ibid art 2(2).

Another ILO convention ratified by Australia was the *Convention (No 131) concerning Minimum Wage Fixing, with Special Reference to Developing Countries*.<sup>104</sup> A key term of that convention required that all participating states 'establish a system of minimum wages which covers all groups of wage earners whose terms of employment are such that coverage would be appropriate'.<sup>105</sup>

The Whitlam government also ratified the *Convention (No 86) concerning the Maximum Length of Contracts of Employment of Indigenous Workers*.<sup>106</sup> 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>107</sup> the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*<sup>108</sup> and the *Instrument for the Amendment of the Constitution of the International Labour Organisation*.<sup>109</sup>

### I 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. Thus, Australia ratified an *Agreement between the Government of Australia and the Government of the Republic of*

<sup>104</sup> *Convention (No 131) concerning Minimum Wage Fixing, with Special Reference to Developing Countries*, opened for signature 22 June 1970, 825 UNTS 77 (entered into force 29 April 1972). The instrument of ratification was deposited for Australia 15 June 1973.

<sup>105</sup> *Ibid* art 1(1).

<sup>106</sup> *Convention (No 86) concerning the Maximum Length of Contracts of Employment of Indigenous Workers*, opened for signature 11 July 1947, 161 UNTS 113 (entered into force 13 February 1953).

<sup>107</sup> *Convention (No 137) concerning the Social Repercussions of New Methods of Cargo Handling in Docks*, opened for signature 25 June 1973, 976 UNTS 343 (entered into force 24 July 1975).

<sup>108</sup> *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959).

<sup>109</sup> *Instrument for the Amendment of the Constitution of the International Labour Organisation*, opened for signature 22 June 1972, 958 UNTS 167 (entered into force 1 November 1974).

*India on Co-operation in the Fields of Science and Technology*.<sup>110</sup> This concerned 'promot[ing] opportunities for cooperation' between Australia and India 'in the fields of civil scientific and technological research and development'.<sup>111</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*.<sup>112</sup> This dealt with facilitating the growth of scientific-technological cooperation and exchanges between government, scientific, technical and industrial research organisations of both countries.<sup>113</sup>

Other treaties in this field, ratified by Australia during the Whitlam government, included the *Exchange of Notes Constituting an Agreement Relating to Scientific and Technical Co-operation between the Government of the Commonwealth 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>114</sup> the *Exchange of Notes Constituting an Agreement between the United States of America and Australia Relating to a Space Research Program*,<sup>115</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>116</sup>

<sup>110</sup> *Agreement between the Government of Australia and the Government of the Republic of India on Co-operation in the Fields of Science and Technology*, 975 UNTS 147 (signed and entered into force 26 February 1975).

<sup>111</sup> *Ibid* art 1.

<sup>112</sup> *Agreement between the Government of Australia and the Government of the Union of Soviet Socialist Republics on Scientific-Technical Co-operation*, 975 UNTS 129 (signed and entered into force 15 January 1975).

<sup>113</sup> *Ibid* art 1.

<sup>114</sup> *Exchange of Notes Constituting an Agreement Relating to Scientific and Technical Co-operation between the Government of the Commonwealth 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*, 916 UNTS 283 (signed and entered into force 30 July 1973).

<sup>115</sup> *Exchange of Notes Constituting an Agreement between the United States of America and Australia Relating to a Space Research Program*, 967 UNTS 275 (signed and entered into force 23 August 1974).

<sup>116</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*, signed 19 December 1974, 975 UNTS 137 (entered into force 11 February 1975).

## J Taxation

Eight treaties were ratified by Australia during the Whitlam government on aspects of taxation. The *Convention on the Nomenclature for the Classification of Goods in Customs Tariffs* ('Nomenclature Convention')<sup>117</sup> entered into force for Australia on 18 July 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 in customs tariffs'.<sup>118</sup>

On 16 January 1975, Australia ratified the *Agreement between the Federal Republic of Germany and the Commonwealth of Australia 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').<sup>119</sup> 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 Republic of Germany.<sup>120</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>121</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*;<sup>122</sup> the *Protocol for the Accession of the People's Republic of Bangladesh to the General*

<sup>117</sup> *Convention on the Nomenclature for the Classification of Goods in Customs Tariffs*, opened for signature 15 December 1950, 347 UNTS 127 (entered into force 11 September 1959). This convention is no longer in force.

<sup>118</sup> *Ibid* Preamble.

<sup>119</sup> *Agreement between the Federal Republic of Germany and the Commonwealth of Australia 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*, signed 24 November 1972, 966 UNTS 255 (entered into force 15 February 1975).

<sup>120</sup> *Ibid* Preamble.

<sup>121</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*, signed 8 November 1972, 904 UNTS 93 (entered into force 31 March 1973).

<sup>122</sup> *Protocol for the Accession of Hungary to the General Agreement on Tariffs and Trade*, opened for signature 8 August 1973, 893 UNTS 236 (entered into force 9 September 1973).

*Agreement on Tariffs and Trade*,<sup>123</sup> and the *Declaration on the Provisional Accession of the Philippines to the General Agreement on Tariffs and Trade*.<sup>124</sup>

### K 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*.<sup>125</sup> 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>126</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*.<sup>127</sup> This was a treaty regulating the International Centre for the Study of the Preservation and Restoration of Cultural Property. That centre has many functions. Two of them are to '[c]ollect, study and circulate documentation concerning the scientific and technical problems of the preservation and restoration of cultural property',<sup>128</sup> and to '[g]ive advice and make recommendations on general or specific points connected with the preservation and restoration of cultural property'.<sup>129</sup>

<sup>123</sup> *Protocol for the Accession of the People's Republic of Bangladesh to the General Agreement on Tariffs and Trade*, opened for signature 7 November 1972, 856 UNTS 198 (entered into force 16 December 1972).

<sup>124</sup> *Declaration on the Provisional Accession of the Philippines to the General Agreement on Tariffs and Trade*, opened for signature 9 August 1973, 893 UNTS 322 (entered into force 9 September 1973).

<sup>125</sup> *Convention for the Protection of the World Cultural and Natural Heritage*, opened for signature 23 November 1972, 1037 UNTS 151 (entered into force 17 December 1975). While this had effect for Australia after the end of the Whitlam government, it was ratified 22 August 1974.

<sup>126</sup> *Ibid* arts 1–4.

<sup>127</sup> *Statutes of the International Centre for the Study of the Preservation and Restoration of Cultural Property*, opened for signature 5 December 1956, 1321 UNTS 286 (entered into force 10 May 1958).

<sup>128</sup> *Ibid* art 1(a).

<sup>129</sup> *Ibid* art 1(c).

Another treaty in this field ratified by the Whitlam government was the *Convention Relating to International Exhibitions* ('CIE').<sup>130</sup> The purpose of the 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>131</sup> The CIE also provides for the resolution of differences where more than one country wishes to hold a similar international exhibition.<sup>132</sup> For example, art 6 of the 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>133</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'.<sup>134</sup> 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>135</sup>

Other key treaties ratified by the Whitlam government in this area included the *Cultural Agreement between Australia and Iran*,<sup>136</sup> the *Cultural Agreement between the Government of Australia and the Government of Malaysia*,<sup>137</sup> an *Agreement of Cultural Co-operation between Australia and Italy*,<sup>138</sup> and the *Cultural Agreement between the Government of Thailand and the Government of Australia*.<sup>139</sup>

<sup>130</sup> *Convention Relating to International Exhibitions*, opened for signature 22 November 1928, 111 LNTS 343 (entered into force 17 January 1931).

<sup>131</sup> *Ibid* art 1.

<sup>132</sup> *Ibid* art 6.

<sup>133</sup> *Ibid*.

<sup>134</sup> *Ibid*.

<sup>135</sup> *Ibid*.

<sup>136</sup> *Cultural Agreement between Australia and Iran*, signed 25 September 1974, 1216 UNTS 107 (entered into force 2 June 1975).

<sup>137</sup> *Cultural Agreement between the Government of Australia and the Government of Malaysia*, [1975] ATS 39 (signed and entered into force 16 October 1975).

<sup>138</sup> *Agreement of Cultural Co-operation between Australia and Italy*, signed 8 January 1975, 975 UNTS 111 (entered into force 28 May 1975).

<sup>139</sup> *Cultural Agreement between the Government of Thailand and the Government of Australia*, 972 UNTS 283 (signed and entered into force 16 December 1974).

### L 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>140</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 International Trade in Textiles*.<sup>141</sup> 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 progressively to achieve the reduction of trade barriers and the liberalization of world trade in these products.<sup>142</sup>

Another significant trade treaty was the *International Sugar Agreement, 1973* ('ISA').<sup>143</sup> The three major objectives of the 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>144</sup> 'to bring world production and consumption of sugar into closer balance',<sup>145</sup> and 'to provide for adequate participation in, and growing access to, the markets of ... developed countries for sugar ... [supplied by] developing countries'.<sup>146</sup>

Another trade treaty that was ratified was the *Agreement Establishing the International Bauxite Association* ('IBA').<sup>147</sup> The IBA was aimed at promoting 'the orderly and rational management ... [of] the mining, processing and

<sup>140</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 27 February 1973, 17 (Sir Paul Hasluck, Governor-General).

<sup>141</sup> *Arrangement Regarding International Trade in Textiles*, opened for signature 20 December 1973, 930 UNTS 166 (entered into force 1 April 1974).

<sup>142</sup> *Ibid* Preamble.

<sup>143</sup> *International Sugar Agreement, 1973*, opened for signature 13 October 1973, 906 UNTS 69 (entered into force 1 January 1974).

<sup>144</sup> *Ibid* art 1(a).

<sup>145</sup> *Ibid* art 1(e).

<sup>146</sup> *Ibid* art 1(g).

<sup>147</sup> *Agreement Establishing the International Bauxite Association*, opened for signature 8 March 1974, 1021 UNTS 175 (entered into force 29 July 1975).

marketing of the bauxite resources of producing countries',<sup>148</sup> and the promotion of the 'increased cooperation and concerted action on the part of bauxite producing countries ... contribut[ing] to the maximization of economic and social benefits accruing to their peoples from the exploitation of ... bauxite resources'.<sup>149</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>150</sup> the *Agreement on Trade and Industrial and Technical Co-operation between the Government of the Socialist Republic of Romania and the Government of Australia*,<sup>151</sup> the *Trade Agreement between the Government of Australia and the Government of the People's Republic of China*,<sup>152</sup> and the *Extension of the International Coffee Agreement 1968*.<sup>153</sup>

### III AUSTRALIA'S INVOLVEMENT WITH INTERNATIONAL LAW

#### A 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:

<sup>148</sup> Ibid Preamble.

<sup>149</sup> Ibid.

<sup>150</sup> *Agreement on the Development of Trade and Economic Relations between the Government of Australia and the Government of the Republic of Korea*, 1020 UNTS 121 (signed and entered into force 17 June 1975).

<sup>151</sup> *Agreement on Trade and Industrial and Technical Co-operation between the Government of the Socialist Republic of Romania and the Government of Australia*, signed 29 May 1975, 1002 UNTS 289 (entered into force 26 June 1975).

<sup>152</sup> *Trade Agreement between the Government of Australia and the Government of the People's Republic of China*, 975 UNTS 59 (signed and entered into force 24 July 1973).

<sup>153</sup> *Extension of the International Coffee Agreement 1968*, opened for signature 31 March 1968, 893 UNTS 350 (entered into force 1 October 1973).

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>154</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 isolationist and parochial approach. That approach limited the achievement of international cooperation and, potentially, presented dangers to Australia that were to be avoided. Australia set out to 'strengthen [its] international framework'.<sup>155</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.

### B *People's Republic of China*

One of the fundamental policies promoted by Whitlam, 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:

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 strategically brilliant, an irresistible photo opportunity that placed Whitlam firmly on the world stage.<sup>156</sup>

Members of the Coalition government at the time ridiculed Whitlam's exercise in regional realpolitik. Malcolm Fraser described Whitlam as having

<sup>154</sup> Whitlam, 'Australia and International Law', above n 14, 2.

<sup>155</sup> Whitlam, *Abiding Interests*, above n 43, 171.

<sup>156</sup> Jenny Hocking, 'Post-war Reconstruction and the New World Order: The Origins of Gough Whitlam's Democratic Citizen' (2007) 53 *Australian Journal of Politics and History* 223, 232.

‘clearly become the Chinese candidate for the next Australian elections’.<sup>157</sup> Yet Whitlam’s visit to the People’s Republic of China coincided with that of United States Secretary of State Henry Kissinger.<sup>158</sup> Within days of these visits, ‘President Richard Nixon announced that he too would visit Peking’.<sup>159</sup> These developments caught the Australian government flat-footed. It was still substantially ‘locked in the cold-war ... [politics] of the Menzies era’.<sup>160</sup> Increasingly, it ‘looked out of date and out of time’.<sup>161</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 reopened its embassy in Peking. After 24 years, it established diplomatic relations with the People’s Republic of China.<sup>162</sup> Thus began a relationship that, since 1972, has become a centrepiece 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.

### C Human Rights

So far as international human rights law was concerned, Australia ratified a record number of international human rights treaties. The United Nations *International Covenant on Economic, Social and Cultural Rights* (‘ICESC’)<sup>163</sup> and the *ICCPR* were the two covenants intended to give effect to the principles earlier stated in the *UDHR*. The former covenant had been adopted by the General Assembly on 16 December 1966, while the latter had been adopted on 19 December 1966. Australia had not become a signatory to either

<sup>157</sup> Graham Freudenberg, *A Certain Grandeur: Gough Whitlam in Politics* (Macmillan, 1977) 212.

<sup>158</sup> Hocking, ‘The Origins of Gough Whitlam’s Democratic Citizen’, above n 156, 232.

<sup>159</sup> *Ibid.*

<sup>160</sup> *Ibid.*

<sup>161</sup> *Ibid.*

<sup>162</sup> National Archives of Australia, Australian Government, *Gough Whitlam — In Office*, Australia’s Prime Ministers <<http://primeministers.naa.gov.au/primeministers/whitlam/in-office.aspx>>.

<sup>163</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

covenant before Whitlam was elected to government.<sup>164</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>165</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>166</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>167</sup> Papua New Guinea's status as an autonomous and independent state was, Whitlam stated in opposition, 'just not negotiable'.<sup>168</sup>

Whitlam's first calls endorsing change in Papua New Guinea occurred in 1960, during his opposition years.<sup>169</sup> Ten years later, he 'placed Papua New Guinea on the [national] political agenda with a widely-publicised tour of the territory in January 1970'.<sup>170</sup> That visit became 'a catalyst for change'.<sup>171</sup> It was viewed, at the time, as potentially one of the most significant events in Australia's region.<sup>172</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 'goals ... [of prompt] independence, with the date ... set to, at the latest, 1976'.<sup>173</sup> Whitlam's status as a widely perceived

<sup>164</sup> See Hocking, 'The Origins of Gough Whitlam's Democratic Citizen', above n 156, 232–3.

<sup>165</sup> *Ibid* 233.

<sup>166</sup> Whitlam, 'Australia and International Law', above n 14, 6.

<sup>167</sup> *Ibid*.

<sup>168</sup> E G Whitlam, 'Labor's Plan for New Guinea' (Press Statement, 12 January 1970).

<sup>169</sup> Rory Ewins, 'The Papua New Guinea Constitution: Australia's Role in Its Development, 1960–75' on *Speedysnail* (12 May 2002) <<http://speedysnail.com/pacific/png.html>>.

<sup>170</sup> *Ibid*.

<sup>171</sup> *Ibid*.

<sup>172</sup> 'Australian Political Chronicle January–April 1970' (1970) 16 *Australian Journal of Politics and History* 227, 262.

<sup>173</sup> Ewins, above n 169.

future Prime Minister of Australia gave force to virtually everything he did in this context.<sup>174</sup>

The earlier 'attention Whitlam 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>175</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 [sic] 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>176</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>177</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. At the time, 'Australia's only remaining powers related to the courts of law, the House of Assembly, electoral affairs and foreign affairs and defence'.<sup>178</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>179</sup> The final colonial links were severed shortly before the dismissal of the Whitlam government on 11 November 1975.<sup>180</sup> They remain an important achievement of the Whitlam government, signalled by

<sup>174</sup> Freudenberg, above n 157, 193.

<sup>175</sup> Ewins, above n 169.

<sup>176</sup> Whitlam, *The Whitlam Government*, above n 1, 90–1.

<sup>177</sup> *Ibid* 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 United Nations Trusteeship Council.

<sup>178</sup> *Ibid* 98.

<sup>179</sup> Ewins, above n 169.

<sup>180</sup> Whitlam, *The Whitlam Government*, above n 1, 99–100.

the presence at Whitlam's funeral in Sydney of the current and a number of past Prime Ministers of Papua New Guinea.<sup>181</sup>

Whitlam's championship of full self-determination for Papua New Guinea was reflected in his support for the self-determination of the peoples of Indochina. This point was made 'at a time when this was not an established political position,' even within the Australian Labor Party.<sup>182</sup> In 1953, Whitlam made a speech on the issue during a debate on the then Australia New Zealand United States ('ANZUS') council meeting. He had argued a case against the use of Australian troops in Malaya and urged self-determination for Indochina as he had previously done with respect to Papua New Guinea.<sup>183</sup> 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>184</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 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>185</sup>

<sup>181</sup> See Daisy Duman, 'The Good, the Great, and Lots of Politicians, Pay Their Respects; Whitlam Memorial — The Insiders,' *The Sydney Morning Herald* (Sydney), 6 November 2014, 6.

<sup>182</sup> Hocking, *A Moment in History*, above n 1, 170.

<sup>183</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 15 September 1953, 211 (Gough Whitlam).

<sup>184</sup> *Ibid* 212.

<sup>185</sup> Hocking, *A Moment in History*, above n 1, 170–1.

#### D *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>186</sup> This became another example of the Whitlam government's innovative use of international institutions. 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>187</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>188</sup>

#### E *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, overseas visits had, by 1972, become much 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

<sup>186</sup> Kirby, 'Whitlam as Law Reformer', above n 2, 67.

<sup>187</sup> Jenny Hocking, *Lionel Murphy: A Political Biography* (Cambridge University Press, 2000), cited in Hocking, 'The Origins of Gough Whitlam's Democratic Citizen', above n 156, 233.

<sup>188</sup> Transcript, 'The Seventeenth Legal Convention of The Law Council of Australia: Perth 4–10<sup>th</sup> July, 1973 — Opening Ceremony' (1973) 47 *Australian Law Journal* 413, 416.

saw this as a proper response to the 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>189</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>190</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 including economics, the environment, human rights, intellectual property rights and trade, to name but a few. As Whitlam explained, '[o]nly a visit by a head of government obliges the countries visited to clarify and co-ordinate their policies towards us'.<sup>191</sup>

Secondly, Whitlam emphasised Australia's 'continuing and substantial interest in Europe and [in strengthening] Europe's awareness of Australia'.<sup>192</sup> His view was that, by visiting Europe personally, he helped accomplish these objectives. 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>193</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>194</sup> In this respect, at firsthand, Whitlam sought, for example, to discuss Australia's interest in long-term access arrangements for its commodities to established and new markets, especially in Europe.<sup>195</sup>

<sup>189</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 1975, 61 (Gough Whitlam).

<sup>190</sup> *Ibid.*

<sup>191</sup> *Ibid.* 62.

<sup>192</sup> *Ibid.* 66.

<sup>193</sup> *Ibid.*

<sup>194</sup> *Ibid.*

<sup>195</sup> *Ibid.*

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 other countries I visited had not previously been visited by an Australian Prime Minister.<sup>196</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 should be exported in an enriched form'.<sup>197</sup> His prediction of Australia's 'role as a potential major supplier of uranium mean[t] 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>198</sup>

Within the context of meat exports, Whitlam pursued with the then European Economic Community ('EEC') issues regarding the EEC's import restrictions on Australian beef. He explained to the EEC 'the disruptive and harmful nature of ... [its actions] to the Australian meat industry'.<sup>199</sup> He explained to European leaders the 'need for stable long-term marketing arrangements'.<sup>200</sup> According to Whitlam, the 'response of the individual governments was, in the main, apologetic and sympathetic'.<sup>201</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 develop[ing] between cartels of producers and consumers'.<sup>202</sup> In relation to Whitlam's discussions concerning the Middle East, he repeatedly asserted the 'right of all

<sup>196</sup> Ibid 61.

<sup>197</sup> Ibid 63.

<sup>198</sup> Ibid; see also above Part II(C).

<sup>199</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 1975, 63 (Gough Whitlam).

<sup>200</sup> Ibid.

<sup>201</sup> Ibid.

<sup>202</sup> Ibid.

countries in the Middle East including Israel, to [enjoy] secure and recognised' international borders.<sup>203</sup>

As the political leader of the Australian people, Whitlam also visited capitals, such as Paris, Bonn and Rome, to 'urge greater support' for the NPT.<sup>204</sup> Australia wanted to see that treaty strengthened and for all states to 'accept the multilateral obligations' that the treaty created.<sup>205</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>206</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>207</sup> Understandably, this proposal appears to have received a cool reception and ultimately got nowhere. It was a rather naïve proposal.

In several countries that he visited, Whitlam had discussions concerning issues arising in the Indian Ocean. In Whitlam's view, supporting any further development of military bases in the Indian Ocean or 'any long-term naval deployments in the area would amount to support[ing] an escalation and ... heightening of tension in the region'.<sup>208</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 discussed capital investment in Australia. He made it clear that the Australian government continued to welcome foreign investment. However, he insisted that Australia wanted 'as far as

<sup>203</sup> Ibid.

<sup>204</sup> Ibid.

<sup>205</sup> Ibid.

<sup>206</sup> Cedric Grant, 'Equity in International Relations: A Third World Perspective' (1995) 71 *International Affairs* 567, 568.

<sup>207</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 1975, 64 (Gough Whitlam).

<sup>208</sup> Ibid.

possible to control ... [its] own industries and resources'.<sup>209</sup> Whitlam had agreed to raise with Australian taxation authorities the 'strongly expressed interest of the Belgian, Netherlands and Italian governments' in negotiating double taxation agreements with Australia.<sup>210</sup> In addition, Whitlam had 'agreed that a West German mission should visit Australia ... to discuss ... all aspects of [German] investment in Australia'.<sup>211</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>212</sup> The Whitlam government introduced Bills to the Australian Parliament 'to give effect to the government's policy on Privy Council appeals'.<sup>213</sup> That policy was to invest the High Court of Australia 'with final jurisdiction in all questions and matters' decided by that court.<sup>214</sup> The *Privy Council (Appeals from the High Court) Act 1975* (Cth) had the effect of precluding any further appeals from the High Court of Australia to their Lordships in London.<sup>215</sup> 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 previous Coalition government.<sup>216</sup>

It had been '33 years since a ... [previous] Labor government [had] established diplomatic relations with the Soviet Union'.<sup>217</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

<sup>209</sup> Ibid.

<sup>210</sup> Ibid.

<sup>211</sup> Ibid.

<sup>212</sup> Ibid.

<sup>213</sup> Ibid.

<sup>214</sup> E G Whitlam, *On Australia's Constitution* (Widescope, 1977) 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 Cruises Pty Ltd [No 2]* (1985) 159 CLR 461.

<sup>215</sup> See especially *Privy Council (Appeals from the High Court) Act 1975* (Cth) s 3.

<sup>216</sup> Kirby, 'Whitlam as Law Reformer', above n 2, 57.

<sup>217</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 1975, 65 (Gough Whitlam).

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>218</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>219</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 (that is, the French Ministry of Foreign Affairs).<sup>220</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>221</sup>

Whitlam also expressed the 'sympathy ... [that] the Australian Government and people felt for the people of Bangladesh in their struggle to feed their population'.<sup>222</sup> He suggested to Sheik Mujib, political leader of Bangladesh, 'international arrangements under which some of the developed countries with capital, such as the Federal Republic of Germany or Japan, might use a portion 'of their petrodollars to finance the purchase of wheat on credit from ... grain producers', such as Australia.<sup>223</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

<sup>218</sup> Ibid.

<sup>219</sup> Ibid.

<sup>220</sup> Ibid.

<sup>221</sup> Ibid; Hocking, 'The Origins of Gough Whitlam's Democratic Citizen', above n 156, 233.

<sup>222</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 1975, 65.

<sup>223</sup> Ibid.

produce surplus grain'.<sup>224</sup> He sought to expand assistance with aid supplied by other wealthy countries.

#### F *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 '[i]t is through membership of the United Nations that Australia best asserts its national independence and international identity'.<sup>225</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 southern Africa'.<sup>226</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 colonialism and apartheid in southern Africa'.<sup>227</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>228</sup> These were very large themes in global foreign relations in the 1970s to the 1990s. At the time of this engagement

<sup>224</sup> Ibid.

<sup>225</sup> Whitlam, *Abiding Interests*, above n 43, 171.

<sup>226</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 24 May 1973, 2649 (Gough Whitlam).

<sup>227</sup> Ibid.

<sup>228</sup> Ibid.

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>229</sup> Australian delegations, with instructions from the Whitlam government, 'took an active part in the drafting and adoption of the Protocols'.<sup>230</sup> Protocol I is concerned with 'the protection of victims of international armed conflicts' and Protocol II concerns 'the protection of victims of non-international armed conflicts'.<sup>231</sup>

In June 1974, the Whitlam government appointed a national advisory committee for the United Nations' then-proposed International Women's Year of 1975.<sup>232</sup> The chair of the advisory committee was Whitlam's wife, Margaret Whitlam,<sup>233</sup> whom Gough Whitlam was to describe as his best appointment.<sup>234</sup> Elizabeth Reid, 'the Prime Minister's adviser on women', headed the advisory committee's secretariat.<sup>235</sup> At several United Nations meetings, Australia 'gave support to non-racial voting at the General Assembly'.<sup>236</sup> It changed Australia's voting on the credentials of South Africa.<sup>237</sup> In addition, in Australia, the federal government banned racially-selected South African sporting teams from entering Australia 'while that country remained under an apartheid regime'.<sup>238</sup>

The Vietnam War was still being waged when Whitlam was elected to government. Australian troops were fighting alongside 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

<sup>229</sup> Gough Whitlam, 'Australia and the UN Commission on Human Rights' (1991) 45 *Australian Journal of International Affairs* 51, 51.

<sup>230</sup> *Ibid.*

<sup>231</sup> *Ibid.*

<sup>232</sup> National Archives of Australia, above n 162.

<sup>233</sup> *Ibid.*

<sup>234</sup> Whitlam, *The Whitlam Government*, above n 1, (Dedication).

<sup>235</sup> National Archives of Australia, above n 162.

<sup>236</sup> *Ibid.*

<sup>237</sup> *Ibid.*

<sup>238</sup> *Ibid.*

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’.<sup>239</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 to work with the United Nations to bring about a negotiated [end to] the war.<sup>240</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 relations 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 a strong, progressive and independent Australia. Taken together, we have begun to fashion a more contemporary relationship with Europe — East and West — more appropriate to the changed conditions of our time. We can now say confidently that Australia has got her relations right, not just with the countries nearest to us, but also with most nations of importance, and regions of importance, in the world.<sup>241</sup>

#### IV IRREVERSIBLE ENGAGEMENT

##### *A 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.

<sup>239</sup> Hocking, *A Moment in History*, above n 1, 301.

<sup>240</sup> Ibid, quoting Gough Whitlam, ‘Extract from speech to Adelaide University ALP Club’ (Whitlam Institute, 12 May 1967).

<sup>241</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 1975, 67.

The ratification of the *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 Indigenous 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 ILO 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 s 51(xxix) of the *Australian Constitution*, the Parliament enacted the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*<sup>242</sup> in the *Arbitration (Foreign Awards and Agreements) Act 1974* (Cth).<sup>243</sup> That measure was far-sighted given the 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 Wildlife 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

<sup>242</sup> *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959).

<sup>243</sup> See also *International Arbitration Act 1974* (Cth).

international and regional banks.<sup>244</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*.<sup>245</sup> 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.

### B 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 the Australian Parliament during 1972–75. However, 93 Bills were rejected by the Senate, more than the 68 that had ‘failed to pass’ within the *Constitution* during all the previous years of federation.<sup>246</sup> 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 Democratic Labor Party Senator Vince Gair as ambassador to Ireland in March 1974.<sup>247</sup> In the result, this provoked breaches of 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

<sup>244</sup> *International Development Association (Further Payment) Act 1974* (Cth); *International Monetary Agreements Act 1974* (Cth); *Asian Development Fund Act 1974* (Cth); *Australian Development Assistance Agency Act 1974* (Cth).

<sup>245</sup> *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, opened for signature 23 September 1971, 974 UNTS 177 (entered into force 26 January 1973).

<sup>246</sup> National Archives of Australia, above n 162.

<sup>247</sup> See, eg, Mark Coultan, ‘Soaring Highs and Chaotic Lows,’ *The Australian* (Australia), 22 October 2014, 20.

economics (now so important to Australian 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, longtime 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 will be.<sup>248</sup> This rather suggests that it found a new equilibrium which successors have substantially endorsed.

Inevitably, there were aspects of Whitlam's foreign policy 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.<sup>249</sup> That government responded in a way that appears to have been more consonant with the language and objectives of the *Refugee Convention* and *Refugee Protocol*, and with the principles of the *Racial Discrimination Act 1975* (Cth) of which Whitlam was so proud. It was the Fraser government that ratified the *ICESC* and the *ICCPR* 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 (also 'Timor-Leste'). It is estimated that 100 000 East Timorese people 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>250</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 ironically had been a general policy of the Whitlam government), Indonesia surrendered control of

<sup>248</sup> Ken Henry, 'Fiscal Policy: More than Just a National Budget' (Speech delivered at Governing the Economy, The Whitlam Institute, 30 November 2009).

<sup>249</sup> See, eg, Quang Luu, 'Whitlam's Policy on Vietnamese Refugees Didn't Last', *Features, The Australian* (Australia), 4 January 2006, 10.

<sup>250</sup> Wendy Way (ed), *Australia and the Indonesian Incorporation of Portuguese Timor, 1974–1976* (Melbourne University Press, 2000) 95.

East Timor.<sup>251</sup> 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.

### C Conclusions

Following his dismissal from the office of Prime Minister of Australia on 11 November 1975, Whitlam continued to advocate an internationalist outlook on the part of Australia, its 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 Organization ('UNESCO') in Paris, a position he was to hold until 1986.<sup>252</sup> There were two 'historical symmetries' in that appointment.<sup>253</sup> First, he took up the post in the wake of the resignation of Sir John Kerr as ambassador-designate to UNESCO. Secondly, with his appointment as Australia's ambassador to UNESCO, Whitlam joined one of the global organisations that 'his father had championed forty years earlier'.<sup>254</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: 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; and building a confident, healthy and well-educated, multicultural nation, looking forward rather than backward.

This article has addressed one facet of the broad political and intellectual agenda of 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

<sup>251</sup> See, eg, Lindsay Murdoch, 'Jakarta MPs Recognise Independence Vote', *The Age* (Melbourne), 20 October 1999, 15.

<sup>252</sup> Hocking, 'The Origins of Gough Whitlam's Democratic Citizen', above n 156, 234.

<sup>253</sup> *Ibid.*

<sup>254</sup> *Ibid.*

government. The chronicle demonstrates the great variety and number of 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; and 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 radical 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 human rights-respecting world and country. On his centenary, it is right that his fellow citizens should remember and reflect on his legacy.