

Chapter Seven

Labor and the Constitution: Forty Years On

Hon Peter Walsh, AO

"A Labor Government should make more use of the external affairs power to extend its legislative competence, in particular by implementing conventions and treaties ... the High Court would not be prone to invalidate Commonwealth legislation in such fields."¹

In 1957 Gough Whitlam delivered in Melbourne the Chifley Memorial Lecture, which he called *The Constitution versus Labor* (emphasis in original). The Chifley Lecture, plus Whitlam's 1961 Curtin Memorial Lecture, *Socialism Within the Australian Constitution*, and his report, *Labor Policies and Commonwealth Powers*, to Labor's 1963 Commonwealth Conference, were published by the Victorian Fabian Society in 1965 under the title *Labor and the Constitution*. In both length and substance the 1957 Lecture was the most significant. The others were footnotes to it.

It should surprise nobody who remembers or has read about that era, that Whitlam's views were unapologetically socialist and centralist. But unlike the British Labour Party before Kinnock, his socialism did not focus on nationalising industry. Two reasons can be cited:

"Members of the Parliament must accept the permanent necessity of seeking the peoples' consent (i.e., amend the Constitution) before they can nationalise an industry."

and:

"Socialists are now more concerned with the creation of opportunities than the imposition of constraints."²

These beliefs might seem somewhat inconsistent with this view:

"In some instances, achievement of planned targets will require nationalisation where an industry is extremely inefficient and where efficiency requires a monopoly in the industry."³

But Whitlam had a two-pronged strategy for achieving his objectives, constitutional amendment if/when it was feasible and extending Commonwealth ownership/control in ways permitted by the existing Constitution.

By today's standards Whitlam's economic policies were highly interventionist. He explicitly favoured agricultural marketing boards, and their attempts to achieve price stabilisation and "equalise losses on the export market". Though Gough probably did not know, price stabilisation schemes could also wipe out potential gains as well as "equalise losses" on export markets. In the early 1950s -- just a few years before Gough spoke -- export parity for Australian wheat was around or above one pound a bushel (nearly \$1,000 a tonne in today's terms and values). Both wheat and egg marketing were heavily regulated and subject to pooling and price equalisation schemes. Wheat worth twenty shillings a bushel was diverted from export markets and sold to domestic poultry farmers for eight shillings a bushel. Eggs surplus to domestic sales were then dumped on export markets at prices below the value of the wheat stuffed down chooks' necks to produce the eggs.

Whitlam also wanted to control private investment decisions by regulation; maintain, for competitive reasons, Commonwealth ownership of the Bank, TAA and Shipping Commission; and extend it into insurance, possibly publishing, and other new areas as the opportunity arose.

Lest the bourgeois Left in today's Labor Party, which posthumously -- in the political sense -- has adopted Whitlam as its own, becomes too euphoric, he also said:

"It will soon be desirable for the Commonwealth to coordinate new methods of generation and conservation in the less developed parts of Australia by granting assistance for nuclear power stations and desalination plants."⁴

Whitlam's expressed preference for economic development was not atypical of his views either in 1957 or very much later. The Whitlam Government in 1975 gave the all clear for mining the 5 or 6 billion dollars worth of mineral sands on Fraser Island. The Fraser Government reversed that decision. The 1975 ALP Federal Conference Platform committed the Party to develop a government owned uranium mining and enrichment industry in Australia. Had Australian coal been less abundant or cheap, there is little doubt the Platform would also have advocated nuclear power stations. (Bombs, however, were never fashionable.)

Also in 1975, Deputy Prime Minister and Trade Minister Jim Cairns went to Iran to flog off uranium to the Shah!

In the 22 years since, those bits of hard history have been buried or falsified. The Keating Government belief that pastoral leases extinguished native title -- explicitly stated and politically endorsed in both the Second Reading Speech and the Preamble to the 1993 *Native Title Bill* -- have been buried or falsified in less than four years. So much so, that the Howard Government's post-Wik attempts to shift policy part way towards the Keating Government's policy position, is denounced by Labor as racist and unconscionable. The media in general, the A.B.C. and the Canberra Press Gallery in particular, who applauded in the Senate the passage of the 1993 Bill, now applaud Labor's newer and very different position, but deny that it is different. A totalitarian regime is apparently not an essential prerequisite for the falsification of history. A media sufficiently biased, lazy or ignorant, but politically correct, can apparently do the job.

Though he mentioned the Commonwealth's unconstrained power over tariffs, Whitlam made no judgment about their merits. Viewed against the 25 per cent tariff cut in 1973, that omission may have been significant. Was Gough a closet international free trader way back in the '50s?

Whitlam saw centralism as an appropriate, or perhaps the only feasible response to a variety of post-War problems, some of which are problems still. His preference for it was not absolute. He believed that urban public transport should be managed not by the States, but by city or regional government.

In regard to industry and economic development, he believed that State governments rarely had enough countervailing power to ensure that the public interest would prevail over the interests of large, vertically integrated and often foreign-owned private companies. If a national government had insufficient countervailing power, which he believed applied to pharmaceuticals, national governments should coordinate their policies under the aegis of the World Health Organisation. His belief that State governments, especially in Queensland and Western Australia, lacked fiscal power to develop their natural resources, led him to suggest that Western Australia should hand over the Pilbara and Kimberley areas to the Commonwealth -- as South Australia had previously handed over the Northern Territory.

In regard to social services, he noted with satisfaction that the 1946 referendum had removed "any constitutional limitation on the Commonwealth's power to provide social services in cash", but lamented "the very great limitations on its ability to provide social services in kind".⁵

When the Constitution was drafted, "State Governments spent nothing on housing, next to nothing on health and very little on education". Consequently, the Constitution had nothing to say about which tier of government should provide and pay for these services. Whitlam could see "no reason why they should not be coordinated, planned and financed on a national basis".

Another constitutional void not foreseen, because the industry was not foreseen, was the control and application of user pays principles to interstate road hauliers. Forty years on, that matter has still not been properly resolved.

That Whitlam clearly recognised the defect now known as "fiscal imbalance", is demonstrated by this passage:

"State Governments of all political complexions constantly pass the financial buck to the Commonwealth and it passes the administrative buck to the States. The electors do not know which Government is responsible and lose faith in the parliamentary system."⁶

In context that passage concerns housing, but it was equally applicable to Whitlam's views on education, health and transport. His centralist views led him to consider Commonwealth policy takeovers, not an increased State own revenue base and commensurate State responsibility.

Followed to their logical conclusion, these beliefs deny the States any functional reason for existence. That, coupled with an expanded system of regional government administration financially dependent on the Commonwealth, was Whitlam's ideal. Chifley, according to his biographer the late Professor Crisp, had similar views.

Unlike Chifley, Whitlam in government substantially implemented that policy via the Department of Urban and Regional Development's Growth Centre and Urban Land Council programmes, which became sink holes for the rapid disposal of public money.

The opening quotation in the paper shows Whitlam to have been well aware of the potential provided by the external affairs power, United Nations conventions and a compliant High Court for extending Commonwealth power without the tiresome and uncertain referendum route. History has confirmed his judgment. I suspect, however, that the policy areas in which the High Court took upon itself the power to amend the Constitution, would have surprised him.

Whitlam's centralist ambitions were focused on economic planning and social services. I doubt that he envisaged the external affairs subterfuge would be used for Commonwealth takeovers of criminal law, land use and forestry management. When it happened, he may or may not have approved, but the Whitlam of 1957 and some time beyond -- a strong advocate for economic development and growth -- would have been distressed by the Commonwealth's misuse of the external power to impose Green extremists' anti-growth policies on the States. The extremists are politically astute enough to know that the Commonwealth will not overrule State governments' economic vandalism (e.g., the NSW ban on mining Lake Cowal), and State governments cannot overrule Commonwealth vandalism (e.g., banning exploration and mining at Shoalwater Bay). They know that economic sabotage is maximised if both State and Commonwealth governments dabble in "environment" policy, and they can shop around for the best deals.

Later generations of centralists would go much further than Whitlam. *He* advocated national centralism, using UN Conventions to transfer power from the States to the Commonwealth. *They* want global centralism, using UN Conventions to transfer power from national governments to international bureaucracies elected by no-one and responsible to no-one.

The most recent example is the frantic push to adopt, at once, legally binding "greenhouse" emission limits -- a response to highly speculative and rapidly changing "scientific" predictions beaten up by self-serving propagandists and bureaucrats. Australian compliance would raise this fundamental question: while the Commonwealth could impose a carbon tax, how could it

directly enforce emission limits on the States? Presumably the High Court would discover the way.

An earlier example of an attempt to shift political power offshore was the recommendation in the report on the separation of Aboriginal children from their parents -- which the chattering classes call genocide -- to enact, as statute law, the UN Convention on genocide. Ironically, a consequence of doing that could be that the report's chief architect, Sir Ronald Wilson, who was a member of the board of Sister Kate's Home in Perth at a relevant time, would be charged with being an accessory to genocide. Hmm. Tempting.

While we play these silly games, the most serious defect in our present federal system -- fiscal imbalance -- is not addressed. In the last 20-odd years two attempts have been made to do something about it. The first, Malcolm Fraser's New Federalism, was ditched by its architect when Labor won the NSW election in May, 1976. The second, Bob Hawke's 1991 attempt to end Commonwealth/State duplication, was sacrificed at the altar of Paul Keating's Prime Ministerial ambition. Hawke's attempt was more serious than Fraser's, but at the very time he raised it, his Government was setting up three new Commonwealth agencies -- the National Food Authority, a Commonwealth Environmental Protection Agency, and a National Child Care Accreditation Council -- which duplicated functions already performed by the States.

A fundamental principle of responsible government in any system is that each government must raise the money it spends. The present system, which in Whitlam's words allows the States "to pass the financial buck to the Commonwealth and it passes the administrative buck to the States", should no longer be tolerated.

Gough Whitlam's preferred solution, Commonwealth funding and complete policy takeover of health, education, housing and transport, is not politically viable. The States will not "wither away", and a referendum to abolish them will not be carried.

If that is accepted, the only feasible solution is to abolish all Commonwealth payments to the States -- other than equalisation grants -- and give the States access to a much broader tax base, which realistically means income or consumption tax. Modern opinion (i.e., Gareth Evans a few weeks ago), contrary to Gough Whitlam's 1957 belief,⁷ is that the Constitution does not preclude State retail sales taxes.

Despite their rhetoric to the contrary, the States will not really welcome that policy. But they will have no choice. And, if their deliberate long term erosion of their own payroll tax base is a reliable indicator, they will dabble in mutually destructive competition for base political reasons. They will probably offer more mutually destructive bribes -- as distinct from efficiency driven lower charges -- to industry. But no system is perfect.

In a Federation in which interstate migration is common, some degree of educational curricular uniformity is desirable. Uniformity of product labelling and quality control is highly desirable. But the Commonwealth's role should be restricted to that of honest broker convening interstate meetings. A Commonwealth bureaucracy *à la* the National Food Authority, consistently exceeding its budget appropriation, is not needed. In the early to mid 1980s the Commonwealth performed such a role in the National Energy Council, which achieved uniform energy efficiency labelling for electrical appliances.

The continuing contest for power between Commonwealth and State governments, coupled with inadequately defined responsibility inflicts, as Whitlam noted, moral damage on the polity. It has also spawned large Commonwealth bureaucracies which deliver no actual service in areas like education and health.

More recent Commonwealth incursions in State territory have exposed its technical incompetence. To appease Green extremists, it abused its export power to dictate forest management policy to the States. In early 1995 it banned logging in an additional 500 forest coupes, ostensibly because of their "high conservation value", whatever that means. These coupes included forest plantations, football fields, an airstrip, rubbish dumps and gravel pits. The grid reference for one placed it in Bass Strait. State authorities actually knew what they were doing. The Commonwealth did not. In time it could assemble the necessary expertise to duplicate another State function. But why?

The incessant quest for extension of Commonwealth power, into both State and new territory, is driven by several factors: common power lust; pressure groups seeking more sites in which to pursue their demands, e.g., two "equal opportunity" shops are better than one; pressure from otherwise barely employable or unemployable activists seeking sinecures for themselves; and too many otherwise superfluous Ministers inventing reasons to justify their own existence.

The last problem has recently got worse. The Hawke Government was into its third term before the Ministry was expanded to 30. The Howard Government reached that milestone of decadence in just 19 months. The Hawke Government had no Parliamentary Secretaries until its fourth term. The Howard administration, ostensibly committed to small government, already has 11.

Finally, all of the changes recommended here do not require constitutional amendment. All that is needed is political will in the Federal Parliament.

Endnotes:

1. E G Whitlam, *Labor and the Constitution*, pp. 28-29.
2. *Ibid*, p. 56.
3. *Ibid*, p. 37.
4. *Ibid*, p. 60.
5. *Ibid*, p. 15.
6. *Ibid*, p. 20.
7. *Ibid*, p. 25.