THE WHITLAM REVOLUTION IN AUSTRALIAN FEDERALISM — PROMISE, POSSIBILITIES AND PERFORMANCE

BY GEOFFREY SAWER*

[*On 10 October 1975, Professor Geoffrey Sawer delivered the tenth Allen Hope Southey Memorial Lecture at the University of Melbourne. It is published here in full. In his lecture, Professor Sawer examined the initiatives in Australian Federalism of the Whitlam Government. His concluding remarks are of particular interest in light of subsequent events.*]

It is pleasant and suitable, *dulce et decorum*, that I should return to my *alma mater* in order to deliver this lecture in memory of a distinguished Victorian lawyer, and in a series of lectures given by great lawyers. Pleasant, because I have nothing but happy and grateful memories of my fifteen years as a student, tutor, senior lecturer and associate professor here, and suitable because since Sir Robert Menzies gave the first Southey lecture in 1960, none of my eminent predecessors has spoken about the Australian constitution. Sir Robert then gave us an excellent summary of a constitutional system which he had helped to create, as advocate, Law Officer of the Crown in both State and Federal spheres, and Prime Minister. He addressed himself particularly to the rather uneasy balance of authority which had been achieved in our federal system by the combined effects of judicial interpretation and political, especially politico-financial, fact. He had been heir to the constitutional initiatives of the Curtin and Chifley governments, and in particular the consequences of the assumption by the Commonwealth in 1942 of a monopoly of income taxation. He had been returned to power in 1949 by among other things a half-promise to re-examine the effect of Commonwealth fiscal dominance on the States, and after a good deal of heart-burning he elected to do nothing about it.

I have vivid memories of that process, because in 1951 I organized a gathering of constitutional experts in Canberra to celebrate fifty years of Australian federalism, and a by-product of the occasion was a gathering of the permanent heads of the seven Australian Treasuries at which a resolution was taken that it was possible, and in principle desirable, that the States should regain some power of imposing income taxes, without which they could not possibly regain a reasonable degree of fiscal autonomy.

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Sir Robert's lecture omits to mention this episode, but describes later consequences of that initiative, which failed. In 1957 the High Court reaffirmed the constitutional validity of the essential elements of the uniform tax scheme,[1] and in 1959 the Menzies government re-stated the statutory basis of the scheme in a way which left it entirely free to any State or combination of States, as a matter of law, to resume the imposition of income taxes if they had the intestinal political fortitude to do so.[2] None in fact did, and Menzies was prepared to go no farther in the direction of encouraging them.

In 1967, in my book *Australian Federalism in the Courts*, I described the politico-legal outcome of these events and of High Court doctrine as making Australia, constitutionally speaking, the frozen continent. On a macroscopic scale, this frozen effect was created by the balance of federal financial authority and State law-making powers. The Feds had most of the money; the States had most of the regulatory competence also essential to government in the era of the mixed-economy, welfare-State policy. The consequences of this depended greatly on the ideology of particular governments. Even the *laissez-faire*, private-enterprise oriented governments of the Menzies era and its brief postscripts could not help but use their financial muscle. Nevertheless, one of the significant bits of co-operative federalism in those years, the Off-Shore Petroleum Agreement and attendant legislation, was tipped in the direction of the States, because their regulatory competence was on the whole greater, if only because they controlled what went on when the Bass Strait and other such products got ashore for processing. It is partly because of such considerations that I cannot raise any great interest in the outcome of the off-shore rights row between Commonwealth and States now before the High Court; one of the cases still, disgracefully, not decided. It seems to me that the alternative possible outcomes of this litigation will be so alike in their practical consequences that it is of no importance how the Court decides the case. My description of the Constitution as frozen was also due at a more microscopic level to a view about the possible interrelation between the federal interstate trade power, section 51(i), and the guarantee of freedom of interstate trade in section 92. It seemed to me quite possible that a more adventurous construction of the interstate trade power might well be cancelled out in its practical effects by a corresponding widening of the area of operation of section 92, denying power to carry out interventionist policies under the interstate trade power. Incidentally, one of the minor constitutional miracles of the Whitlam regime is that in three years of office, it has not once fallen foul of section 92. I may add that the possibilities inherent in the federal corporations power, section 51(xx), of which more later, could

[1] *Victoria v. Commonwealth* (1957) 99 C.L.R. 575.
[2] States Grants Act 1959 (Cth). This removed the condition forbidding the imposition of income tax from the general purpose grants to States. Such a condition was a component of the original 'uniform tax' scheme.

be abridged by State legislation along the lines of the Tasmanian Limited Partnerships Act, making it possible for individuals and firms, not incorporated and so beyond reach of the federal power, to obtain many of the advantages of incorporation. Such are the frozen or potentially refrigerating possibilities of the constitution as left by Menzies, Holt, Gorton and McMahon.

Prime Minister Gough Whitlam has sought to break the ice-block and to create a thaw. Considered in a hard and positivist fashion, his success has been small, though I think it possible that in ten years time a lecturer looking back as Menzies looked back in 1960 will record that the Whitlam initiatives began irreversible changes in the structure of Australian federalism, as Curtin and Chifley did between 1941 and 1950.

In the days of Curtin and Chifley, the Australian Labor Party was pledged by its platform to the destruction of federalism and the introduction of a legally centralised system, a parliament at Canberra with unlimited law-making power but delegating authority to regional bodies, as in Britain the Westminster parliament has delegated powers to Counties and may now delegate to Scottish, Welsh and Irish assemblies. I do not think that the Curtin and Chifley governments ever had or seriously pursued a coherent policy of constitutional change, although their post-war reconstruction policy did include proposals for regional organization with no immediate, but some prophetic, significance. In 1971, at the 29th federal conference of the Australian Labor Party in Launceston, the A.L.P. revised its constitutional platform, largely at the instigation and under the persuasion of Edward Gough Whitlam, then leader of the federal Opposition. The new constitutional platform then adopted and still operative is too long and complicated to recite here. I select four features especially important for present purposes. First, the aim of creating a completely centralised system was quietly abandoned. Second, the States were implicitly, only implicitly, recognised as necessary components in the structure of government. Third, it was asserted that local and regional government must be treated as a third essential feature in the federal structure, with consequential independent claims and rights in the federal balance. Fourth, the federal, Commonwealth parliament was treated as having a major initiating and co-ordinating role in order to achieve the A.L.P.'s general programme of extended social and welfare services and democratic socialism. I am concerned with the constitutional consequences of this, but I must emphasize that a thorough understanding of the constitutional consequences of Gough Whitlam, President Gough as I familiarly call him in my *Canberra Times* fortnightly articles, cannot be fully understood without also understanding his social and political intentions.

Mr Whitlam later explained the essential components of his 'new federalism' in many addresses and papers, among which we can mention

as particularly important his article in the *Australian Quarterly* for 1971,[3] and his address to a conference on federalism in Australia held in Canberra under the auspices of the Academy of the Social Sciences in November 1971.[4] These papers showed that the new federalism contemplated by the A.L.P. was not so much co-operative as organic. The federal authority is to determine all major priorities and policies, but would expect much of the detailed administration and local policy to be determined at State and regional levels. His papers also showed that the major thrust of the policy was to cope with the social problems of the great conurbations — Sydney, Melbourne, Brisbane, Adelaide, Perth, Hobart and Launceston. Rural towns were not neglected, but for the first time in Australian history it was overtly and clearly recognised at federal level that the city dweller, not the farmer, was the typical Australian and required the greatest attention from all governments. However, neither the Launceston programme nor Mr Whitlam's papers gave any clear information about the remaining role of the States, nor about the structure of local and regional government which his policy of area improvement and area-controlled social service benefits would presumably require. All this, including the structural vagueness just mentioned, entered into the A.L.P. policy speeches for the federal general election of 2 December 1972, as a result of which Mr Whitlam became Prime Minister. In the nearly three years since then, politics have been turbulent, government activity has been incessant, even frenetic, but the actual extent of constitutional change has been small.

Let us look firstly at formal constitutional change by parliamentary initiative and approval of the people at referenda under section 128 of the Constitution. President Gough had long thought that the people could be educated to abandon their traditional response of 'No, No' and endorse a gradual, planned series of proposals. In practice, however, his constitutional proposals have all been rejected — the two purely political proposals about wages and prices control in 1973, and the four somewhat more principled and constitutional-systematic but still heavily political proposals of 1974 which accompanied the double dissolution of the federal Parliament. The only comfort which the Prime Minister can draw from all this is that his 1974 proposal to give local governments direct access to the Loan Council received a 47% support overall and a majority in New South Wales. The 1974 proposals were strictly in accord with A.L.P. policy, but were also disastrous from the point of view of a systematic process of educating the electorate, because they were so intimately tied to a narrowly political campaign. Mr Whitlam should have been content with a single proposal — to make constitutional amendment easier. Probably it would have been defeated, but it would have begun an educative process, whereas the other three confusing and badly drafted proposals tended only to confirm the

[3] Whitlam E. G., 'A New Federalism' *The Australian Quarterly* vol. 43, no. 3, September 1971, 6.
[4] Mathews R. L. (ed.), *Intergovernmental Relations in Australia* (1974) 295.

negative habits of the Australian constitutional voter. Why should the Australian government have been so mad keen on abolishing the New South Wales Legislative Council — the least powerful upper House in the country? Why should a power to make grants to local governments have required two amendments to the Constitution, when one amendment, to section 96, would have done the job? If, on the other hand, Mr Whitlam wanted express power to set up federally-designed regional authorities, then the addition he proposed to section 51 was plainly insufficient.

Then we have had the continuing saga of the Australian Constitutional Convention, conceived by Mr John Galbally, an A.L.P. member of the Victorian Legislative Council in 1969; in 1972 Premier Sir Henry Bolte became principal widwife, and the infant was finally delivered by the Prime Minister, Mr Whitlam, at Sydney Town Hall on 3 September 1973. It has proved a sickly child.[5] Abandoning the metaphor, it can be said that Mr Whitlam had grounds for suspecting that the Convention was mainly a conspiracy to aggrandize the States and reduce the Commonwealth's powers. On the other hand, the States were soon given grounds for suspecting the intentions of the Commonwealth. First there was Mr Whitlam's insistence, grudgingly accepted, on participation by local government. Second, when opening the first and so far sole full session in 1973, Mr Whitlam started in statesmanlike fashion by summarising the main structural issues and urging practical commonsense and a give-and-take attitude on the assembly, but he proceeded to destroy the good effect of this by blandly announcing his intention of putting three referendum proposals before the people at the next Senate election (an event merged in the double dissolution). The proposals were equal electorates at both federal and State levels, synchronised elections for the two federal Houses and in effect abolition of the N.S.W. Upper House. These had considerable political importance and almost nothing to do with the structure of the federal system. Since then a proposed session of the Convention for 1974 in Adelaide has had to be abandoned because of federal government objections on a membership point, and the meeting planned for September 1975 in Melbourne was made a travesty by the withdrawal of the New South Wales, Victorian, Queensland and Western Australian governments. Attempts have since been made to represent the events of 24-26 September 1975 at Parliament House, Victoria, and the rival show over the road in the Windsor Hotel, as rather more promising than expected. I remain deeply sceptical. The whole point of the exercise as launched in Sydney in 1973 was to get overwhelming support from *all* governments and *all* parties for a package deal — a substantial transfer of money resources to the

[5] Mr John Finemore, Q.C., Executive Director of the Convention, recently gave a penetrating account of its history at the Centre for Federal-State Financial Relations, A.N.U., which will be published. See also Richardson J. E., 'The Australian Constitutional Convention, Sydney 1973' *The Australian Quarterly* vol. 45, no. 4, December 1973, 35-81.