

Noel Pearson's Gough Whitlam oration

by The Stringer

November 18th, 2013



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November 13, 2013 – Whitlam Institute, University of Western Sydney –

The reward for public life is public progress; an appreciation of the public life of the Hon. E.G. Whitlam AC QC – Prime Minister, 1972-75.

In his 97th year, in this third oration in honour of Australia's 21st prime minister, I use the appellation 'old man' with all the reverence and love of its meaning in the ancient culture of my people. An acute consciousness of the honour bestowed by the governors of the Whitlam Institute to one so richly undeserving, is leavened by unalloyed gratitude for the chance to salute this old man in the twilight of his extraordinary life. The alacrity with which this invitation is seized belies somewhat the humility which an outsider should properly feel when afforded such a rare and august privilege.

I say 'outsider' in the sense of the Australian Labor Party, but if I was born estranged from the nation's citizenship, into a humble family of a marginal people striving in the teeth of poverty and discrimination – it is assuredly no longer the case. This because of *the equalities of opportunities* afforded by the Whitlam program which successive governments built upon, and even where predilections were otherwise, their institutionalisation made their reversal difficult. The truth is I, and numbers of my generation, are today *bourgeois*, albeit with varying propensities to decadence.

I come to reflect on this old man's legacy with no partisan brief. I have no family or community tradition in any of Australia's political parties: raised next to the woodheap of the nation's democracy, my family never developed a passion or allegiance for any party. In my own political philosophy the opportunity redistribution principles of the social democrats naturally resonated with me, the social

conservatism and traditionalism of the conservatives was consonant with my mission and cultural upbringing, and I came to understand the power of the liberal principles of personal agency and self-interest as animators of individual and social progress.

My reflection amounts to an immense gratitude for the public service of the Honourable Edward Gough Whitlam AC, QC, Prime Minister of Australia, 5 December 1972 to 11 November 1975. Let me commence with a personal perspective of indigenous policy under the Whitlam government.

I was born in Cooktown two years before the referendum that gave my people citizenship, raised in the Lutheran mission of Hope Vale. In 1996 I took this old man on a tour there and he recalled his wartime service with the RAAF in Cooktown. We spoke about the history of the mission and my youth under the government of his nemesis: Queensland Premier Joh Bjelke-Petersen.

My home was an Aboriginal Reserve under a succession of Queensland laws commencing in 1897. These laws were notoriously discriminatory and the bureaucratic apparatus controlling the reserves maintained vigil over the smallest details concerning its charges. Superintendents held vast powers and a cold and capricious bureaucracy presided over this system for most of the twentieth century.

In June 1975 the Whitlam government enacted the *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975 (Cth)*.

The law put to purpose the power conferred upon the Commonwealth Parliament by the 1967 referendum: finally outlawing the discrimination my father and his father lived under since my grandfather was removed to the mission as a boy, and to which I was subject the first 10 years of my youth. Whereas my forebears – as had generations of men and women from across Queensland's reserves – worked as drovers and stock-workers, agricultural labourers and domestic help, and whatever unequal wages they received were managed by the Department of Native Affairs: the 1975 law now deprived the Queensland Government of the power to manage the property of Aboriginal Reserve residents without consent. Amongst the files of a great grandmother from Chillagoe in the hinterland of north Queensland, whose wages were managed by the local police protector – protectors were notorious for stealing

from the wages they managed – we found a file-note from a protector informing his successor to be careful dealing with her money, because though she was bushborn, she knew how to count!

A late mentor and friend told me when he returned as a young man from his first job outside the mission in the 1960s, he bought his first motorcar with his savings and drove proudly back home to visit his family. No one owned cars in the mission in that time. The next day the superintendent ordered him to immediately remove his car from the reserve as he had no permission to possess a vehicle. I asked what he did. His precise words were that he obeyed "without bend or bow". There was no questioning in those days.

Powers regulating residency on reserves without a permit; the power of reserve managers to enter private premises without the consent of the householder; legal representation and appeal from court decisions; the power of reserve managers to arbitrarily direct people to work; and the terms and conditions of employment – were now required to treat Aboriginal Queenslanders on the same footing as other Queenslanders, and indeed other Australians.

At the level of legal policy at least, we were at last free from those discriminations that humiliated and degraded our people. Whilst discrimination would continue in practice and the last vestiges of the old institutional controls of Queensland's reserve administration lasted into the next decade (I was a young elected councilor when we severed the Lutheran Church's role in the secular administration of our community in 1989) the Whitlam legislation meant freedom.

The companion to the Queensland discriminatory laws enactment, which would form the architecture of indigenous human rights akin to the *Civil Rights Act 1965* in the United States, was the *Racial Discrimination Act 1975*, enacted that same month.

It was in Queensland, under Bjelke-Petersen, that the importance of the *Racial Discrimination Act* became clear. In 1976 a Wik man from the Wynchanam clan of Aurukun on western Cape York Peninsula, John Koowarta, was supported by the Aboriginal Land Fund Commission to purchase the Archer Bend Pastoral Lease from its white owner. Bjelke-Petersen directed the lands minister to refuse the transfer, citing a policy of the Queensland Government preventing the sale of Crown leaseholds to Aboriginal groups. Koowarta complained to the Human Rights and Equal Opportunity Commission that the Queensland Government's action was unlawful under the *Racial Discrimination Act*. The complaint was upheld.

However the Queensland Government challenged the constitutional validity of the *Racial Discrimination Act* before the High Court.

The High Court's decision in *Koowarta v Bjelke-Petersen*⁵ came down in 1982, and by a 4-3 majority the *Racial Discrimination Act* was upheld as a valid exercise of the external affairs power of the Commonwealth. However for John Koowarta and his people the victory was hollow because in an act of spite Bjelke-Petersen converted the pastoral lease into the Archer Bend National Park. The irony of one of Queensland's all-time champion ball and chain land-clearers using an environmental tenure to deny traditional land rights, spoke volumes.

Like every law student I read this landmark case at Sydney University, returning north to work with my elders at the Cape York Land Council. One was old man John Koowarta. In 1991 I campaigned with him for the new state Labor government of Wayne Goss to enact land rights legislation to give justice to Koowarta's people. The Goss scheme which enabled land claims over national parks failed to do justice.

Old man Koowarta died a broken man. The winner of a landmark High Court precedent, but the victim of an appalling discrimination.

In 2010 Premier Anna Bligh made provision for 75,000 hectares, a portion of the National Park created by Bjelke-Petersen, to be returned under Aboriginal Freehold title. A measure of justice was finally restored to Koowarta's people. The crucial importance of the *Racial Discrimination Act* to land rights would again become apparent, again in Queensland and again involving Joh Bjelke-Petersen.

In 1982 a group of Murray Islanders, led by an expatriate activist-comegroundsman working at James Cook University in Townsville named Eddie Mabo, commenced proceedings in the High Court claiming title under the common law to their traditional homelands in the Torres Strait. In 1985 Bjelke-Petersen's government sought to kill

the Murray Islanders' case by enacting an extraordinary law called the *Queensland Coast Islands Declaratory Act*.

Extraordinary because it said that if native title existed in the islands of the Torres Strait as claimed by Mabo, then this Act effected a retrospective extinguishment of any such title.

If the Queensland Act was effective, the Mabo case would have died there and then. The Murray Islanders sought a declaration from the High Court that the Queensland law was unlawful under the *Racial Discrimination Act*. In December 1988 the High Court ruled 4-3 the Queensland law was invalid because it denied the Torres Strait Islanders their human right to own and inherit property, in a racially discriminatory way. This case was called *Mabo No. 1*.

Consider it: Bjelke-Petersen's position was that Mabo's people should not enjoy the same human right enjoyed by other Queenslanders: the right to own and inherit property. He was happy for mainstream Queenslanders to own and inherit property, in fact one would think he would have defended their rights to the hilt. But he wanted to deny these same rights to Torres Strait Islanders.

There was no political or media uproar against Bjelke-Petersen's law. There was no public condemnation of the state's manoeuvre. There was no redress anywhere in the democratic forums or procedures of the state or the nation.

If there were no *Racial Discrimination Act*, that would have been the end of it. Land rights would have been dead. There would never have been *Mabo No.2* in 1992. There would have been no *Native Title Act 1993 (Cth)*. There may never have been native title, especially if other states around Australia followed Bjelke-Petersen's lead in enacting the *Coast Islands Declaratory Act*. This is certainly what Premier Richard Court's government did when they passed the *Land (Titles and Traditional Usages) Act 1993 (WA)*. This law aimed to extinguish native title throughout the entire of Western Australia and replace it with certain entitlements set out in this state Act. In *The Native Title Act Case* the High Court ruled the *Land Titles and Traditional Usages Act* invalid and native title survived in Western Australia.

I traverse the history of land rights laws to show that without this old man the land and human rights of our people would never have seen the light of day. The importance of *Mabo* to the history of Australia would have been lost without the Whitlam program.

What did this Roman ever do for us anyway?

This brief survey of land rights in Queensland does not include the more wellknown achievements of the Whitlam government: the repossession of the Gurindji of Wave Hill when the prime minister said: "Vincent Lingiari, I solemnly hand to you these deeds as proof, in Australian law, that these lands belong to the Gurindji people, and I put into your hands this piece of earth itself as a sign that we restore them to you and your children forever."

Neither does it anticipate the consequences of the Woodward Royal Commission established to inquire into the recognition of traditional land rights in the Northern Territory. It was this old man's initiative that led to the Fraser Government enacting the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)*, legislation that would see more than half of the territory returned to its traditional owners.

Of course recalling the Whitlam government's legacy has been for 38 years since the dismissal, a fraught and partisan business. Assessments of those three highly charged years and their aftermath, by protagonists and later commentators alike, divide between the nostalgia and fierce pride of the faithful, and the considerable opinion that the political and economic management record of the Whitlam years represented the nadir of national government in Australia.

Lindsay Tanner observed in a 2011 commentary: The [Whitlam] government's record has been clouded by the intense demonisation that followed in the wake of its dismissal. Conscious of the enormity of the constitutional atrocity they had engineered, conservatives

went to extraordinary lengths to sully the Whitlam government's legacy, as if to justify their misuse of the Senate and the dismissal with a plea of self defence.

Let me venture a perspective.

The Whitlam government is the textbook case of reform trumping management. There are four permutations of government: government that fails reform and merely manages, government that balances reform and management, government that reforms and fails management, and government that fails in both. Whitlam's was a reform government for whom political and economic management was secondary. In less than three years an astonishing reform agenda leapt off the policy platform and into legislation and the machinery and programs of government. The country would change forever. The modern, cosmopolitan Australia finally emerged like a Technicolor butterfly from its long-dormant chrysalis.

Thirty-eight years later we are like John Cleese, Eric Idle and Michael Palin's Jewish insurgents ranting against the despotic rule of Rome, defiantly demanding

"and what did the Romans ever do for us anyway?"

"Apart from Medibank?"

"and the *Trade Practices Act 1974*?"

"cutting tariff protections?"

"and no-fault divorce and the *Family Law Act 1975*?"

"the Australia Council?"

"the Federal Court?"

"the Order of Australia?"

"federal legal aid?"

"the *Racial Discrimination Act 1975*?"

"needs-based schools funding?"

"the recognition of China?"

"the Law Reform Commission?"

"the abolition of conscription?"

"student financial assistance?"

"FM radio and the Heritage Commission?"

"non-discriminatory immigration rules?"

“community health clinics?”

“Aboriginal land rights?”

“paid maternity leave for public servants?”

“lowering the minimum voting age to 18 years?”

“fair electoral boundaries and Senate representation for the Territories?”

“Apart from all of this, what did this Roman ever do for us?”

And the prime minister with that classical Roman mien, one who would have been as naturally garbed in a toga as a safari suit, stands imperiously with twinkling eyes and that slight self-mocking smile playing around his mouth – in turn infuriating his enemies and delighting his followers.

There is no need for nostalgia and yearning for what might have been. The achievements of this old man are present in the institutions we today take for granted, and played no small part in the progress of modern Australia.

There is no need to regret three years was too short. Was any more time needed?

The breadth and depth of the reforms secured in that short and tumultuous period were unprecedented and will likely never again be repeated. The Devil might care attitude to management as opposed to reform imperatives is unlikely to be seen again by future governments whose priorities are to retain power rather than reform. We saw this with that succession of provincial Labor governments these past twenty years.

Let me look to the future. The Whitlam program as laid out in the 1972 election platform, consisted three objectives: to promote equality; to involve the people of Australia in the decision-making processes of our land; and to liberate the talents and uplift the horizons of the Australian people. This program is as fresh as it was when first conceived. It could scarcely be better articulated today. Who would not say the vitality of our democracy is a

proper mission of government, and should not be renewed and invigorated? Who can say that liberating the talents and uplifting the horizons of Australians is not a worthy charter for national leadership?

It remains to grapple with the idea of promoting equality.

My chances in this nation were a result of the Whitlam program. My grandparents and parents could never have imagined the doors that opened to me which were closed to them. I share this consciousness with millions of my fellow Australians whose experiences speak in some way or another to the great power of distributed opportunity.

I don't know why someone with this old man's middle – perhaps more accurately, *uppermiddle* – class background, could carry such a burning conviction that the barriers of class and race of the Australia of his upbringing and maturation, should be torn down and replaced with the unapologetic principle of equality. I can

scarcely point to any white Australian political leader of his vintage and of generations following of whom it could be said without shadow of doubt he harboured not a bone of racial, ethnic or gender prejudice in his body. This was more than urbane liberalism disguising human equivocation and private failings.

It was a modernity that was so before its time as to be utterly anachronistic. For people like me who would have no chance to attend university if left to the means available to our families, we could not be more indebted to this old man's foresight and moral vision for universal opportunity. It is my observation that those whose families could never have given them such opportunity, possess a desperately acute understanding of how precious it was and is. I can understand the special desperation of former Prime Minister Julia Gillard in respect of education. It was all she had and it was her main chance. What the Whitlam program gave her was something her family – for all of the things they could, a loving home, every encouragement and so on – could never give her: the chance to attend university. My family was the same. Except my parents could scarcely understand what university was. They gave me love, my father learned Francis Bacon's injunction from somewhere and drilled me incessantly that "reading makes a full man", my mother gave me vegemite damper and tea and sent me off to school every day – but it fell to society through the national government to

give me the chance to attend university. I well understand Gillard's passion in relation to educational opportunity. What I don't understand is how it was that the old man in whose honour I speak tonight had the vision and determination even though he himself came from a relatively advantaged family background. His was not the usual *bourgeois* temper. Those of us who would rise up in the world of opportunity thanks to the educational doorways opened by the Whitlam government, would soon lose our understanding of how it was that we prospered. It is with this university-educated class that I have developed some fundamental

differences in respect of how the project for equality might be understood and prosecuted. It is fair to say that some of my policy convictions around tackling social disadvantage have been at odds with much progressive thinking.

These debates cannot be canvassed at proper length here tonight, but I might at least sketch an outline. I have a problem with people from my class who have obsessed too much about the politics of identity to the exclusion of the politics of material and economic wellbeing. I have a problem with people from my class whose relativism actually disguises a soft bigotry of low expectations, and double standards about what constitutes progress. I have a problem with people whose sole concern with the structures of oppression counsels the disadvantaged not to be agents of their own progress notwithstanding that oppression. The truth is that personal agency and structural reform must be complementary.

I advocate land rights and welfare reform. I advocate cultural determination and economic development. And I resist progressives who will not apply to the disadvantaged the same standards they apply to themselves. The advantaged are advantaged because they pursue their self-interest. Yes, even progressive people are advantaged because the liberal engine of self-interest burns within them as much as it does their cultural opponents on the right. I have a serious problem when progressive people seek to deny that individual and social progress of the disadvantaged is also about self-interest. Self-interest for too many progressives is

anathema to social justice, when in fact it is the very engine of the justice that is sought.

Of course liberal self-interest must be met with opportunity. And it behoves the wider society through its government to ensure that everyone has chance and opportunity. This is where the policy convictions of Prime Minister Whitlam in securing and spreading opportunity for all, have been so germane to the uplift of many millions of Australians.

Our thinking in Cape York includes another insight. In an era where passive welfare has had such a corrosive effect we have come to understand that the building of capabilities within disadvantaged families and individuals, requires not just opportunity, but personal responsibility. Our equation is: Opportunity plus Responsibility equals Capability.

The post-Whitlam project for equality for the most disadvantaged must abandon much of the accumulated progressive theology on how the poor need not always be with us.

I now want to finally turn to the question of constitutional recognition of Indigenous Australians.

Constitutional recognition of Indigenous peoples has been on the agenda for a long time. Now, momentum for change is coming to a head. In January 2012 the Expert Panel delivered its recommendations to Prime Minister Gillard. A public education campaign has been mounted.¹² Lawyers are workshopping possible words and amendments. Politicians are deliberating on changes.

To win a referendum, a majority of voters in a majority of states need to vote yes. For that to happen, bipartisan support for the proposal must be achieved.¹⁴ If we expect Australians to vote yes, the general public needs to feel the change is necessary, and understand the problem we are trying to fix. What is wrong with our Constitution the way it is? Why does it need to change?

For the most part, our Constitution is fine. It has set up the legal framework for a stable, prosperous democracy in Australia. It is – mostly – written in neutral democratic language. It contains no gender bias. It makes no mention of preferred sexuality. It contains no religious bias.¹⁵ It is primarily a fair and just document, and creates a fair and just democratic system. Except in two respects.

There are two problems in our Constitution. The first is the non-recognition of Indigenous peoples. The second is racial discrimination: our Constitution still contains provisions which allow governments to discriminate on the basis of race. Prior to the 1967 referendum, Indigenous peoples were explicitly excluded from the Constitution. Section 127 prevented Indigenous people from being counted in the Census. Indigenous people were also excluded from the scope of s 51(xxvi), the Race Power. The 1967 referendum reversed this exclusion by deleting s 127 and deleting the exclusion in s 51(xxvi).

Ironically, however, the Constitution now makes no mention of Indigenous peoples whatsoever. As a founding, historical document, our Constitution is inadequate. *Mabo* overturned the doctrine of *terra nullius* in Australian domestic law. But our Constitution fails to recognize that this land was not empty when the British arrived. There is no mention of the Indigenous contribution to Australia's heritage and history.

The second problem is that the Constitution contains racially discriminatory provisions which enable governments to treat Australian citizens differently on the basis of race. Section 25 contemplates barring races from voting. S 51(xxvi) gives the Commonwealth the power to pass race-based laws – whether positive or adverse.

This allowance and promotion of racial discrimination is at odds with fundamental tenets of democracy: individual equality before the law, the rule of law (in that the same rules should apply to each individual regardless of colour or ethnicity), and the idea that each person's vote should be equal. The racial discrimination in our Constitution is an undemocratic error. On the issue of race, our founding fathers erred.

Their error was based on outdated factual and moral beliefs, now known to be incorrect. Racial categorizations between human beings, we now know, have no scientific basis.¹⁸ Race should no longer, therefore, have any legal or policy application. We now understand that there is only one race: the human race. Most would now agree that treating citizens differently on the basis of race is unfair. This is why removal of racial discrimination from the Constitution has strong public support.

The race-based approach has also been unsuccessful in addressing the problems we face in Indigenous affairs. This practical failure has had its roots in the philosophical understandings that underpin the race-based approach. Race is a colonial concept. Inherent in the idea of race is the notion that some races are superior and some are inferior. The incorrect notion that Indigenous people belong to an inferior or incapable race has arguably had a poisonous effect on Indigenous policy, law and, consequently, Indigenous people.

While in the past there was much adverse discrimination against Indigenous people on the basis of race, now there is positive discrimination – well intentioned – but often with adverse results. Cape York Institute's work in welfare reform has shown us this all too clearly. The race-based approach has perpetuated low expectations and undermined personal responsibility.

Consequently, as many Indigenous leaders have argued, the law and public policy often fails to hold Indigenous Australians to the same responsibilities and expectations as other Australians.²¹ This attitude does Indigenous people a great disservice.

We must unequivocally reject the idea that Indigenous people are innately or biologically disadvantaged. Indigenous people are not an inferior race. Yes, Indigenous people are for the most part socially and economically disadvantaged due to past discrimination, dispossession and other contemporary factors. And yes, we should do everything we can to assist disadvantaged people, black or white. But we should do so on the basis of individual need – not race.²² A person is not automatically disadvantaged just because he or she is Indigenous. A person should be rewarded on their merits, and assisted in their needs. Race, and Indigeneity, should be irrelevant to matters of public welfare and government assistance.

We need to move from Indigenous non-recognition to recognition. And we need to move from a position of racial discrimination in law and public policy, to one of individual equality before the law.

Reform for recognition means symbolic constitutional recognition of prior and continuing Indigenous occupation of this land, and recognition that Indigenous

cultures, languages and heritage are Australia's cultures, languages and heritage – an important part of our national identity. This is simply a historical truth that should be stated in our founding document. Prime Minister Tony Abbott once said that “every Australian needs to feel some kind of mystical bond and union with every other Australian... to build a nation.” Arguably that ‘mystical bond’ is our shared Indigenous heritage, that most ancient part of our national story that has for too long been denied.

Our British inheritance is recognised. It has been embodied in the Constitution since 1901: through the English language in which it is written, through the structures of democratic government it sets in place, inherited from the English system of law, and by instating the British monarchy as our Head of State.

Australia's Indigenous heritage should rightly sit alongside these fundamental British traditions and institutions. It is, after all, our Indigenous heritage, that gives us that which is unique in the world.

Reform for equality before the law means the racially discriminatory s 25 should be removed. The Race Power should also be removed and replaced with a new power allowing governments to pass necessary laws specific to Indigenous affairs, such as Native Title and Indigenous heritage laws. But the new Indigenous affairs power should not be used for matters of public welfare or government socioeconomic assistance. These matters should be addressed not on the basis of Indigeneity, but on the basis of individual and community need. This distinction should be made clear in the drafting.

In addition to removing the two racially discriminatory provisions, Australia should adopt a new constitutional provision prohibiting racial discrimination in laws and policies and ensuring equality before the law with respect to race, ethnicity and colour. This is necessary to overturn the racially discriminatory precedent that has built up since 1901, through legislation, policies and case law. The Race Power and s 25 established the wrong principle in our Constitution. A new, correct principle needs to be set in place. Simple removal of discriminatory provisions is insufficient.

Those on the left have long argued that we should stop the adverse discrimination against Indigenous people. Those on the right often argue we should stop the perceived preferential treatment of Indigenous people. The balanced ‘radical centre’ position,²⁴ and arguably the fair and correct position in a just democracy, is to eliminate both adverse and preferential treatment on racial grounds.

The most common objection to the propositions I have made for constitutional reform on the basis of Indigenous recognition and equality before the law, is that there is a contradiction between the two principles, or that they are separate and should be dealt with separately. But this in my view is incorrect.

The racial discrimination allowed by our Constitution is inextricably linked to the Indigenous history we want recognised. So extreme was the discrimination against Indigenous people, it initially even denied that we existed. This is what Indigenous recognition is all about – overturning the fallacies of non-existence and racial inequality.

There is no contradiction in saying we recognise the importance of the nation's unique Indigenous heritage and history, while at the same time confirming that we are all equal on the basis of our shared and equal Australian citizenship. The two

propositions are complementary. The one entails the other. What's more, both propositions are politically necessary.

It is the confirmation that all Australians are equal before the law that legitimises and makes acceptable the symbolic recognition of Indigenous history and heritage. It confirms we are *not* creating a separate category of special treatment or collapsing into cultural relativism. It confirms that the same rules should apply to all Australians.

Likewise, it is the symbolic recognition of Indigenous heritage, languages and cultures, that confirms that the 'one land, one law' principle need not dissolve into mere assimilation and cultural loss. Equality before the law needs to go hand in hand with a renewed appreciation of the nation's rich Indigenous traditions that in our national psyche should carry as much pride as our British traditions and institutions.

This land was not *terra nullius* when the British ships arrived.

But recognition should go with equality. This is the yin and the yang. The amendment proposition needs to have this balance.

Indigenous recognition and equality before the law are correct principles for a fairer, more reconciled nation. We first need to agree on this. Then, the challenge will be for the lawyers and drafters to express these principles, carefully and precisely, in the right constitutional amendments.

Let me say finally to Mr Tony Whitlam who is here this evening on behalf of the Whitlam family: please pass on to the old man my warmest affection – nay, love – and convey to him, notwithstanding that my words here tonight could not do his public service proper justice, some sense of my belief that he is Australia's greatest white elder and friend without peer of Indigenous Australians.

Thank you.