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KEEPING THE REVOLUTION AT BAY: THE UNLAWFUL ASSOCIATIONS PROVISIONS OF THE COMMONWEALTH *CRIMES ACT*

Marxists were not the only people to believe that agitation and propaganda could transform the working class from a mass of intermittently militant trade unionists into a revolutionary movement. In the aftermath of the 1917 revolution, many conservatives feared that in this respect Marxists might be right. The industrial and social disturbances which followed the end of World War I raised fears that revolutionary sentiments might spread and, while some conservatives knew better, they also recognised the use to which fear of revolutionaries could be put. Fear of radicalism could be used to mobilise support, thereby averting not only the spectre of communism, but the spectre of social democracy. Quasi-military anti-communist organisations appeared, sometimes making a far from insignificant contribution to the disorder of the times. And, to varying degrees, governments responded to unrest with a mixture of symbolism and coercion. The United States federal government responded with raids, mass arrests and deportations. Yet, despite the hysteria of the times, Congress rejected proposals for legislation to ban the advocacy of radical ideas.[1]

Canada did not react with the administrative ferocity of the United States, but in the aftermath of the Winnipeg General Strike of 1919 the Canadian Parliament amended the Criminal Code to provide that organisations which advocated the use of unlawful means to achieve political change thereby became illegal organisations.[2] Britain saw no need for such legislative innovations, but made use

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1 Murray B Levin, *Political Hysteria in America: The Democratic Capacity for Repression* (1971) provides a comprehensive review and generally persuasive analysis of these events, but is sometimes inclined to mistake arguably defensible reactions to radicalism for hysteria. See too Donald Johnson, *The Challenges to American Freedoms: World War I and the Rise of the American Civil Liberties Union* (1963) 119–48. Congress had enacted a peacetime anti-sedition statute in 1798, but this expired under a sunset clause on 3 March 1800, and was not revived. Wartime anti-sedition legislation elapsed on 2 July 1921 with a Congressional resolution declaring the war to be at an end. See Michael Linfield, *Freedom under Fire* (1990), 16–21, 43–6.

2 Norman Penner, *Canadian Communism: The Stalin Years and Beyond* (1988) 118; *An Act to Amend the Criminal Code*, SC 1919, c 46, s 1.

of existing laws. In the course of the 1920s more than a dozen communists were imprisoned for sedition.[3]

Australia reacted with neither the administrative ferocity of the United States nor the legislative ferocity of Canada, but in 1920 the Commonwealth Government manifested a similar concern with foreignness and radicalism. The *Immigration Act 1901* (Cth) was amended to empower the Minister to deport aliens who were found by an advisory Board to have advocated the violent overthrow or abolition of the government, and members of organisations which entertained or taught any of these doctrines.[4] (The following year the importation of foreign literature which advocated these doctrines was banned by proclamations under the *Customs Act 1903* (Cth) s 52(g).) To deal with local radicals, Parliament amended the *Crimes Act 1914* (Cth) (the *Crimes Act*) so that the uttering of seditious words and taking part in seditious enterprises became Commonwealth offences.[5] (These were already offences under State law, but wartime experiences had led the Commonwealth to conclude that Labor-controlled States could not always be trusted with the suppression of subversion.[6]) It did not, however, adopt the more draconian legislation.

In 1925, Australia suffered a long and costly seamen's strike. The Bruce-Page Government attributed the strike to the ulterior motives of the union's revolutionary leaders, and embarked on a number of measures designed to attack the strikers and their leaders. These included actions under the *Navigation Act* and the amendment of the *Immigration Act* to allow the Minister to deport foreign-born persons who had been convicted of offences against Commonwealth laws relating to trade, commerce, and industrial relations.[7] (Attempts to use the latter powers ended in defeat for the Commonwealth, when the High Court held that the legislation was

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3 Francis Beckett, *The Enemy Within: The Rise and Fall of the British Communist Party* (1995), 20, 23, 25–6.

4 *Immigration Act 1920* (Cth) s 7.

5 *War Precautions Act 1920* (Cth) s 12. Section 11 added a new section, 7A, to the *Crimes Act* whereby it became an offence to incite or encourage the commission of offences against any Commonwealth law.

6 See eg Frank Cain, *The Origins of Political Surveillance in Australia* (1983) 161–2, in relation to Queensland. Later the Lang (Labor) Government of New South Wales refused to co-operate with the Commonwealth when it attempted to deport the union leaders, Walsh and Johnson: Andrew Moore, *The Secret Army and the Premier: Conservative Paramilitary Organisations in New South Wales 1930–32* (1989) 51. In 1932, Jones (Director, Commonwealth Investigation Branch) advised Latham (the then Attorney-General) that New South Wales police would definitely not assist the Commonwealth in any raid on Commonwealth premises: Jones to Latham, 24 February 1932 NAA (National Archives of Australia): A467 Bundle 94/SF42/64 286.

7 *Immigration Act 1925* (Cth) s 7, adding s 8AB to the principal act.

unconstitutional.[8]) In the 1925 election, the government undertook that, if returned, it would take vigorous action against Bolshevism, and threats to law and order in general.[9] Having been elected, it quickly proceeded to deliver on its promise. In February 1926, the government introduced a bill to amend the *Crimes Act 1914* (Cth) by the addition of a new Part IIA. This legislation corresponded closely to the Canadian legislation, although its penal provisions were far less draconian. The new Part (to be discussed in more detail below) defined organisations which pursued particular objectives as 'unlawful associations' and made it an offence for people to do a variety of acts for or on behalf of an unlawful association. The Bill was passed along party lines, and received assent on 16 March 1926. Part IIA was further amended in 1932, with a view to strengthening its provisions, and in its amended form it remains in force. (In this respect, it proved more resilient than the Canadian legislation, which was finally repealed in 1936 after numerous previous unsuccessful attempts by Liberal governments.)[10] However, as we shall see, neither the Bruce-Page government nor its successors made much use of the legislation. In the 75 years of its existence, Harold Devanny is the only person ever to have been convicted of an offence under the unlawful associations provisions, and he was acquitted on appeal. Between 1932–37, Part IIA was used to discourage the renting of meeting halls to communists, and, more importantly, as the basis of banning the postal transmission of communist publications. Between 1935–37, the Commonwealth made a half-hearted attempt to seek a declaration banning the Friends of the Soviet Union (and, almost incidentally, the Communist Party of Australia). But, with the settlement of that litigation, governments largely lost interest in the Act, and never again were any attempts made to enforce the unlawful associations provisions of Part IIA.[11] Indeed, even after the defeat of the *Communist Party Dissolution Act 1950* (Cth), the Commonwealth took no steps to prosecute communists under the Act, notwithstanding the initial success of the Americans in prosecuting more than one hundred leading American communists under the similar United States legislation.[12]

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8 *R v Walsh and Johnson; In re Yates* (1925) 37 CLR 36.

9 See eg C M H Clark, *A History of Australia* (1987), 235–51, passim.

10 Penner, above n 2, 118–9; *An Act to Amend the Criminal Code*, SC 1936, c 29, s 1.

11 Part IIA also made it an offence to engage in certain activities in the course of industrial action: ss 30J–30Q. The Commonwealth has made occasional use of these provisions. (Sections 30L–30Q were repealed in 1973: *Crimes Act 1973* (Cth).)

12 Accounts of the United States prosecutions are to be found in: David Caute, *The Great Fear: The Anti-Communist Purge under Truman and Eisenhower* (1978) 187-209; Michael R Belknap, *Cold War Political Justice: The Smith Act, the Communist Party, and American Civil Liberties* (1977); Peter L Steinberg, *The Great 'Red Menace': United States Prosecution of American Communists, 1947–1952* (1984). The relevant legislation is set out in *Dennis v United States* 341 US 494; 95 L ed 1137 (1951). It is more draconian in that offences carry longer maximum penalties.

In a sense the provisions are of no more than historical interest. The Communist Party is dead and we may not see its like again. Civil libertarianism is probably stronger than it once was. However, the fate of these provisions is of ongoing potential significance. The current period of political calm could conceivably give way to a period of unrest, and in times of unrest governments are wont to contemplate repressive measures. And civil libertarianism has a habit of flourishing most when it is least needed. In face of organised (or apparently organised) disorder, a future Australian government might be tempted to dust off Part IIA. Alternatively, faced with political pressures to respond to the perceived threat, it might contemplate fresh legislation. Whatever governments may do, the history of Part IIA is likely to prove relevant. In particular, it suggests that politically repressive laws are difficult to enforce. An examination of the reasons why this is so throws light on the degree to which civil liberties are protected by constitutions, laws and politics. It also highlights the degree to which the criminal law is a relatively blunt instrument of political repression compared with the more subtle, less visible and less dramatic forms of repression.

This paper begins with an examination of the relevant statutory provisions. In part 2, it examines the limited use made by Commonwealth governments of the unlawful associations provisions. Part 3 considers why governments seem to have made so little use of the Act, and part 4 argues that the time has come to repeal the unlawful associations provisions.

UNLAWFUL ASSOCIATIONS

What is an Unlawful Association?

Central to the operation of Part IIA is the concept of 'unlawful association', this term being defined (s 30A(1)(a)) as including any body of persons whether incorporated or not which, by its constitution, propaganda or otherwise, encourages or advocates:

- overthrowing the Constitution of the Commonwealth by revolution or sabotage;
- overthrowing the established government of the Commonwealth, a State, or a civilised country, or of government in general by force or violence; or
- damage or destruction to property of the Commonwealth or which was used in trade or commerce.

If a body satisfies any of these conditions, bodies which are, or which purport to be, affiliated with such bodies are also unlawful associations: s 30A(1)(a). Bodies which advocate acts to carry out seditious intentions are also defined as unlawful, but their affiliates are not caught by the Act: s 30(1)(b). Branches and committees

of unlawful associations, and any schools or institutions conducted with the actual or apparent authority of unlawful associations are deemed by the Act to be unlawful associations: s 30A(2). There is little authority on the meaning of 'affiliate', but in the *Communist Party Case*[13] Dixon J briefly adverted to the issue:

> There is no definition of the rather vague word 'affiliation', but in *Bridges v Wixon* (1945) US 135 at p 143 (89 Law Ed 2103, at p 2109) the Supreme court of the United States said of the word ... that it imported less than membership and more than sympathy and that acts tending to show affiliation must be of a quality indicating adherence to or furtherance of the purposes of the proscribed body as distinguished from mere co-operation with it in lawful activities.

A body becomes an unlawful association by virtue of its attributes and independently of any court or executive order, and it could cease to be an unlawful association if it changed its policies in relevant ways. This means that the status of a political body might be unclear, and that a decision in relation to this issue in one case would not necessarily be binding on another court in a later case. To avoid any confusion that might result from this, the law was amended in 1932 to provide that an application might be made to the High Court or a State Supreme Court for a declaration that a body was an unlawful association: s 30AA.

The definition of 'unlawful association' is both puzzling and difficult. The 'seditious intention' criterion is to be contrasted with the elements of offences involving sedition. Offences involving sedition require both the existence of a seditious intention and that the acts not be done in good faith with a view to achieving intra-constitutional change or in the course of an industrial dispute: s 24F. Good faith is irrelevant to whether a body which advocates seditious acts is an unlawful association. It is possible, therefore, that a body which encourages disruptive industrial conflict might thereby be an unlawful association though the encouragement itself would not constitute the offence of uttering seditious words.[14]

The three sets of criteria under s 30A(1)(a) sit oddly with each other, although such apparent anomalies as the lack of protection for State and foreign constitutions may reflect the Commonwealth's concern to act within its constitutional powers. The concept of 'overthrow ... by revolution or sabotage' is unclear. The phrase 'by revolution' implies that revolution is a process rather than an outcome. The

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13 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 177. He was discussing the meaning of 'affiliate' in the context of the *Communist Party Dissolution Act 1950* (Cth).

14 The relevant seditious intention would be that of promoting 'feelings of ill-will and hostility between different classes of Her Majesty's subjects so as to endanger the peace, order or good government of the Commonwealth': *Crimes Act 1914* (Cth) s 24A(g)

juxtaposition of 'revolution' and 'sabotage' implies that 'revolution' does not encompass all processes whereby a constitution might be overthrown, but leaves open the question of what those non-revolutionary processes might be. The lack of any express requirement that the revolution be violent (in contrast with the express requirement to this effect in relation to the overthrow of governments) might be taken as implying that a body would fall foul of the section if it advocated non-violent revolution. Conversely, it could be taken as evidencing an assumption that revolution is inherently violent, in which case non-violent revolution would be oxymoronic. In a 1932 memorandum, Knowles, Secretary of the Attorney-General's Department and Solicitor-General, discussed the issue. He concluded that advocacy of revolution brought bodies within the Act only if the revolution was violent. However, while his conclusion seems correct, his reasoning is unpersuasive. He argued that the 'collocation of overthrow and revolution seems to indicate a violent overturning of the Constitution', but if that were so the same would apply to sabotage. Yet he did not suggest that 'sabotage' was to be given a correspondingly limited meaning, noting merely that there was no legally authoritative definition and that dictionary definitions and that usage in published works indicated that the term could encompass a variety of activities ranging from laziness on the job, through disruptiveness to causing damage to capital and raw material.[15]

Difficulties could also arise in relation to the question of whether a body could be said to be advocating or encouraging a proscribed objective. These include the question of whether it is necessary that those through whom the organisation acts should know or suspect that the organisational message advocates a proscribed end, or whether it is enough that they knowingly utter a message or do something, provided the message or act constitutes a relevant form of advocacy or encouragement.[16] The terms 'advocate' and 'encourage' are ambiguous. In particular, does a body advocate revolution when this advocacy is conditional upon

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15 NAA, A467, Bundle 89/part 1/SF42/49 Attachment. Knowles to Crown Solicitor, 17 November 1932. Advocacy of the overthrow of the Constitution by sabotage would presumably imply advocacy of a relatively serious form of sabotage.

16 Consistent with the latter interpretation is the view taken by Stephen in relation to the mens rea required for the common law offences of uttering seditious words, publishing seditious libels, or participating in seditious conspiracies: Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (1883), 298–99. However, there is authority to the effect that the accused must believe that the words or action will or could produce the relevant effect: L W Maher, 'The Use And Abuse Of Sedition' (1992) 14 *Sydney Law Review* 287, 290. The more liberal mens rea requirements are consistent with the courts' modern tendency to condition criminal guilt on knowledge of the relevant elements of the offence – or on reckless indifference as to their existence.

a state of affairs which has not yet arisen?[17] If so, how imminent must that state of affairs be? Is advocacy or encouragement to be inferred from a literal interpretation of words used, or from the way in which the words would or might be interpreted by an audience and, assuming the latter, what is the relevant audience?[18] Does 'encouragement' require that there should actually have been someone who was encouraged, or is it enough that the relevant body should have communicated a message to an intended audience with a view to encouraging members of the audience to behave in a particular way?[19] Does a body advocate or encourage if, say, some but not all of its officials advocate or encourage a proscribed objective?[20] For a person to be guilty of an offence by virtue of their involvement with an unlawful association, is it necessary that they know of the existence of those facts which make the organisation an unlawful association, or is it enough that they know that they are involved with an organisation, that organisation being an unlawful association?[21] Had the legislation been enforced, some of these questions might

17 This issue was canvassed by Evatt J in *R v Hush; Ex parte Devanny* (1932) 48 CLR 487, 517–18 where he suggested that advocacy of distant revolution might not fall within the Act and that if it did the Act would be unconstitutional.

18 The analogy of sedition law — and the purpose of the legislation — would suggest that inferences about the accused's intentions were to be based, inter alia, on the words and the context in which they were uttered: see *Burns v Sharkey* (1949) 79 CLR 101 where the dissenting justices (Dixon and McTiernan JJ) agreed with Latham CJ on this point.

19 Given that, at least in the opinion of the Commonwealth DPP, 'encourage' is essentially synonymous with 'incite' (Commonwealth Attorney-General's Department, *Review of Commonwealth Criminal Law: Interim Report: Principles of Criminal Responsibility and Other Matters* (1990) 237), some assistance may be gained from the law of incitement. This suggests that all that is required is the intention to communicate. While the objective capacity of words or deeds to encourage behaviour might as a matter of evidence be relevant to whether the requisite intention exists, the failure of attempts to incite does not constitute a defence to an incitement charge: *R v Dimozanos* (1991) 56 A Crim R 345, 348 (CCA, Vic).

20 Analogies could be drawn from the principles governing corporate liability. On these see, eg LBC *Laws of Australia*, vol 9 (at 30 March 1997) 9 'Criminal Law Principles', 9.2 'Ancillary liability' [140], [142], [143].

21 On the criteria to be taken into account in determining the scope of the mens rea requirement, see *He Kaw Teh v The Queen* (1985) 157 CLR 523. Counting in favour of a broad mens rea requirement would be the general common law presumption in favour of a mens rea requirement, the strong presumption against interpreting legislation so as to allow it to infringe on political freedoms (insofar as it is now constitutionally permissible for legislation to do this), and the fact that breach of the legislation is punishable by imprisonment. Counting weakly against a broad mens rea requirement would be the short maximum prison terms prescribed by the legislation. If an unlawful association was regarded as constituting a serious threat to Australia's constitution and government, it might be argued that

have been given authoritative answers, but the one case to arise under the legislation resolved none of these issues.[22]

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enforcement of the legislation required a narrow mens rea requirement (a matter whose relevance was accepted in *He Kaw Teh*), but such an argument would not be convincing. Enforcement needs could often be satisfied by obtaining a declaration that a body is an unlawful association. Given a declaration, a defendant with anything but a strictly limited association with an unlawful association would be hard-put to argue post-declaration ignorance of its unlawfulness. Enforcement needs could therefore be satisfied without relying on a narrow mens rea requirement. Declarations would not help where the unlawful association repeatedly transformed itself into associations under different names, but a defendant who had managed to keep up with the shifts in name might be hard-pressed to argue ignorance of the unlawfulness of the latest manifestation of a declared association. The Commonwealth Human Rights Commission argued for reform of the legislation on the grounds that ignorance of the facts that gave rise to the illegality was probably *not* a defence in the absence of honest and reasonable mistake: Human Rights Commission, *Review of the Crimes Act 1914 and Other Crimes Legislation of the Commonwealth* Report No 5 (1983) 6–7. This report pre-dated *He Kaw Teh.*

22 Similar issues were considered by the United States Supreme Court in relation to appeals against convictions under the *Smith Act*. On its face, this legislation is more liberal than the *Crimes Act* provisions. While it made it an offence to organise or be a member of an organisation which advocated the violent overthrow of an American government, it expressly provided that the member must be aware of the organisation's purposes: s 2(a)(3). (This requirement is almost certainly implicit in the Australian legislation.) It did not attach disabilities to other acts for or on behalf of such an organisation, except insofar as the acts amounted to advocacy or conspiracy to advocate the violent overthrow of a government of the United States (ss 2(a)(1), 3). It was an offence to print and publish subversive material only if this was done with the intention of causing the violent overthrow of a United States government: s 2(a)(2). Maximum penalties were far more severe than those prescribed under the *Crimes Act*: 10 years and $10 000: s 5. In *Yates v United States* 354 US 298 (1957), the Court held that advocacy required advocacy of action as distinct from abstract principle divorced from action. Advocacy of the desirability of overthrowing governments as an abstract principle would not constitute advocacy for the purpose of the Act even if uttered in the hope that it might ultimately lead to revolution: 312–22 (Harlan J). This requirement could, however, be satisfied by advocacy of future action: *Dennis v United States* 341 US 494 (1951), and *Yates* 354 US 298, 321 (1957) (Harlan J). *Yates* is, however, of limited relevance to the interpretation to be placed on the Australian legislation, given that it, and the cases on which it was based, were decided within the context of the United States constitutional framework. *Dennis*, which might suggest that Part IIA extends to bodies which advocate the overthrow of government when the time is ripe, is arguably best read in the light of the assumption by four of the six majority justices that the time *would* come when the leaders of the Communist Party would call on its members to rise against the government: see 510–11

The Effect of a Body Being an Unlawful Association

A variety of consequences flowed if a body was an unlawful association. It was an offence to be an adult member, an office bearer or a representative of such a body or to act as a teacher in a school or institution run by such a body: s 30B. It was an offence to contribute or solicit money or goods to or for the body: s 30D. Publications by an unlawful association were not to be transmitted by post, or to be registered or remain registered as newspapers, and if posted were to be forfeited to the Commonwealth: s 30E. Printing, publishing, selling or circulating the publications of an unlawful association was an offence: s 30F. Goods and chattels belonging to an unlawful association were forfeit to the Commonwealth, as were any publications issued by or for an unlawful association: s 30G. The 1932 amendments created two further offences. Occupants of buildings were prohibited from knowingly permitting unlawful associations to conduct meetings there: s 30FC. And members of the executive or committee of a body declared to be an unlawful association were to be stripped of the right to vote for 7 years, insofar as this was constitutionally possible: s 30FD.[23]

It is not clear what knowledge is required of a person charged under these provisions. Clearly, a person could not be guilty unless they were aware of being involved in a proscribed activity for on behalf of an association which was an unlawful association. This would scarcely avail a person charged under s 30B, but it might assist a printer who claimed not to have known that it was an unlawful association which had commissioned the printing of a (non-seditious) pamphlet. Less clear is whether the person must also know of the existence of facts which make the association in question an unlawful association. A ruling to that effect

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(Vinson CJ, Reed, Burton and Minton JJ). (Jackson J, at 570, considered that the risk that the time might come was sufficient. Frankfurter J seems reluctantly to have been of the view that the magnitude of the risk was a matter for Congress to assess. Black and Douglas JJ dissented, the latter on grounds including the well-founded (but then controversial) argument that the party was so weak as to be incapable of constituting a serious threat to the government: at 588–9.)

23 In the original Bill, the proposal had been to disenfranchise all members of an unlawful association. This was the most controversial provision of the 1932 Bill. Opponents of the clause pointed out that if, say, the Australian Railways Union were to be declared an unlawful association on the basis of its recent decision to affiliate with the Red International of Labor Unions, its 30,000 members could be disenfranchised as a result, depending on how s 41 of the Constitution was interpreted. In Committee, the Senate opted for s30FD in its current form: See Commonwealth, *Parliamentary Debates*, Senate, 17 May 1932, 786–808. In the absence of State legislation disenfranchising members of unlawful associations, the section could achieve nothing. Those supporting the amendment did so, hoping that the States would co-operate: see in particular Senator George F Pearce (Minister for Defence), 802.

would limit the degree to which the legislation could be used against members of unlawful associations, and in particular their affiliates, although section 30AA would provide some assistance to a government willing to condition such action on a declaration that the organisation was unlawful. There is no directly relevant authority, and for the purposes of the argument that follows it is enough that the problem be recognised.

Proving Unlawfulness

As initially formulated, the legislation posed a major problem for prosecutors. In each prosecution, it was necessary for the prosecutor to prove that, at the time of the alleged offence, the body in question was an unlawful body. If the basis for the prosecution was the body's constitution, this would not be particularly difficult, assuming one could prove that a given document was indeed the body's constitution. If, however, the body chose not to mention its malign purposes in its constitution, or if it had no constitution, other evidence would be needed. One type of evidence would be a body's propaganda, but in order to rely on this several conditions had to be satisfied. First, the prosecution would need to prove that propaganda was indeed the body's, rather than, say, an expression of views by a member of the body. Second, it would not be enough to prove that the body had at some point in time issued propaganda advocating one or more of the proscribed objectives. For if the body was no longer encouraging or advocating proscribed goals, it would no longer be an unlawful association. A final problem is that proof of certain matters might require evidence from agents within the unlawful association. If the evidence of such agents is used, the agent's infiltrative capital is exhausted. Since the inner sanctums of revolutionary organisations are not readily penetrated, governments may be reluctant to sacrifice information for convictions.

The 1926 legislation sought to overcome these problems in several ways. First, it provided that the prosecutor could aver a particular matter in the information or indictment, and that such averments were to constitute prima facie evidence of the fact alleged: s 30R. If the matter amounted to a mixed question of law and fact, the averment was to constitute prima facie evidence of the fact only: s 30R(2)(b).[24] The

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[24] In *Brady v Thornton* (1947) 75 CLR 140, 147 Dixon J pointed out that it may not be possible to determine from the information whether it raises a mixed question of law or fact and, if so, the nature of the question of law to which it gives rise. He did not discuss the implications of this observation, which are considerable. One problem involves the question of what fact is being averred in an averment which amounts to an averment of fact and law. Neither he nor the other justices in that case provided an answer to this question. The case involved an appeal from a magistrate's decision that an averment to the effect that the defendant had understated his business's income by an amount of at least a specified sum constituted a pure averment of law. It therefore did not give rise to a presumption in

effect of this provision was to ease the prosecutor's task. If the facts alleged in the averment are sufficient to ground a conviction, a defendant who gives no evidence can be convicted even if the prosecution gives no additional evidence.[25] If the averment is false, the defendant would normally give evidence. So long as this evidence gives rise to reasonable doubt as to the defendant's guilt, the defendant must be acquitted. Even if the averment is true, the defendant may give evidence, hoping that this evidence will at least give rise to reasonable doubt. If it does, the defendant must be acquitted. However, while the defendant is able to rely on the requirement that guilt be proved beyond reasonable doubt, the fact that defendants normally need to give evidence to overcome the averments means that the prosecutor may be able to overcome weaknesses in its case by cross-examining defence witnesses.

Second, the Act provided (s 30R(5)) that any publication purporting to be issued by a body should, unless the contrary be proved, be deemed to have been so issued. It was therefore not necessary for the prosecution to prove that a newspaper purporting to be the official organ of the Communist Party was indeed an official organ, although if evidence were to be produced that the newspaper was a forgery, it would be necessary for the prosecution to produce evidence in rebuttal.[26] Proof was further facilitated by the addition of s 30FA in 1932. This provided that the imprint on any publication was to be prima facie evidence that it was published in the interests of, or on behalf of, the body specified in the imprint.

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favour of the existence of any fact. Three justices (Rich, Starke and McTiernan JJ) considered that this averment was a simple averment of fact, but gave no reasons for this conclusion. Two (Latham CJ and Dixon J) held that the averment was a mixed averment. They gave no guidance to the magistrate in relation to how to disentangle the fact that was being averred from the law which was implicit in the averment. The fact that the issue has yet to receive judicial analysis suggests that its analytical significance far outweighs its practical significance.

25 Bray CJ has pointed out that 'when the prima facie case is made out solely by virtue of a statutory presumption it is a difficult and perhaps a baffling task to decide appropriate criteria by which to judge whether the prima facie case has been converted into satisfaction beyond reasonable doubt': *Simmons v Venning* (1969) 1 SASR 403, 406.

26 The obvious response of an organisation would be to desist from such statements, and, following the passage of the amendment, the *Workers' Weekly* did indeed drop its reference to its status as the party's official organ: Jones, 'Communism in Australia' NAA: A467, BUN94/SF42/64 286. However, fortunately for the Commonwealth, the Party seems to have been reluctant to forego credit for its publications, and in October 1930 the *Workers' Weekly* reaffirmed its status as the official organ.

ENFORCING THE LEGISLATION

Having secured the passage of the legislation, the Bruce-Page government took no steps to enforce it. Bruce argued that this was because the legislation had succeeded in its purpose: its immediate effect was to encourage large numbers of people to leave unlawful associations.[27] Its tolerance was also no doubt attributable to the weakness of the Communist Party in the late 1920s, following a decision by the Labor Party to prohibit dual membership and to enforce that prohibition.[28] Labor, which had bitterly opposed the legislation, took no steps to enforce it during its brief term of office between 1929–32. The Lyons government, however, was determined to strengthen and enforce the Act. Among its first legislative measures was legislation to provide machinery whereby bodies could be declared unlawful associations, and to limit the access of unlawful associations to meeting rooms. For the first time, too, attempts were made to enforce the legislation.

Confiscating Mail

The first step in the new government's campaign against the Communist Party involved attempts to deprive the party of the right to transmit its publications through the post. Section 30E of the Act prohibits the transmission through the mail of the publications of unlawful associations. It also provides that newspapers published by or for unlawful associations are not to be registered as newspapers for the purposes of the postal legislation. No criminal sanctions attach to breach of the section, but material transmitted in breach of the section is forfeited to the Commonwealth and may be destroyed or otherwise disposed of by the Commonwealth. The section therefore operates to interfere with unlawful associations in two ways. It adds to the costs of circulating literature. Refusing registration as a newspaper means that charges for transmission are considerably increased. The ban on transmission through the post (insofar as it was complied with) means that alternative channels had to be used. The fact that illegally mailed material can be destroyed means that, insofar as such material is detected, it can be kept from impressionable minds. The section's major impact is therefore economic.

Within days of the swearing in of the conservative Lyons government on 6 January 1932, the Attorney-General's Department had been asked to report on publications

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27 See Commonwealth, *Parliamentary Debates*, House of Representatives, 29 May 1928, 5268 (Stanley M Bruce, Prime Minister); House of Representatives, 24 May 1932, 1214 (Stanley M Bruce, Assistant Treasurer).

28 Alistair Davidson estimates that between 1923–25 party membership fell from 750 to about 280. Between 1926–28, the Party did little more than attempt to spread its propaganda, although it maintained a degree of influence on union affairs via the not unsympathetic New South Wales Labor Council: *The Communist Party of Australia: A Short History* (1969) 34–9.

which might be attacked under s 30E. On 8 January 1932, Garran, Knowles' predecessor, had advised Latham (the Attorney-General) that those responsible for the publication of the *Workers' Weekly* were an unlawful association. On 14 January 1932, Knowles reported evidence of advocacy of revolutionary doctrines in 15 foreign and locally produced periodicals.[29] Some of these were foreign publications, and governed by the *Post and Telegraph Act 1901* (Cth). The remainder potentially fell within the ambit of s 30E. Fenton, the Postmaster-General, and a former Labor minister, had some doubts about the legality of the ban, but eventually agreed to its imposition. On 3 February 1932, the Postmaster-General's Department announced a ban on the transmission through the post of offending publications. Imported publications arriving by mail could be confiscated and destroyed under the *Post and Telegraph Act*. Six domestic publications, *Pan-Pacific Worker*; *Red Leader*; *Soviets To-day*; *Workers' Weekly*; *Working Woman*; and *The Young Worker*, lost their status as registered newspapers. While the initial decision in relation to periodicals seems to have been based on the contents of the periodical in question,[30] ongoing bans were justified by reference to the unlawfulness of the body whose interests they served. Once it was established that a particular edition of a paper emanated from an unlawful association, there was no need for the Post Master General's (PMG) Department to refer further copies of the paper for assessment unless there was some change in the relevant body's constitution.[31] Thus while *Australian Labor Defender* was initially banned on the grounds that it advocated revolutionary doctrines, its banning was subsequently justified on the grounds of its being issued in the interests of the Communist Party, notwithstanding an express finding that the latest edition contained no seditious statements.[32]

Neither the Party nor its supporters were wealthy, and higher transmission costs reduced the market for communist literature. The effect of the ban on *Workers' Weekly* was to increase the cost of posting it to more than a penny, more than the cost of the paper itself.[33] The immediate effect of the ban on transmission was to cause a sharp fall in circulation of the affected papers. Circulation of *Red Leader* fell from 8000 to 3500.[34] Over the longer term the ban on transmission seems to have been less effective. Indeed, Tripp, the Secretary of the Friends of the Soviet

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29 Knowles to Latham (Attorney-General), 14 Jan 1932 NAA: A467, BUN20/SF7/59.

30 So long as the paper advocated a proscribed objective, the body that produced it was an unlawful association.

31 Knowles to Secretary, PMG's NAA: A467, BUN89/SF42/9.

32 Knowles to Latham, 14 Jan 1932 NAA: A467/1, BUN20/SF7/59; Knowles to Secretary, PMG's, 13 Nov 1933 NAA: A467/1, BUN89/SF42/9.

33 Circular Letter to all Subscribers to the Party Press, 5 Feb 1932 NAA: MP341/1, 1932/2216.

34 Stuart Macintyre, *The Reds: The Communist Party of Australia from Origins to Illegality* (1998) 214.

Union (FOSU), claimed that circulation of the FOSU publication, *Soviets To-day*, increased from 6000 in July to 12 000 in November.[35]

Given the volume of mail passing through the post office, it was simply not feasible to search for illegal publications except in a relatively cursory manner. The Post Office had no desire to use its resources censoring the mail.[36] (And, anyway, it was not in the Post Office's economic interests to be too effective.) Knowles sympathised, and doubted whether the establishment of a special staff would be justified, although, as a good public servant, he acknowledged that this was of course a matter of policy. The most that the Post Office should be expected to do was to

> undertake the destruction of any literature, discovered in the post in the normal process of examination, bearing definite indication that it was issued by or on behalf of an organization which had been declared unlawful under the Crimes Act and in respect of which instructions had been received that printed matter emanating from such organization was debarred from transmission through the post and was to be destroyed.[37]

Latham hopefully suggested that it might be possible to make spot checks of mail posted in large quantities, but the Post Office pointed out that this would be difficult except where mail was posted in bulk at Post Offices, as was the case for registered newspapers and where postage was prepaid in cash. Otherwise, people could post illegal articles at letterboxes in such a way as to ensure that only a small number of items would be handled at any given post office.[38]

The Party soon adopted strategies to make the task of the Post Office more difficult. Dispensing with return addresses was an obvious measure. Proscribed papers were printed in a form which reduced the likelihood of detection. FOSU published articles in stencilled form and circulated these through the post. Concealing proscribed publications within permitted publications also reduced the likelihood of detection. Mounted Constable Clemann of the Victoria Police somehow discovered that a bundle of proscribed papers had arrived in the hamlet of Toora, wrapped in

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35 E Tripp, 'Police Drive against FOSU', *Workers' Weekly* (Sydney), 21 October 1932, 3.

36 In mid-1932 the Secretary, PMG's wrote to Knowles pointing out that it was one thing to deprive a newspaper of access to special rates. It was another to engage in effective censorship. If this was to be done, it would require a large staff. If the dissemination of illegal articles was to be prevented, it should be the responsibility of some other department. Secretary to Knowles, 30 June 1932 NAA: A467/1, BUN20/SF7/51.

37 Knowles to Latham, 16 Aug 1932 NAA: A467/1, BUN20/SF7/51.

38 Latham to Knowles, 18 Aug 1932; Secretary, PMG's to Knowles, 20 Sept 1932 NAA: A467/1, BUN20/SF7/51.

the (eminently respectable) *Argus*. The Deputy Director of the PMG's Department accordingly advised the Toora Postmaster to check deliveries to offending addresses.[39] A micro-scandal erupted when it was revealed that some proscribed publications had been posted in New South Wales using Official Service (OS) stamps.[40] In any case, there were alternatives to the mails. Street sales of Party newspapers continued to be an alternative to sale to subscribers, and for decades selling newspapers was to be one of the ways the party faithful contributed to the revolution, and one of the performance indicators used by Party leadership to monitor its rank and file.[41] The Party took over some of the responsibility for distributing copies of its papers to subscribers.[42] The State Railways were generally willing to accept consignments from the party. However the Victorian Railways refused to do so.[43] According to a report from the Commonwealth Investigation

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39 Report by Clemann, 21 Jan 1933; Dep Dir PMG's to PM, Toora, 9 March 1933 NAA: A467/1, BUN20/SF7/51.

40 Jones suggested that the villain could be caught if OS stamps were colour coded for agency. While this would have created a wonderful little sub-discipline for Australian philatelists, it was dismissed as neither practical nor likely to prove effective. (This would have required personalised stamps.) In any case, OS stamps were being phased out. See Knowles to Latham, 26 Jan 1933, and generally NAA: A467/1, BUN20/SF7/52.

41 The files include a circular to members of the Militant Minority urging on its members in the language of a bossy kindergarten teacher, and concluding with no doubt well-warranted warnings against the withholding of money due to 'Management' even for a few days. 'Credit is not available.' NAA A467/1, BUN20/SF7/52.

42 Circular Letter to All Subscribers to the Party Press, 5 Feb 1932 NAA: MP341/1 1932/2216.

43 'New Attack on Workers' Weekly', *Workers' Weekly* (Sydney), 12 May 1933, 1 states that the South Australian Railways also refused to do so. However, in response to a request from Latham, Jones advised that Queensland and South Australia allowed carriage by rail, and that Western Australia did so, but only at normal parcel rates: Jones to Knowles, 6 July 1933 NAA: A467, BUN28/SF10/15. Menzies as Acting Premier of Victoria, had initially doubted whether Victoria possessed the power to do this, and had asked the Commonwealth to legislate to empower State railways commissioners to refuse to carry communist literature. Knowles in turn advised that the Commonwealth lacked the power to pass such legislation, except in relation to its carriage from one State to another. Following this advice, the Victorian Railways banned the carriage of communist literature: Menzies to Lyons, 1 July 1932, Knowles to Secretary, PM's Department 15 July 1932 NAA: A1606/1 K5/1. A later memorandum concluded that if the Commonwealth had the power to enact ss 30F and 30G, as it probably did under s 51(vi) of the Constitution, it would also possess the power to prohibit the intra-state carriage of the newspapers of unlawful associations: Memo, 'Carriage of Newspapers issued by Unlawful Associations', undated, NAA: A467, BUN28/SF10/15. The Commonwealth never got around to passing legislation to

Branch (the IB), the Party, in order to move its publications to the southern States, was able to make arrangements for a truck to pick up parcels from Albury on the NSW-Victorian border.[44]

A second response was the establishment of local party organs, thereby reducing the need to rely on the Sydney-produced *Workers' Weekly*. In Western Australia, *Red Star* was established in 1932 as a four-page roneoed publication. In August 1933, enough money had been raised to ensure that it appeared in printed form. In 1934, it was replaced with a broadsheet newspaper, the *Workers' Star*.[45] In 1933 the Victorian section followed suit. The IB reported that an appeal to raise money for the proposed weekly yielded disappointing results, but, with financial support from Alexander and O'Day, the *Workers' Voice* appeared.[46]

The Party's response to the ban was not confined to attempts to evade and overcome it. The Party had been preparing itself for the Latham onslaught and, within a day of the bans being announced, it had initiated a campaign against the bans.[47] The campaign took the usual form. Meetings were called. Resolutions were passed. Letters were written conveying news of the resolutions.[48] The campaign was at its most intense in February and March and, while it gradually tapered off, letters were being written as late as August (1) and September (3).

Prosecuting Unlawful Associations: Interfering With Meetings

A second strategy involved use of section 30FC to discourage people from making their premises available to Communists for public meetings. Here the tactic used was not prosecution, but the threat of prosecution. Upon becoming aware that a

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ban either the intra-state or the interstate transmission of communist literature by rail.

44 Notes on communism in Australia No 46, 31 May 1935, NAA: A467, BUN28/SF10/15.

45 J Williams, *The First Furrow* (1976), 131–7.

46 Notes on communism in Australia No 50, 30 Sept 1933, NAA: A467, BUN28/SF10/15.

47 A pamphlet was issued on 4 Feb 1932, protesting against the ban and calling for a campaign against the ban. See NAA: A467/1, BUN89/SF42/1.

48 Overwhelmingly their concern was with the action taken against the domestic publications. The ban on the imported publications seems to have received only a handful of mentions, generally from people not associated with the Party. These include the General Secretary of the ALP (WA) (see letter to him dated 29 June 1932), A E Monk of the Central Unemployed Committee, letter dated 27 April 32, WM Ferguson (Secretary, Australian Engineering Union (AEU), Brisbane 3rd Branch), 20 Feb 1932; J W Cowburn, Sec AEU (Sydney), 23 March 1932. The lack of other such letters may simply reflect filing considerations, but it is striking that no letters make reference to the ban on the overseas publications.

communist meeting was to be held, the person in charge of the venue would be notified and warned that if permission was granted the person would be permitting an unlawful association to hold a meeting. Following advice, those in charge of premises generally withdrew permission, often at short notice. Communists were denied the chance to arrange alternative venues.

It was, however, neither a costless nor an effortless procedure. First, the communist press had to be scanned for details of forthcoming meetings. Then inquiries had to be made as to who was in charge of the relevant premises. This could prove surprisingly difficult. Registered owners might turn out to be trustees or executors. They or their predecessors in title may have leased the premises. Lessees in turn may have sub-leased and sub-lessors might have granted informal licences. Reports by investigating agents disclose the kind of proprietary tangles dreamed up by examiners in property law, and created when small businessmen decide to handle matters informally. By the time the relevant person had been identified, the meeting had sometimes been held. Over time, one might expect that this problem would have been overcome as the authorities compiled lists of those in charge of public meeting places, but, well before it acquired the relevant stock of intellectual capital, the Commonwealth had lost interest in enforcing s 30FC.

A further element in law enforcement involved investigating whether meetings actually were held. This required the presence of a police officer at the site of the proposed meeting, and that the officer wait around for at least half an hour. Reports indicated that once the people in charge had been warned, there were no attempts to hold meetings at the relevant premises.

A further problem lay in the legislation and the nature of communist meetings. So long as the body organising the meeting was the Communist Party, it was possible to argue that the relevant meeting was a meeting of an unlawful association. But the Communist Party had a genius for generating organisations related to, but distinct from, the Party itself.[49] These organisations played a major role in the Party's struggle to mobilise support for itself and for such causes as it pursued from time to time. Communists normally played a controlling role in these organisations, partly by careful pre-meeting planning, and partly because those non-communists who joined were reasonably sympathetic to the objectives which the communists wanted the group to pursue. But this did not make such groups unlawful associations. Their constitutions and propaganda did not advocate revolution, although the Party no doubt hoped that their activities might in the long run contribute to it. They were not branches of the Party, and they were not formally affiliated with it. They do not seem to have met the test for affiliation referred to by Dixon J in the *Communist*

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49 See eg Davidson, above n 28, 55–61, 84–7, 103–6, 182–3; Macintyre, above n 34, 181–2 (generally).

Party case.[50] And even if they were, in effect, controlled by, or committed to the purposes of, the Party, proving this would be difficult. It would require evidence from those familiar with the inner workings of such associations, and these would be either committed activists (who would not co-operate), spies (with cover to protect) or renegades (who were thin on the ground). In any case, by the mid-1930s, there was some doubt as to whether even the Communist Party was an illegal organisation. Attempts by the Commonwealth to use section 30FC to restrict access to halls seem to have tapered off after 1932, but State police sometimes took action to discourage the use of public halls for communist meetings.[51] There was an attempt made to use the section as the basis for evicting the League against Imperialism from its premises. In mid-1933, the landlord took out a summons for possession of the premises, producing a notice served by the Commonwealth Crown Solicitor requiring that he not permit his premises to be used by the League. James, the named respondent, denied that he was the tenant, but the magistrate found in the landlord's favour and ordered James to quit.[52]

Prosecutions For Soliciting Funds: The Devanny Litigation

On 22 August 1932, Latham directed that inquiries be made with a view to the institution of proceedings under s 30D of the *Crimes Act*. The inquiries revealed that

50 The Communist Party no doubt assumed that the front organisations would contribute to the furtherance of its ultimate objectives, and tended to abandon front organisations once it had concluded that they did not. However, this does not mean that the same commitment can be imputed to the front organisations which could logically have advocated policies also advocated by communists, but in the belief that these were valuable in themselves, or even in the belief that their realisation would actually reduce the likelihood of revolution.

51 On 20 March 1933, Jones reported to Knowles on the subject. He cited a report in *Workers' Weekly* (6 Jan 1933) that the owner of Cundy's Hall, St Johns Park had been visited by the police on 16 Dec 1932 and been told that if he permitted a League Against Imperialism meeting on 'India in Revolt' to be held, he would be liable to prosecution and could be fined £50. Previously there had been complaints about such meetings and about other communist meetings at the hall. There had been an investigation by the IB, and an assessment that the general position was 'serious': Longfield Lloyd to Director CIB 6 Dec 1932. Following the visit, 'activities in this sphere suddenly ceased, as did the visits of officials of the FOSU etc, who on this occasion, upon observing the Police car near the hall immediately turned their own car about and raced away from the spot. The position is now quiet and the only apparent activity is the circulation of literature.' See NAA: A467/1, Bundle 94/SF42/6033/51.

52 'Police Attempt to Use Landlord in Attempt to Smash LAI', *Workers' Weekly* (Sydney), 14 July 1933, 1.

two communist newspapers had solicited funds. The *Workers' Weekly*[53] of 19 August 1932 carried a solicitation for donations to support the costs of producing *The Young Worker*. The *Red Leader*[54] of 3 August 1932 had sought contributions to enable the production of a special first anniversary edition.[55] Further investigation revealed eight additional solicitations.[56] The next day, Knowles recommended prosecutions in relation to eight of these solicitations, Latham giving his immediate approval.[57] The task of preparing informations then began, it being proposed to institute four prosecutions against the printers and the publishers of *Workers' Weekly*, and one against the printers and the publishers of *Red Leader*.[58] Initially, two informations were prepared, one against Devanny (publisher of *Workers' Weekly*), and one against Rogan (publisher of *Red Leader*).

Other charges would be made later, but delays could be expected: each charge was likely to involve about 24 pages of typing. Ten charges would require 240 pages of typing.[59] The length of the informations reflected the heavy reliance on averments, and a decision to aver not only that the Communist Party advocated and encouraged behaviour such that it was an unlawful association, but evidence of this. Accordingly, the averments against Devanny included the Rules and Constitution of the Communist Party of Australia (6 foolscap pages), along with 3 foolscap pages of extracts from *The Workers' Weekly* demonstrating that the CPA was committed to revolution. The averments against Rogan included a 10 page extract from a pamphlet, *What is the M.M.?,* along with excerpts from the *Red Leader*. By 6 September, an information had been served on Devanny and informations had been

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53 This, as it proudly proclaimed on its masthead, was the official organ of the Communist Party of Australia.

54 This was the organ of the Militant Minority, a front organisation whose objective was to spread communist doctrines within the workplace. It denounced both established union leaders and employers, but in the course of the 1930s gradually shifted towards less indiscriminately oppositional tactics to more ameliorative tactics, even to the point of seeking influence within the union movement. See Macintyre, above n 34, 186–90, 251–8.

55 Watson (Deputy Crown Solicitor) to Crown Solicitor, 24 August 1932, NAA: SP185/1 Box 170.

56 Watson to Crown Solicitor, 25 August 1932 NAA: SP185/1 Box 170.

57 Knowles to Attorney-General, 26 August 1932 NAA: SP185/1 Box 170. Two of the suspect articles did not attract this recommendation. One sought money for the Newcastle Prisoners Defence Funds (to defend people arrested in the course of Newcastle eviction struggles). Knowles doubted whether this involved solicitation for an unlawful purpose, unless the funds were to be passed through Party accounts. The other, the solicitation for the costs of producing *The Young Worker*, seems simply to have slipped through the net.

58 Watson to Crown Solicitor, 29 August 1932 NAA: SP185/1 Box 170.

59 Watson to Knowles, 30 August 1932 NAA: SP185/1 Box 170.

prepared against Gray and Frew, publishers of the *Workers' Weekly* and *The Red Leader*. Rogan continued to elude attempts to serve an information on him.[60]

On 28 September, fresh informations had been prepared. The information against Devanny had expanded to 68 pages (mostly single-spaced)[61] and amounted to a set of 'Selected Materials on Communism in Australia'. It now included the Minority Movement pamphlet, details of bodies related to the CPA, extracts from books and journals, Comintern statutes, details of communist-organised processions, the *Communist Manual of Organisation*, and extracts from numerous workplace-based news-sheets. The last of the averments (no 61) was that there was a solicitation for funds for the Communist Party. The averment then proceeded to set out the alleged solicitation which, on its face, was not so much a solicitation for the purposes of the Party, as a solicitation for an anti-war demonstration which was being managed by a committee of 21 chosen at a conference of delegates from a large number of working class organisations.[62]

The case was heard in Sydney on 24–25 October. The depositions clerk spent three hours reading out the information. Devanny pleaded not guilty. The prosecution then proceeded to seek to have admitted as evidence both the documents referred to in the averments and the information itself. The defendant, represented by Clive Evatt, instructed by the radical solicitor, Christian Jollie Smith, presented no evidence, arguing instead that the Commonwealth lacked the power to enact sections 30D and 30R, and that, even if the legislation were valid, the averments and evidence could not support a conviction. The alleged solicitation for funds was not, as asserted in the averment, a solicitation for the purposes of the Communist Party, but for an anti-war demonstration, and this was evident from the contents of the solicitation which had been both averred and introduced as evidence. On its face, there was nothing in the solicitation to indicate that it was for the purposes of the Communist Party. In reply, the prosecution argued that the information had averred that the solicitation was for the Party. The defence had not produced evidence to rebut this. The prosecution had therefore made out its case. The magistrate rejected Evatt's contentions and convicted Devanny, sentencing him to six months imprisonment, and costs.

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60 Watson to Sharwood (Crown Solicitor), 5 September 1932 NAA: SP185/1 Box 170.

61 Evatt J later stated that he was informed by one of the officers of the High Court that it ran to no less than 27, 453 words: *R v Hush; Ex parte Devanny* (1932) 48 CLR 487, 513. What, one wonders, prompted the enumerator to engage in this piece of exceptionally anal-retentive activity?

62 It is set out in *R v Hush; Ex parte Devanny* (1932) 48 CLR 487, 494.

He appealed to the High Court, seeking prohibition and certiorari against the informant, Hush.[63] The High Court allowed his appeal. Three judges (Gavan Duffy CJ and Starke and H V Evatt JJ) were highly critical of the averments, holding that averments should allege the elements of the offence and no more. They should certainly not allege material which is both irrelevant and prejudicial as the averments in this case had done. Five judges (Gavan Duffy CJ and Starke, Evatt, Dixon and McTiernan JJ) held that the general averment in para 61 was qualified by the particulars and the evidence which the prosecution had produced. On the material before the court, it could not be satisfied beyond reasonable doubt of Devanny's guilt. It was not necessary for the court to consider whether the legislation was within the Commonwealth's powers. Evatt J nonetheless discussed the constitutional issue concluding that the legislation was probably invalid and that in any case, on the evidence before the court, it was doubtful whether the Communist Party was an unlawful association. Rich J dissented.

The High Court decision left open the question of whether other prosecutions could be sustained. While it would obviously be necessary to re-draft the informations in the light of the judgments, the cases against the other defendants were not as weak as the case against Devanny. On 9 December 1932, Knowles wrote to Sharwood seeking information about this. Thought was given to re-drafting some of the informations and proceeding against defendants who had solicited funds for the purposes of the Party itself.[64] But no further proceedings were instituted, and never again was anyone prosecuted for attempting to raise money for an unlawful association.

Postal Bans: Thomas v Commonwealth

R v Hush; Ex parte Devanny resolved relatively little. It did not prevent subsequent attempts to interfere with communist meetings, and it did not lead to a lifting of the bans on the transmission of communist literature. In late 1934, the Friends of the Soviet Union began another campaign to have the ban on their paper, *The Soviets To-day*, lifted. By March 1935, FOSU was threatening litigation.[65] Knowles advised that the litigation was likely to succeed. It would be difficult to prove that FOSU was an unlawful association. There was nothing in FOSU's constitution to suggest this, and it would not be possible for the Commonwealth to rely on the averment provisions in s 30R in defence to an action by FOSU. Knowles considered that there were three courses of action open to the Commonwealth: (1) to defend the anticipated application for mandamus; (2) to apply under section 30AA for a

63 He also appealed to the Court of Quarter Sessions, but this appeal (which would have been an appeal de novo) was delayed pending the High Court appeal.

64 Knowles to Sharwood, 9 December 1932 NAA: A432/86 1932/1255.

65 S Aarons (National Secretary, FOSU) to A J McLachlan (Postmaster General), 4 March 1935 NAA: A467, Bundle 89/Part 1/SF42/49.

declaration that FOSU was an unlawful association and (3) to reverse the previous decision and allow transmission of the journal through the post. He considered that option (2) was preferable to option (1) since the averment provisions would be available in relation to an action to have FOSU declared an unlawful association. Given his doubts about whether even option (2) would succeed, he favoured option (3), suggesting a number of face-saving justifications for the proposed capitulation.[66] This advice was reiterated in a subsequent draft Cabinet memorandum, which also pointed out that the ban was not particularly effective. Permitting the transmission of *The Soviets To-day* would, however, create a precedent. The Postmaster-General would be asked to extend permission to other publications which in fact were communist, and the Commonwealth would face similar difficulties proving that the associations controlling the publications were unlawful associations. This advice was duly transmitted to Cabinet.[67]

Despite Knowles' advice, Cabinet decided to make an application to have FOSU declared an unlawful association. Inquiries were being made by officers of the Commonwealth Investigation Branch in Sydney, with a view to procuring additional evidence that FOSU was affiliated with the Communist Party.[68] Attempts were also made to track down publications which counsel might usefully peruse.[69] Supplied with 'voluminous material', counsel advised that there was sufficient evidence to support an application under section 30AA. While the constitution and propaganda of FOSU were not sufficient to bring it within the Act, it would be possible to show that FOSU was affiliated with the Communist Party. While the material supplied by the Commonwealth was not by itself sufficient to do this, the problem could be overcome by reliance on section 30R. Averments having been made, it would be for FOSU to disprove them and FOSU would be hard-pressed to do so. It would then be necessary to prove that the Communist Party was an unlawful association. Counsel noted that their instructions were silent in relation to whether the Communist Party was in fact unlawful, but they did note that this was implicit in the fact that a number of communist publications were banned from transmission through the post, and appeared to be supported by some of the material

66 Knowles to Harry, 15 May 1935; Knowles, memo to Acting Attorney-General, 15 May 1935 NAA: A467, Bundle 89/Part 1/SF42/49.

67 Knowles to Acting Attorney-General, 21 May 1935 NAA: A467, Bundle 89/Part 1/SF42/49.

68 Sharwood (Crown Solicitor) to Knowles, 11 June 1935 NAA: A467, Bundle 89/Part 1/SF42/49.

69 Watson (Deputy Crown Solicitor) to Knowles, 12 June 1935, Knowles to Watson, 13 June 1935 NAA: A467, Bundle 89/Part 1/SF42/49. (The Deputy Crown Solicitor wanted the Attorney-General's Department to search for the listed publications; the Attorney-General's Department replied that when it received publications for advice its practice was to return them, along with the advice, to the department which had made the request. However, it did enclose some material of potential assistance to counsel.)

which had been supplied. Averments in relation to the Communist Party would throw on to FOSU the burden of proving that the Communist Party was not an unlawful association. However, while it might be possible to show that FOSU was affiliated with an unlawful association, problems would arise if the Commonwealth were to base its case against FOSU on the unlawfulness of a body which was not a party to the litigation. It would therefore be necessary to add the Party as a defendant.[70] Thus the decision to seek a declaration that the Party was unlawful was based not on any particular objection to the Party, but on an assessment that this was necessary if the Commonwealth was to succeed in its defence to an application by one of the Party's relatively harmless front organisations.

The Soviets To-day made the first formal strike. On 13 June, W J Thomas, a member of FOSU and a joint owner of *The Soviets To-day,* filed and served a writ and statement of claim out of the High Court claiming injunctive relief and damages on behalf of himself and all other members of FOSU. The Commonwealth continued planning action under section 30AA.[71] The Commonwealth filed its defence to the FOSU claim on 24 July. The defence involved failure to admit some of the matters in the claim, and denial of the remainder. It also involved the assertion that *The Soviets To-day* was issued by or on behalf of or in the interests of an unlawful association. Meanwhile, the Commonwealth was preparing summonses against FOSU and the Communist Party. Summonses were filed on 16 August, service being by advertisement in the *Sydney Morning Herald*, and published in the *Commonwealth Gazette* of 22 August. The summonses required the FOSU and the Communist Party to attend at the High Court on 2 October 1935 to show cause why a declaration should not be made that they were unlawful associations. The summonses were accompanied by averments. The Commonwealth averred that FOSU advocated all three of the proscribed goals, and was affiliated with the Communist Party which did likewise. The Communist Party summons alleged that the party advocated the three proscribed goals, and was affiliated with the Communist International which did likewise.

Interlocutory skirmishing began soon after, and continued over several sitting days in late 1935.[72] Then, for most of 1936 the case languished, and in September

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70 T R Bavin and J Bowie Wilson, Opinion, 7 June 1935 NAA: A467, Bundle 89/Part 1/SF42/49.

71 Sharwood to Knowles, 12 July 1935; Knowles to Sharwood, 12 July 1935 NAA: A467, Bundle 89/Part 1/SF42/49. (The former emphasised that the copy of J Stalin's *Foundations of Leninism and Problems of Leninism* was the only one in the Commonwealth's possession.)

72 One of these related to the question of what particulars, if any, the Commonwealth should supply. The Commonwealth had learned the lesson of *Devanny* and had drafted a tightly formulated set of averments. Evatt J (who conducted the directions hearing) was concerned that these provided the respondents with far too little

Maurice Blackburn, a Labor MHR who had had some involvement in the litigation on the FOSU side, wrote to Menzies (the Attorney-General) suggesting possible terms of settlement. All claims would be abandoned, with each party bearing its own costs.[73] The Commonwealth, however, would have to lift its ban on the postal transmission of FOSU and Communist Party publications. The terms of the settlement would remain confidential. The matter was referred to Cabinet which in turn referred it to a sub-committee. It was not until May 1937 that Menzies made a formal reply, offering terms identical to those which Blackburn had proposed nine months earlier. On 20 May 1937, the three matters were dismissed, by consent.[74] The Commonwealth seems to have recognised that its case against FOSU was hopeless, and was happy to settle on face-saving terms.[75] The Commonwealth's assessment of its case against the Communist Party of Australia is less clear (although Menzies, at least, seems to have considered it weak), but the history of the litigation suggests that the Commonwealth was not particularly interested in having the Party declared an unlawful association. It had been added as a defendant largely for the purposes of strengthening the Commonwealth's case against FOSU.

Subsequent Developments

Part IIA was still in force and over the next fifteen years showed occasional signs of relevance. In 1940, there were suggestions that the Communist Party of Australia (CPA) be declared an unlawful association, but it is not clear whether those calling for this envisaged action under s 30AA or whether they were simply calling for the Party to be banned. Following the defeat of the 1951 referendum to ban the Party, Cabinet showed some interest in strengthening the Act and using it to deal with the

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guidance as to the case they might have to meet. See Transcript, *In the matter of the Attorney-General of the Commonwealth of Australia v The Communist Party of Australia*, 6 September 1935, 2 October 1935, 6 November 1935, 18 November 1935, 20 November 1935 NAA: A467, Bundle 89/Part 1/SF42/49.

73 FOSU had made only a perfunctory attempt to raise funds for its defence, but the Party's fundraising campaign had been so successful that it seemed there would be money left over for general Party purposes, even after the Party had met FOSU's costs as well. *Civil Security Intelligence* 81, 31 July 1936; 85 30 Nov 1936 NAA: A467, BUN28/SF10/15. In *Civil Security Intelligence* 85 Jones noted the irony of the funding arrangements for the case: 'Whatever other argument can be produced as to its unrelated policy with the FOSU, the CP of A cannot deny that it undertook to defend the FOSU and raise funds for that purpose in connection with its own defence and that the FOSU defence costs are to come out of one common defence fund raised, acknowledged and controlled by the CP of A.'

74 Watson to Whitlam, 20 May 1937 NAA: A467, Bundle 89/Part 1/SF42/49.

75 Menzies (who had been overseas when the litigation began) later said that as soon as he saw the papers he realised the case was hopeless: statement to the Central Committee of Interstate and Overseas Steamship Owners, Jan 1940 NAA: A663/1, O174/1/91.

Party.[76] Nothing came of this. The Act was left unchanged, and no action was taken under it. It has not quite been forgotten. In 1979, the Federal Court was given the jurisdiction formerly conferred on the High Court and State Supreme Courts to make a declaration under s 30AA.[77] And amendments to postal legislation were mirrored in amendments to s 30E. A 1983 report by the Human Rights Commission recommended the abolition of the averment provisions, and recommended that ss 30d and 30fd be amended to apply only to people who were aware that the relevant association was unlawful.[78] These recommendations were not implemented. But for fifty years, the role of the legislation has been to be there for some hypothetical eventuality, rather than to deal with any current threat to the Commonwealth.

WHY WAS PART IIA SO RARELY USED?

Legislative Constraints

One reason why Part IIA was so rarely used may be that, except perhaps in the early 1930s, not many organisations fell within the definition of 'unlawful association'. Indeed, but for the protection afforded foreign governments, it is doubtful that even the Communist Party would have fallen within the definition. A good case can be made for the proposition that the Communist Party did not advocate the destruction of property. After the rhetorical excesses of its 'class against class phase', it does not seem to have advocated the violent overthrow of the governments of either the Commonwealth or the states. It is even arguable that after 1935 the Party did not advocate the overthrow of the Commonwealth Constitution by revolution.

The Party certainly advocated revolution, but the revolution was to take place when the time was ripe and time showed little sign of ripening. Evatt J was probably over-sympathetic when he implied that the Party's commitment was simply to a revolution in the distant future. According to Ferrier, '[i]n the mid-1930s most on the far Left in Australia still believed the revolution was imminent'.[79] But even this

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76 See file NAA: M2576/1, S4 for details of several proposed amendments, and counsel's opinion on their constitutional validity, and 'Law relating to subversive activities', Submission No 192 NAA: A4940/1, C517, recommending that no action be taken to amend the Act.

77 *Jurisdiction of Courts (Miscellaneous Amendments) Act 1979* (Cth) s 123, Schedule.

78 Human Rights Commission, above n 21, 6–7.

79 Carole Ferrier, *Jean Devanny: Romantic Revolutionary* (1999) 127. In 1940, one of Jean Devanny's associates considered that it might not be long before the communists took over: ibid, 76. Bernice Morris, on the brink of joining the Party in 1942 wanted the capitalist system overturned but did not think it would happen 'for a long time': *Between the lines* (1988) 31. Five years later, Aarons assumed that it would come in 'five, maybe ten, or certainly no more than twenty years': Eric Aarons, *What's left?* (1993) 60.

belief was not a commitment to immediate revolution. The Party anticipated that the revolution would involve violence, but it seems to have hoped that it would not. At least by the mid-1930s it seems to have expected that it would be able to achieve power legally, and that violence would be necessary only to overcome illegal resistance to its policies as the duly elected government.[80] This does not mean that the Party also expected that the revolution would be a perfectly constitutional revolution, conducted subject to the Constitution as interpreted from time to time by the High Court. Indeed, there is good reason to believe that, even if the Party came to power legally, it would disregard such legal constraints as appeared to threaten its retention and use of power.[81] It also seems clear that the Party would have been willing to use force to defend itself against anyone seeking to resist its

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80 The constitution adopted at the Party's 1938 conference could not be said to advocate violence, and, in a keynote address commending the Constitution to the delegates, J D Blake stated that socialism could come only when a big majority of Australians were ready for it. Revolution could come only with the support of the majority. The revolution should not and could not be achieved by violence. See Ralph Gibson, *The People Stand Up* (1983) 288–9. Cynics might simply see this as a case of woollen-clad wolves, but, without even needing to be unduly charitable, one could argue that it simply showed that the Party had learned the lessons of Germany, 1932. A generation later, the Communist Party of Australia (Marxist-Leninist) was less optimistic about the possibility of revolution without violence, but even so, it would probably have been able to argue in its defence that the violent revolution it advocated was contingent on the violence being likely to prove successful, and that this was not an immediate possibility.

81 This seems unlikely. Ralph Gibson, in evidence to the Lowe Royal Commission, was asked: 'Suppose the Communist Party, having achieved power, is in office, is there any possibility of a rival party by parliamentary means, unseating the Communist Party and taking its place, as an opposition may now after a general elselction take the place of a ministerial party?' He answered that 'The system would not be a Party system.' 'The party system as we know it would go? A. Yes, the party system as we know it, would go.' Elsewhere he made it clear that a Communist government would appropriate property (apparently without compensation on just terms), and there was evidence that it would resist any attempts to thwart the 'majority': Victoria, Royal Commission Inquiring into the Origins, Aims, Objects and Funds of the Communist Party in Victoria and Other Related Matters, *Report of the Royal Commission Inquiring into the Origins, Aims, Objects and Funds of the Communist Party in Victoria and Other Related Matters* (1950) (Lowe Report), 64–5 (on opposition parties), 49–50 (expropriation), 15, 17,26, 65 (resistance to any attempts to defy the majority). Gibson conceded at 65 that this would involve a change to the system embodied in the Constitution, and, asked how the constitution could be changed, replied: 'We are prepared to work as long as possible and as fully as possible within parliamentary channels and to adopt the means available for the alteration of the present constitution under the constitution, but we hold the view ... that there are so many defences for the power of the capitalists within this State and outside this State that we do not expect to be able to proceed more than a certain way along that line.'

unconstitutional behaviour, and that, while it hoped no one would do so, it regarded this as a distinct possibility. But its advocacy of violence was conditional upon its assuming power, and upon its unconstitutional activities meeting violent resistance. The first contingency was a remote one; the second was therefore effectively irrelevant.[82] It is therefore not certain that the Party would have been found to have advocated the revolutionary overthrow of constitutional government, although it appears to have done so conditionally.[83]

However, even if the Party was not advocating or encouraging violent revolution, it appears – at least according to the law of the times – to have been encouraging acts whose object was the carrying out of a seditious intention. Between 1949–51, three communists, including Laurence Louis ('Lance') Sharkey, the Party's General Secretary, and William Fardon Burns, the nominal publisher of its newspaper, *Tribune*, were convicted under s 24D of the *Crimes Act* of uttering or publishing seditious words.[84] The Commonwealth would have been on reasonably strong ground if it had argued that Sharkey's statement could be treated as having been made on behalf of the Party. Moreover, whatever doubts might have existed in relation to Sharkey's statement, the seditious statements published in *Tribune* which were the basis for the successful prosecution of its (nominal) publisher would certainly qualify as Party propaganda. If Sharkey or William Fardon Burns had uttered or published seditious words, the Party was almost certainly an unlawful association. However, despite Sharkey's conviction and its affirmation in the High Court, it was not clear that the High Court would have found that the Party was an unlawful association. For while the appeal in *Sharkey* had affirmed his conviction, it had done so (inter alia) on the basis that the relevant test was whether the jury could (not should) have convicted him on the basis of the available evidence. Had the unlawfulness issue been raised, the question would be whether the Commonwealth had proved the making of a seditious statement, not whether it was open to a jury to

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82 Conditional advocacy or encouragement of revolution might be enough to bring the Party within the legislation: the extremely hypothetical advocacy of support for invading Soviet armies did not prevent the convictions of Gilbert Burns and Sharkey. *Dennis* 341 US 494 (1951) also provides some support for this proposition (but see above, n 12). However, those favouring a narrower reading of the legislation could argue that the conditional nature of the Party's revolutionary advocacy showed that, effectively, the Party was advocating abstention from attempted revolution, and could take comfort from Evatt J's judgment in *Devanny* (above n 17) and Dixon J's dissent in *Burns v Ransley* (1949) 79 CLR 101, 118.

83 Lowe, whose terms of reference included the question whether the Party advocated or encouraged the forcible overthrow of established government, concluded that it did, but conditionally (Lowe Report, above n 81, 61–7, 106), thereby leaving open the question whether the Party constituted an unlawful association.

84 For a comprehensive account of these trials, see Maher, above n 16. Gilbert Burns (a member of the Party's Queensland State Committee) was also convicted of sedition, but his statement was disowned by the party: Davidson, above n 28, 109.

conclude that it had done so.[85] The conviction of William Fardon Burns had been affirmed on appeal to Quarter Sessions, but it is possible that, if the seditious nature of the relevant articles had been canvassed anew, the High Court would have found them not to be seditious.[86] While the High Court's dismissal of Gilbert Burns' appeal in 1949 suggested that it was willing to give broad operation to the sedition laws, one of the two majority judges (Rich J) had resigned shortly after delivering his opinion, and the court's subsequent decision in the *Communist Party Case* suggests that it would have been inclined to give the sedition legislation a relatively narrow reading.[87] Alternatively, if the sedition provisions were to be given a broad interpretation, it would be correspondingly arguable that s 30A(1)(b) was unconstitutional. Dixon J's observation in the *Communist Party Case* that the protection of the Constitution could not justify measures at variance with democratic values[88] would apply almost as strongly to banning a party on the basis of a broadly interpreted sedition law as to an attempt to do so by express legislation. In the circumstances, the Commonwealth may have decided that it would be unwise to embark on a course of action which could culminate in decisions which would either seriously impair its ability to make further use of the sedition laws or expose it to the danger of yet another constitutional defeat.

A stronger ground for arguing that the Communist Party constituted an unlawful association lay in its support of foreign guerilla movements. In relation to communist insurgents, the Party's support was unambiguous. Moreover, even allowing for blurred cultural sensitivities, it is hard to imagine a court accepting that countries such as China or (later) Malaya were not civilised countries. However, if this were to be the sole ground for asserting that the Communist Party was an unlawful association, it would be a flimsy ground. It would raise the question of whether it was within the Commonwealth's powers to make an organisation unlawful solely on the grounds that it advocated the violent overthrow of a foreign government.[89]

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85 Issue estoppel and res judicata would not arise, since the parties to an unlawful association case would be different from those to the sedition case.

86 The relevant articles appeared in *Tribune* (Sydney) on 1, 5 and 12 July 1950, and criticised Australian involvement in the Korean War and in Malaya. The 15 July article urged that workers have nothing to with the manufacture and transport of munitions and commended the Seaman's Union for taking industrial action against the war. Given the vagueness of sedition law, it cannot be said with certainty that the High Court would not have found them to be seditious, but, if it had found them to be seditious, it is also possible that this would have been at the cost of calling into question the constitutionality of s 30A(1)(b).

87 Since the decision in *Burns v Ransley* (1949) 79 CLR 101 was by statutory majority only, it did not enjoy precedential status.

88 (1951) 83 CLR 1, 187–8.

89 Perhaps it could be justified under the external affairs power. In *R v Sharkey* (1949) 79 CLR 121 Dixon J seems to have been prepared to accept that the external affairs

Even if the Party fell foul of the legislation (as, technically, it almost certainly did), it is far less clear that the legislation extended to the front organisations. Front organisations could fall foul of the *Crimes Act* in several ways. If the organisation was, in effect, a fully controlled subsidiary of an unlawful association, it might arguably be treated as part of that association. In addition, under the Act, they themselves could be unlawful associations, either by advocating proscribed goals or by being affiliated with bodies which were themselves unlawful associations. While many of those who administered front organisations probably hoped that the organisations would make revolution more likely, the organisations did not advocate revolution. Instead they advocated more specific goals such as better working conditions, collective security, doubling the dole, or resistance to fascism. If they were unlawful associations, it was by virtue of their affiliation (if any) with the Communist Party. On the basis of the test suggested by Dixon J in the *Communist Party Case*, it is not clear which of the front organisations could be treated as affiliates. Arguments that bodies were affiliates could be based on the fact that the bodies were subject to more or less effective Party control; that they almost never dissented from Party policy; and that they sometimes (especially between 1930–32) engaged in confrontationist protests. Arguments against would rely on the fact that governing bodies included a considerable number of non-communists; on the fact that bodies appealed to many people who were non-communist or even anti-communist; and on the generally law-abiding nature of the activities of most of the front organisations. It cannot be said with confidence that the lack of action against front organisations is attributable to the lack of any grounds for such action. It is, however, likely that the lack of action against front organisations can be explained in part in terms of the likelihood that courts would subsequently have found that they were neither unlawful associations in their own right, nor affiliates.

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power could justify legislation which made it a seditious purpose to seek to excite disaffection against the government or constitution of any of His Majesty's dominions, 149. The relatively broad definition of the power accepted by a majority of the court in *Polyukhovich v Commonwealth* (1991) 172 CLR 501 means that the legislation could be justified notwithstanding that it was not made pursuant to any treaty. However, it is doubtful that the legislation would satisfy Toohey J's requirement (at 652–4) that the Commonwealth must have an external affairs interest in the relevant matter. Insofar as the legislation would seem to criminalise advocacy of the overthrow of a government which was violating its international human rights obligations, it would fail according to the test applied by Toohey J, unless it could somehow be read down as not applying to such governments. If the provision could not be justified under the external affairs power, it could certainly not be justified under the incidental power s 51(xxxix) or the Commonwealth's implied powers. Following *Political Advertising* (1992) 177 CLR 106, questions would arise as to whether, even if it would otherwise fall within s 51(xxi), it would fall foul of the implied protection now afforded to political communications.

There is, however, one problem with the argument that the lack of prosecutions is attributable to the fact that the Party and its front bodies did not fall within the Act. This argument would have applied even more strongly in relation to the taking of action against United States communists under the *'Smith Act'* of 1940. The United States Party was far weaker than the Australian Party. Its influence in the union movement was limited. It was not even in a position to make a nuisance of itself. Yet its leaders were not only prosecuted, but convicted, and some of those convictions survived judicial review. The United States cases highlight the fact that innocence is not a bar to prosecution and conviction. The non-existence of a fact does not preclude the manufacture of evidence to the contrary.[90]

And even if the Communist Party did not fall within the Act after 1935, there were other bodies which did. Given the rhetoric of the New South Wales New Guard, a strong case can be made for the proposition that it was an unlawful association, by virtue of its advocacy of the use of violence to overthrow the Lang government.[91] And if the Communist Party were an unlawful association by virtue of its advocacy of the violent overthrow of the governments of civilised countries, the same could be said for the anti-communist organisations which advocated (and occasionally organised) violence with a view to the overthrow of communist regimes. The lack of occasions for mobilising the legislation is not a complete explanation for its limited utilisation.

Problems of Proof

A recurrent complaint from the security service was that it was almost impossible to prove to a court that the Communist Party was an unlawful association.[92] Latham (as Attorney-General) sympathised, but argued that his hands were tied by the

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90 Comprehensive studies of the *Smith Act* trials include Belknap, above n 12; Steinberg, above n 12.

91 I shall not develop this argument, but I think there is strong evidence in the following two studies: K Amos, *The New Guard Movement 1931–1935* (1976); Moore, above n 6.

92 Jones argued that the difficulties lay in the failure of State police to co-operate with raids and the fact that the Party had dispersed its documents so that raids would be likely to be ineffective. 'A brief resume of communistic activities in Australia from July 1930 to July 1931', No 36 NAA: A467, BUNDLE 28/SF10/15. Somewhat contradictorily, however, Jones advised of the existence of three documents (Bucharin, *ABC of Communism*, *The Constitution of the Communist Party of Australia* and *Party Training Manual*) which 'show clearly that the aim of the Communist Party, not only in Russia and elsewhere, but also in Australia, is to overthrow by armed revolution the existing governments and set up in their stead Soviet Republics under the "Dictatorship of the Proletariat" that is the "Red Army".' If the documents did indeed show this, the Commonwealth would have had no problem using the Act.

Constitution.[93] Menzies also seems to have considered the problem of proof to have been an insuperable obstacle to action under the *Crimes Act*. But in considering the problem of evidence, it is important to recognise that there are several reasons why evidence may be lacking. One is that the relevant facts do not exist. Another is that, while the alleged facts exist, they cannot be proved.

It is unlikely that 'unprovable facts' constituted a serious problem. Insofar as a body was unlawful by virtue of its constitution and propaganda, this should not have been particularly difficult, assuming of course that the body's propaganda or constitution did indeed advocate or encourage the proscribed objectives. Propaganda, if it is to be effective, must be public. The only difficulty likely to arise in relation to propaganda is attributing it to the body which produced it, and even that may be facilitated by the body's desire to link itself with the propaganda. Proof that an alleged constitution is indeed a body's constitution might be more difficult, but the *Crimes Act* facilitated proof. If a body's publications advocated revolution, it might be possible to prove this by the deeming provision whereby books purportedly published for or on behalf of a body were presumed to have been so published. Moreover averments had the potential to make life easier for the Commonwealth. While they could be rebutted, this would normally require that defendants give evidence, and this in turn would expose them to cross-examination. This could pose a number of problems for communist defendants during the period during which the Party was arguably committed to violent revolution. Indeed even after the Party had shifted towards less violent strategies, it is easy to imagine a course of cross-examination which would have made communist witnesses appear extremely evasive. The task of the prosecution would have been facilitated by virtue of the Party's interest in being seen to be revolutionary even if, in reality, it was not. For communist defendants to have argued that the revolution was not an imminent prospect would, at points of its history, have been unpalatable.

Proof that a body was affiliated with an unlawful association would be more likely to require evidence which would be difficult to acquire and produce. Essentially it would require witnesses who would and could testify to the inner workings of both the unlawful association and its affiliates and those best equipped to provide such evidence would be least inclined to do so.[94] Moreover, given the Party's capacity for creating new front bodies, and abandoning those that had ceased to serve a useful purpose, successes in establishing that any given body fell within Part IIA

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93 Latham to Stevens, 6 April 1933 NAA: A467, BUNDLE 28/SF10/15. (Solutions included legislation by the States to ban the party, and an amendment to the Constitution.)

94 For an example of the problems involved in proving Communist control of front organisations (and of the ways in which governments can overcome these problems) see Arthur J Sabin, *Red Scare in Court: New York Versus the International Workers Order* (1993).

would be of limited use, since the body's functions could and would easily be taken over by a newly created body. It is questionable whether even the *Communist Party Dissolution Act 1950* (Cth) would have proved an effective response to the problem of front organisations.

Most important, however, problems of proof would be likely to arise in relation to offences under the Act. It may be difficult for the government even to identify the members of an unlawful association or those involved in its affairs. Moreover, even if the government does so, it may be difficult to prove that a person was a member of, or involved in, an unlawful association, so long as the person is willing to deny their membership or involvement. If (as is likely) courts had imposed strict mens rea requirements in relation to part IIA offences, it might have been difficult for prosecutors to establish the existence of the requisite mental state. Printers, for example, might not know that literature was communist literature or might not know that the Communist Party's attributes were such that it was an unlawful association. Workers for front organisations might be able to argue that they did not know that the organisation was affiliated to an association with attributes such that it was unlawful. Sometimes, the requisite knowledge could be reasonably inferred. (A person charged with being on the governing committee of the Communist Party could scarcely claim to have been ignorant of the general thrust of its propaganda.) Sometimes, however, claims of ignorance might be more credible.

In such cases, evidence of this nature might come either from documents, phone intercepts, or informers. The first two sources are unlikely to be particularly productive. One would expect unlawful organisations to take care not to reduce their illegal plans to paper, and one would expect their senior members to take care when using the phone. (One should never, however, underestimate the importance of incompetence: a raid on Marx House in 1949 yielded a list of the Party's members, and this list became one of the bases for determining who was a communist for the purposes of the *Communist Party Dissolution Act 1950*: see s 25(2).) Insofar as incriminating evidence is dependent on sources within organisations, two problems arise. First, it may be difficult to discover informants, or to infiltrate agents into a suspect organisation. In particular, it will be difficult and sometimes impossible to infiltrate the higher reaches of an organisation. Second, the investment in a source of information is such that there must always be a trade-off between the advantages of a continued flow of information, and the advantages to be gained by use of a source's evidence in court.[95] For these reasons,

[95] In certain circumstances governments may nonetheless decide that it is worth using agents' evidence. Obviously if the agent's cover has already been blown, there is nothing to be lost by relying on the agent's evidence. Moreover, if there is the likelihood that the agents' evidence can be used to destroy an organisation, the need for a continued flow of information will be less pressing. In the United States, spies' evidence played a major role in the conviction of the country's leading

it would be difficult to prove offences against Part IIA offences insofar as these are constituted by non-public behaviour.

But the problems posed by the gathering of evidence do not seem capable of explaining why so little use has been made of the legislation. While Commonwealth and State agencies infiltrated the Party, the agents' reports do not seem to disclose matters which, if brought to the attention of the courts, would have enabled proof of otherwise unsustainable prosecutions.

Nor do evidentiary problems explain why no action was taken under s 30F to punish those who published communist propaganda in the early 1930s. (If there was sufficient evidence to warrant action under s 30E, there was sufficient evidence to warrant action under s 30F.) Evidentiary problems do not explain why, after the Devanny debacle, there were no further prosecutions under s 30D. They do not explain why action was taken against the party under s 30AA only because it seemed a strategically necessary step in the Commonwealth's defence of the FOSU claim. Nor do they explain why there was no attempt made to have the Party declared unlawful on the (technical) basis of its support for overseas guerilla movements.

Resistance

Governments' capacity to impose and enforce bans was limited by the existence of opposition to those bans. There were a number of strands to this opposition. First, attempts to act against unlawful associations could be expected to arouse opposition on civil libertarian grounds. Commitment to freedom of speech, thought, communication and association sits uneasily with the banning of a body on the grounds of its ideology. Even if civil libertarianism can be analytically and psychologically reconciled with advocacy of the banning of a political organisation, it sits uneasily with bans based on bodies' policies and ideologies as distinct from their actual practices. Bans are not easily reconciled with the widespread (and questionable) civil libertarian tenet that in the end ideas prevail on the basis of their merit. They cast doubts on claims to the effect that civil libertarian values are capable of trumping all others. They cause unease, given the traditional civil libertarian fear that, once governments are able to get away with suppressing the liberties of small unpopular minorities, they will begin nibbling away at the liberties of others.

What makes civil libertarianism important is that it was not confined to people sympathetic to communist and leftist causes. Menzies (who later changed either his mind or his principles) was also sensitive to civil libertarian issues, and until the late

communists: see eg, accounts of the US trials of the early 1950s: Belknap, above n 12; Caute, above n 12; Sabin, above n 94; Steinberg, above n 12.

1940s seems to have believed that people should be punished on the basis of what they do, rather than on the basis of their organisational affiliations.[96] Even in the emotional political climate of 1951, Spicer, the Attorney-General, raised civil libertarian considerations as matters militating against expanding the scope of Part IIA. He rejected the suggestion that the criteria for unlawfulness should be extended to include advocacy of conduct designed to promote the interests of a foreign government to the detriment of the security and defence of Australia. Among his grounds were that 'there may also be dangers in any provision under which it is hard to tell where legitimate differences of opinion in foreign policy end, and the disloyal conduct of a Fifth Column begins'.[97]

But the power of civil libertarianism can be exaggerated. Civil libertarianism was not strong enough to prevent the United States either from prosecuting Communist leaders under the *Smith Act* or from inflicting a myriad of other disabilities on communists and other leftists during the dismal years of 1947–57. In Australia, civil libertarian considerations did not prevent the passage of the *Communist Party Dissolution Act 1950* (Cth), a piece of legislation more repressive than anything passed by the United States Congress during the McCarthyist period. The fact that a referendum to give the Commonwealth the power to pass such legislation won almost 50 per cent of the vote indicates that civil libertarianism does not always have particularly deep roots. But the referendum vote can also be taken as evidence that civil libertarianism can be of considerable political significance, and the subsequent behaviour of the Menzies government suggests that it was reluctant to incur the political flak associated with further public attempts to use the criminal law to attack the party.[98]

Second, enforcement of the legislation would be likely to arouse opposition from those who sympathised with the target group. The political dangers of such opposition would be particularly great in the case of attempts to use the legislation against front organisations. For while these may be objectionable to governments, given their appeal to people outside the unlawful association, that very appeal means that attacks on front groups are likely to involve at least some political costs to governments. Indeed, in dealing with front organisations, governments face the paradox that, if front organisations are powerful enough to warrant repression, they may also be powerful enough to be able to mobilise considerable anti-government pressure in the event of their being attacked.

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96 NAA: A663/1, O174/1/91.

97 'Law relating to subversive activities', Submission No 192 NAA: A4940/1, C517.

98 Relevant behaviour includes the government's reluctance not only to expand the scope of the unlawful associations provisions, but also its failure to use its undoubted constitutional powers to ban the employment of communists in the public service and to ban communists from office in registered unions.

Third, costs can be placed on governments by defendants. There are various ways in which defendants can use trials to embarrass governments. They can drag them out almost interminably and, while this may constitute a drain on Party resources, it can also impose considerable costs on the government and the judiciary. They can use them as political forums. If they are successful, this is likely to be interpreted as a victory for the organisation and a defeat for the government. And if they result in draconian sentences, the defendants may be able to make political capital out of this.[99] The history of the American trials suggests limits to the degree to which governments can be embarrassed, and indicates that trials can sometimes be used by governments as well as defendants.[100] But even recognising this, it is clear that trials can be unpredictable events. Governments cannot be sure that they will work to the governments' advantage. Moreover the advantages of victory may fall short of the costs of defeat. Australian governments had learned from painful experience that judges could not be relied on to give the right answers in cases involving communists. While the Commonwealth had had some success in the cold-war sedition cases, it had had none in its attempts to attack the Party as such, and Lowe's Royal Commission findings augured ill for any subsequent attempt to prove that the Party was an unlawful association.

Alternatives

Finally, governments had access to a variety of alternative strategies. While Part IIA was a dead letter by 1948, other sections of the *Crimes Act* could be, and occasionally were, used against communists. In particular, in 1948–50, three communists were convicted of uttering or publishing seditious words (s 24D) (and a fourth acquitted).[101] More usually, communists were prosecuted for public order offences associated with their political proselytising. Legislation which facilitated the ordering of court-supervised elections weakened communist control of several important unions.[102] Security vetting for public service positions meant that communist public servants had limited promotion prospects and that communists not in the Commonwealth service had little prospect of appointment. Indeed, being suspected for whatever reason of being a security risk could blight promotion

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99 See eg the response to the trial and convictions of communists convicted under the Canadian equivalent of Part IIA: Penner, above n 2, 120-2

100 See the discussions of the *Smith Act* trials in Belknap, above n 12; Caute, above n 12; Steinberg, above n 12.

101 See Maher, above n 16, and Lawrence W Maher, 'Dissent, Disloyalty and Disaffection: Australia's Last Cold War Sedition Case' (1994) 16 *Adelaide Law Review* 1

102 Robin Gollan, *Revolutionaries and Reformists: Communism and the Australian Labour Movement 1920–1955* (1975) 281–3. (The Party recovered much of its strength by 1955, but at the price of having to adapt to the demands of the traditional labour movement.)

prospects.[103] Warnings to universities could be enough to ensure that communists were not appointed to academic positions.[104] While Wentworth's 1952 denunciation of the Commonwealth Literature Fund for funding communist writers elicited a defence of the fund from Menzies, there were no more grants to communists until 1969.[105] Local councils refused to make halls available to communists and their front organisations.[106] Employers were sometimes reluctant to employ them.[107] Some contractors declined to have further dealings with businesses run by communists. Children of communists could suffer at school for their parents' beliefs. Those responsible rarely had to account for their behaviour. It was often not visible enough to arouse the attention of those who might have been indignant. (Indeed, the last thing its victims sometimes wanted was that the public at large should know that they had been victimised as communists.) It was visible enough to discourage behaviour which might be taken as evidence of communist sympathies.

CONCLUSIONS

Given that governments have managed to make do for 65 years without resort to Part IIA, it is hard to resist the conclusion that the case for its retention is weak. Insofar as there is a case for its retention, it must be that there is a finite possibility that future threats may emerge to Australian political institutions, and that Part IIA represents a desirable way of responding to such threats. There are no signs of such

103 See generally Frank Cain, *The Australian Security Intelligence Organization: An Unofficial History* (1994) 106–11; also Rick Throssell, *My Father's Son* (1989) 324–37, 341–2, 352–3, 364–74, 377–82, 385–7, 396–7; J Waterford, 'Was Justice Denied? The Throssell Case' (1989) 58 *Canberra Bulletin of Public Administration* 186. Dismissals on political grounds seem to have been rare, but Dr Paul James, a member of the Australian Peace Council (but not the Communist Party), was summarily dismissed from his position as a research worker at the Heidelberg Repatriation Hospital: Don Watson, *Brian Fitzpatrick: A Radical Life* (1979), and see Fitzpatrick papers 6224ff.

104 For examples of these practices, see Cain, above n 103, 107–8. Evidence of cases of specific people being denied appointment is elusive. David Morris is probably the best documented victim: see in particular Morris, above n 79.

105 Alan Ashbolt, 'The Great Literary Witch-Hunt of 1952' in Ann Curthoys and John Merritt (eds), *Australia's First Cold War 1945–1953* (1984) 180. However *Overland* continued to receive a subsidy notwithstanding having been denounced for its politics and the politics of its contributors: Watson, above n 103, 242–3. Prior to 1952, however, communists had been awarded fellowships: Throssell, above n 103, 161–2 (the CIB was not impressed). Throssell himself managed to achieve a fellowship in the 1950s, notwithstanding ASIO's doubts about his trustworthiness: 350.

106 Watson, above n 103, 227 (Melbourne), 233 (Caulfield); Fitzpatrick Papers 5900-2 (Kew), 15480 (Yallourn), 15651 (Brunswick).

107 For a notable but atypical example, see Cain, above n 103, 100–19; Morris, above n 79, 94–6, 102–4, 124, 126–8, 138, 140–2, 144–51.

threats and, apart, perhaps, from the New Guard, it is doubtful whether there ever have been any. But very occasionally liberal democracies face real threats to their survival. Following some kind of catastrophe so serious as to seriously weaken liberal democratic institutions — defeat in a war, an environmental disaster, collapse of the world financial system — a movement might emerge which threatened constitutional order. In its early stages, the movement might concentrate on attempts to mobilise support by denouncing existing political arrangements and calling for their overthrow. If it could be weakened in those early stages, it might never reach the point where it would constitute a real threat. Could Part IIA be useful in this connection?

I doubt it. While general in form, Part IIA was designed to deal with the threat posed by bodies such as the Communist Party, centrally co-ordinated bodies with authoritative programs, proud of their revolutionary credentials. It could not even be used effectively against the Communist Party, once the Party had abandoned hopes of imminent revolution. It is therefore hard to see how Part IIA could be used against a movement less formally committed to modernist norms such as consistency, coherence and rationality or against a movement lacking the highly bureaucratised structure of the Communist Party. And it is likely that movements of this nature would be the kind of movements most likely to threaten liberal democracy in the future. Their language might be the language of rebirth and renewal rather than revolution; their immediate plans might be to win control of government, and their long term plans vague, but menacing. Their appeals would probably be to different groups for different and contradictory reasons, and their success testimony to their capacity for obfuscatory symbolism and content-free rhetoric. The movement might include both respectable and militant arms, and its leader would almost certainly tailor rhetoric to the audience and situation. It might be structured not on the basis of formal constitutions, but on the basis of personal loyalties and factional accommodations. Law, whose legitimacy is predicated on the idea that language has clear and ascertainable meanings, is not well-equipped to deal with movements adept at using words to conceal and destroy meaning.

By the same token, it is arguable that Part IIA has done no real harm. Indeed this may explain why it has not gone the way of its Canadian counterpart. Nonetheless, the history of Part IIA is enough to provide some warnings. The fact that the government equated a communist-inspired anti-war movement with the Party in *Hush v Devanny* itself indicates that governments can be careless about drawing boundaries between unlawful organisations and movements which happen to share some not unreasonable goals with those organisations. And while FOSU must surely rank as among the more despicable organisations to emerge in the 1930s, it was certainly not a dangerous one. Yet it too attracted administrative sanctions under Part IIA, along with an attempt to have it declared unlawful when it took legal action to have those sanctions lifted. Part IIA suffers from a further defect:

vagueness. Ideally criminal laws should put prospective defendants on notice in relation to when their behaviour could attract criminal sanctions. Part IIA does not do this well. The dangers of this are twofold. First, in the event of governments deciding to make use of it, the threat might achieve over-compliance: people refraining from legitimate political behaviour because they wrongly suspected that it might be caught by the legislation. Second, it might achieve under-compliance, with people being punished because they did not realise that their behaviour fell within a court-adopted broad interpretation of the law. Laws whose best defence lies in the fact that they are never used are rarely good laws.

Does this mean that law should allow anti-democratic organisations to advocate and encourage the destruction of liberal democracy? I think it does, and I think this is the case whether the revolutionary organisation is communist, fascist, religious or (as may well be the case) a mixture of all three. While it would be desirable to curb the spread of a seductive anti-democratic ideology that, uncurbed, could prove so powerful that the relevant organisation could no longer be controlled, laws capable of achieving this are likely to do so only if they are also capable of being used against groups which may be similarly radical, but committed to working within established institutions. Moreover, insofar as such laws are enforced, they may undermine governments rather than reinforcing them. Concern with trying to stamp out dangerous beliefs may distract government attention from the reasons why those beliefs appeal and from what governments could do to limit that appeal. Anti-liberal democratic practices help lend credence to revolutionaries' claims that problems cannot be handled through liberal-democratic institutions. Moreover insofar as provisions such as Part IIA are mobilised, they are likely to be mobilised against organisations which represent the interests of those who feel politically disenfranchised, and who are indeed relatively uninfluential. (Part IIA was, after all, never used against the New Guard.) The advantages associated with discouraging revolutionary violence may need to be balanced against the fact that revolutionary organisations may, by their rhetoric, be able to mobilise people who would otherwise be politically disenfranchised. Moreover, the success of revolutionary organisations may stimulate more conventional organisations to make more vigorous efforts to mobilise that constituency. While there might be circumstances in which Part IIA would protect liberal democratic institutions, it is more likely that its effect will be weakly anti-democratic.

Law has a role to play in the protection of liberal democracy, especially when it focuses on relatively unambiguous behaviour rather than inherently ambiguous advocacy. Not only may the conventional criminal and civil law be used in response to violence by insurgent groups; it may be disastrous for governments to fail to enforce the law in such circumstances. The legitimacy of law may be threatened by under-enforcement as well as by over-enforcement. But the resolution of acute crises will turn largely on politics rather than law. Indeed, the successful use of law

in times of political crisis will depend heavily on the political skills of law enforcers. Successful handling of crises requires openness, flexibility, creativity and ultimate commitment to the integrity of political institutions. Failures of liberal democracies highlight the fact that, in times of crises, politicians do not always possess the requisite skills, but those same failures can provide lessons. Faced with a hypothetical future threat to liberal democracy, Australian politicians would do well to try to learn from what went wrong in Italy in the early 1920s and in Germany ten years later. In the absence of political wisdom, law cannot make much difference to the outcome of real crises.