SOUNDS DREADFUL: BROADCASTING REGULATION, COMMUNISM AND THE EARLY COLD WAR PERIOD IN AUSTRALIA

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[*Ideally, there should be equality of opportunity for public access to the mass media to protect the important interest in self expression and to enable minority viewpoints, especially those which may be very unpopular, to be accessible to a wide public audience. More than 40 years ago, an unsuccessful attempt was made in Australia to provide a legislative framework for access to radio broadcasting during a federal election campaign. The failure to secure an enforceable regime of fair access for minority political parties and other groups, which was due to the fanaticism of the Cold War, has had a lasting adverse effect on the law regulating access to the mass media.*]

The desirability of achieving a regulatory system capable of operating free from arbitrary political interference, and the restricted number of available frequencies on the broadcasting spectrum have been influential factors in legislative control of radio and television in Australia. The need to avoid the chaos thought to be inevitable in the absence of an appropriate system for regulating access to the radio spectrum has traditionally been linked with concerns about the potential which ownership or control of a broadcasting station has for manipulation of public opinion and character assassination of individuals involved in political activity, and about the need to devise workable arrangements by which all shades of public opinion can obtain fair access to broadcasting time. There has never been any reason to suppose that the common law would come to the aid of citizens by providing an enforceable legal right of access to any part of the mass media. If there is to be some measure of such access, it must depend on legislative action.

This article examines historical aspects of the regulation of access to radio broadcasting for political purposes in Australia. It begins by describing the original legislative and administrative controls specifically directed at political broadcasting in Australia. Making use of material from the Australian Archives, in particular records of the Australian Broadcasting Control Board ('the Board'),[1] it then examines one controversial episode which arose in the early Cold War period in Australia at a time when fierce debate raged around the question of whether or not members and other followers of the Communist Party of Australia ('the CPA') should be permitted to express their opinions and

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[1] Australian Archives (Vic.); Australian Broadcasting Control Board, MP 1170/3, Broadcasting and General (1935-1970), Policy and General in Regards to Broadcasting. File BP/5/1, Political, Controversial and Current Affairs (hereinafter referred to as AA, MP 1170/3, BP/5/1).

otherwise freely promote their radical political objectives. It was in this turbulent political climate that the Chifley Government ambitiously, but unsuccessfully, legislated in 1948 to achieve a system of access to the radio spectrum appropriate for an open and democratic society.

From the establishment of the CPA in 1920 during the worldwide ferment produced by the Bolshevik Revolution, successive conservative Commonwealth governments had made repeated attempts to crush the CPA. The Commonwealth Crimes Act 1914 had been amended in 1920, 1926 and 1932 primarily in response to the grave threat to domestic tranquility said to be posed by the 'subversive' activities of the CPA.[2]

In 1932 in *R v. Hush; ex parte Devanny*[3] a majority of the High Court of Australia rejected an attempt to use the 1926 amendments to the Crimes Act to outlaw the CPA. The Commonwealth had constructed an elaborate prosecution of the publisher of the CPA newspaper, *Workers' Weekly*, based on an averment containing 27,453 words which was described by Mr Justice H. V. Evatt as 'one of the most amazing documents in the whole history of law.'[4] Evatt was the only one of the Justices to confront the underlying political basis of the prosecution. As the following passage from his judgment indicates, he was quite unconvinced by the prosecution's reliance on the literal meaning of the rhetoric and propaganda of the CPA which was replete with references to violent civil upheaval and the pressing need for revolutionary social and economic change:

> 'When the time comes.' It is, it would seem from the writings in evidence, the element of time which must be closely examined in determining whether at the present, or in the near, or very far distant, future there is to be any employment of violence and force on the part of the classes for which the Communist Party claims to speak. 'The inevitability of gradualness' as a Socialist and Labor doctrine, the Communists reject. But they believe and advocate that a Socialist State must inevitably emerge from the very nature of capitalist economy. But when? So far as the evidence placed before us goes, there is no answer to this question. So that one possible argument, which may be open to the Communist Party in explaining their references to physical force, is that force and the threat of force are far distant from the present or the near future. The history of the attempts and failures of Communism to gain control of other political movements of the working classes may tend, upon close analysis, to show that, to turn the phrase, Communism illustrates the gradualness, the extreme gradualness, of inevitability.[5]

In 1935 the Commonwealth, relying on the 1932 amendments to the Crimes Act, issued proceedings in the High Court in a further attempt to get rid of the CPA and its front organizations, but the ensuing dispute was eventually settled two years later without the Court being called upon to rule on the merits of the Commonwealth's claims.[6]

In 1940, at a time when, in line with its unswerving support for the 1939 Nazi Germany-Soviet Union pact, it was denouncing Australia's participation in the war against Nazi Germany, the CPA was proscribed (and some of its members

2 War Precautions Act Repeal Act 1920, ss 10-12; Crimes Act 1926, s. 17; Crimes Act 1932. For a description and assessment of these measures see Ricketson, S., 'Liberal Law in a Repressive Age: Communism and the Law 1920-1950' (1976) 3 *Monash Law Review* 101.

3 (1932) 48 C.L.R. 487.

4 (1932) 48 C.L.R. 487, 513.

5 *Ibid.* 517-518.

6 Commonwealth, *Parliamentary Debates*, Senate, 11 December 1934, 977; Senate, 14 November 1934, 203; House of Representatives, 18 June 1937, 71-72. Cain, F., *The Origins of Political Surveillance in Australia* (1983) 251.

interned without trial) pursuant to Regulations made under the National Security Act 1939.[7] That ban was lifted in December 1942 by H. V. Evatt who had left the High Court bench in 1940 to enter the Commonwealth Parliament and who had become Attorney-General at the inception of the Curtin Government in October 1941. By this time, following Nazi Germany's invasion of the Soviet Union in June 1941, the CPA was wholeheartedly in support of the Australian Government's war effort. There followed something of a lull in anti-Communist agitation in the Australian community and, in line with public sympathy for the Soviet Union's grim struggle against Germany, the CPA experienced increasing popular support so much so that by the beginning of 1945 it had an estimated membership of 20,000.[8] However, by the end of the war in Europe in May 1945 the popular honeymoon with the CPA was over. The CPA's membership went into a steady decline from which it never recovered, and the conservative political parties and their allies again began to beat the anti-Communist drum with mounting vigour.

1 *THE EVOLUTION OF LEGISLATIVE CONTROLS ON POLITICAL BROADCASTS IN AUSTRALIA: 1923-1948*

(a) *Specific Controls for a New Medium*

The first systematic Australian radio broadcasting operations commenced in November 1923.[9] In 1924 a system of class A and class B stations was introduced, the former deriving their income from listeners' licence fees and the latter from selling broadcast advertising time. In each case the service was provided by private operators licensed pursuant to regulations made under the Wireless Telegraphy Act 1905, an Act under which the Postmaster-General was given potentially draconian authority to control what could be broadcast.[10]

It soon become apparent that for class A stations there was almost no incentive to operate outside heavily populated areas and the result was that no stations were established in rural areas in the less populous States. To overcome this deficiency the Commonwealth Government announced in 1928 the establishment of a partial national broadcasting service. Under this new arrangement the technical services of the class A stations were owned and operated by the Commonwealth Government and private entrepreneurs supplied the programmes. The then Post Office took over the class A stations as their operating licences expired in 1929 and 1930, the construction of new regional stations was commenced and, after calling for tenders, the Commonwealth Government entered into a three-year

7 National Security (Subversive Associations) Regulations, SR 1940 Nos 109 and 130. See Hasluck, P., *The Government and the People 1939-1941* (1952) Appendix 3.

8 Davidson, A., *The Communist Party of Australia: A Short History* (1969); Gollan, R., *Revolutionaries and Reformists: Communism and the Australian Labour Movement 1920-1955* (1975).

9 Walker, R. R., *The Magic Spark: The Story of the First Fifty Years of Radio in Australia* (1973); Thomas, A., *Broadcast and Be Damned: The ABC's First Two Decades* (1980); Inglis, K. S., *This is the ABC* (1983).

10 Wireless Telegraphy Regulations SR 1924, No. 101, Part III. For the historical background see Armstrong, M., *Broadcasting Law and Policy in Australia* (1982) (hereinafter referred to as Armstrong, *Broadcasting Law*), paras 301-308.

contract with the private company, the Australian Broadcasting Company, for the supply of programmes to the class A stations.

In 1932 the Commonwealth Government decided to establish a service still more national in character. As a result, the Parliament passed the Australian Broadcasting Commission Act 1932 ('the 1932 Act'). The 1932 Act created the Australian Broadcasting Commission ('the ABC') which was required to take over the existing studios of the class A stations, be responsible for additional studios, and provide the programmes for those stations. The Post Office remained responsible for the supply of the whole of the necessary technical services to the ABC and was required by s. 46 of the 1932 Act to provide, free of charge to the ABC, the interconnecting programme transmission lines necessary for simultaneous broadcasting by two or more stations. In effect, the class A stations were nationalized. Class B stations thereafter became known as commercial broadcasting stations.

The original measures affecting political or controversial broadcasts reflected two contradictory policy concerns. The first was the need to ensure that the ABC was given a sufficient degree of independence to prevent it from becoming a government propaganda agency or otherwise succumbing to inappropriate government or private interference. The other, conflicting, concern involved Parliament's recognition of the fact that, in some situations, there may be a public interest justification for the Commonwealth Government directly intervening to control radio programme content. The Commonwealth Government's interest was intended to be protected by s. 20(1) of the 1932 Act which required the ABC to transmit, free of charge from all national broadcasting stations, matter the transmission of which was directed by the Minister as being in the public interest, and by s. 51 which gave the government power to veto programmes.

Section 53 of the 1932 Act provided that where any emergency arose which in the opinion of the Governor-General rendered it desirable so to do, the Governor-General was empowered to authorize the Government to exercise complete control over all material broadcast from ABC stations.[11] At the same time, s. 52 gave the ABC otherwise unfettered power to determine to what extent and in what manner political speeches could be broadcast.[12]

The need to wrestle with the competing policy considerations to be applied to political broadcasts was pressing because radio had soon been put to political use in Australia and, in particular, for electioneering purposes. The 1932 Act left it entirely up to the ABC to decide, so far as ABC stations were concerned, who would be permitted to make political broadcasts, whether any right of reply should be recognized, whether political parties should be recognized and if so,

[11] Also in 1932, as an element of the stiffening of the political offence provisions, the Crimes Act 1914 was amended by, *inter alia*, the insertion of a new 30FB giving the Postmaster-General the power to cancel any broadcasting station licence in respect of any station from which was broadcast any propaganda or advocacy in favour of an object of an unlawful revolutionary association or any seditious matter. Crimes Act 1932 (Cth) s. 7. Section 30FB of the Crimes Act 1914 was repealed pursuant to s. 3 of the Radiocommunications (Transitional Provisions and Consequential Amendments) Act 1983.

[12] Section 52 resulted from an amendment to the Bill moved in the Senate. Commonwealth, *Parliamentary Debates*, Senate, 12 May 1932, 660. An unsuccessful attempt was made in the Senate to have the Bill amended to provide for equal access rights for all political parties. *Ibid.* 659.

how, and the determination of a formula for the allocation of broadcasting time. The practice emerged whereby the ABC, for the purpose of allocating time for political broadcasts at election times, accorded a measure of recognition to political parties, but only to those parties already represented in the Parliament ('the ABC's established party policy'). Those parties were given free time on an equal basis.[13]

The commercial stations remained subject to the separate and very strict controls contained in the Wireless Telegraphy Regulations. In 1930 regulation 59 was recast to give the Postmaster-General power to require a licensee to include any programme material of general interest or utility as the Postmaster-General deemed desirable, and power to censor all broadcast matter including advertising. Regulation 63 obliged licensees to provide programmes to the satisfaction of the Postmaster-General.[14] A broadcasting licensee was required by regulation 59, before broadcasting any matter of a controversial nature or likely to cause offence to any section of the community, to direct the attention of the Postmaster-General to the matter. Access by aspiring political broadcasters to commercial stations depended principally therefore either on capacity to pay for broadcast time or on ownership or control of a broadcasting licence. The major political parties soon accepted the usefulness of radio as an instrument for propagandizing and by the 1930s some capital city radio stations were owned or operated by political parties or interests closely associated with them.

In July 1941 the Commonwealth Parliament established a Joint Committee on Wireless Broadcasting to conduct a general inquiry into broadcasting. In its Report presented to the Parliament in March 1942[15] it noted that, in its comparatively short history, broadcasting had progressed from the position of a novel source of entertainment to the status of an essential public service, and that its influence on the lives of Australians had become so far-reaching that its control was a problem of major national importance. The Report identified shortcomings in the provision of time for political broadcasting on the commercial stations, and recommended that the ABC's established party policy be embodied in legislation and that the commercial stations also be required by law to implement that policy and otherwise to afford to political parties equality of opportunity of access to paid broadcasting time.

The following year the Commonwealth Parliament acted on the Joint Committee's Report, but disregarded the recommendation dealing with access to broadcasting for political purposes. In passing the Australian Broadcasting Act 1942 ('the 1942 Act'), the Commonwealth Parliament dealt for the first time in the same Act with both the national and commercial broadcasting services. The basic

[13] The system adopted by the ABC is described in detail in the *Report of the Joint Committee on Wireless Broadcasting* (1942) (hereinafter referred to as *Joint Committee Report*), para. 258. Problems occurred in 1934 when there were four parties with representation in the Parliament. The Government expressed the opinion that only it and the official Opposition should be recognized, but the ABC decided to recognize all four parties. The ABC declined, however, to recognize parties which were not represented in the Parliament. See *First Report of the Parliamentary Standing Committee on Broadcasting* (1943) (hereinafter referred to as *First Report*), paras 104-107.

[14] Wireless Telegraphy Regulations SR 1930, No. 113. Regulation 124 authorized the seizure of the operations of licensees during an emergency.

[15] *Joint Committee Report*, *op. cit.* n. 13.

features of the 1932 Act were re-enacted and control of commercial broadcasting stations was transferred from the Wireless Telegraphy Regulations to Part III of the new Act. Section 41 reproduced section 51 of the 1932 Act. In accordance with the dual areas of operation of the 1942 Act, s. 89(1) reproduced s. 52 of the 1932 Act in the following expanded form:

> Subject to the provisions of this section, the Commission may determine to what extent and in what manner political speeches or any matter relating to a political subject may be broadcast from national broadcasting stations, and the licensee of a commercial broadcasting station may arrange for the broadcasting of such speeches or matter from that station.

Sections 60 and 62, respectively, reproduced the substance of regulations 59 and 63 of the Wireless Telegraphy Regulations, giving the Minister wide powers, including censorship powers, affecting programmes and advertisements broadcast from commercial stations. Section 104 of the 1942 Act, which empowered the Governor-General to exercise complete control over broadcasting in an emergency, was the combined equivalent of both s. 53 of the 1932 Act and regulation 124 of the Wireless Telegraphy Regulations.

The 1942 Act contained three additional features affecting political broadcasts, each of which had been inspired by provisions in the Canadian Broadcasting Act 1936 and which had been examined in the Joint Committee Report.[16] First, s. 89(2) subjected the ABC and licensees of commercial stations to a complete prohibition on broadcasting of political material on the day of an election for the Commonwealth or a State Parliament or any House of any such Parliament or for any vacancy in any such House and on the two days immediately preceding that day. The Joint Committee had concluded that establishing what it called a 'breathing space' would make it much more difficult, quite late in an election campaign, for one party to snatch victory in a manner that might do incalculable national harm.[17]

Secondly, s. 89(3) subjected the ABC and licensees of commercial stations to a prohibition during a period ('the election period'), commencing on the day of the issue of the writs for a Commonwealth or State election and lasting until the close of the poll for any such election, on the broadcasting of 'any dramatisation of matter relating to any candidate, political party, issues, policy or meeting . . . .' The Joint Committee had reported that, with respect to the ABC, there had not been an occasion on which any party in a federal or state election had attempted to dramatize any part of its policy, or to ridicule an opponent's policy. The Joint Committee was, however, affronted by what had happened in other countries and, whilst the judgment and good sense of the members of the ABC had prevented the adoption of 'such a nefarious practice as dramatised propaganda at any election in Australia', the Joint Committee considered that it was preferable to have a legislative prohibition.[18]

The situation with respect to the commercial stations was different. The Joint Committee reported that the use of dramatized political broadcasting, involving 'trickery and deception', had evoked bitter protests and that the Australian

[16] *Ibid.* para. 260.
[17] *Ibid.* paras 265 and 411.
[18] *Ibid.* paras 262 and 263.

Federation of Commercial Broadcasting Stations ('the Federation') had endeavoured to eliminate offensive broadcasts by a system under which station managers were obliged to submit matter for political broadcasts to the Federation for approval before broadcasting.[19] The Joint Committee saw ample justification for a provision such as that which emerged as s. 89(3) in one notorious episode in 1940 in which a simulated German voice was used in one anti-Labor advertisement urging voters to help Germany by voting for the ALP at the next election.[20]

Finally, s. 90 required the ABC and licensees of commercial stations to announce the true name of every speaker 'who is . . . to deliver an address or make a statement relating to a political subject or current affairs', and to announce the name of the political party in the event that the address was to be delivered, or the statement made, on behalf of a political party.[21]

Section 72 of the 1942 Act established a Parliamentary Standing Committee on Broadcasting. In 1943 and 1944 the Standing Committee produced reports on aspects of political broadcasting. In its 1943 Report the Standing Committee departed from the earlier Joint Committee's approach and rejected proposals for legislative implementation of the ABC's established party policy governing access to free time on the ABC for election broadcasts. The gist of the Standing Committee's objection to the ABC's established party policy was the quite implausible suggestion that if

> . . . half a dozen persons pledged to a policy of violence and hostility to our democratic methods of Government succeeded at an election and established a party in Parliament, then the Commission would be legally bound to recognize such a party and give it broadcasting facilities at the succeeding election.[22]

According to the Standing Committee, there would then be the seriously anomalous situation in which a democratic country would be allowing its national broadcasting system to be used to disseminate subversive and revolutionary propaganda.[23] As to availability of paid time on commercial stations, the Standing Committee recommended amendments to the 1942 Act designed to ensure that all recognized political parties obtained equal access to such time at non-discriminatory rates.[24]

In its 1944 Report[25] dealing with an application by the ALP for broadcasting licences in Tasmania, the Standing Committee again emphasized the importance of ensuring equality of opportunity of access to political broadcasting time, and offered the following conclusions:

> (1) In the interests of democratic government, there should be adequate means of educating the people in affairs affecting the common good of the general community.
> (2) The principal media available for the purpose nowadays are the newspapers and broadcasting stations.
> (3) Leading political organizations which advocate attainment of their objectives by constitutional means should have equality of opportunity to expound their policies to the community through the media.

19 *Ibid.* para. 407.
20 *Ibid.* paras 407 and 408. Armstrong, *Broadcasting Law*, para. 523.
21 *Joint Committee Report*, paras 264 and 412.
22 *First Report*, para. 111.
23 *Ibid.* para. 112. The Standing Committee did not mention the CPA, but it is difficult to accept that it did not have the CPA in contemplation.
24 *Ibid.* para. 117.
25 *Fifth Report of the Parliamentary Standing Committee on Broadcasting* (1944).

(4) Where there is conclusive evidence of inequality of opportunity in either medium, equitable proposals designed to offset the inequality should be encouraged.
(5) In the broadcasting field, efforts should be made to provide equality of opportunity at times when the desired listeners are most likely to be available and the allocation of such times should not be subordinated unreasonably to any prevailing preponderance of entertainment during hours of maximum audience, particularly where the entertainment is not of a type conducive to elevation of the cultural and intellectual level of public taste . . .[26]

The Commonwealth Government's policy of facilitating the use of radio to improve public understanding of political issues was evident in the passage in 1946 of amendments to the 1942 Act. The amendments required the ABC to broadcast daily news and current events programmes and to establish its own independent news service.[27] Separate legislation provided for the broadcasting of proceedings of the Commonwealth Parliament.[28] In addition, section 90 of the 1942 Act was amended to provide that, if the person actually delivering a political broadcast was not the author of the broadcast material, the names of the author *and* the speaker were to be included in the broadcast identification required by s. 90.[29]

(b) *Establishment of the Australian Broadcasting Control Board*

In 1948, following a review of the operation of the existing law and administration and consideration of continuing technological advances, the Parliament passed far-reaching amendments to the 1942 Act.[30] Section 6A of the amended 1942 Act established the Board to take over much of the responsibility for the regulation of broadcasting that had previously been undertaken by the Postmaster-General.[31] In introducing the 1948 Bill, the Postmaster-General, Senator D. Cameron, told the Senate that there was a need for

an independent body to require a reasonable measure of correlation between the national and commercial broadcasting services.[32]

The Minister readily acknowledged that the Post Office had done a satisfactory regulatory job. The Government considered, however, that the time had arrived when it was essential that the overall control and direction of broadcasting

26 *Ibid.* para. 48.
27 Australian Broadcasting Act 1946, s. 5.
28 Parliamentary Proceedings Broadcasting Act 1946.
29 Australian Broadcasting Act 1946, s. 11.
30 Australian Broadcasting Act 1948. Armstrong, M., 'The Broadcasting and Television Act 1948-1976: A Case Study of the Australian Broadcasting Control Board' in Tomasic, R. (ed.), *Legislation and Society in Australia* (1979); Cole, B. G., 'The Australian Broadcasting Control Board and the Regulation of Commercial Radio in Australia Since 1948', Ph.D. Dissertation, Northwestern University (1966); Armstrong, *Broadcasting Law*, para. 308; Curthoys, A., 'The Getting of Television: Dilemmas in Ownership, Control and Culture, 1941-56' in Curthoys, A., and Merritt, J., *Better Dead Than Red — Australia's First Cold War 1945-1959*, Vol. 2 (1986). The Government had conducted a review of broadcasting regulation policy without referring the question to the Standing Committee. Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 1948, 3540.
31 The Government gave as its reasons for establishment of the Board the rapid growth of broadcasting in Australia, technological innovation including frequency modulation broadcasting and television, the emergence of capital city-based broadcasting networks which were seen to be disadvantaging rural stations, the lack of programme diversity, and the overall absence of co-ordination between the programmes of the national and commercial stations. Commonwealth, *Parliamentary Debates*, Senate, 27 October 1948, 2132-2138.
32 *Ibid.* 2135.

matters should be given to a competent specialist agency which, as was the case in most other countries, would devote itself exclusively to such an important activity.[33]

The Opposition vociferously denounced the 1948 changes. This was a time of unparalleled parliamentary hyperbole. For example, speaking in the debate on the Bill, Senator Rankin described it

> as the most insidious and dangerous attack upon the Australian way of life and its ideals of democracy and freedom that has ever been presented to the Senate.[34]

According to the Opposition, the Bill was one step further towards the development of a totalitarian state.

A major institutional issue which these extensive changes involved was the exact nature of the power relationship between the Commonwealth Government and the Board. To what extent was the Board to operate independently of the Postmaster-General? Under the 1948 amending Act the Board took over many of the Minister's functions with respect to the commercial stations. Some of its functions were, however, advisory only. The Postmaster-General was obliged to take into consideration the Board's recommendations, but retained very important powers relating to grant, suspension, revocation and renewal of commercial broadcasting licences.[35] During his second reading speech, Senator Cameron observed (prophetically — as events later unfolded) that

> Although the board will have wide powers and sufficient autonomy to carry out its functions effectively, it is important, because of the far-reaching aspects of certain of its functions, to ensure that in the final analysis its policies shall be in harmony with the intentions of the Parliament.[36]

The functions of the Board were set out in a new s. 6K(1) of the Act as follows:

> (a) to ensure the provision of services by broadcasting stations, television stations and facsimile stations, and services of a like kind, in accordance with plans from time to time prepared by the Board and approved by the Minister;
> (b) to ensure that the technical equipment and operation of such stations are in accordance with such standards and practices as the Board considers to be appropriate; and
> (c) to ensure that adequate and comprehensive programmes are provided by such stations to *serve the best interests of the general public* . . . .[37]

The Postmaster-General retained the ultimate programme veto. Sections 41(1) and 60(3) respectively conferred on the Postmaster-General the power to prohibit

[33] *Ibid.* 2136. Letter, Cameron to Chifley, 18 July 1949. Evatt Papers, The Flinders University of South Australia.

[34] Commonwealth, *Parliamentary Debates*, Senate, 9 November 1948, 2592.

[35] Australian Broadcasting Act 1948, s. 16.

[36] Commonwealth, *Parliamentary Debates*, Senate, 27 October 1948, 2134. In the House of Representatives the Minister for Information, A. A. Calwell, resorted to an over-simplified description of the Board's role: 'The Minister is divesting himself of authority, and reposing it in the Board.' *Ibid.* House of Representatives, 25 November 1948, 3519. The Board seems to have accepted that it had some obligation to keep the government informed about what it was doing. On 15 May 1949 Fanning sent Cameron a detailed report on the Board's activities in its first two months of operations. Letter, Fanning to Cameron, 15 May 1949. Calwell Papers, National Library of Australia (hereinafter referred to as NLA) MS 4738, Box 227. Calwell had earlier made it clear that the Board would not be subjected to Ministerial interference or control in any way. Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 1948, 3535. Calwell's statement to the Parliament cannot be accepted at face value since he had been instrumental in having the Bill drafted so as to ensure that, in important respects, the Board's powers were limited to advising the Minister. Armstrong, M., 'The Broadcasting and Television Act 1948-1976: A Case Study of the Australian Broadcasting Control Board' in Tomasic, R. (ed.), *Legislation and Society in Australia* (1979), 128.

[37] Emphasis added. Did s. 6K invest the Board with power to regulate ABC programming? Armstrong argues that there 'is not a shadow of doubt' that it did. Armstrong, M., *op. cit.*, n. 30, 131. If it did possess it, the Board wisely refrained from exercising such power.

the ABC or any licensee of a commercial station from broadcasting any matter, or matter of any class or character specified by the Minister.

Political broadcasts were affected by the following changes. First, the Board was required by sub-paragraph 6K(2)(b)(iii) of the amended Act to 'ensure that facilities are provided on an equitable basis for the broadcasting of political or controversial matter' ('the access requirement'). The access requirement was open-ended. It did not refer to political parties. Nor was it confined to regulating political or controversial broadcasts at election time. The key phrase 'political or controversial matter' was not defined in the amended 1942 Act.

Secondly, s. 89(1) was recast in expanded form as follows — the changes being shown below in italics:

> Subject *only* to this section, the Commission may determine to what extent and in what manner political speeches or any matter relating to a political *or controversial* subject may be broadcast from national broadcasting stations, and, *subject only to this section and to Part 1A of this Act*, the licensee of a commercial broadcasting station may arrange for the broadcasting of such speeches or matter from that station.[38]

As amended, s. 89(1) therefore contained a fundamentally different regulatory approach to political broadcasts by the ABC and the commercial stations. This reflected the fact that, despite occasional skirmishes between Government and the ABC on particular controversial broadcasts, successive Commonwealth Governments had displayed confidence in the responsible record of the ABC as the national broadcaster. However, unlike the ABC, the commercial stations were to be subject to the Board's requirements formulated under s. 6K (including, in particular, the access requirement) which was contained in a new Part 1A of the Act. Until the Board acted to implement the access requirement, the commercial stations were free to decide whether or not to accept political or controversial matter for broadcasting.[39]

Finally, because the government believed that the prohibition on broadcasts of dramatized political material contained in sub-s. 89(3) was not wide enough, it was extended to apply not merely at election time, but at all times in respect of

> any dramatization of any political matter which is then current or was current at any time during the last preceding five years.[40]

Consistent with the overall administrative changes effected by the Bill, s. 62 was amended by transferring from the Minister to the Board the power to censor all matter, including advertisements, to be broadcast by a commercial station.

The Board was empowered by sub-s. 6L(1) of the amended 1942 Act 'to make such orders, give such directions and do all such other things as it thinks fit' for the purpose of exercising its powers and functions under the Act. Sub-sections 6L(2) and (3) provided that any Orders made by the Board had the force of law

[38] As introduced on 27 October 1948, the Broadcasting Bill also provided for the repeal of s. 89. Had such a provision been passed it would have had the effect of transferring to the new Board the power to control political broadcasts on the ABC. Following vigorous protests from the Chairman and Vice-Chairman of the ABC, the Government relented. Section 89 was retained and expanded in operation with the addition of the term 'controversial' thereby strengthening the ABC's relative independence. Inglis, *op. cit.*, n. 9, 132.

[39] Letter, O'Kelly to Bundaberg Broadcasters Pty Ltd, 9 May 1949, AA, MP 1170/3, BP/5/1.

[40] The strengthening of this provision had been prompted by the Liberal Party's 'John Henry Austral' broadcasts in which an actor taking the part of Chifley Government Ministers attacked the government's bank nationalization policy and socialism generally. See Inglis, *op. cit.* n. 9, 132; Thomas, *op. cit.* n. 9, 166; Cole, *op. cit.*, n. 30, 342-343.

and were subject to disallowance by either house of the Parliament as provided for in s. 48 of the Acts Interpretation Act 1901.

2 *THE PREPARATION OF THE POLITICAL BROADCASTS (FEDERAL ELECTIONS) ORDER 1949*

The Board began operations on 15 March 1949. Its inaugural members were L. B. Fanning, the Director-General of Posts and Telegraphs, R. G. Osborne, the Warden of The Australian National University, and C. Ogilvy, a senior commercial radio station executive. The 1942 Act, as amended in 1948, left it entirely up the Board to determine how it should comply with the generality of the access requirement. The first issue the Board had to consider was how it should approach that requirement for the purposes of the federal election due to be conducted in 1949.[41] In addition, the practicalities of the situation dictated that the Board had to take a sequential approach. If, having regard to its limited resources and the size of its overall task in establishing and maintaining an 'independent' regulatory framework, it could devise and successfully implement a policy for the access requirement at election time, it could then consider the feasibility of moving on to the larger task of ensuring the implementation of the access requirement at other times. The Board considered that the Parliament must have intended that s. 6K should be applied to the broadcasting of political matter calculated to influence the people in their choice of parliamentary representatives at a general election for the national parliament and that, given the overall circumstances which faced the Board in early 1949, it was not free to disregard sub-para. 6K(2)(b)(iii) or to defer its implementation.[42]

(a) *The Board's Analysis of the Issues*

On 20 April 1949 Board members were presented with a short preliminary paper setting out a proposal for the making of an Order by the Board under s. 6L which would impose access obligations on commercial radio stations and thus enable the Board to discharge its statutory duty to implement the access requirement.[43] The author of the preliminary paper identified three specific areas of practical concern for the Board.

1 *Whether broadcasts on behalf of the CPA should be permitted from commercial stations* ('the CPA issue').

At the previous federal election in 1946 the ABC had given fifteen minutes of broadcast time to L. L. Sharkey, then President (and by 1948 General Secretary) of the CPA, and had offered to relay Sharkey's policy speech broadcast to

[41] A first hand account of the background to the preparation of the 1949 Order is to be found in Freadman, P., 'Broadcasting and Politics' (1952) 2 *University of Western Australia Law Review* 281.

[42] *Second Annual Report of the Australian Broadcasting Control Board. Year Ended 30 June 1950* (hereinafter referred to as *Second Annual Report*), para. 153. The Board's view was supported by s. 6A of the 1942 Act as amended which provided that the Board 'shall have and may exercise the rights, powers, authorities and functions conferred upon it by this Act *and shall be charged with and perform the duties and obligations imposed upon it by this Act*' (emphasis added).

[43] Memorandum, 'Broadcasting of Political or Controversial Matter', 20 April 1949. AA, MP 1170/3, BP/5/1.

commercial stations. Prior to the 1947 Queensland State election, the ABC had decided on a policy of allocating broadcast time to minority political groups during election campaigns only when they contested a substantial number of seats. The ABC had formed the opinion that the CPA had insufficient candidates to qualify on that latter occasion.[44] By 1949 the CPA issue could not have been avoided by the Board. It was this issue that was to be the main focus of outraged political and public reaction to the Order eventually made by the Board.

2 *Whether all commercial stations should be compelled to accept political matter irrespective of party interests* ('the compulsion issue').

The author of the paper noted that it was common knowledge that some stations were owned by political parties or interests associated with them and that those stations would be resistant to any attempt to compel them to provide broadcast time to rival parties.

3 *Whether capacity to pay for broadcast time should be a determining factor* ('the free time issue').

Prior to 1942 it was possible for one party to buy all the time available for political broadcasts.[45] Section 61 of the 1942 Act required 'a licensee desiring to broadcast advertisements [to] publish a tariff of advertising charges, and, except as prescribed [to] make . . . advertising services available without discrimination to any person'. Regulation 7 of the Australian Broadcasting Regulations made in 1942 gave the licensee of a commercial station the right to refuse to broadcast advertisements for specific matters or classes of matter.[46] Regulation 7 had been interpreted by the commercial stations as meaning that a station only had a right to refuse to sell time for political broadcasts if its policy was not to take political broadcasts at all. This interpretation was disputed by the Commonwealth Government.[47] In any event, this was probably the least troubling issue. Later, the Board had no difficulty in concluding that enforced free time was unfair and thus contrary to s. 6K of the Act.

Senator Cameron, in his second reading speech on the Bill for the 1948 had said:

> Broadcasting does not exist for sectional purposes, but is essentially a public utility service which should make its appeal in one form or another to every member of the community . . . it is most important that the licensees of commercial stations should carry out their obligations to the community by providing different forms of entertainment and information which the public, or different sections of it, require. It should be a fundamental consideration that the grant of a broadcasting licence is a charter to perform a public service and that the profit motive must be subordinated at all times to that primary responsibility.[48]

44 The 1946 Sharkey broadcast had not been accepted by any commercial station in New South Wales, Queensland, Western Australia or Tasmania. The available records do not disclose whether any commercial station in Victoria or South Australia accepted the broadcast on relay from the ABC. AA, MP 1170/3, BP/5/1.

45 *First Report*, para. 115.

46 SR No. 297 of 1942.

47 Draft Annual Report, 9 June 1950 (hereinafter called '*Draft Report*') AA, MP 1170/3, BP/5/1.

48 Commonwealth, *Parliamentary Debates*, Senate, 27 October 1948, 2136. The High Court has recently emphasised the important public responsibilities which the Broadcasting Act 1942 imposes on commercial and other licensees. See *Australian Broadcasting Tribunal v. Bond* (1990) 170 C.L.R. 321.

It is open to doubt whether the commercial broadcasting stations did invariably put their public service obligations ahead of profit-making. They were expected to aspire to the same public service objectives as the ABC, but they were in a different position to the ABC in several important respects. First, in some cases the station owner or operator was a political or religious organization which may have had a strong direct interest in controlling the controversial content of programme material for ideological reasons. Second, there were sound commercial reasons for wanting to control the broadcasting of political or other controversial material. Some of the material might alienate particular advertisers. Or it might distract listeners from listening attentively to commercial messages. Or such material might, if it had to be accommodated to a significant extent free of charge, eat into the already limited amount of time available for normal paid advertising.

(b) *The Consultative and Policy Development Process*

Following consideration of the preliminary research paper, the Board, in compliance with para. 6K(2)(a) of the 1942 Act as amended, began a consultative process with the ABC, the Federation and individual commercial licensees. Licensees were asked to respond by 23 May 1949 to a detailed questionnaire seeking information about past political broadcasting practices.[49] The Board met with the Standing Committee of the Federation in Melbourne on 12 May and maintained close contact with it during this preparatory phase.[50]

On 3 June a staff memorandum was prepared for the Board summarizing both the replies sent by licensees to the Board's questionnaire and similar information supplied by the ABC. Although there were some discrepancies, it appeared that commercial stations had allocated time equitably in recent elections. However, apart from election time broadcasting time had not been allocated equitably. There was a marked divergence of opinion among commercial stations regarding acceptance of material from the CPA, with several stations indicating that they would refuse to accept such material on principle. This made a uniform policy desirable. The Board was urged by its staff to press the ABC for a definitive statement of the policy it intended to adopt in the forthcoming election. The ABC had asked the Board to keep its questionnaire response confidential because it wished to retain flexibility to amend its policy as it saw fit. If the ABC were to decide, as it had done in 1946, that it would accept election material from the CPA, the Board would have to confront the issue of dealing with those commercial stations opposed to allocating time to the CPA.

The Board also commissioned the preparation of a detailed background paper on the access requirement and investigated the comparable laws and practices in Canada, the United Kingdom and the United States of America.[51] In its

49 Circular Letter No. 2, 26 April 1949, AA, MP 1170/3, BP/5/1.

50 Notes of Discussions, 12 May 1949, AA, MP 1170/3, BP/5/1.

51 Report on the Application of Provisions of the Australian Broadcasting Act 1942-1948 to Political and Controversial Broadcasts over 'B' Class Stations During Election Periods, August 1949 (hereinafter referred to as *Background Report*) AA, MP 1170/3, BP/5/1. Federal Communications Commission, *Report on Editorializing by Broadcast Licensees* 13 F.C.C. 1246 (1949).

consideration of the Act's requirement that the Board ensure that adequate and comprehensive programmes be provided 'to serve the best interests of the general public', the background paper (which was presented to the Board in August 1949) examined whether the CPA could qualify as a legitimate political party. The author of the background paper[52] advised the Board against treating the CPA, which was described as 'the problem-child of politics', as a political party for the purposes of the proposed Order. The gist of this advice was that, in the context of political affairs, 'the best interests of the general public' within the meaning of para. 6K(1)(c) of the 1942 Act as amended involved the following standards:

1. Maintenance of internal stability;
2. Maintenance of the multi-party system of representative Government;
3. Recognition of the relative nature of sectional claims within the community; and
4. Recognition of the right of groups or individuals to make their opinions known through the broadcasting medium, subject only to other norms as set out.[53]

The background paper contended that any group or individual seeking broadcasting time should clearly conform to those four standards. Within the Australian community, so the argument ran, exception was taken to the programme of the CPA on the ground that it did not embrace those standards. Communism was, in the author's assessment, definitely suspect or at least uncertain in terms of political democracy. Specifically, the CPA programme included advocacy of revolution, the prosecution of industrial tactics possibly in the direction of revolution, and establishment of the 'dictatorship of the proletariat' and of a one-party state.[54]

The background paper noted that the CPA did not enjoy popular support and was therefore driven to engage in propagandizing about issues in a way that deflected attention from its real, *i.e.* anti-democratic purposes. The principle of equality of access to broadcasting time could not be invoked by the CPA if its propaganda was bogus, or if there was any reasonable doubt that its underlying purposes were in accord with the standards of 'the best interests of the public'. Accordingly, the Board was urged by its adviser to adopt the following criteria (involving an amalgam of ABC and Canadian practices) in evaluating whether a putative party was or was not to be recognized as a genuine political movement:

1. Pursuance of policies on a wide range of national issues;
2. Possession of a recognised national (or State) leader;
3. Possession of a nation-wide (or State-wide) organization;
4. Standing of candidates in not less than two States and 75% of the constituencies in the case of a Federal election or 15% of the constituencies in a State election; and
5. Pursuance of policies which, judged on the written, spoken, and active record, and on the membership of, the 'party', cannot reasonably be doubted to be in (*or*, are clearly consistent with) the best interests of the general public as laid down.[55]

In arriving at this conclusion, the author of the background paper adopted a literal interpretation of the CPA's propaganda and therefore failed to acknowledge the more realistic approach to the highly charged language of the CPA

52 The principal or sole author of the Background Report appears to have been Mr Paul Freadman, a former Lecturer in the Department of Political Science at The University of Melbourne who joined the Board's staff as a research officer in early 1949 and who is the author of the article cited in n. 41 above.

53 *Background Report*, 1.

54 *Ibid.* 8.

55 *Ibid.* 14-15.

relied upon by Evatt J. in *R. v. Hush; ex parte Devanny*.[56] To its credit, at least in these preparatory stages, the Board was not persuaded to single out the CPA for adverse discriminatory treatment. Instead, it adopted two guiding principles in connection with its analysis of the access requirement. The first was that all commercial stations were to broadcast, free of charge, the opening election addresses of leaders of the parties that were broadcast on interstate relay by the ABC. The other principle was that all the commercial stations were to divide the paid time allotted by them for political broadcasts during the election period on a basis which would afford fair and reasonable access opportunities to the various parties and candidates. The Board adopted the definition of 'political party' which the ABC had used in the 1946 federal election and which, by mid-1949, the Board understood the ABC would again employ in the 1949 election. The CPA would, therefore, be entitled to qualify under the established party policy and to have its leader's policy speech broadcast on the commercial stations on relay from the ABC *if* it nominated enough candidates *and if* the ABC adhered to the approach it adopted in 1946 for the recognition of political parties. In addition, the CPA would be entitled to fair and reasonable opportunities in the division of paid broadcast time otherwise available on the commercial stations.

By late August 1949 the Board had completed its research and consultations. Notwithstanding the opposition to CPA access to radio which had been voiced by some commercial stations in response to the Board's questionnaire, the Board had been assured by the President of the Federation that the Board's proposals were both reasonable and practicable and would be accepted without objection by most responsible broadcasters.[57]

(c) *Implementation*

The Board decided that it would give effect to its policy on the access requirement as finally determined by making a formal Order under s. 6L of the 1942 Act.[58] An Order was drafted by R. G. Osborne and, because of the urgency of the situation, normal Attorney-General's Department processes were ignored. The draft was settled informally by the Chief Parliamentary Draftsman, J. Q. Ewens.[59]

Throughout the consultative process the Board appears not to have liaised regularly with Senator Cameron on the development of the Order. It sent the settled Order to him in late August 1949. Several days later Cameron wrote to Prime Minister J. B. Chifley, enclosing a copy of the Board's proposed Order. Cameron raised the CPA issue in the following way:

56 (1932) 48 C.L.R. 487.

57 Letter, Cameron to Chifley, 30 August 1949, AA, MP 1170/3, BP/5/1.

58 This was the first (and last) such Order that the Board made. Armstrong, *Broadcasting Law*, para. 309.

59 Osborne had previously worked in the Attorney-General's Department and had been Chief Parliamentary Draftsman in Tasmania. *Who's Who in Australia* (1950). Minute, Osborne to Fanning, 8 September 1949, AA, MP 1170/3, BP/5/1. Australian Archives (ACT); Attorney-General's Department, A432/1, Correspondence Files (hereinafter referred to as AA, CRS A432/1), 1949/977, Australian Broadcasting Control Board — Political Broadcasts Order.

> The Order would also, I understand, have the effect of requiring stations to accept broadcasts by the Communist Party, *if* that party is a legally accepted party for the purposes of the election. It is important to mention, however, that the Communist Party would not qualify unless they have at least 20 candidates in at least three States. The Board thinks that it could not adopt any kind of special exception to meet the case of the Communist Party without destroying the whole basis of equal opportunity which it regards as vital.[60]

On 2 September 1949 Chifley replied to Cameron saying that he considered that the arrangements provided for in the Order were very satisfactory. On the CPA issue, the Prime Minister revealed some disquiet about the Order:

> I note that the provisions of the Order will result in the Communist Party being given the same rights as the other Parties, but as far as I can see, that is impossible to avoid.[61]

It would be a mistake to under-emphasise the importance of the apparently strong commitment of both the Board and the Chifley Government to implementation of the access requirement at this late stage in the process. The Board had spent months investigating how it should give effect to the access requirement. On the CPA issue the Board had rejected advice that it should exclude the CPA from the potential benefits of the proposed Order. Moreover, at the stage when the Board notified the government that it was about to make the order, it was clearly still open to the Government to urge and, if necessary, force the Board to reconsider the CPA issue. For reasons that are examined in detail later in this article, Chifley had ample reason to suspect that the Government would face severe criticism and embarrassment by approving a scheme which gave the CPA valuable, if limited, radio access. This was at a time when the Government was engaged in a fierce struggle with the CPA and when, at the same time, it was being subjected to incessant attack from its conservative opponents for being 'soft on communism'. Despite the unmistakable indications that the CPA issue could be a source of trouble for the government, both it and the Board had displayed a determination to proceed with the Order to give effect to the important democratic principle embodied in the access requirement.

On 8 September 1949, the Board formally made the Order and it was published in the *Commonwealth Gazette* on 15 September 1949. In compliance with s. 6L of the 1942 Act, the Order was then forwarded for tabling in both Houses of Parliament. Before looking at the stormy parliamentary and public reception accorded to the Order it is important to describe its main features.

3 *THE SCHEME OF THE 1949 ORDER*

(a) *The Compulsion and Free Time Issues*

By paragraph 4 of the Order, commercial stations were obliged to broadcast, free of charge, the whole of those speeches of the leaders of political parties broadcast by the ABC. This provision was based on the ABC's established party policy and the past practice of the commercial stations which had been to accept the ABC policy speech broadcasts on relay.[62] The Board considered that

60 Letter, Cameron to Chifley, 30 August 1949 AA, MP 1170/3, BP/5/1.
61 *Ibid.* letter, Chifley to Cameron, 2 September 1949.
62 *Second Annual Report*, para. 161.

broadcasting the leaders' policy speeches was a matter of general public interest and that the speeches should therefore be given the widest possible coverage. In keeping with their position of trust, the commercial stations could fairly be expected to bear some of this important public responsibility and, since the total time to be allocated to broadcasting the policy speeches was relatively small, requiring the commercial stations to take the speeches on relay from the ABC free of charge was reasonable. The Board was influenced by similar arrangements which operated in Canada. It also decided that, because s. 89 of the 1942 Act left it to the ABC to decide what political matter it would or would not broadcast, and as a matter of uniformity of treatment, the decision as to which parties' policy speeches were to be broadcast had to rest solely with the ABC.[63]

The Board had resolved the compulsion and free time issues quite simply. Apart from the party leaders' speeches, there was no requirement that commercial stations broadcast any political material or make any other time available free of charge for political broadcasts. The solution was straightforward. The implementation problem concerned the need to formulate a clear and satisfactory definition of the term 'political party'.

(b) *Non-discriminatory Provision of Paid Time*

Where, during the election, commercial stations chose to accept political material other than the leaders' speeches they were obliged by sub-paragraph 5(1) of the Order to allocate paid broadcasting time on a non-discriminatory basis so as to ensure that

> (a) that time is distributed among all such parties and candidates on a basis which will afford fair and reasonable opportunities to those parties and candidates to put before the electors the opposing views on the issues at the election;
> (b) no preference is given to one party or candidate over another party or candidate in respect of the times at which the broadcasts of any party or candidate are made;
> (c) no party or candidate is subject to any prejudice or disadvantage in the broadcasting facilities made available to him by the licensee;
> (d) there is an adequate balance of broadcasts of political matter during each period of seven days in the election period.

For the purpose of this important requirement, 'political party' was defined, consistently with recent ABC practice, as

> a political party on behalf of which candidates are nominated in at least 15 per centum of the electoral divisions for the House of Representatives provided that those divisions are situated in not less than three States.

Sub-paragraph 5(2) of the Order did not require the granting of *equal* time to parties or candidates. Instead, it allowed considerable discretion to licensees in determining what would be *equitable in all the circumstances*. After a consideration of various practical problems which it regarded as intractable, the Board adopted the 'fair and reasonable opportunities' standard as complying with the access requirement. The most important consideration was the division of time between parties and candidates. The Board rejected the Federation's suggestion that the total available time be divided in proportion to the applications received for paid political advertising because it considered that such an approach would

[63] *Draft Report*, *op. cit.* n. 47.

involve ignoring the status of the parties in the parliament and in the electorate. Nor was the Board prepared to equate the statutory requirement of 'equitable facilities' with *equal* opportunity of access in a way that could be translated into a fair and workable concrete arrangement. Similarly, the Board was unable to devise a satisfactory equitable scheme for allocating time according to capacity to pay. In this regard it was influenced (at least in respect of the need to put some scheme in place at short notice in time for the 1949 election) by the Federation's staunch opposition to any Board-imposed requirement that commercial stations provide free time. Because of that opposition, the Board was not prepared to implement a radical departure from accepted practice at short notice.[64]

(c) *The CPA Issue*

The Board considered that the application of the fair and reasonable opportunities standard was largely in the hands of stations concerned which would be required to take account of a series of factors:

> For example, in the case of a minority party which happened to qualify (perhaps the Lang Labor (non-Communist Labor) Party or the Communist Party), each station would have to determine the amount of time which that party would be entitled to buy in light of:
> (1) The amount of time to be made available for all political broadcasts by the station.
> (2) The applications received for such time.
> (3) The respective standing of the parties ascertained by reference to such considerations as the votes secured by the parties at the previous election, the representation of all parties in the last Parliament etc.[65]

The scheme depended on a clear definition of 'political party'. The Board rejected the view that it should facilitate broadcasting of political matter by every minority party or other organization politically active during the election period.[66] The Board's definition of 'political party' was influenced by the fact that there was only one criterion 'namely, that of minimum status or minimum performance applied without discrimination to all parties legally competent to contest the elections'.[67] Thus, any party putting up a reasonable effort in the election campaign should qualify to share in the benefits of the Order unless it was affected by some exclusionary factor. The Board also wished to promote the expression of a multiplicity of opinions.

From the outset, the only problem the Board envisaged with minority parties involved the CPA. The Australian political environment had altered dramatically since Sharkey had been given free time on the ABC in 1946. The Board was well aware that disquiet about access by the CPA and its supporters to broadcasting stations was not confined to opponents of the Chifley Government. Almost on the eve of the making of the Order, one of Chifley's ministers, A. A. Calwell, had written to the Board forwarding a complaint by a Catholic priest in Albury, New South Wales about regular CPA broadcasts on radio station 2AY in Albury.

64 *Ibid.*
65 *Ibid.* The Board later reported to the Parliament that the Act permitted licensees to take into account such matters as the parties and candidates contesting the election in areas served by their stations, the applications for time actually received, and the amount of station time available for political broadcasting having regard to the normal programme and advertising arrangements of the station. *Second Annual Report.*
66 *Second Annual Report*, para. 168.
67 *Draft Report*, *op. cit.* n. 47.

Some of those programmes were highly defamatory of Calwell who endorsed the priest's call that the Board take steps to prevent such broadcasts. In response to a request sent to it by the Board, the station in Albury supplied scripts of the broadcasts each of which had been vetted (and in some cases censored) by the station's head office in Sydney before being broadcast by the station.[68] Calwell, who was given to public displays of visceral anti-Communism had, during the course of the national coal strike, in a speech delivered at the Sydney Domain at the end of July 1949, referred to the CPA as 'a screaming collection of pathological exhibits', 'human scum', 'a pack of dingoes' and 'industrial outlaws and political lepers', and had said '[t]he only places for these people are concentration camps. If it is left to me they will go'.[69]

The expression of ministerial concern about CPA use of radio may well have sounded a warning to the Board that its policy on the access requirement might run into serious trouble in the Parliament. However, at this late stage the Board seems to have been convinced, following the consultation process, that compliance with the Act required it to proceed to implement the access requirement. In retrospect, it can be easily imagined that, had the Board resorted to any form of public consultation, its proposal would have encountered opposition.[70] Given Calwell's implacable opposition to the CPA, it seems likely that if his attention had been drawn to the CPA issue during the months when the Board was investigating implementation of the access requirement, he would have sought to influence the Board and the Government against giving the CPA any rights of access.

How was the Board to comply simultaneously with para. 6K(1)(c) of the 1942 Act ensuring that programmes served 'the best interests of the general public', and the access requirement? The Board's answer was that the former provision was limited by the latter. Thus, the 'best interests of the general public' were to be secured, in part, by the 'provision of facilities on an equitable basis for the broadcasting of political or controversial matter'. The Board was of the opinion that it had no power to prohibit, select or prefer particular political or controversial matter. The only power to prohibit broadcasting of particular matter was conferred on the Postmaster-General under s. 41 and sub-s. 60(3) of the 1942 Act. The Board therefore took the view that it was not entitled to concern itself with the aims of the CPA.[71]

The Board felt that, in the context of the CPA issue, it was impermissible for it to regulate the allocation of broadcasting time by excluding broadcasts by any lawfully constituted political party or by discriminating between parties. The

[68] Letter, Calwell to Fanning, 29 August 1991, AA, MP 1170/3, BP/5/1. In response to Calwell's complaint, the Board's Director of Programme Services advised Fanning that s. 62 of the 1942 Act, which now empowered the Board rather than the Postmaster-General to censor all matter broadcast from commercial stations, should not be used against legitimate free speech. Minute, Jose to Fanning, 19 September 1949, *ibid.*

[69] *Argus*, 1 August 1949; *Herald*, 1 August 1949. In later years Calwell adopted a less antagonistic attitude to the CPA's role in Australian politics. See Calwell, A. A., *Be Just and Fear Not* (1978) 165-176.

[70] In the staff memorandum prepared on 3 June 1949 it was suggested that the Board might usefully consult the leaders of the main political parties, but this suggestion seems not to have been adopted, AA, MP1170/3, BP/5/1.

[71] *Ibid.*

exclusion of a party from broadcasting time on the basis of the unacceptable policies of that party would have exposed the Board to the serious criticism that it would be usurping the functions of the Parliament and Government of the Commonwealth by, in effect, declaring the party to be illegal. The Board also believed that the general question as to whether broadcasts by a particular party should be prohibited entirely on grounds of public policy was for the Postmaster-General and not the Board to determine.[72]

The Board was fully aware that paragraph 5 of the Order might require stations affiliated with political parties to broadcast political material by opposing parties. The Board took the view, however, that since broadcasting is a public medium in the use of which all stations have a responsibility to present all shades of opinion to the public, it was not proper for it to make any distinction between stations on the basis of their political affiliation.[73]

(d) *Broadcasts by Organizations or Persons other than Parties or Candidates*

The preliminary information received by the Board from commercial stations indicated that, at previous elections, a substantial amount of time had been purchased on many stations by organizations other than parties or by individuals other than candidates. The Board concluded that it was necessary to impose an access requirement for such organizations and individuals and at the same time to maintain a reasonable balance of programmes as a whole during the election period.[74]

Here paragraph 7 of the Order prohibited the licensee of a commercial radio station from making available more than two hours of broadcasting time in any period of seven days during the election period for the broadcasting of political matter by organizations and persons other than parties and candidates. In addition, any such time made available had to be divided equally between the organizations and persons 'and so as to afford *equal* opportunities to those organizations and persons to put before the electors the opposing views on the issues at the election'.[75] In so far as time was to be *equally* divided between representatives of opposing views, the Order treated non-party organizations quite differently to parties. This was done because the Board feared that otherwise the available time would be apportioned solely on the basis of the financial resources of organizations or individuals concerned to support or oppose particular policies. The Board adopted this different approach because of what it regarded as the clear distinction between broadcasts by parties and candidates on general political issues, and special appeals to the electors by particular interests.[76] There was, however, no obligation on a licensee to provide any such time free of charge, but otherwise paid time had to be offered on the same non-discriminatory basis that paid time had to be made available to parties and candidates.[77]

[72] *Ibid.*
[73] *Second Annual Report*, para. 169.
[74] *Ibid.* para. 172.
[75] *Ibid.* Emphasis added.
[76] *Ibid.*

(e) *Record-Keeping Obligations*

Licensees were required by paragraph 8 of the Order to keep a complete record of all applications for broadcast time made by or on behalf of parties, candidates and organizations and persons other than parties and candidates, the disposition of the applications, the charges imposed for time made available, and to provide the Board with a copy of the record so kept within seven days after the expiration of the election period.

(f) *Scripts of Broadcasts and Recordings*

Paragraph 9 of the Order imposed on each licensee obligations to require every person making a live political broadcast from the licensee's studio to supply the script from which the broadcast was made, to retain such scripts for at least three months after the expiration of the election period, to supply such a script to the Board on request and, where any political matter was broadcast from a recording, to supply a copy of the script to the Board on request.

4 *THE FURORE*

(a) *The Political Setting*

To understand why the Order provoked such an intense reaction and why it was to enjoy only a short life in its original form, it is essential to recall something of the turbulent political atmosphere within which the Board was expected to operate. The mounting tension and hostility which so characterized Australian politics in the period 1945-1950 presented the Board with a challenge in determining what was to be done to ensure compliance with the parliamentary mandate that broadcasting facilities were to be provided on an 'equitable' basis in a situation where the CPA was competing for access to those facilities.

First and foremost there was the emergence of the Cold War. Within a relatively short time after the end of the Second World War in 1945 many of the nations of the world had divided into two camps. Relations between the Western powers the leadership of which was firmly in the hands of the United States of America, and various Eastern European nations led by the Soviet Union deteriorated continuously from late 1945. The Soviet Union was perceived by many in the West as relentlessly determined, by the use of force or fraud, to gain control of and then to enslave, that part of the globe which remained outside its hegemony.[78] These international tensions worsened in June 1948 when the Soviet Union imposed a blockade on Berlin in a show of strength that was to last until the blockade was lifted in May 1949. By the end of 1948 the Soviet Union

[77] Paragraph 7 of the Order also contained an elaborate provision which required any news commentary, talk or similar broadcast which consisted of or included political matter to be taken into account for the purposes of determining the amount of political matter emanating from organizations or persons other than parties or candidates that was permitted to be broadcast.

[78] There is a vast and controversial literature on the origins of the Cold War. A useful introduction can be found in Dockrill, M., *The Cold War 1945-1963* (1988).

had established its influence in Poland, Bulgaria, Czechoslovakia, Rumania, East Germany, Hungary and Albania.

Any suggestion that the Soviet Union was acting out of a traditional Russian concern for its vulnerability to attack through Eastern Europe (reinforced by even deeper Soviet concerns about the new menace of U.S. atomic weapons and the West's policy of containment)[79] was regarded within conservative political circles in Australia as a sign of childish naïveté or, worse still, sedition. On 29 August 1949 the United States lost its monopoly on atomic weaponry when the Soviet Union exploded its first atomic device. The atomic arms race had begun. Much closer to home there was the apparent downward thrust of Asian communism. By August 1949 the Chinese Communist Party led by Mao Zedong was poised to drive the Koumindang led by Generalissimo Chiang Kai-shek out of mainland China. The Cold War was the dominant factor influencing Australia's role in world affairs.[80]

Secondly, the onset of the Cold War in Europe also had a direct effect on domestic Australian politics. This was exemplified by a vigorous debate about loyalty and subversion which was central to the CPA issue. By early 1949, with the world outlook deteriorating and widespread talk of the imminent outbreak of a third world war, the deadly threat said to be posed by Communism to Australia's internal security had inevitably emerged as a major political issue. The Chifley Government rejected claims that the CPA was organized principally for subversion. The Opposition Liberal and Country Parties and other anti-Communist groups repeatedly denounced the Government as irresponsible on this issue of national survival. On the right of the political spectrum the issue was abundantly clear: Communism was a monolithic and alien threat, and Australian Communism was, in its slavish adherence to Moscow and to Stalinism, treason.

The vital issue of Australia's national security was fuelled by an incendiary political rhetoric. With the passage of time and the end of the Cold War, it is tempting to ignore the intensity of anti-Communist feeling and the extent to which it permeated and regulated public and private discourse. Two anecdotes will suffice to illustrate this. In January 1949 Colin Clarke, the economic adviser to the ALP Government in Queensland, told a conference of university students that Australians had to face the possibility that, in the event of war with Russia, Communist fifth columnists would plant atomic bombs in their cities.[81] In April Lady Dixon, the wife of High Court Justice, Sir Owen Dixon, speaking in her capacity as President of the Women's Group of the Royal Empire Society was reported in the press as telling a public meeting of the International Club of Victoria in Melbourne that any Australian born in Australia who embraced Communism was a traitor. The judge's wife summed up the anti-Communist cause by saying what many people believed, namely, that there was no half way position. There had to be a choice between good or evil and people must be either

[79] See Ambrose, S., *Rise to Globalism: American Foreign Policy 1938-1980* (2nd ed. 1980) ch. 4.
[80] Curthoys, A. and Merritt, J. (eds), *Australia's First Cold War 1945-1953*, Vol. 1 (1984), chs 3 and 4.
[81] *Sydney Morning Herald*, 19 January 1949.

loyal or disloyal.[82] The intense enmity between left and right was notable for its constant vituperation. For the right, anybody not *vehemently and actively* opposed to Communism was to be treated as a supporter of a disloyal and subversive movement, or as highly suspect.

Whilst it was putting the finishing touches to the Order implementing the access requirement, the Board was dragged into the war of words because of the enlarged ban in sub-s. 89(3) of the amended 1942 Act on the dramatization of political events. The Returned Sailors Soldiers and Airmen's Imperial League of Australia ('the RSL'), one of the country's most vocal and active anti-Communist organizations, had decided to declare August 1949 its 'Anti-Communist Month'. Part of its activity involved the presentation of a scripted radio feature on the topic 'Shall We Abandon Australia?' This consisted of a dramatized conversation between two men on the blandishments and perils of Communism. Problems arose when some commercial radio stations, backed by the Federation, refused to broadcast the RSL feature. The RSL sought to have the Board give an informal ruling that such programme material did not contravene sub-s. 89(3). The Board was not persuaded and, partly in response to a request from the Federation for advice, and partly because of difficulties which the ABC was experiencing in interpreting sub-s. 89(3),[83] on 2 September 1949 the Board issued a statement on the interpretation of the term 'dramatization'. The statement had been settled by the Commonwealth Solicitor-General, K. H. Bailey.[84] The RSL was outraged by the Board's decision and later made strenuous but unsuccessful efforts to have the Government overrule the Board.[85]

A third related aspect of the political setting was the highly sensitive issue of the Chifley Government's approach to Australia's internal security apparatus and anxiety within Australia's defence establishment about alleged Soviet espionage in Australia. By 1949 this anxiety had received some public airing which was reinforced by Australian media reports of sensational accusations and disclosures in the United States about Soviet espionage there, culminating in several highly publicised trials, notably that of the former high-ranking U.S. State Department official, Alger Hiss.[86] It was widely believed that the detonation of an atomic device by the Soviet Union was the direct result of information gathered by Soviet espionage agents and the betrayal of U.S. atomic secrets by pro-Soviet scientists and diplomats in the U.S. The Chifley Government had good reason to be concerned by the rising level of anti-Communist fervour in Australia, especially because since early 1948, allegations had been circulating in the highest circles in London and Washington that there was a Soviet-controlled

[82] *Age*, 29 April 1949.

[83] Letter, Watson to General Manager, A.B.C., 20 May 1949, AA, CRS A432/1, 1949/279, ABC-Interpretation of Section 89; AA, CRS A432/1, 1949/894, Federation of Australian Commercial Broadcasting Stations — Script of Political Broadcasts.

[84] Letter, Fanning to Bailey, 15 August 1949; Letter, Bailey to Fanning, 2 September 1949. AA, CRS A432/1, 1949/279.

[85] Letter, Neagle to Menzies, 20 December 1949; Letter, Menzies to Neagle, 9 June 1950, R.S.L. Papers, NLA, Files 2414C and 2966C.

[86] For two contrasting views of the case see Jowitt, W. E. (1st Earl), *The Strange Case of Alger Hiss* (1953); Weinstein, A., *Perjury: The Hiss-Chambers Case* (Vintage ed. 1979).

Communist spy ring operating in the upper echelons of the Australian public service including H. V. Evatt's Department of External Affairs.[87] By early 1949 the Chifley Government was under increasing pressure by the Governments of the United States of America and the United Kingdom to take effective action to strengthen Australia's internal security arrangements against Communist subversion. In mid-1948 the United States Government had suspended the flow of classified military information to Australia, having become convinced that what it perceived as the Communist-influenced Government of Australia was 'a poor security risk'.[88]

The U.S. embargo created severe strains in Australia's relationship with both the United Kingdom and the United States.[89] The Chifley Government's establishment of the Australian Security Intelligence Organization ('ASIO') in March 1949, reluctantly and largely at the urging of the United Kingdom counter espionage agency MI5, did little in the short term to allay U.S. Government fears. After a year of sustained effort by its senior civil and military advisers aimed at persuading the US Government that it was serious in its determination to curb the CPA menace, the Chifley Government could not help but be embarrassed by the Board's action in enabling the CPA to voice its propaganda, much of it virulently anti-American in content.

A further related factor was the antipathy which existed between the ALP and the CPA and, by mid-1949, the CPA leadership's deluded attachment to the idea that the time was approaching when the CPA could challenge the Commonwealth Government's authority and capture from the ALP decisive leadership of the working class political movement. During 1948-1949 the Chifley Government prosecuted three CPA leaders for sedition arising out of pro-Soviet statements.[90] Only two months before the Board made its order a showdown had occurred. From 27 June until 15 August 1949 there was a CPA-inspired and supported general strike in the coal industry. The strike caused widespread public disruption and hardship and led to the urgent passage by the Commonwealth Parliament on 29 June of the partially retrospective National Emergency (Coal Strike) Act 1949 which provided for the seizure of union funds, the use of the

[87] Rear Ad. R. H. Hillenkoetter, Memorandum for the President, 27 January 1948. Dean Acheson Papers, Harry S. Truman Library, Independence, Mo. I am grateful to Dr Gregory Pemberton of the University of New South Wales for providing me with a copy of this memorandum by C.I.A. Director Hillenkoetter. Australian Archives (ACT), CRS A5954/1, Sir Frederick Shedden Papers (hereinafter referred to as AA, CRS A5954/1), Box 1795. Memorandum, 'Australian Security Service — Note on Progress from 1 to 29 June 1949', 20 July 1949. These espionage allegations were revived following the defection, in Canberra in April 1954, of the Soviet diplomat, V. Petrov. For two contrasting assessments of the allegations see Whitlam, N. and Stubbs, J., *Nest of Traitors: The Petrov Affair* (1974) and Manne, R., *The Petrov Affair: Politics and Espionage* (1987).

[88] National Archives (Washington, DC) RG 218, Records of the United States Joint Chiefs of Staff, SANACC 206/57, Disclosure of United States Classified Military Information to Australia, 18 May 1948, Enclosure B.

[89] See Cain, F., 'Missiles and Mistrust: US Intelligence Responses to British and Australian Missile Research' (1988) 3 *Intelligence and National Security* 5; Cain, F., 'An Aspect of Post-War Australian Relations with the United Kingdom and the United States: Missiles, Spies and Disharmony' (1988) 23 *Australian Historical Studies* 186. *Parliamentary Debates*, House of Representatives, 4 November 1948, 2478-2530.

[90] *Burns v. Ransley* (1949) 79 C.L.R. 101; *R. v. Sharkey* (1949) 79 C.L.R. 121; *R. v. Healy* (Supreme Court of Western Australia, 1 November 1949).

armed forces to work the coal mines, and the imposition of fines and terms of imprisonment on Communist leaders of the mining unions for breaches of orders made under the emergency legislation.[91]

During the coal strike disputes arose about an ABC broadcast by the Chairman of the Joint Coal Board which was critical of the strike and about a dramatized item of the strike, produced by the ABC Feature Department. These broadcasts led to tension between the Chifley Government and the ABC. The ABC was attacked by the mining unions for not giving them time to reply to the broadcast of the Joint Coal Board Chairman, by anti-Communist elements within the ALP for not giving time to the Queensland Premier to make an address about the coal strike, and by the Commonwealth Government for infringing s. 89(3) by broadcasting the dramatized feature.[92]

These and other related developments profoundly influenced post-war Australian society. The fierce domestic political struggle was portrayed by the right wing in Australia as one in which, not merely short term public tranquility, but rather the long term survival of Australia's democratic form of government was at risk. In all of this, and despite scorn constantly being heaped on him by his opponents, Chifley stuck firmly to the view that the CPA was entitled to claim genuine political party status and that the only way to defeat the challenge presented by the CPA was to meet it head on and in the open in the industrial and political arenas. Emphasising that if the CPA or its adherents infringed the existing law they would be prosecuted, Chifley repeatedly rejected calls for repressive legislative and administrative measures to be applied to the CPA.[93]

(b) *Whose Democratic Values?*

On the afternoon of 15 September 1949, the day of gazettal of the Order, the Board released a public statement explaining the background to, and main features of, the Order. The Board's statement attracted extensive media attention and comment. The rumblings and discontent began immediately.[94] The following day the *Sydney Morning Herald* noted that commercial radio stations believed that the Order might involve them giving them free time to the CPA

91 Commonwealth, *Parliamentary Debates*, House of Representatives, 29 June 1949, 1673-1724; Senate, 29 June 1949, 1643-1657. S. 8 of the Act operated to affect certain conduct dating back to 16 June 1949. On 6 July 1949 the constitutional validity of the Act was upheld by the High Court in *R. v. Taylor; ex parte Federated Ironworkers' Association of Australia* (1949) 79 C.L.R. 333. Deery, P. (ed.), *Labor in Conflict: The 1949 Coal Strike* (1978); Deery, P., 'The 1949 Coal Strike', Ph. D. Thesis, La Trobe University (1979) Sheridan, T., *Division of Labour: Industrial Relations in the Chifley Years 1945-1949* (1989), ch. 12.

92 Letter, Cameron to Dawes, 1 July 1949; Letter, Boyer to Cameron, 26 July 1949; Letter, Maryborough ALP Branch to Secretary, Federal Parliamentary Labor Party, 12 August 1949; Letter, Cameron to Boyer, 7 September 1949; Letter, Boyer to Cameron, 9 September 1949. AA MP1170/3, BP/5/1.

93 See *e.g.* Commonwealth, *Parliamentary Debates*, House of Representatives, 2 September 1949, 62-67. Crisp, L. F., *Ben Chifley* (1961) 354-367.

94 In the House of Representatives the Country Party Leader, A. W. Fadden, asked Calwell a question about para. 5(1)(d) of the Order. Calwell seemed unprepared for the question and this is consistent with the fact that the Board's contact with the government during the preparatory stages was limited to the provision of a copy of the proposed Order to the Postmaster-General and the Prime Minister. Commonwealth, *Parliamentary Debates*, House of Representatives, 15 September 1949.

leader.[95] In Melbourne the *Argus*, misreading the terms of the Order, claimed that it required equal time to be granted by broadcasters to all recognized political parties. Perhaps the most vehement editorial reaction was that of the *Bulletin* which attacked the Government and the Board under the heading 'Shades of Goebbels'.[96]

On 20 September J. T. Lang, the former ALP Premier of New South Wales and one of the Commonwealth Parliament's most strident anti-Communists, asked Chifley a question in the House of Representatives about the Order. Lang, whose one-man Anti-Communist Labor parliamentary party would not qualify for time under the Order, urged the Government to amend the 1942 Act to give stations the right to refuse time to the CPA on the ground that it advocated anti-constitutional and revolutionary action.[97] In reply, Chifley told the House that he had examined the Order and he believed that Evatt had also examined it. Chifley indicated that, following a discussion he had had with Senator Cameron, the whole matter was being re-examined by the Board.[98]

The complaints made to the Postmaster-General and the Board about the Order fell, predictably, into three main categories. The first was that because, under clauses 4 and 5 of the Order, ALP-owned radio stations would be required to broadcast election addresses by the CPA, this would be taken by some members of the public to mean that the ALP was sympathetic to or associated with the CPA. This would be gravely prejudicial to the ALP's electoral prospects especially with undecided voters. Next, it was argued that some licensees were religious organizations with the most definite objections to affording any facilities to the CPA. To force these licensees to provide such facilities would be an affront to Christian principles. Finally, attention was directed to the fact that any party on behalf of which 18 candidates were nominated in three States had a legal right to free time. Thus, for the expenditure of 450 pounds on candidates' deposits under the Commonwealth Electoral Act 1918 'any cheap-jack party' could obtain time which was worth thousands of pounds.[99]

5 *OFFICIAL REACTION TO THE FURORE*

(a) *The Board*

Given the uproar which had greeted the announcement of the making of the Order, it was inevitable that the Board would feel it necessary to consider the objections, however disinclined it may have been to allow itself to be dragged into the centre of one of the burning political issues of the time. The archival

[95] *Sydney Morning Herald*, 16 September 1949.
[96] *Bulletin*, 24 September 1949.
[97] Commonwealth, *Parliamentary Debates*, House of Representatives, 20 September 1949, 344-345. Lang, J. T., *Communism in Australia* (1944). Nairn, B., *The 'Big Fella': Jack Lang and the Australian Labor Party 1891-1949* (1986) 312-314.
[98] Commonwealth, *Parliamentary Debates*, House of Representatives, 20 September 1949, 344-345. On the same day in the New South Wales Legislative Assembly the Premier was asked if he would approach the Prime Minister to deny the CPA free broadcasting time during the forthcoming federal election. New South Wales, *Parliamentary Debates*, 20 September 1949, 3511.
[99] Memorandum, 21 September 1949, AA, MP1170/3, BP/5/1.

record makes a convincing case for the Board's claim that, before making the Order, it had carefully examined the practices adopted in other English speaking democracies and those which had been recommended unanimously by all party committees of the Federal Parliament for adoption in Australia.[100]

Despite what Postmaster-General Cameron had said in 1948 in his second reading speech on the amending Bill concerning the limited autonomy of the Board, the Act clearly left it to the Board alone to determine, in its discretion, subject only to the possibility of parliamentary disallowance of any Order made under s. 6L of the amended 1942 Act, what was necessary and desirable to ensure that broadcasting facilities were provided on an equitable basis. It was a matter solely within the province of the Board. The Board did not require the Minister's approval. Nor did the Minister have any power to direct the Board in this respect.[101] The Government was, however, anxious to quell the controversy which the gazettal of the Order had provoked and the Board was acutely sensitive as to the Government's concern about the CPA issue.

On 19 September 1949 Fanning, in response to the request from the government, had sent Cameron a detailed report about the making of the Order. Fanning acknowledged that the controversy derived from the fact that paragraphs 4 and 7 of the Order 'may have the effect of requiring the broadcasting of election addresses etc by or on behalf of the [CPA]'. He concluded by advising Cameron that, if the CPA qualified as a party for the purposes of the Order, it did not follow that it would be entitled to equal time with the other parties. Each commercial station would be required to determine the amount of time which the CPA would be entitled to buy from the station having regard to the total amount of time available on the station for political broadcasts, the applications for time and the respective standing of all the parties ascertained by reference to the votes secured by them at the previous election and the representation of the parties in the last Parliament. The following day Cameron replied to Fanning's memorandum asking the Board to give further consideration to the CPA issue, to consult with the ABC and then to discuss the matter with the government.

Also on 20 September, Cameron wrote to Chifley informing him of the request he had sent to the Board. He concluded this letter with the following comment:

> Before I discuss the question with the Board again I would like to have your views on the matter as the Board has no desire to embarrass the Government in any way.[102]

The Government's approach to the Board may have been couched in the terms of a request, but in substance the Board was being treated as if it had the status of a department under the direct and complete control of the Government. According to Professor Inglis, '[t]he Chifley Government ... made the Control Board withdraw the order ...'[103] It is clear that, so far as implementation of the access requirement was concerned, the Government had no legal authority to *insist* on the Board adopting a particular course if the Board was unwilling to do so. Here,

[100] *Second Annual Report* para. 154.

[101] Senator Cameron had explicitly acknowledged this when he wrote to Prime Minister Chifley on 30 August 1949 forwarding the proposed Order. AA, MP1170/3, BP/5/1.

[102] *Ibid.* letter, Cameron to Chifley, 20 September 1949.

[103] Inglis, *op. cit.*, n. 9, 172.

however, it seems equally clear that Government did not have to apply much pressure to the Board. Instead, the Board was anxious to please the Government and to relieve its embarrassment. The Board was conscious of the link between its work and the role of the ABC and during the furore over the Order Fanning maintained close contact with ABC Chairman, R. J. F. Boyer.[104]

At the same time the Board sought a legal opinion on the nature and scope of its obligation to implement the access requirement. On 27 September 1949 the Order was tabled in the House of Representatives. On the same day the Board was given a memorandum of advice by Gregory Gowans, K.C. of the Victorian Bar. Gowans had no doubt that in carrying out its function of implementing the access requirement the Board was not permitted to take into account the religious or political susceptibilities of licensees.[105] Gowans advised that

> the case is stronger in favour of the opinion of the Board being substituted for that of the licensee, at all events, so long as the matter sought to be excluded comes within the condemnation of the law, whether statutory or general.[106]

An example of this, according to Gowans, was political matter

> which advocates, directly or indirectly, the attainment of political or social objectives by other than the established constitutional processes of democratic government [and which] might fall within the area of sedition or other like illegality.[107]

Gowans considered that there might well be a major difficulty in the Board establishing the existence of the necessary facts or even reasonable grounds for believing in their existence and the Board's conduct in this regard would be examinable by a court. However, Gowans also gave the Board a way out of the imbroglio by advising it that the allocation of limited broadcasting time among only those parties that were already represented in the Parliament would not violate the access requirement.[108]

The day after Gowans gave his advice to the Board, while the fate of the Order was still under review by the Board, Opposition Leader, R. G. Menzies, raised the Order in an adjournment debate in the House of Representatives. The motion was to discuss a definite matter of public importance namely

> The invasion of freedom of speech, choice of listening, and business enterprise, which result from the . . . Order made by the . . . Board.[109]

Menzies soon made it plain that the CPA issue had to be confronted:

> We may have the singular spectacle, as a result of this piece of bumbledon, of broadcasting stations devoted to the propagation of Christianity being compelled to broadcast the views of atheistic Communists.[110]

The turning point in the debate was the Government's abandonment, during the contribution of the Minister for Information and Minister for Immigration, A. A. Calwell, of the principle of equality of access embraced by the Board.

104 Members of the Broadcasting Control Board and the ABC conferred on 28 September 1949. Letter, Fanning to Boyer, 12 October 1949, AA, MP 1170/3, BP/5/1.
105 *Ibid.* Memorandum of Advice, 'Political Broadcasts (Federal Elections) Order', 27 September 1949.
106 *Ibid.*
107 *Ibid.*
108 *Ibid.*
109 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1949, 643-659.
110 *Ibid.* 645.

He left no doubt as to what he thought of the Board's action in promulgating the Order:

> When the Government received the order from the Australian Broadcasting Control Board it was in the position that it could have referred it back to the board expressing disapproval of it, or it could have accepted the order as it has done and brought it to the Parliament as required by law, so that honourable members could have an opportunity to move for its disallowance or to make any observations that they cared to make on it. My own view, and I think I express the view of all honourable members on the Government side who have studied the order, is that in respect of that portion of it which defines parties, it is a stupid order.[111]

Calwell told the House that it was the ABC's decision in 1946, 'for some extraordinary reason', to give free time to the CPA that had led to the present mistake made by the Board and that it was likely that the Order would be revoked and that a new Order would be made in which the parties already represented in the Parliament would be specified.[112]

This determined show of parliamentary displeasure made the Board's position on the CPA issue, and therefore on the central scheme of the order difficult, but not untenable. The Government enjoyed a comfortable majority in the House of Representatives and had control of the Senate. In such a situation a Government, determined to defend a piece of subordinate legislation, could have complete confidence that there was no prospect whatsoever of either House disallowing the Order pursuant to the Acts Interpretation Act 1901-1947. The real issues were: Would the government cave in to Opposition and media demands? And, if pressed, would the Board adhere to the principled approach it had carefully formulated and implemented?

As events developed, with a senior Minister attacking the Board and other disquiet in the Government's ranks on the Board's action, together with Opposition, media and public indignation, the fate of the Order was sealed. The Board did not need to be stood over by the Government to be conscious of the real risk that its standing and effectiveness could be irreparably damaged if it did not heed the disapproving signal being sent by the Parliament. If the Board ignored that signal and refused to budge, the result would have been the disallowance of the Order and, in all likelihood, quite apart from the CPA issue, the replacement of the Board's members. Yet, at the same time, the Board knew that there was also a strong likelihood that a Menzies Government would abolish the Board anyway for the reasons which had led the Opposition, twelve months before, to denounce the government for establishing the Board. The Board members had accepted their appointments in this climate of hostility in the full knowledge that the Opposition viewed the Board as an instrument for the nationalization of broadcasting. In this situation, a courageous commitment to principle should have led the Board to risk being replaced without the Board members suffering any appreciable increase in anxiety.

The Board took a different view. It discussed its review of the Order with

111 *Ibid.* 647.

112 *Ibid.* 649. Calwell had been provided with a detailed written briefing by Fanning in preparation for the adjournment debate, but seems to have disregarded it entirely: Teleprinter Message, Fanning to Calwell, 28 September 1949, AA, MP 1170/3, BP/5/1. It appears that no objection was raised in the Parliament in 1946 to the ABC's decision to give broadcast time to the CPA. Inglis, *op. cit.*, n. 9.

113 Letter, Cameron to Chifley, 30 September 1949, AA, MP 1170/3, BP/5/1.

Cameron and informed him that it was impracticable to amend the Order in such a way as to exclude the CPA from its benefits without at the same time unjustifiably excluding other minority groups.[113] In the face of an unremitting media attack upon it, the Board took the safe option and refrained from making any public comment on the controversy. In the climate of intensifying public hysteria about the Communist menace, opponents of the Board were simply not interested in listening to its justification for its considered approach to equality of access to political broadcasting. But, once the pressure was applied to it, the Board decided with alacrity that it had made a mistake and that the Order required amendment. Ostensibly, the Board refused to respond to the furore by amending the Order so as to discriminate against the CPA. It went further and radically altered the scheme provided for in the Order.

In doing this the Board completely abandoned months of work and the principle embodied in s. 6 of the amended 1942 Act and, in effect, removed the one legal impediment to discrimination deliberately directed at the CPA. Fanning sent Cameron a report on 30 September 1949 detailing the legal advice given to the Board by Gowans and a proposed explanatory statement responding to the furore and indicating why the Board had decided to amend the Order. Cameron wrote to Chifley the same day endorsing the Board's proposal and, following a discussion between the two Ministers on 3 October, Chifley readily agreed.[114]

On 5 October, in the House of Representatives, Lang again asked Chifley a series of questions about the Board and the Government's intentions. Chifley told the House that when Cameron had referred the Order back to the Board 'he may have intimated that the Order in its original form might be disallowed', and that Cameron had asked the Board to re-draft the Order in terms that would be likely to meet with the approval of the Parliament.[115] On 6 October 1949 the Board made another Order repealing clauses 4, 5 and 7 of the original Order. On the same day Chifley formally responded to the question which Lang had asked in the House of Representatives on 20 September 1949 by presenting the Board's explanatory statement to the Parliament. In explaining its turnaround the Board responded directly to the Parliamentary debate in a way that was reminiscent of Senator Cameron's second reading speech on the Australian Broadcasting Bill 1948 in which he had emphasised that the Board's independence was ultimately limited by Parliament's intentions. According to the Board,

> it would seem from the discussion which took place in the Parliament last week that, notwithstanding the relevant provisions of the Act, it is not the desire of the Parliament, which has power to disallow any order of the Board, that these conditions should be applied to the broadcasting of political matter prior to the forthcoming Federal Election . . .[116]

(b) *The ABC*

In early August 1949, at the height of the drama of the national coal strike and with an election looming in which the dangerous threat said to be posed by the CPA was one of the major issues, the ABC informed the Board that at its last

[114] *Ibid.*; Memorandum, 30 September 1949; Letter, Chifley to Cameron, 4 October 1949.
[115] Commonwealth, *Parliamentary Debates*, House of Representatives, 5 October 1949, 903-904.
[116] *Ibid.*, 6 October 1949, 1055-1056, 1114.

meeting the ABC had decided, in effect, to allocate time for political broadcasting for the forthcoming election in line with its 1946 decision. This meant that 'with regard to parties not already established in the House, the Commission will favourably consider allocating such broadcasting time as it deems fit to such parties as are contesting at least 15% of the total number of vacant seats and have candidates in at least three States of the Commonwealth'.[117]

The effect of this decision would not therefore be known until the writs for the election were issued. In all likelihood, however, the CPA would contest the minimum number of seats. As late as three days before the Board made the Order, the ABC Chairman, R. J. F. Boyer, wrote to Fanning responding to a request for comments on the Board's wish to ensure that the policy speeches of the leaders of the various parties be given the widest possible coverage. Boyer referred to the 'admittedly difficult problem of minority parties', but doubted whether confining the Board's mandate to recognized major parties would dispose of the problem.[118] Like the Board's stand as embodied in the original Order, the ABC's apparent continuing commitment to the more liberal policy it had adopted in 1946 is impressive given the upheaval of the coal strike and the various attacks made on the ABC for its political broadcasts at the time.

Once the Order was made public the lesson of the Board's misfortune was not lost on the ABC. By engaging in its own brand of *realpolitik*, the ABC was able to avoid the political storm of outrage which rained down on the Board. Had the ABC adhered to its 1946 policy, reaffirmed as recently as the previous month, it would have offered the CPA time to broadcast Sharkey's policy speech and thereby exposed itself to the same kind of ferocious attack which had been lauched against the Board. However, on the day of the debate on the Order in the House of Representatives the ABC held a special meeting and, after the completion of the parliamentary debate, the ABC announced that it had resolved to alter its policy by adding a further qualifying factor namely, 'sufficient significant public support' at the previous election. This could be satisfied by showing either the election of a member or by securing 5% of the total votes cast at the previous election. The CPA, which during its wartime honeymoon stage had managed to secure 2% of the total votes cast in the 1943 federal election, clearly could not satisfy that requirement in 1949. Immediately following its special meeting the ABC announced that it had decided not to provide any time to the CPA in the 1949 election for the reason that the CPA did not conform to the ABC's revised principles because it had received so little popular support at the 1946 election. The ABC had also succumbed to the prevailing anti-communist hysteria and government pressure. This expedient *volte face* by the ABC, executed so as to deny facilities to the CPA, effectively insulated it from the

[117] Letter, Moses to Fanning, 2 August 1949. AA MP 1170/3, BP/5/1. The statement by Freadman, *op. cit.*, n. 41, 292 that the ABC's policy on broadcasting party leaders' policy speeches 'had not been revealed when the Board's order was made' is misleading. It had not been revealed to the public, but it was, as the letter dated 2 August 1949 evidences, well known to the Board.

[118] Letter, Boyer to Fanning, 5 September 1949, AA, MP1170/3, BP/5/1.

trenchant criticism which was levelled at the Board, but did not, however, let the Board or the Government altogether off the hook.[119]

(c) *The Government*

The action of the Board, in repealing those parts of the Order which were so offensive to the Opposition and to elements within the ALP and elsewhere within the all-pervasive anti-Communist community in Australia, did not necessarily extricate the Government from the acute political difficulties which the Order had precipitated. There remained the risk that the CPA might issue legal proceedings to enforce implementation of the access requirement. Chifley, sensing the potential for further damage to be inflicted on the government by any forced accommodation of the CPA's wish to have as much radio exposure as possible, wanted to know whether any dissatisfied party could take legal action to compel the Board to make some provision for equitable facilities similar to those contained in the original Order. On 10 October 1949 Osborne conferred with Bailey, who expressed the opinion that s. 6K of the Act did not give

> any legal right to compel the Board to act in a particular way or at all with respect to the provision of facilities for the broadcasting of political matter.[120]

The Government was correct in suspecting that the CPA would be aggrieved by the denial of access which repeal of clauses 4 and 5 of the Order involved. On 1 November 1949 Max Julius, a member of the Queensland Bar and a would-be CPA candidate in the forthcoming election complained to the ABC's Queensland Broadcasting Advisory Committee that the Board had failed to carry out its functions under the Act.[121] Julius told the Committee that he intended to issue proceedings in the High Court of Australia to seek relief to restrain commercial radio stations from refusing to broadcast CPA material. Two days later the Queensland State Secretary of the CPA wrote to the Board complaining that the majority of commercial stations had refused to accept CPA election material and urging the Board to carry out its statutory duty to ensure that facilities were provided on an equitable basis. However, the CPA seemed not to be in a seriously threatening mood and the Board replied to the complaint by stating that it was not intending to take any further action in relation to political broadcasts in the forthcoming federal election campaign. The CPA did not carry out its threat of legal action.[122]

[119] *Draft Report*, 91. The ABC Chairman was reported as stating, as a public justification of the ABC's stance, that not only did the CPA fail to win a seat in the 1946 election, it had also only obtained an insignificant percentage of the total number of votes cast. *Argus*, 29 September 1949.

[120] Minute, Osborne to Fanning, 13 October 1949, AA, MP 1170/3, BP/5/1.

[121] Max Julius had experienced difficulty in obtaining admission to the Queensland Bar because of his political beliefs. See *Re Julius* [1941] St. R. Qd. 247.

[122] Letter, Conry to ABC Board, 1 November 1949; Letter, Robinson to ABC Board, 3 November 1949; Letter, ABC Board to CPA, 8 November 1949, AA, MP 1170/3, BP/5/1. It is difficult to see how the CPA could have obtained relief against the commercial stations since s. 89 of the 1942 Act did not impose any obligations on the licensees. Any obligations which the licensees did have were dependent on the Board implementing the access requirement.

6 *ASSESSMENT*

The Board's unwillingness to defend its original Order was the direct result of a failure of nerve on its part and of pressure applied to it by the Chifley Government whose far-sighted policy for access to the radio spectrum was defeated by the prevailing anti-communist hysteria of the time. When the Board was confronted with the choice between taking a stand on principle to defend its action in implementing the legislative direction that it promote access to the radio spectrum, or succumbing to the pressure applied to it by and from outside the Government, the conclusion seems inescapable that the three Board members acted chiefly out of self-interest driven by fear for their careers as full-time public servants. In doing so they abandoned the access policy altogether.

By the time the Board made the Order the Australian political environment was gripped by a climate of all-pervading fear of communism. There were widespread rumours that the CPA was heavily armed and poised to mount an insurrection. There was a constant harping on the theme that the CPA was no more and no less than an active revolutionary movement directed from Moscow. On 17 October 1949, less than two weeks after the Board's *volte face*, Mr Justice F. A. Dwyer in the Supreme Court of New South Wales sentenced CPA General Secretary, L. L. Sharkey, to three years at hard labour following Sharkey's unsuccessful appeal to the High Court against a conviction for uttering pro-Soviet seditious words to a newspaper reporter in the course of a series of telephone calls.[123] In his sentencing speech the judge, echoing popular prejudice and hysteria, referred to the CPA in terms of its 'treasonable conspiracies'.[124]

Just how menacing and dangerous was the CPA at this time? Was it the active treasonable conspiracy that Mr Justice Dwyer saw personified in Sharkey? Was the national security so imperilled by the CPA that opinions expressed by CPA zealots should be suppressed and the CPA denied access to the radio spectrum? Such contemporary and other evidence as is available demonstrates that the CPA was a radical movement which operated at various levels. It could be secretive and devious in, for example, its use of front organizations and its determination to control the trade union movement. At the same time it had a high public profile. In public it was (in common with most of its most ardent foes) rowdy, confrontational and it expressed itself through the bombastic and provocative political language of the time. It was not, however, fomenting an armed rebellion. Nor did it present a real or immediate danger to the continuation of constitutional authority in Australia.

The Royal Commission of Inquiry into the CPA conducted in Victoria in 1949-1950 by Mr Justice Lowe of the Supreme Court of Victoria proved disappointing to those on the right of Australian politics whose vivid imaginations led them to fear an imminent Soviet-backed insurrection in the wake of industrial chaos brought on by the CPA.

123 See n. 90 above.

124 *R. v. Sharkey*, Supreme Court of New South Wales (Dwyer J., unreported, 17 October 1949), typescript, p. 16.

Mr Justice Lowe found that the CPA was committed to the overthrow of the capitalist state, that if the capitalists did not abdicate power voluntarily they would be violently overthrown, that there was some evidence of CPA members using fraud, intimidation and violence to achieve their aims, and that the CPA was prepared to use the institutions of representative democracy until the inevitable revolutionary situation arrived. In many ways the Report of the Royal Commission, in its analysis of CPA propaganda, echoed the notion of *gradualness* of the inevitable collapse of the capitalist system which Mr Justice Evatt had remarked on in *R. v. Hush; ex parte Devanny*[125] almost 20 years before. After all the fuss and melodrama surrounding the appointment of the Royal Commission, its Report was not debated in the Victorian Parliament. Nor was it acted upon.[126]

As an exercise in *realpolitik*, the Chifley Government's response to the furore which greeted the Board's Order is perhaps understandable even though it was entirely unjustified as a matter of principle. The divisive quality of the anti-Communist crusade was so intense and bitter that, unless the Government party was prepared to take a united stand on principle to ensure that the access requirement mandated by s. 6K was implemented, the Board could not possibly expect its policy on the access issue to survive. However, a united stand was out of the question not least because of the implacable anti-CPA stance of influential Government members such as A. A. Calwell, and because of the political implications of such a stand. Prime Minister Chifley had the authority to ensure that the government's policy was not sabotaged from within, but chose not to assert his authority.

The approach adopted by the Board, as implemented in the original Order, was sound in principle and should have been allowed to work. In following the lead of the ABC, which had in 1946 moved beyond the politically safe position of the established party policy, the Board had taken an important step towards opening up radio to a wide range of political opinion. The criteria set out in sub-clause 5(1) of the Order were precise and fair. Given the hysterical temper of the times, the Board's insistence on not singling out the CPA for discriminatory exclusion from the ambit of intended benefit of the Order is to be admired. However, by its capitulation, the Board sent a clear message to the politicians on both sides that it was open to pressure and manipulation.

What is of concern is that at a time when the Australian community's commitment to political tolerance was put to the test it was found to be lacking. The Chifley Government was defeated in the election held on 10 December 1949 after a lead-up and campaign in which the Opposition parties shamelessly and relentlessly exploited anti-Communist hysteria and falsely equated the then socialism of the ALP with Communism. It is a salutary reminder of the risks of taking Australians' capacity for political tolerance for granted to point out that,

125 (1932) 48 C.L.R. 487.

126 Victoria, *Report of the Royal Commission Inquiring into the Origins, Aims, Objects and Funds of the Communist Party in Victoria and Other Related Matters* (1950). Victoria, *Parliamentary Debates*, Legislative Assembly, 22 June 1950, 24. See Ricketson, *op. cit.* n. 2.

less than two years after the Board's ill-fated attempt to open up radio to all shades of opinion during election campaigns, it was only by a margin of 50,000 votes that Australian electors rejected the draconian Constitution Alteration (Powers to Deal with Communists and Communism) proposal on 22 September 1951.[127]

[127] Webb, L., *Communism and Democracy in Australia: A Survey of the 1951 Referendum* (1954). The Referendum was prompted by the determination of Prime Minister R. G. Menzies to crush the CPA notwithstanding the decision of a majority of the High Court in *Australian Communist Party v. Commonwealth* (1951) 83 C.L.R. 1 that the Communist Party Dissolution Act 1950 (Cth) was unconstitutional. Anderson, R., 'Australian Communist Party v. The Commonwealth' (1951) 3 *University of Queensland Law Journal* 34. Kirby, M. D., 'H. V. Evatt, "The Anti-Communist Referendum and Liberty in Australia"', (1991) 7 *Australian Bar Review* 93. Following the 1949 fiasco, the Board's attitude to the access requirement was that the Act required amendment before it could be given effect to in a way that would avoid the problems which had arisen in 1949 and since, not surprisingly, the Board could not devise any alternative scheme to that embodied in the 1949 Order, it made no further attempt to implement the access requirement. In 1956 the Act was extensively amended as a prelude to the commencement of television transmissions in Sydney and Melbourne later that year. The unworkable and unwanted s. 6K was replaced with a provision which omitted any general access requirement. Since this article was written the Commonwealth Parliament has passed the highly controversial Political Broadcasts and Political Disclosures Act 1991 (No. 203 of 1991). The Act inserts a new Part IIID in the Broadcasting Act 1942 as amended. It prohibits political advertising on radio and television during Commonwealth, State and Territory election periods and it provides for the grant of free time on radio and television stations to political parties and others. In some respects this new dual scheme is similar to the structure of the original 1949 Order.