

# *Cold War Justice? Judicial Responses to Communists and Communism, 1945–1955*

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## *Abstract*

This article examines the role played by courts in resisting the excesses of anti-communism during the early cold war years. In Part 2, I examine the nature of post-war anti-communism, as epitomised by the preamble to the *Communist Party Dissolution Act 1950* (Cth) (the ‘*Dissolution Act*’), arguing that the recitals reflected a widely shared tendency to confuse distaste for communism with the threat actually posed by domestic communism. One manifestation of this was disproportionate responses to the activities of local communists. These responses were reflected in cases brought both by and against communists. These included not only *Australian Communist Party v The Commonwealth*<sup>1</sup> (the *Communist Party* case), but also the sedition cases, a criminal libel prosecution, numerous summary prosecutions, and a number of civil actions. I discuss these in Part 3, concluding that while communists were often unsuccessful, they also enjoyed a degree of success.

Part 4 examines the reason for these successes, noting that they were largely uninfluenced by the civil libertarian issues posed by these cases, that the cases failed to generate even a hint that there might exist any implied constitutional freedom of political communication, and that even had they done so, their outcomes would rarely have been much different. The contribution of the cold war courts was to insist on evidence at a time when this could constitute a salutary reminder of the gap between fears and the basis for those fears, and to apply laws dispassionately. Given repressive laws and discriminatory prosecutions, this provided imperfect protection for communists’ civil liberties, but enough to encourage communists to act on the basis that courts could protect their interests.

## **1. Introduction**

Accounts of the early cold war years tend to highlight the intensity of the anti-communist sentiments of the time and emphasise the degree to which fear of communism was disproportionate to the threat posed by Australian communists.<sup>2</sup> Terms such as ‘hysteria’ or ‘McCarthyism’ may mislead. There were many anti-communisms and some made considerable sense. Moreover references to McCarthyism may distract attention from the degree to which Australian anti-communists regarded the activities of American anti-communist demagogues with

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1 *Communist Party* case (1951) 83 CLR 1.

considerable distaste. There are even grounds for doubting whether ‘anti-communism’ was as all-pervasive as Louis suggests, although the validity of his claim ultimately depends on what that elusive term is taken to mean.<sup>3</sup>

In Part 2 of this article, I examine Australian anti-communism, highlighting the different implications it had for different political actors, and the fragility of some attitudinal correlates of anti-communism. But I shall also argue that governments of the period, and especially the Menzies government, often failed to distinguish between the question of whether communism was desirable, and the question of whether there was any reason to believe that domestic communists posed a real threat to Australian society. Blurring the distinction between the evils of communism and the threat posed by communism, governments responded to communism with measures which were sometimes totally disproportionate to the actual ‘communist threat’, and in doing so, they enjoyed considerable support from influential groups and from the electorate at large.

These responses were reflected in cases brought against and by communists. The most important of these was the *Communist Party* case of 1950-51, but there were numerous others. Some are still remembered, such as the sedition cases of 1948-53, and the trial of Frank Hardy for criminal libel. Less well-known are the contempt cases of 1949-51, and even less well-known are the numerous others arising out of the routine activities of the Party and its supporters, including summary prosecutions, challenges to local by-laws, and litigation in relation to the hiring of halls. In Part 3 I discuss the issues and outcomes in these cases.

I discuss the implication of these cases in Part 4, arguing that, to a considerable extent, courts seem not to have succumbed to the punitive anti-communism which flourished within the political branches of government. This was the case notwithstanding that in reaching their decisions, courts attached little legal significance to freedom of expression, and did not even contemplate the possibility that there might be an implied freedom of political communication to be gleaned from the Constitution. Moreover while there are some cases which would have been decided differently had the Court developed the implied constitutional freedom fifty years earlier, such cases are surprisingly rare. While the content of law was less liberal than is today, the rule of the law of the time was nonetheless capable of curbing some of the excesses of cold war anti-communism.

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2 Maher refers to ‘anti-Communist hysteria’: Lawrence W Maher, ‘Tales of the Overt and the Covert: Judges and Politics in Early Cold War Australia’ (1993) 21 *Federal Law Review* 151 at 159. See also Constance Larmour, *Labour Judge: the Life and Times of Judge Alfred William Foster* (1985) at 219 (‘Australia ... seemed to parallel America’s cold-war McCarthyism’); Les Louis, ‘Conspiracies and Threats to Democracy: the Other Side of the Coin’ in Peter Love & Paul Strangio (eds), *Arguing the Cold War* (2001) at 37 describes anti-communism as ‘all-pervasive’.

3 *Ibid.*

## 2. *Post-war Anti-communism*

A useful starting point for understanding the content of cold war anti-communism is to be found in the *Communist Party Dissolution Act* 1950 (Cth), (*'Dissolution Act'*) an Act which lends considerable credibility to the view that anti-communism was both central to post-war politics, and disproportionate to the actual 'communist threat'. Its preamble can be treated as an official expression of the anti-communists' fears and beliefs. There would have been no point to the preamble if its assertions were unlikely to be credible to the High Court, and the legislation would have been politically vulnerable if the recitals were unlikely to resonate with the views of opinion-leaders.

The preamble asserted, inter alia, that the Communist Party:<sup>4</sup>

engages in activities...designed to assist or accelerate the coming of a revolutionary situation, in which the Australian Communist Party, acting as a revolutionary minority, would be able to seize power and establish a dictatorship of the proletariat'  
(recital 4');

...engages in activities...designed to bring about the overthrow or dislocation of the established system of government of Australia and the attainment of economic, industrial or political ends by force, violence, intimidation or fraudulent practices  
(recital 5')

...is an integral part of the world communist movement, which, in the King's dominions and elsewhere, engages in espionage and sabotage and in activities or operations of a treasonable or subversive nature...  
(recital 6')

It further alleged that communists' activities had caused and sought to cause disruption to industries vital to the defence of Australia ('recitals 7 and 8'), and that it was necessary for the defence of the Commonwealth and the Constitution, and for the maintenance of the laws of the Commonwealth that the Party and its affiliates be dissolved, and that communists be disqualified from public employment, and from holding office in unions whose members were engaged in vital industries (recital 9').

Recitals 4-8 each contained a grain of truth, but this is partly because of their vagueness. Recitals 4, 5 and 6 are largely silent as to the nature and intensity of the relevant activities and as to the threat they posed. Indeed the same could be said of recital 8. Rhetorically the recitals are damning. Read literally, they say little more than the Australian Communist Party ('ACP' or 'the Party') wanted revolution, tried to increase its likelihood, and was part of an international

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4 For most of its life the Communist Party in Australia was known as the Communist Party of Australia. However, after having amalgamated with the Hughes-Evans Labor Party, and following the dissolution of the Comintern, it renamed itself the Australian Communist Party in January 1944. In 1951 it reverted to its original name: see Alastair Davidson, *The Communist Party of Australia: A Short History* (1969) at 98, 112.

movement some of whose members had engaged in espionage. The claim that the Party ‘engages in’ various activities could easily be read (and almost certainly was intended to be read) as indicating that the Party and its members and supporters were regularly engaging in these activities, and recital 9 follows from the previous recitals only if they are understood to imply that the activities the Party engaged in constituted such a threat to Australia that only the *Dissolution Act* could frustrate that threat.

Official analyses of communism throw light on the degree to which there was evidence to justify the preamble’s claims. There are two suggestive Australian Security Intelligence Organisation (‘ASIO’) memoranda, one setting out evidence to document the allegations in the recitals, and the other discussing whether there was evidence to support an application to have the Party declared an unlawful association under *Crimes Act* 1914 (Cth) Pt IIA.<sup>5</sup> These were not prepared for public consumption, but provide insight into the extent to which ASIO’s surveillance of the Communist Party had yielded evidence of a serious communist threat. If there were evidence that communist activities were such that there was a real danger of revolution or massive economic disruption, one would expect this to be disclosed in these documents.

The documents certainly provide evidence of ASIO’s belief that the threat posed by the ACP was a serious one, but they also demonstrate that the belief rested on a flimsy evidentiary base. Most of the evidence consists of quotations from communist publications, including both the sacred texts, and more ephemeral literature (including reading guides prepared for ‘Marx School’). There is nothing to suggest that the Party had given much thought to how it might actually seize and hold on to power, or that it was making serious plans for this eventuality.

The memoranda cited evidence to support some of the claims in recitals 4-8. They cited considerable documentary evidence of the Party’s ostensible commitment to revolution, and of its belief that a revolution would ultimately occur.<sup>6</sup> They cited the involvement of communist-led unions in disruptive industrial unrest,<sup>7</sup> and evidence that the Party believed that industrial action could be used to achieve its ultimate goals.<sup>8</sup> They also cited evidence of the Party’s involvement in an international movement,<sup>9</sup> and evidence to suggest that in the event of war between the Soviet Union and the West, the Communist Party would support the Soviet Union. (The evidence included several public statements to this effect, including those which formed the basis for four of the seven sedition cases

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5 Preamble to the Communist Party Dissolution Act: Information Substantiating the Statements in the Preamble (‘Preamble’) in *Australian Communist Party Dissolution Act: Miscellaneous Papers 1950-1952*, National Archives of Australia (‘NAA’): M1509 6; Memorandum from the Director-General of Security, 8 February 1952 (‘Memorandum’) in *Australian Communist Party Dissolution Act: Miscellaneous Papers 1950-1952*, NAA: M1509 6. Pinpoint references are to folio number (Preamble) and page number (Memorandum).

6 Preamble, above n5 at 112–148.

7 *Id* at 27, 29–33, 36–42.

8 *Id* at 28, 34–35, 42–46.

9 *Id* at 64–95.

discussed below).<sup>10</sup> The 1952 memorandum reported that communists had been involved in espionage<sup>11</sup> and that it was anticipated that some would soon be prosecuted.

Some support for the recitals also comes from the findings of the Victorian Royal Commission into Communism,<sup>12</sup> and indeed, some of this became the basis for the ASIO memoranda, while some of the material presented to the Commission came ultimately from security sources. The Commission had been established in the aftermath of sensational claims by Sharpley, a defector from the ACP. It had conducted a lengthy and sometimes acrimonious inquiry, and generated several contempt prosecutions (which are discussed below). However, it found little evidence to substantiate most of Sharpley's claims and commentators, including one of the principal communist witnesses before the Commission, considered that its Report was reasonably fair.<sup>13</sup> Its general findings were consistent with the aspects of the allegations in recitals 4-9, but the Report also noted material which qualified the allegations.

It did not make a finding as to whether the Party was committed to the seizure of power by a minority vanguard, but noted the Party's claim that it hoped to seize power with the support of the majority, and that the transfer of power would be peaceful.<sup>14</sup> Evidence from Ralph Gibson, a Party spokesperson, made it clear, however, that once the Party won power, it would not surrender it, and it would abolish existing political institutions, including the courts as constituted.<sup>15</sup> The Report found that the Party had used intimidation and violence to achieve its objectives, but it found that there was only one case in which allegations of ballot-rigging had been substantiated.<sup>16</sup> It accepted that communist union leaders had few qualms about resorting to industrial unrest, and that the Party considered that industrial unrest could be harnessed to serve revolutionary objectives, but it concluded that when communist unions resorted to strike action, they were inspired primarily by a desire to improve their members' conditions.<sup>17</sup>

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10 Id at 12A–24.

11 Id at 56–63.

12 Victoria, *Royal Commission Inquiring into the Origins, Aims, Objects and Funds of the Communist Party in Victoria and Other Related Matters, Report of Royal Commission* (1950) ('Victorian Royal Commission'). This conclusion is slightly at variance with George Williams' contention that the allegations 'were not sufficiently supported by the findings of the Lowe Royal Commission to be credible': George Williams, 'The Suppression of Communism by Force of Law: Australia in the Early 1950s' (1996) 42 *Australian Journal of Politics and History* 220 at 229. The reason for this difference lies in the interpretation one places on the recitals. If they are interpreted literally, they could be supported by the evidence, but this is because, read literally, recitals 4–8 leave open the question of whether the ACP actually did constitute a non-trivial threat to the Australian political order.

13 Ralph Gibson, *My Years in the Communist Party* (1966) at 156–157. Indeed, he considered (quite wrongly) that the Report 'more or less contradicted every point of that preamble'.

14 Victorian Royal Commission, above n12 at 16, 24.

15 Id at 64–66, and see at 26 (statement by Mr Laurie).

16 Id at 75–91, 106.

17 Id at 96–98, 107.

Moreover, both the memoranda and the Report are also of interest for what they do not report. They relied heavily on texts published over the previous thirty years and sometimes earlier. These amply demonstrated the Party's ideological commitment to revolution and its belief that its tactics would prove successful, but neither the Commissioner nor ASIO commented on the obvious fact that thirty years of attempting to comply with authoritative practice had made so little impact on Australians' preparedness for revolution that, for most of the cold war period, a majority of the working class wanted the Party banned, and in the 1949 Senate elections, where ACP candidates stood in each state, it won only 2.1 per cent of the vote.<sup>18</sup> The Report noted that Party leaders did not know when the conditions for revolution would arise, but intended to take advantage of them when they did.<sup>19</sup> The memoranda did not address this issue. Furthermore neither the memoranda nor the Report provided any evidence of even the most rudimentary preparations for the kind of defensive or aggressive violence that a revolution might entail.

There was evidence to support the Commission's conclusion that the Party and its members had been involved in acts of violence, but two of the eight cases dated from the 'class against class' period of the depression years, four involved use of force and obstruction in the course of union disputes, one involved packing a hall in which a debate was to be held, and the other example involved the Party's involvement in the post-war squatting movement.<sup>20</sup> Nor does the position outside Victoria seem to have been any different. There were several post-war cases in which communists were prosecuted for offences involving violence (notably in relation to the disruption of a 1946 election meeting), but these were rare, and (after appeals) only one was treated as warranting a custodial sentence.<sup>21</sup>

This was not the kind of violence likely to threaten either capitalism or the capitalist state. In relation to communist ballot-rigging, the Commission found only one proven case.<sup>22</sup> Moreover, while communists' conduct was clearly not impeccable, the examples cited do not seem to have been egregious by the prevailing standards of union or even political conflict.<sup>23</sup>

Even the evidence of the Party's involvement in industrial unrest is not as damning as it might have seemed. The Report (but not the memoranda) concluded that the industrial action taken by communist unions was prompted primarily by a desire to secure improved working conditions. But neither the Report nor the memoranda considered the question of whether unions were militant because they

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18 Colin Hughes & B D Graham, *A Handbook of Australian Government and Politics, 1890-1964* (1968) at 380-385. The ACP national vote was inflated by a 3.5 per cent vote in Victoria, where it had first place on the ballot and reaped the benefit of the consequent 'donkey vote'. The Party did not contest Senate vacancies in 1946.

19 Victorian Royal Commission, above n10 at 24.

20 *Id* at 76.

21 See below, iii. Minor Offences.

22 Victorian Royal Commission, above n12 at 86, 106. There was also evidence of ballot rigging by the Federated Ironworkers' Association in New South Wales: Robin Gollan, *Revolutionaries and Reformists: Communism and the Australian Labour Movement 1920-1955* (1975) at 283.

23 Peter Cook, *Red Barrister: A Biography of Ted Laurie QC* (1994) at 187-188.

were communist or communist because they were militant.<sup>24</sup> And while there was ample evidence of industrial unrest, there was no attempt to assess the seriousness of its impact on the economy.<sup>25</sup>

Even the allegations of the Party's disloyalty and involvement in espionage needed to be treated with caution. The ASIO memorandum provided little evidence that the Party's opposition to Australia's involvement in World War II had been manifested in activities which had impaired the war effort to a detectable degree. The government did, however, have evidence of post-war communist espionage. In the 1952 memorandum, ASIO's Director-General stated that he had 'no doubts that espionage networks operating on behalf of the USSR make use of individuals who are Communists', and was confident that it would soon be in a position to produce evidence which would lead to the prosecution of some of them. But he also concluded that 'the Communist Party of Australia does not seek to involve itself in espionage, for the reason that if it were so involved, and the fact were discovered, the Party would suffer damage by being brought into public disrepute'.<sup>26</sup> And the prosecutions never eventuated.

While the memoranda and the Report provide evidence consistent with a literal interpretation of recitals 4-8, it is difficult to see how, on this evidence, it could be concluded that the banning of the Party and its allied organisations was necessary for the defence and protection of the Commonwealth. In his 1952 memorandum on whether an application should be made to have the Party declared an unlawful association under the *Crimes Act* 1914 (Cth) s 30AA, the Director-General of ASIO considered that if such a declaration were made, it would achieve little of value, and it would 'add to the difficulties of my Organization in carrying out its investigative work'.<sup>27</sup> Indeed, Michael Thwaites, Spry's deputy, later wrote that it was to ASIO's advantage that the *Dissolution Act* was held unconstitutional, and the subsequent referendum defeated.<sup>28</sup>

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24 A 1955 article in an American political science journal argued persuasively that the correlation between communist leadership in unions and industrial unrest was not a causal one: in Australia, communist leadership, like industrial unrest, was associated with industries characterised by high levels of industrial unrest whether the union leadership included communists (as was often the case in the 1940s) or not (as was often the case earlier), and that the level of industrial strife had increased more dramatically in the post-war years in the United States (where communist influence was weak) than in Australia (where it was greater): James W Kuhn, 'A Note on Communists and Strikes in Australia' (1955) 70 *Political Science Quarterly* 103.

25 The real per capita value of manufacturing output had increased each year between 1945-46 and 1950-51: see the following tables in the Commonwealth Bureau of Census and Statistics, *Quarterly Summary of Australian Statistics Bulletin no 206*, Cat no 1303.0 (December 1951) at 17 (Estimated Net Value of Production - Australia, per Head of Mean Population, 1945-6 to 1946-7); Commonwealth Bureau of Census and Statistics, *Quarterly Summary of Australian Statistics Bulletin no 213*, Cat no 1303.0 (September 1953) at 17 (Estimated Net Value of Production - Australia, Per Head of Mean Population, 1947-8 to 1950-1), 110 (for C Series Retail Price Indexes, 1946-51).

26 Memorandum, above n5 at 6.

27 Id at 3.

28 Michael Thwaites, *Truth Will Out: ASIO and the Petrovs* (1980) at 40.

Moreover subsequent research has cast doubt on even the most plausible and serious of the allegations against the Party. Particularly noteworthy in this respect is Sheridan's research,<sup>29</sup> which highlights the degree to which communist union leaders treated strike action as an industrial, rather than a political weapon. Far from encouraging strike action as a means of causing disruption, they were mindful of the political and industrial costs of gratuitous strikes. They were, of course, militant, but this was a period when industrial militancy generally paid off.

But the very fact that the Dissolution Bill was passed, and the circumstances surrounding its passage, evidence both the Coalition government's commitment to fighting communism, and an expectation that doing so would prove politically advantageous.<sup>30</sup> The legislation was the most politically repressive piece of legislation ever to have been passed by an Australian peace-time Parliament.<sup>31</sup> It banned a political party, and provided for the banning of other communist organisations, and for orders banning members of banned organisations from government employment and from the right to hold office in unions engaged in industries vital to the economy.

The Country Party had long been committed to a ban on the Party, and the RSL had campaigned vigorously for the ban. Robert Menzies, the leader of the Liberal Party had had some reservations about such legislation, but he changed his mind and having done so, embraced the idea of banning the Party with enthusiasm.<sup>32</sup> The proposed ban was part of both Coalition parties' platforms at the 1949 election and the Bill to ban the Party was one of the first measures to be introduced following its success. Poll data suggest that the Bill commanded close to bipartisan support within the electorate, although Labor voters were not as strongly supportive of it as Coalition supporters.<sup>33</sup>

Labor was unsympathetic to the Communist Party. While in office it had passed special legislation to deal with a threatened communist black ban on work on the Woomera rocket range.<sup>34</sup> It had sought to weaken communist influence in the union movement by activity within the unions.<sup>35</sup> It had passed special legislation to deal with a strike by the communist-led miners' union,<sup>36</sup> and it had

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29 Tom Sheridan, *Division of Labour: Industrial Relations in the Chifley Years, 1945–1949* (1989).

30 George Winterton, 'The Significance of the *Communist Party Case*' (1992) 18 *Melbourne University Law Review* 630 at 634–635, 637; Williams, above n12 at 223.

31 I have argued elsewhere that it was far less draconian than some of its critics maintained: Roger Douglas, 'A Smallish Blow for Liberty? The Significance of the *Communist Party Case*' (2001) 27 *Monash University Law Review* 253 at 258–274. But this is consistent with the claim that it was nonetheless a particularly repressive piece of legislation.

32 Williams, above n12 at 222–223; Allan Martin, *Robert Menzies: A Life, Volume 2, 1944–1978* (1999) at 81–82.

33 According to Gallup Polls, support for banning the Party rose from 66 per cent approving in September 1947 (56 per cent of Labor voters, 78 per cent of Liberal-Country Party voters) to 70 per cent (59 per cent Labor, 81 per cent Liberal-Country) in February 1949, and 82 per cent (70 per cent Labor, 90 per cent Liberal-Country) in May 1950, following introduction of the Dissolution Bill: Australian Gallup Polls, *Australian Public Opinion Polls* 459–69 (October, November 1947), 569–78 (February–March 1949), 677–89 (May–June 1950).

34 *Approved Defence Projects Protection Act 1947* (Cth).



approved the prosecution of three leading communists for sedition. It established ASIO in response to evidence of communist espionage,<sup>37</sup> and it had begun the vetting of public servants employed in sensitive positions.<sup>38</sup> It had, however, been less inclined to view the Soviet Union as a serious threat to Australia's interests,<sup>39</sup> and it was generally opposed to the banning of communist organisations, partly because it doubted whether anything was achieved by doing so, partly because it considered that there were better ways of attacking communism, and partly because it was wary lest attacks on communists be generalised to snare those committed to left-wing causes.<sup>40</sup>

Its response to the Bill was ambivalent. The logic of most Labor speeches on the Bill was that the Bill should be defeated, but a minority within the party disagreed and, rather than oppose the Bill outright, the parliamentary party, on the advice of the party's Central Executive, chose to use its Senate majority to insist on amendments which, if implemented, would have made the Act largely unworkable. Even this compromise subsequently became unacceptable to the party's Central Executive. Partly because some of its members favoured the ban and partly because it feared that opposition would precipitate a double dissolution election which Labor would lose, the executive voted to order the parliamentary party to withdraw its opposition to the Bill. The parliamentary party agreed.<sup>41</sup> The executive's concerns were understandable. Poll data suggested that if there were to be a double dissolution election, Labor would lose seats in both houses.<sup>42</sup>

Yet the aftermath of the constitutional challenge to the Act suggests that many Australians' commitment to anti-communism was far shallower than either the government or the opposition seems to have assumed. Following the High Court's ruling that the legislation was unconstitutional, the government legislated for a referendum to amend the Constitution to give it not only the power to enact the *Dissolution Act*, but also the more general power to make laws with respect to communists and communism.<sup>43</sup> The referendum was narrowly defeated. Evatt, the Labor leader, ran a tireless campaign in what seemed to be a hopeless cause, but by referendum day, support for a 'yes' vote had fallen from 80 per cent (July) and 73 per cent (August) to 49 per cent.

Oddly enough the campaign made little long-term difference to attitudes to banning the Party. Rather, the success of the 'no' campaign seems to have been based largely on its having redefined the issue so that voters generally responded according to party allegiance rather than by attitude to the issue. Liberal and

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35 For an excellent discussion of the conflicts between governments and unions in the late 1940s, see Sheridan, above n29.

36 *National Emergency (Coal Strike) Act 1949* (Cth).

37 This seems to have been at the instance of the US and Britain, and many writers have argued that it was not in response to a sense by the Chifley government that this was necessary to combat domestic communism: Phillip Deery, 'Decoding the Cold War: Venona, Espionage and "the Communist Threat"' in Peter Love & Paul Strangio (eds), *Arguing the Cold War* (2001) at 107–108. Contrast Desmond Ball & David Horner, *Breaking the Codes: Australia's KGB Network, 1944–1950* (1998), who agree that ASIO was a response to pressures from Australia's allies, but who argue that Chifley was also convinced of the need for strengthened security after having been informed of the results of the Venona revelations.

Country Party voters seem to have been largely unmoved by the campaign, although support among them for the ban fell from 90 per cent (July) and 87 per cent (August) to 81 per cent (September). But Labor voters abandoned support for the ban in favour of loyalty to their party, with support for a 'yes' vote among Labor voters falling from 66 per cent (July) and 58 per cent (August) to 22 per cent (September).<sup>44</sup>

Once the referendum was over, however, support for banning the Party returned to its pre-1950 level.<sup>45</sup> But for many voters, the issue was of such little salience that by 1957 they could not remember how they had voted in the 1951 referendum and many of those who thought they could, could not do so correctly.<sup>46</sup> Moreover, once banning the Party had ceased to be a highly visible and partisan issue, the relationship between voting intention and attitudes to the ban largely disappeared.<sup>47</sup>

These data suggest that for voters at large, anti-communism was not a particularly salient issue, even during the years of the Korean War. Election results suggest a similar conclusion. The conservative parties do not seem to have reaped much political capital from their attempt to appeal to Australians' anti-communism. Throughout the early cold war years, Labor governments were returned in New South Wales, Queensland and Tasmania, and Labor also governed Victoria between 1952–55, and Western Australia after 1953. In the 1951 election ('fought in an atmosphere of anti-communist hysteria, hatred and espionage'),<sup>48</sup> there was nonetheless a swing to Labor. Labor 'won' the 1953 half-Senate election, and in the 1954 House election, Labor won a majority of votes.<sup>49</sup> It is possible that Menzies realised this. After 1951, government attacks on the Party and its supporters typically took the form not of grand public gestures, but of relatively unpublicised surveillance and harassment.<sup>50</sup> Known communists were no longer appointed to the public service and communist public servants were not

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38 The Chifley government appears to have been more tolerant than the British Labour government which banned communists from its public service. A 1949 report by Shedden to the United States State Department stated that there were about 100 communists employed in the Commonwealth public service, none of whom, however, was employed in security work: David Lowe, *Menzies and the 'Great World Struggle': Australia's Cold War 1948–1954* (1999) at 41. The vetting was not always particularly thorough. For example, James Hill, who appears to have provided information to Clayton for transmission to the Soviet Union, had a successful public service career until 1950, despite suspicions that he was a member of the Communist Party, and despite his being a brother of Ted Hill, the well-known Victorian communist. In 1950, however, his provisional promotion to First Secretary was cancelled on security advice: Ball & Horner, above n37 at 265–266 (Hill), 260 (British ban). The government's reaction to concern about the role of radicals and communists within the Council for Scientific and Industrial Research ('CSIR') was not a purge but legislation enabling the government to transfer research work with security implications from the CSIR to other agencies: Meredith Burgmann, 'Dress Rehearsal for the Cold War' in Ann Curthoys & John Merritt (eds), *Australia's First Cold War 1945–1953, Volume 1: Society, Communism and Culture* (1984) at 66–67. However there was one case where a communist employee of CSIRO was dismissed on flimsy grounds, and at least one case where the Commonwealth Investigation Service intervened to prevent the appointment of a communist academic to a post in a militarily sensitive area: Phillip Deery, 'Scientific Freedom and Post-War Politics: Australia, 1945–55' (2000) 13 *Historical Records of Australian Science* 1 at 1–2, 4–9.

appointed to positions where they would have access to sensitive information.<sup>51</sup> Appointment to scientific positions within the Australian National University became subject to vetting, and there was periodic government intervention in relation to academic appointments in state universities.<sup>52</sup> No communist received a Commonwealth Literary Fund fellowship or any other Commonwealth or state grant between 1952–1969.<sup>53</sup> Rather than rejoice in its persecution of communists, the Menzies government tended to downplay these anti-communist activities. There were, however, occasional, more visible manifestations of the government's anti-communism. In 1953, the government prosecuted three communists on the basis of an article critical of the monarchy, and in 1954, it established a Royal Commission to inquire into Soviet espionage in Australia, following the defection of Vladimir Petrov. The Commission sat for almost a year, and those called before it sometimes suffered as a result of their appearances being treated by the public as evidence of their guilt. But the Commission concluded that while two or possibly three communists or communist sympathisers had engaged in espionage, and that a fourth had passed the information they had provided on to the *Ministerstvo Vnutrennikh Del* (the USSR Ministry of Internal Affairs), there was no evidence of any such espionage after 1948, and no evidence sufficient to warrant any prosecutions.<sup>54</sup> While Petrov had provided a list of people whom the embassy regarded as potential sources of secrets, the Commission concluded that no-one on the list, other than the three or four suspects, had actually provided secrets or even might have done so.<sup>55</sup>

### 3. Cold War Justice

#### A. The Communist Party Case

Australia's most famous cold war case is the *Communist Party* case.<sup>56</sup> At issue was the validity of the *Dissolution Act*. The Act purported to dissolve the Party and vest its property in a receiver under section 4. It also provided for the dissolution

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39 Burgmann, 'Dress Rehearsal' above n38; Meredith Burgmann, 'Hot and Cold: Dr Evatt and the Russians, 1945–1949' in Ann Curthoys & John Merritt (eds), *Australia's First Cold War 1945–1953, Volume 1: Society, Communism and Culture* (1984) at 80; Lowe, above n38 at 16–20, 28–30, 39–40, 42; Christopher Waters, *The Empire Fractures: Anglo-Australian Conflict in the 1940s* (1995) at 22–23, 54–63, 66–88, 95–166, 177–92. There were, of course, variations within the government (among the more important being those between Chifley and Evatt and between External Affairs and Defence) as to the degree to which the Soviet Union was to be seen as a threat, and perceptions as to whether the Soviet Union was a threat changed over time (and especially after June 1948). It nonetheless valued, and was willing to take action to protect, Australia's alliances with Britain and the US: Les J Louis, *Menzies' Cold War: a Reinterpretation* (2001) at 11.

40 Winterton, above n30 at 635–637, 640.

41 Leicester Webb, *Communism and Democracy in Australia: A Survey of the 1951 Referendum* (1954) at 25–37; L F Crisp, *Ben Chifley: A Biography* (1960) at 393–395.

42 Australian Gallup Polls, *Australian Public Opinion Polls 700–710* (July–August 1950).

43 On the referendum, see Williams, above n12 at 233–235; Webb, above n41; see generally Elsa Atkin & Brett Evans (eds), *Seeing Red: the Communist Party Dissolution Act and Referendum 1951 – Lessons for Constitutional Reform* (1991).

of other ‘communist’ organisations through section 5. Other bodies could also be dissolved. Bodies could only be dissolved if they had been affiliated with the ACP; if a majority of their members or the members of their governing boards had been ACP members; or if they supported ‘the objectives, policies, teachings, principles or practices of communism, as expounded by Marx and Lenin, or promote, or ... promoted, the spread of communism, as so expounded’: s 5(1). A body falling within s 5(1) could be dissolved if the Governor-General was satisfied that its continued existence would be ‘prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth’: s 5(2). Upon dissolution, it became an offence, carrying a maximum prison term of 5 years, for a person knowingly to take steps to assist or maintain the organisation: s 7.

Section 9 of the Act also provided for people to be declared communists. This section applied only to communists (defined in s 3), and a person could be declared only if the Governor-General decided that their activities threatened the defence, Constitution, or the maintenance of the laws of the Commonwealth. A declaration meant that the person was disqualified from Commonwealth employment, and from office in a union whose members were involved in an industry declared by the Governor-General to be a vital industry: s 10. Decisions as to whether an organisation fell within s 5(1) and as to whether a person was a communist were judicially reviewable. Decisions as to whether Commonwealth interests were affected were not. In this respect the *Dissolution Act* went further than the

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- 44 Australian Gallup Polls, *Australian Public Opinion Polls* 775–87 (July 1951), 788–99 (August–September 1951); Australian Social Science Data Archive Opinion Poll D0081, cross-tabulation of variables iq5a and rvote. Labor voters are those who said, when surveyed, that their current voting intention was to vote Labor. At the time of the September poll (shortly before the referendum), support for the ‘yes’ vote had fallen to 57 per cent, and it had fallen to 54 per cent in polling four days later. This suggests that among Labor voters, support for the ‘yes’ vote at the time of the referendum may have fallen to between 10–15 per cent which is broadly consistent with an estimate based on the correlation between the ‘no’ vote in each federal electorate and the ALP vote in the 1951 election (see Webb, above n41 at 152–156), a method which yields inflated estimates of the strength of correlations at the individual as opposed to the area level.
- 45 Polls in February 1952 and December 1952 indicated that 64 per cent of respondents favoured the federal government using its powers to try to ban the Party. (Interpreting these answers is difficult given that the Commonwealth’s powers were severely limited). In 1957, 65 per cent of respondents said they would vote ‘yes’ in a referendum to ban the Party: Australian Gallup Polls, *Australian Public Opinion Polls* 1253–63 (June–July 1957).
- 46 Of respondents aged 27 or more at the time of the survey, 50 per cent said they had voted ‘yes’, 19 per cent said they had voted ‘no’ and 31 per cent said they could not remember. Of those who said they had voted Labor in the 1955 election, 47 per cent said they had voted ‘yes’ and 25 per cent ‘no’: Australian Social Science Data Archive Opinion Poll D0084, cross-tabulation of variables q6b and lvote.
- 47 In 1957, 71 per cent of Liberal-Country Party voters, and 61 per cent of Labor voters said they would vote ‘yes’ in a referendum to ban the Party: *ibid.*
- 48 Amirah Inglis, ‘A Hot Time in the Cold War’ in Peter Love & Paul Strangio (eds), *Arguing the Cold War* (2001) at 28.

ineffective unlawful association provisions of the *Crimes Act* 1914 (Cth) which conditioned unlawfulness on the actual existence of the criteria for unlawfulness.

Within hours of the royal assent, the Party, two representative members, a number of communist controlled unions, and a number of communist union leaders<sup>57</sup> had issued writs of summons claiming a declaration that the Act was invalid, along with applications for interlocutory relief. Interlocutory proceedings also dealt with another issue. The ACP had planned to attack the legislation in part on the grounds that the assumptions underpinning it were false and to that end, Ralph Gibson sought leave to introduce oral evidence to support his claims. The Commonwealth contended that the evidence which the Party proposed to introduce was inadmissible. Dixon J chose to deal with the matter by stating two questions for the Full Court of the High Court of Australia, namely (1) whether the validity of the Act depended on a judicial determination as to the facts alleged in the preamble, and if so, whether the plaintiffs could adduce evidence to support their denial of the relevant facts; and (2) if 'no' to either part of question (1), whether the Act was invalid in part or in its entirety.

Within a month, the High Court began its lengthy hearing of the substantive arguments. The Commonwealth's arguments echoed the arguments implicit in the preamble. The law could be justified as an exercise of the Commonwealth's defence power; as an exercise of the Commonwealth's implied power to make such laws as might be necessary to protect the Constitution; and as an exercise of

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49 Labor won 50.03 per cent of the votes, the Coalition parties 47.07 per cent, communists 1.24 per cent, and independents 1.66 per cent. However, the Labor percentage is inflated by the fact that there were seven uncontested seats, of which six were won by the Liberal or Country Parties: Colin A Hughes, above n18 at 394–397. Even adjusting for the votes cast for these seats in the most recent preceding election, the ALP vote exceeded the Coalition vote by about 1.3 per cent.

50 Under Menzies there was a sharp increase in funding for ASIO. The fruit of this increased funding was extensive supervision of even relatively unimportant communists, and the amassing of a great deal of not always accurate information: see Inglis, 'A Hot Time' above n48 at 23, 26–29; Bernie Taft, 'I Lived Through the Cold War' in Peter Love & Paul Strangio (eds), *Arguing the Cold War* (2001) at 31, 33–34; Louis, 'Conspiracies' above n at 40–41.

51 By 1951, ASIO reported that no members or sympathisers had direct access to top secret or secret material and that no members and only five sympathisers had access to such material. However four suspected communists and 11 suspected communist sympathisers had occasional access. In 1952, Spry reported that in the past 12 months, 37 permanent and temporary employees had been removed from positions where they had had access to classified material; nine temporary employees had been dismissed, and another six had not been appointed as permanent. Thirty six applicants for employment had been rejected on security grounds. However, ASIO believed that there were still 59 communists and 121 communist sympathisers employed in the service, albeit usually in positions such that they had no access to top secret or secret information: Louis, *Menzies* above n39 at 35–36, 47; Memorandum regarding Communists and Communist Sympathisers in the Employ of the Commonwealth, 14 July 1952 in *Communists and Communist Sympathisers in the Employ of the Commonwealth Policy*, NAA: A4940 C643. However, Spry failed in his attempt to have the public service purged of communists, and the government rejected his proposal that would-be employees be required to take an oath of allegiance: Lowe, above n38 at 119; Cabinet Minute, Melbourne, 6 February 1953, Decision No 848 in *Communists and Communist Sympathisers in the Employ of the Commonwealth Policy*, NAA: A4940 C643.

the Commonwealth's incidental power under s 51 (xxxix) of the Constitution. While the operation of the legislation was not conditioned on whether the Party actually constituted a threat to the Commonwealth, this was not fatal to its validity. First, in relation to the Communist Party, the court should attach weight to Parliament's conclusion as evidenced by the preamble. Second, the exercise of powers under the Act would be judicially reviewable. If an exercise of powers under the Act could not be justified in terms of the security needs of the Commonwealth, it would be invalid.

The plaintiffs<sup>58</sup> argued that these arguments were untenable. The legislation was not conditioned on whether the activities of the Party actually constituted a threat to the Commonwealth. The fact that Parliament might believe this to be so was irrelevant. What mattered was whether it was in fact so, and this was for courts not Parliament to determine. Moreover, even if the law fell within one or more of the heads of Commonwealth power, it would fall foul of s 92 which protected interstate trade and intercourse. It involved the taking of property for Commonwealth purposes without provision for just compensation. It involved an impermissible exercise by Parliament of the Commonwealth's judicial power, and impermissibly purported to confer judicial powers on the executive. It could also be seen as an impermissible interference with state powers.

The Court, by a 6-1 majority, found that the Act was invalid. Of the six, five (Dixon, McTiernan, Williams, Fullagar and Kitto JJ) gave similar reasons. Webb J came close to upholding the Act but on the basis of an interpretation which would have severely limited its operation. Latham CJ dissented. The 'five' concluded that the provisions for declaring people and bodies to be communists could not be justified by reference to the defence, the incidental or the implied powers. While the Act provided for judicial review in relation to whether an association or a person was one to whom the section applied, it made no provision for review of the Governor-General's assessment of whether the declaration was justified on the grounds of defence, security or the maintenance of the laws and Constitution of the Commonwealth. Dixon and Fullagar JJ concluded that there was no mechanism

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52 Deery, 'Scientific Freedom' above n38 at 3-4.

53 Allan Ashbolt, 'The Great Literary Witch-Hunt of 1952' in Ann Curthoys & John Merritt (eds), *Australia's First Cold War 1945-1953, Volume 1: Society, Communism and Culture* (1984) at 180. Ashbolt's analysis highlights the ambivalence of the Commonwealth's policies with regard to writers. Conservative politicians came to the defence of the Commonwealth Literary Fund's advisory board when it was denounced for being unduly sympathetic towards communist writers, yet Menzies had ordered security checks on all writers recommended by the advisory board and was privately critical of the board's decision to recommend a fellowship to Judah Waten: at 155. Ashbolt also suggests that one of the reasons for the lack of grants to communist writers is that by the 1950s there was less communist writing than there had been: at 181. See also Andrew Moore, 'The "Great Literary Witch-Hunt" Revisited: Politics, Personality and Pique at the CLF, 1952' (2002) 82 *Labour History* 81, who discusses the degree to which the attack on the CLF was inspired by personal animosity self-legitimated as political attack.

54 Australia, Royal Commission on Espionage, *Report of the Royal Commission on Espionage* (1955) at 123-125, 131, 143-151, 299, 300.

55 *Ibid.*

56 *Communist Party* case (1951) 83 CLR 1.

for judicial review of decisions by the Governor-General. They could not be attacked by the traditional judicial review procedures. Nor could they be attacked collaterally.<sup>59</sup> McTiernan, Williams and Kitto JJ concluded that ss 5(4) and 9(4) precluded any judicial review of the Governor-General's decision that a person or body posed a security risk.<sup>60</sup>

As a result, it was possible, under the legislation, for the Governor-General to make an erroneous decision that a person posed a relevant threat. The error might stem from an erroneous assumption about what the relevant power entailed, or from an erroneous finding of fact. The possibility of errors was enhanced by the vagueness of the relevant powers. The possibility of error meant that sanctions might be imposed on people or bodies who did not threaten Australian institutions or the defence of Australia.

In times of war, four of the 'five' had accepted that in some circumstances, a power could be justified as an exercise of the defence power notwithstanding that its exercise was conditioned on the repository's belief that the exercise was necessary for the defence of the Commonwealth, rather than on the 'objective' existence of a nexus between the exercise of the power and the defence of the Commonwealth. This was because the exigencies of war could require this kind of decision-making. But the relevant authorities could assist the Commonwealth only if conditions as at the day of royal assent could justify laws hitherto regarded as valid only in the context of actual or imminent serious armed conflict. There being no such conflict, the Act could not be supported under the defence power.<sup>61</sup>

Moreover the defence power was special. Executive or legislative beliefs that actions were necessary for the protection of the Commonwealth and its laws from internal threats could never be sufficient to justify the relevant measures by

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57 The plaintiffs were as follows:

1. The Australian Communist Party and Ralph Gibson and Ernest Campbell, suing on behalf of all members of the ACP, represented by Laurie and Paterson with Hill and Julius;
2. The Waterside Workers' Federation of Australia and James Healy, represented by Evatt KC, with Isaacs KC and Sullivan;
3. The Australian Railways Union and John Brown, represented by Ashkanasy KC with Laurie;
4. Edwin Bulmer (on behalf of the Building Workers' Industrial Union), and Frank Purse, represented by Ashkanasy KC with Laurie;
5. The Australian Amalgamated Engineering Union and Edward Rowe, represented by Weston KC with Collins;
6. The Seamen's Union of Australia and Eliot Valens Elliott, represented by Isaacs KC with Julius;
7. The Federated Ironworkers' Association of Australia and Leslie McPhillips, represented by Evatt KC with Isaacs KC and Sullivan; and
8. The Australian Coal and Shale Employees' Federation and Idris Williams, represented by Webb KC with Sullivan.

Subsequently the Federated Ship Painters' and Dockers' Union, the Sheet Metal Workers' Union and the Federated Clerks' Union of Australia and M Hughes applied for and were granted leave to intervene.

58 Different plaintiffs sometimes relied on slightly different arguments. The summary which follows lists the major arguments advanced by one or more of the plaintiffs. As to their arguments, see *Communist Party* case (1951) 83 CLR 1 at 28–94, 114–128.

59 *Communist Party* case (1951) 83 CLR 1 at 180 (Dixon J), 257–258 (Fullagar J).

reference to the Commonwealth's incidental or implied powers. While the Commonwealth had the power to legislate to deal with 'actual' threats to the Commonwealth, it was not empowered to deal with perceived threats except in so far as they also constituted actual threats. Dixon J pointed out that the powers were incidental to the carrying on of government under a Constitution and further, a Constitution:

framed in accordance with many traditional conceptions, to some of which it gives effect ..., others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption.<sup>62</sup>

Legislation as vague as the Act could not be said to be incidental to the carrying on of government under the rule of law.

Dixon J went further. Discussing whether ss 5 and 9 could be justified by reference to ss 61 (the executive power) and 51(xxxix) (the incidental power), he observed:

But textual combinations of this kind appear to me to have an artificial aspect in producing a power to legislate with respect to designs to obstruct the course of government or to subvert the Constitution. History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected. In point of constitutional theory the power to legislate for the protection of an existing form of government ought not to be based on a conception, if otherwise adequate, adequate only to assist those holding power to resist or suppress obstruction or opposition or attempts to displace them or the form of government they defend.<sup>63</sup>

The fact that the exercise of powers under ss 5 and 9 was conditioned on the Governor-General's belief that the targets constituted threats to national security was therefore not enough to justify these provisions as an exercise of the Commonwealth's powers.

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60 If, as is now the case, the Governor-General's decision could be reviewed, ss 5(2) and 9(2) would not be open to the objection that they enabled declarations even when the Governor-General acted on an erroneous interpretation of the relevant powers, although they might have been open to the suggestion that they enabled the making of erroneous findings of fact (see, for example Williams J in *Communist Party* case (1951) 83 CLR 1 at 222). They would also have been open to the objection that ss 5(4) and 9(4) purported to preclude review.

61 See *Communist Party* case (1951) 83 CLR 1 at 194–199, 202–203 (Dixon J), 254–259 (Fullagar J). McTiernan J noted that 'the general control of civil liberty which the Commonwealth may be entitled to exercise in war time under the defence power is among the first of war-time powers that would be denied to it when the transition from war to peace sets in': at 207. Williams J considered that even during a grave crisis, such legislation would still be subject to the requirement that it be 'reasonably necessary to protect the nation': at 227, and doubted that the emergency could justify the liquidation of an association or the forfeiture of the property of an individual or association to the Commonwealth: at 229. Kitto J considered that this would be so only if it was open to the Court to determine whether the exercise of the relevant statutory power was within the defence power: at 282.

62 *Communist Party* case (1951) 83 CLR 1 at 193.

63 *Id* at 187–188.



These arguments did not quite dispose of the legislation. Sections 5 and 9 operated only in relation to groups and people with identifiable characteristics, and courts were empowered to determine whether groups and people in fact possessed those characteristics. If the characteristics were such that there was a constitutional basis for making declarations (and imposing the consequent disabilities) in relation to any body or person possessing them, then it would not necessarily be fatal to the sections that the making of declarations also depended on the Governor-General's opinion. If the implied, incidental or defence powers justified the attaching of disabilities to being or having been a communist or associated with communists, ss 5(2) and 9(2) might be saved, along with s 4 (which banned the Party).

If it was self-evident that communists and communist organisations necessarily constituted a threat to the Commonwealth, the sections would have been within the Commonwealth's powers. But the court was not in a position to make a finding to this effect. At most it could assume that communism might constitute a threat. Even accepting that communism constituted a threat and that bodies associated with communism and communists themselves could constitute a threat,<sup>64</sup> it did not follow that the legislation could be justified since its operation was not conditioned on whether communists and communist bodies did in fact constitute a threat. The legislature may have believed they did, and the preamble could be taken as evidence of that belief. But legislative beliefs were not enough. The incidental and implied powers could be exercised only if their exercise was conditioned on the existence of an actual and judicially examinable threat.

While it would have been permissible for Parliament to pass legislation disqualifying communists from office within the public service (since the Commonwealth possessed the power to make laws with respect to the public service), it was not permissible to pass legislation which allowed people to be declared to be communists, regardless of whether they were public servants.<sup>65</sup> While the Commonwealth might have been able to take some action against unions and unionists under its arbitration power, the relevant provisions of the Act could not be justified as an exercise of these powers, given that they applied regardless

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64 Dixon J regarded the international tensions of the time and (possibly) the recent serious dislocation of industry as 'notorious': *Communist Party* case (1951) 83 CLR 1 at 197. McTiernan J was prepared to take judicial notice of the fact that communists engaged in a range of nefarious activities and could not be trusted to be loyal in the event of hostilities between Australia and the Soviet Union: at 208–210. Williams J considered that while the matters set out in the recitals might, if proved, justify action against the Party in time of war: at 225. Fullagar J would have been prepared to take judicial notice of a number of the matters alleged: at 268. Kitto J considered that the Court could take judicial notice of the fact that international tensions had reached a point of real danger to Australia, such that there was a distinct possibility that war would break out. The defence power therefore permitted a somewhat wider range of activities than would have been the case during more peaceful times: at 277.

65 Four justices considered that it was not possible to save the relevant provision by severing it from the unconstitutional sections of the Act: See 203–204 (Dixon J), 213 (McTiernan J), 269–270 (Fullagar J), 284 (Kitto J), as did Webb J, implicitly. Williams J considered that it might be possible to sever ss 9(1)(b), 10(1)(a) and (b), and 14, but reserved the question in view of there not having been any public servant represented before the court: at 232.

of whether the union in question was registered under the *Commonwealth Conciliation and Arbitration Act 1904-1949* (Cth).<sup>66</sup>

Dixon, McTiernan, Williams and Kitto JJ did not consider it necessary to consider whether the Act was invalid on other grounds.<sup>67</sup> (Fullagar J briefly adverted to, and dismissed, the argument that in making the law, the Parliament usurped the Commonwealth judicial power).<sup>68</sup> The judgments of Dixon, McTiernan, Williams, Fullagar and Kitto JJ assume that if the Commonwealth did not possess the power to make such laws, the states did. The problem with the law was that it involved matters which prima facie, lay only within the province of the states.<sup>69</sup> Fullagar J explicitly stated that state parliaments could pass such a law.<sup>70</sup> Kitto J considered that in a unitary system of government, there would have been no problem with the Act.<sup>71</sup>

Webb J considered that there was authority for the proposition that the Governor-General's satisfaction was judicially examinable.<sup>72</sup> Sections 5(4) and 9(4) were to be interpreted on the basis that Parliament would have been aware that the Governor-General's decision would be examinable for constitutional power and that it was therefore not necessary to specify this.<sup>73</sup>

Webb J also considered that, but for the High Court's decision in the *Jehovah's Witnesses* case,<sup>74</sup> ss 5 and 9 would have been intra vires since the power could be exercised only if there were grounds for the Governor-General's conclusion that the activities of the organisation or person threatened the Commonwealth in a relevant way. The same could be said of the ban on the ACP itself. He was prepared to take judicial notice of there having existed a real possibility of war between the West and the Soviet Union, in which Australia might well have been involved as a belligerent. He was also willing to take judicial notice of the widespread suspicion that communists were doing the things attributed to them in the recitals, and that it would therefore have been reasonable to take the measures to avert these activities. The fact that the possibility of war was not adverted to in the preamble was irrelevant; it could be the subject of judicial notice. But one of the grounds on which the High Court had struck down the *National Security (Subversive Organisations) Regulations* in the *Jehovah's Witnesses* case had been that the forfeiture of the organisation's assets was final, regardless of whether the Witnesses ceased to constitute a relevant threat. This, he considered, meant that an open-ended ban on the ACP could be justified only if there was evidence that it

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66 *Communist Party* case (1951) 83 CLR 1 at 203–204 (Dixon J), 213 (McTiernan J), 270 (Fullagar J), 283–284 (Kitto J).

67 Williams J seems to have assumed that if the Act had been a valid exercise of the defence power, acquisition of property under the Act would be governed by Constitution s 51(xxxi): *Communist Party* case (1951) 83 CLR 1 at 229.

68 *Communist Party* case (1951) 83 CLR 1 at 268–269.

69 *Id* at 200 (Dixon J), 225–226 (Williams J).

70 *Id* at 262.

71 *Id* at 271.

72 *Id* at 235–240.

73 *Id* at 238.

74 *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116.

posed a permanent threat. This could not be assumed, and no evidence had been presented to suggest that it was the case.<sup>75</sup>

Webb J therefore considered that the ban on the Party was invalid. A case could be made for the proposition that ss 5 and 9 should be severed, and upheld on the basis that the validity of the relevant opinion would also be conditioned on the existence of grounds for assuming that the relevant threat was permanent. But s 4 (which could not be so read) was central to the scheme underlying the Act. If it fell, the rest of the Act fell with it.<sup>76</sup> But while Webb J came close to allowing important parts of the Act to be saved, its salvation was predicated upon its emasculation. A communist-dominated body could contest a declaration by arguing that its activities could not constitute a permanent threat to the defence or the Constitution of the Commonwealth. It is hard to imagine how the Commonwealth could ever prove otherwise.

Webb J dismissed the argument that the Act was bad by virtue of the Parliament's having assumed judicial powers and by virtue of its having allocated judicial powers to the executive. He also dismissed the plaintiffs' s 92 argument.

Latham CJ dissented. His starting point was that defence policy is inherently political, as was policy relating to how to deal with an internal enemy. It involves decisions as to who constitutes the enemy, what dangers exist and how they are to be dealt with. These issues do not turn on questions of fact, for even if facts could be ascertained, their significance will depend on the policy which the government adopts. Rather they turn on political judgment, and defence policy may be the subject of bitter political disagreement as it was in 1939-40. In relation to defence, it was for the executive and the Parliament to resolve these questions, with the executive being responsible to the Parliament and the Parliament responsible to the people. It was not for the courts to decide such matters, for they can be resolved only on the basis of political opinions, and the Court should have no political opinions:

The exercise of these powers to protect the community and to preserve the government of the country under the Constitution is a matter of the greatest moment. Their exercise from time to time must necessarily depend on the circumstances of the time as viewed by some authority. The question is — 'by what authority — by Parliament or by a court?'<sup>77</sup>

His answer was: by Parliament. The majority's was: ultimately by a court.

## **B. Prosecutions**

### *(i) Sedition and Criminal Libel*

The most famous prosecutions of the period involved a series of sedition trials, and a prosecution for criminal libel. The first of these prosecutions involved Gilbert Burns, a member of the Queensland State Committee of the Party, and arose out

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<sup>75</sup> *Communist Party case* (1951) 83 CLR 1 at 243-245.

<sup>76</sup> *Id* at 245-247.

<sup>77</sup> *Id* at 142.

of words given in answer to a question at a public debate on 15 September 1948.<sup>78</sup> The debate had been between representatives of the Queensland People's Party and representatives of the Communist Party, on the topic: 'That communism is not compatible with personal liberty'. At the end of the debate, members of the audience were given an opportunity to ask questions of the speakers, and taking advantage of this opportunity, one member of the audience asked as follows:

We realise the world could become embroiled in a third world war in the immediate future between Soviet Russia and the western powers. In the event of such a war what would be the attitude and actions of the Communist Party in Australia?

Burns gave a slightly evasive answer:

If Australia was involved in such a war it would be between Soviet Russia and Imperialism of America and Britain on the other hand. It would be a counter-revolutionary war.

His questioner then interjected:

That isn't an answer to my question! I want a direct answer!

Burns then replied:

All right, we would oppose that war. We would fight on the side of the Soviet Union. That's a direct answer.<sup>79</sup>

On the basis of these answers, he was prosecuted under the *Crimes Act* 1914 (Cth) on a charge of uttering seditious words.<sup>80</sup> He opted for summary trial, and was convicted of uttering seditious words and sentenced to six months imprisonment. He appealed to the High Court.

The following year, while Gilbert Burns' appeal was still pending, Laurence Sharkey, the Party's General Secretary, made a similar, but more carefully worded, statement in response to a query from a reporter.<sup>81</sup> In early 1949, European communist leaders had made public statements to the effect that if Soviet troops entered their country in pursuit of an aggressor, the local working classes would join with them in resisting the common foe. On 3 March 1949, J D McGarry, a *Sydney Daily Telegraph* journalist, phoned Sharkey and asked for his comments. Sharkey wisely asked for time to think, and next day, he gave his answer:

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78 See Lawrence W Maher, 'The Use and Abuse of Sedition' (1992) 14 *Sydney Law Review* 287 at 295–301 for a discussion of the circumstances in which the case arose and of its handling by the courts.

79 Maher, 'Use and Abuse' above n78 at 297, citing NAA (Queensland) BT77, Item 17289. The information against Burns attributes slightly different language to him.

80 For a similar but earlier interaction between a communist and a questioner which did not result in a prosecution, see 'Preamble', above n5.

81 Maher, 'Use and Abuse' above n78 at 300–305.

If Soviet Forces in pursuit of aggressors entered Australia, Australian workers would welcome them. Australian workers would welcome Soviet Forces pursuing aggressors as the workers welcomed them throughout Europe when the Red troops liberated the people from the power of the Nazis. I support the statements made by the French Communist leader, Maurice Thorez. Invasion of Australia by forces of the Soviet Union seems very remote and hypothetical to me. I believe the Soviet Union will go to war only if she is attacked and if she is attacked I cannot see Australia being invaded by Soviet troops. The job of Communists is to struggle to prevent war and to educate the mass of people against the idea of war. The Communist Party also wants to bring the working class to power but if fascists in Australia use force to prevent the workers gaining that power Communists will advise the workers to meet force with force.<sup>82</sup>

The answer was carefully crafted: on one hand, it expressed solidarity with Sharkey's European counterparts; on the other, it conditioned his disloyalty on so many contingencies that one would have thought that Sharkey was legally safe.<sup>83</sup> Nonetheless, he too was prosecuted for uttering and publishing seditious words.

Sharkey, opted for trial by jury, was committed for trial, and, after an unsympathetic direction from the trial judge, convicted of uttering seditious words.<sup>84</sup> Following their convictions, Sharkey appealed to the High Court by way of a case stated, and Gilbert Burns appealed, the appeal taking the form of a 're-hearing'. Judgment in the two cases was given on the same day.

The appeals raised several issues. The most fundamental of these related to the constitutionality of the sedition legislation. The second issue related to the nature of the elements of the offences, and the third to whether there was relevant error. The High Court held that the Commonwealth possessed the power to criminalise sedition, either under ss 61 and 51(xxxix) of the Constitution, or by necessary implication.<sup>85</sup> It accepted that the excitement of disaffection (s 24A(1)(b)) required more than exciting discontent: it required exciting active disloyalty, and exciting disaffection against the government involved exciting disaffection against the institutions of government and not simply the government of the day.<sup>86</sup> But the Court found that both convictions were justified. In Sharkey's case, the majority

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82 These are the words he was charged with, and convicted of, having used: *R v Sharkey* (1949) 79 CLR 121 at 138 (Latham CJ).

83 A CIS report described it as including an 'apparently devised formula', concluded that it was security assessable, but implied that its legal implications were uncertain: Notes upon the Question of 'Ban' upon Extremist Organizations in *Aspects of Commonwealth Governmental Intention in relation to Security against Sedition and Subversion*, NAA: A7359 Box 13/61.

84 A copy of the direction is to be found in Appeal Book in *Lawrence Louis Sharkey Prosecution for Alleged Seditious Statement. Appeal to Court of Criminal Appeal*, NAA: A432/82 1949/308 Part 2 at 35.

85 *Burns v Ransley* (1949) 79 CLR 101 at 110 (Latham CJ), 111 (Rich J, whose grounds are unclear), 116 (Dixon J), 120 (McTiernan J); *R v Sharkey* (1949) 79 CLR 121 at 135–138 (Latham CJ), 145 (Rich J), 148–150 (Dixon J), 157–158 (McTiernan J), 159–160 (Williams J), 164 (Webb J). Dixon J held, however, that there was no power to enact s 24A(1)(g) which was satisfied by words expressive of an intention 'to promote feelings of ill-will and hostility between His Majesty's subjects' so as to 'endanger the peace, order and good government of the Commonwealth': at 150–154.

held that it was open to the jury to convict Sharkey on the basis of the evidence before it. (Dixon J dissented on the grounds that the jury's verdict might well have been based on s 24A(1)(g) which he considered was invalid).<sup>87</sup>

Gilbert Burns' appeal was by way of re-hearing, which meant that while the case against him was arguably stronger than that against Sharkey, the burden that he had to discharge was lower. The Court divided 2-2 in relation to his guilt, and since the Chief Justice favoured dismissing the appeal, the conviction stood.<sup>88</sup> The dissents of Dixon and McTiernan JJ are persuasive: it is hard to avoid the conclusion that Burns' intention was not to arouse disaffection, but to extricate himself from a situation in which he would prefer not to have been placed, and even if that was not so, it would be hard to conclude that the seditious intention had been established beyond reasonable doubt.<sup>89</sup>

Following the answers to the case stated, Sharkey returned to the Supreme Court for sentencing. Dwyer J sentenced him to three years imprisonment, the maximum for the offence, whereupon he appealed to the New South Wales Court of Criminal Appeal against conviction and sentence. The appeal against conviction failed, but the appeal against sentence was halved.<sup>90</sup>

Following the decision to prosecute Sharkey, K M Healy, State President of the Western Australian Branch of the ACP, had made a statement to the Perth *Daily News* in which he had expressed 'wholehearted approval' of Sharkey's statement, and in which he reiterated Sharkey's sentiments. He too was prosecuted, but his case had been delayed pending the outcome of Sharkey's appeal. He was tried before Dwyer CJ, who was rather less unsympathetic than Dwyer J had been in Sharkey's case.<sup>91</sup> Despite his having used language more or less identical to that used by Sharkey, he was acquitted, the jury taking only 40 minutes to reach its verdict.<sup>92</sup>

William Burns, the publisher of the *Tribune*, was prosecuted on the basis of three articles published in the *Tribune* in July 1950.<sup>93</sup> These attacked the

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86 *Burns v Ransley* (1949) 79 CLR 101 at 109 (Latham CJ), 111 (Rich J), 115–116 (Dixon J). McTiernan J did not advert to this question, but his decision on the question of guilt assumes a similar analysis. *R v Sharkey* (1949) 79 CLR 121 at 135 (Latham CJ), 145 (Rich J), 156 (Dixon J), 158–159 (McTiernan J), 160 (Williams J), 165 (Webb J).

87 *R v Sharkey* (1949) 79 CLR 121.

88 *Burns v Ransley* (1949) 79 CLR 101.

89 The case receives a detailed, critical analysis in Maher, 'Uses and abuses' above n78.

90 The appeal against conviction was based on the contention that the High Court 'appeal' involved no more than a consideration of the questions in the case stated, its order that the conviction be affirmed being a 'slip'. The Court of Criminal Appeal rejected this argument, pointing out, *inter alia*, that even if there had been a slip, the only court which could correct it would have been the High Court, and it had not been asked to do so: see *R v Lawrence Louis Sharkey*, Transcript of Proceedings (New South Wales Court of Criminal Appeal, 17 February 1950) in *Lawrence Louis Sharkey Prosecution for Alleged Seditious Statement. Appeal to Court of Criminal Appeal*, NAA: A432 1949/308 Part 2. Sharkey represented himself.

91 A copy of the direction is to be found in *Papers of Brian Fitzpatrick, 1905-1965*, NLA MS 4965 at 4522–4526.

92 'Kevin Healy Freed on Seditious Words Charge: Speech to WA Jury on Peace' *Tribune* (5 November 1949) at 6.

Australian Government's decision to become involved in the Korean War. The articles were relatively standard pieces of pro-Soviet propaganda. The war was to be condemned as an act of American imperialism against peace-loving socialist Korea, and as a violation of international law. It was assumed that these sentiments would be shared by large numbers of peace-loving Australians. But what were these peace-loving Australians to do? They were to bombard members of Parliament with letters and telegrams, and Labor leaders were to be pressed to use their Senate majority against the war policy. They were to collect signatures to a petition to ban the atom bomb. The third of the articles went a little further. It praised the seamen's union decision to oppose the war against Korea as 'one of selfless loyalty and devotion to Australia', and called for '[t]he refusal by all sections of workers to have anything whatever to do with the manufacturing or transport of munitions for this unjust war'. Following a summary trial, Burns was convicted on one of three charges of publishing seditious words. The magistrate had no doubt that the words in each of the offending articles was seditious, but found that he had been aware of the contents of only one of the three articles.

Burns appealed to General Sessions, his appeal taking the form of a trial *de novo*. It was heard by a sympathetic judge, who provisionally found in his favour on the crucial question of whether he had been aware of the content of the 'seditious' article, but before the appeal was resolved, the Commonwealth successfully sought an order restraining the judge from continuing with the matter on the grounds of apparent bias. Following the second hearing, Burns was again convicted, but in view of the time which had elapsed between the original trial and the final appeal, the sentence was reduced to six months.

Thereafter, the Commonwealth's enthusiasm for sedition prosecutions seems to have waned. However, in 1953, Adam Ogston, James Bone and Herbert Chandler<sup>94</sup> were prosecuted in connection with an article critical of the monarchy, which had appeared in the *Communist Review*.<sup>95</sup> Unlike the earlier cases, the offending words could not be taken as advocating support for a potential foreign enemy. If they were seditious, it was because they were seeking to excite disaffection against the monarchy. Given the interpretation given to 'disaffection' in *Burns v Ransley*, it was unlikely that this was their intention. Shocked by the verdict in *Sharkey*, and apparently unimpressed by the juries' verdicts in *Healy* and *Hardy* (on which, see below), the Party was anxious that the defendants be tried

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93 Maher, 'Use and Abuse' above n78 at 306. For a more detailed account of the case see Roger Douglas, 'The Ambiguity of Sedition: the Trials of William Fardon Burns' (2005) 9 *Australian Journal of Legal History* 227. The articles appeared in *Tribune*: 'Not a Man, Ship, 'Plane for Korea or Malaya' (1 July 1950) at 1; 'Korea for the Koreans! Withdraw All Aust Forces!' (5 July 1950) at 1; 'Seamen's Patriotic Lead: Stop War on Korea' (12 July 1950) at 1.

94 Ogston was publisher of the *Review*. Chandler was registered owner of the printery in which it was printed, and Bone was also a printer: Lawrence W Maher, 'Dissent, Disloyalty and Disaffection: Australia's Last Cold War Sedition Case' (1994) 16 *Adelaide Law Review* 1 at 26–27.

95 Maher, 'Use and Abuse' above n78; Maher, 'Dissent' above n78 provides a comprehensive account of the trials.

summarily. Despite a belief within the ACP that Chandler and Bone would be ‘fitted’,<sup>96</sup> all three were acquitted, the magistrate opting for a relatively liberal interpretation of the sedition legislation.

The criminal libel charge arose from a profoundly political book. *Power without Glory* was an epic novel covering the life of one ‘John West’, a Melbourne working class boy made good, whose rise to riches involved crime, corruption, and dubious dealings with businesspeople, ecclesiasts and politicians of all parties (other than the ACP). Any lack of resemblance between the characters and actual people was purely coincidental, and it was clear that West was in reality one John Wren, a Melbourne businessperson with a rich web of political associates. Of all the allegations made by Hardy, one of the less central to his implicit argument was to the effect that West/Wren’s wife had had an illicit sexual relationship, an allegation which completely lacked foundation. Hardy had been sceptical about the allegation, suspecting that it may have been ‘fed’ to him by ASIO or some other source with a view to discrediting his project,<sup>97</sup> and wary about the propriety of casting aspersions on Mrs Wren and her daughter.<sup>98</sup>

The aspersion became the basis for a charge of criminal libel, the first such prosecution to be laid in Victoria since the 1930s.<sup>99</sup> Even more than Sharkey’s sedition trial, Hardy’s became a cause célèbre, attracting even more, and more broadly based, attention than Sharkey’s trial. The defence sought to argue that criminal libel required, inter alia, that the words in question be calculated to cause a breach of the peace, and that Mrs West could be Mrs Wren only if Mr West was Mr Wren, in which case it was puzzling why there had been no charges based on the numerous villainies attributed to Jack West. Martin J, who presided over the trial, rejected the claim that the propensity to cause a breach of the peace was an essential element of criminal libel,<sup>100</sup> but the defence nonetheless triumphed. The jury deliberated over the lunch break, making up its mind even before the break was over, and returned a verdict of not guilty, influenced in part by its distaste for John Wren.<sup>101</sup>

96 Report No 5691, 6 August 1953, NAA: A6122/16 1004.

97 Fiona Capp, *Writers Defiled* (1993) at 73–74. See also Jenny Hocking, *Frank Hardy: Politics, Literature, Life* (2005) at 57–61, 75.

98 Even at the page-proof stage, Hardy wavered, concerned about the impact of the allegation on both Mrs Wren, and her impliedly illegitimate daughter. (His source had advised that the liaison had given rise to an illegitimate daughter). Hardy compromised, converting the daughter into a son, but it was too late to excise the story, and the advice he received from JB Miles, the ACP’s former General Secretary, was against doing so: Hocking, above n97 at 63–66.

99 The case and its antecedents are discussed by Pauline Armstrong, *Frank Hardy and the Making of Power Without Glory* (2000), and by Hocking, above n97 at 49–90. Armstrong states that it was the first Victorian criminal libel prosecution in thirty years: at 86. Hocking says it was the first in fifty years: at 75. However, the *Workers’ Weekly* reported two Victorian criminal libel prosecutions in the 1930s: ‘Criminal Libel. Two Vic Workers Charged’ *Workers’ Weekly* (31 August 1934) at 6; ‘Victorian Libel Case. “Workers’ Voice” Publisher for Trial’ *Workers’ Weekly* (7 September 1934) at 5. One of these prosecutions was subsequently withdrawn after the defendant had been committed for trial: ‘Libel Charge Withdrawn’ *Workers’ Weekly* (12 October 1934) at 5. I have not found any reports relating to the fate of the other prosecution.

100 *R v Hardy* [1951] VLR 454.

101 Armstrong, above n99 at 125–139.



*(ii) Contempt*

In response to the miners' strike of 1949, Parliament passed the *National Emergency (Coal Strike) Act 1949* (Cth) (the '*Emergency Act*').<sup>102</sup> The purposes of the legislation were clear. Unions whose members were involved in the strike were forbidden from making payments or promising payments for the purposes of ensuring the continuation of the strike: s 4. They, their sub-units, and their members were forbidden from accepting payments from any other source where the payment was intended to promote the continuation of the strike: s 5. Other organisations were also forbidden from making payments or promising payments for the purposes of ensuring the continuation of the strike: s 6. The Act further provided that the Commonwealth Court of Conciliation and Arbitration could order the return of funds received after the date of the decision to strike in cases where the receipt of such funds would have been illegal after the passage of the Act: s 8. Registrars and Industrial Registrars were empowered to inspect and take possession of union documents and were empowered to require people to provide any information which might relate to the enforcement of the Act: s 10(1). It was an offence to refuse to comply with a requirement under s 10(1) or to interfere with attempts to exercise powers under the subsection: s 10(2). Officers of organisations were deemed prima facie to be guilty of offences committed by the organisation, and people making payments were deemed prima facie to have done so for the purpose of continuing continuation of the strike: ss 11, 12.

Following a meeting of communist-led unions, steps were taken to circumvent the Act. The Waterside Workers' Federation ('WWF') withdrew £6000 and the Federated Ironworkers' Association ('FIA') withdrew £25,000 from their Martin Place Commonwealth Savings Bank Accounts. The Amalgamated Engineering Union ('AEU') withdrew more than £4,000 from a series of accounts. The Australasian Coal and Shale Employees' Federation ('the miners' union') withdrew £15,000, and its Southern and Western Districts withdrew a further £4,200 and £4,500 respectively ('the Southern District', 'the Western District'). The ACP also withdrew £4,500.

The Commonwealth and James Taylor, the Industrial Registrar, then applied to the Court of Conciliation and Arbitration for injunctions restraining the unions and named officials from using union funds to assist the miners, and for orders that the unions and the named officials either return the money to the accounts, or pay it into court (hereafter 'the enforcement applications').<sup>103</sup> The defendants appear to have been chosen on the basis of their positions within the relevant unions, rather than on the basis of their political allegiances: while most of the defendants were prominent members of the ACP, at least one was a member of the ALP, and several others do not appear on an ASIO list of communist union officials.<sup>104</sup>

The applications came before Kelly CJ on 2 July, when his Honour made interim orders restraining the defendants from using or — in the case of the miners' union — receiving money in breach of the *Emergency Act*. On 4 July, the interim injunction was extended, and orders made that the withdrawn funds be paid

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<sup>102</sup> For general accounts of the legislation and its enforcement, see Larmour, above n at 193–202.

into court by 11 am the following day. The following day, the payment-in orders were amended, to extend both to named respondents and any others who might have the money within their possession, and on the following day the orders were amended yet again, to extend the deadline for payment until 2.30 pm that day.<sup>105</sup> Similar orders were made against the Southern and Western Districts and their officials.<sup>106</sup>

Following the making of the July 5 orders, the AEU, the FIA and the miners' union applied to the High Court for orders nisi for prohibition to restrain Kelly CJ, the Commonwealth and the Industrial Registrar from proceeding further with the enforcement applications. The applications were heard immediately and dismissed the following day.<sup>107</sup> The challenge was based on three arguments: a contention that the Act was beyond the Commonwealth's power; an argument that the Chief Judge lacked jurisdiction under the Act to make the orders; and the argument that the coal industry was relevantly governed by both Commonwealth and state legislation, each having undertaken not to act unilaterally. The Court rejected the last argument: no Parliament has the power to bind its predecessors. It also rejected the other two arguments. In an observation of potential significance to the subsequent *Communist Party* case, it noted the recitals 'to which we are entitled to attach importance'. It further noted that it was a notorious public fact that there was a general coal strike, and

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103 An application was also made for injunctive relief against the ACP and people associated with it, in relation to the £4,500, but not until 11 July. An ex parte injunction was issued that day, which restrained the respondents from 'being party to the receipt of any monies or money by an organization or person in contravention of the *National Emergency (Coal Strike) Act 1949*', and the Court further ordered that produce and pay to the Registrar of the court the sum of £1000. After a hearing on the return date, the terms of the orders were slightly modified, and after further hearings, Foster J issued a new order restraining the ACP and those in control of its money from using it in contravention of the Act. There was no payment-in requirement, but copies of the order were to be served on banks where the Party and people associated with the Party kept bank accounts: see *Re the Commonwealth of Australia and James Edward Taylor v The Australian Communist Party* (1949) 64 CAR 803. The reason why the ACP was treated differently to the unions is not clear from Foster J's judgment, but the position of the ACP was legally different. Unlike the unions, it was not an 'organization' for the purposes of s 7 of the Act, and the injunction was justified under s 9. It would therefore not have committed an offence under the Act if it had paid money to the miners' union, although since the union would have been guilty of an offence by receiving the money, the ACP would have been an accessory to that offence. The Party complied with the order: Sheridan, above n29 at 297.

104 The communists were: James Healy, John King, K McKeon, Leslie McPhillips, William Parkinson, Edward Roach & Idris Williams. George Grant was a (militant and critical) member of the ALP: Sheridan, above n29 at 267. ASIO's list of communists active in the Trade Union movement between 1947-49 is in Appendix to *Australian Communist Party Influence in the Trade Union Movement in Australian Communist Party Dissolution Act – Implementation and Administration*, NAA: M1509 7.

105 *Re the Commonwealth of Australia and James Edward Taylor v The Australasian Coal and Shale Employees Federation* (1949) 64 CAR 741.

106 *Id* at 762.

that in the words of one of the recitals that strike is prejudicing or interfering with the maintenance of supplies and services essential to the life of the community and has caused a grave national emergency.<sup>108</sup>

The legislation could be justified as an exercise of the Commonwealth's power to make laws with respect to conciliation and arbitration, since it applied to unions registered under the *Commonwealth Conciliation and Arbitration Act*. Alternatively, it could be justified as legislation designed to preclude assistance to those who strike rather than accept conciliation and arbitration. The power to make the orders was clearly one conferred by the Act.

Proceedings against the AEU and its officials were withdrawn after the Commonwealth was persuaded that its withdrawals were in accordance with its normal banking practices,<sup>109</sup> but continued against the other respondents. On 6 July, Kelly CJ committed John King to one month's imprisonment for failure to answer a question directed to him by the Court.<sup>110</sup> Others were to follow him. Neither the unions nor the officials complied with the orders by the deadline fixed by the orders of 6 July, and on 7 and 8 July, Taylor applied for orders requiring the unions and the named officials<sup>111</sup> to show cause why they should not be dealt with for contempt. Kelly CJ had fallen ill and the applications were heard by Foster J. The first of these involved the FIA and its officials. In that case, Foster J sentenced Leslie McPhillips to 6 months imprisonment, K McKeon to a fine of £100, and the union to a fine of £1,000. The sentences on McPhillips and the union were based on the maximum sentences for offences under the Emergency legislation. The lighter sentence imposed on McKeon was based on his less responsible position in the union and his lesser blameworthiness. The operation of the fine was deferred in the hope that the union would comply with the order. When this hope was dashed, the fine was made immediately enforceable.<sup>112</sup> In subsequent cases, Foster J no longer limited his sentences to those which could have been imposed for substantive offences under the legislation. He imposed sentences of 12 months on a number of union officials,<sup>113</sup> and fines of £2,000 on the miners' union and the

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107 *R v Taylor; Ex parte Federated Ironworkers Association of Australia* (1949) 79 CLR 333.

108 *Id* at 338 (Rich, McTiernan and Williams JJ).

109 Sheridan, above n29 at 366 (n3).

110 *Re the Commonwealth of Australia and James Edward Taylor v The Australasian Coal and Shale Employees Federation Western District* (1949) 64 CAR 762 at 763.

111 No further proceedings were taken against C A Willis.

112 *Re the Commonwealth of Australia and James Edward Taylor v The Federated Ironworkers Federation of Australia* (1949) 64 CAR 707.

113 Idris Williams and George Grant (miners' union): *Re the Commonwealth of Australia and James Edward Taylor v The Australasian Coal and Shale Employees Federation* (1949) 64 CR 741 at 744; Michael Fitzgibbon and William Parkinson (Southern District): *Re the Commonwealth of Australia and James Edward Taylor v The Australasian Coal and Shale Employees Federation Southern District* (1949) 64 CAR 758 at 760; John King: *Re the Commonwealth of Australia and James Edward Taylor v The Australasian Coal and Shale Employees Federation Western District* (1949) 64 CAR 762 at 764 (King's sentence was backdated to begin on the day of his imprisonment pursuant to Kelly CJ's order); James Healy and Edward Roach: *Re the Commonwealth of Australia and James Edward Taylor v The Waterside Workers Federation of Australia* (1949) 64 CAR 835 at 839.

WWF.<sup>114</sup> Other officials were fined £100.<sup>115</sup> As was the case in the FIA case, the custodial sentences were imposed on the basis of the seniority of the defendant's position in the union. In some cases, custodial sentences seem to have been justified on the slightly different ground that those so sentenced had control of the money and could therefore have complied with the orders. Lesser sentences were warranted for officials who had facilitated the withdrawals, who were not in control of the money, but who had taken no steps to inquire as to its whereabouts.<sup>116</sup>

Once the strike was over, the Governor-General made a proclamation to this effect. The union officials, who had been imprisoned for failing to obey orders to pay into court money withdrawn with a view to assisting the miners, applied to the court to be released from prison. Upon their paying the withdrawn money into court and upon their presenting affidavits professing remorse, the Full Court (Kelly CJ and Kirby J, Dunphy J dissenting except in relation to Grant) granted their application. The majority found that the applicants had purged their contempt by publicly acknowledging the authority of the court, Kelly CJ also noting that the money had not in fact been used contrary to the Act, and that there was no evidence that their disobedience had prolonged the strike.<sup>117</sup> The court rejected an application by the unions for remission of the fines imposed for their contempt. The money had not been paid into court until after the strike had ended, and at no stage while the strike was in progress had the unions done anything to comply with the orders made against them.<sup>118</sup> Even allowing for the reductions, these were among the most punitive sentences imposed on communists during the cold war years. In a sense their severity was independent of the defendants' politics: several of the defendants were not communists. They nonetheless received the same sentences, and indeed, they, like their communist co-defendants, received heavier sentences than the six month sentence imposed on McPhillips. But their sentences took place in the context of a strike which was defined as a communist strike, and whose definition as such underlay the extraordinary measures taken by the Chifley government to suppress it.

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114 *Re the Commonwealth of Australia and James Edward Taylor v The Australasian Coal and Shale Employees Federation* (1949) 64 CAR 741 at 744; *Re the Commonwealth of Australia and James Edward Taylor v The Waterside Workers Federation of Australia* (1949) 64 CAR 835 at 839.

115 Arthur Mountjoy: *Re the Commonwealth of Australia and James Edward Taylor v The Australasian Coal and Shale Employees Federation Southern District* (1949) 64 CAR 758 at 761; John Parkinson, Thomas Welsh, William Smith: *Re the Commonwealth of Australia and James Edward Taylor v The Australasian Coal and Shale Employees Federation Western District* (1949) 64 CAR 762 at 765.

116 *Re the Commonwealth of Australia and James Edward Taylor v The Australasian Coal and Shale Employees Federation Southern District* (1949) 64 CAR 758 at 760 (Foster J); *Re the Commonwealth of Australia and James Edward Taylor v The Australasian Coal and Shale Employees Federation Western District* (1949) 64 CAR 762 at 765 (Foster J).

117 *Re Applications by Grant and Others* (1949) 65 CAR 238. The application had the Commonwealth's support.

118 *In the matter of The Australasian Coal and Shale Employees Federation and Others* (1949) 65 CAR 416.

These were not the only cases in which communists received prison sentences for contempt. Two communists were prosecuted not for disobeying court orders but for statements critical of the court. John<sup>119</sup> McPhillips, the Assistant National Secretary of the FIA, received a one month prison sentence for contempt, for having said at a public meeting of four to five hundred unionists:

The basic wage in existence is not related to the standards of living. This will be decided outside the Arbitration Court. We do not trust the people in charge of the Court to play the game. We want an immediate cash increase of not less than 30s per week.<sup>120</sup>

His denial that he had uttered these words was rejected, the court preferring the evidence of three journalists who had been present. Nor were the words fair comment. It was an aggravating circumstance that they were uttered by a person who had frequently appeared before the court as an advocate. The Full Court was unanimous as to McPhillips' guilt, but divided over penalty, Kelly CJ and Foster J favouring imprisonment, while Kirby J considered that the appropriate penalty was a £100 fine.<sup>121</sup> Kirby J was not unsympathetic to the argument that a deterrent sentence was needed, but was concerned at the discrepancy between the custodial sentence and a fine of £200 which had recently been imposed on the Metal Trade Employers' Association following the Association's condemnation of the Court in the *Metal Trades Journal*.<sup>122</sup>

In 1951, Ted Roach was prosecuted for contempt on the basis of his having caused to be published:

a circular and in a newspaper named "The Maritime Worker" certain words, figures, captions and a certain cartoon which were intended and calculated to embarrass the Court in arriving at its decisions, to detract from the authority and influence of its judicial decisions, to lower the authority of the Court as a whole and that of its Judges, to impair the confidence of the people in the Court's judgments, and to cause misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office of the Court in matters litigated before it.<sup>123</sup>

A Full Court found that Roach was indeed responsible for the offending passages, and sentenced him to 12 months imprisonment, the sentence being based on the seriousness of the contempt, which involved both an attack on the court, and an attempt to intimidate it. It also took account of Roach's prior conviction for contempt.<sup>124</sup>

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119 In the miners' strike contempt cases, he is described as 'Leslie John'. In this case, he was charged as 'John'.

120 'Unions Answer McPhillips Sentence with Big Strikes' *Tribune* (9 April 1949) at 1.

121 *Re James Edward Taylor and Leslie John McPhillips* (1949) 63 CAR 308.

122 *Re James Edward Taylor and The Metal Trade Employers' Association* (1948) 62 CAR 165.

123 *Re Taylor and Roach* (1951) 70 CAR 464 at 464.

124 *Re Taylor and Roach* (1951) 70 CAR 464 at 466 (Foster J, with whom Wright J concurred).

Contempt charges also arose out of the Party's response to the Lowe Commissions. *R v Arrowsmith*<sup>125</sup> arose from articles published in the *Guardian*, which were critical of the Royal Commissioner, Lowe J, and of the key witness before the Commission, the former communist, Cecil Sharpley. The articles implied that Lowe J's conduct of the Commission was and would be influenced by the fact that he was a shareholder in the Melbourne *Herald* (which had published Sharpley's post-defection revelations), and by the fact that he was a member of the same club as a number of businesspeople whom the Party wished to expose at the Commission. Sharpley was criticised as a 'liar', a 'traitor' and a 'rat'. Dean J's judgment was a considered one which acknowledged the need to balance the protection of the authority of the judiciary against the need to protect freedom of political expression, and which recognised that the boundaries between what did and did not constitute contempt could be unclear. He found that some (but not all) of the impugned articles constituted contempt, noted that the defendants had done nothing to purge their contempt, but considered that before determining sentence he should give them a chance to do so. The defendants filed affidavits expressing regret, and published an apology in the *Guardian*. Dean J decided to fine them, rather than commit them to prison. The fines were not inconsiderable: Arrowsmith and Miller were fined £35 each, and Little was fined £30.

Counsel assisting the Lowe Royal Commission had been Reginald Sholl KC. In January 1950, Sholl was appointed to the Supreme Court bench, and his appointment was greeted with a critical article in the *Guardian*, the Victorian Communist newspaper. Sholl was condemned as a reactionary whose legal experience had been confined to estates and commercial matters:

Mr Sholl's knowledge of real life is nil — he knows nothing of the lives of the people. He will be called upon to adjudicate in the Criminal court (the only court where even a semblance of the lives of the people arise). Yet Mr Sholl, like all except one of his new colleagues, has very rarely been in the Criminal court — not only is it beyond his capacity, but it is beneath his dignity. What can such a man know of the real problems that arise there? Such an appointment throws a clear light upon the nature of the judiciary — namely, an institution forming an integral part of the repressive machinery of State.

Following publication of the article, the Crown moved for the committal for contempt of Brett, the proprietor, printer and publisher of the paper.<sup>126</sup> Both sides treated the case as one in which the stakes were high. The Crown was represented by Winneke KC, with Gillard, and the defendant by Fred Paterson KC, with Laurie. The Crown contended that the article was an attack on the judiciary, its implication being that the court was composed of men devoted only to the care and protection of the rich and privileged, who, knowing nothing of the problems of the poor, could not act fairly in criminal trials, and who were therefore incapable of doing justice. Paterson's argument was that the article was really an attack not on Sholl, but on the government's appointment practices. O'Bryan J was sceptical:

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125 *R v Arrowsmith* [1950] VLR 78.

126 *R v Brett* [1950] VLR 226.

the fact that some of the assertions were untrue cast doubt on the degree to which they could be treated as simply ‘good faith’ criticism, and the reference to the judiciary’s repressive role posed problems for the defence. But summary prosecutions for contempt could succeed only if the contempt was established clearly and beyond reasonable doubt. It was possible that the defendant did not fully understand the implications of the words used in the article. He had said on oath that he had taken the purpose of the article to be to criticise the methods of appointing judges, that if the article were to be read otherwise, he was sorry, and that he would be prepared to publish an apology. He should therefore not be committed for contempt. But there was a sting in the tail: his Honour chose to make no order as to costs. This probably made no difference to Brett, but it did mean that Paterson and Laurie were not going to have their costs paid by the Crown. O’Byrne J also suggested that in view of his having accepted Brett’s evidence as to what he understood by the article, Brett might consider himself ‘honourably bound’ to publish a statement to the effect that this was indeed the construction he intended should be placed on the article.<sup>127</sup>

There appear to have been no cases of defendants being charged with contempt in relation to comments about magistrates, but in the course of a prosecution of Stanley Moran for using unseemly words, the prosecutor, apparently aggrieved by the magistrate’s dismissal of Moran’s uncomplimentary references to certain police as ‘trivial’, asked: ‘Would your worship says [*sic*] that the reference to Mr Hardwick SM “and three of four others just as bad as him,” was unseemly?’

Mr Sargeson: I may be one of the three of four, and I’m not worried.

Your Worship is not concerned with aspersions towards the Bench?

— Not in the least.<sup>128</sup>

### (iii) *Minor Offences*

Numerous people were arrested for participation in protests supported by the Party, and for minor offences apparently committed in the course of party activity. Details relating to some of these arrests and to the resulting court cases were culled from *Tribune* and the *Guardian* (the major communist newspapers), from cases indexed in the *Sydney Morning Herald* and the Melbourne *Argus* and from other sources (including biographies and autobiographies of party members). The sample probably over-represents Sydney and almost certainly omits some of those charged with minor billposting or pamphletting offences. However, the small number of Melbourne defendants may also reflect the paucity of arrests for communist demonstrations in that city. It is not always clear whether these arrestees were ‘communists’ in the sense that they were members of the Party or people who identified with the Party. About 40 per cent of the arrestees can be

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127 The *Guardian* noted the outcome of the case with satisfaction, but made no attempt to clarify misunderstandings to which the earlier article might have given rise: ‘Guardian Court Charge Dismissed’ *Guardian* (6 April 1950) at 1.

128 ‘Union Treasurer Fined on Language Charge’ *Sydney Morning Herald* (21 October 1947) at 4.

fairly be described as ‘communists’ in this sense on the basis of reports and other information about their politics. There was also material suggesting that particular arrestees were not communists, and they were excluded from the sample. The remaining arrestees (‘others’) may or may not have been ‘communists’. The results reported below are based on cases involving both ‘communists’ and ‘others’. Since the resulting sample almost certainly includes other non-communists, the results reported below may understate the severity with which courts treated communists. However, there are grounds for believing that the resultant bias is minimal. In general ‘communists’ fared no worse than those whose political affiliations were unclear (‘others’). ‘Communists’ were, if anything, slightly more likely to be acquitted than ‘others’ and, if fined, seem to have been slightly less likely than ‘others’ to have been sentenced to the maximum fine. They were, however, more likely to receive custodial and suspended sentences and less likely to be released without a conviction being recorded under *Crimes Act* 1900 (NSW) s 556A (and its equivalents), although this seems partly attributable to legally relevant differences between the ‘communists’ and the ‘others’. (‘Communists’ appear to have had worse prior records).

The 210 or so people who were arrested for, and/or charged with, ‘political’ public order offences far outnumber those arrested for sedition/libel and for ‘contempt’ offences.<sup>129</sup> They were charged with a variety of offences. The most frequent of these charges was offensive behaviour (30 per cent of charges, 37 per cent of cases). The offences next most frequently charged were; assaulting police, resisting arrest and obstruction (7.1 per cent of charges), followed by demonstrating without a permit, unlawful assembly and disrupting a Commonwealth election meeting (5.6 per cent of charges). Other charges included unlawful leafletting and trespass (3.7 per cent of charges). The remainder included a mass of other public order offences, along with offences such as selling publications which did not carry the publisher’s name and address, billposting and writing on footpaths.

Defendants were typically convicted, 83.0 per cent being convicted on one or more counts.<sup>130</sup> Of those who were convicted, and sentenced, 3.5 per cent initially received custodial sentences, 3.5 per cent received suspended sentences, 1.8 per cent received fines coupled with a requirement to enter into a recognizance, and 78.9 per cent were fined. In 9.6 per cent of cases, ‘convicted’ defendants were released under *Crimes Act* 1900 (NSW) s 556A without a conviction being recorded, and three defendants were convicted and discharged after giving an undertaking not to commit the same offence again.

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129 The sample also includes four prosecutions under the *Crimes Act* 1914 (Cth) s 30K. Offences under this section carry a maximum penalty of one year’s imprisonment. In this respect they should, perhaps not be grouped under the heading ‘minor offences’. Two cases resulted in acquittals, and two in convictions.

130 These, and the percentages which follow, are based on those cases in relation to which relevant information was available. In a substantial number of cases, reports of defendants’ initial appearances are not followed by reports of what ultimately happened to them.



The high conviction rate is unsurprising: conviction is the normal fate of defendants who appear before the lower courts, and what may be surprising is that the conviction rate was not even higher. The 17 per cent acquittal rate compares favourably with the acquittal rate of 'political' defendants charged with pre-war public order offences, and is slightly higher than that observed among Victorian 'political' defendants in the 1960s.

The rarity of prison sentences is also striking. At first instance, four defendants were imprisoned. George Thompson had been convicted of disrupting an election meeting. Bernard O'Sullivan was imprisoned for his role in an unlawful assembly which had culminated in an attack on a group of strike-breakers. John Hartley received a three month sentence for assaulting police. Jim Healy was sentenced to six weeks imprisonment under s 30K of the *Crimes Act 1914* (Cth) for his role in a maritime dispute. In one sense the rarity of prison sentences is a legal artefact. The vast majority of defendants in the sample were sentenced in New South Wales, where offensive behaviour and cognate offences were not punishable by imprisonment. However, even when courts possessed the power to impose custodial sentences (as where defendants were charged with unlawful assembly, assaulting police, and with the Commonwealth offence of disrupting an election meeting), custodial sentences were rare. Moreover, while magistrates frequently imposed the maximum fine on minor public order offenders, they almost never used their powers to supplement a fine with the requirement that a defendant enter into a recognisance to be of good behaviour, failing which the defendant could be imprisoned.

Given the generally light sentences<sup>131</sup> which were imposed, it is not surprising that the cases gave rise to relatively few appeals and to little case law. Of ten appeals, six arose from convictions followed by non-custodial sentences. Only one resulted in the conviction being quashed. In *Worcester v Smith* the basis for the defendant's conviction on a charge of offensive behaviour had been that he had carried a placard condemning American involvement in the Korean War, coupled with a hostile reaction by a bystander to the defendant's politics and the fact that the placard had been displayed in the vicinity of the American consulate. O'Bryan J set aside the conviction: the mere expression of political views — even in the presence of those whose views are being attacked — did not constitute offensive behaviour. Nor was the defendant's refusal to obey police orders to 'move on' offensive (although it might have constituted some other offence).<sup>132</sup> All four custodial sentences resulted in appeals, and in three of these, the prison sentence

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131 By contrast with the early 1930s when communist defendants were expected by their comrades to serve the default prison term rather than pay fines, post-war defendants were not expected to go to prison, and indeed in at least some cases, the Party sought to raise the money to pay their fines: see, for example 'Appeal for £107 to Cover Fines' *Tribune* (14 March 1947) at 6; 'Fines on Squatters' *Tribune* (11 October 1947) at 8 (appeal for funds by group associated with the ACP).

132 *Worcester v Smith* [1951] VLR 316.

was reduced to a fine.<sup>133</sup> The successful appellants all appear to have been either party members or at least sympathisers: their successful appeals were noted, with approval, in the *Tribune* or in the *Guardian*.

### C. *Civil Litigation*

In a number of cases, communists and their allies sought to mobilise the courts. In 1948, members of the Party took legal action to restrain attempts to expel them from returned service organisations. At first instance, two of these applications were successful. Robert Griffiths successfully challenged the validity of a by-law of the Legion of Ex-Servicemen and Women under which suspected communists were required to sign a loyalty oath. The requirement was inconsistent with the Legion's articles of association.<sup>134</sup> In 1948, Arthur Bergeest, a member of the ACP and a former member of the RSL State Council, sued the New South Wales branch of the RSL, seeking an injunction restraining it from expelling him on the grounds of his political views.<sup>135</sup> Sugarman J of the New South Wales Supreme Court held that the RSL lacked the power to expel a member solely on the grounds that the member was a communist. There was no specific provision in the League's Federal or State rules permitting the expulsion of communists, and while there was provision for expelling a person for 'ungentlemanly behaviour', being a Communist was not sufficient to constitute ungentlemanly behaviour.<sup>136</sup> The NSW branch appealed, and was successful, the Full Court concluding that it was open to the RSL to expel communists from its ranks if it wished to do so. Nor, in the absence of any other evidence suggesting that the RSL would not afford Bergeest a fair hearing, were there any other grounds for an injunction restraining the hearing of the charges against him.<sup>137</sup> The following year, Charles Davidson challenged his expulsion from the RSL. He obtained an interim injunction, but this

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133 The unsuccessful defendant was Bernard O'Sullivan who had also argued that his conviction had involved a misinterpretation of s 545C of the *Crimes Act* 1900 (NSW): *R v O'Sullivan* (1948) 48 SR(NSW) 400. Thompson's sentence was reduced to a fine of £5, the same fine as that imposed on his 14 co-offenders: "Enemies of Democracy": Judge Rebukes Interjectors' *Sydney Morning Herald* (2 December 1947) at 9. Harley's sentence was reduced to a £10 fine, after the appeal court has been told of his impressive war record: 'Militant's Splendid War Record Impressed Judge' *Tribune* (10 September 1949) at 7. Healy's sentence was reduced to fines of £100: *James Healy – Waterside Workers Federation Prosecution under Crimes Act 30K*, NAA: A432/80 51/294 Part 1; *J Healy – Waterside Workers Federation – Prosecution under Crimes Act, Section 30K. Documents, Pleadings etc*, NAA: A432/80 51/294 Attachment.

134 'Expulsion of Legion Man Invalid' *Sydney Morning Herald* (16 October 1948) at 2.

135 For the background to the litigation see Les J Louis, 'The RSL and the Cold War, 1946-50' (1998) 74 *Labour History* 88 at 88-94. Bergeest was finally expelled following a lengthy hearing by the NSW state council in January 1950.

136 The decision is not reported in the law reports. However, the case received considerable coverage in the *Tribune* and the decision was reported in the *Sydney Morning Herald*: 'Court Test of RSL's Ban on Communists' *Tribune* (10 July 1948) at 6; 'Communist Ban by RSL Challenged' *Tribune* (4 August 1948) at 3; 'RSL Cannot Expel Communists: Vital Court Ruling' *Tribune* (16 October 1948) at 1; 'Court Stops Expulsion from RSL' *Sydney Morning Herald* (15 October 1948) at 2.

137 'Appeal Won. RSL Case' *Sydney Morning Herald* (3 March 1949) at 4.

was dissolved after a fuller hearing, Roper J being satisfied that the RSL rules permitted the expulsion of people on the grounds that they were communists 'within any of the diverse meanings of that word'.<sup>138</sup>

Attempts by communist 'front organisations'<sup>139</sup> to challenge local government decisions met with only limited success. In 1949, fifteen members and officials of the Australia-Soviet House sought damages and an injunction to restrain the Melbourne City Council from reneging on an agreement to give the organisation access to the Melbourne Town Hall. Martin J dismissed the application for an interlocutory injunction: the plaintiffs' interest was non-proprietary; the contract was too uncertain to be enforced in its terms; and it was unclear what damage the plaintiffs (as distinct from the proposed speaker) would suffer from the Council's conduct. The damages claim was subsequently settled.<sup>140</sup>

Litigation by the Youth Carnival for Peace and Friendship ('the Carnival') was slightly more successful. The Carnival was a front organisation which had arranged an international gathering which would involve a variety of wholesome activities, larded with a certain amount of propaganda of a kind attractive to the Party. The Carnival became the subject of bitter criticism, and many of the local authorities which had agreed to make their facilities available to the Carnival reneged on their agreements. *Heidke v Sydney City Council*<sup>141</sup> arose from an attempt by the Carnival to seek injunctions requiring the Sydney City Council to comply with its earlier agreements to allow the Carnival to use a town hall, cricket pitches, tennis courts and four ovals for its activities. The application in relation to the use of the town hall failed: the contract provided that the Lord Mayor could terminate the agreement on refunding the deposit. The agreement in relation to the cricket pitches and tennis courts was too uncertain to be equitably enforceable. The agreement in relation to three of the ovals was not enforceable: they seemed to fall under the *Public Parks Act* 1912 (NSW). Under that Act, temporary licences could be created only with the consent of the Minister, and there had been no such consent. (There being some doubt as to the status of the three ovals, the plaintiff was granted leave to apply for injunctive relief should evidence become available that they did not fall within the Act). The fourth park did not fall under that Act. On ordinary equitable principles, the plaintiff was entitled to an injunction enforcing his contractual rights. (Unlike Martin J, Hardie JA considered that it was immaterial that the plaintiff's interest was non-proprietary). There was no order as to costs.

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138 'RSL Can Exclude Communists' *Sydney Morning Herald* (24 September 1949) at 5. His interlocutory ruling still left it open to Davidson to file a statement of claim based on grounds other than that the State Council of the League lacked the power to expel communists.

139 This term carries with it extensive negative connotations, and in particular the idea that members of front organisations were either dupes or de facto communists. For the purposes of this article, I am using the term to describe organisations which were sufficiently subject to communist control to ensure that they almost never adopted a policy unacceptable to the Party. This does not mean that they did not enjoy a degree of independence from the Party, and it does not imply that a person should have been classed as a communist simply because the person agreed with the party line on a particular issue and was willing to work with a party-influenced organisation to try to achieve shared goals.

*Lockwood v the Commonwealth*<sup>142</sup> involved an attempt to de-rail the Royal Commission on Espionage, mounted by the author of what turned out to be one of the most controversial documents examined by the Commission. Lockwood argued that the Commission was unlawfully constituted and that even if it had been lawfully constituted, it lacked the power to inquire into Lockwood's authorship of the document in question, given that Lockwood had instituted defamation proceedings against the counsel assisting the Commission.<sup>143</sup> Fullagar J dismissed Lockwood's application for an ex parte injunction restraining the Commission from proceeding. There had been delay in initiating the libel action, so it would not be appropriate to issue an injunction unless Lockwood could make out a reasonably strong case on the merits. He had not made out such a case. The relevant legislation was valid and the Commission validly appointed pursuant to the legislation. It was the Commission's duty to conduct the inquiry so doing so could not constitute contempt of court, and indeed, it would be absurd if anyone aggrieved by a pending inquiry could thwart it by initiating legal proceedings.

There are two other cases in which attempts were made to mobilise the law in order to advance what might possibly and loosely be described as communist interests. These involved challenges to by-laws which purported to ban singing and haranguing in public places. The politics of the first applicant are unclear, although having been represented by Laurie, the respected communist barrister, it is likely that he was of the political left. Moreover, Laurie's contention that the by-law was bad in that it interfered with the right to hold street meetings suggests that the challenge was a response to a ban on a form of political activity much used by communists and their allies. The second application was made in the context of the prosecution of the Reverend Alfred Dickie, a non-communist who generally shared the Party's views in relation to the causes of war and peace. In each case,

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140 *Foster v City of Melbourne* (Unreported, Supreme Court of Victoria, No 138 of 1949, 23 February 1949). As far as I know, none of the plaintiffs was a Communist Party member, and at least some were not even particularly sympathetic to communism (except in so far as practised in the Soviet Union). The first-listed plaintiff was Foster J (who features above in a rather different role). Others included a Conciliation Commissioner (Alfred Wallis), an MHR (Doris Blackburn), a teacher (Doris McRae), a clergyperson (Walter Thomas), writers and journalists (Vance Palmer, Frank Dalby Davison, Flora Eldershaw and Brian Fitzpatrick, Leonard Mann), a retired engineering professor (Harold Woodruff), accountants (Frederick Barnett and James Skerry), and three women who described themselves by their marital status (Joyce Turnbull, Rhoda Bell, and Rachel McLaren). The Supreme Court file does not include details of the reasons for the interlocutory decision, and in the absence of the exhibits, the affidavits are not particularly illuminating. Affidavits submitted on behalf of the Council suggest that the defence was predicated partly on the contention that the contract required the Council to take particular steps if the Hall was to be made available (which would mean that the injunctions would effectively require specific performance). For media coverage, see 'Court Hears Argument on Town Hall Hiring' *Argus* (23 February 1949) at 3; 'Injunction Writ Fails' and 'Town Hall Ban. Proceedings in Court' *Age* (23 February 1949) at 1, 3.

141 *Heidke v Sydney City Council* (1952) 52 SR (NSW) 143.

142 *Lockwood v the Commonwealth* (1953) 90 CLR 177.

143 The plaintiff's strategy had become known to the Commonwealth as a result of surveillance and phone tapping by ASIO: Robert Manne, *The Petrov Affair: Politics and Espionage* (1987) at 126–128.

the application was for an order quashing the relevant by-law. In the first of the two cases, the applicant was unsuccessful. The by-law was found to fall within the Council's power to make laws 'prohibiting or minimizing noises in any public highway'.<sup>144</sup> The second case, *Leslie v City of Essendon*<sup>145</sup> related to a differently worded by-law which forbade haranguing both on the highway and in other places to which the public had recourse. At first instance, the application failed, but a more comprehensively argued appeal was allowed. The by-law could not be justified on the 'noise in highways' power. Nor could it be justified as an exercise of the apparently general power conferred on local governments to make laws '[g]enerally for maintaining the good rule and government of the municipality', since this power had to be read down in order to make sense of the conferral of other relatively narrowly defined powers.

I have found only one reference to a relevant lower court civil action, an action for assault brought by a Peace Committee secretary who claimed he had been assaulted while canvassing signatures for a peace petition. He succeeded, and was awarded damages and costs.<sup>146</sup>

#### 4. Conclusions

The cases discussed above frequently involved political liberty as well as law, and the practical effect of the rule of law was sometimes the protection of liberty. Typically judges made no reference to the protection of liberties issues raised by the cases before them, and in some, expressly denied that there were any such issues.<sup>147</sup> But occasionally judges acknowledged what was at stake, and sometimes judges' reasoning reflected an assessment that the relevant law was to be interpreted in part on the basis of presumptions in favour of the protection of liberties. Such reasoning underlay Dixon J's interpretation of the sedition legislation. In distinguishing between government as institutions and government as 'the persons of whom it consists from time to time', for the purposes of defining the scope of the sedition laws, he observed:

Any interpretation which would make the word [government] cover the persons who happen to fill political or public offices for the time being, whether considered collectively or individually, would give the provision [s 24A(1)] an

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144 *Proud v City of Box Hill* [1949] VLR 208. Clause 47(2) clearly fell within that power (since it banned (inter alia) haranguing by persons on a public highway when this caused noise) but cl 47(1) (which also applied to noise on private land or in houses) was not so limited. Gavan Duffy J's judgment does not explain how clause 47(1) could be justified. However cl 47(1) could probably have been severed, which would have left cl 47(2) in place.

145 *Leslie v City of Essendon* [1952] VLR 222.

146 'Assaulted While Canvassing; Wins Action' *Guardian* (8 September 1950) at 3.

147 For example, in his not unsympathetic summing up to the jury in *R v Healy*, Dwyer CJ dismissed the argument that freedom of speech could be relevant: '[f]ree speech does indicate this, that if you have certain opinions on certain matters you are allowed to express them freely as long as you do not breach the law. There are limits in every way to what we can say. The limits are mainly to protect others – slander etc. I would submit to you that the question of free speech hardly arises in this matter at all': *R v Healy* unofficial transcript in *Papers of Brian Fitzpatrick, 1925-1965*, NLA MS 4965 at 4526.

application inconsistent with parliamentary and democratic institutions and with the principles of the common law, as understood in modern times, governing the freedom of criticism and of expression.<sup>148</sup>

There are echoes of this analysis in his judgment in the *Communist Party* case where he observes that the greatest threat to liberty is usually from government rather than from outside government.<sup>149</sup> And while the other majority judgments are largely silent on the civil liberties issues raised by the case, an analysis by Williams of the transcript of the arguments before the High Court in the *Communist Party* case disclosed considerable judicial disquiet at the substantive implications of the Commonwealth's arguments.<sup>150</sup>

Other judges sometimes raised or referred to civil liberties issues. In the first of William Burns' appeals, in an exchange with Shand KC for the Commonwealth, Judge Berne expressed concerns about the prosecution:

Is the Commonwealth pressing for a conviction? If it is, I say now that I would be shocked. The propaganda is that all Communists are liars. If I make a mistake it would be better to make it in the defendant's favour than show an unconscious bias against him. I have no sympathy for this man, but I don't want to do him an injustice.<sup>151</sup>

In *R v Arrowsmith*, Dean J had emphasised the importance of freedom of discussion:

In the present case, the problem is to reconcile the right of free comment upon matters of public concern with the right to have the inquiry [the Royal Commission] conducted without interference. The latter right is less important than the former and only in cases of gross interference such as where the publication is not genuinely an exercise of the right of public comment but is really directed at the Commission or witnesses should the Court interpose.<sup>152</sup>

O'Bryan J applied this analysis in *R v Brett*,<sup>153</sup> and accepted Brett's rather contrived defence.

But these references were the exception, and only in *Burns v Ransley*, *Arrowsmith* and *Brett* did judgments appear to turn even in part on presumptions that law was to be interpreted so as to minimise its adverse impact on freedom of political expression.

There is scarcely a hint that there might exist anything like an implied constitutionally protected freedom of political communication. Taken in isolation, several of Dixon J's dicta might have been taken as suggesting that there might be

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148 *Burns v Ransley* (1949) 79 CLR 101 at 115.

149 See above extracted quotation, *Communist Party* case (1951) 83 CLR 1 at 186–187 (Dixon J).

150 George Williams, 'Reading the Judicial Mind: Appellate Argument in the Communist Party Case' (1993) 15 *Sydney Law Review* 3.

151 'Burns Appeal; Judge Flays Government and Police Witnesses' *Tribune* (16 November 1950) at 7.

152 *R v Arrowsmith* [1950] VLR 78 at 86.

153 *R v Brett* [1950] VLR 226.

circumstances in which the Commonwealth might be so constrained, but when read in the context of his overall analysis, he is saying no more than that the implied and incidental powers of the Commonwealth are limited by the liberal democratic nature of the Australian polity. Indeed, like most of his fellow justices, Dixon J's judgment in the *Communist Party* case accepted that states might pass legislation in the nature of the *Dissolution Act*,<sup>154</sup> and that the Commonwealth could use such powers as it possessed (including, for example, the power to legislate with respect to the public service) to pass laws which discriminated against communists and their allies.<sup>155</sup> It accepted the very broad definition of the wartime defence power which had been developed in the course of the two World Wars, and, following wartime decisions, accepted the validity of laws conferring a power on a minister to 'order the detention of persons whom he believes to be disaffected or of hostile associations and whom he believes that it is necessary to detain with a view to preventing their acting in any manner prejudicial to the public safety and the defence of the Commonwealth'.<sup>156</sup> Given that the government intended to intern most leading members of the Communist Party in the event of war between the West (including Australia) and the Soviet Union, it could have taken considerable comfort from these observations.<sup>157</sup>

The Court's failure to consider an implied freedoms argument was not through want of argument. In the *Communist Party* case Fred Paterson argued that the constitutionally established system of government was to be understood as a system of representative government characterised by a party system, and by freedom of political communication. Legislation which interfered with that system

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154 *Communist Party* case (1951) 83 CLR 1 at 200; see also at 225–226 (Williams J), 262 (Fullagar J), 271 (Kitto J). McTiernan and Webb JJ each treated the question as being whether the Commonwealth possessed the requisite powers.

155 *Communist Party* case (1951) 83 CLR 1 at 203–204; see also at 213 (McTiernan J), 269–270 (Fullagar J), 284 (Kitto J).

156 *Communist Party* case (1951) 83 CLR 1 at 195 (Dixon J), 206 (McTiernan J), 227–228 (Williams J), 258 (Fullagar J) but contrast at 281–282 (Kitto J) and 236–239 (Webb J) who considered that decisions to intern could be judicially reviewable. Winterton argues that the authority cited by the relevant majority was weak, the constitutional issue not having been adequately canvassed in either of the two supposed authorities: above n30 at 652.

157 Louis, *Menzies* above n39 at 51–52; Lowe, above n38 at 118 (who adds that the lists were being constantly updated throughout the 1950s). On the criteria which determined who were listed, see Measures to be Taken in Preparation for a Possible Emergency, 28 July 1950 in *Detention: UK-Australia Internment Policy, Naturalised British Subjects of Non-Enemy Origin, Volume 1*, NAA: A6122 1285. For details of the numbers of local communists whose internment was anticipated (which varied between 400 and 1040, plus dependents) see *Detention Camps: Preparation for War, Provision of Camp Accommodation in Australia for Internees*, NAA: A6122 1287. Minutes of a Chief of General Staff Conference in April 1951 indicate that planning for the construction and running of internment camps had not progressed far, and the Army had little idea of what demands would be placed on it: Serials 14FF, 15T in *National Security (General) Regulations (Drafts and Preparation of)*, NAA: MP729/8 1/431/10. In 1952, when ASIO anticipated that in the event of an emergency accommodation would be needed for 1600 aliens and 400 British subjects, the Army considered that it would be able to provide accommodation for only 1500: Measures to be taken, 13 June 1952 in *Detention Camps: Preparation for War, Provision of Camp Accommodation in Australia for Internees*, NAA: A6122 1287.

of government was therefore invalid. It was also invalid since its effect was also impermissibly to interfere with the independence of the states by limiting who, and which parties, might participate in state politics.<sup>158</sup>

Latham CJ dismissed the argument, observing that: ‘It is difficult to deal with an argument so insubstantial.’<sup>159</sup> None of the other justices even addressed it.

Yet, little seems to have turned on this. Had the implied constitutional freedom of political communication<sup>160</sup> been recognised in the 1940s, it would certainly have been central to the decision in the *Communist Party* case (assuming, of course, that the legislation in question had been passed in face of the implied freedom), but it would not have affected the outcome. It would also have meant that McPhillips and Roach were free to attack the integrity of arbitral authorities (although this would also be partly due to the *Boilermakers’* decision).<sup>161</sup> If the sedition laws were to be interpreted consistently with the implied freedom,<sup>162</sup> it is difficult to see how William Burns’ conviction could be justified.

But otherwise, the implied freedom would have made little difference. Given the interpretation placed on the words uttered by Sharkey and Gilbert Burns, their convictions could probably be legally justified. The implied freedom would have been irrelevant to the legality of defying court orders under the *National Emergency (Coal Strike) Act 1949* (Cth). It would have had minimal relevance to the outcome of the summary offence charges. The constitutionality of legislation prohibiting the distribution of political propaganda would be suspect, especially following the High Court’s decision in *Coleman v Power*. And the same might be the case for some of the legislation under which sellers of communist newspapers were punished. But assault and the disruption of election meetings are not constitutionally protected. Offensive behaviour sometimes is, but in so far as magistrates acted in accordance with O’Byrne’s J’s decision in *Worcester v Smith*,<sup>163</sup> their decisions would have been consistent with the High Court’s decision in *Coleman v Power*.<sup>164</sup>

158 *Communist Party* case (1951) 83 CLR 1 at 36–38.

159 *Communist Party* case (1951) 83 CLR 1 at 169.

160 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Levy v State of Victoria* (1997) 189 CLR 579; *Coleman v Power* (2004) 220 CLR 1.

161 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

162 Gaudron J assumed that sedition laws could be reconciled with the implied freedom: *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 217. But given the requirement of proportionality between a restriction on any interference with freedom of political expression and such legitimate ends as could justify it (*Coleman v Power* (2004) 220 CLR 1), it is arguable that the sedition laws would have to be read down so as not to catch the use of language which, while arguably expressive of a ‘seditious intention’, did not threaten affect Australia’s system of representative democracy. See also Maher, ‘Dissent’ above n95; and for discussion of the constitutionality of the amended sedition legislation see Australian Law Reform Commission, *Fighting Words: a Review of Sedition Laws in Australia*, Report No 104 (2006) at 141–146.

163 *Worcester v Smith* [1951] VLR 316.

164 *Coleman v Power* (2004) 220 CLR 1.



The implied freedom would not have assisted communists in their civil actions against the returned servicemen's associations, or against owners of public facilities, although contemporary plaintiffs in similar situations would probably fare better as a result of developments in the areas of administrative law, equity and anti-discrimination law. It would, however, almost certainly have produced a different outcome in *Proud v City of Box Hill*, given the potential of the by-law to interfere impermissibly with freedom of political communication.

The victories communists won in the cold war courts were generally the result of a narrow form of rule of law. One element of the rule of law is the requirement that those asserting relevant facts have evidence to prove their assertions. This requirement was fundamental to the High Court's decision in the *Communist Party* case, that most important of Australian cold war cases. Concern with evidence meant drawing a profoundly important distinction between the question of whether communists might be more dangerous than non-communists, and the question of whether particular communists were dangerous. Cold War rhetoric (and the preambles) blurred the distinction. The High Court treated it as fundamental, at least in the context of determining whether the communist threat was such that the Commonwealth had the power to legislate with respect to communists per se. It meant that to a considerable extent, Commonwealth action against communists could be justified only if they actually did constitute a threat, and this was an important protection at a time when fears were often disproportionate to actual threats.

There are times when the requirement of evidence seems to have been one which could be lightly satisfied. The cases against Sharkey and Gilbert and William Burns do not seem to have been strong. (Conversely, the verdict in *Hardy* indicates that there are times when disregard of evidence can involve the protection of liberty).

But the evidence requirement set limits on what the government considered it could do to combat communism. While convinced that the Party was an unlawful association for the purposes of *Crimes Act* 1914 (Cth) Part IIA, ASIO considered that it would be difficult for the Commonwealth to prove this and that a trial would be lengthy and used by the Party as the occasion for presenting a favourable view of itself.<sup>165</sup> (This assumed that even at a time of intense anti-communist fervour, anti-communism was vulnerable to communist propaganda). The government, doubtful of whether an application would succeed, decided against seeking a declaration.

The other element was 'law'. Had the law of the time been repressive, the rule of law could have entailed the rule of repressive law, and to some extent it did: the *National Emergency (Coal Strike) Act* 1949 (Cth) was an unprecedented attack on trade union prerogatives, and the broad sedition laws of the period were a legacy of the illiberal post-World War I years. But the case-law surrounding the interpretation of the Commonwealth Constitution left little scope for upholding the

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165 Memorandum, above n5 at 2-3.

*Dissolution Act*, and virtually all the civil and minor criminal cases discussed above were decided under laws which had no obvious political element and which had not been passed to deal with political dissidents. On the whole, the rule of law effectively entailed the rule of laws which on their face were politically neutral, and which could therefore be mobilised by communists in so far as their rights were wrongly threatened. Sometimes prosecutors used these laws in a discriminatory and mildly repressive manner, but even in these cases the rule of law required that defendants be judged according to criteria which would apply regardless of the defendant's politics, and in civil cases, it was communists rather than their adversaries who determined whether the law should be mobilised.

Consistent with this is the fact that the Party, its members and its sympathisers usually chose to run their cases according to legal convention, rather than as 'political trials', their willingness to assert rights as well as to defend suggesting a confidence that law could sometimes be used to resist anti-communist measures.