A Smallish Blow for Liberty? The Significance of the Communist Party case

ROGER DOUGLAS*

The Communist Party Dissolution Act 1950 (Cth) was presented by some of its critics as a first step towards totalitarianism, and the High Court's decision in the Communist Party case has been welcomed as having possibly saved Australia from that fate. In this article, I argue that, except insofar as it related to the Communist Party itself, the Dissolution Act was less repressive than many of its critics maintained. Had the Act survived, the Commonwealth would have been hard-pressed to use it against bodies other than the Communist Party, and against people who had not been members of the party. The under-enforcement of previous pieces of anti-communist legislation suggests the government would have been wary about making use of its powers under the Act.

The High Court's decision itself reaffirmed its commitment to the rule of law, and in doing so protected Australian democracy. However, in doing so, it affirmed the non-reviewability of decisions by the Governor-General, and it left the Commonwealth (and the States) with considerable powers which they could use against communists. The subsequent failure of the Commonwealth and the States to make much use of their legislative powers highlights the degree to which government was subject to political as well as legal constraints. However, the Commonwealth's use of its discretionary powers highlights the degree to which it was nonetheless able to pursue a limited anti-communist agenda.

INTRODUCTION

It is now fifty years since the High Court's decision in the *Australian Communist Party v Commonwealth* (the 'Communist Party case').[1] The decision proved to be a remarkably non-controversial one, given the passions of the time.[2] That this was so is partly attributable to the fact that the Court's anti-socialist decisions in the later 1940s effectively immunised it from attack from those most likely to have

* School of Law and Legal Studies, La Trobe University.

1 (1951) 83 CLR 1.

2 80% of those surveyed in a June 1951 Gallup Poll said that they would vote 'Yes' in the referendum to overturn the decision: Australian Gallup Polls *Australian Public Opinion Polls July 1951*, 775-87. Evidence of its acceptance is provided by the lack of any criticism of the decision in parliamentary speeches in support of the *Constitutional Amendment (Powers to Deal with Communists and Communism) Bill* and by editorials in media which had supported the *Dissolution Act*: George Winterton, 'The significance of the *Communist Party case*' (1992) 18 *Melbourne University Law Review*, 630. Sir Garfield Barwick wrote caustically of the decision in a memorandum of advice to the Solicitor-General: 'I have re-read the judgments. I must confess that views which take so long to express, hedged round with so much explanation, naturally excite comment. However, let bygones be bygones. At least I have been patient enough to re-read them' Barwick to Bailey 26 June 1951 National Archives of Australia (NAA): A467/1 BUN20/SF7/51. But if anyone is likely to criticise a decision it is a KC who has advised a losing party that it had a strong case. He made no comment on the case in his 1995 reminiscences other than to mention that he had been opposed to Evatt: Sir Garfield Barwick, *A Radical Tory: Garfield Barwick's Reflections and Reminiscences* (1995) 109.

regretted its decision to find against the constitutionality of the *Communist Party Dissolution Act 1950* (Cth) (the Dissolution Act). It is also attributable to the technical strength of the majority judgments, which follow almost inexorably both from principle and from precedent. Ross Anderson, an early commentator on the decision, treats its significance as lying primarily in its implications for the balance between Federal and State powers, and treats the case as of considerably less importance than the Bank Nationalisation decisions.[3] For others, however, the decision was of far greater importance. According to them, the decision, and the failure of the subsequent referendum may have saved Australia from totalitarianism. This, understandably, was the view taken by communists. Aarons, for instance, writes that:

> Menzies was determined to press ahead with the totalitarian program of banning the ACP and taming the trade union movement forever. Once he started on the road, the logical result would have been a full-blooded effort to impose a police state and crush all opposition. It was rumoured, not too fancifully, that he planned a concentration camp for the Reds on King Island - he had already interned Thomas and Ratliff in 1941 and he believed the danger was much greater in 1951.[4]

This view was also shared by some Labor opponents of the legislation.[5] It is also a view shared by scholars and judges, albeit in a slightly qualified form. Williams in his generally illuminating paper on the case suggests that:

> [t]he *Dissolution Act* was significant because in seeking to suppress communism in Australia it compromised the freedom of political speech and association previously enjoyed by the Australian people. The Act may have instilled another, equally intolerant form of totalitarianism in Australia. One only has to look at the history of nations such as South Africa and Chile in the early 1950s, which passed legislation similar to the *Dissolution Act*, to realise

3 Ross Anderson, 'Australian Communist Party v The Commonwealth' (1951) 1(3) *University of Queensland Law Journal* 34, 34, 42-3.

4 Laurie Aarons, 'Confessions of a failed outlaw' in Elsa Atkin and Brett Evans (eds), *Seeing Red: the Communist Party Dissolution Act and Referendum 1951 - Lessons for Constitutional Reform* (1991) 23, 29. Lockwood places the concentration camps on Flinders Island, and states that he was shown the relevant plans, which would have been put into effect if the referendum had passed: Rupert Lockwood, 'Seeing red - and darker colours' in Elsa Atkin and Brett Evans (eds), *Seeing Red: the Communist Party Dissolution Act and Referendum 1951 - Lessons for Constitutional Reform* (1991) 111, 118, 125. His account leaves open the question of who had prepared the plans, and whether anyone with authority to do so had approved their implementation. Were they prepared with a view to their immediate post-referendum implementation, or were they contingency plans to be used in the event of Australia becoming involved in a war with the Soviet Union (in which case the ACP had claimed it would support the Soviet Union)? There was no provision for internment under the *Dissolution Act*. Had the referendum been passed, it would probably have permitted the passage of legislation under which declared communists could have been interned, but Lockwood does not refer to the existence of plans for such legislation.

5 The Bills and the Act were similarly interpreted by a number of Labor parliamentarians: eg Edward ('Eddie') Ward ('Government is endeavouring to establish a police state in Australia'): Commonwealth, *Parliamentary Debates*, House of Representatives, 16 May 1950, 2654; Clyde Cameron ('Government is seeking to institute in this democracy a worse form of tyranny than the Communists seek to establish in Korea'): Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1950, 119.

that such legislation may have laid the foundations for a police state.[6]

Winterton's verdict is more cautious, but he nonetheless considers that the decision may have been of fundamental importance for the future of civil liberties in Australia.

> Had the validity of the Act been upheld and the Act enforced unscrupulously by the government, its effect on the Labor movement would surely have been disastrous. It was noted earlier that Menzies had stated in Parliament that the objectives of the Communist Party and the Labor party were identical. This made the Australian Labor Party potentially eligible for 'declaration', subject to limited judicial review by a single judge, but without further appeal therefrom.[7]

Kirby, discussing Evatt's role in the 1951 referendum (the government's response to the decision) argues that had he not joined battle:

> We might have seen the adornment of the Communist Party Dissolution Act with the panoply of security measures now seen in its successor in South Africa. We might have seen the establishment of the Un-Australian Activities Committee. The arrests at midnight for nothing more than holding stigmatising ideas. The 'declaration' of persons and organisations as 'banned'. Public stigmatisation, name-calling, alienation. A witch-hunt society.[8]

There is an element of hyperbole in many of these statements. Taken literally, Williams' reference to 'another, equally intolerant form of totalitarianism' implies that had the 1951 referendum passed and the Act been re-enacted, the Menzies government would have behaved in a similar way to Hitler, Mao or Stalin. Yet previous anti-communist measures had done no such thing, and it is hard to believe that if 72,000 voters had cast their votes differently in the 1951 referendum, Australia would have been at serious risk of a descent into totalitarianism (as opposed, say, to authoritarianism).[9]

There are also problems with Winterton's argument that, but for the decision, an unscrupulous government could have 'declared' the ALP to be an unlawful association. Even if his legal analysis is correct (and I shall argue that it may not be), his suggestion ignores the fact that according to the decision, *State*

6 George Williams 'Reading the judicial mind: appellate argument in the Communist Party case' (1993) 15 *Sydney Law Review* 3, 3. The Chilean law was in fact passed in the late 1940s: National Archives of Australia (NAA): A1838 1493/2. Moreover, between the making of the law and the overthrow of the Allende government in 1973, it was one of the few South American states in which elections were competitive and reasonably free, and in which there had been no irregular transfers of executive power: Charles Taylor and Michael Hudson *World Handbook of Political and Social Indicators* (2nd ed, 1972) tables 2.9, 3.10.

7 Winterton, above n 2, 654. In fact it is not clear that Menzies had made this observation. It was Chifley whom Winterton cites as authority for the proposition that the ALP could be declared under the Act.

8 Michael Kirby, 'HV Evatt, the Anti-Communist referendum and liberty in Australia' (1990) 7 *Australian Bar Review* 93, 119. His comments must be understood as referring to the referendum as distinct from the *Dissolution Act*. If, as I argue, the scope of the Act reflected constitutional constraints, it is possible that, had the referendum succeeded, one consequence might have been more draconian legislation. If that had been so, the decision in the *Communist Party case* would, arguably, have to be seen as a tragedy, whose political effect was to expand the Commonwealth's power to pass repressive legislation.

9 The estimate makes allowance for the requirement that the 'yes' vote receive both a majority of votes, and a majority of votes in a majority of States.

parliaments possessed the power to proscribe political parties. It follows therefore that an unscrupulous State government could have legislated to proscribe the ALP, or for that matter, the Liberal or Country parties. Yet no State government (and there have been several which have shown themselves to be economical with political morality) ever availed itself of this power or even contemplated doing so. Moreover, there is an element of political unreality to the suggestion that a government which was prepared to engage in an effective coup d'état would be worried about whether this would be unconstitutional.

Even Kirby is not altogether convincing. The South African analogy is not a good one. The history of a polity in which 70-80% of the population was disenfranchised can throw only limited light on how Australia would have developed. In any case, while the South African legislation resembled the Australian Act, even in its original form, it was far more wide-ranging, and included significantly fewer safeguards.[10] If analogies are to be drawn, instead, from liberal-democracies, they could be drawn with quite different lessons from the experience of Canada. There, at least in Ontario, the party was illegal during the early 1930s, and it was banned again in 1940. Three hundred communists were interned during the war. But the imprisonment of the Ontario communist leaders produced sympathy for the party. The war-time sanctions operated with only limited success, and did not create an appetite for ever more repressive measures. Post-war governments decided firmly against banning the party. [11] Nor did the Federal Republic of Germany's banning of the Communist Party under the postwar constitution set the Republic down the path towards totalitarianism. Indeed, lessons could even be drawn from Australia, where the party was treated as illegal between 1940-42, but where the ban was enforced in a rather perfunctory manner.[12] Conversely, the United States demonstrates that a less repressive statutory regime than that provided by the *Crimes Act 1914* (Cth)[13] and the *Dissolution Act* could coexist with repression on a far greater scale than ever existed in Australia. More encouragingly, it also illustrates that revulsion against repressive excesses can eventually constrain governments (and unduly compliant

10 Its definition of communism was sufficiently wide to include the advocacy of civil disobedience as a means of achieving legal change: *R v Sisulu* 1953 3 SA 276 (Appellate Division); *R v Alwyn* 1955 3 SA 207 (Appellate Division). See in particular the definitions of 'communism' and 'communist' in the *Suppression of Communism Act* 44 of 1950 (S Af).

11 Winterton, above n 2, 655 states that if the ban had been upheld, 'Australia would have had the dubious distinction of being the only English-speaking democracy to ban the Communist Party'. This is correct only if the phrase 'after World War II' is implied. In the early 1930s, the party was held by an Ontario court to be an unlawful association under the Canadian equivalent of the *Crimes Act 1914* (Cth), Part IIA. It was banned, as such, in 1940. See Norman Penner, *Canadian communism: the Stalin years and beyond* (1987) 117-21, 166-215, 225.

12 Since it was banned under Regulations which were subsequently held to be *ultra vires*, it was never, technically, illegal. The government agreed to lift the ban in December 1942, but did not make the relevant proclamation until March 1943, after the Director-General of Security had drawn its attention to the fact that the lifting of the ban had never been gazetted: Director to Deputy-Director of Security, Qld 10 March 43 NAA: A6122/17 985, Gazette No. 66 of 1943 (25 March 43). On the operation of the ban, see for example, Alistair Davidson, *The Communist Party of Australia. A short history* (1969) 80-3, 90-1; Stuart Macintyre, *The Reds* (1998) 396-411.

13 The *Crimes Act 1914* (Cth) Part IIA provides that bodies and their affiliates which advocate or encourage the revolutionary overthrow of the Commonwealth or the Constitution (*inter alia*) are unlawful associations. They may be dissolved, and those associated with them may be guilty of a range of offences. The legislation is discussed in: S Ricketson, 'Liberal law in a repressive age: communism and the rule of law, 1920-1950' (1976) 3 *Monash University Law Review* 101, and Roger Douglas, 'Keeping the revolution at bay: the Unlawful Associations provisions of the Commonwealth Crimes Act' (2001) *Adelaide Law Review* (forthcoming).

courts).[14]

In this paper, I shall review the *Communist Party* case with the benefit of fifty years of hindsight. While recognising its importance as a civil libertarian decision, I shall argue that its practical significance has been exaggerated. First, I shall argue that the legislation was effectively unworkable, except insofar as it sought to interfere with the capacity of the Australian Communist Party (the ACP)[15] to function as a self-professed communist party. Despite its profoundly unattractive features, the legislation included a number of safeguards, whose effect was to provide considerable protection for many of the non-communists who might have been swept up by it. It even provided some protection for communists. Indeed, in trying in a limited way, to accommodate civil libertarian objections and obvious constitutional constraints, the government had limited the degree to which the Act could be used for its ostensible purpose, the fight against communism. Moreover, insofar as the legislation might have had some effect, this was minimised by the practical constraints under which the government operated. Had the legislation survived judicial review, its fate would have been similar to earlier attempts to outlaw the Communist Party: tentative enforcement attempts, some losses in the courts, and in the end, desuetude.

Second, I shall examine the decision itself. In one sense, I shall argue, the decision was an extremely important one, but it was important because it protected the Court and the rule of law, rather than because it protected civil liberties or the Communist Party. I shall not, however, develop this argument in detail: it has already been adequately dealt with by others who have analysed the case. [16]

Finally, I shall examine the Commonwealth's response to the decision. In some respects, the decision and its aftermath seem to have had a salutary effect. The Commonwealth seems to have become sensitised to the political costs of being seen to be authoritarian. It came to recognise that communist disruption was sometimes better attacked as disruption than as communism. But one effect of the

[14] The most comprehensive account of anti-communist measures in the US is to be found in David Caute, *The Great Fear. The Anti-Communist purge under Truman and Eisenhower* (1978). For details of the cold-war trials of US communists, see Michal Belknap, *Cold War Political Justice. The Smith Act, the Communist Party, and American Civil Liberties* (1977).

[15] For most of its life, the Communist Party called itself the 'Communist Party of Australia'. In January 1944, it changed its name to the 'Australian Communist Party' 'to indicate its national identity': Davidson, above n 12, 98. This was the name under which it sought to challenge the validity of the *Dissolution Act* (The Court held that, as an unincorporated association, it had no standing to do so: Anderson, above n 3, 34). The party reverted to its old name in 1951: Davidson, n 12, 112.

[16] This argument makes a number of assumptions. One is that law is sufficiently unambiguous to warrant the assumption that there can be such a thing as 'rule of law'. The second is that the rule of law is better achieved when the High Court rather than the legislature determines its content. I proceed on the basis that the ambiguity of law does not mean that it is meaningless. I also agree that the rule of law is better achieved by leaving its determination to the High Court rather than to Parliament. First, this flows from the logic of a constitution which confers limited powers, and which was structured on the basis that their limits were to be determined by the High Court. Second, there are good institutional reasons for believing this to be the case. The legitimacy of courts is more heavily dependent on their capacity to hand down legally defensible decisions than is that of parliaments. While arguing that the decision protected the rule of law rather than civil liberties, I am mindful of the fact that the rule of law itself entails some protections for civil liberties. My point is that the two are analytically distinct and the rule of law (at least in the narrow sense used here) can coexist with a considerable degree of law-based (but therefore law-limited) authoritarianism: see Joseph Raz, 'The rule of law and its virtue' (1977) 93 *Law Quarterly Review* 195.

decision was to drive some of the Commonwealth's anti-communism underground where it could not be politically or judicially supervised. Law was a blunt tool for controlling communism. It was an even blunter tool for controlling anti-communism.

THE COMMUNIST PARTY DISSOLUTION ACT 1950 (CTH)

The *Communist Party Dissolution Act 1950* (Cth) received Royal Assent on 20 October 1950.[17] On the same day, the government made and published in the Gazette the *Communist Party Dissolution Resolutions*. Like other Commonwealth legislation of questionable constitutionality, the Act began with a preamble.[18] This began by setting out the powers on which the Commonwealth was relying. The preamble then made a series of somewhat tendentious assertions about the activities of the Australian Communist Party (the ACP).[19] It concludes that the protection and the defence of the Commonwealth and the execution of its laws require various measures. Accordingly, the Act dissolved the Communist Party and provided for the appointment of a receiver of its property: s 4. It also provided for the proscription of front organisations: s 5. An organisation could fall foul of this section only if it satisfied one or more of a number of specified criteria: s 5(1). These included affiliation with the Communist Party; having a membership or controlling body with a communist majority; support, advocacy or promotion of communism; or being substantially controlled by communists who made use of the body to advance communism. On being satisfied that the continued existence of a body which fell within s 5(1) would endanger the defence or security of Australia, or prejudice the maintenance of the Constitution or the laws of Australia, the Governor-General was empowered to declare that the body was an unlawful association. The Executive Council was not to advise the Governor-General to make a declaration unless the material on which it was basing its advice had first been considered by a committee which included the Solicitor-General, the Secretary to the Department of Defence, the Director-

17 For accounts of the political developments leading up to the enactment of the *Dissolution Act*, see Winterton, above n 2, 633-8.

18 Most Commonwealth legislation did not and does not include preambles. In the post-war period, preambles were limited to cases where legislation was designed to give effect to international agreements and to agreements between the Commonwealth and the States, and to cases where the Commonwealth was relying either on the extended defence power, or on some other power not self-evidently associated with the legislation. Examples of legislation in this last category include the following: *Australian National Airlines Act 1945* (Cth); *Defence (Transitional Provisions) Acts of 1946, 1947 and 1948* (Cth); *Liquid Fuel (Rationing) Act 1949* (Cth); *National Emergency (Coal Strike) Act 1949* (Cth); *Shipping Act 1949* (Cth), *Snowy Mountains Hydro Electric Power Act 1949* (Cth). The *Uniform Tax Act 1942* (Cth) was an important war-time example. Typically, such legislation generated constitutional litigation.

19 These were that it sought to accelerate the coming of a revolutionary situation in which the ACP would be able to seize power; that to do so, it engaged in violence, intimidation and fraud; that it was part of a world-wide movement which engaged in espionage and sabotage to achieve its revolutionary goals; that it caused disruption in industries vital to Australia's defence. The debates on the Bill made little reference to communist violence, espionage and sabotage, focussing largely on the external threat posed by the Soviet Union, and the internal threat posed by industrial unrest. For a powerful challenge to the preamble's assertions about the role of communist-led industrial unrest, see Tom Sheridan, *Division of labour: Industrial Relations in the Chifley Years, 1945-9* (1989).

General of Security, and two others: s 5(3).[20] On such a declaration being made, the body could apply to a superior court for an order setting aside the declaration, but only on the basis that it did not fall within s 5(1). If the declared body produced evidence to support its claim, the burden was on the Commonwealth to prove that the body fell within the section. If the declared body did not produce evidence, the burden of proof lay with the body. Bodies declared to be unlawful associations were dissolved 28 days after the declaration unless they applied for an order otherwise. If the application was unsuccessful the body was dissolved on the day the court dismissed the application: s 6. Once a body was dissolved, it became an offence to carry on the body's activities: s 7. Its property vested in a receiver on the day of the publication of the declaration: s 8(2). If the declaration was set aside, property reverted to the body: s 8(3). The operation of the provisions was semi-retrospective. A body fell within s 5(1) by virtue of its attributes as at 10 May 1948. This created the theoretical possibility that a relatively harmless body which was under communist influence in 1948 and which subsequently fell under fascist influence to the point where it constituted a danger to Australian security would fall within the Act. An equally and similarly dangerous group which had been dominated by, say, the Methodist church, would not.

People could be declared to be communists if they were members of the party or if they otherwise satisfied the Act's definition of 'communist', that is, if they 'supported or advocated the objectives, policies, teachings, principles or practices of communism as expounded by Marx and Lenin': ss 9(1), 3. The procedures for declaring a person to be a communist were similar to those governing declarations in relation to associations, except insofar as there was also provision for the making of a declaration that a person was no longer a communist: s 9(7). There was no provision for review of decisions in relation to the exercise of this power. The effect of a declaration was that the person became ineligible for Commonwealth employment, and incapable of holding office in any union vital to the defence and security of Australia: s 10. Communists currently holding Commonwealth employment or union office were suspended from their positions, and for pension purposes, were deemed to have resigned: ss 11, 12.[21]

Sections 15-21 set out the powers and duties of receivers, and the procedures for receivership. Section 22 provided for search warrants. Section 25 set out procedures designed to facilitate proof that a person was a communist, and in particular provided that it was evidence that a person was a communist that their

[20] The Commonwealth seems to have hoped that an ALP MHR or a prominent trade unionist would agree to serve on the Committee: Commonwealth, *Parliamentary Debates*, House of Representatives, 3 October 1950, 163 (Robert Menzies, Prime Minister, saying that he had hoped at one stage that Pollard could have been induced to sit); 'Red Bill will be Law by End of Week' *The Age* 18 October 1950, 1 (reporting that the government had abandoned plans to appoint a unionist to the committee, since, given union opposition to the Bill, the appointee would have been placed in an invidious position).

[21] Being branded as a communist could also subject the person concerned to private sanctions. Peter Cook, *Red Barrister. A Biography of Ted Laurie* (1994), 186 describes the consequences of being regarded as a communist. Murdoch sacked five journalists named before the Lowe Royal Commission as communists, and of the hundreds named in evidence before the Commission or in an appendix to its report, many were subjected to informal sanctioning: 'Some lost credit in the ALP, a woman had her windows smashed, a businessman lost a valuable contract, some were pushed out of school committees, some public servants felt that after the commission their files were marked "not for promotion"'.

name appeared on the records of the party seized from Marx House on 8 July 1949: s 25. This meant that a person who was no longer a communist could nonetheless fall within s 9(1). The Act included a provision whereby the Governor-General could proclaim the Act as no longer necessary for the defence of Australia or for the execution and maintenance of the Constitution and the laws of the Commonwealth, whereupon the Act would be deemed to have been repealed: s 27.

The most controversial sections of the Act were those which related to the declaration of associations and people as communists. In Parliament, Labor had not challenged the banning of the ACP,[22] and Labor speakers had generally accepted the validity of the propositions set out in the preamble. However, Labor strongly objected to the declaration provisions. It objected to declarations themselves on the basis that they could stigmatise the person who was declared, since they effectively proclaimed two things: that the person was a communist, and that the person was a threat to the security of Australia. Labor also challenged the adequacy of the provisions whereby people might appeal against a declaration. First, under the Act, the appeal was to be confined to the question of whether the person or body was communist. Labor argued that there should also be provision for appealing on the grounds that the appellant was not a security risk. Second, Labor argued that the onus to adduce evidence and of proof should lie with the Commonwealth at all stages of the appeal process. Third, it argued that appellants should have a right to trial by jury. Finally, it argued that there should be compensation for those disadvantaged by what was found to be an erroneous declaration. In the Senate, where it had a majority, it amended the first *Communist Party Dissolution Bill* accordingly.[23] These amendments were unacceptable to the government, which argued that they would effectively emasculate the Bill. Some government speakers argued simply that traitors had no right to any legal protections. Senator George Rankin asked: 'Why should not Communists, who are traitors to Australia, be required to answer the charge that they are Communists and to prove their innocence, if possible?'[24] William McMahon, a lawyer who had evidently never browsed through the purple prose of the *State Trials*, claimed that 'I do not think any lawyer would argue for long that particulars should be given to a traitor and a Communist'.[25] Others recognised that civil liberties were at stake, but argued that the nature of the emergency justified some abridgment of liberties and that in any case, the legislation provided substantial adequate safeguards. The Committee of Five would ensure that declarations would rarely be made without cause. The disabilities associated with a declaration were not particularly draconian and they were certainly not

22 On the complex politics underlying Labor's response to the legislation, see eg L F Crisp, *Ben Chifley. A biography* (1960) Ch XXIII; Robert Gollan, *Revolutionaries and reformists. Communism and the Australian labour movement 1920-1955* (1975) 263-7; Lockwood, above, n 4, 113-4; Robert Murray, *The Split: Labor in the Fifties* (1972) 79-90; Leicester Webb, *Communism in Australia. A Survey of the 1951 Referendum* (1954) 25-38.

23 A summary of the amendments made by the Senate to the first *Communist Party Dissolution Bill* is to be found in Commonwealth, *Parliamentary Debates*, Senate, 20 June 1950, 4539.

24 Commonwealth, *Parliamentary Debates*, Senate, 1 June 1950, 3542.

25 Commonwealth, *Parliamentary Debates*, House of Representatives, 3 October 1950, 154. The right to particulars was one of the few rights that treason defendants historically enjoyed. Charges were typically extraordinarily comprehensive, combining florid indignation with considerable detail.

such as to warrant the safeguards enjoyed by a typical criminal defendant. The use of averments was consistent with British justice. Indeed averments were to be found in some of Labor's anti-communist measures and in provisions of the *Crimes Act 1914* (Cth) which Labor argued could serve as an adequate substitute for the *Dissolution Bill*.[26] While the onus of adducing evidence lay on the appellant, the onus of proof lay with the Commonwealth. The evidentiary onus could be satisfied simply by stating in the witness box: 'I am not a communist'. It was undesirable that the Commonwealth should have to prove that a person was a security risk, since this would require disclosing security information, and this would imperil the smooth working of the security system.

Labor, in turn argued that the effective requirement that the appellants give evidence exposed them to undue hazard. In the course of cross-examination, they might make admissions against interest. The Committee of Five would not provide adequate protection since it would not be in a position to assess the veracity of allegations made by Security and its informants. Moreover, there was good reason to believe that Security's informants might be less than reliable. There were all kinds of reasons why people might, given the shield of anonymity, make untrue allegations about others. Indeed, the fact that Menzies, acting on information from Security, had made erroneous statements about five of the 53 union leaders he had stated were communists, was evidence of the unreliability of security information even in a case where the government's informants had particularly good cause to ensure that their information was accurate.[27] Nor would procedural safeguards emasculate the Act. The decisions in the *Dennis* case[28] in the US and in the Australian sedition cases showed that it was possible to secure convictions in jury cases without imperiling security. Increasingly, as the debates proceeded, Labor argued that the Bill was not an anti-communist measure at all. They were really directed at Labor and the union movement. It was a totalitarian measure by a fascist government. If so, the Bill represented the most serious threat to civil liberties in Australia's history.

Restrained Repression

But did it? The Act clearly represented an assault on civil liberties. It attempted to abolish a political organisation and provided for the confiscation of its property without compensation. It also created a theoretical possibility that a non-communist body which was infiltrated by communists could suffer the same fate (if Cabinet decided that the body was a security risk). It meant that communists could be branded as security risks, and dismissed from Commonwealth employment even if they were not in fact security risks. It limited the right of unionists to elect as officers those whom they regarded as best fitted to advance

26 *Crimes Act 1914* (Cth) s 30R.

27 In relation to 4 of them, the error related to their current position. In relation to a fifth, it related to his politics. The seriousness of the errors was magnified in the debates and in some subsequent accounts. See for example Aarons, above n 4, 26 (who states that Menzies had to admit that 'quite a few' were not party members); Lockwood, above n 4, 112 (who states that he admitted that 5 of them were not communists).

28 This is discussed in detail in Belknap, above n 14. It provided questionable support for Labor's case. The convictions were secured on the basis of evidence which included testimony from informants of questionable reliability. Moreover given the duration of the case (7 months), there were good grounds for treating the decision as a powerful argument against allowing jury trials, assuming that one wanted the legislation to work.

the interests of the union. The civil standard of proof meant that if the Act was enforced with any vigour, some organisations and people would be likely to be erroneously found by courts to be communists. But how far did the Act erode the civil liberties of non-communists by exposing them and their organisations to a real risk of being declared communist? In my opinion, Labor fears were exaggerated. While vague, the definition of 'communist' under the Act appears to have provided considerable protection for non-communists. More important, the procedures for appeal, limited though they were, constituted a real safeguard against widespread abuse, not because they were infallible (they were not), but because they were likely to constitute a major disincentive to the Commonwealth 'declaring' communists and communist bodies.

What is a communist?

As an anti-communist measure, the Act's greatest weakness lay in the fact that it actually did provide considerable protection for bodies and people who were declared under the Act. Under s 5, a body could be declared under the Act only if:

- it was or purported to be affiliated with the ACP at a relevant time; or
- it was at a relevant time governed by a committee at least a majority of whom were members of the ACP; or
- it supported or advocated, at a relevant time, 'the objectives, policies, teachings, principles or practices of communism, as expounded by Marx and Lenin' or promoted at a relevant time, or subsequently promoted the spread of communism as so expounded; or
- its policy was at least substantially influenced by people who at the relevant time were either communists or members of the ACP, and who used the body to advocate, propagate or carry out 'the objectives, policies, teachings, principles or practices of communism, as expounded by Marx and Lenin'.

A person could be declared under s 9 only if the person was either a member of the ACP at the relevant time or if the person was 'a communist' at a subsequent time. 'Communist' was defined by the Act (s 3) to mean 'A person who supports or advocates the objectives, policies, teachings, principles or practices of communism, as expounded by Marx and Lenin'. The relevant time was the time between 10 May 1948 and the commencement day of the Act.

The meaning of the definition of 'communist' and the corresponding phrase in s 5 was the subject of considerable parliamentary debate. Some Labor speakers argued that people would fall within the definition so long as they advocated anything that Marx advocated. Thus, a person who favoured free education was, under the Act, a communist.[29] Government speakers argued that this was not what

[29] See Commonwealth, *Parliamentary Debates*, House of Representatives, 10 May 1950, 2358-61 (Clyde Cameron); 11 May 1950, 2515 (Charles Morgan); 17 May 1950, 2756 (Clyde Cameron); 2768-9 (Percy Clarey); 18 May 1950, 2951 (Allan Fraser); Commonwealth, *Parliamentary Debates*, Senate, 31 May 1950, 3425-6 (Senator James Sheehan); 8 June 1950, 3938 (Senator Frederick Katz); 3939 (Senator Joseph Cooke, whose concern that it would catch atheists was evidently not shared by Latham CJ); 3939-41, 3946-8 (Senator Donald Cameron); 8 June 1950, 4071 (Senator Nicholas McKenna, who, elsewhere, seems more sanguine); 14 June 1950, 4223-4 (Senator Morrow); 4229 (Senator James Sheehan); 19 October 1950, 1079-80 (Senator Donald Cameron); See also David Marr, *Barwick* (1980), 81 who argues that the definition 'could as easily trap Marxist historians, Ban the Bomb marchers and admirers of the Red Dean of Canterbury, as "fifth column" industrial wreckers'.

the Act meant,[30] and in my opinion, they are correct. First, it is instructive to compare the wording of the Act with the wording used in an earlier attempt to ban subversive organisations, the wartime *National Security (Subversive Associations) Regulations*. Under the Regulations, it was an offence to advocate or promote unlawful doctrines. Regulation 2 defined 'unlawful doctrines' to include 'any doctrines or principles which were advocated by a body which has been declared to be unlawful, and any doctrines or principles whatsoever which are prejudicial to the defence of the Commonwealth or the efficient prosecution of the war'. In the *Jehovah's Witnesses case*,[31] the meaning of this term was examined by the High Court. Several justices observed that the definition meant that the effect of the proscription of the Jehovah's Witnesses was that it became an offence under the Regulation to propagate Christian doctrines in Australia. Since there was no obvious reason why the defence of Australia would be assisted by the banning of Christianity, the relevant Regulations were invalid unless they could be read down.[32] The majority doubted that they could be read down so as to apply only to unlawful doctrines insofar as these were prejudicial to the defence of the Commonwealth or the efficient prosecution of the war.[33] Since the *Dissolution Act* would have been drafted by people familiar with the *Jehovah's Witnesses case*, it is unlikely that they would have intended to define 'communist' so as to include virtually anyone. This does not mean that they were successful in giving effect to their presumed intent. That depends on the words of the definition. In contrast to the *Subversive Associations Regulations*, the definition did not include the word 'any'. It referred to *the objectives* and policies. Support or advocacy of *a* policy is not support for *the* policies. The lesson of the *Jehovah's Witnesses case* seems to have been learned.[34]

There is more merit to the argument that even if the Act required support for more than a particular objective, it might catch the Labor Party or at least some of its members.[35] If, for instance, it could be said that the ALP shared the same communist objectives while disagreeing as to how they might best be achieved, it might have fallen foul of the Act. And even if the ALP did not, some of its members might have. Chifley argued that Menzies' view of the ALP was such that, if accepted, it would have meant that the ALP was communist for the

30 Commonwealth, *Parliamentary Debates*, House of Representatives, 10 May 1950, 2364 (Geoffrey Brown); 28 September 1950, 131 (Herbert Handby, who wondered why, if its effect was so draconian, Labor supported the Bill in principle); Commonwealth, *Parliamentary Debates*, Senate, 19 October 1950, 1079 (Senator Neil O'Sullivan, Minister for Trade and Customs. An interjection by Senator Edmund Maher, on the other hand, suggested that he agreed that the definition was to be interpreted broadly and that this was a good thing: *ibid*, 15 June 1950, 4339.

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

32 Ibid 144 (Latham CJ with whom McTiernan J agreed, 157); 164 (Williams J, with whom Rich J agreed, 150).

33 Ibid 166 (Williams J, with whom Rich J agreed, 150). Starke J, 154 held that the Regulations could not be read down so as to save them from invalidity. Latham CJ, 144 (with whom McTiernan J agreed, 157) dissented. The issues raised by the case were such that it was not necessary to determine whether the Regulations relating to unlawful doctrines could be read down.

34 Indeed, if it had not, Latham CJ, on the basis of his decision in the *Jehovah's Witnesses case* would not have been able to uphold the validity of the Act.

35 This was argued by numerous Labor speakers, especially as the debates wore on: see eg Senate, 31 May 1950, 3425 (Senator Donald Grant); 1 June 1950, 3524 (Senator John Ryan); 3567-8 (Senator Frederick Katz); Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1950, 153 (Percy Clarey); 10-11 July 51, 1259 (Patrick Galvin).

purposes of the Act.[36] Winterton accepts this interpretation of the definition,[37] and it cannot be said that he is clearly wrong.[38] That said, Labor protestations that the ALP could fall within the Act must be taken with a grain of salt. While Labor moved numerous amendments, it took no steps to amend s 3 so as to make it clear that social democratic bodies and people did not fall within the definition of 'communist'.[39] Defending the Bill, Keith Wilson and George Freeth argued persuasively that insofar as the Bill allowed the ALP to be declared it would be unconstitutional since it could not be justified either as a defence measure nor as a measure to protect the Constitution and laws of the Commonwealth.[40] Moreover, there are several reasons why it was unlikely that a court would interpret s 3 to extend to social democrats. First, while Labor was nominally committed to the socialisation of capital, this was generally accepted within the party to be subject to the 'Blackburn Declaration' which provided that this was not to be the case where private property was used in a socially useful and non-exploitative way.[41] For a Marxist, there could be no such exception: exploitation was inherent in the private ownership of capital. Second, the definition refers to communism as expounded by Marx *and* Lenin. While some members of the ALP might have been willing to support the objectives of communism as expounded by Marx, few would have claimed that they also accepted the objectives of communism as expounded by Lenin. Third, the objectives of communism as expounded by Marx and Lenin included both ultimate objectives and more

36 Many government speakers argued that this interpretation was absurd, but the force of their argument was undermined by numerous government speakers anxious to insist on how blurred the line was between communism and Labor's socialism (see Commonwealth, *Parliamentary Debates*, House of Representatives, 10 May 1950, 2353-7 (Arthur Fadden, Treasurer); 2399-2400 (Eldred Eggins); 11 May 1950, 2502-4 (Bruce Kekwick); 2530 (Charles Anderson), 2985 (Charles Russell); Commonwealth, *Parliamentary Debates,* Senate, 1 June 1950, 3542-6 (Senator Rankin, who regarded Fabian socialists as 'rotten as Stalin', Trygve Lie as a Stalinist, and Sir Stafford Cripps as either a communist or a fellow traveller); 3558 (Senator Edmund Maher). Senator Vincent's comment that 'Any man, irrespective of his politics, who comes into this chamber and opposes this bill must be regarded as a potential traitor to this country' Commonwealth, *Parliamentary Debates*, Senate 17 October 1950, 824 comes close to suggesting that the ALP was a treasonous conspiracy.

37 Winterton, above n 2, 640, 656.

38 Government speakers denied that this construction could be placed on the definition, but their case was not assisted by some of their more virulently anti-communist colleagues who delighted in blurring the difference between communism and socialism. Menzies, who ought to have known better, said (in jest, in relation to something which was no laughing matter) that he knew one Labor Senator who could be declared, and one MHR who would barely escape: House of Representatives, 4 May 1950, 2219. This involved not only the claim that they were communists, but, security risks.

39 In the Senate Debate on the first *Dissolution Bill*, Senator McKenna raised the definition issue, but said that he recognised the difficulty of defining the term and stated that the opposition did not intend to propose to alter it. He sought an assurance from Senator John Spicer that the definition applied only to revolutionary communists. Spicer acknowledged the difficulties of defining the term, arguing that the effect of the definition would be to catch communists and only communists: see Commonwealth, *Parliamentary Debates*, Senate, 8 June 1950, 3935-8, 3941-4. Later, Senator McKenna argued that the reason why Labor was willing to agree to the vague definition was that the safeguards it proposed would ensure that there was no danger that innocent people would be trapped by the Act.

40 Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2488, 2562.

41 The Blackburn Declaration did not have formal status, but in 1949, it had been reaffirmed by the ALP's Federal Executive. In any case, ALP commitment to socialism was qualified by a 1927 Conference resolution restricting Labor to intra-constitutional reforms. Labor's commitment to socialism was therefore subject to s 92 of the Constitution until such time as the section could be amended. For a discussion of Labor's socialist objective, see L F Crisp, *The Australian Federal Labor Party* (1955) Ch XIV.

immediate objectives. The more immediate objectives arguably included the establishment of a dictatorship of the proletariat. Labor did not accept this particular objective. Finally, given the ambiguity of the term, it would have been permissible for a court to rely on the preamble for guidance as to its meaning. Given the lurid description of communists and communism contained therein, the preamble could be taken as indicating that the Act was not intended to catch anyone to the right of Lenin.[42]

A quite different problem posed by the definition was that it might not catch anyone at all. Several Labor speakers commented on the problem of knowing what was actually involved in 'communism as expounded by Marx and Lenin'. Senator Sheehan pointed out that that 'there are in the socialist world almost as many schools of thought which take Marx as their basis as there are sects in the Christian world which take the Bible for their foundation'.[43] Senator Grant raised the question of whether Marxism and Leninism could be reconciled.[44] This being so, did communism, as defined, exist? Several Labor speakers argued that a good case could be made for the proposition that Stalin and the ACP had betrayed the principles of Marxism-Leninism. Did that mean that a Stalinist was not a communist for the purposes of the Act?[45] Senator Grant perceptively raised the question of the implications of disagreements between Stalin and Mao for the application of the definition.[46] Senator Donald Willesee pointed to the paradox that:

> A man could say from a public platform that he believed in everything that Stalin, Molotov and Vishinsky had said in relation to taking over other countries by infiltration, but he could not be declared if he proved that he did not agree with a large portion of the teachings of Marx and Lenin. I repeat that the Government has missed the bus by not stressing in the definition of 'Communist' the international characteristics of communism.[47]

42 Senator John Spicer pointed to the importance of the preamble in this respect: Commonwealth, *Parliamentary Debates*, Senate, 8 June 1950, 3942-3. Given the ambiguity of the definition of 'communist', the preamble could clearly be relied on as an interpretative aide, even adopting the restrictive test adopted by Griffith CJ in *Botwell v Goldsborough Mort & Co Ltd* (1906) 3 CLR 444, 451. Anne Winkley ('The Contextual Role of a Preamble in Statutory Interpretation' (1999) 23 *Melbourne University Law Review* 184) has argued persuasively that the test is unduly restrictive, and that recourse can and could be had to the preamble to determine not only the meaning of an ambiguous expression, but whether a particular expression was ambiguous. The logic of her argument is that this was the position in 1951 and well as currently. Given her argument, an even stronger case could be made for placing a narrow construction on the definition.

43 Commonwealth, *Parliamentary Debates*, Senate, 31 May 1950, 3425.

44 Ibid 3440. Len Fox, who saw himself as a Marxist, and who was a member of the Communist Party for many years, ultimately gave a negative answer to the question: *Broad Left; Narrow Left* (1982) 137-42.

45 Commonwealth, *Parliamentary Debates, Senate*, 31 May 1950, 3440; 8 June 1950, 3949 (Senator Donald Grant); Commonwealth, *Parliamentary Debates*, House of Representatives, 11 July 51, 1363 (E James Harrison). Beazley remarked on the definition's failure to refer to Stalin: ibid, 1396. In this respect the South African legislation seems to encapsulate its target rather better than the Australian Act. It has defined communism to mean (*inter alia*):

> the doctrine of Marxian socialism as expounded by Lenin or Trotsky, the Third International (the Comintern) or the Communist Information Bureau (the Cominform), or any related form of that doctrine expounded or advocated in the Union for the promotion of the fundamental principles of that doctrine: *Suppression of Communism Act* 44 of 1950 (S Af), s 1(1)(ii).

It therefore included Stalinism, and with admirable impartiality, it also included Trotskyism.

46 Commonwealth, *Parliamentary Debates*, Senate, 8 June 1950, 3940-50.

47 Commonwealth, *Parliamentary Debates*, Senate, 19 October 1950, 1079.

There were other questions which could have arisen. Many people who joined the ACP did so out of their hatred of capitalism. They served the party faithfully, but their knowledge of and interest in the principles of Marxism-Leninism was almost non-existent. Were they communists under the Act?[48] How was one to classify a Leninist who approved of Capital, but regarded Marx's *Philosophical-Economic Manuscripts* as adolescent romanticism? How would a court deal with an appellant who produced expert evidence to the effect that Marxism and Leninism were incompatible? A partial answer to these questions lies in the fact that courts would have accepted the need for a definition which would not completely defeat the purposes of the Act. Since the Act presupposed the existence of 'communism as expounded by Marx and Lenin', the existence of such an ideology is assumed. It would therefore not avail an applicant to argue that the phrase was oxymoronic. Nor I think, would a court condition being a communist on being familiar with the entire corpus of Marxist and Leninist writings. To do so would be incompatible with giving any effect to the legislation. I think it would have been enough that the objectives, policies, teachings, principles or practices of communism which a person supported or advocated were supported or advocated on the assumption that they represented communism as expounded by Marx and Lenin. The position of the person who supported most, but not all aspects of communism is harder to classify. 'Substantial' agreement might have sufficed. If communists could be relied on to answer questions in cross-examination in the same way as they would answer questions put to them by the party's control commission, these issues would present relatively few problems. Counsel for the Commonwealth would ask: 'Do you support communism as expounded by Marx and Lenin?', and the answer would be 'Yes'. But even Peter denied Christ thrice, and one would expect that loyal communists would not only be tempted, but sometimes instructed, to deny their Marxist-Leninist commitment.[49] Moreover, such 'communist sympathisers' and others as might have been caught by the Act would normally have been able to state with complete honesty that their commitment to communism was at most qualified, and often no more than tenuous and conditional.

In his judgment in the *Communist Party case*, Dixon J touched on the issue 'Theoretically there may be a difficulty in saying how the provision applies if the body subscribes to some but not to all of the objectives, policies, teachings or practices, but probably it has no practical importance.'[50]

He leaves it to our imagination why it should have no practical importance. It clearly had no practical importance for the decision in the case, but Dixon's use of the word 'probably' makes it clear that this was not what he had in mind. It is also possible that he assumed that even if the term could be given a broad meaning, it would be unlikely that in practice, it would be applied except in

48 Commonwealth, *Parliamentary Debates*, Senate, 8 June 1950, 3940 (Senator Donald Cameron).

49 Communists were often proud to assert their loyalty to the party, even when it may have been illegal: Roger Douglas, 'Trials of the left, 1930-39' (Paper presented at the Australian and New Zealand Society of Criminology Conference, Parkville, Victoria, 20-23 February, 2001), 10; See also the report of Ratliff's uncompromising statement to the court in his 1940 trial: NAA: A1608/1 16/13/239 Pt 1. However, insofar as communists appealed against being so labelled, one must assume they would have been anxious that the label not be attributed to them.

50 (1951) 83 CLR 1, 177.

relation to those whose 'communism' was relatively unambiguous. If so, one detects an element of trust in the Executive not present elsewhere in his judgment. What is also possible is that he realised that communists were Catholic rather than Protestant in their attitudes to the sacred texts. The defining feature of a communist was the belief that the party's interpretation of the texts was the correct one. If the party accepted that Marxism-Leninism was flawless, there was no occasion for accepting some aspects of Marxism-Leninism, but not others. McTiernan J barely adverted to the issue, but his description of the Act as a 'law with respect to communists of the Lenin-Marx school'[51] implies that he did not regard it as applying to other communists or socialists. Fullagar J disavowed any attempt at precision, and in the circumstances, one can see why.

The problem of giving meaning to the definition is highlighted by the way in which the South African Appellate Division handled the definitional problem. The South African definition of 'communism' resembled the Australian definition insofar as it defined it by reference to the teachings of communist theorists. However, it also defined it by reference to the way in which communism was expounded by the Comintern or the Cominform, and it defined communism to include the advocacy of a variety of broadly defined ends and means (including civil disobedience). In *R v Sisulu*,[52] the court concluded that the problems associated with proof of the content of the relevant doctrines was almost insuperable. The content of the doctrines could not be the subject of judicial notice. Moreover:

> The difficulties must have been obvious which would face the prosecution in proving to the satisfaction of a Court what the doctrine of Marxian Socialism was and how it was expounded by Lenin or Trotsky or the Comintern or the Cominform, a difficulty which might be increased by the fact that, even if the doctrine itself is static and not a living growth, its exposition might vary according to the exigencies and new considerations that, from time to time, might face the expounder, and might produce, at any rate in the case of the first two expounders, views different and possibly in conflict with earlier expositions from the same source.[53]

The Appellate Division concluded that advocacy of any of the proscribed means or ends would be sufficient to constitute the advocacy of 'communism'. It would therefore almost never be necessary for the prosecution to have to prove the content of Marxian Socialism as expounded by the relevant authority. The Australian legislation, however, provided no such solution. Had the Act been upheld, Australian courts would have been faced with a task which South African courts regarded as almost impossible.

The Australian definition is so vague that it is pointless to argue that it had a particular meaning. It is likely that in the short and intermediate run, its ambiguities would not have given rise to many difficulties. If the legislation had been enforced only insofar as it related to those who had actually been members of the ACP, its targets would have been people who could normally be assumed to be communists, and whose place on the seized list of ACP members would

51 Ibid 210.
52 [1953] 3 SA 276.
53 Ibid 288 (Greenberg ACJ, for the Court).

constitute evidence of their being communist. Difficulties would have arisen only in relation to those who subsequently joined bodies set up to replace the disbanded ACP, and if the government had tried to spread its net wider so as to catch leftist militants in general. Given the uncertainties surrounding the definition, it is likely that if the question had arisen, different courts would have reached slightly different conclusions. It is, however, unlikely that most courts would have been reluctant to extend the definition so that it encompassed not only those who supported communism as expounded by Stalin (assuming, of course that it did), but those who would have described themselves as socialists.

Proving communism

The impact of the Act would have depended not only on who actually were 'communists' under the Act, but also on both the likelihood that non-communists would be wrongly declared to be communists, and on the likelihood that communists would be wrongly found not to be communists. In the parliamentary debates, Liberal and Country Party MPs assumed that an 'innocent' body or person would have no difficulties meeting the challenge. Labor speakers were pessimistic. Far less attention was given to the question of the ease with which 'communists' could be proved to be 'communists'. It was in the interests of neither government speakers nor the opposition to argue that courts would mis-characterise actual communists. For government speakers, this possibility would suggest that the Bill would not be as effective as they claimed it would be. For opposition speakers, it would suggest that the Bill was less repressive.

In determining whether a group or person was 'communist', courts would inevitably have made errors. There were two reasons for this. First, in many cases, courts would have been acting on the basis of imperfect evidence. Second, given imperfect information and a civil standard of proof, errors must occur, regardless of the quality of the judge. Government speakers insisted that innocent people had nothing to fear. In making the decision to 'declare' a group or person, the Executive would confine its attention to people who posed serious security risks. It would therefore be unlikely to 'declare' non-communist groups or people. If, however, it did, all that one needed to do if one objected to a declaration was to swear 'I am not a communist'. True, they could then be cross-examined, but innocent people would have nothing to fear.[54] The burden of proof would than fall on the government. It all seemed so easy. But government speakers did not deal adequately with the question: if it was so easy for a non-communist to escape declaration, why would 'secret' communists not be able to do likewise?

[54] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1950, 2284 (Percy Spender, Minister for External Affairs and for External Territories); 11 May 1950, 2511 (Thomas Gilmore); 17 May 1950, 2784 (Charles Anderson); 2793 (Thomas Treloar); 20 June 1950, 4549 (Robert Menzies, Prime Minister); 28 September 1950, 107 (Bruce Graham), 117 (Winton Turnbull), 126 (Alan Hulme); Commonwealth, *Parliamentary Debates*, Senate, 6 June 1950, 3680 (Senator Robert Wordsworth, who added that the person should produce 'three men of repute' to back his statement); 3692 (Senator Walter Cooper, Minister for Repatriation); 13 June 1950, 4102 (Senator Edmund Maher), 4105 (Senator Edward Mattner); 14 June 1950, 4194 (Senator John Spicer, Attorney-General); 5 October 1950, 321 (Senator Neil O'Sullivan, Minister for Trade and Customs); 17 October 1950, 848 (Senator Edward Mattner); 19 October 1950, 1053 (Senator Roy Kendall).

The government could discharge that burden in several ways. First, by cross-examination, the government might be able to extract damaging admissions.[55] Second, under the Act, the government could rely on a number of presumptions. Labor argued that this was oppressive. Senator Large warned that cross-examination did not necessarily elicit the truth:

> I have had quite a lot of court experience, and I know the legal habits of trying to impress and then brow-beat witnesses or accused persons who are under cross-examination. On many occasions I have acted as an industrial inspector conducting prosecutions, and I have seen people tricked into saying something that was not true or that they did not mean. They become the victims of the advocates.[56]

The nature of the proceedings also put applicants at a disadvantage. They were required to begin their case without knowing the basis for their alleged communist status. They might not be in a position to know the significance of questions asked of them in cross-examination. They might be at a considerable disadvantage in relation to being able to object to questions. They might be hard-pressed to know the kind of evidence they would need to provide to cast doubt on the allegations against them. The government also no doubt hoped that naive witnesses would self-incriminate, although it probably hoped that it would only be the relatively guilty ones who did so.

In assessing the impact of cross-examination, it is essential to distinguish between its capacity to lay the basis for a no case submission and its effectiveness in weakening an applicant's evidence. For a 'no case' submission to succeed, it is not enough that the cross-examination should cast doubts on the applicant's veracity. The judge must be satisfied that, taking the evidence given by the applicant at its strongest, the applicant has not satisfied the requisite standard of proof. If the test is satisfied, the application must be dismissed. If a 'no case' submission is rejected, the respondent must then decide whether or not to call evidence. If the government decided not to call evidence, there would be a possibility that the judge would decide that, in view of the cross-examination, the applicant was not a particularly credible witness and find against the applicant. However, failure to call evidence in circumstances where evidence could be called would seriously weaken the government's case.

In assessing the ease with which applicants could challenge declarations, it is useful to distinguish between cases where the body or person was declared on the basis of links with the ACP and those where the declaration was based on the fact that the body promoted 'communism' or the individual was a 'communist'. In the former cases, proof that relevant persons were members of the ACP was facilitated by s 25(2), which provided that records found at Marx House on 8 July

55 Winton Turnbull optimistically argued that 'the one thing a Communist does not want to do is enter the witness-box. If he does he may disclose the secrets of his party, further implicate himself, or commit perjury': Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1950, 117; see also 126 (Alan Hulme); 3 October 1950, 194 (Wentworth).
This, I think, underestimates the capacity of communists to acquit themselves well under cross-examination. Communist witnesses before the Lowe Royal Commission seemed to give few secrets away: see The Hon Sir Charles Lowe, *Report of Royal Commission inquiring into the origins, aims, objects and funds of the Communist Party in Victoria and other related matters* (1950). Perhaps there were none to give away.

56 Commonwealth, *Parliamentary Debates*, Senate, 19 October 1950, 1066.

1949 could be evidence of membership of the ACP. This would ease proof by the Commonwealth that a person was a member of the ACP for the purpose of s 9. Proof that a body fell within s 5(1)(b) would be relatively easy if the body in question had published a list of the members of the relevant committee, and where this included many 'listed' communists. Where, however, the allegation was that the body promoted communism or that the individual was an 'unlisted' communist, the task for the Commonwealth was somewhat harder.[57] If, as government speakers contended, communists were unscrupulous, and willing to lie for the sake of the party,[58] one can assume that they would be willing to lie about their commitment to communism (as defined) - except in cases where it would clearly be futile to do so.[59] It is not unrealistic to assume that they would sometimes be coached so that they gave reasonably convincing evidence, and that their evidence would be sufficiently credible to require evidence in rebuttal.[60] McMahon suggested that one solution to this problem was the failure to give particulars:

> If the Commonwealth were obliged to give particulars, the Communists would begin systematically to collect false evidence for the purpose of frustrating the will of the court, distorting the process of justice and preventing the Government, not only from issuing declarations against Communists, but also from maintaining those declarations in force.[61]

But this would avail the Commonwealth only if it could prove that the applicant was a communist without reliance on its own witnesses. Once its witnesses had given evidence, the applicant would be entitled to produce evidence to rebut any claims raised by Commonwealth witnesses, and which the applicant had no reason to anticipate.[62]

One of the issues rarely adverted to in the course of the debates was the kind of evidence the Commonwealth would need in order to make out its case. Two issues could arise. The first would involve the question of the content of 'communism'. This would require the giving of expert evidence, but while this would complicate trials, it would not have constituted an insuperable obstacle to proof of the Commonwealth case. However, even if the content of Marxism-

57 In particular, this would be the case in relation to 'hidden' communists, whose presence was alleged by many government speakers to be widespread: see for example, Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2529 (Charles Anderson).

58 Athol Townley, for instance cited Marx, Lenin and Stalin as authority for the proposition that communism recognises no law and scoffs at the truth. Being atheists, communists attached no value to oaths: Commonwealth, *Parliamentary Debates*, House of Representatives, 16 May 1950, 2677.

59 Thomas Treloar considered that the threat of a conviction for perjury would be enough to deter communists from making false statements: Commonwealth, *Parliamentary Debates*, House of Representatives, 17 May 1950, 2793. Given the government's well-founded suspicion of jury trial, this was a questionable assumption, except in those cases where there would have been no point in a communist lying.

60 There is a reference to communists' preparations for political trials in Amirah Inglis, *The Hammer & Sickle and the Washing up* (1995), 67-8. Communists, however, did not have a monopoly over evidence co-ordination and mendacity: Douglas, above n 49, 7.

61 Commonwealth, *Parliamentary Debates*, House of Representatives, 3 October 1950, 154.

62 There was little discussion of the procedure to be followed by the court, but Senator O'Sullivan (Commonwealth, *Parliamentary Debates* Senate, 19 October 1950, 1988) stated that applicants would be entitled to rebut Commonwealth evidence. This would be in accordance with the normal procedures in civil cases, and Senator O'Sullivan seems correct in assuming that only if there had been specific provision to this effect would applicants not have a right to rebut.

Leninism could be established, the Commonwealth would face the problem of proving that the body or person was communist. In cases brought against the Communist Party and its agents under Part IIA of the *Crimes Act 1914* (Cth), the Commonwealth relied and anticipated relying on documentary evidence alone.[63] One can envisage cases where documentary evidence would be sufficient to demonstrate that a body or person probably fell within ss 5 or 9 of the Act. An association's newsletter might include articles dismissing certain views as wrong by virtue of their being contrary to the teachings of Marx and Lenin. A person might write an article explaining that the dictatorship of the proletariat is a prerequisite for the liberation of Australians from the shackles of capitalism. But most 'communist' writing involved the advocacy of goals and tactics which were not distinctly communist.[64] Moreover, insofar as communists considered that the Act was likely to be enforced, one would expect them to adjust to it, by expressing subversive thoughts in more carefully drafted language, and by creating ambiguity about responsibility and authorship. Such writing would probably have involved the use of 'codes' whose meaning would have been relatively clear to the cognoscenti: there would no doubt have been frequent references to the struggle for democracy and basic liberties, and to the need to protect workers' rights. But courts would be wary of accepting that commitment to democracy, civil liberties and workers' rights was evidence of 'communism'.

In any case, there are 'facts' which would be difficult to prove on the basis of documentary material alone. How, for instance, would one prove that a body was 'substantially controlled' by communists? This would require evidence of the inner workings of the body's governing bodies, and it would also require evidence that those who substantially directed it were 'communists'. The difficulty of proving these things is illustrated by Sabin's study of the litigation associated with the successful attempt by New York State authorities to break up the communist-controlled International Workers Order. The resultant trial lasted for four months.[65] Similarly, consider the case where a person denies being a 'communist' for the purposes of the Act, and makes no damning admissions under cross-examination. How does one prove the person to be a communist other than by producing evidence from people to whom that person had made rashly frank admissions? The problem becomes particularly acute in the case of 'underground' communists, whose 'communism' would presumably not have been evidenced by membership of the party or by public speeches and writings evidencing their commitment.[66] It is difficult to see how the Commonwealth could acquire such information other than by eavesdropping, agents within the organisation in

63 Douglas, above n 13.

64 It is instructive to read the *Workers' Weekly* during the depression years when ACP sectarianism was at its peak. While the paper was filled with articles written in what one quickly comes to recognise as 'communese', references to Marx and Lenin as providing the theoretical grounds for accepting the validity of an assertion are extremely rare. Without knowledge that the paper was the official organ of the Communist Party, and without knowledge that those who wrote in 'communese' were communists, it would not have been easy to prove to a court that the paper was actually a communist paper.

65 Arthur Sabin, *Red Scare in Court: New York versus the International Workers Order* (1993).

66 Maher, for example, referred to Fuchs, who divulged important secrets to the Soviet Union, as the kind of person at whom the Act was targeted: Commonwealth, *Parliamentary Debates*, Senate, 1 June 1950, 3565. But assuming Fuchs to be declared (and the problem was that the British government did not even know he was a risk), how would the government have proved him to be a 'communist'?

question or informants who may be reluctant to have their role as informants exposed. Thus, except in the rare situation where, after the applicant's evidence, there was no case to answer, or where admissions in response to cross-examination were sufficient to discharge the Commonwealth's burden of proof, the Commonwealth might well have been put in the position of having to put its informants and agents in the box in order to make out its case.[67] Either it would have to decline to give evidence (in which case the application would be likely to succeed)[68] or risk identifying its sources. Since the government was evidently extremely reluctant to disclose its sources, it would normally have no alternative but to withdraw the allegation.

The importance of this consideration is two-fold. First, in cases which did go to trial, the Commonwealth would often be hard-pressed to satisfy even the civil burden of proof. Second, given that success at trial would often require evidence from informants and agents, the costs of 'declaring' groups and people would be considerable. Government supporters of the Act argued that one reason for the 'reverse onus' provisions in the Act was that the problems these considerations would pose for the Commonwealth. Informants would have their identity exposed and would risk violent retaliation from communists; the cover of security agents would be blown so they would no longer be able to provide ongoing supervision of communist activities.[69] If, as I have argued, the Commonwealth would often have to produce evidence to support its claims that groups and individuals were communist, then the same problems would arise. This would be sufficient to deter the 'declaration' of all but the most unambiguous, and most dangerous 'communists'. The Commonwealth's commitment to the protection of its agents would ironically have done much to protect Australians' liberties in the event that the Act had survived.

Chasing hydra-headed monsters

The impact of the legislation was also likely to be minimised by what one speaker in the parliamentary debates aptly described as the party's 'hydra-headed nature'.[70] Like other communist parties, the ACP had a genius for organisational fluidity, and was capable of operating through a complex mixture of alter egos, front

67 Herbert Evatt and Albert Thompson seem to have been the only speakers in the debates to have made this point: Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1950, 2294; 3 October 1950, 166.

68 In *Jones v Dunkel* (1953) 101 CLR 298, the majority held (1) that failure by the defence to contradict facts alleged by the plaintiff meant that a jury might more confidently accept the plaintiff's evidence; and (2) that 'any inference favourable to the plaintiff for which there was ground in the evidence might be more confidently drawn when a person presumably able to put the true complexion on the facts relied on as the ground for the inference has not been called as a witness by the defendant and the evidence provides no sufficient explanation of his absence': 308; 312-3 (Menzies J); 320-2 (Windeyer J).

69 See Commonwealth, *Parliamentary Debates*, House of Representatives, 27 April 1950, 2005; 18 May 1950, 2882, 2929-30 (Robert Menzies, Prime Minister); 9 May 1950, 2284 (Percy Spender, Minister for External Affairs and for External Territories); 16 May 1950, 2646 (Frederick Osborne); 17 May 1950, 2771 (John Cramer), 2782 (Hubert Anthony, Postmaster-General); 18 May 1950, 2920 (Malcolm McColm).

70 Commonwealth, *Parliamentary Debates*, House of Representatives, 11 July 1951, 1398 (Kim Beazley). This was, of course, also recognised by government speakers: ibid, 10 May 1950, 2375 (Howard Beale, Minister for Supply); 18 May 1950, 2881 (Robert Menzies, Prime Minister) ('protean form'); 28 September 1950, 115 (Winton Turnbull); Commonwealth, *Parliamentary Debates*, Senate, 8 June 1950, 3036, 3958; 13 June 1950, 4068 (Senator John Spicer, Attorney-General). It was, after all, the rationale for ss 5 and 9.

organisations and infiltrated organisations. Its capacity to reconstitute and express itself in different organisational guises bedevilled and infuriated a generation of anti-communist lawyers. The *Crimes Act* attempted to deal with the problem by the concept of 'affiliation'. The *Subversive Associations Regulations* dealt with it by allowing the government to gazette organisations as subversive organisations. The Act attempted to tackle the problem by use of a variety of formulae. One was to provide for the confiscation of the ACP's property. If successful, this would at least have meant that the reconstituted ACP would have had to start the process of capital accumulation from scratch. However, the delay in introducing the legislation and the time taken to pass it meant that the party had ample time to dispose of its assets and hide its records. Had it been an incorporated association, its casual handling of corporate records would have exposed its directors and officers to criminal charges, but unincorporated associations are under no such duties. Delay in passing the Act also meant that communist front organisations had time to dispose of their assets. The Act did, however, complicate the position of 'communist' bodies established after the passage of the Act. If these bodies were 'declared', their property vested in a receiver appointed in the instrument under which the body was declared. They would have no notice of the government's intention to make a declaration. Their capacity to evade the proprietary consequences of a declaration would therefore be dependent on their either organising their affairs so that they had no property, or disposing of their property illegally. Their capacity to do so would be assisted by poor record-keeping, but complicated by the powers conferred on receivers under the Regulations.[71] War-time precedents suggest that the government would have had some success in seizing association property, especially if it was located on association premises, or in designated bank accounts. Moreover, while the government would often be hard-pressed to prove that 'association' property in private hands was indeed the property of an association, people from whom property was seized often had considerable administrative difficulties recovering it, and could be faced with the problem of proving that disputed property was indeed theirs.[72]

Reconstitution required more than simply renaming the body. Continuity in all but name would, I think, have exposed those involved to prosecution under s 7(2). But there were numerous ways in which s 7 could be circumvented: activation of

71 Under the *Communist Party Dissolution Regulations*, receivers could require those they reasonably suspected of having information about unlawful associations to give sworn information about the property of the association: reg 4(1)-(2). It was an offence to refuse to give information or to give false information: reg 4(3).

72 On several occasions, raids on communists' homes yielded what may well have been party property: a large amount of money when Simpson was raided, a portable typewriter when Templeton's house was raided. The government was convinced that the money was party property, but, recognising that it could not prove this, it reluctantly agreed to return the money, more than a year after it was seized: NAA: A467/1 BUN89/PT1/SF42/79 W3252. It initially refused to return the typewriter, but eventually agreed to do so if Templeton produced a statutory declaration from himself and from the person who allegedly supplied it. Three years after the seizure, the typewriter had not been returned: NAA: 467/1 BUN89/Pt2/SF42/113. A duplicator and other printing equipment were taken when Ostler's premises were raided. These were found to be leased, and were eventually returned to the lessors: A467 BUNDLE89/PART2/SF42/111. Raids on premises occupied by Ratliff and on premises occupied by Scott yielded duplicators, typewriters and paper: NAA: A5954/69 431/2; A467/1 BUN89/Pt2/SF42/123. A linotype machines belonging to the Western Australian branch of the party was seized and disposed of: NAA: A467 BUNDLE89/PART1/SF42/92.

a previously created, but hitherto inert organisation or reconstitution as a structurally, but not substantively, different body. Reconstitution carried obvious risks: people to whom property was entrusted might simply walk away with it. Newly constituted structures might take some time to bed down. Heresy could flourish if control structures were impaired.[73] Moreover, reconstitution under a new name involved the risk of loss of brand-name advantage. The Act would not have destroyed the ACP, but it probably would have impaired its capacity to function smoothly.

Recognising resistance

A third constraint on the government was non-legal. One of the unpalatable facts of life for Australian governments during the golden age of anti-communism was that unions had to be appeased. During World War II, union protests against the internment of two communists, Ratliff and Thomas, were such that the government and its military advisers concluded that it was better to tolerate a degree of communist agitation than risk the disruption likely to result from the taking of action against communists.[74] After the war, Victoria and Queensland discovered that it was impossible to use Essential Services legislation to get strikers back to work.[75] Bates, a supporter of the Dissolution Bill, was prepared to concede that 'the great unions of this country can smash this bill' (He did not think they would).[76] A cabinet meeting in early 1950 had concluded that there was little that a government could do about industrial militancy: its only hope was to encourage changes within the union movement.[77] Even when the Commonwealth used the armed forces as strike-breakers, this was typically only with the concurrence of the ACTU.[78] Recognising the lack of wisdom in alienating the union movement may help explain why the Act provided that registered unions could not be declared under s 5.[79] Any action taken to remove communists from union positions would have been likely to arouse considerable unrest,[80] especially given that recent Commonwealth legislation meant that those communists who won office could no longer be accused of having done so unfairly. Measures to remove non-communist militants would have been even more inflammatory.

73 Davidson, above n 12, 83-4 argues that one paradoxical effect of this was to strengthen the party's attractiveness.

74 See for example Lt Smart to Sec, Military Board 6 August 41 NAA: A8911/1 191. The Minister for the Army had advised that an agitator who had attempted to cause unrest on defence projects was hoping to be interned so that his case would aggravate industrial relations: NAA: 5954/69 431/2. The episode is discussed by Paul Hasluck, *The government and the people* 1939-1941 (1952), 608-12.

75 Sheridan, above n 19, ch 9.

76 Commonwealth, *Parliamentary Debates*, House of Representatives, 16 May 1950, 2653.

77 Bartholomew Augustine Santamaria, *Santamaria: against the tide* (1983) 121.

78 Les Louis, '"Operation Alien" and the Cold War in Australia, 1950-1953' (1992) 62 *Labor History* 1.

79 Opponents of the Bills rightly pointed out that the Bills did not preclude the government from declaring a non-registered union, a state union, a strike committee, or a body such as a Trades and Labor Council: Commonwealth, *Parliamentary Debates*, House of Representatives, 17 May 1950, 2755 (Clyde Cameron); CPD 18 May 1950, 2875-6 (Albert Thompson); Commonwealth, *Parliamentary Debates*, Senate, 13 June 1950, 4083 (Senator Nash); 14 June 1950, 4187 (Senator Nicholas McKenna). A militant union might first be deregistered on the basis of its militancy and then, if communist controlled, declared and dissolved: ibid 17 October 1950, 825 (Senator Donald Cameron).

80 Eddie Ward warned of this Commonwealth, *Parliamentary Debates*, House of Representatives, 16 May 1950, 2656, not recognising that this very likelihood would probably restrain the government from the excesses which he argued would characterise its use of the Act. The government was aware of this, and had contingency plans: Louis, above n 78.

Even if the government had wanted to use the Act to destroy union militancy, it is hard to see how it could have succeeded in doing so.

Civil libertarianism

Finally, the Government was at least somewhat concerned about civil libertarian issues, and about public support for civil libertarianism.[81] Government concerns are reflected in the acknowledgment by some government speakers that the legislation was exceptional and could be justified only by the existence of exceptional circumstances.[82] They are also reflected in the government's willingness to amend the legislation to meet a number of Labor's most telling objections to it. Probably the most important was an amendment limiting the class of people who could be declared members of the ACP and 'communists'. Under the original Bill, any member of an unlawful association could be declared (subject to the non-reviewable requirement that they constitute a security risk).[83] It agreed to tighten the rules relating to searches.[84] In response to criticisms of the original Bill, the government altered the onus of proof provisions so that once an applicant gave evidence, the onus of proof no longer lay with the applicant.[85] Whereas appeals had originally been only to the High Court, by amendment the government agreed that bodies and people could also appeal to a Supreme Court.[86] The legislation creating offences under the Act was amended so as to make it clear that these had to be committed knowingly.[87] The government also

81 Henry Gullett stated that there would be few declarations under the Act, just as there are few prosecutions for treasonous offences under the *Crimes Act*: 'any such course of action would lead to the destruction of the government concerned in a very short time': Commonwealth, *Parliamentary Debates*, House of Representatives, 23 May 1950, 2791; and see too at 2991 (Howard Beale, Minister for Supply)). Senator Robert Wordsworth argued that one reason the government was reluctant to proceed against communists under the *Crimes Act* was that the 'uproar that arose after the introduction of this bill would be nothing compared with the public reaction that would follow': Commonwealth, *Parliamentary Debates*, Senate, 6 June 1950, 3680. Some committed anti-communists had also argued against the legislation on civil libertarian grounds. There were two elements to this argument: the first was a prudential argument: the legislation would make martyrs of, and thereby win support for, the communists; the second was that the political rights of all minorities - communists included - should be respected: Santamaria, above n 77, 122-5; Colm Kiernan, 'Archbishop Daniel Mannix and the Communist Party, 1951' in Elsa Atkin and Brett Evans (eds), Seeing Red: *The Communist Party Dissolution Act and Referendum 1951 - Lessons for Constitutional Reform* (1991) 88.

82 House of Representatives, 27 April 1950, 2005, 2007; 17 May 1950, 2749 (Robert Menzies, Prime Minister) (stating that he could appreciate the attitude that the reverse onus provisions were improper, and recognising that retrospective legislation is undesirable, and that in normal circumstances legislation would never be introduced to throw union officials out of office). Despite his intense anti-communism, WC Wentworth considered that there should be a sun-set clause in the Act: ibid 16 May 1950, 2635. For other arguments that the legislation was justifiable only as a response to an emergency, see ibid 16 May 1950, 2667 (John McEwan, Minister for Trade and Commerce who argued that the emergency explained 'measures which in normal circumstances we would not wish to adopt'); 17 May 51, 2770 (John Cramer), 2875 (Alan Hulme, arguing that the government recognised 'the enormity of what is being done'); 18 May 1950, 2920 (Malcolm McColm), 2790 (Henry Gullett, arguing that cl 9 was 'the less of two evils'). See too Commonwealth, *Parliamentary Debates*, Senate, 1 June, 1950, 3570 (Senator Agnes Robertson gave 'qualified support' to the Bill); 13 June 1950, 4078 (Senator John McCallum).

83 Commonwealth, *Parliamentary Debates*, Senate, 14 June 1950, 4212.

84 Commonwealth, *Parliamentary Debates*, Senate, 23 May 1950, 3014, 3015; 8 June 1950, 3932, 3935.

85 Commonwealth, *Parliamentary Debates*, Senate, 13 June 1950, 4088. Since the standard of proof was the civil standard, this was a largely symbolic concession.

86 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1950, 2922; 23 May 1950, 3013, 3014.

87 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1950, 2923.

amended the Bill to make statutory provision for the Committee of Five.[88] It also provided that the Act could be repealed by a proclamation by the Governor-General, once the emergency was over.[89] Some of these changes were cosmetic, but they reflect a government willing to respond both to its own quasi-liberal values, and to liberalism in the broader community.[90] Government speakers also argued that the ways in which laws were enforced was restrained by public opinion. Explaining why the government had not taken steps to enforce the *Crimes Act*, H B S Gullett argued that while thousands could technically be prosecuted under its provisions for political offences, the outcry if the government were to do so was such that it would not dare to.[91]

Barking loudly; biting gently

According to a report in the Melbourne *Age*, some members of the government including Holt, the Minister for Labour and National Service, planned to use the Act with extreme caution, and only in face of extreme provocation.[92] This was denied by Senator Spooner,[93] and it appears that the government did intend to 'declare' a number of communist union leaders in the event of a favourable High Court decision. It had anticipated that this would result in industrial unrest, but it had drawn up contingency plans to meet that unrest.[94] The government's raid on ACP offices throughout the country, immediately upon the Bill receiving royal assent, indicates that the government intended to make some use of its powers. ASIO had been exploring how the party might operate underground (and continued to do so even after the referendum).[95] However, conservative use of its powers under the Act would have been in keeping with the difficulty of defending declarations, the problems posed by the ACP's multiple embodiments, and by the industrial and political costs of attempts to mobilise the Act.

Moreover, it would have been in keeping with the general tendency of Australia's conservative governments to arm themselves with allegedly vital powers, which then remained largely unused. The Commonwealth criminalised the uttering of seditious words and the publishing of seditious material in 1920, but it was not until 1950 that a conservative government prosecuted anyone for

88 Commonwealth, *Parliamentary Debates*, Senate, 8 June 1950, 3956, 3957.

89 Commonwealth, *Parliamentary Debates*, Senate, 15 June 1950, 4344.

90 Shortly after a poll showing that 80% favoured the Bill, 56% of respondents to a Gallup Poll said that the government should have to prove allegations that people were communists, and 34% considered that the onus should be on the declared persons. Australian Gallup Polls *Australian Public Opinion Polls* 690-699 June-July 1950. Despite the degree to which Labor had emphasised its opposition to reverse onus, Labor and Liberal voters differed less sharply on this issue than they did on whether the ACP should be banned. However, in adopting the formula whereby the government assumed the onus only if the declared person gave evidence, the government had the support of 63% of respondents: Australian Gallup Polls *Australian Public Opinion Polls* 700-710 July-August 1950. On élite and semi-élite reservations about the Bills, see eg Winterton, above n 2, 643-5.

91 Commonwealth, *Parliamentary Debates*, House of Representatives, 23 May 1950, 2971, and see ibid, 6 June 1950, 3680 for similar comments from Senator Wordsworth.

92 'Question Marks on the Anti-Red Legislation' *The Age* 18 October 1950.

93 Commonwealth, *Parliamentary Debates*, Senate, 18 October 1950, 954-5. Senator John Spicer also stated that the government would 'enforce' the Bill: ibid 947.

94 Louis, above n 78, 3-4.

95 NAA: A6122, items 927, 1010, 1013-6, 1019, 1024, 1028, 1030, 1034, 1046, 1048-52, 1080, 1081, 1088, 1090-4, 1096, 1099-1101, 1148.

an offence under the relevant provisions.[96] The unlawful association provisions of the *Crimes Act* were introduced with considerable fanfare and in response to an election undertaking in 1926. The parliamentary debates reveal themes similar to those which were to characterise the debates of 1950-51. The government argued that the measure was absolutely essential if the problem of communism was to be tackled. The opposition argued that the Bill was unnecessary, that it would not work and that its real purpose was to enable the government to persecute the Labor movement in general. The sound and fury over, the Bruce-Page government made no use of the unlawful associations provisions in its remaining years in office. Further amendments to the *Crimes Act* were made in 1932. These gave rise to a debate similar to the debates of 1936 and 1950-51. Between 1932-37, the government took a number of administrative steps whose legality was predicated on the illegality of the Communist Party. However, only one person was tried for an offence under the unlawful associations provisions. The powers conferred by the 1932 legislation were used only once, and in a rather half-hearted way.[97] Even the *Subversive Associations Regulations* were used sparingly. They provided the ostensible legal basis for a large number of raids on the homes and offices of suspected communists, but they gave rise to only a score or so of prosecutions.[98] The fanfare which surrounded the Dissolution Act was such that it is hard to imagine that the government could have escaped the need to take some action under the Act, and it certainly showed that it was prepared to do so. It is likely that some of the union leaders named in parliament would have been 'declared'. It is also possible that some of the communists working in the Naval dockyards would have been declared and sacked. But it is hard to imagine that much more would have followed.

THE LITIGATION

It was clear that the Act rested on questionable constitutional foundations. There was authority to the effect that if the constitutionality of a measure depended on the existence of a fact, legislation would be unconstitutional if it purported to justify the taking of that measure on the basis of the Executive's assessment that the fact existed.[99] The exercise of relevant power had to be conditional upon the actual existence of the fact in question, and if there was to be a dispute about the existence of the fact, there had to be provision for this to be resolved by a court. In the 1926 debate on the *Crimes Bill*, Latham, the then Attorney-General, had emphasised that the Commonwealth could not by a recitation of facts in a

96 Lawrence Maher, 'The use and abuse of sedition' (1992) 14 *Sydney Law Review* 287; Lawrence Maher, 'Dissent, disloyalty and disaffection: Australia's last cold war sedition case' (1994) 16 *Adelaide Law Review* 1. In all, the Menzies government prosecuted four communists for sedition offences, one successfully.

97 For discussions of the unlawful associations provisions, see Ricketson, above n 13, 105-8.

98 For accounts of the war-time ban on the Communist Party, see David Carment, 'Australian Communism and National Security: September 1939-June 1941' (1980) 65 *Journal of the Royal Australian Historical Society* 246. In addition to those prosecuted under the *Subversive Associations Regulations*, about thirty leftists were prosecuted for political offences under the *National Security Regulations* (vagueness about exact numbers reflects uncertainty about whether I have been able to track down details of all relevant prosecutions, along with uncertainty as to the politics of some of those who were prosecuted).

99 *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36.

preamble, lay claim to powers it otherwise would not have. In the 1930s, he regarded this principle as precluding legislation aimed at outlawing the Communist Party as such.[100] In the *Jehovah's Witnesses case*, the High Court had struck down the *Subversive Associations Regulations* on the grounds that they could not be justified as an exercise of the defence power, and this was a decision made while war was raging. It is clear that the drafters were aware of the problems posed by these cases. The provision for the judicial reviewability of decisions that bodies and people were communists represented an attempt to go some of the way towards meeting the problem posed by *Walsh and Johnson* (reliance on the defence and 'incidental' and 'implied' powers represented an alternative possible solution). The legislation did not include a number of the objectionable features of the Regulations struck down in the *Jehovah's Witnesses case*. It respected the rights of creditors of dissolved bodies. It conditioned the exercise of the power to declare on a threat to the Commonwealth. Its preamble can be seen as a statement by the Parliament that in its opinion the defence of the Commonwealth required the measures for which the Act provided. However, the Act was vulnerable to attack on a number of grounds. There was no provision made for allowing the party to revive if the current emergency evaporated, nor was there provision for returning its property. The duration of the Act was not conditioned on a continuation of the state of affairs which had allegedly given rise to it. Moreover, while the exercise of powers under ss 5 and 9 was conditioned on an assessment that a body or person constituted a threat, it was not conditioned on whether the person or body actually did - or could reasonably be found to - constitute a threat. It is tempting to conclude that the government knew that the legislation was doomed, and that its purpose was not so much to ban the ACP as to embarrass the Labor Party.[101] However, the Commonwealth could have taken some comfort from the decisions in *Burns v Ransley*[102] and *R v Sharkey*.[103] These decisions had upheld the validity of the Commonwealth's sedition legislation, and in the former case in particular, had given it an extremely generous interpretation. Moreover, a crude political analysis of the Court would have suggested that the Court could be relied on to assist the Liberal Party in time of need.[104] Evatt's confidence that the legislation would be held unconstitutional does not seem to have been widely shared within the Labor Party: of those who took part in the parliamentary debates, only a handful mentioned the constitutionality question, and they tended to raise it in a relatively tentative

[100] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 January 1926, 472; Latham to Stevens, 6 April 1933 NAA: A467 BUNDLE 28/SF10/15. He gave some thought to the possibility of filling this lacuna by referendum, and anguished over a form of words by which the relevant power could be expressed: Garran to Latham, 9 February 1934 NAA: A467 BUNDLE 28/SF10/15.

[101] Frank Cain, 'All the way to Vietnam: the politics of threats' (1991) 95 *Arena* 115, 123.

[102] (1950) 79 CLR 101.

[103] (1950) 79 CLR 121.

[104] Aarons, above n 4, 25 admits that he doubted that much reliance could be placed on a bench of conservative lawyers.

manner.[105] While some Melbourne and Sydney KCs had had doubts about the constitutionality of the legislation, Marr claims that doubters were won over by Garfield Barwick's arguments to the contrary.[106] The ACP had been advised by most of the KCs it consulted that the legislation would be upheld.[107] Its preparations for illegality were predicated on the assumption that there was at least a real possibility that the legislation would be upheld. We now know that the party's pessimism was misplaced. However, while the 6-1 decision suggests that the legal issues were relatively straightforward, Latham CJ's dissenting judgment demonstrated that one justice was able to find arguments for upholding the legislation. More importantly, several of the majority judgments suggest a degree of judicial unease about their ultimate findings. Webb J in particular was not unsympathetic to the Commonwealth's arguments, and would probably have found for the Commonwealth had he not regarded himself as bound, in a relatively unimportant respect, by the *Jehovah's Witnesses case*.[108] Dixon J stated that his decision was made after 'much consideration'.[109] McTiernan J was prepared to take judicial notice of facts such that it would be reasonable to conclude that in the event of war between Australia and the Soviet Union, the ACP would constitute a real threat to the defence of Australia.[110]

I shall not discuss the decision in detail. There already exist several comprehensive analyses of the decision.[111] Broadly, they are in agreement,[112] and I have nothing new to say about doctrinal aspects of the case. The central issue was formulated by Latham CJ:

> 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?'[113]

[105] In addition to Herbert Evatt (Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1950, 2294), other speakers cast doubts on the constitutionality of the legislation included: Commonwealth, *Parliamentary Debates*, Senate House of Representatives, 11 May 1950, 2511 (Charles Morgan, who, however, had no doubt that the provisions banning the ACP were constitutional); Commonwealth, *Parliamentary Debates*, 1 June 1950, 3516 (Senator Nash), 3533 (Senator Donald Cameron); 15 June 1950, 4342 (Senator Donald Grant); 17 October 1950, 819 (Senator O'Flaherty). Senator Nicholas McKenna had doubts, but thought that the addition of cl 26 (s 27), and Labor's amendments to the first Dissolution Bill strengthened the constitutional position of the proposed legislation: ibid, 30 May 1950, 3317; 15 June 1950, 4344.

[106] Marr, above n 29, 79.

[107] Cook, above n 21, 194, and see Lockwood, above n 4, 111.

[108] He noted that the legislation confiscated the property of the ACP and of declared bodies without making provision for its return at the end of the emergency in question. In the absence of authority, he would not have regarded this as fatal to the legislation, but he considered that the *Jehovah's Witnesses case* bound him to find otherwise, in the absence of evidence that there was a state of emergency warranting extreme measures. Had his been the pivotal vote, the legislation could possibly have been saved by the provision of a trustee who would hold confiscated property for the duration of the emergency.

[109] (1951) 83 CLR 1, 199.

[110] (1951) 83 CLR 1, 208.

[111] Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (1987), 203-7; Williams, above n 6; Winterton, above n 2; Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 219-42.

[112] However, in contrast to the other scholars cited in n 106, Zines highlights the practical and legal difficulties involved in the application of the principle that 'the stream cannot rise above its source'.

[113] (1951) 83 CLR 1, 142.

His answer was: by Parliament. The majority's was (more or less): ultimately by a court. If the Court considered that Australia was at war, it would allow sweeping (but finite) powers to the Commonwealth, and in some contexts it might even allow the Parliament or the Executive to make a final decision in relation to whether particular action could be said to be for the defence of the Commonwealth. Otherwise, it was for the courts to decide whether there existed a sufficient nexus between a proposed exercise of power and the defence of the Commonwealth or the protection of the Constitution and the laws of the Commonwealth from their enemies. [114] To hold otherwise would be to permit the Commonwealth to assume powers which were not granted to it under the Constitution. Banning the Communist Party was not permitted. Australia was not at war, and the ban was not conditioned upon the existence of facts which, if proved would justify the dissolution of the party and the confiscation of its assets. For similar reasons, the Commonwealth lacked the power to 'declare' bodies and people. The legislation might have been within powers if both the decision that a body or person was communist, and the decision that it, he or she constituted a security risk, were reviewable. The decision that a body or person was communist was reviewable, but the decision that a communist body or person posed a security risk was not.[115] Because of this the legislation purported to permit declarations even in cases where by virtue of error or law, or error of fact, the body or person was not in fact a relevant risk.[116] As a measure purporting, in

[114] (1951) 83 CLR 1,194-202. Dixon J, however, pointed out that post-war developments and developments since the passage of the Act meant that the range of activities justifiable under the defence power was greater than would sometimes be the case in peacetime, 206-8. McTiernan J noted, 207, 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 the war-time powers that would be denied to it when the transition from war to peace sets in' and considered that in determining whether a state of war existed, the Court could be guided by a formal statement made by the Executive, and that this would carry considerable weight, especially if it stated that there was an impending danger of war, 222-3, 224-30. 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', 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, 229; 253-9 Fullagar J, 271-4, 281-3. Kitto J concluded that the conferral of a power to decide 'constitutional facts' when a state of war exists was limited to cases where the relevant legislation could not be read as authorising acts 'of a nature or for a purpose unrelated to the defence power', 281-3.

[115] Barwick, in a desperate attempt to save the legislation, had argued that the Governor-General's decisions could be reviewed on the grounds of irrationality, misdirection, or error of law: Williams, above n 6, 13. The majority rejected this argument. Dixon, McTiernan and Fullagar JJ (178-80, 201-11 and 257-8 respectively) reached this conclusion on the basis that decisions by the Governor-General were neither directly nor collaterally reviewable (see too Williams J 221-2). Dixon, McTiernan, Williams and Kitto JJ, 180, 211, 221-2 and 279-80 concluded that, in any case, the legislation made it clear that decisions under the Act were not reviewable. Webb J, 238 considered that there *was* authority for the proposition that the Governor-General's decision was judicially examinable and held that ss 5(4) and 9(4) should be read down accordingly.

[116] The Court did not have to decide whether there would be a sufficient nexus only if a body or person actually constituted a security risk or whether it would suffice that they could reasonably be regarded as constituting such a risk. The Court's analysis of the judicial reviewability of the Governor-General's decisions implies that the latter could suffice. If the former were a condition for the exercise of the relevant powers, the fact that decisions of the Governor-General could be judicially reviewed would be immaterial: a decision could survive review, while still being factually incorrect. Leaving aside the problems posed by the fact that the group property was to be forfeit rather than simply held in trust for the duration of the relevant emergency, none of the majority seems to have been of the view that had the Governor-General's decision been judicially reviewable, ss 5 and 9 would nonetheless have been invalid.

effect, to authorise potentially extra-constitutional action, the legislation was itself unconstitutional.

Insofar as the decision protected the civil liberties of communists, socialists, and anyone else, it did so by virtue of the accidents of the allocation of powers between courts and the other branches of government and between the Commonwealth and the States. The majority showed no interest in Paterson's argument that the ban was inconsistent with an implied freedom of political discourse.[117] Insofar as it considered the issue, it rejected the suggestion that they were inconsistent with s 92.[118] The Commonwealth could use its powers with respect to the public service to exclude communists from the public service.[119] It could use its powers with respect to industrial arbitration to make it a condition for union registration that a union have no communists on its governing bodies.[120] And States, if they wished, were free to abolish the Communist Party (and presumably any other party).[121] Moreover, the logic of the arguments of Dixon, McTiernan and Fullagar JJ was that so long as a government was acting within its constitutional powers, the exercise of those powers by the Governor-General or (presumably) a State Governor were unreviewable. The protections provided to dissidents were therefore institutional rather than legal. To a considerable extent they were fortuitous, a function of the allocation of powers between the centre and the States. The ACP could not be banned in peace-time, but the Commonwealth could nonetheless discriminate against communist public servants, and forbid the registration of unions with communist officials. The decision was a triumph for the rule of law, and only incidentally for civil liberties. It was a decision which affirmed the Commonwealth's subordination to the Constitution, but it was also one which highlighted the degree to which, within its constitutional powers, the Commonwealth was free to discriminate in a relatively unaccountable manner against political dissidents.

AFTERMATH

In one important respect, the Commonwealth accepted the High Court's decision. The government made no attempt to argue that the Court had behaved other than

[117] The only justice to mention it was Latham CJ who curtly dismissed it at 169: 'It is difficult to deal with an argument so insubstantial'.

[118] (1951) 83 CLR 1, 240 (Webb J).

[119] (1951) 83 CLR 1, 203 (Dixon J); 213 (McTiernan J) 232 (Williams J); 269 (Fullagar J); 284 (Kitto J). Williams J, 232 was even inclined to the view that the relevant provisions could be severed and thereby saved.

[120] (1951) 83 CLR 1, 203-4 (Dixon J); McTiernan J, who could possibly be taken as implying this: 213; 269-79 (Fullagar J); Kitto J, who seems to imply this: 284. Williams J did not discuss the issue.

[121] (1951) 83 CLR 1, 200 (Dixon J); 225-6 (Williams J); 262 (Fullagar J); 284 (Kitto J). Legislation had been drafted for the Hollway government in Victoria whereby it would have been an offence for a communist to accept or hold any office in any organisation. The Country Party had favoured introducing the legislation immediately; the Liberals had favoured delaying action until circumstances warranted it: 'CP Challenge on Communism' *The Age* 5 May 1950; 'Action against Communists in 1948 Shelved' *The Age* 9 May 1950, 4; 'State Ban on Communists' *The Age* 10 May 1950, 3. In September, 1950, the Liberal Country Party (opposition) announced that it would introduce a private member's bill into the Victorian Legislative Council. This would complement the Commonwealth Bill. The Country Party Premier dismissed it as a stunt: 'LCP Seeks State Communist Ban' *The Age* 20 September 1950, 1. There is no record of the Bill's having been introduced.

in a legally appropriate way, and this is probably a tribute to the power of the majority's analysis. However, instead of making the most of the powers which the High Court indicated that it possessed, the government attempted to acquire the powers the Court had said it lacked. Its first step was to ask the States to refer to the Commonwealth the power to enact the *Dissolution Act*. The three conservative States agreed. Tasmania did not reply. The Labor governments of New South Wales and Queensland refused. The Commonwealth then legislated for a referendum in which the electorate was asked to approve changes to the Constitution which would give the Commonwealth a general power to make laws with respect to communism, and a more specific power to enact and amend legislation corresponding to the *Dissolution Act*. The referendum narrowly failed.[122] However, the success of the 'No' case seems to be attributable to reservations about the powers the Commonwealth was seeking, rather than to an upsurge in support for communists' political rights. Surveys in 1951-52 suggested that 64% of Australians wanted the party banned, and only 20-24% opposed a ban.[123] There was evidently still considerable support for anti-Communist measures. Cabinet then considered a variety of proposals.[124]

Cabinet considered the possible use of the *Crimes Act*, and considered ways in which it might be re-drafted so as to make it more user-friendly. The status of Part IIA of the *Crimes Act* had been under something of a cloud since the decision in *R v Hush; Ex parte Devanny*.[125] While the decision had turned on questions of proof and procedure, Evatt J had suggested that Part IIA had to be given a very limited interpretation if it was not to fall foul of the Constitution. The decisions in *Burns*[126] and in *Sharkey*[127] undermined some of the assumptions on which Evatt J's dissent had been based. The judgments in the *Communist Party case* left the question open. The Court affirmed the Commonwealth's power to make laws to protect itself from attack, but Fullagar J was the only judge to address the question of whether Part IIA would survive constitutional scrutiny. He proceeded on the basis that it would.[128] Following the failure of the 1951 referendum, Senator Spicer, the Attorney-General, revisited Part IIA. A draft of a memorandum to be submitted to Cabinet noted that the recent US decision in *Dennis v United States*[129] suggested that it might not be 'altogether impossible' to

122 For accounts of the referendum, see Aarons, above n 4, 27-8; Elizabeth Evatt. 'Referendum 1951: a view from the media' in Elsa Atkin and Brett Evans (eds), *Seeing Red: the Communist Party Dissolution Act and Referendum 1951 - Lessons for Constitutional Reform* (1991) 38; Kirby, above n 8; Webb, above n 22.

123 Australian Gallup Polls, *Australian Public Opinion Polls* 822-34, Dec 51; 833-44 Feb/March 52. Respondents were often confused: despite the outcome of the High Court case and the referendum, 19% of December 1951 respondents said the party should be banned, and 13% said they should be punished. As late as 1957, 65% 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.

124 Webb, above n 22, 168-70.

125 (1932) 48 CLR 487.

126 (1950) 79 CLR 101.

127 (1950) 79 CLR 121.

128 (1951) 83 CLR 1, 252. Given their views in relation to the *Dissolution Bill*, Latham CJ and Webb J would have agreed. In the debate on the *Referendum Bill*, Herbert Evatt argued that the Bill was unnecessary, given what the High Court had said about the use that could be made of the *Crimes Act*. Wentworth was unkind enough to refer to Evatt's judgment in *R v Hush*. Evatt did not directly address the question of whether Part IIA could now be assumed to be valid.

129 341 US 494 (1951).

bring the party within s 30A 'in the circumstances and with the knowledge of today'.[130] He advised Cabinet that there would be merit in bringing proceedings against the party under the Act as it stood 'if on the evidence available there would be reasonable prospects of success'. Since he had already noted some of the difficulties involved in bringing the party within s 30A, the last clause turned what might otherwise have been a recommendation to prosecute into an effective recommendation against. He also canvassed a variety of possible amendments to the Act. One would have added a fourth criterion by which a body would become an unlawful body, namely that it advocated or encouraged:

> (iv) the objectives, policies, teachings, principles or practices of international communism, as expounded by Marx and Lenin

The Solicitor-General had canvassed the validity of this proposal with Garfield Barwick, one of the government's counsel in the *Communist Party case*. Barwick's advice was, not surprisingly, that the amendment would not survive challenge.[131] Spicer's advice to Cabinet was that while 'it might not be difficult to establish that the Communist Party does this', the validity of such a provision could be questionable. 'But in any event I am not myself disposed, in present circumstances, to give high priority to a proposal to proscribe an organization by reference to its teachings'. Another possible amendment would have a body unlawful if it advocated 'conduct designed to promote the interests of a foreign government to the detriment of the security and defence of Australia'.
He had no doubt that such a provision would be valid,[132] but doubted that it would be wise:

> There may be difficulty in establishing its application to the Communist Party of Australia. There may also be dangers in any provision under which it is hard to tell where legitimate differences of opinion in foreign policy end, and the disloyal conduct of a Fifth Column begins.

Accordingly, he advised that any further consideration of amendments to s 30A be postponed.[133]

Nor did the Commonwealth take advantage of its power to legislate in relation to the public service, although External Affairs continued to keep the Attorney-General's Department informed of legislative developments in the United States, and supplied press cuttings dealing with the operation of United States loyalty programs.[134] In 1952, cabinet was reported to be considering the need for legislation to exclude communists and 'communist sympathisers' from the public service.[135] No action was taken. In 1953, the intensely anti-communist WC

130 Law relating to subversive activities (draft) NAA: M2576/1 S4.
131 Barwick to Solicitor-General 26 June 51 NAA: M2576/1 S4.
132 This had been Barwick's opinion too. Barwick to Solicitor-General 26 June 51 NAA M2576/1 S4. Barwick had recommended that 'calculated' be used in preference to 'designed'.
133 'Law relating to subversive activities', Submission No 192 NAA: A4940/1 C517.
134 See file NAA: A432/82 47/347.
135 '"Red report to cabinet" Public Service Inquiry' *Sydney Morning Herald*, 6 August 52, 2.

Wentworth drafted a bill to ban communists from the public service, but the Bill was never even introduced into Parliament.[136] Communists were not disqualified from office in registered unions. Instead, the Commonwealth strengthened the contempt powers of the Commonwealth Court of Conciliation and Arbitration. State governments showed no interest in legislating to curb communism.[137] Overall, the Menzies government proceeded to pursue a policy remarkably similar in form (if not degree) to that pursued by its Labor predecessors.

One of the reasons for Cabinet's reluctance to use its powers seems to have been concern for their civil libertarian implications, a concern no doubt enhanced by Labor's success in mobilising civil libertarian sentiments in the 'No' campaign. Another was doubts about whether it could defend particular anti-communist measures in court. But another reason seems to have been that the use of the powers was not necessary.

The government had some success in its campaign against communists in the union movement. Even before the Referendum, the Commonwealth was relying on a variety of measures to tackle recalcitrant unions. Like the Chifley government before it, it relied on measures whose legality was independent of whether communists were involved. These included prosecutions for contempt of the Commonwealth Court of Conciliation and Arbitration, prosecutions under s 30J and 30K of the *Crimes Act*, threats of deregistration, court-controlled ballots, and use of the armed forces to perform essential services.[138] In the early 1950s, it could also include among its anti-communist allies the Labor Party's industrial groups and the Catholic bodies which provided them with so much support. The 1952-53 recession also reduced union power temporarily. In the early 1950s, communist influence within the union movement declined, especially within less militant unions. However, militant unionists continued to elect communists to key positions, and in the mid-1950s communists managed to re-gain some of the influence they had lost in the early 1950s.[139] In the end, the government seems to have recognised that there was little it could do to eliminate communists or militancy from the union movement. Previous governments had learned to live with industrial unrest, and had learned the limits to governments' ability to control unrest. The Menzies government had no alternative but to do likewise.

In relation to the public service, the government's failure to legislate concealed practices which were effectively giving effect to the provisions of the *Dissolution Act*. Even under the Labor government, there had been a degree of vetting of

136 Under the Bill, a Communist Party was either the Communist Party, or a successor, subsidiary or branch thereof. A member of a communist party who was also a government employee was required either to resign from the party or to resign from government employment, and no communist was to join the government service to remain therein after having joined the party. An government employee and any would-be government employee who had ever been a member of a communist party was required to take an oath to give the government any information they had about the affairs of the party. Breach of the requirements of the Act would have been punishable by up to 3 months imprisonment and a fine of £50 if tried summarily, and 5 years imprisonment and a fine of £500 if tried on indictment. The proposed Bill provoked limited protests from several Queensland Trades and Labour Councils, and a cogently argued letter from the Amalgamated Postal Workers' Union of Australia. See generally: NAA: A462/8 211/1/2. The limited number of protests reflected a realistic assessment of the Bill's prospects.

137 In Victoria, the warring non-Labour parties sought to make political capital out of each other's failure to pass anti-communist legislation, but none was actually prepared to introduce legislation to do so, while in power.

138 Louis, above n 78, 9-11.

139 Gollan, above n 22, 281-4.

public servants. Communists were not dismissed from the public service, but people who were regarded by Security as political risks were transferred to less sensitive positions. Under the coalition, surveillance of public servants seems to have become more intense. Security agents were placed in the public service and the defence forces to report on communist activity. In some cases their identity was not even known by departmental heads.[140] Permanency continued to be respected, however. ASIO records the continued employment of various people believed by it to be communists, noting the need to amend its list of Security Risks when one suspected communist resigned from CSIRO, and noting the need for continued surveillance of a suspect typist (whose wish to work in nuclear physics had been denied).[141] It reported that the presence of a communist on the staff of the Department of National Development caused some embarrassment to his superior who was concerned that the person could overhear others' conversations. However the employee gave every satisfaction with his work and there was no reasonable way in which he could be removed.[142]

While communists with permanency were not sacked, they were sometimes eased out of the public service.[143] Others were moved to non-sensitive areas of the public service.[144] Non-permanent government employees who were suspected of communist loyalties were sometimes denied permanency. Dr Paul James, a member of the Australian Peace Council (but not the Communist Party) was summarily dismissed from his (non-permanent) position as a research worker at the Heidelberg Repatriation Hospital.[145] A Queensland report on communists in the Public Service reported that a suspected communist was discharged from the War Service Homes Department after being rejected for permanent employment on security grounds.[146]

Suspected communists who sought to join the public service were refused employment. Daphne Gollan, a party member, was promised a job as a librarian in the Prime Minister's Department, but denied it after a security check.[147] ASIO also advised State governments, universities and even private employers against employing people it suspected of being communists. David Morris was repeatedly told he would be appointed to positions in government, universities, and private enterprises, only to be told that he would not be appointed after all.[148] Bernard Rechter missed out on employment in the Health Department, the CSIRO and the Melbourne Technical College on the basis of his being a security

140 '"Red report to cabinet" Public Service Inquiry' *Sydney Morning Herald*, 6 August 1952, 2.

141 NAA: A6122 XR1 223.

142 In any case, his communism, while sincere, seemed academic and the Director doubted that he would mix with the 'ordinary type of communist', NAA: A6122 XR1 234.

143 Inglis, above n 60, 166 gives the example of Fred Rose. Rose and his family subsequently left for East Germany where Rose eventually became a professor of Anthropology at Humboldt University: Betty Searle, 'Invisible victims of McCarthyism in Australia' (1988) 7 *Social Alternatives* 61, 63.

144 Regional Director, Qld to HQ 31 August 55 NAA: A6122 XR1 228 gives one example.

145 Don Watson, *Brian Fitzpatrick. A radical life* (1979);See also Fitzpatrick papers ANL MS 4965 6224ff.

146 Regional Director, Qld to HQ 31 August 55 A6122 XR1 228.

147 Inglis, above n 60, 166. But party membership was not an obstacle to employment as a music teacher, 168.

148 Bernice Morris, *Between the lines* (1988). A letter from Menzies to Brian Fitzpatrick, who took up his cause on behalf the ACCL, defended the employment decisions on the grounds that Morris posed a security risk. It denied that universities sought information from ASIO when making appointments: Menzies to Fitzpatrick 5 September 58, Fitzpatrick papers ANL MS 4965 6402.

149 Inglis, above n 60, 84.

risk.[149] Communists and 'suspect' non-communists who stayed within the public service found their promotion prospects limited. Promotion was slow, and was limited by the availability of non-sensitive openings. Rick Throssell was repeatedly refused promotion to a level befitting his skills, notwithstanding that he was cleared of any disloyalty by the Petrov Commission.[150] ASIO reported that an ACT Department of National Development officer (who was conceded to be an excellent paleontologist) was likely soon to be promoted to level 2, but that he would already have been promoted to level 3 but for the security aspect.[151]

We do not know much about the administration of anti-communist personnel policies. However we do know that there were occasions when they were pursued with single-minded vindictiveness. David Morris was pursued with such single-minded determination that, unable to find work in Australia, he and his family eventually migrated to China (whose government was willing to use his technical skills). We know that they were applied not only to people who would have been communists under the *Dissolution Act*, but also to relatives of communists, and to people who were never shown to have committed an act of overt disloyalty in their life. A file relating to alleged communist influence within the Department of National Development indicates that Labor's fears of unreliable Security sources were warranted: allegations of communist leanings seem to have flown around, and to have been used as weapons in a sectarian struggle between Catholics and Protestants in the Department. Conflict within the Department seems to have been trilateral, with Protestants sometimes siding with communists in union affairs in order to defeat the Catholics.[152] However, the archives also suggest that the quality of surveillance sometimes left something to be desired from a Security point of view. A report by an officer charged with monitoring the important Department of Supply lamented sloppy practices. Many subjects had left their jobs. The report stated that:

> In most cases the information already on file is at least two years old and there has been no consistent effort, on paper at all events, by Department of Supply Security Officers to elaborate on initial reports. This seems most unfortunate as it is scarcely likely that no information or report whatever has reached the Security Officer in relation to the subjects at his establishment.[153]

Commonwealth public servants were not the only people to suffer discrimination on the grounds of their politics. Warnings to universities could be enough to ensure that communists were not appointed to academic positions.[154] While Wentworth's 1952 denunciation of the Commonwealth Literature Fund for

[150] Rick Throssell, *My Father's Son* (1989), 324-37, 341-2, 352-3, 364-74, 377-82, 385-7, 396-7; J Waterford, 'Was Justice Denied? The Throssell Case' (1989) 58 *Canberra Bulletin of Public Administration* 186.

[151] Regional Director to HQ, ASIO 18 May 55 NAA: A6122 XR1 234.

[152] NAA: A6122 XR1 236.

[153] 'Department of Supply. Infiltration of Communists' 7 June 51 NAA: A6122 XR1 236. Despite the promising start, the only suspect subsequently to emerge turned out to be harmless.

[154] For examples of these practices, see Frank Cain, *The origins of political surveillance in Australia* (1983), 103, 107-8. Evidence of cases of specific people being denied appointment is elusive. David Morris is probably the best documented victim.

funding communist writers elicited a defence of the Fund from Menzies, there were no more grants to communists until 1969.[155] While the government might not be able to do much to punish communist workers, it could impose economic sanctions on communist intellectuals.

As for the party itself, it had become increasingly marginalised except in its union strongholds. Its handling of Khrushchev's Speech and its response to the 1956 Hungarian uprising were the last straws for most of its remaining intellectuals. In the five years following the referendum, its membership halved.[156] Its electoral support fell to the point where most of its Senate votes were coming from 'donkey voters'. Its fate vindicated those who urged that it be fought politically rather than legally. That it was in many ways the victim of its illiberalism was a lesson which the government would have done well to learn.

CONCLUSION

The struggles over the *Dissolution Act* have come to be represented as an apocalyptic struggle between good and evil, with the *Communist Party* case representing a triumph of good. When one reads the debates about the Bill, one sometimes has the sense that they represent a clash of hysterias, each feeding off the other. Writers about the case and its aftermath sometimes give the impression that it was only through luck and HV Evatt that Australia did not descend into a totalitarian hell. In doing so, they under-estimate the problems faced by a government bent on authoritarian measures. The *Dissolution Act* is of interest, not only as evidence of government authoritarianism, but also of the constraints on government authoritarianism. Its structure reflects the government's awareness that there were major limits to its constitutional powers. It also reflects the degree to which, even in the anti-communist climate of the time, the government was, and needed to be, responsive to civil libertarian concerns within its own ranks and within the general community. The Act is also of interest as evidence of the problems any government would be likely to face if it were to attempt to ban a political group. Its almost meaningless definition of 'communist' highlights the problems that arise when one is sure that a group is evil, but when one is not quite sure why. The problems of proof inherent in the Act raise questions about the government's intentions in introducing it, and about the extent to which the government naively believed that the Act would be self-executing. To a considerable extent, the Act is arguably best understood as symbolic legislation, the emotions it aroused reflecting not so much what it was likely to achieve, as in what it symbolised to its supporters and opponents alike.[157]

[155] Alan Ashbolt, 'The great literary witch-hunt of 1952' in Ann Curthoys and John Merritt (eds), *Australia's first Cold War 1945-1953* (1984) 153, 180. However *Overland* continued to receive a subsidy notwithstanding having been denounced for its politics and the politics of its contributors: Watson, above n 145, 242-3. Prior to 1952, however, communists had been awarded fellowships: Throssell, above n 150, 161-2 (the CIB was not impressed). Throssell himself managed to achieve a fellowship in the 1950s, notwithstanding ASIO's doubts about his trustworthiness, 350. In 1952, Menzies had ordered that ASIO investigate all persons put forward for CLF fellowships: Australia, Royal Commission on Intelligence and Security, *Second Report* (1977).

[156] Cook, above n 21, 121-3.

[157] Some committed anti-communists were concerned that the legislation would lull anti-communists into a sense of false complacency, and thereby weaken commitment to the kind of hard work needed to defeat communists in the union movement: Santamaria, above n 77, 121-5.

The High Court's decision was not needed to save Australia from totalitarianism, but it did advance the cause of liberal democracy in Australia. First, a ban on the ACP (insofar as it was effective) would have entailed the weakening of a body which, for all its faults, was sometimes the only group which had the resources and commitment to articulate the interests of those otherwise denied a voice in the political system. This in turn would therefore have weakened the pressures on other parties and interest groups to respond to the interests of the politically inarticulate. Second, had the Act been upheld, it would almost certainly have discouraged some timid leftists from publicly expressing their views. While I have argued that the Act did not cover non-communist leftists, one of the paradoxical results of the debates on the Bill would probably have been that many people would have believed otherwise. Risk-averse leftists would therefore have been discouraged from making comments which led to their being identified as communists. The voice of the democratic left would have been weakened (and one by-product of this is that the ACP (in its post-Act manifestation) would have been in a slightly stronger position to assert dominance over the 'far' left).

Finally, the decision can be welcomed as an affirmation of the rule of law. For the High Court to have upheld the Act would have amounted to an abdication of its authority as a credible constitutional guardian. In time, no doubt, it would have recovered its nerve, just as the US Supreme Court did in *Yates v US*.[158] But the decision would have weakened the Court's authority, especially in the eyes of a political left, accustomed to its role as the guardian of *laissez-faire* in the 1940s.[159] The decision in the *Communist Party case* was not so much a courageous decision, as a wise one. Fortuitously, because of the federal division of powers, it meant that Commonwealth governments could act to protect the State from threats, but only if they could identify a real threat, define it with precision, specify objective criteria by which its existence could be ascertained, and determine an economical response to it. These were important constraints.

It is clear from the *Dissolution Act* that the Commonwealth had not been able to identify the nature of the threat posed by the ACP, and that insofar as it had done so, it could not see a politically feasible way to meet the threat head on. The problem it was really trying to address was industrial militancy, led by unions which were on the whole very good at it, and supported by workers who were as eager as their employers to do everything possible to take advantage of their bargaining power. It was convenient to blame communists. Their sickening devotion to Stalin and to the Soviet Union had helped strip them of much of the moral credibility that might otherwise have attached to their cause. Their conflicts with State and Federal Labor governments had eroded their capacity to mobilise support from Labor. Blaming workers, on the other hand, was far more hazardous, and far less easily justified. Liberal leaders recognised that in a tight labour market, there was little they could do. Moreover, Labor and the unions would not tolerate the kind of assault on the labour movement that would have been necessary to curb industrial militancy. It was because the Act was a dishonest Act that it could not survive scrutiny. As an affirmation of the rule of

[158] 354 US 298 (1957).
[159] Galligan, above n 111, 207.

law, the decision was also an affirmation of the rule of honesty, and this was a major virtue. Yet the decision was both a triumph for the rule of constitutional law and an affirmation of the degree to which the Executive enjoyed considerable power so long as it acted within constitutionally prescribed limits. This was evidenced by the degree to which the government was able and willing to use its discretionary powers to keep the public service free of those it regarded as communists and security risks. It was to be another generation before courts, the executive and the parliament were prepared to take the further steps needed to ensure the accountability which Labor had sought to build into the *Dissolution Act.*