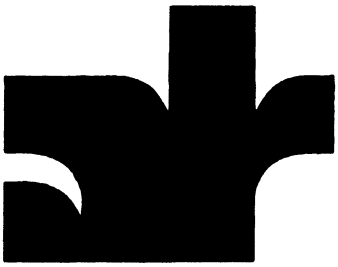

ARTICLES

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DISSENT, DISLOYALTY AND DISAFFECTION: AUSTRALIA'S LAST COLD WAR SEDITION CASE

THE PROVOCATION

IN its issue dated June 1953 the *Communist Review*, the organ of theory and practice of the Communist Party of Australia ("the CPA"), featured an article (reproduced in full in the appendix to this article) entitled "The 'Democratic' Monarchy". The author of the article was identified only by the initials "RC". The article, which was prompted by the

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Coronation of Queen Elizabeth II at Westminster Abbey on 2 June 1953, unflatteringly chronicled various changes in European Royalty in the Nineteenth Century. In particular, it traced the ancestry of Prince Philip, the former Prince of Greece and Denmark, upon whom had been bestowed the title Duke of Edinburgh prior to his marriage to the then Princess Elizabeth in 1947. "RC" referred disparagingly to members of the English Royal Household and described the Royal circle as made up of people

> whose background, origins, birth and connections are big business and profits, reactionary politics, opposition to social change and anti-working class. The Coronation will be their parade.

"RC" attacked the use of public money to send an Australian contingent to London for the Coronation, but did not directly criticise the Queen. However, the article as a whole was a robust attack on the English monarchy and aristocracy which "RC", both in the sarcastic title and in the body of the article, portrayed as an instrument of class oppression. By today's standards of political discourse, the tone and content of the article were not very remarkable. By the prevailing standards of CPA rhetoric and propaganda the article was remarkably restrained. Yet, so intense was the resentment generated by publication of "The 'Democratic' Monarchy" that, fantastic as it now appears, it was officially characterised as posing a real risk to public order, if not to the continued existence of the Commonwealth. The Commonwealth Government took little time to decide to launch a sedition prosecution against the persons involved in publishing the article.

How was it that an article on historical aspects of the British monarchy published in the *Communist Review*, an obscure journal whose very small audience was confined to selected party members and sympathisers, scholars, and the security service, could divert the security service and law enforcement resources of the Commonwealth to the extent that it did? In this writer's opinion, the answer to this question is to be found primarily in a consideration of the fanatical anti-communist policies of the Menzies Government, and to a lesser extent in the Prime Minister's own passionate loyalty to the Monarchy and the corresponding importance attached by the Australian Government to the Coronation, and in the apparent eagerness of some of the Government's public service advisers to pander to the anti-communist enthusiasms of their political masters.[1]

1 For contemporary indications of the Prime Minister's fondness for the Crown, see his second reading speech on the Bill for the *Royal Style and Titles Act* 1953

Official reaction to the publication of the piece by "RC" marked a further lapse from freedom of expression and freedom of association in Australia. The Government's intolerant responses were all too characteristic of Australian public life in the period 1948-1970. Almost invariably, these lapses had as their primary target the CPA and its adherents. This was surely the case with the innocuous, albeit caustic, *Communist Review* article. Using available official archival material, this article examines the origins and course of the 1953 sedition prosecution, a curious long-delayed sequel civil case, and connections between those cases and the most dramatic event in Australian Cold War history: the defection of the Soviet diplomat Vladimir Mikhailovich Petrov.[2] As a prelude, it is necessary to indicate briefly the vulnerability of the CPA at the time to repressive state action.

THE CONTEXT

From its establishment in 1920 the CPA had been subjected to regular surveillance and harassment by Commonwealth and State security agencies on the basis that it was a self-confessed revolutionary conspiracy.[3] During the 1920s and 1930s determined but unsuccessful efforts were made by conservative Commonwealth Governments to outlaw the CPA.[4] Between 1940 and 1942 the CPA had been a proscribed organization as a result of wartime action taken by the Menzies Government under regulations made

(Cth): Aust, Parl, *Debates* HR (1953) Vol 221 at 52-57; and his speech at the Coronation: *The Sydney Morning Herald*, 3 June 1953.

2 The principal official archival material relied upon is to be found in Australian Archives (ACT), CRS A432, Attorney-General's Department Correspondence Files Annual Single Number Series, Items 1953/734 (Canberra Central Office prosecution file); 1960/188 (Canberra Central Office file on the later civil action); Australian Archives (NSW), SP782, Deputy Crown Solicitor's Office NSW Correspondence Files Annual Single Number Series, Items 1964/1991 and 1964/1911 (corresponding Deputy Crown Solicitor's Office Sydney files) and in various other Attorney-General's Department files, ASIO files and files of the Royal Commission on Espionage (1954-1955) referred to below. Apart from the use of the complete Australian Archives citation when a file is first referred to, abbreviated series and item references are used throughout.

3 Cain, *The Origins of Political Surveillance in Australia* (Angus and Robertson, Sydney 1983) Ch 7.

4 *War Precautions Act Repeal Act* 1920 (Cth); *Crimes Act* 1926 (Cth); *Crimes Act* 1932 (Cth); *R v Hush; ex parte Devanny* (1932) 48 CLR 487; Ricketson, "Liberal Law in a Repressive Age: Communism and the Law 1920-1950" (1976) 3 *Mon L Rev* 101.

pursuant to the *National Security Act* 1939 (Cth).[5] Then, with the onset of the Cold War, at a time of increasingly widespread anti-communist agitation, the CPA had been the target of several sedition prosecutions and investigations in the years after 1948.[6] The Chifley Government implemented many anti-communist measures. Most notably, it established the Australian Security Intelligence Organization ("ASIO") in early 1949 in response to intense foreign and domestic pressure for tougher internal security measures to deal with the dire subversive threat said to be posed by the CPA and its sympathisers.[7] The anti-communist movement developed to the point where the political legitimacy of the CPA itself was one of the

5 National Security (Subversive Associations) Regulations, SR 1940 Nos 109 and 130. See Hasluck, *The Government and the People 1939-1941* (Australian War Memorial, Canberra 1952), Appendix 3. The ban was lifted following the complete reversal in the attitude of the CPA to the Australian war effort prompted by Germany's invasion of the Soviet Union in June 1941: National Security (General) Regulations, SR 540 of 1942: *Cth of Australia Gazette*, No 66, 25 March 1943, 718-719. The revocation of the ban on the CPA and its publications followed an agreement made in December 1942 between the government and the CPA under which the CPA gave HV Evatt as Attorney-General undertakings of maximum support for the war effort: See AA (ACT) CRS AA1969/224/1, Attorney-General's Department Central Office Miscellaneous Central Registry Records 1905-1968, Item (102) 55/4437 and see also Prime Minister Menzies' answer to a question on notice: Aust, Parl, *Debates* HR (1951) Vol 214 at 121.

6 Maher, "The Use and Abuse of Sedition" (1992) 14 *Syd L Rev* 287.

7 The establishment of ASIO was publicly announced by Prime Minister Chifley on 2 March 1949: AA (ACT) CRS A7452/1, Department of the Prime Minister and Cabinet, Correspondence Files Third A Series, Item A48. The Directive establishing ASIO was first published in full in Cth, *Fourth Report of the Royal Commission on Intelligence and Security* (1977), Vol 1 (Parl Pap 1977/248), App 4-B. It is only with the increased availability of Australian and United States archival material in the last decade that the events surrounding the establishment of ASIO have begun to be more fully documented. See generally Cain, "Missiles and Mistrust: US Intelligence Responses to British and Australian Missile Research" (1988) 3 *Intell'ce & Nat'al Sec'y* 5; Cain, "An Aspect of Post-War Australian Relations with the United Kingdom and the United States: Missiles, Spies and Disharmony" (1989) 23 *Aust Hist'al St* 186; Cain, "ASIO and the Australian Labour Movement - An Historical Perspective" *Labour History* No 58, May 1990, 1. See also Andrew, "The Growth of the Australian Intelligence Community and the Anglo-American Connection" (1989) 4 *Intell'ce & Nat'al Sec'y* 213; Maher, "The Lapstone Experiment and the Beginnings of ASIO" *Labour History* No 64, May 1993, 103; see also the statement by Dr Evatt: Aust, Parl, *Debates* HR (1954) Vol H of R 3 at 372-373. The UK Government could shed more light on this subject if it departed from its inflexible policy against allowing public access to archival security service records.

major issues in the 1949 federal election. The Opposition parties led by RG Menzies and AG Fadden vociferously contended that the CPA was plotting revolution at the behest of the Soviet Union, and promised that a Menzies Government would promptly ban the CPA. However, by late 1951 the CPA had survived both a full-blooded attempt by the Menzies Government to outlaw the party and a constitutional referendum designed to overcome the invalidation of the *Communist Party Dissolution Act* 1950 (Cth) by a majority of the High Court of Australia.[8]

After the Chifley Government's resolute action in ending the 1949 coal strike,[9] that Government's subsequent electoral defeat at the end of 1949, the contemporaneous success of the Chinese communist revolution, and the outbreak of the Korean War, the anti-communist orthodoxy in Australia began to change. After 1950 the main threat to Australia's security was perceived more to be the downward thrust of Asian communism rather than spontaneous internal rebellion fomented by the CPA. If Menzies and his Government no longer quite so confidently expected the CPA or underground forces which it controlled to mount an insurrection based on widespread industrial disruption and sabotage, it claimed to be sure that the CPA would side with the Chinese communists and their Soviet backers if and when they undertook an invasion of Australia. The Menzies Government was no less convinced that the CPA would continue to wield its trade union power in order to soften up the country in advance of such an invasion and as part of its programme of proletarian revolution. Prime Minister Menzies had said that a third world war was imminent and that

8 The *Communist Party Dissolution Act* 1951 had been held by a majority of the High Court to be unconstitutional in *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1. The referendum on the *Constitution Alteration (Power to Deal with Communists and Communism)* 1951 (Cth) was narrowly rejected on 22 September 1951. See Webb, *Communism and Democracy in Australia: A Survey of the 1951 Referendum* (Cheshire for the Australian National University, Melbourne 1954); Cain & Farrell, "Menzies' War on the Communist Party of Australia, 1949-1951" in Curthoys & Merritt (eds), *Australia's First Cold War 1945-1953: Communism and Culture* Vol 1 (George Allen & Unwin, Sydney 1984); Kirby, "HV Evatt, The Anti-Communist Referendum and Liberty in Australia" (1991) 7 *Aust Bar Rev* 93; Winterton, "The Significance of the *Communist Party* Case" (1992) 18 *MULR* 630; Williams, "Reading the Judicial Mind: Appellate Argument in the *Communist Party Case*" (1993) 15 *Syd L Rev* 3.

9 Deery (ed), *Labor in Conflict: The 1949 Coal Strike* (Australian Society for the Study of Labour History, Canberra 1978).

when that war erupted the CPA would act as a fifth column.[10] However, despite a determined effort made possible by the unaudited expenditure of copious amounts of public money, ASIO failed to uncover evidence of incipient communist insurrection or sabotage. Similarly, ASIO's record in exposing pro-Soviet CPA espionage was not marked with much success. The repeated raids on CPA offices unearthed a large amount of material recording the CPA's political activities, but it was a disappointing and to some extent embarrassing haul in terms of the quest for spies, saboteurs and armed revolutionaries.[11] The recitals in the *Communist Party Dissolution Act* 1950 (Cth) attributed to the CPA complicity in "espionage and sabotage and ... activities or operations of a treasonable or subversive nature". The Menzies Government, through its senior officials like Professor KH Bailey, who was both Secretary of the Attorney-General's Department and Solicitor-General of the Commonwealth,[12] acknowledged that it had not been possible to establish any attempt at armed revolt or overthrow of the state by violence or that the CPA was foreign-controlled. The Chief Parliamentary Draftsman, JQ Ewens,[13] in particular, expressed doubt as to whether any good purpose would be served by the recitals to the 1950 Act.[14] Politically, the purpose of the recitals was to have the statute book stigmatise Australian communism and to have the High Court take the allegations as true as a matter of judicial notice.

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10 See, for example, Aust, Parl, *Debates* HR (1951) Vol 212 at 78-81. The Menzies Government's concern about Australian security was also manifested in the enactment of the *National Service Act* 1951 (Cth), the *Defence Preparations Act* 1951 (Cth) and the *Defence (Special Undertakings) Act* 1952 (Cth).

11 The Director-General of ASIO from July 1950, Colonel Spry (see fn 23) apparently adhered to the view that Soviet espionage activities were effectively curtailed in the years following ASIO's establishment: Memorandum, Spry, 8 February 1952; AA (ACT) CRS M1509/1, Attorney-General's Department Central Office Solicitor-General's Files 1946-1957, Item 6; Cth, *Report of the Royal Commission on Espionage* (1955) paras 299, 300 and 400; See also Manne, *The Petrov Affair: Politics and Espionage* (Pergamon Press, Sydney 1987) p178 (footnote).

12 Kenneth Hamilton Bailey (1898-1972). Dean of the Faculty of Law, The University of Melbourne 1928-1946. He retired as Solicitor-General of the Commonwealth in 1964. See the notice (1972) 46 *ALJ* 152 and obituary (1972) 46 *ALJ* 366.

13 John Qualtrough Ewens (1907-1992). Ewens had been First Parliamentary Draftsman since 1949. See D StL Kelly, Preface to *Essays on Legislative Drafting: In Honour of JQ Ewens, CMG, CBE, QC* (Adelaide Law Review Association, Adelaide 1988) and the obituary by Kirby (1992) 66 *ALJ* 870.

14 M1509/1, Item 7.

The Menzies Government pursued a wide range of overt and covert measures designed to counteract the influence of the CPA which was strongest in important sectors of the trade union movement and in specific political campaigns, such as the peace movement.[15] After the failure of the Menzies Government's attempt to carry out its promise to ban the CPA, the chief weapons in the *overt* campaign against the CPA were the enforcement of legislation providing for union elections to be supervised by the Commonwealth Court of Conciliation and Arbitration,[16] the use of *Crimes Act* prosecutions,[17] prosecutions for contempt of court,[18] the raiding of trade union premises, the use of military forces for strike-breaking civilian work especially the loading and unloading of maritime cargoes,[19] the attempted de-registration of trade unions, and the use of passport controls to prevent or to limit the overseas travel of leftists and the entry of foreign

15 Cabinet Minute, Decision No 186, 2 October 1951 and Attached Statement, Minister for Labour and National Service, 2 October 1951: AA (ACT) CRS A4940/1, Menzies Ministry Cabinet Files C Single Number Series, Item C66. O'Neill, *Australia in the Korean War 1950-1953 - Vol 1: Strategy and Diplomacy* (Australian War Memorial and AGPS, Canberra 1981) pp307-311; Carter, "The Peace Movement in the 1950s" in Curthoys & Merritt (eds), *Better Red Than Dead: Australia's First Cold War 1945-1959* Vol 2 (George Allen & Unwin, Sydney 1986).

16 For details of the use of the Chifley and Menzies Governments' legislation see Aust, Parl, *Debates* HR (1952) Vol 220 at 4150-4151. For examples of proceedings arising out of disputed union elections see *Re Federated Clerks Union of Australia: ex parte Henry* (1949) 66 CAR 281; *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Grant* (1950) 81 CLR 27; *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Federated Clerks Union of Australia, New South Wales Branch* (1950) 81 CLR 229; *Federated Ironworkers' Association of Australia v The Commonwealth* (1951) 84 CLR 265; *Alford v Healy* (1951) 70 CAR 432; *Short v Mackay* (1951) 71 CAR 100; *Short v Wellings* (1951) 72 CAR 84; *Webb v Elliott* (1952) 73 CAR 115. The *Conciliation and Arbitration Act (No 2)* 1951 (Cth) strengthened the penal provisions of the Act and the scheme of court-controlled union elections.

17 *Crimes Act* 1914 (Cth) s30K. See *Barnwell v Healy*, unreported, Court of Petty Sessions, Sydney, 19 July 1951; Supreme Court of New South Wales, 27 June 1952; Court of Quarter Sessions, Sydney, 17 July 1952; A432/1, Item 1951/294 Parts 1 and 2; *Howell v Doyle* [1952] VLR 128.

18 *Conciliation and Arbitration (No 2) Act* 1951 (Cth) s7; *Attorney-General v Williams* (1951) 70 CAR 448; *Taylor v Roach* (1951) 70 CAR 464; *R v Taylor; Ex parte Roach* (1951) 82 CLR 587; *Attorney-General v Waterside Workers Federation of Australia* (1952) 74 CAR 12 and (1952) 74 CAR 44.

19 The definitive account of the government's military responses to industrial disruption is to be found in Louis, "'Operation Alien' and the Cold War in Australia, 1950-1953" *Labour History*, No 62, May 1992, 1.

communists or leftists.[20] By 1953 the campaign to undermine communist control of, or influence in, the trade unions, which was enhanced by the vigorous effforts of the ALP Industrial Groups to wrest control of trade unions from their communist officials, had achieved notable success.[21]

Menzies delegated responsibility for the *covert* anti-communist campaign to ASIO. On 6 July 1950 he replaced the inaugural Director-General of ASIO, Mr Justice GS Reed,[22] with the Director of Military Intelligence, Col CCF Spry.[23] Spry ran ASIO on disciplined military lines. He also relied extensively on Bailey for legal advice.[24] Spry was part of a closely knit defence establishment elite in Melbourne which was notable for its

20 For restrictions on the overseas travel of communists see AA (ACT) CRS A1838/1, Department of External Affairs Correspondence Files Multiple Number Series, Item 1542/43. On 24 January 1952 the Cabinet decided that ASIO should take co-ordinated action with the Department of Immigration to prevent the entry into Australia of visitors to the forthcoming CPA-sponsored Youth Carnival: Cabinet Decision No 293, A432/1, Item 1952/2001. This followed Bailey's advice to Attorney-General Spicer (see below fn41) that the Commonwealth could not, on the available information, validly prohibit the holding of the Carnival.

21 For a range of treatments of this period and the Industrial Groups, see Rawson, "The ALP Industrial Groups" in Isaac & Ford (eds), *Australian Labour Relations: Readings* (Sun Books, Melbourne 1966); Murray, *The Split: Australian Labor in the Fifties* (Cheshire, Melbourne 1970); Santamaria, *Against the Tide* (Oxford University Press, Melbourne 1981); McClelland, *Stirring The Possum: A Political Autobiography* (Penguin, Ringwood, Victoria 1988); Short, *Laurie Short: A Political Life* (Allen & Unwin in Association with Lloyd Ross Forum, Nth Sydney 1992).

22 Geoffrey Sandford Reed (1892-1968), Acting Judge (1935-1937) and Judge of the Supreme Court of South Australia (1943-1962). See (1949) 22 *ALJ* 512.

23 Charles Chambers Fowell Spry (1910-) was Director of Military Intelligence between 1946 and 1950. He served as Director-General of ASIO between 1950 an 1969. Spry's appointment commenced on 17 July 1950: Letter, Menzies to Spry, 6 July 1950; M1509/1, Box 2/1 and Item 37. He was later promoted Brigadier and transferred to the Reserve of Officers (General List) on 15 June 1954. On the same day he was re-appointed as Director-General until he attained the age of 60 years: Aust, Parl, *Debates* HR (1960) Vol H of R 27 at 2253; A7452/4, Item 224.

24 Spry's correspondence and memoranda show a continuing and impressive familiarity with legal issues and processes. Administratively, ASIO was set up within the Attorney-General's Department. This made it easy for legal officers to be seconded from the department to ASIO. See, for example, the obituary on CL Hermes (1991) 65 *ALJ* 430.

vehement anti-communism and its informal links with the Liberal Party.[25] Bailey was also very much at home in this milieu. Under military command, ASIO expanded rapidly and thrived on the collection of vast amounts of intelligence about the CPA. This was, after all, its *raison d'être*.[26] ASIO surveillance of the CPA, especially its national headquarters in Sydney and the Victorian Branch headquarters, was sustained and comprehensive and, it seems, not always inhibited by considerations of legality. Telephones were tapped, electronic listening devices were installed and the CPA leadership and key unions were infiltrated at a high level by informers and *agents provocateurs*.[27] CPA officials were followed wherever they went. If they travelled overseas, their luggage was thoroughly searched for material of security interest.[28] Wherever possible, ASIO went after primary evidentiary material relating to CPA plotting and sabotage. As early as June 1949, as part of the steps taken to enforce the Chifley Government's *National Emergency (Coal Strike) Act* 1949 (Cth),[29]

25 Some of these connections are explored in Maher, "Tales of the Overt and the Covert: Judges and Politics in Early Cold War Australia" (1993) 21 *Fed L Rev* 151.

26 ASIO's Subversive Organisations and Personnel Branch was concerned with "(a) Study of International Communism, (b) Study of the Australian Communist Party (generally), (c) Study of the Australian Communist Party espionage activities (in co-operation with [the] Counter-Espionage branch), (d) Penetration by the Australian Communist Party of Government Departments, (e) Penetration of industry by the Australian Communist Party, (f) Evaluation of security risks (personnel) arising from screening.": Spry, Summary Paper on the Australian Security Intelligence Organization, July 1951, AA (ACT) CRS A1209/56, Prime Minister's Department Correspondence Files Annual Single Number Series (Classified), Item 72/10048. Under Reed, ASIO set up its headquarters in Sydney in 1949 in large part because the CPA headquarters were situated in that city. Reed, Outline of the Foundation and Organisation of ASIO, 30 June 1950: AA (ACT) CRS A6122/30, ASIO Central Office Subject Files Multiple Number Series, Item 1267.

27 Colonel Spry was operating pursuant to a secret Directive which provided in part that "No enquiry is to be carried out on behalf of any Government Department unless you are satisfied that an important public interest bearing on the safety of the Commonwealth ... is at stake": Para 7, *Charter of the Australian Security Intelligence Organization* (A Directive from the Prime Minister to the Director-General of Security), 6 July 1950. M1509/1, Item 37. The revised Directive was first published in Aust, *Fourth Report of the Royal Commission on Intelligence and Security* (1977), Vol 1 (Parl Pap 1977,248), App 4-B.

28 See, for example, ASIO Sharkey Dossier, Vol 8, AA (ACT) CRS A6119/XR1, Australian Security Intelligence Organization Central Office Personal Files Alpha-Numeric Series, Item [226].

29 The validity of the Act was upheld in *R v Taylor; Ex parte Federated Ironworkers' Association of Australia* (1949) 79 CLR 333.

ASIO participated in the raiding of Marx House, the CPA's national headquarters in Sydney, and further raids were carried out immediately following the coming into operation of the *Communist Party Dissolution Act* 1950 (Cth) on 20 October 1950, and on several occasions in the next two years.

Even though the referendum conducted on 21 September 1951 had resulted in a rejection of the Commonwealth's proposal to alter the Constitution to enable the CPA to be outlawed, the Menzies Government believed in the aftermath to the referendum that there might yet be some residual source of legal power that could be employed to stamp out the CPA. Following a similar path that had been followed by the Lyons Government in the 1930s, consideration was given by Spry and Bailey in early 1952 to the making of an application to the High Court under s30AA of the *Crimes Act* 1914 (Cth) for a declaration that the CPA was an unlawful association. Spry's view was that there was a basis for making such an application because the CPA was an association that was intrinsically disloyal. He considered that such a declaration would do something to disrupt and hamper the CPA's activities, especially its "peace" campaign, but that no great benefit would accrue to ASIO's work because the CPA had an underground apparatus that was already in use. Menzies and his Government tacitly acknowledged that they could not stamp out the CPA by legislation. Nevertheless, they and their senior civilian and military advisers continued to regard the CPA as a highly subversive organization and were resolutely determined to achieve, in a variety of indirect ways, what the High Court had ruled was not open directly by legislation, namely, the complete neutralisation of the CPA as a political and industrial force. Spry's assessment was that the efficacy of a *Crimes Act* 1914 (Cth)s30AA application would be enhanced by passage of an Official Secrets Bill and a Sabotage Bill which the Menzies Government had been preparing and which Spry was actively promoting.[30]

30 Spry, Memorandum Re the Communist Party of Australia, 8 February 1952: M1509/1, Item 6. This top secret document of 84 pages is indicative of Spry's assessment of the threat then posed to Australia's internal security by the CPA. It is, for the most part, a collection of excerpts from standard Marxist and CPA texts and from the *Report of the Royal Commission Inquiring into the Origins, Aims, Objects and Funds of the Communist Party in Victoria and Other Related Matters*; Vic, Parl, *Debates* LA (1950) Vol 232 at 24. When reduced to its main thesis it amounts to no more than that communists advocated the overthrow of capitalism by proletarian revolution, at the earliest practicable time. On 9 September 1952 the Cabinet rejected one proposal for stiffening the existing official secrets provisions of the *Crimes Act* 1914 (Cth): M1509/1, Item 20.

In this context of unremitting official action aimed at crushing the CPA, it should be appreciated just how convenient the appearance of the *Communist Review* article was in affording a basis for the Menzies Government, through ASIO, to swoop yet again on the CPA's headquarters and other premises occupied by party functionaries in the ongoing quest for intelligence about the CPA's membership and its subversive activities. In this context, the law of sedition was but one pretext available to the Commonwealth for harassing the CPA and its supporters (both real and imagined).

THE PRETEXT

In 1920 the Commonwealth Parliament amended the *Crimes Act* 1914 (Cth) ("the Act") to provide for a codified law of sedition. Section 24D(1) of the Act made it an offence, punishable by up to three years' imprisonment, to write, print, utter or publish any seditious words. Section 24B(2) provided that seditious words were words expressive of a seditious intention. Section 24A(1) of the Act, in its original form, provided that an intention to effect any one of several specified purposes was a seditious intention. Those purposes were:

(a) to bring the Sovereign into hatred or contempt;

(b) to excite disaffection against the Sovereign or the Government or Constitution of the United Kingdom or against either House of the Parliament of the United Kingdom;

(c) to excite disaffection against the Government or Constitution of any of the King's Dominions;

(d) to excite disaffection against the Government or Constitution of the Commonwealth or against either House of the Parliament of the Commonwealth;

(e) to excite disaffection against the connexion of the King's Dominions under the Crown;

(f) to excite His Majesty's subjects to attempt to procure the alteration, otherwise than by lawful means, of any matter in the Commonwealth established by law of the Commonwealth; or

(g) to promote feelings of ill-will and hostility between different classes of His Majesty's subjects so as to endanger the peace, order or good government of the Commonwealth.

Section 24A(2) provided that it was not unlawful for a person, acting in good faith, to point out the errors or defects in the government, to attempt to bring about a change of government by lawful means, or to point out matters productive of, or tending to produce, feelings of ill-will and hostility in order to secure the removal of such matters. The sedition provisions had been inserted in the Act in 1920 largely in response to anxiety about the Bolshevik Revolution and its positive impact on radical socialist agitation in Australia.[31] Conservative Commonwealth Governments had not instituted sedition prosecutions in the 1920s or 1930s. But they had used every other device at their disposal to rid the Australian political landscape of the CPA. They had deported foreign communists, prosecuted Australian communists for other *Crimes Act* 1914 (Cth) offences, banned the importation of communist literature, restricted the use of the mails for the distribution of such literature, restricted the distribution of foreign language publications, confronted the use of industrial power by CPA-led trade unions, provided for the denial or the stripping of naturalisation for communist aliens, passed further amendments to the *Crimes Act* 1914 (Cth), and issued procedings in the High Court designed to secure a judicial declaration that the CPA was an illegal revolutionary organization.[32] Sooner or later, it was inevitable that

31 *War Precautions Act Repeal Act* 1920 (Cth) s12. See Davidson, *The Communist Party of Australia: A Short History* (Hoover Institution Press, Stanford 1969); Gollan, *Revolutionaries and Reformists: Communism and the Australian Labour Movement 1920-1950* (Australian National University Press, Canberra 1975); and Evans, *The Red Flag Riots: A Study of Intolerance* (University of Queensland Press, St Lucia, Queensland 1988). Following the presentation of the Final Report of the Royal Commission on Australia's Security and Intelligence Agencies s24D(1) of the *Crimes Act* 1914 (Cth) was amended and now provides as follows: "Any person who, *with the intention of causing violence or creating public disorder or a public disturbance*, writes, prints, utters or publishes any seditious words shall be guilty of an indictable offence." (emphasis added). The passage in italics, which imposes a more exacting onus on the prosecution, was inserted by s11 of the *Intelligence and Security (Consequential Amendments) Act* 1986 (Cth): Aust, Royal Commission on Australia's Security and Intelligence Agencies (Hope, Chair), *Report* (1984). See Maher, "The Use and Abuse of Sedition" (1992) 14 *Syd L Rev* 287.

32 United Australia Party, *The Record of the Lyons Government January 1932 to January 1933* (1933); Cain, *The Origins of Political Surveillance in Australia* Ch 7; Ricketson, "Liberal Law in a Repressive Age: Communism and the Law

the sedition provisions would be deployed in the relentless conservative campaign against the CPA.

Although some left wing elements in the ALP had flirted with the CPA in the first three decades of its existence, the Federal Conference of the ALP had on more than one occasion unequivocally repudiated the objectives and methods of the CPA.[33] In the right wing of the ALP there was support for repressive anti-communist measures, but for the most part the ALP resisted the temptation to implement such measures. Prime Minister Chifley claimed that, as a matter of principle and practicality, it was preferable to fight communism in the open.[34] There is therefore some irony in the fact that during the early years of the Cold War it was the ALP which first wielded the particularly oppressive instrument of the sedition prosecution in the struggle against Australian communism.

The targeting of the CPA after 1945 was the direct result of the identification of the CPA as an active part of an international revolutionary Communist movement. Soon after the end of the Second World War a new world order emerged characterised by polarised and worsening relations between the western nations grouped behind the United States, and the eastern bloc led by the Union of Soviet Socialist Republics. As the Cold War intensified, the CPA, which uncritically followed the Soviet line, was widely condemned in Australia as a willing tool of Soviet imperialism. By mid-1947 the US had embraced the policy of containment of Soviet expansionism (the Truman Doctrine) and had announced the European Recovery Plan (the Marshall Plan). There was talk of a looming third world war. Whilst Chifley's idiosyncratic Minister for External Affairs, Dr Evatt, guided Australian foreign policy along independent paths, Australia inevitably lined up as a small player in the western alliance.[35] In this setting

1920-1950" (1976) 3 *Mon L Rev* 101; Watson, "Anti-Communism in the Thirties" *Arena* , No 37, 1975, 40.

33 Crisp, *The Australian Federal Labour Party 1901-1951* (Hale & Iremonger, Sydney, 2nd ed 1978) pp175-181.

34 Aust, Parl, *Debates* HR (1948) Vol 196 at 613. Despite this declaration, the Chifley Government also waged a very intensive covert campaign against Australian communism.

35 The literature on the origins of the Cold War is daunting in volume and complexity. A recent comprehensive treatment is Leffler, *A Preponderance of Power: National Security, the Truman Administration, and the Cold War* (Stanford University Press, Stanford, California 1992). For recent Australian assessments, see Edwards, "The Origins of the Cold War 1947-1949" in Bridge (ed), *Munich to Vietnam: Australia's Relations With Britain and the United States Since the 1930s* (Melbourne University Press, Carlton, Victoria 1991)

the public utterance of pro-Soviet opinions was fraught with a range of perils including prosecution for sedition. Such opinions were, by definition, therefore, anti-Australian. In 1948-1949 the Chifley Government successfully prosecuted Gilbert Burns, a member of the Queensland State Executive of the CPA, and, more importantly, Laurence Louis ("Lance") Sharkey, the General Secretary of the CPA, for uttering pro-Soviet seditious words. The High Court upheld both convictions. But the Commonwealth was unsuccessful in prosecuting the Western Australian State President of the CPA, Kevin Martin Healy, for allegedly uttering seditious words in support of Sharkey's statement. Both Burns and Sharkey served terms of imprisonment. In 1950, after the outbreak of the Korean War, the Menzies Government successfully prosecuted a CPA journalist, William Fardon Burns, arising out of a story in the CPA newspaper *Tribune* in which he condemmed Australia's participation in the United Nations (UN) forces in Korea saying, in part, "Not a man, not a ship, not a plane and not a gun for the aggressive imperialised war in Korea." WF Burns was also sentenced to a term of imprisonment.[36]

Between 1950 and 1952 the Commonwealth Attorney-General's Department was kept busy responding to requests from ASIO and the Commonwealth Investigation Service ("CIS")[37] for legal advice on possible sedition prosecutions against CPA offficals and activists, mostly for trenchant criticism of Australian involvement in the Korean War. Such criticism was a risky business regardless of its source. In one case in 1952 the government seriously considered prosecuting ALP Senator Donald Cameron[38] for sedition, or for assisting a public enemy contrary to s24(1) of the Act, because of an article he had published in the ALP newspaper *Labour Call.* Cameron had claimed in the article that

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and Meaney, "Australia, the Great Powers and the Coming of the Cold War" (1992) 38 *Aust J of Pol and Hist* 316.

36 *Burns v Ransley* (1949) 79 CLR 101; *R v Sharkey* (1949) 79 CLR 121; *R v Healy* (unreported, Supreme Court of Western Australia, 1 November 1949); *Sweeny v Burns* (unreported, Court of Petty Sessions, Sydney, 1950, Quarter Sessions Appeal Court, 15 November 1950); A432/1, Item 1963/362. For a detailed treatment of these cases see Maher, "The Use and Abuse of Sedition" (1992) 14 *Syd L Rev* 287.

37 The CIS, whose origins could be traced back to 1917, had been re-organized in 1945 to be responsible for internal security matters. Its security intelligence functions were significantly curtailed following the establishment of ASIO in 1949 although it did operate closely with ASIO. See Cain, *The Origins of Political Surveillance in Australia* Ch 7.

38 Donald Cameron (1878-1962), Senator for Victoria, 1938-1962.

> the soldiers fighting in Korea under the flag of the [UN] should be told that they are not fighting to keep South Korea free. They are fighting to extend and strengthen American imperialism in Asian countries and nothing else.

In the House of Representatives, one of the country's leading anti-communist zealots, WC Wentworth,[39] without naming Cameron, referred to the article and asked Menzies whether the ALP was harbouring a traitor and to undertake to initiate proceedings for the expulsion of the member concerned. Menzies replied by saying that a statement such as Cameron's would be seditious. A similar attack on Cameron was made in the Senate. On 28 February Cameron made a reply in the Senate saying that he had been misrepresented. KH Bailey, instructed the Commonwealth Crown Solicitor, DD Bell,[40] to consider whether Cameron's article disclosed any offence. Bell's advice was that there was no offence under paragraphs (b) or (d) of s24A(1) of the Act, that there was a prima facie case of an offence against paragraph (g) of s24A(1), and no offence under s24(1), but that he was not confident that a prosecution would be successful. Bailey discussed the case with the Attorney-General, Senator JA Spicer QC,[41] and advised that

> extreme as some of the comments may be, and offensive as it [would] be to many, it does not appear likely that any criminal prosecution in respect of it under the Crimes Act [would] be successful.[42]

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39 William Charles Wentworth (1907-). Member of the House of Representatives (1949-1977). Wentworth's zealous anti-communism was evident in most of his activities. In the years immediately following the defeat of the 1951 anti-communist referendum, he sponsored legislation aimed at rooting out communists from the public service. Cth, Parl, *Debates HR*, 11 March 1952 at 812.

40 David Dowson Bell (1898-196?), Crown Solicitor of the Commonwealth 1951-1955.

41 John Armstrong Spicer (1899-1978) Senator for Victoria 1940-1944, 1950-1956; Attorney-General of the Commonwealth 1949-1956; Chief Judge of the Commonwealth Industrial Court 1956-1976. See the announcements (1956) 30 *ALJ* 200 and (1976) 50 *ALJ* 598, and obituary (1978) 52 *ALJ* 109.

42 Memo, Bailey to Bell, 29 February 1952: A432/80, Item 52/146; *Labour Call*, 14 February 1952; Aust, Parl, *Debates* HR (1952) Vol 216 at 431, 861-870, Aust, Parl, *Debates* S (1952) Vol 216 at 406-407, 501-502. In its issue dated 28 February 1952, *The Canberra Times* called on the government to prosecute Cameron.

In another case in 1952 a man attending a compositing class in Hobart responded to a remark about a forthcoming memorial service for King George VI by saying "That's (*sic*) a waste of time having it. We are better off without him." The student, who apparently admitted to being a communist and who was known to have heckled Menzies in a speech he had given in Hobart the previous year, was reported to ASIO by his compositing instructor. Spry, who took an expansive view of his operating Directive which charged him with protecting the national security, was sufficiently concerned by the informer's story to ask Bailey for advice on whether further investigations should be carried out with a view to launching a sedition prosecution. Spry acknowledged that the case was doubtful. He thought that a prosecution would focus attention on a statement by an unimportant person, that it might stir up similar sentiment in the community, and that such publicity might not be welcomed by the Royal family. In truth, this was as trivial a case of alleged sedition as could be imagined. Bailey could have dismissed it out of hand especially since his first reaction was that sedition did not extend to such an innocuous remark. However, Bailey resisted the temptation to throw caution to the wind and instead asked his Department to look at the case. Predictably, advice was duly given that no offence was disclosed, but the case did not end there. Eventually Bailey referred the case to Attorney-General Spicer who agreed that there was no *prima facie* case of sedition. Little did Australians realise at the time just how closely their everyday political discourse could excite the curiosity of those in high office charged with protecting the national security.[43]

The election of the Menzies Government on an anti-communist platform and the successful prosecutions in the previous two years had increased the likelihood of resort to sedition charges to suppress communist propaganda. In *Burns v Ransley* and *R v Sharkey* the High Court had confirmed that s24A(1) involved an objective test of the mental element of sedition. If an individual uttered, printed or published words which, when analysed objectively, could be said to be expressive of an intention of the kind specified in any of paragraphs (a) to (g) of s24A(1), then the words were expressive of a seditious intention. It was no part of the prosecution's case to prove, by extrinsic evidence outside the words themselves, that the individual *in fact* was possessed of a seditious intention at the relevant time. Moreover, even though the High Court had held in principle that the statutory concept of "disaffection" did not simply mean opposition to the government of the day, but rather opposition to government as such in the

43 A432/80, Item 52/1513.

sense of an appeal to reject and overthrow the lawfully established government, the upholding of the convictions in *Burns* and *Sharkey* showed just how easily it was to penalise speech which posed no danger whatsoever to the continuation of lawfully established authority.[44]

In effect, the High Court had, very unwisely, interpreted the sedition provisions of the Act in a way that enabled the Act to be used to punish expressions of "disloyalty". At the time the concept of loyalty was defined in terms of an enforced rigid anti-communist political orthodoxy.[45] In the evolving Cold War context, the Soviet Union was the enemy, "extreme" left wing dissent was readily stigmatised as disloyal, and such disloyalty was then conveniently equated with subversion.

In its Star Chamber origins the law of sedition had been used to suppress the expression of all forms of anti-government opinion. But by the mid-nineteenth century, the scope of, and justification for, the crime of sedition was fundamentally different; the law of sedition was said to be necessary only to protect the state against speech or expressive conduct which imperilled the state. Otherwise, the English common law purported to permit criticism of the State. But in *Burns* and *Sharkey* the High Court had allowed itself to be manipulated by the prevailing anti-communist hysteria and in so doing had legitimated punishment of that very small group of individuals who did no more than question the official line about how the Soviet Union was to be treated. Stigmatising the CPA and communists generally as "disloyal" and "subversive" was to become a central feature of Australian Cold War politics. Hysterical fear of communism and the Soviet Union was promoted relentlessly by a coalition of conservative politicians, newspapers, and anti-communist forces in business, the professions, the churches, and right-wing trade unions. So all-pervasive was anti-communist sentiment that it also had its active promoters within the judiciary. The most prominent example of the judicial anti-communist agitators was Sir Edmund Herring, the Chief Justice of Victoria who,

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44 It is suggested, with respect, that Brennan J's adoption in *Nationwide News v Wills* (1992) 177 CLR 1 at 52 of Latham CJ's analysis of legitimate "political criticism" in *Burns v Ransley* needs to be considered in the light of (a) the innocuous nature of what Gilbert Burns was prosecuted for saying, (b) the fact that the prosecution of Burns was, in essence, a political stunt, and (c) Latham's lifelong aversion to communism. See Maher, "Tales of the Overt and the Covert: Judges and Politics in Early Cold War Australia" (1993) 21 *Fed L Rev* 151.

45 For an incisive discussion of comparable US attitudes see Commager, *Freedom Loyalty Dissent* (Oxford University Press, New York 1954), esp Ch V.

amongst other things, organized and announced the anti-communist "Call to the Nation" campaign in 1951.[46] Another member of the judiciary who felt compelled to warn the general public about the perils of the CPA and its adherents was Mr Justice FA Dwyer of the Supreme Court of New South Wales, who had presided over the sedition trial of LL Sharkey in Sydney in 1949 and had sentenced Sharkey to the maximum penalty. In open court in Wagga Wagga in October 1952 he announced that a recent issue of the *Communist Review* contained a "gross and flagitious incitement to crime" and stated that it was disquieting that the appropriate Commonwealth authorities had not taken any steps to prosecute those responsible.[47]

Otherwise true to its 1949 election promise, the Menzies Government launched a crusade against communism. Communists were publicly identified and denounced as traitors. To some extent Menzies and his ministers and senior advisers were inspired by the legislatively enforced loyalty programmes and the anti-communist witch hunts of the Truman and Eisenhower administrations in the United States.[48] It was said, for example, that communists had infiltrated the Commonwealth public service and were undermining the government. In 1952 RG Casey, the Minister for External Affairs, condemned the publication by the CPA newspaper *Tribune* in late 1951 of a confidential draft of a proposed Australia-US Treaty of Friendship, Commerce and Navigation ("FCN"). Playing on the mounting fear of communist subversion, Casey attributed the leak to an "extremely dangerous nest of traitors that exists in the Public Service".[49] Even though the CPA was well aware that it was under constant ASIO

46 Maher, "Tales of the Overt and the Covert: Judges and Politics in Early Cold War Australia" (1993) 21 *Fed L Rev* 151.

47 *The Daily Telegraph*, 15 October 1952; *The Herald*, 14 October 1952; *Guardian*, 16 October 1952; A6122/16, Item 989.

48 See Caute, *The Great Fear: The Anti-Communist Purge Under Truman and Eisenhower* (Secker & Warburg, London 1978). Bailey and Spry followed US developments closely. Spry was something of a fan of J Edgar Hoover, Director of the FBI, who was a fanatical anti-communist. Spry urged Menzies to emulate Hoover by publishing advertisements encouraging the Australian public to contact ASIO in order to report suspected sabotage or subversion. Menzies seems not to have been persuaded: Letter, Spry to Menzies, 21 March 1951. A1209/56, Item 72/10048; For evidence of Bailey's attention to US developments see M1509/1, Item 16.

49 Aust, Parl, *Debates* HR (1952) Vol 217 at 872. One of the targets of this episode was Dr John Burton, who had been Secretary of the Department of External Affairs between 1947 and 1950 during most of which period HV Evatt was the Minister. See Pemberton, "John Burton", *Union Issues*, November 1991, 12.

surveillance, and even though three out of four sedition prosecutions of CPA functionaries had resulted in convictions and sentences of imprisonment, it seems unlikely that the decision to publish "The 'Democratic' Monarchy" was accompanied by any apprehension that the critical nature of the piece carried with it a major risk of the publishers falling foul of the reinvigorated law of sedition.

THE INVESTIGATION AND THE RAIDS

Soon after the "The 'Democratic' Monarchy" was published it came to the attention of Colonel Spry,[50] who promptly consulted JQ Ewens, who was acting as Solicitor-General, and Attorney-General Spicer.[51] Spicer, Bailey, Ewens and the Commonwealth Crown Solicitor formed a quartet of the Government's most senior legal advisers. Ewens regularly acted as Solicitor-General in the absence of Bailey. He was no stranger as regards the Menzies Government's anti-communist crusade. With Bailey he had drafted a large part of the *Communist Party Dissolution Act* 1950 (Cth). In a brief submission put before both Spry and Spicer Ewens concluded that the article contained words expressive of a seditious intention contrary to paragraph (b) of s24A(1) of the Act. He recommended that a warrant should be sought under s10 of the Act to search the premises of the printer and the publisher of the *Communist Review* and the person who was believed to be the author of the article, Rex Chiplin, a regular contributor to the CPA newspaper, *Tribune*.[52]

In considering the *Communist Review* article Ewens focussed in particular on the words:

> There is not and cannot be anything in common between the ordinary people and the monarchy...The monarchy is a useful weapon to...paralyse working-class action for social change.

Ewens contended that, in substance, this passage was intended to include the Queen within its ambit. "RC" asserted that the Monarchy was an

50 Letter, Deputy Director-General to Director, 30 June 1953. A6122/16, Item 1004.

51 Memo, Deputy Director-General to Director, 30 June 1953: as above.

52 Memorandum, untitled, unsigned and undated [1953]: A432/1, Item 1953/734. That this document was ultimately authored by Ewens is confirmed by a letter dated 8 July 1953 sent by Spry to the Director of the CIS: A432/1, Item 1953/734.

instrument of the property-owning class and that it existed for the purpose of preserving the interests of that class at the expense of the interests of the ordinary people. This was, of course, standard Marxist fare. According to Ewens, the general tenor of the article was that the Monarchy provided nothing for the working class or the ordinary people - a proposition that was doubtless deeply offensive to the Menzies Government and many, if not most, Australians. Ewens also drew attention to the passage quoted in the opening paragraph of this article contending that in that passage the author went even further and implied that the "Royal circle" was itself actively opposed to the working class.[53]

It is a chilling reminder of the intensity of the anti-communist fervour which gripped the Government's advisers and much of the Australian community at this time to realise that these criticisms of the "Royal circle" were seriously considered by the Government and its legal advisers to be seditious. Ewens contended that the references in the article to "the Monarchy", the "Royal circle", the Coronation, the Royal Household and the Duke of Edinburgh's ancestry were all contrived by "RC" to refer disparagingly to the Queen.[54] Forty years later the prospect of an Australian republic is not only a respectable subject of political debate, but has become a prime issue in the movement for constitutional renewal as the centenary of Federation approaches.[55] However, at that earlier time *all* criticism of the Monarchy was frowned upon. On the day of the Coronation an editorial writer in *The Sydney Morning Herald* observed that "The Monarchy has no opponents and few critics outside the jaundiced ranks of the Communist Party."[56] Australian newspapers carried reports of uninhibited expressions of loyalty at public meetings and church services throughout Australia. There was, literally, dancing in the streets in joyous celebration of the Coronation. *The Sydney Morning Herald* reminded its readers that the Coronation was a solemn religious ceremony.[57] Criticism of the Coronation thus combined sacrilege and disloyalty.

The skimpy submission prepared by Ewens for Spicer's approval discloses little about the author's legal analysis. This is surprising because the relevant legislative provisions had been considered so recently by the High

53 As above.
54 As above.
55 Winterton, *Monarchy to Republic: Australian Republican Government* (Oxford University Press, Melbourne 1986); Aust, Republic Advisory Committee, *Issues Paper*; *Report* (1993).
56 *The Sydney Morning Herald*, 2 June 1953.
57 *The Sydney Morning Herald*, 1 June 1953.

Court in *Burns* and *Sharkey*. Almost invariably when other cases of alleged sedition were submitted to the Attorney-General's Department for opinion in the years after 1949 the High Court decisions were cited and analysed by senior departmental officers including Bailey.[58] Ewens, it seems, had no doubts about the scope of the law so much so that he did not see any free speech issue implicated in the subject matter of Spry's request for an opinion. There is, for example, no record of his ever having considered the applicability of the defences in s24A(2) of the Act. The surviving record of the Ewens opinion reveals a third-rate assessment of the legal issues - an opinion utterly unworthy of the acting Second Law Officer. Interestingly, the archival material reveals that elsewhere within the higher levels of the Attorney-General's Department there was confusion about the nature and scope of the offence created by s24D(1) of the Act even after the decisions in *Burns* and *Sharkey* and that, to some extent, Bailey acted as a restraining influence in a climate where there was pressure within the security and defence establishment for a vigorous campaign of sedition prosecutions against the CPA. In 1950 Bailey had drawn the Department's attention to a misconception about the law of sedition evident in a departmental recommendation that a [CPA] member be prosecuted for publishing seditious words in a [pamphlet] which, like the 1950 statement of WF Burns, contained trenchant criticism of the Menzies Government's decision to commit troops to the United Nations action in Korea. Emphasising the seriousness of prosecuting individuals for expressing opinions, Bailey remarked:

> I do not pretend to be able ...to draw with precision the line between extreme but legitimate political controversy on the one hand and that excitation of disaffection on the other which the law of sedition forbids...Unfair, prejudiced, vituperative and even false as this kind of writing is, I would myself think it can only be handled ... by putting out better and positive stuff to counter it.[59]

In that earlier case Bailey took the view that the Attorney-General's Department was misreading the Act and the decisions in *Burns* and *Sharkey*, and that a prosecution was not justified. In view of Bailey's considered approach to the substantive law, there is at least some basis for believing that had Bailey been in Canberra when Spry sought advice on the

58 For details of these other cases, see Maher, "The Use and Abuse of Sedition" (1992) 14 *Syd L Rev* 287 at 306.

59 Memo, Bailey, 6 December 1950: A432/1, Item 1950/1857.

Communist Review article, his advice would have been contrary to that given by Ewens.[60]

Ewens discussed the case with Spicer and the Attorney-General expressed agreement with the opinion given by Ewens and endorsed his recommendation for the issue of a search warrant. Spicer did, however, tell Ewens that "he was not too happy about" going on with action in respect of the article, but directed that within the following week all available information should be gathered concerning the alleged offence and that no positive action, such as searching of premises (including the homes of CPA officials), should be carried out without his prior approval.[61] Spry then sent a memorandum to the Director of the CIS, RW Whitrod,[62] initiating detailed inquiries in preparation for the issue of search warrants.[63]

The Attorney-General's Department files indicate that up to this stage the ostensible focus of investigative attention was the need to ascertain the identity of "RC" and all the individuals who were responsible for printing and publishing the offending issue of the *Communist Review*. But when it came to the CPA, ASIO was no respecter of persons. For ASIO the CPA was a monolithic menace. Everyone in or connected with the CPA was, by definition, of national security interest and ASIO went about compiling vast

60 This was not because Bailey was, to use the vernacular of the Cold War, "soft" on communism. Nor is it meant to suggest that Bailey would not have supported the raids on CPA premises. He shared the conservative's dread of communism. But he also seems to have made a clear distinction between, on the one hand, the Commonwealth tolerating CPA propaganda and, on the other hand, the Commonwealth ensuring that the CPA did not otherwise threaten the security of the Commonwealth. In this latter respect he seems to have been an enthusiastic supporter of measures promoted by Spry to rid the Commonwealth Public Service of known and suspected communists. See, for example, Spry, Memorandum, Communists and Communist Sympathisers in the Employ of the Commonwealth, 14 July 1952: M1509/1, Item 16.

61 Telephone message, 7 July 1953: A6122/16, Item 1004; Letter, Spry to Whitrod, 8 July 1953: A432/1, Item 1953/734.

62 Raymond Wells Whitrod (1915-) had become head of the CIS after serving with ASIO in the formative years 1949-1953: Thwaites, *Truth Will Out: ASIO and the Petrovs* (Collins, Sydney 1980) p32.

63 The request that the CIS pursue an investigative role was meant to reflect compliance with paragraph 5 of ASIO's revised 1950 charter which, albeit ambiguously, precluded it from undertaking any activities related to the enforcement of the criminal law. However, despite this Spry seems to have interpreted the Directive in a way that permitted ASIO to take an active role in fundamental law enforcement activities such as the execution of search warrants.

lists of suspected CPA members and sympathisers.[64] The controllers of the party were always of supreme intelligence interest. There is no reason to doubt that Spry ever shirked the determination to probe the CPA as far as he could.[65] He informed Whitrod that Ewens had expressed the opinion (probably in response to Spry's express inquiry rather than being volunteered) that the available material was sufficient to justify a reasonable suspicion that the members of the Central Committee of the CPA had been guilty of an offence against s5 of the Act which made it an offence to aid, abet, counsel or procure or be knowingly concerned in or party to any offence against any law of the Commonwealth.[66] The submission prepared by Ewens does not identify the "available material" and thus it is not possible to evaluate what Ewens thought of the material. Given the prevailing ASIO position that the CPA was a criminal conspiracy and that the party's Central Committee exercised rigid control of the entire party apparatus, it followed inexorably that *any* CPA activity could be traced directly to the party's controllers. In this setting s5 was a very useful dragnet provision which equipped the government, virtually at any time, to undertake a fishing expedition designed, in part, simply to identify persons who were the members of the CPA and otherwise to obtain any and all intelligence about its activities.[67] The political offence and search warrant provisions of the Act were reinforced by the revised 1950 secret ASIO Directive under which Spry ran ASIO. That Directive provided that ASIO's task was the defence of the Commonwealth and its Territories from external and internal dangers arising from attempts at espionage and sabotage or from actions of persons and organizations, whether directed from within or without Australia which "may be judged to be subversive of the security of Australia." In substance, the final arbiter on threats to national security was Spry.[68]

It is clear that, if there was to be a sedition prosecution, an informant could have quite adequately prepared the prosecution case against the individuals

64 See, for example, the lists compiled making use of material supplied by the CPA defector Cecil H Sharpley in or about 1952: A6119/1, Item 189.

65 It seems to have been an article of ASIO faith that the CPA was always on the verge of overthrowing the government. Old ASIO hands cling to this view. See Thwaites, *Truth Will Out: ASIO and the Petrovs* ; Barnett, *Tale of the Scorpion* (Allen & Unwin, Sydney 1988); ABC Radio, Station 3LO, Transcript of Interview with Harvey Barnett, 30 October 1990.

66 Letter, Spry to Whitrod, 8 July 1953: A432/1, Item 1953/734.

67 The scope (but not the constitutionality) of s10 of the Act was eventually tested in *R v Tillett; Ex parte Newton* (1969) 14 FLR 101.

68 A7452/1, Item A48.

involved in publishing the offending article in the *Communist Review* without the need to search their *homes* for incriminating documents at all. Even if a search of CPA *offices* was called for, it could just as easily have been strictly confined to looking for material that supplemented the other admissible formal evidence concerning publication and printing of the article and material that supplemented any relevant admissions of printing and publication. Just as in the sedition cases in 1948-1950, the likely focus of the prosecutorial contest would be the allegedly seditious character of the published material and not the technical proofs of printing and publishing. The amount of investigative effort that was devoted to preparation of the 1953 sedition cases was wholly disproportionate to the essentials of the prosecutorial task.

From the outset it was obvious to Spry and Ewens that a search warrant (or warrants) could do much more than simply look for evidence specifically about the "RC" article. A warrant could, given the scope of s5 of the Act, set up a trawling operation. The CPA was always at risk in that regard, although previous raids had been mostly confined to CPA office premises. In addition, a warrant could be used to obtain information about particular political and industrial campaigns. The Attorney-General's Department files relating to the 1953 case record that directions were given to look for evidence about *CPA membership generally* and, in particular, for evidence of where certain pamphlets, unconnected with the *Communist Review* article, were printed and as to their authorship. Two specific concerns which the Commonwealth Government had in mid-1953 were the CPA's belligerent and obstructive attitude to court-controlled elections for unions registered under the *Conciliation and Arbitration Act* 1904 (Cth) and a campaign of rolling strikes on the Australian waterfront.[69] Two CPA pamphlets, *Ballot Riggers at Work* and *Spies in Labour Ranks* and an article entitled "Security Men Rig Union Ballots" published in the communist newspaper, *Tribune*, were of particular concern to Spry because they accused ASIO of fraudulent conduct in certain fiercely contested union elections.[70] Consideration was given to prosecuting the persons

69 See, for example, "Police Called to Prevent Union Scrutineer From Watching Ballot", *Tribune*, 31 March 1953; "Security Men Rig Union Ballots" *Tribune*, 20 May 1953; "Ballot Riggers Squirm as Facts Hit Home", *Tribune*, 17 June 1953: Letter, Keon to Spicer, 20 May 1953; Letter, Spicer to Keon, 17 July 1953: A432/80, Item 1953/2304.

70 Notes on Alleged Seditious Article in "Communist Review", Undated [1953]: A432/1, Item 1953/734; Memo, Bell to Ewens, 21 July 1953: A432/1, Item 1953/734.

responsible for these publications for criminal libel,[71] for contempt of the Commonwealth Court of Conciliation and Arbitration[72] and/or for sedition, as well as the issue of a civil defamation action by an officer of ASIO and/or an electoral officer, but there was doubt as to the scope of the law in each category and, more importantly, the available evidence concerning the identity of those responsible was quite inadequate.[73] JW Shand QC,[74] of the Sydney Bar, advised the Commonwealth that there was evidence on which to proceed against one prominent CPA official, Herbert Bovyl Chandler, for contempt of court.[75]

In addition, ASIO was on the trail of Soviet espionage operations in Australia. The offending *Communist Review* article thus provided a convenient basis for pursuing a range of pending investigations and the pretext for the most systematic assault on CPA records since the party was banned in 1940.[76]

Between 6 and 15 July, Ewens and ASIO and CIS officers worked closely to prepare applications for search warrants to raid various premises in and around Sydney associated with the CPA and its leading members. Near the end of this preparatory phase Whitrod conferred with Ewens and Roy Woodhouse, a senior ASIO officer, and, acting on instructions given to him in that conference, Whitrod travelled to Sydney on 15 July 1953. That day CIS officer William Henry Barnwell visited the CPA's Pioneer Bookshop at 40 Market Street, Sydney and purchased copies of the June and July issues

71 Pursuant to s10 of the *Wrongs Act* 1928 (Vic); see *R v Hardy* [1951] VLR 256. Counsel advised that in respect of one publication a criminal libel charge could be laid, but that it was unlikely that a jury would convict: Opinion, Coppel, QC, 4 August 1953; A432/80, Item 1953/2304.

72 Shand QC (see below fn74) advised that in respect of one article in *Tribune*, there was evidence to proceed against Chandler for contempt of the court, but this advice seems not to have been acted on: Memo, Bell to Ewens, 3 August 1953; A432/80, Item 1953/2304.

73 *Tribune*, 20 May 1953: Memo, Bell to Ewens, 22 June 1953; Memo, Bell to Ewens, 30 July 1953: AA (ACT) A432/73, Item 1953/763.

74 John (Jack) Wentworth Shand (1897-1959). Shand was a tenacious advocate and no stranger to sedition cases. He had prosecuted WF Burns in 1950. On the appeal by Burns, Shand had clashed with the judge and had been ordered to leave the court. *The Sydney Morning Herald*, 15 November 1950: A432/1, Item 1963/362.

75 Memo, Bell to Ewens, 3 August 1953: A 432/80, Item 1953/2304.

76 For a detailed account of the background to, and the steps taken by the Menzies Government to contain, CPA-led or -inspired industrial disruption, especially on the waterfront, see Louis, "'Operation Alien' and the Cold War in Australia, 1950-1953" *Labour History*, No 62, May 1992, 1.

of the *Communist Review*. Whitrod swore out the necessary informations and obtained the search warrants the next day. The timing of the raids seems to have been influenced by ASIO's belief that the CPA was planning, for some unspecified reason, to remove documents and records from all its State headquarters to safe places on the weekend of 18-19 July.[77] Spry gave approval to an instruction that "continuous and comprehensive surveillance be exercised over [CPA headquarters]" in all States between 2.00 pm on Friday, 17 July and midnight on Sunday, 19 July to detect any movement of CPA documents.[78] On the morning of Friday, 17 July 1953 the ASIO and CIS officers taking part in the proposed raids were briefed by Whitrod, the CIS Regional Director for New South Wales, Brigadier FG Galleghan,[79] ASIO Regional Director, GR Richards,[80] and FJ Mahony of the Deputy Commonwealth Crown Solicitor's Office in Sydney.[81] At 2 pm that day teams of ASIO and CIS officers raided eight locations in the City of Sydney and metropolitan area, including CPA headquarters at 40 Market Street, Sydney where the communist newspaper *Tribune* had its office, the homes of the *Communist Review* publisher, Adam Ogston (who was the Chairman of the Sydney District of the CPA), HB Chandler and Rex Chiplin, and the business premises of the *Communist Review* printer, James Norman Bone.

During the raid at CPA headquarters the party's solicitor, Harold Rich,[82] arrived at the scene and, after a short dispute with Whitrod and his CIS colleague, William Grenfell Sweeny, about the scope of the search warrant,

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77 Instruction, ASIO Regional Director (S Aust), 16 July 1952: A6122/16, Item 1004.

78 Memo, [undated], July 1953: A6122/16, Item 1004.

79 Frederick Gallagher Galleghan (1897-1972), Deputy Director of the CIS 1945-1947, 1950-1955.

80 George Ronald Richards (1904-1988) served in the Western Australia Police Special Branch before joining ASIO in 1949. He was an intrepid anti-subversive sleuth. He played a central role in the Petrov defection and the Petrov Royal Commission. See the works cited below in fn202.

81 Francis Joseph Mahony (1915-), a very accomplished lawyer, was later a Deputy Secretary of the Attorney-General's Department. He was Acting Director-General of ASIO between the appointments of Peter Barbour (1970-1975) and Mr Justice AE Woodward (1975-1981).

82 Harold Rich (1918-). Rich was subjected to ASIO surveillance: A6119/64, Items [506]-[508]. One of the instructions given at the briefing before the raids had been to obtain a sample of the output of CPA office typewriters. This was facilitated in part by Whitrod having an office worker, without objection, type out a receipt of the items seized pursuant to the search warrant: Statement, Raymond Whitrod, 17 July 1953; A432/1, Item 1953/734.

left saying that he would be applying for an injunction to halt the search of that part of the premises occupied by *Tribune*. He made an unsuccessful *ex parte* application to Mr Acting Justice Myers in the Supreme Court of New South Wales. Rich based his application first on the fact that the warrant authorised a search at the CPA headquarters and, on the basis that *Tribune* was a separate entity, the *Tribune* offices at 40 Market Street could not be searched pursuant to that authority and, secondly, on the fact that the warrant referred specifically to an alleged offence revealed in the *Communist Review* article rather than to anything which had been published in *Tribune*.[83] Rebuffed in court, Rich returned to CPA headquarters where the search was continuing and demanded to know the names of those taking part in the raid. Sweeny refused to identify the Commonwealth officers involved.[84]

Chandler was a member of the Central Committee of the CPA and in the register kept under the *Printing Act* 1899 (NSW) and the *Newspapers Act* 1898 (NSW) was recorded as, respectively, the owner of the printery, and the printer of the *Communist Review*. Like Ogston and Bone, he had been a target of surveillance by ASIO and its forerunner security organizations since the 1930s.[85] Ogston had come close to being charged with sedition in 1950 over a statement of opposition to Australian involvement in the UN operation in Korea.[86] Chandler was believed by ASIO and the CIS to be responsible for the CPA's own security and intelligence gathering (ie espionage) apparatus and for that reason was of particular interest. By early 1952 Spry held the view that the formal CPA apparatus as such did not seek to involve itself in espionage for the reason that if it were so involved, and the fact were discovered, the party would suffer damage by being brought into public disrepute. Spry's assessment was that the Soviet espionage network operating in Australia on behalf of the Soviet Union operated at a clandestine level. It used individual Communists (such as Chandler) rather then the party or party officials as such. Spry was confident that ASIO's sources of information would generate material that would result ultimately

83 *The Sydney Morning Herald*, 18 July 1953. I have been unable to locate a record of the reasons given by Myers AJ. According to Whitrod, Rich stated that in refusing the injunction application the judge had said Rich's clients could sue in trespass: Statement of RW Whitrod; A432/1, Item 1953/734.

84 Report, Sweeny to Galleghan, 17 July 1953: A432/1, Item 1953/734.

85 A6119/2, Items 71-77 and A6119/79, Items 657-658 (Chandler); A6119/79, Items 574-580 (Ogston); A6119/79, Item 573 (Bone).

86 A432/1, Item 1950/1621.

in the prosecution of offenders.[87] Success in the ongoing pursuit of Soviet spies would be had primarily through ASIO's covert work. There would, however, be opportunities to obtain evidence by search warrant and Chandler was a primary target for this purpose. His involvement in the publication of the offending issue of the *Communist Review* provided an opportunity for ASIO to turn both his office and his house over.

The CPA considered that it was justified in maintaining a security capacity and that it needed to be vigilant because, despite the outcome of the 1951 Referendum, ASIO was determined to prevent it from functioning as a legitimate political party. The CPA dealt openly in its publications with the risk it faced of being undermined by ASIO *agents provocateurs*. Only a week before the raids on 17 July *Tribune* had published a story which alleged that Ogston had been approached by an ASIO agent, S Cleary, and offered money to act as a regular ASIO informer.[88] To the extent that the CPA pursued secret activities that it claimed were necessary for the survival of the party, it necessarily reinforced the Government's case that those clandestine activities were, by definition, subversive.

One of the warrants authorised a search at premises in Sydney at which Chandler worked. In executing the warrant, ASIO officer William Reginald Campbell and two CIS colleagues encountered no resistance from Chandler who readily acknowledged his involvement in the printing of the June 1953 issue of the *Communist Review*. Chandler expressed the opinion that he did not think that there was anything damaging to the Crown or the Commonwealth in "RC"'s article.

Not surprisingly, Chandler's candid response did not dampen the investigative enthusiasm of the ASIO/CIS team. Any admissions about the printing and publication of the offending article that were elicited during the raids were bonuses in the wider sweep for intelligence.[89] During the search at his office Chandler telephoned his home and was informed of the simultaneous search underway there.[90] The raid at Chandler's home lasted three and a half hours and, from ASIO's standpoint, was a resounding,

87 Spry, Memorandum on the Communist Party of Australia, 8 February 1952; M1509/1, Item 6.

88 *Tribune*, 8 July 1953.

89 According to the CIS, Ogston also readily admitted to being the publisher of the *Communist Review*: Statement, EA Stevens, 17 July 1953; A432/1, Item 1953/734.

90 Statements of Campbell, Bailey and Manning, undated [July 1953]: AA (NSW) SP 782, Box 35A.

albeit troubling, success as a fishing expedition. The search warrant for Chandler's home was executed by CIS officer, Lindsay Eldon Watson, and ASIO Senior Field Officer, Ernest Oliver Redford.[91] In keeping with the instructions given at the pre-raid briefing earlier that day, each room in the Chandler house was methodically searched. Hundreds of documents were seized. Near the end of the search Chandler arrived home from the search at his office and remonstrated with Watson and Redford, but to no avail. The search yielded evidence of the espionage network which Spry associated with Chandler. In a wardrobe in the main bedroom of Chandler's home Redford found a list (enclosed in a newspaper published on 4 July 1953) of registration numbers of ASIO motor vehicles and a list of the names and addresses of thirteen ASIO agents. Both lists dated from 1950. In the same room Watson located copies of extracts from the secret personal diaries of RG Casey recording his official visit to the UN General Assembly in late 1952.[92] This rich intelligence find was to have importance far beyond the ensuing prosecution of Chandler, Ogston and Bone for sedition and would to some extent compensate for any disappointment experienced by the government arising out of the eventual failure of that prosecution. The Government's security advisers reckoned that the list of ASIO motor vehicles and agents was prepared on a typewriter in Chandler's Sydney office, that an ASIO employee (who had left the organisation in 1950) had leaked information about ASIO, and that during 1950 ASIO had itself been subjected to CPA surveillance.[93] This intensified ASIO's nervousness

91 Like Richards and many of the officers who served in ASIO in its early years, Redford was a former State (Victorian) policeman with Special Branch experience: Public Records Office Victoria (hereinafter "PROV"), VPRS 807, Item 2322. It is not difficult to see why ASIO officers with police backgrounds, especially those with experience in dealing with the CPA, participated in all raids on CPA premises. Since its inception ASIO had pursued a very active field role in the gathering of intelligence about the CPA.

92 There are several surviving versions by Watson and Redford explicitly recording their discovery of the sensitive documents. For later accounts prepared for the Petrov Royal Commission, see Memorandum, Redford and Gilmour to Richards, 30 July 1954; Statement, Redford, 1 December 1954; Statement, Watson, 1 December 1954: A6119/XR1, Item 77.

93 Minute, 30 [July] 1953: A6119/XR1, Item 77; Aust, Royal Commision on Espionage, *Report* (1955) para 849. Soon after Spry took over as Director-General of ASIO there was a "purge" of several ASIO officers one of whom, RFB Wake, formerly a CIS officer, was particularly disliked and distrusted by the defence and intelligence establishment. See Letter, Shedden to Chilton, 13 June 1949: AA (ACT) CRS A5954/1, Department of Defence, Sir Frederick Shedden Papers, Box 1795/1. Wake may well have come under further suspicion as a result of the 1953 discovery at Chandler's home. A very disgruntled Wake later fed Evatt information which fuelled Evatt's suspicions about the genesis and uses

about its own security in part because during 1950 the newly-established ASIO's major task had been the investigation of claims by its parent organization, the British intelligence agency MI5, that a Soviet espionage ring involving the CPA had operated in the Department of External Affairs in Canberra in the period 1945-1948. It was these claims which led directly to the establishment of ASIO.[94] This top secret investigation, carried out in conjunction with MI5, had been code-named "The Case". In June and July 1953, as a part of the continuing investigation of "The Case", ASIO had obtained a confession from a woman who had worked in HV Evatt's Sydney office in 1944-1945 that she had passed secret government information to a CPA officer, WS Clayton, who was regarded as Chandler's predecessor as the CPA's chief security officer in the 1940s.[95]

During the raid at his home an attempt was made to have Rex Chiplin admit to authorship of the article. A copy of the June 1953 issue of the *Communist Review* was found in Chiplin's papers. He was shown the article by "RC" and asked if the initials referred to him. Chiplin, who already had some experience in dealing with prying into his affairs by Commonwealth security officers in the context of the leak to *Tribune* of the proposed Australia-US FCN treaty in 1951, said that he did not have to answer the question. When he was asked to agree that he was not the author, he gave the same response.[96]

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of the Petrov defection: File, "Phil's Friend", HV Evatt Papers, The Flinders University of South Australia. For one account of this see Manne, *The Petrov Affairs: Politics and Espionage* p242. During the Second World War Mr Justice Reed had conducted an inquiry into claims that Wake was unfit to hold an Army commission. Reed seems to have cleared Wake.

94 The UK Prime Minister Attlee had sent the Director-General of MI5, Sir Percy Sillitoe, to Australia in early 1948 to inform Prime Minister Chifley and to institute an investigation of the leak. Letter, Shedden to Burton, 7 April 1948: AA (ACT) CRS A6691/1 Department of External Affairs Central Office Confidential Personnel Files, AS3/1 Sect 6. See also the literature cited in fn7 and Sillitoe, *Cloak Without Dagger* (1955) ****publication details**** and Statement by Evatt, Aust, Parl, *Debates* HR (1955) Vol H of R 8 at 1704-1705, 1716.

95 Statement of Frances Bernie, 8 September 1954: AA (ACT) CRS A6215/1, Royal Commission on Espionage Commissioner Philp's Files, Copies of Reference Material, Item 5; Letter, Spry to Menzies, 31 July 1953. A6119/XR1, Item 19; Aust, Royal Commission on Espionage, *Report* (1955), paras 418-427, 457 and 543.

96 It is possible that Chiplin had been alerted to the raids occurring elsewhere in Sydney. The ASIO and CIS officers had originally gone to a house in Ryde only to ascertain that Chiplin had vacated the premises the previous Saturday. It was necessary to ascertain Chiplin's new address, obtain a fresh search warrant

At the end of each raid the ASIO and CIS officers involved returned to the CIS regional office in Sydney with the seized documents and prepared statements detailing what had occurred during the raids. In the case of the raid at the Chandler residence several versions of the list of items seized were to be prepared over the next year. The earlier lists were very generalised. Before Watson and Redford left the Chandler home they made a rather ham-fisted attempt to have Chandler admit that the documents containing secret government information were included in the items seized, but without actually confronting Chandler specifically with their discovery of the sensitive items.[97]

On 20 July, Galleghan reported on the raids to Whitrod.[98] The next day Bell sent Ewens (who was continuing to act as Solicitor-General in Bailey's absence) a report on the raids and the continuing examination of the seized documents. Apart from the items found at Chandler's home, nothing of significance had been located and, after all the material had been copied for ASIO's files, most of the seized items were soon returned. Ewens consulted Spicer and instructed Bell to obtain Senior Counsel's opinion on the evidence obtained in the raids. Bell had already retained JW Shand QC to advise the Commonwealth. Bell informed Ewens that Shand's opinion was that, as against Chandler, Bone and Ogston, there was a *prima facie* case of infringement of s24D(1), the seditious intention being that specified in para (a) of s24A(1). Shand could find no evidence to support a charge against Chiplin.[99] Ewens reported to Spicer who asked for written advice

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and execute it at the substitute address by which time three hours had elapsed since the co-ordinated raids had commenced. The officer who executed the fresh warrant considered that Chiplin did not have any warning of the raid. Statement of FV Stewart, 17 July 1953: A432/1, Item 1953/734. In the ASIO files there is some equivocal evidence that the CPA was tipped off about the raids, but ASIO's surveillance reports indicated that the CPA leadership had acknowledged that the raids took the party by surprise. See, for example, ASIO Report, 5691, 7 August 1953: A6122/16, Item 1004.

97 Statement of Watson, 3 December 1954: A6119/XR1, Item 77.

98 Letter, Galleghan to Whitrod, 20 July 1953: A432/1, Item 1953/734. Whitrod reported to Ewens as Acting Secretary of the Attorney-General's Department. Letter, Whitrod to Ewens, 22 July 1953: A432/1, Item 1953/734.

99 During the raid at 40 Market Street, Sydney the Commonwealth officers obtained a proof copy of the offending *Communist Review* article containing the initials "NB" who was identified by ASIO and the CIS as a CPA office worker. Consideration was given to charging "NB" with writing, printing and publishing seditious words and draft Informations were prepared. Letter, Bennett to Bell, 23 July 1953: A432/1, Item 53/734. Shand also raised for the Deputy Crown Solicitor's consideration the possibility of charging "NB" with being knowingly

from Shand. Bell's deputy in Sydney, AG Bennett, sent a detailed report to Bell expressing the opinion that there was a *prima facie* case against Chandler, Ogston and Bone.[100] In a separate report made on the same day Bennett cryptically reported to Bell that "[t]he case is presenting some bizarre features concerning which I will not mention in this little note".[101] Bennett conferred with Shand and his junior HJH Henchman[102] and they settled a joint written opinion which advised that the article expressed each of the seditious intentions specified in paragraphs (a), (b) and (g) of s24A(1) of the Act.[103] Bennett's report and the Shand/Henchman opinion were given to Ewens and Spicer on 26 July. The Shand/Henchman opinion came to the same conclusion as that supplied by Ewens, but with only marginally more analysis of the statutory provisions. This is a matter of some curiosity particularly since Henchman acted regularly for the Commonwealth and had been briefed in a variety of prosecutions in the CPA's illegal period in 1940-1942 and, more recently, in the Gilbert Burns, Sharkey and WF Burns sedition prosecutions. The joint opinion contained the bald assertion that "no valid defence could be established by a defendant under s24A(2)". Shand and Henchman advised that it was preferable for the charges to be heard summarily.[104]

Ewens, manifesting continuing confidence in the strength and gravity of the case against Chandler, Ogston and Bone, told Spicer that, if the case was prosecuted summarily, it was "unlikely that any penalty higher than 12 [months] would be imposed on the three people concerned" and advised that no objection should be taken to the charges being heard summarily.[105]

Spicer agreed with his officers' and counsel's advice and on 27 July, as directed by Spicer, Ewens instructed Bell to initiate the prosecutions. Since

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concerned in an offence contrary to s5 of the *Crimes Act* 1914 (Cth). The worker was interviewed later in July 1953, but did not admit initialling the galley proof. Handwriting experts were consulted, but on 3 August 1953 Ewens instructed Bennett not to take proceedings against "NB": Memo, Bell to Ewens, 30 July 1953; A432/1, Item 53/734; Statement of Wilks, undated [1953]; SP 782, Box 35A.

100 Letter, Bennett to Bell, 23 July 1953. A432/1, Item 53/734.

101 As above.

102 Hereward John Humfry Henchman (1904-) Acting Judge of the Supreme Court of New South Wales 1966-1967, Judge of the District Court of New South Wales (1968-1974). See (1968) 41 *ALJ* 445.

103 Shand and Henchman, Joint Memorandum for the Crown Solicitor, 23 July 1953: A432/1, Item 53/734.

104 As above.

105 Ewens to Spicer, 24 July 1953: A432/1, Item 53/734.

the Government wanted to generate maximum publicity for its struggle against the CPA, Bennett was also told to notify Ewens of the return date and place of hearing of the Summonses before they were served so that consideration could be given to the utility of issuing a press statement about the cases at the time the Summonses were served. CIS officer Sweeny, who had been the informant in the 1950 sedition prosecution of WF Burns, swore out the Informations after Spicer had given his permission as required by s24E(1) of the Act.[106]

There is nothing in the publicly accessible archival material which suggests that Spicer gave any independent consideration to the merits of the advice tendered to him that those responsible for the offending article should be prosecuted for sedition. Spicer's apparent willingness to accept unhesitatingly whatever advice was proffered to him is reinforced by evidence of blatant inconsistency in his analysis of the law of sedition. Two years before the Chandler, Ogston and Bone cases, Spicer had been asked by one of his ministerial colleagues to prosecute the pro-communist *Northern Standard* newspaper in Darwin for sedition. On that occasion Spicer told his colleague that although certain articles in the newspaper were vituperative and unfair they did "not extend so far beyond the limits of political criticism as to constitute an incitement to repudiation of the Government's legal authority as such, and they cannot, therefore, be said to bear the grave legal character of sedition."[107] That assessment could have been applied with equal if not greater force to "The 'Democratic' Monarchy".

Colonel Spry's role in the 1953 cases points to the extent of his anti-communist enthusiasms and to the deep-seated ambiguity of the secret operating Directive he had received from Menzies in July 1950. As Director-General, Spry enjoyed a very close working relationship with Menzies both because the ASIO Directive gave him access at all times to the Prime Minister and also because at the personal level they shared much in terms of their social background in Melbourne, exemplified in part in their dealings with Herring CJ, and the conservatives' ideological dread of communism. In accordance with the Directive, Spry had consulted Menzies regularly on a range of security-related issues and had kept the Prime

106 Ewens to Bell, 27 July 1953: A432/1, Item 53/734.

107 Letter, Spicer to Anthony: A432/1, Item 1950/1857. Bailey had drafted this letter for Spicer. The only time Spicer seems to have hesitated was in 1953 when he told Ewens that "he was not happy" taking investigative action in respect of the offending article.

Minister closely informed about the investigation of "The Case". On 31 July 1953, soon after the Prime Minister's return from the Coronation, Spry reported to Menzies on the discovery of the secret documents at Chandler's home, a development which Spry characterised as pertaining to the ongoing investigation of "The Case".[108] In mid-1953 several officers of the Department of External Affairs were under suspicion of passing information to the Soviet Embassy in the period after 1951 especially since, as Spry told Menzies when reporting on the find at Chandler's home, some of these officers were known to be meeting with the Third Secretary and Consul at the Soviet Embassy in Canberra, Vladimir Mikhailovich Petrov.[109]

THE PUBLIC AND CPA REACTIONS

The raids were front page news in Sydney the following morning and were given lesser media prominence elsewhere in Australia. According to *The Sydney Morning Herald*, a high government official had acknowledged, as the archival evidence shows was unquestionably the fact, that the raids had been planned fours weeks earlier and were designed to secure evidence of deliberate attempts to foment rolling waterfront strikes and of alleged CPA efforts to frustrate the Commonwealth Court of Conciliation and Arbitration in its conduct of secret ballots in union elections. The article in the *Communist Review* was not the primary focus of the newspaper story on the raids.[110] Except for the CPA, which protested at what it charged was an abuse of power that infringed its free speech rights, the fact that the raids were designed to uncover evidence that was entirely unrelated to the *Communist Review* article seems to have been treated as quite

108 Letter, Spry to Menzies, 31 July 1953: A6119 XR1, Item 19. Brigadier Spry declined my request for information and comment.

109 For a first-hand account by one government official who was wrongly suspected of disloyalty and whose career was indelibly stamped by the Petrov defection, see Throssell, *My Father's Son* (Mandarin Australia, Port Melbourne, 1989). One DEA officer who had been seen with Petrov had been suspended from duty on 20 July 1953 ostensibly for reasons that had to do with the officer's "efficiency" and medical fitness, but in reality it was the officer's contacts with Petrov that led to his suspension: A6691/1, Item AS3/1 Sec 7. More than 35 years later ASIO was, it seems, still resisting attempts to restore the officer's reputation: Oakes, "Non-Spy Comes in from the Cold", *The Bulletin*, 22 May 1990.

110 *The Sydney Morning Herald*, 18 July 1953; see also eg *The Age*, 18 July 1953; *The Bulletin*, 22 July 1953. I have not been able to locate a formal press release. It is unlikely that there was one. However, it is clear enough from (a) the evidence of a plan to brief the media and, (b) the nature of the newspaper reports that Ewens, or someone deputised by him, gave the news media a detailed background briefing at the time the summonses were issued and served.

unremarkable. It was open season on the CPA.[111] In Sydney, *The Sunday Herald* columnist "Onlooker" found it difficult to believe that the *Communist Review* article had anything to do with the raids. According to "Onlooker", the article was a "cheap and half-hearted jibe", but it was certainly not unprecedented in terms of criticism of the Monarchy. As "Onlooker" observed, it had not even advocated the establishment of an Australian republic.[112] The mainstream press had no sympathy for the CPA and nobody seems to have questioned the propriety of the raids. *The Bulletin* described the CPA as "a cancer in the heart of the community, the agent of the enemy who is killing Australians in Korea."[113]

Members of the Central Committee of the CPA met in Sydney on 20 July to discuss the raids. According to the ASIO surveillance reports of the meeting, EF Hill,[114] the feisty Secretary of the CPA in Victoria and a member of the Victorian Bar, "appeared to be in a vicious mood and was overheard discussing Mr Whitrod in an extremely critical fashion."[115] The CPA's intensified security measures in the aftermath of the raids were of limited efficacy because of ASIO's successful penetration of the inner councils of the CPA and unions like the Waterside Workers Federation (WWF). ASIO was able to monitor every step in the CPA's decision-making processes and operatives in New South Wales reported that at a meeting of the CPA National Fraction of the WWF on Monday, 13 July 1953 instructions were given to a WWF official to clean up the union's federal office of all evidence of the rolling waterfront strikes and other CPA tactics.[116] The CPA leadership, apprehending that the Menzies Government had embarked on a fresh offensive to remove the leadership, was concerned that further raids would occur and was especially anxious to secure its membership records in order to guard against the raiding of

111 Spicer denied that the raids were an abuse of power or that the press had been forewarned of the raids: Letter, Walsham to Spicer, 20 July 1953; Letter, Spicer to Walsham, 29 July 1953: A6122/16, Item 1004.

112 *The Sunday Herald*, 19 July 1953.

113 *The Bulletin*, 22 July 1953. On 27 July 1953 North Korean, Chinese and UN commanders concluded an armistice at Panmunjom: O'Neill, *Australia in the Korean War 1950-1953 - Vol 1 : Strategy and Diplomacy*.

114 Edward Fowler ("Ted") Hill (1915-1988). See the profile by Walker, "Keeping the Faith" (1986) 60 *LIJ* 1070. Such was and is the grip of ASIO anti-communist orthodoxy that, as late as 1988, one former Director-General of ASIO could invest Hill with so dangerous a persona as to describe him as a "lifetime revolutionary and motivator of the tiny and conspiratorial CPA [Marxist-Leninist].": Barnett, *Tale of the Scorpion* p42.

115 ASIO Report 5581, 27 July 1953: A6122/16, Item 1004.

116 As above.

members' homes. ASIO surveillance disclosed that Chandler had assured the party leadership that the raids did not find any important party material. Within the CPA leadership there was suspicion that the raids were carried out in order to plant material on the party so that it could be discredited.[117]

The communist press condemned the raids as the work of a fascist government.[118] In August EF Hill published a pamphlet, *Conspiracy Against the Australian People*, which denounced the Menzies Government in inflammatory terms and counselled CPA members and sympathisers in ways of safeguarding themselves from further government harassment and intimidation. These anti-government outpourings of the CPA press were reminders of how uninflammatory the *Communist Review* article was and, in the case of Hill's pamphlet, almost led to him being prosecuted for sedition. Hill called Menzies a conspirator, a Hitler lover, a lover of American fascism and said that the raids on 17 July were designed to support "the crime of the Menzies Government ...a framed up charge of conspiracy against the communists."[119] Whitrod sent Hill's pamphlet to the Attorney-General's Department for consideration and on this occasion a senior departmental officer advised, without ascribing any reasons, that nothing in the pamphlet provided a basis for a prosecution.[120] The ASIO

117 ASIO Reports 5582, 27 July 1953 and 5646, 4 August 1953: as above

118 See *Tribune*, 22 July 1953, 29 July 1953, 5 August 1953, 12 August 1953, 19 August 1953, 26 August 1953 and 2 September 1953.

119 *Conspiracy Against the Australian People* (CPA pamphlet, August 1953) p9.

120 Letter, Whitrod to Ewens, 11 August 1953; Memo, Hutchinson to Ewens, 14 August 1953: A432/1, Item 53/2483. On this occasion Ewens seems to have accepted the Department's assessment without comment. The likely explanation for this outcome is that it was not thought politically expedient to prosecute Hill who was himself subject to constant ASIO surveillance: A6122/1, Items 6-12, 209-215, 344-346. In the ongoing investigation of the *Ballot Riggers at Work* pamphlet Colonel Spry considered that to the extent that CPA announcements of Hill's pamphlet referred to the promotional drive concerning *Ballot Riggers at Work*, they afforded evidence that the CPA possessed full knowledge of *Ballot Riggers at Work*: Letter, NSW State Executive, 3 August 1953; Spry, notation on memorandum, 14 December 1953: A6122/1, Item 1004. Ted Hill was never one to understate the case against the evils of capitalism. Late in 1949 he attacked the Chifley Government as reactionary and repressive. He denounced the sedition prosecution of Sharkey and the trial judge, Dwyer J, he accused Calwell (see fn 122 below) of carrying on a violent campaign of race hatred, he accused the government of national betrayal, and he described ASIO as a Gestapo: Hill, "Defend Democratic Rights" *Communist Review*, December 1949, 356; Hill, *Reflections on Communism in Australia* (Communist Party of Australia, Melbourne 1983). Hill's brother, JF Hill, was one of the prime suspects in "The Case": AA (ACT) CRS A6691/1, Item

surveillance records on the CPA's reaction to the raids reveal that, despite the party's display of public indignation, its leadership, including Hill who was "directing all the legal work", was seriously concerned that Chandler and Ogston would be "fitted in the Local Court" and that Chandler would receive a prison sentence of six months.[121]

On 1 August 1953 *The Sydney Morning Herald* published an item referring to the sedition charges brought against the three men. At this point the prosecution of Chandler, Ogston and Bone took on a decidedly bizarre quality and demonstrated a serious contradiction in the law of sedition. The offending *Communist Review* article, the full seditious text of which was set out in the Informations charging Chandler, Ogston and Bone with the offences against the Act, was published in its entirety in *The Sydney Morning Herald.* This was too much for the Deputy Leader of the Opposition, AA Calwell,[122] who wrote to Spicer a week later inquiring whether the government intended also to bring a sedition prosecution against the persons responsible for publication of the article in *The Sydney Morning Herald.* Calwell, a committed anti-communist, suggested that, unless the Government was prepared to withstand the charge that the case was a political stunt, it should prosecute "all persons and interests that have reprinted the article". In terms of theory, given the expansive interpretation which both the High Court and the government applied to the sedition provisions, there was much to be said for this demand if consistent law enforcement was to be a hallmark of the government.[123]

Spicer's reply to Calwell was brief and, predictably, it avoided the substance of Calwell's criticism. Spicer simply recited that at the time of publication by *The Sydney Morning Herald* the Informations had been filed in Court and the Summonses had been served on each of the defendants. Proceedings against *The Sydney Morning Herald* for publishing "The 'Democratic' Monarchy" in full could not be justified since the newspaper

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AS3/2 and A6119/XR1, Items 91-93; Aust, Royal Commision on Espionage, *Report* (1955), paras 130, 131, 142, 150, 151, 219, 402.

121 ASIO Reports 5652, 6 August 1953 and 5691, 7 August 1953: A6122/16, Item 1004.

122 Arthur Augustus Calwell (1896-1973) Deputy Leader of the Opposition (1951-1960), Leader of the Opposition (1960-1967); Calwell, "Arthur Calwell and his Times" *The Australasian Catholic Record*, July 1988, 279.

123 Letter, Calwell to Spicer, 8 August 1953: A432/1, Item 2506.

had done no more than report the case and faithful and fair reports of judicial proceedings were privileged.[124]

So, from the situation where "RC"'s article was read, at the most, by several thousand of the party faithful and a security service avid for evidence of sedition, subversion and sabotage, the ludicrous position was reached where the article, obnoxious to the Commonwealth for the serious threat it allegedly posed to public safety, was now capable of being read by hundreds of thousands of the Queen's subjects in New South Wales and elsewhere in the nation with no apparent threat to public tranquility thereby, and no aggravation of any offence already given to the Crown.

The CPA leadership considered implementing a public campaign for the prosecution of *The Sydney Morning Herald* and other papers for sedition in respect of material they published criticising the Coronation. CPA President Dixon recognised that such a campaign was wrong as a matter of principle and managed to discourage this course because it would be entirely inconsistent with the CPA's vigorous campaign for the repeal of the sedition and other political offence provisions of the *Crimes Act* 1914 (Cth).[125]

THE DECISION TO PROSECUTE

Why did the Commonwealth persist in the sedition prosecution against Chandler, Ogston and Bone? After the raids on 17 July it was still open to the Commonwealth to drop the sedition investigation just as it had done on Bailey's advice in other sedition investigations in the previous two years. Despite the opinions given by Ewens, Shand and Henchman, it cannot be seriously contended that the kind of highly unpopular criticism of the Monarchy which the *Communist Review* article contained was ever intended to be caught by the sedition provisions of the Act. But, given the inherent political flavour of the offence of sedition and the successful outcomes of the sedition prosecutions in 1948-1950, the Government's departure from Bailey's less enthusiastic approach to the sedition provisions

124 Letter, Spicer to Calwell, September 1953: A432/1, Item 2506. Calwell might have been accused of protesting just a little too loudly since he was a member of the Chifley Government which in 1948 and 1949 respectively successfully prosecuted Burns, Sharkey and Healy for sedition. The Chifley Government did not consider prosecuting any of the newspapers or radio stations which reported verbatim the statements made by Burns, Sharkey and Healy both before and after their sedition prosecutions were instituted. See Maher, "The Use and Abuse of Sedition" (1992) 14 *Syd L Rev* 287.

125 ASIO Memorandum 5548, 27 August 1953: A6122/16, Item 1004.

of the Act should not be a source of surprise. The entire history of enforcement of sedition laws has been a succession of selective prosecutions of political dissenters and misfits for partisan political purposes. The prosecution of Gilbert Burns in 1948 had been instituted in order to gain political advantage and contrary to unanimous legal advice, including advice from Bailey. Similarly, the prosecutions of Sharkey and Healy the following year had less to do with protecting the peace, order and good government of the Commonwealth than with the increasingly desperate efforts of the Chifley Government in an election year to convince the Australian public and the US and UK Governments that it was serious in its efforts at countering the internal communist menace.[126] The crime of sedition had become obsolescent in the United Kingdom. There had been very few sedition prosecutions there in the first half of the twentieth century and the few reported cases involved colonial prosecutions.[127] For example, in 1940 in *R v Wallace-Johnson* the Privy Council had upheld a sedition conviction in a case from the Gold Coast in which the accused had denounced European colonisation of Africa.[128] A consideration of the language used by Wallace-Johnson reveals that he was punished not because anything he said actually risked the continuation of colonial rule, but rather simply because he was *advocating a particular idea* that was unpalatable to his colonial masters, namely, the end of colonial rule. In Australia in 1953, as in 1948-1949, the political imperatives of state anti-communist action clearly overwhelmed any potential countervailing factors such as the prospect of Bailey's advising against prosecution.

A complete answer to the question of how and why the 1953 sedition case was pursued as far and as vigorously as it was cannot be offered whilst significant portions of the archival material from the Attorney-General's Department, and especially ASIO, remain exempt from public access under the *Archives Act* 1983 (Cth).[129] However, the available archival and other evidence demonstrates that there was much more to the prosecution than

126 See Maher, "The Use and Abuse of Sedition" (1992) 14 *Syd L Rev* 287.

127 *R v Aldred* (1909) 22 Cox CC 1.

128 [1940] AC 231.

129 For details of ASIO's (so far unsuccessful) campaign to be released from the ambit of the *Archives Act* 1983 (Cth), see Aust, Parl, Parliamentary Joint Committee on the Australian Security Intelligence Organisation, *ASIO and the Archives Act: The Effect on ASIO of the Operation of the Access Provisions of the Archives Act* (PP 68,1992); Aust, Inspector-General of Intelligence and Security, *Complaints by Dr G Pemberton and Mr D McKnight Against ASIO* (September 1992); Cain, "The Right to Know: ASIO, Historians and the Australian Parliament" (1993) 8 *Intell'ce & Nat'al Sec'y* 87.

simply avenging the offence given to the Royal family at the height of the Coronation euphoria.[130] The government's legal advice, such as it was, supported a prosecution and the government could claim, sanctimoniously, that it was doing no more than enforcing the law. But, more importantly, the prosecution offered the prospect of damaging the CPA's capacity to mount clandestine operations by removing Chandler, albeit temporarily, from his important role as the chief CPA security official.[131] It was an extension of the government's continuing comprehensive measures taken against the CPA in response to its disruptive industrial activities.[132] In particular, it assuaged the concerns of the Overseas Shipping Representatives Association[133]and it enabled the government to respond to press criticism[134] (and privately expressed judicial concern about attacks on the system of court-controlled ballots[135]) that it was not taking a hard

130 It was later suggested that there would not have been a prosecution if Menzies had been in the country when the decision to prosecute was being considered: *The Sydney Morning Herald*, 21 September 1953. The anonymous newspaper commentator was being wise after the event. There is no reason at all to suppose that Spicer, Bailey, Ewens, or Spry would have embarked on the prosecution if Menzies was opposed to it. Menzies returned to Australia from his Coronation trip on 23 July 1953. I have not located any surviving relevant cable to or from Menzies during his absence from Australia to attend the Coronation.

131 It has been said that "After July 1953 there was probably no single contemporary relationship which interested ASIO more deeply than that between Chandler and the MVD.": Manne, *The Petrov Affair: Politics and Espionage* p199. Manne is one of the select band who have been favoured with the personal recollections of Brigadier Spry, Manne, *The Petrov Affair: Politics and Espionage* xiii. If Chandler was passing information to the Soviet Embassy, his sloppy attitude to security, as exemplified in the discovery of the secret documents at his home, suggests that the CPA's security and intelligence apparatus was badly flawed.

132 See Louis, "'Operation Alien' and the Cold War in Australia, 1950-1953" *Labour History*, No 62, May 1992, 1.

133 *The Sydney Morning Herald*, 18 July 1953.

134 For one example of a contemporary claim that the Attorney-General's Department was too timid to take any action against the CPA in respect of the attack on court-controlled union elections see "Minister Hits Reds Ballot Smear", *The Herald*, 17 June 1953; "Govt 'Timidity' on Court Ballot Smear", *The Sun*, 1 July 1953. These criticisms were not well received by a government that was easily wounded by any accusation that it was not taking a sufficiently tough anti-communist stand. See Memo, Ewens to Spicer, 2 July 1953: A432/16, Item 1004.

135 See Letter, Kelly to Spicer, 20 July 1953: A432/16, Item 1004. Chief Judge Kelly of the Commonwealth Court of Conciliation and Arbitration urged Spicer to prosecute those responsible for two documents sent to him by mail and to devise some method, by public statements or otherwise, to vindicate the

enough line against the CPA. It also improved the Government's anti-communist credentials vis à vis what it portrayed as the ALP's suspiciously ambivalent attitude to communism and provided yet another vehicle for official anti-communist propaganda.[136] In this latter respect, it is notable that Spry had been pressing Menzies to implement an extensive propaganda campaign designed to expose the CPA's real subversive purposes.[137] The government may also have considered that with Chandler behind bars there were enhanced prospects both of exposing the true extent of communist espionage and of solving "The Case". Finally, given the state of widespread public animosity to communism, it was highly unlikely that the government would attract any politically damaging criticism for its resolve to discipline the CPA in a sedition prosecution. Hill advanced the interpretation that because the raids had failed to yield any evidence of a communist conspiracy in relation to the waterfront strikes or the court-controlled union elections, the Menzies Government was forced to do something to justify the raids.[138]

Bone was charged with printing seditious words, Ogston with publishing seditious words and Chandler with both printing and publishing seditious words, all contrary to s24D(1) of the Act. The Commonwealth's determination was unremitting. The prosecution had prepared its case for weeks, but the government's advisers considered that a period of 10 days was adequate for the defence cases to be prepared. Because the Commonwealth regarded the alleged offences as serious, Bell told Ewens

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authority of the court-controlled ballots legislation, the judges of the Commonwealth Court of Conciliation and Arbitration and the Commonwealth Electoral Officer. Spicer told Kelly that the identity of the person or persons responsible for publication of the pamphlets was not known despite inquiries having been made in that regard and that he was consulting with the Minister for Labor and National Service about the possibility of making a public statement dealing with the whole situation: Letter, Spicer to Kelly, 31 July 1953: A432/16, Item 1004.

136 According to the US *Chargé d'Affaires* in Canberra, who was close to the Australian security establishment, the raids on 17 July 1953 and the ensuing prosecutions marked the opening of a new phase of action against communist activity: National Archives, Washington, DC, RG 59, Department of State, Byrd to State Department, Despatch No 38, 4 August 1958, 743.001/8-453. On the *Chargé's* dealings with ASIO see Byrd to State Department, Despatch No 453, 23 March 1953, 743.001/3-2353.

137 See, for example, Letter, Spry to Brown, 11 July 1952: AA (ACT) A1209/23, Item 57/4892.

138 "Menzies Plans New Attack on Democracy", *Communist Review*, December 1953, 358.

that he was intending to instruct counsel to oppose vigorously any application by the defendants for an adjournment. Ewens agreed.[139]

In the lead up to the hearing, everything on the prosecution side seemed to have been thoroughly prepared. However, ASIO had one potentially embarrassing problem. One of its officers, EO Redford, who had participated in the raid on Chandler's home, was expected to give evidence on behalf of the informant. Shand was asked by ASIO

> to ensure that the officer will not be required to answer any questions relating to a certain document which was found at the home of one of the defendants or as to the activities, organization and so on of ASIO.[140]

Bell sent Ewens a memorandum recording ASIO's concerns and commenting on the law of Crown privilege. Shand advised that the Commonwealth could object to any such questions concerning ASIO's activities and organization on the ground of relevance, that a separate overriding public interest objection was also available, and that an appropriate certificate embodying that objection should be signed in advance by the Prime Minister to be available for counsel at the hearing in case it was needed.[141]

The defence of the charges had to be prepared in a political setting in which strident anti-communism was a powerful community force, and in a legal context in which the Commonwealth Constitution lacked any entrenched protection of the right to freedom of expression and in which only a very small group of lawyers (many of them CPA members) was prepared to act in cases involving the CPA.[142] Forty years later the High Court in

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139 Memorandum, Bell to Ewens, 6 August 1953: A432/1, Item 1953/734.

140 Memorandum, Bell to Ewens, 8 August 1953, and attached Prime Minister's certificate: A432/1, Item 1953/734.

141 Memorandum, as above. At the time save for the Privy Council's decision in *Robinson v South Australia* [1931] AC 704, the informant was in a strong position to prevail if there was any argument about a claim of Crown privilege. Since then, of course, the situation has changed. See *Sankey v Whitlam* (1977) 142 CLR 1 and *Alister v R* (1983) 154 CLR 404.

142 Because he was a communist, Healy had difficulty in obtaining legal representation in Perth in 1949. However, in the end his decision to represent himself was a deliberate strategic choice: Interview, Healy, 29 November 1987. To some extent it suited the CPA to select counsel from its party ranks, because it ensured sympathetic legal representation: Interview, Harold Rich, 13 August 1989. For the most part the CPA counsel resisted the temptation to use the

Australian Capital Television Pty Ltd v The Commonwealth [No 2][143] and *Nationwide News Pty Ltd v Wills*[144] has discerned an *implied* constitutional right to free speech. The High Court has indicated, in terms which, so far at least, provide little detailed guidance, that such a right would not preclude the application of laws relating to contempt of court, sedition and defamation. It remains to be seen what kind of sedition offence would be constitutionally permissible. If the newly discovered implied constitutional right of free speech is to give substantive protection to the expression of unpopular views and the activities of minority groups, it is difficult to see how any sedition statute applied to the facts of the 1953 case could possibly withstand a constitutional attack.[145] The lack of a constitutionally protected right of free speech did not, however, deter counsel acting for Chandler, Ogston and Bone from tenaciously fighting the prosecution case on the basis that it involved an eggregious attack on freedom of expression. Their resolute defence of the three communists deserves to be long remembered for its fearless advocacy.[146]

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court processes for the party's propaganda purposes. This was in marked contrast to the aggressive defence tactics of counsel representing the leaders of the Communist Party of the United States in *US v Dennis* 341 US 494 (1951); *Sacher v US* 343 US 1 (1952); Dorsen & Friedman, *Disorder in the Court: Report of the Association of the Bar of the City of New York Special Commitee on Courtroom Conduct* (Pantheon Books, New York 1973) p49.

143 (1992) 177 CLR 106.

144 (1992) 177 CLR 1.

145 The High Court has indicated that certain broad categories of laws, including sedition, can be made without infringing the newly pronounced constitutional right: *Australian Capital Television Pty Ltd v The Commonwealth [No 2]* per Brennan J at 149; *Nationwide News Pty Ltd v Wills* per Brennan J at 39, 51-52, per Deane and Toohey JJ at 77). However, since the term "sedition" is used to connote both communications which may involve a threat to public order *and* communications (such as those in the 1953 case) which clearly do not pose a threat to public order, the court will have to delineate the extent to which the legislature is justified in punishing dissident speech. There seems to be no basis on which an Australian court could uphold a law which purported to punish libels on government *per se*. See also in this regard *Hector v Attorney-General of Antigua and Barbuda* [1990] 2 AC 312; *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534.

146 In the past resistance to the introduction of a constitutionally entrenched bill of rights for Australia has pointed to the fact that in 1951 the *absence* of a bill of rights did not prevent the High Court from invalidating the *Communist Party Dissolution Act* 1950 (Cth) and that in the same year the *existence* of a bill of rights did not prevent the Supreme Court of the United States from upholding the convictions of the leaders of the Communist Party of the United States for *conspiracy to advocate the overthrow of government*: *Dennis v US* 341 US 494 (1951). This argument has been overdone. It (a) ignores the significantly

A preliminary question of defence strategy which arises is this: why did the defendants agree to a summary hearing rather than electing under s24E of the Act to undergo a committal hearing and preserve their right to trial by jury? In 1948 Gilbert Burns was tried summarily and was convicted. The following year LL Sharkey was tried before a judge and jury and was convicted. Sharkey was unlucky to draw a trial judge, Mr Justice FA Dwyer, who could scarcely conceal his contempt for the accused and all he stood for. This was confirmed by the trenchant terms of the judge's sentencing speech and the draconian maximum sentence of three years imprisonment which he imposed on Sharkey.[147] There was, however, a contrary indication in the case of Kevin Healy who in late 1949 in Perth had been tried on a charge of sedition before a judge and jury and had been acquitted. Healy, who represented himself with great distinction, conducted his defence on the basis that the prosecution was a contrived political stunt and made an eloquent plea to the jury to uphold his right to free speech.[148] The very experienced counsel advising the three defendants in the 1953 cases seem to have considered, presciently as events turned out, that, on balance, their best chance for having the charges thrown out was to be heard before a magistrate. For the CPA the lesson of Sharkey's case was quickly recalled and ASIO's constant telephone interception and electronic and other surveillance of the CPA disclosed that in 1953 the party leadership was intent, "at all costs" on avoiding having the Chandler, Ogston and Bone cases tried in the Supreme Court.[149]

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different path which the Supreme Court of the United States took in and after *Yates v US* 354 US 298 (1957) and (b) assumes, contrary to the experience of Australian communists - experience which is being confirmed by an emerging body of archival evidence - that Australian communists were not noticeably impeded in the pursuit of their political programme following invalidation of the 1951 Act.

147 Francis Aloysius Dwyer (1902-1953) Judge of the Supreme Court of New South Wales, 1948-1953. See the notice (1948) 21 *ALJ* 471 and obituary (1953) 27 *ALJ* 521 and Maher, "Tales of the Overt and the Covert: Judges and Politicsin Early Cold War Australia" (1993) 21 *Fed L Rev* 151. For the judge's sentencing remarks, see *Transcript, R v Sharkey*, 17 October 1949: A432/1, Item 1949/308.

148 AA (WA) PP352/1, Attorney-General's Department Deputy Commonwealth Crown Solicitor WA Branch Correspondence Files 1944-1969, Item WA 4164. KM Healy Papers, copies in the author's possession: Interview, Healy, 29 November 1987.

149 ASIO Report No 5691, 7 August 1953: A6122/16, Item 1004.

THE HEARINGS

All three cases were called on for hearing before Mr MS Meagher SM, in the Sydney Court of Petty Sessions on 10 August 1953. Harold Rich, who appeared for Chandler, applied for an adjournment so that he could brief senior counsel. Counsel for the other defendants also applied for an adjournment. Over Shand's strenuously argued objection, the three cases were adjourned for eight days. Shand informed the court that the Informant's case was that, in respect of all three Defendants, it would be alleged that "The 'Democratic' Monarchy" was expressive of the seditious intentions specified in each of paragraphs (a), (b), (c) and (g) of s24A(1) of the Act. If the prosecution was serious, this was one of the most heinous and dangerous publications in Australian history.

On 18 August 1953 all three cases were called on for hearing before the same Magistrate and, after some procedural skirmishing about the order in which the cases should be heard, the Magistrate ruled that he would commence with the case against Ogston. FW Paterson of the Queensland Bar instructed by Rich appeared for Ogston [150] Paterson, the only CPA-endorsed candidate to be elected to an Australian parliament, had appeared on behalf of the CPA for more than twenty years and had on more than one occasion himself been charged with public order offences including sedition.[151] Shand and Henchman appeared for the Informant. Ogston pleaded not guilty and the Magistrate proceeded to hear the charge summarily. To appreciate fully the anachronistic quality of the offence of sedition, the ruthlessness of the Commonwealth Government in pursuing the three cases, and the limited scope which the law allowed defence counsel to meet the charges, it is necessary to devote some space to a detailed consideration of the evidence and submissions.

Shand led evidence from CIS officer EA Stevens which was intended to establish that Ogston had admitted to being the publisher of the June 1953 issue of *The Communist Review* and that a copy of the offending issue had been found during the search of Ogston's home. The offending article was tendered and read out in full in open court. Paterson's cross-examination

150 For details of Paterson's unique career see Maher, "Tales of the Overt and the Covert: Judges and Politics in Early Cold War Australia" (1993) 21 *Fed L Rev* 151.

151 He had been acquitted on a charge of sedition in Queensland in 1930 and had been convicted of an offence against the National Security Regulations in 1940 during the CPA's illegal period. Paterson was the subject of CIS/ASIO surveillance: A8911/1, Items 155-158; A6119/64, Items [509] and [510].

probed Stevens's recollection and was designed to discredit it in part by demonstrating a lack of consistency between Stevens's written statement prepared on the day of the raid on the Ogston home and his evidence in court. Stevens acknowledged that he could not be positive that he had announced to Mrs Ogston that he had a search warrant to execute, but was certain that he had told Mr Ogston and that Mr Ogston had invited him into the house. He also said that, when asked whether he was the Editor, Ogston had acknowledged being the publisher of the *Communist Review*. Paterson pressed Stevens concerning the purpose of the search and indicated that his purpose was to demonstrate that Stevens was a biased witness against men of the political views of Ogston. The warrant had referred in general terms to documents or material that might be relevant to an offence under the *Crimes Act* 1914 (Cth). However, Stevens acknowledged that he based his search of Ogston's home not on the general instructions set out in the warrant, but rather on the instructions given to him in the briefing before the raid. He was adamant that he was trying to establish who was the publisher of the *Communist Review* and no more.

Paterson then directed attention to stories in Sydney newspapers dealing with the Monarchy including criticism of expenditure on the Coronation. Stevens had read such articles, but had not noted them in any way. As a CIS investigator, he did not read newspapers to see whether they contained seditious articles. He had never investigated political offences. His work had been in the area of health regulations. Shand's only other witness was another CIS officer, DF Bickerton. His evidence corroborated that of Stevens as required by s24D of the *Crimes Act* 1914 (Cth). In cross-examination Bickerton said that he and his CIS and ASIO colleagues had been looking for evidence of the offence of sedition and for material about the *Communist Review*. In particular, Bickerton was looking for material relating to the Royal family which he understood comprised the Queen, the Duke of Edinburgh and their two children. Otherwise, Bickerton conceded that he did not know what amounted to the crime of sedition. At this point Shand closed the prosecution case. Nothing had been raised about ASIO in Paterson's cross-examination.

Ogston did not call any evidence. Instead, Paterson submitted that Ogston had no case to answer because the evidence did not establish that he had published the article or that it was published with seditious intent. As to publication, the evidence that Ogston admitted that he was the publisher did not amount to evidence that he had published the specific issue or article which had led to the prosecution. According to Paterson, Shand was

required to prove that in relation to the article, Ogston "knew of its existence, knew of its content, and published [it] with that knowledge".[152] The substantial part of Paterson's no-case submission concerned the question of seditious intent. Paterson submitted that there was no evidence of intention at all. In summary form, Paterson's argument was that (i) the prosecution was required to prove an *actual* seditious intention, (ii) proof of the state of Ogston's mind at the relevant time required at least proof that he knew of the existence of the article, and (iii) there was no evidence that Ogston published the article with any of the intentions specified in s24A(1). Paterson then dealt separately with paragraphs (a), (b), (c), and (g) of s24A(1). This presented him with the opportunity to point out the archaic nature of the offence and to demonstrate the stupidity of the prosecution in part at least because it enabled him to give offence in much the same way as "RC"'s article apparently did.

(a) "*To bring the Sovereign into hatred or contempt*": Paterson argued that in its comments about the Duke of Edinburgh, the article was not referring to the Sovereign and could not therefore reflect on the Sovereign. Paterson also argued that had King Edward VIII not abdicated before he married Mrs Wallace Simpson, "newspapers throughout the length and breadth of the world could have ridiculed and defamed Mrs Simpson, and no prosecution could have been successfully launched as far as paragraph (a) [of s 24A(1)] is concerned". The word "Sovereign" could not mean both the Sovereign as a specific person and as an institution. The term "hatred" referred to something different to "contempt". In discussing the Monarch's husband and the Royal household, the main emotion that the article could arouse was pity - "pity for Queen Elizabeth II that she is surrounded by such a gang of parasites".[153] Paterson took the Magistrate through the article line by line emphasising repeatedly that it was contrary to principle and democracy that the Monarchy should be beyond reproach.

(b) "*To excite disaffection against the Sovereign or the Government, or Constitution of the United Kingdom, or against either House of Parliament of the United Kingdom*": That the impugned article could be characterised as posing a threat to the continuation of lawfully constituted authority in the UK at once demonstrated the archaic nature of the statutory provisions, the degree of technicality defence counsel had to confront, and the sheer bloody-mindedness of the prosecution. Shand informed the Magistrate, in response to Paterson's renewed request for further particulars of the offence

152 Transcript of *Sweeny v Ogston* at 31.
153 As above at 38.

charged, that the prosecution's case was that the term "the Sovereign" meant the Sovereign personally *and* as an institution, that the term "the Government" meant the institution of Government rather than the individual personnel making up a Government at any given time, and that "Constitution of the United Kingdom" meant both all the laws and conventions acccording to which the United Kingdom was governed *and* the legislative institution comprising the two Houses of Parliament and the Sovereign.

(c) "*To excite disaffection against the Constitution of any of the King's Dominions*": Paterson again pressed Shand for particulars. Shand described the request as ridiculous. The Magistrate ruled that he was not prepared to order the delivery of further particulars of the charge. Here Paterson simply confined himself to a submission that New South Wales was not a dominion, and that all the article did was to oppose the Government as an institution rather than to incite disaffection against constitutional government or the Commonwealth as a polity.[154] All that the article did, said Paterson, was to offer political commentary.

(g) "*To promote feelings of ill will and hostility between different classes of His Majesty's subjects or to endanger the peace, order or good government of the Commonwealth*": Paterson pointed to the inherent ambiguity of the term "classes". How was the relevant process of *classification* to be undertaken? Was it possible, for example, to have one class of persons comprised of those who could leave their daughters seven and a half million pounds and another class comprised of those who could not?[155] Paterson contended that the High Court in *Sharkey* had not decided whether the prosecution had to prove an actual intention to endanger the peace, order or good government of the Commonwealth or whether it was sufficient to establish an endangering tendency regardless of the accused's intention. Then followed this rhetorical question and answer:

> [C]an this article be construed in any way by any stretch of the imagination which would enable Your Worship to come to the conclusion that it was capable either of endangering the peace, order or good government of the Commonwealth

154 As above at 61.

155 This was a reference to that part of the article by "RC" which dealt with the very wealthy Lady Edwina Mountbatten, heiress to Sir Edward Cassel's banking fortune. Her husband, Earl Mountbatten, was Prince Phillip's uncle. As above at 62.

> or that it was capable of being construed in a way that it was the intention of the writer to endanger the peace, order or good government of the Commonwealth? All I can say is if you come to [such a] conclusion ... then I would raise the defence of temporary insanity ...[156]

According to Paterson, all the article did was to assert that the monarchy was used by the ruling classes for their purposes including opposition to working class action for social change. To suggest that the wealthy ruling classes would do otherwise would be to deny what was well known about human nature. However, none of this could be seriously regarded as endangering the Commonwealth and the conduct of the CIS officials showed that, using the vernacular, "they were not fair dinkum" when it came to enforcing the law of sedition.[157]

On the second day of the hearing LC Badham QC,[158] who with Paterson appeared for HB Chandler, requested the court not to deliver any decision in Ogston's case until the evidence and submissions in Chandler's case had been completed. Paterson then announced that he no longer wished to pursue his no case submission and that he would not be calling any evidence on behalf of Ogston. After further procedural submissions concerning the order of counsel's final addresses, the Magistrate ruled that it was up to Paterson to submit that Ogston should not be convicted, that Shand had a right of reply, and that he would reserve his decision until the completion of the evidence and submissions in Chandler's case.[159] Paterson then made his submission that the prosecution had not proved the case beyond a reasonable doubt, a submission which covered most of the contentions which had made up the abandoned no-case submission. In addition, he indicated that he was relying generally on the defence in s24A(2) and would be adopting the submissions in that regard to be made in the Chandler and Bone cases.[160]

Shand met each of Paterson's contentions head on. In doing so, he demonstrated the ferocity with which the Menzies Government pursued its anti-communist crusade.

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156 Transcript of *Sweeny v Ogston* at 64.
157 As above.
158 Leonard Campbell Badham (1887-1964). Badham had worked as a journalist before becoming a barrister.
159 Transcript of *Sweeny v Ogston* at 68.
160 As above at 68-87.

(i) The prosecution had established that Ogston had published the offending item because he had admitted to being the publisher and it was assumed that he knew what his own publication contained. Ogston had not offered any evidence to establish that he was an innocent distributor of the publication.[161]

(ii) Whether or not "RC"'s story was true was irrelevant. Although it was a defence to a charge of criminal libel to establish that the allegedly defamatory matter was true if it was also established that the matter complained of was published for the public benefit, there was nothing in the Act which enabled a similar plea to be relied upon by way of defence to a charge of seditious libel.[162]

(iii) There was no requirement that the prosecution introduce extrinsic evidence that the words complained were expressive of a seditious intention. All that the Act required was an examination of the words in the context of the article as a whole.[163]

(iv) Seditious words need not be aimed at provoking violence. Nor was it necessary that anyone should be affected by the words.[164]

(v) Shand submitted that the defence provided for in s24A(2) was an expanded version of the following dictum of Lord Ellenborough in *R v Lambert and Perry* :

> [T]here may be error in the present system, without any vicious motives, and with the greatest virtues, on the part of the reigning Sovereign. He may be misled by the Ministers he employs, and a change of system may be desirable from their faults. He may himself, notwithstanding the utmost solicitude for the happiness of his people, take an erroneous view of some great question of policy, either foreign or domestic. I know but of one Being to whom error may not be imputed. If a person who admits the wisdom and the virtues of his Majesty, laments that in the exercise of these he has taken an unfortunate and erroneous view of the interests of his dominions, I am not prepared to say that this

161 At 87.
162 At 92.
163 At 94.
164 At 95.

> tends to degrade his Majesty, or to alienate the affections of his subjects. I am not prepared to say that this is libellous. *But it must be with perfect decency and respect, and without any imputation of bad motives. Go one step farther, and say or insinuate, that his Majesty acts from any partial or corrupt view, or with an intention to favour or oppress any individual or class of men, and it would become most libellous.*[165]

(vi) The term "Sovereign" referred to both a legal concept of sovereignty and to the person who was the Sovereign. According to Shand, in most cases criticising or libelling the institution necessarily involved reflecting adversely on the person who is the Sovereign for the time being.[166]

(vii) The defence had not attempted to rely on s24A(2). At this point Shand was gripped by forensic hyperbole:

> But this is an article which has the elements of subtlety in it, and with that, *grave elements of danger* and the story told is one of a complete picture and a consistent attempt ... I am going to pick out the plot in the article, subtle, but if believed, appealing and hatred engendering, and the scheme is to show that the Sovereign, much more than being out of step with the people whom she is supposed to represent, is in fact an oppressor, a person who uses the wealth of the country to oppress the poorer classes which form the bulk of the community ...[167]

Shand then took the Magistrate through the article. It was, Shand contended, a carefully contrived attack on the Monarchy and it could not be genuinely argued by anybody that the article would not be likely to bring the Sovereign into hatred and contempt. It was, said Shand in completing his submissions, one of the most dangerous and insidious types of sedition.[168]

The Magistrate reserved his decision. Chandler's case was called on immediately following the conclusion of Ogston's case. Shand and

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165 Transcript of *Sweeny v Ogston* at 97, citing Lord Ellenborough in *R v Lambert and Perry* (1810) 2 Camp 398; 170 ER 119 (emphasis added).
166 Transcript of *Sweeny v Ogston* at 99.
167 As above at 102.
168 At 107.

Henchman again appeared to prosecute. Chandler pleaded not guilty to both charges and elected to be tried summarily with both charges being heard together. Badham foreshadowed a submission that the Informations did not disclose any offence. Shand relied on the same particulars of seditious intention that had been provided to Ogston.[169]

Shand began by seeking to rely on an affidavit sworn by Chandler in compliance with s3 of the *Newspapers Act* 1898 (NSW). The prosecution case consisted mainly of a series of formal proofs linking Chandler with the *Communist Review*. Shand called evidence from CIS officer R K Bailey who had accompanied ASIO agent W R Campbell on the raid at Chandler's office. R K Bailey's evidence was that Chandler, whom Bailey identified as being present in the courtroom, had acknowledged that he was the printer and publisher of the June 1953 issue of the *Communist Review*. Badham's cross-examination aimed at establishing that the raid was designed to "get something on Chandler", but Bailey denied this whilst acknowledging that the removal of documents served the purpose of detecting any offence against the *Crimes Act* 1914 (Cth). A large amount of time was devoted to Shand and Badham arguing about the admissibility of evidence pertaining to the allegation that Chandler was the printer and publisher. Shand called evidence to prove Chandler's signature on documents connecting him with the *Communist Review*. He also called CIS officer R V Manning to give the required corroboration of RK Bailey's evidence,[170] and CIS agent Barnwell to give evidence about his execution of one of the search warrants and his purchase of copies of the *Communist Review* the day prior to the raids.[171] Shand closed his case.

Badham elected not to call evidence and to make a no case submission. Badham adopted Paterson's submissions in Ogston's case and reiterated them in detail.[172] In essence, Badham urged the court to take a realistic and fair-minded approach to the article and to treat it as no more than the expression of a strong opinion in an open society. The prosecution case posed an enormous threat to free speech.[173] There was not the slightest hint of incitement to forcible overthrow of the monarchy. When pressed by the magistrate on whether the article was suggesting that there should not be a Coronation, Badham responded in the following terms:

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169 Transcript of *Sweeny v Chandler* at 2-3.
170 At 24-29.
171 At 29-37.
172 At 42.
173 At 64-80.

> Even suppose it did ... say "In my opinion ... there should not be any Coronation or Coronation ceremony"; supposing it did go so far, why in the name of Heaven is that to be considered anything in the nature of sedition or the utterance or publication of seditious words?"[174]

Badham also contended that, although it was not necessary for his case, his client had a complete defence under s24A(2) and that all institutions were open to criticism.

> Neither the State nor the Crown nor Sovereignty nor Parliament nor the Church can possibly stand if they cannot survive criticism. Criticism has led us out of the wilderness in the past and has brought about those institutions and made them what they are today ...[175]

Shand briefly adopted the submissions he made in the Ogston case describing the article (again presumably with a straight face) as an extremely grave seditious libel.[176] The Magistrate then reserved his decision in Chandler's case.[177]

By the time Bone's case came on for hearing on 21 August 1953 the cases had occupied three and a half sitting days. Bone was represented by GTA Sullivan[178] also instructed by Rich. Shand's case was again presented economically and there was an unsuccessful attempt by Sullivan to keep out of evidence much of the formal or technical proofs relating to publication and printing relied on by Shand. In cross-examination, CIS officer Alfred Amos Wilks told the court he was looking for evidence at Bone's print shop that the article had been printed and published in the *Communist Review*. ASIO officer Alan William Walmsley corroborated the Wilks evidence, but was not cross-examined by Sullivan.[179] CIS officer Barnwell gave the same corroborative evidence he had given in Chandler's case about his purchase of the *Communist Review* at the Pioneer Bookshop on 15 July. He was not cross-examined. Shand closed his case.

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174 At 82.
175 At 85.
176 At 87-91.
177 At 91-92.
178 Gregory Thomas Aloysius Sullivan (1911-1986) Solicitor-General of New South Wales 1979-1980. See (1979) 53 *ALJ* 161.
179 Walmsley was identified as an officer of the Attorney-General's Department without reference to ASIO.

Sullivan submitted there was no case to answer. The magistrate ruled that there was a case to answer.[180] Sullivan announced that he was calling evidence and tendered Harold Laski's *Parliamentary Government in England*. This tender was made on the basis that, given the essentially political nature of the offence of sedition, the court was entitled to have evidence of the views of leading exponents of contemporary politics, in this case specifically on the role of the Crown in modern society.[181] Shand objected but after argument withdrew his objection.[182] The further hearing of the case was adjourned until, and resumed on 28 August 1953.

Without detracting at all from the vigorous tactics employed by Paterson and Badham on behalf of their clients, it has to be said that Sullivan's defence of Bone, which spanned three days, was even more admirably direct and tenacious. It was a *tour de force* in the annals of Australian courtroom advocacy. Sullivan repeatedly heaped scorn on the prosecution and called in question the government's motives in pursuing the cases:

> It was with some amazement that I listened to the suggestions of Mr Shand. This is the type of matter that anybody reads in any social or constitutional discussion back in first year arts. The fact that it appeared in the *Communist Review* does not make it any different from what Professor Laski wrote in *Parliamentary Government in England* or what Jennings wrote in his book; or what Dr Mansfield is writing in his document in connection with republicanism in New South Wales; or what was written by *The Bulletin* here in the 80s; or what O'Sullivan, Walker and Black were saying in regard to republicanism, when the matter was brought up in the Legislative Assembly here. Nobody has ever regarded it as sedition until the present government decided that it was seditious. It may be suggested that they might have another motive.[183]

180 Transcript of *Sweeny v Bone* at 10-13.

181 At 11-12. On the issue of admissibility Sullivan relied on statements of Evatt J in *R v Hush; ex parte Devanny* (1932) 48 CLR 487 at 516 and of the Privy Council in *Read v Bishop of Lincoln* [1892] AC 644.

182 Sullivan also got into evidence Jennings, *Cabinet Government* (CUP, Cambridge, 2nd ed 1951) and Harold Nicolson's *King George The Fifth: His Life and Reign* (Constable, London 1952).

183 Transcript of *Sweeny v Bone* at 64.

Sullivan submitted that, although the case was ostensibly a prosecution by a private individual, it was in reality an attempt by the Commonwealth Government "to cut down as far as possible the freedom of the press". Sullivan noted that Shand had made a lot of Lord Ellenborough's remarks in *R v Lambert & Perry* as if the law of sedition had somehow been perfected for all time in 1810. What Shand had overlooked was the subservient position of the English judges in 1810. They had allowed themselves to be manipulated by the Crown in its efforts to repress freedom of discussion and the struggle for democratic institutions. Lord Ellenborough's standard of sedition was appropriate only for "a barbarous and uncivilised colony". Sullivan added that the Privy Council would never say that the standards imposed in *R v Wallace-Johnson* were suitable to Australia. The prosecution was an abuse of process and was designed to inhibit freedom of the press by terrorising the printing trade.[184] The evidence indicated that Bone knew nothing about the article until his premises were raided. Wilks had not administered any warning to Bone. Bone had been completely candid in his response to the interrogation of him by Wilks. Sullivan then went through the case law on sedition methodically demonstrating how the scope of sedition had been progressively narrowed. Likewise, Sullivan subjected the *Crimes Act* 1914 (Cth) provisions to detailed scrutiny. On 28 August the further hearing of the case was adjourned until 18 September 1953. On that day Sullivan completed his submissions and closed his defence of Bone.

THE DECISION

At the conclusion of the hearing of the charge against Bone on 18 September 1953 Magistrate Meagher handed down his decision dismissing the cases against all three defendants.[185] In doing so he effectively accepted the substance of the defence submissions. The Magistrate began by rejecting Shand's heavy emphasis on Lord Ellenborough's dictum in *R v Lambert & Perry*:

184 Sullivan contended that the fact that the prosecution was brought against those allegedly involved in the printing and publishing of the article indicated that the government was not interested in the writer of the article. It is clear, however, that it was only lack of evidence which deterred the government from prosecuting Rex Chiplin on the basis that he was "RC". Similarly, the government gave serious consideration to prosecuting "NB" for her alleged role in proof reading the article at CPA headquarters. See fn 99 above.

185 Unreported. I am relying on the transcribed version to be found in A432/1, Item 1953/734.

> That dictum was in 1810, in a period when the living standards, education and social outlook of the English people and of the Australian people were vastly different from what they are today.[186]

He then adopted as his basic premise the statement in the second edition of *Halsbury* that "proof of intention is the essence of the offence and if the acts done or the words used are not done or used with such an intention the offence of sedition has not been committed, however defamatory the words may be". Next, he distinguished the Privy Council's decision in *R v Wallace-Johnson* on the basis that it was primarily concerned with interpreting the requirement of seditious intention in the legislation of the Gold Coast colony. That still left the High Court's recent decisions in *Burns v Ransley* and *R v Sharkey*. From several short passages in the judgments in the former case, and especially a dictum from Dixon J's dissent, the Magistrate stated that he was satisfied that proof of intention was an essential ingredient in the offence charged against the three men. He then found that the article did not convey the meaning that Shand had contended for, namely, that, more than merely criticising the Sovereign, "RC" had branded the Sovereign as an oppressor of the working class. There was no evidence to satisfy the Magistrate that the article was intended to promote feelings of ill-will and hostility that might in any way endanger the peace, order or good government of the Commonwealth. In response to a request by Badham, the Magistrate made an express finding that the article was not seditious. There can be little doubt that the Magistrate's decision in each case involved a reviewable misunderstanding and misapplication of the High Court's decisions in *Burns v Ransley* and *R v Sharkey*. In some respects it turned the statutory law of sedition, as so recently applied by the High Court, on its head.

The day after the Magistrate's decision *The Sydney Morning Herald* unctuously applauded the result and called the prosecution "stupid", simultaneously reminding readers that "the Communists are a bad and dangerous minority who rarely, if ever, act in good faith".[187] The

186 As above.

187 *The Sydney Morning Herald*, 19 September 1953. Evatt was reported as having called the prosecution ill-conceived, futile and a threat to fundamental civil liberties: *The Age*, 21 September 1953. The erratic Evatt's apparent failure to question the propriety of the prosecution sooner was probably due less to his absence from Australia to attend the Coronation than to his pragmatic dealings at this time with the right wing of the labor movement. On Evatt's meanderings on the issue of communism and the labor movement, see Murray, *The Split:*

communist press was exultant, hailing the dismissal of the charges as a great victory in the continuing struggle against fascism.[188]

The result of the prosecution was promptly communicated to KH Bailey who spoke to Spicer the same day.[189] Four days later Bennett sent Bell a memorandum formally reporting on the outcome of the prosecutions and asking for instructions as to whether an appeal was to be instituted. Bell consulted Bailey and Bell was informed that it had been decided not to appeal.[190] This was to be the last occasion on which the Commonwealth instituted a sedition prosecution.[191] The available archival material does not record expressly what led the Menzies Government not to seek a review of the Magistrate's decision. Bailey's involvement, the adverse press comment on the decision to prosecute, a feeling that enough had been done to defend the honour of the House of Windsor, and, perhaps, an assessment that a successful outcome of an appeal was unlikely, go part, if not all, of the way towards explaining why the Government threw in the towel. In any event, it was, in the overall scheme of things, a relatively small setback in what otherwise was a continuing parade of successes in the overt and covert campaigns against the CPA. In addition, although the prosecution had been finalised, the Government still faced the prospect of having to defend in court the legality of its raids.

THE SEQUEL

On 22 July 1953, five days after the raids on CPA premises, Margaret Mary Chandler, the wife of HB Chandler, issued a writ out of the New South Wales Registry of the High Court of Australia against the Commonwealth of Australia and CIS officer LE Watson seeking a declaration that s10 of the *Crimes Act* 1914 (Cth) was unconstitutional, a declaration that the warrant authorizing the forceful entry of her home was void, and £10,000 damages for trespass to land and goods. A decade later that action was still pending in the High Court.

Australian Labor in the Fifties Ch 10. For one contemporary CPA assessment of Evatt see Hill, "In Defence of the Labour Movement", *Communist Review*, February 1954, 39.

188 See, for example, *The Tribune*, 23 September 1953.

189 By late September 1953 Bailey had resumed his duties as Solicitor-General.

190 Memo, Bell to Bailey, 24 September 1953 and handwritten instruction, Bailey to Bell, 28 September 1953: A432/1, Item 1953/734.

191 The High Court later dismissed an appeal against a sedition conviction in the Territory of Papua New Guinea: *Cooper v R* (1961) 105 CLR 177.

CPA General Secretary Sharkey released a public statement welcoming the civil action and indicating that it was designed to secure a ruling that would prevent the government from further interference with the CPA.[192] Sharkey's statement has the ring of plausibility about it. The CPA wanted to protect the rights of CPA members to be secure in their homes and it wanted to ensure the confidentiality of its membership records. The challenged warrant had been executed at a citizen's home, as had the warrants directed at Ogston and Chiplin and in this respect the Government's attack on the CPA had intensified from the unsuccessful raids which the government had carried out in the previous two years. The CPA's leadership acted promptly to have the action issued because it felt that some form of protest against the searches had to be made immediately. Mrs Chandler was apparently chosen as the plaintiff so as to avoid selecting a plaintiff who was a member of the party leadership and because it was alleged that Redford and Watson had illegally removed items that belonged to her.[193]

Bennett received the Writ the day of its issue and recommended to Bell that because of the important constitutional question involved in the challenge to the validity of s10 of the Act, Sir Garfield Barwick QC[194] be retained on behalf of the Commonwealth. Spicer was consulted and agreed.

In the Statement of Claim drawn by FW Paterson, Mrs Chandler alleged that, in purported reliance on the warrant, Watson, acting on behalf of the

192 *Tribune*, 29 July 1953.

193 ASIO Report No 5691, 7 August 1953: A6122/16, Item 1004. But why, out of the three search warrants executed on 17 July 1953 at the homes of party functionaries, did the CPA choose to attack the warrant executed at Chandler's home? If HB Chandler was implicated in the passing of information to the Soviet Union and if the Chandlers were aware of the discovery of the ASIO-related material and the Casey diaries in their home, there was an astonishing element of gamesmanship in Mrs Chandler' decision to challenge the legality of the raid. The decision to issue the proceedings seems to have been taken at the party level. This would not have been surprising even if Chandler had not been a member of the Central Committee. If regard is had to Spry's assessment that Soviet espionage in Australia was anchored in the activities of individual communists and not in the formal CPA apparatus (fn87), then presumably only a small group of the Central Committee of the CPA might have had an inkling that Chandler's action could prove embarrassing for the party.

194 Garfield Edward John Barwick (1903-). Attorney-General of the Commonwealth 1958-1963; Minister for External Affairs 1961-1964; Chief Justice of the High Court of Australia 1964-1981. In 1953 Barwick was the undisputed leader of the New South Wales Bar. See (1964) 38 *ALJ* 1 and (1981) 55 *ALJ* 4, 169; Marr, *Barwick* (George Allen & Unwin, Sydney 1980).

Commonwealth, had wrongfully removed and detained items which were then particularised. The plaintiff also alleged that the search and seizure of the documents and other articles of personal property "was not in any way related to the obtaining of evidence as to the commission of an offence under the Commonwealth *Crimes Act* 1914-1950".

At the time of the raid on the Chandlers' home Watson had given a receipt for the items seized. The receipt did not, however, condescend to the level of particularity of identifying each of the 1850 seized documents. Instead, it referred, for example, to "9 Documents" and "Envelope Sundry Papers", and so on. On 24 August the Defence as settled by Barwick was sent to Ewens and he was advised by Bell that:

> It was decided not to ask for particulars [of the allegations in the Statement of Claim] apparently, as I understand it, for the reasons that we know what we took and we don't want the fact of certain documents which we have retained brought forward.[195]

The Defence was drawn so as to particularise the documents *taken* as *those which had been handed back to Chandler*. This masterly if disingenuous tactic was designed to confine the factual contest so as to put out of contention the discovery of the sensitive documents although the underlying purpose of the warrant could be probed. It is scarcely surprising that Chandler delivered a Reply joining issue. The action was set down for trial before a single Justice at the High Court sittings scheduled to commence in Sydney on 10 November 1953.

At this stage the action was proceeding expeditiously, but the Commonwealth had every reason to delay the trial of the action. In particular, it was considered essential to protect the secrecy surrounding ASIO. Just as in the sedition prosecution of Chandler, Ogston and Bone, there was a complete determination not to have ASIO's activities investigated in any way, and especially not to have its officers cross-examined in a public forum, so also in the defence of the civil action there was an equal determination not to see any of ASIO's operations probed and to ensure that no ASIO officer was cross-examined. As inaugural Director-General, Mr Justice Reed had advised the Government that "it is highly undesirable that officers of ASIO be called as witnesses before a court, a

195 Minute, Bell to Ewens, 21 August 1953: A432/1, Item 1953/734.

Royal Commission, or any tribunal."[196] Reed had persuaded Chifley and Evatt in mid-1949 that this imperative was reason enough to have ASIO decline to co-operate overtly with the Royal Commission on the CPA established by the Victorian Government.[197] Both the Chifley and the Menzies Governments had stated that ASIO's secret mission was so sensitive that no public statements could be made about it and, for the most part, neither Government would answer questions about ASIO in the Parliament.[198]

Ewens, Bennett and Spry conferred with Barwick and Henchman about Mrs Chandler's action and Barwick advised that an application should be made to the High Court to have the specific questions of law raised by the statement of claim determined by the court before the trial of the action. After he had discussed the matter further with Henchman, Bell wrote to Rich informing him that the Commonwealth intended to apply to the Court for an order that the two questions of law raised by the Statement of Claim should be determined, namely whether the search warrant was authorised by s10 of the Act and whether s10 was a valid exercise of the powers of the Commonwealth Parliament.[199] The Commonwealth's application was duly made and came before Dixon CJ[200] on 1 April 1954 but was adjourned. The Chief Justice declined to make the orders because, in his view, the answers to those questions would not finally determine the dispute between the parties.[201]

There then followed an event which continues to excite curiosity and, for some older Australians with first hand memories of it, a kind of retrospective disaffection as regards the Menzies Government. On the evening of Tuesday, 13 April 1954 Menzies announced in the House of Representatives the defection of the Soviet diplomat, Vladimir Mikhailovich

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196 Memorandum, Reed to Spicer, 3 April 1950: A1209/56, Item 72/10048.

197 Letter, Chifley to Hollway, undated [June 1949]: PROV, VPRS 3841/R1, Box 1.

198 This changed to some extent following the Petrov defection. One Opposition member, EJ Ward, directed a series of parliamentary questions to the government about ASIO; see, for example, Cth, Parl HR, *Debates* (1954) Vol H of R 4 at 865ff.

199 Letter, Bennett to Rich, 30 September 1953: A432/1, Item 1960/188.

200 Owen Dixon (1886-1972), Justice (1929-1952) and Chief Justice of the High Court of Australia (1952-1964). See the obituary by Merralls (1972) 46 *ALJ* 429; Stephen, *Sir Owen Dixon: A Celebration* (Melbourne University Press, Carlton, Victoria 1986).

201 Letter, Bennett to Renfree, 8 May 1956: A432/60, Item 1960/188.

Petrov, and the establishment of a judicial inquiry into Petrov's claims about Soviet espionage in Australia.[202] Like all Soviet diplomats in Australia, Petrov, who was himself an intelligence officer, had been closely watched by ASIO since his arrival in 1951. By 1953 Petrov was being characterised by ASIO as a potential defector and on 23 July 1953, that is in the week following the ASIO/CIS raids in Sydney and eight days before Spry had reported in writing to Menzies about the documents found in the raid at HB Chandler's home and about the suspicions and expectations attaching to Petrov, an ASIO officer had tentatively sounded out Petrov on the possibility of his remaining in Australia.[203] If Petrov is to be believed,

202 Aust, Parl, *Debates* HR (1954) Vol H of R 3 at 325-326. Evatt was not in the House when the Prime Minister made his statement. There seems little doubt that Menzies deliberately chose a time when he knew Evatt would be absent. For fundamentally differing views on the Petrov saga see, on the one hand, Whitlam & Stubbs, *Nest of Traitors: The Petrov Affair* (Jacaranda, Milton, Queensland 1974) and, on the other, Paul, "Labor's Petrov Legend: A Suitable Case for Internment" in Manne (ed), *The New Conservatism in Australia* (Oxford University Press, Melbourne 1982) and Manne, *The Petrov Affair: Politics and Espionage* (1987); see also Waterford, "A Labor Myth" in Curthoys & Merritt (eds), *Better Red Than Dead: Australia's First Cold War 1945-1959* Vol 2. For Menzies' account see Menzies, *The Measure of the Years* (Cassel Australia, North Melbourne, Victoria 1970) p154. Less useful first-hand accounts are Bialoguski, *The Petrov Story* (Heinemann, Melbourne 1955) and V & E Petrov, *Empire of Fear: The Petrovs Own Story* (Deutsch, London 1956). The Petrovs' account was ghost-written by Michael Thwaites, a senior ASIO officer whose appointment to ASIO had been recommended to Spry by Herring CJ. See Thwaites, *Truth Will Out: ASIO and the Petrovs*; Aust, Parl, *Debates* HR (1956) Vol H of R 12 at 474-475, 781; Vol H of R 13 at 1795.

203 One of the reasons why some commentators argue that there is still a case for characterising the government's handling of the Petrov defection as a calculated political stunt is that there is clear evidence that Prime Minister Menzies did not tell the Parliament the truth concerning his knowledge of the circumstances surrounding the defection. The Prime Minister's credibility is central to acceptance of the conventional explanation of Petrov's defection. When challenged by Evatt, after the Menzies Government had been returned at the election held on 29 May 1954, the Prime Minister made the following ringing declaration in the House of Representatives: "I say to the House and to the country that *the name of Petrov became known to me* for the first time on Sunday night, the 11th April [1954], I think, or the preceding Saturday night." (emphasis added): Aust, Parl, *Debates* HR (1954) Vol H of R 4 at 284. See also Aust, Parl, *Debates* HR (1954) Vol H of R 5 at 1625. Menzies later acknowledged that he had been briefed by Spry about *an* impending defection in early February 1954, "but the identity of the subject was not disclosed, nor did I ask for it ... I repeat that I had not heard of Petrov before his actual defection in April 1954.": Aust, Parl, *Debates* HR (1955) Vol H of R 8 at 1869-1871. But there can be no doubt that Menzies *had first heard or read the name of Petrov* in

Chandler seems not to have been unsettled by the raids on 17 July 1953 since Petrov later told ASIO that he had been taken by a secret ASIO agent to a function where he had met Chandler on 1 August 1953.[204]

No doubt in part at least because of the diversion of resources forced on the CPA because of the lengthy Royal Commission on Espionage which followed Menzies' announcement, and which included appearances in the witness box by HB Chandler, WS Clayton, Frances Bernie and Rex Chiplin, nothing much appears to have been done in the two years after April 1954 to bring Mrs Chandler's action to trial.[205] But the action was not ignored by ASIO. On 9 July 1954 ASIO agents EO Redford (who had helped execute the warrant at Chandler's home) and JM Gilmour, both of whom were involved in the on-going interrogation of Petrov, visited Chandler at his home. Chandler was informed that ASIO took a serious view of his possession of some of the documents which had been seized at his home in July 1953. GR Richards, who in the meantime had become ASIO Deputy Director (Operations), had instructed the ASIO agents to seek an explanation from Chandler regarding his possession of the documents as the matter might later be raised at the Royal Commission. Chandler's response, according to the ASIO record of the meeting, was that he had nothing to say and to refer the agents to his lawyers.[206]

Then on 17 August 1954 Redford visited the High Court Registry in Sydney and spoke with the Principal Registrar, JG Hardman. The Registrar informed Redford that it would be some considerable time before Mrs Chandler's case was brought before the court and obligingly agreed to keep Redford informed as to developments in the case.[207] Why Hardman considered the case would not be heard for a "considerable time" is not

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the context of alleged Soviet espionage and threats to Australian internal security in July 1953, if not earlier. See Letters, Spry to Menzies, 31 July 1953 and 9 September 1953, both of which identify Petrov *by name*: A6119/XR1, Item 19. That discrepancy does not, of course, establish a conspiracy. It does, however, call for a rather fuller explanation than so far has been offered by pro-Menzies Petrov apologists such as Manne, *The Petrov Affair: Politics and Espionage*. See this author's recent exchange with Manne: *Quadrant*, March 1994, pp54-63.

204 Memo, "HEH" [ASIO] to Richards, 20 October 1954: AA (ACT) CRS A6283/XR, Australian Security Intelligence Organization Central Office Correspondence Files Multiple Number Series (Royal Commission Section), Item (6).

205 Paterson was engaged in the Petrov Royal Commission and was also ill during part of that two years.

206 Memo, Redford and Gilmour to Richards, 30 July 1954: A6119/XR1, Item 77.

207 Memo, Redford to Richards, 17 August 1954: A6119/XR1, Item 77.

clear. Nor is it possible to ascertain from the available archival material whether Hardman notified Chief Justice Dixon about the ASIO visit, but it would hardly be surprising to learn that the Chief Justice, who moved in the same Melbourne social circles as Menzies and Spry, was informed of such a highly unusual visit and the undertaking given to ASIO, which was not a party to the action, on behalf of the court registry.

There was official concern that potential witnesses would leave the country before the Petrov inquiry commenced. In early 1954 the Government was alarmed to discover that HB Chandler had left Australia and travelled to China. Immigration Minister, HE Holt,[208] promptly cancelled Chandler's passport.[209] However, Chandler's whereabouts were not difficult to ascertain. He was interviewed by Australian officials in Hong Kong on 9 May and his passport was impounded. He told the officials that he was intending to return to Australia and, true to his word, did so.[210] CIS and ASIO officers visited Chandler on 1 December 1954 to serve a Petrov Royal Commission subpoena on him.[211]

The Petrov Royal Commission Report was presented to the Parliament on 14 September 1955. In its assessment of the role of the CPA as an auxiliary pro-Soviet force, of the pretensions of the CPA to being merely an Australian political party and of the role of a group of concealed communist espionage agents, the Royal Commission accepted unhesitatingly Colonel Spry's thesis concerning the true nature and purposes of the CPA. It referred briefly to the ASIO-related documents found during the raid at Chandler's home in 1953.[212] In his evidence given to the Petrov Royal Commssion Chandler had denied all knowledge of the documents but for reasons that are difficult to discern he was not pursued vigorously by counsel.[213] The Royal Commission reported that Petrov's evidence was

208 Harold Edward Holt (1908-1967), Prime Minister of Australia 1966-1967.

209 Statement by the Minister for Immigration, 10 May 1954.

210 Cable No 42, Australian Government Trade Commissioner's Office, Hong Kong to Department of Immigration, 9 May 1954: AA (ACT) A6213/1, Item RCE/R/5.

211 Statement of Davis, undated [December 1954?]: A6119/XR1, Item 77.

212 Aust, Royal Commision on Espionage, *Report* (1955) paras 846-851.

213 The historical orthodoxy (eg Manne *The Petrov Affair: Politics and Espionage* and Paul, "Labor's Petrov Legend: A Case for Internment" in Manne (ed) *The New Conservatism in Australia*) is that there is no reason to doubt the correctness of the Petrov Royal Commission's implicit finding that Chandler had wrongfully secreted the ASIO-related material and the secret Casey diary extracts in his bedroom as part of his involvement in a Soviet espionage operation. There seem to be only two possible explanations concerning these intriguing

that the Casey diary extracts located at Chandler's home had not been supplied to the Soviet Embassy in Canberra. The Royal Commission had a major domestic political impact. It reinforced the schism within the labor movement that had opened up in late 1954 and early 1955 and it hastened Evatt's political and mental decline.[214] However, not a single prosecution resulted from the exercise.[215] Despite this curious result ASIO was not noticeably weakened. To the contrary, the whole episode strengthened ASIO's role and influence and enhanced its reputation in the Western intelligence community. It had, after all, caught a Soviet spy, a quest that it had been assiduously pursuing since its formation in 1949. The most disturbing result of the Petrov imbroglio was that the relationship between the Federal Opposition, indeed the ALP generally, and ASIO was completely poisoned. Spry and Menzies blamed this outcome on Evatt and his erratic behaviour. But in a political environment in which the ALP had split on the issue of the appropriate response to the CPA's trade union power, in which the government was exploiting anti-communism and the split in the ALP to the fullest extent for partisan political advantage, and in which ASIO under Spry pursued its own relentless anti-communist crusade,

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documents: (a) They were located as claimed by ASIO and Chandler lied when he denied all knowledge of these items and he lied to protect himself and the CPA espionage apparatus; *or* (b) They were located as claimed by ASIO and Chandler was telling the truth when he denied all knowledge of these items. If the true explanation is (b), then the unanswered question is: who was responsible for placing the sensitive items in Chandler's house? If the true explanation is (b) and if there was any Commonwealth Government complicity (admittedly two very large *ifs*), then the wider Petrov Affair takes on a fundamentally different complexion. Frank Cain casts new light on this larger ASIO/Petrov/CPA question in his forthcoming book, *The Australian Security Intelligence Organization: An Unofficial History* (Frank Cass & Co, 1994).

214 One sign of the adverse impact which the Petrov affair had on Evatt's political judgment (and mental state) was his extraordinary revelation to the Parliament in the wake of his unsuccessful exertions as counsel before the Petrov Royal Commission that he had written to the Soviet Foreign Minister, VM Molotov, seeking an authoritative Soviet pronouncement on the authenticity of documents which Petrov had delivered to ASIO at the time of his defection. It would have surprised nobody (except perhaps Evatt) that the Soviet Government responded to Evatt's strange *démarche* by denouncing the Petrov documents as fabrications: Aust, Parl, *Debates* HR (1955) Vol H of R 8 at 1695.

215 The Royal Commission's assessment of the prospects for launching prosecutions is dealt with in para 29 of the conclusion to its Report: Aust, Royal Commision on Espionage, *Report* (1955) at 301.

it was inevitable that ASIO would be seen by the ALP as doing the partisan bidding of the government.[216]

Meanwhile, the Commonwealth was still faced with Mrs Chandler's action. On 14 April 1956 Paterson and Henchman discussed the case and agreed in principle on a different procedural approach to have the court resolve the preliminary questions of law.[217] Following that discussion Henchman recommended the proposed course to Bennett, and Rich pressed Bennett for a reply. The Crown Solicitor consulted Ewens in mid-June 1956. Ewens, no doubt acutely conscious of the continuing political undertones of the case, went to see Spicer. Such was the impact which Barwick had on him, that Spicer replied by saying merely "to anything Barwick may advise I agree".[218] Barwick agreed with Henchman's procedural suggestion and Bennett advised that he would write to Rich.[219] However, at this stage the action again appears to have been shelved by the plaintiff. More than a year passed without any further step being taken in the action. This may well have been attributable to the upheaval within the CPA following the momentous events of 1956 across the communist world. These included the Soviet Union's brutal suppression of the Polish and Hungarian uprisings in 1956, and, following the 20th Congress of the Communist Party of the Soviet Union in that same fateful year, *exposés* about the Stalin regime's manifold cruelties which, in turn, led to expulsions and resignations from the CPA. In March 1958 the Crown Solicitor, HE Renfree,[220] wrote to his deputy in Sydney asking for a report on Mrs Chandler's case. On 12 April 1958 the Crown Solicitor was advised by his Sydney office that the questions of law had not been set down for hearing, that Rich had recently been pressing to have the action heard during the current sittings of the High Court in Sydney, and that he had written to Rich asking him to implement the agreement reached two years before between Paterson and Henchman.

On 18 April 1958 Rich set the question of law down for hearing. It was the intention of the parties that, when the points of law came on for hearing before a single Justice, an application would be made that they be referred to

216 ASIO was, in any event, engaging in political activities that showed up the essentially self-serving ambiguity of the 1950 Directive (see fn 27).

217 Minute Bennett to Bell, 8 May 1956: A432/1, Item 1960/188.

218 Handwritten instruction on Minute, Renfree to Ewens, 18 June 1956: as above.

219 Memo, Bennett to Renfree, 16 August 1956: as above.

220 Harold Edward Renfree (1905-). Commonwealth Crown Solicitor 1955-1970. Renfree, *History of the Crown Solicitor's Office* (Government Printer, Canberra 1970).

the Full Court. Later that year Henchman told the Deputy Crown Solicitor's office in Sydney that Sir Garfield Barwick, who was to become Attorney-General of the Commonwealth following his election to the Commonwealth Parliament at the election held on 22 November 1958, intended to accept briefs "to keep his hand in". Renfree suggested that Barwick be offered the brief without fee before another leading counsel was approached.[221] However, the case was not reached and another year passed. In March 1959 Rich wrote to the High Court Deputy Registrar requesting that the case be listed before a single Justice. The Commonwealth saw no reason to depart from its stance of leaving the case up to the initiative of the plaintiff.[222]

The High Court now had a direct link with the facts leading up to Mrs Chandler's action. WJV Windeyer QC, who had been leading counsel assisting the Petrov Royal Commission, was appointed a Justice of the High Court on 8 September 1958. He had examined Chandler in the Royal Commission proceedings and had been briefed by ASIO on the events surrounding the raid on Chandler's home.[223]

The application was listed for mention before Kitto J[224] on 21 September 1959. Barwick had declined to appear at the trial of the action and Bailey asked the Crown Solicitor to suggest another leader. On 18 September, by arrangement with Paterson, Henchman appeared before Kitto J in chambers. The judge indicated that he was adopting the course proposed by the Chief Justice more than five years before and would not be referring the questions of law to the Full Court.[225] Kitto informed Henchman that he would be pressing counsel to deal with the facts as well as the questions of law and that he would set the case down for trial on 28 September so as to dispose of it.

The action seemed destined never to be tried. The parties wanted the court to determine preliminary questions of law. The court wanted the parties to

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221 Minute, Good to Bailey, 1 July 1958: A432/1, Item 1960/188.

222 Minute, Good to Bailey, 3 July 1959: As above

223 William John Victor Windeyer (1900-1987), Justice of the High Court of Australia 1958-1972. See the notice (1958) 32 *ALJ* 158 and obituary (1987) 61 *ALJ* 823. Clearly, Windeyer could not have participated in the disposition of the merits of any of the issues raised in the proceedings in *Chandler v Commonwealth and Watson*..

224 Frank Walters Kitto (1903-1994). Justice of the High Court of Australia (1950-1970). (1950) 24 *ALJ* 21, 45.

225 Minute, Good to Bailey, 21 September 1959: A432/1, Item 1960/188.

agree on the relevant facts or be prepared to go to trial on the factual issues. The parties had their own reasons for shying away from going into evidence about the circumstances surrounding the issue and execution of the warrant.

The Crown Solicitor reported to Bailey on 21 September. Ironically, Barwick nominated Badham QC to lead Henchman. Bailey responded by informing the Crown Solicitor that

> The reason for desiring to confine the proceedings as far and as long as possible to the [questions] of law was, as I think you know, that there were objections on grounds of national interest and security to the giving of evidence as to either the contents or even the nature of some of the documents found on the premises searched. The [plaintiff] appeared also to have reasons of her own for seeking to avoid going into evidence on these matters.[226]

Bailey discussed this aspect of the case with Spry and Barwick and it was decided that the Commonwealth would assert that it would be prejudicial to the public interest for the sensitive documents to be published. Barwick was prepared to produce the documents for inspection by the court, by the plaintiff's counsel and by the plaintiff in return for an undertaking that the contents of the documents would not be divulged by the plaintiff or her advisers.[227]

It was soon realised that Badham had represented HB Chandler in the sedition prosecution in 1953 and Barwick then indicated a preference for JD Holmes, QC of the Sydney Bar[228] over Shand as Henchman's leader. Paterson told Henchman that he would not be pressing the constitutional point about the validity of s10 of the Act.

On 23 September 1959 the case came before Kitto J for mention. After hearing submissions from Paterson and Holmes, Kitto stood the case over to be mentioned before Dixon CJ.[229] The case was now going around in procedural circles.

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226 Handwritten memo, Bailey to Renfree, 21 September 1959: A432/1, Item 1960/188.

227 As above. Draft Affidavit, Barwick, September 1959: A432/1, Item 1960/188.

228 John Dashwood Holmes (1907-1973), Judge of the New South Wales Court of Appeal, 1965-1973. See (1965) 39 *ALJ* 252 and (1973) 47 *ALJ* 106.

229 Transcript of Proceedings, *Chandler v The Commonwealth*, 23 September 1959, Case No 25 of 1953: A432/1, Item 1960/188.

Bailey had conferred with ASIO on 22 September about the need to prepare to defend the case in regard to the facts surrounding the seizure of items pursuant to the warrant. Spry gave instructions for the preparation of a memorandum for counsel on the facts. A fortnight later he sent Bailey 1,850 photographic reprints of the items seized at the Chandler residence summarising his view of the matter in the following terms:

> I am told that Counsel has expressed informally the opinion that the extracts from the confidential Australian memorandum relating to external affairs must either be produced without restriction or withheld entirely. If Government decide that those extracts should not be produced in evidence, I assume that, in due course, you will have prepared an affidavit for execution by the Attorney-General claiming privilege in respect thereof. In the event of a decision that the extracts should not be produced, I would think that the list of motor car numbers and names of persons might well be disclosed, provided that it is made clear at the hearing that there was found with it another document in respect of which Crown privilege is claimed.[230]

By this time the plaintiff's interest in the case had begun to wane. In March 1960 Paterson sounded out Henchman on the prospects for settling the action. Paterson confessed that he had lost interest, but was under pressure from his client to do something. He asked for a money settlement. Henchman responded by saying that, in the unlikely event of the plaintiff succeeding, any amount a court might award would be small and that Paterson should obtain his client's instructions to make a specific offer. Henchman told the Crown Solicitor's office that if the case could be settled for £50 it would remove the difficulty that the Commonwealth had always felt about the case going to trial on the facts.[231] A month later Paterson told Henchman he had instructions to accept £1,000 in full settlement of the action. Henchman told the Crown Solicitor that the figure was unrealistic. The Crown Solicitor's office recommended rejecting the offer, but suggested that £100 would be an appropriate amount if any money was to be offered.[232] Barwick was informed of the settlement overtures made by

230 Letter, Spry to Bailey, 7 October 1959. Bailey agreed saying that he did not think that all the possibilities of dealing with the Casey diaries had been explored in sufficient detail. Letter, Bailey to Spry, 14 October 1959: as above.

231 Memo and File note, Bannerman to Renfree, 25 March 1960: as above.

232 Memo, Bannerman to Renfree, 2 May 1960: as above.

the plaintiff and asked whether he agreed to the Commonwealth continuing to adopt a wait and see approach. Barwick's response was unequivocal. The Commonwealth should not entertain any settlement of the action and he instructed the Crown Solicitor to convey that message firmly to the plaintiff.[233]

In retrospect, this response is not at all surprising. Nor should it have been at the time. In everything he did Barwick was a fighter of bull dog determination and in 1960 he was in no mood to exhibit the slightest degree of weakness or charity as regards the struggle against communism in Australia.[234] That struggle had reached a high point. The ALP had split on the issue.[235] The CPA was continuing to lose popular support especially in the wake of the Soviet Union's behaviour in the Polish and Hungarian uprisings and the *exposés* at the 20th Congress of the Communist Party of the Soviet Union. Partly at Barwick's urging, ASIO had recently been very active in discrediting the Australian peace movement as a communist front.[236] At the same time Barwick's department was working on amendments to the political provisions of the *Crimes Act* 1914 (Cth) aimed at crushing any last vestige of CPA "subversion".[237] The Commonwealth Parliament passed the *Telephonic Communications (Interception) Act* 1960 (Cth) to provide a clearer legal basis for ASIO's telephone intercept activities.[238] This was also the year in which Barwick sacked a former CPA member, JF Staples, who was working as a lawyer in the Attorney-General's Department in Canberra.[239] Staples had been expelled from the

233 Handwritten instruction on memo, Good to Barwick, 16 June 1960: as above.

234 Barwick had been leading counsel for the Commonwealth in *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, but despite his fierce and highly polished advocacy had only managed to persuade Latham CJ, a lifelong anti-Communist ideologue, to reject the challenge. See Maher, "Tales of the Overt and the Covert: Judges and Politics in Early Cold War Australia" (1993) 21 *Fed L Rev* 151 and Marr, *Barwick*, Ch 8.

235 Murray, *The Split: Australian Labor in the Fifties* .

236 Summy & Summers, "The 1959 Melbourne Peace Congress: Culmination of Anti-Communism in Australia in the 1950s" in Curthoys & Merritt (eds), *Better Red Than Dead: Australia's First Cold War 1945-59 Vol 2.*

237 *Crimes Act* 1960 (Cth) esp ss24, 52 and 55. For Barwick's Second Reading speech see Aust, Parl, *Debates* HR (1960) Vol H of R 28 at 1020-1033.

238 For Barwick's second reading speech see Aust, Parl, *Debates* (1960) Vol H of R 27 at 1422-1431; Darvall & Emmerson, "Eavesdropping: Four Legal Aspects" (1962) 3 *MULR* 364.

239 James Frederick Staples (1929-). Deputy President, Australian Conciliation and Arbitration Commission (1975-1986). Staples had been subjected to ASIO surveillance since 1950: A6119/64, Item 411.

CPA during the turmoil of 1956. Barwick defended the firing of Staples saying in Parliament that "expulsion" was "a fancy way these gentlemen have of dissociating themselves, for the time being, from the party so that they may do more valuable work under cover". Barwick said that he was not prepared to let Staples "loose amongst the secrets of this country" or "to rifle the records of the Attorney-General's Department".[240]

Another four years passed without Mrs Chandler taking any further step in her action. In the meantime, on 22 September 1961, Mr Justice Owen, who had chaired the Petrov Royal Commission, had also been appointed to the High Court.[241] On 27 April 1964 the High Court's Petrov connection was further enhanced. Barwick was induced by Menzies to leave the realm of parliamentary politics for the office of Chief Justice to replace Dixon who had resigned. Barwick's Petrov connection was that he had appeared as counsel for ASIO at the Royal Commission.[242] If Mrs Chandler's action was not soon resolved, the parties might find that the appropriate bench could not be assembled.

But then in July 1964 Paterson told Henchman that Mrs Chandler was prepared to agree to her case being struck out with each side bearing its own costs. The new Attorney-General, BM Snedden,[243] agreed. An order by consent to that effect was made on 27 July 1964, perhaps appropriately, by Windeyer J.[244] And so the strange case of the raid on the Chandler home ended, to borrow Eliot's words in *The Hollow Men*, not with a bang but a whimper.[245]

It would, in my view, be wrong to characterise Mrs Chandler's action as an unmitigated failure. In one very important sense it was, arguably, a resounding success. It may not have secured any redress for the violation of the Chandlers' home or produced any judicial ruling on the use of search

240 Aust, Parl, *Debates* HR (1960) Vol H of R 28 at 1042-1046, 2083. See Marr, *Barwick*, pp154-155.

241 William Francis Langer Owen (1899-1972), Acting Judge (1936-1937) and Judge of the Supreme Court of New South Wales 1937-1961, Justice of the High Court of Australia 1961-1972. Like Windeyer, Owen would have been required to disqualify himself from participating in the court's consideration of the merits of *Chandler v The Commonwealth.*

242 Marr, *Barwick* pp208-209.

243 Billy Mackie Snedden (1926-1987). See Schedvin, *Billy Snedden: An Unlikely Liberal* (Macmillan, South Melbourne 1990).

244 Memo, Good to [?], 23 July 1964: A432/1, Item 1960/188.

245 T S Eliot, *Selected Poems* (Faber, London 1967).

warrants for impermissible purposes. But it did, it seems, put an effective barrier in the way of ASIO's ability to raid the homes of Australian citizens in its hunt for CPA spies and subversives. In that respect the CPA was able through the civil action to secure a measure of compliance with what Chifley, Evatt and Acting Attorney-General McKenna[246] may have supposed was, or intended, as the spirit of the ambiguous Directive given to Reed J in March 1949 and thus what may be supposed to be the spirit of the slightly altered Directive given to Colonel Spry in July 1950.

THE LESSONS

By the time Mrs Chandler abandoned her action the CPA had split along bitter ideological lines reflecting the prevailing schism between Moscow and Peking, and the Australian communist movement was well past its influential peak.[247] Nevertheless, Australian communism in all its factional manifestations was still of paramount importance in ASIO's eyes. No matter how debilitated the Australian communist movement in fact was, it was still regarded by ASIO as a dangerously subversive enterprise. For ASIO to have adopted any other stance would have been tantamount to an acknowledgment that its mission was complete.[248] ASIO's targeting of the CPA and leftists continued for another two decades and received renewed stimulus with the emergence of anti-Vietnam War movement.

The events surrounding the 1953 case present four enduring lessons. First, they illustrate the dangers to democracy inherent in granting state agencies power to act against threats to national security when no clear definition of national security is employed, when there are no or no adequate mechanisms for ensuring proper public accountability of national security agencies, and where *loyalty* to the State is conceived of as admitting no "extremist" criticism of the State. The secret ASIO Directives of 16 March 1949 and 6 July 1950 were beset with ambiguity. They gave ASIO unreviewable power to trespass on freedom of speech, assembly and association. The growing body of publicly available archival material from the 1950s and 1960s demonstrates that ASIO was unremitting in its

246 Nicholas Edward McKenna (1885-1974) Senator for Tasmania, 1944-1968.

247 See Davidson, *The Communist Party in Australia: A Short History*. For inside accounts from opposite sides of the schism in the CPA see Gibson, *My Years in the Communist Party* (International Bookshop, Melbourne 1966), Ch 7; Hill, *Reflections on Communism in Australia*, Ch 7.

248 ASIO had nevertheless been downplaying the influence of the CPA which it saw as being in decline. See, for example, Interim Report on the Communist Party of Australia, April 1957: A7452/3, Item A288.

interference with the exercise of political freedoms by communists and the non-communist left. The current legislation controlling the activities of ASIO, which was enacted after the detailed review conducted by Mr Justice Hope, goes some of the way, though not nearly far enough, towards curbing the potential for abuse of the power to make national security decisions which affect dissident political behaviour.[249]

Secondly, the 1953 prosecution is a reminder of the need for an open society to guard against the abuse of prosecutorial decision-making power. A statutory requirement that a prosecution may not be commenced without the Attorney-General's consent is intended to provide an effective obstacle to the politically (or otherwise improperly) motivated prosecution. But such a safeguard is itself prone to collapse if the Attorney-General is improperly influenced by political considerations or if the alleged offence has a sensitive political dimension. Both these extraneous factors were present in 1948-1949 when McKenna consented to the prosecutions of Gilbert Burns, Sharkey and Healy.[250] Spicer's decision to consent to the 1950 and 1953 prosecutions was as shabby as McKenna's. There is simply no escaping the conclusion that in each case the prosecution was designed solely to serve the government's partisan political purposes. In the case of sedition the protection offered by the requirement in s24E that the Attorney-General consent to a prosecution is illusory since sedition is inherently a political crime. The passage of legislation establishing an independent office of Director of Public Prosecutions, it is to be hoped, reduces the risk of such abuse.[251]

Next, the 1953 case is the classic Australian illustration of the use of the law of sedition by the dominant social or political group to silence or harass a minority social or political group, particularly a group that is both

249 *Australian Security Intelligence Organization Act* 1979 (Cth) ss7 and 21 (on the entitlement of the Leader of the Opposition to be consulted and informed), ss41-83 (on the role of the Security Appeals Tribunal) and ss92A-92T (on the role of the Parliamentary Joint Committee on ASIO); Fox, "The Salisbury Affair: Special Branches, Security and Subversion" (1979) 5 *Mon L Rev* 251; Seddon, "ASIO and Accountability" *Aust Quart'y*, Summer 1982, 362; Note, "Scope and Content of 'National Security'" (1984) 58 *ALJ* 67; Hanks, "National Security - A Political Concept" (1988) 14 *Mon L Rev* 114; Lee, "The Australian Security Intelligence Organization - New Mechanisms for Accountability" (1989) 38 *ICLQ* 890.

250 Maher, "The Use and Abuse of Sedition" (1992) 14 *Syd L Rev* 287.

251 *Director of Public Prosecutions Act* 1983 (Cth). The developing law of abuse of process may also provide some scope for curbing the excesses of zealous private informants: See, for example, *Spautz v Williams* (1992) 174 CLR 509.

numerically very small and highly unpopular, supposedly in the name of protection of "public order" and "natural security". There is still vocal opposition to the proposition that there should be an unqualified abolition of all common law and statutory sedition offences. It may perhaps be thought that it is inconceivable that a sedition prosecution would proceed in the present stable political climate and that some such offence should be retained as a safeguard. In 1991 the Commonwealth Criminal Law Revision Committee recommended the repeal of the existing sedition provisions and their replacement by a range of incitement offences.[252] That the continued existence of the crime of sedition will, inevitably, provide an inducement to the State to condemn dissidents as "disloyal" and to punish expressions of opinion of which the state disapproves was most recently evidenced by calls for the prosecution of those Australians who opposed Australia's participation in the UN military action in the 1991 Gulf War.[253] In short, sedition is a grotesque anachronism in a society which prides itself on being free and open and pluralist.

Finally, the events surrounding the prosecution of Chandler, Bone and Ogston indicate that in the continuing search for more effective protection of freedom of thought, speech and association there is a strong case for firm judicial enforcement of a constitutionally entrenched guarantee of free expression. The offence of sedition is presently suspended between obsolescence and abolition. Australian politics is a very mild brew when set aside the storm and tempest of, say, the period 1945-1955. If the High Court carries through the spirit of its decisions in *Australian Capital Television Pty Ltd v The Commonwealth [No 2]*[254] and *Nationwide News Pty Ltd v Wills*,[255] it will either effectively abolish sedition as a crime or confine its operation so narrowly that it can be resorted to only in those situations when the state is truly threatened and there is no other effective mechanism to protect the survival of the state. If, as a matter of *realpolitik*, there is to be some form of "modernised" quasi-sedition or incitement offence, it should be "proportionate to the gravity of the threat and the probability of its realisation".[256] Either way, the High Court will ensure

252 Aust, Review of Commonwealth Criminal Law, *Fifth Interim Report* (1991). For a critique of the recommendations see Maher, "The Use and Abuse of Sedition" (1992) 14 *Syd L Rev* 287.

253 As above.

254 (1992) 177 CLR 106.

255 (1992) 177 CLR 1.

256 G deQ Walker, "'Underground Empire': Intelligence Agencies and the Rule of Law" (1991) 20 *Fed L Rev* 293 at 295. See, for example, the very narrow test formulated by the Supreme Court of the United States in *Brandenburg v Ohio*

that the lamentable departure from freedom of thought, expression and association which was involved in the early Cold War sedition cases is never repeated. But even though extreme left wing political speech no longer gives "offence" or "threatens" the established order in the way that it did during the four decades and more of the Cold War, there are new threats to the capacity of individuals to engage in unpopular speech and thus good reason to be concerned that Australian legislatures may be tempted to enact legislation to penalise the expression of ideas which a majority of Australians may find repellent. Ironically, many of these newly emerging threats to free speech emanate from the left of the political spectrum and reflect new intellectual trends which define social "harm" in a dangerously elastic and authoritarian way. There are, for example, increasing demands for legislation to punish racial and religious "hate speech" and for the prohibition of vilification of women and homosexuals. Even though we are unlikely to witness their repetition, the Cold War sedition cases should be a clear reminder that a free and open society should not, save in situations of threatened dire irretrievable peril to existing democratic institutions, succumb to the temptation to penalise highly unpopular speech simply because the vast majority of citizens are repelled by the ideas expressed, or because in some vague way it is thought that society is harmed by demonstrably false or repellent ideas. The "harm" which may be thought to flow from the mere expression of, for example, racist, homophobic, sexist or religiously bigotted ideas is best fought by promoting free expression not by suppressing it. This should be the abiding lesson of the Cold War sedition cases.

395 US 444 (1969); Emerson, *The System of Freedom of Expression* (Random House, New York 1970), Ch V.

APPENDIX

jobs I had during the past 38 years—workers education, labour research, and editing and publishing. Although I was especially occupied with the publishing of books during the past 28 years, I also gave all my leisure time to workers' education and labour research, as well as the Communist movement, and expect to continue in these endeavours. My activities were public, and I was happy in my work and in my associations.

The prosecutor also referred to the fact that I was arrested in Newark in 1924—the only previous arrest. I was arrested on the day Lenin died. I went to Newark to address a meeting in the Labour Lyceum which the police called off, and we held the meeting in front of the Lyceum, on its property. The police pulled me down from the stand after I only managed to say "Lenin died today." For that I was arrested and taken with others to the police station. A lawyer of the Civil Liberties Union came and had us released.

I am proud to stand here before you with these dear comrades of mine and with the books in the dock with us, and ready to be judged for publishing them. There are millions of these books abroad in the land today, and I am happy in the knowledge that they will continue to bring light and warmth and love and comradeship among the men and women, workers and farmers, Negro and white people in whose homes they live. I salute them in the hope that there will be more books coming out to keep them company. In fact, I am sure of this.

Before concluding my inadequate remarks, your Honour, I wish to quote from a book I read during my present sojourn in prison. It is a quotation from the remarks of an Abolitionist editor who was imprisoned several times for helping to save a Negro from being taken back into slavery, after having reached the North. He spoke at a reception in his hometown celebrating his return from exile, after the conclusion of the war, and he said:

> "...There was something deeper in the struggle in which I was engaged than questions of technical law. There was something higher than decisions of the courts. It was the old battle, not yet ended, between freedom and slavery, between the rights of the toiling many and the special privileges of the aristocratic few. It was the outlawed right against despotic might. It was human justice against arbitrary power. It was the refining spirit of humanity."

THE "DEMOCRATIC" MONARCHY

R. C.

IN to-day's world of rapid social change the monarchy and the Coronation have an important role to play in the fight for the preservation of the old order, the dying order.

There is not and cannot be anything in common between the ordinary people and the monarchy which, as a social institution, is a close preserve of the ruling class and as a political institution a bulwark of conservatism against social change.

The Monarchy is a useful weapon to protect the system, to stifle class consciousness, foster class collaboration and paralyse working class action for social change.

That, too, is the aim of the Coronation.

Let's look first at "neutral" Royalty and then at the "neutral" Royal Household:

Exactly 100 years ago European Powers recognised a prince from the Danish-German border province of Schleswig as heir to the Danish throne.

Hence came the Duke of Edinburgh, husband of Elizabeth.

The Prince was Christian of Glucksburg who became King Christian XI of Denmark, reigned for half-a-century and gave many descendants to the thrones of Europe.

The Glucksburgs supplied George of Greece, infamous initiator of Greek monarcho-fascism. George was thrown out of Greece in 1923, returned on a fake plebiscite (arranged by fascist dictator Metaxas) in 1935.

George scuttled to Cairo in 1941 and came back in 1946 after another fake plebiscite.

The Duke of Edinburgh, formerly Prince Phillip of Greece, is fascist George's nephew, only son of George's brother, Prince Andrew and his wife, Princess Alice of Battenburg (now Mountbatten).

And who are the Mountbattens?

In 1851 a certain Alexander, son of the Grand Duke of the small German State of Hesse, contracted a morganatic marriage with a Polish "commoner".

The eldest son of this marriage had the ancient title of Count of Battenburg revived for him and later he and his Countess received royal rank as Prince and Princess of Battenburg.

Their eldest son, Prince Louis of Battenburg, came to England, was well received at Victoria's court, joined the navy and became an Admiral.

Anti-German feeling in England during the war caused him to change his name—he translated it literally to Mountbatten—and King George V, who simultaneously changed his name from Wettin to Windsor, granted him a peerage as Marquess of Milford Haven.

Milford Haven's daughter, Alice, married into the Glucksburgs and became Phillip's mother.

Milford Haven's second son, now Admiral Earl Mountbatten, is Phillip's uncle and is said to be a considerable power behind the throne.

Mountbatten symbolises the connection between the Court and the financial oligarchy.

He married Lady Edwina Mount Temple, wealthiest heiress in Britain at the time.

She was the eldest daughter of the first Lord Mount Temple, formerly Wilfred Ashley, Tory M.P., chairman of the Anti-Socialist Union, President of the notorious Anglo-German Fellowship.

Mount Temple's wife was the only daughter of Sir Edward Cassel, son of a Cologne banker, who left his daughter £7,500,000 which, in turn, passed to Mountbatten's Edwina.

As a topical conclusion to this brief summary of Phillip's background, we record the fact that last year his sister, Princess Sophie, widow of Prince Christopher of Hesse, spent a holiday at Balmoral Castle.

Phillip later spent a holiday with Sophie in West Germany. Sophie's husband was killed during the last war fighting with Hitler's Luftwaffe and Germany is again being rearmed.

To those who claim the Royal Household is neutral, I commend a close examination of Who's Who, Debrett and Burke's Peerage. This is what they would find:

The Queen's Lord Chamberlain is the Earl of Scarborough, landowner, director of Lloyds Bank, Standard Bank of South Africa and the Yorkshire Insurance Company.

The Lord Steward is the Duke of Hamilton, deputy-governor of the British Linen Bank and director of insurance companies.

The two permanent Lords-in-Waiting are Lords Cromer and Wigram.

Wigram is a director of the Midland Bank, insurance companies and South American trusts.

Cromer is director of banks, insurance companies, the P. O. and oil companies.

A recent addition to the Honorable Corps of Gentlemen at Arms is Major General Charles Dunphie. When he was appointed, the London Daily Express noted: "At the same time he became managing director of the engineering works and shipyards of Vickers-Armstrong."

Nothing further from the ordinary people could be imagined. The royal circle is a circle whose background origins birth and connections are big business and profits, reactionary politics, opposition to social change and anti-working class.

The Coronation will be their parade and it will be headed by the Royal Standard Bearers.

Lord Harlech, banker and Tory politician, will carry the Welsh Standard.

Lord de L'Isle and Dudley, Tory Secretary for Air, will bear the Irish Standard.

Viscount Dudhope, Tory M.P., will bear Scotland's Standard.

The Earl of Derby, of Martins Bank and the London and Lancashire Company, will carry England's Standard.

Viscount Mongomery will carry the Royal Standard and the Union Standard will be borne by another army officer.

Labour Party historian Harold Laski has noted that every occupant of the throne since George III has "been consistently Conservative and imperialistic in private opinion."

"The inescapable fact is that the social environment of the King is heavily weighted on the Conservative side," Laski wrote.

Historian Sir Charles Petrie wrote a series of articles on Royalty as a pre-Coronation splurge for the London Daily Mail.

Petrie commented on how unpopular George III, George IV and Queen Victoria were. (Victoria in the early part of her reign only, Petrie said.)

Victoria's later popularity can be explained by the fact that her reign saw a tremendous growth of Britain's productive forces, an expansion of the Empire and an expansion of British trade.

In other words, her popularity rose with the capitalists' bank balances.

Sir Charles Petrie is convinced that "George V saved the British Monarchy in an age of revolution."

Even more frank is Sir Charles Nicholson, Court-appointed biographer of King George V.

Nicholson writes that George V sympathised with the Czar and King Alphonso of Spain, both tossed out by their enraged subjects.

Only by the greatest pressure could George V be got to agree to the Liberal 1911 Parliamentary Act cutting down the powers of the House of Lords.

He regarded the defeat of the great British General Strike as a victory for law and order and he personally congratulated the police chief of the time.

George V played a major part in the great Ramsay MacDonald betrayal of 1931.

George V's reign saw great technical changes and social readjustments which he distrusted and feared.

As Nicholson wrote: "The King realised with displeasure that new methods of visual and oral communication, new means of transport, new educational systems and opportunities were creating a younger generation possessing different eyes, different ears and different minds.

"No longer would any adolescent be taught or inclined to take his status for granted. All too clearly did the King recognise the chaotic elements in this confused tradition.

"They seemed to him elements of moral disorder; he did no realise that they were also elements of creative vitality."

The Yanks will be there in force. General George Marshall will represent Eisenhower and with him will go California's Governor, Earl Warren, Mrs. Fleur Gardiner Cowles of Cowles Publications and General Omar Bradley who will represent the U.S. armed services.

The Coca Colonisers have bought up all the best flats and hotel positions along the route and LIFE magazine is advertising a special Coronation issue. With typical Yank modesty, LIFE offers "a panoramic view that will surpass that of the Queen herself."

Japan will be well represented. On March 3, s.s. Glenroy unloaded at a Thames dock 15 tons of small paper Union Jacks, labelled "Made in Japan" and Crown Prince Akihito will be in the Abbey.

The New York Journal of Commerce has figured that the government will make a handsome profit on the whole show. The Journal estimates that Britain will celebrate by quaffing an extra 50 million pints of beer and the tax on this will more than pay for the Coronation.

Overtaxed, underpaid, semi-starved British workers and their wives don't see much to celebrate over. Nor do flood victims and pensioners.

The War Office intends to spend £450,000 on the Coronation. A few minutes before he announced this in the House of Commons, War Minister Anthony Head refused to grant disabled ex-Servicemen a Coronation bonus of 10/- each—a total cost of £25,000.

Osbert Peake, Minister for National Insurance, doesn't think "any special action is called for" by way of making a small grant to old age pensioners to enable them to enjoy the celebrations.

All official uniforms will bear special Coronation badges.

Women making them were paid 3d. an hour. The badge making was sub-contracted by the government.

On March 3, the London Daily Worker interviewed one of the women concerned. The badges were made in strips of 12 and she was given 12 strips for a week's work.

"My job was to make four black crosses and six jewels on each badge. I nearly went blind...with the help of others, I finished the 12 and received 14 - for them," she said. Needless to say, her husband threatened to burn any more she brought home.

Approximately 100 official visitors will be there from Australia, most of their expenses will come from the taxpayers' pockets.

This excludes the services contingent.

There'll be Menzies and his wife, Dr. and Mrs. Evatt, Senate leader O'Sullivan and Mrs. O'Sullivan.

Six Government members and six Labour members, Senate President Mattner and his wife, Speaker Cameron and his wife, Minister for Labour Holt and his wife, six officers and advisers including head of the Prime Minister's Department A. Brown and Secretary to the Treasury Dr. Roland Wilson.

Menzies' party flew by special plane, calling at the U.S. on the way, and they will be guests of "Whip and Lash" Daniel Malan in South Africa on the return trip.

Then, taxpayers have to pay for their individual State teams.

N.S.W. pays for Premier Cahill and his wife, Opposition leader Treatt and his wife, P. Roper, Under-Secretary for the Premier's Department, and T. Tallentire, Cahill's secretary.

Each other State will pay for its Premier and guests and the leader of the Opposition and his wife.

Sydney ratepayers will be shouting Lord Mayor Hills, his wife and Deputy Town Clerk E. W. Adams. Because of "the difficulty of estimating the cost," Hills has been given an open cheque and asked to fill in the details when he comes home.

On March 16, Indian Communist Parliamentary leader Hiren Mukherji attacked the Coronation as "medieval mummery" and demanded that Prime Minister Nehru stay away from it.

Irish Labour M.P. Harry Diamond was ordered from the Northern Ireland House of Commons on March 3 for declaring that the queen was "a foreign monarch".

Irish Nationalist Cahir Healy was even more forthright in the House of Commons on the same day when he opposed the queen's title "Queen of Northern Ireland."

This is an attempt to make partition of Ireland permanent, he said It was an attempt to drag in portion of Ireland which was held by force of arms.

All in all, the Coronation is in the best interests of the ruling class: It is their show alone.

The Coronation provides no solution to inflation and sagging living standards. It does not contribute one iota to the struggle for peace and national independence.

The People's Coronation Day will be the day when their glorious struggles achieve world socialism. On that day Peace and Humanity will be forever enthroned in the heart of all mankind.