

## **AUSTRALIAN INTELLIGENCE ORGANISATIONS AND THE LAW: A BRIEF HISTORY**

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Since World War I intelligence organisations have been much favoured in Australia by Liberal Governments (in their various guises) as a means for upholding the law. After he deserted the Labor Party in 1916 and took over the leadership of the National Party, Prime Minister Billy Hughes expanded and reinforced the role of intelligence agencies as a means of prosecuting dissenters against the war and especially critics of his leadership. In the 1920s, the National Government, under Prime Minister Stanley Bruce, tried to suppress the new Communist Party of Australia ('CPA') using legislation and surveillance bodies. In 1940 the United Australia Party-led Government, under Prime Minister Robert Menzies, legislated to ban the CPA and to allow intelligence bodies to seize their documents and prosecute those members remaining active. As leader of Liberal Party-led Governments after the World War II, Menzies continued his assault on the CPA. By this time, Menzies was working against the background of the Cold War and was able to make use of larger and more sophisticated intelligence bodies.

Liberal Party leaders who have succeeded Menzies have continued to nurture intelligence bodies. Following the 11 September 2001 attacks on the US, Prime Minister John Howard has endowed intelligence bodies with even greater legal powers on the assumption that they are a front line force to be employed in the pursuit of terrorists.

### **I INTELLIGENCE BODIES AND THE FIRST WORLD WAR**

Popular support for World War I waned soon after it commenced, and the large economic slump it created began to affect many people. The war imposed financial strain as prices and rents rose whilst wages remained stationary. Unemployment also increased because of heavy drought, the closure of mines unable to export their ores for refining in Europe and the stoppage on imports due to shipping shortages. The protracted nature of the war also had an effect, leading many people to risk prosecution for voicing dissent against a war that

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seemed to have no end. Surveillance was conducted by the Military Intelligence section of the Australian army against these dissenters, most of whom identified with the political left. Many were prosecuted and fined for such offences as urging men not to enlist and for pronouncing that it was the 'capitalist class' alone which would benefit from the war. The powerful Military Intelligence section arranged postal censorship, newspaper censorship, prosecution in the courts and a small amount of telephone tapping. Anti-war activists were identified through letter-opening by the censor or police reports on public speakers. These sources revealed to Military Intelligence a web of activists, and the card index maintained in the censor's office continued to expand as the war continued.

Australia was governed to a great extent during these war years by the provisions of the *Commonwealth Defence Act 1903* (Cth), but more importantly the *War Precautions Act 1914* (Cth), the model for which was the British *Defence of the Realm Act 1915* (UK). A constant stream of regulations were issued under the *War Precautions Act 1914* (Cth), through which many aspects of wartime life was controlled, ranging from the banning of the sale of gold to anyone other than the Commonwealth Government, to banning the display of red flags because this symbol of socialism was adopted by the war's opponents. The regulations were also used to suppress dissent against the war, such as urging men not to enlist.<sup>1</sup> Hughes later declared that he and Robert Garran's fountain pens had governed Australia during the war years.<sup>2</sup> Sir Robert Garran was the Commonwealth Solicitor-General at that time.

The Australian military was subordinate to the British military commanders for most of the war. When Hughes visited Britain in 1916 he was informed by these British commanders that Australia would have to introduce conscription as the means of providing sufficient numbers of soldiers to replace those wounded or killed. Hughes' plan to introduce conscription met with opposition, particularly from the trade unions who had established the Australian Trades Union Anti-Conscription Congress in the Melbourne Trades Hall. Anti-conscription pamphlets were printed on left-wing presses in Melbourne only to be seized by Military Intelligence for not having been submitted for the censor's approval, and the printers were prosecuted under the *War Precautions Act 1914* (Cth). The printers argued in the Magistrates Court that Prime Minister Hughes had announced at the commencement of the conscription debate that censorship would not apply and they issued a subpoena on Hughes to attend the court to attest. Hughes refused and sent an affidavit to excuse his non-attendance, which was accepted by the Magistrate. The printers were fined the then substantial amount of £50 or four months jail, and both had to enter a bond of £100 to obey the war precaution regulation for the remainder of the war.<sup>3</sup>

Given Hughes' treatment of his trade union friends and supporters, the ensuing split in the Labor Party Government came as no surprise. In an amazing

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1 *War Precautions Act 1914* (Cth) reg 28.

2 Frank Cain, *The Origins of Political Surveillance in Australia* (1983) 22.

3 *Holland v Jones* [1917] VLR 395.

demonstration of political agility, Hughes switched from leading a Labor Party Government to leading the National Party (composed of fellow Labor deserters plus the existing Liberal Party), following which he urged Military Intelligence to more actively pursue the opponents of the war.<sup>4</sup> Hughes rallied Military Intelligence as a type of private police force to strike out at his foes in the trade unions, the anti-war groups and the state Labor Governments, such as that in Queensland, which refused to allow its police force to pursue dissenters against the Commonwealth's war policies.

Under his new anti-Labor approach, Hughes began pursuing an anti-war group on the left of the Labor Party, called the Industrial Workers of the World ('IWW') and also known as 'Wobblies'. The IWW had been formed in Chicago in 1905 and was taken up by Australian left activists by 1910. Because industrial strikers in the US were frequently attacked and their strikes broken by the US military, the Australian IWW appealed to growing anti-military sentiment that was reflected in opposition to the war and to recruitment. The IWW published a paper, *Direct Action*, which carried stinging cartoons of the sacrifices of the workers in a war that enriched the capitalist class. Branches were established in most capital cities and their public meetings attracted large crowds. They became an important focal point for the anti-war movement and it was not surprising that Prime Minister Hughes wanted them suppressed. Military Intelligence, the censor's office and the various police forces increased their surveillance on the IWW and in September 1916, following the outbreak of fires in Sydney early in 1916 these agencies arrested 12 of the Wobblies' leaders ('the twelve'), accused of starting the fires and charged them with treason felony. This charge was later changed to charges of conspiring to commit arson, conspiring to pervert the course of justice and conspiring to cause sedition. The accused were tried by Pring J<sup>5</sup> and jailed for long terms, thereby helping the Government to brand the movement as a body of terrorists and arsonists.

On 28 October 1916, a referendum to introduce conscription was rejected by the public and, as if to compensate for this defeat, Prime Minister Hughes decided to ban the IWW and had the *Unlawful Associations Act 1916* (Cth) passed by Parliament on 19 December. The Act declared the IWW to be an unlawful association, rendering its members subject to imprisonment for six months if they took any action to hinder the war. Being an IWW member, however, was not illegal. Offending members not born in Australia could be deported.

The IWW ceased its anti-war program and concentrated its efforts on having the twelve retried while continuing to publish *Direct Action*. Public sympathy swelled for the imprisoned twelve and money and support flowed in. Hughes then introduced an amendment to the *Unlawful Associations Act 1916* (Cth) in February 1917, making membership of the IWW illegal, and punishable with six months jail. Overseas-born members were to be deported after their six months

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4 See Cain, above n 2, 58 for a discussion of the Hughes-led attack and prosecution of the Melbourne Trades Hall Council.

5 *R v Reeve* (1917) 17 SR (NSW) 81.

imprisonment. Printing and distributing IWW material could incur a jail term of six months. The onus of proof of not being a member and of not being foreign-born fell on the accused.

The police and Military intelligence had seized all IWW records and the subscribers' list for *Direct Action*, and these were used to arrest, try and sentence 103 members to six months imprisonment mostly with hard labour. Two men in Sydney denied having continued to be members, but the prosecution used the seized records as evidence and they were jailed for nine and 12 months for perjury. Selecting members for deportation was problematic because many had no birth records, but the police and Military Intelligence combed shipping lists and birth registrations. Twelve members were selected for deportation after six months imprisonment and put on board a ship in Sydney Harbour sailing to Chile. They were unloaded at Valparaiso and the complaints of British deportees as well as the Chilean Government were loudly heard in London through the British ambassador in Chile. Lord Milner, Secretary of State for Colonies, sent a stinging letter to the Australian Governor-General saying that '[t]he expulsion of British subjects from British soil, and their deportation to a country to which they do not belong ... is not in accordance with recognised international practice'.<sup>6</sup>

Agitation in the labour movement led to protests over the jailing of the twelve, particularly because the police informers were found to have fabricated their evidence. Justice Street conducted an inquiry in August 1918 and interviewed the informers who had become disgruntled about the small amounts of money paid to them by the police. The police paid one man to move to the US and he was compelled to return to Sydney for the hearing. Justice Street said, however, that he could find no 'misconduct against members of the police force' and the sentences remained. Another inquiry was conducted leading to the men being released in August 1920.<sup>7</sup> Much of the work in pursuing and prosecuting the IWW leaders was conducted by the Counter Espionage Bureau, which was the Australian branch of the British MI5 led by Major George Steward, who doubled as the official secretary to the Governor-General. His task was to watch neutral countries obtaining exports from Australia for sale to Germany. Once that trade was terminated, Steward had little to engage him and he became involved in arresting IWW members and seeing to their deportation.<sup>8</sup>

When the war ended in 1918, the Government decided to continue the surveillance of left radicals. The Investigation Branch was established within the Attorney-General's Department to conduct that work as well as functioning as the investigative agency for breaches of Commonwealth laws, such as forgery of bank notes, or breaches of naturalisation or immigration laws. The Branch was established by administrative fiat, with its staff drawn from former Military Intelligence officers and its existence kept secret. It inherited the large number of files that had been created by Military Intelligence and it continued to monitor the same radicals, this time with the goal of preventing them from importing

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6 Frank Cain, *The Wobblies at War: A History of the IWW and the Great War in Australia* (1993) ch 10.

7 See New South Wales State Records Agency, Police Department, Special Bundle, *Papers Concerning the International [sic] Workers of the World 1917-23*, box 7/5593.

8 Cain, above n 2, ch 11.

socialist and radical publications, which it stopped by instituting a Customs Department literature ban. The Branch was in contact with Scotland Yard and MI5 for the exchange of information concerning the travels of Bolsheviks and, later, communists to and from Moscow. Major Richard Casey in the Australian High Commissioner's office in London acted as the agent for transmitting this surveillance information. When the CPA was established in 1921, the work of the Branch expanded and it became fully occupied with banning communist papers and books produced either locally or overseas, as well as monitoring industrial disputes in which radical trade unionists led their unions to ignore judgments issued by the Commonwealth Arbitration Court.

The appointment of John Latham as Attorney-General in 1925 was of considerable aid to the Branch because Latham was a fierce opponent of the Australian left and the Communist Party. With Garran's assistance, Latham had the *Commonwealth Crimes Act 1900* (Cth) expanded in 1926 to strike more effectively at the left. These reforms incorporated portions of the *Unlawful Association Act 1916* (Cth) which shifted the onus of proof on to the accused. On the suggestion of the Director of the Investigation Branch, Latham arranged for all communist papers to be banned under s 30E of the *Crimes Act 1900* (Cth) from using the post. Latham made further amendments to that Act in 1932 to allow the Attorney-General to apply to the High Court or a Supreme Court for a judgment that a particular organisation was an unlawful association.

The Government then launched a prosecution against Hal Devanny, the publisher of the *Workers' Weekly*, under the *Crimes Act 1900* (Cth) for seeking funds for the Communist Party. This could then be used as evidence under *Crimes Act 1900* (Cth) s 30D that the paper was an organ of the party, which was itself an unlawful association. He was sentenced to six months jail, but appealed successfully to the High Court<sup>9</sup> where a majority decision of five to one found that the conviction should be quashed. Justice Evatt said that the case was very poorly framed and should not have gotten through the lower court. The Investigation Branch was able to counter this slight set-back by using other amended legislation. Under the *Immigration Restriction Act 1901* (Cth) non-Australian born agitators could be deported, immigrant radicals prevented from becoming naturalised citizens and communists denied passports for travel to Moscow. Under the *Conciliation and Arbitration Court Act 1904* (Cth) radical unions affiliating with the Communist Party could be deregistered (although that was to happen later), and under the *Customs Regulations* imported radical papers and books could be seized.<sup>10</sup>

In 1938, the NSW Police joined with the local Military Intelligence to establish the Military Police Intelligence Section, which prepared dossiers in Police Headquarters on local communists and radicals. This was mainly because the headquarters of the CPA were in Sydney and trade union militancy was more strongly organised there. Robert Menzies had replaced Latham as Attorney-General in 1934, and nearly a year later Latham was appointed Chief Justice of

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9 *R v Hush; Ex parte Devanny* (1932) 48 CLR 487.

10 Cain, above n 2, ch 7.

the High Court. However, Menzies was no more tolerant of the left and the CPA than Latham had been. World War II commenced on 3 September 1939 and Menzies, now Prime Minister, introduced the *National Security Act 1939* (Cth), similar to the *War Precautions Act 1914* (Cth), that provided for the issuance of national security regulations. On 15 June 1940, the Communist Party was banned under the specially prepared *National Security (Subversive Associations) Regulations 1940* (Cth).<sup>11</sup> The Investigation Branch oversaw the ban with police assistance. The Party's presses, books, papers and documents were seized in all Australian states. The confiscations extended to the Mackay Circulating Library in Queensland because it held Left Book Club editions in its collection.<sup>12</sup>

The Party leaders went underground and printed anti-Menzies literature with hand-operated presses. Lillian Davis was arrested in Sydney in July 1940 for letter-boxing this material and the police prosecuted her under the s 3(1) of the *Printing Act 1899* (NSW) because the printer's name was not displayed. The police sought to prosecute her as well under reg 7 of the *National Security (Subversive Associations) Regulations 1940* (Cth), but the Commonwealth Crown Solicitor, Harry Whitlam objected and declared that, while the pamphlet was invective, it could not be considered a statement of unlawful doctrine. It was soon obvious to the intelligence community that it was very difficult to ban political parties, such as the Communist Party, who could conceal their activities in various ways. They met in tennis club premises pretending to be sporting enthusiasts and two of their leaders stood as candidates in the 1940 federal elections as 'independents'.<sup>13</sup>

When the Labor Government took office in October 1941 they changed the structure of the wartime Security Service that had evolved as a collection of New South Wales policemen and army officers. The new Attorney-General, Dr Herbert Vere Evatt, appointed W B Simpson<sup>14</sup> as its Director-General and the Security Service became the central surveillance body for watching communists after Evatt lifted the ban on the Party in December 1942. The army was the dominant intelligence body; it conducted the postal, telephone and press censorship and was unwilling to provide information to its competitor, the Security Service. It also conducted the radio intercept operation against the Japanese and had spare capacity to listen to Soviet communications in the region. The question of how much the Labor Government knew of that army operation is still open. The Investigation Branch went into abeyance for the course of the war. When the war ended, the Security Service was merged with the revived Investigation Branch in November 1945 to form the Commonwealth Investigation Service, while the army kept hold of the radio intercept operation.

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11 These regulations were amended by further delegated legislation. See *Subversive Association Regulations 1940* (Cth).

12 See Cain, above n 2, ch 8 for the legal details of the ban and how it was enforced mainly by the State police forces.

13 National Archives of Australia, CRS A1608, item B39/2/2; CRS A 472, bundle 89, item 78.

14 Simpson was a school friend of Evatt and was appointed judge of the Supreme Court of the ACT at the end of the war: Cain, above n 2, 291–3.

## II THE VENONA OPERATION

The Allies perfected their methods of collecting intelligence about the enemy by tapping into their communications network during the war, and this contributed to numerous campaign successes. The US Army's Signal Intelligence Service expanded its program during the war to break into Soviet communications between Moscow and its many embassies and consulates. This operation was known as VENONA and from 1943 the Americans seem to have been assisted by Australia's military signals intelligence organisation, which collected the cables sent and received by the Soviet embassy in Canberra. This demonstrates the usefulness of the army retention of the radio signals organisation at the end of the war. The Australian Labor Party Government knew nothing of this successful interception program or the army's role in it.

The Americans collected these transmissions with the intention of decoding them and by April 1947 their cryptanalysts had achieved success in breaking into the messages between the Canberra embassy and Moscow. These transmissions revealed that material had been leaked from Australia's Department of External Affairs to the Soviet embassy. The US officials chose to inform the British intelligence officials of this leak, rather than the Australian Government. Consequently, Prime Minister Joseph Chifley first heard of the affair when Sir Percy Sillitoe, chief of the British counter-espionage body MI5, flew to Australia in May 1948 to reveal the small portion of the decryption that the Americans were prepared to give the British. Sillitoe's information was incomplete, but Chifley ordered that an inquiry be conducted by the Department of Defence into these revelations. The investigation was based on limited material and produced nothing positive. Chifley communicated this to British Prime Minister Clement Attlee. The Pentagon officials were highly alarmed by these Australian VENONA revelations and they imposed a ban on the transfer of all classified information to Australia in 1948.<sup>15</sup> This affected the British, who were then developing their missile manufacturing program and had planned to build a missile testing range at Woomera in South Australia.

In order to win back US support, Chifley and Attlee agreed to establish a new counter-insurgency body to be known as the Australian Security Intelligence Organisation ('ASIO').<sup>16</sup> The Labor Government was already prepared to establish a new security vetting body under a creditable lawyer and it announced the establishment of ASIO on 16 March 1949. Justice Reed of the South Australian Supreme Court was appointed as its Director-General, responsible to the Attorney-General.<sup>17</sup> The Secretary of the Department of Defence, Sir Frederick Shedden, was sent to Washington to demonstrate the credentials of the new ASIO and establish why the US embargo had been imposed. Sillitoe had not revealed the existence of VENONA to Chifley and pretended MI5 had obtained

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15 Frank Cain 'Venona in Australia and its Long-Term Ramifications' (2000) 35(2) *Journal of Contemporary History* 231, 234.

16 Frank Cain, *The Australian Security Intelligence Organisation: An Unofficial History* (1994) 28–82.

17 *Prime Minister's Memorandum to the Director General of Security, Being a Directive for the Establishment and Maintenance of a Security Service*, signed by Ben Chifley, 16 March 1949, <<http://www.asio.gov.au/About/Timeline/Content/Directive.htm>> at 15 November 2004.

the information from a spy. Although Shedden spoke to the senior members of the US administration, including President Harry Truman himself, he met with blank silence from officials who seemed to be looking more to the Labor Government being deposed by the new Liberal-led Menzies Government at the elections planned for December 1949.

The new Menzies Government wished to expand ASIO. Menzies began by advising Justice Reed that he could return to South Australia and then he appointed the Director of Military Intelligence, Colonel Charles Spry, as the new Director-General with an expanded directive.<sup>18</sup> Menzies' legislation to ban the Communist Party was passed by Parliament for the second time in October 1950, but it was declared unconstitutional by the High Court in March 1951.<sup>19</sup> Menzies' attempt to amend the Constitution, intended to make the ban constitutional, was rejected by a referendum in September 1951. The new ASIO began investigating Sillitoe's disjointed information, which included the names of officers in the Department of External Affairs (Hill, Throssell and Milner) and code names allocated by the Soviets to Australians such as 'Bur', 'Klod' and 'Tourist'. The contents of the VENONA papers seemed to be known to senior Liberals like Richard Casey, who was closely connected to leading members of both the British and US intelligence agencies. In May 1952, Casey made a significant announcement in the Commonwealth Parliament that 'there was a nest of traitors in our midst'.<sup>20</sup> This 'nest' was identified as having been in the Department of External Affairs and it had flourished when Evatt was Minister. It was a signal that Menzies had evidence to expose the VENONA Soviet spies.<sup>21</sup>

The means for uncovering the 'nest' was already at hand in the form of the coding clerk at the Soviet Embassy, Vladimir Petrov. He had arrived with his wife, Evdokia, on 5 February 1951 and was soon befriended by a part-time ASIO agent, Dr Bialoguski, who spoke Russian and had migrated from Poland in June 1941. He worked as a medical doctor by day and an ASIO agent by night and entertained Petrov at the bars and brothels in Kings Cross on Petrov's frequent visits to Sydney. He reported Petrov's conversations to his ASIO handler including Petrov's inclination to defect if the rewards were sufficient. Petrov offered, as the price for his re-settlement in Australia, to produce papers he said were held in the embassy's KGB safe, to which he claimed to have access.

This caught the attention of ASIO and the Government because they would have the opportunity to insert what they knew of the contents of the VENONA papers into the papers Petrov said he would bring out on his defection. The senior members of the Menzies Government longed to expose and prosecute the 'nest of traitors', but lacked the authorisation of US intelligence to produce the VENONA documents as court evidence for prosecution of, say, Walter Clayton for stealing Crown documents. However, if the names could be 'found' in Soviet documents Petrov was to produce, the guilty people could be exposed before the Royal

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18 *Charter of the Australian Security Intelligence Organisation*, signed by Robert Menzies, 6 July 1950.

19 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

20 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 May 1952, 808 (Richard Casey, Minister for External Affairs).

21 *Ibid* 871–2.

Commission and put on trial without referring to the American decrypts. Thus Hill and Throssell and the owners of the Soviet code names, 'Bur', 'Klod' and 'Tourist' (as mentioned above) could be summoned before a Royal Commission, as had happened in the Gouzenko defection in Canada nearly 10 years previously. These individuals could then be prosecuted in court for spying, as also happened in the Canadian spy cases.<sup>22</sup> ASIO encouraged Petrov to defect by offering him citizenship and \$10 000 (worth approximately \$63 000 today) for his documents, and twice that amount if the papers were highly revealing. To further tempt Petrov, in December 1953 ASIO offered to buy him a chicken farm outside Sydney.<sup>23</sup>

All went according to plan and before Petrov defected on 3 April 1954 he met with Colonel Spry at Kings Cross, who gave him the wad of money promised for his defection.<sup>24</sup> We do not know when the papers from the VENONA information were merged with those Petrov was supposed to have withdrawn from the KGB safe. It could have been after he was driven to ASIO's safe house in a Sydney suburb. This cleverly planned defection unsurprisingly occurred on the eve of the 1954 parliamentary elections. Opinion polls suggested that Menzies might lose the election, but by springing this defection he effectively 'pulled a rabbit from a hat'. The electors were attracted back to the devil they knew and Menzies and his Government were returned to office. The Labor party won more votes nationally, but were left with a minority of seats.

The Petrov Royal Commission and the papers he produced, including the VENONA names, became the central focus of the Royal Commission on Espionage established by Menzies. The papers were divided into several categories and contained the names of 63 Australians, but, more significantly, the names of 11 people appearing in the VENONA papers. ASIO controlled the course of the Royal Commission because it held the various documents, which it strategically released during the hearing, and it held the Petrovs in its safe house where they were taken through rehearsals of the evidence to be produced the following day.

The Commission was composed of three judges selected by Prime Minister Menzies. These included Justice William Owen from NSW, Justice Philp from Queensland and Justice Ligertwood from SA. Dr Evatt, then leader of the Labor party in opposition, was convinced that Menzies had arranged the defection to coincide with the election as the means of ensuring Evatt's defeat. Evatt appeared before the Commission to represent members of his staff mentioned in Petrov's documents. He believed that the documents were fabrications, but he had no overview of the papers ASIO held or the sequence in which ASIO would produce them. He knew nothing of the VENONA secrets nor the names of the people mentioned in the VENONA papers who would be called before the Commission. This led him to exert too much energy in attacking the first group of papers,

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22 See Frank Cain, 'Responses to the Defection of Gouzenko in Canada and Petrov in Australia', in Margaret MacMillan and Francine McKenzie (eds), *Parties Long Estranged: Canada and Australia in the Twentieth Century* (2003) 183.

23 National Archives of Australia, ASIO Report RCS, Cabin 12, Folder A, A6283/XR1, item 18.

24 For a detailed account of the defection and its planning, see Cain, above n 16, chh 6–7.

Document J, instead of waiting for the appearance of the later documents.<sup>25</sup> His combative technique raised some questions over the standing of the Royal Commission and, when he asked for Dr Bialoguski (whose involvement was an ASIO secret) to be called to give evidence, the Commissioners withdrew his permission to appear. The Royal Commission continued until September 1955.

The Petrovs were not in Australia during the VENONA-revealed activities, but they claimed to have 'remembered' details from conversations they had overheard in Russia about code names and local events in surprising detail.<sup>26</sup> However, nothing sensational was revealed and, given that the Americans would not endorse the use of VENONA for local prosecutions, none were recommended by the Commissioners. Colonel Spry and ASIO emerged with an enhanced reputation with Spry declaring that 'the Petrovs had identified over 500 Intelligence Officers. This information is invaluable to the Free Democracies'.<sup>27</sup> Spry was concerned that the Labor Party's opposition to ASIO, and Dr Evatt's questioning of ASIO's dominance of the Royal Commission on Espionage could be a disadvantage for ASIO if an Evatt-led Government were elected in the future. ASIO then functioned under the 1949 Chifley Government charter and Spry asked Menzies in October 1954 to introduce legislation establishing ASIO as a statutory body. But this did not occur until October 1956 when Menzies introduced the *Australian Security Intelligence Organisation Act 1956* (Cth), drafted by Spry,<sup>28</sup> and gave a second reading speech also prepared by Spry.<sup>29</sup>

### III EXTERNAL SPYING AND EAVESDROPPING

Richard Casey, already mentioned as a leading member of the governing Liberal Party, had long been involved in intelligence affairs in Britain and the US where he was a close friend of the two Dulles brothers, one of whom became Secretary of State and the other the Director of the Central Intelligence Agency. Casey believed that it was essential for Australia to possess its own spying agency to collect information about the Chinese communists, the communist threat in French Indochina and the Malayan Communist Party. In May 1952 he obtained the Prime Minister's authority to establish the Australian Secret Intelligence Service ('ASIS') which, like the CIA, would have an operations wing and officers trained in the use of guns and explosives.<sup>30</sup> Casey arranged for the ASIS agents to be trained by the British Secret Service, also known as MI6,

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25 ASIO introduced more important documents later, ie, the Moscow letters and Document G, linking the Soviet code names appearing in VENONA to various Australians. For letters see National Archives of Australia, A6201, item 51.

26 Cain, above n 16, ch 8.

27 Commonwealth, Royal Commission on Espionage, Transcript of Proceedings, A6213, U7 (Letter from Charles Spry, Director-General of Security, to Secretary, Prime Minister's Department, 6 September).

28 See also Cain, above n 16, 253–6.

29 Commonwealth, *Parliamentary Debates*, House of Representatives, 31 October 1956, 2019–20 (Robert Menzies). For Evatt's and Whitlam's responses see Commonwealth, *Parliamentary Debates*, House of Representatives, 31 October 1956, 2015, 2033. See also Cain, above n 19, 254–5.

30 *Charter of the Australian Secret Service*, signed Robert Menzies, 15 May 1952.

after which they were posted to serve undercover in Australian embassies. They liaised with the local intelligence agencies in the pursuit of their common enemy, the Sino-Soviet bloc. The existence of ASIS remained a well-kept government secret until it was exposed in 1977, after which it attracted the public spotlight in a series of blunders.<sup>31</sup>

Other Australian intelligence agencies expanded by the Menzies Government in the post-war years included the Defence Signals Directorate ('DSD'). This body was the continuation of the wartime code-breaking institutions developed by the Allies to intercept the enemy's radio communications and counter their actions – activity that considerably shortened the war. Western governments viewed these facilities as a means of countering the communist nations after the war and this led to the formation of a secret alliance between the US, Britain, Canada, Australia and New Zealand whereby the communications traffic of communist countries would be collected, translated and exchanged between the participating countries. The various military intercept stations established during the war in Australia were incorporated into the Defence Signals Directorate, which functioned under the control of the Department of Defence.

Under the secret agreement, DSD's role was and is to intercept communications in the North Asia, China and Indonesian regions. This is done using its large satellite terminals to intercept, for example, Indonesia's Palapa communication satellite system, which has been installed in geo-stationary orbit over the Indonesian archipelago. Because other South East Asian states such as Thailand, Malaysia, Singapore, the Philippines and Papua New Guinea have leased space on these satellites, their communications are also collected by DSD.<sup>32</sup> The various DSD listening stations are linked to the main centre within the army's signal's regiment base at Watsonia outside Melbourne. Watsonia provides secure communication by direct links through the 'Project Sparrow' satellite network, from DSD's head office in Canberra to the headquarters of the US National Security Agency ('NSA'), at Fort Meade, near Washington, USA. In 1988 the Commonwealth established a new DSD station at Geraldton, north of Perth, but more importantly on the western side of the continent so that it can interrogate communication satellites that hover over China, in an arc stretching from Moscow in the west to Alaska in the east. This station can monitor communications and other signals transmitting from over 100 geostationary satellites.

By interrogating these satellites, DSD is able to tap into communications flowing in and around the five nations of the former Soviet Union, China, Japan, India, Pakistan as well as the neighbouring Asian nations.<sup>33</sup> DSD monitors Indonesian military matters and can send aircraft or submarines to collect low-level transmissions from military radios or wireless telephones not detectable from its own listening stations. By these means, DSD detected the Indonesian military attacks on East Timor nationalists from 1975 to 1999, particularly the

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31 Brian Toohey and William Pinwell, *Oyster: The Story of Australian Secret Intelligence* (1989) ch 11.

32 Desmond Ball, *Signals Intelligence in the Post-Cold War Era: Developments in the Asia-Pacific Region* (1993) 63.

33 Desmond Ball, *Australia's Secret Space Programs* (1988) 40.

thousands of killings conducted by the Indonesian armed militias around the time of the UN sponsored referendum on independence in 1999.

The intercepts, both then and now, are translated into English but, instead of being made available to the Australian Government, they are analysed by the Defence Intelligence Organisation (searching for defence information) and the Office of National Assessments ('ONA') (searching for commercial and political intelligence). The interpretation sent to the Government is not infrequently melded to match the Government's policy towards the Indonesian Government. Throughout the Indonesian occupation of East Timor, from 1975 until 1999, Australian governments tolerated Indonesia's military presence and the Timorese deaths rather than embarrass the Indonesian Suharto Government. The human rights of the unfortunate Timorese people were then of little importance.<sup>34</sup>

#### IV SURVEILLANCE AND THE VIETNAM WAR

The Vietnam War brought ASIO into greater prominence as it conducted surveillance on the growing numbers of protesters against Australia's participation in the war. Middle-class mothers who formed Save Our Sons groups and university students who established branches of the Draft Resisters' Movement were all surveilled. ASIO recruited right wing students and some teaching staff to act as informers and to infiltrate the anti-war groups.<sup>35</sup> For a time, ASIO operated in Vietnam in advising the South Vietnam Government on conducting surveillance and counter-espionage operations. ASIS would have assisted the South Vietnamese in their spying operations and DSD would have been monitoring the North Vietnam radio communications and especially Soviet merchant shipping, which was transporting arms and SAM missiles for use against America's aerial bombardment.

The intelligence bodies were acting on the policies of their ministers. Their reports were not objective: they could not tell their ministers that the war was unwinnable and that Australia should withdraw before more of its task force in the Phuoc Tuy Province were killed. But killed they were, and a small number of Australia's middle class withdrew their support from the war after 1969 and voted, many for the first time, for the Labor Party. Policies were sought within governing circles on how to slow this drift to the left. ASIO's management responded to this call for support from the Liberal leadership by preparing briefing papers for distribution to the Australian-wide media emphasising the evils of communism and the 'new Left'.<sup>36</sup> But the drift continued and the Whitlam-led Labor Government took office in December 1972.

Some members of the Labor Party believed that ASIO had played a partisan role in staging the Petrov Affair, and other members objected to ASIO's surveillance of Party activists demonstrating against the Vietnam War. This

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34 Desmond Ball and Hamish McDonald, *Death in Balibo, Lies in Canberra* (2000).

35 Ann-Mari Jordens, 'Conscription and Dissent, The Genesis of Anti-War Protest' in Gregory Pemberton, (ed), *Vietnam Remembered* (1990) ch 3.

36 'How Secret Police Use the Press and Vice Versa' (1976) 23 *New Journalist* 3.

mood of resentment in the Party led to the near adoption of a resolution at the Party's National Conference, which would have bound a new Labor Government to disband ASIO. On becoming Prime Minister in 1972, Whitlam arranged for a judicial inquiry into ASIO and the other secret intelligence bodies about which the Whitlam Government knew little – ASIS, DSD, and the Joint Intelligence Organisation ('JIO'), later known as the Defence Intelligence Organisation ('DIO'). Whitlam appointed Justice Albert Woodward to be head of ASIO at this time and had the *Australian Security Intelligence Organisation Act 1956* (Cth) amended to provide that if a judge were appointed Director-General of ASIO his or her tenure, status, rank and salary would be unaffected (this bill was passed by the incoming Fraser Government).<sup>37</sup> To conduct the inquiry, Whitlam appointed Justice Robert Hope of the New South Wales Court of Appeal. However, Hope was slow to report and it was to the new Liberal Prime Minister, Malcolm Fraser, that he reported, rather than to Whitlam who was dismissed in November 1975.

Hope recommended a brace of illiberal measures which would render ASIO independent of ministerial and parliamentary control, while preserving its secretive nature. Journalists or others revealing an ASIO agent's name would be fined \$1000 or jailed for one year, as would any ASIO employee providing information about the organisation. The enduring harmony between a Liberal Party-led Government and ASIO continued and Prime Minister Fraser introduced the Hope recommendations by an amending *Australian Security Intelligence Organisation Act 1976* (Cth) in October 1979.<sup>38</sup> The Labor Party sought changes, but they were rejected by the Liberal Party, which wanted to defend ASIO against what its members believed to be an attack by left-wing forces. One recommendation of the Australian Labor Party was to establish a security review tribunal by which people could have their security classification, if damaging, reviewed. This was incorporated in the Fraser Government's legislation.

The Liberal Party's Members of Parliament seemed to believe that ASIO was an unofficial branch of their Party and shared its goals of excluding left forces from holding any position of authority, such as in the military services, the public service or in other positions of influence. Attempts by Labor to make changes to ASIO were perceived by the Liberals as being a threat to their security of influence. The Liberal Party's perception of closeness to ASIO accounts for the emotion it used in rejecting Labor's amendment. Such changes, they said, would 'effectively emasculate' ASIO, while Labor's open discussion of ASIO activities would assist Australia's enemies. Another Labor amendment seeking a periodical judicial audit of ASIO was seen as a Labor plot to infiltrate Labor-friendly judges into ASIO. 'I can think of a couple of judges', said one Liberal leader, 'whose names would only have to be dropped for the security organisation to be in shambles within a week'.<sup>39</sup>

The Hawke Labor Government was returned in March 1983 intending, like the Whitlam Government, to make ASIO more accountable. Hawke arranged for

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37 *Australian Security Intelligence Organisation Act 1976* (Cth).

38 *Australian Security Intelligence Organisation Act 1979* (Cth).

39 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 September 1979, 1210 (Kevin Cairns).

Justice Hope to conduct a second inquiry to follow up to his inquiry of 1978. Labor put its recommendations to Hope and these were included in the amending Act, which was introduced in May 1986.<sup>40</sup> These provided for greater ministerial influence over ASIO, the establishment of a Joint Parliamentary Standing Committee on ASIO and the establishment of the office of Inspector-General of Intelligence and Security to oversee the five intelligence bodies (ASIO, ASIS, DSD, JIO and the ONA established by Prime Minister Fraser).

These accountability provisions were opposed by the Liberal Party, which was still determined to preserve ASIO from leftist interference. The Party's rhetoric in defence of ASIO persisted with the Liberal's Deputy Leader (and Melbourne barrister), Neil Anthony Brown declaring: 'I would not trust the Australian Labor Party as far as I could kick it as far as having anything to do with the security services of this country is concerned'.<sup>41</sup> The Liberal Party especially opposed the clause providing for a Standing Parliamentary Committee on ASIO, perceiving it as a means for Labor MPs to acquire inside knowledge of ASIO's workings. It could not stop the amendment, but it promised to abolish it on being elected to office.<sup>42</sup> Fortunately, this threat was not carried out when the John Howard's Liberal-led Government regained government in 1996.

## V INTELLIGENCE AND THE END OF THE COLD WAR

The conclusion of the Cold War by 1991 had a significant impact on all the Australian intelligence bodies. Their Russian linguists were made redundant although they could now fraternise with Russian intelligence officials based in the Canberra embassy of the newly capitalist Russian state, known as the *Sluzhba Vneshney Rasvedi Rossii*, the successor to the dreaded KGB. One ASIO Russian linguist who met Russian officers was soon after secretly photographed while removing papers from his ASIO office and charged with 24 counts of espionage. He claimed that the papers were official documents discussing redundancy and, after a drawn-out trial period, the charges were dropped. ASIO wished to avoid the public exposure that an extended trial would have created.<sup>43</sup>

ASIS was affected by similar uncertainties and dismissals of staff. ASIS agents in India and Egypt were exposed to stressful situations and were pushed out of the secret service when they sought help and compensation. Receiving no assistance from the Inspector General's Office, they appealed to the television media in 1994 and mentioned that Australian agents had made payments to political parties in Malaysia. The Labor Party's Foreign Minister, Gareth Evans, immediately silenced further discussion by establishing a Royal Commission of Justice Samuels and Michael Codd, to investigate ASIS generally and the staff complaints. They produced a 900 page report in April 1995 recommending that

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40 *Australian Security Intelligence Organisation Amendment Act 1986* (Cth).

41 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 June 1986, 4373–4 (Neil Anthony Brown).

42 Cain, above n 16, ch 11.

43 Jack Waterford, 'Hunt for Moles Within ASIO', *Canberra Times* (Canberra), 5 May 1994, 15.

ASIS be brought under its own parliamentary act. The complaints of the unfortunate staff members were abruptly dismissed.<sup>44</sup>

During the Cold War, the Australian media was reluctant to discuss intelligence agencies, but this policy changed as the war's tensions faded in the early 1990s. The media began to question the functions of the agencies, and the agencies responded with accusations of media irresponsibility concerning matters of national security. The media's discussion of allegations concerning Australian funding of Malaysian political parties angered Foreign Minister Evans. In a parliamentary speech in June 1995, the Minister made the startling declaration that journalists could be prosecuted and jailed under the *Commonwealth Crimes Act 1900* (Cth) for publishing those comments.<sup>45</sup> The media responded with outrage at the Minister's comments and remarked that news about intelligence bodies could not continue to be suppressed in these changed times.<sup>46</sup>

ASIO's management likewise responded to the media's scrutiny of its organisation and, in an attempt to deter further probing, its Deputy Director-General, Gerard Walsh, made the announcement that the murder of three ASIO agents or suspected agents was due to irresponsible reporting by the media. Details of these deaths were demanded by an astonished media, but none were produced.<sup>47</sup> These attacks on the media by management and ministers did little to deter investigative journalism.

Further cuts in the size of intelligence bodies followed the election of the Liberal-led Howard Government in 1996 as it set about reducing the size of the public service. ASIS was compelled to borrow money from the Treasury in 1996 to fund redundancy payments for 20 of its agents.<sup>48</sup> ASIO had to shed 50 positions (down to 520) to meet a five per cent budget cut that also reduced its management numbers.<sup>49</sup> The growing uncertainty for career prospects in ASIO led to an increased resignation rate, reaching 11.5 per cent by 2002. The reduction in office space through ASIO's lay-offs provided rooms on its top floor for housing another intelligence agency that had been functioning since 1979, the ONA. The role of the ONA was to provide collective intelligence derived from other government departments, including DSD, on civil and economic issues affecting the countries of strategic importance to Australia.

Questions remained about how the two leading Cold War civilian intelligence agencies, ASIO and ASIS, should be handled a decade after the war's end. Reviewing visas for travellers to the impending Sydney Olympic Games in 2000 created some work for ASIO, but handling terrorist threats was considered a task more suited to state and Federal police and army commandos. Cold War-based intelligence skills were no longer required to defend the state from external

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44 Royal Commission of Inquiry into the Australian Secret Intelligence Service, *Report of the Australian Secret Intelligence Service*, Public Edition (1995).

45 Gareth Evans, 'Why Security Breaches Must be Outlawed', *The Australian* (Sydney), 2 June 1995, 11.

46 Cameron Stewart, 'The Big Stick', *The Australian* (Sydney), 3 June 1995, 15.

47 Cameron Stewart, 'The Politics of Espionage', *The Australian* (Sydney), 4 November 1995, 12.

48 Ian McPhedran, 'ASIS Borrows \$3.1 million for Redundancies', *Canberra Times* (Canberra), 7 September 1996, 6.

49 Ian McPhedran, 'ASIO Managers at Risk of Axe', *Canberra Times* (Canberra) 21 May 1997, 4.

subversion. Governments and the public were more concerned about corporate crime, cash flows from drug related activities, commercial fraud and police corruption. Several Commonwealth and state anti-corruption bodies had been established under special legislation endowing them with legal powers to conduct clandestine operations, interrogate people in secret hearings, and inspect taxation records and banking data.<sup>50</sup>

As the means for stopping criminal money being shipped overseas undetected, the Australian Transaction Reports and Analysis Centre ('Austrac')<sup>51</sup> was established in 1988, requiring banks to report on cash transfers of more than \$10 000, including information on their destination. The several government agencies were also empowered to use modern electronic devices in tapping telephones and computers and to secretly place electronic devices on people and their cars as the means of observing their movements. Illegal operators within Australian capitalism had become the more serious threat to the Australian state by the 1990s, and this was a threat against which ASIO's counter-espionage skills were of little use. In spite of its redundancy, ASIO remained intact because other western countries refrained from dismantling their counter-espionage bodies, and the special relationship between ASIO and the Liberal Party also ensured its preservation.

The appointment of a new Director-General, Dennis Richardson, came at a crucial time. Richardson had a background in the Department of Foreign Affairs. In 1992, while working in the Prime Minister's Department, he had conducted an inquiry into the intelligence agencies in the light of the collapse of the Soviet empire. The high security clearance he required and the knowledge he gained from visiting the western agencies to conduct that inquiry made him an obvious candidate for selection as the new head of ASIO. Richardson began upgrading the organisation's capacities in monitoring and use of electronic devices in the same manner as the new anti-corporate crime bodies already mentioned. Legislation was passed in August 1999 empowering ASIO to inspect taxation papers and Austrac's records of money transfers to and from overseas, place bugs on cars or clothing as a means of following suspects, enter computer networks while concealing the organisation's secret entry, and finally to collect foreign intelligence in Australia using human agents.<sup>52</sup> Both sides of federal Parliament endorsed the expansion of ASIO's powers, but the media and civil liberty groups were suspicious of endowing these powers on the agency.<sup>53</sup> With access to modern electronic devices and enjoying new legal powers, ASIO gained a new lease on life in the post-Cold War years.

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50 Such as the Australian Securities and Investments Commission and the Australian Crime Commission.

51 *Financial Transactions Reports Act 1988* (Cth).

52 Second Reading Speech, Australian Security Intelligence Organisation Legislation Amendment Bill 1999 (Cth), House of Representatives, 30 August 1999 (Daryl Williams, Attorney-General).

53 Sue Bushall, 'Spies on the Net, ASIO's Hacking Powers', *The Bulletin* (Sydney), 11 May 1999, 92; Richard McGregor, 'ASIO Spreads its Spy Net', *The Australian* (Sydney), 24 March 1999, 2; Parliamentary Joint Committee on ASIO, Parliament of Australia, *Advisory Report on ASIO Legislation Amendment Bill* (1999).

The future of ASIS was indicated by the recommendations of the aforementioned Samuels and Codd Royal Commission of 1994, which advocated that ASIS should have its own parliamentary Act so that it would function independently within the Department of Foreign Affairs and Trade. The Howard Government adopted the same approach for DSD, making it an independent body within the Department of Defence. ASIS was placed under a Director-General, rather than the Secretary of Foreign Affairs, and DSD was also given an independent head. Isolating these services from their major departments ensured greater secrecy and closer control of their staff, which would discourage leaks and whistle blowing. The three intelligence agencies were to be overseen by a joint parliamentary committee. This amending legislation was passed in the week following the events in New York and Washington on 11 September 2001 thus ensuring that the local intelligence agencies were available to aid the Bush administration in mobilising for its 'war against international terrorism'.<sup>54</sup>

## VI ASIO'S CONVERSION INTO A SECRET POLICE FORCE

Australia's military involvement in the anti-terrorist campaign began with John Howard's commitment to send military forces to fight in Afghanistan following a telephoned request from President Bush on 17 October 2001. This coincided with campaigning for the federal elections slated for 10 November 2001. In addition to issues of international instability, the Government's campaign dealt with what it termed 'border security'. This was a program involving the military services under the code name of Operation Relex, and was designed to deter asylum seeker 'boat-people' landing in Australia. Numerous boats had sailed from Indonesia over the previous months carrying over 2000 asylum seekers, mainly from Afghanistan and Iraq. The refugees had paid comparatively large amounts to have people smugglers transport them to Australia. There was an antipathy among many Australian voters towards Muslim immigrants and, after the assault on New York and Washington and a military campaign launched against the Taliban forces in Afghanistan, the Liberal Party leader, John Howard, shrewdly calculated that his Government would win the election by emphasising the internal and external threats (asylum seekers and terrorists) facing the nation. The electoral campaign was punctuated by television clips of navy and army forces seizing refugee boats and transporting the occupants to the impoverished states of Nauru and Papua New Guinea. The Government paid these states to accommodate the asylum seekers in camps until their refugee status was established.

The combination of terrorism in the US and boat-loads of Muslim refugees landing on Australian shores frightened enough voters for the Government to be returned to office. In a propitious coincidence for the Howard program, a huge Norwegian container ship, *Tampa*, reached Australia with 438 refugees it had

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54 Joint Select Committee on the Intelligence Services, Parliament of Australia, *An Advisory Report on the Intelligence Services Bill 2001, the Intelligence Services (Consequential Provisions) Bill 2001 and Certain Parts of the Cybercrime Bill (2001)*.

rescued from their sinking vessel, and the Prime Minister ordered the military to seize the ship and take the refugees to Nauru. He seemed to attract more votes by this action. Two authors who analysed this affair described the actions of Howard, his senior ministers plus senior military officers and senior public servants in the following terms:

They put lives at risk. They twisted the laws. They drew the military into the heart of an election campaign. They muzzled the press. They misused intelligence services, defied the United Nations, antagonised Indonesia and bribed poverty stricken pacific states. They closed Australia to refugees – and won a mighty election victory.<sup>55</sup>

Thirteen months after the 11 September disaster in New York, on 12 October 2002, a car bomb exploded in Denpasar in Bali, Indonesia, killing many local people and 88 Australian tourists. The Government responded by expanding the size of the various local intelligence agencies and enlarging their legal powers. International terrorism, it was believed, could be countered by mounting a secret intelligence war against it on the same lines as communism had been contained. The Islamic organisations which harboured its activists would need to be identified, documented, observed, infiltrated, their money supply halted and national intelligence agencies mobilised to pool information and maintain a global eavesdropping on their communications. The Howard Government allocated \$25.5 million for upgrading the security of Parliament buildings, \$157 million on expanding the Australian army's special-forces command and \$100 million enlarging ASIO and ASIS. Early in 2002, the Howard Government introduced five anti-terrorist laws, the leading one of which advanced ASIO to being the central counter-terrorist intelligence force. This development matched the Cold War years when the Liberal Party elevated ASIO to be Australia's main foil against local communism and again reflected the long-term relationship between the Liberal Party and ASIO.

In the rush to enhance the intelligence agencies, a crucial fact was overlooked. This was that the Australian police forces – the Australian Federal Police and the state police forces – are best positioned to counter violent criminal activity, and have the capacity to detain relevant suspects and put them before the courts. However, rather than invest greater resources in the police forces, the Government legislated to endow police powers on the secrecy-oriented ASIO, thereby converting it into a form of secret police. This clandestine body (the names of whose employees can be revealed only on pain of a \$1000 fine) was given the power to detain people and hold them for lengthy periods. Under the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] (Cth), the Director-General, Dennis Richardson, would have been authorised to seize suspected persons on a 28 day warrant, hold them in a secure location and have them interrogated by ASIO agents. The suspects would have been compelled to surrender documents 'or other requested things' to ASIO and forced to provide all information in spite of the possibility of its being used against them in subsequent criminal proceedings for terrorism. Failure to meet any of these

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55 David Marr and Marian Wilkinson, *Dark Victory* (2003) back cover.

demands would have lead to a five year jail sentence. The suspects were to be denied access to lawyers or friends during most of this time. They could be strip searched, as could young children, and held incommunicado for an indefinite period under a series of rolling 48 hour warrants.<sup>56</sup> The Government and ASIO imagined that if a person was a member of a terrorist network, a planned operation could be disrupted by placing them in isolation. It was an extraordinary piece of legislation, unmatched by any measure in Britain, the US or elsewhere. Evidence pointed to it being crafted by Keith Holland and Steven Marshall, lawyers in the Attorney-General's Department, and the Attorney General's non-lawyer chief, Dennis Richardson.<sup>57</sup> In reality, however, the impetus came from the Howard Government itself, which was driven by two motives. One was the certainty that a secret intelligence surveillance body was better suited to fighting terrorism (as it had against communism) and the other was the hope that the Labor Party might oppose the legislation thereby giving Howard the chance to accuse Labor of being soft on terrorism.

However, a strong and informed public opposition rallied against this legislation from churches, human rights groups, and particularly heads of law schools.<sup>58</sup> Their dissent was expressed to the Parliamentary Joint Committee on ASIO, ASIS and DSD which heard these submissions over April and May 2002.<sup>59</sup> Constitutional lawyers argued that it violated the principle of the separation of powers. They pointed out that ASIO agents were public servants and that they could not exercise the powers constitutionally belonging to the courts. ASIO's chief, Dennis Richardson, defended this unconstitutional measure with the ambiguous remark that 'I wish there had been a law in place like this before the 11<sup>th</sup> of September'.<sup>60</sup>

Fifteen recommendations for change were made by the Joint Committee, mostly authored by Labor members, including a sunset clause for terminating the legislation after three years. The Howard Government ignored these recommendations and had the Bill passed and sent to the Senate where it was again roundly condemned during a lengthy examination in November 2002 by the Legal and Constitutional References Committee, at a time when Australia was reacting to the deaths of eighty-eight Australians in the Bali bomb blast.<sup>61</sup> In spite of the Government wanting the Bill passed urgently, leading legal and other expert opinion continued to oppose it. The media condemned it as being far in

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56 Second Reading Speech, ASIO Legislation Amendment (Terrorism) Bill 2002 (Cth), House of Representatives, 21 March 2002 (Daryl Williams, Attorney-General).

57 Evidence to the Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, Canberra, 30 April 2002, 22–49.

58 Submissions to Parliamentary Committee on ASIO, ASIS, and DSD, Parliament of Australia (2002). This contains 294 submissions.

59 Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *Official Committee Hansard* (2002).

60 Farah Farouque, 'Terror Risk Higher, Says Spy Chief', *The Age* (Melbourne), 3 May 2002, 6.

61 Senate Legal and Constitutional Reference Committee, Parliament of Australia, *Official Committee Hansard* (2002) 12–18.

excess of what the times required,<sup>62</sup> and a senior editor appeared before the Senate Committee on behalf of the Fairfax group to argue that journalists could be compromised by being caught in ASIO's net and that 'quite frankly, these provisions are more reminiscent of the former East Germany'.<sup>63</sup>

Unwilling to accept Labor's amendments and have the Bill passed, the Government decided to lay it aside on 12 December and Prime Minister Howard declared that Australia's exposure to terrorist actions 'would be on the head of the Australian Labor Party and on nobody else's head'.<sup>64</sup> Labor responded that the legislation could be passed by lunchtime if the Government would include Labor's recommendations.<sup>65</sup> In March 2003 the Government re-introduced the same ASIO terrorism legislation. It landed in the Senate on 13 May, but it was less sweeping than the previous Bill. A three year sunset clause was included, legal representation was allowed, incommunicado detention was removed as was strip searching of children and indefinite detention. Numerous legal experts and civil liberty experts discussed the Bill in the media opposing the more extreme measures. This led the Government to settle for a compromise and the new legislation became law on 26 June 2003.

## VII INTELLIGENCE AND AUSTRALIA'S WAR IN IRAQ

It is not known when Prime Minister Howard decided to engage Australia in the Iraqi war, although it is known that President George W Bush ordered plans to be prepared for the invasion on 21 November 2001, just 71 days after that fateful day of 11 September. 'Let's get started on this', he enthusiastically told his senior cabinet members.<sup>66</sup> On 29 January 2002, Bush made his famous 'Axis of Evil' speech forewarning of a US invasion, and when Howard was in Britain early in April 2002, he seems to have agreed with the plans of Blair and Bush to join their invasion.<sup>67</sup> At the end of the year he sent Australian military forces to 'pre-position themselves' in the Middle East while denying that an invasion was in the offing. On 8 March 2003, after facing down extensive debate in the United Nations Security Council opposing an invasion, forces from the 'coalition of the willing', as they labelled themselves, launched the offensive.

Howard's commitment of Australian forces was supported in the House of Representatives, but defeated in the Senate, demonstrating a national divide on this issue from the outset. Iraq was almost totally disarmed as a result of its heavy defeat in the 1991 war and the continuing British and US overflights which had destroyed most of the remaining defences. After 1991, Iraq was left with obsolete Soviet-era equipment and it had dismantled its nuclear project and stopped its

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62 Fergus Shiel, 'ASIO Bill Threatens Journalism, Age Editor Tells MPs', *The Age* (Melbourne), 23 November 2002, 8.

63 Evidence to the Legal and Constitutional References Committee, Senate, Canberra, 22 November 2002, 178 (Michael Gawenda).

64 Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 2002, 10566.

65 Ibid.

66 Bob Woodward, *Plan of Attack* (2004) 4.

67 Tony Wright, 'The Road to War', *The Bulletin* (Sydney), 8 April 2003, 29.

missile production program. However, the Blair, Bush and Howard Governments claimed that it had developed chemical and biological weapons and weapons of mass destruction, thus justifying the invasion. Senior members of the three governments did absurd things on the basis of misleading intelligence information seemingly supplied by their respective intelligence agencies. US Secretary of State Colin Powell showed enlarged photographs and drawings to the UN Security Council including an incorrectly labelled 'mobile biological warfare production plant', and British Prime Minister Blair produced what were later described as 'dodgy dossiers' claiming falsely that Iraq had tried to purchase uranium from Niger. Blair also quoted other material later found to have been lifted from a US student's PhD paper published on the internet.<sup>68</sup>

Prime Minister Howard simply repeated the mantra that the weapons of mass destruction would be found soon. Howard never challenged the false assertions about events in Iraq made by his coalition partners and, as was later discovered, the intelligence agencies did not raise doubts about the veracity of these reports from London or Washington. Had they consulted international newspapers or watched probing television programs (known in intelligence circles as 'open sources of information') they could have quickly seen that the 'official overseas reports' were misleading. To the great disadvantage of Australia, it can now be seen that the nation's intelligence agencies were aware that the Howard Government was unwilling to hear any alternative explanation of what was contained in the overseas intelligence reports. As the war continued and no weapons of mass destruction or chemical or biological weapons were found, questions were raised in Parliament about whether the Government's intelligence agencies had misled the Government. The Senate, where the Government lacked a majority, referred the matter in June 2003 to the Parliamentary Joint Committee on ASIO, ASIS and DSD.

The Committee invited submissions from the three intelligence agencies over which it had no supervision, – DIO, ONA and the new Defence Imagery and Geospatial Organisation ('DIGO'), which operates the Australian defence surveillance satellite. However, these agencies were guarded in what evidence they presented. The Committee expressed disappointment that it was not permitted to read reports from the overseas partner agencies because the Australian agencies insisted that they were obliged not to release them. The Committee also seemed to have been denied the information collected through DIGO's satellite, which was probably tilted to collect communications intelligence emanating from Iraq. The Committee further complained about 'the paucity of information upon which it had to make its judgement' and how 'the cloak of national security' created an impenetrable 'closed circle' which had 'some detrimental effects on our ability to judge the accuracy and reliability of intelligence'.<sup>69</sup> The intelligence agencies claimed that they had accepted the various reports and information passed from London and Washington and, while

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68 Tony Wright, 'Lies, Damned Lies & Intelligence', *The Bulletin*, 1 July 2003.

69 Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *Intelligence on Iraq's Weapons of Mass Destruction* (2003) 27.

they were aware of the political disputes in those cities relating to the authenticity of the documents, they lacked knowledge about the local political issues to make qualifications to the documents they sent to the Howard ministry. The Committee declared that in this matter the agencies were 'disingenuous' and 'that their [documents'] deficiencies had the potential to become our deficiencies'.<sup>70</sup>

The Committee reported to Parliament in December 2003, and its final recommendation was that an independent assessment of the performance of intelligence agencies be conducted by an experienced former intelligence expert 'with full access to all the material' apparently denied to the Committee. The report was to be submitted to the National Security Committee of Cabinet and recommend changes for the better functioning of the agencies.<sup>71</sup> In response, the Government appointed the former chief of ONA, Philip Flood, to conduct the inquiry. However, the Labor Party rejected his selection since he would face a conflict of interest when investigating the ONA, and insisted on the matter being referred to a royal commission.

These events in recent Australian administrative history demonstrate how the intelligence agencies, initially established as instruments to fight the Cold War, have become part of the extended political arm of government. In these changed circumstances the agencies have become reluctant to be fully accountable to the parliamentary bodies overseeing their operations. And it is apparent that the reports they gave their political masters contained information selectively culled to match what they knew as the political policies of the incumbent Government; 'unfavourable' details were played down or eliminated. In this sense they were like any other government department – their managers perceived their public service role to be that of implementing the political aims of the administration.

The Howard Government demonstrated how to use the power of the state to its electoral advantage during the 2001 general elections. Ordering army commandos and armed naval ships to repel the landing on Australian beaches of boat-loads of penniless Muslim asylum seekers during the height of an election campaign while pronouncing on the topic of 'border protection' proved to be a shrewd political decision. The role of intelligence agencies appeared to form an essential part of this campaign. The notion of a 'war on terrorism' was adopted as the strategy of the newly-elected Government, although it is not known when Howard enrolled Australia in America's war against Iraq. It is now established, however, that intelligence agencies selectively released information misleadingly demonstrating the existence of weapons of mass destruction in Iraq to justify an illegal invasion of that country. The actual explanation for the Howard ministry committing itself to the war, likely as a result of a direct telephoned invitation from President Bush to the Prime Minister, will not be known with certainty for some years. The use by John Howard of his intelligence services differed greatly from that of Prime Minister Hughes. People were not jailed nor were they deported, although Mr Howard promoted such bodies as the important means for

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70 Ibid 70.

71 Ibid 98.

confronting the 'enemy' with a self-conviction not dissimilar to that used by Hughes.

### VIII CONCLUSION

Intelligence agencies have functioned in Australia as part of the law enforcement apparatus of the state. This situation came about because of political events surrounding World War I when the left-wing trade unions and other leftist bodies headed opposition to the war. Dissenters were perceived as disloyal, and left trade union leaders and left radicals were identified during the War as a danger to the state requiring special surveillance, although they were not a new phenomenon in Australian political history. The surveillance/policing role of intelligence agencies was continued after the war by the specially established Investigation Branch of the Attorney-General's Department. The radical targets were not acting illegally, but the legal apparatus was altered to allow them to be so classified during the inter-war years. The end of World War II was immediately followed by the commencement of the Cold War, and the clandestine surveillance of dissenters and left radicals was lifted to a new level of efficiency and thoroughness as a defence against the perceived subversive nature of the Sino-Soviet empire. Dissenters and left radicals were then considered to be disloyal criminals. Prime Minister Menzies' famous – and failed – attempt to introduce legal measures to have the CPA banned and its members detained in detention camps has earned him a particular place in Australian legal history.

Two developments marked Australian intelligence organisations at this time; one was the wall of secrecy that enveloped the institutions and their workers, and the other was their internationalisation, which made them appear as if they held loyalties to overseas bodies greater than that to the Australian state. As a result, accountability provisions were enacted after 1983. The end of the Cold War made some of these intelligence agencies seemingly redundant but the events of 11 September renewed their relevance. Having witnessed the efficient manner in which ASIO and the other agencies, including their international counterparts, had applied techniques and operations that seemingly led to the collapse of Soviet communism, Prime Minister Howard enlisted these institutions to drive the new war on terrorism. He had laws introduced that increased their powers, converting them into a form of secret police. He had funding allocated for enlarging their staffing numbers and he encouraged their expanded connections with overseas intelligence bodies. This development demonstrates a firm theme that runs through the history of intelligence agencies in Australia. That theme represents the solid conviction in Australian Liberal Governments, stretching from Hughes to Howard, of the effectiveness of intelligence bodies to function as important defenders of the national state.