

NOT PEACE BUT A SWORD! — THE HIGH COURT UNDER J.G. LATHAM

1. INTRODUCTION

Australia's High Court has generated a relatively meagre literature. There is no general history of the Court, although J M Bennett prepared a useful historical memoir for the opening of the Canberra High Court building in 1980.¹ Bennett found it extraordinary that no comprehensive history had been written, and that few of the justices had yet had their 'distinguished careers' commemorated in writing. This lack of biography has been partly redressed by the publication of substantial works on two Chief Justices, Sir Samuel Griffith (by Roger Joyce) and Sir Garfield Barwick (by David Marr). The Court resisted the temptation to commission a general history for the historical splurge of 1988, perhaps concluding that its centennial in 2003 is more appropriate. Bennett's memoir and the handful of biographies have touched on the milieu and processes of the Court, but its rich, subterranean life has been largely neglected. This article tries to fill some of the gaps by focussing on Sir John Latham's long legal career, particularly his 16 years as Chief Justice, and his involvement (both political and legal) with attempts to suppress Australian Communism.²

Latham's career was one of the most extraordinary in Australian legal history. In just under 50 years, Latham ranged over virtually every facet of the law: student; teacher of contracts and personal property; articulated clerk, barrister and leading silk of the Melbourne Bar; twice Federal Attorney-General; Chief Justice of Australia. His legal career was intertwined with a political career of comparable richness, although Latham was denied the ultimate prize of the Prime Ministership. There have been other political lawyers whose careers have resembled Latham's: Isaacs, Barwick and Murphy were Federal Attorneys-General before becoming High Court judges. Menzies was more distinguished than Latham as advocate and politician, although he was never a judge. Only Evatt combined

FOOTNOTES

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1 *Keystone of the Federal Arch* (1980).

2 This article is an expanded version of a paper presented to the Law and History Conference, La Trobe University, May 1986. Its principal source is the collection of Sir John Latham's papers held by the Australian National Library (ANL MS 1009). The principal series used are:

1. General Correspondence;
13. Barrister;
26. 1925 Elections;
27. Seamen, Deportation and Communism;
39. Maritime Industries Bill.
52. Deputy Prime Minister.
53. Attorney-General;
62. Chief Justice;
63. Legal Interests.

Only the relevant series number is cited hereafter. Where an item is undated or otherwise unidentified, the item number from the series is given where possible. Some dates are indicated approximately from the context. Most undated material is placed at the end of the series.

substantial legal scholarship, distinction at the Bar, political eminence and the High Court Bench (although not the Chief Justiceship) in a manner comparable to Latham. Like Latham, he did not become Prime Minister.

Latham was born in Melbourne in 1877 in relatively humble circumstances (his father was an officer of the Victorian Society for the Protection of Animals), and his early scholastic interests were philosophy and logic, although he was briefly inclined to mining engineering and was a teacher for a time. He was awarded bachelor's and master's degrees, but declined a chair in philosophy at Adelaide University while he was still a young man. Latham graduated Bachelor of Laws in 1902, took articles, then was admitted to the Bar where he practised intermittently for 30 years. Immensely vigorous throughout a long life, Latham engaged in public, social and sporting activities - he was skipper of the Victorian lacrosse team - and his practice took time to develop. For some years he supplemented his income by journalism.

When World War I came, Latham did not join the AIF for family reasons, but became head of Naval Intelligence in 1917. Latham was a member of the Australian delegation to the Versailles Peace Conference, acquiring a lasting detestation for William Morris Hughes, then Australian Prime Minister. He did not return to the Bar until 1919; his practice thriving, he took silk in 1922. In that year, Latham was elected to the Federal Parliament as a Progressive Liberal, joining the ruling National Party after the 1925 elections. He was Attorney-General in the Bruce-Page Government, retaining the post until the Government was defeated in October 1929. Latham became Leader of the Opposition, but was displaced in 1931 when the conservative forces were reconstituted as the United Australia Party, led by Joseph Lyons who won the Federal elections in December 1931. Latham was deputy Prime Minister and, for a second time, Attorney-General in Lyons' UAP Government. He did not contest the 1934 elections, returning to the Bar to replenish what he described as his 'depleted fortunes', then practised as a successful silk until appointed Chief Justice of the High Court in October 1935.

As an advocate Latham lacked the scintillating qualities of mercurial figures like Menzies, Evatt and Dixon, but his logic, persuasiveness and courtroom skills won him the admiration of his instructing solicitors and clients:

'You [Latham] won a noble victory in this case - [I] never saw you in better form than on the last day summing up, being in my judgment a masterpiece, and I have instructed them all in my time - by all, I mean such smallfry as Higgins, Isaacs, Cussen, Mitchell, Irvine, Topp, Starke, etc. Therefore I know what I am talking about.'³

Much of his work, particularly in the early phases of his career, was in commercial practice with an emphasis on personal and industrial property. He was also active in wills and probate jurisdictions, advising a daughter of Alfred Deakin on a family dispute over her father's papers.

2. LATHAM AND POLITICS - SOME QUESTIONS

During his long sojourn in Federal politics, Latham did not cut himself off from legal practice, constantly writing opinions and accepting retainers

3 G E Wilson to Latham, Series 1, 7 July 1917. Wilson was a customs and shipping agent.

even when his political career was most intensive. On 28 February 1931, when the political tumult which deposed him as Federal Opposition Leader was at its height, Latham wrote a long opinion on a complex matter of negotiable instruments. On the same day, he prepared an opinion for BHP on debenture payments in London, following his usual custom of writing, in full, a contrary opinion. To Latham's embarrassment, the alternative opinion went to the client headed as an 'additional memorandum by Mr Latham'.⁴ Latham's ability to concentrate on opinions at a time when his political career was jeopardised exemplifies his powers of analysis and control.

Latham's records show that throughout his political career he accepted retainers, usually five and 10 guineas, from several major clients - BHP, Carlton and United Breweries, Howard Smith, the Government of Victoria, the Collins House mining companies. Usually, they were expressed as for 'all courts and jurisdictions and before arbitrators, committees and Tribunals'. One from Electronic Zinc in January 1929, when Latham was Attorney-General, was for the 'Patents Office and in the courts and jurisdictions in which you practice and in the High Court of Australia'. Some were stated simply as for 'all jurisdictions'. Latham was paid retainers during both of his terms as Attorney-General, while he was Opposition Leader, and during his three years as Deputy Prime Minister. He only ceased to accept an annual retainer from BHP shortly before he became Chief Justice.⁵

Latham's advisings while he was a senior Minister raise questions of conflict of duty and interest. For example, he was paid a retainer by the Commonwealth Steamship Owners' Association early in 1929. Latham, as Attorney-General, had been a crucial figure in a series of major industrial disputes involving the maritime industry and, to contemporary eyes, it seems peculiar that he should have been retained by a highly partisan participant. In particular, he was the principal deviser of the Maritime Industries Bill of 1929, which sought to transfer industrial regulation back to the States save for the maritime and stevedoring industries, clearly a legislative measure with enormous implications for shipowners. One request to Latham for an opinion when he was Opposition Leader differentiated his legal from his political role: 'Your opinion is desired for business, not for political purposes'.⁶

It seems unlikely that Latham would have been unaware of the High Court's decisions in cases where members of Parliament had acted as paid agents. In *Wilkinson v Osborne*⁷ the court decided that an agreement between a land owner and two Parliamentarians who were paid to influence the Government to buy certain land was contrary to public policy. Isaacs J outlined the duty of a Member of Parliament thus:

'Men who place themselves in the position of forcing through the zone of ministerial approbation a project that awakens such resistance as the evidence discloses, must have been very

4 Both opinions are in Series 13, dated 28 February 1931. See also correspondence from the Commonwealth Steamship Owners Association, 18 February 1929 in this series.

5 These examples are taken from numerous records in Series 13. Records in the BHP Archives (Melbourne) confirm retainers to Latham ending shortly before he became Chief Justice.

6 Davies, Campbell and Piesse to Latham, 28 February 1931, Series 13.

7 (1915) 21 CLR 89.

ardent advocates of its adoption. Paid advocacy of that kind by a member of the Legislature having the duty of supervision and a possible veto is a position in which he allows his interest to conflict with his duty, and, therefore is in a position which the law will not allow.’⁸

It is reasonable to presume a higher duty on a Minister of the Crown with rather more influence on the ‘zone of ministerial approbation’ than a mere Member of Parliament. Isaacs noted the danger that ‘sentinels of the public welfare’ might become the ‘sappers and miners’ of the Constitution.⁹ He quoted with approval¹⁰ Lord Lyndhurst’s description of the duty of a Parliamentarian in *Egerton v Brownlow*¹¹

‘In the framing of the laws it is his duty to act according to the deliberate result of his judgment and conscience, uninfluenced, as far as possible, by other considerations, and least of all by those of a pecuniary nature.’¹²

In no specific instance can it be said that Latham acted as a paid or Parliamentary agent, or that he acted improperly by the standards of the time. Considerable latitude had traditionally been extended to British barristers like F E Smith to augment their Parliamentary incomes by private practice and to be paid higher salaries than other Ministers when they became senior law officers of the Crown. It would seem extraordinary that Latham preserved records of these transactions in his private papers if he felt that anything unusual was involved. It is also possible that some retainers were paid with such mechanical regularity that they became a formality, with services neither expected nor rendered. Latham’s practice was no different from that of, for example, Menzies. He cut off all retainers before he became Chief Justice, suggesting that he differentiated between judicial and political standards. However, even allowing for the defences and qualifications that can be made, the retainers paid to Latham raise important questions of conduct and conflict of interest.

3. LATHAM AND THE COURT - SOME HIGGLING PROBLEMS

As Chief Justice, Latham was responsible for much menial administration. The Court’s functioning, its finances and its staff were under the overall authority of the Commonwealth Attorney-General’s Department and the Solicitor-General, although the Chief Justice had administrative flexibility within the Court’s budget. Contacts with State Supreme Courts were scant, apart from the occasional need to formulate an Australian attitude to candidates for bodies such as the International Court of Justice. Usually the British nominee was endorsed without question.

Staff administration was not onerous, involving the payment and

8 Ibid 102.

9 Ibid 105.

10 Ibid 98.

11 (1853) 4 HLC 1, 161.

12 The High Court reached broadly similar conclusions in two other cases involving the use of Parliamentarians as paid agents: *Horne v Barber* (1920) 27 CLR 494 and *The King v Boston* (1923) 33 CLR 386. Again, it seems improbable that Latham would have been unaware of these cases or of the extensive British case law on the whole area of Parliamentary duty. I am indebted to Paul Finn of the Faculty of Law, ANU, for these references.

deployment of court officers, associates and typists; Latham insisted that the 'Court ladies' who travelled should 'be without anxiety in proper comfort'.¹³ Occasionally, a judicial opinion had to be expressed on the choice of a refrigerator for the lunchroom: 'The Chief Justice is of the opinion that a Frigidaire of seven cubic feet capacity would be the most suitable.'¹⁴ Important appointments, such as court registrars, were infrequent, and the Chief Justice could devote most of his time off the bench to organising hearings, judgments and the activities of his colleagues. This should have been relatively straightforward, but was made difficult by the composition of the Court and the web of bad relationships which enmeshed its judges.

A constant problem was finding enough judges to constitute a court, particularly in what Sir George Rich and Sir Hayden Starke insisted on calling the 'outlying states'.¹⁵

When Latham became Chief Justice in 1935, the bench comprised six justices; it was not raised to full strength of seven until 1946. Privy Council requirements meant that Rich was absent in London for several months shortly after Latham became Chief Justice. In later years, diplomacy and other international commitments brought further absences. Latham was Australian ambassador to Japan in 1940-41, and Dixon J was posted to Washington for part of World War II. Webb J served on a Japanese War Crimes Tribunal after the war, although he continued to write and exchange judgments. Dixon returned from United Nations work in Kashmir only a few weeks before the Court began hearing the *Communist Party Case* late in 1950. Illness was a constant problem for a small bench of relatively elderly judges.

During the early 1930s, High Court sittings were confined to Sydney and Melbourne as an economy measure. (Most cases originated in Sydney and Melbourne, where the Bar was strongest, but an annual circuit to the 'outlying states' was traditional.) As the Great Depression abated the national circuit was restored, although the Chief Justice had some discretion as to whether a visit was warranted. Some 'outliers' were more popular than others, particularly Brisbane at the height of the southern winter. Even when the Court was confined to Sydney and Melbourne, regular travel by rail or steamer was arduous. Starke described the rigors of High Court life thus:

'I regard this as a preposterous arrangement. The judges are expected to sit in Melbourne 62 days and out of Melbourne 128 days. They [Judges] are like and are treated like carpetbaggers roaming the country.'¹⁶

Rich, arriving in Melbourne at 2am after a long detour to avoid railway washouts, observed sourly: 'Water everywhere, but no drinks on train'.¹⁷

Constituting a Bench for the 'outliers' was complicated by Starke's virtual refusal to sit beyond Sydney and Melbourne. His justifications were many and varied: his unwillingness to leave his 'boy' (a final-year

13 Latham to [Sir] Kenneth Bailey, 31 October 1950, Series 62.

14 Latham to [Sir Kenneth] Bailey, 19 December 1950, Series 62.

15 G Rich to Latham, 15 January 1937, Series 62.

16 H Starke to Latham, 17 October 1938, Series 62.

17 Rich to Latham, April 15 (no year), Series 62.

law student) alone in the house; his illness or that of his wife; his need to steer his 'boy', who had failed Conflict of Laws, through a 'supp'; the pointlessness in travelling to Perth or Hobart to hear two or three cases. A frequent response by Starke was to urge Latham to get the 'Sydney men' (Evatt and McTiernan) to do it.¹⁸ Latham was dependent on the goodwill and co-operation of his close friend, Dixon, and McTiernan to ensure that a Bench was available. Even the congenial McTiernan raised an occasional objection to Latham's scheduling: 'Your interpretation of the schedule...whilst it is intrinsically good, is I think, too revolutionary.'¹⁹

A constant vexation was travelling expenses, an issue which went back long before Latham's appointment. The origins of the grievance are obscure, but it had existed since the early days under Griffith. According to Latham, there had been a controversy between Griffith and the Attorney-General, Sir Josiah Symon, who demanded that judges should submit detailed accounts of expenses. His predecessor, Gavan Duffy, 'bequeathed' to Latham a file on the controversy which he kept in his bottom drawer.²⁰

During the crisis of public finance in the early 1930s, allowances were cut and, according to Latham, railway passes were abolished, upsetting Rich who claimed that some of his colleagues (presumably Evatt and McTiernan), had consented to 'robbery' because they were former Ministers whose 'gold passes' gave them free travel. Starke had conducted what Latham described as a 'vendetta' on this issue.²¹ The resentments of Rich and other judges were not assuaged by a crudely ironic suggestion from the Attorney-General, R G Menzies, that expense claims should be lodged with the Commonwealth Investigation Branch.²²

Latham was often required to iron out idiosyncratic problems raised by fellow justices, ranging from hunting out a pair of 'weepers' for Dixon, to relatively petty wrangles between the political and judicial arms. Evatt complained that alterations to his chambers in Melbourne had reduced natural light, and given him eye strain:

'This simple request [for adjustments] has been refused by His Majesty's Attorney General [Menzies] who seems to have developed delusions of grandeur since his trip abroad: can you do something with the PM [Joe Lyons]? I feel disposed to make some public protest but it would only cause scandal.'²³

Such squabbles were relatively trivial and Latham could resolve them, unlike the deeply-ingrained personal antagonism which permeated the Bench. Political factors were partly responsible. Starke never accepted the Scullin Government's appointment of two former Labor politicians, Evatt and McTiernan, to the Court in 1930. There was lingering resentment about the manner in which Latham's predecessor, Gavan Duffy CJ, had

18 Starke to Latham, 24 November 1938, Series 62. See also Starke to Latham, 19 August 1936 and 30 November 1936.

19 E McTiernan to Latham, nd (probably 1937-38), Series 62.

20 Latham to D Williams, 10 May 1949, Series 62.

21 Latham to G S Knowles, 6 October 1940, Series 62.

22 Starke to Latham, 2 February 1937, Series 62.

23 Evatt to Latham, (nd) item 63, and 27 September 1937, Series 62. On Dixon's 'weepers', Dixon to Latham, 10 February 1936, Series 62.

left the Court, particularly on Evatt's part. Evatt asserted that Gavan Duffy had been forced off the bench by a 'combination which included one member of the present bench'.²⁴ It is not clear whether he meant Latham or another judge. Leaving Federal politics at the end of 1934, Latham had gone to the Bar for almost a year before taking up his post. There is nothing to suggest that his appointment as Chief Justice was unduly hastened to Gavan Duffy's detriment.

Milder expressions of rivalry flashed between the two longest-serving judges, Starke and Rich, usually as feline comments by one about the other. Thus, Starke greeted Rich's appointment to the Privy Council:

'Rich will be like a dog with two tails...But I thought the Privy Councillorship was reserved for those who had rendered distinguished political, judicial or other services. It is a pity to degrade the rank by such an appointment.'²⁵

Starke was more hostile to Dixon, partly over matters of legal style and substance, partly because he considered that Dixon exercised a disproportionate influence on his fellow justices. Starke's expression of the law was sparer than Dixon's often complex formulations. His criticism of Dixon's method was not without point:

'Dixon sent me his judgement which I think is a delightful exhibition of the logical method at which I often scoff when applied to human conduct and action. He takes a presumption of legitimacy and founded on its strength reaches the conclusion that the evidence is not strong enough to displace it. And all this in the face of the undoubted position that the legitimacy of the child is not in issue.'²⁶

Starke asserted that Dixon dominated the Court, unduly influencing McTiernan and Evatt. He savagely caricatured this pair as 'parrots':

'I am quite convinced that Evatt pays no attention to the facts and is merely a parrot...Dixon suddenly alters his mind and to me [gives] a most confusing judgment and the parrots at once agree...Dixon may be right but let an independent majority say so.'²⁷

'The parrot [Evatt] I take it agrees with Dixon.'²⁸

'It is gravely detrimental to the High Court and its independence that whenever a grave difference of opinion is disclosed, the 'parrots' always reaches [sic] the same conclusion as Dixon.'²⁹

Starke saw this as a new development in the Court's functioning and one to be deplored. Latham argued that Dixon was aware of his influence and found it disagreeable, but Starke rejected this interpretation:

'I blame him [Dixon] a good deal for he angles for their support and shepherds them into the proper cage as he thinks fit.'³⁰

24 Evatt to Latham, 12 October 1939, Series 62.

25 Starke to Latham, 8 January 1936, Series 62.

26 Starke to Latham, 24 November 1938, Series 62.

27 Starke to Latham, 22 February 1937, Series 62.

28 Starke to Latham, 24 November 1938, Series 62.

29 Starke to Latham, 2 December 1938, Series 62.

30 *Ibid* (Presumably, a parrot cage!).

Even more than Dixon, Starke's venom was directed at Evatt, also formidable and vituperative. Until Evatt left the bench in 1940, his relationship with Starke dominated the Court's internal workings. Starke refused to have any consultation with Evatt, to exchange reasons for judgments and draft judgments with him, or even to supply him with final judgments. Starke applied similar sanctions to other judges, particularly Dixon, but only with Evatt was the veto absolute. Starke invariably joined Evatt with McTiernan in his strictures to Latham, but his personal relationship with McTiernan seems to have been more cordial.

Evatt, in turn, refused to co-operate with Starke, leaving Latham in the invidious position of having to co-ordinate the work of two irascible, gifted lawyers who communicated only in the most stiffly formal terms. When Latham was absent, as he often was through illness in 1936-37, relations were even tenser because Starke acted as Chief Justice. In such circumstances, it seems remarkable that the Court functioned at all. That it did was largely due to the refusal of McTiernan and, more surprisingly, Evatt to provoke a public brawl:

'Evatt and McTiernan have endured Starke's failure or refusal to consult them and at least outwardly there is calm if not peace.'³¹

Evatt regarded his restraint and forbearance as a public duty:

'I regret to say that Starke's behaviour as presiding justice towards colleagues - and I refer to McTiernan and myself - has been disgraceful. It is only one's sense of duty to the court that prevents scandal.'³²

The most vivid exemplification of the animosities on the bench at this time was given in an invocation to Latham by Starke's associate, Cedric Park: 'I bring not peace but a sword!'

Starke, said Park, had no objection to his proposed remarks being shown to Mr Justice Dixon, but 'he said that as he and Mr Justice Evatt did not make a practice of exchanging reasons for judgment, he sees no reason why an exception should be made in the present case - notwithstanding its unique nature'.³³

Latham had been Starke's pupil, and this constrained his dealings with the older man. Despite this tie, he sympathised with Evatt and suggested several times that the imbroglio was not Evatt's fault. For instance, he acknowledged in July 1939 that Evatt had reasons to support his refusal to consult or attend conferences 'with a certain judge'.³⁴

Only a few examples can be given here of Latham's problems in administering the Court. One of the greatest battles in Latham's early years as Chief Justice was over *Nassoor v Nette*³⁵ which was resolved only after a lengthy process of what Starke called 'higgling'. Starke insisted, against opposition from his colleagues, that the case should be

31 Dixon to Latham, 11 August 1936, Series 62. On court administration during Latham's absence, see Dixon to Latham, 24 April 1936, 5 May 1936, 2 June 1936, and Starke to Latham, 12 May 1936. All Series 62.

32 Evatt to Latham, 6 May 1936, Series 62.

33 Cedric Park to Latham, 25 July 1937, Series 62.

34 Latham to Evatt, 5 July 1939, Series 62.

35 (1937) 58 CLR 446.

re-argued. Latham tried vainly to get a compromise, particularly between Starke and Dixon, the main opponents. Starke brusquely rejected his plea:

‘Compromise in matters of right and justice are out of the question as far as I am concerned.’³⁶

Latham’s power to resolve such judicial disputes was limited; he could only suggest and try to persuade. Evatt insisted that more drastic measures should be taken to compel judges to make judgments available to their colleagues, perhaps by order of the registrar. Evatt also suggested appealing to an authority outside the court, presumably the Solicitor-General, the Attorney-General or the Prime Minister. He hinted at possible public scandal, perhaps implying that the court’s internal problems might be ventilated in the Parliament or the press.³⁷ Rich’s objections to a re-hearing were milder but pointed: ‘The old-fashioned idea is to deal with the case or not deal faithfully with your colleagues.’³⁸ But Starke prevailed and the case was re-argued.³⁹

There was further ‘higgling’ in 1939 over what the judges labelled the *Flour Tax* and *Milk* cases.⁴⁰ The dispute arose over possible hearings of the Court during the mid-year vacation. Evatt expressed suspicions that the *Flour Tax* hearing had been expedited because of political pressures, and embarked on a recriminatory exchange with Latham whom he accused of ‘exacerbating feelings of unpleasantness, suspicion and even hostility among the judges’.⁴¹ In response, Latham was plaintive, almost pathetic, commenting about the problems in getting testy judges to confer together:

‘What can be done in these circumstances which I found existing when I came to the Court? I have tried very hard to improve the personal relations of other members of the Court, but I must confess without success...The only object that I have in view is to get the work of the Court done with efficiency and credit to its members and as pleasantly as possible...The latter objective is not in any way inconsistent with the former...We ought to be able to enjoy our work and live happily together. Will you not help to bring this about?’⁴²

Evatt was obdurate, accusing Latham of trying to ride roughshod over him. He disputed the contention that Latham had merely inherited a bad situation, claiming that things were a good deal worse ‘than when Duffy was forced off the bench’.⁴³ Evatt was clearly at fault, leaving his colleagues dissatisfied with his procrastination. Rich wondered whimsically

36 Starke to Latham, 23 February 1937, Series 62.

37 Evatt to Latham, 3 July 1937, Series 62.

38 Rich to Latham, 27 April 1939, Series 62.

39 On the dispute over *Nassoor v Nette*, there are several letters between the judges and Latham in February-May 1937: Starke to Latham, 2 February 1937; Starke to Latham, 27 February 1937; Latham to Starke, 29 April 1937; Starke to Latham, 31 March 1937; Starke to Latham, 21 April 1937; Latham to Starke, 17 April 1937. All from Series 62.

40 *Attorney-General for NSW v Homebush Flour Mills* (1937) 56 CLR 390; *Milk Board (NSW) v Metropolitan Cream P/L* (1939) 62 CLR 116.

41 Evatt to Latham, 3 July 1939, Series 62.

42 Latham to Evatt, 5 July 1939, Series 62.

43 Evatt to Latham, 12 October, 1939, Series 62.

why there should be a delay of several days while Evatt added another case citation to his judgment:

‘It is difficult to play games with a sport who works outside the rules of the game.’⁴⁴

Starke was much more scathing, annotating a memorandum from Evatt thus:

‘Rot! Why is he [Evatt] not ready and what light and learning does he ever derive from the other opinion? He never sees mine nor I his. His statement of Duffy’s practice is imagination. He had none.’⁴⁵

Starke could be even more splenetic in his communications with Latham:

‘I resent your dirty insinuation that I stayed on in Sydney to make a bob out of the government, and also your silly schoolmaster attitude towards me. I think an apology is overdue and in future pray keep your criticisms of me to yourself unless I ask for them.’⁴⁶

Always, Latham was placatory:

‘I hope when this reaches you the irritation manifested in your letter will at best have diminished. Of course I did not say or think and did not mean to suggest that you were making money out of government by stopping in Sydney.’⁴⁷

Perhaps as close as Latham ever drew to rebuking Starke was this mild comment at the peak of a period of acrimony over sitting times and other inconveniences: ‘It is a matter for rational discussion - not for quarrelling’.⁴⁸

Once, at least, Latham decided to force a showdown. Perhaps by design he chose Evatt rather than Starke, although it might well have been an instant response to an unexpected confrontation. Evatt, a member of the governing body of the NSW Art Gallery, announced his intention to finish his Court early so that he could attend a trustees’ meeting. Latham asked Evatt to reconsider, pointing out that the Court could not work if each judge claimed ‘an independent right’ to leave the Bench at any time. When Evatt declined, Latham circulated a memo to the other judges eliciting their views. The scrawled comments gave Latham firm support:

‘I am perfectly aware that it is one judge alone who prevents the court from being merely courteous to each other...(sic)’

‘This kind of a thing has to be brought to a stop...Most courts act on the principle *Vicissim v Eniam Damus* [sic]. Here one person only is to be privileged.’

Buttressed by the support of his colleagues, Latham passed the decision on to Evatt who roundly rejected it:

‘With all respect to you, I do not ask you to adjourn at

44 Rich to Latham, 26 June 1939, Series 62.

45 Memorandum, Evatt to Latham, 12 October 1939 (annotated by other judges), Series 62. On the wrangling over the *Flour Tax* and *Milk* cases, see also Martin Brennan (Evatt’s associate) to Latham, (nd) item 183, and Evatt to Latham, 13 June 1939. (Starke was related to Gavan Duffy by marriage).

46 Starke to Latham, 6 May 1940, Series 62.

47 Latham to Starke, (nd) Series 62, item 816.

48 Ibid.

4.15p.m. I shall leave the Court at 4p.m. after informing the parties.⁴⁹

Possibly Evatt sought to apply a principle stated succinctly by Rich: 'Council's convenience is the Court's convenience.'⁵⁰

After Evatt moved to the Federal Parliament in 1940, Starke was more tractable, and Latham seems to have worked harmoniously enough with him during the final years of their association. Evatt's relationship with Latham was also warmer, particularly when Evatt was Attorney-General. The pair corresponded formally over s92 and the *Banking Case*,⁵¹ with Evatt signing a brief letter about an administrative matter written after the Labor Government's defeat in the 1949 election campaign, 'Kindest Regards, Bert'. Evatt and Latham were even able to joke about the vicissitudes of the past. Announcing an increase in judges' salaries, Evatt wrote:

'As this means a pension of 2,000 pounds per annum, I think in the interests of the Court that two resignations should follow.!!'⁵²

In 1947 the High Court Bench achieved full strength when Webb returned from War Crimes Tribunal duties, and Latham was able to deploy his judicial resources more flexibly. In his final years as Chief Justice, there was co-operation and harmony on the bench. Latham particularly welcomed the appointments of Fullagar and Kitto to succeed the venerable Rich and Starke:

'They are great acquisitions and the appointments have given me great pleasure. They are both highly competent and cooperative.'⁵³

Latham had been deeply conscious of his inability to make the Bench work effectively during the earlier years. Most probably a more aggressive and less conciliatory approach by him would have proved futile. Faced with virtually irreconcilable personality differences, Latham was tactful and restrained, subordinating his pride and considerable ego to the good of the Court. Latham's tribulations as Chief Justice were described by his colleague and successor, Dixon, when reflecting at Latham's retirement on an association which had lasted for 42 years in 'unbroken amity':

'The antagonisms which for such a large part of the period of the Court's existence seemed so characteristic of it have ceased for some time and I hope will never recur. But I know that they qualified the happiness which otherwise could not but have come from the success of your work as Chief Justice. However, you had the satisfaction of spending the last two or three years of your judicial life in a court where harmony and friendship prevailed.'⁵⁴

49 It is difficult to date this incident accurately. This account is based on undated notes and memoranda at the end of Series 62.

50 Rich to Latham, (nd) Series 62. Evatt to Latham, 15 December 1949.

51 *Bank of NSW v Commonwealth* (1948) 76 CLR 1.

52 Evatt to Latham, (nd) probably 1946-47, Series 62, Item 812.

53 Latham to Sir Keith Officer, 8 August 1950, Series 62. For a similar comment in Latham to Dixon, 26 May 1950, Series 1.

54 Dixon to Latham, 7 April 1952, Series 62.

Rich vividly recalled the poisonous atmosphere on the bench inherited by Latham:

‘My mind goes back to the time when Duffy opposed the acceptance of Isaacs’ portrait, and with the aid of Knox and Starke prevented the Court having it.’⁵⁵

Latham had gradually transformed the Court, making it more effective and dispelling the foetid and fretful atmosphere prevalent for so many years. He achieved consultation between judges and reduced inefficient allocation of the Court’s resources. Despite these improvements Latham remained cautious about how much change was warranted:

‘A great deal of time can be saved by consultation and by assigning one judge to write a judgment. I am now finding it possible to adopt this method more frequently, but it has to be watched in order to prevent a tendency which, I suggest, has at times been most odious in the Privy Council, to leave it to one judge to do all the work and really make up the mind of the Court.’⁵⁶

As a measure of his achievement, Latham pointed to the number and quality of the joint judgments delivered in his final years as Chief Justice. His colleagues generally approved his measures, Williams particularly praising the manner in which three constitutional cases had been handled in 1949:

‘I must thank you and Dixon for moulding the result of the conference into such excellent shape. It is a great thing that the Court is able to speak with one voice on these important cases.’⁵⁷

Believing that the Court was dealing with extremely complex issues, Latham approved longer and more detailed judgments than he might have done in earlier years.

Latham had a reputation for legal verbosity which is somewhat undeserved, although he could be wordy when conducting cases from the Bench, as he acknowledged in his valedictory address.⁵⁸ His written advisings were usually concise, as were many of his High Court judgments, but he always felt that the issues should be thoroughly defined and expounded. Latham’s perusal of earlier law reports convinced him that many cases had been only half-argued, resulting in inadequate judgments. Where a complex issue had to be adjudicated, Latham was extremely thorough. The antithesis of Latham’s approach was that of Sir Patrick Hastings, the great British advocate and judge. Latham considered that Hastings focussed far too much on one particular point at the expense of thorough analysis:

‘I would like to see [Hastings] getting to the core of a case, in which it has to be determined, for example, whether interminable deposit receipts for blank days issued in 1897 by a Queensland Bank, after suspension of payment in a scheme sanctioned by orders made by the Supreme Court

55 Rich to Latham, 12 December (no year), Series 62.

56 Latham to B A Levinson, 8 August 1950, Series 11 (this was precisely the criticism that Starke had levelled at Dixon).

57 Williams to Latham, 30 May 1949, Series 62.

58 (1952) 85 CLR viii.

of Queensland, the Supreme Court of New South Wales, and the High Court in England upon certain events, including the liquidation of the bank, should in 1956 be paid in English pounds or Australian pounds.’

Accordingly, the resolution of major constitutional issues in the *Banking Case*, the *Pharmaceutical Benefits Case* and the *Communist Party Case*⁵⁹ required a comprehensive statement:

‘In my opinion the judge in a superior court should state his reasons sufficiently to enable anyone to understand the process of reasoning by which he has reached the result. An ex-cathedra pronouncement is not a satisfactory form of judicial decision where it merely abstains from paying attention to contrary arguments.’⁶⁰

As Chief Justice, Latham believed that judgments should be reached by consultation and co-operation. His approach is best exemplified by the way in which the judgments in the *Banking* and *Communist Party* cases were achieved. For the *Banking Case*, Latham called a conference of all judges in the High Court library, distributing beforehand a 57-page memorandum setting out the issues and indicating his own preferences and possible counter arguments:

‘In this memorandum I raise points which appear to require decision. It does not profess to be complete, but it will, I hope, be of some service in discussion. It deals mainly with the Act in relation to the Constitution Section 51(XIII), (XX) and (XXXI). I have not gone into detail with respect to s92 and arguments based on interference with states and the Financial Agreement. When I used the words ‘It is suggested’ in this argument I am not stating a final opinion, but I am submitting a question for consideration.’⁶¹

Latham’s memorandum may have assisted his colleagues, but it did not convince a majority to support him. Even on relatively minor matters, Latham’s suggestions were often unheeded. He wrote to Williams J pointing to a passage in a judgment which he felt was poorly expressed. Latham suggested a substitution which, whatever its merits, was twice the length of the original. Williams responded that his version was based on Lord Halsbury, and should stand:

‘I have discussed your formulation with Fullagar [J] and we both feel now that the reasons have been published that it would be preferable to leave the present text which is quite clear, and to my mind, apt, rather than to make the somewhat lengthy alteration that you suggest.’⁶²

59 *Bank of NSW v Commonwealth* (1948) 76 CLR 1; *British Medical Association v Commonwealth* (1949) 79 CLR 201; *Communist Party of Australia v Commonwealth* (1951) 83 CLR 1.

60 This and the preceding quotation are taken from Latham to B A Levinson, 8 November 1950, Series 1.

61 Memorandum, 15 June 1948, Series 62.

62 Latham to Williams, 20 March 1951; Williams to Latham, 4 April 1951; Latham to Williams, 6 April 1951.

4. LATHAM AND COMMUNISM

Latham applied similar techniques of consultation and suggestion when the Court was preparing the judgment in the *Communist Party Case*, in which his colleagues decisively rejected his arguments. Latham's judgment synthesised two crucial issues in his long career: his loathing of Communism, and a long-sustained association with the Constitutional defence power. These are complex questions which warrant much more detailed treatment than can be attempted here but some account is necessary as background for considering Latham's involvement in the *Communist Party Case*.

(a) Background - 1917-1934

Latham's obsession with Communism largely derived from his work with Naval Intelligence during World War I. When Latham began his duties in 1917, following problems with security in naval dockyards, Hughes' Nationalist government was using the Unlawful Associations Act 1916, hinged on the Constitutional defence power, to harass and destroy in Australia the effectiveness of the International Workers of the World. Radicals remained under intensive, often unfavourable, scrutiny during the war and Latham enthusiastically read all military intelligence and censorship reports, initialling and annotating them, marking some passages in red ink for subsequent readers.⁶³ According to Cain, Latham was alarmed more by indications of clandestine or conspiratorial intent than by threats to governments and employers:

'Latham's interest in the more conspiratorial messages in letters is perhaps an illustration of the point that it takes one scheming mind to recognise another.'⁶⁴

Latham's intelligence work gave him basic information on the organisation and aspirations of Australian radicalism which he was able to build upon as Commonwealth Attorney-General. When he returned to the Bar after the war, he was given a further opportunity to become familiar with radical movements and the counter measures taken against them. In March 1919, there were skirmishes in Brisbane between Socialist organisations and returned soldiers, with the police stoutly defending the Russian Community Hall against attack. In the popular mind, these so-called 'Red Flag' riots gave radical activity a Russian, even Bolshevik, tinge which was largely unjustified. Some Russians were taken into custody and ultimately deported, including Alexander Zuzenko, a leader of the Russian community and a Socialist but not a Bolshevik.⁶⁵

Latham was involved in the aftermath of the 'Red Flag' riots when he acted as counsel for Davies Brother, a Tasmanian newspaper publisher, in a defamation action brought against it by the estate of the former Queensland Premier, T J Ryan. The hearing produced much evidence about the riots, Socialist propaganda in Brisbane, and the local Russian community. Latham preserved the lengthy court transcript in his files.⁶⁶

When Latham became Attorney-General of Australia in December 1925, the battle lines were more clearly discernable. Communism had stabilised

63 Cain, *The Origins of Political Surveillance in Australia* (1983) 99.

64 *Ibid.*

65 *Ibid* 162-67.

66 Latham Papers, Series 13.

in Russia, the Comintern was functioning, an Australian Communist Party with Russian links had emerged, and some of its officials had visited Moscow. The Government's ability to counter political and industrial agitation by deportation was dealt a substantial blow when the High Court in *ex parte Walsh and Johnson*⁶⁷ held that the Constitution would not sustain the deportation of established Australian citizens.

As Attorney-General, Latham moved aggressively against Communists and other radicals, claiming a mandate from the 1925 election policy speech of Prime Minister, S M Bruce. These election campaigns were dominated by the 'Red Menace' with Nationalist election propaganda showing a sea of blood waiting to engulf voters if they rejected Bruce. Printed electoral material was equally crude:

'You homeowners, do you believe that the Christian religion should be scrapped. If so, vote for Charlton [the ALP leader].'⁶⁸

Latham kept samples of this material in his papers, including an underscored pamphlet which described Communism as a 'subtle and sinuous menace which is hovering over the entire world'. Bruce pledged the Government, if re-elected, to 'defeat the nefarious designs of extremists in our midst'.⁶⁹

Latham sought to amend the Crimes Act 1914 so as to incorporate some of the more stringent provisions of the Unlawful Associations Act applied during World War I. His amendments were based not on the defence power but a combination of the executive power, the incidental power and the trade and commerce power. He was uneasy about the revision, considering it vulnerable to challenge and remarking on Constitutional law in general that there was no more uncertain field.⁷⁰ Despite his apprehensions, the revised Crimes Act was not challenged.

Latham argued that there was no proletariat in Australia, which he described, rather extravagantly, as the 'fullest and freest democracy the world has known'. Communism fanned class hatred where it did not exist, importing ideas suited to 'Russian serfs' but unsuitable to Australia.⁷¹ His attack was largely aimed at Communist exploitation of other groups to foment social and industrial discontent. He acknowledged that there were few Communists in Australia but claimed that their influence was not negligible. Although inspired by a variety of ideals and motives, Communists were generally committed to destroying Australian society, overthrowing the Constitution, resisting Commonwealth laws, and subverting both external and internal commerce and intercourse.⁷² The threat was best dealt with quickly and decisively.

Fundamental to Latham's approach was his conception of incitement which permeates his speeches and writings at this time. He insisted that he was not threatening freedom of opinion or expression; indeed it would

67 (1925) 37 CLR 36.

68 Latham quoted Bruce's policy at length in the opening of his second reading speech, Aust, Parl, *Debates*, H of R (28 January 1926) 457. For 1925 election material, see Latham Papers, series 27.

69 Latham, *supra* n 66 at 457.

70 *Ibid* 470.

71 *Ibid* 459ff.

72 *Ibid* 470. See also Cain *supra* n 63 at 243ff.

have been gross inconsistency if he had done so, for he was a dedicated rationalist, inimical to all religion. The amended Crimes Act sought to prevent revolutionary action, but its ambit was restricted to the protection of the Constitution, the elected government, foreign trade and commerce and the Commonwealth public service. It was not intended as a general criminal law, which the Parliament had no authority to enact.

For Latham, the statement of Socialist, even Communist, views was acceptable: for example, the Australian Labor Party advocated Socialism but to be achieved by Constitutional means, not revolution. By contrast, advocacy of Socialist or Communist objectives which either stated or implied revolution and the overthrow of the state was incitement which warranted suppression. Latham did not differentiate calls for revolution, which might be mere rhetoric or ideological persiflage, from pragmatic blueprints for revolution. This notion of incitement to violence pervaded Latham's approach to Communism throughout his public life.⁷³

Tactically, the amendments were skilfully devised and implemented. The legislation sought to remove impediments to deportation of troublesome agitators, shifting onus of proof onto the accused.⁷⁴ It penalised sending radical literature through the post, and giving Communists access to halls and offices, effectively striking at the logistical basis of Australian Communism. The changes were tremendously popular with the press which presented them as laws against the 'wreckers' from revolutionary groups.⁷⁵ The revised Crimes Act was effective in curbing revolutionary agitation and activities, but it was largely bluff. Menzies, who supplied an opinion to the *Melbourne Herald*, concluded that the Act was Constitutional but later High Court decisions gave support to Latham's suspicion that the Act was vulnerable.⁷⁶ Communists and other radical groups were sufficiently intimidated to avoid the courts, so the Act was a successful ploy, and the Bruce-Page government was convinced that Communism had diverted into orthodox political channels.

Latham continued his oversight of Communism even during the great industrial struggles of 1928-29. Although Latham was a protagonist in this confrontation, he found time to collect Communist literature, countering criticism with the latest gleanings from *Pravda* and Comintern publications. Included in his papers is a well-thumbed and annotated copy of the *Communist Manifesto*. He encouraged his department to produce anti-Communist propaganda, and the Commonwealth Investigation Branch flourished under Latham. It produced an account of Community *modus operandi* covering underground propaganda, the formation of 'germ cells' in crucial areas of industry, the 'white anting' of union officials and the recruitment of returned soldiers, particularly machine gunners.⁷⁷

With Latham's approval, leaflets were distributed outlining the careers of 'dangerous alien Communists' in Australia such as the deportees, Zuzenko and Simonoff, and the agitator Dimitriades, described as a 'filthy sexual pervert' who had been defended on a charge of indecency by a

73 Latham's conception of incitement is outlined in his Crimes Bill second reading speech, *supra* n 63 at 466-67.

74 Cain, *supra* n 63, 205ff, 243ff.

75 *The Argus*, 1 February 1926. *The Age*, 29 January 1926: 'New Law Against the Wreckers'.

76 *Melbourne Herald*, 27 February 1926.

77 Printed material in Series 27. See particularly *The Communist Menace* (nd).

'Communist woman lawyer'.⁷⁸ Latham kept in touch with British security agencies through Richard Casey, the Commonwealth liaison officer in London, obtaining the names and addresses of alleged Australian Communists.⁷⁹

Communism remained a major preoccupation for Latham when he was restored as Deputy Prime Minister and Attorney-General in January 1932. The value of the amended Crimes Act as a deterrent had been eroded by increased militancy during the Depression, particularly among the unemployed. With other radicals, Communists were more aggressive and ready to challenge oppressive regulation. The Investigation Branch recommended tougher measures, including further amendment of the Crimes Act to proscribe the Communist Party, based on a declaration by the Governor-General. Latham rejected this suggestion, most likely because he doubted its validity, but in May 1932 the Act was amended to allow proceedings against Communists and other radicals based on a declaration of unlawfulness from the High Court or a Supreme Court.⁸⁰

Armed with these powers, Latham moved against a Communist publisher, using an averment of 27,000 words to obtain a lower court conviction. This was quashed on appeal to the High Court which found that averment and evidence was insufficient to prove the alleged offence.⁸¹ Restrictions on mail, halls and offices were much less effective. Latham was embarrassed when he directed the Investigation Branch to inquire into the Australian Pensioner League which he suspected of radical activity and with which he quarrelled fiercely. The investigation found that the League's principal activity was organising concerts for pensioners and their friends.⁸² Latham considered the use of the defence power, his advisors arguing that Communists in other countries had seized power by force, so this approach was fundamental to Australian Communism and justified its suppression.⁸³

Frustrated by a perceived lack of Federal power, Latham turned to the States. He wrote to the NSW Premier, B S B Stevens, the Victorian Premier, Stanley Argyle, and the Victorian Attorney-General, R G Menzies, urging them to act against Communism. According to Latham, the Commonwealth's legislative power was very limited, particularly in criminal law, and it had no police force. Rather curiously, Latham gave as an example of what might be done the Victorian government's suppression of John Wren's totalisator many years before. Latham insisted that the Commonwealth could legislate only if there were actual or threatened revolution (a clear implication that neither circumstances then applied), and Communists had taken care to avoid incitement at their meetings.⁸⁴

Latham's letter to Stevens gave the fullest outline of his distinction between incitement to violence or revolution, and legitimate political activity:

'The Commonwealth Government does not believe in

78 Ibid.

79 See Series 27, item 169.

80 Cain, *supra* n 63 at 248.

81 Ibid, and *R v Hush, ex parte Devanny* (1932) 48 CLR 487.

82 Latham Papers, Series 53, item 347.

83 See memorandum on Communism, series 53, item 261.

84 Latham to Bertram Stevens, 6 April 1933, Series 53. Latham to Stanley Argyle, 18 July 1933, Series 53.

suppression of political agitation even though it may take such an extreme form, but the government draws a distinction between such activity and actual incitement to violent action for the purposes of overthrowing government as such.’⁸⁵

Neither State Government took up Latham’s proposals.

He raised the matter again at a meeting in 1934 of Commonwealth and State Ministers on Constitutional reform. The Commonwealth Attorney-General’s Department brief for the meeting included a memorandum on Communism and revolutionary activity concluding that the Commonwealth couldn’t penalise Communism under criminal law because it was not a ‘matter incidental to the exercise of the enumerated legislative powers of the Commonwealth’.⁸⁶ Constitutional amendment was considered, apparently for the first time. The departmental papers for the conference included a draft amendment inserting a new clause xxxviiiia in s51: ‘The suppression or control of associations declared by the High Court to have unlawful purposes’.⁸⁷ Again, Latham did not act, suggesting that he did not consider Constitutional amendment feasible at this time. Latham’s experience confirmed the scepticism he had expressed in 1931 to a political colleague who cited Canada’s effectiveness in suppressing Communism and deporting Communists:

‘It is difficult to understand why Australia has continued to put up with a certain element, a large number of whom should have been deported...Some Canadian medicine would be good for the Sydney crown.’⁸⁸

Latham could only respond that the Australian Government lacked criminal power, and it could legislate only within very narrow limits: ‘We will do our best in the matter to which you refer’.⁸⁹

Latham’s loathing of Communism had common elements with his repugnance to orthodox religion. Although a paragon of social, political and economic conservatism and rectitude, Latham was radical in his attitudes to theology, describing the economic and political dogmatism of Russian Communism as having a ‘startling parallel with the ecclesiastical tyranny of past ages, and I am equally opposed to both’.⁹⁰ The Comintern’s activities gave an international dimension to his deeply ingrained notion of incitement:

‘I...draw a distinction between political propaganda and propaganda deliberately conducted through appropriate agencies by a foreign country...with the objective of upsetting by violence a system of government which the people of Australia approve.’⁹¹

He believed that Russia was deliberately promoting misery, distress and disorder so as to create a proletariat where it did not exist, quoting

85 Ibid.

86 Memorandum for Ministers’ Conference, Series 53, item 261; and see *R v Bernasconi* (1915) 19 CLR 629, 634-5.

87 Ibid, Item 224.

88 H C Cornforth to Latham, 21 January 1932, Series 53.

89 Latham to H C Cornforth, 27 February 1932, Series 53.

90 Latham to J M Alexander, 7 March 1933, Series 52.

91 Ibid.

Maniulski of the Comintern Executive as applauding Stalin's success at promoting disorder in England and civil war in India.⁹²

Latham left Federal politics in 1934, having failed in his sustained and vigorous attempt to destroy Australian Communism by using Federal executive power and legislation. Before looking at the judicial phase of his involvement with Communism, it is necessary to consider briefly some aspects of his relationship with the evolving interpretation of the Constitutional defence power.

(b) The defence power

Latham's maturation as a lawyer in many ways counter-pointed the development of defence power. This involvement can be traced back to the foundation case of *Farey v Burvett*,⁹³ in which he appeared as junior counsel for the respondent. A majority of the High Court held that the defence power supported legislative action to fix the price of bread during World War I. Thus was established the principle that the defence power went beyond the operations of armies and navies to war-time regulation of economic and community activities. Thereafter, as advocate and judge, Latham quoted approvingly the formulation of Isaacs J:

'If the measure questioned may conceivably in such circumstances even incidentally aid the effectuation of the power of defence, the court must hold its hand and leave the rest to the judgment and wisdom and discretion of the Parliament and the Executive it controls - for they alone have the information, the knowledge, and the experience and also, by the Constitution, the authority to judge of the situation and lead the nation to the desired end.'⁹⁴

As Federal Attorney-General, Latham was the nominal plaintiff in a major challenge to the use of the defence power in a time of peace.⁹⁵ The Court held that the defence power, in conjunction with the incidental power, did not sustain any establishment of businesses for trade that was wholly unconnected with any purpose of military or naval defence. Latham KC appeared for the Commonwealth in *Attorney General (Vic) v Commonwealth*⁹⁶ in which the Court decided that a clothing factory making military uniforms was a valid use of the defence power in peace-time. Latham's argument is only baldly stated in the reports,⁹⁷ but he argued that it was for Parliament and Government to determine what was a defence situation requiring use of the defence power, not the courts: 'The Commonwealth Government is entitled to do what it is doing: if not there is no legal remedy but only a political one.' He may have regretted his lack of initiative in not using the defence power when he was Attorney-General.

Latham was on the Bench for many of the 80 or so cases involving the defence power which the High Court decided during World War II,

92 Ibid.

93 (1916) 21 CLR 433.

94 Per Isaacs J at 455: Latham quoted this passage in *South Australia v Commonwealth* (1942) 65 CLR 432.

95 *Commonwealth Attorney-General v Australian Commonwealth Shipping Board* (1926) 39 CLR 1.

96 (1935) 52 CLR 533.

97 Ibid 550-551.

mostly supporting government legislation and regulations so based. Essentially, Latham applied the principle of *Farey v Burvett*: if food prices could be regulated during war, so also could a wide range of other services and activities: shelter, control of expenditure and economic activity, reduced interest rates, regulated admission to universities, price control, employment of women. Latham's approach is exemplified best in one of the principal war-time defence power cases, the *Jehovah's Witnesses Case*.⁹⁸

'It is a well-established doctrine of constitutional law that it is for Parliament to choose the means by which its powers are to be carried into execution. In the absence of a relevant constitutional prohibition it is not a proper function of a court to limit the method of exercising a legislative power.'

A rather droll example of Latham's approach to the defence power is his judgment in *Ferguson v Commonwealth*⁹⁹ which is almost dead-pan:

'It is a matter of common knowledge that, at particular seasons of the year, particularly at Christmas, and to a lesser extent at Easter and the New Year, there is a practice of making gifts and there is a rise in the expenditure of the public.'

Thus, a regulation which sought to limit the volume of festive advertising was valid because it made more labour and finance available for the war effort. Latham, the rationalist, was careful to point out that the regulation did not prohibit Christmas greetings unrelated to the sale of goods. Using the defence power to contain Santa Claus is perhaps the most striking example of its usage, but the example could be multiplied many times.

Despite his broad sympathy with government use of the defence power, he certainly did not regard it as immutable. There were limits, as in *South Australia v Commonwealth*:¹⁰⁰

'The defence power was widely interpreted and applied in *Farey v Burvett*. But that case shows that even this power has a limit - it is not sufficient to wave the flag as if that were a conclusive argument.'

Thus, Latham stated that he was unable to find a connection between the defence power and legislation which enabled the Commonwealth to 'forcibly seize a state department, its personnel, accommodation and equipment'. In *Victorian Chamber of Manufactures v The Commonwealth*¹⁰¹ Latham concluded that the existence of war enabled the Commonwealth to deal with war and war-created problems, but it was not empowered to legislate upon all subjects whatever. Thus, industrial lighting did not have any real connection with defence, even in war-time.

Although Latham balked occasionally when he could not discern a 'real connection', he broadly followed the approach summarised by David Marr:

'When the chips are down the High Court is not going to stand in the way of the war effort'.¹⁰²

98 (1943) 67 CLR 116, 133.

99 (1943) 66 CLR 432, 434.

100 (1942) 65 CLR 373, 431.

101 (1943) 67 CLR 413.

102 Marr, *Barwick* (1979) 284.

He particularly stressed the immense problems faced by the government in fighting a 'total war', a concept which, to Latham, was not mere rhetoric but urgent reality:

'But the impact of war does not produce only physical consequences. War produces grave dislocation in the social and economic structure of the community. It affects not only industrial employment but all employment. War requires the full utilization of all the resources of the community.'¹⁰³

Latham also approved the use of the defence power to regulate during the immediate post-war years, arguing that the power was not cut off 'as with a guillotine'. It included the need to prepare for war and to restore peace-time conditions gradually after war, as well as to prosecute war. The only alternative would be to crudely abandon Federal control immediately peace was declared.¹⁰⁴ He was a member of the Bench of five which by unanimous decision in *R v Foster*,¹⁰⁵ decided that the spillover of the defence power into the post-war years should cease. Latham took particular pride in *Foster's Case* as exemplar of the number and quality of joint judgments he was able to extract from the Court during those years.

(c) Law, politics and pessimism

By 1949, Latham was nearing the end of his long term as Chief Justice and the High Court had moved away from the application of the defence power in peace-time. When considering the challenge to the Communist Party Dissolution Act in the High Court, and the subsequent attempt to amend the Constitution to prohibit that party, Latham's political attitudes after he became Chief Justice are relevant. Shortly after Latham joined the High Court, Rich speculated on the wisdom of his departure from politics:

'I wonder if you look back on the fields of Canberra. Ours is a hard life and we have strange bedfellows and many restrictions.'¹⁰⁶

As Chief Justice, Latham remained close to politics and his old political colleagues in the United Australia, Liberal and Country Parties. His hostility to Communism was neither extinguished nor moderated by his transfer to the High Court. According to Sir Zelman Cowen, who wrote brief studies on Latham's political and legal careers, Latham looked back in later years with more pleasure to politics than to the Court.¹⁰⁷ Certainly, Latham had a rare ability to move with facility between the two worlds.

While Latham was Chief Justice, he gave advice on political and constitutional issues to non-Labor politicians such as Menzies, R G Casey, Harold Holt and Sir Earle Page. His links with the conservative parties appear to have strengthened after World War II as Menzies restored the Liberal Party and moved it steadily towards government. Latham advised Casey on the corporations power and the Commonwealth's power to make

103 *R v Commonwealth Court of Conciliation and Arbitration ex parte Victoria* (1944) 68 CLR 485, 494.

104 *Dawson v Commonwealth* (1946) 73 CLR 157, 174ff.

105 (1949) 79 CLR 43.

106 Rich to Latham, April 14 (no year, probably 1936-37), Series 62.

107 *Sir John Latham and Other Papers* (1965) 54.

grants for home building, a contentious political issue in the immediate post-war years.¹⁰⁸ He gave Casey a commentary on possible incorporation of a Bill of Rights in the Australian Constitution, describing it as a series of short notes on 'unsigned sheets'.¹⁰⁹ During the 1959 election campaign, Menzies sent Latham a copy of his policy speech and thanked him for his 'contribution'.¹¹⁰

Latham welcomed the election of Menzies which he said had 'put new heart into many people'.¹¹¹ He was in touch with Menzies after the election, telling Dixon in May 1950 of a successful dinner at the Australian Club for the Prime Minister: 'I spent an hour or two with him on Sunday and discussed many matters.'¹¹² He supplied a senior Minister, Harold Holt, with a memorandum of adjusting wages to prices, noting that the Communists planned to peg prices and unpeg wages:

'It is entirely personal and confidential to yourself, and I ask that if you use it in any way, my name, for obvious reasons should not be associated with it.'¹¹³

Menzies wrote to him in August 1951:

'I feel ashamed of myself for not having acknowledged your various interesting documents which I am discussing with Harold Holt.'¹¹⁴

Even as Chief Justice, the Gordian Knot of law and politics which determined Latham's public career was never slashed.

Two High court cases involving Communists in 1949 indicate the nature of Latham's thinking on the eve of the *Communist Party Case*. In *Burns v Ransley*,¹¹⁵ the Court held that Crimes Act provisions on sedition were within the Constitutional power vested in the Commonwealth Parliament. Cowen, who was not overly critical of Latham, described it as the worst of a group of cases in which Latham showed too little regard for fundamental liberties:

'It seems to me that Latham's view was insensitive to important issues touching the liberty of the subject in a very troublesome area of the criminal law, and that the dissenting view was wholly persuasive.'¹¹⁶

This is putting it mildly. Latham's strictures against disaffection and fifth column activity seem excessive when weighed against a Communist's statement that in a third world war Australian Communists would fight on the side of the Soviet Union. Latham took this opinion, which was given reluctantly and under pressure at a public meeting, as evidencing a present disaffection against king and government:

'The encouragement of internal disloyalty is a grave obstacle to effective defence against an external enemy. Such

108 Latham to R G Casey, 20 July 1949, Series 1.

109 Latham to Casey, 15 August 1949, Series 1.

110 Menzies to Latham, 1 December 1949, Series 1.

111 Latham to S Scott, 13 December 1949, Series 1.

112 Latham to Owen Dixon, 4 May 1950, Series 1.

113 Latham to Harold Holt, 3 August 1950, Series 1.

114 Menzies to Latham, 12 August 1951, Series 1.

115 (1949) 79 CLR 101.

116 Cowen, *supra* n 107 at 48.

encouragement is an incitement to the promotion of civil war at a time when the country is protecting itself against hostile attack...Protection against fifth column activities and subversive propaganda may reasonably be regarded as desirable or even necessary for the purpose of preserving the constitutional powers of governmental agencies and the existence of government itself...I agree that the Commonwealth Parliament has no power to pass a law to suppress or punish political criticism, but excitement to disaffection against a government goes beyond political criticism.’¹¹⁷

In *R v Sharkey*,¹¹⁸ the Court again sustained the validity of Crimes Act provisions and dismissed an appeal against a conviction for seditious intent. Latham considered that a carefully-worded statement given by Sharkey to the press was designed to excite disaffection between Australia and Russia, not only in the event of war but also independently of and in advance of war:

‘The words spoken by Sharkey were uttered in March 1949 at a time of acute tension between Soviet Russia and powers with which Australia is most closely associated...The jury was entitled to take that notorious fact into consideration...The substance of Sharkey’s statement could in my opinion properly be found by a jury to be that the Australian people should welcome a Russian invasion with non-resistance because any resistance would amount to aggression.’

Lance Sharkey had been a prominent member of the Communist Party since the mid-1920s, and well known to Latham in a political context. These were the first cases in which Latham had directly encountered Communists and they reflect both his antipathy to Communism and his ambivalence over fundamental liberties. The judgments confirm his preoccupation with international Communism, possible war with Russia and fifth column activity in Australia at a time when the Liberal Party was preparing to suppress Communism by legislative action.

In the months before the Communist Party legislation reached the Court, Latham had no doubt that the world was drifting into a pre-war situation, with a renewal of global conflict imminent. He expressed his apprehensions in letters to the British Law Lords, Simon and Jowitt, to whom he sent food parcels. He wrote to Jowitt in December 1950 while the *Communist Party Case* was before the Court:

‘I cannot pretend to be at all easy about things as they are, but I shall be much easier if we manage to avoid war within the next two or three years, and in the meantime have built up a powerful army.’¹¹⁹

As the Court sorted out its judgment in the *Communist Party Case* early in 1951, Latham’s assessment of international affairs was more virulent:

‘The present condition of world affairs is such as to cause

117 *Burns v Ransley* (1949) 79 CLR 101, 110.

118 (1949) 79 CLR 121, 142.

119 Latham to Lord Jowitt, 22 December 1920, Series 1.

many of us to be very apprehensive - the state of many people is one of apprehension verging upon alarm. Nearly everything seems to have gone wrong in Korea...It would be for the good of mankind if some sections of the press were strangled.¹²⁰

The Korean War was then at a critical point for the United Nations forces, and China had entered the war while the Court was hearing the *Communist Party Case*.

Despite Latham's loathing of Communism and his pessimism, he was not a rabid Cold War warrior committed to the destruction of Russia at any price. He could see merit in a system which divided the world into two blocs on the basis of non-interference and 'live and let live':

'We certainly do not want to prescribe the form of government in Russia and the policy in Russia.'¹²¹

What mainly concerned Latham was Communist incitement within Australia. Even with a Liberal-Country Party Federal government, Latham was perturbed about the weakness of executive government. He came to regard the coalition victory in 1949 as a draw because it had not got control of the Senate, and a double dissolution of Parliament seemed a distinct possibility.¹²² Throughout 1950, his correspondence was studded with references to the paralysis and palsy of government and deadlocked parliaments. In May, he wrote to Dixon in Kashmir:

'The political position in Australia is highly unsatisfactory from the point of view of everybody who wants to see a certain stability and continuity in government, whichever party is in power.'¹²³

Latham contemplated alterations to the Constitution so the Parliament might elect a Prime Minister who would choose ministers from outside, as in the United States. It was further evidence of his hankering for a much stronger executive.

There is evidence that Latham was under intense personal strain at this time. He wrote to a police inspector in a Victorian country town enclosing a letter from a person whom he described as having a mental disorder. Latham said the letter caused him disquiet, although he was not asking for any action to be taken.¹²⁴ He was advised subsequently by the Victorian Police Commissioner that the person had been committed to the Reception House. It was an action uncharacteristic of Latham, accustomed to the receipt of abusive and threatening mail. The picture emerges of an ageing public figure, vastly experienced in law and politics, profoundly depressed by the spread of world Communism and apprehensive about instability within Australia. In this pessimistic frame of mind he was called to adjudicate a great Constitutional case hinged on Australian Communism.

120 Latham to Jowitt, 11 January 1951, Series 1. Latham referred frequently to what he saw as irresponsible and contradictory reporting from Korea in the press.

121 Latham to C K Allen, 10 April 1951, Series 10.

122 Latham to Dixon, 20 July 1951, Series 1.

123 Ibid.

124 Latham to Police Inspector, Wodonga, 23 May 1950, Series 1.

(d) The Communist Party Case

Latham was aware that his fellow judges were dubious about the legislation to dissolve the Communist Party. Dixon wrote to him from Kashmir:

'Presumably the anti-Communist legislation at present before the Parliament will not be passed for a little time, and no doubt it will take a good deal of further time before a challenge to it reaches the court. I do not know what danger that involves, but I can see that an act based on the legislature's judgment concerning the facts by which alone its constitutional validity may be supported, raises a difficulty which so far has not been dealt with fairly and squarely.'¹²⁵

Reservations were put to Latham more bluntly by the 87-year-old Rich who had retired from the Bench in 1950. Writing from England to announce his impending wedding to Letitia Fetherstonhaugh, Rich warned Latham that the 'Commo bill' required careful handling:

'I have not seen the bill but I have always felt doubtful and have stated my anxiety. I hate the Commos...but I'll fight for liberty and justice and the old principle of innocence of the accused. Tomorrow one of us may be in the dock and you must prove your innocence and so on.'¹²⁶

When the case came before the Court late in 1950, Latham faced constant threats of disruption, even violence. He received many telegrams about the case, some from Communists but many from ALP members and non-Communist unions. Some were abusive and extreme in language but most were relatively moderate.

The most common complaints concerned the recitals in the preamble to the challenged Act, and the procedural quirk which allowed [Sir] Garfield Barwick QC to open the case even though his client, the Commonwealth, was the defendant. Surprisingly, Latham referred all of the telegrams to the Attorney-General asking that they be examined to see whether action against the senders was warranted. Leaflets were distributed canvassing his long opposition to the Communist Party and the Labor movement generally. He was accused of drawing up the Communist Party legislation in a secret conclave with Menzies and the Commonwealth Attorney-General, John Spicer, at the Australian Club in Melbourne. In all the turbulence, Latham continued his administrative duties, even lobbying Menzies about sending an Australian judge regularly to the Privy Council. He argued that many thought the Privy Council was very ignorant of Australian conditions.¹²⁷

As was his practice in these years of judicial co-operation, Latham distributed to his colleagues a 25-page memorandum defining the issues as he saw them:

'The following are some preliminary notes which may possibly assist in the consideration of the case. This document is not

125 Dixon to Latham, 23 May 1950, Series 1.

126 Rich to Latham, 11 November 1950, Series 1.

127 Latham's office forwarded telegrams and other material to the Commonwealth Solicitor-General on 29 November 1950 and 16 March 1951 (Series 62). On the Privy Council, see Latham to Menzies, 12 December 1950, Series 1.

to be regarded as a draft judgment. It is respectfully- perhaps too ambitiously - intended to suggest and to discuss ideas which may possibly be relevant, some of which may have not really been mentioned in the argument, lengthy as it was...By all be it understood that what has been written does not represent my concluded judgment. It is a preliminary endeavour to sort out some of the questions and to put some points which were not developed by the parties.¹²⁸

This memorandum and two earlier, cruder drafts indicate that Latham made up his mind on the principal issues shortly after the hearing ended. He subsequently modified much of his material in the preparation of the final draft, described by Cowen as 'long and incredulous', but the essential principles stayed the same. His first draft stated his fundamental approach to the defence power:

'Examine cases on defence power to show that the real connection with war is matter which the court consider and that the court never consider whether undertaking the war was genuinely the defence of Australia.'¹²⁹

Parliament had decided that there was an enemy 'in our midst'. This was a decision for Parliament and not the Court to take. Latham observed that in 1914 and 1939, Australia was involved in war before the High Court decided any cases on the defence power. He felt that the Communist Party had got into trouble partly because it dealt with a defence situation (presumably the Cold War), which had not arisen before:

'Here a novel problem met by novel (to us) legislation. Compare legislation elsewhere, e.g. Rumania.'¹³⁰

This early material throws some light on how Latham conceived modern warfare and the fifth column activity associated with it:

'War, unfortunately can no longer be described as a temporary emergency...It has changed its form. Preparation for resistance [to] apprehended attack has become the normal condition of many countries. Best way to defeat a country is to undermine the will of its citizens to fight and to conduct propaganda to prevent enlistment and recruitment and to depreciate the morale of the community.'¹³¹

He rejected the argument that a law for a temporary emergency could not have a permanent effect, such as abolishing a political party. This would be tantamount to a treason in which the convicted felon was released with an apology once war ended.

The memorandum contained some ironical jibes at the conduct of the Communist Party's case, partly directed at his old colleague, Evatt, who was an advocate for the Communist Party:

'The arguments for the plaintiffs, not surprisingly, varied, and were sometimes inconsistent. But all the plaintiffs agreed in intense admiration of judges and courts, in distrust of the Commonwealth Parliament, and in enthusiasm for civil

128 Memorandum, 11 January 1951, 13, Series 62.

129 Draft judgment, Series 62, Item 978 (nd) 3.

130 Ibid 3.

131 Ibid 9.

rights, public rights of property, for liberty and for British traditions.’¹³²

His draft judgments and other notes were far more critical of the conduct of the Commonwealth case by Barwick. Latham implied that Barwick had made a major tactical error by basing his argument on two sections of the Act which permitted the Governor-General to make declarations about Communist organisations, unlawful associations and individual Communists. He felt that Barwick had made heavy weather out of using these declarations as a link with the defence power so as to validate the legislation. Barwick’s action required ‘tortured construction’ of subsections of the Act, and he had encountered much difficulty in using those sections to establish a connection with defence.¹³³ Latham was just as critical of Barwick’s efforts to use the recitals in the Act’s preamble to provide the ‘real connection’:

‘Alternatively the connection was to be found in the recitals, but the defendant’s arguments on the recitals seemed to me to get nowhere.’¹³⁴

In other passages Latham asserted scathingly that the defendants had shown no conception of the nature of executive and parliamentary power and responsibility. They had failed to put to the Court any argument that whether Communism is a danger is entirely a matter of political opinion, ‘which cannot be resolved in accordance with the political opinion of the judges’.

Latham even considered the hypothetical situation where a High Court judge might have Communist sympathies. Throughout the drafts he reiterated that Parliament could not recite itself into power; but if it thought Communism was a danger to defence preparation and the maintenance of the Commonwealth Government, then it could dissolve the Communist Party. The opinion of government and Parliament provided the vital ‘real connection’ with the defence power, not the declarations in the legislative recitals.

If Latham was disappointed with the overwhelming rejection of his approach he did not show it, busying himself with sorting out costs and the technicalities of delivering judgment:

‘There is something to be said for giving judgment at a time when the Parliament is not actually sitting so that both the government and the opposition can consider the matter before it is made a subject of parliamentary question and debate.’¹³⁵

References to the case in his correspondence are brief:

‘You [C K Allen] will see [on reading the judgments] there is a difference of outlook upon the nature of the government and the responsibility of the organs of government which may be of interest to you.’¹³⁶

132 Memorandum, *supra* n 126 at 18.

133 *Ibid* 13.

134 Draft judgment, *supra* n 129 at 5.

135 Memorandum, 1 March 1951, Series 62.

136 Latham to C K Allen, 10 April 1951, Series 1.

Latham exchanged letters about the case with the former Prime Minister and Country Party leader, Sir Earle Page, then a senior minister in the Menzies Government. Page wrote to Latham praising his judgment because it was realistic and original, the only judgment consistent with 'world facts' at that time. Page said that he had used the judgment as a text during the 1951 federal election campaign because it was a 'blueprint for successful governmental action against fifth column subversive activities'. Page concluded:

'At your leisure, I wonder whether you could not advise some constitutional amendment that would enable us to take action during the traditional pre-war period which now has become the decisive phase of modern war. No one is better fitted for the task than yourself with your tremendous legislative, administrative and judicial experience.'¹³⁷

In asking Latham to use his 'tremendous legislative, administrative and judicial experience' on behalf of the Menzies Government, Page does not appear conscious of any impropriety.

Latham responded that he had no doubt that his opinion was legally sound; however, the decision had gone the other way:

'As to constitutional amendments I have already had an informal talk with the Prime Minister and have made some suggestions to him.'¹³⁸

The exchange raises some disturbing questions. Latham's apparent willingness to advise Menzies on Constitutional amendments to snare the Communist Party after dissolution legislation was found invalid prompts speculation that he may also have advised the Prime Minister on measures to suppress Communism before the 1949 elections, perhaps even on the Communist Party Dissolution Act itself. Latham's papers show signs of careful pruning and it seems unlikely that this exchange with Page would have been preserved if he felt that it reflected on his integrity or impartiality in any way.

Another interpretation has been put forcefully by Toby Miller:

'The very concept of a Chief Justice assisting the executive to amend the Constitution after a six to one High Court decision had gone against him raises serious doubts about his integrity and acceptance of major decisions of the Full Bench, quite apart from the fact that it is a judge's job to consider legislation, not to make it. The separation of powers between executive and judiciary was jeopardised.'¹³⁹

The exchange with Page certainly raises questions which throw some shadows over Latham's final years as Chief Justice.

137 Earle Page to Latham, May 15 1951, Series 1.

138 Latham to Page, 27 May 1951, Series 62.

139 Miller, 'Sir John Latham and the Communist Party Dissolution Act: a Research Note' APSA Newsletter, September 1983, 2.