

# SIR JOHN LATHAM'S EXTRA-JUDICIAL ADVISING

FIONA WHEELER\*

*[Sir John Latham served as Chief Justice of the High Court from 1935 to 1952, his appointment to the bench following closely on his earlier career in conservative politics. While publicly, Latham's conduct as Chief Justice conformed to the general norms of judicial behaviour — in particular the requirements of judicial independence and impartiality — privately he remained involved in the political world. As this article shows, almost from the beginning of his time as Chief Justice, Latham clandestinely provided advice to federal government and actively communicated with political contacts about sensitive and partisan issues. Building on the work of Clem Lloyd, the article exposes the sweep of Latham's extra-judicial advising before, during and after World War II, including his remarkable involvement with the Liberal Party in the lead-up to the 1949 federal election. The article concludes with an assessment of Latham's conduct and reflects on lessons to be learnt from it.]*

## CONTENTS

|     |  |     |
|-----|--|-----|
| I   | Introduction .....   | 652 |
| II  | Lyons Government .....   | 654 |
| III | Wartime Menzies and Curtin Governments .....                     | 657 |
|     | A Menzies Government .....                                       | 657 |
|     | B Curtin Government .....  | 662 |
| IV  | Post-War Menzies Government .....                                | 665 |
|     | A Liberal-Country Party Coalition Return to Power: 1945–49 ..... | 665 |
|     | B Post-War Menzies Government in Office .....                    | 669 |
| V   | Reflections and Analysis .....                                   | 672 |
| VI  | Conclusion .....   | 676 |

\* BA, LLB (Hons), PhD (ANU); Professor, ANU College of Law, The Australian National University. Much of the work on this article was done while I was an Honorary Harold White Fellow, National Library of Australia. I would like to thank the Library and its staff for their generous support. I am particularly indebted to Graeme Powell for his assistance in locating a number of letters written by Sir John Latham and for his insights in relation to the Latham correspondence. I am also grateful to Professor Michael Coper and Professor John Williams for their comments on an earlier version of this article, as well as to the referees for their reports. The article draws from Latham's voluminous personal papers held in the Library (MS 1009). I have relied primarily on Series 1 (General correspondence 1896–1963), Series 62 (Chief Justice 1935–61), Series 63 (Legal interests 1920–63) and Series 65 (Minister to Japan 1940–41). Series 10 (Family papers 1868–1964) has been accessed from 1935 to the death of Latham's elder son, Richard, in 1943. Where material is held in both the National Library of Australia ('NLA') and National Archives of Australia ('NAA'), I have used the NAA reference for items accessible via their website.

[T]he strength of the judiciary as an element in a constitutional system depends very largely, not only upon the ability of its members, but also upon their record and reputation for complete political impartiality. This, however, is a large subject which has many aspects.<sup>1</sup>

## I INTRODUCTION

Sir John Latham personifies the ‘politician-judge’ in Australia. He came to the High Court after a career in conservative politics that brought him to the brink of becoming Prime Minister of Australia. When it became apparent that the nation’s top job would not be his, the office of Chief Justice of the High Court — to which he was appointed by his political colleagues in 1935 — was his consolation prize.<sup>2</sup> However, Latham did not treat the chief justiceship as a sinecure. Self-made and driven by nature,<sup>3</sup> Latham vigorously applied his very considerable talents to the task of leading the High Court until his retirement from the bench, aged 74, in 1952. The Latham Court spanned some of Australia’s most testing times as the nation faced the perils of war and, after victory against Germany and Japan, the demands of post-war social and economic reconstruction. To the outside observer, there is much to suggest that Latham was largely successful in steering the Court through this turbulent period. Whilst some in the community chafed at certain of the Court’s decisions, notably those striking down the socialist initiatives of the Chifley Labor government,<sup>4</sup> the Latham Court’s independence and integrity was never seriously doubted.

Behind the scenes, however, a different picture emerges of Latham’s chief justiceship. It has long been known that, once appointed to the bench, Latham did not wholly eschew the heady world of federal government policy and politics. In particular, Clem Lloyd has shown that, in the late 1940s and early 1950s, Latham clandestinely advised several conservative political figures, notably Robert Menzies, Richard Casey and Harold Holt, on a range of controversial matters.<sup>5</sup> Most astoundingly, after *Australian Communist Party v Commonwealth* (‘Communist Party Case’)<sup>6</sup> in 1951 — in which the High Court held that the Menzies government’s ban on communism was invalid — Latham, the only dissentient in the case, appears, by his own admission, to have secretly advised Prime Minister Menzies on alterations to the *Constitution* to overcome

<sup>1</sup> Letter (copy) from Sir John Latham to Sir Owen Dixon, 17 April 1944 in *Papers of Sir John Latham*, NLA MS 1009/1/5680, 5680.

<sup>2</sup> Stuart Macintyre, ‘Latham, Sir John Greig (1877–1964)’ in Bede Nairn and Geoffrey Serle (eds), *Australian Dictionary of Biography* (Melbourne University Press, 1986) vol 10, 2, 4–5 (noting, in particular, how Latham came ‘very close to winning the highest political office’ in Australia: at 5); Zelman Cowen, *Sir John Latham and Other Papers* (Oxford University Press, 1965) 16–18, 25–6; Philip Ayres, *Owen Dixon* (Miegunyah Press, 2003) 61, 70.

<sup>3</sup> See generally Macintyre, above n 2.

<sup>4</sup> Roger Douglas, ‘Latham Court’ in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 421, 422.

<sup>5</sup> Clem Lloyd, ‘Not Peace but a Sword! — The High Court under J G Latham’ (1987) 11 *Adelaide Law Review* 175, 195. Lloyd deals with Latham’s political advising whilst Chief Justice at 195–6, 202.

<sup>6</sup> (1951) 83 CLR 1.

the effect of the Court's ruling.<sup>7</sup> Especially when considered against the backdrop of Latham's crusade against communism whilst a Member of Parliament,<sup>8</sup> the revelation of a conference between the Chief Justice and the Prime Minister about the outcome in the *Communist Party Case* is, as Lloyd says, 'disturbing' indeed.<sup>9</sup>

Even more disturbing, however, is the fact that Latham's backroom advising was more extensive in nature than has previously been suggested. Almost from the beginning of his time as Chief Justice, Latham volunteered advice to government and actively communicated with political contacts about sensitive and partisan issues. Significantly, his 'politicking'<sup>10</sup> was not confined to the conservative Lyons (1932–39) and Menzies (1939–41, 1949–66) governments but, seemingly prompted by Latham's concerns about the war, extended — though in a more subdued fashion — to his former political adversaries in the Curtin Labor government (1941–45). The sheer volume of Latham's policy advising suggests that he was not troubled by the consistency of his actions with his independence as a judge. Yet, at the same time, Latham not infrequently stressed the secrecy or unofficial nature of his advice, telling his confidant that his (Latham's) identity should not be linked to the issue at hand.<sup>11</sup> He cultivated this Janus-like divide between his public and private persona in other ways, invoking judicial impartiality to persons outside his inner circle as a reason for declining certain publishing and speaking engagements or involvement in particular causes.<sup>12</sup>

This article explores Latham's extraordinary record of extra-judicial advising as revealed largely by his personal correspondence preserved in the National Library of Australia. The article divides that advising into three broad phases: the Lyons government, the wartime Menzies and Curtin governments and the post-war Menzies government, including the period prior to the critical 1949 federal election at which Labor was defeated and the Liberal-Country Party coalition returned to power. The article considers the disjunction between Latham's public commitment to 'complete political impartiality'<sup>13</sup> and his private involvement in the political world. It looks at how personal friendships — especially Latham's closeness to leading conservative political figure Richard Casey — drew the Chief Justice into the political vortex and also how Latham sought to influence public policy in relation to issues large and small. The final part of the article offers an assessment of the propriety of such extra-judicial entanglements then and now, and reflects on questions raised by Latham's repeated forays into the political sphere.

<sup>7</sup> Lloyd, above n 5, 202.

<sup>8</sup> Ibid 188–93.

<sup>9</sup> Ibid 202.

<sup>10</sup> This evocative expression is borrowed from Laurence Maher, who likewise uses it to describe judicial involvement in political affairs: see, eg, Laurence W Maher, 'Owen Dixon: Concerning His Political Method' (2003) 6 *Constitutional Law and Policy Review* 33, 34.

<sup>11</sup> See, eg, text accompanying below nn 52, 152; see also below n 104.

<sup>12</sup> See, eg, text accompanying below nn 34, 97, 154, 160.

<sup>13</sup> Letter (copy) from Sir John Latham to Sir Owen Dixon, 17 April 1944 in *Papers of Sir John Latham*, NLA MS 1009/1/5680, 5680 (see text accompanying above n 1).

## II LYONS GOVERNMENT

Latham was appointed Chief Justice by the Lyons government, taking the judicial oath of office on 11 October 1935. He had served under Joseph Lyons as Deputy Prime Minister from 1932 — when the newly established United Australia Party was swept to power — to 1934, when he resigned from Parliament to return, albeit briefly, to the Bar.<sup>14</sup> Latham and Lyons had an effective and cordial working relationship,<sup>15</sup> but seem not to have forged the same close political bond that, as will be seen, Latham shared with persons such as Richard Casey and, to a lesser extent, Robert Menzies. Lyons had defected to conservative politics from the Scullin Labor government in 1931, becoming Leader of the Opposition under the United Australia banner. Up until that time, Latham had led the conservatives in Parliament, but he now stood down as Opposition Leader in favour of Lyons, recognising the greater electability of ‘Honest Joe’.<sup>16</sup> There is nothing to suggest that Latham harboured any enmity towards Lyons for upstaging him in this way.<sup>17</sup> Rather, it was perhaps the disparate political and social backgrounds of the two men that prevented them from drawing more closely together.

In his new role as Australia’s most senior judge, Latham was clearly obliged to turn his back on his former political career and henceforth to remain independent from all partisan interests. Latham had several contemporary reminders of this, over and above the judicial oath itself. Following Latham’s appointment, for example, Lyons wrote warmly to him, extolling the qualities that Latham would bring to the bench, including his ‘impartiality’.<sup>18</sup> The ‘glor[ies]’<sup>19</sup> of judicial independence in the British tradition were also trumpeted at the Australian Legal Convention in 1938, a gathering attended by Latham and several other members of the High Court. There the President of the Law Council, Clive Teece KC, reiterated the ‘truism’ that ‘the judiciary should be free from all suggestion of political bias’<sup>20</sup> and urged adherence to the Irvine Memorandum of 1923 as one

<sup>14</sup> Macintyre, above n 2, 4–5.

<sup>15</sup> Ibid 5 (describing Latham as a ‘close counsellor’ of Lyons); Brendan Lyons, *They Loved Him to Death* (Bokprint, 2008) 144–6, reproducing the warm correspondence that Latham and Lyons exchanged on Latham’s announcement of his retirement from Parliament. Latham may have dominated the political partnership, however: see A W Martin, *Robert Menzies: A Life* (Melbourne University Press, 1993–99) vol 1, 127, quoting senior British civil servant, Maurice Hankey.

<sup>16</sup> P R Hart and C J Lloyd, ‘Lyons, Joseph Aloysius (1879–1939)’ in Bede Nairn and Geoffrey Serle (eds), *Australian Dictionary of Biography* (Melbourne University Press, 1986) vol 10, 184, 186–7, 188 (‘Honest Joe’); Cowen, *Sir John Latham and Other Papers*, above n 2, 17.

<sup>17</sup> See, eg, M H Ellis, ‘Latham: A Memoir’, *The Bulletin* (Sydney), 8 August 1964, 34, 34; Cowen, *Sir John Latham and Other Papers*, above n 2, 17–18; Anne Henderson, *Joseph Lyons: The People’s Prime Minister* (NewSouth Publishing, 2011) 268–70, 273–4.

<sup>18</sup> Letter from Prime Minister Lyons to Sir John Latham, 17 October 1935 in *Papers of Sir John Latham*, NLA MS 1009/1/4908, 4908.

<sup>19</sup> R Clive Teece, ‘Democracy and the Judiciary’ (1938) 11 *Australian Law Journal* 395, 395.

<sup>20</sup> Ibid 397. Teece continued: ‘The maintenance of the prestige of the Bench and of the confidence of the public in the administration of justice rests to a large degree on the feeling that judges have no politics, and that their decisions are never determined by political reasons’.

means of ensuring that judges kept 'aloof from all questions of politics'.<sup>21</sup> Sir William Irvine, himself a former politician turned judge, wrote to the new Chief Justice on the day of his swearing-in reflecting on the 'difficulty' Latham must have experienced in choosing between politics and the bench since, in Irvine's words, '[p]olitical ambitions have a charm hard to resist'.<sup>22</sup> In opting for the Court, Irvine told Latham, 'I feel sure that ... duty carried the day'.<sup>23</sup>

From the outset of Latham's chief justiceship, however, it was apparent that he did not regard himself as having taken a vow of political celibacy or, at least, as being required to remain at arm's-length from government on policy issues. Letters from Prime Minister Lyons to Latham show that, as Chief Justice, Latham continued periodically to perform the role — as he had as Deputy Prime Minister — of 'counsellor'<sup>24</sup> and policy proponent to the Prime Minister. Thus Lyons wrote to Latham in mid 1936 thanking Latham for his views on the 'thorny'<sup>25</sup> issue of the honours awards and, shortly after the abdication crisis, for his 'helpful words' in connection with what Lyons described as 'the trouble over the king'.<sup>26</sup> In March 1938, the two men were in communication over Latham's 'suggestion'<sup>27</sup> that the government construct a military road along the eastern coastline. Lyons said that he would examine Latham's idea and submit it 'personally' to the Council of Defence.<sup>28</sup> Later that year, Lyons accepted what seems to have been an invitation from Latham to have the benefit of Latham's views on 'mandated islands and aliens', foreshadowing arrangements for a discussion between himself and the Chief Justice on the topic.<sup>29</sup>

Contrary to his later practice, Latham appears not to have kept copies of his letters to Lyons, leaving the Prime Minister's replies as an incomplete, though tantalising, record of what passed between them. The Lyons correspondence is not the only indication, however, that Latham was dabbling in executive advising at this early stage of his judicial career. Latham's friendship with Richard Casey,

<sup>21</sup> Ibid 398. In relation to the Irvine Memorandum, in which the Chief Justice of the Supreme Court of Victoria, Sir William Irvine, explained at length to the Victorian Attorney-General why the Court regarded it as inappropriate for one of its members to conduct a Royal Commission, see Sir Murray McInerney and Garrie J Moloney, 'The Case Against' in Glenys Fraser (ed), *Judges as Royal Commissioners and Chairmen of Non-Judicial Tribunals* (Australian Institute of Judicial Administration, 1986) 3, 10–12.

<sup>22</sup> Letter from Sir William Irvine to Sir John Latham, 11 October 1935 in *Papers of Sir John Latham*, NLA MS 1009/1/4631, 4631.

<sup>23</sup> Ibid.

<sup>24</sup> Macintyre, above n 2, 5. See also Cowen, *Sir John Latham and Other Papers*, above n 2, 24.

<sup>25</sup> Letter from Prime Minister Lyons to Sir John Latham, 25 June 1936 in *Papers of Sir John Latham*, NLA MS 1009/1/5067, 5067. See also Letter ('Personal') from Prime Minister Lyons to Sir John Latham, 13 February 1939 in *Papers of Sir John Latham*, NLA MS 1009/1/5280.

<sup>26</sup> Letter from Prime Minister Lyons to Sir John Latham, 2 January 1937 in *Papers of Sir John Latham*, NLA MS 1009/1/5087, 5087.

<sup>27</sup> Letter ('Personal') from Prime Minister Lyons to Sir John Latham, 25 March 1938 in *Papers of Sir John Latham*, NLA MS 1009/1/5183, 5183.

<sup>28</sup> Ibid. In this letter, Lyons also indicated to Latham that he shared Latham's view that a 'bold' plan to attract immigrants to Australia was needed: at 5183.

<sup>29</sup> Letter from Prime Minister Lyons to Sir John Latham, 8 December 1938 in *Papers of Sir John Latham*, NLA MS 1009/1/5245, 5245.

federal Treasurer between 1935 and 1939,<sup>30</sup> was already showing the initial signs of what would, in due course, become the most intensely party political connection maintained by Latham as Chief Justice. Casey approached Latham in 1938, for example, over a proposed Royal Commission on doctors' payments under a national insurance scheme.<sup>31</sup> Latham seems to have been reluctant to involve a member of the High Court in the inquiry, so Casey sought Latham's views on the suitability of Arbitration Court Chief Judge, George Dethridge, as Commission Chair: 'he is used to this arbitration business & to deflating exaggerated claims' wrote Casey breezily to Latham, 'I'd like your comments on this.'<sup>32</sup> Latham's reply is not preserved, but given his later dealings with Casey, it seems likely that the Chief Justice and the Treasurer discussed the merits of this particular executive appointment.<sup>33</sup>

The nature of these contacts between Latham and the Lyons government is thrown into sharper relief when contrasted with Latham's concurrent dealings with members of the public who approached him about various causes. To a call in 1938 from religious activist, Dr Charles Strong, that Latham should provide leadership on the teaching of ethics in Australian schools, Latham responded that he could not be actively involved 'in work which has a political complexion'<sup>34</sup> (though, just a few days earlier, Latham had addressed the Conference of the Victorian Teachers' Union on the importance of social values in education).<sup>35</sup> In the same year in a letter to a representative of the Australian Youth Council, Latham defended the White Australia Policy in its application to Japan, albeit not in an 'official' capacity since, as Latham explained, 'I cannot now take any part in anything that looks like political controversy'.<sup>36</sup>

Latham's public persona as a judge conscious of the restraints upon him seems also to have accorded, at least to some extent, with his own self-image, whatever degree of personal reflection was involved in this assessment. To his son Dick, also a lawyer, Latham wrote in 1938 of the choices he (Latham senior) had made over his career:

<sup>30</sup> W J Hudson, *Casey* (Oxford University Press, 1986) ch 5.

<sup>31</sup> Letter ('Personal and Confidential') from Richard Casey to Sir John Latham, 14 June 1938 in *Papers of Sir John Latham*, NLA MS 1009/1/5205.

<sup>32</sup> Ibid 5206.

<sup>33</sup> Dethridge was appointed Chair of the Royal Commission on Doctors' Remuneration for National Insurance Service and Other Contract Practice in July 1938. However, he died during the inquiry, which never reported: Ian G Sharp, 'Dethridge, George James (1863–1938)' in Bede Nixon and Geoffrey Serle (eds), *Australian Dictionary of Biography* (Melbourne University Press, 1981) vol 8, 293; Scott Prasser, *Royal Commissions and Public Inquiries in Australia* (LexisNexis Butterworths, 2006) 262. There are also hints of behind the scenes policy contacts between Latham and members of the Lyons government apart from the Prime Minister and Casey: see, eg, Letter ('Personal and Confidential') from Sir Archdale Parkhill, Minister for Defence, to Sir John Latham, 11 August 1936 in *Papers of Sir John Latham*, NLA MS 1009/1/5076.

<sup>34</sup> Letter (copy) from Sir John Latham to Dr Charles Strong, 3 February 1938 in *Papers of Sir John Latham*, NLA MS 1009/1/5169, 5169. See also Letter from Dr Charles Strong to Sir John Latham, 26 January 1938 in *Papers of Sir John Latham*, NLA MS 1009/1/5168.

<sup>35</sup> 'True Citizenship', *The Age* (Melbourne), 26 January 1938, 15.

<sup>36</sup> Letter (copy) from Sir John Latham to Anne Hooper, 27 May 1938 in *Papers of Sir John Latham*, NLA MS 1009/1/5196, 5196.

When I became a judge I gave up politics ... an obvious illustration of the acceptance of one duty excluding the exercise of another right.<sup>37</sup>

In this statement, much turns on the content of the 'duty' in the same way that Latham observed to Sir Owen Dixon in 1944 that judicial impartiality was a topic with 'many aspects'.<sup>38</sup> The war was to demonstrate that judicial independence and impartiality were not fixed concepts as traditional inter-branch relationships were turned on their head.

### III WARTIME MENZIES AND CURTIN GOVERNMENTS

#### *A Menzies Government*

Joseph Lyons died suddenly on 7 April 1939 and, after a brief period during which Earle Page served as Prime Minister — Latham having advised Page on this interim arrangement<sup>39</sup> — was succeeded in office by Robert Menzies. Six months later the nation was at war with Germany. For Latham, the war posed an epochal struggle between good and evil. On 16 June 1940, only days before the fall of France, Latham wrote to John Curtin, then Leader of the Opposition, stating that the war would determine the very 'fate of civilisation'.<sup>40</sup> If Britain and her allies were defeated, he told Curtin, 'Australians may never again choose a Government of their own'.<sup>41</sup> This sentiment — that Australia risked the imposition of tyranny — was echoed in a passage in Latham's judgment in *South Australia v Commonwealth* ('First Uniform Tax Case')<sup>42</sup> two years later. There the Court, at the height of the war against Japan, upheld the validity of the Curtin government's radical scheme to give the Commonwealth exclusive control, vis-a-vis the states, over income taxation.<sup>43</sup> In supporting the essence of the scheme, Latham claimed that '[o]nly the firm establishment of some political doctrine as an obligatory dogma' would allow the courts to distinguish 'between essential

<sup>37</sup> Letter from Sir John Latham to Richard Latham, 12 November 1938 in *Papers of Sir John Latham*, NLA MS 1009/10/2005, 2008. See also, to similar effect, Latham's later reflections: Letter (copy) from Sir John Latham to Professor W Friedmann, 8 April 1952 in *Papers of Sir John Latham*, NLA MS 1009/63/596.

<sup>38</sup> Letter (copy) from Sir John Latham to Sir Owen Dixon, 17 April 1944 in *Papers of Sir John Latham*, NLA MS 1009/1/5680, 5680 (see text accompanying above n 1).

<sup>39</sup> Letter (copy) from Sir John Latham to Alured Kelly, 20 April 1956 in *Papers of Sir John Latham*, NLA MS 1009/1/9439, 9440. In this letter, written after his retirement from the bench, Latham claimed that Page and Billy Hughes had telephoned him on Lyons' death seeking his (Latham's) 'opinion' on what to do. He responded 'that they should ask the Governor General to invite Page, as the senior Minister in the Cabinet, to form an administration, Page undertaking to resign after the UAP had appointed a new leader ... They, and the Governor General acted in accordance with my advice': at 9440. Latham did not claim that he had directly advised the Governor-General, however.

<sup>40</sup> Letter (copy) from Sir John Latham to John Curtin, 16 June 1940 in *Papers of Lloyd Ross*, NLA MS 3939, Box 46, Folder 37.

<sup>41</sup> Ibid.

<sup>42</sup> (1942) 65 CLR 373.

<sup>43</sup> For the backdrop to, and aftermath of, the *First Uniform Tax Case*, see Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (University of Queensland Press, 1987) 130–4.

and non-essential' functions of government 'and Australia has not come to that'.<sup>44</sup>

Latham's High Court colleague, Owen Dixon, held similar views about the gravity of the crisis confronting Australia.<sup>45</sup> As soon as war was declared, Dixon approached the government asking how he could help.<sup>46</sup> Almost immediately, Dixon was made a member of the Central Wool Committee — a form of executive agency — and, while continuing to sit on the High Court, was thereafter closely involved in devising and managing wartime arrangements for the sale of Australian wool.<sup>47</sup> By virtue of this position, Dixon quickly became enmeshed in the war effort — a telegram to Latham from the Prime Minister on 27 September 1939, for example, dragged Dixon away from the High Court's Adelaide sittings to a meeting in Melbourne over wool pricing<sup>48</sup> — and Latham may have envied Dixon's closeness to the action. Certainly, in April 1940, Latham's son Dick asked his father: 'Are you still wanting very much to be doing something more active in the war?'<sup>49</sup> Officially, Latham's opportunity to do so came in late 1940 when he took leave from the High Court to become Australia's first envoy to Japan.<sup>50</sup> Unofficially, however, Latham involved himself in the war from the outset by continuing and, it seems, intensifying the advisory practices he had established under Lyons.

One of Latham's early wartime political interventions involved Richard Casey. In the early weeks of World War II, the Menzies government came under sustained public criticism for what many regarded as a sluggish response to the crisis.<sup>51</sup> Latham was alive to this problem and wrote to Casey — expressly acknowledging the risks for him (Latham) in so doing — seeking to galvanise the government into action.<sup>52</sup> Casey had, by this time, relinquished the Treasury portfolio and was now Minister for Supply and Development, a post that included certain defence responsibilities.<sup>53</sup> On recruitment and related issues, Latham told Casey bluntly, the administration seemed 'semi-dead'.<sup>54</sup> Latham then proceeded to issue the comatose government with a wake-up call, explicitly invoking its electoral vulnerability:

<sup>44</sup> *First Uniform Tax Case* (1942) 65 CLR 373, 423.

<sup>45</sup> See Ayres, above n 2, ch 7; J D Holmes, 'Royal Commissions' (1955) 29 *Australian Law Journal* 253, 272 (commentary on Dixon).

<sup>46</sup> Ayres, above n 2, 115–16.

<sup>47</sup> Ibid 115–28 (as discussed by Ayres, Dixon served on the Central Wool Committee between 1939 and 1942, holding the position of Chair from 1940).

<sup>48</sup> Ibid 118.

<sup>49</sup> Letter from Richard Latham to Sir John Latham, 20 April 1940 in *Papers of Sir John Latham*, NLA MS 1009/10/2099, 2099.

<sup>50</sup> (1940–41) 64 CLR iv.

<sup>51</sup> Martin, above n 15, vol 1, 288, 295; Ayres, above n 2, 117–18.

<sup>52</sup> Letter (copy) from Sir John Latham to Richard Casey, 20 September 1939 in *Papers of Sir John Latham*, NLA MS 1009/1/5348.

<sup>53</sup> Hudson, above n 30, 108–9.

<sup>54</sup> Letter (copy) from Sir John Latham to Richard Casey, 20 September 1939 in *Papers of Sir John Latham*, NLA MS 1009/1/5348, 5348.

if the Government does not get some *action* in this direction *very soon* — it will go ... and this notwithstanding admirable work in other departments.<sup>55</sup>

Casey's response is not known, but the frank and informal tone of the letter — Latham concluded with some conciliatory remarks — attests to their continuing friendship.

Latham may also have put his concerns about the government's lack of action directly to the Prime Minister. Certainly, Latham and Menzies were in contact in this period. On 10 October 1939, they sent a joint cable to the Australian High Commissioner in London, former Prime Minister Stanley Melbourne Bruce, urging Bruce to accept the newly created position of Australian Minister to the United States.<sup>56</sup> While Latham had worked closely with Bruce as his Attorney-General between 1925 and 1929,<sup>57</sup> the Chief Justice's involvement in this particular matter is probably best explained by the fact that the cable raised the issue of the Japanese threat to Australia; Latham had visited Japan in 1934<sup>58</sup> and was widely regarded as an expert on Australian–Japanese relations. Bruce nonetheless declined the Washington post and Menzies appointed Richard Casey to the position instead.<sup>59</sup> Before Casey departed for overseas, he arranged for Latham, along with certain other friends, to correspond confidentially with him, the letters being, if Latham so wished, 'sealed with wax'.<sup>60</sup> Casey was not to return to Australia until 1946,<sup>61</sup> after which, as will be seen, Latham and Casey's political relationship assumed a more overtly partisan tone.

As the war in Europe escalated in the first half of 1940, Latham's concerns about the conflict appear, not surprisingly, to have deepened. In this context, his extra-judicial lobbying continued. On 16 April 1940, Latham wrote to the Prime Minister on a 'Personal and Confidential' basis concerning the implications for Australia of a German attack on the Netherlands and, specifically, the possibility that the Netherlands East Indies could fall into enemy hands.<sup>62</sup> '[C]areful preparations should be made in Singapore and Australia', counselled Latham, to

<sup>55</sup> Ibid 5349 (emphasis in original).

<sup>56</sup> A copy of this cable, dated 10 October 1939, is in Latham's papers, annotated in Latham's handwriting: 'Sent to S M Bruce from Prime Minister J G L'. The text of the cable opens by noting: 'from Latham sent with my concurrence': *Papers of Sir John Latham*, NLA MS 1009/1/5378, 5378.

<sup>57</sup> Cowen, *Sir John Latham and Other Papers*, above n 2, 7.

<sup>58</sup> Ibid 25.

<sup>59</sup> For an account of the machinations behind the selection of Australia's first envoy to the United States, see P G Edwards, *Prime Ministers and Diplomats: The Making of Australian Foreign Policy 1901–1949* (Oxford University Press, 1983) 121; Martin, above n 15, vol 1, 293–4. Around this time, Casey sought and received Latham's views on aspects of relations between the British Empire (including Australia) and the United States. See Letter from Richard Casey to Sir John Latham, 8 January 1940 in *Papers of Sir John Latham*, NLA MS 1009/1/5390 (including the associated enclosure); in reply, Letter (copy) ('Personal') from Sir John Latham to Richard Casey, 16 January 1940 in *Papers of Sir John Latham*, NLA MS 1009/1/5395.

<sup>60</sup> Letter from Richard Casey to Sir John Latham, 23 January 1940 in *Papers of Sir John Latham*, NLA MS 1009/1/5403, 5403.

<sup>61</sup> See generally Hudson, above n 30, chs 6–8.

<sup>62</sup> Letter (copy) ('Personal and Confidential') from Sir John Latham to Prime Minister Menzies, 16 April 1940 in *Papers of Sir John Latham*, NLA MS 1009/1/5428, 5428.

prevent this occurring.<sup>63</sup> He then proceeded to outline the diplomatic and military action that, in his opinion, was urgently needed to counteract the threat to Australia's security.<sup>64</sup> Two months later, after the surrender of the Netherlands and the entry of the German army into Paris, Latham was seeking to leverage strategic outcomes in other directions, writing to Opposition Leader John Curtin to urge him, as David Day has pointed out,<sup>65</sup> to join a government of national unity.<sup>66</sup> Curtin had consistently rejected this idea and was unlikely to be swayed by Latham.<sup>67</sup> The Labor leader responded politely to the Chief Justice without engaging him on the issue.<sup>68</sup>

Latham's behind the scenes attempts to do 'something more'<sup>69</sup> for the war reached their zenith in mid 1940. On 20 June 1940 — as France came under German control — Latham again wrote to the Prime Minister, though this time the letter was marked 'MOST SECRET AND PERSONAL'.<sup>70</sup> Latham's attention was now focused on Australia's position in the event of Britain's defeat and the establishment in London of a German-controlled 'puppet Government'.<sup>71</sup> In the Chief Justice's opinion, Australia should resist any show of loyalty to such a regime. Rather, he counselled Menzies, if the mother country were defeated, Australia should consider severing her ties with Britain in favour of association with the United States.<sup>72</sup> The gravity of this radical suggestion was not lost on Latham, though, surprisingly, he saw this as a cue for personally becoming more, not less, entangled in the activities of the executive branch. Were the government forced into such a momentous decision, said Latham, there would be value in involving himself as Chief Justice 'openly and personally with the Cabinet in the consideration of the question'.<sup>73</sup> Menzies' response, sent two days later, was equally remarkable. He described Latham's proposal concerning the United

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> David Day, *John Curtin: A Life* (Harper Perennial, 2006) 419–20.

<sup>66</sup> Letter (copy) from Sir John Latham to John Curtin, 16 June 1940 in *Papers of Lloyd Ross*, NLA MS 3939, Box 46, Folder 37. Latham does not directly urge Curtin to do this but Day is surely correct in advancing this interpretation of Latham's letter. Latham kept a handwritten copy of this letter in his papers: Letter (copy) ('Personal') from Sir John Latham to John Curtin, 16 June 1940 in *Papers of Sir John Latham*, NLA MS 1009/1/5456.

<sup>67</sup> Day, *John Curtin*, above n 65, 419–20 (including n 26).

<sup>68</sup> Telegram from John Curtin to Sir John Latham, 22 June 1940 in *Papers of Sir John Latham*, NLA MS 1009/1/5463.

<sup>69</sup> See Letter from Richard Latham to Sir John Latham, 20 April 1940 in *Papers of Sir John Latham*, NLA MS 1009/10/2099, 2099.

<sup>70</sup> Letter (copy) ('MOST SECRET AND PERSONAL') from Sir John Latham to Prime Minister Menzies, 20 June 1940 in *Papers of Sir John Latham*, NLA MS 1009/1/5459, 5459.

<sup>71</sup> Ibid.

<sup>72</sup> See Letter (copy) from Richard Latham to Sir John Latham, 21 May 1940 in *Papers of Sir John Latham*, NLA MS 1009/1/5460 (Latham senior sent Menzies a copy of this letter from his son Dick along with his own letter).

<sup>73</sup> Letter (copy) ('MOST SECRET AND PERSONAL') from Sir John Latham to Prime Minister Menzies, 20 June 1940 in *Papers of Sir John Latham*, NLA MS 1009/1/5459, 5459.

States as 'realistic' and the idea of involving the Chief Justice in any Cabinet decision on the issue as 'a good one'.<sup>74</sup>

The transformation in relations between the High Court and the government suggested by this exchange — for the Chief Justice to urge the Prime Minister that the country should contemplate a shift in political allegiance is an extra-judicial intervention directed at the very heart of executive power<sup>75</sup> — is also graphically illustrated by Owen Dixon's wartime advisory role. As already noted, Dixon was appointed at the outset of the war to the Central Wool Committee. He later also headed a collection of executive bodies, notably the Australian Coastal Shipping Control Board, concerned with maritime transport.<sup>76</sup> While Dixon's advisory work was concentrated in these areas, his biography indicates that he freely provided advice to senior government figures on a range of other war-related issues.<sup>77</sup> In particular, Dixon's seat on the Central Wool Committee brought him into close contact with Prime Minister Menzies who, 20 years previously, had been Dixon's pupil at the Bar.<sup>78</sup> As Dixon's diary attests, their wartime discussions extended well beyond Dixon's official extra-judicial responsibilities. Thus Dixon warned Menzies (as Latham warned Casey) about government 'inaction' as the war began.<sup>79</sup> Dixon also variously suggested to the Prime Minister that Menzies should run the war through a 'council of state'<sup>80</sup> (advice Dixon also gave Prime Minister Curtin),<sup>81</sup> 'go to England now' (in early 1940)<sup>82</sup> and, following the invasion of France and her neighbours, 'speak on Mon [presumably in a national broadcast] & to take extreme steps'.<sup>83</sup>

Direct comparison of the respective levels of Latham and Dixon's wartime advising lies beyond the scope of this article. What is clear, however, is that both High Court justices engaged in this activity, not as a one-off exercise, but on a repeated basis. Their interventions concerned issues of national significance,

<sup>74</sup> Letter ('Personal') from Prime Minister Menzies to Sir John Latham, 22 June 1940 in *Papers of Sir John Latham*, NLA MS 1009/1/5461, 5461. David Day interprets this letter from Menzies as evidence of the Prime Minister's 'private fears' of German victory: David Day, *Menzies and Churchill at War* (Angus & Robertson, 1986) 25. For an extended discussion of the 'fall of Britain' exchange between Latham and Menzies in the context of the challenges it posed to traditional conceptions of judicial independence and separation of powers, see Fiona Wheeler, 'Parachuting In: War and Extra-Judicial Activity by High Court Judges' (2010) 38 *Federal Law Review* 485.

<sup>75</sup> See Wheeler, above n 74, 493.

<sup>76</sup> Ayres, above n 2, 128–34.

<sup>77</sup> Prominent individuals advised by Dixon include Prime Ministers Menzies and Curtin, General Sir Thomas Blamey and Harold Clapp (who held various senior government positions relating to aircraft production): see generally *ibid* ch 7.

<sup>78</sup> Laurence W Maher, 'Menzies, Robert Gordon' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 477, 477. For contact between Dixon and Menzies arising out of Dixon's role on the Central Wool Committee, see *ibid* 116–21, 124.

<sup>79</sup> Ayres, above n 2, 117, quoting Dixon's diary entry of 14 September 1939; Martin, above n 15, vol 1, 288.

<sup>80</sup> Ayres, above n 2, 118 (the quoted words are those of Ayres, describing Dixon's idea put to Menzies on 24 September 1939).

<sup>81</sup> *Ibid* 134.

<sup>82</sup> *Ibid* 120, quoting from Dixon's diary entry of 15 January 1940.

<sup>83</sup> *Ibid* 121, quoting from Dixon's diary entry of 12 May 1940.

though — at least in the case of Latham — on occasions also sought more modest outcomes (such as when Latham petitioned Menzies in mid 1940 that, in light of staff shortages, a particular ‘woman doctor’ should not be given a passport to undertake missionary work overseas).<sup>84</sup> Dixon believed that his engagement with the executive was justified by wartime ‘necessity’,<sup>85</sup> a view that Latham seems to have shared.<sup>86</sup> Yet Latham’s former life as an elected politician inevitably casts his contacts with government in a more overtly political light. In his letter to Casey about the early handling of the war, for example, Latham directly canvassed the Menzies government’s electoral survival. By contrast, Dixon kept a greater distance from party politics, though as future Labor leader Arthur Calwell remarked in Parliament in 1942, Dixon was clearly not a ‘Labour [sic] man’.<sup>87</sup> The available evidence also suggests that Latham’s advising, which predated the war, was ultimately on a wider scale than Dixon’s.<sup>88</sup>

#### B Curtin Government

Latham’s appointment as Australian Minister to Japan in 1940, which was closely followed by Dixon’s appointment as Minister to the United States in 1942, saw each judge take leave from the Court to serve in a full-time executive post with wide-ranging diplomatic and administrative responsibilities.<sup>89</sup> From Tokyo, Latham reported to the Minister for External Affairs, at first Sir Frederick Stewart and, after the Curtin government came to power on 7 October 1941, Latham’s former High Court colleague, Dr H V Evatt.<sup>90</sup> It has been said that

<sup>84</sup> Letter (copy) from Sir John Latham to Prime Minister Menzies, 18 June 1940 in *Papers of Sir John Latham*, NLA MS 1009/1/5458, 5458. Menzies referred Latham’s letter to the Minister for the Interior, H S Foll. As a result of Latham’s intervention, passport applications in this category were henceforth referred for the Minister’s personal consideration: Letter from H S Foll to Prime Minister Menzies, 17 July 1940 in *Papers of Sir John Latham*, NLA MS 1009/1/5471. See also Latham’s intervention, to the Assistant Minister for Information, over an ‘alarmist’ report in *The Age* newspaper: Letter from Sir Henry Gullett to Sir John Latham, 17 June 1940 in *Papers of Sir John Latham*, NLA MS 1009/1/5457; Letter from Keith Murdoch (then Director-General of Information) to Sir John Latham, 20 June 1940 in *Papers of Sir John Latham*, NLA MS 1009/1/5462 (the latter correspondence referring to Latham’s concern about the ‘alarmist’ story and informing him that ‘[s]ince your letter ... *The Age* has been told that alarming unconfirmed reports must not be featured’: at 5462).

<sup>85</sup> This is the assessment of Dixon’s biographer: Ayres, above n 2, 117. See also Holmes, above n 45, 272.

<sup>86</sup> Letter (copy) (‘*MOST SECRET AND PERSONAL*’) from Sir John Latham to Prime Minister Menzies, 20 June 1940 in *Papers of Sir John Latham*, NLA MS 1009/1/5459.

<sup>87</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 6 May 1942, 926 (Arthur Calwell); see also at 927.

<sup>88</sup> Though Dixon’s advisory activities, outside wartime, were hardly insignificant, notably his dealings with Prime Minister Menzies in relation to the Petrov Royal Commission: see Maher, *Owen Dixon*, above n 10, 38–40; Ayres, above n 2, 243–4. See also Laurence W Maher, ‘Tales of the Overt and the Covert: Judges and Politics in Early Cold War Australia’ (1993) 21 *Federal Law Review* 151, 168–75.

<sup>89</sup> Latham’s official period of leave from the High Court was from 12 November 1940 to 31 December 1941 inclusive: (1940–41) 64 CLR iv; Dixon’s leave commenced on 26 May 1942 and ended on 8 November 1944: (1941–42) 65 CLR iv; (1944–45) 69 CLR iv.

<sup>90</sup> Though by the time the Curtin government took office, Latham had left Japan on a visit to Australia. He became seriously ill en route in Singapore in October 1941 and was later hospital-

Latham received scant direction from Stewart and, as a result, 'virtually dictated his own policy' in his dealings with the Japanese government.<sup>91</sup> For his part, Latham kept Canberra apprised of developments in Japan in a series of despatches totalling hundreds of pages.<sup>92</sup> He developed strong views on the defence of Australia and the region against Japanese attack, which he set out in letters to Prime Ministers Menzies and Curtin.<sup>93</sup> Latham's diplomatic work came to an abrupt end in late 1941, however, following the attack on Pearl Harbor and the declaration of war against Japan.<sup>94</sup> Back in Australia, Latham returned to the High Court in the first half of 1942.<sup>95</sup>

Latham viewed the war against Japan no less grimly than that against Germany. In early 1943, he told former United States Ambassador to Japan, Joseph Grew, that Australia faced enslavement if the war in the Pacific was lost.<sup>96</sup> He was thus bound to continue doing what he could for the war, though as he explained to Grew:

I am limited to some extent in what I say by my position as Chief Justice, but I am taking all opportunities that I can reasonably use for the purpose of doing my best to arouse Australians to the real meaning of this war.<sup>97</sup>

Some of this work took the form of public speeches, such as Latham's 1943 Smyth Memorial Lecture on 'Education and War'.<sup>98</sup> Earlier, on 3 September 1942, he had travelled to Canberra to address a meeting of Members of federal Parliament.<sup>99</sup> However, the Chief Justice's extra-judicial efforts to shape Austra-

ised in Australia. When Japan entered the war against the Allies in December 1941, it became clear that Latham would not be returning to Tokyo: see Cowen, *Sir John Latham and Other Papers*, above n 2, 27; Edwards, above n 59, 128.

<sup>91</sup> Edwards, above n 59, 127 (and generally at 127–8).

<sup>92</sup> For Latham's despatches, see NAA: A4231 (A4231/2), 1941/TOKYO ('Australian Mission — Tokyo — Despatches 1–83, 1941').

<sup>93</sup> Letter (copy) from Sir John Latham to Prime Minister Menzies (enclosing memorandum 'The Invasion of Australia'), 22 August 1941 in NAA: A5954, 581/7 ('Invasion of Australia: Sir John Latham's Proposals'); Letter from Prime Minister Fadden to Sir John Latham, undated in *Papers of Sir John Latham*, NLA MS 1009/65/540 (acknowledging receipt of Latham's memorandum and noting that the matter would be brought before the War Cabinet); Letter (copy) ('Secret and Personal') from Sir John Latham to Prime Minister Curtin, 5 November 1941 in *Papers of Sir John Latham*, NLA MS 1009/65/622 (suggesting adoption of cooperative defence measures in South-East Asia and Australasia); Letter (copy) from Sir John Latham to Prime Minister Curtin, 16 December 1941 in *Papers of Sir John Latham*, NLA MS 1009/65/638 (need to increase defence readiness in Singapore).

<sup>94</sup> Letter from Sir John Latham to H V Evatt, 16 December 1941 in NAA: A981 (A981/4), AUS 188 ("Australian Minister in Japan — Resignation of Sir John Latham, Dec 1941", 1941–1942).

<sup>95</sup> Cowen, *Sir John Latham and Other Papers*, above n 2, 27.

<sup>96</sup> Letter (copy) from Sir John Latham to Joseph Grew, 11 February 1943 in *Papers of Sir John Latham*, NLA MS 1009/1/5606, 5606.

<sup>97</sup> Ibid 5607.

<sup>98</sup> In this lecture, Latham drew on his experience as envoy to Japan to warn that the Japanese people believed 'that they have been entrusted with a divine mission to conquer the world': Sir John Latham, *Education and War: The Professor Smyth Memorial Lecture 1943* (Melbourne University Press, 1944) 10.

<sup>99</sup> This meeting was organised by the Empire Parliamentary Association and held in the Senate Chamber. It coincided with the secret sittings of Parliament held on 3–4 September 1942. For the relevant correspondence see NAA: M1415, 107 ('Personal Papers of Prime Minister Curtin,

lia's response to the war, and post-war reconstruction, also included — in what was becoming a familiar, though secretive pattern — a series of direct overtures to the new Labor Prime Minister, John Curtin.

Latham and Curtin had known each other for over two decades. They first met during World War I in Melbourne when they were active on opposing sides of the conscription debate.<sup>100</sup> In the late 1920s and early 1930s, they sat opposite each other in federal Parliament. The two men seem to have had a cordial relationship, though were hardly close. Nonetheless, Latham felt free to impart to the Prime Minister the benefit of his advice on a range of issues. Writing in his 'personal' capacity and, on some occasions, explicitly on a 'confidential' basis, Latham volunteered views to Curtin on controversial subjects such as military service (telling Curtin in December 1942 that he 'should not be led into accepting a referendum' on the topic),<sup>101</sup> wartime censorship<sup>102</sup> and immigration (suggesting to Curtin strategies for maintaining the White Australia Policy in a post-war international environment).<sup>103</sup> Knowing that the government was considering constitutional reform, Latham even wrote to Curtin proposing a series of radical amendments to the *Constitution* that would have greatly increased Commonwealth power by giving it control over all trade and commerce, and over subjects including health and housing.<sup>104</sup>

The Prime Minister's replies to the Chief Justice were scrupulously polite but tended to avoid engaging with Latham, suggesting that Curtin was not overly keen to encourage the exchange. In response to Latham's suggestions concerning the *Constitution*, for example, Curtin simply thanked him without inviting further discussion.<sup>105</sup> However, Curtin passed on some of Latham's ideas, such

Correspondence "L"); see also 'War Statement — Secret Sittings of Parliament', *The Canberra Times* (Canberra), 3 September 1942, 2.

<sup>100</sup> Letter (copy) from Sir John Latham to Sir Owen Dixon, 9 February 1943 in *Papers of Sir John Latham*, NLA MS 1009/1/5600A, 5601. While this is Latham's recollection of when he first met Curtin, it is possible they met earlier through the Rationalist Society of Victoria, which Latham had established. Curtin's biographer states that, in later life, Curtin 'blamed Latham' for Curtin's loss of religious belief: Day, *John Curtin*, above n 65, 534; see generally at 146, 534–5.

<sup>101</sup> Letter ('Personal and Confidential') from Sir John Latham to Prime Minister Curtin, 14 December 1942 (with copy of Curtin's reply of 16 December 1942) in NAA: M1415, 168 ('Personal Papers of Prime Minister Curtin, Correspondence "L").

<sup>102</sup> Letter from Sir John Latham to Prime Minister Curtin, 24 May 1943 (with copy of Curtin's reply of 26 May 1943) in NAA: M1415, 232 ('Personal Papers of Prime Minister Curtin, Correspondence "L") (Latham suggesting to Curtin that a statement in a newspaper report should not have passed wartime censorship).

<sup>103</sup> Letter (copy) from Sir John Latham to Prime Minister Curtin, 21 September 1943 in NAA: A433, 1945/2/5960 ('Sir John Latham: Re White Australia Policy and General Immigration').

<sup>104</sup> Letter ('Personal' and 'absolutely unofficial and completely personal and confidential to yourself alone') from Sir John Latham to Prime Minister Curtin, 6 December 1943 (with enclosed memorandum and copy of Curtin's reply of 15 December 1943) in NAA: M1415, 307 ('Personal Papers of Prime Minister Curtin, Correspondence "L"). On the Curtin government's constitutional reform agenda, see Geoffrey Sawer, *Australian Federal Politics and Law 1929–1949* (Melbourne University Press, 1963) 171–4. Latham also lobbied Curtin over the need — which seems to have been very real — for improved information flows from the Department of External Affairs to Australia's overseas missions: Letter (copy) from Sir John Latham to Sir Frederic Eggleston, 31 August 1943 in *Papers of Sir John Latham*, NLA MS 1009/1/5635.

<sup>105</sup> Letter (copy) from Prime Minister Curtin to Sir John Latham, 15 December 1943 in NAA: M1415, 307 ('Personal Papers of Prime Minister Curtin, Correspondence "L").

as those on immigration, to the public service for consideration.<sup>106</sup> In initiating this back-channel correspondence, Latham presumably did not fear exposure by his former political opponents as a meddling Chief Justice.<sup>107</sup> Given his earlier contacts with Menzies, he may have believed that the war justified his actions or that by writing 'unofficially' he avoided any impropriety. Alternatively, the urge to again be in the thick of things after his mission to Japan, or a belief in his own powers of statesmanship, may simply have got the better of him.

Certainly, during this period, Latham was still maintaining the divide between his public and private personas. In June 1943, Latham wrote to the Prime Minister asking Curtin whether he had any objections to Latham becoming President of the Australian–Netherlands Society. Latham explained that he had been approached to undertake this role but was seeking Curtin's views because he was required, as Chief Justice, to avoid 'any activity that may have a political complexion'.<sup>108</sup> Curtin replied that he could see no obstacle to Latham's involvement in the Society's work.<sup>109</sup> However, quite what Curtin made of the Chief Justice's claim to political clean hands in light of Latham's other overtures to him is impossible to say.

#### IV POST-WAR MENZIES GOVERNMENT

##### A *Liberal-Country Party Coalition Return to Power: 1945–49*

By the time Australia celebrated victory in the Pacific on 15 August 1945, Ben Chifley was Prime Minister, a position he occupied until the Liberal-Country Party coalition, led by Robert Menzies, was returned to power in December 1949. In the period immediately following the war, Latham's behind the scenes government lobbying seems, to some extent, to have abated. While Latham wrote confidentially to Chifley in 1948 expressing his concern over the severity of one of the death sentences imposed by the International Military Tribunal in Tokyo — 'I write to you because you possibly may have been consulted by General MacArthur as to the confirmation or reduction of the sentences'<sup>110</sup> —

<sup>106</sup> See, eg, Memo from E W Tonkin, Private Secretary to Prime Minister Curtin, to Minister for the Interior, 1 October 1943 in NAA: A433, 1945/2/5960 ('Sir John Latham: Re White Australia Policy and General Immigration').

<sup>107</sup> Cf Bruce Allen Murphy, *The Brandeis/Frankfurter Connection — The Secret Political Activities of Two Supreme Court Justices* (Oxford University Press, 1982) 12.

<sup>108</sup> Letter from Sir John Latham to Prime Minister Curtin, 23 June 1943 in NAA: M1415, 232 ('Personal Papers of Prime Minister Curtin, Correspondence "L"').

<sup>109</sup> Letter (copy) from Prime Minister Curtin to Sir John Latham, 25 June 1943 in NAA: M1415, 232 ('Personal Papers of Prime Minister Curtin, Correspondence "L"'). For reference to an example of a similar letter written by Latham, this time to Prime Minister Menzies over Latham's involvement in the Red Cross, see Letter from Prime Minister Menzies to Sir John Latham, 25 October 1939 in *Papers of Sir John Latham*, NLA MS 1009/1/5363.

<sup>110</sup> Letter (copy) ('Personal and Confidential') from Sir John Latham to Prime Minister Chifley, 30 November 1948 in *Papers of Sir John Latham*, NLA MS 1009/1/6817, 6817. Chifley responded that he too was concerned about the Tribunal but that MacArthur was of the view that the death sentences should not be altered: Letter ('Personal and Confidential') from Prime Minister Chifley to Sir John Latham, 3 December 1948 in *Papers of Sir John Latham*, NLA MS 1009/1/6819. Latham's High Court colleague, Sir William Webb, served as President of the International Military Tribunal in Tokyo. Webb also had reservations about the appropriateness

Latham's papers otherwise contain little evidence that he endeavoured to counsel Chifley, in any sustained way, on particular issues.<sup>111</sup> Latham and Chifley had worked together on the National Debt Commission, on which both held ex-officio seats, since 1942.<sup>112</sup> Chifley wrote warmly to Latham about their association on more than one occasion<sup>113</sup> and it is always possible that they discussed a range of issues on the sidelines of Commission meetings. It may also be that the exigencies of war had indeed prompted many of Latham's earlier interventions, especially with Prime Minister Curtin.

An alternative explanation for why the trail of Latham's executive advising tapers off in this period is that he was directing his attention not so much to the government, but rather to the opposition's return to office. Integral to this shift of focus was Richard Casey's return to the Australian political scene. In 1944, Casey wrote to Latham from Calcutta — where Casey was serving as Governor of Bengal<sup>114</sup> — to tell his old friend that he was anxious to return to Australian politics but unsure how best to do so. Casey was clearly aiming high: 'the UAP won't ever be able to do any good with Bob [Menzies] as leader', he told Latham, yet 'I don't relish the job of fighting Bob — whilst the Labour [sic] party look on and cheer. What do you recommend?'<sup>115</sup> Latham's papers contain no evidence of a response on his part to Casey's question. However, by the late 1940s, Casey was back in Australia and, ostensibly reconciled to 'Bob' as leader, took up the position in 1947 of Federal President of the newly established Liberal Party of Australia. Casey also stood as a candidate for the Victorian seat of La Trobe at the 1949 federal election.<sup>116</sup>

Their association thus renewed, Latham — in an extraordinary display of political partisanship by a serving judge — proceeded clandestinely to assist the Liberal 'Party Chief'.<sup>117</sup> Indeed, Latham's advisory relationship with Casey in the period prior to the 1949 federal election seems, in its intensity, to have outstripped any of Latham's previous extra-judicial entanglements with the

of the Tribunal's imposition of the death penalty: see Justice Ian Callinan, 'Webb, William Flood' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 706, 707.

<sup>111</sup> Latham's personal papers contain only a handful of letters sent to, or received from, Prime Minister Chifley. An online search of materials held in the NAA yields a similar result. Likewise, Latham's papers do not suggest he sought to forge an ongoing advisory relationship with his former High Court colleague, Dr H V Evatt, who was Minister for External Affairs and Attorney-General in the Chifley government. Given the tense relationship between Latham and Evatt on the Court, this is perhaps hardly surprising: see Lloyd, above n 5, 180–5.

<sup>112</sup> See *National Debt Sinking Fund Act 1923* (Cth) s 6.

<sup>113</sup> See Letter from Prime Minister Chifley to Sir John Latham, 18 August 1945 in *Papers of Sir John Latham*, NLA MS 1009/1/5773; Letter from Ben Chifley to Sir John Latham, 26 December 1949 in *Papers of Sir John Latham*, NLA MS 1009/1/7503.

<sup>114</sup> For how this British government appointment came about, see Hudson, above n 30, 154–9.

<sup>115</sup> Letter from Richard Casey to Sir John Latham, 20 September 1944 in *Papers of Sir John Latham*, NLA MS 1009/1/5713, 5713. See also Hudson, above n 30, 180 (observing that when Casey returned to Australia in 1946 'his ambition was to dethrone Menzies and become Prime Minister'). Ironically, it is possible that Menzies also sought Latham's political counsel whilst in opposition: see Letter from Robert Menzies to Sir John Latham, 13 April 1942 in *Papers of Sir John Latham*, NLA MS 1009/1/5557.

<sup>116</sup> On this period in Casey's life, see Hudson, above n 30, 190–204.

<sup>117</sup> Ibid ch 9 (chapter title 'Party Chief').

nation's political leadership. In late 1948, for example, Casey sent Latham a prototype party political platform that proposed the formulation of Liberal policies in areas including housing, trade practices and relations between employers and workers: 'I would greatly appreciate your views', Casey wrote.<sup>118</sup> A week later, Casey sent Latham further Liberal Party material, this time a letter to State Division Presidents exhorting party members to establish contact with swinging (Casey called them 'floating') voters.<sup>119</sup> In his covering letter to Latham, Casey explained that this was the document 'I mentioned ... this morning'.<sup>120</sup> While Latham's papers again contain no evidence of a response on his part to these letters, other exchanges make it clear that they were part of a pattern of engagement between the two men whereby Casey sought Latham's political and legal counsel and Latham willingly provided it.

This pattern emerges most vividly in 1949.<sup>121</sup> Without recounting all their contacts over this crucial year, on 9 February Casey wrote to Latham referring to a recent conversation between them on a 'uniform' corporations law and asking Latham to look at some material on the topic.<sup>122</sup> In response, Latham provided the Liberal Party President with a brief written opinion on key aspects of the Commonwealth's corporations power in s 51(xx) of the *Constitution*.<sup>123</sup> On 13 July, Casey sought Latham's 'private views and advice' on the Commonwealth's capacity to provide financial assistance to individuals for home construction.<sup>124</sup> Latham acquiesced, suggesting to Casey how this could be done despite the 'controversy' (as Latham put it)<sup>125</sup> over the scope of s 81 of the *Constitution*: 'I hope that we will soon be able to meet to have a talk on these and other matters', said Latham.<sup>126</sup> A month later, Casey sent Latham a proposal that the Liberals

<sup>118</sup> Letter ('personal and confidential') from Richard Casey to Sir John Latham, 22 October 1948 in *Papers of Sir John Latham*, NLA MS 1009/1/6698, 6698 (covering letter), 6699 (platform).

<sup>119</sup> Letter from Richard Casey to Sir John Latham, 29 October 1948 in *Papers of Sir John Latham*, NLA MS 1009/1/6726 (covering letter), 6727 (enclosure, using the word 'floating' at 6727).

<sup>120</sup> Ibid 6726.

<sup>121</sup> Each of the incidents discussed in this paragraph was first brought to light by Lloyd: see above n 5, 195–6. Lloyd observes that Latham's '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': at 195.

<sup>122</sup> Letter ('Personal') from Richard Casey to Sir John Latham, 9 February 1949 in *Papers of Sir John Latham*, NLA MS 1009/62/404, 404.

<sup>123</sup> Letter (copy) from Sir John Latham to Richard Casey, 17 February 1949 in *Papers of Sir John Latham*, NLA MS 1009/62/407. Latham described the view that later was to prevail in *New South Wales v Commonwealth* (1990) 169 CLR 482 ('Incorporation Case') as 'clear': at 407. He also stated that the Commonwealth could prescribe financial reporting requirements for s 51(xx) corporations.

<sup>124</sup> Letter from Richard Casey to Sir John Latham, 13 July 1949 in *Papers of Sir John Latham*, NLA MS 1009/62/450, 450. In this letter, Casey also referred Latham at some length to what Casey termed 'the Employer–Employee problem' (at 450), asking Latham 'what should we do' to achieve reform in this area (at 451 (emphasis in original)).

<sup>125</sup> Letter (copy) from Sir John Latham to Richard Casey, 20 July 1949 in *Papers of Sir John Latham*, NLA MS 1009/62/452, 452.

<sup>126</sup> Ibid 453. Latham's solution to the home payments issue involved the Commonwealth Bank. On employment relations, Latham suggested that Casey's concerns were best 'left to education and the industrial authorities': at 453.

sponsor a referendum for a constitutional bill of rights.<sup>127</sup> Is there ‘anything in this’, Casey asked Latham.<sup>128</sup> Latham replied by sending Casey an ‘unsigned’ memorandum on rights protection.<sup>129</sup> The Chief Justice seems to have been lukewarm about the idea: ‘Any constitutional provisions introducing protection of human rights would have to be very carefully drafted’, he told Casey.<sup>130</sup> Menzies was even less enthusiastic when he discovered that his party President was toying with a bill of rights. The idea was scuppered.<sup>131</sup>

As the election neared, Latham’s involvement with the Liberal Party did not abate. On 30 September 1949, Casey sent Latham a lengthy document prepared for Menzies outlining Casey’s thoughts ‘on some policy matters that have relevance to the policy speech’.<sup>132</sup> The document surveyed the struggle between ‘free enterprise’ and ‘Socialism’<sup>133</sup> and proposed ‘way[s] to preserve’<sup>134</sup> free enterprise in Australia, primarily through greater employer–employee cooperation.<sup>135</sup> ‘I would ... like ... your reactions’, wrote Casey to Latham.<sup>136</sup> Latham replied that Casey had made several ‘important points’. Some of Casey’s ideas, Latham noted, ‘could not be directly implemented by federal legislation’, though indirect means, such as tax incentives, could be used.<sup>137</sup> Home ownership could also be promoted in this way, said Latham, with ‘the valuable result, from your point of view, of creating ... “thousands of little capitalists”’.<sup>138</sup>

Menzies’ policy speech was delivered on 10 November 1949.<sup>139</sup> On 1 December 1949, a week before the election, Menzies wrote to Latham enclosing a booklet containing the speech and expressing his appreciation for a ‘contribution’ (Menzies placed the term in inverted commas) Latham had sent a few days earlier.<sup>140</sup> It is unclear what this was but Menzies’ gesture may signify that he was aware, to some degree at least, of the aid the Chief Justice had provided to the Liberal Party cause.

<sup>127</sup> Letter from Richard Casey to Sir John Latham, 12 August 1949 in *Papers of Sir John Latham*, NLA MS 1009/62/469 (covering letter), 470 (proposal).

<sup>128</sup> Ibid 469.

<sup>129</sup> Letter (copy) from Sir John Latham to Richard Casey, 15 August 1949 in *Papers of Sir John Latham*, NLA MS 1009/62/475, 475 (covering letter describing the memorandum as ‘unsigned’), 476 (memorandum).

<sup>130</sup> Ibid 478 (memorandum).

<sup>131</sup> Hudson, above n 30, 197.

<sup>132</sup> Letter (copy) from Richard Casey to Robert Menzies, 19 September 1949 in *Papers of Sir John Latham*, NLA MS 1009/1/7383, 7383.

<sup>133</sup> Ibid 7383.

<sup>134</sup> Ibid 7386.

<sup>135</sup> Ibid 7386–9.

<sup>136</sup> Letter from Richard Casey to Sir John Latham, 30 September 1949 in *Papers of Sir John Latham*, NLA MS 1009/1/7382, 7382.

<sup>137</sup> Letter (copy) from Sir John Latham to Richard Casey, 19 October 1949 in *Papers of Sir John Latham*, NLA MS 1009/1/7390, 7390.

<sup>138</sup> Ibid.

<sup>139</sup> Martin, above n 15, vol 2, 114. Martin nominates Casey, along with Enid Lyons and Percy Spender, as key influences on Menzies in relation to this speech: at 115.

<sup>140</sup> Letter from Robert Menzies to Sir John Latham, 1 December 1949 in *Papers of Sir John Latham*, NLA MS 1009/1/7456, 7456. Again, this incident was first brought to light by Lloyd: above n 5, 196.

### B Post-War Menzies Government in Office

The return of the conservative parties to power in 1949 provided fresh fields for Latham's extra-judicial advising. Not surprisingly, given his now long history of involvement in such activity, Latham seized the opportunity with gusto. Latham spoke directly with the Prime Minister: in May 1950, for example, he told Dixon he had 'spent an hour or two' with Menzies over the weekend 'and discussed many matters'.<sup>141</sup> At the same time, Latham peppered other members of the new government with his ideas and suggestions. To Percy Spender, the incoming Minister for External Affairs, Latham expressed 'the hope that active steps will be taken to make a Peace Treaty with Japan'.<sup>142</sup> To Sir Earle Page, the Minister for Health, Latham wrote of the problems associated with 'absolutely free medical and dental treatment ... in England'.<sup>143</sup> He drew Page's attention to an article on the topic which, said Latham, could usefully be circulated 'among members'.<sup>144</sup> On a single day in July 1950, Latham wrote separately to Menzies, urging reform of the income tax treatment of persons in the creative arts;<sup>145</sup> to Page, suggesting that the government provide free hearing aids to persons requiring them;<sup>146</sup> and to the Acting Minister for Defence, Philip McBride, urging greater Asian language training for defence personnel.<sup>147</sup>

While some of these advances, such as that concerning Asian languages, appear relatively innocuous, 'free medical ... treatment' was a controversial topic that had recently been the subject of High Court litigation.<sup>148</sup> Controversy

<sup>141</sup> Letter (copy) from Sir John Latham to Sir Owen Dixon, 4 May 1950 in *Papers of Sir John Latham*, NLA MS 1009/1/7612, 7612. This is also noted by Lloyd: above n 5, 196. The Communist Party Dissolution Bill 1950 (Cth) had been introduced into Parliament by Menzies a few days earlier (27 April 1950).

<sup>142</sup> Letter (copy) from Sir John Latham to Percy Spender, 11 January 1950 in *Papers of Sir John Latham*, NLA MS 1009/1/7649, 7649.

<sup>143</sup> Letter (copy) ('Personal') from Sir John Latham to Sir Earle Page, 1 May 1950 in *Papers of Sir John Latham*, NLA MS 1009/1/7609, 7609.

<sup>144</sup> Ibid. Page responded that he would read the article; Letter ('Personal & Confidential') from Sir Earle Page to Sir John Latham, 3 May 1950 in *Papers of Sir John Latham*, NLA MS 1009/1/7610.

<sup>145</sup> Letter (copy) ('Personal') from Sir John Latham to Prime Minister Menzies, 31 July 1950 in *Papers of Sir John Latham*, NLA MS 1009/1/7743. Menzies replied that the matter was before the Commonwealth Committee on Taxation; Letter from Prime Minister Menzies to Sir John Latham, 12 September 1950 in *Papers of Sir John Latham*, NLA MS 1009/1/7854. Latham also discussed this issue with Menzies and Treasurer Arthur Fadden; Letter (copy) from Sir John Latham to John Hetherington, 25 September 1950 in *Papers of Sir John Latham*, NLA MS 1009/1/7853.

<sup>146</sup> Letter (copy) from Sir John Latham to Sir Earle Page, 31 July 1950 in *Papers of Sir John Latham*, NLA MS 1009/1/7744. Page wrote a polite, non-committal reply a few days later: Letter from Sir Earle Page to Sir John Latham, 4 August 1950 in *Papers of Sir John Latham*, NLA MS 1009/1/7745. At the time of this exchange, Latham was Patron of the Association for Better Hearing.

<sup>147</sup> Letter (copy) ('Personal') from Sir John Latham to Philip McBride, 31 July 1950 in *Papers of Sir John Latham*, NLA MS 1009/1/7746. McBride replied that he would raise the issue with Sir Frederick Sheddell, the Secretary of the Department of Defence; Letter from Philip McBride to Sir John Latham, 7 August 1950 in *Papers of Sir John Latham*, NLA MS 1009/1/7747.

<sup>148</sup> See Galligan, above n 43, 148–57 discussing *A-G (Vic) ex rel Dale v Commonwealth* (1945) 71 CLR 237 ('First Pharmaceutical Benefits Case') and *Federal Council of the British Medical Association in Australia v Commonwealth* (1949) 79 CLR 201 ('Second Pharmaceutical Benefits Case').

did not deter Latham, however. In 1950, he became deeply concerned about the inflationary pressures then afflicting the Australian economy, especially what Latham termed the 'vicious spiral' by which prices and wages increased in step.<sup>149</sup> In a three-page memorandum sent to Harold Holt, then Minister for Labour, and later circulated at Latham's behest to Menzies and Attorney-General John Spicer, Latham argued for reform of the prevailing approach to wage fixation.<sup>150</sup> In so doing, his memo canvassed the legal and policy implications of various wage-setting models.<sup>151</sup> Latham's covering note to Holt described the memorandum as 'confidential' and insisted that its authorship remain secret.<sup>152</sup> At the same time, Latham sought to justify his actions in terms of the national welfare, telling Holt that the topic was 'above all party interests'.<sup>153</sup> Despite this protestation, however, it is hard to believe that anyone could seriously regard wages policy as non-partisan in nature. Indeed, in 1952 Latham declined an invitation from the Australian Industries Development Association to write on 'conciliation in industry' citing the need to avoid 'controversial political questions' of this kind.<sup>154</sup>

The actual impact of Latham's memorandum on Holt, Menzies and Spicer is unclear. While each Minister responded politely to the Chief Justice, only Menzies suggested they have 'a word'.<sup>155</sup> By contrast, Latham's continuing dealings with Richard Casey, who became Minister for External Affairs in mid 1951, were characterised by Casey's enthusiastic attempts to harness Latham's external relations expertise. In June 1951, for example, Casey asked Latham for 'any ideas or views' regarding a forthcoming trip by Casey to Asia and also invited the Chief Justice to propose names to fill diplomatic posts.<sup>156</sup> Latham responded that he was not sufficiently informed to comment on postings, though

<sup>149</sup> Sir John Latham, Memorandum (untitled), 3 August 1950 in *Papers of Sir John Latham*, NLA MS 1009/1/7757, using the expression 'vicious spiral' at 7757.

<sup>150</sup> Ibid 7757–9. Latham also sent Holt, Menzies and Spicer a second, shorter, memorandum: 'Adjustment of Wages to Prices', July 1951 in *Papers of Sir John Latham*, NLA MS 1009/1/7760. For Lloyd's discussion of this, see above n 5, 196.

<sup>151</sup> Sir John Latham, Memorandum (untitled), 3 August 1950 in *Papers of Sir John Latham*, NLA MS 1009/1/7757.

<sup>152</sup> Letter (copy) from Sir John Latham to Harold Holt, 3 August 1950 in *Papers of Sir John Latham*, NLA MS 1009/1/7756, 7756.

<sup>153</sup> Ibid. See also Letter (copy) ('Personal and Confidential') from Sir John Latham to Attorney-General John Spicer, 18 December 1951 in *Papers of Sir John Latham*, NLA MS 1009/1/8474.

<sup>154</sup> Letter (copy) from Sir John Latham to C P Pusey, 7 April 1952 in *Papers of Sir John Latham*, NLA MS 1009/1/8565, 8565. Likewise, in 1948, Latham backed out from writing a newspaper article for 'Education Week' in Victoria claiming he could not get involved in public debate: Letter (copy) from Sir John Latham to D H Wheeler, Secretary, Education Office (Victoria), 5 July 1948 in *Papers of Sir John Latham*, NLA MS 1009/1/6464. Latham declined to give a public address on the career of former Prime Minister S M Bruce for the same reason: Letter (copy) from Sir John Latham to S Barton Babbage, 11 January 1949 in *Papers of Sir John Latham*, NLA MS 1009/1/6884.

<sup>155</sup> Letter from Prime Minister Menzies to Sir John Latham, 12 August 1951 in *Papers of Sir John Latham*, NLA MS 1009/1/8307, 8307.

<sup>156</sup> Letter ('Personal') from Richard Casey to Sir John Latham, 25 June 1951 in *Papers of Sir John Latham*, NLA MS 1009/1/8234, 8234. Casey asked a number of his contacts to suggest persons suitable for such positions: Hudson, above n 30, 230.

he nominated certain contacts relevant to Casey's travels.<sup>157</sup> Later that year, Casey sent Latham materials on Australia's policy at the United Nations seeking Latham's 'imaginative advice as to "a line"' to adopt in that forum.<sup>158</sup> Latham responded that Russia was the critical issue and went on to suggest how the West might engage with the Soviet Union. Otherwise, said Latham, 'I think that your suggested approach is very sound.'<sup>159</sup> Yet in July 1951, Latham declined an invitation to give a public lecture on Australia's relations with Asia, stating that the topic was 'highly controversial and ... I am still Chief Justice'.<sup>160</sup>

It is in this period — the final year of Latham's chief justiceship — that Latham famously corresponded with his old friend Sir Earle Page, Minister for Health, over the High Court's decision in the *Communist Party Case*, delivered on 9 March 1951.<sup>161</sup> As Clem Lloyd has recounted,<sup>162</sup> Page asked Latham whether Latham 'could not devise some constitutional amendment' to give Parliament the power which the High Court majority — though pointedly not Latham — had ruled that it lacked.<sup>163</sup> Latham's reply to Page was disarmingly direct: on the topic of constitutional change, said Latham, he had 'already had an informal talk' to Menzies and 'made some suggestions to him'.<sup>164</sup> Latham's whole career as Chief Justice was, as this article has shown, littered with such contacts between himself and members of the executive government. He had even written to Prime Minister Curtin, it will be recalled — albeit with little response from the Labor leader — sharing his thoughts on a far-reaching constitutional reform agenda. In this respect, Latham's advising on communism was simply another example of a well-worn pattern.

In other respects, however, Latham's conversation with Menzies in the wake of the *Communist Party Case* arguably stands alone: Menzies was doubtless highly receptive to Latham's views on this issue; Latham's actions in collaborating with the government to change the law as declared by his fellow judges — which is what Latham effectively seems to have done — could be construed as a refusal

<sup>157</sup> Letter (copy) from Sir John Latham to Richard Casey, 2 July 1951 in *Papers of Sir John Latham*, NLA MS 1009/1/8235; see also Letter ('Personal') from Richard Casey to Sir John Latham, 5 July 1951 in *Papers of Sir John Latham*, NLA MS 1009/1/8248.

<sup>158</sup> Letter ('Personal') from Richard Casey to Sir John Latham, 20 September 1951 in *Papers of Sir John Latham*, NLA MS 1009/1/8367, 8367.

<sup>159</sup> Letter (copy) from Sir John Latham to Richard Casey, 28 September 1951 in *Papers of Sir John Latham*, NLA MS 1009/1/8368, 8368.

<sup>160</sup> Letter (copy) from Sir John Latham to Norman Cowper, Australian Institute of International Affairs, 26 July 1951 in *Papers of Sir John Latham*, NLA MS 1009/1/8287, 8287.

<sup>161</sup> Latham's relationship with Page went back to their early days in Parliament together: Cowen, *Sir John Latham and Other Papers*, above n 2, 6–7.

<sup>162</sup> Lloyd, above n 5, 202.

<sup>163</sup> Letter from Sir Earle Page to Sir John Latham, 15 May 1951 in *Papers of Sir John Latham*, NLA MS 1009/62/684, 684. There is a slip in the quote as reproduced in Lloyd. Page uses the term 'devise', but it appears in Lloyd as 'advise': see *ibid*.

<sup>164</sup> Letter (copy) from Sir John Latham to Sir Earle Page, 22 May 1951 in *Papers of Sir John Latham*, NLA MS 1009/62/685, 685. The Menzies government subsequently initiated a referendum to alter the *Constitution* to allow the Commonwealth Parliament to ban communism. The referendum was held on 22 September 1951 and was defeated: see Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 5<sup>th</sup> ed, 2010) 1402.

by the Chief Justice to accept his own Court's ruling on a socially divisive issue,<sup>165</sup> and, above all else, Latham's involvement in efforts to help plug the gap in Commonwealth power disclosed by the High Court's decision constituted direct political engagement on his part in a matter on which he had recently passed judgment. As one of Latham's successors, former High Court Chief Justice Murray Gleeson, has observed, in a modern democracy, judicial impartiality is one of the legitimating features of judicial power.<sup>166</sup> Latham may have truly believed that his judgment in the *Communist Party Case* was correct in law and that communism posed a dire threat to Australia. Yet his subsequent back-room dealings with Menzies over the issue compromised the foundations of his own authority as a judge.

#### V REFLECTIONS AND ANALYSIS

Building on the points made in the body of this article, the discussion that follows is advanced as an initial, and by no means comprehensive, analysis of the Chief Justice's conduct outlined above. Given the sheer scale of Latham's extra-judicial advising, other studies will be needed to tease out the full lessons to be learnt from his behaviour.<sup>167</sup> Reflecting in general terms on Latham's extra-judicial advising, however, a number of points may be made.

First, it is readily apparent that many instances of Latham's advising, most notably his involvement, via Richard Casey, in the 1949 Liberal Party federal election campaign, and his discussion with Menzies following the *Communist Party Case*, would today be regarded as clear affronts to basic standards of judicial independence and propriety.<sup>168</sup> Latham was plainly involved with Casey in party politics and, in relation to the *Communist Party Case*, seems to have endeavoured directly to influence government policy on a highly contentious issue on which the Court had adjudicated only a month or so previously. Sixty years on, the revelation of such conduct on the part of a serving High Court justice would lead to calls for that person to be removed from office under s 72 of the *Constitution*.<sup>169</sup> Not only would the removal process be damaging to the individual and their legacy but public confidence in the wider institutional integrity of the Court would be shaken.<sup>170</sup>

Yet, today's standards of judicial behaviour are not necessarily the same as those in previous periods. In particular, judicial independence is a value that varies in its demands over different eras and between legal systems.<sup>171</sup> Even at a

<sup>165</sup> This point is made by Toby Miller, 'Sir John Latham and the *Communist Party Dissolution Act: A Research Note*' [1983] (September) *APSA Newsletter* 2, 3, quoted in Lloyd, above n 5, 202.

<sup>166</sup> Chief Justice Murray Gleeson, 'Judicial Legitimacy' (2000) 20 *Australian Bar Review* 4, 6.

<sup>167</sup> See, eg, Wheeler, above n 74.

<sup>168</sup> James Thomas, *Judicial Ethics in Australia* (LexisNexis Butterworths, 3<sup>rd</sup> ed, 2009) 181–8, 299; Miller, above n 165, 3, quoted in Lloyd, above n 5, 202.

<sup>169</sup> In relation to this removal mechanism, see Enid Campbell and H P Lee, *The Australian Judiciary* (Cambridge University Press, 2001) 101–11.

<sup>170</sup> See *Grollo v Palmer* (1995) 184 CLR 348, 365 (Brennan CJ, Deane, Dawson and Toohey JJ).

<sup>171</sup> See, eg, Shimon Shetreet and Jules Deschênes (eds), *Judicial Independence: The Contemporary Debate* (Martinus Nijhoff, 1985); Peter H Russell and David M O'Brien (eds), *Judicial Inde-*

single point in time, the boundary between 'acceptable' and 'unacceptable' judicial involvement in activity outside the courtroom is liable to be contested.<sup>172</sup> In Latham's case, a war — which placed the nation in extreme peril — further clouds the issue of the rights and wrongs of his extra-judicial advising.<sup>173</sup> However, it defies belief to think that Latham's engagement with the Liberal Party prior to the 1949 election or, for example, his later provision to the Prime Minister and others of detailed advice on a topic such as wages policy — let alone his *Communist Party Case* discussion — could be explained by the less demanding standards 'of a different age'.<sup>174</sup> Moreover, the disjunction between Latham's public and private communications and the confidentiality with which he shrouded much of his backroom work reveal a consciousness on his part of the dubious propriety of what he was doing.<sup>175</sup> By contrast, some of Latham's early exchanges with Prime Minister Lyons could possibly be viewed more benignly as remnants of the statesmanship of a different world.<sup>176</sup>

Secondly, accepting that Latham repeatedly transgressed the boundaries of judicial propriety — then and now — why did he do so? The answer to this question awaits a fuller study of Latham the man,<sup>177</sup> though a number of hypotheses may be ventured. The allure of involvement in politics provides one obvious explanation. Stuart Macintyre, writing in the *Australian Dictionary of Biography*, observes that Latham 'cared greatly to be in the centre of public affairs, and in his later years it was his experiences as a minister and not as chief justice that he was wont to recall with relish'.<sup>178</sup> Sir William Irvine's comment to

pendence in the Age of Democracy: Critical Perspectives from around the World (University Press of Virginia, 2001). See also Thomas, above n 168, 191–2, 298–301.

<sup>172</sup> The debate over whether judges should serve on bodies such as Royal Commissions provides one example: see Glenys Fraser (ed), *Judges as Royal Commissioners and Chairmen of Non-Judicial Tribunals* (Australian Institute of Judicial Administration, 1986). Maher makes the same point: 'Tales of the Overt and the Covert', above n 88, 193.

<sup>173</sup> On whether wartime is different in this regard, see Wheeler, above n 74, 496–502.

<sup>174</sup> Thomas, above n 168, 192; see also at 185–8, 191–2, specifically commenting on Latham's conduct as outlined by Lloyd. See also Teece, above n 19, 397, 399.

<sup>175</sup> See Thomas, above n 168, 188. Cf Lloyd, above n 5, 202, saying of Latham's letter to Page about the outcome in the *Communist Party Case* that '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.'

<sup>176</sup> On Sir Samuel Griffith and Sir Edmund Barton's executive advising whilst High Court justices, see Don Markwell, 'Griffith, Barton and the Early Governor-Generals: Aspects of Australia's Constitutional Development' (1999) 10 *Public Law Review* 280. As Markwell shows in his article, the bulk of this advising by Griffith and Barton was to Governors-General, though it appears that in some cases Griffith also advised federal Ministers. See also Chief Justice Robert French, 'The Chief Justice and the Governor-General' (2009) 33 *Melbourne University Law Review* 647, 655, suggesting that Griffith and Barton's executive advising was specific to the early post-Federation constitutional context.

<sup>177</sup> There is as yet no comprehensive biography of Latham. The key existing studies are Macintyre, above n 2; Cowen, *Sir John Latham and Other Papers*, above n 2; Zelman Cowen, 'Latham, John Greig' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 419.

<sup>178</sup> Macintyre, above n 2, 5; see also at 3. See also Cowen, *Sir John Latham and Other Papers*, above n 2, 17, 59.

Latham on his first day as Chief Justice that ‘[p]olitical ambitions have a charm hard to resist’ was, in all probability, prescient.<sup>179</sup>

Latham doubtless also rationalised some of his political interventions by reference to the need to protect the nation against its enemies, whether the Axis powers or, as Latham saw it, the threat of communism and associated left-wing movements.<sup>180</sup> The latter concern, in particular, may do much to explain, though not to justify, Latham’s involvement in the 1949 election campaign.<sup>181</sup> In this regard, a web of receptive contacts also nurtured and sustained the Chief Justice’s advising. Whereas Latham appears, not surprisingly, to have made little headway in influencing Labor’s John Curtin, his relationship with Richard Casey was actively cultivated by the latter.<sup>182</sup> Menzies likewise seems to have had little compunction in seeking Latham’s counsel when it suited him. Possibly in the closed ‘echelons of establishment power’<sup>183</sup> the legitimacy of Latham’s particular brand of political activism developed its own normative force.<sup>184</sup> Certainly, when Latham died in 1964, Casey volunteered to *The Age* newspaper that when he (Casey) ‘was in Australia, seldom did a week go by without our meeting or exchanging letters or telephone calls’.<sup>185</sup>

Thirdly, did Latham’s continuing participation in political life distort his decision-making as a judge? Latham presumably would have rejected any such charge. In a letter to Dixon in 1944, Latham reflected at length on the judicial process, describing the prospect of a judge letting their personal beliefs dictate the results they reached as a ‘vicious’ one.<sup>186</sup> Of course, Latham’s dissenting judgment in the *Communist Party Case* was consistent with his views on communism. That does not necessarily mean that it was infected by personal preference — the complexity of the process of judgment in appellate courts means that a spectrum of outcomes and reasons is frequently possible.<sup>187</sup> The critical point, however, is that Latham’s behaviour, as recounted in this article,

<sup>179</sup> See text accompanying above n 22.

<sup>180</sup> Lloyd has recounted Latham’s strong anti-communist views: above n 5, 188–93, 195–8.

<sup>181</sup> See Maher, ‘Tales of the Overt and the Covert’, above n 88, 175–83, 194. On Casey’s anti-communist views, which hardened in the lead up to the 1949 election, see Hudson, above n 30, 198–201, 209–10.

<sup>182</sup> Interestingly, while Casey was Australia’s envoy in Washington, he had firsthand experience of United States Supreme Court Justice Felix Frankfurter’s now famous off-court advising: Hudson, above n 30, 128; see also at 143–4. On Frankfurter’s extra-judicial advisory activities, see Murphy, above n 107.

<sup>183</sup> Thomas, above n 168, 187.

<sup>184</sup> Which, of course, would not justify the practice. See, on this point, the insightful discussion, in a closely related context, of Maher: ‘Tales of the Overt and the Covert’, above n 88, 194–5.

<sup>185</sup> Lord Casey, ‘A Tribute to Sir John Latham’, *The Age* (Melbourne), 29 July 1964, 2, 2. Casey added in this letter that Latham was a ready source of ‘advice and guidance’ to others.

<sup>186</sup> Letter (copy) from Sir John Latham to Sir Owen Dixon, 17 April 1944 in *Papers of Sir John Latham*, NLA MS 1009/1/5680, 5680. See also Letter (copy) from Sir John Latham to Professor W Friedmann, 8 April 1952 in *Papers of Sir John Latham*, NLA MS 1009/63/596.

<sup>187</sup> See, eg, Tony Blackshield, ‘Judicial Reasoning’ in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 373. However, Dixon, who also held strong anti-communist views, told Latham that he (Dixon) was ‘sickened’ by Latham’s draft *Communist Party Case* opinion: Ayres, above n 2, 221. As Ayres notes at 223, Dixon was not the only member of the Court troubled by Latham’s judgment. See also the analysis in Maher, ‘Tales of the Overt and the Covert’, above n 88, 176–83.

raises the spectre that he may not have been appropriately detached from either the issues or the parties at hand, remembering that the Commonwealth executive was a litigant in the case. Simply put, the mere appearance of partiality is enough for concern and underscores why Latham's closeness to the Menzies government was unacceptable.<sup>188</sup> Of course, one could retort that most Australians had no inkling of what Latham was doing off-court, but conduct in breach of ethical standards does not become less unethical merely because it is undertaken in secret.

Fourthly, the nature and scale of Latham's extra-judicial advising casts fresh light on the best known example of such advising by a serving High Court judge — Chief Justice Sir Garfield Barwick's advice to Governor-General Sir John Kerr concerning the dismissal of the Whitlam government in 1975. The propriety of Barwick's role in that constitutional crisis continues to be hotly contested.<sup>189</sup> Yet, amidst all the turmoil of the time, the fact that Barwick had advised the Governor-General was a matter of public record.<sup>190</sup> Moreover, Barwick's memorandum to Kerr was made freely available, albeit after the Whitlam government had been fatefully deposed.<sup>191</sup> Critics of Barwick's role in the dismissal rightly point out that aspects of the events of 1975 were, in all probability, justiciable, potentially forcing Barwick's recusal from any High Court challenge and thereby underscoring the inappropriateness of his conduct.<sup>192</sup> But how would Latham have acted in the face of a constitutional challenge to Commonwealth legislation enacted in accordance, for example, with his private constitutional advice to Casey? Would anyone have known, apart from a select few in the Menzies government, that the Chief Justice had advised the Liberal Party on the issues at hand?

Finally, some might argue that Latham's example shows that appointments to the High Court of persons with political backgrounds are so fraught with danger to the integrity of the judiciary that they should no longer occur.<sup>193</sup> Views are liable to differ on this question, though it is possible for former politicians elevated to the Court to eschew past political associations, as Sir Edward

<sup>188</sup> On the importance of judicial impartiality, in reality and appearance, see Stephen Parker, 'The Independence of the Judiciary' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 62, 68–71.

<sup>189</sup> See, eg, David Marr, *Barwick* (Allen & Unwin, 1980) 280–4; Paul Kelly, *November 1975 — The Inside Story of Australia's Greatest Political Crisis* (Allen & Unwin, 1995) 226; French, above n 176, 654–6.

<sup>190</sup> Marr, above n 189, 279; Sir Garfield Barwick, *Sir John Did His Duty* (Serendip Publications, 1983) 87. For the full text of Kerr's statement, issued on 11 November 1975, explaining why he had dismissed the Whitlam government, and referring to his (Kerr's) contact with Barwick over this, see Kelly, above n 189, 346–9.

<sup>191</sup> Marr, above n 189, 282–3. Barwick's memorandum is reproduced in Kelly, above n 189, 343–4. Following his retirement from the Court, Barwick also publicly defended his actions at length: Barwick, above n 190, ch 5.

<sup>192</sup> See, eg, Tony Blackshield, 'Dismissal of 1975' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 212, 214. Barwick maintained that he had advised on a non-justiciable issue: Barwick, above n 190, ch 5.

<sup>193</sup> See, eg, Thomas, above n 168, 186, 300–1.

McTiernan did.<sup>194</sup> Latham himself believed that ‘every constitutional lawyer was the better for parliamentary and ministerial experience.’<sup>195</sup> Whatever the merits of this particular debate, the modern tendency towards forging political careers from early adulthood, combined with the increasing size and complexity of the corpus of Australian law, makes future transitions from politics to the High Court less likely on a practical level. Modern communications technology and the unrelenting media cycle would also make it considerably more difficult for a contemporary Latham to keep their actions concealed from public view.

## VI CONCLUSION

Ultimately, however, Latham’s conduct or, at least, some of it — who knows what activity went unrecorded — was not concealed from public view. He deposited his personal papers in the National Library of Australia, inviting the verdict of history upon them.<sup>196</sup> This article suggests that that verdict, as regards his extra-judicial advising, should not be a complimentary one. It also suggests that adherence to the separation of powers and judicial independence has a more chequered history in Australia than many of us would like to believe. Glossing over this reality would be to engage in a similar act of denial to that which sustained much of Sir John Latham’s advisory work.

<sup>194</sup> See generally Justice Michael Kirby, ‘Sir Edward McTiernan — A Centenary Reflection’ (1991) 20 *Federal Law Review* 165.

<sup>195</sup> Ellis, above n 17, 34.

<sup>196</sup> Though Lloyd has suggested that ‘Latham’s papers show signs of careful pruning’: above n 5, 202.