

peared to be too willing to draw whatever teeth the Authority had as soon as it could. (*The Age*, 24 October 1986)

The controversy over the newest legislation in Australia to set up an independent statutory watchdog promises to continue into 1987 with the Victorian Police Complaints Authority both appealing against the decision of Justice Hampel and lobbying the Government to remedy the flaws which it claims defeat the spirit of ALRC1 and 9 and the legislation which created it in 1986.

asio

There are groups of people here who feel important by imagining their phones are being tapped and there is a file being compiled on these dull activities. They hear a crackle on the line and think it's ASIO. In fact it's probably Harry Butler nailing a budgie to a pole to get a good picture.

Barry Humphries, *Australian House & Garden's Celebrities at Home* Sydney, 1982

1986 was a significant year for the Australian Security Intelligence Organisation (ASIO). The organisation which is concerned with Australia's internal security received more than its usual media coverage. The reasons for this coverage included:

- the move of ASIO's headquarters from Melbourne to Canberra with the concomitant problem of staff losses;
- new legislation to more clearly define ASIO's powers and functions and to create an Inspector-General of Intelligence and Security;
- the death of Justice Lionel Murphy whose name has been associated with ASIO since 1973 when he, as federal Attorney-General, led a 'raid' on ASIO's headquarters to obtain information, the implication being that ASIO was withholding it from him;
- the court case seeking to restrain publication of a book by former spy Peter Wright in which it was suggested that a former head of the British intelligence organisation MI5 who assisted in the

establishment of ASIO may have been a Russian spy.

ASIO has always operated covertly and shunned publicity but in 1986 there were efforts made to 'woo the media'. The new Director-General of ASIO, Mr Alan Wrigley, took the unprecedented step of addressing the National Press Club in Canberra and also during the year invited selected journalists on a tour of the new ASIO headquarters in Canberra to meet 'typical' ASIO officers. (*Sydney Morning Herald*, 7 March 1986)

lionel murphy and asio. The names of Lionel Murphy and ASIO were first associated in the minds of many people in 1973. Early on the morning of 16 March 1973 Lionel Murphy, the then Attorney-General, 'raided' (as the newspapers of the day referred to it) the headquarters of ASIO in Melbourne. The previous evening he had visited the Canberra office of ASIO. In a later statement in Parliament, Senator Murphy said that while at ASIO he had inspected documents relating to Croatian terrorist organisations and to ASIO itself (Senate *Hansard*, 27 March 1973, p551) and that he had ordered Commonwealth Police who had accompanied him to seal a number of safes and containers in ASIO headquarters. The raid preceded the visit to Australia of the Yugoslav Prime Minister and there was fear of a terrorist attack against him. The then Senator Murphy said that on the basis of information he had obtained, partially from his 'raid' on ASIO, security had been significantly tightened for the Yugoslav Prime Minister, and the visit proceeded without major incident.

While a number of questions remain unanswered about Murphy's 'raid' on ASIO, the event appears to have had a number of long term consequences. It is often regarded as the commencement of a decade of uncertainty for ASIO. During that time its role and activities were examined in detail by two Royal Commissions, the recommendations of which are still being implemented. There is

no doubt that ASIO has and is undergoing fundamental change.

lionel murphy in the high court. Murphy's link with ASIO did not cease with the notorious raid of 1973. Later, when Murphy was a judge of the High Court, he had on a number of occasions to consider the role of security services in a democratic society and especially the application of the role of law in that society to all persons and organisations.

In *Church of Scientology v Woodward* (1982) 43 ALR 587 it was claimed that ASIO had collected intelligence concerning the Church of Scientology and its members and classed them as security risks and that ASIO had acted unlawfully in doing this. The Church sought an injunction to prevent ASIO from continuing to engage in such activities. Justice Murphy in the course of his minority judgment made the following comments about ASIO:

ASIO had not been authorised (and it could not constitutionally be authorised) to do what any natural person could do – that is, to investigate and disseminate information about anyone he or she chooses for any purpose at all provided that this did not involve breach of any law. Nor has ASIO been authorised to exercise all possible power with which the Executive Government could be vested by way of investigation or dissemination of information.

Any powers granted to ASIO and exercisable by its Director-General or other officers must, like other powers, be used in good faith for the purposes for which they are conferred and with due regard to those affected. That is the general rule. Therefore, if a violation of the law by ASIO is proved, ASIO and its officers are amenable to legal process and to remedies available at least under the Constitution. The difficulty the plaintiffs face is that assertion of violation of the law is one thing, proof is another. If a case comes before the courts where it is claimed on what appear to be reasonable grounds that ASIO has misused its powers, it is to be expected that the courts will be astute to ensure that misuse of power is not cloaked by claims of national security. Because of the experience that secret organisations of this kind from time-to-time misuse their powers in relation to individuals and institutions, it is essential that the judicial process be exerted, no doubt with caution, but if occasion warrants it, firmly,

to keep the organisation and officers within the law ((1982) 43 ALR 587, 608-9).

In the later case of *A and Others v Hayden and Others* (1984) 156 CLR 532, ASIO's sister organisation ASIS was under scrutiny. This case arose out of the highly publicised ASIS training exercise at the Sheraton Hotel in Melbourne. Investigations concerning criminal offences were undertaken by the Victoria Police and the ASIS participants sought a declaration to restrain the Commonwealth from disclosing their identity. This was on the basis that their contracts of employment stipulated that their identity was to be confidential. The High Court unanimously refused to grant the injunction sought. Justice Murphy commented:

The plaintiff's case as first presented appeared to assume that without Parliament's authority, the government (or its officers or agents) can authorise persons whether officers of the Commonwealth or not, to engage in other countries in conduct which is against the laws of those countries (apart from what is authorised by international law). Neither the Commonwealth nor any of its Ministers, officers or agents, military or civilian, can lawfully authorise the commission by anyone in another country of conduct which is an offence against the laws of that country and is not authorised by international law (for example, by the laws of war). Whether Parliament could empower such authorisation does not arise for decision; it has never purported to do so. Under our Constitution and laws, Australia is a law-abiding member of the community of nations.

In Australia it is no defence to the commission of a criminal act or omission that it was done in obedience to the orders of a superior or the government. Military and civilians have a duty to obey lawful orders, and a duty to disobey unlawful orders.

If the contract is valid, it is unenforceable in the circumstances presented here. It would be contrary to public policy for a Minister or the executive government to be prevented from revealing information which would assist in the investigation of a crime, whether great or less. The Minister is not bound to reveal the identity; it is within his discretion whether he does or not. Common sense would suggest that the discretion be exercised against revelation in the case of a minor offence, but this is for the executive authority, not for the court.

the new asio legislation. The stated aim of the new legislation was to improve the accountability of Australia's intelligence services and reduce potential human rights abuses. It involved implementation of a number of the recommendations in the Hope Royal Commission Report. The key elements of the Australian Security Intelligence Organisation Amendment Act 1986 (Cth) are:

- Provision for the establishment of a Parliamentary Joint Committee on ASIO to review aspects of ASIO's activities referred to it by the Attorney-General or either House of Parliament. The Committee may also request the Attorney-General to refer a matter to it and it has the power to obtain information and documents from ASIO.
- Important changes to the interpretation provisions including:
 - deletion of the definition of 'domestic subversion' and the term 'subversion' from the definition of 'security';
 - a new definition of 'politically motivated violence' to include 'acts or threats of violence or unlawful harm that are intended or likely to achieve a political objective whether in Australia or elsewhere' and 'acts that are directed to overthrowing or destroying or assisting in the overthrow or destruction of, the government or the constitutional system of government of the Commonwealth or of a State or Territory';
 - a new definition of 'promotion of communal violence' to mean 'activities that are directed to promoting violence between different groups of persons in the Australian community so as to endanger the peace, order or good government of the Commonwealth'.

The aim of these definitional changes is to direct ASIO's focus to unlawful

violence directed at undermining Australia's system of government.

- ASIO may collect foreign intelligence but only under written warrant of the Attorney-General.
- The Minister has greater control over the exercise of ASIO's powers and functions. But the Minister may not override the Director-General's opinion:
 - concerning the nature of the advice which should be given by ASIO; and
 - whether the collection or communication of intelligence on a person is justified except by written direction.
- The Security Appeals Tribunal has greater powers.

Another recommendation of the Hope Royal Commission Report was implemented by enactment of the Inspector-General of Intelligence and Security Act 1986. It creates the new position of Inspector-General who is empowered to receive complaints and conduct inquiries into the propriety and effectiveness of all Australian intelligence services:

- Australian Security and Intelligence Organisation (ASIO);
- Australian Security Intelligence Service (ASIS);
- Defence Signals Directorate (DSD);
- Joint Intelligence Organisation (JIO);
- Office of National Assessments (ONA).

Mr Wrigley at the press club. In the first address by a head of ASIO to the National Press Club, Mr Wrigley gave some insights into the work of ASIO. He stated that the vast majority of ASIO's resources and the greatest proportion of operations conducted under the Attorney-General's warrant were directed towards espionage, terrorism and clandestine or deceptive acts of foreign powers. He also sounded a somewhat sobering warning when he observed:

You should not be in the slightest doubt that there are undeclared foreign intelligence officers working in Australia. Some of them use coercion and prey on character or family vulnerabilities and other human frailties in order to enlist Australian residents to work against this country's interests. (*The Age*, 11 September 1986)

the peter wright book

Those of us who are no longer young remember that Botany Bay and Van Diemen's Land were the names which in our youth we associated with expatriated rascaldom . . . Van Diemen's Land has been made sweet as a rose by changing her hated name to Tasmania.

Anthony Trollope, *The Tiresless Traveller*
BA Booth ed, Berkeley, 1941

Books about spies, especially those about a country's intelligence service, often create great interest, intrigue and controversy. A book by former British spy Peter Wright is a good example, not because of its content or startling revelations (although not all of these have yet been made public) but because the British Government commenced court action to prevent its publication in Australia. This has turned the book into a potential best-seller. The case in the New South Wales Supreme Court attracted widespread publicity and public interest in both Australia and the United Kingdom and created something of a political storm in England especially for the Prime Minister, Mrs Thatcher. There were allegations that Mrs Thatcher may have misled the Parliament over the reasons why the Government had not attempted to prevent the publication of an earlier book by Chapman Pincher entitled 'Their Trade in treachery' which had apparently been based on information supplied by Peter Wright.

the background. Peter Wright worked for MI5, the British equivalent of ASIO, from the mid 1950s until 1976 when he retired to Tasmania to breed horses. During that time there were a number of well-publicised examples of Russian 'moles' (eg Burgess, McLean, Philby) having penetrated British intelligence services, in particular MI5. Peter Wright was convinced that there were more who have never been exposed. He set about

doing something about it — both before and after his retirement. His activities since retirement have led to the current court case. After 1976 he returned to England a number of times, he appeared before a parliamentary committee, he went on national television calling for an inquiry into MI5, he made information available to a journalist which formed the basis of a book about MI5 and finally he put pen to paper and wrote his memoirs.

The British Government has done little in the past to prevent or restrain the publication of material about the intelligence services. But Peter Wright is a person with intimate knowledge of the workings of MI5 and the British Government decided that the time had come to make a stand. It does not want former intelligence officers to publish material in this way and is seeking to discourage it. The difficulty in the Wright case was that the book was to be published in Australia and action to prevent publication had to be taken in the New South Wales Supreme Court applying the law of that State. Had they chosen the right 'test case' to obtain the principles or guidelines they were seeking?

the legal issues. In August 1986 the British Government sought and was granted an interim injunction in the New South Wales Supreme Court restraining Heinemann and Wright from publishing the book. The parties had agreed when this injunction was granted that in order to limit legal argument there would be no contest over the accuracy of the information contained in the memoirs. Granting the injunction Justice Powell outlined the following issues for determination:

- whether the relationship of Mr Wright and the Crown was one of contract,
- if the contract imposed an obligation of confidence on Mr Wright,
- if the confidence extended to all matters in the memoirs,
- if it was in the Australian public interest that they be published, and