

PROTEST LAW AND THE FIRST WORLD WAR: THE CASE OF THE INDUSTRIAL WORKERS OF THE WORLD (IWW)

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I INTRODUCTION

This article is a case study of the use of law in Australia against protest groups for political purposes. It examines the fabrication of evidence and the use of vaguely drawn and poorly understood laws of treason, treason felony, sedition and conspiracy against a radical anti-war group, the Industrial Workers of the World ('IWW'), during the First World War. It argues that the trial and conviction of the men known as the 'IWW Twelve' was a miscarriage of justice orchestrated with the political aim of tarnishing the reputation of the anti-conscription movement and of anti-war advocates, more generally. While the men were eventually released, the episode had both medium and long-term effects. It helped justify the Commonwealth government's decision to pass wide-ranging anti-protest legislation, and to establish an accompanying surveillance and enforcement apparatus, which in the longer term was deployed for other purposes.

This article begins by setting out the political and legal background to the prosecution of the IWW Twelve, including the origins and ideas of the group, and the summary prosecution of IWW organisers under the *War Precautions Act 1914* (Cth) ('*War Precautions Act*'). It then outlines the factual and legal basis for the men's prosecution for far more serious offences, including treason felony and conspiracy. Next, it deals with the events surrounding the trial, the sentences and the appeals of the men against their convictions, including other prosecutions of IWW members proceeding at the same time. It then explains the campaign for the release of the men, the official inquiry and the Royal Commission into their convictions, and the final legal suppression of the IWW. The conclusion reassesses the question of whether the men were guilty of any criminal offences, let alone those with which they were charged, and briefly considers the implications for the use of law against protest groups in a more modern context.

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II THE WAR PRECAUTIONS ACT AND THE IWW

When Britain declared war on Germany on 4 August 1914, Australia was also at war.¹ Within two months, on 28 October 1914, W M ‘Billy’ Hughes as Attorney-General had secured the passage of the *War Precautions Act* through the Australian House of Representatives and the Senate, and the legislation had received Royal Assent.² Passed pursuant to the defence power, the *War Precautions Act* was intended to enable the Governor-General to make regulations and orders for ‘securing the public safety and the defence of the Commonwealth’.³

According to Sir Robert Garran, the first Commonwealth Solicitor-General, who drafted the Act, the *War Precautions Act* gave:

almost unlimited powers to the Executive to frame regulations for covering the defence of the country. ... These Regulations, stringent as they were, were cheerfully accepted by almost everybody, and on the very few occasions when they were challenged they were ... upheld by the High Court as necessary for defence purposes in a total war. ... To all intents and purposes Magna Carta was suspended and [Hughes] and I had full and unquestionable power over the liberties of every subject.⁴

The original purpose of the legislation was to root out enemy subversives.⁵ This focus was reflected in the original, provisional regulations, passed on 30 October 1914.⁶ The most significant of these was probably reg 17, which provided that:

No person shall by word of mouth or in writing spread reports likely to cause disaffection ... among any of His Majesty’s Forces or the Commonwealth Forces or among the civilian population.

Pursuant to this emphasis on the spreading of ‘disaffection’, in the early months of the war the state police forces ‘spent a great deal of time pursuing reports of enemy activity passed to them by a suspicious and excited population’.⁷

1 Peter McDermott, ‘Internment during the Great War — A Challenge to the Rule of Law’ (2005) 28 *UNSW Law Journal* 330, 337. As to the effect of Britain’s declaration of war on Australia, see Joan Beaumont, *Broken Nation: Australians in the Great War* (Allen & Unwin, 2013). While ‘the Commonwealth government had gained control over ... “external affairs”, this ambiguous power was not interpreted by politicians to mean the right to manage Australia’s diplomatic relations with the rest of the world. Rather, these were assumed to remain the prerogative of London, which conducted foreign policy on behalf of the whole British Empire’: at 12.

2 McDermott, above n 1, 350.

3 *War Precautions Act* s 4.

4 Sir Robert Randolph Garran, *Prosper the Commonwealth* (Angus & Robertson, 1958) 220–1. According to Garran, Hughes himself had no time to spare for the duties of Attorney-General, so he ‘met the situation by appointing me Solicitor-General and vesting in me practically all the powers of the Attorney-General, which under the War Precautions Regulations were almost unlimited’: at 221. For an example of an unsuccessful challenge to regulations under the *War Precautions Act*, see *Farey v Burvett* (1916) 21 CLR 433.

5 Thus, as McDermott points out, the *War Precautions Act* ‘was intended to apply to naturalised British subjects who were of German birth or origin’, as well as to aliens: McDermott, above n 1, 350. The British models for the Act were the *Official Secrets Act 1911*, 1 & 2 Geo 5, c 28 and the *Aliens Act 1905*, 5 Edw 7, c 13: at 336.

6 *War Precautions Regulations 1914* (Cth).

7 Frank Cain, *The Origins of Political Surveillance in Australia* (Angus & Robertson Publishers, 1983) 45.

On 28 July 1915, however, the provisional regulations were repealed,⁸ and reg 17 was replaced by a new reg 28, which read as follows:

No person shall, by word of mouth, or in writing, or in any newspaper, periodical, book, circular, or other printed publication —

- (a) spread false reports or make false statements or reports, or statements likely to cause disaffection to His Majesty, or public alarm, or to interfere with the success of His Majesty's Forces by land or sea, or to prejudice His Majesty's relations with foreign powers; or
- (b) spread reports or make statements likely to prejudice the recruiting, training, discipline, or administration of any of His Majesty's Forces;

and if any person contravenes this provision, he shall be guilty of an offence against the Act.

Thus, the original prohibition on the spreading of 'disaffection' was supplemented by a new prohibition directed at those who were opposed to the war effort, without necessarily being subversive or disloyal. However, it was not clear exactly how these regulations were to be policed. On 25 November 1915, the regulations were tightened further by a new reg 28A, which allowed the Deputy Chief Censor to 'order in writing ... the editor or printer or publisher at any newspaper or periodical' to submit material for approval before publication. This appears to have been interpreted as requiring a printer or publisher to submit articles for approval by the Censor.⁹

Reflecting this change in focus, the civil and military intelligence began to spend less time scrutinising the activities of enemy aliens in Australia, and more 'watching people and groups who expressed opposition to the war and the Government's war policy'.¹⁰ These included innocuous-sounding bodies such as the Australian Peace Alliance, the No Conscription Fellowship and the Australian Freedom League.¹¹ Such groups ran the risk of prosecution under the *War Precautions Act* on the basis that their anti-war activities were 'likely to prejudice recruiting'.¹²

The members of these bodies were often also members of the Australian Labor Party, or at least in ideological sympathy with it.¹³ Many Labor politicians had serious doubts about their friends or supporters being arrested and charged for speaking out about the growing public concern about Australia's involvement in the war.¹³ On the other hand, the police and military intelligence saw the anti-war or anti-recruiting elements as disloyal subversives.

8 See *War Precautions Regulations 1915* (Cth).

9 See Cain, *The Origins of Political Surveillance in Australia*, above n 7, 47.

10 Ibid 46; Nicholas Moore, 'Detective Moore's Report Re History and Proceedings of IWW' (State Archives of New South Wales, NRS 10923, Police Special Bundles 1846–1963, Box 7/5593) 5 ('*Moore Report*'). Both civil and military intelligence assumed responsibility for acting under the *War Precautions Regulations 1915* (Cth): ibid 45.

11 See Cain, *The Origins of Political Surveillance in Australia*, above n 7, 46–7.

12 Ibid 46.

13 Ibid 48.

This ideological tension within the Labor Party was reflected in debate about whether the police should be able to prosecute alleged breaches of the *War Precautions Act* on their own initiative, or whether such prosecutions should only occur when politically authorised. Prior to September 1915, police had the power to bring summary prosecutions for alleged breaches of the *War Precautions Act* direct to a magistrate, and without reference to civil or military authorities.¹⁴ This position changed in September, when the government passed an amendment requiring prosecutions under the *War Precautions Act* to be approved by the Attorney-General, or the Commonwealth Minister for Defence, or a person authorised in writing by those Ministers.¹⁵ Not surprisingly, this was opposed and undermined by conservative elements, particularly in the police force of New South Wales, which argued that it led to unacceptable delays in obtaining evidence and approval for prosecutions.¹⁶

Given this internal conflict, the most fervently pro-war elements within the Labor Party required a more colourful enemy than the Peace Alliance or the Freedom League — a convenient object on which to fixate the general public's concerns about foreign infiltration, and a handy brush to tar the anti-conscriptionists or those who were merely ambivalent about the war.

The Industrial Workers of the World, or the 'Wobblies', were a perfect fit for this role. Formed in Chicago in June 1905, the 'Wobblies' had quickly split into a moderate faction prepared to consider traditional parliamentary action as a route to socialism, and those who believed that only 'direct action' would truly meet the aims of the working class.¹⁷ According to Turner, 'direct action' was an end-justifies-the-means philosophy, wasting no time on 'bourgeois morality'.¹⁸ He quotes from an IWW manifesto extolling the virtues of 'any and all tactics that will get the results sought with the least expenditure of time and energy. ... The question of "right" and "wrong" does not concern us'.¹⁹ Among the tactics it boasted of were sabotage — destroying raw materials or machinery — symbolised by the 'sab-cat', the black cat and the sabot, or wooden shoe, which striking workers in France were said to throw into factory machinery.²⁰

But were the Wobblies really violent revolutionaries, a dangerous threat to peace and order? According to Frank Cain, their maximum membership in Australia was about 2000 people. Their newspaper, *Direct Action*, had a circulation of

14 *War Precautions Act (No 1) 1915* (Cth) s 4.

15 *War Precautions Act (No 2) 1915* (Cth) s 3.

16 *Moore Report*, above n 10, 5; see Cain, *The Origins of Political Surveillance in Australia*, above n 7, 46.

17 Ian Turner, *Sydney's Burning: An Australian Political Conspiracy* (Alpha Books, revised ed, 1969) 7, 9.

18 *Ibid* 9.

19 *Ibid*.

20 Australian Administration of the Industrial Workers of the World, 'Sabotage' (State Archives of New South Wales, NRS 10923, Police Special Bundles 1846–1963, Box 7/6720: IWW Police Miscellaneous Papers 1917–1929); *ibid* 9–12; see Stephen Gray, "'Death Cults', Murdering a Police Officer, and the First World War' (2016) 41 *Alternative Law Journal* 259, 259.

about 10 000 at the peak of ‘Wobbly’ influence, around September 1916.²¹ Like other organisations with idealistic or extreme social aims, they were fond of high-flown language and perhaps grandiose conceptions of their own importance, and this undoubtedly gave some of their rhetoric a disturbing tone.²²

However, the reality on the ground was less glamorous. They were likely to be patronised and laughed at, according to reports from the police assigned to watch them.²³ The New South Wales Premier, W A Holman, wrote in 1915 that ‘[t]here is no indication in these reports of any subsidising of the organization from any external source’.²⁴ Far from being a tightly, centrally controlled secret network, IWW members were mostly working-class, more anarchists and larrikins than syndicalists, as a later commentator, Rowan Day, has pointed out.²⁵

Given this, it seems arguable that the real reason for the intensification of official antagonism towards the IWW was not so much the danger it posed to mainstream Australian society, but rather the political opportunity of tarnishing anti-war and anti-conscriptionist advocates by association with this easily maligned group.²⁶

A The Prosecution of Tom Barker

Tom Barker was a Wobbly organiser who had arrived in Sydney in February 1914. Born in England, Barker had originally emigrated to New Zealand, where he had become involved in a tramways strike and been charged with sedition.²⁷ He arrived in Australia as a fully-fledged agitator and revolutionary. Heavily involved

21 Cain, *The Origins of Political Surveillance in Australia*, above n 7, 15.

22 Many of the ‘IWW Twelve’ made inflammatory statements, and they are quoted at length in the cases discussed below. One example is J B King, who was supposed to have said ‘[t]he only dope that counts with the master class is sabotage. You must hit them through their stomachs and pockets’: *R v Reeve* (1917) 17 SR (NSW) 81, 109.

23 Cain, *The Origins of Political Surveillance in Australia*, above n 7, 150–1. New South Wales police concluded that their principal members were ‘not of the best character, but the majority of their sympathizers are reputable citizens’: at 151. Another wrote that they ‘appeared to have no friends or sympathisers whatever, their doctrine was treated with derision, they were men of no ability, very little education, no eloquence, and judging by the language they used, of very doubtful character’.

24 Ibid 151.

25 Rowan Day, *The Tottenham Rebels: Radical Labour Politics in a Small Mining Town during the Great War* (PhD Thesis, University of Western Sydney, 2014) 107–8. See also Andrew Lynch, Nicola McGarrity and George Williams, ‘Lessons from the History of the Proscription of Terrorist and Other Organisations by the Australian Parliament’ (2009) 13 *Legal History* 25, 28.

26 While ‘the radicals could not have made any real difference to the effective prosecution of the war, their existence allowed the creation of surveillance agencies and of jobs for the officials needed to run them’, as Frank Cain argues: Cain, *The Origins of Political Surveillance in Australia*, above n 7, 19.

27 *Moore Report*, above n 10, 40; Verity Burgmann, *Revolutionary Industrial Unionism: The Industrial Workers of the World in Australia* (Cambridge University Press, 1995) 70–1.

with the IWW magazine *Direct Action*,²⁸ he took part in huge anti-war meetings in Sydney's Domain during 1915, alerting workers to 'the plain unvarnished Truth of having been wage-slaves they were now to become cannon-fodder in the interests of the same master class'.²⁹ During one meeting in Queensland, IWW agitators had been so vocal in 'count[ing] ... out' Prime Minister Hughes that he was unable to continue to speak.³⁰

Police harassment of the IWW took a serious turn in September 1915. On about 22 July, Barker had posted a 'recruiting poster' on Sydney buildings, his famous 'To Arms' poster:

TO ARMS!!!
 Capitalists, Parsons, Politicians,
 Landlords, Newspaper Editors, and
 Other stay-at-home Patriots.
 YOUR COUNTRY NEEDS YOU IN THE TRENCHES!!
 WORKERS,
 FOLLOW YOUR MASTERS!!³¹

On 14 September 1915, Barker was summarily convicted under the *War Precautions Act* with publishing a poster prejudicial to recruiting.³² Interestingly, the offence of publishing a poster prejudicial to recruiting did not exist until reg 28 to the *War Precautions Act* was introduced on 28 July — seemingly, after Barker had committed the alleged offences around 22 July.³³ In addition, Barker

28 The IWW deliberately fostered confusion about whether or not he was editor: E C Fry, *Tom Barker and the IWW* (Australian Society for the Study of Labour History, 1965) 21:

It wasn't long before the authorities got curious about who was editing the paper, and they couldn't decide whether it was Tom Barker, Tom Glynn, or who it was. We got the idea that we'd make it a little more difficult, so we put on the paper: 'Editor: Mr. A. Block'. For this A. Block we got a block of wood and a dingy old top hat that somebody had inherited. We put the hat on this block of wood and kept it behind the door in the editorial room and if anybody came wanting to see the Editor, we took him in and said, 'Allow us to introduce you to the Editor, Mr. A. Block'.

29 Burgmann, above n 27, 185.

30 Ibid.

31 Fry, above n 28, 25.

32 For another example of a left-wing printer being prosecuted in the Magistrates Court under the *War Precautions Act*, see *Holland v Jones* (1917) 23 CLR 149; Frank Cain, 'Australian Intelligence Organisations and the Law: A Brief History' (2004) 27 *UNSW Law Journal* 296, 297. For more on Barker's prosecution, see Frank Cain, *The Wobblies at War: A History of the IWW and the Great War in Australia* (Spectrum Publications, 1993) 232; see also Burgmann, above n 27, 190.

33 See 'Extracts from Certificate of Conviction' (State Archives of New South Wales, NRS 10923, Police Special Bundles 1846–1963, Box 7/5588.2) ('*Extracts from Certificate of Conviction*'); see also 'Unlawful Associations Act: Persons Sentenced in NSW' (State Archives of New South Wales, NRS 10923, Police Special Bundles 1846–1963, Box 7/5590: IWW Papers No 101–70); Cain, *The Wobblies at War*, above n 32, 230; Cain, *The Origins of Political Surveillance in Australia*, above n 7, 48. For other general discussions of this episode see Day, above n 25, 157–8, citing Turner, above n 17, 16. According to Turner, Barker was charged under war regulations made in New South Wales, and these were later found invalid as contrary to the Commonwealth Act. However, this appears to be based on an incorrect comment made by Barker himself, in his autobiography: see below n 40.

was convicted under New South Wales legislation, the *Printing Act 1899* (NSW), with an offence of publishing a poster without attaching the printer's name.³⁴

Barker argued in his defence that the poster was, in fact, a serious attempt at recruiting. His attitudes to authority probably did little to endear him to the magistrate,³⁵ who fined him £50 or six months' imprisonment.³⁶ The Wobbly philosophy was to do the time, so Barker went to jail, with the support of a Defence Committee, which protested against 'sending a working man to rot in gaol for the crime of telling the boss to go to the front'.³⁷ Barker appealed. He argued that the poster was not 'prejudicial to recruiting' because it was a genuine attempt to recruit.³⁸ His argument was successful; and the New South Wales government managed to convince the Governor to remit the fines and costs of the *Printing Act 1899* (NSW) offence.³⁹ A month later, Barker was released.⁴⁰

B 'Billy' Hughes and the IWW

In October 1915, 'Fisher resigned his Prime Ministership to become High Commissioner in London', and 'Billy' Hughes was unanimously chosen by his

34 At least, according to Frank Cain: see Cain, *The Origins of Political Surveillance in Australia*, above n 7, 48. The certificate of conviction, however, merely states that Barker was convicted because the paper was 'printed on one side only and which said paper had been printed since the 10th day of May 1827 and on which said paper was not printed on the front of each paper in legible characters the name of each person printing the said paper and the name of the place and also the name of the town street court or lane at which the dwelling place of the said printer was situated': see *Extracts from Certificate of Conviction*, above n 33.

35 Fry, above n 28, 25. Barker claimed in his autobiography that:
[t]he magistrate wasn't a man of any great reputation. He was regarded quite favourably, I understand, in a certain number of disorderly houses and, some years previously, one of the madams in these establishments had got the idea he was so good and kind, such a friend to the ladies of the profession, that they decided to make a public presentation to him. That almost got him the sack, but, after all, it's Australia I'm talking about and not the highly moral land of Britain.

36 According to Turner, the magistrate said that 'a poster which contained the words "Workers, follow your masters, stay at home" was prejudicial to recruiting': Turner, above n 17, 16.

37 Burgmann, above n 27, 190.

38 *Ibid.*

39 Cain, *The Origins of Political Surveillance in Australia*, above n 7, 48–9.

40 Fry, above n 28, 25. According to his autobiography, his appeal succeeded because: it was discovered that the sentences were ultra vires. What happened was that when the war came on the States all undertook their own parts in it, but, as time went by, the Federal Government got tired of this sectional business and so they took over the whole of the legislation that had to deal with the war. It just happened, very luckily for me, that on the day previous to me getting my sentence from the Magistrate in the Central Police Court, the Federal government had taken over these powers. Therefore, at the moment when I was sentenced in New South Wales by the New South Wales' authority, the Federal government had the power, and the sentences were dismissed as being ultra vires. I got out of that one by the kindness of the Federal government. It was just an accident. Turner supports Barker's recollection, stating that the conviction was quashed because 'the regulations under which Barker was charged were State regulations, and this was a field in which Commonwealth law prevailed': Turner, above n 17, 17. Burgmann also repeats Barker's version of events, stating that 'Barker appealed successfully on a technicality, as the New South Wales government was deemed not to have the necessary power to have prosecuted him under a federal Act': Burgmann, above n 27, 190.

caucus colleagues to be Prime Minister.⁴¹ The war in Europe was not going well for the Allied Powers, with the Western Front ‘bogged down in the foul Flanders mud’ and the Dardanelles campaign a ‘tragic failure’.⁴² The British required reinforcements. Despite being a Welsh immigrant and a trade union leader, Hughes ‘had a passionate attachment to the British Empire’.⁴³ Hughes was vehemently in favour of conscription to meet this need. He had initiated a ‘War Census’, which required Australian males to ‘complete questionnaires about their potential for military service’, and which was widely viewed, despite Hughes’ unconvincing assurances, as a ‘forerunner to conscription’.⁴⁴ He became Prime Minister just before the evacuation of Anzac Cove, and in November 1915 agreed to offer the British a further 50 000 troops.⁴⁵

This evoked fierce opposition from large sections of the labour movement. His ‘Call to Arms’ letter was attacked as ‘disguised’ conscription.⁴⁶ On departing for England in January 1916, Hughes launched a stinging attack on the IWW, denouncing them as ‘foul parasites who have attached themselves to the vitals of Labour’.⁴⁷ ‘It is no use treating these people like a tame cat ...’, he snarled, ‘[t]hey must be attacked with the ferocity of a Bengal tiger’.⁴⁸ At the same time, Hughes formed the Australian Special Intelligence Bureau, a branch of the Imperial Counter-Espionage Bureau, and the first Commonwealth agency dedicated to security.⁴⁹ The actions of the new Bureau were soon directed not at German spies,⁵⁰ but at anti-conscriptionists such as the Peace Alliance and the Women’s Peace Army, who ‘found their correspondence being monitored and their homes being raided for potentially treasonable material’.⁵¹

Barker was jailed again in early 1916, this time for printing a cartoon by Syd Nicholls ‘of a gigantic field-gun with a soldier crucified on it and top hatted persons collecting his dripping blood in bowls. Underneath it we put this piece from the prospectus of the new war loan’.⁵² Again, Barker was convicted for prejudicing recruitment under the *War Precautions Act*. He was released after three months — ‘not because they loved me’, he says, but ‘to take the steam out of

41 Day, above n 25, 25; L F Fitzhardinge, *The Little Digger 1914–1952: William Morris Hughes — A Political Biography* (Angus & Robertson Publishers, 1979) vol 2, 44.

42 See Turner, above n 17, 20.

43 See Beaumont, above n 1, 142.

44 Ibid 146.

45 Ibid 147.

46 Ibid 148.

47 Turner, above n 17, 20.

48 Ibid; Day, above n 25, 156.

49 Beaumont, above n 1, 232.

50 According to Frank Cain, ‘with most enemy aliens in internment camps and no German spies to be found anywhere, they had little to occupy their time. ... The identification of the IWW as a public enemy was to give his [Major Steward, the head of the Counter-Espionage Bureau] flagging Bureau a considerable boost’: Cain, *The Wobblies at War*, above n 32, 239.

51 Beaumont, above n 1, 231–2.

52 Fry, above n 28, 27; *Extracts from Certificate of Conviction*, above n 33. Barker was jailed on 4 May 1916: see Burgmann, above n 27, 192.

things for a little while, but all the time they were concocting the biggest scheme which they had in mind'.⁵³

III THE PROSECUTION OF THE IWW TWELVE

The 'biggest scheme' was the arrest of the IWW Twelve. The New South Wales police had been watching the Wobblies from the middle of 1915. Reports were sent to a Detective Moore, attached to military intelligence, including the 'numbers of branches, the division of sexes, the amount of funds handled and the numbers on the electoral roll'.⁵⁴ In August 1915, police had begun to investigate the forging of five pound notes. This investigation seems to have convinced the police that serious charges could be laid against the IWW.⁵⁵

The forgery was a large-scale police investigation during the first part of 1916, culminating with a public announcement from police in August 1916, and a reward offer of £100.⁵⁶ A taxi driver implicated a process engraver, Leslie Grummitt, who led them in turn to a linotype operator, John Ferguson, and his partner, Fred Morgan.⁵⁷ Another process engraver, H W Bradbury, as well as two engineers, Charles Cattell and Emerald Tighe, were soon also under suspicion, as was another man, J B King.⁵⁸ At the time, King was the registered publisher of the IWW magazine *Direct Action*.⁵⁹ Ferguson and Morgan were also IWW members.⁶⁰ Several of the accused claimed two Russian-Jewish tailors, Davis and Louis Goldstein, had financed the forgeries.⁶¹ Davis Goldstein had also been an IWW member, and maintained a close association with leading 'Wobblies'.⁶²

At the same time as the police were pursuing the forgery investigation, a number of factory fires occurred in Sydney. The first was on 1 June 1916 at Simpson's Free Bond Store on the Sydney waterfront, when a large stock of copra and copper cable was completely destroyed, causing £150 000 damage.⁶³ On 16 June, two weeks later, the manager at Mark Foy's retail store found burning cotton waste, and extinguished the fire before any damage was done.⁶⁴ On 24 June, Winn's retail store in Oxford Street burnt out, causing £40 000 damage.⁶⁵ Three days later another factory fire at Stedman's caused damage estimated at £150 000.⁶⁶ A

53 Fry, above n 28, 28.

54 Cain, *The Origins of Political Surveillance in Australia*, above n 7, 150.

55 *Moore Report*, above n 10, 16–18; *ibid* 151–2.

56 Turner, above n 17, 23.

57 *Ibid* 23–4.

58 *Ibid* 24.

59 *Ibid* 23–4.

60 *R v Ferguson* (1916) 17 SR (NSW) 69, 70.

61 Turner, above n 17, 24.

62 *Ibid* 29.

63 *Ibid* 22.

64 *Ibid*.

65 *Ibid*.

66 *Ibid*.

further fire in August did another £50 000 damage.⁶⁷ In September, there were twelve acts of ‘attempted incendiarism’, none of which appear to have caused any damage.⁶⁸ Thus, while the fires caused extensive damage to property, nobody was killed or even injured — a long way short of ‘any and all tactics that will get the results’,⁶⁹ which the IWW was on the record as having preached.

At first, there was no obvious link between the IWW and the fires. This changed in early September 1916, when another IWW member, the wharf labourer and aspiring police informer Francis McAlister, gave information to a detective ‘about the use of an incendiary solution by IWW members to start fires’.⁷⁰ The police also had evidence from Louis and Davis Goldstein. Davis Goldstein had agreed to give evidence against the accused arsonists in return for charges against him being dropped in the forgery case.⁷¹ To this, they were swiftly able to add incriminating evidence ‘discovered’ by the arresting police, part of a well-established police culture in Sydney at the time ‘by which the jails were kept full and the crime rate ostensibly kept low’.⁷²

The first conscription referendum was due in a month.⁷³ Whether political pressure was a factor or not, the police decided that the time was right to stamp out the IWW. On 23 September 1916, police raided the IWW clubrooms, and arrested four of the five leaders they sought, as well as two ordinary members swept up in the raid.⁷⁴ Failing to find any fire-making chemicals, they seized instead large quantities of cotton waste, arguing this was the incriminating evidence they sought, since cotton waste could be soaked in turpentine and phosphorus and used to start a fire.⁷⁵ In fact, the cotton waste ‘was used by workers operating the IWW press’.⁷⁶ A few days later they arrested another leader, Donald Grant, in Broken Hill, and then an additional four men, three of them in the one rooming-

67 Ibid 23.

68 *Moore Report*, above n 10, 26–8; Turner, above n 17, 22–3. See also *R v Reeve* (1917) 17 SR (NSW) 81, 100, with similar details of these fires, although slightly different dates are given for some.

69 See Turner, above n 17, 9.

70 Cain, *The Origins of Political Surveillance in Australia*, above n 7, 152; Turner, above n 17, 28; see also *Moore Report*, above n 10, 28–32. McAlister had been a regular attendee at IWW meetings: Turner, above n 17, 28. He told a Detective Fergusson a complex set of stories involving a Wobbly acquaintance named Andrew, and a Russian Wobbly named Androvitch, who were ‘preparing fire-dope for wholesale arson’. McAlister knew Fergusson because his daughter had married the detective’s cousin: *Moore Report*, above n 10, 30. For further contemporary discussion of McAlister, see New South Wales, Royal Commission of Inquiry into the Matter of the Trial and Conviction and Sentences Imposed on Charles Reeve and Others, *Report* (1920) 2 (*Ewing J IWW Royal Commission Report*).

71 Turner, above n 17, 29, 43; see also at 207–8 for further discussion of Davis Goldstein’s role. Davis Goldstein had been an IWW member who had contributed articles and money to the IWW magazine *Direct Action* during 1915 and 1916: at 29. On 15 September 1916, he ‘gave police a bottle of fire-dope which he said a Wobbly named Jack Hamilton had given him’: at 29, 208. It was on this basis that the warrants were issued.

72 Cain, *The Wobblies at War*, above n 32, 209.

73 Fry, above n 28, 28.

74 *R v Reeve* (1917) 17 SR (NSW) 81, 101. The men arrested in the clubrooms were Glynn, Larkin, Hamilton, Reeve and Besant: Cain, *The Wobblies at War*, above n 32, 205. According to Cain, McPherson was also arrested in the raid: at 206.

75 Cain, *The Wobblies at War*, above n 32, 206.

76 Ibid 205–6.

house.⁷⁷ This completed the so-called IWW Twelve.⁷⁸ A further IWW member, the chemist Harry Scully, was ‘accosted’ by detectives on September 30, and agreed to give evidence for the prosecution in return for not being charged.⁷⁹ Scully became an important element in the prosecution case.⁸⁰

The original charge has been the subject of some confusion.⁸¹ According to contemporary reports, the original charge was treason, for which the penalty was death.⁸² Both the media and the public appear to have understood that the charge was treason, and that the death penalty was a very real possibility, particularly in light of the publicity given to Sir Roger Casement’s execution for that offence in England, only a few weeks before.⁸³ Detective Moore’s report states that the original charge was treason,⁸⁴ as do a number of other references in the police correspondence at the time of the arrests.⁸⁵ Labor politicians also appear to have believed the lives of the Twelve were at stake; and Donald Grant, one of the Twelve, remained convinced for the rest of his life that ‘Billy Hughes intended placing a rope collar around our necks’.⁸⁶

The alternative possibility is that the charge was treason felony, an ‘ancient and little-used element of English law’,⁸⁷ then part of the *Crimes Act 1900* (NSW)

77 Ibid 206–7.

78 Ibid 206–8.

79 Turner, above n 17, 33. It seems that Scully agreed to become an informer after being threatened by the police with being charged with selling the fire-making chemicals: Cain, *The Wobblies at War*, above n 32, 211.

80 *Moore Report*, above n 10, 32–34. Scully had lectured members of the IWW about fire-making techniques, and was the ‘manufacturer of the instrument of destruction’: see *Ewing J IWW Royal Commission Report*, above n 70, 2; see also Turner, above n 17, 32–3.

81 ‘Warrant to Apprehend a Person Charged with an Indictable Offence’ (State Archives of New South Wales, NRS 10923, Police Special Bundles 1846–1963, Box 7/5588.2) (*IWW Twelve Warrant*).

82 See P J Rushton, ‘The Trial of the Sydney Twelve: The Original Charge’ [1973] (25) *Labour History* 53, 53.

83 See *R v Casement* [1917] 1 KB 98. Casement was hanged on 3 August 1916. The legal issue was whether he could be convicted of treason in relation to acts committed outside England: at 121. The relevant statute stated that ‘[i]t shall be treason if a man do levy war against our Lord the King in his realm or be adherent to the King’s enemies in his realm, giving to them aid and comfort in the realm or elsewhere’: at 122, citing *Treason Act 1351*, 25 Edw 3, c 2 (*Treason Act 1351*). The defence argued that the words ‘or elsewhere’ only applied to ‘aid and comfort’, not to the words ‘be adherent to the King’s enemies’. The Court rejected this contention: at 129; hence the subsequent view that Casement was ‘hanged on a comma’. For consideration of the Casement trial in the context of the general law of treason, see Graham S McBain, ‘Abolishing the Crime of Treason’ (2007) 81 *Australian Law Journal* 94, 123, and sources cited therein.

84 *Moore Report*, above n 10, 34.

85 For example, see a police telegram dated 2 October 1916 referring to the necessity of Donald Grant arriving in Sydney early on treason charges; also a letter from the Office of the Inspector General of Police headed ‘re attached warrant for the arrest of Donald Grant on a charge of treason’, as well as to ‘evidence at the Central Police Court against certain members of the IWW charged with treason’: see State Archives of New South Wales, NRS 10923, Police Special Bundles 1846–1963, Box 7/5590: IWW Papers No 101–70.

86 Rushton, above n 82, 53.

87 Cain, *The Wobblies at War*, above n 32, 204.

by virtue of the *Treason Felony Act 1848*.⁸⁸ While to a layperson the difference between the two offences might seem semantic, in fact there is an immense practical distinction; the death penalty is not available for the charge of treason felony, the maximum penalty being imprisonment for life. After some discussion, historian P J Rushton concludes that the charge was treason felony, not treason.⁸⁹ However, he points out that even the police remained confused about the difference between the two charges, noting that one detective was ‘not prepared to say anything about the difference between treason and treason felony’ during the trial.⁹⁰

The confusion is entirely understandable. As McBain has argued, both the offences of treason and of treason felony are vague, archaic and overlapping. In particular, ‘levying war against the sovereign’ may amount either to treason or to treason felony.⁹¹ The arrest warrant is in intimidating terms, but it does not deign to specify what the charge against the accused actually is. Relevantly, it states that the various accused:

have this day been charged upon oath before the undersigned ... for that they not regarding the duty of their allegiance but wholly withdrawing the love obedience fidelity and allegiance which every true and faithful subject of our Lord the King does and of right ought to bear at Sydney in the State of New South Wales ... feloniously and wickedly did compass imagine invent devise or intend to levy war against our Lord the King within His Majesty’s Dominions to wit the State of New South Wales in order by force or constraint to compel him to change his measures or counsels ... as well before as after that day feloniously and wickedly did conspire consult confederate assemble and meet together to raise make and levy insurrection and rebellion against our said Lord the King ...⁹²

88 Ibid 204–5; *Treason Felony Act 1848*, 11 & 12 Vict, c 12; see also Day, above n 25, 170. By this Act, originally dating from the English *Treason Act 1351*, ‘it was made a felony to depose the king or force him to change his counsel or “to overawe either or both Houses of Parliament”’: Cain, *The Wobblies at War*, above n 32, 204–5.

89 Rushton, above n 82, 55–6.

90 Ibid 55. See also Michael Head, *Crimes against the State: From Treason to Terrorism* (Ashgate, 2011) 106, adopting Rushton’s conclusion.

91 McBain, ‘Abolishing the Crime of Treason’, above n 83, 99. On treason and treason felony more generally, see also Graham S McBain, ‘Abolishing the Crime of Treason Felony’ (2007) 81 *Australian Law Journal* 812. Apart from ‘antiquarian curiosities’, McBain points out, treason under the *Treason Act 1351* criminalises a person who ‘levies war against the sovereign in the realm’ or who is ‘adherent to the sovereign’s enemies in the realm, giving them aid and comfort in the realm or elsewhere’: McBain, ‘Abolishing the Crime of Treason’, above n 83, 95. Originally, the levying of war had to be de facto and not just a conspiracy: at 97. However, a notion of ‘constructive’ levying developed in a number of cases, so that a riot to alter a law was treason, even if the riot was directed against Parliament rather than the sovereign: at 108. ‘Adhering to ... the sovereign’s enemies’, which is not relevant for present purposes, included committing ‘hostile acts’ or inciting ‘the enemy to invade the realm’: at 123–4. ‘Treason felony’ also includes levying war against the Sovereign, as well as compelling her to change her measures or counsels or attempting to intimidate or overawe Parliament (McBain, ‘Abolishing the Crime of Treason Felony’, 812) and urging a foreign invasion. The legislation was originally drafted to fill various gaps or perceived gaps in the old offence of treason; for example, treason did not clearly include conspiring to depose as opposed to kill the sovereign: at 813–14. More importantly, it was developed to make it clear that conspiracy to levy war, as opposed to the actual levying of war, was a criminal offence: at 816.

92 *IWW Twelve Warrant*, above n 81.

The warrant continues in these terms for seven pages, referring repeatedly to levying war, insurrection and rebellion, and to burning down buildings. Not once, however, does it name the offence, let alone refer to the legislation forming the basis of the charge. The conclusion seems inescapable that the purpose of the warrant and charge was not to provide precise information about the nature of the offences the men were said to have committed, but rather to impress upon them and their supporters the extreme gravity of their predicament. In any case, the Twelve were refused bail, and committed for trial on 20 November 1916. Five of their number (Hamilton, Fagin, Teen, McPherson and Beatty) were kept in strict solitary confinement while awaiting trial.⁹³

Meanwhile, debate about the first conscription plebiscite was reaching its peak. In September, the Labor Party had split on the issue, with Hughes being expelled from the labour movement, together with the New South Wales Premier, Holman.⁹⁴ Prime Minister Hughes identified the anti-conscription campaign with the criminality of the IWW, claiming that '[t]he IWW not only preach but they practise sabotage. ... They are to a man anti-conscriptionists'.⁹⁵ As Head points out, it 'is difficult to imagine more prejudicial and *sub judice* comments on the eve of a major political trial'.⁹⁶

To similar effect, the Sydney *Mirror* wrote:

The public now know who are behind the anti-reinforcement campaign. They know that the IWW is dominated, on the one hand, by German money and German influence, and, on the other hand, by a gang of American and other foreign criminals, who will stop at nothing to achieve their wicked ends — murder, arson, forgery, smuggling — all the crimes in the calendar.⁹⁷

Other pro-conscription slogans claimed that '[t]he Kaiser and the IWW want you to vote "No"; the Anzacs want you to vote "Yes"' and 'IWW ASSASSINS WANT YOU TO VOTE NO'.⁹⁸ Despite all of this, and much to the government's shock, and the surprise of the labour movement, the conscription plebiscite was defeated on 28 October 1916.⁹⁹

93 See 'Isolation of Prisoners and Separation of Twelve IWW Men Committed for Trial on a Charge of Treason' (State Archives of New South Wales, NRS 10923, Police Special Bundles 1846–1963, Box 7/5590: IWW Papers No 101–70). Turner comments that '[t]his was an interesting division: perhaps it represented the authorities' undisclosed view of which of the Twelve were really guilty': Turner, above n 17, 221; see also at 40, for the date on which they were committed for trial. The document itself, however, suggests an alternative explanation. Dated 16 October 1916, it states that 'Mr Lamb KC, conducting the prosecution for the Crown in this case, requests that if practicable, the Prisoners should be kept isolated when in Gaol, as it has been hinted that some of them are likely to give valuable information in connection with the charge, but are kept from so doing by the others. In the event of it not being convenient to isolate them all Mr Lamb suggests that Fagin, Beatty, Teen and Hamilton might be kept separate'.

94 Beaumont, above n 1, 235.

95 Turner, above n 17, 47–8.

96 Head, above n 90, 166.

97 See Turner, above n 17, 48.

98 *Ibid.*

99 Day, above n 25, 296.

IV THE TWELVE ON TRIAL

Three weeks later, the trial of the Twelve began. At some point, and for reasons that remain unclear, the Crown had dropped the treason, or treason felony, charge.¹⁰⁰ Instead of alleging the men wished to ‘levy war’ against the King, the Crown alleged a seditious conspiracy. The first charge was that the twelve men did ‘conspire combine confederate and agree together maliciously to set fire to certain warehouses, store houses, shops and bags of chaff in Sydney aforesaid and elsewhere ... with intent to injure’.¹⁰¹ The second was that they conspired ‘by unlawful means to procure the release from gaol of one Tom Barker before the proper termination according to law of a sentence then being served’.¹⁰² The third charge takes up more than a page of the law reports. In summary, it alleged that they had been:

unlawfully, maliciously and seditiously contriving, intending and devising to raise and create discontent and disaffection amongst liege subjects of our Sovereign Lord the King ... and to excite hatred jealousy and ill-will amongst different classes of the said subjects ... and further unlawfully maliciously and seditiously contriving intending and devising by means of intimidation to procure and effect changes to be made in the Government laws and constitution of this realm as by law established ...¹⁰³

In essence, the seditious conspiracy charge required only that the defendants advocated political change by unlawful means. Fiery words were enough. No proof of violent or unlawful acts was required.

This is borne out by an examination of the acts alleged against the individual accused. At a meeting in the Domain on 2 April 1916, it was said that Tom Glynn ‘advocated the use of sabotage against the master class and exhorted his hearers to purchase the book “Sabotage” and to read, mark and learn the methods of sabotage. At the same meeting Grant addressed the crowd and said that for every day Tom Barker was incarcerated in Long Bay it would cost the capitalist classes £10,000’.¹⁰⁴ A further meeting took place in the Domain on 27 August 1916, ‘at

100 Rushton speculates that the decision to drop treason or treason felony charges was the result of the police’s inability to obtain evidence from Fritz Georgi, an escaped German internee who had been helped by the IWW: Rushton, above n 82, 54, citing Vere Childe Gordon, *How Labour Governs: A Study of Workers’ Representation in Australia* (Melbourne University Press, 2nd ed, 1964) 147. Alternatively, as Turner suggests, it may have been simply that the Crown thought a jury was less likely to convict of an offence which carried the death penalty: Turner, above n 17, 48–9.

101 *R v Reeve* (1917) 17 SR (NSW) 81, 87.

102 *Ibid.*

103 *Ibid* 87–8.

104 *Ibid* 99.

which Grant, Glynn, Reeve and Larkin spoke, all advocating sabotage'.¹⁰⁵ When Reeve was arrested on 23 September, he had the book 'Sabotage' with him, 'a most dangerous and mischievous publication', according to the Court of Criminal Appeal, which 'does inculcate doctrines in the highest degree subversive of law and order and incites its readers to fraud, dishonesty and destructiveness'.¹⁰⁶ As for Besant, he was 'an associate of many of the other accused' and was 'present at the meeting of 10 September when Reeve and Larkin made most violent and seditious speeches'.¹⁰⁷ Moreover, he was arrested on 23 September in possession of a parcel containing cotton waste.¹⁰⁸

Nevertheless, much of the argument before the jury appears to have revolved around the question of whether the Twelve had in fact conspired to destroy life and property in the factory fires. J B King, the only one of the men to conduct his own defence,¹⁰⁹ said that 'there was not enough evidence to convict "a sick cat"'. As for the alleged conspiracy, the IWW was opposed to violence; the destruction of life and incendiarism were "unthinkable" to the accused'.¹¹⁰ Lamb KC for the Crown said that the question was whether the accused 'had tried to burn down Sydney' — not necessarily themselves, but by remaining 'behind the scenes while others, their dupes, did the work'.¹¹¹

In summing up, Pring J took care to point out to the jury that sedition included 'the promotion of "ill-will or hostility" between different classes', a formulation

105 Ibid 100. The actual summons refers only to Reeve, Grant and Larkin, not to Glynn: 'Re: Charles Reeve, Donald Grant, and Peter Larkin, Charged with Using Abusive Words in the Domain on Sunday the 27/8/16, whilst Addressing a Meeting of the IWW Union' (States Archives of New South Wales, NRS 10923, Police Special Bundles 1846–1963, Box 7/5590: IWW Papers No 101–70). It is noteworthy that there is no suggestion of words advocating sabotage in the original police court proceedings against Reeve and Larkin, which are only for using 'abusive words.' Larkin was convicted before Mr Love SM at the Central Police Court on 4 September 1916 for using abusive words, to wit, 'Morris Hughes is going to try and do the same to Australian women and children as they did at Petersfield near Manchester where little children and women were done to death. Hughes is what is commonly known as a pimp. The soldiers who returned never went to fight they went to pimp and rob dead soldiers. They were bludgers on women, some of them'. He was sentenced to pay a fine of five pounds. As for Reeve, he was convicted on the same day before the same magistrate for using abusive words, to wit, 'The Censor will put his blue pencil through anything said about Mr Billy Hughes and Mr Pearce, Bill Hughes, Ha! Ha! Jesus Christ Billy Hughes and Saint Peter Mr Pearce, they were elected to voice the grievances of the workers in Parliament, but what have they done, sold their birthright for a mess of pottage. Lousy Bill Hughes and scabby Mr Pearce have torn the entrails out of Labor'. He was also sentenced to a fine of five pounds: see State Archives of New South Wales, NRS 10923, Police Special Bundles 1846–1963, Box 7/5588.2. Needless to say, these words, while no doubt fiery, fall far short of advocating sabotage.

106 *R v Reeve* (1917) 17 SR (NSW) 81, 102 (Gordon J). Reeve had also written a letter containing references to sabotage, including the following words: 'Let us see to it that the kittens travel and Bryant and May's is not dead yet. Tell all rebels to put on the shoes and kick like hell; it's high time something was done, and now's the time to do it. Motions and philosophising is not much good. It's action that counts': *Ewing J IWW Royal Commission Report*, above n 70, 2.

107 *R v Reeve* (1917) 17 SR (NSW) 81, 104.

108 Ibid. According to Turner, the cotton waste for which Besant was arrested was 'about in the print-shop where he was working': Turner, above n 17, 209. He adds that Besant was probably picked up because he 'was suspected of participation in the forgeries [and] the police had been unable to make this stick'.

109 *R v Reeve* (1917) 17 SR (NSW) 81, 88–9.

110 Turner, above n 17, 54.

111 Ibid.

which included ‘the propagation of class war’.¹¹² He added, anticipating somewhat the jury’s deliberation, that the British people were only entitled to discuss matters in a ‘fair and temperate way’, and that the IWW went clearly beyond this limit.¹¹³

The jury took just five hours to find the men guilty. Seven of them were convicted on all three counts; four of them of two counts; and one man, J B King, of one count of ‘seditious conspiracy’.¹¹⁴ Before sentencing, the Twelve gave speeches in which they denied their guilt, and accused the prosecution of mounting a conspiracy against them because of their advocacy of revolution and the class war.¹¹⁵ Pring J, in sentencing, described their actions as ‘the act of devils’, for which it was his duty to pass a ‘heavy penalty’.¹¹⁶ He gave the seven men fifteen years hard labour; four men ten years; and J B King, who was already in prison on the forgery charge, five years on one count, to be served after his sentence for forgery had expired.¹¹⁷ All this took place on 1 December 1916, not much more than two months after the men’s arrest.¹¹⁸

A The Tottenham Murder Trial

Almost in parallel with these events, eleven IWW men in Western Australia were charged in Perth with seditious conspiracy to raise ‘discontent and disaffection’ among the subjects of the King.¹¹⁹ There was no specific allegation of arson; the prosecution seems to have alleged that the IWW itself, as an organisation, was a seditious conspiracy.¹²⁰

Even more seriously, a couple of IWW men were on trial in Bathurst for their lives. On 26 September 1916, three days after the arrest of the IWW Twelve, a police constable, George Duncan, had been sitting at his desk in the New South Wales town of Tottenham, about four hundred miles from Sydney, when he was struck and killed by two .32 calibre bullets fired through the police station’s open window.¹²¹

112 Head, above n 90, 167, citing Turner, above n 17, 54–5.

113 Turner, above n 17, 54–5; Head, above n 90, 167.

114 ‘Letter, Metropolitan Superintendent to Darlinghurst Police Station’ (State Archive of New South Wales, NRS 905, Letters Received, Box 5/7442: Papers Relating to the Conviction of IWW Members, Letter 16/40351).

115 Workers’ Defence and Release Committee, *Speeches from the Dock of New South Wales and West Australian IWW Members Convicted of Treason* (H Cook & Co Print, 1917).

116 ‘The King v Reeve and Others: Sentence’ (State Archives of New South Wales, NRS 905, Letters Received, Box 5/7442: Papers Relating to the Conviction of IWW Members, Letter 16/40351) 2. Pring J was ‘a governor of The King’s School [in Sydney], and president of its Old Boys’ Association’: Tony Cunneen, ‘Supreme Court Judges in the First World War’ [2009] (Winter) *Bar News: Journal of the NSW Bar Association* 73, 77. His son, Phillip, ‘enlisted in the Field Artillery in November 1916 ... at the height of the publicity surrounding the trial’, although he did not sail for the war until 1918. His clerk, Edmund Beaver, was wounded in action: at 78.

117 *Extracts from Certificate of Conviction*, above n 33; Turner, above n 17, 57–9.

118 *A-G (NSW) v Bailey* (1917) 17 SR (NSW) 170.

119 Workers’ Defence and Release Committee, above n 115.

120 Turner, above n 17, 45; Head, above n 90, 166–7.

121 *Moore Report*, above n 10, 12–13; John Patten, *Ned Kelly’s Ghost: The Tottenham IWW and the Tottenham Tragedy* (Kate Sharpley Library, 1997) 11–12; see also Gray, above n 20, 260.

Within a couple of days, Criminal Investigation Branch police officers arrested two local IWW members, Roland Kennedy and Frank Franz. Franz initially denied involvement, but on 30 September, he ‘confessed to the murder, and blamed Roland Kennedy, along with Kennedy’s older brother, Herb’.¹²² As Franz later said, ‘it was stated to him that, if he made a confession and gave evidence for the crown, his life would be spared and he or his family would probably receive the reward’ of some £200.¹²³

On 16 October 1916, just three weeks after the killing, the two men were put on trial in Bathurst.¹²⁴ The judge was the New South Wales Chief Justice Sir William Cullen. The motive for the murder seemed somewhat inadequate — Duncan and Roland Kennedy had exchanged words after the arrest of an IWW man for offensive language the day before, during which one of them (it was not clear who) had accused the other of being illiterate.¹²⁵ Faced with this, the prosecution elected for an all-out assault on the IWW, saying the men ‘had their minds inflamed and saturated by the pernicious literature of that body, which was found at their residences’.¹²⁶

Franz and Kennedy both pleaded not guilty, blaming each other for instigating the crime.¹²⁷ Franz no doubt hoped his deal with the prosecution would save his life. If so, he was to be disappointed. The jury took less than an hour to find both men guilty, and the judge, ignoring any question of a deal, promptly sentenced both men to death by hanging.¹²⁸ Roland Kennedy reportedly thanked the jury, and said to Franz: ‘I hope they will give us the same length of rope.’¹²⁹

The IWW mounted a public campaign to have the men’s lives spared, as did other opponents of capital punishment, including the Labor Party.¹³⁰ The prospects for success seemed reasonable. The New South Wales Premier, Holman, was a former Labor man who had always opposed capital punishment, and had in fact been Attorney-General when Cabinet commuted a death sentence imposed on a

122 Gray, above n 20, 260.

123 Patten, above n 121, 13, quoting ‘Tottenham Murder’, *National Advocate* (Bathurst), 2 October 1916, 1.

124 Turner, above n 17, 41; Day, above n 25, 204. See also *Moore Report*, above n 10, 14, which has the date of the trial as October 18.

125 Day, above n 25, 183–4.

126 Patten, above n 121, 15, quoting John D Fitzgerald, *Studies in Australian Crime: First Series* (Cornstalk Publishing, 1924) 157; see also Turner, above n 17, 42.

127 Kennedy in fact pleaded guilty at first, having failed to understand the trial process. He changed the plea after the judge explained to him that he would have the chance to explain the circumstances of the crime only if he pleaded not guilty: Day, above n 25, 204, quoting ‘Tottenham Murder’, *National Advocate* (Bathurst), 19 October 1916, 1.

128 Day, above n 25, 208.

129 Ibid, quoting ‘The IWW Two Members Sentenced to Death’, *The Advertiser* (Adelaide), 19 October 1916, 6.

130 ‘Leaflet against Capital Punishment, and the Sentence of Death Passed on the Tottenham Murderers, Said to Emanate from the IWW Which are Being Distributed from Door to Door in Sydney and Suburbs’ (State Archives of New South Wales, NRS 10923, Police Special Bundles 1846–1963, Box 7/5590: IWW Papers No 101–70).

young man for murder about five years before.¹³¹ However, the men's appeals to the Executive Council and the Court of Criminal Appeal were swiftly rejected.¹³² The two were executed at Bathurst jail on 20 December 1916, less than three months after their crime — Franz, at least, in breach of a deal with the police, and after giving 'King's Evidence', an event 'without precedent in any British community', according to the weekly magazine *Truth*.¹³³

As far as the 'Wobblies' were concerned, there was no doubt that political motivations were behind the harshness of the sentences. On 21 December 1916, the day after the executions, the *Sunday Times* printed a cartoon showing the ghost of Ned Kelly, in full armour, standing, arms folded, behind an IWW man holding a rifle and a firestick. 'If they hanged me, what should be done with him?', the caption reads.¹³⁴

B The Appeals and the Unlawful Associations Act 1916 (Cth)

The IWW began a campaign for the release of the Twelve. Even prior to the convictions, they had formed Workers' Defence Committees in Sydney, Melbourne, Brisbane, Adelaide and Broken Hill.¹³⁵ Now they stepped up the rhetoric, claiming with typical flourish (and with reference, once again, to the Prime Minister's promise to fight 'with the ferocity of a Bengal tiger') that the men:

ARE NOT CONVICTED NOR SENTENCED on the strength of that evidence. THIS IS THE FIRST STAMP OF THE 'IRON HEEL' IN THE FACE OF LABOR! ... We, the working class, cannot afford to lose their services, and we are going to fight like tigers to see that the capitalist class does not keep them from us. CAN WE COUNT ON YOUR HELP?¹³⁶

Despite a history of animosity between them, other sections of the labour movement swung their support strongly behind the IWW men. This was particularly true of Henry Boote, the editor of the Australian Workers' Union weekly, the *Australian Worker*. On 8 December 1916, the Twelve lodged notices of appeal.¹³⁷ On 14 December, Boote published an article, 'The Case of Grant: Fifteen Years for Fifteen Words'. In this article he claimed that:

only a Judge as insolent as he was bitterly biased [sic] could have handed out fifteen years for that, and pretended he was dealing lightly with the prisoner at the bar. ... It is one of the most ghastly atrocities that the law has ever been guilty of,

131 Day, above n 25, 220, citing 'The Glebe Murder', *The Sydney Morning Herald* (Sydney), 29 February 1912, 10.

132 New South Wales Executive Council Office, 'Minute Paper for the Executive Council, 1916' (State Archives of New South Wales, NRS 905, Letters Received, Box 5/7400: Bundle 16/11242).

133 Day, above n 25, 215–16.

134 Patten, above n 121, 1; see also Day, above n 25, 228–9.

135 Turner, above n 17, 61.

136 Ibid 63–4.

137 *A-G v Bailey* (1917) 17 SR (NSW) 170, 171.

and that is saying something. I feel dizzy with amazement when I think of it. It turns me hot and cold with indignation.¹³⁸

Together with the paper's proprietor, John Bailey, Boote was charged with contempt; in March 1917 he was convicted, with both defendants being ordered to pay costs.¹³⁹

At the same time, Hughes was stepping up his campaign against the IWW. Now head of a new National Labor Party government,¹⁴⁰ Hughes needed to 'demonstrate his untrammelled assertiveness' against an organisation he viewed as 'providing ideas and inspiration to people opposed to the government's war policy'.¹⁴¹ The triggers for the ban were the failure of conscription, and the split within the Labor Party.

In December 1916, Hughes introduced the Unlawful Associations Bill 1916 (Cth) into federal Parliament, providing that any organisation which 'by its constitution or propaganda, advocates or encourages ... the taking or endangering of human life, or the destruction of property' was unlawful.¹⁴² In introducing the Bill, Hughes stated: 'I say deliberately that this organisation holds a dagger at the heart of society, and we should be recreant to the social order if we did not accept the challenge it holds out to us. As it seeks to destroy us, we must in self-defence destroy it.'¹⁴³

Meanwhile, the appeals of the Twelve proceeded. The men argued that there was no evidence to support the verdict, or that it was against the weight of evidence.¹⁴⁴ They also took issue with various points of evidence, notably that the prosecution should have directed the jury that McAlister was an accomplice, and that therefore his evidence should only be accepted if corroborated.¹⁴⁵ They contended that the Goldstein brothers, who had also given evidence for the prosecution, were also potentially accomplices.¹⁴⁶ Finally, they appealed against sentence. Submissions began on 26 February 1917, and took seven days.¹⁴⁷

138 Turner, above n 17, 65–6, quoting Henry Boote, 'The Case of Grant: Fifteen Years for Fifteen Words', *Worker* (Sydney), 14 December 1916; *Ibid* 172–3; 'The Case of Grant' (State Archives of New South Wales, NRS 10923, Police Special Bundles 1846–1963, Box 7/5597: IWW Unsorted Papers).

139 'Henry Ernest Boote: Convictions' (State Archives of New South Wales, NRS 10923, Police Special Bundles 1846–1963, Box 7/5597: IWW Unsorted Papers).

140 Beaumont, above n 1, 245.

141 Cain, *The Wobblies at War*, above n 32, 227.

142 See Andrew Lynch, Nicola McGarrity and George Williams, 'Lessons from the History of the Proscription of Terrorist and Other Organisations by the Australian Parliament' (2009) 13 *Legal History* 25, 28, quoting *Unlawful Associations Act 1916* (Cth) s 3(b); see also Turner, above n 17, 69–70. The Preamble made the true purpose of the legislation clear: 'Whereas an Association known as the Industrial Workers of the World and members thereof have been concerned in advocating and inciting ... And whereas it is expedient for the effective prosecution of the present war that laws shall be enacted for the suppression of such practices'.

143 Lynch, McGarrity and Williams, above n 142, 29, quoting Burgmann, above n 27, 215.

144 *R v Reeve* (1917) 17 SR (NSW) 81, 89.

145 *Ibid* 89, 91.

146 *Ibid* 89–90.

147 Turner, above n 17, 80.

On 10 March, Gordon J of the New South Wales Court of Criminal Appeal delivered judgment. He rejected the argument that the trial judge had failed to direct the jury on the matter of whether McAlister was an accomplice, stating that the judge's directions were adequate on this matter. On the question of the Goldsteins, Gordon J stated that the trial judge:

did not tell the jury that they were not accomplices, but merely stated — correctly, as counsel for the appellants admit — that there was no suggestion that they were accomplices. In our opinion there was no evidence that the Goldsteins were accomplices.¹⁴⁸

On the other issues as well, the Court of Criminal Appeal supported the directions and decision of Pring J. The convictions and sentences of the Twelve were confirmed, with the sole exceptions that the convictions of Tom Glynn and Don McPherson on the count of conspiring to secure Tom Barker's release were quashed, and their sentences reduced from 15 to 10 years.¹⁴⁹ The Court of Criminal Appeal even affirmed the conviction of Beatty, who was convicted solely on the evidence of an admitted accomplice, Scully. Gordon J did so on the basis that the trial judge had adequately warned the jury that it ought not to convict on an accomplice's uncorroborated evidence; and that as the jury had done so nevertheless, it ought not to interfere with that verdict.¹⁵⁰

In the period between the trial and the appeal, the police had distributed a £600 public reward which had been offered in the arson cases. The four police informants got the lion's share of the money: McAlister £250; Harry Scully £200; and the Goldstein brothers £60 each.¹⁵¹

V THE RELEASE CAMPAIGN AND THE SUPPRESSION OF THE IWW

The defendants and their advisors decided that further appeal would be useless in light of the Court of Criminal Appeal's decision. Instead, the IWW and its supporters put their trust in a broad public campaign. By the end of March 1917,

148 *R v Reeve* (1917) 17 SR (NSW) 81, 92 (Gordon J).

149 *Ibid* 102, 105, 109.

150 *Ibid* 107. In concluding, Gordon J added (at 110) that:

[i]f wrongs exist they can under our constitution be remedied by proper and legal methods, but it is contrary to the interests of all members of the community that law and order should be set aside and a reign of terror and violence be set up in their place. The offences charged in this indictment are such as cannot for a moment be allowed to pass unchallenged, and if proved deserve and should receive severe punishment.

151 'Expenses Incurred by the Police Department in Connection with the Conviction of the Twelve Members of the IWW Organisation in 1916' (State Archives of New South Wales, NRS 10923, Police Special Bundles 1846–1963, Box 7/6720: IWW Police Miscellaneous Papers 1917–1929); See also New South Wales, *Inquiry under the Police Inquiry Act, 1918: Report of Mr Justice Street, the Commissioner Appointed by the Act* (1919) 19–20, 22 ('Report of Mr Justice Street'); Turner, above n 17, 71–2.

the Defence and Release Committee had collected over £1000 to support the prisoners' families and to campaign for their release.¹⁵²

By the end of 1917, the IWW itself had been effectively suppressed.¹⁵³ On 18 July 1917, Hughes introduced a Bill to amend the *Unlawful Associations Act 1916* (Cth). It specified a jail term of six months for any person who remained a member of the IWW one month after the declaration of the Act.¹⁵⁴ It also provided for a jail term of six months 'for printing and distributing IWW material and prohibited the transmission of that material through the post'.¹⁵⁵ Hughes refused to justify the legislation, other than to quote from IWW literature extolling the virtues of sabotage, and linking the trade unions, the Australian Labor Party and other anti-conscription forces to the IWW.¹⁵⁶ Labor members such as Frank Anstey noted that the IWW continued to serve Hughes as an all-purpose scapegoat, and that it had helped Hughes win the election in May 1917.¹⁵⁷ In any case, within weeks over 80 IWW members had been rounded up and jailed, effectively destroying the IWW as an organisation.¹⁵⁸

Nevertheless, other elements of the labour movement, especially Henry Boote in the *Australian Worker*, continued to argue strongly that the prosecution case against the Twelve was deeply flawed. In June and July 1917, he produced pamphlets questioning the evidence given by the Crown witnesses, suggesting 'they always found what they wanted to find and heard what they wanted to hear; and the accused were extremely obliging, because they always provided the Crown with the evidence it wanted'.¹⁵⁹

This public commentary troubled the New South Wales Premier, Holman. Even more troubling was the behaviour of the police informants, particularly McAlister and Scully, who were both seeking more money.¹⁶⁰ In early 1917, each filed writs against the New South Wales Government, alleging breach of agreements reached that they would be paid for supplying information about the IWW.¹⁶¹ In late April 1917, McAlister rather suddenly and perhaps suspiciously died; but Scully continued to cause trouble, and in early 1918 told a journalist from the *Telegraph* newspaper, Roy Connolly, that six of the IWW Twelve knew nothing of any arson case, and that the evidence was rigged against the others.¹⁶²

152 Turner, above n 17, 85.

153 This was done partly through a further amendment to the *Unlawful Associations Act 1916* (Cth), authorising the government to declare any association illegal whose purposes were those proscribed by the Act: see, eg, Turner, above n 17, 86–9.

154 Cain, *The Wobblies At War*, above n 32, 256.

155 Ibid 256–7.

156 Ibid 258.

157 Ibid 258–9.

158 Turner, above n 17, 89. 'One after another, they mounted the stump to offer themselves as sacrifices for their movement. ... There was, among the Wobblies, an air of eagerness to make their sacrifice ... Surviving IWW opinion describes the death struggle of the Wobblies as an act of courage, but it was rather — as Tom Glynn said — misplaced bravado': at 87, 89. See also Head, above n 90, 90.

159 Turner, above n 17, 97–8.

160 Ibid 102.

161 Ibid.

162 *Report of Mr Justice Street*, above n 151, 36, 46; Turner, above n 17, 102–4.

Scully was sacked from his job at a coal workers' union, and he claimed to be in fear of his life. After some negotiation, the police and the government offered him £150 to get out of the country.¹⁶³ He sailed for San Francisco on 26 June 1918¹⁶⁴ — not before showing Davis Goldstein, another police informant, a copy of his written statement to the defence.¹⁶⁵ On 16 April 1918, Goldstein also provided a written statement admitting that he had given false evidence at the trial.¹⁶⁶

A The Royal Commissions

In August 1918, the New South Wales government appointed Street J to 'inquire into certain charges made against members of the police force in respect of their conduct in connection with the case of *The King v Reeve and others*'.¹⁶⁷ It sat for 47 days, hearing evidence from Scully, who had been brought back from America for the purpose, and from the Goldstein brothers.¹⁶⁸ His report, dated 11 December 1918, stated:

that the charges of misconduct made against members of the police force ... have not been established as a fact, and that nothing has been brought before me which raises any suspicion in my mind that misconduct, in fact, took place ... I have to report that no fresh facts have been elicited before me raising any doubt in my mind as to the guilt of the convicted men.¹⁶⁹

This was an extraordinary finding; and it was viewed in this light by the defence campaign, especially Boote, by then writing for the New South Wales Labor Council.¹⁷⁰ In March 1919, the Council published a 63-page pamphlet written by Boote, 'Set the Twelve Men Free'.¹⁷¹ The pamphlet went at length through the confessions of Scully and Davis Goldstein, as well as allegations of bribery by

163 Turner, above n 17, 109.

164 Ibid 108–9.

165 'What Are You Doing for the Release of the 12 IWW Men: Statement of HC Scully, Handed by Him to E E Judd' (State Archives of New South Wales, NRS 10923, Police Special Bundles 1846–1963, Box 7/5588.2). According to Verity Burgmann, 'Scully was kicked to death [in 1921] by police who were afraid he was about to squeal': Burgmann, above n 27, 214. Turner states that Scully died, more prosaically, of meningitis: Turner, above n 17, 253.

166 Goldstein's statement is Appendix D to Justice Street's report: *Report of Mr Justice Street*, above n 151, 63; Turner, above n 17, 112.

167 *Report of Mr Justice Street*, above n 151, 1; Turner, above n 17, 117 (emphasis in original).

168 Turner, above n 17, 135–6. According to Turner, Scully was 'an extraordinary witness', 'alert and intelligent ... respectful to the court, never showing resentment or anger', while Davis Goldstein was 'belligerent' and his brother Louis 'nervous'. According to the Street Commission, Davis Goldstein was 'evidently a man of not much education, but he has considerable natural ability, he is fluent of speech, very vain, probably very arrogant and overbearing among his associates, reckless, and unprincipled, and he has a front of brass': *Report of Mr Justice Street*, above n 151, 10. Scully 'had agreed to return [to Australia] on condition that his return fare, living expenses and fare back ... be paid': Cain, *The Wobblies at War*, above n 32, 222.

169 *Report of Mr Justice Street*, above n 151, 56–7, cited in Turner, above n 17, 140.

170 Turner, above n 17, 226.

171 Henry E Boote, *Set the 12 Men Free: An Examination of the Sensational Fresh Facts Brought Out before the IWW Royal Commission* (Committee Appointed by the New South Wales Labor Council to Secure a Royal Commission to Investigate the IWW Cases, 1919); Ibid.

the police.¹⁷² In reply, Holman published articles in the *Sunday Times* attacking Boote, detailing uncontradicted evidence about fire-making from Scully and McAlister, and noting that the fires had stopped once the IWW men were in jail.¹⁷³ However, Holman's arguments did not stop the continuing view in the Labor Party that there was a good chance the men had been unjustly jailed.

In June 1920, a new Labor government appointed a further Royal Commissioner, Ewing J of Tasmania. His commission was much wider than the previous Street inquiry, being to inquire into '[a]ll facts and circumstances surrounding or relating to ... the ... trial of the prisoners or which shew or may tend to shew the guilt or the extent of the guilt or the innocence of the prisoners or any of them'.¹⁷⁴ His report described Scully and the Goldsteins as men 'capable of almost anything to serve their own ends, and [who] would not hesitate to take any steps in the way of making evidence to incriminate others'.¹⁷⁵ This included lighting some of the incriminating fires, which had occurred at times and in a manner that could not possibly have caused any real damage.¹⁷⁶

Ewing J considered that six of the Twelve had been wrongly convicted; that four had been rightly convicted on one of the charges, seditious conspiracy, but that their sentences had been excessive, and they should be released; and that King's sentence also was excessive. Only Charlie Reeve remained in jail — at least until November 1921, when with remissions he was quietly released.¹⁷⁷

VI CONCLUSION

By then, at least as far as the IWW was concerned, it no longer mattered. The war was over; the IWW was long spent as a political force. All the political imperatives had long gone to keep these men in jail, or to maintain the fiction that the Industrial Workers of the World were a menace to the fabric of society, against whom the most repressive legal measures were justified to protect the state's security. The

172 Turner, above n 17, 226.

173 Ibid 226–7, citing 'The Worker Abandons the One Big Union: But Continues its IWW Agitation', *Sunday Times* (Sydney), 30 March 1919, 3.

174 *Ewing J IWW Royal Commission Report*, above n 70, iii; see also Turner, above n 17, 234.

175 *Ewing J IWW Royal Commission Report*, above n 70, 2. Turner quoted Ewing J as having said that the informers were 'persons of such a character that they may justly be described as liars and perjurers, and men who, whenever it served their own ends, and irrespective of the consequences to other persons, would not hesitate to lie, whether upon oath or otherwise': Turner, above n 17, 237, quoting *Ewing J IWW Royal Commission Report*, above n 70.

176 *Ewing J IWW Royal Commission Report*, above n 70, 3. Ewing J considered that the later fires were not lit by the same people who had lit the earlier, destructive fires, and were not lit with destructive intention, but with the intention of creating suspicion and evidence against those who were wanted for the earlier fires.

177 *Ewing J IWW Royal Commission Report*, above n 70, 4–13; Turner, above n 17, 238, 247. According to Ewing J, Reeve had openly and publicly advocated 'sabotage' in speeches and in a letter in which he referred to Messrs Bryant and Mays: at 238. Turner considers that Ewing's finding on Reeve was 'strange', since he was guilty of no more than unwise words about sabotage; and that three men who were in all probability involved were released.

War Precautions Act itself was repealed at the end of the war,¹⁷⁸ together with the *Unlawful Associations Act 1916* (Cth). These pieces of legislation, however, cast a long shadow — parts of them reappeared, in slightly altered form, in the unlawful associations provisions of Part IIA of the *Crimes Act 1914* (Cth), amended in 1926 following a seaman's strike; and most notoriously they reappeared eventually after World War II, in the *Communist Party Dissolution Act 1950* (Cth).¹⁷⁹

Were the men, or any of them, guilty of any criminal offence? There is no doubt that some of them spoke flamboyantly, not to say foolishly, about sabotage and even arson, in pursuit of the IWW's aims. The labour movement had some history in the use of arson, which was sometimes used by shearers as a way of getting revenge on exploitative employers; and Tom Barker himself speaks in a guarded and opaque fashion of the use of arson in his memoirs.¹⁸⁰ However, that is a long way from saying any of them lit the Sydney factory fires between June and August 1916.

In fact, the only evidence connecting any of the IWW men with these fires is the stories of the four police informers, McAlister, Scully and the Goldstein brothers. None of these men came forward with their stories at the time. They only did so in September 1916, when the conscription debate was reaching its peak, and the politically powerful were keenest to forge a link in the public's mind between anti-conscriptionists, the IWW and subversive acts. September was when the rewards were issued for information about the fires,¹⁸¹ and when the police raided the IWW headquarters and arrested the men later known as the 'Twelve'. Most significantly, it was when the unsuccessful and remarkably amateurish fires were lit at various premises around Sydney, fires which caused no damage but which had the effect of heightening the public fear of the IWW and fires.

That the fires were not the work of the earlier arsonists, whoever they were, seems evident; the conclusion that they were lit by police or their agents in an effort to boost the case seems almost inescapable. This is not to say that none of the IWW men had been involved in arson. Some of them probably were, as Barker

178 See *War Precautions Act 1918* (Cth), assented to on 25 December 1918. This legislation in fact extended the operation of the *War Precautions Act 1914* (Cth) until 31 July 1919.

179 Roger Douglas, 'Keeping the Revolution at Bay: the Unlawful Associations Provisions of the Commonwealth *Crimes Act*' (2001) 22 *Adelaide Law Review* 259–97, 260–1.

180 As Barker writes (see Fry, above n 28, 28–9):

there was nothing new about fire dope. It was just a mixture of phosphorus and calcium disulphide. ... It had been used in Australia by shearers over many generations to get rid of faulty accommodation. ... We had many little groups working amongst us who were doing various things, and those things were deadly secret and they kept them to themselves, so that you might be God Almighty in the organisation, but you wouldn't know half a dozen things that were going on. ... The point is this: the police never did catch anyone actually with the stuff. They certainly had it themselves in the Police Department ... The police were naturally born lazy, they were always hopelessly out of touch with everything, so if they couldn't find evidence they had to make it.

181 The reward was £500, issued on 15 September 1916: Turner, above n 17, 23.

himself admitted, although not the prominent IWW members swept up in the police raids.¹⁸²

Even if any of them were involved in arson, there is little or no evidence in support of the further and more serious charges of conspiracy and seditious conspiracy, let alone treason. To begin with, it makes no sense to say, as the prosecution alleged, that the motive of the men in lighting the fire was to secure Tom Barker's release. As Turner points out, if this had been their motive they would have burnt Commonwealth and not private property, and advertised rather than sought to hide their involvement.¹⁸³ As for the charges of raising 'discontent and disaffection' among the King's subjects,¹⁸⁴ such as to amount to a seditious conspiracy, these are so vague as to be almost meaningless. Some of the men spoke in an inflammatory way of class war, as was the habit of IWW members more generally; but there is no evidence at all that their acts went beyond mere words.¹⁸⁵

As this article has argued, the case as a whole was overwhelmingly a police frame-up, eagerly supported by the law and by the courts. It was almost certainly not ordered from 'on high', although the Prime Minister was informed and took a keen interest in the investigation's progress.¹⁸⁶ This was not necessary, since the police and others involved in the cases understood with some precision what was politically desired, and went to considerable pains to provide it. The injustice was eventually uncovered, but only when the political heat had gone out of the issue; and even then those most closely involved in the frame-up escaped all censure in the Ewing J Royal Commission, let alone criminal charge.¹⁸⁷

The episode is almost forgotten now in Australian history. Nevertheless it is an extraordinary one — not least because of the enormous official effort involved in a police investigation, trial, Supreme Court appeal, then two Royal Commissions,

182 On the basis of Scully and Goldstein's statutory declarations during the release campaign, Turner concludes that of the Twelve, Fagin, Teen and Hamilton were probably guilty of at least one of the arson attacks, and that Beatty, Glynn and McPherson may have been involved: Turner, above n 17, 205–6. He argues that the police frame-up originated with Detective Moore, who hired an American private eye named Joe Brown to spy on the IWW in July 1916: at 206. Brown reported talk of arson, and Moore then assigned another police officer, Detective Fergusson, to help him. Fergusson knew McAlister, and offered to put him on the payroll in return for information, which McAlister obligingly provided. There is no evidence that the prominent IWW members Larkin, Reeve and Grant were involved.

183 Turner, above n 17, 194.

184 Ibid 45.

185 Turner argues that sedition 'is essentially a political offence', and so is 'characteristically used against propagandists', who are most likely to be charged and convicted at times of political crisis, when their suppression suits the needs of the powerful: Turner, above n 17, 143, quoted in Head, above n 90, 168.

186 Turner, above n 17, 208. Turner cites evidence that Hughes knew about the arson case and was pressing for quick action; also that the New South Wales government was pressing for speedy trials.

187 Turner writes that Ewing J's 'questions to the police witnesses made it quite clear that he had no difficulty in believing that the police might cook a case, but his report made it equally clear that he felt it impolitic to say so': Turner, above n 17, 239. If this were the case, it would support Turner's suggestion of an 'unacknowledged agreement' between the police and their judicial superiors: at 256. It was the job of the police to create the case against those their superiors judged undesirable, and to do it even where this involved corruption and malpractice; and it was the job of the politicians and judiciary to pretend that this never occurred.

into some factory fires that caused property damage, but no loss of life. All this took place against the backdrop of the Somme and the aftermath of Gallipoli. Whatever was going on in the wider world, the small protest group was important enough to merit the government's closest attention: a case of attacking the Sab-Cat with the ferocity of a Bengal tiger, to adopt the argot of the times — or using the sledgehammer of the state to crack a nut. The case therefore remains relevant in more modern times. It demonstrates the ability of the organs of the state — including intelligence and police agencies, and the courts — to orchestrate a frame-up, and to manipulate and switch charges in order to obtain the politically desired result.