

**THE LIMITS OF POLITICAL LIBEL:  
CONSCRIPTION AND THE *RYAN V THE ARGUS*  
LIBEL TRIAL**

MARK LUNNEY\*

*The conscription referendums of the First World War remain amongst the most divisive events in Australian political history. They sparked a number of libel actions, the most prominent of which was (in effect) between the leaders of the ‘pro-’ and ‘anti-’ conscription campaigns in the second referendum in December 1917: WM Hughes and TJ Ryan. The action, which resulted ultimately in an award of contemptuous damages to Ryan, reflected the limits of libel law, particularly in a jury trial, to deal satisfactorily with highly politicised issues such as conscription. Using archival and newspaper sources, this article argues that Ryan’s faith in the legal and constitutional issues at the heart of his claim were misplaced given the doctrinal and forensic limits of the defamation action. Moreover, the conflict over the extent of federal power which lay at the heart of the political dispute gave the law of political libel in practice a field of operation with a distinctively Australian context.*

CONTENTS

I	Introduction.....	2
II	TJ Ryan and the Censorship of Hansard .....	6
III	The Aftermath of the Seizure of Hansard No 37 .....	10
IV	Defamation Action and Further Incitement .....	13
V	The First Trial .....	19
VI	The Second Trial.....	24
VII	The Significance of the Case .....	27
VIII	Conclusion .....	31

\* LLB (Hons), BA (Qld), LLM (Cantab); Professor of Law, University of New England; Visiting Professor, Dickson Poon School of Law, King’s College London. The research for this article was supported by an Australian Research Council Discovery Grant (DP130103626: England’s Obedient Servant? A History of Australian Tort Law 1901–1945). Thanks are due to my research assistant, Peta Lisle, for her outstanding archival and editorial assistance, and to Paul Mitchell for his comments on an earlier draft. Earlier versions were delivered to the London Legal History Seminar in October 2015 and as part of the 2016 Rare Books Lecture, delivered by the author at Melbourne Law School on 21 July 2016, and thanks are also due to participants in those events. I also acknowledge the helpful comments of the referees for this article.

Cite as:

Mark Lunney, ‘The Limits of Political Libel: Conscription and the *Ryan v The Argus* Libel Trial’ (2017) 41(2) *Melbourne University Law Review* (advance)

## I INTRODUCTION

The conscription referendums of 1916 and 1917 were two of the most divisive events in Australian political history. Nowhere was this more in evidence than in Queensland where the state Labor government of Thomas James (‘TJ’) Ryan provided a focal point for opposition, particularly in 1917 when Ryan occupied the position of unofficial leader of the opposition to conscription abroad.<sup>1</sup> When, at the zenith of the 1917 debate, Melbourne’s *The Argus* newspaper published highly derogatory comments about Ryan and the Ryan government, Ryan sued the paper for libel. But while the proprietors of the *The Argus* were the named defendants, the action was very much a trial between the political personages that had supported different sides in the conscription debate: Ryan for the ‘no’ side and Prime Minister WM Hughes for the ‘yes’.

Libel, in both its civil and criminal forms, was an important feature of the Australian political landscape from early colonial times until the *Ryan v The Argus* case (and beyond).<sup>2</sup> While criminal libel became less used in the second half of the 19<sup>th</sup> century as a means of controlling political dissent — in part because of the first significant Australian statutory amendment to the law of libel in 1847<sup>3</sup> — civil actions for libel or slander brought by politicians can be traced throughout the 19<sup>th</sup> century.<sup>4</sup> Actions continued apace in the 20<sup>th</sup> century: at least 40 actions can be traced in newspapers where actions were brought by sitting politicians or unsuccessful candidates for electoral office from the commencement of the century to the date of the *Ryan v The Argus* case. While this article is not a history of political libel in Australia, it is necessary to make the argument why the *Ryan v The Argus* libel trial was a particularly noteworthy example of a genre that was far from uncommon in Australia.

To understand the importance of the case, it needs to be recognised that political libel is a term that can encompass a number of quite distinct situations. At its broadest, a political libel is one that disparages a politician or someone

<sup>1</sup> *Defence Act 1903* (Cth) ss 47, 49 allowed for conscription for service within Australia but not abroad.

<sup>2</sup> See generally Brendan Edgeworth, ‘Defamation Law and the Emergence of a Critical Press in Colonial New South Wales (1824–1831)’ [1990] *Australian Journal of Law and Society* 50; Andrew T Kenyon and Sophie Walker, ‘The Cost of Losing the Code: Historical Protection of Public Debate in Australian Defamation Law’ (2014) 38 *Melbourne University Law Review* 554.

<sup>3</sup> See generally Paul Mitchell, ‘The Foundations of Australian Defamation Law’ (2006) 28 *Sydney Law Review* 477; Margaret Van Heekeren, ‘The Press and the 1847 Libel Act: The First Criminal Libel Cases in New South Wales’ (2009) 13 *Legal History* 269.

<sup>4</sup> For reported examples (which usually deal only with procedural aspects of the cases), see *McDowell v Robertson* [1841] TASSC 29; *Langton v Syme* (1877) 3 VLR (L) 30; *Ward v Derlington* (1880) 14 SALR 35; *McElhone v Bennett* (1885) 1 WN (NSW) 115.

involved in politics more generally. While it is difficult to draw a bright-line distinction between disparaging imputations affecting a politician's personal or political life, many cases of political libel involved allegations of personal impropriety, such as fraud, corruption or misuse of public power.<sup>5</sup> Fewer cases involved allegations of political betrayal,<sup>6</sup> and fewer still dealt with conduct that could be seen as disloyal or seditious. Almost all of these latter cases in the 20<sup>th</sup> century (up to the time of the *Ryan v The Argus* case) involved allegations which challenged the individual's commitment to the war effort. Prime Minister Andrew Fisher (in 1914) and New South Wales Premier William Holman (in 1916) sued for libel in respect of publications they argued imputed (among other things) that they were disloyal and were traitors. The seriousness of the imputations were reflected when both defendants in the actions caved in and apologised, refuting any suggestion that these impressions were intended by the publications.<sup>7</sup> In later cases newspaper defendants were more willing to defend their statements rather than apologise, no doubt hoping for a change of sentiment to charges of disloyalty brought about by the social and political dislocation of the continuing war. For example, when sued over allegations that JGD Arkins, member of the Legislative Assembly for Castlereagh, had only enlisted 'from base and unworthy motives, and not from a wholehearted desire to serve his Majesty the King against his enemies',<sup>8</sup> *The Castlereagh* newspaper took its allegations to trial but then led no evidence in defence and the jury awarded £50 to the plaintiff.<sup>9</sup> More serious allegations were made in April 1917 when

<sup>5</sup> For examples from the period between 1900–18, see *Tucker v Hutchison* (personal impropriety in share dealings), as reported in 'Alleged Libel: Tucker v Hutchison', *The Advertiser* (Adelaide, 12 March 1902) 6; *Bond v The Mercury* (improper business practices), as reported in 'Libel Action: Bond versus "The Mercury"', *The Mercury* (Hobart, 15 November 1911) 5; *Denham v Daily Mail* (fraudulent business practices), as reported in 'Alleged Libel: Denham v "Daily Mail"', *The Telegraph* (Brisbane, 7 November 1913) 7; *Hall v Australian Workers' Union* (corruption in failing to order criminal prosecution when Attorney-General), as reported in 'Alleged Libel: Action by the Attorney-General', *The Sydney Morning Herald* (Sydney, 1 December 1914) 6.

<sup>6</sup> See, eg, *Miramis v The Age* (allegation of betrayal of protectionist party to free-traders), as reported in 'Political Libel Action: Miramis versus The Age', *The Age* (Melbourne, 20 September 1901) 6.

<sup>7</sup> 'General News: Libel Action Settled', *Geelong Advertiser* (Geelong, Victoria, 17 December 1914) 4; 'Mr Fisher's Loyalty: The £10,000 Claim for Alleged Libel', *The Advertiser* (Adelaide, 17 December 1914) 8; 'Political Libel Action: Premier Holman versus The Cumberland Argus', *The Cumberland Argus and Fruitgrowers Advocate* (Parramatta, New South Wales, 12 April 1916) 2.

<sup>8</sup> 'Law Report: Banco Court', *The Sydney Morning Herald* (Sydney, 19 September 1916) 6.

<sup>9</sup> *Ibid.*

*The Australian Statesman and Mining Standard*<sup>10</sup> accused Tasmanian Labor Senators Keating and Bakhap of ‘subordinat[ing] the interests of the country and of the Empire to the interests of the Roman Catholic Church’.<sup>11</sup> Here too the defendants led no evidence in the action by the Senators who in November 1917 were each awarded £450 by a jury.<sup>12</sup> Despite the seriousness of the allegations, the context in which they were made — the lead-up to the 1917 federal election, the first since the split in the Labor Party after the 1916 conscription referendum, and the creation of the Hughes-led Nationalist Party — emboldened at least one newspaper, editorially a strong supporter of the war, to invoke the importance of a free press when criticising the award.<sup>13</sup> This context also produced the convoluted libel claim by the President of the Senate Senator Givens against *The Age* for its report of the political accusations surrounding Hughes’s attempts to improve his numbers in the Senate after the Labor Party split in late 1916.<sup>14</sup> This was high politics indeed but the core complaint was about political conduct and not disloyalty or treason. Where allegations of the latter kind had been made, plaintiffs had been successful in libel actions but the increasing disquiet of newspapers over these results reflected the polarisation of public opinion over the war and how it should be prosecuted. It was not controversial to find in favour of plaintiffs, even on the political left, when there was a political consensus in favour of the war but it was more problematic when protection of reputation through a libel action could be depicted as against the national interest.

The perceived dangers of successful political libel actions by critics of Australia’s involvement in conflict was judicially expressed in Pring J’s summing up in a case arising out of an earlier conflict. In *Griffith v Johnson*, the plaintiff, a Labor member of the New South Wales Parliament, sued the proprietors of *The Newcastle Morning Herald and Miners’ Advocate* over speeches and letters it published about the plaintiff’s opposition to the Second Boer War.<sup>15</sup> The jury

<sup>10</sup> Owned by the fanatical pro-conscriptionist and anti-Irish Frank Critchley Parker.

<sup>11</sup> ‘Political Libel Action: Senators Keating and Bakhap Plaintiffs’, *The Mercury* (Hobart, 14 November 1917) 7.

<sup>12</sup> Ibid; ‘Political Libel Action: Tasmanian Senators Plaintiffs’, *The Mercury* (Hobart, 16 November 1917) 7. See also ‘Political Libel Action: Tasmanian Senators Plaintiffs’, *The Mercury* (Hobart, 15 November 1917) 7. A defence of fair comment was argued before the jury.

<sup>13</sup> ‘Press and Public’, *The Mercury* (Hobart, 17 June 1918) 4.

<sup>14</sup> The claim failed ultimately because the article was held by the jury to be privileged: ‘Political Libel Suit: Givens v “The Age”’, *The Age* (Melbourne, 20 July 1917) 6. For a discussion of the legal significance of the case, see Mark Lunney, *A History of Australian Tort Law in Australia 1901–1945: England’s Obedient Servant?* (Cambridge University Press, 2018) ch 4.

<sup>15</sup> *Griffiths v Johnson* (1903) 3 SR (NSW) 107.

found for the defendants on the basis that most of the publications were protected by the defence of fair comment and on appeal the verdict was upheld.<sup>16</sup> In summing up to the jury, however, Pring J left no doubt where his sympathies lay. He was of the opinion that ‘when a nation was committed to a war it was the bounden duty of every subject to stand by the nation until, at all events, the war was over’.<sup>17</sup> If a member of Parliament could say the war was repulsive and improper, every citizen could do the same, and ‘[w]hat nation could stand under such circumstances?’<sup>18</sup> And on the petition signed by the plaintiff (among others) and presented to the House of Commons suggesting immediate self-government for Transvaal and the Orange Free State, Pring J observed that, while not ‘absolutely’ disloyal or seditious, ‘His Honor could not think of any man with any sense of the fitness of things asking for self-government so that these people could at once enter into further hostilities. But that was a matter by the way.’<sup>19</sup> Judges could potentially be just as hostile as jurors when asked to protect reputation against the perceived national interest.

As is evident, then, the issues raised in the *Ryan v The Argus* libel trial were not unique: imputations of disloyalty and sedition had given rise to actions for libel previously in times of national controversy. Yet none of these previous cases had raised the issue in such politically divisive times in relation to conduct which went to the heart of the Australian political settlement post-federation. Unlike *Griffith*, where the defendant was one of a relatively small group of politicians who opposed Australian involvement in the Second Boer War, *Ryan v The Argus* involved the two most important politicians of the second conscription referendum in a struggle over the scope of freedom of speech and the constitutional division of power between states and the Commonwealth. These legal aspects of the largely political conscription question, the answer to which

<sup>16</sup> Ibid; ‘No 2 Jury Court: Action for Alleged Libel’, *The Sydney Morning Herald* (Sydney, 4 December 1902) 4; ‘No 2 Jury Court: Action for Alleged Libel’, *The Sydney Morning Herald* (Sydney, 5 December 1902) 3; ‘No 2 Jury Court: Action for Alleged Libel’, *The Sydney Morning Herald* (Sydney, 6 December 1902) 7; ‘Appeal in an Action for Alleged Libel: Griffith v Johnson and Others’, *The Sydney Morning Herald* (Sydney, 17 February 1903) 7; ‘Appeal in an Action for Alleged Libel: Argument Adjourned’, *The Sydney Morning Herald* (Sydney, 12 March 1903) 4.

<sup>17</sup> ‘No 2 Jury Court: Action for Alleged Libel’, *The Sydney Morning Herald* (Sydney, 9 December 1902) 7.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid. Note the sober judgment of a contemporary Australian defamation handbook that ‘the epithet “traitor” [could] be fair comment’: EH Tebbutt, *The Statute Law Relating to Defamation and Newspapers, etc: Including the Defamation Act, No 22, 1901; Newspapers Act, No 23, 1898; Printing Act, No 16, 1899; Post and Telegraph Act, No 12, 1901; and Other Acts Dealing with Defamation, the Press, and Copyright* (Law Book, 1909) 20.

had proved impossible to find through political discourse, were left to the jury in a libel action to mediate. In the poisonous politics of the conscription referendums, it was impossible that the trial would be anything other than a rehash of the earlier debates. Moreover, it was the law of libel as mediated through a judge and jury that determined these questions. Here too there was nothing unusual in form from other libel trials where trial by jury was the standard mode of trial (even if it was rare in the High Court where the case was heard).<sup>20</sup> But it was the context in which the jury had to operate that gives the case its significance. Moreover, while political libel actions can be found in the English political landscape, the setting for these actions was the same as for the vast majority of the Australian cases: hypocrisy, personal impropriety and making false representations about other candidates.<sup>21</sup> There is no equivalent in England of the *Ryan v The Argus* trial in the same period, nor could there be, given the different constitutional settings. If *Ryan v The Argus* is important legally because it shows the limits of libel law in practice, if not in strict theory, that practice was rooted in a distinctively Australian context.

## II TJ RYAN AND THE CENSORSHIP OF HANSARD

Conscription for overseas service was defeated in the first conscription referendum in October 1916. The Australian Labor Party, in power federally and in several states before the referendum, split as a consequence of disagreements over conscription with the end result that Hughes and a number of former Labor party members formed a new Nationalist Party with elements of the former opposition Liberals. When Hughes won the subsequent federal election in May 1917,<sup>22</sup> part of his election manifesto was that conscription would not again be brought before the Australian people unless there was a change in the strategic

<sup>20</sup> The detail varied among jurisdictions but jury trial for civil actions was the usual mode of trial at this time. In New South Wales, for example, at the date of the case civil jury trial in the Supreme Court was enshrined in the *Jury Act 1912* (NSW) ss 29–30, and in the District Court for matters over £20: *District Courts Act 1912* (NSW) s 90. In the Supreme Court a jury could be dispensed with if the parties consented: *Supreme Court Procedure Act 1900* (NSW) s 3. For a history of the civil jury in New South Wales, see Ian Barker, *Sorely Tried: Democracy and Trial by Jury in New South Wales* (DreamWeaver Publishing, 2003) chs 2, 3, 11.

<sup>21</sup> See, eg, 'Political Libels: Tories and Liberals', *The Telegraph* (Brisbane, 30 October 1911) 2, citing a report from the London *Star* that the 1910 United Kingdom election had spawned 30 political libel actions, the most (in its reckoning) that had ever arisen from one national election.

<sup>22</sup> His earlier attempts to gain a majority in the Senate for the new coalition provoked a spate of defamation actions: see *Givens v David Syme & Co [No 2]* [1917] VLR 437 and the discussion in Lunney (n 14).

situation.<sup>23</sup> By the second half of 1917, losses on the Western Front led to concerns that voluntary recruiting would not maintain the desired minimum fighting strength of the Australian forces in France.<sup>24</sup> Unlike the situation in 1916, Hughes now had the parliamentary majority to pass conscription without a referendum but he did not take this path, perhaps because of his promise in the election, but also because he had advice that it might take too long to reinforce by going through the parliamentary route.<sup>25</sup> In November 1917 Hughes announced that there would be another referendum.<sup>26</sup>

Ryan had played a part in the defeat of the 1916 referendum, and it was widely accepted — then as now — that the political opposition to the second referendum was led by him as the only sitting Labor state premier.<sup>27</sup> As part of his campaign for a ‘no’ vote, on 19 November he spoke against conscription at the Centennial Hall in Brisbane.<sup>28</sup> However, the version of his speech that appeared in the press had been censored by the Commonwealth censor acting under the authority of the Commonwealth Minister of Defence and the War Precautions legislation.<sup>29</sup> The following day Ryan made a statement to the press but this was censored in full and was not allowed to appear.<sup>30</sup> On 21 November, he sent a telegram to Hughes to protest about the censorship but received no reply.<sup>31</sup> On the same day, he gave notice of a motion to be discussed in the

<sup>23</sup> ‘Conscription Policy: Announced by Mr Hughes’, *The Argus* (Melbourne, 13 November 1917) 5 (at ‘General Election Issues’); ‘Grave War Measure: Commonwealth v State’, *The Argus* (Melbourne, 28 November 1917) 8 (at ‘The Prime Minister’s Letter’).

<sup>24</sup> ‘Conscription Policy: Announced by Mr Hughes’ (n 23) 5 (at ‘Urgent Need for Reinforcements’); ‘Grave War Measure: Commonwealth v State’ (n 23) 8 (at ‘The Prime Minister’s Letter’).

<sup>25</sup> John Connor, *Anzac and Empire: George Foster Pearce and the Foundations of Australian Defence* (Cambridge University Press, 2011) 108.

<sup>26</sup> ‘Conscription Policy: Announced by Mr Hughes’ (n 23) 5.

<sup>27</sup> See generally DJ Murphy, *TJ Ryan: A Political Biography* (University of Queensland Press, 1975) ch 13.

<sup>28</sup> ‘Ryan v “The Argus”: Claim for £10,000’, *The Argus* (Melbourne, 15 August 1919) 7 (at ‘Mr Ryan Gives Evidence’).

<sup>29</sup> See David Hewitt Maling, Editorial, *The Argus* (Melbourne, 29 November 1917) 6. See also regs 28–28AC of the *War Precautions Regulations 1915* (Cth), as at 14 November 1917, made under s 4 of the *War Precautions Act 1914* (Cth). The Commonwealth censor in Brisbane also posted two military officers within the premises of *The Daily Standard*, a newspaper with close links to the Australian Labor Party: see Raymond Evans, *Loyalty and Disloyalty: Social Conflict on the Queensland Homefront, 1914–18* (Allen & Unwin, 1987) 106.

<sup>30</sup> ‘Ryan v “The Argus”: Claim for £10,000’ (n 28) 7 (at ‘Mr Ryan Gives Evidence’).

<sup>31</sup> *Ibid.*

Queensland Legislative Assembly on the question of censorship.<sup>32</sup> But Ryan's address was not the only item to be censored. The Anti-Conscription Campaign Committee had been formed in response to Hughes's announcement of the second referendum, and it planned to distribute an anti-contriscription leaflet to the voters of Queensland.<sup>33</sup> There is no doubt that this Committee was closely linked to the Ryan Labor government: its chairman was the Treasurer, EG Theodore, and another member was the firebrand Fihelly, Minister for Justice,<sup>34</sup> whose anti-English comments in the wake of the Easter Uprising<sup>35</sup> already made him a hated figure within pro-contriscription ranks. On 22 November, a circular letter was written by members of the organising committee of the Anti-Conscription Campaign Committee to two people with the conveniently German-sounding names of Schache and Richter, indicating that a plan had been hatched to foil the efforts of the censor.<sup>36</sup> The letter indicated that the committee had called on members of the State government to assist them to get the censored material published,<sup>37</sup> and it noted:

The response of the Government has been prompt, and to-day, in Parliament, the question of the censorship will be discussed. We have arranged for the whole of the censored matter to be read in the House. This will be published in "Hansard", and, by this method only, can we state our case.<sup>38</sup>

The idea of using Hansard to avoid the censor's ruling was not some wild hunch: on a previous occasion Hughes himself had said that the sole power of censoring Hansard lay with the relevant Speaker and not the Commonwealth censor,<sup>39</sup> and the freedom of Parliament to regulate its own procedures free from outside scrutiny was supported by the venerable authority of *Stockdale v*

<sup>32</sup> Ibid.

<sup>33</sup> Ibid (at 'Conscription Campaign Recalled').

<sup>34</sup> Ibid.

<sup>35</sup> 'Ryan v "The Argus": Plaintiff Cross-Examined', *The Argus* (Melbourne, 16 August 1919) 19 (at 'More of Mr Fihelly'). For the speech itself see: Fred R Brown, 'Mr Fihelly's Indiscretion: Outspoken Utterances at Irish Association Meeting', *The National Leader* (Brisbane, 22 September 1916) 5.

<sup>36</sup> 'Ryan v "The Argus": Claim for £10,000' (n 28) 7 (at 'Conscription Campaign Recalled').

<sup>37</sup> Ibid; 'Hansard Seized: Action in Queensland', *The Sydney Morning Herald* (Sydney, 28 November 1917) 11 (at 'Letter to a "Comrade"'); Maling (n 29) 6.

<sup>38</sup> 'Ryan v "The Argus": Claim for £10,000' (n 28) 7 (at 'Conscription Campaign Recalled'). For the full letter to Schache, see Appendix 1: Letter from Lewis McDonald and Cuthbert Butler to C Schache, 22 November 1917.

<sup>39</sup> 'Ryan v "The Argus": The Summing Up', *The Argus* (Melbourne, 22 August 1919) 7 (at 'A Resume of Facts').

*Hansard*.<sup>40</sup> On 22 November, in the Queensland Legislative Assembly, Ryan repeated censored portions of the speech he made in Centennial Hall on 19 November,<sup>41</sup> and he was followed by EG Theodore who read out the contents of the leaflet the Anti-Conscription Campaign Committee had wanted to publish which had been censored.<sup>42</sup>

What followed next is the subject of some considerable doubt, but a number of things are clear. First, the form in which this particular part of *Hansard* was published deviated markedly from the usual form the publication took. The parts of the parliamentary record relating to the previously censored material were recorded in bold type, while the questions and comments of those who supported the actions of the censor were in ordinary type.<sup>43</sup> In a later letter to Ryan, Hughes commented that neither he (who had served in Parliament for over 23 years) nor others with similar length of service had seen a *Hansard* 'in the least degree resembling this' one.<sup>44</sup> 'It is a "Hansard" only in name', he said.<sup>45</sup>

Another unusual aspect of this *Hansard* was the speed with which it was published. The normal practice was for proofs of the document to be sent to contributors for correction before publication but on this occasion it was not done and it was printed the next day.<sup>46</sup> The result was that when the Brisbane censor requested the Queensland Government Printer not to publish the proceedings of 22 November in *Hansard*, it was too late: the document had already been printed.<sup>47</sup> The reply to the censor's letter from the Government Printer, but probably, as counsel for *The Argus* submitted, written by Ryan,<sup>48</sup> suggested that the proper course for the censor was 'to apply to the court for an injunction to restrain the further publication of the report complained of, and so [to] test the validity of the claim set out in [the censor's] memorandum'.<sup>49</sup> At the same

<sup>40</sup> (1839) 9 Ad & El 1; 112 ER 1112.

<sup>41</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 22 November 1917, 3134–8.

<sup>42</sup> *Ibid* 3146–50.

<sup>43</sup> 'Grave War Measure: Commonwealth v State' (n 23) 8 (at 'The Prime Minister's Letter').

<sup>44</sup> *Ibid*.

<sup>45</sup> *Ibid*.

<sup>46</sup> 'Ryan v "The Argus": Counsel's Closing Addresses', *The Argus* (Melbourne, 20 August 1919) 9 (at 'Speeding up "Hansard"').

<sup>47</sup> 'Grave War Measure: Commonwealth v State' (n 23) 8 (at 'Warning by Mr Hughes'). See also *ibid*.

<sup>48</sup> 'Ryan v "The Argus": Counsel's Closing Addresses' (n 46) 9 (at 'Speeding up "Hansard"').

<sup>49</sup> *Ibid*. See also 'Grave War Measure: Commonwealth v State' (n 23) 8 (at 'Warning by Mr Hughes').

time, Ryan ordered a number of police to the Government Printer's Office, on his evidence given in the first trial, to keep out unauthorised persons.<sup>50</sup> But the game had gone on too long as far as Hughes was concerned. Commonwealth military authorities made a raid on the building late on the evening of 26 November and seized the offending Hansards.<sup>51</sup> At face value, this was a truly remarkable event with the possibility that conflict could arise, but Ryan had in fact ordered the state police who were present in the Government Printer's Office to allow entry to any persons showing an authority to enter, and in evidence he made it clear that he told the police that Commonwealth military personnel had that authority.<sup>52</sup> Absent starting a potential civil war, he could hardly have done otherwise.<sup>53</sup>

### III THE AFTERMATH OF THE SEIZURE OF HANSARD NO 37

The seizure provoked a fury of claim and counterclaim, law suit and counter-law suit.<sup>54</sup> On 27 November, Ryan wrote to Hughes saying that he could not

<sup>50</sup> 'Ryan v "The Argus": Claim for £10,000' (n 28) 7 (at 'Mr Ryan Gives Evidence').

<sup>51</sup> 'Grave War Measure: Commonwealth v State' (n 23) 8 (at 'Warning by Mr Hughes'). Legislative power to enter property and seize and destroy publications containing injurious matter was given by an amendment to the *War Precautions Regulations 1915* (Cth) reg 28AC, made on 14 November 1917, less than two weeks before the intervention: WM Hughes, Prime Minister, 'Notification of the Making of Regulations' in Commonwealth, *Commonwealth of Australia Gazette*, No 195, 15 November 1917, 2971, 2971; 'Uncensored Publications: Power to Search Premises', *The Argus* (Melbourne, 16 November 1917) 6.

<sup>52</sup> 'Ryan v "The Argus": Claim for £10,000' (n 28) 7 (at 'Mr Ryan Gives Evidence'); 'Ryan v "The Argus": Plaintiff in the Box', *The Argus* (Melbourne, 19 August 1919) 5. There is, however, some evidence to the contrary. In a memorandum from the Brisbane censor, JJ Stable, to the Deputy Chief Censor on 24 November, Stable advised that the Queensland Government Printer told him that Ryan had ordered him to ignore the censorship instructions and that if the military attempted to seize the type in the Printing Office 'the Police would be instructed to offer every resistance in their power': Memorandum from JJ Stable to Deputy Chief Censor, 24 November 1917 (National Archives of Australia, B197, 2021/1/154).

<sup>53</sup> Ryan arranged for a special issue of the Government Gazette to be published explaining what had happened. There is some evidence that armed violence was contemplated if the publication of the Gazette had been censored (Evans (n 29) 107–8) although the tone of the Anti-Conscription Campaign Committee leaflet regarding the Gazette was more measured: see Appendix 2: Letter from Lewis McDonald and Cuthbert Butler to members of the Anti-Conscription Campaign Committee, 27 November 1917.

<sup>54</sup> Ryan's conduct was praised or condemned along class and religious lines: see AJ Buchanan, 'Yesterday's Seizure', *The Daily Mail* (Brisbane, 28 November 1917) 6; GI Roberts, 'A Raided Government', *Maryborough Chronicle, Wide Bay and Burnett Advertiser* (Maryborough, Queensland, 29 November 1917) 4; 'Military Tyranny: Ryan and Theodore Stand up for Freedom', *The Worker* (Brisbane, 6 December 1917) 11; 'The Triumphant Reception of Premier Ryan in Sydney', *The Catholic Press* (Sydney, 20 December 1917) 21.

think the decision to seize the Hansard was taken under Hughes's direction, but if it was or was under the direction of a member of his government, Ryan 'desired, on behalf of his Government, to protest against such invasion of the rights of a sovereign State'.<sup>55</sup> He warned: 'You must realise the great necessity of avoiding anything in the nature of displays of military force which may inflame the public mind at a time when feeling is already running high.'<sup>56</sup> Hughes responded with a 15-point letter, stating the importance of the conscription issue, and the primacy of the Commonwealth government in matters of defence.<sup>57</sup> He rejected the idea that there was political censorship of the press:

[W]hatever statements you chose to make in reference to the proposals of the Government may be made therein, but you and every other person must be prepared to take the full responsibility for such statement, and not seek to strike a blow at the heart of the Commonwealth under cover of privilege. Outside Parliament, of course, you and every other citizen may make whatever statement you choose, subject to your taking full responsibility for same.<sup>58</sup>

In typical Hughes style, he finished: 'Rest assured, if some of the statements published in your so-called "Hansard" are repeated outside, I shall know how to deal with them.'<sup>59</sup> Hughes's rejection of press censorship was difficult to reconcile with an earlier part of the letter where he reminded Ryan that

[t]o ensure that the true facts should be placed before the electors who are to decide this momentous issue the Government passed last week a regulation under the *War Precautions Act* making it an offence to place before the people statements calculated to mislead them in the exercise of their franchise, and created machinery ensuring the speedy hearing and punishment of offenders under the regulation.<sup>60</sup>

But Hughes's gall did not end there: Ryan was prosecuted under this provision for the public statements he had made outside of Parliament.<sup>61</sup> Ryan, however,

<sup>55</sup> 'Grave War Measure: Commonwealth v State' (n 23) 8 (at 'Warning by Mr Hughes').

<sup>56</sup> Ibid.

<sup>57</sup> Ibid (at 'The Prime Minister's Letter').

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid. In fact, the relevant regulation (*War Precautions (Military Service Referendum) Regulations 1917* (Cth) reg 42, as at 19 November 1917) refers only to making a false statement of fact likely to affect the judgment of electors in relation to their votes.

<sup>61</sup> 'Alleged False Statements: Queensland Case', *The Argus* (Melbourne, 5 December 1917) 9 (at 'Charge against Premier'). This provision was invoked because Ryan's primary argument

could be as tough as Hughes and was a better lawyer: he responded with subpoenas for the attendance of key witnesses, including Senator Pearce (the Minister for Defence),<sup>62</sup> and he had even threatened to subpoena Hughes.<sup>63</sup> The police magistrate was bombarded with submissions from Ryan's counsel, the indefatigable Hugh Macrossan<sup>64</sup> (including that the regulation was *ultra vires*, which the police magistrate understandably replied was for a higher tribunal).<sup>65</sup> In the end, an *ex parte* application to subpoena Pearce in Western Australia was granted but as there was only a power to adjourn proceedings for 48 hours, it was made returnable at 2.30pm the following day and, as press reports noted, could not possibly be given effect.<sup>66</sup> Hughes's gamble backfired spectacularly: when the case came on for hearing the following day Ryan went into the witness box and cogently explained his reasons for his statements about the adequacy of the number of men available to replace casualties.<sup>67</sup> Macrossan's reference to the magistrate having to decide the case only because the defendant was Ryan and that it was a political prosecution did the trick. The magistrate did not want to get into this at all: he dismissed the charge and, after a delay due to applause from Ryan's supporters, said 'I decline to find any fact'.<sup>68</sup> Ryan's appearance before the magistrate was not the end of the legal wrangling: Hughes initiated a charge of criminal conspiracy to subvert Commonwealth law against Ryan, Theodore and two others,<sup>69</sup> and Ryan arranged for the Queensland state government to bring proceedings against the Commonwealth seeking a declara-

against conscription was that, using statements from the Minister for Defence (Senator Pearce) and the Chief of the General Staff (General Legge), the Australian army in France could be maintained at the required strength without it: Murphy (n 27) 327, 333–4.

<sup>62</sup> 'Alleged False Statements: Queensland Case' (n 61) 9 (at 'Charge against Premier').

<sup>63</sup> *Ibid* (at 'Subpoena to Mr Hughes: A Hot Reply').

<sup>64</sup> Although earlier political opponents, Macrossan and Ryan later developed a bond and Macrossan appeared with Ryan in a number of constitutional cases: W Ross Johnston, 'Macrossan, Hugh Denis (1881–1940)' in Bede Nairn et al (eds), *Australian Dictionary of Biography* (Melbourne University Press, 1986) vol 10, 363, 364.

<sup>65</sup> 'Alleged False Statements: Queensland Case' (n 61) 9 (at 'Charge against Premier').

<sup>66</sup> *Ibid*.

<sup>67</sup> 'Alleged False Statements: Queensland Case', *The Argus* (Melbourne, 7 December 1917) 7 (at 'Case Dismissed').

<sup>68</sup> 'No Facts Found: Alleged False Statement', *The Telegraph* (Brisbane, 7 December 1917) 3. When challenged by prosecuting counsel the magistrate affirmed that he was only declining to find that Ryan's statement was a fact.

<sup>69</sup> 'Censor and "Hansard": The Conspiracy Charges', *The Argus* (Melbourne, 8 December 1917) 18.

tion that the actions of the Commonwealth in seizing Hansard were unconstitutional and without warrant or authority.<sup>70</sup> He also brought contempt proceedings against Hughes for publishing the telegraph message Hughes had sent Ryan just before the hearing of the case against Ryan for breach of the *War Precautions Regulations*.<sup>71</sup> In due course, all of these actions were discontinued or lapsed<sup>72</sup> but they are graphic reminders of just how hard the politics of the second referendum were played and also that once the cause for the political posturing had finished — the referendum was held at the end of the December 1917 — the need to use legal mechanisms to establish political dominance had diminished.

#### IV DEFAMATION ACTION AND FURTHER INCITEMENT

It was in the law of defamation, however, where many of these political high noons were eventually played out and the events surrounding the seizure of the Queensland Hansard were no exception. Hughes was not the defendant in the action but in many ways the case was a re-run of the political arguments that had taken place in 1917. At the end of November 1917 — the week of the seizure and the competing telegrams — *The Argus* published a damning editorial about the role of the Ryan government.<sup>73</sup> There was much that was objectionable (from Ryan's point of view) in the editorial but the first two sentences capture its gist (and formed the majority of Ryan's complaint):

Almost any outbreak may be expected from the Ryan Ministry in Queensland, and it is almost incredible that it should have descended so low as to have entered into the paltry and contemptible conspiracy with Germans and other disloyalists against the authority of the Commonwealth Defence department. The letter from the general secretary of the Anti-Conscription Campaign Committee, read by Mr Hughes on Tuesday evening, proves that the Ministry is the servile agent of

<sup>70</sup> 'Alleged False Statements: Queensland Case' (n 61) 9 (at 'Seizure of "Hansard": Writ against Commonwealth').

<sup>71</sup> 'Alleged Contempt: Proceedings against Mr Hughes', *The Argus* (Melbourne, 10 December 1917) 6; 'Mr Hughes and Mr Ryan: Contempt of Court Motion', *The Argus* (Melbourne, 1 March 1918) 4.

<sup>72</sup> The contempt and conspiracy proceedings were dropped on the same day, suggesting a compromise was reached: 'Echo of Referendum', *The Daily Mail* (Brisbane, 4 April 1918) 4. Although some procedural orders were made in January 1918, Ryan's constitutional challenge also did not proceed: Order for Directions, *Queensland v Commonwealth* (High Court, Powers J, 25 January 1918) (National Archives of Australia, A10038, 1917/4).

<sup>73</sup> Maling (n 29) 6.

the committee, and is prepared to degrade all the powers of the Government in order to carry out its commands.<sup>74</sup>

Ryan issued his writ against the proprietors of *The Argus* in December 1917 but the case was not heard until August 1919.<sup>75</sup> By that time, another incident involving the censoring of Hansard occurred, although it attracted less public attention (mainly because of censorship). In July 1918, Commonwealth forces again occupied the office of the Queensland Government Printer to seize Hansard. Allegations had been made in the Queensland Legislative Assembly about the improper treatment of internees and it was feared that if this information was published, retribution would be taken against Australian prisoners of war ('POWs').<sup>76</sup> Ryan was furious, claiming that he had received no notice of the proposed occupation.<sup>77</sup> The detailed accusations and counteraccusations are not relevant for present purposes,<sup>78</sup> but Ryan maintained throughout the dispute that he was acting to protect civil administration from military takeover.<sup>79</sup> Nor did he accept that the Commonwealth had any right to censor Hansard as

<sup>74</sup> Ibid.

<sup>75</sup> Ironically, by the time he had issued his writ, Ryan was being courted for a move from state to federal politics. He was elected federal member for West Sydney in the December 1919 election: W Ross Johnston and DJ Murphy, 'Ryan, Thomas Joseph (1876–1921)' in Geoffrey Serle et al (eds), *Australian Dictionary of Biography* (Melbourne University Press, 1988) vol 11, 499–500.

<sup>76</sup> Telegram from Watt (Acting Prime Minister) to TJ Ryan, 24 July 1918 (National Archives of Australia, A3934, SC6/5). With implicit reference to Hansard 37, the Brisbane censor (Stable) thought Cuthbert Butler (who moved the motion) wanted to use the Hansard report of the debate to publish a letter that had previously been censored: Memorandum from JJ Stable to Deputy Chief Censor, 31 July 1918 (National Archives of Australia, A3934, SC6/5). In fact, Butler was successfully prosecuted for attempting to publish a letter in breach of the *War Precautions Act 1914* (Cth) in October 1918 although the record does not reveal whether it was the same letter: 'Labor MLA Fined: Unusual Censorship Case', *The Daily Standard* (Brisbane, 17 October 1918) 5.

<sup>77</sup> Telegram from Ryan to Watt (Acting Prime Minister), 26 July 1918 (National Archives of Australia, A3934, SC6/5); 'Hansard Trouble: Tuesday's Debate', *The Telegraph* (Brisbane, 27 July 1918) 7. Any reference to the seizure was initially planned to be censored but it was later agreed to publish Ryan's statement as 'the lesser of two evils': Telegram No 26654 from Deputy Chief Censor to all Censors, 26 July 1918 (National Archives of Australia, A432, 1929/4567 Supplement); Memorandum from JJ Stable to Deputy Chief Censor, 29 July 1918 (National Archives of Australia, A3934, SC6/5).

<sup>78</sup> Details are located in the letters and telegrams in the National Archives of Australia A3934, SC6/5; A432, 1929/4567 Supplement.

<sup>79</sup> Telegram from Ryan to Watt (Acting Prime Minister), 29 July 1918 (National Archives of Australia, A3934, SC6/5).

that question had ‘yet to be decided’.<sup>80</sup> Whether or not there were grounds for the censorship was in many ways beside the point: Ryan’s unwillingness to give up on the constitutional correctness of his approach no doubt exacerbated existing views of the already controversial Ryan, and the challenge for the defamation case would be to separate the question of the legality of his action from the political view of its desirability. On the latter question, there was certainly support in Queensland for Ryan’s actions: *Truth*, in advocating for the re-election of his government in March 1918, argued that ‘violent seizure by the military of Queensland “Hansards”, the effort to bring Australia immediately under Federal tyranny by means of Commonwealth police, [and] the threat to declare Queensland a disloyal State’ were all avoided when the 1917 conscription referendum was defeated, largely through Ryan’s efforts.<sup>81</sup> Whatever the truth of the assertion, the Ryan government was comfortably re-elected in March 1918 in the Queensland election with a slightly increased majority.<sup>82</sup>

The political nature of the defamation trial is evident from the involvement of the Commonwealth in what was a trial between private citizens. The Attorney-General’s Department file for the criminal conspiracy case in 1917–18 reveals that the Commonwealth was contacted by the solicitors for *The Argus* in August 1919 to see if it would pass on any information collected on Ryan on account of the conspiracy charge.<sup>83</sup> Despite recognising that the Government could not ‘of course ... identify itself with [*The Argus*] in defending the action’,<sup>84</sup> it was agreed in the Attorney-General’s office that it would provide, confidentially, any non-confidential information to the paper (ie names of agents etc would be protected).<sup>85</sup>

Apart from the context, the trial was also procedurally different as it was said to be the first case in the High Court where a jury trial (with a common

<sup>80</sup> ‘Queensland “Hansard”: Military in Printing Office’, *The Australasian* (Melbourne, 10 August 1918) 35.

<sup>81</sup> ‘Conscription Complot: Effect of Queensland Elections’, *Truth* (Brisbane, 10 March 1918) 4. For Catholic support for Ryan’s re-election, see ‘Ryan, the Biggest Australian: Queensland Premier a National Hero’, *The Catholic Press* (Sydney, 7 March 1918) 27. See generally Murphy (n 27) 350–6.

<sup>82</sup> ‘Ryan v “The Argus”: Counsel’s Closing Addresses’ (n 46) 9 (at ‘Shaking a Traitor’s Hand’).

<sup>83</sup> Letter from Gordon H Castle to the Secretary of the Attorney General’s Department, 2 August 1919 (National Archives of Australia, A432, 1929/4567).

<sup>84</sup> Letter from GS Knowles to S McHutchison, 6 August 1919 (National Archives of Australia, A432, 1929/4567).

<sup>85</sup> *Ibid.*

jury of 12)<sup>86</sup> was used (the case fell within the original jurisdiction of the High Court,<sup>87</sup> presumably as the parties were in different states). Jury trial was allowed in the High Court but only on the order of a Justice.<sup>88</sup> Where such a trial was ordered, the rules of the place where the Court sat applied to any jury that heard the case.<sup>89</sup> As might be imagined, the location of the trial was an issue between the parties, with Ryan asking for Brisbane and *The Argus* for Melbourne. As everyone's compromise second option, the trial was ordered to take place in Sydney.<sup>90</sup> This meant that the jury laws of New South Wales applied to the trial. Under the *Jury Act 1912*, the standard mode of civil trial was before a special jury of four, but with provision for a jury of twelve from common or special jurors to be ordered on the application of either party.<sup>91</sup> However, the practice of the court was to order trial by a common jury of twelve if one party asked for it, with the onus being on the opposing party to provide reasons why a special jury was more appropriate.<sup>92</sup> Hence when *The Argus* applied for a special jury of twelve and this was opposed by Ryan who sought a common jury of twelve, the onus was on *The Argus* to give reasons why this should not be ordered. The gist of *The Argus's* argument — that the public importance of the case meant it should be tried by better educated men — was rejected by Isaacs J: while 'the less [he went] into details the better', the matters concerned the whole community so the jury should be as representative as the law permitted.<sup>93</sup> A special jury would exclude the greater portion of possible jurors and diminish its representative character while a common jury would embrace all classes and exclude none.<sup>94</sup> Given that special jurors were primarily middle-class,<sup>95</sup> it is

<sup>86</sup> 'Ryan v "The Argus": What Was Jury's Decision?', *The Argus* (Melbourne, 26 August 1919) 5. See also 'Ryan v "The Argus"', *The Argus* (Melbourne, 7 August 1919) 7.

<sup>87</sup> 'Ryan v "The Argus": Claim for £10,000' (n 28) 7 (at 'Conscription Campaign Recalled').

<sup>88</sup> *High Court Procedure Act 1903* (Cth) ss 12, 13.

<sup>89</sup> *Ibid* s 15.

<sup>90</sup> 'High Court of Australia: Ryan v Cunningham and Others', *The Telegraph* (Brisbane, 21 July 1919) 2; 'Law Report: Ryan v Cunningham and Others', *The Brisbane Courier* (Brisbane, 24 July 1919) 9.

<sup>91</sup> *Jury Act 1912* (NSW) ss 29, 30.

<sup>92</sup> See *Cowlshaw v McLeod* (1898) 14 WN (NSW) 189; *Ritchie v D'Arcy* (1900) 17 WN (NSW) 93.

<sup>93</sup> "'Special" or "Common"? What Jury for Libel Action?', *Truth* (Brisbane, 17 August 1919) 11.

<sup>94</sup> *Ibid*.

<sup>95</sup> Special jurors were 'justice[s] of the peace, lessee[s] of the Crown, banker[s], bank director[s], merchant[s], accountant[s], engineer[s], manager[s] of a station, broker[s], chemist[s], druggist[s], warehouse[m]en, commission agent[s], architect[s], or ... the owner[s] or tenant of any lands or tenements of the yearly value of one hundred pounds and upwards': *Jury Act 1912*

hardly surprising that *The Argus* should seek a special jury as it was widely believed conscription had been defeated by Catholic working-class votes of the kind represented by Ryan.<sup>96</sup> But any potential benefit Ryan gained was minimised by the assistance *The Argus* received from the Hughes government. The Deputy Crown Solicitor, McHutchison, went through the jury list with *The Argus's* solicitor and ‘was able to indicate the qualities of some persons on the panel’.<sup>97</sup> It was also suggested the Commonwealth provide officials to investigate an allegation that ‘jury squarers were at work’ in the interests of Ryan.<sup>98</sup> This was rejected, not on the grounds of impropriety but for lack of expertise, and McHutchison facilitated a meeting between the solicitor for *The Argus* and the officer in charge of the Intelligence Section of Victoria Barracks. This apparently resulted in ‘steps [being taken] to detect any anticipated interference with the jury on the principle of the axiom: “Set a thief to catch a thief”’.<sup>99</sup> McHutchison’s conclusory comment — ‘I do not see what possible assistance the Commonwealth Government could have given on a matter of this kind in a civil action between private parties’<sup>100</sup> — is equivocal but, given the willingness of the Commonwealth to assist and that it was made to the acting secretary

(NSW) s 20. By the time of the trial, special juries were used primarily to ‘ensure a higher class of jurymen’ than common jurors: James Oldham, ‘Special Juries in England: Nineteenth Century Usage and Reform’ (1987) 8 *Journal of Legal History* 148, 151. While the default position in civil cases in the Supreme Court of New South Wales was trial by a special jury of 4, either party could seek permission for a common or special jury of 12. The middle-class composition of special jurors, together with the ability to challenge and strike jurors, made a special jury more appealing to *The Argus* than a common jury.

<sup>96</sup> Whether this belief was justified is more difficult to assess: Murray Goot, ‘The Results of the 1916 and 1917 Conscription Referendums Re-Examined’ in Robin Archer et al (eds), *The Conscription Conflict and the Great War* (Monash University Publishing, 2016) 111, 136–141. Macrossan for Ryan expressly raised the issue of the potential political bias if a special jury was empanelled: “Special” or “Common”? What Jury for Libel Action? (n 93) 11.

<sup>97</sup> Letter from McHutchison to GS Knowles, 12 August 1919 (National Archives of Australia, A432, 1929/4567). See also Sir Lloyd Dumas, *The Story of a Full Life* (Sun Books, 1969) 34–5, who describes *The Argus's* attempts at jury vetting to determine political allegiances. Dumas was chief of staff of *The Argus* at the time. While some of the details provided in his account — published fifty years after the event — are incorrect, there is no reason to doubt his general memory of *The Argus's* actions leading up to the trial.

<sup>98</sup> Letter from McHutchison to GS Knowles, 18 August 1919 (National Archives of Australia, A432, 1929/4567) 2. If so, they were unsuccessful: Lloyd Dumas thought at least half of the jury empanelled were ‘violently anti-Sinn Fein and therefore anti-Ryan’: Dumas (n 97) 34. Dumas himself had taken the list of names of potential jurors to four organisations hostile to Sinn Fein and, as the home addresses of potential jurors were listed, the suburban branches of the organisations provided reports on the political sympathies of each name on the list.

<sup>99</sup> Letter from McHutchison to GS Knowles, 18 August 1919 (National Archives of Australia, A432, 1929/4567) 2.

<sup>100</sup> *Ibid.*

of the Attorney-General's Department, it is more likely to be an explanation for why more could not be done to assist *The Argus*.

**ALLEGED LIBEL.**

**RYAN v. MELBOURNE "ARGUS".**

**ASKS FOR £10,000.**

**FIGHTING THE CASE IN A NEUTRAL STATE**

**Before a Special Jury of Twelve.**



**PREMIER RYAN, MRS. RYAN AND FAMILY.**

WE VALUE OUR CLEAN NAME FOR OURSELVES, OF COURSE, BUT MORE AS A PRICELESS HERITAGE TO GIVE TO OUR CHILDREN. AND MR RYAN IS FIGHTING FOR THAT CLEAN NAME.

*Illustration 1: Headline in Truth on Commencement of the Trial*<sup>101</sup>

<sup>101</sup> 'Alleged Libel: Ryan v Melbourne "Argus"', *Truth* (Brisbane, 24 August 1919) 2. The quote is from Ryan's counsel Hugh Macrossan. The headline incorrectly states that the hearing was before a special jury.

## V THE FIRST TRIAL

As befitted such a long-running saga, there were in fact two trials. Ryan pleaded among a number of imputations that the article alleged he was a ‘traitor’ and was ‘guilty of the crime of treason’, was guilty ‘of having entered into a criminal conspiracy’, was ‘a disloyal person’ and was ‘false to his oaths of office’.<sup>102</sup> He claimed £10,000,<sup>103</sup> a large sum for the times. Understandably, counsel for Ryan opened with the seriousness of the charges alleged against Ryan: the article, he said, ‘contained the most serious libel that had ever been published in Australia on any public man’.<sup>104</sup> But even in 1919, the scars of the conscription referendum were plain to see and there was no point in skirting around the issue. By doing so, however, Macrossan for Ryan in his opening address raised the stakes. The issue really was one of constitutional importance:

‘The Argus,’ in its advocacy of conscription, naturally desired to belittle and damage Mr Ryan, who was perhaps the chief spokesman on the other side. A certain measure of criticism in that direction was justified, and was not resented by Mr Ryan. But a charge of treason and criminal conspiracy was quite a different matter.

The jury, in order to secure an accurate impression of the facts of this case ... should recall that a political censorship was imposed during the conscription campaign, and that much resentment was occasioned thereby. Mr Ryan saw the wrong that had been done by the imposition of this political censorship. He took the constitutional course of setting out his protest in the way in which the law provided it should be done, and he gave notice of his intention to initiate a discussion in the Legislative Assembly regarding the censorship, and in the course of that discussion he set out his protest, and he did not take that action at the request of or under agreement with the anti-conscription committee, but on his own personal responsibility and initiative.<sup>105</sup>

In other words, apart from denying the conspiracy charge, Ryan also denied that there was any sense in which a protest complying with legal formalities could be the subject of any kind of adverse comment without attracting potential liability in defamation.

<sup>102</sup> ‘Ryan v “The Argus”: Claim for £10,000’ (n 28) 7 (at ‘Conscription Campaign Recalled’). See also Statement of Claim, *Ryan v Cunningham* (High Court, 18 March 1917) 6 (National Archives of Australia, A10075, 1918/13).

<sup>103</sup> Statement of Claim (n 102) 6; ‘Ryan v “The Argus”: Claim for £10,000’ (n 28) 7 (at ‘Conscription Campaign Recalled’).

<sup>104</sup> ‘Ryan v “The Argus”: Claim for £10,000’ (n 28) 7 (at ‘Plaintiff’s Case Opened’).

<sup>105</sup> *Ibid.*

Whatever the merits of this argument, it was lost in the course of a powerful cross-examination by Adrian Knox when Ryan went into the witness box. Apart from the provocative statements made by Fihelly after the Easter Rebellion (prompting questions as to why he was retained as a Cabinet minister),<sup>106</sup> Ryan had earlier in the year (1919) met Eamon De Valera in Dublin.<sup>107</sup> While this was not a secret visit, Knox was able to paint a picture of Ryan as someone who supported enemies of the Empire.<sup>108</sup> It boded poorly when Knox asked: ‘And you seriously see no impropriety in the Premier of a British possession shaking hands with a man who was in open rebellion against the King?’, and Ryan replied: ‘I see no impropriety in what I did.’<sup>109</sup>

*The Argus*, however, made no attempt to justify any of the imputations alleged against Ryan. It made the unsurprising decision to use fair comment rather than justification as a defence.<sup>110</sup> Prior to any recognition of constitutional implications protecting political speech, fair comment was the primary defence for defamatory political speech that could not be proved to be true or be protected by any privilege attaching to fair and accurate reports. To be successful, the defendant needed to convince a judge or jury that the publication was a comment rather than a statement of fact,<sup>111</sup> on a matter of public interest, based on true facts, and was fair in the sense that it was capable of representing an opinion that could honestly (not reasonably) be held.<sup>112</sup> The defence failed if

<sup>106</sup> ‘Ryan v “The Argus”: Plaintiff Cross-Examined’ (n 35) 19 (at ‘The Irish Rebellion’, ‘Mr Ryan and De Valera’); ‘Alleged Libel: Ryan v Melbourne “Argus”’ (n 101) 2.

<sup>107</sup> ‘Ryan v “The Argus”: Plaintiff Cross-Examined’ (n 35) 19 (at ‘Labour and Recruiting’).

<sup>108</sup> See ‘Ryan v “The Argus”: Plaintiff in the Box’ (n 52) 5 (at ‘The Case for Defendants’); ‘Alleged Libel: Ryan v Melbourne “Argus”’ (n 101) 2.

<sup>109</sup> ‘Ryan v “The Argus”: Plaintiff Cross-Examined’ (n 35) 19 (at ‘Labour and Recruiting’). See also ‘Alleged Libel: Ryan v Melbourne “Argus”’ (n 101) 2.

<sup>110</sup> Defence, *Ryan v Cunningham* (High Court, 4 May 1918) (National Archives of Australia, A10075, 1918/13) 1; ‘Ryan v “The Argus”: Plaintiff in the Box’ (n 52) 5 (at ‘Mr Knox’s Address’).

<sup>111</sup> Although eschewing general commentary because of the excellent English texts, a contemporary Australian handbook commented that the fact–comment distinction in the fair comment defence was ‘noteworthy’: Tebbutt (n 19) 20. For New South Wales affirmation of this point, see *Christie v Robertson* (1889) 10 LR (NSW) 157, 161.

<sup>112</sup> For contemporary elaboration of these elements in English texts, see Sir Frederick Pollock, *The Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law* (Stevens and Sons, 11<sup>th</sup> ed, 1920) 256–62; W Wyatt-Paine, *The Law of Torts by JF Clerk and WHB Lindsell* (Sweet & Maxwell, 7<sup>th</sup> ed, 1921) 596–8, 604–6, 609. Note that Salmond thought there was no separate requirement of fairness, the relevant conditions for this aspect of fair comment being an honest belief in the truth of the comment and an absence of malice: John W Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries* (Stevens and Haynes, 1907) 412.

malice was proved against the defendant. As the matter was clearly one of public interest, it was the other three elements of the defence that were in issue (malice was not raised separately from any issue of fairness). A clear point of disagreement was whether the imputations were of fact or comment: Macrossan argued that they were allegations of fact so that fair comment did not apply.<sup>113</sup> As was frequently the case when counsel argued the fair comment defence before a jury, however, it is not always easy to map Knox's argument against the elements of the defence. He was clearly not concerned that the comments would not be seen as being fair from the language used; while they were strong, they were made in the context of an inflamed political debate over conscription and '[A]s usual there were a good many hard things said on both sides, but a hard thing was not necessarily defamatory.'<sup>114</sup> But this was premised on *The Argus* proving the facts on which the comment had to be based if it was to be fair. A contemporary edition of *Clerk & Lindsell on Torts* variously described this as requiring that the comment not be 'perversely unjust'<sup>115</sup> and that 'under the circumstances of the case, [it was] a fair and legitimate criticism on the conduct and motives of the party who is the object of censure'.<sup>116</sup> But while the author noted that the discretion of the jury when deciding this question — and this was a jury question — was exercised 'partly on popular sentiment, partly on the nature of the subject-matter', greater leniency was granted for 'matters of taste and opinion' rather than matters of 'conduct and character'.<sup>117</sup>

The suggestion that there were limits on the defence where private character was attacked had a long history which reveal the roots of the fair comment defence in artistic criticism.<sup>118</sup> As Mitchell notes, however, while a fair comment defence based on the distinction between critiquing a literary work as opposed to the character of its creator may have been appropriate in the arts, it was difficult to justify in relation to criticism of public officials, and from the mid-19<sup>th</sup> century English law compromised by allowing attribution of corrupt motives to a public official to constitute fair comment if there was a sufficient factual basis for the comment.<sup>119</sup> This ought to have meant that the first task of

<sup>113</sup> 'Ryan v "The Argus": Counsel's Closing Addresses' (n 46) 9 (at 'Counsel for Mr Ryan').

<sup>114</sup> 'Ryan v "The Argus": Plaintiff in the Box' (n 52) 5 (at 'Mr Knox's Address').

<sup>115</sup> Wyatt-Paine (n 112) 605.

<sup>116</sup> *Ibid*, quoting *Wason v Walter* (1868) LR 4 QB 73, 96.

<sup>117</sup> *Ibid* 605–6.

<sup>118</sup> *Thomas v Bradbury, Agnew & Co, Ltd* [1906] 2 KB 627; Paul Mitchell, *The Making of the Modern Law of Defamation* (Hart Publishing, 2005) 169–177.

<sup>119</sup> Mitchell (n 118) 181–2. Cf James Moriarty, *The Law of Actionable Defamation whether Spoken or Written in the State of New South Wales 1909* (F Cunningham & Co Printers, 1909) 20, 26

*The Argus's* defence was to prove the facts which would make the political comment fair.

The problem for Knox was that he could establish few facts on which to base the comment. He was left with an appeal to popular sentiment, an important component of the artistic criticism branch of the defence but problematic in highly-contested political debates. Relying on one branch of popular sentiment that hated Ryan for his stance on conscription, Knox adopted a scattergun approach in his arguments before the jury. Some arguments, such as that the attack was on the Ryan ministry and not Ryan,<sup>120</sup> do not seem to bear any relationship to fair comment: it is a reference to the connection with the plaintiff rather than fair comment. Knox also tried to establish a conspiracy by showing that even if Ryan did not know of Theodore's plan to read the leaflet in Parliament, he knew afterwards, and his failure to stop it rendered him part of the conspiracy.<sup>121</sup> But the crux of the argument was that there was conspiracy to break the law.<sup>122</sup> This required Knox to attack the legitimacy of Ryan's constitutional arguments. Ryan's position as Premier meant he had to accept the Commonwealth position regarding censorship but he had used underhanded efforts to publish what had been censored. Although Ryan had said he had used legal means, this argument was avoided by *The Argus*: the conspiracy on which the comment was based was a conspiracy to subvert a Commonwealth decision on what the law was. The notion that Ryan had acted legally was belittled: Knox commented disparagingly that something was 'a lawyer's suggestion' and written 'tongue in the cheek',<sup>123</sup> and later that '[t]hey knew very well that these people were endeavouring to break the law without appearing to break it'.<sup>124</sup> 'A meaner scheme was never concocted', Knox continued, before revealing the fifth-column argument: 'How is any Government to fight ... if it always has a man walking behind it ready to stab it in the back, or to descend to any trick in order to gratify his personal vanity or serve his party aims?'<sup>125</sup> And then the reason behind exploring the company Ryan kept was revealed: his reputation was already so low that the allegations of *The Argus* could cause no damage,

(where inconsistent statements are made as to whether imputations as to personal motives could ever fall under the fair comment defence).

<sup>120</sup> 'Ryan v "The Argus": Plaintiff in the Box' (n 52) 5 (at 'Mr Knox's Address').

<sup>121</sup> 'Ryan v "The Argus": Counsel's Closing Addresses' (n 46) 9 (at 'Was There an Arrangement?').

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.* (at 'Speeding up "Hansard"').

<sup>124</sup> *Ibid.* (at 'A Mean Scheme').

<sup>125</sup> *Ibid.*

although (somewhat paradoxically) Knox argued that Ryan had also won an election with a bigger majority than before to suggest he suffered no damage.<sup>126</sup>

There was some truth in Macrossan's submission to the jury in closing that *The Argus's* fair comment defence was simply 'an impudent subterfuge to enable them to sling more mud at the plaintiff'.<sup>127</sup> Other than stressing the lawfulness of Ryan's behaviour and the limited licence allowed to newspapers to attack public men,<sup>128</sup> he could only reiterate Ryan's good character. Isaacs J then gave a detailed summing up,<sup>129</sup> but on the question of the nature of any conspiracy he summed up largely against Ryan:

Mr Ryan had said he took steps to get his speech before the public without submitting it to the censor, because he believed he was legally entitled to do it, and because the censorship was being applied for political purposes. In [my] opinion, the Commonwealth was the sole judge of that. The Commonwealth Government had power to censor matter which in its discretion it thought ought to be censored, and if the censor, acting under instructions from his Ministerial head, carried out that power, he was perfectly entitled to do so. Therefore, for anybody, even the State Government printer, to attempt to publish what the Commonwealth Government had censored would be illegal ...<sup>130</sup>

Although Isaacs J indicated that Ryan's bona fide belief was relevant (he did not explain why),<sup>131</sup> his comment reveals a distaste for arguments based on a state's challenge to Commonwealth authority. Isaacs held an extremely wide view of the scope of federal power,<sup>132</sup> and it is not surprising that he was unimpressed with Ryan's legality argument. But even the existence of the argument shows the limits of the private law defamation action in trying to mediate between difficult questions of administrative and constitutional law. To determine the limits of freedom from Commonwealth executive authority by deciding

<sup>126</sup> Ibid (at 'Shaking a Traitor's Hand').

<sup>127</sup> 'Ryan v "The Argus": The Summing Up' (n 39) 7 (at 'We Say: No Damages'). Ryan also accused Knox of throwing mud during his cross-examination: 'Legal Wits: Interesting Contest', *The Daily Standard* (Brisbane, 16 August 1919) 5 (at 'Throwing Mud').

<sup>128</sup> 'Ryan v "The Argus": Counsel's Closing Addresses' (n 46) 9 (at 'Counsel for Mr Ryan').

<sup>129</sup> See 'Ryan v "The Argus": The Summing Up' (n 39) 7 (at 'His Honour Sums Up'). Although, it is doubtful whether the issue of defamatory meaning was really a question that should have been left to the jury.

<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

<sup>132</sup> See generally Zelman Cowen, *Isaac Isaacs* (University of Queensland Press, rev ed, 1993) ch 7.

whether allegations that one had disobeyed an executive decision using allegedly constitutional means were defamatory was hardly the best way to determine whether and how the competing interests could be balanced.

This long story then took a completely unexpected twist. In attempting to get the jury to answer all the questions he had left to them, Isaacs J exasperated the jury to the point where, having previously reached majority answers on almost all of the questions, they decided after being locked up for the night that they could in fact agree on the answers to none of the questions.<sup>133</sup> This magnificently perverse gesture resulted, as they no doubt had hoped, in the jury being discharged,<sup>134</sup> and led to arguments over whether the answers that had been handed up and returned by Isaacs J constituted a verdict on which judgment could be entered. The detail of this part of the proceeding need not concern us here, but Isaacs J ruled that there had been no final verdict on which to base a judgment, and this was upheld by the Full Court of the High Court.<sup>135</sup>

## VI THE SECOND TRIAL

After an attempt to have a special jury sit on the case failed (because the common jury had allegedly not understood certain questions put to it in the first)<sup>136</sup> the second trial took place in December 1919.<sup>137</sup> In the second trial Ryan did not give evidence<sup>138</sup> and only one witness was called.<sup>139</sup> Macrossan's opening revealed a slightly different approach from the first trial: the emphasis was on the newspaper as defendant as much as Ryan's conduct. There are references to the newspaper's commercial purposes of selling their newspaper,<sup>140</sup> the need for some limit on 'an unbridled press',<sup>141</sup> and that damages were the 'only check' on newspapers 'making ... reckless charges ... to "boost" their circulation by

<sup>133</sup> 'Ryan v "The Argus": Jury Fails to Agree', *The Argus* (Melbourne, 23 August 1919) 19.

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

<sup>135</sup> *Cunningham v Ryan* (1919) 27 CLR 294. See also 'Ryan v "The Argus": Defendants Seek Judgment', *The Argus* (Melbourne, 17 October 1919) 7.

<sup>136</sup> 'Ryan v "The Argus": The Second Trial', *The Argus* (Melbourne, 1 November 1919) 20; 'Ryan v "The Argus"', *The Australasian* (Melbourne, 8 November 1919) 36.

<sup>137</sup> 'Ryan v "The Argus"', *The Argus* (Melbourne, 4 November 1919) 4. See also 'Ryan v "The Argus": The Second Trial' (n 136) 20.

<sup>138</sup> 'Ryan v "The Argus": Second Trial Begun', *The Argus* (Melbourne, 16 December 1919) 7 (at 'Mr Shand's Address').

<sup>139</sup> See *ibid* (at 'Police Commissioner's Evidence').

<sup>140</sup> *Ibid* (at 'Plaintiff's Case Opened').

<sup>141</sup> *Ibid* (at 'An Unbridled Press').

publishing sensational articles'.<sup>142</sup> These were charges against the gutter press but, he noted, *The Argus* was not the gutter press: it 'paraded itself as a journal of eminent respectability and traditions', hence the impact of the libel was greater.<sup>143</sup> But a more aggressive response was taken by the new counsel for *The Argus*, Shand KC, for good reason. As Ryan had not gone into the witness box, the defendants 'had to admit that what had been written about [Ryan] was prima-facie libellous' and that they could not prove it.<sup>144</sup> But there was an appeal to a non-legal but powerful symbolic argument: what had happened in Queensland was 'a matter of vital public interest'.<sup>145</sup> And while Macrossan had besmirched the newspaper, it was a risky strategy. Shand argued that

[t]he public relied upon the large papers [to keep them informed], and the papers would be failing in their public duty not only if they refrained from publishing news of matters which came within their knowledge, but also if they failed to comment on matters of vital public interest.<sup>146</sup>

This kind of argument formally carried little weight, and was contrary to the expressed judicial view that newspapers had no greater protection when commenting than an ordinary citizen,<sup>147</sup> but the frequency of its use in cases against newspapers suggests counsel thought it did resonate with juries. Shand was equally forceful on the legality argument:

Mr Ryan was a barrister who knew the law, yet what did we find? He admitted in his own statement that he made a speech in the Centennial Hall. The censor censored the speech, and immediately Mr Ryan used his Parliamentary position to defy the censor and to circumvent the law. If he considered that he had been unjustly treated he should have had recourse to the High Court. He should have felt himself bound by his position to follow the constitutional way, but he had thought that his position and the means he adopted would permit him to achieve his object — which was to get before the public matter banned by the censor — with immunity.<sup>148</sup>

<sup>142</sup> Ibid.

<sup>143</sup> Ibid.

<sup>144</sup> Ibid (at 'Mr Shand's Address').

<sup>145</sup> Ibid.

<sup>146</sup> Ibid (at 'An Absurd Suggestion').

<sup>147</sup> See, eg, the slightly later *Sunday Times Publishing Co Ltd v Holman* (1924) 27 WALR 10.

<sup>148</sup> 'Ryan v "The Argus": Verdict for Plaintiff, *The Argus* (Melbourne, 17 December 1919) 15 (at 'Premier Not Immune').

Shand's most telling argument was that Ryan had failed to go into the witness box:

He knew that the defendants could not prove their case except through him or one of his Ministers, or a member of the anti-conscription committee, for they were the sole repositories of the information which the jury required.<sup>149</sup>

As Rich J noted in his summing up, Ryan was perfectly entitled to refuse to go into the witness box,<sup>150</sup> but at this stage it was all about Ryan's character and Shand showed no restraint in attacking it. Perhaps the lowest point was when he accused Ryan of using his children to garner favour with the jury. Macrossan had argued that the stigma of the accusations against Ryan would inure to the discredit of his children. Shand was having none of it:

[Ryan's] counsel had drawn a pitiful picture of his children, with their youth spoiled by the stigma placed upon them by this charge against their father. Two little girls, dressed in white for innocence, had appeared in Court that day, apparently to impress the jury, but that was all 'flap doodle'.<sup>151</sup>

Rich J was determined to avoid any problem of overelaboration and kept his summing up short. The admission that the words were libellous of Ryan and could not be justified 'stripped the case of many difficulties'.<sup>152</sup> Rich J made no reference to fair comment in the summing up, probably because the more extreme allegations were not fair comment on the only facts that *The Argus* could prove (those admitted by Ryan in his rebuttal of Hughes and published in *The Argus*).<sup>153</sup> Rich J's summing up was very favourable to Ryan; as Shand had conceded the defamatory meaning point, all that was left was damages.<sup>154</sup> After three hours the jury found the article was defamatory of Ryan but awarded only one farthing damages.<sup>155</sup> The only solace for Ryan was that Rich J was not prepared to award costs against him; indeed as Rich J went through the factors in support of his decision — the grave charges against Ryan, the failure of *The Argus* to apologise, and the lack of any adverse evidence on Ryan's character<sup>156</sup> — one senses some sympathy for Ryan.

<sup>149</sup> Ibid.

<sup>150</sup> Ibid (at 'His Honour Sums Up').

<sup>151</sup> 'Ryan v "The Argus": Second Trial Begun' (n 138) 7 (at 'Mr Shand's Address').

<sup>152</sup> 'Ryan v "The Argus": Verdict for Plaintiff' (n 148) 15 (at 'His Honour Sums Up').

<sup>153</sup> Ibid.

<sup>154</sup> Ibid.

<sup>155</sup> Ibid (at 'The Verdict'). *The Argus* 'had not expected that he would get any more from that jury': Dumas (n 97) 35.

<sup>156</sup> Ibid (at 'Question of Costs').

## VII THE SIGNIFICANCE OF THE CASE

Viewed from a purely doctrinal standpoint, there is little in *Ryan v The Argus* that is worthy of note. There was no appellate decision (on the defamation issue) so there is little discussion of questions of law and the result was a product of the toxic politics surrounding the conscription debates. But *Ryan v The Argus* is a striking example of the difference between ‘law in the books’ and law as practised. Whatever the formal ability of the law of defamation to deal with the issues raised in the case, it is no surprise that *in practice* the jury in the trial struggled to deal with the enormity of the political forces at play, especially given the tactics adopted at trial. These tactics were not accidental and played to pre-existing prejudices surrounding Ryan. The unsatisfactory nature of the trial was recognised nearly 20 years later when the benefits of jury trial were under discussion at the second convention of the Law Council of Australia in 1936. Responding to High Court judge HV Evatt’s paper defending jury trials, federal Attorney-General Robert Menzies used the *Ryan v The Argus* case as the exemplar of the problems faced in civil jury trials.<sup>157</sup> Isaacs J’s attempts to force the jury to separate ‘the grain from the chaff’<sup>158</sup> by putting 35 questions to them, led to the jury making ‘the inevitable botch of them’.<sup>159</sup> Conversely, Rich J in the second trial left the jury to make a general verdict which allowed them to ‘decide the case on what they thought of Ryan or the other party’.<sup>160</sup> In response, all that Evatt (who had been junior counsel for Ryan in part of the first trial and all of the second) could say about *Ryan v The Argus* was that it showed ‘that in a very exceptional type of defamation action the jury may act wrongly’.<sup>161</sup> Whatever the merits of Menzies’s criticism of civil jury trial more generally, they resonated in relation to the *Ryan v The Argus* case. Ryan’s constitutional and free speech objections to the course adopted by the Hughes government were always going to be difficult to sell in a jury trial. The weaknesses of Ryan’s case was its complexity. It was based on some fairly sophisticated legal and constitutional propositions more suited to considered reflection by a judge with, perhaps, some knowledge of the legal and historical traditions to which

<sup>157</sup> Justice Herbert Vere Evatt, ‘The Jury System in Australia’ (1936) 10 *Australian Law Journal* 49, 74.

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid* 75.

<sup>160</sup> *Ibid.* See also ‘Florence Nightingale’, ‘Sheisms and Girleens’ Gossip’, *Truth* (Perth, 20 December 1919) 3: ‘[t]he farthing was the vote of a political jury — the huge costs it carried the opinion of an honest judge’.

<sup>161</sup> Evatt (n 157) 76.

the argument implicitly appealed.<sup>162</sup> While judges too could have their biases, there is no suggestion that either Isaacs J or Rich J displayed their personal feelings with the relish of Pring J in *Griffith v Williams*.<sup>163</sup>

Even in the absence of any anti-Ryan guidance from judges, however, the legal niceties of his argument were no match for Knox and Shand's appeal to popular non-legal perceptions of Ryan as a person who put party ahead of country. While the immediate political controversy ended with the defeat of the second conscription referendum, the divisions it created were remembered long after. As Evans noted in the Queensland context, when peace came 'the mood remained divisive, vengeful and ugly, as loyalists ... demanded capitulation and atonement rather than reconciliation'.<sup>164</sup> By the end of the war, Ryan was in an 'increasingly untenable position':<sup>165</sup> hated by loyalists, but subject to criticism from the political left for his support for the war and voluntary recruitment.<sup>166</sup> In this environment, it is little wonder that counsel for *The Argus* played the man rather than the ball.

In many ways, Ryan was in a quandary. As Rich J noted in summing up in the second trial, once *The Argus* failed to apologise to Ryan (as he had requested) he had either to keep silent or bring an action.<sup>167</sup> In the end, however, there was little Ryan could do against a large newspaper holding a mainstream view. Ryan was undoubtedly a polarising political figure and the law of defamation was not designed to mediate between those holding radically different political views. This was especially so when one party to the action was given the tacit support of the state (the Commonwealth) in an ostensibly private law action to determine private rights. Emboldened by the result and the manner in which it was obtained, *The Argus* was defiant in notional defeat:

<sup>162</sup> Which may explain why Ryan's preferred mode of trial was by judge alone, with a common jury of twelve being an alternative: "Special" or "Common"? What Jury for Libel Action? (n 93) 11.

<sup>163</sup> Although earlier in the dispute members of the High Court had expressed their displeasure at Ryan's contempt proceedings: Griffith CJ referred to the 'prosecutors of this precious proceeding', mused whether the case should be adjourned to the 'Greek Kalends, or the Day of Judgment', and commented that a similar application against Douglas Haig in England would not even be heard: 'Mr Hughes and Mr Ryan: Contempt of Court Motion' (n 71) 4. This prompted a rebuke of Griffith CJ by the Brisbane *Truth*: 'Judicial Jabbers: Judges and Their Jobs', *Truth* (Brisbane, 31 March 1918) 4.

<sup>164</sup> Evans (n 29) 148.

<sup>165</sup> Joan Beaumont, *Broken Nation: Australians in the Great War* (Allen & Unwin, 2013) 422.

<sup>166</sup> See *ibid.*

<sup>167</sup> 'Ryan v "The Argus": Verdict for Plaintiff' (n 148) 15 (at 'His Honour Sums Up').

We make no apology for the publication of the comments objected to. The circumstances as disclosed at the time demanded that we should express what we felt to be the widespread and deep indignation of all loyal people evoked by the attempt of some persons in Queensland to defy and circumvent the Commonwealth Government in connection with its war measures. It was necessary to speak out plainly, and we feel that we conformed to the best traditions of British journalism in taking our stand beside the Crown in a time of some peril to the Commonwealth.<sup>168</sup>

Whatever Ryan's weaknesses,<sup>169</sup> one must admire his faith in legal processes. While the two trials were taking place he was already involved in another action against Hobart's *The Mercury* for a report arising out of actions in Brisbane in the May Day parade in 1919.<sup>170</sup> He lost that case, a verdict being found for the defendant in June 1921,<sup>171</sup> and he was taking steps to appeal at the time of his death in August 1921.<sup>172</sup> In the lead-up to the first trial, information reached the Crown Solicitor that the reason Ryan was suing *The Argus* was to obtain further information which would allow him to proceed with the Hansard seizure case<sup>173</sup> but to suggest an ulterior motive for the action misses Ryan's stated commitment to acting within the confines of the law. Ryan was no amateur lawyer. He was a regular, successful visitor to appellate courts,<sup>174</sup> including the Privy Council, he was made a King's Counsel in 1920, and he was elected an Honorary Member of the Hall of Gray's Inn in 1919 for the duration of his trip to England.<sup>175</sup> The suggestion that he was subverting the law was deeply personal. If his private defamation action brought out additional information

<sup>168</sup> Editorial, *The Argus* (Melbourne, 17 December 1919) 14.

<sup>169</sup> Ryan consistently appeared in person in controversial constitutional cases involving his government during the First World War sparking at times justifiable criticism from the Bench for the conduct of the cases. This 'fuelled a perception of personal conflict between a radical young premier and an ageing and hostile Supreme Court': John McKenna, *Supreme Court of Queensland: A Concise History* (University of Queensland Press, 2012) 111.

<sup>170</sup> See 'Ryan v the Argus: Expediting an Appeal', *The Argus* (Melbourne, 14 October 1919) 7 (at 'Writ against Hobart "Mercury"'); 'Political Libel Action: Ryan versus "The Mercury"', *The Mercury* (Hobart, 17 June 1921) 5.

<sup>171</sup> 'Political Libel Action: Ryan versus "The Mercury"' (n 170) 5 (at 'The Verdict').

<sup>172</sup> *Ryan v Davies Brothers Ltd* (1921) 29 CLR 527, 532.

<sup>173</sup> Letter from Gordon H Castle to Secretary of the Attorney General's Department, 19 August 1919 (National Archives of Australia, A432, 1929/4567).

<sup>174</sup> Including in the libel trial: in Macrossan's absence, he was given leave to represent himself before Isaacs J on the legal effect of the jury's answers.

<sup>175</sup> I gratefully acknowledge the assistance of Andrew Mussell (Archivist, Gray's Inn), who provided this information. Murphy's suggestion that Ryan was elected an Honorary Bencher of

which would help the constitutional challenge — a constitutional challenge he saw rooted ultimately in fundamental principles of free speech<sup>176</sup> — this was an incidental benefit, but it is hard to believe he would have persevered so long in the absence of a belief he had been unjustly vilified. Perhaps his free speech concerns would have been more prominent if the power given to the Speaker of the House of Representatives and the President of the Senate to censor federal Hansard on the same grounds as under the *War Precautions Regulations*, agreed by Parliament in October 1918, had been exercised.<sup>177</sup> Here the competing claims for free speech and national security were not hampered by the complications of the constitutional distribution of powers, and it is clear that the Speaker and President would have acted at the request of the Commonwealth censors, raising starkly the question of the appropriate limits of executive authority.<sup>178</sup> But whatever his hopes for the trial, he won only a technical victory which, while not pyrrhic, came at the cost of exacerbating established views about his role in the conscription debate. His biographer, DJ Murphy, was overly generous in asserting that the result of the trial gave Ryan ‘the satisfaction of knowing ... that his reputation had been vindicated by a group representing his fellow Australians’.<sup>179</sup> Rather, the history of the trial reveals that he suffered in substance a defeat,<sup>180</sup> an inevitable defeat given the limits of a private law libel action tried by jury to address fundamental constitutional questions.

the Inn, itself taken from comments of the Queensland Crown Solicitor, William Flood Webb, in WF Webb, ‘Ryan the KC: His Liking for the Law’, *The Daily Standard* (Brisbane, 9 August 1921) 7, is incorrect: Murphy (n 27) 521. At that date, the title of Honorary Bencher was awarded sparingly, usually to heads of state and Law Lords. It may have galled Ryan that his nemesis WM Hughes’s application for membership of the Inn was expedited to allow him to be made a King’s Counsel while in England, but even Hughes was only appointed an Honorary Bencher for the duration of his stay in England.

<sup>176</sup> ‘Face the Issue! Liberty at Stake’, *The Daily Standard* (Brisbane, 14 December 1917) 1.

<sup>177</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 2 October 1918, 6560–72. The power was only granted for the duration of the war and there is no record of it being exercised before the war ended.

<sup>178</sup> The contemporary criticism of the Labor opposition that the power would be exercised in practice on the advice of the censors (Commonwealth, *Parliamentary Debates*, House of Representatives, 27 September 1918, 6472 (Frank Tudor, Leader of the opposition)) corresponds to the procedures put in place to implement the resolution: Letter from GF Pearce to Deputy Chief Censor, 3 October 1918 (National Archives of Australia, A432, 1929/4575); Letter from the Acting Secretary, Attorney-General’s Department to Secretary, Department of Defence, 8 October 1918 (National Archives of Australia, A432, 1929/4575).

<sup>179</sup> Murphy (n 27) 474.

<sup>180</sup> See the comments of *The Watchman* Protestant newspaper: ‘Our Blotting Pad’, *The Watchman* (Sydney, 28 August 1919) 4; ‘Ryan’s Recompense: A Verdict of a Farthing’, *The Watchman* (Sydney, 18 December 1919) 8.

## VIII CONCLUSION

The law of defamation was enmeshed with the leading political disputes of the First World War. There was no bigger issue than the conscription referendums, and while the doctrinal elements of libel — defamatory meaning, reference to the plaintiff, fair comment and privilege — all required judicial analysis in this confrontational context,<sup>181</sup> *Ryan v The Argus* provided the stage for a replay of the bitter political debates of November 1917. The wounds from those divisive debates, left unremedied by the political process, had to be confronted by an Australian judge and jury, and the way in which they answered them in part dictated the role that defamation law played in regulating these intense political conflicts. To say that *Ryan v The Argus* simply involved the application of the general principles to an Australian context rather downplays the bilateral relationship that exists between context and general rule. While there was no significant difference between the general rules that applied in England and Australia, to ignore both how these rules were applied, and the results they produced, can produce a false negative when evaluating the potential distinctiveness of the Australian law of defamation in practice. If the gist of Ryan's argument related to the scope of federal power and the limits of appropriate means of state challenge to that power, this was outside anything contemplated by an English law of defamation. In a vastly different political context, the broad assertions of English traditional texts that fair comment was largely a question of fact could shed little light on how to resolve this question.<sup>182</sup>

While *Ryan v The Argus* has this importance for the legal historian, of more general interest is the fact of the politicians' appeal to the law of defamation to be the referee for determining the boundaries of acceptable political speech in the most heated of political debates. This article has argued that such hopes were misplaced because of the limits of the legal rules and of the forensic process, but the fact that the appeals were made tells its own story. Australian defamation law largely mirrored the English in substance but in application *Ryan v The Argus* is evidence that the questions posed were not always identical. The peculiarities of the Australian political environment, as highlighted in the most high-profile defamation case to arise out of the conscription debates, show that, at the very least, the common law could be infused with an Australian flavour.

<sup>181</sup> For examples, see *Givens* (n 22); *David Syme & Co v Canavan* (1918) 25 CLR 234, discussed in Lunney (n 14).

<sup>182</sup> See, eg, Pollock (n 112) 256–62.

*Appendix 1: Circular Sent to Members of Anti-Conscription Campaign Committee  
regarding Proposed Steps to Avoid Censorship*

Addressed to:- Mr C Schache. Gladstone.  
-----

Queensland Anti-Conscription Campaign Committee.  
-----

Worker Building.  
Brisbane.  
22nd November 1917.

Dear Comrade,

Political events have taken such a decided serious turn and things have happened which must be brought to the notice of your members at once. Will you therefore call a special meeting of your organisation and place this letter before them.

As you are probably aware we had decided to issue a no-conscription pamphlet to every elector in Queensland, the matter for this leaflet was submitted to the Censor today and he has dealt with it in such a way as to make it worse than useless for our purpose. He, the Censor, has not only cut out most vital portions but has prevented us from reprinting matter which was published in the Australian "Worker" of Nov: 15, 1917. The position we now find ourselves in is that our last vestige of freedom has been taken from us and to prevent the calamity which is eminent, we have called upon the State Labour Government to assist us. The response of the Government has been prompt, and today in Parliament the question of the censorship will be discussed. We have arranged for the whole of the censored matter to be read in the House. This will be published in "Hansard", and by this method only can we state our case. The Hansard containing the speeches will be sent to you for distribution. It will now rest with you to see that every person in your district has a copy of Hansard. That you may fully realise the gravity of the situation, we may state that yesterday two military officers were installed into the office of the "Daily Standard", and we do not know what steps they will next take.

We look to you to do your part in the fight against the political censorship. No more tyrannical form of Government has ever been practiced in any country, and unless we at once assert our authority, the great authority of the people, we shall be crushed and beaten as people have been in other countries.

As soon as your Hansards arrive, scatter them throughout your district and send word what progress is being made.

Yours faithfully,

(Signed) Lewis McDonald, Hon. General. Sec.  
Cuthbert Butler, Sec. Literature Com.

*Appendix 2: Circular Sent to Members of Anti-Conscription Campaign Committee  
regarding Circulation of Extraordinary Government Gazette Explaining the  
Federal Intervention to Seize Hansard*

QUEENSLAND ANTI-CONSCRIPTION COMMITTEE.

"Worker" Building,  
BRISBANE,  
November 27, 1917.

Dear Comrade,

As indicated in our last circular the political situation has developed into a most serious state.

Our promise to forward bundles of "Hansard" containing the case against conscription cannot be fulfilled, and we now ask you to let your members know what has happened.

The State Labour Government dealt with the Censorship on a motion of censure in the Legislative Assembly on Wednesday last 22nd instant, this debate was printed in the ordinary way in Hansard and every preparation was made for distribution. The Government delivered one load of the Hansard to our office rooms last night, and before we arrived this morning a Military escort came and raided our premises and took away every copy of Hansard. The Military also raided the Government Printing Office and removed every copy printed. They further instructed the Government Printer not to print any more copies. Thus you will realise what we are up against.

The Government is now issuing an Extraordinary Gazette setting forth what has happened and this will be circulated as widely as possible. A parcel will be sent to you.

In case none reach you, we would desire to let you know the opinion of Mr. T. J. Ryan, Premier and Attorney General, as stated during the debate on Wednesday and printed in "Hansard".-

"... In my opinion the manner in which the censorship is being exercised during this Campaign ... is entirely outside the scope of the powers of the Censor. In short, in my opinion, the exercise of the powers in a manner in which they are being exercised is entirely unlawful."

Mr. the Prime Minister, has violated the powers conferred upon him by the people and as the process of fighting the case in the High Court might be too long we can only hope that the people will answer Hughes at the Ballot Box.

We now appeal to every member of your organisation to support the State Government and this Committee in the fight being made against a system of censorship which has become intolerable.

Call your members together and read this circular to them and ask them to make the facts herein stated as widely known as possible as this is now our only hope of fighting. Let us know by return mail of the safe arrival of this letter.

Yours faithfully,

LEWIS McDONALD, Hon. Secretary.

CUTHBERT BUTLER, Secretary Literature Committee.