

LAW, WAR AND LIBERTY: THE WORLD WAR II SUBVERSION PROSECUTIONS

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[This article examines one manifestation of the uneasy status of civil liberties in times of war — the prosecution of anti-war activists for offences under regulations made under the National Security Act 1939 (Cth). It argues that these prosecutions were characterised by both repression and restraint. Repression was reflected in the breadth of the anti-subversion regulations (which, interpreted literally, made advocacy of almost anything illegal), in occasional prosecutions for trivial offences which bore no relationship to the efficient conduct of the war, in disproportionately severe sentences (in Western Australia) and in judicial interpretations of the regulations which did little to limit their possible abuse. Restraint manifested itself in the rarity of prosecutions, in the rigorous filtering process applied by the Commonwealth Attorney-General's Department, in occasional magisterial and judicial assertions of the need to construe legislation in the spirit of liberalism, and in sentences which (except in Western Australia) tended to be proportionate to the offence and were normally non-custodial. Repression is explained in terms of opportunity and political pressure. Restraint is explained in terms of lingering civil libertarianism on the part of some members of the government, along with the need to avoid alienating the government's 'loyal opponents' by steps likely to be treated as manifesting anti-leftism, as opposed to anti-subversion. The article concludes with an assessment of the implications of this analysis, arguing that it casts doubt on the practicality of, and need for, anti-subversion laws. Where opposition to war is widespread, anti-subversion prosecutions may be both impracticable and counterproductive. Where opposition is limited, prosecutions are unnecessary.]

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I INTRODUCTION

Wars can be bad for civil liberties, especially when the very survival of a nation appears to be at stake.¹ If nations are to wage war successfully, they need to be capable of mobilising and supporting armed forces. This is likely to require military conscription, along with personnel policies which direct people from ‘inessential’ to ‘essential’ industries. Sustaining the infrastructure needed to support a war will require a massive diversion of resources, increases in taxation and the appropriation of various forms of property. Total war is difficult to reconcile with the maintenance of ‘economic’ liberties. More problematic is the relationship between war and ‘political’ liberties. While political liberties tend to suffer in times of total war, the reasons for this are unclear. It is important to distinguish between functional explanations, which treat the curtailment of political liberties as essential for the conduct of a total war, and sociopolitical explanations, which treat curtailed political liberties as a consequence of total war and its exigencies.

There are clearly some circumstances in which political liberties may be incompatible with the efficient conduct of a war. A degree of censorship is almost certainly needed to prevent the private and public communication of information which might be of use to the enemy. In cases of doubt, security interests may require that the uncertainty be resolved in favour of censorship at the expense of the freedom of political communication. But censorship carries with it the possibility of abuse. It may be used not only to protect national security, but as a means to harass dissident groups.

Effective defence might also require some control over attempts to sway the views of others. For instance, reg 42 of the *National Security (General) Regulations 1939* (Cth) made it an offence for a person to attempt to influence public opinion in a manner likely to be ‘prejudicial to the defence of the Commonwealth, or the efficient prosecution of the war’.² The offence was not conditioned upon proof that the attempt had been successful, but it envisaged that in certain circumstances attempts to influence the public might be successful and might be inconsistent with the efficient prosecution of the war. In principle, these assumptions seem uncontroversial. Attempts to influence public opinion do sometimes succeed; indeed, therein lies a rationale for freedom of political expression. It is possible to point to particular beliefs which, if widely held, would clearly be inconsistent with the effective defence of a country. A widespread belief that

¹ See generally Donald Johnson, *The Challenge to American Freedoms: World War I and the Rise of the American Civil Liberties Union* (1963); Michael Linfield, *Freedom under Fire: US Civil Liberties in Times of War* (1990); Neil Stammers, *Civil Liberties in Britain During the 2nd World War: A Political Study* (1983).

² Similar regulations were made by other Commonwealth governments: *Defence (General) Regulations 1940* (UK) reg 39B; *Defence of Canada Regulations*, CRC 1940, reg 39A; *Public Safety Emergency Regulations 1940* (NZ) reg 2.

there was nothing that could be done to resist an invading enemy could become a self-fulfilling prophecy. A belief that a war was being waged for sectional interests and without any real justification might make it difficult for a government to mobilise the resources needed to wage total war.³ More controversial is the degree to which attempts to influence public opinion are likely to pose a threat to national security. After all, if a government — with all of the nation's resources at its disposal — cannot employ its propaganda machine to prevail over the small groups of dissidents typically charged with such offences, serious questions must arise as to whether the government should be waging the war. Moreover, the tenuous nature of the link between public opinion and public behaviour means that even if 'undesirable' attempts to influence the public are successful, they may make no detectable difference to the government's capacity to wage war.

It is also possible that the curtailment of political liberties may contribute to boosting morale insofar as it helps to eliminate the appearance of dissent and to reassure the majority that the 'enemy within' is being punished. It is clear that 'unpatriotic' behaviour can arouse considerable passion in time of war. It is not so clear, however, that government tolerance of dissent inclines 'patriotic' groups to become less committed in their patriotism. Nor is it clear that government repression of 'unpatriotic' groups reduces levels of apparent dissent or soothes unease among the general public.⁴

There are costs associated with the suppression of political liberties. One danger is that attention to the harm which may be done by potentially disloyal people may divert attention from the contribution that such people may nonetheless be capable of making to the war effort.⁵ A second is that attacks on dissidents may enhance their determination to resist the government.⁶ A third is that dissent may be useful to the extent that it draws the government's attention to problems that need addressing and holds decision-makers accountable for their conduct. Measures which reduce the level of 'disloyal' dissent are also likely to discourage 'loyal' dissent and, in any case, will ultimately deprive governments of the advantages to be gained from expressions of opposition.

It is, therefore, at least arguable that the effective conduct of total war is consistent with tolerance of political dissent, even when that dissent involves

³ Smaller wars can, of course, be waged despite considerable public opposition to them.

⁴ Needless to say, there may be considerable dispute over what patriotism involves. For the purposes of this argument, 'unpatriotic behaviour' is behaviour which is generally regarded as threatening the interests of the nation. 'Repression' is also a potentially value-laden term. For the purposes of this article, repression is used to describe government activities which limit the freedom of groups and individuals to associate and propagate their beliefs. Obviously there are degrees of repression. Moreover, I do not intend to imply that what I describe as repression is unjustifiable. I think it normally is, but this is a conclusion to be defended rather than reached by definitional fiat.

⁵ Margaret Bevege, *Behind Barbed Wire: Internment in Australia During World War II* (1993) xv, 7, 26, 84–5, 128, 140–1, 167, 212, 214–17, 236 makes the point that the adverse effects of internment on the labour force stem both from the fact that internees are no longer able to be productive and from the fact that people need to be diverted from other duties in order to supervise them. Recognition of this is to be found in various British policies concerning the release of internees: Stammers, above n 1, 50–6.

⁶ Gianfranco Cresciani, *Fascism, Anti-Fascism and Italians in Australia 1922–1945* (1980) 175–6, 180–1. See also Bevege, above n 5, 234–7.

challenges to the legitimacy of the war in question. The coexistence of total war and intolerance of certain forms of political dissent may reflect a belief to the contrary on the part of relevant policy- and decision-makers. It may also reflect circumstances associated with total war, which mean that those otherwise inclined to abridge the liberties of particular dissident groups may more easily do so in wartime than in peacetime.

There are several reasons why total war may create a climate in which a degree of political repression becomes feasible. Those who make the requisite sacrifices — whether willingly or unwillingly — are apt to feel hostile to those who avoid making, or refuse to make, similar sacrifices.⁷ They may feel particularly hostile to those who argue that their sacrifices are in vain. They are likely to have little sympathy towards those who suffer lesser inconveniences as the state goes about its business. Moreover, when a country faces an enemy, opposition to the war may be conflated with sympathy with the enemy, so that what might have been legitimate politics prior to the outbreak of war comes to be perceived as disloyalty once war has been declared. Equating dissidents with the enemy may be of particular importance when the enemy is powerful and unreachable and where dissidents are close to hand. As a result, dissidents may become a surrogate for the true enemy.

Such considerations may affect governments in different ways. For governments that are generally intolerant of dissident groups, public hostility may provide an opportunity to do what might be legally or politically unfeasible in peacetime. For governments that doubt the wisdom of political repression, public resentment of dissidents may mean that they feel under pressure to be seen to be doing something. At the same time, regardless of their inclinations, governments are likely to be constrained by the need to maximise their moral authority.⁸ The capacity to wage war will depend on the degree to which governments are able to appeal both to their natural supporters and to their traditional domestic adversaries. Governments may be tempted to take action against dissident groups, while at the same time being constrained by the fear of adverse reactions from groups that are both willing to provide the government with qualified support and wary of what they see as partisan attacks on dissenters.

This article examines one aspect of the Commonwealth government's reaction to political dissent during World War II, with a view to an assessment of the degree to which total war requires and gives rise to the curtailment of two crucial political liberties: the freedom to communicate unpopular political ideas and the freedom of political association. In Part II, I briefly describe the major sources of opposition to Australia's involvement in World War II. In Part III, I examine the wartime legislation which governed 'subversive' activities and the degree to which it is to be understood in terms of the particular concerns of the Menzies government as opposed to more general considerations. Parts IV and V examine

⁷ See, eg, the degree to which Australians were concerned about equality of sacrifice: Paul Hasluck, *The Government and the People 1939–1941* (1952) 281–4.

⁸ Thus, the British government agreed to consult with opposition parties in relation to wartime regulations, rather than using its numbers to defeat a disallowance motion: Stammers, above n 1, 17–22.

the enforcement of the legislation, arguing that it was characterised by both considerable repression (in Western Australia) and by considerable restraint (in the eastern states), and that while Australia reacted more punitively to opponents of the war than the United Kingdom, its responses appear to have been more restrained than those of Canada and New Zealand. Finally, in Part VI, I consider the implications of these patterns, arguing that they suggest that there is little 'need' for repression, and that if political liberties are to be restricted in time of war, this should be by laws and institutions, which usually circumscribe such measures. While the Australian experience was that government officials could often be trusted not to abuse their wartime powers, it is also clear that wide-ranging anti-subversion laws are sometimes used to catch people whose activities pose no conceivable threat to the efficient conduct of total war.

II WARTIME DISSENT

In the early years of the war, its most active opponent was the Communist Party of Australia ('CPA'). Prior to August 1939, the CPA had urged resistance to fascist aggression, as had communist parties throughout the world. It had criticised German, Italian and Japanese expansionism and had been active in organising anti-fascist pamphlets, demonstrations and boycotts. Communists had fought and died in the Spanish Civil War and the CPA had condemned the conservative parties for their appeasement policies and warned of the need to prepare for war against Japan. Its support for anti-fascist measures was, however, contingent on these being acceptable to the communist movement. It favoured collective security, but it showed little enthusiasm for the kind of military preparation needed if Australia and its potential Western allies were to play an effective role in an anti-fascist war. The Molotov-Ribbentrop Pact⁹ caused some consternation within the CPA, although it came to be justified in terms of Western duplicity, and as an opportunity for the Soviet Union to buy time. Some communist leaders expressed their support for the war following Australia's declaration of war on Germany. Others did not, and their will eventually prevailed. In finally deciding that the war was to be opposed, the CPA was ultimately guided by instructions from the Comintern. The Comintern, or 'Communist International' or 'Third International', had been established in the immediate aftermath of the Russian Revolution. It was an international organisation, membership of which was conditioned on a party's subscribing to the Comintern rules. As a quid pro quo, the party enjoyed the legitimacy afforded by virtue of its association with the one communist party to have successfully seized power, and a limited amount of financial and other assistance from the Soviet authorities. Ostensibly self-governing, the Comintern was effectively under Stalin's

⁹ The Molotov-Ribbentrop Pact (or the Soviet-German Non-Aggression Pact) was signed on 23 August 1939. Under its terms, the two parties agreed that neither would attack the other. It was further agreed (although this was not immediately apparent) that the Soviet Union would be free to occupy Estonia, Latvia, Bessarabia and eastern Poland in exchange for Hitler having a free hand in relation to western Poland. A month later, Ribbentrop and Molotov agreed on a communiqué committing the parties to cooperation and friendship rather than mere non-aggression. See, eg, François Furet, *The Passing of an Illusion: The Idea of Communism in the Twentieth Century* (1999) 315–30 for an account of the pact and its context.

control. In the immediate aftermath of the pact, it was silent, but it soon made its analysis of the war clear. As early as 9 September 1939, it had issued a directive that the war was now an imperialist war. In successive directions to the CPA, the Executive Committee of the Comintern first made it clear that the war was not an anti-fascist war, but an imperialist one, and then that it was to be actively resisted. The correct approach to the war having been made clear, the CPA proceeded to adopt it.¹⁰

An imperialist war, it was argued, could only be bad for the working class. The government's motives for entering the war were questioned, and the Allies were condemned for having a hidden agenda which was not the defeat of Hitler, but to pressure him to leave the West alone and to attack the Soviet Union instead. Somewhat inconsistently, criticism of the government's preparations for war coexisted with criticism of the attempts by members and supporters of the government to avert war with Japan. The end of the 'phoney war' in May 1940 meant that the government's motives were no longer so suspect, but opposition continued. The war remained an imperialist one, undeserving of working class support.

In practice, the CPA's opposition to the war was relatively constrained.¹¹ It appears not to have engaged in any form of sabotage¹² and its attempts to stir up discontent within the armed forces appear to have been relatively half-hearted.¹³

¹⁰ On CPA attitudes between 1935–41, see W J Brown, *The Communist Movement and Australia: An Historical Outline — 1890s to 1980s* (1986) 53–139; Alastair Davidson, *The Communist Party of Australia: A Short History* (1969) 78–9; Carole Ferrier, *Jean Devanny: Romantic Revolutionary* (1999) 164–8; Ralph Gibson, *The People Stand Up* (1983) 355–79; Robin Gollan, *Revolutionaries and Reformists: Communism and the Australian Labour Movement 1920–1955* (1975) 79–85; Oriel Gray, *Exit Left: Memoirs of a Scarlet Woman* (1984) 48–52; E F Hill, *Communism and Australia* (1989) 25–6, 28–9, 105; Stuart Macintyre, *The Reds* (1998) 385–9; John McKenzie, *Challenging Faith* (1993) 78–84, 90–3; Carolyn Rasmussen, *The Lesser Evil? Opposition to War and Fascism in Australia, 1920–1941* (1992); Bernie Taft, *Memoirs of Bernie Taft: Crossing the Party Line* (1994) 36–8. For analyses of Trotskyist interpretations of the war, see Gollan at 86–9. The British, Canadian and New Zealand communist parties had initially supported the war, but like those Australian communists who had, their stance changed to opposition once the Comintern's views were made clear. The Communist Party of the USA saw the war as imperialist from its commencement. See John Attfield and Stephen Williams (eds), *1939: The Communist Party of Great Britain and the War* (1984); Norman Penner, *Canadian Communism: The Stalin Years and Beyond* (1988) 161–5; S W Scott, *Rebel in a Wrong Cause* (1960) 138–9.

¹¹ Gibson, above n 10, 376 notes that while the CPA tended to adopt a Leninist analysis, it did not follow this analysis through to its logical extreme and, as such, did not seek to turn the imperialist war into a civil war so as to bring about a revolution.

¹² There had been fears that there would be attempted sabotage in the event of war between Britain and the Soviet Union (but this eventuality did not come to pass): Intelligence Summary No 25, Prepared for the War Cabinet on the Basis of Information to Hand, 1 December 1939, in *Menzies Papers* (National Library of Australia, Canberra) MS 4936/2/36/3; Secretary, Military Board to the Secretary, Department of the Army, 22 December 1939; Communist Party: Secret, Navy to Secretary, Department of Defence Coordination, 22 December 1939; Air Force to Secretary, 23 December 1939 (National Archives of Australia) A2671/1 1/1940. Throughout his work, Hasluck makes no reference to any actual acts of sabotage by or on behalf of the CPA: see Hasluck, above n 7.

¹³ For concerns about such attempts, see Intelligence Summary No 25, Prepared for the War Cabinet on the Basis of Information to Hand, 1 December 1939, in *Menzies Papers* (National Library of Australia, Canberra) MS 4936/2/36/3; Navy to Secretary, 22 December 1939 (National Archives of Australia) A2671/1 1/1940. As to the nature of such attempts, see Macintyre, above n 10, 394–5. Military Intelligence was unconcerned about communist activities in South

Furthermore, while the party was associated with industrial unrest which weakened the economy, these actions are better understood in terms of the rationality of industrial unrest rather than a desire to sabotage the war effort.¹⁴ On the other hand, the CPA did denounce the war in its papers and in a series of pamphlets, and it continued to print and circulate anti-war literature after its proscription in June 1940.

Communist opposition to the war was brought to an end not by government measures but by Hitler's decision to break his pact with Stalin. The German invasion of the Soviet Union transformed the CPA's attitude to the war almost overnight.¹⁵ The war was to be supported, and if support entailed curbing industrial militancy, that was a price that had to be paid. The CPA continued to combine this support with attempts to advance its particular political interests, but support for the war generally took precedence.

Supporters of the CPA were not, however, the only people to have opposed the war. Trotskyists denounced the war, and continued to do so even after the CPA's volte-face in June 1941. There was also considerable opposition to the war from non-communists.¹⁶ Within the Australian Labor Party ('ALP') and the union movement there was some opposition to Australian involvement in the war and considerable criticism of the nature of that involvement. In April 1940, a motion supporting Curtin's policy of support for the war was passed by the Australian Council of Trade Unions Federal Conference by the narrowest of margins, and amendments condemning the war as imperialist and calling for the workers of the belligerent countries to overthrow capitalism were only narrowly lost. The Easter conference of the left-dominated New South Wales Branch of the ALP passed a motion condemning the war as imperialist.¹⁷ Concerns that the working class was being asked to make sacrifices that the rich were not were reflected in hostility to all forms of conscription, and memories of the bitter debates of 1916–17, combined with Labor isolationism, were reflected in intense hostility to any suggestion of conscription for overseas service. Federal intervention saw the replacement of the executive of the New South Wales Branch of the ALP with one less hostile to the war, but supporters of the old executive split off and formed a new party: the State Labor Party, or the Hughes-Evans Labor Party. This party (which was effectively a communist front) advocated positions not markedly different from those advocated by the CPA. Indeed, during the period of the CPA's ban, the Hughes-Evans Labor Party provided a degree of assistance to the CPA, including access to its newspaper. It eventually amalgamated with

Australia: Communism: 4th Military District, 18 July 1940 (National Archives of Australia) A6335/6 11.

¹⁴ Gollan, above n 10, 93–4; Macintyre, above n 10, 392; Allan Martin, *Robert Menzies: A Life* (1993) vol 1, 297–8.

¹⁵ There was some uncertainty about how to respond. Initially, news of the invasion was greeted with disbelief and, given poor communications with the Comintern, the CPA was reluctant to commit itself immediately, lest its decision turn out to be erroneous: see Davidson, above n 10, 81–2; Gollan, above n 10, 99–100.

¹⁶ Macintyre, above n 10, 391–3.

¹⁷ Gollan, above n 10, 91–2; Hasluck, above n 7, 248–9.

the CPA in 1943.¹⁸ That said, even official Labor MPs — Eddie Ward in particular — sometimes used rhetoric similar to that employed in CPA denunciations of both the war and the way in which it was being fought.

There was ambivalence about the war even within the government. At the same time as the CPA was condemning the war as imperialist, Menzies was privately pondering whether there was anything to be gained from a war over a country about which ‘nobody really [gave] a damn’.¹⁹ In May 1940, when Britain was deciding whether to continue fighting or to surrender, Stanley Bruce, the Australian High Commissioner to London, was urging a negotiated settlement. At this point, however, the war threatened a country about which Menzies did give a damn, and he favoured resistance.²⁰

Opposition to the war also came from religious groups. There was some opposition from within the Catholic Church to involvement in the war, but this did not give rise to sustained anti-war activity.²¹ The Jehovah’s Witnesses’ uncompromising opposition to the war aroused official hostility in Australia, just as it did in New Zealand and Canada, albeit hostility based on exaggerated ideas about the degree to which the Witnesses were acting on behalf of others rather than themselves.²² Pacifism inspired little overt opposition to the war in Australia, in contrast to New Zealand where conflict between pacifists and the authorities resulted in numerous arrests.²³ However, the last three people to be charged under reg 42 of the *National Security (General) Regulations 1939* (Cth) were ‘Christian pacifists’ who had allegedly sought signatures to a petition urging a negotiated peace with Japan.

It also goes without saying that Nazis were opposed to Australia’s involvement in the war, as were members of the *fascii*, local branches of the Italian Fascist Party, after Italy’s entry into the war in 1940. Nazis and fascists were typically German or Italian nationals, and in Australia were not dealt with by prosecutions, but by internment. Following the outbreak of war, large numbers of Germans were interned, including the overwhelming majority of the known members of the Nazi Party.²⁴ After Italy’s entry into the war, most prominent

¹⁸ Davidson, above n 10, 80; Len Fox, *Broad Left, Narrow Left* (1982) 79–97; Macintyre, above n 10, 405–6. During the period of the ban, several communists stood as Labor Party candidates for the New South Wales Parliament.

¹⁹ Macintyre, above n 10, 391.

²⁰ John Lukacs, *Five Days in London: May 1940* (1999) 142.

²¹ Gollan, above n 10, 89–91.

²² William Kaplan, ‘The World War Two Bans on the Jehovah’s Witnesses in Canada and Australia: Do Constitutional Protections Really Work?’ (1991) 9 *Australian Canadian Studies* 5, 12–13.

²³ See generally Nancy Taylor, *The New Zealand People at War: The Home Front* (1986) vol 1, 171–208.

²⁴ A 1943 memo lists 48 members or candidate members of the Nazi Party in Australia. Of these, 32 were interned, five had returned to Germany, two were in Japan and two were dead. Seven were not interned. The memo lists two other suspected members — one dead and the other interned. See Deputy Director SA to Director-General of Security, 12 November 1943 (National Archives of Australia) A9108/3 8/5. This file also includes details of the degree to which members of various Nazi front organisations had been interned. It also reports that, of 61 listed New South Wales members of the Nazi Party, 47 were interned. Four had returned to Germany, one had gone to Batavia and one to New Zealand, while another was in Perth. There was no record of the whereabouts of seven others.

Fascisti were interned, along with some hapless apoliticals and anti-fascists.²⁵ Organised right-wing opposition to the war was rare. While there had been some sympathy towards the positions taken by Germany and Japan prior to the outbreak of the relevant wars, this sympathy did not carry over into criticism of Australia's involvement once war had begun. The only 'rightist' group to engage in public opposition to the war was the Australia First Movement. Its opposition is memorable not because it struck the faintest chord with its audience, but because of the government's overreaction to the group's activities following the arrest of four of its associates for allegedly plotting to overthrow the government in the event of a Japanese invasion of Western Australia.²⁶

The only other local groups to cause much concern to the government were a number of anti-Semitic groups associated with the League of Rights.²⁷ While these groups may not have been totally opposed to the war,²⁸ language in some of their pamphlets could be taken as suggesting otherwise.²⁹ Moreover, in attacking the financial system, they potentially threatened the government's capacity to raise loans. It is clear, though, that active opposition to the war was the exception. Far more widespread were criticisms of the way in which the war was being run. These took their most public form in debates about how Australian troops should be deployed, and how the nation could be best mobilised to meet the threats with which it was likely to be, and was, confronted. They were reflected in feelings of resentment towards the perceived injustices associated with mobilisation. At a more mundane level, they took the form of the grizzling and whingeing that are probably inevitable when a democracy is at war.

²⁵ Cresciani, above n 6, 171–81; Bevege, above n 5, 60–1.

²⁶ See generally Bruce Muirden, *The Puzzled Patriots: The Story of the Australia First Movement* (1968).

²⁷ As early as 1940, Publicity Censorship, the government agency responsible for the censorship of the Australian media, was monitoring the anti-Semitic publication, *New Times*: Deputy Chief Publicity Censor to Deputy Director, Department of Information, 17 May 1940 (National Archives of Australia) SP195/1/1 72/1/5 pt 3. In 1941, consideration was being given to whether Eric Butler should be prosecuted and whether his pamphlet, *The World-Government Plot Exposed* (1940), should be banned: Croll, Acting Chief Publicity Censor, to Knowles, 4 April 1941 (National Archives of Australia) SP109/3/1 316/03. In 1942, Publicity Censorship anguished over whether and to what extent the New World Reconstruction Movement should be allowed to attack the financial system. In 1943–44 there was considerable debate about the degree to which publications such as *New Times* and pamphlets such as *Communism — Why Not?* could and should be banned, with Publicity Censorship deciding, with some reluctance, that they did not fall foul of their guidelines: (National Archives of Australia) SP109/3/1 316/38; SP109/3 316/39.

²⁸ An intelligence report on one of their leading publicists, Eric Butler, advised that intelligence reports on Butler were favourable, apart from his views on Social Credit: Croll, Acting Chief Publicity Censor, to Knowles, 4 April 1941 (National Archives of Australia) SP109/3/1 316/03. Perhaps, though, it was these views that were the problem.

²⁹ In *The World-Government Plot Exposed* (1940), Butler wrote: 'A stream of Australian youth is leaving to be smashed to bloody pulp in the second war to "save democracy" which, like the first war, was fomented by Jewish International finance, will be financed and controlled by the same group, and will mean their undisputed world domination': at 7.

III LAWS

A *The National Security Act 1939 (Cth)*

To understand the wartime prosecutions, one must start with a review of the relevant legislation. The federal Parliament met shortly after the declaration of war on 3 September 1939. On 9 September 1939, it passed the National Security Bill 1939 (Cth). The Bill received Royal Assent the same day. The *National Security Act 1939 (Cth)* ('*National Security Act*') resembled its 1914 counterpart — the *War Precautions Act 1914 (Cth)* — and the equivalent legislation in Canada, New Zealand and the United Kingdom.³⁰ Section 5 of the Act, its most important section, conferred on the Governor-General the power to make regulations for securing the public safety and for the defence of the Commonwealth.

Section 10 of the Act governed trials of people charged with offences. All offences under regulations, and under subordinate legislation made under powers conferred by regulations, were offences under the Act.³¹ They could be tried either summarily or on indictment.³² In the former case, the maximum penalty was a fine of £100 and six months imprisonment; in the latter, there was no upper limit on the size of the fine or the term of imprisonment.³³ Courts might also require the defendant to enter into a recognisance to comply with the provision in relation to which the offence was committed. In default of the defendant agreeing to enter into the bond, the court could order up to six months imprisonment.³⁴ Prosecutions on indictment were to be in the name of the Attorney-General. Summary prosecutions required the written consent of the Attorney-General or the Minister for Defence, or of persons acting within their written authority.³⁵

³⁰ See *War Measures Act*, RSC 1927, c 22; *Emergency Regulations Act 1939 (NZ)*; *Emergency Powers (Defence) Act 1939*, 2 & 3 Geo 6, c 62.

³¹ Section 10(1).

³² Section 10(2).

³³ Section 10(3).

³⁴ Sections 10(6), 14.

³⁵ Section 10(4). On 5 March 1940, the Attorney-General delegated his authority to the person holding the office or performing the duties of the Deputy Crown Solicitors in Sydney and Melbourne: *Commonwealth of Australia Gazette*, No 48, 12 March 1940, 589. On 13 March 1940, the Minister for Defence Coordination delegated his authority to those holding the offices or performing the duties of the Adjutant General and the District Commandants: *Commonwealth of Australia Gazette*, No 56, 20 March 1940, 701. Within the Army there was ongoing uncertainty about who might initiate prosecutions. On 23 January 1941, the Secretary, Department of Defence Coordination advised the Secretary, Army that the War Cabinet had decided that prosecutions under reg 42A(1) were to be pursued only with the consent of the Crown Solicitor or a Deputy Crown Solicitor: (National Archives of Australia) MP508/1 4/708/959. In February 1941, Military Intelligence, 4th Military District sought advice as to whether the District Commandant could consent to prosecutions under regs 17B and 42A. He was advised that this was so: General Staff Southern Command to 4th Military District, 28 February 1941 (National Archives of Australia) MP385/4 1940/218. Shortly afterwards, there was a further query from the 4th Military District. Having referred two cases to the Deputy Crown Solicitor only to have consent to prosecute refused, the 4th Military District wished to know whether it was necessary to get this approval or whether the District Commandant's approval was sufficient: Major, General Staff Officer III (Military Intelligence) 4th Military District to Intelligence Section, Southern Command, 6 March 1941 (National Archives of Australia) MP385/4 1940/218. Again he was

B *Causing Disaffection and Threatening the War Effort*

Four days later, the government gazetted the *National Security (General) Regulations 1939* (Cth) ('*General Regulations*'). These created a number of offences. Regulation 41 made it an offence to try to cause disaffection among service personnel or among people engaged in essential services, or to possess any printed matter which, if disseminated, would cause such disaffection. Regulation 42 (which was to be the basis of almost half the 'political' prosecutions) made it an offence to attempt to influence public opinion or the opinion of any section of the public (in Australia or elsewhere) in a manner likely to be 'prejudicial to the defence of the Commonwealth, or the efficient prosecution of the war', or to do or possess anything with a view to such an attempt. Prosecution under regs 41 or 42 required the Attorney-General's consent.³⁶ These regulations were supplemented by reg 42A, which was made on 9 January 1941 and was replaced by a new and slightly less restrictive version on 27 March 1941. The amendments, however, were not sufficient to save the regulation from disallowance by the House of Representatives on 3 July 1941. Regulation 42A of the *General Regulations* overlapped with reg 42, but criminalised statements which were likely to lead to a breach of the peace, along with 'subversive statements'. Such 'subversive statements' were defined to include statements likely to undermine public morale, as well as those likely to undermine confidence in banking or the currency, so as to prejudice attempts to raise money to finance the war. The earlier version of the regulation also covered statements calculated to adversely affect war-related production. The purpose of the regulation was to catch statements which had the potential to undermine support for the war, notwithstanding that they might not have been made with the intention of influencing public opinion.³⁷

At least some of the behaviour which fell within regs 41 and 42 of the *General Regulations* would also have constituted sedition under the then *Crimes Act 1914* (Cth) ss 24A–24E ('*Crimes Act*'). Seditious purposes included the exciting of disaffection against British, Dominion and Australian governments and Constitutions.³⁸ Attempts to cause disaffection among service people and those engaged in essential defence services (which is what reg 41 of the *General Regulations* proscribed) might well involve pursuing the seditious purpose of arousing disaffection against the Crown or the Commonwealth, the likely targets of such disaffection. Similarly, the intemperate language which characterised some anti-war propaganda almost certainly meant that it could have constituted both an offence under reg 42 of the *General Regulations* and the utterance or publication of seditious words under the *Crimes Act*. In 1940, two defendants were prosecuted for uttering seditious words. Henry Leuthold was convicted by

advised that such consent was unnecessary: Lieutenant Colonel, General Staff Officer (Military Intelligence) to Intelligence Section, 4th Military District, 17 March 1941 (National Archives of Australia) MP385/4 1940/218. In practice, most if not all eastern states' prosecutions appear to have been commenced with the approval of the Attorney-General's Department, and Western Australian prosecutions appear to have been approved by Defence.

³⁶ *General Regulations* regs 41(2), 42(2).

³⁷ See (National Archives of Australia) A472/6 W15A pt 1.

³⁸ Section 24A(1).

the Brisbane Police Court on a sedition charge based on pro-Nazi utterances and was sentenced to six months imprisonment.³⁹ Later, Redvers McVilly, a Jehovah's Witness, was convicted of sedition by a Hobart magistrate after he told some residents of Crabtree not to put their faith in the King.⁴⁰

However, from the standpoint of the Commonwealth, sedition law was unlikely to constitute an effective means of dealing with attempts to disrupt the war effort. For one thing, the scope of sedition law was unclear. Given the decisions in *Burns v Ransley*⁴¹ and *R v Sharkey*,⁴² it is arguable that much anti-war propaganda could have been classed as seditious. But these decisions post-date the war, and they came as a surprise to the Commonwealth's legal advisers, who had doubted whether the prosecution of Burns could succeed.⁴³ In 1939, the Commonwealth could not be confident that subversive propaganda would be classed as seditious by courts. In any case, even if some anti-war propaganda might have been seditious, it is possible to envisage propaganda which would not be. Arguments that it was neither in Britain's nor Australia's interest that the war be waged could not easily be classed as attempts to excite disaffection and, in any case, might bring the defendant's behaviour within the 'good faith criticism' defence provided by what was then s 24A(2) of the *Crimes Act*.

There was a further reason for not relying on sedition law: defendants in sedition cases had a right to opt for trial by jury. While juries would probably have been unsympathetic to anti-war propagandists, they could not be relied upon to convict in cases which might only *technically* have been sedition. In state sedition trials, for instance, juries had typically been reluctant to convict.⁴⁴

³⁹ Leuthold was German-born, but naturalised. He had given a Nazi salute to soldiers inside a city hotel and had said: 'I am a good Nazi German, and proud of it': 'Six Months' Gaol for Sedition', *The Courier-Mail* (Brisbane), 12 April 1940, 7. When questioned, he stated: 'I must have had too much beer.'

⁴⁰ 'Jehovah's Witness Charged: National Security Prosecution', *The Mercury* (Hobart), 1 October 1940, 2; 'Sedition Charge Denied: Jehovah's Witness Adherent in Hobart Police Court', *The Mercury* (Hobart), 1 November 1940, 4; 'Seditious Utterances: Sect Adherent Found Guilty', *The Mercury* (Hobart), 2 November 1940, 2; 'Portentous Warning: "No Room for Disloyalty in British Empire"', *The Mercury* (Hobart), 7 November 1940, 2. As far as I know, Leuthold and McVilly were the only two people prosecuted for wartime sedition, but the fact that their trials received relatively cursory attention outside their home states raises the possibility that there may have been others whose cases did not even achieve the limited coverage that these cases attracted. *The Courier-Mail* report leaves open the possibility that there had been other prosecutions outside Brisbane: 'Six Months' Gaol for Sedition', above n 39. Laurence Maher, the leading authority on the enforcement of Australian sedition legislation, appears to have been unaware of the Leuthold and McVilly prosecutions: see, eg, Laurence Maher, 'The Use and Abuse of Sedition' (1992) 14 *Sydney Law Review* 287; Laurence Maher, 'Dissent, Disloyalty and Disaffection' (1994) 16 *Adelaide Law Review* 1.

⁴¹ (1949) 79 CLR 101.

⁴² (1949) 79 CLR 121.

⁴³ Maher, 'The Use and Abuse of Sedition', above n 40, 300. The case against Sharkey was, if anything, weaker, but the success of the Burns prosecution provided grounds for suspecting that it too might succeed.

⁴⁴ There were three Queensland sedition trials in the 1930s. Phillip Bossone was tried twice — he was eventually convicted after the jury in the first trial had been unable to reach a verdict: 'Communist Charged', *Sydney Morning Herald* (Sydney), 23 July 1930, 17; CPA, 'Alleged Sedition', *Workers' Weekly* (Sydney), 3 October 1930, 2. Fred Paterson was acquitted: Ross Fitzgerald, *The People's Champion, Fred Paterson: Australia's Only Communist Party Member of Parliament* (1997) 49–52. In 1934, a third defendant was acquitted when the judge ruled that there was no case to answer.

Moreover, George Knowles, the Commonwealth Solicitor-General, had been sensitive to the vagaries of juries in giving advice on whether to prosecute for sedition.⁴⁵ The perceived drawbacks of sedition law had been sufficient to ensure that, in the 19 years since the sedition provisions had been added to the *Crimes Act*, they had never been the basis for a prosecution, even during the turbulent depression years.

The offences created by the *General Regulations*, by contrast, had several advantages over the sedition offences. They were not subject to a ‘good faith criticism’ defence (although, in practice, such a defence was given de facto recognition by the Attorney-General’s Department); they encompassed propaganda which was calculated to impair the war effort, whether or not it was likely to arouse disaffection; and defendants charged under the *General Regulations* could be tried summarily.

C Censorship Offences

In April 1940, the *General Regulations* were amended by the addition of reg 17A. This made it an offence for people to print for publication, to publish or to have in their possession any paper that bore in any way on the war, and which did not include details of the printer and the person or body responsible for the paper. The new regulation was placed in Part II of the *General Regulations* — ‘Espionage and Acts Likely to Assist the Enemy’ — and followed reg 17, which made it an offence to obtain, record, communicate, publish or possess information about the Commonwealth’s defence forces or weaponry, or information which might be directly or indirectly advantageous to the enemy. On its face, it reads like an attempt to discourage the printing of information which might be of military use to the enemy. Yet in reality it had little to do with espionage or disclosure of military information, and more to do with attempts to influence public opinion. Its purpose was to give teeth to the censorship system for which provision was made in reg 16 of the *General Regulations*.

In the months prior to the making of reg 17A, Publicity Censorship⁴⁶ had been involved in ongoing conflict with the CPA. While communist media had been allowed to operate according to the self-censorship system which governed the media in general, frequent breaches of censorship standards prompted the government to order that a full copy of communist publications be submitted for pre-publication censorship. The requirement to submit copies would be ineffective unless sanctions were provided for failure to do so. Moreover, the government was concerned by a number of anonymous pamphlets which clearly infringed censorship standards and which had not been submitted for approval.

⁴⁵ In advising against prosecution of the *Barrier Daily Truth* for sedition, Knowles warned that even if the relevant words were seditious, a jury would be unlikely to convict: Knowles to Brennan, 26 August 1935 (National Archives of Australia) A432 1935/1215.

⁴⁶ A distinction was drawn between publicity censorship and communication censorship. Publicity Censorship was a branch of the Department of Information and headed by the Chief Publicity Censor. Communications Censorship was responsible for censorship of postal and telegraphic communications. It was the responsibility of the Department of Defence, and later the Department of the Army, and was headed by a Controller of Postal and Telegraph Censorship: see generally Hasluck, above n 7, 179–82.

Regulation 17A was intended to facilitate the imposition of sanctions. If publications included details of their printers and publishers, this would facilitate the task of proving responsibility. If they did not, this would expose those involved in their production and distribution to possible prosecution.

Regulation 17A also covered *possession* of ‘anonymous’ material, although it was a defence if the possessor could prove ‘lawful excuse’. This obviously strengthened the regulation since it obviated the need for the prosecution to prove that a person found in possession of anonymous material possessed it for the purposes of disseminating it. The relatively objective criteria for guilt under the regulation made it a particularly attractive one for prosecutors. The following month, in May 1940, reg 17A was supplemented by reg 17B which provided that the Minister for Defence could declare communist publications to be prohibited, whereupon it became an offence to print or publish such publications.⁴⁷ The presses, type and materials used for the purposes of publication of a prohibited paper were forfeited to the Commonwealth. In August 1940, reg 17A was amended so that possession of papers not carrying details of the printer and publisher was an offence, even if the paper had been printed prior to the making of the regulation.⁴⁸ This obviated the problems that might arise in relation to a prosecution for possession of an undated paper relating to the war, but it also meant that people could be prosecuted for continuing to possess papers which had been legal when first printed.

Regulation 17A overlapped with state printing legislation,⁴⁹ which also required that printed matter contain details of the printer and publisher. There is at least one instance of an anti-war propagandist being prosecuted under a state printing Act.⁵⁰ However, there were two problems that prevented prosecutors from relying on state legislation. First, with the exception of New South Wales,⁵¹ the legislation did not cover material produced by mimeograph. Second, the maximum penalty for state offences was a fine and confiscation. By contrast, the Commonwealth regulation covered all forms of reproduction, and provided for imprisonment.

D *The National Security (Subversive Associations) Regulations 1940 (Cth)*

In June 1940, the government made the *National Security (Subversive Associations) Regulations 1940 (Cth)* (*‘Subversive Associations Regulations’*). Under these regulations, a body was declared to be unlawful if the Governor-General, giving notice in the *Commonwealth of Australia Gazette*, regarded the body as prejudicial to the defence of the Commonwealth or to the efficient prosecution of

⁴⁷ Nine publications were declared: *Tribune*, *Soviets Today*, *Communist Review*, *Wharfie*, *World Peace*, *Militant*, *Workers’ Star*, *The Guardian* and the *North Queensland Guardian*: *Commonwealth of Australia Gazette*, No 94, 24 May 1940, 1149. *Militant* was a Trotskyist publication.

⁴⁸ *Statutory Rules 1940, No 187 (Cth)* reg 1.

⁴⁹ State legislation applied generally, and was not limited to publications relating to the war.

⁵⁰ Lillian Davis was prosecuted under the *Printing Act 1899* (NSW); Galleghan to Director, Commonwealth Investigation Branch, 6 August 1940 (National Archives of Australia) A472 W1452.

⁵¹ *R v Banks* (1932) 32 SR (NSW) 516.

the war.⁵² Regulations 7–9 of the *Subversive Associations Regulations* created offences. It became an offence to advocate an unlawful doctrine via the press or over the radio.⁵³ This offence was later extended to include possession of material advocating unlawful doctrines.⁵⁴ Regulation 8 made it an offence to hold or convene a meeting to advocate unlawful doctrines and provided that an averment by the prosecutor that a meeting was held for such a purpose should be prima facie evidence against an accused. Regulation 9 made it an offence to solicit, receive or pay funds for the purposes of promoting any unlawful doctrine, and included an averment provision. ‘Unlawful doctrines’ included any doctrines or principles advocated by a body which had been declared to be unlawful, and any principles which were prejudicial to the defence of the Commonwealth or to the efficient prosecution of the war.⁵⁵

The purpose of the *Subversive Associations Regulations* was to give the Commonwealth the power to ban the CPA and its associated organisations. Immediately after the making of the Regulations, notices were gazetted declaring the CPA and two associated bodies — the League for Peace and Democracy and the Minority Movement — unlawful.⁵⁶ The government also used its powers to ban a number of *fascii*, Italy having recently entered the war.⁵⁷ Over the next seven months a number of other communist and Trotskyist bodies were added to the list of declared bodies.⁵⁸ Several Jehovah’s Witnesses groups were declared in 1941.⁵⁹ In deciding which bodies to ban, the Commonwealth sometimes acted on surprisingly obsolete information. The selection of targets suggests that the Commonwealth was by no means as well-informed as one might have expected. The Minority Movement had been dissolved by the CPA, its approach to unionism no longer consistent with the party’s desire to play an active role in the running of trade unions.⁶⁰ The League for Peace and Democracy had been dissolved by its members in December 1939.⁶¹ At the time it was banned, the Revolutionary Workers’ League had ceased to exist.⁶²

⁵² Regulation 3.

⁵³ Regulation 7.

⁵⁴ *Statutory Rules 1940, No 152 (Cth) reg 3.*

⁵⁵ *Subversive Associations Regulations reg 2.*

⁵⁶ *Commonwealth of Australia Gazette*, No 110, 15 June 1940, 1295.

⁵⁷ *Ibid.* The proscribed Fascisti were Luigi Platania (Sydney); Gino Lisa (Melbourne); Guiseppe [sic] Degol (Brisbane); Armando Bergossi (Adelaide); Paolo Solaroli (Cairns); Nicola Nisco (Innisfail); and the *Fascio* at Edie Creek, New Guinea.

⁵⁸ *Commonwealth of Australia Gazette*, No 114, 21 June 1940, 1333 (Forward Press Pty Ltd, Modern Publishers Pty Ltd, Printers Investment Co Pty Ltd); *Commonwealth of Australia Gazette*, No 117, 24 June 1940, 1341 (Communist League); *Commonwealth of Australia Gazette*, No 127, 6 July 1940, 1443 (Revolutionary Workers’ League); *Commonwealth of Australia Gazette*, No 154, 8 August 1940, 1725 (Australian Youth Council); *Commonwealth of Australia Gazette*, No 34, 24 February 1941, 387 (League of Young Democrats).

⁵⁹ *Commonwealth of Australia Gazette*, No 8, 17 January 1941, 123 (Jehovah’s Witnesses, Watch Tower Bible and Tract Society, International Bible Students’ Association, Adelaide Company of Jehovah’s Witnesses and Consolation Publishing Co).

⁶⁰ Davidson, above n 10, 87; Macintyre, above n 10, 257–8.

⁶¹ McKenzie, above n 10, 85.

⁶² Susanna Short, *Laurie Short: A Political Life* (1992) 32–3. Short does, however, note that the Revolutionary Workers’ League was later revived, following a split in the Communist League: at 33.

Regulation 7 of the *Subversive Associations Regulations* overlapped with reg 42 of the *General Regulations*. However, reg 7 did not cover oral attempts to influence public opinion, and reg 42 did not extend to advocacy of doctrines which were unlawful by virtue of their having been advocated by an unlawful association. Regulation 7 of the *Subversive Associations Regulations* also overlapped to a considerable extent with reg 17A of the *General Regulations*. Regulation 7, however, had exclusive operation in relation to proscribed doctrines unrelated to the war, and in the improbable event that a publication of an unlawful association contained full details of its printer and publisher. Regulation 17A had exclusive application where the anonymous publication did not advocate a proscribed doctrine. The areas where either regulation would have had exclusive operation would typically have been areas where the constitutionality of such operation would have been questionable. In the cases which were actually prosecuted, prosecutors could almost invariably have relied on either regulation.

The *Subversive Associations Regulations* also had the potential to overlap with Part IIA of the *Crimes Act*, which provided that certain organisations were unlawful and that those involved in the affairs of such organisations were thereby guilty of various offences. An association was unlawful if it advocated or encouraged the overthrow by revolution of the *Australian Constitution*, or the violent overthrow of an Australian government or that of another civilised country.⁶³ While the unlawful associations provisions had been drafted with a view to the proscription of the CPA, attempts to use them against the party had failed. The first attempt had left open the question of whether the CPA was an unlawful body. The second ended in a compromise, but one prompted by the suspicion that the CPA was probably not an unlawful association for the purposes of the legislation.⁶⁴ Moreover, even if the CPA were found to be an unlawful association, there was a further difficulty. Supposing the CPA were banned, if it were to resurrect itself in a different guise, proving that its reincarnation was also an unlawful association might have been difficult. Even in the early 1930s, John Latham, the then Attorney-General, had concluded that the only way of tackling the CPA was to ban the party and its associates as such, rather than on the basis of their alleged attributes. In peacetime, this was not constitutionally possible.⁶⁵

In wartime, however, it probably was possible.⁶⁶ The formula adopted in the *Subversive Associations Regulations* was clearly superior to the difficult

⁶³ *Crimes Act* s 30A(1).

⁶⁴ For a discussion of these cases and the ambit of the unlawful associations provisions, see Roger Douglas, 'Keeping the Revolution at Bay: The Unlawful Associations Provisions of the Commonwealth *Crimes Act*' (2001) 22 *Adelaide Law Review* 259.

⁶⁵ 'Suppressing Communism: Declaring Organisations Unlawful', *The Argus* (Melbourne), 15 September 1932, 12 (answering a question from Lane MP). Given his doubts, he had explored possible amendments to the *Constitution* which might confer such a power on the Commonwealth. Devising such formulae had not proved easy: see Garran to Latham, 9 February 1934 (National Archives of Australia): A467 28/SF10/15.

⁶⁶ While the *Subversive Associations Regulations* were eventually held to be unconstitutional, the reasons for this finding did not preclude proscription by government order so long as property rights were respected and offences were defined in such a way as to ensure that people could be convicted only if their behaviour bore some link to the war effort.

procedures under Part IIA of the *Crimes Act*. It did not require proof that the offending body actually constituted any kind of threat to the war effort. This meant that bodies could be proscribed expeditiously, so that if a proscribed body were to reincarnate under a new name, it could promptly be re-proscribed. The illegal status of a body would be readily ascertainable. It was therefore not surprising that once the Commonwealth had decided that the CPA should be banned, it chose not to rely on Part IIA of the *Crimes Act* but on the simpler procedures of the *Subversive Associations Regulations*.

E *Accounting for Legislation*

Implicit in the *National Security Act* was the assumption that anti-war measures involve a degree of experimentation. The *General Regulations* were initially based on predictions about the kinds of problems that the government was likely to face. Up to a point, they drew on the Commonwealth's experiences during World War I, but there were several World War I measures which were not replicated in the *General Regulations*. In particular, there was no equivalent of the *Unlawful Associations Act 1916* (Cth), which was the World War I analogue to the *Subversive Associations Regulations*. This is probably not surprising. Drafts of the regulations had been prepared well before the outbreak of war, and those who prepared them had little reason to believe that the war would be opposed by the CPA, given its hostility towards both Hitler and Japan. Indeed, even when the regulations were made, the party's attitude to the war was still ambiguous. Even after it had become clear that the CPA would be opposing the war, no attempt was made to tighten the *General Regulations* until April 1940.

From early January 1940, however, the Commonwealth had been considering how best to respond to communist opposition to the war. Menzies was opposed to a ban on the CPA. In a January 1940 meeting with a deputation from the Central Committee of Interstate and Overseas Ship Owners, Menzies had presented powerful arguments against banning the party: a ban would be hard to implement; it would create martyrs; and it might distract attention from dangerous noncommunists, while catching harmless communists.⁶⁷ A conference of military and police representatives in early 1940 had discussed the issue. The conference 'did not think it desirable *at present* to declare the CPA an illegal association, because such action would give the party undesirable publicity and further its cause'.⁶⁸ It did, however, recommend that censorship be tightened and that regs 41 and 42 of the *General Regulations* be amended so as to expand the range of people who might give permission for prosecutions.⁶⁹ The two regulations were left unchanged, but regs 17A and 17B of the *General Regulations* can be understood as attempts to respond to increasing communist reluctance to comply with the censorship authorities.

⁶⁷ (National Archives of Australia) A663/1 O174/1/91.

⁶⁸ Report of Conference, 23 January 1940 (National Archives of Australia) MP729/6/0 29/401/121 (emphasis added).

⁶⁹ Colonel Bertrand Combes to Secretary, Department of the Army, 3 February 1940 (National Archives of Australia) MP729/6/0 29/401/128.

The decision to ban the CPA has been variously explained. Two developments seem to have prompted the decision.⁷⁰ One was the formation of a coalition government between the United Australia Party (which had previously been governing as a minority government) and the Country Party, which had traditionally been more committed to banning the CPA than its urban partner. Banning the party might have been part of the price demanded by the Country Party for its participation in the coalition. Alternatively, the Country Party's participation may have shifted the balance in Cabinet so that the ban became governmental policy. The other crucial development seems to have been a communist-supported miners' strike. Such explanations suggest that the *Subversive Associations Regulations* might not have been passed had Labor been in power. Consistent with this suggestion is the fact that the British government's decision not to ban the Communist Party of Great Britain appears to have been partly attributable to the influence of Labour members of the national government.⁷¹ However, there is also evidence to suggest that party ideology may not have been a particularly important consideration in relation to the decision to ban the CPA. The ALP made no attempt to disallow the *Subversive Associations Regulations* and did not remove the formal ban on the CPA until 18 months after the party's change of line in mid-1942.

Moreover, wide-ranging anti-subversion regulations were not uniquely Australian. In both Canada and New Zealand, regulations provided for the proscription of subversive organisations, notwithstanding that Canada was governed by a party which had repealed Canada's equivalent of the unlawful associations provisions of the *Crimes Act*⁷² and notwithstanding that, at all relevant times, New Zealand had a Labour government.⁷³ Moreover, both the New Zealand and Canadian governments used their powers to ban allegedly subversive organisations. In October 1940, the New Zealand government had used its equivalent regulation to ban the Jehovah's Witnesses, and while it did not ban the New Zealand Communist Party, it had set in motion the machinery for doing so, and the party may have been saved from illegality only by the German invasion of the Soviet Union.⁷⁴ Canada made considerable use of its powers, banning the

⁷⁰ Martin, above n 14, 296–7.

⁷¹ Stammers, above n 1, 108–12.

⁷² *Defence of Canada Regulations*, CRC 1940, reg 39C. In addition, maximum penalties for offences against the regulations were heavier (12 months on summary trial as against six in Australia). In some respects, however, the Canadian regulations were less repressive. Importantly, they expressly provided that it was a defence that offending words or publications involved criticism in good faith of government policies: reg 39B. A precedent for this defence is to be found in the law on sedition offences. Offences based on possession of literature prejudicial to the war applied only where a quantity of literature was involved: reg 39A; see also *R v Money* (1940) 75 CCC 402.

⁷³ *Public Safety Emergency Regulations 1940* (NZ) reg 2A. Because the regulations provided for sentences in excess of three months, under New Zealand law defendants had the right to opt for trial by jury: see *R v Ostler* [1941] NZLR 318 for a discussion of some of the procedural issues arising from the exercise of this option. Defendants frequently availed themselves of this right, but rarely with success.

⁷⁴ Taylor, above n 23, 223, 237.

Communist Party of Canada and more than a dozen allied organisations, a number of *fascii*, the Jehovah's Witnesses and a body called Technocracy Inc.⁷⁵

In all three countries, the bans commenced around mid-1940, just as Britain was beginning the fight for its very survival. While local considerations determined the precise nature of the response to subversive organisations,⁷⁶ it seems clear that the choice of responses was strongly influenced by the state of the war.

IV PROSECUTIONS

Despite widespread reservations about the war, prosecutions under the *General Regulations* and *Subversive Associations Regulations* were rare, especially in states other than Western Australia.

It is difficult to know precisely how many people were prosecuted for offences under the regulations. Discussions of the number of *communists* arrested for offences under either the *General Regulations* or the *Subversive Associations Regulations* generally put the figure at about 50, but rarely state the basis for this estimate.⁷⁷ Macintyre suggests that the figure of 50 is an underestimate.⁷⁸ My estimate is that the government approved the prosecution of at least 69 people (including fascists, pacifists, Trotskyists, non-Trotskyist communists and a lone Jehovah's Witness, Redvers McVilly, against whom a reg 42 charge was withdrawn following his conviction for uttering seditious words) under the regulations and that, of these, 61 were tried (including four whose cases were dismissed after the prosecution chose not to call evidence).⁷⁹

⁷⁵ Originally the regulations provided that a court could make an order banning an organisation subsequent to the conviction under the regulations of a person who was a member of the organisation. An Ontario court made an order banning the Communist Party of Canada. Later, the party and its associated organisations were banned by regulation. Subsequent bans were by Order-in-Council pursuant to powers conferred by the regulations. For details, see William Kaplan, *State and Salvation: The Jehovah's Witnesses and Their Fight for Civil Rights* (1989) 42–3, 47, 49–50.

⁷⁶ In Canada, for instance, the Liberal government's willingness to ban the Communist Party of Canada was influenced by the strong support for the ban from within the Liberal Party's Quebec wing. This, in turn, reflected the influence of the strongly anti-communist Catholic hierarchy on Quebec Liberals: see Penner, above n 10, 28, 171, 184–91.

⁷⁷ See, eg, Brown, above n 10, 113; W Campbell, *History of the Australian Labour Movement: A Marxist Interpretation* (1945) 156; Peter Cook, *Red Barrister: A Biography of Ted Laurie* (1994) 54; John Sendy, *Comrades Come Rally! Recollections of an Australian Communist* (1978) 9. Consistency may reflect no more than the reliance of later writers on earlier sources. Ted Hill — not one to underestimate the degree to which communists were persecuted — comments that 'a few of [the CPA's] members were gaoled': Hill, above n 10, 105.

⁷⁸ Macintyre, above n 10, 401 (who refers to 50 *convictions*). He rightly states that the Australian Council for Civil Liberties ('ACCL') recorded almost that number (although some of those listed were not necessarily communists, and the reports were generally silent on the affiliations of those whose cases they discussed). He adds that Commonwealth archives contain files for many other 'raids, arrests and prosecutions'. The archives certainly contain files of *some* additional prosecutions, but not a great number.

⁷⁹ A list is available from the author. This estimate is based on the following overlapping sources:

- Indexes to the *Sydney Morning Herald* and to *The Herald* and *The Argus*;
- Reports in the wartime publications of the ACCL;
- Files in the National Archives of Australia;
- Law Reports relating to Supreme Court and High Court appeals against convictions under the regulations.

Arrests did not always mean prosecutions. In a number of cases referred to the Attorney-General's Department for consideration, officials recommended against prosecution. Even after the regulations were changed to allow prosecutions based on literature published before the date of the making of the regulations, it was not the practice of the Attorney-General's Department to institute proceedings in relation to such literature. It was enough that the literature was seized.⁸⁰ In interpreting reg 17A of the *General Regulations*, Whitlam, the Crown Solicitor, concluded that a particular pamphlet could not be said to constitute information or comment on the war simply because it opposed conscription and criticised the government as quasi-fascist. Nor, according to Whitlam, could criticism of conscription fall within reg 42 of the *General Regulations* so long as the conscription issue was an open question which was the subject of legitimate public debate.⁸¹ Watson, a Deputy Crown Solicitor, considered that publications should be examined as a whole. He regarded the same pamphlet as 'borderline', despite his conclusion that

[t]he pamphlet might be said to be of a subversive nature in the sense that it tends to undermine confidence in the Government and bring about, or contribute to, an absence of unity; and a lack of confidence, and a sense of disunity could be argued to be prejudicial to the defence of the Commonwealth.⁸²

Whitlam went further and concluded that the pamphlet did not fall within reg 42.⁸³

The *Subversive Associations Regulations* were generally read down, so that they applied only to activities inconsistent with the efficient prosecution of the war. Thus, in Doblo's case, Whitlam recommended against a prosecution based on Doblo's possession of four copies of *The Spark*, an internal CPA circular, on the grounds that while the publications attacked capitalism and urged a world

A comparison between these sources indicates that none of them is complete. The ACCL publications yield the most comprehensive list of defendants, but they leave out a number who appear in reports in the indexed media and in files of the National Archives. Given that each of the sources is incomplete, it is likely that there are at least some people who were charged, but who appear in none. However, such people are unlikely to have been numerous. The communists' autobiographies I have read include no reference to trials of people who are not mentioned in any of the above sources. That said, a history of the CPA in Western Australia mentions two people who do not appear in them: Justina Williams, *The First Furrow* (1976) 169–70. One of them, who is also mentioned in a report in the *Western Australian*, expressed support for Hitler. The other was a communist, whose case is mentioned, but not documented. The National Archives contain no record of his trial, but he appeared on the Western Australian Commandant's wish list of potential internees. It is unlikely that the arrest of an ALP member would have gone unnoticed and uncriticised by the ALP. The fact that the *Sydney Morning Herald* and *The Argus* could carry an account of the trial of two politically naive communist sympathisers in Geraldton, Western Australia, suggests that trials could be noticed and newsworthy, notwithstanding their remote venues: 'Prison for Man and Wife. Subversion Charge. "Communitistic Views"', *Sydney Morning Herald* (Sydney), 17 February 1941, 11; 'Man and Wife Imprisoned: Security Act Breach', *The Argus* (Melbourne), 17 February 1941, 5.

⁸⁰ Knowles, Secretary, Attorney-General's Department to Director, Investigation Branch, 11 August 1941 (National Archives of Australia) A467 92/SF42/10.

⁸¹ Whitlam, Crown Solicitor to Secretary, Attorney-General's Department, 23 July 1940 (National Archives of Australia) A472 W1285.

⁸² Watson, Deputy Crown Solicitor to Crown Solicitor, 23 July 1940 (National Archives of Australia) A472 W1452.

⁸³ Whitlam, Crown Solicitor to Secretary, Attorney-General's Department, 26 July 1940 (National Archives of Australia) A472 W1452.

struggle against imperialism, they could not be said to be prejudicial to the defence of the Commonwealth or the efficient prosecution of the war.⁸⁴ ‘Unlawful doctrine’ was given a narrow meaning. As far as Whitlam was concerned, a successful prosecution would require proof of the content of the doctrines and principles advocated by the CPA. It was therefore not enough that pamphlets should be ‘communistic’.⁸⁵

In 1941, Clausen, a Deputy Crown Solicitor, considered that possession of *The Guardian*, a communist newspaper, could not be said, of itself, to be sufficient to ground a charge of possessing a publication wherein an unlawful doctrine was advocated.⁸⁶ There could even be problems proving that the publication was indeed the *The Guardian*. He considered that a prosecution under reg 42 of the *General Regulations* might succeed, but Whitlam recommended against prosecution.⁸⁷ Whitlam also recommended that E R Pearce not be prosecuted for his possession of *The Pilot*, a communist newsletter. While the newsletter might be subversive, its criticism of members of the government for their allegedly pro-Japanese leanings were not enough to bring the paper within reg 7 of the *Subversive Associations Regulations*.⁸⁸ Moreover, Whitlam drew a distinction between ‘sheer invective’ and ‘advocacy’.⁸⁹

Sensitivity to problems of proof underlaid another documented decision to recommend against prosecution. In discussing the possible prosecution of George Scott, Whitlam expressed concern about the problems of proving that a particular doctrine was communistic, noting that it was harder to prove this under the regulations than it was under Part IIA of the *Crimes Act*.⁹⁰ A raid on premises occupied by H Ostler uncovered duplicating equipment, a typewriter and more than 1000 copies of the *Communist Review*. Watson advised that, while Ostler almost certainly knew what was going on, there was no evidence of his active involvement in illegal activities, and that consequently he should not be prosecuted.⁹¹ Even when the Attorney-General’s Department considered that

⁸⁴ Whitlam, Crown Solicitor to Secretary, Attorney-General’s Department, 1941 (National Archives of Australia) A6119/84 1708.

⁸⁵ Whitlam, Crown Solicitor to Secretary, Attorney-General’s Department, 24 October 1940 (National Archives of Australia) A467/1 89/pt 2/SF42/123. He recommended prosecution under regs 17A and 42.

⁸⁶ Clausen, Deputy Crown Solicitor to Whitlam, Crown Solicitor, 21 May 1941 (National Archives of Australia) A467/1 92/SF42/7.

⁸⁷ Ibid; Whitlam, Crown Solicitor to Knowles, Solicitor-General, 22 May 1941 (National Archives of Australia) A467/1 92/SF42/7.

⁸⁸ Whitlam, Crown Solicitor to Knowles, Solicitor-General, 13 May 1941 (National Archives of Australia) A467/1 89/pt 2/SF42/107. In this case, Clausen had concluded that the contents of the paper would have grounded a prosecution under reg 7: Clausen to HQ Southern Command, 23 May 1941 (National Archives of Australia) A467/1 89/pt 2/SF42/7.

⁸⁹ Whitlam, Crown Solicitor to Knowles, Secretary, Attorney-General’s Department, 7 August 1940 (National Archives of Australia) A472 W1452.

⁹⁰ Whitlam, Crown Solicitor to Knowles, Secretary, Attorney-General’s Department, 24 October 1940 (National Archives of Australia) A467 89/pt 2/SF42/123. He did, however, consider that there was evidence to justify prosecutions under regs 17A and 42. The problem did not arise to the same extent in relation to the *Subversive Associations Regulations* regs 8 and 9, since the government could aver that the activity was for the purposes of an unlawful association.

⁹¹ Watson, Deputy Crown Solicitor to Whitlam, Crown Solicitor, 31 March 1941 (National Archive of Australia) A467 89/pt 2/SF42/111.

there were legal merits to a prosecution, it would recommend against prosecution if it thought that a court might acquit.⁹²

The vast majority of those prosecuted under the *General Regulations* and the *Subversive Associations Regulations* were leftist opponents of the war. Most of these appear to have been communists,⁹³ but defendants included at least two Trotskyists, one or two leftist members of the ALP and a member of the Industrial Workers of the World, who seemed mildly aggrieved that her behaviour had not hitherto attracted the attention of the authorities.⁹⁴ Three Christian pacifists were prosecuted in 1942,⁹⁵ but they appear to have been the only pacifists ever prosecuted. Only four ‘Hitlerites’ appear to have been prosecuted under the regulations.⁹⁶

Most of the political prosecutions under the *General Regulations* involved charges under regs 17A or 42.⁹⁷ In cases that went to trial (including four in which the prosecution led no evidence), 21 defendants were charged under reg 17A (all in connection with communist literature) and 20 were charged with

⁹² Advice given by the Attorney-General’s Department expressly referred to the courts’ likely reaction, even to the point of recommending against prosecutions in cases where the law seemed on the Commonwealth’s side, but the advisers believed that courts would nonetheless not agree. See, eg, discussions of the prosecution of Harkin: (National Archives of Australia) A1608/1 F39/2/3 pt 1; W Lindner: (National Archives of Australia) A467/1 92/SF42/7; and E R Pearce: (National Archives of Australia) A467/1 89/pt 2/SF42/107.

⁹³ It is not possible to give an exact figure. One reason is that the term ‘communist’ is ambiguous. Among other things, it could include people who were members of the CPA (at least prior to its dissolution) and people who, while not members of the CPA, followed its policies in the sense that, whenever the party changed its policies, they would too. It could also include those who defined themselves as ‘communists’ (but this would include Trotskyists). A definition based on the degree to which a person was committed to communist doctrines would be defensible, but problematic, since many who saw themselves as ‘communists’, and as followers of Marx and Lenin, had little idea of the finer points of Marxism and Leninism. Indeed, self-professed Marxist-Leninists can disagree vehemently as to what Marxism-Leninism entails. The problems of defining ‘communist’ and ‘communism’ have bedevilled legislative attempts to attack communism per se: see, eg, the problems created by the *Subversive Associations Regulations* (which are discussed below). Whatever definition one adopts, classification is sometimes complicated by paucity of evidence. For the purposes of this article, I favour a definition which defines as ‘communist’ those who were either members of the CPA or were prepared to treat CPA policy as authoritative. My estimate, based on cases where I have been able to find some evidence of defendants’ politics, is that more than 80 per cent of ‘leftist’ defendants were ‘communist’ under this definition.

⁹⁴ The Trotskyists included John Wishart and A B Thistlethwayte: Lieutenant General, General Officer Commanding, Eastern Command to Secretary, Military Board, 12 August 1941 (National Archives of Australia) A8911/1 191. The ALP members included James Starling: ACCL, *The War and Civil Rights* (1940) 15–17. Another member was Marie Nielsen: *Fitzpatrick Papers* (National Library of Australia, Canberra) MS 4965, 14338. Bernard Hearsch (against whom charges were subsequently dropped) was a member of the ALP but police reports also described him as a communist: *Fitzpatrick Papers* (National Library of Australia, Canberra) MS 4965, 14337. The Industrial Workers of the World veteran was Violet Wilkins: ‘Woman Gaoled. “Endeavour to Cause Disaffection”’, *Western Australian* (Perth), 2 April 1941, 5.

⁹⁵ William Allen, Albert Hooke and John McKellar: *Fitzpatrick Papers* (National Library of Australia, Canberra) MS 4965, 8871.

⁹⁶ John Martin: ‘Man Alleged to Have Said He Hoped Hitler Won’, *The Herald* (Melbourne), 27 September 1940, 3; Arthur Jeffrey: ‘Man Sentenced at Northam. Chance Conversation in a Car’, *Western Australian* (Perth), 15 June 1940, 5; Joseph Moore: ‘Charge under Section 42A: Subversive Words’, *The Argus* (Melbourne), 11 March 1941, 7; and an anonymous defendant: ‘Sabotage Plans: Year’s Gaoled for Propagandist’, *Sydney Morning Herald* (Sydney), 8 November 1941, 15.

⁹⁷ This, and the analysis which follows, is based on my sample of cases of people prosecuted under the regulations.

offences under reg 42, of whom one was a Trotskyist, three were pacifists and three were ‘Hitlerites’. One noncommunist leftist, one communist and one fascist were charged under reg 41. One leftist and one ‘Hitlerite’ were charged under reg 42A and one leftist was charged with an offence under reg 17B.

Prosecutions under the *Subversive Associations Regulations* were somewhat less common: 22 people, of whom at least 14 were communists, were prosecuted under reg 7, six under reg 8, and one under reg 9.⁹⁸

Despite the potential for overlap between the charges, defendants were generally charged under only one regulation — only 15 defendants were charged under two different regulations. In 14 of these cases, defendants were charged under reg 17A and another offence.⁹⁹ The remaining defendant was charged under regs 41 and 42 of the *General Regulations*. In most of the ‘multiple charge’ cases, the charges arose out of different facts. In at least one case, however, the *General Regulations* reg 17A charge and the *General Regulations* reg 42 charges were regarded as alternatives. In another they seem to have been based on the same literature. This was also the case in relation to at least one of the cases involving charges under reg 17A of the *General Regulations* and reg 7 of the *Subversive Associations Regulations*.

Prosecutions were largely limited to offences committed within a 14 month period between April 1940 and June 1941. The only defendants prosecuted for offences under the relevant regulations committed outside that period appear to have been three Christian pacifists, charged in relation to a petition urging a negotiated settlement with Japan.¹⁰⁰ Very few defendants were charged on the basis of public acts, such as speeches or actual distribution of subversive material. Most were charged on the basis of possession of subversive material. In a considerable number of these cases, there were grounds for suspecting that the defendant may have possessed the articles for the purposes of distributing them. In some cases, however, charges of possession were brought even when there were no grounds for suspecting that the defendant had retained possession of the article other than for private purposes.

A *Addresses to Public Meetings*

Five defendants were charged following statements made at public meetings. James Starling was charged following an address to an anti-conscription meeting on 19 April 1940. The speech included passages critical of the war, describing it as imperialist; as offering nothing for the working class; as a war against freedom; and as a war which would culminate in an attack on the Soviet Un-

⁹⁸ Of the 11 cases in which prosecutions were approved, but which did not proceed to trial, there were charges under reg 17A in seven; charges under reg 17 in three; charges under reg 42 in two; and charges under reg 41 in one. In most of these cases, I have no details of the defendant’s politics.

⁹⁹ *General Regulations* regs 42 (in six cases) and 17 (in one case); *Subversive Associations Regulations* regs 7 (in three cases), 8 (in three cases) and 9 (in one case). Regulation 17 was not, on its face, a political regulation. It related to the collection of military information.

¹⁰⁰ It is also possible that an anonymous fascist who was convicted in November 1941 (see above n 96) had committed his offence after June 1941. The newspaper report does not give details of the date of the offence.

ion.¹⁰¹ Phyllis Johnson was charged in relation to a speech given at an anti-conscription meeting where she had said that ‘Menzies admires Hitler because Hitler did things in Germany that Menzies would like to do here.’¹⁰² She was also charged under reg 17A of the *General Regulations*¹⁰³ for having been in possession of two pamphlets — *Character of the War* and *The Peace Question* — at the time of her arrest. Thomas Garland and Francis Rowan were charged under reg 42 of the *General Regulations*¹⁰⁴ on the basis of speeches that they had made on 26 June 1940 at a public meeting in Adelaide called by the League Against Conscription. The speeches included extremely critical comments about the then government, its members and policies.¹⁰⁵ Violet Wilkins was charged under reg 41 of the *General Regulations*¹⁰⁶ on the basis of a speech given on the Perth Esplanade calling for service people to join the Industrial Workers of the World and take control of their own affairs.¹⁰⁷

B *Small Group Advocacy*

Several other defendants were charged with oral attempts to influence public opinion, but not on the basis of addresses to mass meetings. These included Mr and Mrs Owen of Geraldton. A tradesman who called at their house made a remark about the war, whereupon Mrs Owen proceeded to denounce the British government and rejoice in the prospect of its imminent overthrow by revolution. According to one report of the trial, the tradesman had gone to their home on another occasion and, while he was there, Mrs Owen had tried to tune in to Radio Moscow. According to that report, Mrs Owen had also told another visiting tradesman that she had books which would enlighten him.

The Owens were not, however, charged under reg 42 of the *General Regulations*. Mr Owen was charged under *Subversive Associations Regulations* reg 7¹⁰⁸ on the basis of communist literature which was subsequently found at their house. Mrs Owen was charged with being knowingly involved in her husband’s offence.¹⁰⁹ The only other communist to be charged on the basis of an oral attempt to influence the opinions of a small group of people was Fred Paterson,

¹⁰¹ Some passages from the speech are set out in Watson to Crown Solicitor, 15 October 1940 (National Archives of Australia) A472/6 W1145. Others are set out in ACCL, *The War and Civil Rights*, above n 94, 15.

¹⁰² ACCL, *The War and Civil Rights*, above n 94, 12.

¹⁰³ *General Regulations* reg 17A prohibited the possession of publications lacking details of the printer and publisher. In relation to the charging of Phyllis Johnson, see generally ACCL, *The War and Civil Rights*, above n 94, 12–13.

¹⁰⁴ *General Regulations* reg 42 prohibited attempts to subvert public opinion. For details of the cases, see ACCL, *The War and Civil Rights*, above n 94, 13–14.

¹⁰⁵ Rich J provides extracts from the speech and reports some of the interjections in his judgment: *Francis v Rowan* (1941) 64 CLR 196, 200–1. According to the police prosecutor, Garland’s speech was ‘somewhat similar to Rowan’s speech, but was very much stronger’: ACCL, *The War and Civil Rights*, above n 94, 14.

¹⁰⁶ *General Regulations* reg 41 prohibited attempts to cause disaffection.

¹⁰⁷ ‘Woman Gaoled’, above n 94.

¹⁰⁸ *Subversive Associations Regulations* reg 7 prohibited possession of publications advocating an unlawful doctrine.

¹⁰⁹ ‘Prison for Man and Wife’, above n 79; ‘Man and Wife Imprisoned’, above n 79 (although this report does not mention Radio Moscow or the second tradesman).

the most prominent communist to be charged under the regulations. He was charged under reg 42. At a meeting of the Townsville City Council on 15 May 1941, a motion had been put that a special committee of three members of the Council meet with representatives of the Returned Sailors', Soldiers' and Airmen's Imperial League of Australia ('RSSAILA') to discuss arrangements for a farewell to departing service people. Paterson, a member of the Council, moved an amendment whereby it was to be explained at the farewell that:

- 1 the policy of the war was determined by the kings of industry and finance;
- 2 that it therefore did not reflect the wishes and desires of the people;
- 3 that it was not a war to defeat Nazism and fascism but to determine which group of millionaires would dominate the world; and
- 4 that various socialist policies must be implemented to ensure the defeat of fascism and Nazism.

The motion lapsed through want of a seconder. Prior to the meeting, Paterson had given a copy of his proposed amendment to a local journalist.¹¹⁰

Several 'rightists' and pacifists also fell foul of reg 42 of the *General Regulations* on the basis of comments made to small audiences. Arthur Jeffrey had told the driver and a passenger in a car in which he was travelling that 'a man was a fool to go away and fight for this country' and that 'if Hitler came here conditions could not be worse than they were under British rule'.¹¹¹ John Martin had allegedly said while arguing in a barber's shop that 'I hope Britain will not win the war. We would all be better off under Hitler'.¹¹² He was charged under regs 41 and 42 of the *General Regulations*. After an altercation with a barmaid in a pub, Joseph Moore was alleged to have said: 'I am a Hitlerite, and all Australians can go to hell'.¹¹³ In 1942, three Christian pacifists were charged under reg 42 after having allegedly attempted to persuade people to sign a petition calling for peace negotiations with Japan.¹¹⁴

C Distribution of Literature

Several defendants were charged with having distributed 'illegal' literature. These included Francis Sheridan, a constable with the Northern Territory Police, who was charged at Alice Springs with distributing pamphlets advocating doctrines prejudicial to the conduct of the war. The prosecution alleged that he had given two pamphlets to another person, intending that that person would pass them on to others.¹¹⁵ E V Marshall was accused of distributing a pamphlet — *Where Does Labor Stand?* — and was charged under reg 17A of the *General Regulations*. David Cunningham's offence was being in possession of a pam-

¹¹⁰ Details of the case are to be found in (National Archives of Australia) A467/1 92/SF42/6.

¹¹¹ 'Man Sentenced at Northam', above n 96.

¹¹² 'Man Alleged to Have Said He Hoped Hitler Won', above n 96.

¹¹³ 'Charge under Section 42A', above n 96. Evidence was given that, despite his statement, his loyalty was unquestionable.

¹¹⁴ They were William Allen, Albert Hooke and John McKellar. The petition stated that 'the war was for material wealth and could not be masked in self-righteous eloquence': 'Peace Petition Charge: Imprisonment Order', *Sydney Morning Herald* (Sydney), 24 April 1942, 7.

¹¹⁵ The case, which resulted in an acquittal, is referred to in (National Archives of Australia) MP508/1 4/702/141.

phlet advocating an unlawful doctrine. However, according to prosecution evidence, he had been distributing the pamphlet.¹¹⁶ Edward Crowe was charged under reg 7 of the *Subversive Associations Regulations* on the basis of having distributed several copies of a communist publication (and was also found to have possessed multiple copies of several illegal publications).¹¹⁷ Horace Street was prosecuted under reg 42 of the *General Regulations* after having been caught distributing copies of *There is a Path to Peace*.¹¹⁸ Paddy Troy was charged under the *General Regulations* reg 17A with distributing a paper, *The Spark* (the charge being based on a single act).¹¹⁹ Marie Nielsen was charged under the *General Regulations* reg 17B with having distributed *The Guardian*, a banned publication.¹²⁰ Scanlon's crime was to prepare three posters, headed 'Fascism declared by Herr Menzies'. He then posted them on the wall of a shop near a tram stop, at a hostel and on a notice board at the mine where he worked. He was charged under the *General Regulations* reg 17A and the *Subversive Associations Regulations* reg 7.¹²¹ Theodore Jones allegedly possessed a number of stickers and copies of *Home Front* for distribution.¹²² The only communist to be charged with serious attempts to distribute literature was Adam Ogston, who was charged under reg 42 of the *General Regulations* with possession of leaflets entitled *Freedom Press*, these having been found at a shop where he lived.¹²³

The most systematic distributor of literature was, however, a nameless fascist charged with having distributed three copies of *Action Post*. The charges were representative. He had admitted to having posted between 150–200 copies of his work to firms and public bodies, with a view to their content being read out as correspondence and thereby communicated to a wide audience.¹²⁴

D Possession of Proscribed Material

Most defendants were charged on the basis of their possession of proscribed material. In several cases, it was clear from the evidence that the defendants were also involved in its production or distribution. Frederick James, the first Queensland to be charged under reg 42 of the *General Regulations* had been found in possession of 3000 handbills headed 'The *Tribune* is Silenced; Communism Speaks'.¹²⁵ James Conroy was picked up by police while walking along Pitt Street, Sydney, and was found to have in his possession six stencils for preparing

¹¹⁶ The pamphlet was *There is a Path to Peace*: 'Lumper Has Man Arrested on Literature Charge', *The Herald* (Melbourne), 20 September 1940, 3.

¹¹⁷ 'Gaoled for Having Communist Papers', *The Herald* (Melbourne), 13 March 1941, 13; 'Had Communist Papers: Dock Worker Gaoled', *The Argus* (Melbourne), 14 March 1941, 5.

¹¹⁸ 'National Security Offences. Man Fined £20', *Sydney Morning Herald* (Sydney), 4 September 1940, 7. He was also charged with possession of the offending literature.

¹¹⁹ (National Archives of Australia) A1608/1 F39/2/3 pt 1.

¹²⁰ *Fitzpatrick Papers* (National Library of Australia, Canberra) MS 4965, 14338.

¹²¹ ACCL, 'National Security Cases' (1941) 5 *Civil Liberty* 13, 20–1. The full text of his posters is set out at 21.

¹²² 'Breach of War Rules', *Daily Telegraph* (Sydney), 13 December 1940, 9.

¹²³ 'Charge Not Proved: Security Breach Alleged', *Sydney Morning Herald* (Sydney), 18 November 1941, 12.

¹²⁴ 'Sabotage Plans', above n 96.

¹²⁵ ACCL, *The War and Civil Rights*, above n 94, 8.

a roneoed paper, *Trade Unionists — Fight the Warmongers in Your Own Ranks*. He was charged under the *General Regulations* reg 17A with possession of both the stencils and copies of the paper.¹²⁶ The raid on John Morris' rooms yielded not only a number of inadequately identified publications, but materials which could be used in the production of literature.¹²⁷ Horace Ratliff and Max Thomas were found in possession of a typewriter, a duplicating machine, paper and a number of pamphlets.¹²⁸ G Scott had been found in possession of printing equipment and illegal publications.¹²⁹ Brook Morris was found to be in possession of a sufficiently sizeable quantity of literature to cast doubts on his claim that he possessed the literature for personal reasons only.¹³⁰ F H Lindsey was prosecuted for possession of a variety of illegal publications, including one of which he had had multiple copies.¹³¹ E R Pearce was found to be in possession of 10 copies of *The Pilot*, a roneoed paper, the relevant edition of which claimed that Spender, the Minister for the Army, was in the pay of the Japanese.¹³² James Elliott had allegedly been found in possession of multiple copies of the banned *Tribune*.¹³³ John Simpson had £95 in his possession, allegedly for the use of the CPA. He was also found in possession of three copies of the *Communist Review* dated January 1941 and 13 copies of *Soviet Russia and the War*.¹³⁴ John Wishart had been found in possession of 14 or 15 copies of a document headed: 'To the Soldiers of the Second AIF. Military Punishment and the Rank and File.'¹³⁵ William Dean had been found in possession of only one offending document, a circular to be distributed to branches of the CPA in Western Australia, and lacking the details required under reg 17A. According to police evidence, he admitted that it had been circulated.¹³⁶

On the whole, however, defendants were charged following raids or searches which yielded no more than a handful of pieces of illegal literature. Elizabeth Holdsworth was prosecuted for possession of four different copies of the *Tribune*.¹³⁷ Kevin Healy's prosecution under reg 17A of the *General Regulations* was based on his possession of *The Spark* and a number of anti-war circulars.¹³⁸ The charges against Keith Wallbridge were based on his possession of *The Coming War in the Pacific* and a post-ban edition of the *Tribune*. The police

¹²⁶ 'Charges against Youth. War-Time Prosecutions', *Sydney Morning Herald* (Sydney), 27 June 1941, 5.

¹²⁷ See (National Archives of Australia) A467/1 89/pt 2/SF42/104.

¹²⁸ (National Archives of Australia) A1608/1 16/13/239 pt 1.

¹²⁹ (National Archives of Australia) A467/1 89/pt 2/SF42/123.

¹³⁰ (National Archives of Australia) A467/1 92/SF42/5.

¹³¹ (National Archives of Australia) A467/1 89/pt 2/SF42/109.

¹³² (National Archives of Australia) A467/1 89/pt 2/SF42/107.

¹³³ (National Archives of Australia) A467/1 92/SF42/14.

¹³⁴ (National Archives of Australia) A467/1 89/pt 1/SF42/79 W3252; 'Man & Woman in WA Court: Subversive Charges', *The Herald* (Melbourne), 22 April 1941, 3.

¹³⁵ *Wishart v Fraser* (1941) 64 CLR 470, 471, 485. He admitted that he possessed the copies with the intention of distributing them, but stressed that this was contingent on approval from the Communist League, which had not been given.

¹³⁶ 'Communist Gaoled', *Western Australian* (Perth), 1 June 1940, 14.

¹³⁷ The charges were later dropped: (National Archives of Australia) A467/1 92/SF42/12.

¹³⁸ '3 Months Gaol for WA Communist Secretary', *The Herald* (Melbourne), 14 June 1940, 3.

added that they had found other documents, including *Home Front*, but there was no suggestion of possession for distribution.¹³⁹ The charges against J W Coleman were based on his possession of two copies of a prohibited publication, *The Workers' Star*, which contained articles about his son-in-law.¹⁴⁰ A L Blair and Norman Neels were each charged under *Subversive Associations Regulations* reg 7 for possession of single copies of two pamphlets.¹⁴¹ Francis Legeny was charged under *General Regulations* reg 17A for possession of two copies of the *Communist Review*, found in his possession after he was searched on alighting from a train.¹⁴² Keith Wallbridge was charged under regs 7 and 17A of the *General Regulations* after being found in possession of a copy of the *Tribune* dated 7 April 1941 and a copy of the pamphlet, *The Coming War in the Pacific*.¹⁴³ Several defendants were charged on the basis of possession of a single publication.¹⁴⁴

The only defendants to be charged under reg 8 of the *Subversive Associations Regulations*, which made meetings held for the purpose of advocating an unlawful doctrine illegal, also seem to have been engaged in relatively harmless activities. The meeting in question was held at the School of Arts in Bondi. The behaviour of those attending the meeting had led the caretaker to suspect that it was a meeting of Jehovah's Witnesses and the local police were duly notified. They informed the federal authorities who, after trying in vain to eavesdrop on the proceedings, entered the premises and were told that the meeting was a

¹³⁹ 'Had Communist Literature: Man's Three Fines', *Sydney Morning Herald* (Sydney), 25 July 1941, 5.

¹⁴⁰ *Coleman v Richards* (1941) 43 WALR 21.

¹⁴¹ In Blair's case the pamphlets were *No War on Russia* and *The War and the Working Class: Fitzpatrick Papers* (National Library of Australia, Canberra) MS 4965, 8853. Neels had been found with *The War and the Working Class* and *The Imperialist War and Socialist Revolution: ACCL, 'National Security Cases'*, above n 121, 18.

¹⁴² ACCL, 'National Security Cases', above n 121, 19. A prior search at his camp had revealed nothing unlawful.

¹⁴³ 'Had Communist Literature', above n 139.

¹⁴⁴ Eric Knowles and Leslie Jury were charged under reg 17A for having in their possession single copies of *The Spark: 'Three Months' Imprisonment'*, *The Herald* (Melbourne), 7 June 1940, 3; 'Had Communist Paper', *Sydney Morning Herald* (Sydney), 10 June 1940, 5; 'Doctor Charged under National Security Act', *The Herald* (Melbourne), 19 June 1940, 3. However, in opposing bail, the prosecutor alleged that Dr Jury 'had been going round Fremantle selling pamphlets and agitating for Communism': 'Doctor Charged under National Security Act', *The Herald* (Melbourne), 19 June 1940, 3. Stickland was prosecuted under reg 7 for possessing a single copy of *No War on Soviet Russia*: see *Stickland v Nevin* (1941) 43 WALR 18 for the report of the appeal against his conviction. Doblo was charged under reg 7 on the basis of his possession of a circular headed 'War Developments and the Tasks of the Party', which presented the standard CPA line on the war: Crown Solicitor to Secretary, Attorney-General's Department, 1941, NAA: A6119/84 1708. Albert Cant was found in possession of a single copy of the *Workers' Star* and was charged under reg 7: 'Union Leader Gaoled: Had Banned Paper', *The Argus* (Melbourne), 8 January 1941, 5. Stanley Read was charged under reg 7 for having in his possession a circular, 'Study Class Material': ACCL, 'National Security Cases', above n 121, 21. Perry was charged with having in her possession, on 2 April 1941, a circular advocating unlawful doctrines. The evidence was that police had searched her premises and had found in her car a document headed 'Warning'. This advised people 'to carry on their work of agitation carefully and subtly'. Not all communists heeded that advice. Perry's house was raided after police who had been following John Simpson saw him visit the house. See '*Perry v Basley*' (1941) 15 *Australian Law Journal* 97; 'Man & Woman in WA Court', above n 134.

‘tennis meeting’.¹⁴⁵ There was far more communist literature in the room than is normal at tennis club meetings. Yet there was no evidence that the meeting was for purposes other than the discussion of general communist doctrines. Searches of the homes of the defendants revealed that two of them possessed some communist literature, but these defendants were charged under the *General Regulations* reg 17A, not reg 42.

V TRIALS

A Decisions at First Instance

As if to acknowledge the qualified consensus surrounding the war, the Commonwealth was reluctant to run the risks inherent in trial by jury in wartime subversion prosecutions.¹⁴⁶ All defendants charged with offences under the regulations were tried summarily.

Only rarely were the facts in dispute. Arthur Jeffrey, a ‘Hitlerite’, argued that the two witnesses who had given evidence about a subversive conversation had fabricated it.¹⁴⁷ Theodore Jones admitted possessing some literature which did not carry the prescribed details, but denied police claims both that he possessed a number of stickers and copies of the *Home Front* and that he had admitted that he was intending to distribute them.¹⁴⁸ Starling¹⁴⁹ and Johnson¹⁵⁰ argued that the police report of what they said at anti-conscription rallies omitted important parts of their speeches, and Violet Wilkins argued that police reports of what she allegedly said on the Perth Esplanade overstated the degree to which she was attempting to incite disaffection.¹⁵¹ In most cases, however, defendants admitted the facts as alleged by the prosecutor. They did not deny having made speeches in which they had criticised the war or the way in which it was being run. They did not deny having been found in apparent possession of proscribed material. They do not even appear to have challenged prosecution evidence about admissions allegedly made to the police.¹⁵² Even so, they rarely pleaded guilty.¹⁵³

¹⁴⁵ See (National Archives of Australia) A467 89/pt 1/SF42/78. The six defendants were D Donovan, H Druitt, T Fogarty, T Gordon, H Gould, R McConnell. Donovan and Fogarty were also charged under reg 17A.

¹⁴⁶ In the 1940 federal elections, communist candidates standing as independents sometimes performed well. Gibson won nine per cent; Paterson polled 18 per cent. Several candidates for the State Labor Party in New South Wales also polled well, Gollan winning 25 per cent and Lockwood 15 per cent; Macintyre, above n 10, 406. In a typical jury, therefore, it was possible that there would be at least one juror inclined to hold out for the acquittal of a communist defendant.

¹⁴⁷ ‘Man Sentenced at Northam’, above n 96.

¹⁴⁸ ‘Breach of War Rules’, *Daily Telegraph* (Sydney), 13 December 1940, 9.

¹⁴⁹ Watson, Deputy Crown Solicitor to Crown Solicitor, 15 October 1940 (National Archives of Australia) A472/6 W1145.

¹⁵⁰ Watson, Deputy Crown Solicitor to Crown Solicitor, 22 October 1940 (National Archives of Australia) A472/6 W1456.

¹⁵¹ ‘Woman Gaoled’, above n 94.

¹⁵² The lack of such challenges is sometimes puzzling. For instance, Wishart reportedly said to the police: ‘I am prepared to accept the consequences of any action the authorities might take against me. I deserve punishment. I know the police are in possession of ample evidence of my activities with the Communist League of Australia and the Revolutionary Workers’ League. You know I have been down in the domain on Sundays speaking from the platform of the Communist

Instead they relied heavily on ‘legal’ arguments to the effect that the prosecution evidence could not sustain the charges to which it related. While some of the legal defences had little to commend them, the range of ‘legal’ defences is testimony both to the skill and thoroughness of the lawyers who represented defendants charged under the regulations and to the vagueness and complexity of the regulations themselves.

Several defences involved challenges to the validity of the regulations. Phyllis Johnson’s defence at first instance was based partly on a constitutional argument to the effect that the Commonwealth lacked the power to enact the *National Security Act* and, this being the case, it lacked the power to make *General Regulations* regs 42 and 17A.¹⁵⁴ Wishart made a similar challenge to the validity of reg 41 of the *General Regulations*.¹⁵⁵ Simpson and the ‘tennis club’ defendants challenged the validity of the *Subversive Associations Regulations*.¹⁵⁶

Typically, though, defendants assumed the validity of the regulations, but argued that they did not cover their activities. Wishart questioned whether one could be guilty under reg 41 of the *General Regulations* if, at the alleged time of the defence, one did not have a present intention to incite disaffection.¹⁵⁷ Paterson and Martin asked whether one could be guilty of attempting to influence the public if the relevant audience consisted of only a handful of people, and if there was nothing to suggest that any of these people had, in fact, been influenced.¹⁵⁸ Rowan and Starling asked whether the prosecution had to prove both the attempt to influence the public and knowledge that the attempt, if successful, might interfere with the efficient prosecution of the war.¹⁵⁹ Charges against Scanlon under the *General Regulations* reg 17A gave rise to the question of whether handmade copies could be said to be ‘printed’.¹⁶⁰ Lindsey based a defence to a reg 17A charge on the contention that the prosecution had not done enough to prove that the allegedly fictitious printer was indeed fictitious.¹⁶¹ In his Quarter Sessions appeal, John Morris argued that reg 17A did not apply when the publication in question consisted of a single sheet, printed on both sides.¹⁶²

League of Australia’: see ‘Charge Against Solicitor’, *Sydney Morning Herald* (Sydney), 17 September 1940, 3. This reads like an unimaginatively drafted verbal or a statement by an old Bolshevik at the end of a show trial. It is not what one would expect of a Trotskyist — especially a Trotskyist with legal training. Yet the evidence went unchallenged.

¹⁵³ Among those who did were Jury, the Owens and Wallbridge. Dean changed his plea to guilty after hearing the prosecution evidence.

¹⁵⁴ Deputy Crown Solicitor to Crown Solicitor, 21 October 1940 (National Archives of Australia) A472/6 W1456.

¹⁵⁵ See *Wishart v Fraser* (1941) 64 CLR 470.

¹⁵⁶ Richards to Inspector Read, 22 October 1941 (National Archives of Australia) A467 89/pt 1/SF42/79; Deputy Crown Solicitor to Crown Solicitor, 21 July 1941 (National Archives of Australia) A467 89/pt 1/SF42/78.

¹⁵⁷ See *Wishart v Fraser* (1941) 64 CLR 470.

¹⁵⁸ (National Archives of Australia) A467/1 92/SF42/6; ‘Man Alleged to Have Said He Hoped Hitler Won’, above n 96.

¹⁵⁹ ACCL, *The War and Civil Rights*, above n 94, 13–17. See also *Francis v Rowan* (1941) 64 CLR 196.

¹⁶⁰ ‘National Security Cases’, *Kalgoorlie Miner* (Kalgoorlie), 30 June 1941, 1.

¹⁶¹ (National Archives of Australia) A467/1 89/pt 2/SF42/109.

¹⁶² (National Archives of Australia) A638/8 326.

Several defendants charged under the *Subversive Associations Regulations*, including Doblo, argued that the allegedly offending pamphlets did not advocate anything: they simply presented a particular analysis. Eileen Perry and Doblo, moreover, argued that the advocacy of particular tactics could not be said to constitute advocacy of a doctrine. Counsel for Simpson challenged Detective Sergeant Richards to state the nature of the doctrines advocated by the CPA and elicited an admission of uncertainty.¹⁶³ In the ‘tennis club’ case, J B Sweeney argued that the defendants could not be said to have ‘held’ a meeting — ‘hold’ meant ‘convene’ and the defendants had simply assembled. He also argued that inadequate particulars had been given and that the averment to the effect that the meeting was held for the purposes of advocating an unlawful doctrine was an averment of law, not of fact, and therefore of no evidentiary value.¹⁶⁴

Both the *General Regulations* reg 17A and the *Subversive Associations Regulations* reg 7 provided that ‘lawful excuse’ could constitute a defence. Stickland argued that it was a lawful excuse that offending literature had been acquired prior to the enactment of the regulations which made possession an offence and that it was also a lawful excuse that he had kept the pamphlet for personal use only.¹⁶⁵ Coleman contended it was a defence that he had acquired two copies of an offending paper before they became illegal and that he had kept the copies for sentimental reasons only — the paper contained a story about his son-in-law.¹⁶⁶ Phyllis Johnson argued that it was a lawful excuse for possession that she had taken the papers in question without knowing or discovering their contents prior to her arrest shortly afterwards.¹⁶⁷ Five defendants¹⁶⁸ argued that they were not in possession of the offending literature at all.

Despite the ingenuity of some of these defences, trials usually resulted in convictions, and these convictions usually survived appeals. In 61 trials, there were 10 acquittals at first instance, two cases in which defendants were convicted on at least one count, and 48 cases where defendants were convicted on all counts. I have found no details of the outcome of one trial, that of McKellar, a Christian pacifist. Four defendants¹⁶⁹ were acquitted after the prosecutor failed to call evidence.¹⁷⁰ In one case, it is unclear why the defendant was acquitted.¹⁷¹ Details are, however, available about the other five acquitted defendants.

¹⁶³ McKenzie, above n 10, 103.

¹⁶⁴ Watson, Deputy Crown Solicitor to Crown Solicitor, 21 July 1941 (National Archives of Australia) A467 89/pt 1/SF42/78.

¹⁶⁵ *Stickland v Nevin* (1941) 43 WALR 18, 20.

¹⁶⁶ *Coleman v Richards* (1941) 43 WALR 21.

¹⁶⁷ Deputy Crown Solicitor to Crown Solicitor, 21 October 1940 (National Archives of Australia) A472/6 W1456.

¹⁶⁸ Doblo, Johnson, Ogston, Coleman, Perry.

¹⁶⁹ E R Pearce, A L Blair, Bernard Hearsch, and Ellen Nielsen.

¹⁷⁰ In Pearce’s case, the reason for the prosecution’s failure to call evidence was that it wanted to charge him under a different regulation. He had originally been charged under reg 7 of the *Subversive Associations Regulations*. Whitlam, the Crown Solicitor, considered that he should have been charged under reg 42A of the *General Regulations*. At his appearance at the Malvern Court of Petty Sessions, the prosecution sought an adjournment so that they could substitute charges. The defence objected and the application was denied. The prosecution chose to call no evidence and the reg 7 charge was dismissed. Whitlam considered that the acquittal of the *Subversive Associations Regulations* charge could not, at law, justify a successful plea of autrefois acquit to

In the case of Starling, who was charged under reg 42 of the *General Regulations* in relation to comments made at an anti-conscription rally, Magistrate Pickup accepted a defence based partly on the inadequacy of the evidence: the prosecution evidence consisted of a police officer's transcription of shorthand notes taken of allegedly objectionable features of Starling's speech. The Magistrate accepted Sweeney's argument that, before any inference could be drawn, the offending passages had to be considered in the context of the entire speech. It was apparent that substantial sections of the speech had not been reported and that the report — in contrast to Starling's grammatical language — included numerous ungrammatical and incoherent sentences. Since the full text of the speech was not in evidence, the Magistrate held that it would be wrong to convict. Magistrate Pickup also found that Starling had been concerned not to hinder the war effort, but only to attack the methods adopted.¹⁷²

Rowan had also been charged on the basis of remarks made at an anti-conscription rally. He was acquitted at first instance on the ground that, while his remarks were objectively likely to impede the efficient conduct of the war, it had not been proved that he had intended that effect. Sheridan had been acquitted on the basis of a ruling that giving pamphlets to one other person did not constitute distribution. Ogston was the only defendant to rely successfully on an argument to the effect that there was not enough evidence to support a finding that he was in possession of the offending literature. Albert Hooke, who had been charged under reg 42 of the *General Regulations* on the basis of attempts to gather signatures for a petition urging a negotiated settlement with Japan, was acquitted on the ground that the only people whose signatures he had solicited had been people who he knew shared his beliefs.¹⁷³

The two Western Australian defendants who relied on 'lawful excuse' defences may have been unfortunate. In Stickland's case, Magistrate Wallwork was not unsympathetic to the defendant's argument that possession for personal use only could constitute a lawful excuse, but he drew a distinction between works which were of recognised literary merit, and those which were not:

a new charge under reg 42A. He feared, however, that a magistrate might nonetheless accept an *autrefois* acquit plea or suggest that the prosecution should withdraw a reg 42A charge. He therefore advised against a further prosecution: see (National Archives of Australia) A467/1 89/pt 2/SF42/107. In the other three cases, prosecutions had been approved, but the cases had not come to trial by the time Herbert Evatt became the Commonwealth Attorney-General.

¹⁷¹ One of these was Downie who was acquitted by a Perth court of a charge under reg 42 in relation to a speech given in May 1940: see ACCL, *The War and Civil Rights*, above n 94, 11; *Fitzpatrick Papers* (National Library of Australia, Canberra) MS 4965, 8842. The former source refers to an unnamed defendant prosecuted in July. The latter source states a name but refers to a decision in August. The two accounts appear to relate to the same case.

¹⁷² ACCL, *The War and Civil Rights*, above n 94, 15–17. This latter finding is puzzling. Starling had said that the war was for the purpose of the enslavement of humanity. Given that he was an anti-fascist, one would assume that this was intended as a condemnation, rather than a commendation, of the war. If so, one must assume that Starling was hoping by his speech to persuade others to accept that view and thereby reduce the government's capacity in a manner prejudicial to the efficient conduct of the war: plainly, if a war is being conducted against the interests of humanity, it is best that it not be prosecuted efficiently.

¹⁷³ 'Second Case Fails', *The Herald* (Melbourne), 23 April 1942, 3; 'Peace Advocate Gaoled for Breach of Security Laws', *The Sun* (Melbourne), 24 April 1942, 8. Charges against McKellar were adjourned. Given that, according to *The Herald* report, McKellar's defence was the same as Hooke's, it is likely that either the charges against him were dropped or he was acquitted.

It seems to be a reasonable interpretation of these regulations to follow the provisions of legislation relating to indecent publications, which make an exception in favour of scientific treatises, and works of recognised literary merit. The possession of political works of such standing could be lawfully excused under the *National Security Regulations* where the intention of the legislature was clearly not to suppress intelligent reading, but to prohibit the dissemination of subversive propaganda during the present state of war.¹⁷⁴

As examples of works of recognised literary merit, he instanced works by Karl Marx and Adolf Hitler (specifically *Mein Kampf*), observing that no objection seemed to be taken to these, as evidenced by the fact that '[t]hey and many similar works, are for sale in book shops, and exposed in public libraries.'¹⁷⁵ The pamphlet, *No War on Soviet Russia*, did not fall within this category. Rather, it fell within the category of 'subversive propaganda'.¹⁷⁶ But the fine of £5 which he imposed was remarkably lenient by Western Australian standards, and contrasts with Coleman's sentence of four months at first instance.¹⁷⁷

Generally, however, the trial courts appear to have had little sympathy towards the defendants' arguments. In this respect, they had the general support of the appeal courts.

B Appeals against Conviction

The only defendants to appeal successfully against a conviction in the subversion prosecutions were John Morris, Phyllis Johnson and William Allen, a Christian pacifist. Judge Hill allowed Morris' appeal based on the contention that reg 17A of the *General Regulations* did not cover publications printed on both sides of a single sheet. This, however, was a pyrrhic victory: convictions on other charges stood and Morris' sentence was not reduced. Phyllis Johnson's appeal against a conviction under reg 17A succeeded. The Court accepted her claim that the circumstances under which she had taken and retained possession of the papers were such as to constitute a 'lawful excuse'.¹⁷⁸ Judge Clyne accepted Allen's contention that the reference in the *General Regulations* to the 'present war' meant the war between the Allies and Germany, and did not include the war against Japan, which had begun after those regulations were made. On appeal to the High Court, the Commonwealth's arguments against this finding prevailed, but Allen's was a nominal defeat only: the Commonwealth pressed for its interpretation of the law and not for a conviction — its appeal was therefore dismissed.¹⁷⁹

Stickland and Coleman came close to being acquitted. In Stickland's case, the Full Court of the Western Australian Supreme Court (Northmore CJ and Dwyer J) agreed with the Magistrate that the pamphlet advocated unlawful doctrines, but could not agree on whether possession for mere personal use

¹⁷⁴ See *Stickland v Nevin* (1941) 43 WALR 18, 20.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ See *Coleman v Richards* (1941) 43 WALR 21, 25.

¹⁷⁸ (National Archives of Australia) A6119 1174.

¹⁷⁹ *Birch v Allen* (1942) 65 CLR 621.

constituted a ‘lawful excuse’.¹⁸⁰ The conviction therefore stood.¹⁸¹ Coleman’s appeal was dismissed by Dwyer J.¹⁸² His Honour held that it was open to the Magistrate to find on the evidence that Coleman possessed the documents in question — indeed, this was the only reasonable decision. There was more merit in the argument that it was a lawful excuse that the copies of the prohibited paper were acquired prior to the making of the *Subversive Associations Regulations*, but Dwyer J regarded himself as bound by the decision in *Stickland v Nevin*.¹⁸³ He implied that, but for this decision, he would have allowed Coleman’s appeal:

It is my duty, as I conceive it, therefore, whatever my opinion may be, to hold that acquisition before the date of illegality, that is, before the date of the Regulation introducing “possession” as an offence, is not to be deemed a lawful excuse.¹⁸⁴

Nor was it a lawful excuse that the document was retained for sentimental reasons. But, even if this was not a lawful excuse, it was a relevant consideration for the purposes of mitigating sentence. As such, Coleman’s sentence was reduced to the one month’s imprisonment he had already served.

All other defendants’ appeals failed. Wishart appealed unsuccessfully against his conviction under reg 41 of the *General Regulations* to a Court of Quarter Sessions of New South Wales and then purported to appeal to the High Court. Rich and Starke JJ treated his arguments with contempt. Dixon, McTiernan and Williams JJ found them to be untenable: there was ample authority permitting the delegation to the executive of the power to make regulations with respect to the defence of the Commonwealth.¹⁸⁵ Furthermore, the defence power was broad enough to ground reg 41 of the *General Regulations*.¹⁸⁶ The documents that Wishart possessed were clearly intended to cause disaffection among soldiers. The only possible problem facing the prosecution was Wishart’s contention that he had no intention of circulating the documents on the date of the alleged offence. Even if this was Wishart’s intention (and the Chair of Quarter Sessions had decided that it was not), that was immaterial. Time was not an element of the offence, and it was enough that Wishart had at an earlier date possessed the

¹⁸⁰ *Stickland v Nevin* (1941) 43 WALR 18, 20–1. Northmore CJ simply reported the disagreement. He did not indicate why one of the two judges would have allowed the appeal. As a result it is unclear whether the judge who would have allowed the appeal would have done so on the ground that the document was acquired before the making of the regulation, on the ground that possession for private purposes was a defence, or on the ground that possession of documents acquired before the making of the regulation would be a defence if the possession was for private purposes.

¹⁸¹ One basis for the ‘lawful excuse’ argument could have been that only by reading down the regulation could it be treated as a proper exercise of the regulation-making power conferred by the *National Security Act*. Alternatively, it could have been argued that the very fact that the regulation could achieve this result indicated that, in making it, the Commonwealth had exceeded its powers.

¹⁸² *Coleman v Richards* (1941) 43 WALR 21.

¹⁸³ *Ibid* 24.

¹⁸⁴ *Coleman v Richards* (1941) 43 WALR 21, 24. This suggests that he was the judge who favoured allowing *Stickland*’s appeal.

¹⁸⁵ *Wishart v Fraser* (1941) 64 CLR 470, 484–5 (Dixon J), 487–8 (McTiernan J), 489 (Williams J, agreeing with Dixon J).

¹⁸⁶ *Ibid* 485 (Dixon J), 488 (McTiernan J), 489 (Williams J, agreeing with Dixon J).

documents with a view to circulating them. The only issue to capture the Court's imagination was whether Wishart was entitled to appeal, as of right, to the High Court, given that appeal as of right lay only from a magistrate's decision, and Wishart had already appealed to a Court of Quarter Sessions, where his conviction was upheld. The Court held that the effect of the Quarter Sessions conviction was that the right to appeal no longer lay from the magistrate's decision. Special leave to appeal was therefore required, but this was refused — not that a right to appeal would have been of any comfort to Wishart had it been granted, given what the Court thought of his case.

Perry had been charged under reg 7 of the *Subversive Associations Regulations*. The Perth Court of Petty Sessions had fined her £50 and she appealed to the High Court.¹⁸⁷ Perry's appeal was based on three grounds: that the contents of the document could not be said to be a doctrine; that the document was not a circular; and that she did not possess it.¹⁸⁸ In an extempore judgment, Rich ACJ observed that 'Mr Hill [Perry's counsel] put up a valiant fight in a hopeless cause.'¹⁸⁹ He dismissed the contention that the document did not advocate an unlawful doctrine, and that it was not intended to be circulated:

A perusal of Exhibit A [a copy of the document] shows that it was intended to be communicated issued or transmitted by subtle and secret means for the purpose of causing industrial unrest and stirring up strife. The document in question gives instruction (teaching) and directions in aid of these purposes and it advances arguments and opinions in favour of direct action. This constitutes advocating doctrines or principles within the meaning of the regulations.¹⁹⁰

He also rejected the contention that Perry was not in possession of the document, which she argued on the basis that it was found in her locked car.¹⁹¹ In even briefer judgments, Williams and Starke JJ agreed. Starke J's judgment is of interest only in that it included an oblique reprimand to the prosecution for relying on irrelevant and prejudicial material linking Perry with Simpson and, by implication, his politics.¹⁹² Williams J considered that 'doctrine' and 'teaching' could be equated, and that 'teaching' could include anything that was taught.¹⁹³ Rich ACJ appears to have assumed that general guides to action could be classified as 'principles', at least when supported by argument.¹⁹⁴

¹⁸⁷ '*Perry v Basley*', above n 144. This is the only report of the case, and it does not completely reproduce their Honours' judgments. Unlike Wishart, Perry appealed as of right.

¹⁸⁸ See the High Court file on *Perry v Basley* which is available from the Court and includes the Appeal Book (which contains the order nisi, the magistrate's notes and a transcription of the document), along with a supplementary ground of appeal and the judges' reasons (which were delivered orally).

¹⁸⁹ *Perry v Basley* (Unreported, High Court of Australia, Rich ACJ, Starke and Williams JJ, 4 June 1941) 1.

¹⁹⁰ *Ibid* 1–2.

¹⁹¹ *Ibid* 2; see also '*Perry v Basley*', above n 144, 98.

¹⁹² *Perry v Basley* (Unreported, High Court of Australia, Rich ACJ, Starke and Williams JJ, 4 June 1941) 3; see also '*Perry v Basley*', above n 144, 98.

¹⁹³ *Perry v Basley* (Unreported, High Court of Australia, Rich ACJ, Starke and Williams JJ, 4 June 1941) 4; see also '*Perry v Basley*', above n 144, 98.

¹⁹⁴ *Perry v Basley* (Unreported, High Court of Australia, Rich ACJ, Starke and Williams JJ, 4 June 1941) 2; see also '*Perry v Basley*', above n 144, 98.

In Rowan's case, the Commonwealth successfully appealed to the High Court against a first instance acquittal. The Court agreed with the Magistrate that the words used in the document Rowan possessed were likely to prejudice the war effort. Unlike the Magistrate, they held that intention to produce the evil in question was not an element of the offence. The words of reg 42 of the *General Regulations* required only that there be an attempt to influence public opinion and that the effect of this attempt be prejudicial to the war effort. The nature and purpose of reg 42 was such that to require proof of an intention to produce the deleterious effect 'would destroy its purpose and its efficacy.'¹⁹⁵ Only Williams J saw fit to explain why this might be so:

In time of war the necessity to protect the safety of the realm is paramount and must take priority over individual rights. The creation of such a state of public opinion would be just as prejudicial to this paramount necessity, whether it was brought about by a person who had a genuine belief that the statements he was making would not influence public opinion in this way, or by some one who was in the pay of the enemy and was deliberately attempting to do so.¹⁹⁶

Starke J went further and doubted whether Rowan could really be said not to have intended to prejudice the war effort, but acknowledged that the Magistrate had had the advantage of seeing and hearing the defendant. He was therefore willing to concede that it was 'possible that the respondent was a stupid and blundering man, who, in the excitement of the moment, made statements the effect of which he did not appreciate.'¹⁹⁷ Williams J also seems to have been sceptical and unsympathetic:

It is possible, therefore, that the defendant's subversive remarks were made in the heat of the moment and under the influence of considerable but well-justified heckling. This only shows that at times like the present persons who cannot control their remarks under such circumstances would be well advised to refrain from public utterances.¹⁹⁸

Although several defendants had earlier challenged the validity of the *Subversive Associations Regulations* at first instance, none of them pursued the issue before the High Court. It was not until after the Soviet Union entered the war that the High Court had to determine their validity. Even then, the challenge was brought not by the communists, but by the Jehovah's Witnesses, and it arose in the context of a trespass action against the Commonwealth rather than an appeal against conviction for an offence under the particular regulations.¹⁹⁹ The plaintiffs argued that the *Subversive Associations Regulations* were invalid on

¹⁹⁵ *Francis v Rowan* (1941) 64 CLR 196, 202 (Starke J).

¹⁹⁶ *Ibid* 204.

¹⁹⁷ *Ibid* 202. Starke J's uncomplimentary assessment was not shared by the writer of a wartime intelligence report on communism in South Australia: 4th Military District, 18 July 1940 (National Archives of Australia) A6335/6 11. See also Sendy's extremely positive assessment of Rowan: Sendy, above n 77, 7.

¹⁹⁸ *Francis v Rowan* (1941) 64 CLR 196, 205.

¹⁹⁹ *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 ('*Jehovah's Witnesses Case*').

the grounds that they were contrary to s 116 of the *Constitution*²⁰⁰ and that they could not be justified as an exercise of the Commonwealth's defence power. The High Court concluded that if the regulations could be justified as an exercise of the defence power, s 116 would not assist the plaintiffs. The majority (Rich, Starke and Williams JJ) concluded that the regulations were invalid, at least insofar as they purported to exercise the seizure of the plaintiffs' property. However, Williams J, with whom Rich J concurred, pointed out that, after the banning of the Jehovah's Witnesses, the prohibition on the advocacy of unlawful doctrines meant that it was an offence under the regulations to conduct Christian church services.²⁰¹ Even given a generous construction of the defence power, this could not be justified under the *Constitution*.²⁰² Williams and Rich JJ recognised that it *might* be possible to sever the offending aspects of the definition of 'unlawful doctrine' so that regs 7 and 8 of the *Subversive Associations Regulations* applied only to doctrines insofar as their propagation threatened the defence of Australia, but doubted whether this was so. Since the case before them did not require a final decision on the validity of these regulations, they left the question unanswered.²⁰³ Nonetheless, they did find that regs 3–6B were invalid. Starke J's judgment was to similar effect, except that he concluded that the *Subversive Associations Regulations* were all invalid.²⁰⁴

Latham CJ, with whom McTiernan J agreed, pointed out that under the *Subversive Associations Regulations*, advocacy of adherence to the Ten Commandments, or of improvements to the education system, could constitute an offence.²⁰⁵ The definition of 'unlawful doctrine' was therefore so broad as to be indefensible. He concluded that the problem could be solved by severing the words which defined unlawful doctrines by reference to their having been advocated by an unlawful association.²⁰⁶

The majority judgments in the *Jehovah's Witnesses Case* sit uneasily with the decision by the same three judges in *Perry v Basley*.²⁰⁷ In *Perry v Basley*, Rich,

²⁰⁰ Section 116: 'The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth'.

²⁰¹ *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 165.

²⁰² *Ibid.*

²⁰³ Williams J did, however, make it clear that in his opinion regs 7 and 8 were invalid: *ibid* 166–7. For some reason he did not address the validity of reg 9, although its fate would seem to be inseparable from that of regs 7 and 8.

²⁰⁴ *Ibid* 156.

²⁰⁵ *Ibid* 144.

²⁰⁶ This restrictive reading would have limited the scope of the 'unlawful doctrine' offences. In practice, however, defendants seem to have been charged with 'unlawful doctrine' offences only if the doctrines were prejudicial to the defence of Australia and to the efficient prosecution of the war. See the reports of the Perry and Simpson cases: 'Man & Woman in WA Court: Subversive Charges', above n 134. In Cunningham's case, *The Herald* reported that the pamphlet had read: 'There is a path to peace, despite Hitler, Churchill and Menzies. That way is proletarian revolution': 'Lumper Has Man Arrested on Literature Charge', above n 116. The six 'tennis club' defendants, however, might have had a defence. The basis for the charges in that case appears to have been the advocacy of communist doctrines rather than doctrines which threatened the defence of the Commonwealth.

²⁰⁷ *Perry v Basley* (Unreported, High Court of Australia, Rich ACJ, Starke and Williams JJ, 4 June 1941); 'Perry v Basley', above n 144.

Williams and Starke JJ (who constituted the Court) had no doubts as to the defendant's guilt. In the *Jehovah's Witnesses Case*, they were strongly inclined to the view that the regulation under which Perry had been convicted was beyond the Commonwealth's powers, and that it could not be saved by its being restricted to cases where the unlawful doctrine threatened the defence of Australia (as Perry's pamphlet arguably did). The apparent inconsistency is somewhat illusory. Perry's legal representatives did not raise the constitutional issue either at first instance or on appeal. Moreover, the basis for the charge was not that the 'doctrine' advocated by Perry was unlawful because it advocated communist principles. Rather, it was that in encouraging the fomentation of industrial discontent, the 'doctrine' threatened the efficient prosecution of the war. It evidently did not occur to Perry's legal advisers that the regulation might be unconstitutional on the grounds that their Honours were later to suggest in the *Jehovah's Witnesses Case* and, even if it did, it is likely that her advisers would have questioned the wisdom of using her case as a vehicle for challenging the validity of the *Subversive Associations Regulations*. In the circumstances of the case, it is probably not surprising that it did not occur to their Honours that there might be no constitutional basis for Perry's conviction. That said, the contrast between the two decisions raises tantalising questions about the role of accident and strategy as determinants of the validity of Commonwealth legislation.

C Sentences

Of those convicted at first instance of offences under the regulations, 28 received prison sentences and 18 were fined (eight of whom were also required to enter into a recognisance). Four defendants were released on recognisance alone. Phyllis Johnson was imprisoned only because she refused to enter into a recognisance to be of good behaviour.²⁰⁸ The best predictor of sentence was a jurisdictional variable, namely whether the defendant was sentenced in Western Australia: 89.5 per cent of those sentenced in Western Australia received prison sentences, as compared with 35.5 per cent of those sentenced outside the State. The charge on which defendants were convicted bore no relation to the type of sentence, nor to the quantum. Nor, at first sight, was there any relationship between sentence and a somewhat subjective measure of seriousness, which differentiated between 'possession' and 'proselytising' cases, and accounted for the number of items possessed or the number of people proselytised. However, when one allows for the location of sentencing, a statistically significant relationship between seriousness and the likelihood of imprisonment emerges for defendants sentenced in the eastern states.²⁰⁹ Maximum sentences seem to have

²⁰⁸ Watson to Crown Solicitor, 21 October 1940 (National Archives of Australia) A472/6 W1456.

²⁰⁹ A measure of the extent to which more severe sentences are associated with more serious offences is provided by Kendall's tau-c. The values of this statistic range from -1 to +1. A tau-c of or close to -1 occurs only when increased values of one variable are almost invariably associated with decreased values of the other variable. A relationship of or close to +1 indicates that increased values in one variable are almost invariably associated with increased values of the other. This would be the case, for example, if non-serious offences invariably attracted lenient sentences, while offences of moderate seriousness attracted moderate sentences and serious offence invariably attracted severe sentences. A tau-c of 0 would mean that there was no ten-

been more frequent than one would expect if they had been reserved for the most serious examples of the offence in question, but they were imposed only in a minority of cases.²¹⁰

Consistent with this analysis are several egregious Western Australian sentences. Mr and Mrs Owen received sentences of six months for their ill-fated and patently unsuccessful attempt to convert a tradesman to the communist view of the war. Mr Owen's war service record, and the Owens' pleas of guilty, were to no avail. Scanlon's six month sentence for his three posters criticising the government as fascist seems disproportionate to the offence (insofar as there was one).²¹¹ Coleman's sentence of four months at first instance was perhaps even more flagrant, given the circumstances surrounding his possession. Coleman was fortunate — his case was taken on appeal and, despite the fact that his appeal against conviction failed, his sentence was reduced to the one month he had already served. Notably, Dwyer J used the occasion to affirm the principle that unorthodox views were not punishable as such, even in wartime:

It is true that he may hold certain unorthodox opinions, but I cannot regard the fact that he holds those opinions as being a reason why he should be punished. ... [T]here is no reason, because a man has an unpopular opinion, or a wrong opinion, that he should receive a greater punishment for an offence than others who may be thought to have orthodox opinions. ... In my view, in imposing the penalty the Magistrate was affected by matters which should not have been introduced regarding the accused. They certainly seem to have had a very serious effect on the Magistrate's mind, because the offence, in the circumstances surrounding it, seems to have been of a minor character.²¹²

dency for offence seriousness to be related one way or the other to sentence severity. On tau statistics, see further William Hays, *Statistics for Psychologists* (1963) 641–3, 647–51. In the eastern states, the tau-c statistic is 0.36; in Western Australia it is 0.22. The likelihood that there is, in fact, no relationship between the two variables is 0.009 in the east and 0.109 in the west. When Western Australia and other cases are examined together, the tau-c statistic is smaller, and statistically non-significant. This was because while Western Australian cases were more likely than cases in other states to be relatively trivial, Western Australian defendants were nonetheless more likely to receive prison sentences, regardless of the severity of their offences.

²¹⁰ Gollan, above n 10, 96 is wrong when he states that the usual penalty was six months imprisonment. See also Macintyre, above n 10, 402 whose statement that possession or distribution of communist literature brought sentences of three or six months is misleading if (which is unclear) it means that these were the usual sentences for *General Regulations* reg 17A and *Subversive Associations Regulations* reg 7 offences. The maximum sentence was imposed on only 11 of the 47 defendants who were convicted. In addition, one defendant received an aggregate sentence of seven months, and another an aggregate sentence of 12 months. Technically, aggregate sentences of more than six months could have been imposed in the case of defendants convicted of multiple offences, but these were almost invariably treated as if they arose out of a single factual situation. The only defendants to receive concurrent sentences were Dean (two sentences of three months, with an aggregate of six months), Legeny (one sentence of six months, and another of one month cumulative), Coleman (two sentences of two months, with an aggregate of four months) and a rather half-hearted Nazi, whose offences spanned a period of time and who received three sentences of six months with an aggregate of twelve months. However, defendants convicted on multiple counts were more likely to receive longer sentences: eight out of the 13 defendants who received sentences of six months or more were convicted on multiple counts. Of those who received sentences of three months or less, only three out of 15 were convicted on multiple counts. I have no details of the length of one sentence.

²¹¹ See Hartrey to Fitzpatrick, 2 July 1941, in *Fitzpatrick Papers* (National Library of Australia, Canberra) MS 4965, 7080ff; 'National Security Cases', above n 160.

²¹² *Coleman v Richards* (1941) 43 WALR 21, 25–6.

Neither the Owens nor Scanlon appealed.

VI REPRESSIVE LAWS, RESTRAINED ENFORCEMENT?

A Laws

The regulations placed substantial limits on the right to criticise the war. Under the *General Regulations* reg 42, it was effectively an offence to argue that Australia should not be fighting the war. Regulations 17A and 17B of the *General Regulations* were capable of catching people who wrote *anything* about the war without providing details of the printer and publisher of the material. The *Subversive Associations Regulations* were even more far-reaching. Not only did they purport to authorise the banning of bodies which opposed the war, they banned the propagation of *any* doctrine advocated by a banned body.

The scope of the regulations might have been limited had courts chosen to give them a narrow interpretation, but they seemed disinclined to do so. While several magistrates expressed concern at the range of activities covered by the regulations, appeal courts generally resolved debatable legal issues in favour of the government. The decision in *Francis v Rowan*²¹³ meant that a person was guilty under reg 42 of the *General Regulations* even if the person had not realised that their attempt to influence public opinion would, if successful, interfere with the efficient prosecution of the war.²¹⁴ Furthermore, the High Court in *Perry v Basley*²¹⁵ gave ‘doctrine’ a far broader meaning than that attributed to the term by the Crown Solicitor.²¹⁶

B Enforcement

Australian governments were sparing in relation to prosecutions under the regulations. Logically, a paucity of prosecutions can be interpreted in at least three ways. First, it may reflect a paucity of offences. If so, it does not tell us much about governmental restraint or otherwise. Second, it may reflect a lack of visible offences. If so, a low level of prosecutions is not necessarily indicative of restraint — although it might be insofar as the lack of visibility reflects the limited resources devoted by the government to apprehending those engaged in relatively secretive conduct. Third, it may reflect restraint in enforcement.

The first explanation does not appear to be sufficient. While we know comparatively little about the degree to which noncommunists committed wartime political offences, we do know that communists regularly engaged in behaviour which would have brought them within the regulations. Even after the CPA and its papers were banned, communist writings continued to appear, albeit in an attenuated form. Communist pamphlets continued to be produced and meetings

²¹³ (1941) 64 CLR 196.

²¹⁴ A similar decision was reached by the Ontario Court of Appeal: *R v Stewart* [1940] 1 DLR 689.

²¹⁵ *Perry v Basley* (Unreported, High Court of Australia, Rich ACJ, Starke and Williams JJ, 4 June 1941); ‘*Perry v Basley*’, above n 144.

²¹⁶ See the judgments of Rich ACJ and Williams J in *Perry v Basley* (Unreported, High Court of Australia, Rich ACJ, Starke and Williams JJ, 4 June 1941); see also ‘*Perry v Basley*’, above n 144.

were held.²¹⁷ Yet, despite the numerous offences entailed in the maintenance of the CPA between June 1940 and June 1941 (and afterwards, when it continued to exist as an illegal organisation), fewer than 50 communists appear to have been convicted under the regulations, and most of these were convicted under the *General Regulations*, rather than the *Subversive Associations Regulations*. It also seems that the Jehovah's Witnesses continued to proselytise.²¹⁸ Nonetheless, there appear to be no cases in which these attempts resulted in prosecutions.²¹⁹

The second explanation appears to constitute a major reason for the lack of prosecutions. Again, we know little about how noncommunist opponents of the war behaved, but we do know that communists generally took steps to keep their anti-war activities concealed from the authorities. Printing presses were spirited away to 'safe' locations. Pamphlets were shoved into letterboxes by night. Papers were sold to trusted purchasers. Forbidden documents were destroyed or kept well hidden. Moreover, according to communist accounts, police attempts to enforce the regulations were characterised by considerable ineptitude.²²⁰ The paucity of prosecutions may, therefore, be partly attributable to the CPA's capacity to outwit the government. Had known communists been carefully and systematically supervised, it is likely that many more would have been found to have engaged in nefarious activities or in possession of proscribed pamphlets. However, after the massive raids which accompanied the banning of the party — and which rarely resulted in any prosecutions²²¹ — the intensity of raids dimin-

²¹⁷ Macintyre, above n 10, 399, 402, 404–5.

²¹⁸ In answer to a question from Hubert Anthony complaining about Jehovah's Witnesses going from door to door, and asking whether the ban was going to be lifted, Herbert Evatt, the Commonwealth Attorney-General, stated that it was not proposed that the ban be lifted, that the Security Director was taking steps to stop canvassing, and (in answer to an interjection from Anthony that they had nonetheless come to his door) that 'where proof is forthcoming the Security Director is taking strong action, and some members have been placed under severe restrictions': Commonwealth, *Parliamentary Debates* (House of Representatives), 28 January 1943, 110–11. That, apart from a question about Jehovah's Witnesses working in munitions factories, was the only reference to Jehovah's Witnesses in the *Parliamentary Debates*. The nature of the 'strong action' and the 'severe restrictions' is not clear.

²¹⁹ Apart from the 1940 prosecution of McVilly, there are no references to reported prosecutions of Jehovah's Witnesses for offences under the relevant regulations in the indexes to either the *The Argus* or the *Sydney Morning Herald*. Nor, as far as I can determine, are there any references to such prosecutions in the National Archives of Australia. There were, not surprisingly, several prosecutions for failing to obey call-up notices.

²²⁰ One source of advice to members of the CPA was a roneoed pamphlet, *Defence of the Party and the Fights Against Provocation*, a copy of which was to be found in (National Archives of Australia) A467/1 89/pt 2/SF42/123. It was found among the papers of George Scott, who, in his subsequent conversations with the police, demonstrated that he had not taken much notice of its contents. There are numerous accounts of the CPA's response to the ban: Davidson, above n 10, 80–1; Gray, above n 10, 51–2; Hill, above n 10, 106–7; Macintyre, above n 10, 397–400; McKenzie, above n 10, 99–100; Joyce Stevens, *Taking the Revolution Home: Work among Women in the Communist Party of Australia: 1920–1945* (1976) 156–7, 175–6. Many accounts develop the time-honoured theme of intellectual communists faced by dimwitted policemen (although Gray and Macintyre are guardedly sceptical), and thereby possibly miss the point that it scarcely mattered whether police confiscated the works of Dostoyevsky rather than those of Stalin, if the real purpose of raids was to punish communists, to show them that police knew their politics and to deter them from visible activism.

²²¹ McKenzie, above n 10, 100 states, in relation to Western Australia, that '[t]hough many house raids were carried out at this time, there were no arrests.' This is not quite true. Dr Jury was arrested after a Western Australian raid: 'Doctor Gaoled', *Western Australian* (Perth), 22 June

ished sharply. One reason for the lack of prosecutions, then, lies in offenders' success in concealing their offences, though this is difficult to disentangle from the limited resources devoted by the authorities to searching for evidence.²²²

The paucity of prosecutions also reflects a degree of tolerance — at least in the eastern states.²²³ It is apparent, for example, that prosecutions tended to be limited to cases where the prosecution had a good chance of success.²²⁴ If every possible offence had been prosecuted, one would expect that there would have been numerous cases based on criticisms of the way in which the war was being conducted and a smaller number based on outright opposition to the war. The former would frequently have resulted in acquittals, since they would have included many borderline cases. In fact, most prosecutions related to reasonably clear-cut cases. Prosecutions under reg 42 of the *General Regulations*, for instance, were largely confined to cases where the defendant had allegedly sought to influence public opinion by arguing that the war itself was unacceptable.²²⁵ Regulation 42 does not appear to have been used against people who accepted the need for the war, but who disagreed with the way in which it was being run.

It is also clear that prosecutions were governed by a number of de facto policies. Despite the breadth of the *Subversive Associations Regulations*, it is rare (outside Western Australia) to find examples of communists, or anyone else for that matter, being prosecuted under them for activities unrelated to the war. Well-known communists stood for Parliament as independents or as members of the Hughes-Evans Labor Party and we must assume that they advocated at least some communist principles.²²⁶ Other communists, including Lance Sharkey and Stan Moran, spoke every week from their pitch in the Sydney Domain before an audience that included a number of shorthand writers from the state police and security services.²²⁷ Yet, none of these highly visible communists was prosecuted. Indeed, the only prominent eastern states' communist to be prosecuted was Fred Paterson.²²⁸ Furthermore, while the government did not agree to lift the ban on the CPA until December 1942, arrests of communists ceased almost immediately upon the Soviet Union being brought into the war. Even in Western Australia, the prosecution of communists ceased once the CPA began supporting

1940, 15. Another person to be arrested after one of the early raids was Theodore Jones: 'Breach of War Rules', above n 148.

²²² The authorities did, however, devote some effort to supervising communists. Shorthand notes were taken of speeches by prominent communists (although these rarely resulted in prosecutions). Several inept attempts were made to infiltrate the CPA (and we probably do not know about the successful attempts). See generally Ferrier, above n 10, 166–7, 169–72, 176–7, 184; Macintyre, above n 10, 402, 404–5; Stevens, above n 220, 157.

²²³ This view is accepted by several communist and lapsed communist writers: Eric Aarons, *What's Left? Memoirs of an Australian Communist* (1993) 43; Hill, above n 10, 108.

²²⁴ Evidence to this effect is provided by the high success rate of prosecutions and by the low success rate in cases where defendants appealed against conviction.

²²⁵ See above Part IV for examples of the cases typically prosecuted under reg 42.

²²⁶ Those who stood as 'independent' or 'State Labor' candidates included Ralph Gibson, Bill Gollan, Jack Hughes, Rupert Lockwood and Fred Paterson: Macintyre, above n 10, 406.

²²⁷ *Ibid* 404–5; Stan Moran, *Reminiscences of a Rebel* (1999) claims that, while speaking, he put forward CPA policy: at 29.

²²⁸ For an account of the context of the prosecution, see Fitzgerald, above n 44, 124–32.

the war. Moreover, if communists were under-prosecuted, other opponents of the war were barely prosecuted at all. Even when the New South Wales Branch of the ALP was pursuing policies similar to those of the CPA, only one of its members was prosecuted. No member of the Hughes-Evans Labor Party appears to have been prosecuted under the regulations, nor any Jehovah's Witness apart from Redvers McVilly (against whom a reg 42 charge was dropped after his conviction for uttering seditious words).

Despite all this, Australia's response to communist dissidents seems severe when compared to the response in the United Kingdom. The British government rarely prosecuted communists, or any other anti-war activists, under its equivalent regulations, although a considerable number of communists were prosecuted for ordinary public order offences in connection with anti-war activities.²²⁹ In contrast to New Zealand and Canada, however, Australia was generally sparing in its use of the regulations. In Canada, two communist papers — the *Clarion* and the *Clarté* — were banned in November 1939. By February 1940, 64 people had been arrested for offences under the Canadian subversion regulations, of whom 19 were imprisoned.²³⁰ The Communist Party of Canada and 14 associated bodies were declared illegal on 6 June 1940, shortly before the ban on the CPA. While some communists were prosecuted for being members of an illegal organisation, the Canadian government relied heavily on the power to intern. Within a few months of the ban, more than 100 communists had been interned, and internments did not stop with the party's change of policy in 1941.²³¹ Communists, however, were not the only group to face prosecution, imprisonment and internment. Hundreds of Jehovah's Witnesses were arrested for offences under the Canadian regulations,²³² along with at least one 'Technocrat'.²³³ In addition, large numbers of Canadians were prosecuted under the Canadian equivalent of the *General Regulations* reg 42 for making statements prejudicial to the war effort, but which were apparently made under the influence of alcohol.²³⁴ The prosecutions and bans did not prevent the illegal bodies and their members from pursuing many of their objectives, but they tended to discourage overt proselytising.²³⁵ The bans were lifted slowly. Only in late 1942 did the Canadian government release interned communists. The ban on the party

²²⁹ Stammers, above n 1, 90.

²³⁰ Canada's Party of Socialism, *History of the Communist Party of Canada 1921–76* (1982) 137.

²³¹ Penner, above n 10, 169–70, 184. An official history of the party states that about 250 communists were interned: Canada's Party of Socialism, above n 230, 137.

²³² On the ban on Jehovah's Witnesses, see generally M James Penton, *Jehovah's Witnesses in Canada* (1976) 129–55; Kaplan, *State and Salvation*, above n 75, chs 2–4; Gary Botting, *Fundamental Freedoms and Jehovah's Witnesses* (1993) 15–29. Botting cites John Diefenbaker as stating that about 500 Witnesses had been prosecuted for their membership of an illegal organisation: at 28.

²³³ *R v Demorest* (1941) 75 CCC 360. He was acquitted on appeal.

²³⁴ Kaplan, *State and Salvation*, above n 75, 281 fn 79.

²³⁵ Penner, above n 10, 168.

was not lifted until the end of the war²³⁶ — although, as a compromise, the party was permitted to function from 1943 under a different name.²³⁷

Prosecutions of communists under New Zealand's *Public Safety Emergency Regulations 1940* (NZ) ('*Emergency Regulations*') began earlier than in Australia; the first decision to prosecute was made in February 1940. The New Zealand Communist Party was much weaker than the CPA, but its members were much more likely to be charged with and convicted of wartime offences.²³⁸ In the course of 1940, dozens of communists were prosecuted for making or publishing subversive statements, most of whom received prison sentences.²³⁹ Between 1941–43, numerous New Zealand pacifists were arrested under the *Emergency Regulations* for holding illegal meetings and for publishing subversive literature.²⁴⁰ Two people were charged on the basis of anti-British statements and a handful of Jehovah's Witnesses were charged with publishing subversive materials or participating in the activities of a subversive association.²⁴¹ Overall, in 1940, there were 59 charges of making or publishing subversive statements, of which nine were heard in the New Zealand Supreme Court. In one sense, these defendants were rather more successful than their Australian counterparts. Only one Supreme Court defendant was acquitted but, in the New Zealand magistrates' courts, only 37 of the 50 defendants were convicted.²⁴² On the other hand, of those who were convicted, a majority received prison sentences, often for 12 months. By 1941, New Zealand's enthusiasm for the prosecution of subversion offences was waning. In that year, there were only six such charges.²⁴³

As in Australia, courts in Canada and New Zealand occasionally emphasised the importance of protecting political liberties even in time of war, but more usually they approached the regulations on the basis that, in wartime, executive powers were to be given a broad construction. The protection of liberties required their temporary subordination to national security.²⁴⁴

²³⁶ Ibid 28. The Canadian government resisted subsequent United States pressure in the early cold war years to ban the Canadian party once more: at 225.

²³⁷ Ibid 193–5.

²³⁸ The Communist Party of New Zealand's membership in 1939 was less than a tenth of the membership of the CPA: Taylor, above n 23, 211. Indeed, communist peace resolutions were defeated by overwhelming majorities at conferences of the New Zealand Federation of Labour: at 222.

²³⁹ Ibid 213–21.

²⁴⁰ Ibid 197–203. Numerous other New Zealand pacifists were arrested for traditional public order offences such as obstructing police: at 197–203.

²⁴¹ Ibid 233–4, 238.

²⁴² Ibid 221.

²⁴³ Ibid 213–21. Taylor provides precise figures on the number of prosecutions and their outcome, but details of sentences must be gleaned from the detailed descriptions which she provides of cases reported in the media.

²⁴⁴ Examples of judgments which emphasised the importance of political liberties include: *R v Demorest* (1941) 75 CCC 360, 363–5 (Doak DCJ) (where the security justifications for the prosecution appear to have been patently negligible); *R v Barrington* [1942] NZLR 502, 518 (Smith J); *Billens v Long* [1944] NZLR 710, 722 (Johnston J), 732 (Northcroft J) (in the context of an alleged censorship offence by a non-dissident paper). For examples of judgments which emphasised the interests of the state and national security, see *Ex parte Sullivan* (1941) 75 CCC 70, 74–5, 77–8 (Hope J); *R v Ravenor* (1941) 75 CCC 294, 299 (Judge Ellis); *R v Burt* [1941] 1 DLR 598, 602–3 (Hogg J); *Re Carriere* (1942) 79 CCC 329, 333–7 (Surveyer J); *Kelman v Browne* [1940] NZLR 941, 945–6 (Ostler J); *Stevenson v Reid* [1942] NZLR 1, 2–5 (Cal-

D Understanding Enforcement Patterns

While one may loosely refer to the Commonwealth's response to anti-war activism, it is clear that the 'Commonwealth's reaction' was, in fact, the sum of the reactions of a variety of institutions. The handling of anti-war activism depended on executive and legislative policy; the vigour with which political dissent was policed; the willingness of administrators to approve prosecutions; and the approaches taken by courts. Moreover, even within institutions, the handling of anti-war activism could vary according to who was making the relevant decisions. Different agencies were not, of course, completely independent.

While wide-ranging, the regulations set limits on the kind of behaviour that could be successfully prosecuted. Regulation 42 of the *General Regulations* required that there be an attempt to influence public behaviour. It did not, therefore, catch mere expressions of discontent. Regulation 17A of the *General Regulations* applied only in relation to publications relating to the war. It did not, therefore, apply to all the publications of anti-war groups. In addition, all regulations were ultimately subject to the requirement that they be justified as an exercise of the defence power contained in s 51(vi) of the *Constitution*. This was not an exacting requirement, but the decision in the *Jehovah's Witnesses Case* highlighted the fact that it was a potentially material one.

The limits set by law were, in some respects, self-imposed; they were dependent on the way in which officials understood the law and on their reluctance to risk defeat in the courts. Senior officials in the Attorney-General's Department were acutely sensitive to the problems of proof that could, but rarely did, arise under the regulations.²⁴⁵ They also favoured a reading of the regulations which was consistent with the legislative and constitutional limits to which the regulations were subject.²⁴⁶ The significance of the Attorney-General's Department's interpretations lies partly in, but extends beyond, the fact that the Attorney-General's consent was required for certain prosecutions.²⁴⁷ Police in both Queensland and New South Wales were critical of the Department's failure to approve prosecutions which, in their estimation, could easily have been sustained. After the Attorney-General's Department had advised against the prosecution of a well-known communist, the New South Wales Police wrote to the Director of the Commonwealth Investigation Branch to complain, warning that in the light of that decision, the New South Wales Police Commissioner had

lan J); *Billens v Long* [1944] NZLR 710, 717 (Myers CJ dissenting); Taylor, above n 23, 213–21 identifies examples of a range of attitudes, ranging from attempts to treat offences according to conventional criteria to much harsher attitudes.

²⁴⁵ See also Whitlam's analysis (in relation to the Doblo prosecution) of the problems of proving that a doctrine was 'communist': Whitlam, Crown Solicitor to Secretary, Attorney-General's Department, 23 July 1940 (National Archives of Australia) A472 W1452; Clausen's reference to the problem of proving that a paper called the *Guardian* was indeed the communist paper of that name and that it advocated 'communist' doctrines: Clausen, Deputy Crown Solicitor to Whitlam, Crown Solicitor, 21 May 1941 (National Archives of Australia) A467/1 92/SF42/7.

²⁴⁶ None of the files I have read contains an explicit reference to possible constitutional issues, but the cautious reading given to the regulations is the kind of reading one would expect of officials sensitive to constitutional considerations.

²⁴⁷ *General Regulations* regs 41(1), 42(2).

concluded that there was little point in devoting police resources to trying to track down the printers and distributors of subversive literature.²⁴⁸ While this may simply have been a threat, aimed at producing either changes to the regulations (which were in fact made) or less obstruction on the part of the Attorney-General's Department, it also suggests that the cautious attitude of the Department may in fact have made police less inclined to investigate potential offences under the regulations.

The outcomes of the trials of wartime dissidents suggest that the Attorney-General's Department tended to err on the side of caution. The narrow interpretation its officials gave to 'advocacy' and 'doctrine' were implicitly rejected by the High Court in *Perry v Basley*. Courts tended to give a broader interpretation to reg 7 of the *Subversive Associations Regulations* than that favoured by the Department, although the decision in the *Jehovah's Witnesses Case* vindicated the Department's approach. The evidentiary issues associated with proving that publications were communist publications or advocated communist doctrines did not arise in practice. However, caution was justified. Defence cases were often argued with considerable technical aplomb, and while some magistrates seem to have been over-willing to convict, others gave the regulations a relatively narrow interpretation.²⁴⁹

Enforcement also seems to have been constrained by political considerations. The most important constraint on the government lay in its need to secure the support of the ALP and the union movement.²⁵⁰ Following the 1940 election, the government's slender majority meant that its capacity to govern was heavily dependent on the degree to which it could command the general support of the ALP — and, even if its majority had been greater, its capacity to call for sacrifice was dependent on the degree to which its efforts received endorsement from the Opposition.²⁵¹ The government's capacity to establish the economic basis for a total war depended on the cooperation of the union movement. The labour movement was wary of the government's intentions, but was willing to cooperate with the war effort provided that its interests and concerns were recognised. John Curtin, the ALP Leader of the Opposition, gave Menzies considerable and generous support,²⁵² but this would have been jeopardised if the government had taken action against Labor's anti-war wing.²⁵³ Unions were willing to work with the government, but the price of cooperation was recognition of union sensitivities.²⁵⁴ Thus, union papers were treated more favourably than communist papers,

²⁴⁸ Galleghan, Acting Inspector, NSW Police to Director, Investigation Branch, 6 August 1940 (National Archives of Australia) A472 W1452. Complaints from the Queensland police are documented by Kay Saunders, "Red Baiting Is an AWU Habit": Surveillance and Prosecution of Communists in Queensland During World War II" (1988) 74 *Journal of the Royal Australian Historical Society* 213, 223.

²⁴⁹ See, eg, the approaches taken by the magistrates in the cases of Starling and Rowan: ACCL, *The War and Civil Rights*, above n 94, 13–17.

²⁵⁰ Hasluck, above n 7, 145–6, 207–8, 215–16, 234–5; Martin, above n 14, 293, 296, 298–9.

²⁵¹ Hasluck, above n 7, 494–500.

²⁵² *Ibid*; Martin, above n 14, 311–12, 371, 383.

²⁵³ See Hasluck, above n 7, 495–500.

²⁵⁴ Hasluck makes numerous references to the degree to which the government saw the need to take account of the views of both the ALP and the union movement: *ibid* 232–4, 290–1, 370–1, 375.

notwithstanding that they sometimes published very similar articles.²⁵⁵ Communist union leaders could say certain things as union leaders, which they could not say as communists.²⁵⁶ Following the banning of the CPA, planning for raids proceeded on the basis that no prominent union officials were to be targeted.²⁵⁷ Failure to respect union sensitivities could mean industrial unrest, as evidenced by the instability following the internment of Ratliff and Thomas.²⁵⁸ The support of the 'loyal Opposition' was conditional on its loyalty being recognised and reciprocated. The government seems to have been sensitive to the possibility that 'undue' repression could create 'martyrs' and alienate public support.²⁵⁹

That said, law and politics obviously operated unevenly across Australia. Western Australia was different. In part this reflects the vigour with which Detective Sergeant Richards of the Western Australian Special Branch pursued his prey, but it also seems to reflect a more general enthusiasm for repressive measures on the part of the Western Australian authorities. At the January 1940 conference of police and security officials, David Hunter, the Western Australian Police Commissioner, had been one of the most fervent advocates of repressive anti-communist measures.²⁶⁰ Western Command had urged the internment of a rather larger number of dissidents than the other Commands.²⁶¹ Moreover, repressive measures tended to receive the imprimatur of the Western Australian courts. The vast majority of Western Australian defendants received prison

²⁵⁵ See, eg, Letter from Menzies to Murdoch, 13 June 1940 (National Archives of Australia) SP109/3/1 300/5 pt 2 arguing that union papers should be dealt with under the normal censorship regime, rather than under the regime which applied to communist papers.

²⁵⁶ Gibson, above n 10, 336; Hill, above n 10, 106.

²⁵⁷ Hughes to Knowles, 15 June 1940 (National Archives of Australia) A467/1 90/SF42/8; Macintyre, above n 10, 397, 405. Kay Saunders and Helen Taylor, 'The Impact of Total War upon Policing: The Queensland Experience' in Mark Finnane (ed), *Policing in Australia: Historical Perspectives* (1987) 143, 152 refer to a raid on noncommunist trade union leaders by Queensland police, but also point out that Hughes criticised the raid. There was also a raid in 1941 on the homes of the executive of the Portland branch of the ALP: Bevege, above n 5, 118.

²⁵⁸ Ratliff and Thomas were interned following the expiry of their six month prison sentences. Their internment provoked considerable industrial unrest: see generally Hasluck, above n 7, 609–12. The unrest provoked by their internment was sufficient to persuade Southern Command that it was better to tolerate a degree of subversion than to risk the industrial unrest which interments could provoke: Lieutenant General Smart to Secretary, Military Board, 6 August 1941 (National Archives of Australia) A8911/1 191.

²⁵⁹ See notes prepared for a meeting between Menzies and a delegation from the Central Committee of Interstate and Overseas Steamship Owners, January 1940: (National Archives of Australia) A663/1 O174/1/91. Inspector Wake of the Attorney General's Department's Investigation Branch advised against interning Paterson on the grounds that it might make him a martyr: Jones to Knowles, 29 August 1941 (National Archives of Australia) A467/1 92/SF42/6. In discussions about whether Ratliff and Thomas should be interned, Spender, the Minister for the Army, informed the Advisory War Council of a case where one dissident, Donald Thompson, was suspected of stirring up trouble in the hope that he would be interned and that his case would provoke yet more unrest: Advisory War Council Minute, 4 April 1941 (National Archives of Australia) A5954/69 431/2. Knowles suggested that one reason for not prosecuting the anti-Semitic Eric Butler was that Butler might welcome the publicity a court appearance would bring: Knowles to Director, Information, 5 March 1941 (National Archives of Australia) SP109/3/1 316/03. Some convictions under the regulations provoked vigorous campaigns protesting against the defendant's treatment: see, eg, Stevens, above n 220, 196. Most, however, appear not to have done so. Violet Wilkins in Western Australia was disappointed that protests against her fine were perfunctory.

²⁶⁰ Minutes of Conference, 22 January 1940 (National Archives of Australia) A8911/1 52.

²⁶¹ (National Archives of Australia) A8911/1 191.

sentences upon conviction.²⁶² Neither law nor politics constituted the constraint that they did in the eastern states. Yet Western Australian repression seems to have been directed at perceived threats to the war effort, rather than against dissidents per se. Once the CPA became a supporter of the war, prosecutions ceased, as they had in the eastern states, and the ever-vigilant Rogers directed his efforts to stamping out fascism.²⁶³

After mid-1941, prosecutions largely came to an end. In part, this is attributable to the defeat of the Country Party-United Australia Party coalition in the 7 October 1941 federal election. Herbert Evatt, the new Attorney-General, had doubted the wisdom and propriety of the ban on the CPA and there was considerable support within the ALP for a more tolerant attitude towards the party, especially given its enthusiastic support of the war. The change of government seems, however, to have been of only limited importance. Canada and New Zealand also appear to have become more tolerant, and in each country persecution of the unrepentant Jehovah's Witnesses had largely ceased by 1943. Greater tolerance evidently reflected developments common to the three countries. The tide was shifting in favour of the Allies, and with this shift there appeared to be a growing willingness to tolerate dissent.

VII CONCLUSIONS

This article suggests that wartime political repression arises less from necessity than from the opportunities and pressures that war can create for such governmental action. The limited need for wartime repression is suggested by the fact that it is hard to point to any ill effects associated with relatively tolerant treatment of dissidents. Britain provides an outstanding example of a country which waged total war, while treating domestic critics of the war with considerable tolerance. Australia does not seem to have suffered any ill effects from the restrained way in which the anti-subversion laws were enforced in most of the country. There appear to be several reasons for this.

First, there are limits to what repression can achieve. In relation to the CPA, relatively mild repression seriously weakened the party's capacity to proselytise and it may have weakened the party hierarchy's capacity to impose discipline. It did not, however, prevent the CPA from meeting and producing literature. Nor did it prevent the CPA from functioning through a variety of alter egos.²⁶⁴ The Canadian and New Zealand bans on the Jehovah's Witnesses appear to have made little impact, partly because martyrdom seems to have appealed to the

²⁶² See above Part V(C).

²⁶³ See Muirden, above n 26, 79–92 for details of Richards' involvement in a conspiracy which led to the prosecution of four deluded Western Australian Japanese sympathisers who were tenuously associated with the Australia First Movement.

²⁶⁴ Academic analysis on this point varies. Macintyre, above n 10, 393–405 provides a comprehensive account of the CPA's experiences during the war, noting its successes and also the problems posed by the bans on its activities. Gibson, above n 10, 336 notes that the ban impaired the CPA's capacity to spread its message. Campbell, above n 77, 155–7 argues that the CPA survived its proscription well. Hill, above n 10, 105–7 argues that the ban seriously weakened the CPA. Brown, above n 10, 107–14 seems to want it both ways, treating the repression as analogous to that unleashed by the Nazi SS on the German Communist Party, while at the same time highlighting its ineffectiveness.

Jehovah's Witnesses (and, in New Zealand, to Christian pacifists) more than it did to the more practically-minded communists.²⁶⁵

Second, the threat posed by dissident groups can easily be exaggerated. Anti-subversion legislation assumes that there are ideas which, once allowed into the community, are likely to run rampant. Yet there was no evidence to suggest that the major dissident groups possessed some mysterious capacity to seduce the populace. Indeed, their ongoing minority status was testimony to their ineffectiveness in this regard. Moreover, if subversive messages were dangerous, prosecutions in open court were scarcely advisable, since trials might result in publicity for these messages and provide defendants with a forum for communicating their views to a wide audience. The Commonwealth evidently did not regard subversive statements as dangerous per se, and they were almost certainly correct in this assumption.²⁶⁶

Third, it might not have mattered much if anti-war propaganda had made some impact on attitudes to the war. Ian McLaine's study of morale in wartime England reports analyses which suggested that there was little relationship between attitudes and whether people perform their allotted tasks to the best of their ability.²⁶⁷ Nonetheless, it is possible that attempts to influence public opinion might still affect morale — for example, by affecting people's perceptions of the degree to which they would be likely to incur social sanctions in the event of their behaving in a particular way. But even when wars become unpopular, people are generally willing to perform their 'allotted tasks'. During the Vietnam war, for instance, as many as 98 per cent of those eligible appear to have registered for conscription, and 99 per cent of those required to report for duty had done so. It is possible, however, that some resisters complied with the forms of the law, but succeeded in failing their medical examination.²⁶⁸

Repression is better understood in terms of opportunities and pressures. Opportunities include legal opportunities. In Australia, the range of activities permitted pursuant to the defence power is enlarged when the country is at war. Moreover, in non-constitutional cases, courts tend to be willing to give more weight to the views of the executive and less to individual liberties.

Wars can also create a climate in which repression becomes politically feasible, and possibly even politically expedient. Anti-war propaganda caused

²⁶⁵ In New Zealand, in response to attacks from hostile members of the public and bans by local authorities, communist meetings largely ceased and the Communist Party of New Zealand relied more on personal contact and printed material to convey its views: Taylor, above n 23, 210–12. In relation to pacifists' reactions to possible charges, see Taylor, above n 23, 181–208. In relation to the Jehovah's Witnesses, see Penton, above n 232, 136–49.

²⁶⁶ In Britain, where the government was rather more tolerant of communist propaganda, such propaganda made so little impact that it was not even regarded as worthy of comment in Home Intelligence reports. Even when the *Daily Worker* was banned, the Home Secretary (who supported the ban) considered that there was virtually no evidence that communist propaganda was having an appreciable effect on national morale: Ian McLaine, *Ministry of Morale: Home Front Morale and the Ministry of Information in World War II* (1979) 189–91.

²⁶⁷ Ibid 119. See also Macintyre, above n 10, 119.

²⁶⁸ Peter Edwards, *A Nation at War: Australian Politics, Society and Diplomacy during the Vietnam War 1965–1975* (1997) 310–12, 362. The precise level of noncompliance was bitterly contested, partly because anti-conscriptionists hoped that a perception that noncompliance was widespread would itself encourage noncompliance which in turn would make the system unworkable.

considerable anger. Even during the ‘phoney war’ period, resentment of the CPA’s policies was reflected in a spate of attacks on party meetings and premises.²⁶⁹ Those involved included many of the usual suspects along with bored soldiers, but they evidently felt that the CPA’s policies provided a licence for political and apolitical hooliganism.²⁷⁰ Similar examples of increased intolerance are to be found in other countries.²⁷¹

Resentment of anti-war activity is also reflected in the background to a number of the prosecutions. Several had their origins in reports to the authorities from people outraged by subversive statements. The Owens were reported by a tradesman. Cunningham was reported by another waterside worker. The ‘fascist’ loudmouths seem to have been reported by people annoyed by their pro-Hitler statements.²⁷² Paterson was prosecuted following representations from the RSSAILA. Moreover, recipients of anti-war pamphlets sometimes took the trouble to write to the government, asking that something be done.²⁷³ Prosecutions served to reassure people concerned by anti-war activities. They could reassure those who felt that they were making the requisite sacrifices, and who were resentful that others were not only refusing to make similar sacrifices but were challenging the very rationale for those sacrifices.²⁷⁴ They suggested a government which was able, and willing, to act.

However, there are limits to public intolerance. The Menzies and Fadden governments were sensitive to the problems that could arise if attacks on the CPA came to be seen as attacks on the political left in general. The Canadian government found that a point was reached where the ban on the Jehovah’s Witnesses had ceased to be politically acceptable.

Such considerations highlight the degree to which wartime political repression is better understood in terms of opportunities and expediency rather than need. For if a group is to be the target of political repression, it is almost essential that it not be particularly powerful. Action is apt to be taken against anti-war propagandists not because their propaganda is likely to appeal to a receptive audience, but because it is not. This may explain the apparent paradox surrounding the

²⁶⁹ On these attacks, see Aarons, above 223, 42; Ferrier, above n 10, 167; Gibson, above n 10, 335; Macintyre, above n 10, 389–91.

²⁷⁰ Macintyre, above n 10, 391.

²⁷¹ See, eg. the reactions to Christian pacifists and communists in New Zealand: Taylor, above n 23, 182–92, 209–10. In particular, Taylor notes that most members of the pacifists’ audiences were well-behaved, and even the critics were usually not particularly hostile, although soldiers who disrupted pacifist meetings tended to be drunk. In contrast, reactions to communist meetings were far more violent.

²⁷² ‘Man Sentenced at Northam’, above n 96.

²⁷³ See the letters contained in (National Archives of Australia) SP195/1/1 4/72/1/5. It is obviously difficult to extrapolate from letter-writers to the community at large, and it should also be noted that the number of letters complaining about leaflets was trivial in comparison with the number generated by the campaigns against the persecution of the CPA in the 1930s. However, the government seems to have taken them seriously. Correspondents received sympathetic letters, explaining that the government shared their concerns, explaining that prosecution was difficult, but reassuring them that the government was prepared to take action.

²⁷⁴ Bevege, above n 5, 8, 139–40, 150, 229–30 reports cases where such considerations prompted the internment of harmless aliens. She suggests that action against dissidents might even have been prompted by concern that unofficial reprisals against dissidents might have required the diversion of resources which could have been better used against the enemy.

timing of prosecutions of communists. Prosecutions did not begin until May 1940, by which time the appeals of anti-war propaganda were in decline. Prior to the German occupation of Western Europe in May–June 1940, criticisms of the war and advocacy of a negotiated peace resonated with the beliefs of sizeable sections of the community.²⁷⁵ The ALP, while supportive of Australian involvement overseas, was wary of war.²⁷⁶ Business groups, while more sympathetic, were apt to be hostile to the war effort insofar as it impinged on their particular interests. Pacifism enjoyed considerable support within each of the major political parties.²⁷⁷ As Britain's position deteriorated, patriotism became more intense, more shrill and rather more diffuse. Paul Hasluck observes that '[t]he bad news of May and the worse news of June gave rise in many sections of the community to a call to "do something", but there was much uncertainty as to what the "something" should be.'²⁷⁸ One thing governments *could* do was prosecute communists — not because they were dangerous, but because they were not.

If Australia were ever again to be involved in another all-out war, the political dynamics associated with this involvement would no doubt produce political pressures for repressive measures. Governments might be tempted to legislate against anti-war propaganda, hopeful that such laws would be reasonably enforced and that zealous enforcers would be restrained by libertarian courts. Such assumptions might well be borne out, but the history of the World War II prosecutions is a reminder that not all administrators are cautious and not all courts libertarian. In any case, it is questionable whether repression could work in an age where subversive propaganda could and would be transmitted electronically at almost no cost and with little effort. A degree of repression would be understandable, but it would also be dangerous, unnecessary and doomed to fail.

²⁷⁵ On Menzies' doubts, see Macintyre, above n 10, 391. Within the British government there was also considerable support for a negotiated settlement: see generally Lukacs, above n 20. But see Rasmussen, above n 10, 112–24. She argues that while some elements in the peace movement still hoped for a negotiated settlement, most had reluctantly accepted both the inevitability of, and the need for, war.

²⁷⁶ Gollan, above n 10, 91–2; Hasluck, above n 7, 248–9.

²⁷⁷ Macintyre, above n 10, 391–3; see also Rasmussen, above n 10, 106, 108 on the degree of support outside the peace movement for the Munich agreement. The Munich Agreement, between Britain, France, Germany and Italy was signed on 29 September 1938. Under the agreement, the parties agreed to the 'orderly' occupation by Germany of the Sudetenland region of Czechoslovakia and to procedures for resolving some of the issues arising out of that occupation. Germany and Italy undertook to respect the revised Czech borders, an undertaking Germany soon disregarded. The agreement represented capitulation by Britain and France in the face of threatened force, and while initially welcomed, soon came to be condemned as 'appeasement' by those appalled by its moral and Realpolitik implications — especially as these became more apparent.

²⁷⁸ Hasluck, above n 7, 236. One measure of the impact of the German advances is that enlistments for the Australian Imperial Force, which were sluggish during the first four months of 1940, suddenly increased sharply in May: Hasluck, above n 7, 399, 613. See also Bevege, above n 5, 228, who observes, in relation to internment policies, that '[w]hen people feel threatened they look for evidence of action by the authorities to remedy the situation and if a military reply cannot be forthcoming some scapegoat has to be satisfactorily sacrificed to provide a substitute.'