[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

BRISLAN;

EX PARTE WILLIAMS.

H. C. OF A. 1935.

SYDNEY, *Oct.* 25, 28, 29; *Dec.* 17.

Latham C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Constitutional Law (Cth.)—Wireless telegraphy—Radio broadcasting—Validity of statute—"Postal, telegraphic, telephonic and other like services"—Appliance for receiving "messages" by means of wireless telegraphy—Broadcasting receiving set—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 51 (v.)—*Wireless Telegraphy Act* 1905-1919 (*No.* 8 *of* 1905—*No.* 4 *of* 1919), *secs.* 2, 6.

Sec. 51 (v.) of the Constitution confers on the Commonwealth Parliament power to legislate with respect to radio broadcasting.

A wireless set kept for the reception of broadcast programmes is an appliance maintained for the purpose of receiving messages by means of wireless telegraphy within the meaning of sec. 6 of the *Wireless Telegraphy Act* 1905-1919, and that section, so construed, is validly enacted under the power conferred by sec. 51 (v.) of the Constitution.

So *held* by *Latham* C.J., *Rich*, *Starke*, *Evatt* and *McTiernan* JJ. (*Dixon* J. dissenting).

Observations on the meaning of the words "other like services" in sec. 51 (v.) of the Constitution and of the word "messages" in sec. 6 of the *Wireless Telegraphy Act* 1905-1919.

ORDER NISI for writ of prohibition.

Upon an information laid by Roy Vincent Brislan, a wireless inspector employed in the Postmaster-General's Department, Dulcie Williams was charged before a stipendiary magistrate, sitting in the Court of Petty Sessions, Sydney, for that she did on or about 26th September 1934, at Surry Hills, in the State of New South

Wales, without authorization by or under the *Wireless Telegraphy Act* 1905-1919, maintain an appliance for the purpose of receiving messages by means of wireless telegraphy contrary to the Act in such case made and provided.

The evidence showed that upon the occasion of a visit paid by departmental officers on 26th September 1934 to the defendant's premises they found there a five valve all-electric wireless receiving set connected to an indoor aerial. They heard a B class broadcasting station broadcasting speech. On the following day the defendant admitted to the officers that she owned the wireless receiving set, that it had been installed for a week, and that she did not have a current wireless listener's licence. The receiving set was capable of receiving messages or any audible sounds or matter from a wireless transmitting or broadcasting station. The defendant was convicted and fined.

Upon her application *Evatt* J. ordered the informant and the magistrate to show cause before the Full Court of the High Court why a writ of prohibition should not be issued to restrain them and each of them from further proceeding on or in respect of the conviction. The grounds of the order nisi were (*a*) that the *Wireless Telegraphy Act* 1905-1919 is *ultra vires* the Commonwealth of Australia Constitution; (*b*) that the regulations as to broadcasting made under that Act are *ultra vires* the Act; (*c*) that the Constitution gives no authority to the Commonwealth Parliament to make laws or authorize regulations of a general character in relation to radio broadcasting; (*d*) that there was no evidence (i.) that the appliance (if any) maintained by the applicant was for the purpose of receiving messages by means of wireless telegraphy within the meaning of the *Wireless Telegraphy Act* 1905-1919, (ii.) that the applicant did maintain an appliance for the purpose of receiving messages by means of wireless telegraphy, or (iii.) to support the conviction.

The matter was argued before *Rich*, *Starke*, *Dixon*, *Evatt* and *McTiernan* JJ., on 21st and 22nd March 1935, and judgment was reserved. Pursuant to an announcement by *Rich* J. on 14th October 1935, the matter now came on to be re-argued.

H. C. OF A. 1935. THE KING v. BRISLAN; EX PARTE WILLIAMS.

Piddington K.C. (with him *Evatt* and *Farrer*), for the applicant. The reception of speech is not forbidden by or under the *Wireless Telegraphy Act*. The word "broadcast" does not appear in that Act. The Parliament has not legislated in respect of broadcasting; there is not any statute which supports broadcasting. The question before the Court turns on the meaning of the words "other like services" in placitum v. of sec. 51 of the Constitution. As used in the Constitution "service" means department of the Public Service (see the Constitution, secs. 69, 85). The words "postal," "telegraphic," and "telephonic," refer, by definition, to departments of the Public Service; therefore the words "other like services" must mean departments of the Public Service "like," or of the nature of, but not one of, the three named services. Broadcasting is different in character from postal, telegraphic and telephonic services. The nature of those services is that they are services to enable all members of the community to engage in mutual communication of anything within their desire, and to engage in that communication without limitation and with right of non-disclosure to other persons. The essential features of mutuality of exchange and right of non-disclosure to other persons are not present in broadcasting; therefore matter which is broadcast is not a "message" within the meaning of the *Wireless Telegraphy Act*. Even if the means are "like," the service is wholly different. To broadcast is to disseminate information, or instruction, or entertainment; it is not intercourse between individuals. Sec. 51 (v.) of the Constitution does not empower the Commonwealth Parliament to legislate with respect to broadcasting. In any event the Parliament has no power to legislate in the manner shown in the *Wireless Telegraphy Act*; it has no power to monopolize broadcasting. Broadcasting service is not a physical thing; it is an arrangement, an organization, utilizing actual physical things (*In re Regulation and Control of Radio Communication in Canada* (1)). The only point of resemblance is in the use of wireless telegraphy. It is not a point of resemblance in the service; it is a similarity of the way by which the service is carried on.

E. M. Mitchell K.C. (with him *A. R. Taylor*), for the respondents. The validity of the *Wireless Telegraphy Act* and the regulations may

(1) (1932) A.C. 304, at p. 315.

be supported on the grounds that (*a*) the service given is a telephonic service within the meaning of placitum v. of sec. 51 of the Constitution, (*b*) it is a "like service" within the meaning of placitum v., and (*c*) if neither (*a*) nor (*b*), it is a part of inter-State commerce. Broadcasting is a telephonic service within the meaning of placitum v. (*In re Regulation and Control of Radio Communication in Canada* (1)). In that case the Privy Council held that the word "telegraph" did not there mean the apparatus; it referred to the service conducted by the apparatus, and that the service there in question was a telegraph service because it came within the definition of service conducted by a telephone for transmitting messages. There is not a telegraphic service in the Canadian system. "Wireless telegraphy" means any system for the transmission of messages (*Halsbury's Statutes of England*, vol. 19, pp. 290, 291). The means whereby transmission and reception are effected were discussed in *Chappell & Co. Ltd.* v. *Associated Radio Co. of Australia Ltd.* (2) and *Buck* v. *Jewell-LaSalle Realty Co.* (3). Full and adequate control over broadcasting is vital to the security of the Commonwealth (*Carbines* v. *Powell* (4)). The meaning of the Constitution cannot fluctuate; words of wide meaning were used so as to cover all possible inventions (*Toronto Corporation* v. *Bell Telephone Co. of Canada* (5)). A broadcast licence is obtainable by any person. The essence of the telegraph service is that it is a service for transmitting messages from a distance by sounds or signals. The word "services" as used in placitum v. does not refer to or mean "departmental services." The words "other like services" do not cut down the meaning of the words "telephonic" and "telegraphic"; they were inserted for more abundant caution to provide for future developments and inventions (*Attorney-General* v. *Edison Telephone Co. of London* (6); *Attorney-General for New South Wales* v. *Brewery Employees Union of New South Wales* (7); *Edwards* v. *Attorney-General for Canada* (8)). Those words should be given a liberal interpretation. A "like service" in that context means any other service for trans-

(1) (1932) A.C. 304.
(2) (1925) V.L.R. 350; 47 A.L.T. 12.
(3) (1931) 283 U.S. 191; 75 Law. Ed. 971.
(4) (1925) 36 C.L.R. 88, at p. 93.
(5) (1905) A.C. 52.
(6) (1880) 6 Q.B.D. 244, at pp. 248, 249, 254.
(7) (1908) 6 C.L.R. 469.
(8) (1930) A.C. 124, at p. 136.

H. C. OF A. 1935.

THE KING v. BRISLAN; EX PARTE WILLIAMS.

mitting messages or communications from a distance by similar means. The words " telegraphic " and " telephonic " in placitum v. were meant to include a telegraphic or telephonic service whether it was or was not a wireless service, and the words " other like services " were used to embrace all unknown future discoveries which might deal with the conveyance of intelligence by electricity. At the date the Constitution was assented to wireless was the subject of invention, and also was in practical use for several years prior to that date. In order to be " like," the service is not required to be identical in all respects (*Attorney-General for New South Wales* v. *Brewery Employees Union of New South Wales* (1); *Attorney-General* v. *Edison Telephone Co. of London* (2)). The test of the " likeness " of a service is not the nature of control but the purpose it serves. If it serves by transmitting messages by electricity from a distance it is indistinguishable from telegraphic services. The development of wireless represents a progressive improvement in the use of the telegraph ; it does not constitute a new subject matter for which provision has not been made in the Constitution (*Pensacola Telegraph Co.* v. *Western Union Telegraph Co.* (3)). The point to point despatch—as opposed to broadcast to all and sundry—is not an essential of the then existing or future systems which would be properly comprehended to be within the category of telegraph ; it was a limitation of the system then known. Simultaneous reception by subscribers per medium of the telephone was, in 1903, a practically operating application of the telephone service (*Poole* on *Practical Electricity*, p. 548). It is nothing to the point that all persons are not allowed to broadcast ; the right of every person to use the telephonic or the telegraphic service at his own volition without regulation is not an essential characteristic of those services. Broadcasting is a public or national service. One of the reasons for the inclusion in placitum v. of the words " other like services " was the necessity for protecting the revenue which the Commonwealth obtained from the postal, telephonic and telegraphic services. The broad question is : Is broadcasting a service for the transmission of messages from a distance by electric signals ? If the answer be in

(1) (1908) 6 C.L.R., at p. 501.
(2) (1880) 6 Q.B.D., at p. 256.
(3) (1877) 96 U.S. 1, at p. 9 ; 24 Law. Ed. 708, at p. 710.

the affirmative, then, although the details may differ, broadcasting is a " like service " within the meaning of placitum v. In its essential features broadcasting is " like " the postal, telegraphic and telephonic services, more particularly the telephonic service. The service of sending messages by broadcast is within the inter-State commerce power conferred upon the Commonwealth by placitum I. of sec. 51 of the Constitution. What constitutes inter-State commerce is shown in *Willoughby* on *The Constitutional Law of the United States*, 2nd ed. (1929), vol. 2, p. 735. In the nature of the subject matter the inter-State and intra-State commerce in wireless messages is intermingled to such an extent that the secrecy and efficiency of the inter-State and foreign radio involves a right of the Commonwealth to insist upon licences for the operation of all receiving stations and all transmitting stations within its area (*Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.* (1)). The transmitter cannot be separated from the receiver (*In re Regulation and Control of Radio Communication in Canada* (2)). Where inter-State and intra-State commerce are intermingled in such a way that the effective regulation of inter-State commerce requires the regulation also of the intra-State commerce, then intra-State commerce may be regulated so far as may be necessary for the effective conduct of inter-State commerce (*R.* v. *Turner*; *Ex parte Marine Board of Hobart*; *Tasmania* v. *The Commonwealth* (3); *Minnesota Rate Cases* (4)). It is a matter of common knowledge that all receivers at times receive inter-State messages by way of inter-State broadcasts. What is so transmitted and received is a " message " (*In re Regulation and Control of Radio Communication in Canada* (5); *Chappell & Co. Ltd.* v. *Associated Radio Co. of Australia Ltd.* (6); *Buck* v. *Jewell-LaSalle Realty Co.* (7)). " Message " should be given a broad and literal meaning; not a restricted meaning. It should not be overlooked that the broadcasting service is national in character, affecting nation-wide interests, and should, for that reason, be in the care of the national government. The form of

(1) (1933) 289 U.S. 266, at p. 279; 77 Law. Ed. 1116, at p. 1175.
(2) (1932) A.C., at p. 315.
(3) (1927) 39 C.L.R. 411.
(4) (1913) 230 U.S. 352; 57 Law. Ed. 1511.
(5) (1932) A.C., at p. 316.
(6) (1925) V.L.R. 350; 47 A.L.T. 12.
(7) (1931) 283 U.S. 191; 75 Law. Ed. 971.

H. C. OF A. 1935.

THE KING v. BRISLAN; EX PARTE WILLIAMS.

licence issued in England is set forth in *British Broadcasting Co.* v. *Wireless League Gazette Publishing Co.* (1)).

Piddington K.C., in reply. The power of the Commonwealth to control and regulate broadcasting depends entirely upon the interpretation of the expression " other like services " in placitum v. That expression does not mean other services carried on by like apparatus. It is not sufficient to consider only the means by which a service can be carried out. In broadcasting there is not any mutuality as between the transmitter and the receiver; the latter is a " listener " only. This feature and also the absence of secrecy, which is of the essence, distinguishes broadcasting from " postal, telegraphic and telephonic services." " Service " means service in being; that is, the Government departments expressly referred to in placitum v., as then existing. The Canadian Constitution is different from the Commonwealth Constitution, especially as regards this subject; therefore the decision in *In re Regulation and Control of Radio Communication in Canada* (2) does not apply. The word " service," which is of the utmost importance here, was not construed in that case. The regulation of broadcasting does not come within the trade and commerce power of the Commonwealth. The word " message " as used in the *Wireless Telegraphy Act* means telephonic message or telegraphic message.

Cur. adv. vult.

Dec. 17.

The following written judgments were delivered :—

LATHAM C.J. The question raised upon this application for a writ of prohibition is whether Dulcie Williams, the defendant in the proceedings before the Court of Petty Sessions at Sydney, was rightly convicted for maintaining without authorization by or under the *Wireless Telegraphy Act* an appliance for the purpose of receiving messages by wireless telegraphy contrary to the *Wireless Telegraphy Act* 1905-1919.

Sec. 6 (1) of that Act is in the following terms :—" Except as authorized by or under this Act, no person shall—(*a*) establish,

(1) (1926) Ch. 433; 42 T.L.R. 370. (2) (1932) A.C. 304.

erect, maintain, or use any station or appliance for the purpose of transmitting or receiving messages by means of wireless telegraphy; or (*b*) transmit or receive messages by wireless telegraphy. Penalty: Five hundred pounds, or imprisonment with or without hard labour for a term not exceeding five years."

It is provided in sec. 2 of the 1905 Act as amended by the *Wireless Telegraphy Act* 1919 that wireless telegraphy "includes all systems of transmitting and receiving telegraphic or telephonic messages by means of electricity without a continuous metallic connection between the transmitter and the receiver."

The evidence shows that officers of the Postmaster-General's Department visited defendant's premises on 26th September 1934 and found there a five valve all-electric wireless receiving set connected to an indoor aerial. They heard the broadcasting station 2 KY broadcasting speech. On the following day the defendant admitted to the officers that she owned the wireless receiving set, that it had been installed for a week, and that she had no current wireless listener's licence. The defendant was convicted and was fined £1 with eight shillings costs or alternatively three days imprisonment.

The objections taken in the Court of Petty Sessions are repeated in the grounds upon which the order nisi was granted: these grounds are as follows:—"(1) (*a*) That the *Wireless Telegraphy Act* 1905-1919 is *ultra vires* the Commonwealth of Australia Constitution. (*b*) That the regulations as to broadcasting made under the *Wireless Telegraphy Act* are *ultra vires* the said Act. (*c*) That the Constitution gives no authority to the Commonwealth Parliament to make laws or authorize regulations of a general character in relation to radio broadcasting. (2) That there was no evidence that the appliance (if any) maintained by the applicant was for the purpose of receiving messages by means of wireless telegraphy within the meaning of the *Wireless Telegraphy Act* 1905-1919. (3) That there was no evidence that the applicant did maintain an appliance for the purpose of receiving messages by means of wireless telegraphy as alleged. (4) That there was no evidence to support the conviction."

1. The first question for consideration is whether, upon the assumption that the relevant provision of the *Wireless Telegraphy Act* is valid, the defendant committed an offence thereunder.

H. C. OF A. 1935.

THE KING v. BRISLAN; EX PARTE WILLIAMS.

Latham C.J.

Sec. 6 of the Act prohibits, *inter alia*, the maintenance of any appliance for the purpose of receiving messages by means of wireless telegraphy (which includes telephony) except as authorized by or under the Act. There is no doubt that the defendant was not authorized by or under the Act to maintain the wireless set which she did in fact maintain.

Provision is made under the regulations for an authority or licence to maintain a wireless receiving set. It has been argued that the regulations, so far as they deal with broadcasting, are *ultra vires* the Act. But even if this were so, the only result would be that no valid provision was made for giving a licence under the regulations. The success of the argument would not give the defendant a licence or other authority. Thus the alleged invalidity of the regulations cannot affect the liability of the defendant in this case. It is therefore necessary to consider carefully the section of the Act itself under which the defendant was charged.

2. The appliance the maintenance of which without authority is prohibited by sec. 6 of the Act is an appliance for the purpose of transmitting or receiving messages by means of wireless telegraphy, which, as defined in the Act, includes all systems of transmitting and receiving wireless telephonic messages. Telephony consists in the reproduction of sounds, with or without amplifiers, at a distance.

It has been suggested that a telephone is an instrument which provides communication from point to point only, and that if what is heard at the receiving end is available for all bystanders to hear, the communication is not telephonic in character. This argument does not appear to be sound. If an amplifier is attached to an ordinary telephone receiver the essential character of the operation, which consists in what is ordinarily described as the reproduction of sounds at a distance, is not changed. Similarly the fact that a large number of receiving instruments can pick up the same message does not alter the telephonic nature of the operation. It can readily be arranged that an ordinary conversation conducted over an ordinary telephone should be audible simultaneously at many receivers which are suitably connected by wires to the system. In such a case there is no doubt that the communication is still of a telephonic nature. Accordingly the grounds which have been suggested for

the purpose of reaching a conclusion that wireless broadcasting is not a system of transmitting and receiving telephonic communications do not appear to me to justify that conclusion.

3. The appliance in this case was maintained for the purpose of receiving whatever might be broadcasted from wireless broadcasting stations—whether speeches or music or other audible sounds. It is urged that even if the operation of broadcasting is telephonic in character, yet the definition of wireless telegraphy (which has already been quoted) limits wireless telegraphy for the purpose of the Act to systems of transmitting and receiving messages, and that what was received by the defendant's wireless set could not properly be described by the term " message."

It is difficult to enumerate all the forms of message which may be used by mankind. A message may be communicated by spoken or written words, by notches cut in a stick, by audible or visible symbols which are not ordinary words or not words at all, but to which a meaning can be attached by those who understand the relevant code. Direct conversation is not usually regarded as a message, though a more or less formal oral deliverance to a number of persons is often, with a well-established extension of the more ordinary meaning of the word, called a message.

An understanding of the nature of a message for the purposes of the Act can be obtained from the Act itself. The words of the Act show that a message is something which is transmitted and which may be received. There is a distance between the transmitter and the receiver, and the function of the appliance referred to in the Act is to assist in bridging that distance. This appears from the words of sec. 6. Thus the essential characteristic of a message appears to be found in communication from a distance, as distinguished from direct communication between persons who are face to face. As a general rule such communications are made for the purpose of conveying " information, news, or intelligence." But the sender may use for this purpose a language that is not generally intelligible. A communication may be a message even if the person actually dispatching it does not understand it. A message sent in code, consisting of permutations of figures, is none the less a message because it means nothing to persons who are not in a position to

H. C. OF A. 1935.

THE KING v. BRISLAN; EX PARTE WILLIAMS.

Latham C.J.

apply the key to decipher it. The morse signals which are tapped out by a key at a transmitting telegraphic instrument, and which are recorded by a receiving instrument, constitute a message even before they are interpreted. Where a teleprinter is used, a message has been sent though no one supposes that the actual letters have been sent along the telegraph wire. Thus, in the case of an electric telegraph, a message is received when visible symbols of some kind, generally, but not necessarily, accompanied by audible sounds, are received by a receiving instrument.

It is not out of place to recall that the first telegraphs consisted of manually operated semaphores. Such apparatus is still in use, particularly at sea. The working of such a telegraph leaves no permanent result anywhere in any record. The message can be received by any persons who are within the area from which the apparatus is visible. What such a telegraph sends out is called a message though it is broadcasted to the world.

A telephone message can be heard only through a suitable receiving instrument. The fact that such an instrument is necessary does not affect the character of a communication as a message.

It would therefore appear that neither the number of possible recipients of a communication nor the necessity for a special receiving apparatus is material in determining whether a particular communication is a message. In other words, it has long been recognized that a message does not cease to be a message merely because it is either intended for or may in fact be received by a large number of persons simultaneously. Thus broadcasting by wireless may be a means of transmitting messages which are receivable by large numbers of persons who possess suitable receiving apparatus.

If the broadcasting of speech is in this connection the transmission of messages (i.e., of communications which because they are sent to a distance may be properly called messages), then the reception of such speech by means of an appliance maintained for the purpose of picking up whatever is broadcasted involves the maintaining of an appliance for the purpose of receiving messages by means of wireless telegraphy as defined in sec. 2 of the Act.

4. It is true that the defendant's wireless receiving set would pick up musical programmes as well as spoken communications and

that it was doubtless maintained also, and perhaps mainly, for this purpose. But even if the reception of a musical programme is not the receiving of a message, this fact does not affect the truth of the proposition which has just been stated, namely, that the reception of speech is, in this connection, reception of a message in the sense in which that word has long been used in connection with telegraphy and telephony. For this reason it is not, in my opinion, strictly necessary to decide in this case whether or not the transmission or reception of musical programmes or of sounds as such can be described as the transmission or reception of a message. If, however, it were necessary to decide this question, I would agree with the conclusion reached by my brothers *Rich*, *Starke* and *Evatt*. I would so agree upon the ground that the essence of a message is to be found in the fact that it is a communication sent from one person to another person or other persons, and that therefore the broadcasting of music does involve the transmission and reception of messages.

Thus, in my opinion, if sec. 6 of the *Wireless Telegraphy Act* is valid, the defendant was rightly convicted.

5. The next question which arises is therefore the question of the validity of the Act.

The contention raised on behalf of the defendant is that, even if the Act (as a matter of construction) authorizes the control of broadcasting, the Constitution does not confer upon the Commonwealth Parliament any power to legislate with respect to broadcasting. The Constitution provides in sec. 51 (v.) that the Commonwealth Parliament may make laws for the peace, order and good government of the Commonwealth with respect to "postal, telegraphic, telephonic, and other like services." It is contended for the defendant that broadcasting does not fall within any of the subjects mentioned.

In the earlier part of this judgment I have stated my reasons for the opinion that broadcasting is a form of wireless telephony. It consists in the transmission by wireless of sounds to a distance. The transmission of music by such means is no less telephonic than the transmission of spoken words. It is, in my opinion, unnecessary to investigate the precise means whereby transmission and reception are effected. Some discussion of these matters is to be found in

H. C. OF A. 1935.

THE KING v. BRISLAN; EX PARTE WILLIAMS.

Latham C.J.

the cases of *Chappell & Co. Ltd.* v. *Associated Radio Co. of Australia Ltd.* (1) and *Buck* v. *Jewell-LaSalle Realty Co.* (2).

The Canadian Constitution does not refer to telephonic services. The Dominion Parliament, however, has exclusive power to control "lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province" (*British North America Act* 1867, sec. 92 (10)). It has been held that in this section "telegraphs" includes telephones (*Toronto Corporation* v. *Bell Telephone Co. of Canada* (3)). There is now the further authority of the Judicial Committee of the Privy Council for the proposition that broadcasting also falls within the description of "telegraphs" (*In re Regulation and Control of Radio Communication in Canada* (4)). If broadcasting is included in "telegraphs" in the Canadian Constitution, then *a fortiori* broadcasting is covered by the words "telegraphic" and "telephonic" in the Australian Constitution.

6. It is not, however, sufficient that the operation of broadcasting and receiving broadcasted material should be telephonic in character. The Commonwealth Parliament, so far as telephony is concerned, can legislate only with respect to a telephonic service or services. It is contended that broadcasting is not a service in the sense in which that term is used in sec. 51 (v.) of the Constitution.

In the first place it was suggested that "service" in sec. 51 (v.) should be read in a sense similar to that in which it is used in sec. 69, which provides for the transfer to the Commonwealth of specified departments of the Public Service in each State, including "posts, telegraphs, and telephones." The services so transferred are, it is suggested, the same services as those with respect to which the Parliament can legislate under sec. 51 (v.).

In my opinion sec. 69 refers to departments of the State Public Services in the sense of the servants of the State employed in the departments mentioned. Sec. 69 gives to the Commonwealth the control of those servants from the dates proclaimed or otherwise fixed under the section. The effect of this transfer is stated in

(1) (1925) V.L.R. 350; 47 A.L.T. 12.
(2) (1931) 283 U.S. 191; 75 Law. Ed. 971.
(3) (1905) A.C., at p. 57.
(4) (1932) A.C. 304.

detail in sec. 84, and legislative power with respect to the departments is vested exclusively in the Commonwealth Parliament by sec. 52 (II.). The property used in connection with such a department is transferred to the Commonwealth under sec. 85. These sections, however, do not confer upon the Commonwealth Parliament power to legislate with respect to the subject matter with which these transferred departments deal. Parallel instances can be found in naval and military defence and in customs. Power to control the actions of officers constituting the defence services and the customs services is to be found in the sections mentioned. But the power to legislate on matters of defence is dealt with by sec. 51 (VI.) and on matters of customs by sec. 51 (I.) and (II.) and sec. 90.

Similarly, in the case of postal, telegraphic, telephonic, and other like services, sec. 51 (V.), in my opinion, gives a power which is really, and not only nominally, additional to that given by the other sections quoted. It cannot be limited to a power to legislate with respect to public servants.

7. But it is more strongly urged that the power conferred by sec. 51 (V.) is a power to legislate only in respect of services in the sense of publicly controlled services of the same general character as those which the Colonies controlled before Federation. The argument tends to become elusive, but it was expressed by saying that these services were public utilities, including installation, maintenance, operation, and organization, provided and controlled by Parliaments, for the purpose of spoken or written converse between any person and any other person by means of postal, telegraphic and telephonic apparatus and equipment. It was said that it was a characteristic feature and an essential feature of these services that any member of the public had the right to avail himself of them for both sending and receiving. Attention was called to the fact that broadcasting in Australia was provided in part by a broadcasting commission and in part by what are known as B class stations. The regulations require licences for both transmitting and receiving broadcasts. It is said that, if such a system be a service at all, it is not a service in the sense in which the term is used in the phrase "postal, telegraphic, telephonic, and other like services."

H. C. OF A. 1935.

THE KING v. BRISLAN; EX PARTE WILLIAMS.

Latham C.J.

I am unable to see any satisfactory reason for adopting so narrow a construction of sec. 51 (v.) as that which is suggested. The character of any service is determined by reference to the function which it performs. A telephonic service consists of the means and organization provided for sending telephonic communications. Under a power to legislate with respect to telephonic services a Parliament may pass laws to provide and instal telephone apparatus, and to determine rules in accordance with which any such apparatus may be used. On the other hand, the Parliament need not make any such provision at all. If it does not make such provision, it may give complete control to a Minister in charge of a department, or it may "farm it out." A Parliament which disapproved of telephones might, so far as legal powers are concerned, repeal all statutes dealing with telephones and prohibit the existence of any telephone service, just as it might (in the exercise of powers under sec. 51) prohibit the existence of any defence force or of any lighthouses or copyrights or patents. It might also allow any persons to instal and use telephones without any governmental authority of any kind.

It is impossible to express or apply any definite measure of legislative power upon the principle suggested for the defendant. To say that postal, telegraphic and telephonic services must necessarily be "public" services is to introduce what, in this connection, is a very vague conception. It is a question of policy whether there should be any and what legislation upon such subjects as communication services. A telephone service may be provided by a private person or by an ordinary public company, or by a public company or other corporation operating under a franchise or other special power, or by a Government department. The necessity for acquiring rights to erect poles and to place conduits in public highways has in practice made it necessary for the Legislature to confer special powers upon a company or specially created body or upon a Government department. But, whatever form of management and control may be adopted, it is management and control of the same thing—the provision of facilities for telephonic communication, as generous or as limited as Parliament has thought proper. No standard can be suggested according to which it is possible to

determine that one statute providing for the control of telephonic communications is valid because the control is "public" and because all the members of the public have "rights" to use the telephone, whereas another statute is not valid because the control thereunder is not "public" enough, or the service is not sufficiently available to members of the public. The validity of the *Post and Telegraph Act* can hardly depend upon the extent to which facilities are given to the public or upon the extent of the prohibitions applied by Parliament to sending letters and other articles through the post. It appears to me to be impossible to attach any definite meaning to sec. 51 (v.) short of that which gives full and complete power to Parliament to provide or to abstain from providing the services mentioned, to provide them upon such conditions of licences and payment as it thinks proper, or to permit other people to provide them, subject or not subject to conditions, or to prohibit the provision of such facilities altogether.

If, however, the argument presented on this aspect of the case is sound, it should be remembered that the *Wireless Telegraphy Act*, the regulations thereunder, and the *Australian Broadcasting Commission Act* 1932, do in fact permit both broadcasting and the reception of broadcasted material by authorized persons, but under a large measure of public control, exercised either by the statutory Broadcasting Commission or by the Postmaster-General.

Under the power to make laws with respect to telephonic services it is, in my opinion, within the power of the Commonwealth Parliament to regulate as it may think proper that form of wireless telephony known as broadcasting.

8. If, however, this opinion should not be well founded, it is necessary to consider the words "or other like services."

In the first place, it is clear that it was intended by these words to extend the legislative power beyond postal, telegraphic, and telephonic services. Otherwise the words would be meaningless. The reasons for the addition of the words "other like services" can be readily understood if reference is made to the history of the subject. In *Attorney-General* v. *Edison Telephone Co. of London* (1) it was held, after much argument, that Edison's telephone was a

(1) (1880) 6 Q.B.D. 244.

H. C. OF A. 1935.

THE KING v. BRISLAN; EX PARTE WILLIAMS.

Latham C.J.

"telegraph" within the meaning of the *Telegraph Acts* 1863 and 1869, although the telephone was not invented or contemplated in 1869, and that a telephone conversation was a "message," or at all events "a communication transmitted by a telegraph," and therefore a "telegram" within the meaning of those Acts. It was held that the Legislature deliberately used language "embracing future discoveries as to the use of electricity for the purpose of conveying messages." At the time when this decision was given (1880) wireless was completely unknown. But the Court anticipated the possible discovery of wireless when it said that the definitions in the Acts included under "telegraph"—"electric signals made, if such a thing were possible, from place to place through the earth or the air," as well as "a set of common bells, worked by wires pulled by the hand, if they were so arranged as to constitute a code of signals" (1). As to the application of the *Telegraph Act* 1869 to "private" telephone systems, see *Postmaster-General* v. *National Telephone Co. Ltd.* (2).

The Constitution of the United States of America provides in Art. I., sec. VIII., that Congress shall have power to establish "post offices and post roads." It was held in *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.* (3) that under this power and the power to regulate commerce with foreign nations, and among the several States, Congress could control telephonic messages. It was doubtless hoped by the draftsmen of the Commonwealth Constitution to avoid the uncertainty which led to such litigation.

9. But, in the next place, only "services" can be comprehended within the words. I have already given reasons for my view that legislation with respect to the provision and control of broadcasting facilities, for both transmitting and receiving, is legislation with respect to a service.

10. Further, any service covered by the words in question must be a "like" service. By what test can it be determined whether a service is a "like" service as compared with postal, telegraphic and telephonic services?

It was suggested for the defendant that these services were, when controlled by the States (and are now, when controlled by

(1) (1880) 6 Q.B.D., at p. 249.
(2) (1909) A.C. 269.
(3) (1877) 96 U.S. 1; 24 Law. Ed. 708.

the Commonwealth), in their nature such that all members of the public could use them for purposes of communication and that such communications were secret or private in character. Broadcasting, on the other hand, under the system in operation in Australia, is open for use only to those who have licences for transmitting or receiving, and certainly what is broadcasted cannot be described as secret or private.

It does not appear to me to be a necessary incident of postal, telegraphic or telephonic services as such either that they should be open for use to all members of the public or that they should possess to any particular extent characteristics of secrecy or privacy. A postal service, for example, would be none the less a postal service because it could only be used, in an autocratic State, by the friends of the autocrat, or because licences or the payment of heavy fees were required before persons could use it, or because it was enacted that copies of all letters posted should be shown to a censor or even made public in some manner. Such provisions might be highly objectionable, but they would, in my opinion, be provisions with respect to "a service." Similar observations apply to telegraph and telephone services. In addition to these considerations it may be pointed out that any person who obtains the appropriate licence can transmit or receive broadcasted matter—just as anybody who buys the necessary stamps can use the post offices, and just as anybody who pays the charges imposed by law can send a telegraphic or telephonic message.

11. Reference has already been made to the contention that these services, in order to be services, must be the subject of public control in some sense. It has similarly been contended that likeness in method of control should be accepted as the test of likeness for the purposes of sec. 51 (v.). Thus if the Commonwealth Parliament made the control of the post office similar to that now in operation with respect to broadcasting, then it might be that the latter subject could be dealt with by the Commonwealth Parliament as it is actually dealt with in existing legislation, because then the two services would be "like services." Alternatively, it was put that broadcasting could be made a "like service," so as to fall within Federal legislative power, by assimilating the form of management of broad-

H. C. OF A. 1935.

THE KING v. BRISLAN; EX PARTE WILLIAMS.

Latham C.J.

casting to the present form of management of postal, telegraphic and telephonic services in Australia.

I can see no reason for interpreting the legislative powers conferred upon a Parliament by a Constitution in relation to one subject by reference to what that Parliament elects to do with respect to another subject, unless there is some positive direction which requires uniformity of treatment as between the two subject matters. I am unable to find any such positive direction in the word "like." It may be added that if similarity in method of control were the test of "likeness" of services, then the Commonwealth Parliament could legislate about all kinds of matters provided only that a system of control similar to that which happens to obtain in, e.g., the post office, were adopted. It is not possible to accept such a proposition.

12. There are difficulties in the way of accepting the view suggested on behalf of the defendant that the means used by the postal, telegraphic and telephonic systems constitute the essential features of "likeness." It is true that both telegraphs and telephones use electric energy. So does broadcasting. But so also do power-transmission systems. The post office uses horses, motor cars, ships and aeroplanes. But the power to legislate with respect to postal services cannot reasonably be said to contain a power to deal with horses &c. as separate subjects in themselves, or with any system or service which also uses horses &c.

13. The common characteristic of postal, telegraphic and telephonic services, which is relevant in this connection is, in my opinion, to be found in the function which they perform. They are, each of them, communication services. This is also the characteristic of a broadcasting service in all its forms, which is therefore, in my opinion, a "like service" within the meaning of sec. 51 (v.) of the Constitution. If a new form of communication should be discovered, it too might be made the subject of legislation as a "like service."

14. It was argued for the respondent that the Commonwealth Parliament has power to legislate with respect to broadcasting under the power to make laws with respect to trade and commerce with other countries and among the States (the Constitution, sec. 51 (I.)). It was put that any broadcast is necessarily inter-State

in character, or at least that any broadcast may be made inter-State by an increase in the power, and that authority to control inter-State broadcasting must, owing to the very nature of the subject matter, necessarily and inseparably include a power to deal also with broadcasting which did not purport to be inter-State in its operation. It was also said that there was a right in the Commonwealth Parliament to protect inter-State broadcasting against interference, as an element of inter-State trade and commerce. One broadcasting station can readily interfere with another, and a defective or ill-managed receiving set can interfere with reception by other sets. Accordingly, it was said, the subject must be treated as a whole, and, if the Commonwealth Parliament had any power at all in relation to broadcasting under the trade and commerce power, the subject matter was such that that Parliament had all the power. No actual evidence was given in the Court below as a basis for the argument, though possibly what was alleged as to the nature of broadcasting may be regarded as common knowledge. I abstain from expressing any opinion upon the extent of the trade and commerce power in this direction because, in the view that I have taken, it is unnecessary to do so.

In my opinion the order of the Court of Petty Sessions was right and the appeal should be dismissed.

RICH AND EVATT JJ. This is an appeal from a Court of Petty Sessions exercising Federal jurisdiction. The appellant was convicted under sec. 6 of the *Wireless Telegraphy Act* 1905-1919. The appliance which she maintained was a broadcasting receiving set. The questions raised by the appeal are whether such an instrument is within the *Wireless Telegraphy Act* and, if so, whether it is within the power of the Federal Parliament to penalize the possession or maintenance of broadcasting receivers. As the interpretation of the Act must be controlled or affected by the constitutional power, we proceed to express our opinion upon the second question first.

The constitutional power primarily relied upon is sec. 51 (v.)—power to make laws with respect to postal, telegraphic, telephonic, and other like services. The power was expressed in this form, we have little doubt, because of the known difficulties which had arisen in

H. C. OF A. 1935.

THE KING v. BRISLAN; EX PARTE WILLIAMS.

Rich J. Evatt J.

the United States. The constitution of the United States had conferred power to establish "post offices and post roads." When the electric telegraph came into use the objection was made that it was outside the power. The objection was answered, it is true. The answer given provides one of the principles of constitutional interpretation. *Waite* C.J. said: "The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances" (*Pensacola Telegraph Co.* v. *Western Union Telegraph Co.* (1)). But, notwithstanding this principle, the difficulty served as a warning to the framers of the Australian Constitution and accordingly they expressed themselves in terms calculated to cover developments in science and organization enabling the control of analogous and ancillary services. We do not think that it is disputed that wireless telegraphy and telephony are a means, although perhaps unthought of in 1897 by the framers of the Constitution, whereby the services described in sec. 51 (v.) may be conducted. What is disputed is that the application of wireless telegraphy or telephony to broadcasting falls within the power. The object of the power is to place under Federal authority the control of distant communication carried on according to a systematic plan.

Broadcasting, both in its means and in the fact that its main purpose is the transmission of sound instantaneously over long distances, possesses the prominent features of telephony. Looked at from the point of view of the public, however, it differs in the fact that it is the receipt and not the sending of the sound that provides the service of which the members of the public are at liberty to avail themselves. It does not give the advantage of one man communicating with another when he wishes. What it does give is the advantage of allowing a listener with a suitable receiving set to entertain himself with such sounds as strike his ear as pleasurable, be they musical, vocal or of any other description, which those operating at the transmitting station regard as

(1) (1877) 96 U.S., at p. 9; 24 Law. Ed., at p. 710.

satisfying a public want. The distinction is apparent, but the question is whether it takes broadcasting beyond the legislative power.

In dealing with such a question it must not be forgotten that it is a constitutional power intended to provide for the future and bearing upon its face an attempt to cover unknown and unforseen developments. A wide operation should be given to such a power. In the next place the description "telegraphic and telephonic" carries with it, not by derivation, but by use, a reference to electrical means of transmission of signals and speech. Broadcasting, whether conducted by private enterprise or by a governmental body, is a public service and it is telephonic in its nature. In the case of *In re Regulation and Control of Radio Communication in Canada* (1) the Privy Council had to deal with the application of both these words to broadcasting by radio. The question arose under sec. 92 (10) of the *British North America Act* 1867, which has the effect of placing under the power of the Dominion "lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province." It happened that in a previous case (*City of Montreal* v. *Montreal Street Railway* (2)) an observation had been made that the "works" in this provision were physical things, not services. When, in the *Radio Case* (1), the Privy Council was called on to decide whether broadcasting was within the power of the Dominion, Viscount *Dunedin* (3), speaking for their Lordships, said that they were of opinion that it was and fell "within both the word 'telegraphs' and the general words 'undertakings connecting'" &c. Viscount *Dunedin* (4) went on to say, in reference to the word "services," that "'undertaking' is not a physical thing, but is an arrangement under which of course physical things are used," thus showing that he regarded broadcasting as fairly within the expression "services." He returned to the statement that their Lordships thought broadcasting fell within the description of telegraphs and said :—"No doubt in everyday speech telegraph is almost exclusively used to denote the electrical instrument which by means of a wire connecting that instrument with

(1) (1932) A.C. 304.
(2) (1912) A.C. 333, at p. 342.
(3) (1932) A.C., at p. 314.
(4) (1932) A.C., at p. 315.

H. C. OF A. 1935.

THE KING v. BRISLAN; EX PARTE WILLIAMS.

Rich J. Evatt J.

another instrument makes it possible to communicate signals or words of any kind. But the original meaning of the word 'telegraph' as given in the *Oxford Dictionary*, is: 'An apparatus for transmitting messages to a distance, usually by signs of some kind'" (1).

This very strong authority, coupled with the principles of interpretation and the other considerations to which we have referred, appears to us ample justification for holding that wireless broadcasting is a telephonic service. Anything which comes within those words must be within the power conferred by sec. 51 (v.), which cannot be restricted to those arrangements or systems of communication which were employed or used when the Constitution was adopted.

It remains to consider whether wireless broadcasting is within the *Wireless Telegraphy Act* 1905-1919. According to sec. 2, wireless telegraphy includes all systems of transmitting and receiving telegraphic or telephonic messages by means of electricity without a continuous metallic connection between transmitter and receiver. The difficulty in applying the Act to broadcasting lies, in our opinion, only in the use of the word "messages," which occurs also in sec. 6. All the other expressions are appropriate. During the argument before us we had the advantage of an examination of the British statutes and other relevant material relating to telegraphy and wireless. It is clear that the word "message" has become almost a word of art in relation to telegraph and telephone services. This involves no departure from the meaning of which the word is naturally capable. But it does show that it is used to denote the transmission of any complete communication which, so to speak, forms a unit in the traffic going over a line or "the air." The word has no relation to the nature of the communication. Possibly some of the things which are transmitted by broadcast cannot be brought within its fair meaning, but most of them can. In our opinion, a wireless receiving set is an appliance for the purpose of receiving messages by means of wireless telephony, which is included within the statutory definition of wireless telegraphy.

For these reasons we think the appeal should be dismissed.

(1) (1932) A.C., at pp. 315, 316.

STARKE J. Appeal by way of prohibition.

The prosecutor, Dulcie Williams, was charged before a stipendiary magistrate, sitting in the Court of Petty Sessions at Sydney, for that she did without authorization by or under the *Wireless Telegraphy Act* 1905-1919 maintain an appliance for the purpose of receiving messages by means of wireless telegraphy, contrary to the Act, and she was convicted of that offence. She had on her premises an electric wireless receiver connected to an indoor aerial. The receiving equipment was capable of receiving messages or any audible sounds or matter from a wireless transmitting or broadcasting station. The rule nisi was granted upon several grounds, but the principal grounds are :—(1) That upon its true construction the *Wireless Telegraphy Act* 1905-1919 only prohibits the maintenance of appliances for the purpose of receiving messages by means of wireless telegraphy and not for the purpose of receiving radio broadcasts. (2) That if and so far as the Act regulates or authorizes the regulation of radio broadcasting, it transcends the Constitution.

The Act, by sec. 6, provides that no person shall, except as authorized by or under the Act, maintain or use any appliance for the purpose of transmitting or receiving messages by means of wireless telegraphy. The *Wireless Telegraphy Regulations*, made or purporting to have been made under the Act, regulate generally radio broadcasting and the issue of listeners' licences for stations used solely for the reception of programmes from broadcasting stations. Ordinarily, one would consider whether regulations are authorized by the Act under which they purport to have been made. But in the present case, it is advisable, I think, to determine the extent of the legislative power of the Commonwealth over radio broadcasting.

The Constitution, sec. 51 (v.), confers upon the Parliament power to make laws for the peace, order and good government of the Commonwealth with respect to " postal, telegraphic, telephonic and other like services." It was argued that the likeness of a service to those enumerated depends upon the character of the service ; it must be a service, it was said, under the control of the Government,

H. C. OF A. 1935.

THE KING v. BRISLAN; EX PARTE WILLIAMS.

Starke J.

and it must provide for the transmission and reception of communications between citizens and be private in its nature. But in my opinion the likeness of the service depends upon no such considerations, but upon the likeness of the means by which the service is performed. Thus there is no material distinction between a telegraphic and a telephonic service (*Attorney-General* v. *Edison Telephone Co. of London* (1)); in both cases communication takes place by means of a wire acted upon by electricity. In a wireless service, communication takes place without a continuous metallic connection between transmitter and receiver. It is quite unnecessary to discuss the theory of radio transmission and reception. It is sufficiently referred to in *Chappell & Co. Ltd.* v. *Associated Radio Co. of Australia Ltd.* (2) and in *Buck* v. *Jewell-LaSalle Realty Co.* (3). "The important matter," as *Cussen* J. said in *Chappell & Co.'s Case* (4), "is that in all cases of reproduction of . . . similar sounds at a distance the modulations in the original atmospheric disturbances are in a sense preserved, though manifesting themselves at various stages and in various media in various ways." But more important, from a legal point of view, is the decision of the Privy Council in *In re Regulation and Control of Radio Communication in Canada* (5). Under the Canadian Constitution (*British North America Act*, 30 & 31 Vict. c. 3), the Provinces have exclusive powers (sec. 92) to make laws in relation to local works and undertakings other than such as are of the following classes, telegraphs and other works and undertakings connecting the Province with any other or others of the Provinces or extending beyond the limits of the Province (sub-sec. 10). The matters so excepted become part of the exclusive legislative authority of the Dominion (sec. 91, sub-sec. 29). "Now," said their Lordships, "does broadcasting fall within the excepted matters? Their Lordships are of opinion that it does, falling . . . within both the word 'telegraphs' and the general words 'undertakings connecting the Province with any other or others of the Provinces or extending beyond the limits of the Province'" (6).

(1) (1880) 6 Q.B.D. 244.
(2) (1925) V.L.R., at pp. 357, 358; 47 A.L.T., at p. 15.
(3) (1931) 283 U.S., at pp. 199-202; 75 Law. Ed., at pp. 976-978.
(4) (1925) V.L.R., at p. 358: 47 A.L.T., at p. 15.
(5) (1932) A.C. 304.
(6) (1932) A.C., at p. 314.

In my opinion, therefore, the Constitution gives the Commonwealth full authority to legislate with respect to wireless telegraphy, including radio broadcasting.

The next question is how far the Commonwealth has exercised this power in the *Wireless Telegraphy Act* 1905-1919. The Act gives the Minister for the time being administering the Act the exclusive privilege of establishing, erecting, maintaining and using stations and appliances for the purpose (amongst others) of transmitting messages by wireless telegraphy within Australia and receiving messages so transmitted (sec. 4). Wireless telegraphy includes all systems of transmitting and receiving telegraphic or telephonic messages by means of electricity without a continuous metallic connection between the transmitter and the receiver (sec. 2). These sections may be compared with sec. 80 of the *Post and Telegraph Act* 1901-1923: "The Postmaster-General shall have the exclusive privilege of erecting and maintaining telegraph lines and of transmitting telegrams or other communications by telegraph within the Commonwealth and performing all the incidental services of receiving collecting or delivering such telegrams or communications except as provided by this Act or the regulations." It will be observed that the word "messages" is used in the *Wireless Telegraphy Act*, whereas in the *Post and Telegraph Act* the words are "telegrams or other communications." But a message is a communication, and the use of the one word rather than "messages or other communications" does not suggest any special limitations of the privilege granted by the *Wireless Telegraphy Act*. Little difficulty seems to have been found in treating telephonic conversations as messages (see *Attorney-General* v. *Edison Telephone Co. of London* (1)). Again, in the English *Wireless Telegraphy Acts* 1904, 1925, and 1926 (4 Edw. VII. c. 24; 15 & 16 Geo. V. c. 67; 16 & 17 Geo. V. c. 54), the word "messages" is used in a sense wide enough to include broadcasting. Thus, in sec. 1 (7) of the 1904 Act, as amended in 1925, "wireless telegraphy" is defined to mean "any system of communication by telegraph as defined in the *Telegraph Acts*, 1863 to 1904, without the aid of any wire connecting the points from and at which the messages or other communications are sent

(1) (1880) 6 Q.B.D., at p. 258.

H. C. OF A. 1935.

THE KING v. BRISLAN; EX PARTE WILLIAMS.

Starke J.

and received: Provided that nothing in this Act shall prevent any person from making or using electrical apparatus for actuating machinery or for any other purpose than the transmission and reception of messages." The scope and object of the *Wireless Telegraphy Act*, and the broad sense in which the word "message" is used in connection with wireless telegraphy, lead me to the conclusion that the word "messages" in the Act includes the dissemination of any sounds or audible matter, e.g., musical performances, speeches, &c., by means of electricity without a continuous metallic connection between the transmitter and the receiver. The Act might well have followed the English legislation, but it is not so futile that it regulates some undefined communications called messages, and leaves radio broadcasting entirely unregulated and beyond the monopoly granted to the Minister in the interest of the whole Commonwealth.

All that remains for consideration is the validity of the regulations. By sec. 10 of the Act, the Governor-General may make regulations not inconsistent with the Act prescribing all matters which by the Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act. If the construction I have given to the Act is right, namely, that the Commonwealth has authority under it to control and regulate radio broadcasting, then the regulations or at all events the licensing clauses appear to be within power and perfectly valid.

The rule nisi should be discharged.

DIXON J. The appellant was convicted under sec. 6 of the *Wireless Telegraphy Act* 1905-1919 of maintaining, without authorization, an appliance for the purpose of receiving messages by means of wireless telegraphy. "Wireless telegraphy" is defined by sec. 2 to include all systems of transmitting or receiving telegraphic or telephonic messages by means of electricity without a continuous metallic connection between the transmitter and the receiver. What the appellant was in fact maintaining was an ordinary wireless broadcasting receiving set.

The contentions advanced in support of her appeal are that upon its proper interpretation the section under which she was charged does not extend to broadcasting receiving sets and that, if

it does, it is to that extent invalid because the power conferred upon the Parliament by sec. 51 (v.) of the Constitution to make laws with respect to postal, telegraphic, telephonic and other like services, does not cover broadcasting and there is no other power within which the provision can be brought.

In my opinion, the first of these contentions is well founded and to maintain a broadcasting receiving set for use in the ordinary manner is not an offence against sec. 6 of the *Wireless Telegraphy Act* 1905-1919. The second contention involves the long standing question of the power of the Commonwealth over broadcasting. From the beginning of broadcasting the difficulty which exists in bringing it within the legislative power of the Commonwealth has been well understood, but the *Wireless Telegraphy Regulations* governing it have hitherto enjoyed an immunity from attack which suggests a general acquiescence almost in the Commonwealth's assumption of the power. The difficulty, of course, lies in regarding broadcasting for general amusement, information, instruction, or edification, as a service which forms part of, or is like, postal, telegraphic and telephonic services. A similarity undoubtedly exists between the appliances used, on the one hand, in telegraphy and telephony and, on the other, in wireless broadcasting. But it is said that the likeness to which the Constitution refers is to be found in the character of the service performed for the public and not in the mechanical or electro-magnetic nature or basis of the instruments employed for the purpose.

The present would appear to me to be anything but a suitable occasion for deciding this important constitutional question, if the opinion of the majority of the Court were adverse to the power. No one has thought fit to raise it in the interests of the States, which, apparently, are well content to suffer the Commonwealth to exercise the power. In the United States of America broadcasting by wireless has been held to fall within the power over inter-State commerce (*Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.* (1)). If, therefore, a Commonwealth statute dealing with broadcasting were enacted on the basis of the power with respect to trade and commerce between the States, some support might be found to

(1) (1933) 289 U.S., at p. 279; 77 Law. Ed., at p. 1175.

H. C. OF A. 1935.

THE KING v. BRISLAN; EX PARTE WILLIAMS.

Dixon J.

exist, independently of sec. 51 (v.), for the Federal claim to control the entire subject. But the *Wireless Telegraphy Act* 1905-1919 is not based in any way on the commerce power and, in my opinion, cannot be considered as a law with respect to the subject matter of that power. The question has long been left in suspense and, if a majority of the Court had been, as I am, unable to arrive at the conclusion that broadcasting is within the power with respect to postal, telegraphic, telephonic and other like services, I should have been disposed to limit the expression of my opinion to the ground I have already stated, namely, that the ordinary use of a broadcasting receiving set is not within the prohibition contained in sec. 6 (1) of the *Wireless Telegraphy Act*. As it is, I shall give my reasons for that conclusion and then state very shortly why, in my opinion, wireless broadcasting is not within the subject matter of sec. 51 (v.).

The provision applies only when the purpose exists of transmitting or receiving messages by means of wireless telegraphy. It may be that the means employed come within the words forming part of the definition of wireless telegraphy—"by means of electricity without a continuous metallic connection between the transmitter and the receiver." Nevertheless I do not think broadcasting programmes constitute or contain "messages." This word appears to me to mean a communication sent to one definite person by another. It does not mean matter in the form of speech or other sounds disseminated indiscriminately among the public who, being equipped with the mechanical means, desire to hear it. From a listener's point of view, a wireless receiving set may be regarded as a mechanical means of extending the range of natural hearing restricted to sounds which at the place of emission have been mechanically dealt with so that they may be so heard. The very word "broadcast" is used because the sounds are addressed to all who have thus extended their range of hearing by an appropriate appliance. Its meaning involves publicity. The expression "transmit and receive a message" could not, I think, be applied to a speech delivered at a gathering through amplifiers by a speaker a great part of whose audience was beyond the natural range of hearing. But when a speech is broadcast, the operation differs only in the fact that the listeners are not congregated together and,

without television, cannot see the speaker. In the Act the word "message" is, I think, appropriate only to individual communication. In saying it means a communication to one definite person by another, I do not mean to exclude messages which are simultaneously despatched to many. Each of these is in fact a separate message although identical in expression with the others. Nor do I mean to emphasize the singular in the "one" and the "other." The senders may be a body or collection of people, and the recipients may be a body or collection of people. The difference is between definite individuals and a form of public performance, recital, or utterance.

It may be objected that by the licensing system broadcast listeners are defined and, although a multitude, they are definite individuals. The objection rather misses the substance of the distinction. But, in any case, it is not to the point, because it is not licensed but unlicensed reception that must be considered in determining what is prohibited under the word "message."

It is not surprising if sec. 6 of the Act does not cover broadcast reception. It was passed in 1905 before broadcasting commenced. Of course a communication sent by radio could be picked up then, as now, by anyone with a suitable receiver. But the object of the Act was to regulate uses of wireless for purposes of communication like the telegraph and telephone. It was for that reason that the word "message" was employed as part of the definition of the offence. It was for that reason also that unauthorized appliances were made forfeit to the Crown by sec. 7.

The *Wireless Telegraphy Act* is a law with respect to postal, telegraphic, telephonic, and other like services, enacted in the exercise of the power conferred upon the Parliament by sec. 51 (v.) of the Constitution. Upon the construction which I have placed upon the statute, there is, I think, no doubt of its validity. But, as I have already said, I am unable to concur in the opinion that the power is wide enough to include wireless broadcasting and to support the statute if, upon its proper interpretation, it authorizes Part III. of the *Wireless Telegraphy Regulations* 1924-1934, which deals with broadcasting.

H. C. OF A. 1935.

THE KING v. BRISLAN; EX PARTE WILLIAMS.

Dixon J.

The grant of power contained in sec. 51 (v.) is expressed in a form plainly adopted in order that it should include every present and future mode of performing the services called postal, telegraphic and telephonic. The feature which the services, so described, possess in common is that they supply an organized means of enabling people at a distance to communicate one with another either by writing or by word of mouth.

The object of the postal service is to provide a system by which a missive may be dispatched by one person and delivered to another. The missive is not necessarily a written message. It may be a journal or a book or any physical thing susceptible of transmission through an organization ready to undertake the task of receiving articles from individual senders, transmitting them and delivering them to individual addressees. In postal services the physical identity of the missive is preserved.

A telegraphic service resembles the postal service in providing a system by which a communication may be sent by one person for delivery to another separated from him by distance. But rapidity of transmission is obtained by the use of signals, at first mechanical, but, later, electro-magnetic. This means that the contents of the message are repeated. Perhaps the characteristics which differentiate a telegraph from a postal service are the greater expedition of the telegraph, its limitation to messages and the fact that the message is reproduced and not conveyed in its original material form.

A telephone service provides an inter-related system for oral communication at a distance. It depends, so far at any rate, on the reproduction of sound by electro-magnetic devices. Its purpose is to enable a definite person obtaining access to an instrument at a fixed point to interchange spoken communication at a distance with another definite person having access to another such instrument.

They are all services because they consist in an established system organized for the purpose of performing a function to satisfy the demands of the members of the community. The demand they go to satisfy in common is for means of interchanging intelligence at a distance. The primary requirement of the community they fulfil is for a method by which an individual who desires to communicate with another at a distance may dispatch and have delivered to him

his message, or establish direct oral communication with him. No doubt the need of receiving communications, if sent, is an important want of a community. The two things are mutual. But the ability of the individual to originate the communication received is the first condition. The expression "other like services" covers, I should think, every system or organized process of furnishing means of individual inter-communication, notwithstanding that, at the time when the Constitution was adopted, it was undiscovered and unthought of. The power, of course, extends to everything which is incidental or arises out of the main purpose or its fulfilment. Moreover, although almost from their respective beginnings these services have in Australia been conducted by Government, that is not an essential characteristic.

Electric telegraph and telephone services may use metallic circuits or wireless. Wireless is used in broadcasting, and broadcasting includes the transmission of speech to a distance. It affords an advantage to the public by an organized system and, therefore, may be called "a service." But here, in my opinion, the points of resemblance are exhausted.

Broadcasting provides a means by which those who secure for themselves an appropriate receiving set may hear speeches, music, entertainments, announcements and the like, addressed to the public at large from some central point. There is no inter-communication; no means is provided by which one individual can originate a message or establish communication with another; there is nothing to satisfy the purpose for which any of the enumerated services exist. It appears to me to be outside the scope and purpose of the power. It is said that carrying on such an operation performs a service to the public and that, according to high judicial authority, the adjective "telegraphic" may be applied because the means adopted is wireless telephony and "telephony" is included in "telegraphy." This does not meet the difficulty. It takes each of the two words "telephonic" and "service." It applies each of them in a manner differing from that in which they are used in sec. 51 (v.). It then combines them and requires the combination to serve the purpose of including a quite different thing. The expression

H. C. OF A. 1935. THE KING v. BRISLAN; EX PARTE WILLIAMS. Dixon J.

"postal, telegraphic and telephonic services" describes a well known category of public services which, in my opinion, possessed definite characteristics. The addition of the expression "other like" services emphasizes the fact that the category looked to those characteristics. In my opinion altogether different characteristics belong to wireless broadcasting.

For these reasons I think the appeal should be allowed.

McTIERNAN J. I agree that this appeal should be dismissed.

Since the decision of the Judicial Committee in *In re Regulation and Control of Radio Communication in Canada* (1) the view must be accepted that broadcasting as established and regulated by the regulations, made pursuant to the *Wireless Telegraphy Act* 1905-1919, may be classed with telegraphic and telephonic services. It follows from this decision that sec. 51 (v.) of the Constitution upon its true interpretation authorizes Parliament to legislate with respect to the service of broadcasting. (See also *Attorney-General* v. *Edison Telephone Co. of London* (2) and *Attorney-General for New South Wales* v. *Brewery Employees Union of New South Wales* (3), per *Griffith* C.J., and cf. *Halsbury's Laws of England*, 1st ed., vol. 27, p. 350.)

But it is said that the provisions of the *Wireless Telegraphy Act* do not authorize the making of regulations with respect to broadcasting, as the scope of the Act is limited to systems of transmitting and receiving telegraphic or telephonic messages by means of electricity without a continuous metallic connection between the transmitter and the receiver (see sec. 2 of the *Wireless Telegraphy Act* 1905-1919). This contention depends on the view that the transmission of such messages does not include broadcasting of programmes such as are provided for by the regulations. In my opinion it is quite in accord with common usage to describe the transmission by radio of sounds representing such programmes as the transmission of messages. The word "messages" in the *Wireless Telegraphy Act* 1905-1919 was not intended to have a

(1) (1932) A.C. 304. (2) (1880) 6 Q.B.D. 244.
(3) (1908) 6 C.L.R., at p. 501.

meaning more limited than it usually bears when applied to the subject matter of wireless telegraphy and telephony.

H. C. OF A. 1935.

THE KING v. BRISLAN; EX PARTE WILLIAMS.

Appeal dismissed. The appellant to pay costs of appeal including costs of first hearing before the High Court but not of the subsequent further argument.

Solicitor for the appellant, *T. F. Williams.*

Solicitor for the respondents, *W. H. Sharwood*, Commonwealth Crown Solicitor.

J. B.

[HIGH COURT OF AUSTRALIA.]

AMALGAMATED ZINC (DE BAVAY'S) LIMITED APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

H. C. OF A. 1935.

MELBOURNE, *Nov.* 15; *Dec.* 19.

Latham C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Income Tax (Cth.)—Assessment—Deductions—Compulsory contributions to fund—Fund for benefit of taxpayer's employees—Taxpayer's business discontinued—Obligation to contribute to fund continuing—Outgoings "actually incurred in gaining or producing the assessable income"—Loss made "in carrying on a business"—Income Tax Assessment Act 1922-1934 (*No.* 37 *of* 1922—*No.* 51 *of* 1934), *secs.* 23 (1) (*a*), 26.

A company carried on a business in which it employed workers who came within the *Workmen's Compensation (Broken Hill) Act* 1920 (N.S.W.), so that the company was obliged to contribute to the compensation fund established under that Act. The company discontinued its business, but remained liable to make, and made, payments to the fund in subsequent years. The company claimed to deduct the amount of these payments from its assessable income. Its income, after it had discontinued the business, was derived solely from investments.