

IS AUNTY EVEN CONSTITUTIONAL?

A ship stoker's wife versus Leviathan.

On *The Bolt Report* in May 2013, an erstwhile Howard government minister was asked whether privatizing the ABC would be a good thing. Rather than answer, he made pains to evade the question, leaving viewers with the impression that there are politicians who would like to privatise the ABC but don't say so from fear of the controversy. If only they had the courage of the poor, barely literate ship stoker's wife in 1934 who protested against the authorities' giving her a fine for the simple pleasure of listening to radio station 2KY in the privacy of her solitary boarding house room.

All federal legislation has to come under what is called a head of power, some article in the Constitution which authorises Parliament to "make laws ... with respect to" that particular sphere. For controlling broadcasting in general and maintaining government media organisations such as the ABC and SBS in particular, this has been considered to be Section 51(v), which authorises laws regarding "postal, telegraphic, telephonic and other like services." This affirmation came from an obscure High Court of Australia case of 1935, *R v Brislan*, which challenged the government's right to charge radio listeners licence fees.

After being given the fine in September 1934 by Roy Vincent Brislan, an inspector of the department of the Postmaster General, Dulcie Williams of Surry Hills, Sydney, decided that rather than pay the one quid she would challenge the right of the Postmaster-General to make her pay for listening to her "all-electric wireless receiving set."

The issue at the heart of the matter was whether that phrase from the constitution, "to make laws ... with respect to postal, telegraphic, telephonic service

and other like services," authorised the federal government to be involved with radio broadcasting.

At first sight, it would seem a slam dunk for Dulcie. How could the service of being able to send a letter or a telegram, or make a phone call to one's Aunt Gladys in Wangaratta to get details for this year's family Christmas dinner, be in any way the same as radio broadcasting news, music, and crime dramas to millions of people within a finite geographical area?

This argument has been reduced to a straw man by no less an authority than the current federal Parliamentary Education Office, which asserts on its website that Dulcie Williams "refused to pay the listener's licence on the grounds broadcasting is not mentioned in the Constitution." It is true that, when addressing the High Court, Williams's barrister did declare that the word "broadcasting" was not in the constitution, but he then went on to explain in detail why the actual concept of broadcasting, whether mentioned by word or not, could not be interpreted from any words contained therein.

Placitum V of Section 51, he claimed, related to services to enable all members of the community to engage in "mutual communication" at their will and "hedged about with secrecy and privacy by law." Broadcasting was "the very antithesis of this," in that it was very public as well as lacking "the mutuality of exchange which



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was the essence of postal telegraphic and telephonic services.” The subsection, he argued, was limited to point-to-point messages sent by or on behalf of one individual to another under circumstances which permitted the recipient replying to the sender. He added, perhaps sardonically, that his client had been using her radio to only listen to musical programs and not to send or receive messages.

The Same or Just Similar?

It must be noted that Section 51(v) actually covers two categories. Commentators often fail to make the distinction, which leads to confusion in interpreting a *ratio decidendi* (the rationale for the decision). The government is authorised to involve itself in something which *is* a postal, telegraphic, or telephonic service (what could be called the *equates* argument). Secondly, it may involve itself in an undertaking which, while not actually being postal, telegraphic, or telephonic, is similar and falls within the genus, the common denominator, of the three (the *genus* argument).

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Some writers assume the case was decided on the genus argument and declare it an excellent example of the Constitution of 1901 being written to accommodate not only contemporary practices and concepts but also those yet to be invented. With regards to the latter, they are indeed correct. What would better fit within the *genus* descriptor of “other like services” than emailing or phone texting? Both are private, person-to-person, reciprocal communication services where no stretch of credulity would be needed to justify government involvement.

However, most of the majority justices realised the visible flaws in applying the *genus* argument to the very different technology of broadcasting. If they were going to deny the appeal, they would have to find a way to rationalise that radio

broadcasting was, in itself, a postal, telephonic, or telegraphic service.

Their Honours of the Majority

In leading the majority opinion, Chief Justice John Latham began with the *equates* argument. In defending the claim that one-to-many broadcasting “is a form of wireless telephony,” he wrote:

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.

But it *is*. As the dissenting judge explained, a primary characteristic of the telephone is inter-communication—hearing what is said from a particular person and then responding to it. With broadcasting, “There is no inter-communication; no means is provided by which one individual can originate a message or establish communication with another.”

Perhaps the Chief Justice realised he was on shaky ground with the *equates* argument. In any event, he added the *genus* argument to his rationale:

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.*

Considering that all three were also private, person-to-person, and reciprocal, it does seem a bit of a stretch to describe their “common characteristic” merely as communication. If Chief

* *R v Brislan*[1935] HCA 78, per Latham CJ. Para. 13.

Justice Latham had been sent out by his wife to buy “carrots, celery, spinach, or other like items,” would he have dared return home carrying deep-fried chicken and Angel cake because, after all, they were all foodstuffs?

Judges George Rich and H.V. Evatt, on the other hand, seemed not to want to depend on—or touch with a 50 foot barge pole—the genus argument. In delving into constitutional law history, their joint opinion specifically notes mistakes made by the United States in granting Congress power to regulate “post offices and post roads,” a narrow clause which presented difficulty when the federal government came to want to regulate the electric telegraph. The Australian framers “accordingly . . . expressed themselves in terms *calculated to cover developments in science and organization* enabling the control of analogous and ancillary services” (emphasis added). It would be difficult to interpret this in any other way than that the learned brethren were referring to the phrase “or other like services.”

However, after establishing their belief that 51(v) “bear[s] upon its face an attempt to cover unknown and unforeseen developments,” do they take advantage of this *genus* phrase “calculated to cover developments in science” and justify broadcasting under it? Without reason, they did not. Although they admit that, unlike telephony, “broadcasting does not give the advantage of one man communicating with another when he wishes” and “the distinction is apparent,” their final comment was that this later developed science of broadcasting till “is a telephonic service.”

Compared to Latham’s almost 5,000 words, Justice McTiernan’s 273-word opinion was the shortest of the case, and the thought that went into it appears to have been commensurate.

Since the decision ... *In re Regulation and Control of Radio Communication in Canada* the view must be accepted that broadcasting ... may be classed with telegraphic and telephonic services.

True, they may be in the same class, but had the honourable gentleman considered the actual wording of section 51(v)? The service had to actually

be telegraphic (or telephonic) or alternatively be in the same class of not just telephonic and telegraphic, but telephonic, telegraphic, *and* postal.

Finally there was an idiosyncratic ruling from Justice Heyden Starke, a frequent dissenter known to be independent and occasionally hostile with his colleagues. He also followed the Privy Council decision from *In re Regulation and Control of Radio Communication* but, unlike McTiernan, Starke read from the case that broadcasting “fall[s] within ... the word telegraphs.”

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If, for the sake of the argument, we were to accept Latham’s reasoning about “communication services,” where would it lead us? If radio’s one-to-many communication were a “like service,” then because both electrical and non-electrical communications are within the genus, it would follow that all one-to-many communications, whether electrical or not, could also fall under government control. This would obviously include the printed word: newspapers and other journals. If the meaning of section 51(v) includes the right to control the press, surely something as important as this would have been specifically mentioned by the drafters of the constitution rather than simply assumed by the words “telephonic,” “telegraphic,” and “postal.” Are we to believe the drafters meant control of the press to be included but didn’t want to add another subsection containing “the press”? Why, because it would make the Constitution too long?

Piddington

When King’s Counsel for Dulcie Williams, Albert Bathurst Piddington, referred to the “secrecy and privacy” of mutual communications, he had

reason to be conscious of the privacy, or supposed privacy, of telegrams. Twenty-two years earlier, he had been offered and had accepted a seat on the very court he was now addressing. This, however, followed an inopportune exchange of telegrams with his brother-in-law, who was acting on behalf of Attorney General Billy Hughes. Asked his position on states' rights, Piddington had answered: "In sympathy with supremacy of Commonwealth powers." Hughes was trying to stack the court with like-minded centralists. When the telegram exchange leaked to the press, public outcry forced Piddington to do the right thing and resign before even taking his seat.

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Piddington's later career was reputable, while marked by involvement in left-wing activist causes. He chaired a Commonwealth commission in 1919 on the basic wage, reporting that it should be increased dramatically; he wrote radical articles for *Smith's Weekly*; he ran for political office a few times, becoming a close associate of volatile, left-wing New South Wales premier Jack Lang; and he served as president of the state's Industrial Relations Commission. In 1934, he undertook an ideological pilgrimage to the Soviet Union and came back full of praise.

He became prominent in a cause célèbre that same year when the government tried to deport Czechoslovakian-born communist agitator Egon Kisch, who was on a speaking tour in Australia. The government forced Kisch to submit to a dictation test of "a passage of fifty words in length in a European language," as allowed under the Immigration Restriction Act. Since the text used was in Scottish Gaelic, Kisch unsurprisingly did not pass. When the issue went all the way to the HCA, Piddington defended Kisch—successfully.

Ratio decidendi non est

Piddington was probably too diplomatic to say so, but on hearing the final decisions of the court, he

could have noted that the honourable gentlemen of the majority had contradicted each other. Taking the *equates* line, Starke J held that "the Commonwealth [had] full authority to legislate with respect to wireless telegraphy, including radio broadcasting." But Justices Rich, Evatt and Latham all held it was not telegraphy but telephony that encompassed broadcasting.

What is interesting about this is that, because there is no majority *ratio decidendi*, there can be little precedent set by *R v Brislan*. By a concept of law known as *stare decisis*, the reason given by the majority in one case sets legal precedent and thus becomes a valid reason for ruling similarly in future cases with similar circumstances. But if there is a multitude of reasons, including some which contradict, what do you do?

If you arbitrarily choose a *ratio* by one or two majority judges, then why should that take precedence, even over an opinion by one or two dissenting judges? This problem was finally solved in 1994 by the full bench of the HCA in *Re Tyler; Ex parte Foley*, where it held that a judgement does not have a *ratio* if there is no common majority reasoning.

Of the six judges in *Brislan*, no four declared the *genus* argument or the *equates* argument for *any common one* of postal, telegraphic, or telephonic. Legally speaking, government radio broadcasting is constitutional because the High Court has said it is—even though there is no binding reason that accompanies that 1935 decision.

The Dissenter

Fortunately for the reputation of Australian jurisprudence, there was at least one member of the High Court in 1935 who was not dismissive of the appellant because of her low station nor intimidated by the high station of her opponents, both government and private.

This was no less a figure than that great Australian jurist Sir Owen Dixon, who according to Robert Menzies was considered by at least two Lord Chancellors to be "the greatest judicial lawyer in the English-speaking world." Dixon was granted honorary degrees by both Oxford and Harvard universities and a memorial prize by Yale University "for services to mankind," and

described by then U.S. Secretary of State Dean Acheson as someone who would adorn the U.S. Supreme Court if it were possible to appoint him. Australian historian and 17th Governor-General Sir Paul Hasluck described Dixon as having possessed “the most distinguished mind I have ever been privileged to know among fellow Australians.”

Dixon’s biographer describes him as “a classicist in spirit, a pessimist by inclination, sceptical, agnostic in religious matters, he had a profoundly logical mind. ... It would be hard to find a less politically influenced judge than Dixon.” His dissent in *R v Brislan* proves the latter claim. He was strongly anti-communist, and if anyone on the court (apart from the Chief Justice himself) had reason to rule against the appellant because of her communist-sympathising King’s Counsellor, it would have been Dixon. But it was he alone who ruled in her favour.

Melbourne University professor Geoffrey Sawer, one of the leading contributors to research in Australian government, law, and politics in the generation following World War II, is described by the *Oxford Companion to Australian Politics* as an author who had “a lively appreciation of the human frailties and idiosyncrasies of judges.” In 1967, with the advantage of the passage of time, he wrote about *R v Brislan* of the “surprisingly large” majority who took the government position. Dixon’s dissenting viewpoint on Section 51(v), he held, was an “overwhelmingly more probable construction of what the Founders intended.” In 1965, in *Jones v the Commonwealth (no 2)*, High Court judge Victor Windeyer also opined that Dixon’s dissent in *Brislan* was correct.

Owen Dixon’s was the lone voice of reason, but unfortunately numerically unable to affect the court’s decision.

A Political Angle

So why did the High Court of Australia rule as it did? It may be relevant that Chief Justice John Latham was not a paragon of the separation of powers. Prior to joining the High Court, he served as federal attorney-general with first the Nationalist Party government, leader of the Nationalist Party, deputy leader of the newly formed United Australia Party, and attorney-

general once again under Prime Minister Joe Lyons. Academic Fiona Wheeler, in a 2011 *Melbourne University Law Review* article, described how his political past continued to affect him:

Once appointed to the bench, Latham did not wholly eschew the heady world of federal government policy and politics. ... [He] clandestinely advised several conservative political figures, notably Robert Menzies, Richard Casey and Harold Holt, on a range of controversial matters. ... [I]t is readily apparent that many instances of Latham’s advising, most notably his involvement, via Richard Casey, in the 1949 Liberal Party federal election campaign, and his discussion with Menzies following the Communist Party Case, would today be regarded as clear affronts to basic standards of judicial independence and propriety.

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As federal attorney-general in 1925, his antagonism towards communism manifested in his department’s orchestrated anti-communist propaganda as well as his amendment to the Crimes Act declaring it an offence to belong to seditious and revolutionary associations. When the well-known Communist Party Case of 1951 came before him, fellow judge Owen Dixon—who, as mentioned, was no friend of communism himself—noted that the Chief Justice “displayed an unrestrained hostility [towards Communist Party counsel] that I thought very unwise not to say unjudicial.” When Latham later showed Dixon the opening section of his judgement, which subsequently became the sole dissenting opinion, Dixon observed, “It sickened me with its abnegation of the function of the Court.”

In the *Brislan* hearing, which was Latham’s first HCA appearance, his role was to judge the constitutional validity of legislation similar to the Australian Broadcasting Commission Act, a law which the United Australia Party (UAP) government

had passed three years earlier when he himself was attorney-general. To invalidate the one act would have been effectively to invalidate the other, thus alienating his erstwhile colleagues in the UAP. If Latham had ever entertained any doubts about the position he was going to take in this case, they may well have been banished by the Communist Party fellow traveller, Albert Piddington, facing him from the other side of the bench.

There are certain other circumstances worth considering. *R v Brislan* was *not* the cause célèbre of 1935. It was not the *Mabo* or *Roe v Wade* of its day. There were no letters to the editor, protest marches, or agitprop plays filling the theatres. Justice Dixon in his summation stated, “The present [case] would appear to me to be anything but a suitable occasion for deciding this important constitutional question.”

At the time, the high-tech concept of broadcasting news and entertainment directly into the home was a popular new idea. If the existing private organisation, the Australian Broadcasting Company, could not afford to maintain the service from a portion of licence fees collected by the Postmaster-General, then many people wanted the government to take over. A deputation to three senior cabinet members (one of whom was Latham) in January 1932 carried a petition to the government to take over that privately-run company. According to the history of the Australian Broadcasting Commission *This Is the ABC*:

The petitioners made up a pageant of respectable Melbourne: Frank Tate, former Director of Education; F. W. Eggleston, former state Minister and connoisseur of public corporations; Ernest Scott and other professors; R. G. Menzies, barrister and member of the Victorian parliament; Mrs. Claude Couchman, president of the Australian Women’s National League ... [and] representatives of Rotary, the Australian Natives’ Association, church missions, the Stock Exchange and the Choral Association. .

The legislation to introduce government broadcasting could not have been more bipartisan.

The first bill on the subject was introduced into federal parliament in November 1931 by the Labor Party and eight months later, after a change of government, the Australian Broadcasting Act was introduced and passed by the opposition United Australia Party. It is an understatement to say that any controversy about the *Brislan* case passed under the radar. Well-known judge and future opposition leader H.V. Evatt thought so little of its importance that he joined fellow judge George Rich and left the opinion to him. Australian historian Ken Inglis’s two-volume, thousand-page history of the ABC, cited above, fails to mention the HCA challenge once.

As for the remaining four justices of the majority, they may have thought to themselves that as long as the decision went the way the public wanted, no one was going to harass them by criticising it. Besides, why start off with a new chief justice on a bad foot by dissenting his opinion on his very first case?

Vae Victis

So what happened to poor Dulcie? Costs of £164 12s 11p were awarded against her for justice being dispensed, and some two years later, after the Attorney-General’s Office commented in communication (presumably in a financial context) that “Mrs Williams is a person of no substance,” she was made bankrupt for non-payment of these costs.

Despite arguments that ‘everyone was in favour of a public broadcaster,’ or that one should merely read the constitution broadly enough so that it will include whatever you want it to include, or that the legislation had bipartisan support, the simple fact is that neither the Australian Broadcasting Act nor the act under which Dulcie Williams was fined was valid law. ABC critics today question the legitimacy of politicians’ being permitted to appoint those who run the largest media organisation in Australia. But that is not the reason the decision was wrong. It was wrong simply because any government involvement in broadcasting clearly exceeds what is authorised by Section 51(v) of the Constitution. Unfortunately, *R v Brislan* was an instance where the rule of law broke down: technically the law said one thing, but conflict of interest and populist sentiment said another.