Miller v Tcn Channel Nine Pty Ltd [1986] HCA 60; (1986) 161 CLR 556 (21 October 1986)

HIGH COURT OF AUSTRALIA

MILLER v. TCN CHANNEL NINE PTY LTD [1986] HCA 60; (1986) 161 CLR 556
F.C. 86/061

Constitutional Law (Cth)

High Court of Australia
Gibbs C.J.(1), Mason(2), Murphy(3), Wilson(4), Brennan(5), Deane(6) and Dawson(7) JJ.

CATCHWORDS

Constitutional Law (Cth) - Freedom of interstate trade and commerce - Prohibition of establishment, erection, maintenance and use of station for transmission or receipt of wireless telegraphy messages without permit - Uncontrolled discretion to grant or refuse permit - Whether regulatory law - Validity - Severance - Whether guarantee of freedom of communication implied by Constitution - The Constitution (63 & 64 Vict. c. 12), s. 92 - Acts Interpretation Act 1901 (Cth), s. 15A - Wireless Telegraphy Act 1905 (Cth), ss. 4, 5, 6, 7.

HEARING

1986, August 5-6; October 21, 21:10:1986
CASE STATED.

DECISION

GIBBS C.J.: The facts of this case and the relevant provisions of the Wireless Telegraphy Act 1905 (Cth) as amended ("the Act") are set out in the judgment of Wilson J., which I have had the advantage of reading and I need not repeat them. It is enough to say that the defendant's station at Somersby was erected, maintained and used for the purpose of receiving and transmitting television signals between Sydney and Brisbane; it was erected, maintained and used only for the purpose of serving as a link in a chain of stations for the transmission of messages between a television station in Sydney and another television station in Brisbane. Other links were provided by the Australian Telecommunications Commission for that purpose, but there were occasions when they were not available to carry the defendant's messages. The erection and maintenance by the defendant of the station is said to constitute an offence against s.6(1)(a) of the Act. That provision prohibits the establishment, erection, maintenance or use of any station or appliance for the purpose of transmitting or receiving messages by means of wireless telegraphy except as

authorized by or under the Act. It was conceded that the transmission of the messages between Sydney and Brisbane constituted activities of interstate trade, commerce or intercourse.

2. Although it was originally thought that the argument would challenge accepted assumptions as to the effect of s.92 of the Constitution, in the event the submissions fell within quite a narrow compass. There were three broad issues - first, whether either the erection or the maintenance of the station by the defendant is within the protection of s.92, second, if so, whether the provisions of the Act can nevertheless be justified as regulatory, and third, whether, if some of the prohibitions imposed by the Act are invalid and others are valid, it is possible to sever the good from the bad.

3. In Uebergang v. Australian Wheat Board [1980] HCA 40; (1980) 145 CLR 266, at p 298, I joined with Wilson J. in thinking that it remains apt to say, as Dixon J. said in Gatwick v. Johnson [1945] HCA 7; (1945) 70 CLR 1, at p 19, that "in questions concerning the application of s.92 of the Constitution ... it has become desirable for the Court to avoid as far as possible the statement of general propositions and in each case to decide the matter, so far as may be, on the specific considerations or features which it presents". In the present case, little discussion of principle is required to establish that the prohibition effected by s.6 of the unauthorized use of a station for the purpose of transmitting or receiving messages by means of wireless telegraphy must be invalid in its operation on transmissions and receipts made in the course of interstate trade, commerce or intercourse, unless the prohibition can be upheld as regulatory. The transmission and receipt of the messages between Sydney and Brisbane formed part of the defendant's trade, commerce or intercourse and the prohibition on unauthorized use restricted that trade, commerce or intercourse "directly and immediately" within the principle laid down in The Commonwealth v. Bank of N.S.W. [1949] HCA 47; (1949) 79 CLR 497, at p 639; (1950) AC 235, at p 310. That would be so even if one were to have regard to the practical effect of the Act rather than to its legal effect. It is immaterial that the Act forbids the use of a station for intrastate as well as interstate transmission; see The Commonwealth v. Bank of N.S.W., at p 636; p 306 of AC It is equally immaterial that another means of transmitting messages was usually available; a legislature cannot justify a restriction of one form of interstate communication by saying that it has provided another, just as the Commonwealth could not justify the exclusion from interstate trade of airline carriers other than its own instrumentality by saying that that instrumentality was bound to provide adequate services: see Australian National Airways Pty. Ltd. v. The Commonwealth [1945] HCA 41; (1945) 71 CLR 29.

4. The same conclusion must, I consider, be reached in relation to the prohibition of the unauthorized maintenance of a station. "Maintain", in the section, clearly enough means "keep in working order". The maintenance of a station is an inseparable concomitant of its use, for mechanical installations must be kept in working order if they are to be used, and the maintenance of a station used in interstate trade, commerce or intercourse is an inseparable concomitant of that trade, commerce or intercourse. It therefore enjoys the same protection as that afforded by s.92 to the interstate trade, commerce or intercourse itself: see North Eastern Dairy Co. Ltd. v. Dairy Industry Authority of N.S.W. [1975] HCA 45; (1975) 134 CLR 559, at p 599; Perre v. Pollitt [1976] HCA 27; (1976) 135 CLR 139, at p 151; Australian Coarse Grains Pool Pty. Ltd. v. Barley Marketing Board (No.2) [1985] HCA 38; (1985) 59 ALJR 516, at p 520; [1985] HCA 38; 59 ALR 641, at p 647, and cases there cited.

5. The prohibition of the establishment and erection of a station stands in a different situation. It has been held that a restriction on the manufacture of a commodity intended for use exclusively in interstate trade does not infringe s.92: Beal v. Marrickville Margarine Pty. Ltd. [1966] HCA 9; (1966) 114 CLR 283, following Grannall v. Marrickville Margarine Pty. Ltd. [1955] HCA 6; (1955) 93 CLR 55. The reason for those decisions was that manufacture, although an essential preliminary condition to interstate trade in the commodity manufactured, forms no part of that

trade; it precedes it and is outside the freedom conferred by s.92, see Grannall, at pp.71-72; Beal, at p.300. On the same principle, prohibition of the importation from abroad of an aircraft intended for use in interstate trade does not infringe s.92: Reg. v. Anderson; Ex parte Ipec-Air Pty. Ltd. [1965] HCA 27; (1965) 113 CLR 177; Ansett Transport Industries (Operations) Pty. Ltd. v. The Commonwealth [1977] HCA 71; (1977) 139 CLR 54. Similarly, quotas, or a tax, on hens kept for the production of eggs intended to be sold in the course of interstate trade do not infringe s.92: Bartter's Farms Pty. Ltd. v. Todd [1978] HCA 36; (1978) 139 CLR 499; Damjanovic & Sons Pty. Ltd. v. The Commonwealth [1968] HCA 42; (1968) 117 CLR 390. No doubt the prohibition or restriction of the manufacture, production or importation of something to be used in the course of interstate trade would have a practical effect, and a seriously adverse one, on the proposed trade but those authorities establish that that is not enough to attract the protection of s.92 to activities which are anterior to the interstate trade and which do not form an inseparable concomitant of it. It is true that the distinction between something which is an inseparable concomitant of interstate trade and something which precedes it may in some cases be difficult to draw. However the distinction is a real one and it is well recognized in the authorities. I find it impossible to distinguish the manufacture, production and importation of goods intended for use in interstate trade, commerce or intercourse on the one hand from the erection of a wireless telegraphy station also intended for such use on the other. The erection of the station, like the manufacture, production or importation of the goods, precedes the interstate trade, commerce or intercourse and is not a concomitant of it. The line to be drawn may be a fine one but the distinction is soundly drawn. It is well accepted that words of the Constitution which confer power should not be narrowly construed, but that does not mean that the words of s.92, which restrict power, should be given an expanded meaning with the consequence that activities which themselves do not answer the description of trade, commerce or intercourse among the States and are not inseparable concomitants thereof should be placed outside the capacity of any legislature to prohibit or restrict except in a manner that could be justified as regulatory. I conclude that a prohibition of the unauthorized establishment or erection of a station, if it stood alone in the Act, would not be rendered invalid by reason of s.92.

6. The Act, in so far as it prohibits the unauthorized maintenance or use of stations, cannot in my opinion be justified as merely regulatory. It is true that the transmission and receipt of messages by wireless telegraphy is an activity which requires regulation in the public interest. The radio frequency spectrum is a limited resource and a failure to regulate its use would render radio communications ineffective and would be likely to cause very serious loss and inconvenience, and possible danger to the lives of those who travel by air. However the Act gives the Minister an uncontrolled discretion to grant or refuse a licence to use or maintain a station. Such a statute cannot validly apply to interstate trade: see Ackroyd v. McKechnie [1986] HCA 43; (1986) 60 ALJR 551; 66 ALR 287 and cases there cited. We were referred to the regulations made under the Act; they impose obligations on the licensee but do not fetter the discretion of the Minister to grant or refuse a licence. The administrative procedures followed under the Act may well be entirely reasonable, but as was recently reaffirmed in Ackroyd v. McKechnie, "in considering the validity of a statute which is said to infringe s.92, the Court must consider the law according to its own terms, and the fact that the actual administration of the law may not be inconsistent with s.92 is immaterial". The fact that the decision of the Minister may be subject to judicial review does not alter the position; the discretion remains one that is not controlled by any certain and definite criteria.

7. The learned Solicitor-General relied on a dictum of their Lordships in James v. The Commonwealth [1936] HCA 32; (1936) 55 CLR 1, at pp 54-55; (1936) AC 578, at pp 625-626, where, speaking of a provision in the Post and Telegraph Act 1901-1923 (Cth) which forbade and made it an offence subject to specified exceptions to send or carry a letter for reward otherwise than by post, their Lordships said that "it is ... a limitation notoriously existing in ordinary usage in all modern civilized communities; it does not impede freedom of correspondence, but merely as it

were, canalizes its course just as 'free speech' is limited by well known rules of law", and went on to say, "very much the same is true of the Wireless Telegraphy Act 1905". Two comments may be made on this dictum. In the first place, there has been much refining of thought regarding the effect of s.92 since James v. The Commonwealth was decided. Secondly, whatever may be said of the Post and Telegraph Act, the Wireless Telegraphy Act did not merely canalize the course of communications made by wireless telegraphy. The Act contemplated that licences might be granted and the stated case shows that as at 31 December 1983 some 481,700 radio communication licences under the Act had been issued. The scheme of the Act is to give the Minister a very tight control of, inter alia, the maintenance and use of stations but it does not merely canalize messages sent by wireless telegraphy into a system which the Commonwealth has provided. In any case the dictum would not lead me to depart from the conclusion which both principle and authority requires.

8. The final question that remains is whether it is possible to sever the provisions which prohibit the unauthorized establishment and erection of stations (which by themselves would be valid) from the remaining provisions of the Act, some of which are invalid. This is a question on which I have experienced considerable difficulty. It will be observed that the prohibitions effected by s.6 all form part of one connected provision. The breach of any one of those prohibitions results in the forfeiture of any appliance erected, maintained or used in contravention of the Act: s.7(1). Section 6 may be regarded as simply giving effect to the provisions of s.4 which gives the Minister the exclusive privilege of establishing, erecting, maintaining and using stations for the purpose (inter alia) of transmitting messages by wireless telegraphy within Australia and receiving messages so transmitted. Nevertheless if the reference to maintenance and use is removed from s.6 the effect of the remaining provisions is exactly the same. Section 15A of the Acts Interpretation Act 1901 (Cth), as amended, establishes "a presumption in favour of the independence, one from another, of the various provisions of an enactment, to which effect should be given unless some positive indication of interdependence appears from the text, context, content or subject matter of the provisions": Fraser Henleins Pty. Ltd. v. Cody [1945] HCA 49; (1945) 70 CLR 100, at p 127; Australian National Airways Pty. Ltd. v. The Commonwealth [1945] HCA 41; (1945) 71 CLR 29, at p 92. Section 6 prohibits a number of activities which are separately described, and its operation and effect upon the activities to which it can validly apply (establishment and erection) would be unchanged if the reference to the other activities (maintenance and use) were excised; in these circumstances there is no difficulty in separating the good from the bad: see R. v. Poole; Ex parte Henry (No. 2) [1939] HCA 19; (1934) 61 CLR 634, at p 652; Pidoto v. Victoria [1943] HCA 37; (1943) 68 CLR 87, at pp 110-111. Moreover, there is nothing in the Act that indicates an intention that the whole of its provisions should fail if any part of them should fail. There would be nothing surprising in an intention to prohibit the unauthorized establishment and erection of a station, even if the prohibition of its use and maintenance should prove ineffective. In my opinion effect should be given to the presumption that the legislature intended to prohibit the unauthorized establishment or erection of stations even if it could not prohibit their maintenance or use in the manner in which it has attempted to do. Indeed the substantial purpose of the Act will be achieved, in most cases at least, if the prohibition of establishment and erection is valid.

9. For these reasons I have reached the conclusion that although the provisions of the Act which deal with maintenance and use are invalid those which deal with the establishment and erection of stations are valid. The conclusion that the Act is in part invalid is, of course, cold comfort to the defendant in the present case.

10. In the alternative, it was submitted by the defendant, in reliance on views expressed by Murphy J. in Buck v. Bavone [1976] HCA 24; (1976) 135 CLR 110, at p 137, and later cases, that it is possible to imply into the Constitution a guarantee of freedom of communication. This suggestion was a corollary of the theory that s.92 forbids only discriminatory fiscal burdens - a

theory which the authorities have consistently rejected and which finds no support in the words of the section itself. Section 92 leaves no room for an implication of the kind suggested.

11. I would answer the questions asked in the stated case as follows:

1. Does section 92 of the Constitution prevent the application of sections 4, 5, 6(1) and 7(1) of the Wireless Telegraphy Act 1905 or any of those sections to the actions of the defendant described in paragraphs 2 to 5 hereof?
deal with the maintenance or use of the station or appliance.

2. Does any implied constitutional guarantee prevent the application of sections 4, 5, 6(1) and 7(1) of the Wireless Telegraphy Act 1905 to the actions of the defendant described in paragraphs 2 to 5 hereof?

Answer: No.

MASON J.: Although it seemed that the stage had been set for the presentation of an argument which would invite a fundamental reconsideration of the interpretation of s.92 of the Constitution, the arguments actually presented in this case followed orthodox lines, except in so far as an endeavour was made to support Murphy J.'s fiscal burden theory. It was not submitted that the section should be read as a prohibition against the imposition on inter-state trade of burdens of a discriminatory kind, a view that in my opinion has much to commend it (see Finemores Transport Pty. Ltd. v. New South Wales [1978] HCA 16; (1978) 139 CLR 338, at p 352). Nor was it submitted that the section might be read as a guarantee of the freedom of inter-state trade as at the frontier, to mention another interpretation that gives effect to the view that s.92 is the expression of a free trade concept.

2. The history of border tariffs and protectionism in the Australian colonies before Federation, the position of the section in Ch. IV of the Constitution headed "Finance and Trade" and the fact that the section provided that the freedom was not to come into operation until the imposition of uniform duties of customs, all combine to suggest that the freedom is either limited to fiscal charges or that it embodies a wider notion of free trade (Zines, The High Court and the Constitution (1981) p.80). And the development in recent times of the law relating to the review of the exercise of administrative discretions diminishes, if it does not eliminate, what was thought to be a weakness in the free trade interpretation of the section expounded by Evatt J. in such cases as Peanut Board v. Rockhampton Harbour Board (1933) 48 CLR 266, and R. v. Vizzard; Ex parte Hill [1933] HCA 62; (1933) 50 CLR 30.

3. I have previously expressed the view that, notwithstanding the Privy Council's approval in James v. Cowan [1932] UKPCHCA 2; (1932) 47 CLR 386, at p 398, of Isaacs J.'s dissenting judgment in this Court [1930] HCA 48; ((1930) 43 CLR 386, at p.418), where his Honour said that s.92 conferred "a personal right attaching to the individual and not attaching to the goods", the section does not speak of the private right of the individual to engage in inter-state trade and commerce; instead it refers to that trade and commerce as an entire and total concept (Pilkington v. Frank Hammond Pty. Ltd. [1974] HCA 13; (1974) 131 CLR 124, at p 185). In that case and later in North Eastern Dairy Co. Ltd. v. Dairy Industry Authority of N.S.W. (1975) [1975] HCA 45; 134 CLR 559, at pp 614-615, I mentioned the predominant public character of the provision and that the protection which it gives to the rights of the individual is "incidental to and consequential upon the protection which is given to the entire concept of interstate trade".

4. True it is that this approach has been criticized by some members of the Court - see Uebergang v. Australian Wheat Board [1980] HCA 40; (1980) 145 CLR 266. However, this criticism depends very largely on acceptance of the proposition that the constitutional provision is a guarantee of individual rights in the light of the weight of authority which supports that view. To say that this interpretation seems to draw too heavily on the laissez-faire notions of political economy prevailing in 1900 is merely to express in different language what I have said elsewhere (North Eastern Dairy, at p.615).

5. But this in one sense is by the way. For present purposes what is important is the divergence of views expressed by the members of the Court in Uebergang. The judgments in that case demonstrate in convincing fashion that there is now no interpretation of s.92 that commands the acceptance of a majority of the Court. There is much to be said for the view that in this situation the Court has a responsibility to undertake a fundamental re-examination of the section. Nonetheless, if such a re-examination is to take place, it should be undertaken after we have had the benefit of comprehensive argument, an advantage which we have not enjoyed in this case.

6. If I were at liberty to adopt the interpretation of s.92 for which I have previously expressed a preference, or some similar interpretation, it is unlikely that I would conclude that the relevant sections of the Wireless Telegraphy Act 1905 (Cth) ("the Act") are invalid. The Act does not appear to impose discriminatory burdens on inter-state trade or to authorize the imposition of burdens of that kind. But this is to make no more than a passing comment because the conclusion which I have reached on the arguments actually presented is that the Act does not impose a burden on inter-state trade.

7. The defendant's case was that s.6(1)(a) of the Act imposes a direct burden on inter-state trade and commerce by prohibiting, except as authorized by or under the Act, the establishment, erection, maintenance or use of a station or appliance for the purpose of transmitting or receiving messages by means of wireless telegraphy. The prohibition contained in s.6(1)(b) falls into a similar category, according to the defendant, though it lacks some of the complications associated with s.6(1)(a). However, it has no direct application to the offences of erection and maintenance of a station with which the defendant has been charged.

8. Inter-state communication by means of wireless telegraphy is an example of inter-state trade, commerce or intercourse within the meaning of s.92 (Hospital Provident Fund Pty. Ltd. v. State of Victoria [1953] HCA 8; (1953) 87 CLR 1, at pp 14-15; H.C. Sleigh Ltd. v. South Australia (1977) 136 CLR 475, at p 507). The use of a station for the purpose of transmitting or receiving such communications is just such an example of inter-state trade, commerce or intercourse. But what of the erection or maintenance of a station for such a purpose? Can it be said that erection or maintenance in this context is an element of that trade, commerce or intercourse, so that a prohibition on the activity contravenes s.92? Or, alternatively, can it be said that even if erection or maintenance is not such an element, the prohibition is nonetheless a burden on that trade, commerce or intercourse?

9. The defendant relied on the so-called "criterion of operation", the principle enunciated by Dixon C.J. in Hospital Provident Fund, at pp.17-18, though in the light of the recent decisions and their reasoning, it can no longer be accepted as the principle which necessarily governs the interpretation of s.92. The criterion of operation was reiterated and applied in later cases and coupled with the doctrine of "circuitous device" - see for example, Wragg v. State of New South Wales [1953] HCA 34; (1953) 88 CLR 353; Grannall v. Marrickville Margarine Pty. Ltd. [1955] HCA 6; (1955) 93 CLR 55; Mansell v. Beck [1956] HCA 70; (1956) 95 CLR 550, at pp 564-565. Rather than set out the statement in Hospital Provident Fund, for convenience I quote the statement in the joint judgment of Dixon C.J. and Webb J. in Mansell v. Beck (at pp 564-565) because it incorporates a reference to the "circuitous device" doctrine on which the defendant also

relies. With reference to a law impairing the freedom assured by s.92, their Honours said:

> "To give a law that character it is not enough that there are or may be transactions of inter-State trade, commerce or intercourse that are adversely affected by the operation of the law. That may be a consequence of a law which is not concerned with any fact, matter or thing forming part of inter-State trade, commerce or intercourse but takes for its operation events or circumstances or conduct which of their own nature do not fall within that conception and do not constitute or necessarily include any essential element or attribute of trade, commerce and intercourse among the States. A law which imposes restrictions or burdens upon some description of act matter or thing not of its own nature forming part of inter-State trade, commerce or intercourse and does so because of some characteristic which is independent of any element entering into that conception is very unlikely to be found to destroy impair or detract from the freedom secured by s.92. It may conceivably do so if upon examination of the facts and scrutiny of its intended operation it appears that in spite of the prima-facie absence of any but an accidental interference with inter-State trade, commerce and intercourse the law is but a circuitous means of burdening, restricting or impeding operations of a kind which s.92 protects."

10. In the more recent cases beginning with North Eastern Dairy, the criterion of operation has steadily ceased to play a prominent part in the reasoning of the Court in decisions on s.92, partly because it attaches too much weight to the legal operation of a law and too little to its practical operation, thereby opening the way to circumvention, and partly because it leads to unsatisfactory results, notably by conferring an undue advantage on the inter-state trader as compared with the intra-state trader. In North Eastern Dairy the Court had regard to the practical operation of the law in concluding that it was discriminatory and in considering whether it could be sustained as a reasonable regulation of inter-state trade (pp.588-589, 606-607, 622).

11. What is meant by an "essential element or attribute" of trade, commerce and intercourse among the States in the passage just quoted is not altogether clear. What is clear is that, in conformity with the formalistic legal reasoning that has hitherto dominated the interpretation of the section, a distinction has to be drawn between essential and incidental attributes of that trade, commerce and intercourse, just as a distinction has to be drawn between the proscribed burdens which are direct and immediate, and those which are indirect, consequential and remote and are therefore not proscribed. When the section is so understood, the area of protection given by s.92 to inter-state trade, commerce and intercourse is significantly less than the area within which the legislative power under s.51(i) may be exercised. This difference in content has been ascribed to the presence of the words "with respect to" in the constitutional expression of the legislative power.

12. The importance of the difference is illustrated by the circumstance that, although this Court has held that the legislative power with respect to overseas trade and commerce (s.51(i)) extends to "slaughter for export" (O'Sullivan v. Noarlunga Meat Ltd. [1954] HCA 29; (1954) 92 CLR 565, at pp 596-597), the Court has consistently refused to regard production for inter-state trade as falling within the protection of s.92 (Grannall; Beal v. Marrickville Margarine Pty. Ltd. [1966] HCA 9; (1966) 114 CLR 283; Bartter's Farms Pty. Ltd. v. Todd [1978] HCA 36; (1978) 139 CLR 499). In Grannall the Court pointed out (at pp 71-72) that, though production within, or importation into, the Commonwealth is an essential preliminary condition to inter-state trade in goods, this was not a reason for extending the protection given by s.92 to activities antecedent to the commencement of that trade. These decisions proceed on the footing that there can be no trade in goods until they come into existence. See Australian Coarse Grains Pool Pty. Ltd. v. Barley Marketing Board (No. 2) [1985] HCA 38; (1985) 59 ALJR 516, at p 527; [1985] HCA 38; 59 ALR 641, at p 659. Consistently with these decisions the imposition of a duty on the keeping of hens used in the production of eggs for inter-state trade was held not to be a burden on that trade (Damjanovic & Sons Pty. Ltd. v. The Commonwealth [1968] HCA 42; (1968) 117 CLR 390). The point is that neither production, nor an activity essential to production, is an essential attribute of inter-state trade.

13. Subsequently, in accordance with what had been said in Grannall, the Court held that prohibition of the importation into Australia of aircraft to be used for the purpose of inter-state air transportation did not contravene s.92 because importation is antecedent to the commencement of the relevant inter-state trade (Reg. v. Anderson; Ex parte Ipec-Air Pty. Ltd. [1965] HCA 27; (1965) 113 CLR 177; Ansett Transport Industries (Operations) Pty. Ltd. v. The Commonwealth [1977] HCA 71; (1977) 139 CLR 54). For my part I consider that importation stands outside the protection given by s.92 on the independent ground that the Constitution confers upon the Commonwealth Parliament an unqualified power and control over exports and imports as well as customs duties (Coarse Grains, at p.527; p.660 of ALR). But this was not an element in the reasoning in Ipec-Air.

14. Importation, like production, is not an essential attribute of inter-state trade, commerce or intercourse. This is because, in the context of the criterion of operation, an essential attribute is one which gives the relevant transaction its character as inter-state trade, commerce or intercourse (Hughes and Vale Pty. Ltd. v. The State of New South Wales (No. 2) [1955] HCA 28; (1955) 93 CLR 127, at p 162). The distinction is between something which is of the essence of that trade, commerce or intercourse, e.g., a sale of goods, a communication, and something which is not of the essence, e.g., an antecedent or preparatory act or activity.

15. This brief survey of the decisions and the reasoning on which they are based provides no support at all for an argument that an act or activity antecedent to the commencement of inter-state trade, even if it be a sine qua non of that trade, is entitled to the constitutional protection. Nor does the survey sustain the view that the erection of a station for the purpose of transmitting and receiving inter-state communications by wireless telegraphy is anything but an antecedent activity preparatory to the commencement of that trade. If, as has been held, the production of goods with which a person intends to engage in inter-state trade stands outside the constitutional protection, so must the erection of the station in the present case. It is one step more remote from that trade, for the simple reason that it involves the installation of the structure and the equipment that enables the inter-state signal to be transmitted and received. In the language of the cases the erection of the station is not an attribute of inter-state trade, let alone an "essential attribute" of it. A similar comment may be made about maintaining the station, though it is not quite so remote. In the context of s.6(1)(a) the word "maintain" means "keep in good order ready for use".

16. The defendant seeks to overcome this problem by relying on the circuitous device element in the statement of principles quoted from Mansell v. Beck, in order to attack the prohibitions against

erection and maintenance, asserting that they constitute a circuitous or devious means of barring or burdening the sending and receipt of inter-state communications. The strength of this aspect of the defendant's case is that the prohibition against erection and maintenance of a station in s.6(1)(a) is not expressed as an unqualified prohibition. It is a prohibition against erecting or maintaining a station or appliance for the purpose of transmitting and receiving messages by wireless telegraphy, that is for a purpose which includes essential attributes of inter-state trade, commerce and intercourse. The very form of the prohibition suggests that its only purpose is to forbid inter-state communication by means of wireless telegraphy except in accordance with the statutory scheme. Support for the view that this is the real and substantial purpose of s.6(1) is provided by s.6(1)(b) which prohibits the transmission or receipt of messages by wireless telegraphy.

17. On the other hand the reference to purpose loses much of the significance which it might otherwise have once it is seen that the reference to purpose is largely descriptive or adjectival. It describes and identifies the stations and the appliances that are the subject of the prohibition in s.6(1)(a) in much the same way as if they had been loosely described as "any wireless telegraphy station, or appliance". So understood sub-s.(1)(a) does no more than describe and identify the stations and the appliances which are the subject of the prohibition.

18. But even if this were not so, the "circuitous device" doctrine does not come to the defendant's aid here. The concept put forward was an addendum to the criterion of operation because that doctrine, with its focus on the legal, rather than on the practical, operation of a law, was vulnerable to circumvention. But the concept was not developed in such a way that it became a doctrine in its own right, grounded in the practical operation of a law, identifying practical or economic consequences as impediments to inter-state trade. As I shall show by reference to the decided cases, the concept seems to have been virtually devoid of content. No law has ever been struck down on the expressed ground that it burdened inter-state trade by means of a circuitous device, though it has been suggested that Vacuum Oil Co. Pty. Ltd. v. Queensland [1934] HCA 5; (1934) 51 CLR 108; Fish Board v. Paradiso [1956] HCA 60; (1956) 95 CLR 443, and Wilcox Mofflin Ltd. v. State of N.S.W. [1952] HCA 17; (1952) 85 CLR 488, may be capable of explanation on this footing.

19. The concept added little, if anything, to the criterion of operation because the decisions in the cases seem to proceed on the footing that if, applying the criterion of operation, no contravention of the Constitution by the statute was shown, that was the end of the matter. If all the statute did was to impose a prohibition, restriction or burden on a step antecedent or preparatory to the commencement of inter-state trade there was no contravention of s.92, even if there was a statutory or executive purpose of interfering with trade. It seems that, in conformity with its general philosophy or policy, the Court was not prepared to take the circuitous device concept to the point of examining and pronouncing upon the practical and economic consequences of a statute. Be this as it may, the combination of prohibition against an antecedent or preparatory act with a purpose of interfering with inter-state trade does not amount to a circuitous device. The difficulty, indeed the impossibility, of bringing the present case within the concept is illustrated by the comments of Dixon C.J., McTiernan, Webb and Kitto JJ. in Grannall (at p.78). In discussing the concept their Honours were at pains to point out that they were referring to a possible situation in which an essential attribute of inter-state trade "is made the subject of the operation of a law which by reference to it or in consequence of it imposes" circuitously, deviously or covertly some restriction or burden or liability. They went on to say:

> "But generally speaking, it will be quite otherwise if the thing with reference to or in consequence of which the law operates or which it restricts or

> burdens is no part of inter-State trade and commerce and in itself supplies no element or attribute essential to the conception. It will not be enough that it affects something which, because it is a sine qua non to the existence of some subject of the freedom which s.92 guarantees, has a consequential effect on what might otherwise have been done in inter-State trade."

20. Their Honours then went on to consider an argument that the motive, purpose or object of the legislative restriction on the production of margarine was to inhibit or interfere with the inter-state trade in margarine. After indicating that it was immaterial that the legislators advert to a particular consequence or desire it to occur, they remarked (at p.79):

> "Nor can it matter whether the purpose or motive is inferred from circumstance or from the statute or, indeed, is stated therein in terms."

21. Their Honours then gave a number of examples of the defendant's argument, each example leading to consequences which were unacceptable. In dealing with each example their Honours made it clear that a legislative prohibition, restriction or burden on an activity preparatory to the commencement of inter-state trade, or on something to be used in that trade, with the purpose of interfering with that trade or preventing the thing from being used in that trade, would not contravene s.92. Their Honours said (at p.79):

> "The defendant company's argument in the present case would, for example, appear to mean that there could be no effective prohibition of the importation of goods into Australia if they were merchandise intended to be bought and sold in inter-State trade. A customs tariff could not effectively be used to restrict importation if its purpose and operation were to prevent the dutiable goods going into inter-State trade. Indeed consistently with the argument, if it possessed any foundation, it is not easy to see how the Bank Notes Tax Act 1910, which taxed the bank notes issued by trading banks out of existence, could be justified. For it accomplished the purpose of forcing them out of circulation whether in inter-State or intra-State commerce."

22. In Bartter's Farms the validity of a statute which limited the number of hens which might be kept for the production of eggs was upheld, notwithstanding that the Court was prepared to assume its purpose may have been to reduce the inter-state trade in eggs - see pp.505, 509, 516. And in Ipec-Air the Court unanimously held that the Director-General's discretionary refusal to grant permission to import aircraft was not obnoxious to s.92, even though the refusal seems to have been actuated by the motive and purpose of excluding the applicant from engaging in inter-

state air transportation with those aircraft. The reasoning to this conclusion was based on an acceptance of the principles in Grannall; the reasoning did not depend in any way on the special character of the Commonwealth's powers with respect to importation and customs duties.

23. These decisions from Grannall onwards are inconsistent with the defendant's contention that the prohibitions in s.6(1)(a) amount to a prohibition against inter-state communications by means of a circuitous device. So much was made clear by Kitto J. in Samuels v. Readers' Digest Association Pty. Ltd. [1969] HCA 6; (1969) 120 CLR 1, at p 30, where he pointed out that the Margarine Cases, though instances of manufacture, were not decided by reference to a consideration applying exclusively to manufacture. Those cases and the subsequent decisions which followed from them in a direct line of descent rested on the formal distinction between inter-state trade, commerce and intercourse and its essential attributes on the one hand, and on the other hand acts, transactions and activities which are antecedent, preparatory or collateral and affect that trade, commerce and intercourse as a matter only of economic or practical consequence.

24. The defendant sought to derive support from an observation in Antill Ranger & Co. Pty. Ltd. v. Commissioner for Motor Transport [1955] HCA 25; (1955) 93 CLR 83, another case which, it has been suggested, might be regarded as an instance of a circuitous device, though the judgments give no explicit support to the suggestion. There the plaintiff succeeded in his action to recover illegal road charges paid under protest, though the State statute barred the right to recover, the charges having been levied in contravention of s.92. Dixon C.J., McTiernan, Williams, Webb, Kitto and Taylor JJ. said with reference to s.92 (at p.101):

> "In protecting the freedom of individuals to trade across State lines it invalidates any law purporting to confer any anterior authority to s him doing so."

25. Plainly enough their Honours were speaking of a pre-existing authority to stop a person from engaging in an act or transaction of inter-state trade, i.e., transporting goods inter-state by road. They were not speaking of an authority to stop a person from engaging in an activity that was anterior or preparatory to engaging in inter-state trade.

26. The question then is whether, assuming that the prohibition against use of a station or appliance in s.6(1)(a) is invalid because it contravenes s.92, can the remainder of the provision be severed? For substantially the same reasons as those advanced by the Chief Justice to support his conclusion that the provisions dealing with establishment and erection may be severed from those dealing with maintenance and use, I conclude that the remainder of s.6(1)(a) can be severed from the prohibition against use. Severance does not give the remaining provisions a different operation. And I am unable to detect any indication that the operation of each of the individual prohibitions in s.6(1)(a) was intended to be conditional on the operation of all the others. Indeed, it is not unlikely that Parliament intended to control each of the activities mentioned in the subsection to the extent that it had power to do so.

27. There was an alternative argument put by the defendant, based on the judgment of Murphy J. in Buck v. Bavone [1976] HCA 24; (1976) 135 CLR 110, at p 137, that there is to be implied in the Constitution a new set of freedoms which include a guarantee of freedom of communication. It is sufficient to say that I cannot find any basis for implying a new s.92A into the Constitution.

28. In the result I would answer the questions asked as follows:

(1) Yes, but only in so far as those sections relate to the use of the station or appliance.

(2) No.

MURPHY J.: The defendant was charged with two offences under s.6(1)(a) of the Wireless Telegraphy Act 1905 (Cth) ("the Act") which states that no unauthorized person shall "establish, erect, maintain, or use any station or appliance for the purpose of transmitting or receiving messages by means of wireless telegraphy ...". The two charges were concerned with the erection of a station and the maintenance of a station.

2. By s.4 of the Act the Minister has the exclusive privilege of establishing, erecting, maintaining and using stations for the purpose of transmitting and receiving messages. Section 5 gives the Minister an unfettered discretion in the granting of licences to operate transmitting stations. Section 7 states that appliances erected, maintained or used without authorization shall be forfeited to the Commonwealth.

3. The defendant, without obtaining a licence, erected, maintained and used a station at Somersby in New South Wales for the purpose of receiving and transmitting messages interstate by means of wireless telegraphy. This station was a link in a chain of the defendant's stations which transmitted messages between the defendant's stations in Sydney and Brisbane.

4. The case stated raises two questions:

(1) Does section 92 of the Constitution prevent the application of sections 4, 5, 6(1) and 7(1) of the Wireless Telegraphy Act 1905 or any of those sections to the actions of the defendant described in paragraphs 2 to 5 hereof?

(2) Does any implied constitutional guarantee prevent the application of sections 4, 5, 6(1) and 7(1) of the Wireless Telegraphy Act 1905 to the actions of the defendant described in paragraphs 2 to 5 hereof?

Seeking the opinion of the Court by a stated case presenting separate questions causes a difficulty. For example, a majority of justices may answer No to each question, yet a majority may be of opinion either s.92 or an implied guarantee prevents the application of the sections to the defendant. The problem of framing the questions so that there is no possibility of a distorted result was agitated in the preliminary proceedings in Uebergang v. Australian Wheat Board [1980] HCA 40; (1980) 145 CLR 266 (see Transcript of Proceedings 20 August 1979, pp 15, 21-23; 6 February 1980, pp.23-26).

5. An example of where the adoption of separate questions would have distorted the ultimate result is Queensland v. The Commonwealth [1977] HCA 60; (1977) 139 CLR 585 (The Second Territory Senators Case). There, a majority was in favour of the view that if a previous decision was wrong it should not be followed and a different majority was in favour of the view that the previous decision was wrong. Had these questions been asked separately, and the logical result of those answers been treated as decisive, the previous decision would have been overturned even though a majority of the Court was in favour of adhering to the previous decision.

6. A civil or criminal appeal also provides a useful illustration of this point. If an appeal is made on two or more grounds, ordinarily the reasons of each justice are for or against allowance or dismissal of the appeal. If each ground of appeal was decided as a separate question, the appellant may not have a majority on either ground but a majority of the Court, for disparate reasons, may consider that the appeal should be allowed. As I understand it, the practice has been to refuse to poll the Court on separate issues. The Court bases its order on the whole of the issues. Here the real question is whether the defendant is entitled to protection either under s.92 or under an implied guarantee.

(1) S.92 of the Constitution

7. The interstate transmission of television messages between the defendant's stations comes within the phrase "trade, commerce, and intercourse among the States" contained in s.92. Equally clearly, the Act imposes no tax or other fiscal burden discriminating between the States. Section 92 is, therefore, not applicable for the reasons I gave in Buck v. Bavone [1976] HCA 24; (1976) 135 CLR 110 and a number of later cases. (See H.C. Sleigh Ltd v. South Australia (1977) 136 CLR 475; Finemores Transport Pty Ltd v. New South Wales [1978] HCA 16; (1978) 139 CLR 338; Boyd v. Carah Coaches Pty Ltd [1979] HCA 56; (1979) 145 CLR 78 and Uebergang's Case).

(2) Implied Constitutional Guarantee

8. The Australian Constitution must be interpreted against a background of responsible government and democratic principles generally. Implications should be made which would promote such principles rather than those of arbitrary government and tyranny. In The Commonwealth v. Kreglinger & Fernau Ltd [1926] HCA 8; (1926) 37 CLR 393, this point is made by Justice Isaacs:

> "Constitutions made, not for a single occasion, but for the continued life and progress of the community may and, indeed, must be affected in their general meaning and effect by what Lord Watson in Cooper v. Stuart calls 'the silent operation of constitutional principles.' 'Responsible government,' ... is part of the fabric on which the written words of the Constitution are superimposed." (p.413)

9. In Australian Communist Party v. The Commonwealth [1951] HCA 5; (1951) 83 CLR 1, Justice Dixon said:

> "...it is government under the Constitution and that is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption." (p.193)

10. Other "traditional conceptions ... simply assumed" include, in my view, a prohibition on slavery or serfdom (Reg. v. Director-General of Social Welfare (Vict.); Ex parte Henry [1975] HCA 62; (1975) 133 CLR 369, 388), a prohibition on the infliction of cruel and unusual punishments (Sillery v. The Queen [1981] HCA 34; (1981) 55 ALJR 509, 513; [1981] HCA 34; 35 ALR 227, 233-234) and a prohibition upon persons being tried and declared guilty of criminal offences by non-judicial bodies (Victoria v. Australian Building Construction Employees' and Builders Labourers' Federation [1982] HCA 31; (1982) 152 CLR 25, 109).

11. The Constitution also contains implied guarantees of freedom of speech and other communications and freedom of movement not only between the States and the States and the territories but in and between every part of the Commonwealth. Such freedoms are fundamental to a democratic society. They are necessary for the proper operation of the system of representative government at the federal level. They are also necessary for the proper operation of the Constitutions of the States (which derive their authority from Chapter V of the Constitution). They are a necessary corollary of the concept of the Commonwealth of Australia. The implication is not merely for the protection of individual freedom; it also serves a fundamental societal or public interest. I have referred to this implied guarantee in a number of cases (Buck v. Bavone; Ansett Transport Industries (Operations) Pty Ltd v. The Commonwealth [1977] HCA 71; (1977) 139 CLR 54 and McGraw-Hinds (Aust.) Pty Ltd v. Smith [1979] HCA 19; (1979) 144 CLR 633).

12. Many countries have explicitly stated these freedoms in their constitutional **Bills of Rights** (see Antieau, Adjudicating Constitutional Issues (1985), p.167). In others this constitutional value has been recognized by many courts and judges (see Antieau, pp.174-177).

13. In the United States its Supreme Court has often recognized implications regarding freedom of movement or communication (see Crandall v. State of Nevada [1867] USSC 15; (1867) 6 Wall 35, 44; Slaughter-House Cases (1872) 16 Wall 36, 79; Twining v. New Jersey [1908] USSC 145; (1908) 211 US 78, 97; Edwards v. California [1941] USSC 146; (1941) 314 US 160, 178; Shapiro, Commissioner of Welfare of Connecticut v. Thompson [1969] USSC 85; (1969) 394 US 618, 629-631 and Zobel v. Williams, Commissioner of Revenue of Alaska [1982] USSC 119; (1982) 457 US 55, 66-67). In United States v. Guest [1966] USSC 63; (1966) 383 US 745, 757-758, the Supreme Court said: "The constitutional right to travel from one State to another ... occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized. ...that right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created." (My emphasis.)

14. In Australia, references to such implied freedoms are to be found in R. v. Smithers; Ex parte Benson [1912] HCA 92; (1912) 16 CLR 99. The Court held invalid s.3 of the Influx of Criminals Prevention Act 1903 (NSW) which prevented convicted criminals from entering New South Wales within three years following the termination of a period of imprisonment of a year or longer for a crime committed in another State. Chief Justice Griffith and Justice Barton based their decisions on implications drawn from the creation of the Commonwealth. Justice Barton stated "... the creation of a federal union with one government and one legislature in respect of national affairs assures to every free citizen the right of access to the institutions, and of due participation in the activities of the nation" (pp.109-110). Justices Isaacs and Higgins based their decision on an infringement of s.92 of the Constitution but both Chief Justice Griffith and Justice Barton expressly disclaimed any reliance on that section.

15. In the context of freedom of movement into and out of the A.C.T., Chief Justice Dixon asserted in Pioneer Express Pty Ltd v. Hotchkiss [1958] HCA 45; (1958) 101 CLR 536 that:

> "No one would wish to deny that the constitutional place of the Capital Territory in the federal system of government and the provision in the Constitution relating to it necessarily imply the most complete immunity from State interference with all that is involved in its existence as the centre of national government, and certainly that means an absence of State legislative power to forbid restrain or impede access to it." (p.550)

In that case, references were made to the wide implications drawn in Crandall v. Nevada.

16. In relation to the drawing of implications generally, Justice Dixon in Australian National Airways Pty Ltd v. The Commonwealth [1945] HCA 41; (1945) 71 CLR 29 said:

> "We should avoid pedantic and narrow constructions in dealing with an instrument of government and I do not see why we should be fearful about making implications." (p.85)

Older cases recognized implications in the nature of guarantees or prohibitions (for example, the reserved powers of the States) some of which have been overturned.

17. Recent cases have recognized implications in the absence of any explicit mention in the Constitution (see Victoria v. The Commonwealth [1975] HCA 52; (1975) 134 CLR 338; New South Wales v. The Commonwealth [1975] HCA 58; (1975) 135 CLR 337 and The Commonwealth v. Tasmania [1983] HCA 21; (1983) 57 ALJR 450; 46 ALR 625). Western Australia v. The Commonwealth [1975] HCA 46; (1975) 134 CLR 201 (The First Territory Senators Case) is an illustration of conflicting implications in which that favouring democracy prevailed over that of federalism.

18. The implied freedom of communication is not absolute but is subject to necessary regulation. The question arises whether the statutory scheme under the Act conforms to the concept of necessary regulation.

19. The parties accepted that if there were an implied guarantee of freedom of communication, the test of whether particular regulation was compatible with that freedom should be judged by tests analogous to those of reasonable regulation presently applied to s.92.

20. The number of airwave frequencies, despite constant increases with advances in technology, is a limited resource which must be rationed in an orderly way. In the United States, licensing schemes to regulate radio communication do not necessarily violate the First Amendment guarantee of free speech. (See National Broadcasting Co. v. United States [1943] USSC 100; (1943) 319 US 190, 226-227.)

21. The defendant readily and rightly conceded that there is a need to regulate in this area but contended that the legislative scheme was unreasonable in that the Act establishes a monopoly over communication facilities with an unfettered discretion in the granting of licences residing in the Minister.

22. The informant (and the Commonwealth) contended otherwise. First, that the very nature of communications systems justified such a system. Paragraphs 9 and 10 of the case set out the need for a controlled and ordered system and the dangers inherent in allowing complete freedom.

However, it is one thing to say that regulation is needed; it is another to say that an unfettered discretion to issue or decline to issue licences is the only, or only reasonable, way to achieve it. The provisions of the Radiocommunications Act 1983 (Cth), which replaced the Act, show that it is possible to regulate in other, more appropriate, ways.

23. Second, it was submitted that the question of validity should not be determined by the possible legislative reach of the Act but rather by reference to the way it has been administered. There were, in fact, almost 500,000 licences on issue as at 31 December 1983 and the present defendant held 109. There has been no suggestion that the issue of licences has been made on an arbitrary or capricious basis. Nonetheless, the potential reach of the Act is such that there is nothing to stop the Minister from taking into account any consideration in the decision as to whether or not to grant a licence. For example, authorization could be refused simply because it may affect the commercial viability of another licenceholder in this area. Such a decision would not be consistent with the implied freedom of communication.

24. A related argument in favour of validity was that the Minister's decision could be reviewed under the Administrative Decisions (Judicial Review) Act 1977 (Cth). Once again, this approach looks at the Act in operation rather than its potential reach. In relation to validity under s.92 it has been said by this Court that "administrative practice is not the measure of the legal operation of the regulations and it is with the latter alone that we are concerned" (Collier Garland Ltd v. Hotchkiss [1957] HCA 40; (1957) 97 CLR 475, 486). A similar approach should be adopted when considering whether a statute infringes an implied freedom.

25. The defendant is entitled to the protection of the implied freedom. The Act does not incorporate the features of necessary regulation consistent with this implied freedom. It would not affect my view if the defendant's operation were wholly intrastate.

26. Returning to the stated case, if the question were in the form "Does s.92 or any implied constitutional guarantee prevent the application of the sections of the Act to the actions of the defendant?", I would answer yes. Because I consider that the questions should not be answered separately, I would answer:

(1) Not answered

(2) Yes.

WILSON J.: The principal question raised for decision by this stated case is whether s.92 of the Constitution prevents the application of ss.4, 5, 6(1) and 7(1) of the Wireless Telegraphy Act 1905 (Cth) as amended ("the Act"), or any of those sections, to the actions of the defendant described in the case.

2. The material facts may be stated briefly. They are taken from pars 1 to 6 of the case. Between 11 December 1981 and 30 May 1983 the defendant, upon land occupied by it at Somersby in New South Wales, erected, maintained and used a station ("the station") for the purpose of receiving and transmitting messages by means of wireless telegraphy. It did so without the authority of a licence granted in accordance with s.5 of the Act. At all relevant times the station was erected and maintained by the defendant for the purpose of serving as a link in a chain of links for the transmission of messages by means of wireless telegraphy between TCN Channel Nine in Sydney in New South Wales and QTQ Channel Nine in Brisbane in Queensland.

3. The usual means for transmitting television messages between Sydney and Brisbane were the links, known as Telecom bearers, provided by the Australian Telecommunications Commission.

In the period during which the defendant used the station it also made use of the Telecom bearers, but they were not always available.

4. Technological considerations touching the transmission and reception of messages from the station are summarized in the case as follows:

> "7. Transmission and reception of the said messages from the station involved the utilization of the radio frequency spectrum. The radio frequency spectrum comprises a continuous range of electromagnetic radiations which vary from the longest waves, just above the frequency of human hearing, to decimillimetric waves oscillating thousands of millions of times per second. Radio waves are labelled according to their frequency measured in hertz (Hz). They range from very low frequencies (VLF), to low frequencies (LF), medium frequencies (MF), high frequencies (HF), very high frequencies (VHF), ultra-high frequencies (UHF), super high frequencies (SHF) and extremely high frequencies (EHF). Modern technology allows transmission, reception and separation of thousands of radio services operating simultaneously in the spectrum. The links used by the defendant operated in the SHF band of frequencies.
>
> 8. Radio transmitters can be made to emit waves of a particular frequency and a radio receiver can be tuned to select waves of that frequency.
>
> 9. The radio frequency spectrum is a limited natural resource of fundamental importance to communications. It is limited by several major factors such as the total of useable frequencies, the different propagation characteristics of bands of frequencies and the technology employed in using it. Many types of communication can be economically and effectively conducted only on particular frequency bands. The spectrum must therefore be segmented to allow space in the various bands appropriate to the particular type of use. Some bands are useful for many uses and the different types of services then need to be carefully separated. Spectrum use has increased as improved technology has become available, allowing a narrower band of frequencies to be used for different services.

10. Without effective radio frequency management, radio communications, including radio navigation, satellite communications, radar, television and radio broadcasting would be ineffective. These services would interfere with each other and there would be interference between services in the same category. Without a controlled and ordered system based on complex engineering practices, the widespread use of the spectrum would be impossible. The effects would range from inconvenience to financial loss and even loss of life."

5. The material provisions of the Act are as follows:

"2. (1) In this Act -

...

'Wireless telegraphy' includes all systems of transmitting and receiving telegraphic or telephonic messages by means of electricity without a continuous metallic connexion between the transmitter and the receiver.

...

4. The Minister shall have the exclusive privilege of establishing, erecting, maintaining, and using stations and appliances for the purpose of -

(a) transmitting messages by wireless telegraphy within Australia, and receiving messages so transmitted ...

5. Licences to establish, erect, maintain, or use stations and appliances for the purpose of transmitting or receiving messages by means of wireless telegraphy may be granted by the Minister for such terms and on such conditions and on payment of such fees as are prescribed.

6. (1) Except as authorized by or under this Act, no person shall -

(a) establish, 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: One thousand dollars, or imprisonment for Five years.
>
> ...
>
> 7. (1) All appliances erected, maintained, or used in contravention of this Act or the regulations, for the purpose of transmitting or receiving messages by means of wireless telegraphy, shall be forfeited to the Commonwealth".

6. The case outlines administrative procedures relating to the issue of licences under the Act. The policy was that, subject to Ministerial direction, an applicant for a radiocommunications service would be licensed, subject to appropriate technical and operating conditions, except where frequencies are not available or there is a potential detriment to the radio frequency spectrum or there is a potential detriment to the public interest in the sense that public safety is prejudiced or manifestly unlawful activities are facilitated. As at 31 December 1983 some 481,700 licences were on issue of which some 137,000 were held in New South Wales. The defendant held about 109 licences.

7. In June 1983 the defendant was prosecuted for two alleged breaches of s.6(1)(a) of the Act, one for erecting and the other for maintaining the station, in each case without authorization and for the purpose of transmitting or receiving messages by means of wireless telegraphy. After evidence was taken in April 1984 the proceedings were removed into this Court on an application made in accordance with s.40(1) of the Judiciary Act 1903 (Cth), as amended.

8. It is to be noted that the issues requiring determination in the case are now of limited significance. The Act was repealed on 27 August 1985, being replaced by the more elaborate provisions of the Radiocommunications Act 1983 (Cth), as amended.

9. The central submission advanced for the defendant by Mr Hughes may be shortly stated. It is that s.6(1)(a) selects as the criterion of its operation the formation by a person of a purpose to engage in trade, commerce or intercourse. The paragraph prohibits, save as authorized by or under the Act, the establishment, erection, maintenance or use of any station or appliance for the purpose of transmitting or receiving messages by means of wireless telegraphy. It is common ground that the transmission or reception of messages between Sydney and Brisbane by means of wireless telegraphy itself constitutes trade, commerce or intercourse between the States. The first limb of Mr Hughes' submission then is that the establishment, erection, maintenance and use of the station for the purpose of engaging in that trade, commerce or intercourse forms

> "... an essential attribute of that conception, essential in the sense that without it you cannot bring into being that particular example of trade commerce or intercourse among the States ...".

(per Dixon C.J. in Hospital Provident Fund Pty. Ltd. v. State of Victoria [1953] HCA 8; (1953) 87 CLR 1, at p 17). Mr Hughes acknowledged that later decisions of this Court reflected a more expansive view of the phrase "trade, commerce, and intercourse among the States" in s.92 (North Eastern Dairy Co. Ltd. v. Dairy Industry Authority of N.S.W. [1975] HCA 45; (1975) 134 CLR

559; Australian Coarse Grains Pool Pty. Ltd. v. Barley Marketing Board (No. 2) [1985] HCA 38; (1985) 59 ALJR 516; 59 ALR 641) but found the narrower formulation postulated by Dixon C.J. in Hospital Provident to be a convenient and accurate description of the present case. The second limb of the argument is that to prohibit the establishment, erection, maintenance or use of the station for the stated purpose, save under the authority of a licence which may be granted or refused by the Minister in his absolute discretion, is to create a burden which s.92 will not permit.

10. Issue was joined on both limbs of Mr Hughes' submission by the informant, supported by the intervening Attorneys-General for the Commonwealth and New South Wales. In relation to the first limb, it was argued that neither the erection nor the maintenance of the station enjoyed the protection of s.92 because in each case the activity was anterior or antecedent to the interstate trade, commerce or intercourse. Reliance was placed on earlier decisions of this Court relating to the manufacture, production and importation of goods intended for interstate trade: see Grannall v. Marrickville Margarine Pty. Ltd. [1955] HCA 6; (1955) 93 CLR 55; Beal v. Marrickville Margarine Pty. Ltd. [1966] HCA 9; (1966) 114 CLR 283; Damjanovic & Sons Pty. Ltd. v. The Commonwealth [1968] HCA 42; [1968] HCA 42; (1968) 117 CLR 390; Bartter's Farms Pty. Ltd. v. Todd [1978] HCA 36; (1978) 139 CLR 499; Reg. v. Anderson; Ex parte Ipec-Air Pty. Ltd. [1965] HCA 27; (1965) 113 CLR 177; Ansett Transport Industries (Operations) Pty. Ltd. v. The Commonwealth [1977] HCA 71; (1977) 139 CLR 54.

11. With respect to the second limb of the defendant's argument, the learned Solicitor-General for the Commonwealth, supported by counsel for the informant and the learned Solicitor-General for New South Wales, advanced a number of disparate arguments in support of a submission that the licensing system prescribed by the Act is compatible with the freedom guaranteed by s.92.

12. The first limb of the argument is capable of raising substantial questions touching the operation of s.92. However, I do not find it necessary to enter upon a consideration of those questions because, in my view, the proper construction of s.6(1)(a) of the Act serves to distinguish the cases relied upon by the informant and the interveners and to determine the matter in favour of the defendant. I say that because of the emphasis that s.6(1) expressly places upon the stated purpose. This is a feature which distinguishes the law under consideration in this case from the legislation which formed the subject of Grannall's Case and the cases which followed in its train. Paragraph (b) of the subsection forbids the transmission or reception, without authority, of messages by wireless telegraphy while par.(a) provides that without authority no person shall establish, erect, maintain, or use any station or appliance for that purpose. The subsection is concerned solely with the stated purpose, namely, the actual trade, commerce or intercourse encompassed in the transmission and reception of messages. While par.(b) is addressed expressly to that subject, par.(a) deals comprehensively with the means by which the activity is carried on. Those means range from the establishment and erection of the facility to its maintenance and use for the central purpose. The emphasis upon that central purpose has the effect of binding into a unity the activities that are described by the verbs contained in par.(a). They are the means by which the trade, commerce or intercourse is actually carried on, that is to say by which the purpose is achieved. It follows, in my opinion, that they are inseverable from each other. The result is that if any one of those activities attracts the freedom of which s.92 speaks, then that freedom extends to each of the other activities. To ban, save under licence, the use of a station for the purpose of engaging in interstate trade, commerce or intercourse would clearly offend s.92 unless the impediment was no more than regulatory in nature and compatible with the freedom envisaged by the Constitution. It would attribute a capricious intention to the Parliament to construe the paragraph as inoperative in its purported application to the use of a station for the purpose of engaging in interstate trade, commerce or intercourse but fully operative in its application to the establishment, erection or maintenance of the facility for that same purpose. In such a case, s.15A of the Acts Interpretation Act 1901 (Cth), as amended, could not avail the informant. The manner in which that section operates is fully discussed in Strickland v. Rocla

Concrete Pipes Ltd. (1971) 124 CLR 468, at pp 492-493, 502-506, 513, 515-520, 526-528. The intention of the legislature, determined in the light of its provisions read as including s.15A, is to prevail.

13. This construction of s.6(1)(a) gains support from the fact that the legislative power of the Parliament to enact the Act is derived from s.51(v) of the Constitution. It is a power to make laws with respect to services, namely postal, telegraphic, telephonic, and other like services. If the use of a facility for the purpose of providing a service is not controlled by the legislature, then it is difficult to find a sufficient nexus to the power to sustain a prohibition on the establishment, erection or maintenance of a station, as distinct from its use, for the provision of a service.

14. I would therefore sustain the first limb of Mr Hughes' argument and turn to a consideration of the submissions of the Solicitor-General for the Commonwealth directed to showing that the licensing system imposed by the Act was no more than regulatory. First, it was said that in construing s.92 regard should be had to the special place that systems of communication held, and still hold, in the international arena. This fact coupled with the monopoly in the field of posts and telegraphs exercised by colonial governments prior to their federation, was said to lead to the conclusion that the continuation of such a monopoly, and its extension to the field of wireless telegraphy, was compatible with s.92. Reference was made in this regard to a passing comment on these aspects of community life by the Judicial Committee of the Privy Council in James v. The Commonwealth [1936] HCA 32; (1936) 55 CLR 1, at pp 54-55; (1936) AC 578, at pp 625-626. It is a sufficient answer to this submission to say that the Act does not purport to confer a monopoly on the Commonwealth in the field of wireless telegraphy and there is no warrant for fashioning a novel doctrine of s.92 confined in its application to this narrow field. If it were to be made the subject of a government monopoly then the compatibility of that regime with s.92 would no doubt fall to be determined by reference to the guidance contained in this Court's decision in Uebergang v. Australian Wheat Board [1980] HCA 40; (1980) 145 CLR 266 and due regard would be given to any international considerations.

15. Second, it was observed that the airwaves constitute a limited resource such that not all who wish to use them can do so without preventing or hindering their use by others. The submission was that therefore it was compatible with s.92 to preserve the freedom of some users by rationing airwave frequencies even if it meant the exclusion of some users entirely. So much may be conceded but the submission stops short of justifying the vesting in the Minister of an arbitrary power to grant or withhold a licence as the only reasonably practicable method of controlling that limited resource. Indeed, as I have already noted, the case outlines administrative procedures that are followed in practice by the Minister when determining whether or not to grant a licence. The existence of these procedures demonstrates that it would not have been impracticable to include in the Act a set of criteria to control the exercise of the Minister's discretion to grant a licence. Those criteria would embrace technical and operating considerations including the availability of appropriate frequencies and the existence or otherwise of a potential detriment to the radio frequency spectrum or to the public interest in terms of public safety or the facilitation of manifestly unlawful activities.

16. Third, the Solicitor-General relied on the manner in which the licensing system was administered coupled with the availability of judicial review to a disappointed applicant for a licence (cf. the Administrative Decisions (Judicial Review) Act 1977 (Cth), as amended) as supporting a conclusion that the system was compatible with s.92. But as Gibbs C.J. has said in Ackroyd v. McKechnie [1986] HCA 43; (1986) 60 ALJR 551, at p 554; [1986] HCA 43; 66 ALR 287, at p 292:

> "In considering the validity of a statute which is said to infringe s.92, the Court must consider the law according to its own terms, and the fact that the actual administration of the law may not be inconsistent with s.92 is immaterial:
>
> '... administrative practice is not the measure of the legal operation of the regulations and it is with the latter alone that we are concerned': Collier Garland Ltd. v. Hotchkiss [1957] HCA 40; (1957) 97 CLR 475, at p 486, and see also at pp 483, 488".

17. Finally it was argued by the Solicitor-General that in all the circumstances, the question being one of fact and degree, the licensing scheme embodied in the Act and Regulations constituted reasonable regulation compatible with s.92. This point was also addressed in Ackroyd v. McKechnie, where the Chief Justice said, at p 553 of ALJR; p 290 of ALR:

> "... since the decisions in Hughes and Vale Pty. Ltd. v. The State of New South Wales [1954] UKPCHCA 5; (1954) 93 CLR 1 and Hughes and Vale Pty. Ltd. v. The State of New South Wales (No. 2) [1955] HCA 28; (1955) 93 CLR 127 it has been settled that a statutory provision which restricts or burdens trade unless a licence or permit is granted, and which gives the licensing or permitting authority an uncontrolled discretion to refuse to grant the licence or permit, cannot validly apply to interstate trade: see also Boyd v. Carah Coaches Pty. Ltd. [1979] HCA 56; (1979) 145 CLR 78, at p 84".

Furthermore, there can be no question of necessity, as witness the fact that administrative procedures have been devised, and are therefore shown to have been practicable, whereby the unlimited discretion conferred by the Act on the Minister is deprived of its arbitrary character. Had those criteria been incorporated in the Act, the system may well have survived an attack under s.92.

18. In the result, the defendant has shown that it is entitled to the protection of s.92. It was also argued for the defendant that a constitutional right to freedom of communication was to be implied from the Constitution and that this implied right furnishes it with a defence to the informations laid against it. In the light of the conclusion to which I have come with regard to s.92, it is unnecessary to answer the question in the case that is related to this submission. Nevertheless I may say that I agree with what Dawson J. has written in this regard.

19. The stated case raises for the opinion of the Court the following questions of law:

> (1) Does section 92 of the Constitution prevent the application of sections 4, 5, 6(1) and 7(1) of the Wireless Telegraphy Act 1905 or any of those sections to the actions of the defendant described in paragraphs 2 to 5 hereof?

(2) Does any implied constitutional guarantee prevent the application of sections 4, 5, 6(1) and 7(1) of the Wireless Telegraphy Act 1905 to the actions of the defendant described in paragraphs 2 to 5 hereof?

I would answer the questions as follows:

(1) Yes.

(2) Unnecessary to answer.

BRENNAN J.: There is a chain of receiving and transmitting stations between TCN Channel Nine at Sydney and QTQ Channel Nine at Brisbane which transmit television messages by wireless telegraphy between those two points. One of the stations is at Somersby in New South Wales. It was erected, maintained and used by the defendant for the purpose of transmitting and receiving television messages by means of wireless telegraphy, and it was so erected, maintained and used without authorization under the Wireless Telegraphy Act 1905 (Cth) ("the Act").

2. On 21 June 1983 the informant laid two informations against the defendant for hearing before the St James Court of Petty Sessions in Sydney. The first information charged the defendant with erecting the Somersby station without authorization for the purpose of transmitting or receiving messages by means of wireless telegraphy. The second information charged the defendant with maintaining the station without authorization for the same purpose. The proceedings were removed into this Court and a case was stated by the Chief Justice raising for the opinion of the Full Court two questions of law as to the application of ss.4, 5, 6(1) and 7(1) of the Act to the defendant's actions in erecting, maintaining and using the station.

3. Section 4(a) of the Act confers on the Minister "the exclusive privilege of establishing, erecting, maintaining, and using stations and appliances for the purpose (inter alia) of transmitting messages by wireless telegraphy within Australia, and receiving messages so transmitted". Section 5 empowers the Minister to grant licences to establish, erect, maintain, or use stations and appliances for the purpose of transmitting or receiving messages by means of wireless telegraphy for such terms and on such conditions and on payment of such fees as are prescribed. Section 6(1) provides -

" Except as authorized by or under this Act, no person shall -

(a) establish, 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: One thousand dollars, or imprisonment for Five years."

Section 7(1) provides -

> " All appliances erected, maintained, or used in contravention of this Act or the regulations, for the purpose of transmitting or receiving messages by means of wireless telegraphy, shall be forfeited to the Commonwealth."

The application of s.7(1) to the defendant's appliances depends on whether the defendant by the actions charged in the informations contravened the provisions of s.6(1). The informations charge the defendant only with erecting and maintaining the station, but the case states that the defendant without authorization erected, maintained and also used the station for the purpose prescribed by s.6(1)(a) of the Act.

4. It is not hard to divine the reason why no information was laid charging the defendant with using the station for the prescribed purpose without authorization. The Solicitor-General for the Commonwealth, appearing for the Attorney-General who intervened in the proceedings, conceded that the transmission of messages by means of wireless telegraphy between Sydney and Brisbane was an activity of interstate trade, commerce or intercourse, but submitted that, even if such transmission of messages and the use of a station for that purpose fell within the protection of s.92 of the Constitution, the erection and maintenance of the station were activities antecedent to and not part of interstate trade, commerce or intercourse - "something which precedes it and is outside the freedom conferred", to use the familiar phrase from the majority judgment in Grannall v. Marrickville Margarine Pty.Ltd. [1955] HCA 6; (1955) 93 CLR 55, at p 72. The principle by reference to which manufacturing was held in Grannall and in subsequent cases to be an activity antecedent to interstate trade, commerce and intercourse and outside the protection of s.92 was stated by Kitto J. in Samuels v. Readers' Digest Association Pty.Ltd. [1969] HCA 6; (1969) 120 CLR 1, at p 30:

> " The ratio decidendi had to do, not with anything peculiar to manufacture, but with the distinction between laws which impose by their own force restrictions or burdens upon the very things which s.92 protects, namely inter-State trade, commerce and intercourse themselves, and laws which impose restrictions or burdens upon things antecedent or preparatory or collateral to inter-State trade, commerce or intercourse and affect such trade, commerce and intercourse as a matter only of economic or practical consequence."

5. To counter this argument, counsel for the defendant sought to distinguish the cases relating to prohibitions on the manufacture and importation of goods intended for interstate trade. Manufacture and importation of goods were said to be exceptions to a general principle that s.92 protects antecedent activities which are inseparably connected with an interstate trading activity. Counsel sought to found the argument on the judgment of Dixon C.J. in Hospital Provident Fund Pty.Ltd. v. State of Victoria [1953] HCA 8; (1953) 87 CLR 1, at pp 17-18:

> " If a law takes a fact or an event or a thing itself forming part of trade commerce or intercourse, or forming an essential attribute of

> that conception, essential in the sense that without it you cannot bring into being that particular example of trade commerce or intercourse among the States, and the law proceeds, by reference thereto or in consequence thereof, to impose a restriction, a burden or a liability, then that appears to me to be direct or immediate in its operation or application to inter-State trade commerce and intercourse, and, if it creates a real prejudice or impediment to inter-State transactions, it will accordingly be a law impairing the freedom which s.92 says shall exist. But if the fact or event or thing with reference to which or in consequence of which the law imposes its restriction or burden or liability is in itself no part of inter-State trade and commerce and supplies no element or attribute essential to the conception, then the fact that some secondary effect or consequence upon trade or commerce is produced is not enough for the purposes of s.92."

6. Grannall and the cases relating to manufacturing and importation which followed it are not exceptions to the principle expressed by Dixon C.J.: they are instances of the application of the principle (cf. S.O.S. (Mowbray) Pty.Ltd. v. Mead (1972) 124 CLR 529, per Menzies J. at p 565). The manufacturing and importation of goods to be ventured in interstate trade are no part of interstate trade. Although manufacturing or importing of goods is an essential prerequisite to the activity of engaging in interstate trade in those goods, neither manufacturing nor importing supplies an "element or attribute essential to the conception" of interstate trade. The Hospital Provident Fund test does not extend the scope of s.92 protection to activities and transactions which by themselves form no part of interstate trade, commerce and intercourse; it merely affirms the distributive protection given by s.92 to each of the essential parts of an activity or transaction which together constitute an example of interstate trade, commerce or intercourse. If a part of such an activity or transaction supplies an "element or attribute" which brings the activity or transaction within the description of interstate trade, commerce and intercourse, that part is protected, but that is not to say that the protection extends to an antecedent activity or transaction which is merely the sine qua non of an activity within that description: Reg. v. Anderson; Ex parte Ipec-Air Pty.Ltd. [1965] HCA 27; (1965) 113 CLR 177, at p 193. It is not right "to add together a particular prerequisite step and the particular example of inter-State trade which the step makes possible and treat the aggregate as an example of inter-State trade" (per Kitto J. in Tamar Timber Trading Co. Pty.Ltd. v. Pilkington [1968] HCA 15; (1968) 117 CLR 353, at p 368). As Mason J. said in Perre v. Pollitt [1976] HCA 27; (1976) 135 CLR 139, at p 153:

> " According to received doctrine a distinction is to be drawn between on the one hand those acts and activities forming part of interstate trade, or 'forming an essential attribute of that conception, essential in the sense that without it you cannot bring into being that particular example' of interstate trade, and on the other hand acts and activities which are merely

> antecedent or preparatory to the commencement of interstate trade ... The former, as opposed to the latter, falls within the protection conferred by s.92."

7. Erecting a station is not and maintaining a station may not be an essential element in the use of the station for the purpose of transmitting or receiving interstate wireless messages. It follows that, even if use of a station for that purpose were protected by s.92, Hospital Provident Fund would not warrant extension of the protection to the activity of erection and might not warrant extension of the protection to the activity of maintenance. Nevertheless, the validity of the prohibitions relating to erection and maintenance depends, in my opinion, on the validity of the prohibition relating to use. I shall state why I would hold that, if the prohibition relating to use were to fall as being inconsistent with s.92, the prohibitions relating to erection and maintenance would fall with it.

8. Although s.92 is expressed to protect activities or transactions and does not in terms withdraw legislative or administrative power from the Commonwealth or any State, that section invalidates the operation of a law or an administrative action to the extent to which it would prohibit, restrict or burden an activity or transaction within the scope of the protection. When a law prohibits, restricts or burdens some classes of activities and transactions which are within the scope of the protection and some which are not, a question arises as to whether the legislature intends the law to operate distributively upon the several classes of activities and transactions to which the law relates - so that part of the law's operation is valid and part invalid - or whether the legislature intends the law to operate as a whole - so that, unless the law operates fully in accordance with its terms, it does not operate at all: R. v. Poole; Ex parte Henry (No.2) [1939] HCA 19; (1939) 61 CLR 634, at p 652. A presumption in favour of the former construction is enacted by s.15A of the Acts Interpretation Act 1901 (Cth). That provision is invoked in this case to ensure the validity of the Act to the extent to which it prohibits the erection or maintenance of a station for the purpose prescribed by s.6(1)(a).

9. The effect of s.15A, as Dixon J. said in Bank of N.S.W. v. The Commonwealth [1948] HCA 7; (1948) 76 CLR 1, at p 371 -

> " is to reverse the presumption that a statute is to operate as a whole, so that the intention of the legislature is to be taken prima facie to be that the enactment should be divisible and that any parts found constitutionally unobjectionable should be carried into effect independently of those which fail. To displace the application of this new presumption to any given situation arising under the statute by reason of the invalidation of part, it must sufficiently appear that the invalid provision forms part of an inseparable context."

To give effect to s.15A, it is not sufficient merely to identify particular words or phrases which import invalidity and to construe the statute as though those words or phrases were struck out. The critical consideration is not the grammatical structure of an impugned law but the legislature's intention to maintain the valid operation expressed in some of the law's words or phrases despite the invalidity of its operation in respects which flow from other words or phrases. In Cam & Sons Pty.Ltd. v. The Chief Secretary of New South Wales [1951] HCA 59; (1951) 84 CLR 442, at p

454, the majority of this Court said:

> " It has of course been held repeatedly that an enactment which would be invalid if given a full operation according to its terms cannot be saved by the application of a general reading-down provision such as is found in s.15A of the Acts Interpretation Act 1901-1950 (Cth.) if a positive indication appears in the enactment that the legislature intended it to have either a full and complete operation or none at all."

The legislature's intention must be ascertained by reference to the terms of the law and its subject matter. There are two steps in the construction of s.6(1) of the Act to which s.15A might apply. The first step relates to the prohibition on use of a station for the prescribed purpose. If the prohibition could have no valid operation upon the use of a station in interstate trade, commerce or intercourse, would it nevertheless operate upon its use in intrastate trade, commerce or intercourse? The second step relates to the prohibitions on establishing, erecting and maintaining a station for the prescribed purpose. If the prohibition relating to use is wholly invalid, do the other prohibitions operate validly and independently? As to the first step, the relevant provisions of the Act prohibit the unauthorized use of any station for the purpose of transmitting or receiving messages by means of wireless telegraphy and the unauthorized transmission or reception of messages by wireless telegraphy. If these prohibitions could not be maintained in their entirety, there would be little point in maintaining a prohibition limited to the unauthorized transmission and reception of intrastate wireless messages and the unauthorized use of a station for that purpose. A complete prohibition on such transmission, reception and use of stations without authority is essential if there is to be effective control of the radio frequency spectrum. It would be futile to attempt to control the spectrum if there were no inhibition on the use of radio frequencies for the transmission and receipt of interstate messages. To read down the general prohibitions on unauthorized use of a station and on unauthorized transmission and reception of wireless messages so that they applied only to activities in intrastate trade, commerce and intercourse would entirely subvert the purpose and effect of those prohibitions. The intention to be attributed to the Parliament is that there should be "a full and complete operation or none at all". That takes us to the second step.

10. Does it matter that the provisions of s.6(1)(a) in relation to use and of s.6(1)(b) might be invalid if the provisions in relation to erection and maintenance can be given an independent operation? There is no difficulty in grammatically severing the words "establish, erect, maintain" from the word "use" in s.6(1)(a) of the Act. If s.6(1)(a) prohibited the mere establishment, erection and maintenance of a station, those prohibitions could be severed from the other prohibitions contained in s.6(1) so that, irrespective of any invalidity affecting the latter prohibitions, the former prohibitions might be held to have an independent and valid operation. But s.6(1)(a) prohibits establishment, erection and maintenance of a station only if those respective acts are done "for the purpose of transmitting or receiving messages by means of wireless telegraphy". The relevant prohibitions are not intended to operate independently of the prohibition against unauthorized transmission and reception of wireless messages. If unauthorized transmission or reception of wireless messages could not validly be prohibited, it seems unlikely that the Parliament would intend to prohibit the erection and maintenance of a station to be used for that purpose. Rather, the terms of s.6(1)(a) show that the policy of that provision is to prohibit the taking of steps towards the unauthorized transmission or reception of wireless messages. That policy would be frustrated if the unauthorized transmission and reception of messages are lawful. If the unauthorized transmission and reception of wireless messages were lawful, the relevant

prohibitions would lose their raison d'etre. To construe s.6(1) as prohibiting the doing of acts for a lawful purpose when those acts are not harmful in themselves would be to attribute an absurd intention to the Parliament. It follows that, in my opinion, the validity of the operation of the provisions of s.6(1)(a) relating to establishment, erection and maintenance are not saved by s.15A if the provision relating to use and the provisions of s.6(1)(b) are invalid. I therefore turn to examine the validity of the latter provisions.

11. The question is whether the Parliament may validly prohibit the transmission or reception of interstate messages by wireless telegraphy except in conformity with a licence granted by the Minister under s.5 of the Act. That question has two aspects: is the law a law with respect to "postal, telegraphic, telephonic, and other like services" so as to be supported by s.51(v) of the Constitution? And if so is the law nevertheless beyond power because it infringes s.92 of the Constitution? There is no issue about the first aspect. The Act is clearly within the power conferred on the Parliament by s.51(v). The second aspect is in issue. It is as well to bear in mind that the reason why the Act is said to be beyond power is that s.92 operates to restrict the exercise of power conferred by s.51 for the peace, order and good government of the Commonwealth and the impugned law falls within the restriction. A restriction on powers conferred by s.51 for the peace, order and good government of the Commonwealth should not be construed as confining those powers more narrowly than is necessary to effect the purpose which the restriction is intended to serve. Section 92 is not a charter for anarchy, as Kitto J. pointed out in Breen v. Sneddon [1961] HCA 67; (1961) 106 CLR 406, at p 415. His Honour went on to say, in a passage cited with approval by the Privy Council in Freightlines& Construction Holding Ltd. v. New South Wales [1967] UKPCHCA 1; (1967) 116 CLR 1, at p 20:

> " (Section 92) creates freedom for participation in activities of the specified descriptions within a community organized by law; and it therefore presupposes laws of the kind which may be described ... as circumscribing an individual's latitude of conduct in the interests of fitting him into a neighbourhood - a society, membership of which entails, because of its nature, acts and forbearances on the part of each by which room is allowed for the reasonable enjoyment by each other of his own position in the same society."

The great purpose of s.92, as Windeyer J. said in Damjanovic & Sons Pty.Ltd. v. The Commonwealth [1968] HCA 42; (1968) 117 CLR 390, at p 406, is "to ensure the unity of Australia in an economic sense and to prevent that unity being broken by and at State boundaries". A provision which is intended to ensure the bonding of a nation ought not be construed as excluding laws essential alike to its peace, order and good government in general and to the orderly conduct of trade, commerce and intercourse among the States in particular. I respectfully adopt without repeating what Stephen J. said in Permewan Wright Consolidated Pty.Ltd. v. Trewhitt [1979] HCA 58; (1979) 145 CLR 1, at p 26, as to the qualification in the interests of the community at large of the freedom guaranteed to interstate traders by s.92, acknowledging, as his Honour said (at p.21), that -

> " ... there exists a tension between the constitutionally declared freedom of interstate trade and the need of governments to legislate in

> aid of what they perceive to be the public interest ..."

The laws which are consistent with s.92 as circumscribing an individual's latitude of conduct in order to fit him into a neighbourhood are described as regulatory in order to distinguish them from laws which impermissibly burden or obstruct interstate trade, commerce and intercourse. "Regulation" is not a criterion of validity but a term used to describe laws which do not infringe the freedom guaranteed by s.92. The character of a regulatory law is described - I do not say defined - by Dixon C.J., McTiernan and Webb JJ. in Hughes and Vale Pty.Ltd. v. The State of New South Wales (No.2) [1955] HCA 28; (1955) 93 CLR 127, at p 160:

> " ... no real detraction from the freedom of inter-State trade can be suffered by submitting to directions for the orderly and proper conduct of commercial dealings or other transactions or activities, at all events if the directions are both relevant and reasonable and place inter-State transactions under no greater disadvantage than that borne by transactions confined to the State."

12. Are the impugned provisions of the Act directions for the orderly and proper conduct of wireless transmission and reception? Those provisions prohibit the unauthorized use of radio frequencies in a limited spectrum. The stated case shows that the radio frequency spectrum is "a limited natural resource of fundamental importance to communications". If every person having the requisite facilities were free to use the radio frequency spectrum, none could do so effectively. Paragraph 10 of the stated case describes the position:

> " Without effective radio frequency management, radio communications, including radio navigation, satellite communications, radar, television and radio broadcasting would be ineffective. These services would interfere with each other and there would be interference between services in the same category. Without a controlled and ordered system based on complex engineering practices, the widespread use of the spectrum would be impossible. The effects would range from inconvenience to financial loss and even loss of life."

Thus the very condition for engaging in trade, commerce and intercourse by means of wireless telegraphy is that an exclusive use of a particular frequency be made available for the purpose. In this case, there is a conceded necessity for some form of control of the use of the radio frequency spectrum, and that consideration brings the case squarely within the approach which Stephen J. adopted in Permewan Wright, at p.22:

> " The process of reasoning which justifies such a law as this as valid, reconciling its apparent

> conflict with the absolute freedom which s.92 guarantees, is a familiar one: since true freedom of interstate trade cannot be enjoyed in a state of anarchy, laws which subject the conduct of that trade to reasonable regulation may be seen to promote its freedom of enjoyment rather than to burden it."

13. The same approach has been adopted by the Supreme Court of the United States in upholding legislation for the allocation and regulation of the use of radio frequencies by prohibiting such use except under licence. The ground of attack upon the legislation in the United States was the First Amendment's injunction against the making of a law abridging the freedom of speech. In National Broadcasting Co.,Inc. v. United States [1943] USSC 100; (1943) 319 US 190; 87 Law Ed 1344, Frankfurter J. delivering the Opinion of the Court, said (at p 226; p 1368):

> " Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied."

In Red Lion Broadcasting Co., Inc. v. Federal Communications Commission [1969] USSC 141; (1969) 395 US 367; 23 Law Ed 2d 371, White J. delivering the Court's Opinion, said (at pp 388-389; p 388):

> " Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same 'right' to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves. It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum."

14. Just as the freedom of speech guaranteed by the First Amendment was held not to be infringed by a law prohibiting the unauthorized use of the radio frequency spectrum, so the freedom of

interstate trade, commerce and intercourse ought not to be held to be infringed by such a law. The rationing out of a limited natural resource in order that trade, commerce and intercourse can be carried on by utilizing that resource requires an allocation of the resource among the proposed users, a restriction on the use of the resource to what is allocated and a prohibition against use of the resource by those to whom no allocation is made. A prohibition which is integral to such a rationing scheme is different in purpose and effect from a prohibition against the carrying on of an ordinary trade in which goods that are generally available are bought and sold or in which resources that are generally available are employed. The purpose and effect of a prohibition of the former kind is to facilitate trade by rationing the resource essential to carrying it on; the purpose and effect of a prohibition of the latter kind is to prevent trade which, but for the prohibition, would be carried on by trading in goods or by using resources generally available to the community. One prohibition is conducive to trade, commerce and intercourse; the other suppresses trade. A rationing scheme which is conducive to trade, commerce and intercourse and which affects indifferently interstate and intrastate activities and transactions is unlikely to infringe the freedom guaranteed by s.92.

15. A distinction between an invalid law which prohibits the unauthorized carrying on of an ordinary interstate trade employing resources generally available and a valid law providing for a discretionary rationing scheme to facilitate interstate trade was drawn in the joint judgment of Dixon C.J., McTiernan and Webb JJ. in Hughes and Vale (No.2). After denying validity to wide discretionary licensing of the carriage of goods by motor vehicle among the States, their Honours said (at p.166):

> " Yet there are some points at which the existence of an administrative discretion to exclude a person or a vehicle from carrying goods upon an inter-State highway may be consistent with s.92. One example is suggested by the passage in the judgment of the Privy Council in Hughes & Vale Pty.Ltd. v. State of New South Wales (No.1) [1954] UKPCHCA 5; ((1955) AC 241; (1954) 93 CLR 1) in the course of which Lord Morton said: 'Their Lordships can imagine circumstances in which it might be necessary, e.g. on grounds of public safety, to limit the number of vehicles or the number of vehicles of certain types in certain localities or over certain routes, with the result that some applicants might be unable to obtain licences' ((1955) AC, at pp.306,307; (1954) 93 CLR, at pp.32-33). Probably it would be necessary to define with some particularity the factual conditions in which such a power became exercisable but once it arose there seems to be no inconsistency with s.92 in leaving to the discretion of the administrative agency the actual means of giving effect to the necessity of controlling the volume of the specific description of traffic. The analogy is the fixing of priorities for journeys when the facilities are overtaxed."

When their Honours referred to a need to define "the factual conditions", they were speaking of the conditions upon the fulfilment of which the discretionary power would arise. Their Honours were not referring to conditions directing the manner in which the discretion must be exercised. Quite the contrary. Given the need to control the volume of traffic, their Honours said that there is no inconsistency with s.92 in leaving the means of control to the discretion of the administrative agency.

16. The proposition that a law which fixes "priorities for journeys when the facilities are overtaxed" is not, on that account, inconsistent with s.92 is not contradicted by Gratwick v. Johnson [1945] HCA 7; (1945) 70 CLR 1. Indeed, it is affirmed by implication in two of the judgments (of Rich and Dixon JJ.) which were concerned to show that the decision was no authority for doubting the validity of laws for the rationing of limited resources. In Gratwick v. Johnson, a wartime Order made under the National Security (Land Transport) Regulations directly prohibited unauthorized interstate travel by rail or commercial passenger vehicle. The Court held the prohibition invalid. Although the case arose in wartime when rationing was a familiar and valid means of conserving resources for defence purposes, the attempt to uphold the validity of the prohibition was not founded on the argument that the prohibition was an element in a scheme of rationing interstate transport. Dixon J. said of the Order (at p.19):

> " It does not profess to be concerned with priorities of travel upon transport facilities under excessive demand and it is certainly not confined to that matter. It does not, at all events so far as appears from its text or by evidence, depend in any degree for its practical operation or administration upon the movement of troops, munitions, war supplies, or any like considerations. It is simply based on the 'inter-Stateness' of the journeys it assumes to control ..."

The prohibition against the unauthorized transmission or reception of messages by wireless telegraphy is not imposed by reference to any interstate element; it is imposed simply because the facilities would be overtaxed if no rationing scheme were in operation.

17. An interstate trader who, without authority, utilizes a particular radio frequency in order to transmit and receive wireless messages can succeed in doing so only if that frequency is not being used by another. It would indeed be curious if s.92 strikes down a prohibition against unauthorized use of a radio frequency by a person whose ability to use that frequency effectively depends on obedience to the prohibition by others. Section 92 surely gives no support to those who, by unauthorized appropriation of part of a limited resource, would steal a march on others wishing to use the same resource. I would repeat what I said in The Australian Coarse Grains Pool Pty Ltd v. The Barley Marketing Board (No.2) [1985] HCA 38; (1985) 59 ALJR 516, at p 535; [1985] HCA 38; 59 ALR 641, at p 673:

> " Section 92 does not confer a personal right on one who wishes to engage in interstate trade ... to override any legislative or executive impediment against his doing so."

18. By transmitting signals at Somersby on a particular radio frequency (7310 megahertz) the defendant created a potential for interference described by par.14 of the stated case:

> " Interference could be caused by such matters as -
>
> (1) the operation of satellite services in the same band;
>
> (2) transmissions from airborne stations, such as aeroplanes, by means of harmonic interference, which occurs at multiples of frequency of the primary signal so that services operating in that band may suffer interference.
>
> (There is no practical risk of harmonic interference where the relevant equipment includes a cut-off frequency filter. The equipment in use at the station included such a filter).
>
> (3) intermodulation, which can occur when two stations are operating in parallel and two frequencies mix together, giving an entirely new frequency, which could interfere with stations operating on the new frequency thereby created;
>
> (4) defence satellite systems which operate throughout the band, rather than on a fixed frequency;
>
> (5) meteorological satellites which rely upon receipt of signals from the earth's surface; and
>
> (6) operations by other licensed users."

Indeed, for a time the defendant's transmission created the possibility of interference with transmission by NBN Limited which was licensed to transmit at the same frequency from a mobile station at Newcastle and its environs. The possibility was avoided by an arrangement between NBN Limited and the defendant that the former would use other frequencies which it was licensed to use. If s.92 precluded the prohibition of transmission by the Somersby station at 7310 megahertz, the public could not be protected from the risk of interference in the ways stated and a licensed operator could not be protected in its exclusive use of its authorized radio frequency against the defendant's unauthorized appropriation of the same frequency. The facts stated in the case show that regulation of the use of the radio frequency spectrum is essential not only in the interests of the public but in order to provide for the mutual accommodation of the rights and actions of those engaged in trade, commerce and intercourse.

19. There is no analogy between the present case and the cases where a law conferring an absolute discretion to relieve against a prohibition has been held to infringe the freedom guaranteed by

s.92. In those cases, the law has fallen because the discretion was insufficiently controlled to ensure that the prohibition would not impermissibly prohibit, burden or restrict interstate trade; here, the prohibition and the relieving discretion are the components of a rationing scheme designed to facilitate trade, commerce and intercourse, both interstate and intrastate, which require utilization of the radio frequency spectrum. Utilization of the radio frequency spectrum can be provided for only by prohibiting unauthorized use of radio frequencies, and the prohibition is directed to that purpose. The Act itself provides the facility which is needed in order to engage effectively in either interstate or intrastate trade, commerce and intercourse, namely, the exclusive use of a radio frequency. Of course, a radio frequency exists in nature, but a person who wishes to engage in trade, commerce and intercourse by transmitting or receiving wireless messages needs to acquire an exclusive use of a radio frequency, and exclusivity of use can be obtained only pursuant to the Act. Section 92 gives no right to the exclusive use of a radio frequency; that right only arises under the Act.

20. The difficulty in this case arises because the prohibition which operates as an integral component of a rationing scheme needed to facilitate trade, commerce and intercourse also prohibits unauthorized activities (transmission and reception of wireless messages, etc.) which are engaged in in trade, commerce and intercourse. The latter operation is not necessarily fatal to the validity of the Act. A law of general application which imposes a prohibition, burden or restriction on an activity or transaction without reference to the essential qualities connoted by the phrase "trade, commerce, and intercourse among the States" is unlikely to be inconsistent with s.92. As Dixon C.J. and Webb J. said in Mansell v. Beck [1956] HCA 70; (1956) 95 CLR 550, at p 565:

> " A law which imposes restrictions or burdens upon some description of act matter or thing not of its own nature forming part of inter-State trade, commerce or intercourse and does so because of some characteristic which is independent of any element entering into that conception is very unlikely to be found to destroy impair or detract from the freedom secured by s.92. It may conceivably do so if upon examination of the facts and scrutiny of its intended operation it appears that in spite of the prima-facie absence of any but an accidental interference with inter-State trade, commerce and intercourse the law is but a circuitous means of burdening, restricting or impeding operations of a kind which s.92 protects."

21. The restriction imposed by the law impugned in Mansell v. Beck was a prohibition on the sale of tickets in an interstate lottery, so that the passage cited is as applicable to an absolute prohibition as it is to a more limited restriction or burden. The passage cited may appear to be at odds with a principle, stated by Gibbs J. in Boyd v. Carah Coaches Pty.Ltd. [1979] HCA 56; (1979) 145 CLR 78, at p 84:

> " Since the decisions in Hughes and Vale Pty. Ltd. v. New South Wales [1954] UKPCHCA 5; ((1954) 93 CLR 1) and Hughes & Vale Pty.Ltd. v. New South Wales (No.2) [1955] HCA 28; ((1955) 93 CLR 127) it has been settled law

> that a statutory provision which forbids a person to carry on an ordinary trade without a licence, and gives the licensing authority an uncontrolled discretion to refuse to grant a licence, cannot validly apply to interstate trade, by reason of s.92 of the Constitution."

In Boyd v. Carah Coaches, a State law providing for the licensing of travel agents was held to be inconsistent with s.92 on the ground that the discretion to refuse a licence was too wide. To identify that as the ground of invalidity in that case subsumes two distinct lines of reasoning which appear in the judgments. Both lines led to the conclusion of invalidity in that case, but they require separate consideration in this case. The first line of reasoning was that the width of the discretion precluded the view that the law was regulatory - "nothing but a reasonable regulation of interstate trade". That was the line of reasoning of Gibbs J. (at pp.84-85). The second line of reasoning was that the law was of a regulatory character but the width of the discretion enabled the licensing authority "to refuse a licence on arbitrary and unspecified grounds which are quite obnoxious to the concept of freedom of interstate trade embodied in s.92". That was the line of reasoning of Mason J. (at pp.93,97). The distinction between the two lines of reasoning is of importance in this case because if the width of the discretion conferred by s.5 of the Act denies a regulatory character to the rationing scheme created by ss.4,5 and 6 of the Act, the prohibitions against the unauthorized use of a station for that purpose fall squarely within the principle stated by Gibbs J. and must be held invalid. On the other hand, if the scheme is regulatory, the width of the discretion will invalidate the scheme only if the Minister is purportedly empowered to refuse a licence on grounds obnoxious to the freedom guaranteed by s.92.

22. In my respectful opinion, the second line of reasoning is applicable in this case and the first is not. The principle stated by Gibbs J. in the passage I have quoted, and which was recently reaffirmed in Ackroyd v. McKechnie [1986] HCA 43; (1986) 60 ALJR 551, at p 553; [1986] HCA 43; 66 ALR 287, at p 290, applies when the person carrying on an ordinary trade has complied with any applicable regulatory law. He cannot then be prohibited from carrying on such a trade interstate, and the invalidity of a prohibition against doing so cannot be saved by the creation of an absolute discretionary power to relieve against it: the power gives no assurance that it will be exercised so as to leave the person carrying on the interstate trade free to do so (see per Mason J. in Perre v. Pollitt, at pp 153-154). But that principle comes into play only when any applicable regulatory law has been complied with. In the joint judgment in Hughes and Vale (No.2) (at p.166) cited above, their Honours accepted the validity of a regulatory law "leaving to the discretion of the administrative agency the actual means of giving effect to the necessity of controlling the volume ... of traffic". Provided the discretion is so constrained that its exercise cannot be obnoxious to the freedom guaranteed by s.92, the width of the discretion furnishes no reason in principle why a law providing a licensing scheme should not be characterized as regulatory. In my respectful opinion, the principle as stated by Gibbs J. is not an applicable criterion for determining whether a law prescribing a scheme for the licensing of a trade is regulatory. It is an applicable criterion for determining whether a law which requires a licence for the carrying on of an interstate trade is valid when the law is not regulatory. That appears from what Mason J. said in Boyd v. Carah Coaches, at p 92:

> " The fact that a statute in terms prohibits a person from entering without a licence into transactions which constitute the carrying on of interstate trade and commerce is not in itself enough to establish a contravention of s.92. If the prohibition is an element in a regulatory

> licensing scheme which leaves the trader free to carry on his interstate trade so long as he conforms to requirements prescribed so as to ensure a reasonable regulation of the trade for the protection of the public, there is no contravention of s.92. (S.O.S. (Mowbray) Pty. Ltd. v. Mead (at p 544); North Eastern Dairy Co. Ltd. v. Dairy Industry Authority of N.S.W. [1975] HCA 45; ((1975) 134 CLR 559, at pp 600-601,607-608, 615-616,634))."

The freedom to carry on interstate trade guaranteed by s.92 is the freedom enjoyed when any applicable regulatory law has been complied with. The passages in the cases to which his Honour refers dealt with the reasonable regulation of trade to protect the community "from many hazards such as health, nutrition, inimical and fraudulent practices in trade and the like" (per Barwick C.J. in S.O.S. (Mowbray)). However, as Mason J. pointed out in North Eastern Dairy (at p.615):

> " There is, of course, no reason why the class of regulation consistent with the section should be limited to laws the effect of which is to protect public health. There are many other fields in which interstate trade may be regulated in the interests of the public in conformity with s.92."

The regulatory character of an impugned law is to be judged by reference chiefly to the interests of the community at large, though the operation of the law upon the activities and transactions into which an individual may enter is a relevant factor. The greater significance of community interests flows from the predominantly public character of s.92, as Mason J. pointed out in Permewan Wright (at p.36):

> " It is because the section has this predominant public character that it is to be readily understood as presupposing a society in which conduct is regulated in the interests of the community, rather than a society in which conduct is merely regulated in the interests of those engaged in trade (the North Eastern Dairy Case (at p.615))."

23. If regulation of an activity is necessary in the public interest and if a law providing for that regulation does not select or authorize a licensing authority to select as the criterion of its application any of the essential qualities connoted by the phrase "trade, commerce, and intercourse among the States", the law does not infringe the guarantee of freedom given by s.92. It is truly regulatory.

24. Minds will differ as to whether regulation of an activity is necessary in the public interest, particularly when the regulation is designed to preserve the availability of a facility to the general community. The long and chequered history of the transport cases bears witness to that: see, for example, Armstrong v. The State of Victoria (No.2) [1957] HCA 55; (1957) 99 CLR 28, per Dixon C.J. at pp 43-44. The answer to the question whether a law is a reasonable regulation of

interstate trade depends on a variety of factors, as Mason J. said in Permewan Wright (at pp.37-38):

> " They will include the nature of the regulation sought to be imposed, the mischief which it is designed to remedy and the goal which it seeks to achieve, as well as the effect which the regulation has on the relevant interstate trade.
> ...
>
> In general, legislation which permits interstate trade to go forward, albeit subject to compliance with standards and conditions affecting intrastate and interstate trade in like degree, will be acknowledged as a reasonable regulation of interstate trade. The same may be said of laws which prohibit or eliminate the interstate trade in dangerous or deleterious goods and commodities in order to protect public health and safety."

25. The present case is a clear case of regulation necessary in the public interest. It is also clear that the prohibition is imposed on the unauthorized transmission and reception of wireless messages and on the unauthorized use of stations for that purpose without reference to the essential qualities connoted by the phrase "trade, commerce, and intercourse among the States". This case is quite different from those transport cases where the impugned laws were held not to be regulatory and to be invalid because the discretion was so wide that the carrier was not entitled to the licence which he needed to carry on lawfully his ordinary interstate trade. In those cases, the carrier was using facilities, namely the roads, which were available to the community generally and which could not be denied to any carrier. Here, the relevant facility, namely the radio frequency spectrum, must be denied to some who would wish to use it in order that it may be used effectively by others.

26. The fact that persons who would wish to engage in interstate trade, commerce and intercourse by using the radio frequency spectrum are prohibited from doing so without a licence does not invalidate the rationing scheme of which the prohibition is an element. In considering whether a law is merely regulatory, it is erroneous to start with the notion that s.92 confers on any person who wishes to engage in interstate trade, commerce and intercourse a personal right to do so, so that any law which prohibits, burdens or restricts the individual in engaging in such activities or transactions prima facie infringes the freedom guaranteed by s.92. Rather a freedom to carry on an ordinary trade involving the use of facilities generally available to the community - a freedom which exists independently of s.92 - is protected by s.92 to the extent that that trade is carried on interstate. The "right" of a person not to be burdened or restricted in the carrying on of ordinary interstate trade is in truth an immunity, the trader having the right to "invoke the judicial power to prevent the application to their interstate trade and commerce of the invalid law" (per Mason and Jacobs JJ. in Clark King & Co.Pty.Ltd. v. Australian Wheat Board [1978] HCA 34; (1978) 140 CLR 120, at p 188). If the relevant trading activity is subject to regulation in the public interest so that no person is free to engage in that trading activity without complying with the regulation, s.92 does not confer on an interstate trader an exemption from the regulation unless the regulation has been applied to the activity by reference to the essential qualities connoted by the phrase "trade, commerce, and intercourse among the States". That is, unless the regulation is discriminatory.

27. It will be necessary presently to consider whether the licensing discretion which, together with the prohibitions in s.6(1) constitute the elements in the rationing scheme, is so wide as to be inconsistent with s.92. But mention should first be made of s.4 of the Act which suggests that the transmission and reception of wireless messages and the use of stations for that purpose should be a State monopoly which the prohibitions in s.6(1) are intended to enforce. In The Commonwealth v. Bank of N.S.W. ("the Banking Case") [1949] HCA 47; (1949) 79 CLR 497, at pp 640-641; (1950) AC 235, at p 311, their Lordships allowed that prohibition with a view to State monopoly may be permissible if interstate trade and commerce "thus monopolized remained absolutely free". That view accords with what the Privy Council had said in James v. The Commonwealth [1936] HCA 32; (1936) 55 CLR 1; (1936) AC 578, in reference to a prohibition contained in s.98 of the Post and Telegraph Act 1901-1923 (Cth) which secured to the Commonwealth a monopoly of postal services. Their Lordships said (at p.54; pp.625-626):

> " Sec.98 of the Act calls for special notice: it forbids and makes it an offence subject to specified exceptions to send or carry a letter for reward otherwise than by post. As this provision applies to inter-State as well as intra-State correspondence, it is in one sense a limitation on freedom of intercourse, assuming that term to include correspondence and it may thus be regarded as an interference with trade. Whether that is so or not, it is however a limitation notoriously existing in ordinary usage in all modern civilized communities; it does not impede freedom of correspondence, but merely as it were, canalizes its course just as 'free speech' is limited by well known rules of law. Very much the same is true of the Wireless Telegraph Act 1905."

Although s.4 of the Act suggests that there should be a State monopoly of wireless telegraphy services, s.5 contains a general power to authorize other persons to provide such services. That power has been exercised so that approximately 481,700 radio communication licences had been issued under the Act at 31 December 1983, 137,000 in New South Wales alone. If the Act had in truth created a Commonwealth monopoly of wireless telegraphy services, it may have been necessary to consider the present authority of the views expressed by the Privy Council in the passages to which I have referred and perhaps the authority of cases which, following the Privy Council's judgments in James v. The Commonwealth and the Banking Case, have found in s.92 an obstacle to the validity of Commonwealth monopolies or at least to Commonwealth monopolies which are an integral feature of national schemes for organized marketing. Construing ss.4, 5 and 6 of the Act together, however, the Act does not create a monopoly; it creates a licensing scheme which empowers the Minister to apportion among Commonwealth instrumentalities on the one hand and individual users on the other rights to use particular radio frequencies. The Act reposes in the Minister a discretionary power to control the use of the radio frequency spectrum, not a simple prohibition against use.

28. Is the discretion conferred by s.5 upon the Minister so wide that the Minister may exercise it in a manner inconsistent with s.92? A discretion which might be exercised in a manner obnoxious to the freedom guaranteed by s.92 is a discretion wider than the Constitution can support and an attempt to confer such a discretion must fail. And if the discretion were to fall, the whole rationing scheme would be brought down. It would not matter that the purpose of the law is to regulate an

activity in the public interest if the discretion reposed in an administrator is wider than the Constitution can support. In the transport cases, the objection to the width of the discretion was that an interstate carrier who was free to engage in interstate carriage (that is, a carrier who had complied with or was not bound by any valid regulatory law) had no enforceable right to a licence and, in the absence of an enforceable right, was prohibited from engaging in interstate carriage. The prohibition per se was inconsistent with s.92 and only a licence or an enforceable right to a licence sufficed to ensure that the carrier could freely engage in interstate carriage in accordance with the s.92 guarantee: see Hughes and Vale (No.2), at p 201; Buck v. Bavone [1976] HCA 24; (1976) 135 CLR 110, at pp 119,126. A right falling short of that (for example, a mere right to apply for a licence) did not. In those cases, the question was whether the discretion was so structured as to assure to the carrier his freedom to engage in interstate carriage once he had complied with any valid and applicable regulatory law. But that cannot be the question here. For reasons earlier stated, the Act is itself regulatory and the width of the Minister's discretion can be destructive of the validity of the scheme only if the exercise of the discretion conferred by the statute cannot be restrained by judicial review so that its exercise is within constitutional power.

29. What manner of exercise of the discretion would be obnoxious to the freedom guaranteed by s.92? The answer must conform to the criteria by reference to which the consistency of a statute with s.92 is to be determined. As I agree, for reasons earlier stated, that the permissible scope of regulatory laws should be stated in terms of the interests of the community, I would adapt the language of Mason J. in Perre v. Pollitt, at p 154, to describe one of the criteria governing the validity of a licensing discretion. In that case, his Honour held the provision conferring the discretion to be invalid because the discretion was "so wide and general as to enable (the licensing authority) to refuse an application for reasons divorced from the protection of the public and the advancement of the public interest". His Honour was not there purporting to define a criterion but those words accord with one of the indicia of invalidity expressed in Permewan Wright. The other criterion is whether the discretion is so wide as to enable the Minister to refuse a licence by reference to the essential qualities connoted by the phrase "trade, commerce, and intercourse among the States". This criterion does not look to the consequential effect of a refusal on trade, commerce and intercourse among the States: it is concerned with the ground by reference to which a decision to refuse a licence is made. If an element which would bring an activity or transaction within the connotation of the phrase can be a ground of refusal, the discretion is too wide. A licence to transmit or receive wireless messages between points on different sides of a State border may be refused, but not because those points are on different sides of a State border. The discretion cannot be used to discriminate against interstate trade, commerce and intercourse. If the Minister were enabled to refuse a licence either for reasons divorced from protection of the public or advancement of the public interest or to discriminate against interstate trade, commerce and intercourse, the discretion conferred on the Minister by s.5 would be too wide.

30. True it is that the discretion conferred by s.5 is not confined by statutory criteria. The reason why such a discretion is left at large is not hard to conjecture. The theory is stated by Dixon J. in Swan Hill Corporation v. Bradbury [1937] HCA 15; (1937) 56 CLR 746, at p 757:

> " The reason for leaving the ambit of the discretion undefined may be that legislative foresight cannot trust itself to formulate in advance standards that will prove apt and sufficient in all the infinite variety of facts which may present themselves. On the other hand, it may be because no general principles or policy for governing the particular matter it is desired

> to control are discoverable, or, if discovered, command general agreement."

The facts fit the theory. Paragraph 11 of the stated case reveals the policy affecting the issue of licences:

> " An applicant for a radiocommunications service under the Wireless Telegraphy Act 1905 will be licensed, subject to appropriate technical and operating conditions, except where -
>
> frequencies are not available, or
> there is a potential detriment to the radio frequency spectrum, or
> there is a potential detriment to the public interest in the sense that public safety is prejudiced or manifestly unlawful activities are facilitated."

The reference to "potential detriment to the radio frequency spectrum" shows that there is difficulty in formulating precise criteria governing the issue of licences. And as the rationing of a resource that is insufficient to satisfy all those who wish to use it must result in allocating something to some and nothing to others, an equitable scheme must leave to the administrator an opportunity to consider the relevant claims of all who apply and of all who might be expected to apply in the future. Although guidelines may be prescribed, in the result the discretion must remain at large. So it is under s.5. Yet the s.5 discretion must be exercised bona fide in furtherance of the purpose for which it was given. Of necessity, the area of the discretion must be large: the nature of the subject to be regulated requires that the discretion be wide. But it is not so wide that considerations foreign to the purpose for which the discretion is conferred can be taken into account. Nor can the discretion be exercised to discriminate against interstate trade, commerce and intercourse. That is because a discretion must be exercised by the repository of a power in accordance with any applicable law, including s.92, and, in the absence of a contrary indication, "wide general words conferring executive and administrative powers should be read as subject to s.92" (per Dixon, McTiernan and Fullagar JJ. in Wilcox Mofflin Ltd. v. State of N.S.W. [1952] HCA 17; [1952] HCA 17; (1952) 85 CLR 488, at p 522). In Inglis v. Moore (No.2) (1979) 46 FLR 470, St John J. and I stated the relevant rule of construction, at p 476:

> " ... where a discretion, though granted in general terms, can lawfully be exercised only if certain limits are observed, the grant of the discretionary power is construed as confining the exercise of the discretion within those limits. If the exercise of the discretion so qualified lies within the constitutional power and is judicially examinable, the provision conferring the discretion is valid."

There is nothing in the context of s.5 which would exclude this rule of construction. Being bound to exercise the discretion reposed in him consistently with s.92, the Minister cannot lawfully refuse a licence on the ground that an applicant wishes to engage in interstate trade, commerce or intercourse.

31. If judicial review were not available to ensure that the discretion is confined within constitutional limits, an exercise of the power outside those limits could not be restrained. In effect, the power would be wider than the Constitution could support: see Australian Communist Party v. The Commonwealth [1951] HCA 5; (1951) 83 CLR 1, at pp 185-187, 258. In the transport cases, the Court gave some weight to the procedural obstacles in the way of showing administrative infringement of s.92 because the grounds on which a wide licensing discretion might be exercised could not be discovered (see, for example, Hughes and Vale (No.2), at pp.158,187,202 and 243). But the s.5 discretion is amenable to judicial review pursuant to s.75(v) of the Constitution or pursuant to the Administrative Decisions (Judicial Review) Act 1977 (Cth) and any procedural obstacles to discovery of the ground on which a discretion has been exercised have been legislatively removed by that Act. The discretion is effectively confined so that an attempt to exercise the discretion inconsistently with s.92 is not only outside the constitutional power - it is equally outside statutory power and judicial review is available to restrain any attempt to exercise the discretion in a manner obnoxious to the freedom guaranteed by s.92. It follows that the statutory rationing scheme of which the discretion is an essential part is valid. Section 92 does not affect the validity or operation of ss.4, 5, 6(1) and 7(1) of the Act.

32. An alternative argument for denying the application of those provisions of the Act to the actions of the defendant asserts the existence of an "implied constitutional guarantee of freedom of inter-state communication". The freedom of interstate communication rests not upon an implied guarantee but upon the express terms of s.92: see per Gibbs J. in McGraw-Hinds (Aust.) Pty.Ltd. v. Smith [1979] HCA 19; (1979) 144 CLR 633, at p 645. Communication among the States is an integral part of the "intercourse", if not always of the trade and commerce, the freedom of which is guaranteed by s.92. But whether the freedom of interstate communication is thought to rest on the express terms of the Constitution or upon some implication, the freedom does not withdraw from the Commonwealth the legislative power to provide for the orderly use of the radio frequency spectrum. It would be absurd to imply in the Constitution a freedom of interstate communication which denied power to regulate the use of the radio frequency spectrum when freedom of communication depends in large measure on effective regulation. Such an implication would enhance the freedom of the few to the disadvantage of the Australian people in general.

33. The freedom of interstate communication protected by s.92 can be invoked by a licensee if a law purports to prohibit, burden or restrict him in the transmission or receipt of interstate wireless messages on a radio frequency which he is licensed to use, but it cannot be invoked to destroy the law which provides for the regulated use of the radio frequency spectrum. It follows that the answers to the questions should be:

> Question (1) : Does section 92 of the Constitution prevent the application of sections 4, 5, 6(1) and 7(1) of the Wireless Telegraphy Act 1905 or any of those sections to the actions of the defendant described in paragraphs 2 to 5 hereof?
>
> Answer : No.
>
> Question (2) : Does any implied constitutional guarantee prevent the application of sections 4, 5, 6(1) and 7(1) of the Wireless Telegraphy Act 1905 to the actions of the defendant described in paragraphs 2 to 5 hereof?

Answer : No.

DEANE J.: This is another case about the operation and effect of s.92 of the Constitution. Both sides argued with apparent conviction on the basis of existing authority to support diametrically opposed conclusions. Perhaps that should not be seen as surprising since the more one becomes immersed in the decisions of the Privy Council and this Court on the subject of s.92, the plainer the impression becomes that one has entered an area where the ordinary processes of legal reasoning have had but a small part to play and where judicial exegesis has tended to confuse rather than elucidate. Indeed, it is as if many voices of authority have been speaking differently at the same time with the result that, putting to one side some basic propositions, it is all but impossible to comprehend precisely what it is that authority has said.

2. If it be necessary to illustrate the difficulty in comprehending precisely what the cases stretching over more than three-quarters of a century have established about the true nature and scope of s.92, it should suffice to refer to the two comparatively recent cases in the Court concerning the validity of the Wheat Stabilization Scheme ("the Scheme") which had been established by complementary Commonwealth (the Wheat Industry Stabilization Act 1974 (Cth)) and State legislation. Those two cases are Clark King & Co. Pty. Ltd. v. Australian Wheat Board [1978] HCA 34; (1978) 140 CLR 120 and Uebergang v. Australian Wheat Board [1980] HCA 40; (1980) 145 CLR 266. In the Clark King Case, the divergence of views among the five Justices who comprised the Court was such that no line of reasoning enjoyed majority support. As between the particular parties, there was a decision by three Justices that the scheme did not infringe the prescription of s.92 in its application to wheat the subject of interstate trade. Beyond that, the case lacked authority for the reason that, as Aickin J. pointed out in Uebergang, the decision of the majority lacked any ratio enjoying majority support (cf. Amalgamated Clothing and Allied Trades Union of Australia v. D. E. Arnall & Sons; In re American Dry Cleaning Co. [1929] HCA 35; (1929) 43 CLR 29, at pp 51-52). In Uebergang, when the guidance of the Court was sought about what (if any) evidence of factual material might be decisive on the hearing of a renewed challenge, based on s.92, to the validity of some of the legislation establishing the scheme, the Court was again unable to speak with true authority. Two Justices held that no such evidence could be in point since the validity of the scheme in its application to interstate trade and commerce could be determined in the abstract. Of those two Justices, one (Barwick C.J.) thought that the scheme was plainly invalid by reason of the provisions of s.92; the other (Murphy J.) thought that it was plainly valid. The remaining five Justices held that factual material would or could be decisive of validity. There was, however, deep division between them about what such evidence might be relevant to prove. Two (Stephen and Mason JJ.) were of the view that it would suffice to establish that the impugned legislation was consistent with s.92 if the factual material persuaded the Court that the restrictions which the legislation imposed upon interstate trade were no greater than was reasonably necessary in all the circumstances, due regard being had to the public interest. The other three Justices (Gibbs, Aickin and Wilson JJ.) expressly rejected that view. They concluded that factual material would be unavailing to bring the scheme within the area of possible validity unless it positively established that a monopoly covering both interstate and intrastate trade in wheat was the only practical and reasonable course open in the then circumstances. Even between those three Justices, there were significant differences in approach; in particular, Aickin J. (at p.326) came very close to sharing, while Gibbs and Wilson JJ. (in a joint judgment) expressly disavowed (at p.300), the incredulity expressed by Barwick C.J. in Clark King (at p.156) about the possibility that the creation of a monopoly (extending to interstate trade and commerce) in a State or Commonwealth agency might, in some circumstances, be justified as consistent with s.92 (cf. The Commonwealth v. Bank of N.S.W. [1949] HCA 47; (1949) 79 CLR 497, at pp 640-641). To resolve the judicial impasse about the practical relevance of factual material, each of the two members of the Court who were of the view that evidence of factual material would be unavailing on the question of validity indicated which of the competing conclusions of the other Justices was the less unattractive to him. Barwick C.J., who had denounced (at pp.284-285) the proposition that

evidence might possibly establish the validity of the scheme as involving "inherent falsity", lent his support to the conclusion of Gibbs, Aickin and Wilson JJ. Mr. Justice Murphy, who held that the scheme did not even come within the area of operation of s.92, lent his support to the conclusion of Stephen and Mason JJ. The result was that there was a decision between the parties on the question asked. As in Clark King, however, there was no line of reasoning which enjoyed majority support. There was no authoritative ratio of the decision in the case.

3. With the exception of Murphy J., all the members of the Court in Uebergang sought to decide the case consistently with what they saw as current authority. It is apparent from their judgments that the differences of opinion between them reflected basic disagreement about what authority had or had not established. Thus, on the fundamental question of the "public" as opposed to the "private" character of s.92, it is possible, as Gibbs and Wilson JJ. made clear (at pp.298-300), to identify at least three differing points of view, each of which was seen by its respective proponents as consistent with current authority. Whatever be the explanation, however, Clark King and Uebergang demonstrated that the outcome of all the past cases was that the Court was unable to give authoritative guidance or to express an authoritative view about the process of reasoning which was relevant to determine the constitutional validity of a national scheme which had been adopted by the Commonwealth and all the States for the marketing of one of the nation's most important commodities.

4. In these circumstances, few would deny that, somewhere along the line, things have gone wrong. The simple words of s.92 have, in an unsuccessful search for certainty in the law, been overlaid by formulae which have given rise to many problems while solving almost none. The section was, plainly enough, intended to serve the essential function of reinforcing the economic and social unity of an emerging nation by removing the barriers to commerce, trade and intercourse which the frontiers between the federating colonies had previously represented. It has been converted into a form of constitutional guarantee of the economics of laissez-faire and the politics of "small government". The importance of the notion of "freedom as at the frontier" which was recognized even in James v. The Commonwealth (1936) [1936] HCA 32; 55 CLR 1, at p 58 as lying at the heart of s.92 has been progressively discounted and disregarded. In the result, interstate trade, commerce and intercourse has been placed in a position of significant and preferential immunity from non-discriminatory laws which the courts have, for reasons which still await currently authoritative identification, judged to be inconsistent with s.92. Where s.92 has been held to preclude the application of such non-discriminatory laws to interstate trade and commerce leaving them to apply to intrastate trade and commerce, the section, which was intended to preclude inequality between the treatment of the trade and commerce of the interstate trader and the treatment of the trade and commerce of the local trader, has become an actual source of such inequality of treatment to the detriment of the local trader. Indeed, the importance of the discrimination of which the section has been made the cause is underlined by the accounts, in the Commonwealth Law Reports, of the expenditure of time and money in attempts - sometimes successful and sometimes unsuccessful - to attract to what would otherwise be local trade and commerce the competitive advantages which would flow from a conversion into interstate trade and commerce. In cases where laws which were non-discriminatory as enacted have been made discriminatory by reason of the fact that s.92 has had the effect that intrastate trade and commerce alone remain subjected to them, a section which was adopted as a guarantee of unity and equality under the Federation has been converted into a source of unfair and potentially divisive preference.

5. A broad submission was advanced in the course of argument to the effect that the impugned provisions of the (now repealed) Wireless Telegraphy Act 1905 (Cth) ("the Act") were not within the area of operation of the prohibition of s.92 for the reason that that prohibition applies only in relation to fiscal burdens. That submission was not developed by argument. It was plainly directed to Murphy J. who has made clear, in Uebergang and other cases, his acceptance of that view of the

purpose and operation of s.92. Otherwise, it has not been sought by either side to make the present case an occasion for challenging existing authority. Indeed, the Solicitor-General for the Commonwealth, who presented the main argument on behalf of the informant, expressly indicated that he was not concerned to launch a general attack on the "formula" enunciated by Dixon C.J. in Hospital Provident Fund Pty. Ltd. v. Victoria [1953] HCA 8; (1953) 87 CLR 1, at pp 17-18 upon which the defendant primarily relied. That being so, the present case does not seem to me to provide the occasion for considering whether the difficulties in the current state of authority about the nature and scope of s.92 are such as to make it incumbent upon the Court yet again to embark upon a consideration of fundamental questions which so many past cases have failed satisfactorily to resolve. It follows that I shall seek to consider the present case on the basis of my understanding of current authority and leave for another day the question of the extent (if at all) to which that authority should be reopened and reviewed. When that question does arise for consideration by the Court as a whole, it will be relevant to bear in mind that the difficulties of ascertaining the purposes of executive action and government policy, which were no doubt seen as supporting a need for precise tests formulated in terms of the objective operation of laws, have been substantially alleviated in many areas by the availability of procedures for the examination and review of the reasons of administrative decision-makers.

6. As has been said, the defendant placed primary reliance upon the "formula" or test enunciated by Dixon C.J. in the Hospital Provident Fund Case (at pp.17-18). That test had been foreshadowed and the reasoning behind it had been explained by his Honour in some detail in O. Gilpin Ltd. v. Commissioner for Road Transport and Tramways (N.S.W.) [1935] HCA 8; (1935) 52 CLR 189, at pp 205-206. It was applied in a number of subsequent cases and, for a period, plainly enjoyed the support of the Court to the extent that references to it and to the "criterion of operation" of an impugned law largely displaced any reference to the words of s.92 in the argument and in the essential reasoning of cases in the Court. In essence, the effect of the test was to strike down (or render inapplicable to interstate trade, commerce and intercourse) any law which "takes a fact or an event or a thing itself forming part of trade commerce or intercourse, or forming an essential attribute of that conception ... and proceeds, by reference thereto or in consequence thereof, to impose a restriction, a burden or a liability" which represents "a real prejudice or impediment to inter-State transactions".

7. If the Hospital Provident Fund Case test could be viewed in isolation, I should have thought that it would have plainly encompassed the relevant operation of s.6(1)(a) (and the associated provisions of ss.4, 5 and 7(1)) of the Act the validity of which is challenged in the present case. Section 6(1)(a) did not prohibit the erection or maintenance of a "station" simpliciter. It applied, according to its terms, to prohibit and penalize the erection or maintenance of a station only by reference to or in consequence of the existence of "the purpose of transmitting or receiving messages by means of wireless telegraphy". It is common ground that the purpose for which the defendant's station at Somersby was erected and maintained (and actually used) was the transmission of messages as a link in a chain of communication stretching from Sydney to Brisbane and that such transmission of messages constituted an integral part of interstate trade, commerce and intercourse. The purpose of transmitting messages by means of wireless telegraphy would, as a matter of plain common sense, seem to be a fact or thing which is an essential attribute or concomitant of the trade, commerce or intercourse of so transmitting messages in the sense that without it you cannot bring into being that particular example of trade, commerce or intercourse among the States. Put in the precise words of the Hospital Provident Fund formula, the relevant operation of s.6(1)(a) was to take "a fact ... or a thing itself ... forming an essential attribute" of trade, commerce or intercourse and to proceed "by reference thereto or in consequence thereof, to impose" the restriction constituted by the prohibition of erection or maintenance and the liability or burden of the statutory consequences of its breach. That being so, the effect of the application of that formula, viewed in isolation, would be that the restriction and the liability or burden which the relevant operation of s.6(1)(a) (and the consequential provisions of s.7(1)) imposed by

reference to the purpose of transmitting messages was "direct or immediate in its operation or application" to the defendant's interstate trade, commerce or intercourse of which that purpose was an essential attribute.

8. In truth, of course, the Hospital Provident Fund Case test cannot be viewed in isolation. The notion that such a formularized and formalized criterion of operation can be substituted for the substance of the words of s.92 has not been accepted by a majority of the Court at least since North Eastern Dairy Co. Ltd. v. Dairy Industry Authority of N.S.W. [1975] HCA 45; (1975) 134 CLR 559. In some respects, as Mr. Hughes Q.C. (who appeared for the defendant) pointed out, the Hospital Provident Fund test reflects a narrower view of the scope of s.92 than would appear to have been accepted in some more recent cases (see, e.g., North Eastern Dairy; Permewan Wright Consolidated Pty. Ltd. v. Trewhitt [1979] HCA 58; (1979) 145 CLR 1; Australian Coarse Grains Pool Pty. Ltd. v. Barley Marketing Board (No. 2) [1985] HCA 38; (1985) 59 ALJR 516, at pp 525-526, 542; [1985] HCA 38; 59 ALR 641, at pp 657, 685). What is more in point here, however, is that it would seem plain that, in other respects, the test projects an unduly wide view of the reach of s.92. Thus, to take an obvious example, it is difficult in the light of cases such as Permewan Wright to see how a non-discriminatory Commonwealth sales tax could, in its application to interstate sales, survive the application of the Hospital Provident Fund Case formula. Yet such a Commonwealth tax on the sale of goods has been accepted as a basic - and for many economists the preferred - means of raising national revenue since the earliest days of the Commonwealth. The burden upon interstate trade and commerce of such a sales tax, aimed purely at raising revenue, could not, at least on any current theory about s.92, be justified as merely "regulatory". Nor could it be justified by reference to the fact that s.90 of the Constitution is not expressed to be subject to s.92 since the terms of the former section make plain that its operation is not to confer legislative power but to make exclusive a particular aspect of the general legislative power with respect to taxation conferred on the Parliament of the Commonwealth by s.51(ii). It may well be that the exemption of interstate sales from a general sales tax which continued to apply to intrastate sales would involve no more than carrying the conversion of s.92 into an actual source of discrimination against local trade and commerce to its logical conclusion notwithstanding that the result might be effectively to eliminate intrastate sales at least in more highly taxed commodities. For me, the logical validity of that conclusion reached by an application of the Hospital Provident Fund formula could serve only to demonstrate the need to qualify the premise of the formula since such a conclusion would, if accepted, turn the combined effect of the two economic provisions (ss.90 and 92) which were central to the Federation (see Hematite Petroleum Pty. Ltd. v. Victoria [1983] HCA 23; (1983) 151 CLR 599, at pp 660-662) into a travesty of their intended operation.

9. Perhaps more in point for the purposes of the present case, there are two distinct strands of current authority which combine to exclude the relevant operation of s.6(1)(a) (and the associated provisions) of the Act from the ambit of s.92. The first of the two strands is concerned with the line to be drawn between acts which are properly to be seen as antecedent or preliminary to interstate trade, commerce and intercourse and acts which constitute a part or essential attribute of that conception. Thus it has been plainly established that the fact that goods are intended to be devoted to, or used in, interstate trade does not attract the protection of s.92 to the manufacture or importation of the goods notwithstanding that such manufacture or importation "is an essential preliminary condition to trade and commerce between the States in merchandise" in the sense that, if manufacture and importation in particular goods be prevented or obstructed, trade and commerce in them will be either wholly or partly precluded (see Grannall v. Marrickville Margarine Pty. Ltd. [1955] HCA 6; (1955) 93 CLR 55, at pp 71-72, 79-80; Bartter's Farms Pty. Ltd. v. Todd [1978] HCA 36; (1978) 139 CLR 499, at pp 510-511, 516, 523-524). That the authority of those cases is not confined to manufacture or importation was made clear by Kitto J. in Samuels v. Readers' Digest Association Pty. Ltd. [1969] HCA 6; (1969) 120 CLR 1, at p 30 in a

passage which has subsequently received general acceptance:

> "The Margarine Cases were cases of manufacture, but the principle for which they are authorities is missed if they are thought of as having been decided as they were because of some consideration applying exclusively to manufacture. The ratio decidendi had to do, not with anything peculiar to manufacture, but with the distinction between laws which impose by their own force restrictions or burdens upon the very things which s. 92 protects, namely inter-State trade, commerce and intercourse themselves, and laws which impose restrictions or burdens upon things antecedent or preparatory or collateral to inter-State trade, commerce or intercourse and affect such trade, commerce and intercourse as a matter only of economic or practical consequence."

When one applies that "principle" to the facts of the present case, it is plain that the erection of a "station" for the purpose of transmitting signals by means of wireless telegraphy was, in the relevant sense, antecedent to and not a part or an attribute of the trade, commerce or intercourse involved in the transmission of such signals. Nor, in my view, can it properly be said that the maintenance of a station for the purpose of transmitting such signals was, in the sense explained by Kitto J. in the above passage, either a part or an essential attribute of the trade, commerce or intercourse involved in the actual transmission of the signals. A law which prohibits or burdens the maintenance (i.e. the keeping "in efficient working order": Galashiels Gas Co. Ltd. v. Millar [1949] UKHL 2; (1949) AC 275, at p 286) of a station does not "by its own force" impose "restrictions or burdens upon the very things which s.92 protects", namely, the interstate trade, commerce and intercourse involved in the actual transmission of signals. Such a law restricts or burdens only what is "antecedent or preparatory or collateral to" the actual transmission of signals. It affects the trade, commerce or intercourse which that transmission involves "as a matter only of ... practical consequence". Indeed, s.6(1)(a) of the Act itself distinguishes between the "antecedent", "preparatory" and "collateral" activities of the erection, establishment and maintenance of the station and the activity of using the station in the actual process of transmission. It is the last-mentioned activity (i.e. the actual use) which alone constitutes a part or an essential attribute of trade, commerce or intercourse (i.e. the transmission of signals interstate) which s.92 protects.

10. The second strand of authority is that which establishes that a non-discriminatory law will not infringe s.92 of the Constitution - either as a matter of direct operation or by reason of identification as a circuitous device (cf. Mansell v. Beck [1956] HCA 70; (1956) 95 CLR 550, at p 565) - if it operates to preclude or burden something which is antecedent to interstate trade, commerce or intercourse notwithstanding that it does so by reference to the existence of trade, commerce or intercourse or a purpose of engaging in trade, commerce or intercourse. The relevant cases must, in my view, be seen as qualifying the Hospital Provident Fund formula upon grounds that are largely pragmatic. Thus, the purpose of dealing commercially with the produce of hens would seem to be an essential attribute of commerce in eggs. The fact that a tax on the keeping of hens was imposed by reference to that essential attribute of trade and commerce was not, however, seen as attracting the protection of s.92 for an interstate trader in eggs (see Damjanovic & Sons Pty. Ltd. v. The Commonwealth [1968] HCA 42; (1968) 117 CLR 390, at pp 396-397, 401-402, 404-405). It should be mentioned that in Damjanovic (at p 398) Kitto J. seems to draw a

distinction between a prohibition or burden imposed by reference to the existence of a general purpose of selling eggs when produced and a prohibition or burden imposed by reference to selling particular eggs after they have been produced. That distinction was, however, essentially an arbitrary one and was not adverted to by the majority of the Court. Again, a law which imposes a financial burden on a carrier by reference to the fact that his vehicle was used or intended to be used in trade and commerce would seem, in the words of the formula, to take "an essential attribute" of the trade and commerce of carrying goods by that vehicle and to proceed "by reference thereto or in consequence thereof" to impose the relevant financial burden. Yet the fact that the burden of paying road tax was imposed by reference to the fact that a vehicle was used or intended to be used in trade or commerce was held not to bring the law imposing the burden within the prohibition of s.92 in a case where the relevant use or intended use constituted interstate trade or commerce (see, e.g., the Road Maintenance (Contribution) Act 1958 (N.S.W.) and Freightlines & Construction Holding Ltd. v. New South Wales [1967] UKPCHCA 1; (1967) 116 CLR 1, at p 21). Finally, in Reg. v. Anderson; Ex parte Ipec-Air Pty. Ltd. [1965] HCA 27; (1965) 113 CLR 177, the Court upheld, as consistent with s.92, an executive refusal to permit the importation of some aeroplanes in circumstances where it was plain (see Kitto J., at pp.188 and 191-192) that the refusal of permission to import was based upon a government policy against allowing anyone to participate in the trade or commerce of conducting interstate air services other than those already engaged in it. Ipec-Air and the subsequent case of Ansett Transport Industries (Operations) Pty. Ltd. v. The Commonwealth [1977] HCA 71; (1977) 139 CLR 54 are authority for the proposition that the imposition or maintenance of a ban or burden on something antecedent to interstate trade, commerce or intercourse by reference to a purpose of engaging in such trade, commerce or intercourse (or for the purpose of preventing it) does not infringe s.92 of the Constitution even where interstate trade, commerce or intercourse is or would be involved. Indeed, Kitto J. (in Ipec-Air, at p.193) described the contrary view as "misconceived". Similarly, once the conclusion is reached that the defendant's erection and maintenance of the Somersby station was not, on the current state of the authorities, part of or a necessary attribute of the trade, commerce or intercourse involved in the use of the station to transmit signals, the fact that the prohibition and penalization of such erection and maintenance was by reference to the purpose of using the station (in its erected and maintained state) for the purpose of such trade, commerce or intercourse does not, on the present state of the authorities, bring the case within the scope of s.92 of the Constitution.

11. A question which has caused me considerable difficulty in the present case is whether the prohibition in s.6(1)(a) of the establishment, erection or maintenance of any station or appliance for the designated purpose is severable from the prohibition of use of any station or appliance for that purpose. That question is canvassed at length in other judgments and I am conscious of the force of the arguments supporting a conclusion against severability. On balance, however, I have come to the view that the prohibition on establishment, erection or maintenance is severable from the prohibition on use if the latter is either invalid or inapplicable to use in the course of interstate trade, commerce or intercourse. Plainly enough, there is no technical problem involved in severance. The severance of the operation of s.6(1)(a) in relation to use can be achieved by a simple deletion which leaves the meaning and effect of the balance of the clause quite unaltered. Nor, in my view, is it possible to discern in the Act a positive legislative intent that provisions dealing with the erection, establishment or maintenance of facilities for transmission are interdependent with the provisions dealing with the actual use of those facilities. That being so, the presumption of severability raised by s.15A of the Acts Interpretation Act 1901 (Cth) is not displaced. It follows that it is unnecessary for me to consider the question whether the prohibition on use in s.6(1)(a) can be justified as regulatory or must be read down so as not to apply to interstate trade, commerce or intercourse.

12. There remains for consideration the question whether "any implied constitutional guarantee" prevents the application of the relevant sections of the Act to the actions of the defendant in

erecting and maintaining the Somersby station. I do not find it necessary to examine in this judgment the general concept of the implication of constitutional guarantees of fundamental freedoms which has been considered and developed by Murphy J. in a series of judgments commencing with Buck v. Bavone [1976] HCA 24; (1976) 135 CLR 110, at p 137. The reason for this is that I do not consider that any such implied constitutional guarantee would relevantly extend beyond the wide operation which current authority gives to s.92 of the Constitution and which I have accepted for the purposes of the present case.

13. I would answer the questions asked in the stated case as follows:

> (1) In so far as those provisions of the Wireless Telegraphy Act 1905 (Cth) relate to the erection or maintenance of a station or appliance, No. Otherwise, unnecessary to answer.
>
> (2) No.

DAWSON J.: The Wireless Telegraphy Act 1905 (Cth), which has now been repealed, provided by s.6(1) that, except as authorized under the Act, no person should:

> "(a) establish, 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."

The defendant, TCN Channel Nine Pty. Ltd., was prosecuted in a Court of Petty Sessions in New South Wales under s.6(1)(a) upon two separate informations; one for erecting, without authorization, a station for the purpose of transmitting or receiving messages by means of wireless telegraphy and the other for maintaining, without authorization, a station for the same purpose. The proceedings were removed into this Court under s.40(1) of the Judiciary Act 1903 (Cth). Upon a case stated by the Chief Justice, the following questions are raised for the opinion of the Court:

> (1) Does section 92 of the Constitution prevent the application of sections 4, 5, 6(1) and 7(1) of the Wireless Telegraphy Act 1905 or any of those sections to the actions of the defendant described in paragraphs 2 to 5 hereof?
>
> (2) Does any implied constitutional guarantee prevent the application of sections 4, 5, 6(1) and 7(1) of the Wireless Telegraphy Act 1905 to the actions of the defendant described in paragraphs 2 to 5 hereof?

2. The case states that at Somersby in New South Wales the defendant, without a licence, established, erected, maintained and used a station the purpose of which was the receiving and transmitting of messages by means of wireless telegraphy as defined in the Wireless Telegraphy Act. The station was used as a link in a chain of links for the transmission of television messages between TCN Channel Nine at Sydney in the State of New South Wales and QTQ Channel Nine at Brisbane in the State of Queensland.

3. The usual method for the transmission of television messages between Sydney and Brisbane was by means of links, known as bearers, provided by the Australian Telecommunications Commission (Telecom). The defendant used the Telecom bearers but they were not always available. The defendant used its station to transmit television messages for itself and others who could not obtain access to the Telecom links. There is no contest that the transmission of messages by the use of the defendant's station formed part of interstate trade, commerce or intercourse.

4. Section 4 of the Wireless Telegraphy Act purported to confer upon the Minister the exclusive privilege of establishing, erecting, maintaining, and using stations and appliances for the purpose of transmitting and receiving messages by means of wireless telegraphy within Australia. Section 5 provided that licences to establish, erect, maintain, or use stations and appliances for the purpose of transmitting or receiving messages by means of wireless telegraphy might be granted by the Minister for such terms and on such conditions and on payment of such fees as are prescribed. Section 7 provided that all appliances erected, maintained, or used in contravention of the Act or regulations for the purpose of transmitting or receiving by means of wireless telegraphy should be forfeited to the Commonwealth. I should add that the Radiocommunications Act 1983 (Cth), which has replaced the Wireless Telegraphy Act, provides for a significantly different licensing system, so that the matters removed into this Court are of limited importance.

5. Although the defendant was not charged with using its station without authority, it is appropriate to consider first of all the validity of the statutory prohibition against unauthorized use. In the context of s.92, that is obviously the prohibition most susceptible to attack and, if invalid and not severable, would bring down the whole of s.6(1)(a).

6. Putting to one side for the moment certain submissions made on behalf of the Commonwealth, to which I shall refer later, the prohibition against the use of a station to transmit or receive messages by means of wireless telegraphy would, in the absence of the power to grant licences, have amounted to a contravention of s.92. It was a prohibition against intrastate and interstate use alike, but it was not contended that it could be read down so as to apply only to intrastate use. The first question is, therefore, whether the licensing system established by the relevant provisions of the Wireless Telegraphy Act constituted a sufficient qualification of the prohibition to render the relevant provision compatible with the freedom guaranteed by s.92. That would only have been so if the system amounted to no more than reasonable regulation in all the circumstances of the trade, commerce or intercourse involved. There is no need in this case to examine what might amount to reasonable regulation because, whatever the answer to that question, it is clearly established that a prohibition, subject only to an unfettered executive discretion to issue or refuse a licence, goes beyond regulation which may be permissible having regard to the guarantee afforded by s.92. See Hughes and Vale Pty. Ltd. v. The State of New South Wales [1954] UKPCHCA 5; (1954) 93 CLR 1, at pp 26-27; Hughes and Vale Pty. Ltd. v. The State of New South Wales (No.2) [1955] HCA 28; (1955) 93 CLR 127, at pp 162-163; Boyd v. Carah Coaches Pty. Ltd. [1979] HCA 56; (1979) 145 CLR 78, at pp 84-85; Ackroyd v. McKechnie [1986] HCA 43; (1986) 60 ALJR 551; 66 ALR 287.

7. Under s.5 of the Wireless Telegraphy Act the discretion conferred upon the Minister to issue or refuse a licence was clearly uncontrolled; the prohibition against the unauthorized use of a station

which was imposed by s.6(1) must therefore have amounted to interference with the freedom of the trade, commerce or intercourse involved in its use. Nor can it be contended that the licensing provision, as it was administered, amounted to no more than reasonable regulation, for a legislative provision which is wide enough to embrace conduct which infringes s.92 cannot be saved by establishing that it is in fact administered in accordance with the requirements of s.92. Both in Collier Garland Ltd. v. Hotchkiss [1957] HCA 40; (1957) 97 CLR 475, at p 486 and in Ackroyd v. McKechnie at p 554; p 292 of ALR it was pointed out that it is the legal operation of the relevant provision with which the Court is concerned and not administrative practice. For the same reason, the availability of judicial review of administrative decisions of the sort now provided for by the Administrative Decisions (Judicial Review) Act 1977 (Cth) has no relevance: it is the licensing provision which establishes the width of the discretion whatever avenues might exist for the review of decisions made in the exercise of that discretion.

8. The Commonwealth, which intervened to support the legislation, sought to justify the mode of regulation by a submission that s.92 does not operate to disturb governmental monopolization of a system of communication. It pointed to the recognition given by the Privy Council in James v. The Commonwealth [1936] HCA 32; (1936) 55 CLR 1, at p 54; (1936) AC 578, at p 626, to the state monopoly over postal services and the observation that the limitation upon private activities in that area is "... a limitation notoriously existing in ordinary usage in all modern civilized communities; it does not impede freedom of correspondence, but merely as it were, canalizes its course just as 'free speech' is limited by well known rules of law. Very much the same is true of the Wireless Telegraph Act 1905". Their Lordships in making these comments were, of course, dealing with the argument that certain federal statutes had been enacted on the assumption that s.92 did not bind the Commonwealth, but it is difficult to read the reference to the Wireless Telegraphy Act as a reference to a state monopoly because the Act upon its face, notwithstanding the declaration of exclusive ministerial privilege contained in s.4, plainly did not provide for a monopoly: it provided for the establishment, erection, maintenance and use under licence of stations and appliances for the purpose of transmitting or receiving messages by means of wireless telegraphy. And the case stated reveals that thousands of licences were issued authorizing the use of the radio frequency spectrum by means of wireless telegraphy. This case does not, therefore, raise the question which has been agitated in recent cases whether a state monopoly of some aspect of trade or commerce might be compatible with the absolute freedom guaranteed by s.92 if it is "... the only practical and reasonable manner of regulation ...": see The Commonwealth v. Bank of N.S.W. [1949] HCA 47; (1949) 79 CLR 497, at p 641; (1950) AC 235, at p 311. See also Clark King & Co. Pty. Ltd. v. Australian Wheat Board [1978] HCA 34; (1978) 140 CLR 120; Uebergang v. Australian Wheat Board [1980] HCA 40; (1980) 145 CLR 266. The regulation for which the Wireless Telegraphy Act provided was not regulation by means of monopoly; it was regulation by means of a licensing system. To avoid infringement of s.92 such a system must be reasonable in the relevant sense. This involves recognition of the need for an ordered society so that the freedom guaranteed by s.92 might be enjoyed by those to whom its protection extends. A system which confers an arbitrary discretion upon the Minister to grant or refuse a licence without regard to any consideration which might be measured against this requirement does not, as I have already pointed out, comply with s.92.

9. A cognate submission made by the Commonwealth was that the airwaves constitute a limited resource such that not all who wish to use them can do so without preventing or hindering use by others. It was said that it was compatible with s.92 to preserve the freedom of some users by rationing airwave frequencies and excluding others entirely. The answer to this submission must be the same as that just given. The argument might have force if it could be shown that the system of licensing established by the Wireless Telegraphy Act required the Minister to consider restricting the availability of a scarce resource to certain persons for the greater good of the whole community. But the absolute discretion given to the Minister shows that he was not required to be motivated by any such consideration. Some distinction may have to be drawn between cases

involving the rationing of a scarce resource by means of a system of licences and cases involving regulation by means of a licensing system for some other purpose, such as the orderly conduct of business. It may be true to say that in cases where rationing is a reasonable mode of regulation, there will be no necessary infringement of s.92 if an application for a licence may be refused upon grounds having nothing to do with the character of the applicant or his activities. By way of contrast, in other cases, such as the transport cases, regulation by means of a licensing system will only be reasonable if the conditions laid down for the issue of licences are reasonable and an applicant for a licence is entitled to it if he meets those conditions. Where rationing is reasonable because of the limited availability of a resource, it may necessarily involve the licensing of some and the prohibition of others. That, however, is not the same thing as complete prohibition. "If I cannot lawfully prohibit altogether, I cannot lawfully prohibit subject to an absolute discretion on my part to exempt from the prohibition": McCarter v. Brodie [1950] HCA 18; (1950) 80 CLR 432, at p 498, per Fullagar J. A system of licensing which allows a licence to be refused upon arbitrary grounds unrelated to the scarcity or availability of the resource in which participation is sought cannot fairly be described as a system of rationing and cannot be described as reasonable in reliance upon the need for such a system. The relatively large number of licences that were granted under the Wireless Telegraphy Act indicates quite clearly the scope which the Act gave to the Minister to grant or refuse a licence for reasons unrelated to the limited spectrum of radio frequencies.

10. The next question is whether the prohibition against unauthorized use may be severed from s.6 (1)(a), leaving the sub-section to operate in other respects. I think that this question admits of only one answer having regard to the quite separate and distinct expressions used in the sub-section. There can hardly be any doubt that the establishment, erection, maintenance and use of a station, however much they may be related, are concepts each of which, as a matter of construction, is capable of standing on its own. The severance of the word "use" does not alter the operation of the words which precede it upon the persons to whom the sub-section applies. Were it not for s.15A of the Acts Interpretation Act 1901 (Cth), it might be possible that from some of the other sections in the Wireless Telegraphy Act a legislative intent could be discerned to the effect that the Act, and s.6(1)(a) in particular, should have operated only as a whole. Such an intent might, perhaps, be seen in s.4 which gave the Minister the exclusive privilege of establishing, erecting, maintaining and using wireless telegraphy stations. And it might be thought that the prohibition against the unauthorized establishment, erection and maintenance of a station was ancillary to the prohibition against the unauthorized use of a station and not intended to have an independent operation. I very much doubt whether such would be the case: it seems more likely that, if it could not prohibit unauthorized use, the legislature intended to prohibit such unauthorized activities in relation to wireless telegraphy stations as it could. However, the matter cannot be approached upon that basis, for s.15A makes it plain, in my view, that the prohibition against the unauthorized establishment, erection and maintenance of a wireless telegraphy station is, in each instance, to be construed as having an operation independent of the prohibition against unauthorized use. It has been observed that a provision such as s.15A raises "a presumption in favour of the independence, one from another, of the various provisions of an enactment, to which effect should be given unless some positive indication of interdependence appears from the text, context, content or subject matter of the provisions": see Fraser Henleins Pty. Ltd. v. Cody [1945] HCA 49; (1945) 70 CLR 100, at p 127, per Dixon J. I can find no such indication of interdependence in the Wireless Telegraphy Act. There is no difficulty in treating the activities prohibited by s.6(1)(a) as distributive or divisible and no different meaning is required to be given to them when they are so treated.

11. That, then, leads to the next question, which is whether any of the prohibitions against the unauthorized establishment, erection or maintenance of a wireless telegraphy station was an interference with interstate trade, commerce or intercourse and for that reason an infringement of s.92. The argument put on behalf of the defendant placed strong emphasis upon the passage in the

judgment of Dixon C.J. in Hospital Provident Fund Pty. Ltd. v. State of Victoria [1953] HCA 8; (1953) 87 CLR 1, at pp 17-18, in which he said:

> "If a law takes a fact or an event or a thing itself forming part of trade commerce or intercourse, or forming an essential attribute of that conception, essential in the sense that without it you cannot bring into being that particular example of trade commerce or intercourse among the States, and the law proceeds, by reference thereto or in consequence thereof, to impose a restriction, a burden or a liability, then that appears to me to be direct or immediate in its operation or application to inter-State trade commerce and intercourse, and, if it creates a real prejudice or impediment to inter-State transactions, it will accordingly be a law impairing the freedom which s.92 says shall exist. But if the fact or event or thing with reference to which or in consequence of which the law imposes its restriction or burden or liability is in itself no part of inter-State trade and commerce and supplies no element or attribute essential to the conception, then the fact that some secondary effect or consequence upon trade or commerce is produced is not enough for the purposes of s.92."

Counsel for the defendant recognized the possibility that a broader conception of interstate trade, commerce or intercourse might be extracted from later cases: see North Eastern Dairy Co. Ltd. v. Dairy Industry Authority of N.S.W. [1975] HCA 45; (1975) 134 CLR 559; Permewan Wright Consolidated Pty. Ltd. v. Trewhitt [1979] HCA 58; (1979) 145 CLR 1; Smith v. Capewell [1979] HCA 48; (1979) 142 CLR 509; Australian Coarse Grains Pool Pty. Ltd. v. Barley Marketing Board (No.2) [1985] HCA 38; (1985) 59 ALJR 516; 59 ALR 641. He was, however, content to rest his argument upon the passage which I have set out, submitting that the erection and maintenance of a wireless telegraphy station were both essential to the transmission of television messages interstate, that being the form of trade, commerce and intercourse in which his client was admittedly engaged, and were therefore inseparable concomitants of it.

12. The contrary argument, which was put on behalf of the Commonwealth, placed reliance upon cases which draw a line between acts or transactions which are preliminary to interstate trade, commerce or intercourse and the trade, commerce or intercourse itself. These cases fall into two categories. There are those dealing with the manufacture or production of goods for interstate trade or commerce in which it was held that there can be no trade in the goods until they come into existence: Grannall v. Marrickville Margarine Pty. Ltd. [1955] HCA 6; (1955) 93 CLR 55; Beal v. Marrickville Margarine Pty. Ltd. [1966] HCA 9; (1966) 114 CLR 283; Damjanovic& Sons Pty. Ltd. v. The Commonwealth [1968] HCA 42; (1968) 117 CLR 390; Bartter's Farms Pty. Ltd. v. Todd [1978] HCA 36; (1978) 139 CLR 499. And there are the cases in which it was held that a prohibition against the importation of goods for use in interstate trade or commerce does not operate upon, and so does not interfere with the freedom of, interstate trade or commerce: Reg. v. Anderson; Ex parte Ipec-Air Pty. Ltd. [1965] HCA 27; (1965) 113 CLR 177; Ansett Transport Industries (Operations) Pty. Ltd. v. The Commonwealth [1977] HCA 71; (1977) 139 CLR 54. Whilst in Ansett Transport Industries (Operations) Pty. Ltd. v. The Commonwealth Aickin J.

pointed out, at p 113, that the importation cases might also be explained upon the basis that s.92, being dependent for its operation upon the introduction of uniform customs duties, necessarily contemplates prohibitive measures against imports. Nevertheless those cases, as well as the cases dealing with manufacture or production, also rest upon the proposition that the relevant activity is anterior to interstate trade and does not form part of it: cf. Australian Coarse Grains Pool Pty. Ltd. v. Barley Marketing Board (No.2) at p 527; pp 659-660 of ALR It is not enough to attract the protection of s.92 that the activity "... affects something which, because it is a sine qua non to the existence of some subject of the freedom which s.92 guarantees, has a consequential effect on what might otherwise have been done in inter-State trade": Grannall v. Marrickville Margarine Pty. Ltd. at p 78.

13. It is true that in Reg. v. Anderson; Ex parte Ipec-Air Pty. Ltd., at p 204, Windeyer J. expressed the view that "... to deny to a person lawfully engaged in inter-State trade things requisite and necessary for carrying on his trade might ... in some circumstances contravene s.92". But if that is a valid qualification, it carries this case no further so far as establishment and erection are concerned, because, in speaking of lawful engagement in interstate trade, it presupposes the lawful establishment or erection of a wireless telegraphy station. There might be, in some circumstances, difficulty in drawing the line required by the manufacture or production cases and the importation cases having regard to the later cases of North Eastern Dairy Co. Ltd. v. Dairy Industry Authority of N.S.W.; Perre v. Pollitt [1976] HCA 27; (1976) 135 CLR 139; and Australian Coarse Grains Pool Pty. Ltd. v. Barley Marketing Board (No.2). However the difficulty does not, I think, arise in this case in relation to the establishment and erection of a wireless telegraphy station which can, as I shall point out, be clearly seen as activities which are preparatory to the transmission and receipt of messages.

14. However, it can, I think, be said that the maintenance of a wireless telegraphy station is not a mere preliminary to the use of the station. The maintenance of a wireless telegraphy station, as that word was used in s.6(1)(a), involves keeping the station in good order and repair and, notwithstanding that as a matter of construction it may be regarded separately, it is an element of the use of the station rather than an activity which precedes it. Cf. Australian Coarse Grains Pool Pty. Ltd. v. Barley Marketing Board (No.2) at p 520; p 647 of ALR If, as is clear in this case, the use of the station constitutes interstate trade or commerce, then in my view so too does the maintenance of the station. It is, to put it in the words of Dixon C.J. in the Hospital Provident Fund Case, an attribute of use which is essential to such use. For the same reason that the prohibition against the unauthorized use of the station is invalid, so must the prohibition against unauthorized maintenance be invalid.

15. The establishment and erection of a wireless telegraphy station can, on the other hand, only be seen as something separate from the trade, commerce or intercourse involved in its use. They are prerequisites to the use of the station but no more so than is the manufacture or importation of goods a prerequisite to their entry into interstate trade and commerce. The establishment and erection of a wireless telegraphy station is the method by which an operator equips himself with the wherewithal to send television messages and so engage in trade, commerce or intercourse but it is a mere preparation for that activity and, even if it constitutes trade or commerce of itself it is, I think, clearly of an intrastate and not interstate character. See Beal v. Marrickville Margarine Pty. Ltd., at pp 304-305, per Kitto J. If, as the cases show it can, a line is to be drawn between acts of preparation for engaging in interstate trade, commerce or intercourse and the actual interstate trade, commerce or intercourse itself, then it appears to me that the establishment and erection of a wireless telegraphy station falls within the former category. The cases to which I have referred show not only that such a line can be drawn but also that it ought to be drawn. Even if the effect of prohibiting preliminary activities, which are not of themselves interstate trade, commerce or intercourse, is to prevent or impede entry into interstate trade, commerce or intercourse, there is no burden upon interstate trade, commerce or intercourse and no invalidity on that account. It is only

acts or transactions which amount to interstate trade, commerce or intercourse that are protected by s.92, not freedom of commercial dealing: Australian Coarse Grains Pool Pty. Ltd. v. Barley Marketing Board (No.2) at p 542; p 686 of ALR

16. The submission made in a number of ways on behalf of the defendant amounted in the end to the one thing: the establishment and erection of a wireless telegraphy station are inseparably connected with its use for the purpose of transmitting television messages in the course of interstate trade, commerce or intercourse. But for my part I think that there is a clear separation between the establishment and erection of a wireless telegraphy station and its use, certainly its use in interstate trade, commerce or intercourse. Obviously the establishment and erection of the station are essential before it can be used, but to say as much is not to say that establishment and erection constitute an attribute of trade, commerce or intercourse, let alone an essential attribute of interstate trade, commerce or intercourse. It is to the noun "attribute" as well as the adjective "essential" that attention should be given in the passage which I have quoted from the judgment of Dixon C.J. in the Hospital Provident Fund Case.

17. It was submitted that the nature of the legislative power to enact the Wireless Telegraphy Act supports the argument that the establishment and erection of a wireless telegraphy station is part and parcel of its use and not an antecedent activity which may be regarded separately. The relevant power is contained in s.51(v) and gives to the parliament power to make laws with respect to postal, telegraphic, telephonic, and other like services. As I understand the submission, it is said that the power to prohibit the establishment or erection of a wireless telegraphy station must be the power to make laws with respect to telegraphic services and hence the establishment and erection of such a station must form part of those services or be incidental to them. Thus, it is said, there is an inseparable connexion between the establishment and erection of a wireless telegraphy station and its use which attracts the protection of s.92 to the one as well as the other. I think that the argument is misconceived. Section 92 does not speak of telegraphic services but of interstate trade, commerce and intercourse. Not all that falls within the subject of telegraphic services constitutes trade, commerce or intercourse or, at all events, interstate trade, commerce or intercourse. What may be a sufficient connexion to bring an activity within the legislative power may be insufficient to bring it within the description of interstate trade, commerce or intercourse for the purposes of s.92. There is, in my view, no reason to be found in the legislative power for regarding the establishment and erection of a wireless telegraphy station as other than antecedent to and separate from the trade, commerce or intercourse involved in its use.

18. Counsel for the defendant, as part of his argument, pointed to the fact that it was not the unauthorized erection of a wireless telegraphy station which was prohibited by s.6(1)(a) but the unauthorized erection of a station for the purpose of transmitting or receiving messages by means of wireless telegraphy. This, it was said, was sufficient to establish an inseparable connexion between erection and use. However, a common purpose does not preclude the separation of the two activities for the purposes of s.92: it was never in question in the cases to which I have referred that the purpose of the manufacture, production or importation of the goods was to engage in interstate trade but they nevertheless remained antecedent activities. Moreover, the reference to purpose in s.6(1)(a) may be readily understood as making explicit the legislative power upon which reliance was placed.

19. It remains only to deal with the last submission advanced on behalf of the defendant which was that the operative sections of the Wireless Telegraphy Act impinged upon an implied, constitutional guarantee of freedom of communication. This submission was based upon a view expressed by Murphy J., first in Buck v. Bavone [1976] HCA 24; (1976) 135 CLR 110 and subsequently in Ansett Transport Industries (Operations) Pty. Ltd. v. The Commonwealth and McGraw-Hinds (Aust.) Pty. Ltd. v. Smith [1979] HCA 19; (1979) 144 CLR 633. Some support for such an implication might be found in the judgment of Griffith C.J. and Barton J. in R. v.

Smithers; Ex parte Benson [1912] HCA 92; (1912) 16 CLR 99, but the guarantee of freedom of communication which they found by implication in the Constitution was found by the other members of the Court, Isaacs and Higgins JJ., to be expressly provided for by s.92. There can, of course, be no room for implication in the face of express provision.

20. In Buck v. Bavone and subsequent cases, Murphy J. has expressed the opinion that the freedom which s.92 was intended to secure was freedom from fiscal imposts only. Whether as a matter of history the intention was so confined is something upon which scholars may differ but for a lawyer the intention must be drawn primarily from the words used and they do not admit of any such interpretation. In Uebergang v. Australian Wheat Board at pp 315-316, Aickin J. observed that the view advanced by Murphy J. contemplated a total ban on the movement of goods from one State to another, something which he regarded as irreconcilable with both the language of s.92 and its basic function in the Constitution. And in Clark King & Co. Pty. Ltd. v. Australian Wheat Board at p 151, Barwick C.J. pointed out that if s.92 only spoke as to border duties, then in reality it was only addressed to the Commonwealth, the States already being precluded from the imposition of border duties by s.90. He continued: "that the 'barbarism of borderism' was a factor in the acceptance of s.92 may be conceded. But border duties were but the more obvious manifestation of legislative and executive acts which share in that barbarism. The idea that the Commonwealth would impose border duties, which of necessity must be uniform and without discrimination so far as States were concerned, is somewhat ludicrous. That s.92 was only designed to prevent the Commonwealth pursuing such a course is beyond belief." And, of course, authority is uniformly against the view that s.92 is so confined. Perhaps the most relevant of the authorities for present purposes is Gratwick v. Johnson [1945] HCA 7; (1945) 70 CLR 1, for in that case it was held that the freedom guaranteed by s.92 to intercourse extends to communication in the form of travel interstate for purposes other than commercial purposes. I do not think that any implication can be made of the sort for which the defendant contends in view of the established scope of s.92.

21. I would answer the questions in the same manner as the Chief Justice.

ORDER

Answer the questions as follows:

Question 1: Does section 92 of the Constitution prevent the application of sections 4, 5, 6(1) and 7(1) of the Wireless Telegraphy Act 1905 (Cth), as amended, or any of those sections to the actions of the defendant described in paragraphs 2 to 5 hereof?

Answer: Yes, but only in so far as those sections relate to the use of the station or appliance.

Question 2: Does any implied constitutional guarantee prevent the application of sections 4, 5, 6(1) and 7(1) of the Wireless Telegraphy Act 1905 (Cth), as amended, to the actions of the defendant described in paragraphs 2 to 5 hereof?

Answer: No.

Order that the costs of the proceedings in this Court be paid by the defendant.
