

HIGH COURT OF AUSTRALIA

Bradley

Vs.

The Commonwealth.

(Barwick C.J.(1), McTiernan(2), Menzies(3), Gibbs(1) and Stephen(4) JJ.)

10 September 1973

CATCHWORDS

Posts and Telegraphs - Postmaster-General - Power to withdraw postal and telecommunication services - Duty to provide services - Injunction - Post and Telegraph Act 1901-1971 (Cth), ss. 54, 57, 91, 96, 158.

International Law - United Nations - Security Council - Resolution declaring regime in power in a country unlawful - Resolution calling upon member states to take appropriate measures - Effect in Australian municipal law - Charter of the United Nations Act 1945 (Cth), s. 3.

HEARING

Melbourne, 1973, May 4, 7;
Sydney, 1973, September 10. 10:9:1973
MOTION.

DECISION

September 10.
The following written judgments were delivered:-

BARWICK C.J. AND GIBBS J. Denzil Vaughan Montague Bradley, the plaintiff in Commonwealth of Australia and the Postmaster-General, claims, by his writ, the following relief:

- "1. That the defendants their officers servants and agents have wrongfully and unlawfully discontinued the telephone service and stopped the mails and failed to provide all or any of the services normally provided by the Postmaster General at the Rhodesia Information Centre, 9 Myrtle Street, Crows Nest in the State of New South Wales.
2. For a declaration to the effect that such actions are unjustifiable and unlawful.
3. For an injunction against the continuance of such actions.
4. For damages.
5. For costs of this action

6. For such further or other relief as the case may require."

On the day on which the writ was issued the plaintiff took out a motion for an order that the defendants by themselves, their officers, servants or agents be restrained until the hearing of this action or further order from continuing the disconnexion of telephone, mail and other services formerly provided by the Postmaster-General for the use, occupancy and enjoyment of the Rhodesia Information Centre at the address aforesaid. The matter has come before a Full Court pursuant to a direction under s. 18 of the Judiciary Act. Before us, both parties have agreed that the motion should be treated as one for a perpetual injunction so that this Court may pronounce finally on the principal questions that arise. (at p561)

2. The relevant facts of the case are as follows. The plaintiff is a South African national who has since about June 1972 been the acting director of the Rhodesia Information Centre at 9 Myrtle Street, Crows Nest, Sydney. He described the purpose of the Centre as "the dissemination of factual information about Rhodesia throughout Australia". For that purpose he distributes a publication called "The Rhodesian Commentary" which is registered for transmission through the post office. No further details of the activities of the Rhodesia Information Centre were elicited in evidence other than that no commercial activity is carried on at 9 Myrtle Street, Crows Nest. (at p562)

3. The plaintiff said that he is employed at the Rhodesia Information Centre by "the Department of Information, Rhodesian Government". To repeat that description is not to suggest that the so-called Government is one which either exercises legal power within the territory which it purports to control or that it is recognized by the Commonwealth of Australia. We are entitled to take judicial notice of "the course of open and notorious international events of a public nature" (Australian Communist Party v. The Commonwealth [\[1951\] HCA 5; \(1951\) 83 CLR 1](#), at p 196 ; and see also Anglo Czechoslovak & Prague Credit Bank v. Janssen [\(1943\) VLR 185](#), at p 197) and to take account of the fact that power in Southern Rhodesia ("Rhodesia" as it will be convenient to call it) is exercised by a regime which has unlawfully usurped power: Madzimbamuto v. Lardner-Burke [\[1968\] UKPC 2; \(1969\) 1 AC 645](#) . If, for the purpose of this case, it were necessary to take judicial cognizance of the status of the regime in Rhodesia, and if uncertainty existed on that question, the Court would seek from the Executive Government a statement upon the precise matter necessary to be known, and the information furnished by the appropriate Minister in response to the request of the Court would be regarded as conclusive: Duff Development Co. Ltd. v. Government of Kelantan [\(1924\) AC 797](#), at pp 805-806, 813, 824, 830 . However, the so-called Government of Rhodesia is not a party to these proceedings, and for reasons that will appear, the question of its status does not need to be considered or determined. (at p562)

4. There were admitted into evidence, over objection, copies of a number of resolutions passed by the Security Council of the United Nations, over a period of years from 1965 to 1970. It is unnecessary to set out the effect of these resolutions in full; the Security Council has condemned the Unilateral Declaration of Independence, and the Proclamation of Republican Status, in Rhodesia, has described the regime in that territory as illegal and has called on all member states to refrain from recognizing or assisting it and it is enough to refer in particular to two of the clauses of a resolution of 18th March 1970 whereby the Security Council (inter alia) -

"3. Calls upon Member States to take appropriate measures, at the national level, to ensure that any act performed by officials and institutions of the illegal regime in Southern Rhodesia shall not be accorded any recognition, official or

otherwise, including judicial notice, by the competent organs of their State."

"11. Requests Member States to take all possible further action under Article 41 of the Charter to deal with the situation in Southern Rhodesia, not excluding any of the measures provided in that Article."

Article 41 of the Charter of the United Nations provides as follows:

"The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." (at p563)

5. It is not in contest that on 18th April 1973 the Postmaster-General issued a direction that all postal and telecommunication services for the Rhodesia Information Centre should be withdrawn. This direction was implemented by an instruction dated 19th April 1973 which was sent to the postmaster at Crows Nest in the following terms:

"The following extract of a telex message from the Director-General to the Director is forwarded for your information:

'The Postmaster-General has directed that all postal and telecommunication services for the Rhodesian Information Centre shall be withdrawn forthwith and that this direction shall apply to any other person business name, corporation or organisation which is acting on behalf of or in any way assisting the Rhodesian Regime.

2. The following action should therefore be taken immediately:
Postal Services to be withdrawn from Rhodesian Information Centre.

Cancel tenancy of P.O. Box 138, Crows Nest, N.S.W.

Deregister the publication 'Rhodesian Commentary'.

Cease any delivery of postal articles to the Rhodesian Information Centre at 9 Myrtle Street, Crows Nest.

3. Any postal articles known to be lodged by or for the Rhodesian Information Centre should be refused if tendered at P.O. counter or if otherwise noticed in the mail they should not receive further transmission.

4. All the mail referred to above is to be treated as undeliverable and returned to sender with an "undeliverable" endorsement only appearing thereon.

5. Concerning persons acting on behalf of the centre you might please arrange to ascertain the names and addresses

of any persons it is considered may come under the terms of the Minister's direction in regard to their postal or telephone services and advise this office so that further action can be agreed.'

2. With regard to paragraph 5 of the above telex message, please advise me promptly if you or your staff know, or in the future learn of the names and addresses of any persons it is considered may come under the terms of the Minister's direction in regard to their postal or telephone services.

3. This confirms my telephonic advice of today."

The officers of the post office, acting on the instruction of the Postmaster-General, in fact caused all mail and telephone services to the Rhodesia Information Centre to be discontinued and for this purpose (inter alia) stopped mail to the Centre, deregistered "The Rhodesian Commentary" and changed the lock on the post office box of which the plaintiff had a tenancy. Periodicals addressed to the Centre and marked "Undeliverable" in accordance with the instruction were torn up. On 24th April, in obedience to an interim injunction, the services were restored. (at p564)

6. The question that now falls for decision is whether the direction thus issued by the Postmaster-General, and the action taken by the officers of his department in pursuance of his direction, were beyond the powers conferred by law on the Postmaster-General and his officers. If they were beyond power, and if they have caused or will probably cause particular injury to the plaintiff, there can be no doubt that this Court, acting in the exercise of the jurisdiction conferred by [s. 75](#) of the [Constitution](#), has power to grant an injunction to restrain the continuance of the unauthorized actions. (at p564)

7. The defendants were unable to point to any express statutory authorization for the above actions except in relation to the so-called "withdrawal" of the telephone service which it was claimed was authorized by a regulation whose effect will later be considered. Their submission was that the Post and Telegraph Act 1901-1971 (Cth) ("the Act") and the regulations thereunder give no right to any member of the public to use the postal and telephonic services provided by the Commonwealth. Those statutory provisions, it was said, are permissive rather than obligatory, and directory rather than mandatory; they empower the Postmaster-General to provide facilities for the public, and direct the officers of his department in the performance of their administrative duties but do not place the Commonwealth or the Postmaster-General or the officers of his department under any duty to any member of the public except in those cases (of which the present is not one) where a right or remedy is expressly conferred on particular members of the public. It was further submitted that the common law does not impose on the defendants any duty to provide the plaintiff with postal or telephonic services. The defendants in effect contended that the Postmaster-General has an absolute and unfettered power to deprive any person in the Commonwealth of mail and telephone services without giving any reason and without being required to justify his action. The important question that falls for consideration is whether these submissions are correct. (at p565)

8. In *Bennett and Fisher Ltd. v. Electricity Trust (S.A.)* [1962] HCA 11; (1962) 106 CLR 492, at pp 499-501, 510, this Court held that no doctrine has been established in English law that a public authority exercising an exclusive franchise is bound to provide the service covered by the franchise. However, the plaintiff in the present case did not rest his claim upon any principle of the common law and the decision of this case depends entirely upon the proper construction of the Act and regulations. It should, however, be said that there is nothing in *Bennett and Fisher Ltd. v. Electricity*

Trust (S.A.) (1962) [106 CLR 492](#) that is inconsistent with the established rule that in the construction of a statute regard may be had to its subject matter and object, and if the object of the statute is to confer a monopoly upon some public authority the decision in that case does not deny that due regard may be had to that fact. In *Bennett and Fisher Ltd. v. Electricity Trust (S.A.)* [1962] HCA 11; (1962) [106 CLR 492](#) the statute itself provided for the entitlement of individuals to be supplied with the electricity which the Electricity Trust was authorized to supply and the case was decided upon the construction of the precise words by which that entitlement was conferred. The object of the Act under consideration in the present case is to provide for the administration and control of the postal, telegraphic and telephonic services which soon after federation were taken over by the Commonwealth from the various States and, with certain immaterial exceptions, became the monopoly of the Commonwealth. Although the extent to which mail can be delivered or telephones connected to any part of the Commonwealth must depend on practical considerations, so that it may not be possible to deliver mail in every place or to provide a telephone for every person who wants one, there can be no doubt that the postal and telephone services are among the most important amenities available to the people of the Commonwealth, and are essential to the conduct of trade and commerce as well as to the enjoyment of any real freedom in the dissemination of information and opinion. It is legitimate to have regard to these considerations in interpreting the Act, although they would not justify a departure from the ordinary meaning of words that were clear and unambiguous in themselves and not inconsistent with other provisions of the statute. When, however, it becomes necessary to resolve an ambiguity or obscurity, it is right to start from the assumption that if the Parliament intended to confer on the Postmaster-General an arbitrary power, subject to no conditions and to no review, to deprive any person of the liberty to use the postal and telephone services, with all the grave consequences that might ensue, it would use clear words for that purpose. It then becomes necessary to turn to the Act and to make a survey, in some detail, of its relevant provisions in an attempt to determine whether the power claimed for the Postmaster-General has in truth been given to him. (at p566)

9. The Act provides, by s. 4, that the Postmaster-General's Department shall have control of the postal and telegraphic (which includes telephonic (s. 3)) services of the Commonwealth, and, by s. 5, that the administration of the Act and the control of the department are vested in the Postmaster-General (who is one of the Ministers of State for the Commonwealth). The officer of the Public Service who, under the Postmaster-General, exercises control of the department throughout the Commonwealth is the Director-General of Posts and Telegraphs (s. 6) and the principal officer of the department in each State is the Director of Posts and Telegraphs (s. 7). The Postmaster-General is in effect given a monopoly in respect of telegraphs (including telephones) by s. 80, and in respect of the carriage of letters by s. 98; there are exceptions, but they are immaterial. The Act abounds with indications that it is intended that a letter which is properly addressed and stamped and which is received at a post office for transmission and delivery shall be transmitted and delivered to the address indicated or, if letter carriers are not provided, to the nearest post office, except in cases for which express provision is made. Section 60 provides as follows:

"(1) The transmission of a postal article addressed to a person in the Commonwealth to the post office of the post town to which it is directed or if not so directed then to the post office of the post town nearest to the address named shall be sufficient transmission under this Act.

(2) When delivery by letter carriers is provided delivery according to the address or at the last known place of residence of the person named in the address shall be sufficient delivery

to such person unless he by written notice to the postmaster of the office to which such article is addressed has prohibited such delivery."

Many other provisions of the Act are consistent only with the assumption that the general rule to be followed is that a letter duly stamped and addressed will be delivered to the addressee or appropriate post office. Thus it is provided that, subject to certain exceptions, "Every postal article received by post from a place out of the Commonwealth shall be transmitted and delivered free of charge within the Commonwealth ..." (s. 20); that "No additional charge shall be made on prepaid postal articles (other than parcels) re-addressed within the time and in manner prescribed and again forwarded by post within the Commonwealth if the postage originally paid would have been sufficient if the postal article had originally been addressed to its new destination ..." (s. 22(1)); that "Any letter post-card letter-card or packet posted for delivery in the Commonwealth on which the postage is not fully prepaid may be transmitted and delivered, but before delivery there shall be paid double the amount of the deficient postage ..." (s. 23); that certain communications shall be transmitted and delivered free of charge (s. 24) or although the postage has not been prepaid (ss. 25, 27); that no postmaster shall be bound to take any notice of stamps not affixed on the face of the postal article and near the address written thereon (s. 35); that registered articles "shall be put into the post office and also be delivered at or between such hours in the day and under such conditions as the Postmaster-General shall appoint" (s. 38(1)); that the Postmaster-General shall, if directed by an order of a competent court, cause postal articles addressed to a bankrupt to be delivered to the official receiver (s. 55) and that postal articles addressed to deceased persons may be delivered to their personal representatives on production of probate or letters of administration and until such production to some near relative of the deceased (s. 56 and reg. 88 of the Postal Regulations). The Postal Regulations made under the Act recognize even more explicitly that there is a duty to receive and transmit mail that complies with the requirements of the Act and regulations; it does not seem necessary to set out the provisions of the regulations in any detail but particular reference may be made to regs. 51, 82, 157, 175, 176A and 187-193. (at p568)

10. However, as has been indicated, the contention of the defendants is that any duty to receive and transmit mail is owed by the officers of the department only to the Crown and that a person whose mail is not transmitted, or to whom mail is not delivered, has no right to any redress. The defendants referred particularly to a number of provisions of the Act and regulations which expressly give remedies against the Postmaster-General and submitted that it is only in those cases that any remedy is available. With two exceptions (ss. 29 and 43), to which further reference will be made and which on examination will be seen to be opposed to the defendants' argument, the provisions relied on afford little assistance in answering the present question. Those provisions in short provide for the determination by arbitration of (a) the amount to be paid by the Postmaster-General to the State railways for carrying mails (s. 18); (b) compensation to be paid for damages sustained by local authorities and other persons by reason of the exercise of the powers conferred by the Act (which appear to be powers to enter and do works on lands, affix telegraph wires to buildings and so on) (s. 90); (c) the amount payable on the resumption of any private telegraph or telephone line (s. 92); and (d) "any difference which arises between the Postmaster-General and an electric authority or its agents with respect to any requirements of the Postmaster-General, or as to the cost of any alterations of telegraph lines" (s. 154). Further reference was made to regs. 165 and 172 which give a right in certain circumstances to compensation for loss or damage to registered articles. None of these provisions in any way relates to the power of the Postmaster-General to prevent an individual from using the mails or the telephone service and it is impossible to draw from them any inference that it was intended that a person who, by reason of an unauthorized executive action, is not

permitted to use those services should have no remedy at law. (at p568)

11. There are, on the other hand, a number of sections of the Act that render it impossible to accept the submission that the Postmaster-General has an unfettered power to direct that the use of the postal services shall be denied to an individual and that the refusal of an officer of the department to receive or deliver postal articles lodged by or for a particular person provides no legal ground of complaint. Of these sections perhaps the most important is s. 57, which provides as follows:

"(1) If the Postmaster-General has reasonable ground to suppose any person to be engaged either in the Commonwealth or elsewhere in receiving money or any valuable thing -

- (a) as consideration (1) for an assurance or agreement express or implied to pay or give or (2) for securing that some other person shall pay or give any money or valuable thing on an event or contingency of or relating to any horserace or other race or any fight game sport or exercise; or
- (b) for promoting or carrying out a scheme connected with any such assurance agreement or security or a lottery or scheme of chance or an unlawful game; or
- (c) as contributions or subscriptions towards any lottery or scheme of chance; or
- (d) under pretence of foretelling future events; or
- (e) in connexion with a fraudulent obscene indecent or immoral business or undertaking;

he may by order under his hand published in the Gazette direct that any postal article received at a post office addressed to such person either by his own or fictitious or assumed name or to any agent or representative of his or to an address without a name shall not be registered or transmitted or delivered to such person.

(2) The order shall specify such name or address and upon publication be of full force and effect until cancelled by the Postmaster-General."

Section 58 provides how letters addressed to the person named in any such order shall be dealt with. The power given by s. 57 is limited by the conditions therein expressed and is exercisable only in the formal way which the section prescribes. If the Postmaster-General had an unfettered power to direct that mail addressed to a particular person should not be transmitted or delivered to him or if the giving of any such direction could not be legally challenged, it would have been quite unnecessary to confer on him the qualified power which s. 57 confers. There are a number of other sections which are inconsistent with the contention that if the Postmaster-General and his officers interfere with the ordinary use by an individual of the postal services, that individual has no redress. Section 29 (3) and (4) provide that a Director may refuse to transmit or deliver any issue of a publication if it contains indecent or obscene matter, and that any posted newspaper found to contain such matter may be destroyed by order of the Postmaster-General. Section 29 (5) provides as follows:

"No action shall be brought against the Postmaster-General

or any officer of the Department for anything done or purporting to be done under the provisions of this section but any person aggrieved by anything done or purporting to be done by the Postmaster-General or a Director under this section may appeal to a Justice of the High Court or to a Judge of a Supreme Court of a State by summons or petition in a summary manner. The Justice or Judge may decide whether the action taken under this section was justified in law or in fact and may make such order as to restoration to the register or otherwise as to him may seem just and may award damages and costs or either in his discretion."

Section 43 provides as follows:

"The Postmaster-General or any Director may at any time cause any postal article having anything profane blasphemous indecent obscene offensive or libellous written or drawn on the outside thereof or any obscene enclosure in any postal article to be destroyed.

No action shall be brought against the Postmaster-General or any officer of the Department for anything done under the provisions of this section but any person aggrieved by anything done by the Postmaster-General or a Director under this section may appeal to a Justice of the High Court or to a Judge of a Supreme Court of a State by summons or petition in a summary manner."

These two sections, so far from supporting the defendants' argument, show a recognition by the Parliament of the need for express authorization when it is desired to refuse to transmit or deliver, or to destroy, a postal article and of the possibility that the Postmaster-General and the officers of his department would be actionable for acts of that kind which were done without statutory protection. Sections 45 to 53 regulate the position regarding unclaimed and undelivered articles and give power (inter alia) to cause such articles to be returned to sender, opened or (in the case of newspapers) destroyed. Sections 59 and 61, which relate to parcels, also give express authority to refuse to receive or transmit, or to delay, postal articles in certain circumstances. There would be hardly need for these provisions if the treatment of mail lay entirely within the discretion of the Postmaster-General or his officers. (at p570)

12. So far as the postal services are concerned it remains to notice three other sections. Section 54 provides:

"Except in the cases in this Act expressly mentioned no letter packet or newspaper shall be destroyed or returned to the writer or sender thereof without either the consent in writing of the person to whom the same is addressed or the direction in writing of the Postmaster-General and no letter packet or newspaper shall be delivered to any person not named in the address thereof without such consent or direction."

The purpose of this section is somewhat obscure. It may be associated with the immediately preceding sections and may be intended to provide for the disposal of unclaimed or undelivered mail in cases for which no express provision has been made. It may be intended to place officers of the department under a legal obligation which would add force to the oath, in the terms of the 2nd Sch., which they take pursuant to s. 9. Whatever its purpose it is restrictive rather than enabling in form. It forbids the destruction of a letter or its return to sender or delivery to any person other than the addressee without the written consent of the addressee or the written direction of the Postmaster-General. Having regard to the other express provisions already mentioned it cannot be construed as impliedly giving to the Postmaster-General an uncontrolled power to direct that a letter which is properly addressed and stamped and is otherwise deliverable may be destroyed or returned to sender or delivered other than to the addressee named on it. In any case, the section, however construed, would not justify a direction such as that given in the present case. Section 157 provides for the giving of a notice of action and for a special limitation period in certain cases. Counsel for the defendants conceded that the section has no application to the present case but it does recognize that things done or omitted to be done in pursuance of the Act may be actionable and to that extent is inconsistent with the argument of the defendants that the legislation is purely permissive and directory. Section 158 provides:

"An action or other proceeding shall not be maintainable against the King or the Postmaster-General or any officer of the Department by reason of any default delay error omission or loss whether negligent or otherwise in the transmission or delivery or otherwise in relation to -
(a) a postal article posted or received or omitted to be posted or received under this Act; or
(b) a telegram sent or received or omitted to be sent or received under this Act."

The section obviously related to actions and proceedings maintained by reason of something done in the past in relation to a postal article or a telegram. The claims made for a declaration and an injunction are not of that description; they are not made by reason of anything done in relation to any postal article or telegram, although of course what has been done in relation to postal articles lodged by or addressed to the Rhodesia Information Centre is admissible in evidence in the proceedings. The present action, except in so far as it claims damages, is maintained to secure a declaration that the direction given was beyond the power of the Postmaster-General and to prevent unauthorized action being taken in the future in pursuance of such direction. The section accordingly does not protect the defendants from the action in so far as it claims a declaration and an injunction. A claim for damages that rested on any failure to transmit or deliver a letter or telegram would, however, be barred. (at p572)

13. The survey which has been made of the Act makes it plain that the Postmaster-General has no power to direct that postal articles lodged by a particular person should not be received for transmission or that postal articles addressed to a particular person should not be delivered to him except in the cases for which the Act expressly provides and that the present is not such a case. Moreover, there is no provision of the Act that would prevent the plaintiff from maintaining the present action in so far as it seeks relief other than damages. (at p572)

14. There are three cases to which reference should be made before passing from this question. *Hartle v. Campbell* ([1886](#)) [12 VLR 604](#) was a decision on s. 28 of the Post Office Act 1883 (Vict.)

which authorized the Postmaster-General, if he had at any time reasonable ground to suppose any person to be engaged in receiving money as and for the consideration for any promise or agreement to pay money on certain events, or to be engaged in promoting or carrying out any such promise or agreement, or any lottery, scheme of chance, or unlawful game, or to be engaged in any fraudulent business or undertaking, to order and declare by notification to be published in the Gazette that no letter, etc., addressed to such person should be either registered or delivered to any such person. It was held by the Full Court of Victoria that the section applied only to letters to be delivered in Victoria and that the Postmaster-General of Victoria had no power to prevent the delivery of a letter addressed to the promoter of a sweep at his residence in New South Wales. The question whether the Postmaster-General had, apart from that section, authority to refuse to deliver the letter was not discussed but it must have been assumed that he had not. This appears to have been the only relevant case on the powers of a Postmaster-General decided in a colony before federation and it is reasonable to suppose that when the Act was compiled, largely on the basis of the colonial statutes, the decision would have been known to the framers of the Act, and that they would have acted on the view that the Postmaster-General would not have any power to refuse to deliver mail unless such power were in terms granted to him by the Act. (at p572)

15. In *R. v. Arndel* [1906] HCA 7; (1906) 3 CLR 557, this Court considered the effect of s. 57 of the Post and Telegraph Act whose provisions have already been set out. The Postmaster-General had made an order under s. 57 of the Act directing that postal articles addressed to the prosecutors should not be registered, transmitted or delivered to them. The prosecutors unsuccessfully sought mandamus to command the Postmaster-General to transmit through the post office all mail addressed to them. Griffith C.J. considered that so long as the order made under s. 57 stood it was binding on the Postmaster-General as well as on the officers of his department and provided an answer to the application, so that in substance what was sought was to compel the Postmaster-General to rescind his order, and that the Postmaster-General owed no duty to the prosecutors to do so, because in acting under s. 57 he was not acting merely ministerially but was exercising a discretion. The grounds of his decision were summed up in the following passage (1906) 3 CLR, at p 571 :

"The Court is asked in substance to require the Postmaster-General to revise the conclusion at which he arrived, and to come to the conclusion that he has no reasonable ground to suppose that the applicants were engaged in a fraudulent or immoral business. But it is clear that the duty of the

Postmaster-General

is not a mere ministerial duty, but that it is a duty involving the exercise of a discretion, and upon which he must form his own independent judgment. He may come to a conclusion one way or the other, and this Court cannot revise his judgment in a case where he is called upon to exercise a discretion. It is therefore clear that the Court cannot by mandamus interfere to order the Postmaster-General to cancel this order, nor, as long as this order stands, can the Court compel anybody to act in disobedience to it."

He later added, obiter, the following remarks (1906) 3 CLR, at p 573 :

"Supposing that s. 57 were not in the Act, it is extremely doubtful whether there would be a right to compel the Postmaster-General to deliver letters, because prima facie the answer would be that the person affected could bring an action for the detention of the letters. If he could not, so much the worse for him; if an action for detinue would lie, he could not get a mandamus to compel the delivery of the letters."

He further rejected an alternative argument that in making an order under s. 57 the Postmaster-General was acting judicially or quasi-judicially, and was required to give the person affected an opportunity to be heard before the order was made, and that the failure to do so provided a ground for certiorari. The reasons given by Barton J. were substantially to the same effect as those of the Chief Justice, but the defendants particularly relied on some of the observations which his Honour made in denying that a judicial proceeding was required under s. 57. He said (1906) 3 CLR, at p 576 :

"The public business could not go on if the current transactions of great departments of State were liable to a thousand interruptions at the hands of the Courts. Before one of such interruptions can be judicially sanctioned, we ought to be able to see that Parliament has not been content to assure itself of the generally just and fair conduct of Ministers by the ordinary means so ready to its hands - the assertion, as often as need be, of their responsibility to itself. And in the present case I cannot see that Parliament has used language which supports the contention that judicial interference was contemplated."

The defendants also found support for their arguments in the judgment of O'Connor J., who went further than the other members of the Court in holding that the Postmaster-General owed no duty to individual members of the public. He said (1906) 3 CLR, at p 580 :

"There is no section of the Act which directly or indirectly imposes upon the Postmaster-General or upon any of his officers the duty to deliver or transmit letters under any circumstances."

and further said (1906) 3 CLR, at p 581 :

"It is merely necessary to say that, taking the whole purview of the Act, it appears to be one of those Acts which, for the benefit of the public, empowers the Government by its officers to perform certain duties, but with no obligation on the part of the officers towards any member of the public. In these circumstances it is impossible to say that there is any duty owing by the Postmaster-General or by any officer of the Post Office to the applicants to receive transmit or deliver their correspondence which the Court could enforce by mandamus."

He further held that mandamus did not lie to compel the Postmaster-General to alter the order made

under s. 57 and that the order could not be treated as a nullity. (at p574)

16. It is apparent that *R. v. Arndel* [[1906\] HCA 7; \(1906\) 3 CLR 557](#) is quite distinguishable from the present case and for that reason it is unnecessary to express any opinion as to the correctness of the grounds on which the majority based their decision. It may, however, be remarked that although the power given by s. 57 is, as the Court held, discretionary, it can only be exercised if the Postmaster-General has reasonable ground to suppose one of the matters mentioned in the section, and, assuming that the words "has reasonable ground to suppose" mean that he has in fact reasonable ground, rather than that he thinks that he has reasonable ground (that is, assuming that the construction of such words adopted in *Nakkuda Ali v. M.F. de S. Jayaratne* ([1951\) AC 66](#), at pp 76-77 is preferable to that taken in *Liversidge v. Anderson* [[1941\] UKHL 1; \(1942\) AC 206](#)) it may be thought that the validity of an order made under that section would, nowadays at least, be examinable in an action for a declaration and an injunction. However that may be, it is only in the judgment of O'Connor J. that support is to be found for the defendants' contention that the only relevant duties imposed by the Act are owed to the Crown and not to individual members of the public. His reasoning was not accepted by the majority of the Court, and, although entitled to the greatest respect, cannot be regarded as authoritative. The dictum from the judgment of the Chief Justice (1906) 3 CLR, at p 573 does no more than suggest that if there were a legal right to the delivery of letters it would be enforceable by detinue rather than by mandamus, and it does not suggest an answer to the different question whether a declaration and an injunction might be granted to restrain the Postmaster-General from acting in excess of his statutory powers. The remarks of Barton J., suggesting caution in holding that judicial interference with the Post Office was contemplated, were made in relation to the question whether action under s. 57 necessarily involved a judicial proceeding, and do not warrant a conclusion that the Parliament intended that a person deprived of the use of the mails by the unauthorized act of the Postmaster-General should have no legal redress. (at p575)

17. Finally, counsel for the defendants referred us to *Triefus & Co. Ltd. v. Post Office* ([1957\) 2 QB 352](#) , where it was held, in conformity with earlier authority, that no contract existed between the Post Office (in the United Kingdom) and a person who entrusted it with a letter or packet for transmission through the post. That decision is of no relevance in the present case where the claim of the plaintiff is not that the Postmaster-General has broken a contract but that he has exceeded his statutory powers. (at p575)

18. The conclusion we draw from our examination of the Act, having due regard to the decisions to which we have been referred, is that no authority exists for the giving of the directions in relation to the plaintiff's mail which the Postmaster-General has given. We should add, however, that it may well be that it should be concluded from that examination of the Act that the plaintiff had a right to the use of the mail not in contract but derived from the statute. Such a conclusion has been drawn in earlier times from an examination of a then current statute relating to the mail. But, it presently suffices that the Postmaster-General lacked power to give the directions in fact given. (at p576)

19. The direction given by the Postmaster-General specifically required that action be taken to cancel the tenancy of the post office box, and to deregister "The Rhodesian Commentary". In these respects the direction was clearly unauthorized by any provision of the Act or regulations. Post office boxes may be rented pursuant to Pt XI of the Postal Regulations. Regulation 139 gives the Postmaster-General an express power to cancel the tenancy of such a box in certain specified circumstances. A further power of cancellation is given by reg. 135. The express grant of this power, conditioned in the manner specified in the regulations, is inconsistent with the existence of

any power to cancel a tenancy in circumstances for which the regulations do not provide. It was not suggested that it would be possible to justify the purported cancellation under either reg. 135 or reg. 139. The conditions of eligibility for registration of a publication as a newspaper are laid down in s. 28 of the Act. There are three categories of registration the details of which are set out in s. 29. Power to remove a publication from the register is given to the Director in circumstances specified in s. 29(1) and 29(2D). Regulation 50 of the Postal Regulations gives the Director power to call upon the proprietor, printer or publisher of any newspaper to furnish evidence as to its continued compliance with the requirements of the Act and regulations with respect to its registration, and any other particulars which are in his opinion necessary to enable him to determine whether the newspaper should be removed from the register or not. These provisions indicate that there is no power to cancel the registration of a newspaper except in the circumstances for which the Act provides and in the manner laid down in the Act and regulations. Nothing in the Act or regulations would permit the removal from the register of "The Rhodesian Commentary". (at p576)

20. For the reasons given it must be concluded that the direction of the Postmaster-General, in so far as it directed the withdrawal of all postal services from the Rhodesia Information Centre, was wholly beyond power. It remains to consider, however, the validity of the direction that other telecommunication services, and more particularly the telephone service, should be withdrawn. Perhaps because in 1901 the telephone service had not quite assumed the importance to the public that it has today, Pt IV of the Act, which deals with telegraphs (including telephones), is less detailed in its provisions than those parts of the Act that deal with the carriage and treatment of mail. Section 80 in effect gives the Postmaster-General the exclusive privilege of erecting and maintaining telegraph and telephone lines and of transmitting telegraphic and telephonic communications, subject to exceptions, including an exception in favour of private lines, which are recognized by ss. 80, 81 and 83. By s. 91 it is provided:

"If any person to whom before or after the commencement of this Act the use of any line of telegraphic communication has been granted -
(a) refuses or neglects to pay when due and on demand the rent or charges prescribed by the regulations; or
(b) commits in the opinion of the Postmaster-General a breach of any of the said regulations or of any of the terms or conditions upon which the use of such line is granted permitted or continued
the Postmaster-General may without prejudice to the remedies for such refusal or neglect prescribed in section ninety-three resume possession of the said line and prevent the further use thereof by such person and such person shall not be entitled to any compensation for loss arising through the exercise by the Postmaster-General of the powers conferred by this section."

On behalf of the defendants it was submitted that this section applies only to private lines. That submission would be supported by the marginal note ("Postmaster-General may resume possession of private lines for default") if it were permissible to regard it, but it is not: s. 13(3) of Acts Interpretation Act (Cth). The next succeeding section, s. 92, deals with the resumption of private lines and is followed by s. 93, which reads:

"If any person refuses or neglects to pay on demand the rent

or charges due from him under the regulations for the use of any line of telegraphic communication the Postmaster-General may recover the same with costs in any court of competent jurisdiction."

The words of ss. 91 and 93 are quite general but the question is, what is the meaning of the expression "any line of telegraphic communication"? The words "line of telegraphic communication" in these sections appear to mean the same as "telegraph line" in s. 97(n) which enables regulations to be made for the purpose of:

"Prescribing the terms and conditions on which agreements may be made by the Postmaster-General or a Director with any person for the construction and maintenance of a telegraph line for the exclusive use of such person or for granting the exclusive use of any existing telegraph line to any person and prescribing the scale and times and manner of payment in advance or otherwise of the rent and charges to be paid by such person as the consideration for the agreement."

It is true that ss. 91 and 93 do not use the adjective "exclusive" before the word "use". However, to speak of "the use of any line of telegraphic communication" is not a natural way of referring to the use of the telephone service, and the words "resume possession of the said line" are not apt to refer to the termination of a service or the disconnexion of a telephone. It therefore seems that ss. 91 and 93 refer to the private use of a telegraph or telephone line rather than to the use of an ordinary telephone service connected to an exchange. On this construction, s. 91 has nothing to say as to the disconnexion of telephones or the withdrawal or telephone services from an individual subscriber, and no other provision of the Act expressly deals with those matters. It then becomes necessary to turn to the Telephone Regulations, which are made under the authority of s. 97 of the Act. That section commences:

"The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters which are necessary or convenient to be prescribed for carrying out or giving effect to this Act ..."

It goes on to provide that the Governor-General may, in particular, make regulations for certain specified purposes, none of which, however, would embrace the regulations about to be considered. The section then concludes:

"The power to make regulations contained in this section shall extend to the making of regulations binding not only upon officers and persons having business with the Department, but upon all persons whatsoever, and all regulations made in pursuance of this section shall have effect as if they were enacted in this Act." (at p578)

21. The regulation upon which the defendants most strongly rely is reg. 8 of the Telephone Regulations, which reads as follows:

"(1) The Department may at its discretion refuse to comply with any application for a telephone or other like service or for the transfer of any such existing service or for the construction or use of any telephone line or service, and it also reserves the right to withdraw either totally or partially any telephone or other like service at any time.

(2) Neither the Department nor any of its officers shall be liable to any action, claim, or demand for compensation arising from the refusal to provide or authorize any telephone or other like service or from interruption of service through any cause whatever."

It is submitted that this regulation, read in the context of regs. 5 (which provides that all telephone services are subject to the conditions set forth in the regulations) and 6 (by which a subscriber, on being provided with a telephone service, shall be deemed to have agreed to be bound by the several provisions of the regulations in force from time to time) gave the department, and therefore the Postmaster-General, a clear right totally to withdraw the telephone service provided to the Rhodesia Information Centre. The words "withdraw ... any telephone or other like service" are not defined but the phrase "withdraw the service" appears in reg. 17(2), which provides that if a person is convicted of an offence against reg. 17(1) (which prohibits a subscriber from selling or offering for sale his telephone service or from advertising the service as being for sale), the department may "withdraw the service in respect of which the offence was committed, and remove any telephones and other apparatus belonging to the Department". There are a number of other regulations which use different expressions in relation to the determination of a telephone service. Regulations 41 and 44 respectively empower the department to "order that the telephone service be disconnected from the exchange", cancel the agreement, cause the name of the subscriber to be removed from the telephone directory and order the removal of all instruments, etc. belonging to the department, where a subscriber fails to pay rental or other charges due or becomes bankrupt or makes a composition or scheme of arrangement with his creditors. Regulation 46, which relates to a person who, being a defaulter with respect to one telephone service obtains another, is in similar terms, except that it speaks of disconnecting the telephone rather than the telephone service. Regulation 63 also gives power to disconnect a telephone and remove instruments and fittings where any person while using the telephone has used objectionable language and in similar specified cases. Regulation 62 provides that in certain cases where a person has been convicted of carrying on an illegal business the Director may, without awaiting the result of any appeal, determine the agreement with the subscriber, remove the subscriber's name from the telephone directory and remove all instruments, etc. used in connexion with the service. It appears from reg. 62(4), (5) and (6) that the action taken under reg. 62(1) is regarded as having the effect that the telephone service is "discontinued". Finally it is necessary to notice reg. 10(1) and (2) which provide as follows:

"(1) The period certain for which a telephone or other like service may be rented shall be fixed by the Department, and thereafter the renting shall continue unless and until determined by notice in accordance with this regulation.

(2) On or at any time after the expiration of the period fixed by the Department, the renting of the service may be determined by the subscriber or the Department giving notice, in writing, of the intention to discontinue the service." (at p580)

22. These regulations are by no means easy to construe. They display little consistency in the use of the various expressions which the draftsman has selected to describe the disconnection of a telephone. The use of the words "withdraw the service" in reg. 17(2) does provide some support for the view that the words "withdraw ... any telephone or other like service" in reg. 8(1) refer to the disconnection of an individual telephone. On the other hand, if reg. 8 were intended to confer a perfectly general and unrestricted power to deprive an individual subscriber of his telephone service for no reason, the detailed provisions of regs. 17(2), 41, 44, 46, 62 and 63, which give a power of disconnection only in the cases expressly specified in those regulations, would be largely unnecessary. The provisions of the latter regulations, would be largely strong implication that the telephone service of an individual subscriber cannot be disconnected or discontinued unless the conditions laid down in those regulations are satisfied. Moreover, those regulations (again in language which is not altogether consistent) confer an additional power to remove the telephone instrument itself, and the absence of this power from reg. 8 lends some support to the view that the relevant words of that regulation are not dealing with the disconnection of an individual subscriber, but with the withdrawal of service generally in a particular area or during particular times. Further, whereas the other regulations mentioned expressly give the department a power to withdraw or disconnect or discontinue the service, reg. 8 merely reserves a right to the department to do so, and this suggests that the relevant part of the regulation is intended to afford the department a defence to an action for breach of contract, rather than to operate as the grant of any statutory power. An attempt must be made to place on the words of reg. 8 a meaning that will render them harmonious with the other provisions of the regulations, and for reasons already given if those words are ambiguous a construction should be preferred which would not confer on the Postmaster-General a completely arbitrary and unfettered power to cut off the telephone of any individual in the community. On the whole, therefore, it should be concluded that reg. 8(1) upon its proper construction did not authorize the Postmaster-General to give a direction which had the effect that the telephone of the Rhodesia Information Centre was disconnected. In this respect, the Postmaster-General in his direction used words that had the colour of statutory authority, but he had no power to direct his officers to do what they in fact did, i.e. cut off the telephone. It is unnecessary to consider the meaning and effect of reg. 10(2), because no written notice was given determining the service. It is also unnecessary, on the view that has been taken, to discuss the extent of the power given by the Act to make regulations, or the effect of the provision that regulations made in pursuance of the section should have effect as if enacted in the Act. (at p581)

23. Counsel for the defendants referred to *Gibson v. Mitchell* [1928] HCA 37; (1928) 41 CLR 275, where this Court by a majority upheld the validity of reg. 21A(2) of the Telephone Regulations 1913 then in force which provided (inter alia) that a person entering into occupation of premises having a telephone service who used the service before it had been transferred to him should be liable for all amounts owing in respect of the service at the time he entered into occupation. In the course of his judgment Isaacs J. said (1928) 41 CLR, at p 279 : "The telephone services are the property of the Postmaster-General and no one has any right to use them without his permission." His Honour was in that case not discussing the power of the Postmaster-General to prevent a person to whom a telephone service had been supplied from continuing to use it and his broad generalization, made in a very different context, does not assist in the decision of the present case. (at p581)

24. The position regarding telegrams is in no doubt. Section 96 of the Act provides:

"Any person employed under the authority of the Postmaster-General may refuse to receive or transmit a telegram

containing blasphemous indecent obscene offensive or scandalous matter in its contents address or signature."

The clear implication is that there is no authority to refuse to receive or transmit a telegram which does not contain such offensive matter, provided of course that any relevant regulations as to payment or method of lodgment are complied with. The Postmaster-General accordingly had no power to direct his officers to refuse to receive or transmit telegrams simply because they emanated from or were addressed to the Rhodesia Information Centre. (at p581)

25. For the reasons given, the direction given by the Postmaster-General exceeded his authority. If acted upon it will cause particular injury to the plaintiff. In these circumstances the plaintiff is entitled to a declaration and an injunction unless some reason exists why the Court in its discretion should refuse that relief. (at p582)

26. Two matters were suggested as justifying an exercise of discretion in the defendants' favour. First, reliance was placed upon the resolutions of the Security Council to which reference has already been made. These resolutions are, in their terms, addressed to member states who, by art. 25 of the Charter, have agreed "to accept and carry out the decisions of the Security Council in accordance with the present Charter". However, resolutions of the Security Council neither form part of the law of the Commonwealth nor by their own force confer any power on the Executive Government of the Commonwealth which it would not otherwise possess. The Parliament has passed the Charter of the United Nations Act 1945 (Cth), s. 3 of which provides that "The Charter of the United Nations (a copy of which is set out in the Schedule to this Act) is approved". That provision does not make the Charter itself binding on individuals within Australia as part of the law of the Commonwealth. In *Chow Hung Ching v. The King* [\[1948\] HCA 37](#); [\(1948\) 77 CLR 449](#), at p 478, Dixon J. said: "A treaty, at all events one which does not terminate a state of war, has no legal effect upon the rights and duties of the subjects of the Crown and speaking generally no power resides in the Crown to compel them to obey the provisions of a treaty: *Walker v. Baird* [\(1892\) AC 491](#)", and a similar view was expressed by Latham C.J. in *R. v. Burgess; Ex parte Henry* [\[1936\] HCA 52](#) [\[1936\] HCA 52](#); ; [\(1936\) 55 CLR 608](#), at p 644. Although, in those passages, mention is made of British subjects, it is clear since *Johnstone v. Pedlar* [\[1921\] UKHL 1](#); [\(1921\) 2 AC 262](#) that an alien, other than an enemy alien, is, while resident in this country, entitled to the protection which the law affords to British subjects. (See also *Nissan v. Attorney-General* [\[1969\] UKHL 3](#)[\[1969\] UKHL 3](#); ; [\(1970\) AC 179](#), esp at pp 211-212, 232-233, 235.) Section 3 of the Charter of the United Nations Act 1945 was no doubt an effective provision for the purposes of international law, but it does not reveal any intention to make the Charter binding upon persons within Australia as part of the municipal law of this country, and it does not have that effect. Since the Charter and the resolutions of the Security Council have not been carried into effect within Australia by appropriate legislation, they cannot be relied upon as a justification for executive acts that would otherwise be unjustified, or as grounds for resisting an injunction to restrain an excess of executive power, even if the acts were done with a view to complying with the resolutions of the Security Council. It is therefore unnecessary to consider whether the resolutions of the Security Council, properly construed, would require the Commonwealth as a member nation to take the action that has been taken against the Rhodesia Information Centre. (at p583)

27. The second matter relied upon by the defendants is that the plaintiff is employed by, and acting in aid of, a regime which has usurped power and which it may be assumed has not become the lawful government of Rhodesia, and is not recognized as such by the Commonwealth of Australia, but must be regarded as being in a state of rebellion against the Queen. However the evidence does

not reveal, and the defendants did not submit, that the activities of the plaintiff or any other person in connexion with the Rhodesia Information Centre were in any way illegal. It is true that the plaintiff is employed by a regime in Rhodesia whose activities, on the assumptions made, are illegal in that country, but neither that circumstance, nor the fact that he may be assumed to be endeavouring to influence public opinion in Australia in favour of that regime, means that he himself has committed any breach of the law. So long as he abides by the law of this country he is entitled to its protection, however wrong his opinions may be, and however legally and morally blameworthy may be the regime which he serves and supports. We were referred by counsel for the defendants to *Litvinoff v. Kent* (1918) 34 TLR 298, but in that case M. Litvinoff was refused relief, not because he was representing an illegal regime, but because he had himself broken the law (having contravened the Defence of the Realm Regulations then in force) and committed breaches of covenant. To refuse a plaintiff relief to which he is otherwise entitled it should be shown that his own conduct has been illegal or improper. It is not enough that he is supporting a regime whose activities in another part of Her Majesty's dominions are illegal, provided that his support involves only the use of lawful and proper means, or that he is employed and paid by such a regime, provided that his employment does not involve him in any wrongdoing. There is very little evidence as to what the plaintiff is employed to do, but if it be accepted that the function of the Rhodesia Information Centre is mainly to disseminate propaganda in favour of the regime in power in Rhodesia, that does not mean that the plaintiff's activities are unlawful unless (and this is not suggested) he is guilty of sedition or is in breach of some relevant statutory prohibition. Moreover, if his activities are not unlawful, they cannot be described as improper in a legal sense, for there is no impropriety necessarily involved in endeavouring to persuade others to form favourable opinions of a cause which is considered officially, and perhaps by many members of the community, and perhaps for good reasons, to warrant condemnation. It follows that no justification has been shown for denying the plaintiff the relief to which he is legally entitled. (at p584)

28. An appropriate declaration should be made and an injunction issued. (at p584)

McTIERNAN J. I agree in the reasons of Menzies J. (at p584)

2. In my judgment the Acts and Regulations to which we were referred in argument entrust to the Postmaster-General full control of the services and facilities the use of which the Minister has denied to the Rhodesia Information Centre. (at p584)

3. I see no evidence that the Minister exceeded the limits of such control in the case of any of these services and facilities in taking any action of which the Rhodesia Information Centre complains in these proceedings. (at p584)

4. Accordingly I would dismiss the action. (at p584)

MENZIES J. By Ch. 2 of the [Constitution](#) the Executive Government of the Commonwealth was established and provision was made for the transfer to the Commonwealth of certain State departments, including "Posts, telegraphs and telephones". (at p584)

2. The Post Office so established is not a commercial undertaking established for the benefit of individuals. It is a Department of Government administered by the Postmaster-General, one of the Queen's Ministers of State for the Commonwealth. See the [Constitution](#), s. 64. The Postmaster-General occupies a like position to that of the ministerial heads of other Commonwealth departments providing services for Australians, e.g., Minister for Transport and Minister for Civil

Aviation, Minister for Overseas Trade, Minister for Immigration, Minister for Science, Minister for Primary Industry. (at p584)

3. The basic question to be decided here is whether a private person has by statute a right enforceable against the Commonwealth and the Postmaster-General to the services of this Department of State against the formally expressed will of the Postmaster-General. It is not whether the Post and Telegraph Act authorizes the discontinuance of such services, nor is it whether a particular officer of the Post Office has failed to perform a particular statutory duty. (at p584)

4. It is my opinion that a person has a right such as the plaintiff asserts only if some law of the Commonwealth gives it positively. The absence of a law authorizing the denial to persons of the use of postal and telephonic facilities is not enough for the plaintiff here. To succeed in these proceedings for a declaration of right and an injunction, the plaintiff must establish a legal duty binding the Commonwealth and the Postmaster-General to provide him with the postal and telephonic facilities of the Post Office. Moreover, we are not here concerned with the breach of any contract to carry mail. If the plaintiff has the rights he claims they must be found in legislation. (at p585)

5. It is sufficient for me to say that, after diligent search, I have found no such positive law. I would add that reflection upon the hardship that individuals might suffer, unless the Post and Telegraph Act were to be construed as conferring a general right to use the facilities of the Post Office, affords me no assistance in determining, as a matter of construction, whether or not the Act confers such a right. Moreover, the absence from the Post and Telegraph Act of any provision conferring such a right is not, I think, to be explained by an assumption that it was not required because of the existence of some overriding general obligation to carry and delivery mail. For this there is no warrant. (at p585)

6. It is true that there are in the Post and Telegraph Act and the regulations made thereunder special provisions providing for the denial of particular services in specified circumstances. The existence of such facilitating provisions, which sometimes merely authorize particular officers to act - e.g., ss. 29, 43 and 96 - does not, however, lead me to the conclusion that implicit in the Act, although nowhere expressed, there is a grant to every person in Australia of the right, enforceable at law, to use the postal and telephonic services of the Commonwealth subject only to particular exceptions. Perhaps s. 57 is the provision that suggests most plausibly the existence of a duty such as the plaintiff must establish in order to succeed. To my mind, however, from the express provision of a special procedure for denying the postal services to gamblers and those connected with "a fraudulent obscene indecent or immoral business or undertaking", to infer, not merely the absence of a general power to discontinue existing services, but the existence of a positive duty to transmit and deliver mail, is to infer too much. Such a provision dealing with a flagrant abuse of the Post Office provides but a poor foundation upon which to erect the edifice of a binding legal duty to transmit and deliver postal articles to and for all persons in Australia. (at p585)

7. It is upon the absence of any positive law granting the plaintiff the rights which he asserts by his writ that I base my conclusion that his action should fail. Subsidiary questions such as the rights of a person renting a post office box or registering a newspaper are insignificant unless the plaintiff can establish a general right to the services of the Post Office. This, in my opinion, has not been established. (at p586)

8. It may be observed that this same view of the real matter in contest here was expressed forcibly as

long ago as in 1906 when in *R. v. Arndel* (1906) 3 CLR, at pp 580-581, O'Connor J. said:

"There is no section of the Act which directly or indirectly imposes upon the Postmaster-General or upon any of his officers the duty to deliver or transmit letters under any circumstances.

...

It is merely necessary to say that, taking the whole purview of the Act, it appears to be one of those Acts which, for the benefit of the public, empowers the Government by its officers to perform certain duties, but with no obligation on the part of the officers towards any member of the public. In these circumstances it is impossible to say that there is any duty owing by the Postmaster-General or by any officer of the Post Office to the applicants to receive transmit or deliver their correspondence which the Court could enforce by mandamus." (at p586)

9. I would dismiss the action. (at p586)

STEPHEN J. On 19th April 1973, the postmaster at Crows Nest, a Sydney suburb, was, by direction of the Postmaster General, instructed to deny all postal and telecommunication facilities to the plaintiff, described by his registered business name of "Rhodesia Information Centre". The instruction was not confined to the plaintiff, it was expressed to apply also "to any other person, Business name, Corporation or Organisation which is acting on behalf of or in any way assisting the Rhodesian Regime". (at p586)

2. As a consequence mail deliveries to the plaintiff ceased immediately, correspondence addressed to him being marked "undeliverable" and either returned to the sender or sent to the dead letter office; his tenancy of a post office box was cancelled and the lock changed; a publication which he distributed, "Rhodesian Commentary", was de-registered as B class mail; postal officers were instructed not to accept mail which the plaintiff or anyone on his behalf might seek to post; his telephone service, both inwards and outwards, was discontinued. (at p586)

3. Following application to this Court for interlocutory relief and the grant of an interim injunction, the matter now comes before the Full Court and argument has been heard in full from both parties. (at p587)

4. The plaintiff asserts that the Postmaster-General had no power to take this action against him and relies upon the alleged absence of specific power in the relevant Act and regulations. The defendants both deny any absence of such power and also contend that in any event the plaintiff can show no enforceable right to postal and telephone services and has no remedy in law arising out of the denial to him of the use of those services. (at p587)

5. I turn first to consider whether the plaintiff has any right, enforceable by the courts, to the use of postal facilities; if so, the second question will be whether, in the particular circumstances of this case, the Postmaster-General was entitled to deprive him of those services. (at p587)

6. The Post and Telegraph Act does not in express terms confer upon individuals any general right to postal facilities; in this respect it is no different from legislation found elsewhere in common law countries and which owes its origin, immediate or remote, to the English postal legislation of

previous centuries. The Act vests in the Postmaster-General control of his Department, which in turn is to control the postal and telegraphic (including telephonic) services of the Commonwealth and is given a substantial monopoly in the carriage of letters and in the transmission of messages by telegraph and telephone; the Act also contains much detailed legislation, some relevant to the present issue. (at p587)

7. But first it is convenient to notice how the courts in common law jurisdictions have viewed the individual's use of post office facilities. (at p587)

8. In *Stock v. Harris* [[1771 EngR 22](#); [\(1771\) 5 Burr 2709 \(98 ER 422\)](#)], the Court of King's Bench entertained an action by the plaintiff against the defendant, Deputy-Postmaster of Gloucester, founded upon the failure of the latter to deliver a letter sent through the post and addressed to the plaintiff. The defendant, having been informed, so he said, by the Postmaster-General that he need not deliver to the houses of addressees in Gloucester letters which he received addressed to them, by public notice announced that thenceforth house delivery would be charged as an extra, failing payment of which letters would await collection at his post office. The plaintiff wrote to the defendant demanding the customary house delivery without extra charge and when, soon afterwards, the defendant failed so to deliver a letter addressed to him he sued. Following a special verdict the opinion of the Court was sought whether the defendant was obliged to deliver to the plaintiff's place of abode without extra charge, if so verdict was to be for the plaintiff in damages, with costs. (at p588)

9. Lord Mansfield presided and said that he saw no great difficulty in resolving the matter "though the Acts of Parliament are not professedly explicit about it" - (1771) 5 Burr, at p 2713 (98 ER, at p 424). The relevant legislation referred to "the limits of the delivery of letters and packets"; those limits were fixed by usage, in the present case within the city of Gloucester; very great inconvenience would be involved if all must call at the post office on post days to see if there were letters for them; the Acts did not justify any additional charge for house delivery. Accordingly the defendant had done wrong and the action was well brought by the plaintiff. Aston, Willes and Ashhurst JJ. concurred, each delivering a short judgment. (at p588)

10. A similar point arose two years later, concerning the Ipswich deputy postmaster and in *Rowning v. Goodchild* ([1773\) 5 Burr 2716 n \(98 ER 425\)](#)), an action on the case brought in the Common Pleas, de Grey C.J. delivered the reserved judgment of the Court in favour of the plaintiff against the defendant, deputy postmaster of that city. The Lord Chief Justice, having traced the history of English, and later British, postal services, referred to the duty of the postmaster of receiving, carrying and delivering letters, as provided in 9 Anne c. 10 and, after considering a number of sections of that statute and the terms of later Acts, concluded that this involved delivery at the addressee's house in post towns and that an action for damages lay against the deputy postmaster for failure to so deliver and this notwithstanding that the legislation itself provided for penalties which the plaintiff might instead have sought to recover. As reported in William Blackstone's Reports ([1773\) 2 Wm Bl 906](#), at p 910 [[1746 EngR 173](#); [\(96 ER 536\)](#), at p 538) his Lordship said "But if the action lies at common law, as we think it does, the penalty is only an accumulative sanction". There was accordingly judgment for the plaintiff for one shilling damages and his costs. In the course of his judgment his Lordship referred to the matter as "not a question of private contract, or of a common carrier; but arises from a great public employment for establishing correspondence" - (1773) 5 Burr, at 2718 (98 ER, at p 426); the report in William Blackstone's Reports (1773) 2 Wm Bl, at p 908; (96 ER, at p 537) states it thus "... the duty arises out of a great public trust, since the legislative establishment of the post-office by the Statutes of Charles the Second and Queen Anne ...

The present question is now merely a question of construction on the statute 9 Anne c. 10, to explain the meaning of the word 'delivery.'" Reference may also be made to *Smith v. Dennison* [1790] EngR 1869; (1774) Lofft 753 (98 ER 901) , and to *Smith v. Powdich* [1774] EngR 106[1774] EngR 106; ; (1774) 1 Cowp 182 (98 ER 1033) . In both cases Lord Mansfield presided and *Rowning v. Goodchild* (1773) 5 Burr 2716 n (98 ER 425) was followed. (at p589)

11. These, then, were English cases, never since departed from, in which a member of the public was held entitled to recover damages against a deputy postmaster, not for breach of contract or as a common carrier but for his default in compliance with what was held to be a duty imposed upon him by statute to deliver letters addressed to the plaintiff. (at p589)

12. In the joint judgment of the Chief Justice and of Gibbs J., which I have had the advantage of reading, reference is made to the modern English case of *Triefus & Co. Ltd. v. Post Office* (1957) 2 QB 352 , the only other case in the English courts in which this point appears to be adverted to. In that case the question was whether any contract existed concerning the carriage of packages of diamonds by the defendant and it was held that it did not. However it is noteworthy that in that case Hodson L.J. said in argument (1957) 2 QB, at p 358 , speaking of s. 34(2) of the Post Office Act of 1908, which confers upon the Postmaster-General "the exclusive privilege" of conveying letters and of performing the incidental services of receiving and delivering all letters:

"I think that the Postmaster-General is under a duty;
the Act imposes the duty in a very dignified way by calling it
a privilege".

This observation appears, with respect, to accord with the views of Lord Mansfield and of the Lord Chief Justice earlier referred to; with it may be contrasted the opposing view of Parker L.J., also expressed in argument (1957) 2 QB, at p 357 . (at p589)

13. A similar view has been taken both in Canada and in the United States and this is not without significance since the postal services of those countries, like our own, are successors to the British colonial postal services which, in the case of the North American continent, were established by the British government "at great charges ... on the main land in North America, through most of her Majesty's plantations and colonies in those parts" - recital to 9 Anne c. 10, the Act which established a general post office for all Her Majesty's dominions. (at p589)

14. In Canada it has been held that the Postmaster-General may not, without express statutory authorization, deny to any the use of the postal services and, that, should he do so, he will be liable at the suit of the member of the public thus injured. The question arose in *Literary Recreations Ltd. v. Sauve* (1932) 4 DLR 553 . Section 7 of the Canadian Post Office Act conferred upon the Postmaster-General power to make regulations declaring what should and should not be deemed to be "mailable matter"; pursuant to that power he determined that the plaintiff's circular letters were not "mailable matter" and while the British Columbia Court of Appeal held him to be justified in so acting the judgments emphasize that, but for the express statutory power conferred by s. 7 to deny the use of the Canadian mail to specific types of matter, there would have been an enforceable duty owed by the Postmaster-General to accept and deliver the plaintiff's mail. Martin J.A. referred to the history and origin of the Canadian Post Office and to its English sources and said of it (1932) 4 DLR, at pp 556-557 :

"it is now long too late to deny the right of all members

of the public in Canada to make use of the public postal service in accordance with said Post Office Act".

The Chief Justice also concluded that the contention that no general duty was owed to the public was ill-founded, although none was expressly imposed by the legislation, and said that, unless the rejection of the circular letters was expressly authorized pursuant to s. 7 of the Act, the Postmaster-General would be liable to the plaintiff for the wrong involved in prohibiting its use of postal services (1932) 4 DLR, at p 556 . He went on to describe the Post Office as:

"in reality a public utility erected for the convenience of the public at their expense, thereby giving those who use it the right to demand immunity from torts such as the one which was alleged to have been committed here".

The tort to which he referred was an exclusion from use of postal services unauthorized by legislation. The tenor of the judgment of McPhillips J.A. is to the same effect and Macdonald J.A. disposed of the Postmaster-General's contention that while the post office afforded public facilities the plaintiff had no legal right in respect of those facilities, the use of the post office being a concession or privilege which might be withdrawn, when he said (1932) 4 DLR, at pp 562-563 :

"If the right to use a commercial agency maintained by the public for many years is denied to a citizen a legal right is invaded". (at p590)

15. Literary Recreations Ltd. v. Sauve ([1932\) 4 DLR 553](#) did not depend upon any special feature of the Canadian legislation; it has been followed in various Canadian jurisdictions and in Reg. v. Randolph ([1966\) 56 DLR \(2d\) 283](#) , the approach of the Supreme Court of Canada to the same legislation, when read in the light of the decision under appeal, that of the President of the Exchequer Court (1966) Ex CR 157 , is along similar lines. (at p591)

16. In the United States a like view has prevailed and this is not I think, to be attributed to the influence of any doctrine of fundamental rights guaranteed by the [Constitution](#) - Public Clearing House v. Coyne (1903) 194 US 497 (48 Law Ed 1092) . The Postmaster-General has conferred upon him a statutory power to deny the use of the mails to individuals upon various grounds and while the Courts do not assert any right to inquire into the correctness of the determination by the Postmaster-General of the question whether correspondence is or is not "mailable" they will intervene at the suit of the individual should he act without statutory authority in denying the use of postal services. Thus in American School of Magnetic Healing v. McAnnulty [[1902\] USSC 38; \(1902\) 187 US 94](#) (47 Law Ed 90) , where, on the instructions of the Postmaster-General, letters addressed to the plaintiff were not delivered to it because it was alleged that its business involved obtaining money through the mails by false pretences, the Court granted an injunction against the Postmaster-General who, it held, had assumed jurisdiction in a case not covered by the Statute and had thus ordered the detention of mail without statutory authority. In its judgment the Supreme Court said that the Postmaster-General's right (1902) 187 US, at p 109 (47 Law Ed, at p 96) "to exclude letters or to refuse to permit their delivery to persons addressed must depend upon some law of Congress, and if no such law exists, then he cannot exclude or refuse to deliver them". Otherwise, it was said, the individual would be "left to the absolutely uncontrolled and arbitrary action of a public and administrative officer whose action is unauthorized by any law (1902) 187 US, at p 110 (47 Law Ed, at p 96) . The Court stated that there was a legal right in the individual to have letters

addressed to him delivered and that that right had been violated. (at p591)

17. Turning now to Australia, the Australian colonies, when they were authorized by 12 and 13 Vict. c. 66 to establish inland posts in their respective territories, took as their model the English legislation of 1837, 7 Wm. 4; 1; Vict. c. 32-36, and the "penny postage" scheme of 3 & 4 Vict. c. 96; the various colonial Acts in turn constituted the basis for the present Commonwealth legislation. In the joint judgment of the Chief Justice and of Gibbs J. the case of *Hartle v. Campbell* ([1886](#)) [12 VLR 604](#) is discussed and the assumption underlying the judgments of the members of the Full Court are referred to; to that colonial decision may be added a reference to *Blakeney v. Pegus* ([1885](#)) [6 NSWLR 223](#), in which a country telegraph mistress was sued for the consequences to the plaintiff of his mistakenly being given a telegram intended for another. The Full Court held that the action would not lie for mere negligence, absent intent to mislead. The plaintiff relied upon *Rowning v. Goodchild* ([1773](#)) [5 Burr 2716](#) n ([98 ER 425](#)) and in distinguishing it Martin C.J., having earlier referred to cases involving private telegraph companies, said ([1885](#)) [6 NSWLR](#), at p 232 :

"But we are dealing with a public officer, having duties to discharge to the whole of the community. As regards the Post Office, there are cases to show that the delivery of letters must be at the house of the person to whom they are addressed, and that non-delivery is actionable. That is what the decision in *W. Blackstone* amounts to. That is the law as it then stood. But that is not a case like this. That case may establish the right of an individual to bring an action for a breach of duty on the part of a public officer; but it does not establish that when a person to whom a telegram is not addressed, but to whom such a telegram had been sent, has suffered damage from such wrong delivery, such a person can bring an action against the officer who made the mistake. I am of the opinion that if the telegraph mistress, in this case, intentionally misdirected this telegram and sent it to the wrong person, an action would be maintainable."

Having acknowledged the distinction between a private telegraph company and the case of a public officer and referring to the unintentional nature of the error in this case his Honour continued ([1885](#)) [6 NSWLR](#), at p 232 :

"The erroneous statement in this case is that the telegram sent to Black was intended for Blakeney. Unless that statement was intentionally false, I am of opinion that the action will not lie. No doubt, if a person gets a telegram from a public officer, he has a right to suppose that the telegram was received as it purports to be. But, although that be not so, yet an action will not lie unless the thing was done deliberately."

Windeyer J. agreed with the reasons of the Chief Justice and Faucett J. also agreed that the action would not lie. (at p593)

18. These two cases, on legislation not in its general character very different from the present

Commonwealth Act, lend some support to the view that for breach of a statutory duty imposed by postal legislation, such as a failure to deliver, an action will lie at the suit of the individual affected by the breach. They are in that respect consistent with the decisions in other jurisdictions to which I have referred. (at p593)

19. Since Federation the only Australian case on the point appears to be that of *R. v. Arndel* [1906] HCA 7; (1906) 3 CLR 557 . This case is considered in detail in the joint judgment of the Chief Justice and Gibbs J. and calls for no further comment by me. (at p593)

20. That being the state of such authorities as exist on the matter, if there is to be found in the Post and Telegraph Act indications that there is a duty imposed upon the Postmaster-General to receive and deliver mail, subject always to compliance with the requirements of the Act and regulations, there is, I think, good ground for holding that the plaintiff may, by proceedings such as these, seek to have performance of that duty enforced. (at p593)

21. In the joint judgment of the Chief Justice and Gibbs J. a close scrutiny is made of the legislation and it is unnecessary for me to do more than express my agreement with what is there said and with the conclusion expressed that there are clear indications in the legislation that properly addressed and stamped letters received for transmission and delivery must be duly transmitted and delivered except in those cases for which express provision to the contrary is made, that no unfettered and general power reposes in the Postmaster-General to direct that postal facilities may be denied to an individual and that, in the circumstances of this case, no power existed whereby either delivery of mail addressed to the plaintiff or the receipt from him and transmission of mail which he desired to be transmitted through the post could be denied to him. In their joint judgment their Honours have also dealt with the purported cancellation of the tenancy of the plaintiff's post office box, the de-registration of "The Rhodesian Commentary", the suspension of telephonic and telegraphic services and the general question of the exercise by the Court of its discretion in favour of the defendant in respect of the relief sought by the plaintiff and in all these respects I am in agreement and have nothing to add. Accordingly in my opinion appropriate orders by way of declaration and injunction should be made. (at p593)

ORDER

Declare that the direction given by the Postmaster-General on or about 18th April 1973 that all postal and telecommunication services for the Rhodesia Information Centre should be withdrawn was beyond the power of the Minister and invalid.

Order that the defendants, their officers, servants and agents be perpetually restrained from acting in any way in furtherance of the said direction and in particular from withdrawing or withholding any postal or telephone services that were on or before 18th April 1973 provided by the Commonwealth of Australia or the Postmaster-General for the Rhodesia Information Centre at Crows Nest in the State of New South Wales, and from cancelling the tenancy of Post Office Box 138 at Crows Nest aforesaid, and from deregistering the publication "The Rhodesian Commentary", except in accordance with law.

Order that the defendants pay to the plaintiff his costs of and incidental to the motion and the proceedings before the Full Court, including costs reserved.

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