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SUPREME COURT OF SOUTH AUSTRALIA

O'LEARY v MATTHEWS

White J

4, 14 June, 17 July 1979 — (1979) 28 ALR 97; (1979) 42 FLR 114

POST AND TELECOMMUNICATIONS – WIRELESS TELEGRAPH – "BROADCASTING PROGRAMMES" – MESSAGES – TRANSMITTING AND RECEIVING APPLIANCES – APPLIANCES CAPABLE OF RECEIVING BOTH "MESSAGES" AND "BROADCASTING PROGRAMMES" – WHETHER WITHIN AMBIT OF WIRELESS TELEGRAPHY OR BROADCASTING AND TELEVISION ACTS – CRIMINAL LAW – ONUS OF PROOF – STATUTORY OFFENCE – ABSOLUTE PROHIBITION – UNLESS AUTHORIZED BY LICENCE – ONUS OF PROOF THAT AUTHORIZED – BROADCASTING – WIRELESS TELEGRAPH – REGULATION OF – AMBIT OF BROADCASTING AND TELEVISION ACT – MATTER TRANSMITTED BY WIRELESS TELEGRAPHY – WHETHER WITHIN BROADCASTING AND TELEVISION ACT – WIRELESS TELEGRAPHY ACT 1905 (CTH) SS4, 59 6(1)(a) – STATUTORY INTERPRETATION – "MESSAGES" – "RECEIVERS" – "BROADCASTING PROGRAMMES" – "TRANSCIVERS": WIRELESS TELEGRAPHY ACT 1905 (CTH) SS4, 5, 6(1)(a); BROADCASTING AND TELEVISION ACT 1942 (CTH) SS4, 130, 130(2); CRIMES ACT 1914 (CTH) S14.

The appellant, a tow truck operator, was convicted in Adelaide Magistrates' Court of maintaining six appliances for the purpose of receiving messages (Receivers) by means of wireless telegraphy and of maintaining two further appliances for the purpose of both transmitting and receiving messages (transceivers), contrary to s6(1)(a) of the *Wireless Telegraphy Act 1905* (Cth). The evidence before the special magistrate included the six receivers tendered as exhibits, photographs of the receivers *in situ*, the oral evidence of the inspectors who tested the receivers and written reports of the inspectors. The evidence showed that the receivers had been altered to receive frequencies outside the ordinary FM band including frequencies allotted to the Police Department and the St. John Council (used for messages to and from ambulances). The evidence further showed that the transceivers were capable of transmitting and receiving messages on the FM frequency allotted to the Blair Athol Towing Service, of which the appellant was the registered proprietor. No evidence was put before the special magistrate by the appellant or the respondent as to whether or not the appellant possessed a licence under the *Wireless Telegraphy Act 1905* (Cth).

HELD: Appeal dismissed.

1. Section 6(1)(a) of the *Wireless Telegraphy Act 1905* (Cth) prohibits the maintaining without proper authority of an appliance for the purpose of transmitting or receiving messages by wireless telegraphy. The ambit of the prohibition is cut down by the *Broadcasting and Television Act 1942* (Cth) which deals, to the exclusion of the *Wireless Telegraphy Act 1905* (Cth), with broadcast receivers and the transmission of broadcasting programmes.

2. Section 4 of the *Broadcasting and Television Act 1942* (Cth) makes it clear that a broadcast receiver is an appliance capable of being used for the reception, by means of wireless telegraphy, of matter intended for aural reception by the general public in broadcasting programmes.

3. Consequently, all matter transmitted by wireless telegraphy not for the general public but for a limited class – i.e. "messages" – is governed by the *Wireless Telegraphy Act 1905* (Cth).

4. An appliance is governed by the *Wireless Telegraphy Act 1905* (Cth) if it is capable of receiving messages, even though it might also be capable of receiving broadcast programmes.

5. There was evidence before the special magistrate that the six receivers were used for receiving messages.

6. The inference was clearly open that the appellant was maintaining the two transceivers for the purpose of transmitting and receiving messages appropriate to his crash repair business.

7. Where an Act makes an activity unlawful unless authorized in the manner prescribed by the Act, the onus is upon the defendant to show that he was so authorized. Where an activity is normally lawful and becomes unlawful only if carried out in certain ways by certain persons, the onus is upon the prosecution to show that the circumstances existed which made the activity unlawful.

8. The *Wireless Telegraphy Act 1905* (Cth), with certain irrelevant exceptions, wholly prohibits the reception and transmission of messages by wireless telegraphy, unless authorized by licence. The onus is therefore upon the defendant, pursuant to s14 of the *Crimes Act 1914* (Cth) to prove that he was licensed.