

Delegated legislation—what can and cannot be done¹

Mark Emery

1—Introduction

1.1—Nature of delegated legislation

Pearce and Argument² refer to *delegated legislation* as being any legislative instrument made by a person or body to which the power to legislate has been delegated. They refer to the fact that legislation cannot be made by a body other than Parliament without the authority of Parliament and they define legislation as essentially being a rule of conduct of general application, or a power, right or duty created by an instrument that may affect the community at large.³

This paper will mainly concentrate on *regulations* made by the Governor. The *Subordinate Legislation Act 1978* (SA), a **regulation** is defined as “any regulation, rule or by-law made under an Act”.⁴

1.2—Use of delegated legislation

It is generally accepted that it is necessary and convenient for the Parliament, in the nature of things, to give a variety of subsidiary powers and functions to the Governor or other appropriate functionaries. This is the theory behind regulations – instruments that provide a lot of the detail within a statutory scheme or framework that has been created by statute and that naturally lend themselves to more detail. The history of regulations can be traced back to at least 1337.⁵

It is generally accepted that the following matters may be included in regulations:

- detailed technical matters
- provisions that must be amended frequently to reflect changing circumstances or where flexibility is required
- administrative or procedural matters that are not of primary significance.

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² Pearce and Argument: *Delegated Legislation in Australia*, 3rd edition (2005) LexisNexis. Butterworths at 1.

³ Ibid at 2.

⁴ Section 9 of the *Subordinate Legislation Act 1978* allows the Governor, by proclamation, to extend the operation of the Act to any other enactment of a legislative character made pursuant to any Act.

⁵ Statute 11 Edward 3, c. 1 of 1337 gave subsidiary and ancillary powers to a Minister. Pearce and Argument, above n 2 at 5 also refer to an early example of legislation delegating legislative power as being the Statute of Proclamations in 1539. This Act stated that:

The King for the Time being, with the Advice of his Council...may set forth Proclamations under such penalties and Pains as to him and them shall seem necessary, which shall be observed as though they were made by Act of Parliament.

It is also worth noting that this form of provision gave rise to the term “Henry VIII clause”.

2—General power to make regulations

2.1—Introduction

It is a fundamental aspect of the nature of delegated legislation that the power to make it must be conferred by a relevant Act of Parliament. This power may either be conferred in general terms, or it may be expressly contemplated by specific provisions in the Act. In association with this key concept is the requirement that regulations must be within the limits of the power that has been conferred. Furthermore, the starting point to determining this question must be to determine the “true nature and purpose of the [regulation-making] power”.⁶

2.2—The general power

The general power to make regulations is usually expressed as the power to make regulations that “are necessary or expedient for the purposes of this Act”.⁷

An important principle that applies in relation to this general power is that the regulations must be within the scope of the Act. A good case to use as an example of this principle is *Shanahan v Scott*⁸. In this case, regulations made under a Victorian Act prohibited the cold storage of eggs without the permission of a board. The Act provided for marketing schemes for eggs but not for the general control of eggs. The regulations were invalid because they purported to apply to all eggs including to eggs to which the Act did not necessarily apply. The following passage from the judgment is relevant to this point:

...such a power does not enable the authority by regulation to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying out or to depart from or vary the plan which the legislation has adopted to attain its ends.⁹

A useful approach offered by Pearce and Argument is to distinguish between complementing and supplementing a regulation-making power. An examination of the relevant Act should reveal whether a regulation is an attempt to add something to the operation of the Act which cannot be related to the specific provisions of the Act, or is being used merely to fill out the Act.¹⁰

As you would expect, in determining whether a particular regulation may be made under a general power to make regulations under the Act, it is also relevant to consider the content and scheme of the Act. In particular, it is accepted that the more general the Act, the more scope for regulations to be made to fill out the intended policy of the Act and the general power to make regulations can be interpreted more widely. This is the point made in the case of *Morton v The Union Steamship Company of New Zealand Limited*¹¹.

⁶ See *South Australia v Tanner* 166 CLR 161 at 164.

⁷ As noted by Pearce and Argument, this general power may be coupled with a number of specific regulation-making powers. *Ibid* at 151.

⁸ (1957) 96 CLR 245.

⁹ *Ibid* at 250.

¹⁰ See Pearce and Argument, above n 2 at 153. See also *Carbines v Powell* (1925) 36 CLR 88.

¹¹ (1951) 83 CLR 402.

In this case, the *Excise Act 1901* of the Commonwealth gave specific attention to the question about who should be liable to pay excise duty. The purpose of a regulation that was being challenged was to add to the events where duty could be imposed on an additional set of persons. The High Court found this to be something which was far more than incidental to the provisions of the Act or to its effective administration. The following passage is of particular relevance:

Regulations may be adopted for the more effective administration of the provisions actually contained in the Act, but not regulations which vary or depart from the positive provisions made by the Act or regulations which go outside the field of operation which the Act marks out for itself. The ambit of the power must be ascertained by the character of the statute and the nature of the provisions it contains. An important consideration is the degree to which the legislature has disclosed an intention of dealing with the subject with which the statute is concerned.

In an Act of Parliament which lays down only the main outlines of policy and indicates an intention of leaving it to the Governor-General to work out that policy by specific regulation, a power to make regulations may have a wide ambit. Its ambit may be very different in an Act of Parliament which deals specifically and in detail with the subject matter to which the statute is addressed.¹²

2.3—General power coupled with specific powers

It is often the case that an Act will provide for a general power to make such regulations as are contemplated by the Act or as are necessary or expedient for the purposes of the Act, and then to provide that, without limiting the generality of the general power, regulations may be made with respect to any matter set out in a list of specific powers.

The first point to note is that the expression “with respect to” gives a relatively wide regulation-making power. This formulation is discussed in the High Court case of *Paull v Munday*¹³ where Gibbs J said that the words “with respect to” are wider than the word “for”.¹⁴

Secondly, the inclusion of a list of specific powers with the expression “without limiting the generality of” is taken to ensure that the general power is not “read down”. At the same time, Pearce and Argument make the point that the specific powers must be interpreted so as not to exceed the general regulation making power.¹⁵

3—Empowering provisions – The power to “regulate” or “prohibit” an activity

The two most common provisions used in specific regulation-making powers are provisions which allow the regulations to “regulate” or to “prohibit” a particular activity. It is necessary to understand the scope of these provisions.

¹² Ibid at 410.

¹³ (1976) 9 ALR 245.

¹⁴ Ibid at 251.

¹⁵ See Pearce and Argument, above n 2 at 164-165.

3.1—Power to regulate an activity

The first thing to note is that, from a general perspective, the conferral of a power to *regulate* an activity does not include the power to *prohibit* the activity. This point is made in *Swan Hill Corporation v Bradbury* by Dixon J:

...a power to make by-laws regulating a subject matter does not extend to prohibiting it either together or subject to a discretionary licence or consent. By-laws made under such a power may prescribe time, place, manner and circumstance and they may impose conditions, but under the prima facie meaning of the word they must stop short of preventing or suppressing the thing or course of conduct to be regulated.¹⁶

In this case, the High Court had to consider a municipal by-law that purported to prohibit the erection of any building without the approval of the municipal council. A section of the relevant Act allowed by-laws to be made regulating and restraining the erection and construction of buildings and the Act also allowed for any matter to be “determined, applied...or regulated by the council”. The High Court found that the by-law was not within the power conferred by these provisions and was therefore invalid. The court appeared to be particularly influenced by the fact that the council had an “uncontrolled discretion” as to what might or might not be approved and it would not be possible for an applicant for approval to be able to compel the council to decide the application in his or her favour.

It can be that the power to regulate an activity may be exercised by prohibiting the activity unless the activity is done in a particular way or stated conditions are observed. If the question of whether the conditions or other requirements have been met is to be decided by a person or body in authority, the authority’s decision must be reviewable by the courts.

It is also the case that the power to regulate an activity may support the prohibition of a part of the activity. Thus, a power to regulate the practice of law enabled the making of a regulation prohibiting advertising by lawyers - *Goldberg v Law Institute of Victoria*.¹⁷

Generally speaking, it would appear that a regulation is more likely to be regarded as valid if the prohibition is only a small part of the overall activity that may be regulated, or that the prohibition is seen as an integral or logical aspect of an aspect of an activity that is to be regulated.

3.2—Power to prohibit an activity

The power to prohibit an activity will be construed strictly. So, for example, a power to make by-laws prohibiting the use of buildings for specified classes of trades was purportedly exercised by prohibiting all trades carried on in buildings within a specified city area. The by-law was held to be invalid because it did not specify the trades concerned.¹⁸

¹⁶ (1937) 56 CLR 746 at 762.

¹⁷ (1972) VR 605.

¹⁸ *Stewart v City of Essendon* (1924) VLR 219.

In this context, it may be that a court will consider the extent to which the prohibition is reasonably proportionate to the end to be achieved. So, for example, in *South Australia v Tanner*¹⁹, the issue was whether regulations made under a power under the *Waterworks Act 1932* to make regulations “for regulating, controlling or prohibiting the use of any land within a watershed...so as to reduce or prevent the deterioration or pollution of any water within a watershed...”, where the regulation prohibited the establishment of a piggery, zoo or feedlot within a watershed, was a valid exercise of power. The majority judgment referred to the need to establish that the relevant prohibition had a sufficient nexus to the express purpose and that the regulation could be considered as being reasonably proportionate to the pursuit of the enabling purpose. In other words, did the regulation go beyond any restraint which could be reasonably adopted for the prescribed purpose?²⁰ The decision was that the regulation was in fact within power. Evidence before the court indicated that the problem of water quality within the watershed was acute and extraordinary measures needed to be taken. The prohibitions contained in the regulation were reasonable in the circumstances.²¹

A power to prohibit an activity includes the power to provide for the enforcement of the prohibition. Thus a power to prohibit signs was found to authorise a by-law allowing a council to seize signs that were contrary to the by-law.²²

The prohibition of an activity coupled with a power to alleviate the prohibition - for example, a prohibition unless the activity was approved by the Minister - is a valid use of the power to prohibit. This can be considered as the “reverse angle” situation to the position that applied in the case of *Swan Hill Corporation v Bradbury*.²³ So, for example, in *Country Roads Board v Neale Ads Pty Ltd*²⁴ a by-law under a power to make by-laws for the purpose of “regulating or prohibiting the erection and construction of [advertising hoardings]...on or in the vicinity of State highways” where the effect of the by-law was to forbid advertising hoardings near State highways without the consent of a board was found to be valid. As stated in the majority judgment: [O]nce it is realised that the power authorises prohibition, complete or partial, conditional or unconditional, what reason is there for denying that the condition may be the consent, or licence, or approval of a person or a body?²⁵

3.3—Power to “regulate or prohibit”

It is not uncommon for a statute to allow regulations to be made to “regulate or prohibit” a certain activity. It has been accepted that this allows various forms of regulation or prohibition to be prescribed, including the power to prohibit an activity subject to conditions.²⁶ This formulation therefore effectively gives the proponent of the relevant regulations “the best of both worlds” and can be construed as a composite power and also as two separate powers.

¹⁹ (1989) 166 CLR 161.

²⁰ *Ibid* at 165.

²¹ See also *Minister for Resources v Dover Fisheries* (1993) 116 ALR 54.

²² See *Seat Ads Pty Ltd v Commissioner of Main Roads* (1985) 63 LGRA 85 and Pearce and Argument, above n 2 at 184.

²³ (1937) 56 CLR 746 and see above.

²⁴ (1930) 43 CLR 126

²⁵ *Ibid* at 135.

²⁶ See *Country Roads Board v Neale Ads Pty Ltd* (1930) 43 CLR 126 at 134.

4—Inconsistency (or repugnancy)

A regulation that is inconsistent with its enabling Act, any other Act or the common law is invalid unless it is supported by an express power.

4.1—Inconsistency with the enabling Act

In relation to the issue of inconsistency with the enabling Act, it would not be expected that one would find a regulation that is directly inconsistent with the Act as this is one of the most obvious situations to avoid in the making of a regulation. However, an example of such a case is *Macris v Lucas*.²⁷ In this case, a provision of the *Mining Act 1930* provided that a person could not own more than one claim on account of any miner's right, but allowed a person to hold more than one miner's right and for each such right a claim. A provision of the regulations under the Act provided that a person could not at any one time hold more than one precious stones claim, or more than one claim over a public road, street or highway. The Supreme Court (constituted by Mitchell J) held that the regulation was in conflict with the Act and was therefore invalid. Provided that a person held the requisite number of miner's rights, he or she could hold the corresponding number of claims (as envisaged by the Act). The regulation was inconsistent with the scheme established by the Act.

As stated by Pearce and Argument, the more common situation that may lead to a declaration of invalidity is where the regulations are found to be repugnant to the Act under which they are made because they deal with a matter in a way that "runs counter to the effect of the Act".²⁸

The case of *R v Commissioner of Patents; Ex parte Martin*²⁹ related to a scheme for the amendment of documents under the *Patents Act 1903* of the Commonwealth. Section 117 of the Act allowed the Commissioner to correct clerical errors in the Register of Patents or in any proceedings under the Act. A regulation purported to empower the Commissioner to amend any document "for the amending of which no special provision is made by the Act". The High Court declared the regulation to be invalid on the ground that the Act must be taken to have provided for all such amendments as the legislature considered proper. Fullagar J said:

When an Act contains a number of specific provisions for the amendment of documents, a regulation cannot, under the general power [in section 108 of the Act to make regulations which are necessary or convenient to give effect to the Act or for the conduct of any business relating to the Patent Office]...authorize the amendment of any document for which no provision is made. The Act must be taken to have provided for all such amendments as the legislature considered proper...The two most important documents which come into existence under the Act are the letters patent themselves and the complete specification. For amendment of the latter the Act makes exhaustive provision. It contains no provision whatever for the amendment of the letters patent themselves. I would not think it possible to hold that, in these circumstances, a regulation under the general power given by s. 108 could be give to the commissioner an unlimited power, or any power, to amend so important a document.³⁰

²⁷ (1971) SASR 329.

²⁸ See Pearce and Argument, above n2 at 223.

²⁹ (1953) 89 CLR 381.

³⁰ *Ibid* at 406-407.

Henry VIII clauses

It is possible for delegated legislation to be authorised to “override” or vary or amend particular legislation through the authorisation of a “Henry VIII” clause. The variation may include substantive changes and the relevant Act will be amended accordingly.³¹

4.2—Inconsistency with other Acts

There are examples where a regulation has been found to be invalid because of inconsistency with another Act of Parliament.³²

However, there are also cases where the legislative intent is that both an Act, and certain regulations, or types of regulation, made under another Act, are expected to be complied with and, if this is practicable, both provisions will need to be complied with and the regulations are therefore valid. An example of this principle is found in the case of *South Australia v Tanner*.³³ As noted above, this case involved the validity of a set of regulations made under the *Waterworks Act 1932* that prohibited the establishment of a piggery, zoo or feedlot within a watershed. One argument advanced in challenging the regulations was that the regulations were inconsistent with, or had been impliedly repealed by, the *Planning Act 1982*, which established a scheme under which no development could proceed without the consent of the relevant planning authority and which provided that the Development Plan was able to prohibit specified activities. The contrary argument, put by the Solicitor-General, was that there was no inconsistency. Rather, each Act had a distinct purpose, with the *Waterworks Act 1932* regulating a specific problem associated with the protection of a water shed and the *Planning Act 1982* establishing a general regime of planning control over the whole State. The following point was made in main judgment of the High Court:

In our opinion the submission of the Solicitor-General is correct. There is no reason to suppose that the South Australian legislature intended sub silento to vary the operation of the stringent controls imposed under the authority of the *Waterworks Act*. The *Planning Act* is to be read in light of the maxim *generalalia specialibus non derogant*. It follows, therefore, on the proper construction of the *Planning Act*, that s. 47(6) does not have the effect that a consent granted pursuant to its provisions overrides the prohibition imposed by reg. 37.2.1 [under the *Waterworks Act*].³⁴

Pearce and Argument make the point that if a reasonable construction of two laws can reconcile them, that construction should be adopted. It is to be assumed that the authors of statutory instruments do not intend to produce contrary laws and accordingly techniques of statutory interpretation such as reading down a provision, or recognising the distinction between a general law and a more specific law, should be used. The issue is ultimately one of statutory construction.³⁵

³¹ See Pearce and Argument, above n 2 at 222. The name of such a clause arises from the “extensive” uses of such clauses by the King of that name (as noted by Pearce and Argument at 14).

³² See *Stevens v Perrett* (1935) 53 CLR 449 and *Re Port Adelaide Corporation; ex parte Groom* (1922) SASR 35.

³³ (1988) 166 CLR 161.

³⁴ *Ibid* at 171.

³⁵ See Pearce and Argument, above n 2 at 235-236.

4.3—Inconsistency with common law

There are a number of examples of inconsistency with the common law that have led to the invalidity of a piece of subordinate legislation (in the absence of a specific provision to the contrary).

These examples are discussed extensively in *Pearce and Argument* and include the fact that regulations cannot reverse the onus of proof³⁶, empower an authority to deny procedural fairness to a person³⁷ or limit access to the courts.³⁸

5—Regulations made for an improper purpose

A court can look at the purpose for which the Crown (the Governor) has made regulations, as established by the leading case *R v Toohey; Ex parte Northern Land Council*.³⁹

In this case regulations made by the Administrator of the Northern Territory declared that certain land fell within the boundaries of a town for town planning purposes. However, the regulations were made to block a land rights claim and were held by the High Court to be invalid for that reason. As part of the judgment, Gibbs CJ said the following:

[I]f the Crown in Council makes a regulation which appears on its face to be made for a purpose that was not authorised by the statute under which it purports to be made, the regulations will be invalid. It would be anomalous if a regulation which bore the resemblance of propriety would remain valid even though it should be shown in fact to be made for an unauthorised purpose; that would mean that a clandestine abuse of power would succeed when an open excess would fail.⁴⁰

Earlier in his judgment, Gibbs CJ had referred to the fact that the relevant power to make regulations under the Act did not depend on a subjective belief or opinion as to a particular matter and was not granted on the basis that the power be exercised for a particular specified purpose. However, the nature and extent of a power to make a particular regulation needed to be inferred from the construction of the relevant Act read as a whole. A statutory power may only be exercised for the purposes for which it is conferred. The exercise of the power for an ulterior object will be invalid. In the present case, the powers conferred under the *Planning Act* of the Northern Territory were conferred for planning and development purposes, not for the purpose of defeating the traditional land claims of Aboriginals. The Crown, like any other official acting under an Act of Parliament, could not enlarge by its own act the scope of a power conferred by a statute.⁴¹ Courts have a duty to ensure that statutory powers are exercised only in accordance with law.⁴²

³⁶ *Willoughby Municipal Council v Homer* (1926) 8 LGR 3.

³⁷ *R v City of Whyalla; Ex parte Kittel* (1979) 20 SASR 386.

³⁸ *R & W Paul Pty Ltd v The Wheat Commission* [1937] AC 139.

³⁹ (1981) 151 170.

⁴⁰ *Ibid* at 192.

⁴¹ *Ibid* at 186 – 187.

⁴² *Ibid* at 193.

In some cases it may be difficult to ascertain whether or not the regulations have been made for an improper purpose. In *Friends of Ellison v SA*⁴³, Bleby J said that “whether or not a regulation has been made for an improper purpose can often be determined from the nature of the regulation itself”.⁴⁴ The question may be one of an analysis of the effect of the relevant subordinate legislation and then determining whether, because of that effect, the provision may be characterised as seeking to achieve something different to the purpose that applies under the principal Act.⁴⁵

In this case, one of the sets of regulations under review specified certain categories of activity to be Category 1 development under the *Development Act 1993* and therefore not subject to the rights of representation and appeal afforded by section 38 of the Act in relation to development that would otherwise be Category 3 development. Accordingly, the effect of the regulation was to remove these rights from the plaintiff. Bleby J made the point that the Act was silent as to the criteria which should govern a decision of the Governor to assign certain forms of development to Category 1 or 2. The very purpose of assigning a class of development to Category 1 was to exclude development within the class from the rights of representation and appeal. No improper purpose could be detected from the terms of the regulation under challenge. It was within the power of the Governor to make the regulations.⁴⁶

Bleby J then said:

All delegated legislation will generally be enacted for a purpose...If the empowering legislation specifies in some detail the purpose for which the delegated legislation may be enacted, and that purpose is not apparent from the delegated legislation itself, in the event of challenge it may be necessary to inquire, according to evidence of extraneous facts, whether the legislation was enacted for that purpose or for some other purpose. That will be a permissible inquiry. Where, as in this case, the only purpose of the delegated legislation is to restrict rights of representation and appeal in respect of particular development authorisations by labelling the development a category 1 development [under the scheme of the Act], the purpose is obvious and its achievement equally clear. There may, however, be evidence of a motive or motives which indicates that the regulation was made for some extraneous or improper purpose...However, it is not sufficient that the regulation operates to the detriment or benefit of one particular individual.

It is not unusual for political considerations to enter into the decision to exercise a particular regulation-making power. However, that does not render the regulation invalid as being made for an improper purpose, and it is not for a court to judge whether some political influence had been brought to bear if the regulation on its face appears to be a valid exercise of the regulation-making power.⁴⁷

⁴³ (2007) 96 SASR 246.

⁴⁴ *Ibid* at 282.

⁴⁵ See, for example, the case cited by Bleby J in *Friends of Ellison v SA* at 282-283.

⁴⁶ *Ibid* at 282 and 283.

⁴⁷ *Ibid* at 283-284.

In *Friends of Ellison v SA*, reference is made to an earlier case in point, being *South Australian River Fishery Association Inc and Warrick v SA*.⁴⁸ This case related to regulations made after the election of the Rann Government. The circumstances of the case involved a compact between the Labor Party and an independent Member of Parliament under which the Member agreed to support a Labor Government in the Lower House of Parliament in order to enable Mike Rann to form a Government. One requirement of the compact was that the Government immediately ban the use of gill nets in the Riverine corridor of the Murray and phase out commercial fishing of native species within 12 months. The plaintiffs argued that regulations subsequently made to prohibit the use of gill nets were invalid because they were made for an improper purpose as a result of the political compact. This was rejected by the Court. Whether political considerations played a part in deciding whether or not to make a regulation that is apparently within power is not an indicator of invalidity. The exercise of a power to make particular regulations will often be motivated by political considerations. The question is whether the regulations are within the true nature and purpose of the regulation-making power. Doyle CJ said the following:

Another way of putting it is that the court must decide whether the amending regulations go beyond what could be reasonably adopted for that purpose...

In this respect the court takes a broad approach. The court does not impose its view of the solution to an issue. The court does not substitute its decision as to how a matter should be dealt with. The question for the court is whether what is done by the amending regulations is reasonably capable of being made or adopted for the permitted purpose: *Tanner* (at 165 and 175). This formulation reflects the appropriate place of the exercise of judicial power in this respect. The role of the court is to consider whether the amending regulations have a sufficient relationship to the head of power, not whether the amending regulations embody what the court regards as the appropriate response to the circumstances in question.⁴⁹

At a point later in his judgment, Doyle CJ makes the point that an “improper purpose” is a purpose that is not within the scope of the empowering legislation. In this case, the amending regulations were appropriate to achieve an end within power or, in other words, they had a purpose that is within power. As stated in his judgment:

Like the [trial] judge, I am prepared to accept that the Minister would not have brought the amending regulations to Cabinet but for the compact. But to say that is only to say that political considerations played a part in the making of a decision that is apparently within power.

The conclusion is not an indicator of invalidity. The exercise by the Governor-in-Council of a statutory power will often have a political aspect. To put it bluntly, if two quite different but acceptable courses of action are open in a given case involving the exercise of a statutory power for a specified purpose, the government of the day is entitled to adopt the course which will secure a political advantage. That is, if a statutory power to make delegated legislation can validly be exercised to achieve either one of two quite different ends, the government of the day may make the choice according to political considerations.⁵⁰

⁴⁸ (2003) 85 SASR 373.

⁴⁹ *Ibid* at 384.

⁵⁰ *Ibid* at 392 – 393.

6—Unreasonableness and proportionality

A regulation may be declared to be invalid by a court on the ground that it is inconceivable that Parliament intended that the regulation in question could be made under the power provided by the Parliament in the Act. This point may be seen as another example of the point that as a matter of statutory interpretation, an exercise of a power to make regulations on a particular subject matter under an Act may be seen as being such that it could never be within the contemplation of the Parliament when it conferred the relevant power.

This point is often based on the following passage from the judgment of Dixon J in the High Court case of *Williams v Melbourne Corporation*⁵¹:

To determine whether a by-law is an exercise of a power, it is not always enough to ascertain the subject matter of the power and consider whether the by-law appears on its face to relate to that subject. The true nature and purpose of the power must be determined, and it must often be necessary to examine the operation of the by-law in the local circumstances to which it is intended to apply. Notwithstanding that *ex facie* there seemed a sufficient connection between the subject of the power and that of the by-law, the true character of the by-law may then appear to be such that it could not reasonably have been adopted as a means of attaining the ends of the power. In such a case the by-law will be invalid, not because it is inexpedient or misguided, but because it is not a real exercise of power.⁵²

However, it is commonly thought that a court will be reluctant to hold a set of regulations to be invalid purely because they appear to be unreasonable on assessment by the court.⁵³ Pearce and Argument point to an unwillingness by the courts to substitute judicial opinion as the reasonableness of a provision for that of the entity authorised to make the relevant provision under a power to make delegated legislation.⁵⁴

7—Uncertainty

Courts will strive to give certainty to regulations by construction and interpretation but if that is not possible then the regulations will be declared to be invalid. The approach to uncertainty adopted by Dixon J in *King Gee Clothing Company Pty Ltd v The Commonwealth*⁵⁵ was as follows: if the regulation is a valid exercise of a delegated power, then the court must treat the regulation like a piece of legislation enacted by the Parliament and strive to find a meaning. However, if it is not possible for the court to find a meaning after applying all recognised methods of construction, then it may be said that the maker of the regulation has failed to achieve an effective exercise of the power that has been conferred and the regulation must be declared to be invalid.

⁵¹ (1933) 49 CLR 142.

⁵² *Ibid* at 155.

⁵³ See, for example, the discussion in an article by Pearce in AIAL Forum No 21 at 31.

⁵⁴ See Pearce and Argument, above n2 at 261.

⁵⁵ (1945) 71 CLR 184.

8—Sub-delegation

There is a broad principle that the delegation of a legislative power by Parliament does not include a power to sub-delegate. However, it would appear that courts have not applied this principle very often.⁵⁶

Furthermore, there are various instances where what looks like an invalid sub-delegation may be valid.

Firstly, as discussed earlier, a power to prohibit an activity will support a regulation that prohibits the activity except where an authority (for example, a Minister), has approved the activity. So, in *Country Roads Board v Neale Ads Pty Ltd*⁵⁷ the relevant Board had the power to make by-laws regulating or prohibiting the erection or construction of hoardings. The High Court decided that the power to prohibit completely includes power to prohibit partially or subject to conditions and a condition may be the exercise of a discretion by a person or body. Indeed, in *Foley v Padley*⁵⁸, Gibbs CJ expressly states that the sub-delegation of power is not involved in this situation.⁵⁹

Furthermore, where a power to regulate is used legitimately to prohibit a minor aspect of the activity that may be regulated, the prohibition may be alleviated by a discretion. So, for example, in *Ex parte Cottman; Re McKinnon*⁶⁰, a by-law made under a power to regulate the use and enjoyment of the Domain prohibited the distribution of printed material unless authorised by the Commissioner of Police. The by-law was held to be valid.

It is also the case that a power to make regulations includes the power to sub-delegate functions of an administrative nature as distinct from those of a legislative nature. It is likely that the wider the powers that have been sub-delegated, the more likely it is that the court will characterise the sub-delegation as a sub-delegation of legislative power. If, on the other hand, the sub-delegated powers are to fill in details or are to be exercised in accordance with guidelines laid down in the regulations, it is likely that a court will find that the relevant regulation is valid.

Finally, it is often the case that the principal legislation will expressly provide that a regulation-making power may be sub-delegated.

⁵⁶ So, for example, see the judgment of Gibbs CJ in *Dainford v Smith* (1985) 58 ALR 285 at 290 where his Honour says: "I am not convinced that recourse to the maxim *delegatus non potest delegare* is of much assistance in deciding upon the validity of an exercise of statutory powers. It is simpler to ask directly whether the power has been exercised by the person upon whom it has been conferred and whether it has been exercised in the manner and within the limits laid down by the statute conferring the power."

⁵⁷ (1930) 43 CLR 126.

⁵⁸ (1984) 54 ALR 609.

⁵⁹ *Ibid* at 617.

⁶⁰ (1935) 35 SR (NSW) 7.

9—Licences and fees

9.1—Licences

The main point to note in relation to a power conferred by a statute to be able to require a licence by subordinate legislation will be construed strictly for the purposes for which it is given - see Pearce and Argument⁶¹ and, for example, *Banks v Transport Regulation Board (Vic)*⁶², where the High Court held that a power to impose conditions on a licence by regulation would not support a condition requiring compliance with the Act and with other relevant legislation. The conditions to be complied with were required to be specified in the regulations and this was not achieved by the approach that had been adopted.

9.2—Fees

The courts have been consistent in maintaining that a body exercising delegated legislative authority has no power to impose a charge without a specific authorisation under the Act.⁶³

To the extent that a statute may allow for the imposition of a fee connected with a service, the courts have required that any fee set by subordinate legislation must be related to the cost to the relevant authority in administering the scheme to which the fee relates and must not simply be a means of raising additional revenue (and thus result in the imposition of a tax). (Obviously, this principle can be displaced by a specific provision in an Act that allows a fee to raise more than the costs associated with the administration of the relevant scheme.)

The following cases are relevant in this area.

*Marsh v Shire of Serpentine-Jarrahdale*⁶⁴ involved by-laws prohibited the quarrying for materials without a licence and required the payment of a fee calculated at a rate of 3d. per cubic yard of the total area in respect of which the licence was granted. Barwick CJ made the point that he could not find in the relevant Act anything to suggest that the granting of a licence was intended to be used to add to the funds of the licensing board or to allow the board to participate in the quarrying operations carried out by a licensee. Barwick CJ continued:

To put the matter another way, to require the payment of a sum rated to the volume of material capable of extraction is not, in my opinion, in furtherance of any purpose or policy discoverable in the Act nor is it a contemplated method of regulating or controlling the activity of quarrying in the public interest. But the Act, it seems to me, does contemplate that the Board may to some extent recoup itself for its administrative effort in considering the application and physically issuing the licence...[In this case], the fee bears no relationship to the cost of administering a licensing system.⁶⁵

⁶¹ Above n 2 at 207 - 208.

⁶² (1968) 119 CLR 222.

⁶³ See Pearce and Argument, above n 2 at 209.

⁶⁴ (1966) 120 CLR 572

⁶⁵ *Ibid* at 580 - 581.

*Harper v Minister for Sea Fisheries*⁶⁶ involved a fee based on the value of the product – abalone – that the licence permitted to be taken. Reference was made to the fact that abalone is a finite but renewable resource which cannot be subjected to unrestricted commercial exploitation without endangering its continued existence. The fee was held not to be tax (and accordingly was not a duty of excise either). The leading judgment is that of Brennan J and the following extract is relevant:

When a natural resource is limited so that it is liable to damage, exhaustion or destruction by uncontrolled exploitation by the public, a statute which prohibits the public from exercising a common law right to exploit the resource and confers statutory rights on licensees to exploit the resource to a limited extent confers on those licensees a privilege analogous to a profit a prendre in or over property of another. A limited natural resource which is otherwise available for exploitation by the public can be said truly to be public property whether or not the Crown has a radical or freehold title to the resource. A fee paid to obtain such a privilege is analogous to the price of a profit a prendre; it is a charge for the acquisition of a right akin to property. Such a fee may be distinguished from a fee exacted for a licence merely to do some act which is otherwise prohibited (for example, a fee for a licence to sell liquor) where there is no resource to which a right of access is obtained by payment of the fee.⁶⁷

Brennan J later said:

The next question is whether the amount required to be paid by a licensee to obtain the right to fish is a tax...As the amounts payable to obtain an abalone fishing licence are of the same character as a charge for the acquisition of property, they do not bear the character of taxes. They are not duties of excise.⁶⁸

The other members of the Court paid particular attention to the fact that it was possible to “discern a relationship between the amount paid and the value of the privilege conferred by the licence, namely, the right to acquire abalone for commercial purposes in specified quantities.” The judges went on to say that it did not necessarily follow that any extraction of money for conserving a public natural resource would not constitute a tax. It depended on the circumstances (and the relationship between the value of what is acquired and the amount charged).⁶⁹

*Air Services Australia v Canadian Airlines International Ltd*⁷⁰ involved charges imposed in relation to various services and licences and authorisations under the *Civil Aviation Act 1988* of the Commonwealth. The validity of various charges imposed on a “network” basis was challenged by a carrier. The charges were calculated using formulae based substantially on the maximum take-off weight of aircraft and not in relation to the actual cost of providing services to a particular operator or user of the services. The High Court found that the charges were valid because they were set to recover the expenses associated with the provision of services generally and on account of facilities provided across the system to operators and other people.

⁶⁶ (1989) 168 CLR 314.

⁶⁷ *Ibid* at 335.

⁶⁸ *Ibid* at 335 - 336.

⁶⁹ *Ibid* at 336 - 337.

⁷⁰ (1999) 202 CLR 133.

Some extracts from the judgments are as follows:

In this case: the charges were not imposed to raise revenue; the charges were undoubtedly charges for the provision of services and facilities; the charges were imposed to recover the cost of providing such services and facilities across the entire range of users; the charges for categories of services were reasonably related to the expenses incurred in relation to the matters to which the charges related; the services and facilities were, of their nature, part of an activity which must be highly integrated in order to be effective; there was a rational basis for such discrimination between users as existed.⁷¹

In a commercial context of the kind described, it seems to me that, notwithstanding that charges apply differently to different users and reflect neither the cost nor the value of particular services rendered, they are properly characterised as fees for if three conditions are met. The first is that they are levied only against persons who use the services. The second is that they are levied against all such users. The third is that there is a commercial justification for discriminating against different users.⁷²

Where services are provided by a public authority...where the statutory context and the surrounding circumstances otherwise fail to indicate a revenue-making purpose for a charge, the lack of a discernible relationship between the value of a particular service received on a particular occasion and the amount of the charge for that service does not necessarily indicate that the charge has a character of a tax...Where the total charges recovered for providing the services exceeds the total cost of providing the services...a rebuttable presumption naturally arises that the pricing structure is employed for a revenue-raising purpose.⁷³

It follows that in the statutory context of this case the lack of a discernible relationship between the charge levied for, and the value of, a particular service provided on a particular occasion, does not destroy the prima facie character of the charges as fees for services. All the charges in question are therefore properly regarded as fees for services and do not amount to taxation.⁷⁴

A recent case decided by the Full Federal Court, *Queanbeyan City Council v ACTEW Corp Ltd*⁷⁵, involved a “water abstraction charge” (WAC) imposed by the ACT Government on ACTEW, a statutory corporation (the case also involved a utilities charge but this was not done via delegated legislation and is therefore not relevant to this paper). The power to impose the WAC was derived from the *Water Act 2007* (ACT), which authorised the relevant Minister to determine fees for the Act. The WAC commenced at 10 cents per kilolitre of water and was increased on a number of occasions; at the time of trial the WAC was 55 cents per kilolitre. ACTEW passed the charge on to Queanbeyan City Council (QCC), which refused to pay the WAC above the level of 10 cents per kilolitre.

⁷¹ Ibid at 178 – Gleeson CJ and Kirby J.

⁷² Ibid at 192 – Gaudron J.

⁷³ Ibid at 240 – McHugh J.

⁷⁴ Ibid at 241 – McHugh J.

⁷⁵ [2010] FCAFC 124

Keane and Stone JJ in separate judgments agreed that the WAC was not a tax (applying the above authorities). Their Honours held that it was a fee for a service because it could not be said that there was no discernable relationship between the WAC and the value of the water supplied by the ACT to ACTEW (Keane J also found that the WAC was a valid charge on the voluntary acquisition by ACTEW of a right to a public resource akin to a profit a prendre or a royalty). Perram J considered that the matter should be remitted to the trial judge for a determination of the value of the water so that the judge could determine whether the WAC was a duty of excise.

In April 2011, the High Court granted QCC special leave to appeal.

10—Procedures required for making regulations

Generally, if an Act prescribes a procedure to be complied with in the making of regulations, the courts will require those procedures to be followed exactly.

A South Australian case where this issue was considered is *Epstein v WorkCover Corporation of South Australia*.⁷⁶ This case involved regulations purportedly made under the *Workers Rehabilitation and Compensation Act 1986* which excluded participants in sporting or athletic activities from the coverage of the Act. Section 3(8) of the Act provided that a regulation excluding any class of workers from the application of the Act could not be made unless the board of the Corporation “agree[d] to the making of the regulation”. The point that is relevant in this context is that the board resolution referred to “sporting professionals” without defining the term, while the regulation referred to a worker “employed ...to participate in a sporting or athletic activity...in relation to that employment”.⁷⁷ The court made the point that “sporting professional” was not defined by the Act, the regulations or a resolution of the board. It might identify a larger class than those referred to in the regulation or, indeed, a smaller class. The court considered that the words of the Act required very close correspondence between the resolution of the board and the regulation. It was also noteworthy that the making of the regulation excluded a class of workers from the application of the Act and so this was a significant step. The court therefore held that there had been non-compliance with a statutory precondition to the making of the regulation and that in the circumstances this rendered the regulation invalid.⁷⁸

In considering this case, there are a couple of other matters that are relevant (and that were referred to in the leading judgment in *Epstein*).

Firstly, it is a question of statutory interpretation as to the significance of any recommendation. The question can be asked from a *Project Blue Sky* perspective: whether actual non-compliance will render the regulation invalid, that is, whether a breach of a condition relating to the exercise of a statutory power will render the exercise of that power ineffective. As stated in the leading judgment in that case, this is a question of statutory interpretation involving a consideration of “legislative purpose”, which is to be ascertained by reference to the language of the statute, its subject matter and objects, and the consequences of holding a particular act undertaken in breach of the statutory condition void.⁷⁹ (In the case of *Epstein*, the Act provided that a regulation could not be

⁷⁶ (2003) 85 SASR 561.

⁷⁷ Ibid at 572 - Besanko J.

⁷⁸ See Besanko J, especially at 573-576.

⁷⁹ See *Project Blue Sky Inc v ABA* (1998) 194 CLR 355 at 388-389.

made **unless** the recommendation was provided - this was assessed to be an imperative requirement).

In this context the decision of *Bond v WorkCover Corporation of South Australia* is relevant.⁸⁰ This case involved some more regulations made under the *Workers Rehabilitation and Compensation Act 1986* seeking to exclude certain classes of workers from the application of the Act, where the relevant provision had been amended so as to require now “consultation” with an advisory committee before regulations could be made. Gray J stated that consultation in these circumstances occurred when the advisory committee was made aware that it was being consulted under the Act and where it was given a reasonable opportunity to express any views that it might have regarding the proposed regulations.⁸¹ Furthermore, Gray J went on to consider the effect that a failure to consult would have on the regulations (even though consultation had actually occurred). The judge referred to the change in approach and language from the earlier provision - from the use of the wording “cannot” be made unless to the use of the wording “may only be made if”. The word “cannot” was taken to suggest an absence of power and so to suggest that non-compliance resulted in invalidity, while “may only” did not connote an absence of power, but suggested a power that is to be performed only in certain circumstances (but that a failure to undertake the consultation in these circumstances would not render the regulations invalid).⁸²

Secondly, if the recommendation is effectively of a “binding” nature, it then becomes necessary to consider how closely the final regulation “corresponds” to the recommendation, with a difference arising if the recommendation is in general terms rather than more specific terms.

11—Consideration of regulations by the Legislative Review Committee and disallowance

In South Australia, section 10A of the *Subordinate Legislation Act 1978* provides that any regulation that is required to be laid before Parliament is, when made, referred by force of the section to the Legislative Review Committee of the Parliament. The committee is required to inquire into each set of regulations that is referred to it and may report to the Parliament that the committee is of the opinion that the regulations should be disallowed.

12—National schemes

It may be that special rules are included in certain Acts or statutory schemes for “national laws” in relation to the making, operation or disallowance of regulations made under or for the purposes of the national scheme.

For example, under the *National Electricity (South Australia) Act 1996* section 11, the *National Energy Retail Law (South Australia Act 2011)* section 14 and the *National Gas (South Australia) Act 2008*, regulations made under the relevant laws are not subject to disallowance under the *Subordinate Legislation Act 1978*.⁸³

⁸⁰ (2005) 93 SASR 315.

⁸¹ *Ibid* at 329.

⁸² *Ibid* at 330-336.

⁸³ Section 14 of the *National Energy Retail Law (South Australia Act 2011)* excludes the operation of the *Subordinate Legislation Act 1978* in its entirety from operating in relation to regulations made under the national law.

Under the *Health Practitioner Regulation National Law* set out in the *Health Practitioner Regulation National Law (South Australia) Act 2010* and the *Occupational Licensing National Law* under the *Occupational Licensing National Law (South Australia) Act 2011*, regulations are made by a Ministerial Council (rather than by the Governor).

Under section 246 of the *Health Practitioner Regulation National Law*, a national regulation that is disallowed by a House of Parliament does not cease to have effect in the relevant participating jurisdiction, unless the regulation is disallowed in a majority of the participating jurisdictions.

Furthermore, in relation to regulations under national schemes, it is important to distinguish between: (1) a legislative scheme that provides for the express application of a national set of regulations (such as the schemes referred to above); and (2) a scheme where national model legislation leaves it to each jurisdiction to enact its own regulations.

In the first case, it is usually the case that the State will apply the legislation and the regulations made by a specified authority under the relevant law – for example, a Ministerial Council.

In the second case, even if there is uniform legislation and model regulations have been developed nationally, a particular jurisdiction still has the option to enact its own set of regulations in any form that it wishes (and these regulations may or may not be the same as the model regulations that have been prepared). In other words, the model regulations are simply that – a model, which the Governor in Executive Council may, or may not, decide to follow. So, for example, in some cases model regulations have not been promulgated, or have been varied, because of the poor quality of drafting, or because the model needs to be varied to suit the situation in South Australia (and transitional provisions may be an example where variations may become necessary).