For some years now I have been conducting research into various aspects of the written law as distinct from the common law. I have been concerned with the ways in which such law is made by the parliament and delegates of the parliament. I have also examined the manner in which the courts deal with written law and how they reconcile it with the common law. The two books that I am submitting for the award of the degree of Doctor of Philosophy are concerned with aspects of this overall research programme.

"Statutory Interpretation" deals with the way in which the courts carry out their constitutional task of giving effect to legislation. The so-called rules of interpretation are common to all legislative instruments. They are used to ascertain the meaning of delegated legislation as well as Acts of Parliament.

"Delegated Legislation" examines the methods of making such legislation; the oversight of it exercised by parliament; and the rules adopted by the courts in pronouncing upon its validity.

The two books are related to one another in the narrow sense that the rules of statutory interpretation apply to the interpretation of delegated legislation. In particular, the rules are used in determining the validity of delegated legislation. I prefer, however, to see their interrelationship as being on the wider level of dealing with different aspects of the one subject matter - legislation.

D. C. Pearce
1 March 1978.
DELEGATED LEGISLATION
IN
AUSTRALIA AND NEW ZEALAND
DELEGATED
LEGISLATION
IN
AUSTRALIA AND NEW ZEALAND

by

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With a Foreword by
THE HONOURABLE SIR ANTHONY MASON, KBE
A Justice of the High Court of Australia

BUTTERWORTHS
SYDNEY-MELBOURNE-BRISBANE
ADELAIDE-PERTH
1977
AUSTRALIA:
BUTTERWORTHS PTY LTD
586 Pacific Highway, Chatswood 2067
Bookshop, 233 Macquarie Street, Sydney 2000
343 Little Collins Street, Melbourne 3000
Commonwealth Bank Building, King George Square, Brisbane 4000
48 Fullerton Road, Norwood, Adelaide 5067
49-51 St Georges Terrace, Perth 6000

NEW ZEALAND:
BUTTERWORTHS OF NEW ZEALAND LTD
T & W Young Building,
77-85 Customhouse Quay, Wellington 1

ENGLAND:
BUTTERWORTH & CO (PUBLISHERS) LTD
88 Kingsway, London, WC2B 6AB

CANADA:
BUTTERWORTH & CO (CANADA) LTD
2265 Midland Avenue, Scarborough, ONTARIO, MIP 4SI

SOUTH AFRICA:
BUTTERWORTH & CO (SA) (PTY) LTD
152-154 Gale Street, Durban 4001

NATIONAL LIBRARY OF AUSTRALIA
Cataloguing-in-Publication entry

Pearce, Dennis Charles
Delegated legislation in Australia and New Zealand
ISBN 0 409 31820 5
1 Delegated legislation — Australia 2 Delegated legislation — New Zealand. 1 Title.
348 94023

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Wholly set up and printed by TIEN WAH PRESS Singapore.
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"Delegated Legislation in Australia and New Zealand" represents another advance in Australasian legal publishing. We are now emerging from the Age of Darkness in which our reliance on overseas textbooks was relieved only by the desultory appearance of an indigenous and indigestible practice book, invariably cast in the iron-clad mould of annotations to a statute, and by the publication of Australasian supplements to English textbooks, in which the local law is expressed as if it were a mere appendage to the corpus of English law.

Our knowledge and our thinking have been conditioned by what textwriters have had to say about the law of the United Kingdom. Overseas authors have given scant attention to judicial decisions in Australia and New Zealand and none at all to Australasian statute law. The dearth of authentic textbooks of local origin has not only led to an inadequate recognition of our contribution to the law, it has handicapped its development. Nowhere is this more evident than in administrative law which has no long history behind it and has great potential for growth ahead of it. The rise of the Welfare State has been accompanied by a vast expansion in regulatory laws and a corresponding need to protect the citizen from arbitrary administrative decisions. The Courts have assisted in solving this problem by making a greater use of declaratory relief in administrative cases than was hitherto thought possible. The existence of s 75(v) of the Commonwealth of Australia Constitution conferring jurisdiction on the High Court to grant mandamus, prohibition and injunctions against Commonwealth officers has led to a more extensive use of prohibition, with a corresponding diminution in the role of privative clauses.

In both Australia and New Zealand special provision has been or is being made by statute for appeals from administrative decisions and for a more efficient system of judicial review. These important innovations are the result of Australasian initiatives. They are not a pale reflection of developments in the United Kingdom. The omens therefore indicate that administrative law in Australia and New Zealand is likely to pursue a distinctive and independent course.

Mr. Pearce's latest work will assist us in charting that course. It is organized into three parts. Part I deals with the making, the publication and the commencement of delegated legislation generally. Part II examines parliamentary review of delegated legislation in which separate attention is given to the procedures of the Commonwealth of Australia, each of the Australian States, the Northern Territory and the Dominion of New Zealand. Part III deals with judicial review of delegated legislation.

Parts I and II bring together for the first time materials which will be of great value to practising and academic lawyers and to all those who are interested in the procedures and processes of legislation and government. In presenting these materials the author has drawn upon his experience as a draftsman in the office of the Parliamentary Counsel to the Commonwealth of Australia.

Part III — judicial review — stands in a different position. It is the longest section of the book and it contains an instructive discussion of the problems,
the principles and the precedents. The author's achievement is deserving of praise. He succeeds to a remarkable degree in identifying the various questions which have arisen and are likely to arise in relation to the validity of delegated legislation, and in equal degree he succeeds in conveying the strands of thought which underlie the many judicial decisions which he discusses. He manages to steer a middle course between the perils of oversimplification and the hazards of diffuse discussion, at all times leaving the reader with a clear understanding of what the problem involves and with a precise impression of how the Courts have endeavoured to answer it.

"Delegated Legislation in Australia and New Zealand" has arrived on the scene at the right time. It will be warmly welcomed by the administrative lawyer and by all those who are interested in administrative law.

ANTHONY MASON

Judges' Chambers,
High Court of Australia,
Sydney.
September, 1977.
PREFACE

Since the time when Governors Phillip and Hobson first read the delegated legislation proclaiming the respective establishment of the colonies that were to become Australia and New Zealand, legislation made by delegates of parliaments has governed the lives of members of the public in those countries. In number, delegated legislative instruments (which for present purposes can be taken to embrace regulations, rules, by-laws and ordinances) exceed the enactments of the parliaments in the two countries. But the use of, and controls exercised over, such instruments has largely passed unexamined. This book is intended to go some way towards filling that gap. It deals with three broad issues. Part 1 looks at the making, commencement and publication of delegated legislation. Part 2 discusses the ways in which the various parliaments in Australia and New Zealand check the legislation that is made by delegates of the parliament. Part 3 sets out the bases on which the courts review the validity of delegated legislation.

The book is intended to be primarily descriptive, but, where appropriate, suggestions are made for changes in the present position. In particular, it is suggested that some aspects of the procedure for making and for parliamentary review of delegated legislation should be altered: see chapters 2 and 13. The discussion of judicial review is directed primarily to Australian authority, reference being made also to the principal New Zealand cases. However, where Australian and New Zealand law differs, an endeavour is made to state the New Zealand, as well as the Australian, position fully.

There are a number of people to whom I am indebted for assistance in the preparation of this work. The practices relating to the making and the parliamentary review of delegated legislation are largely undocumented and I was only able to find out what those practices are by seeking the help of the persons concerned with them. In all cases information was readily forthcoming. I wish to thank the following persons who afforded me assistance in respect of the jurisdictions mentioned: I hope that I have not unduly misrepresented that which they told me. Commonwealth of Australia: Mr A Cumming-Thom, Mr H Evans, Mr E Tudor; New South Wales: Mr D Tricket, Mr D Carpenter, Mr T Willis; Victoria: Mr J Little, Ms M Wimpole; Queensland: Mr R Armstrong MP, Mr L Murray; South Australia; Mr C Wells MP, Mr J Hull, Mr M Bowering; Western Australia: Mr R Viney; Tasmania: Mr A Shaw, Mr P Roach, Mr K Allbrook; Northern Territory; Mr F Thompson; New Zealand: Mr W Iles, Mr L Marquet.

I wish to express my appreciation of the considerable help in the preparation of the manuscript provided by the secretarial staff at the Law School, Australian National University, and, in particular, by Rita Harding. The checking of references was undertaken by Mr M Richardson and Mr T Smith and I wish to thank them for performing this most tedious task. I wish also to acknowledge the assistance given me by Professor L Zines and Mr G Lindell of the Law School, Australian National University. Their willingness at all times to discuss problems patiently and with their customary acumen was invaluable. I, of course, accept full responsibility for all that appears in the text. Finally, I am greatly honoured that Sir Anthony Mason has kindly written a foreword to the book.

January 1977

D C PEARCE
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PART ONE

Introduction

Making and Commencement of Delegated Legislation

CHAPTER 1

INTRODUCTION

[1] Meaning of “delegated legislation”. “Delegated legislation” is a convenient general description for a legislative instrument made by a body to which the power to legislate has been delegated. The expression therefore postulates an ability to identify two things. First, a form of delegation; and, secondly, instruments that can be described as “legislation”. The first poses fewer problems than the second. Legislation cannot be made by a body other than the parliament without the authority of the parliament. The authority is given by means of an Act of parliament. Accordingly, delegated legislation is legislation made by a non-parliamentary body acting pursuant to an Act of parliament. The instruments that can properly be described as “legislation” are more difficult to define with precision. The Committee on Ministers’ Powers (Report 1932 Cmd 4060: the Donoughmore committee) endeavoured to distinguish legislative and executive activity by adopting the approach that legislative action constitutes the process of formulating general rules of conduct without reference to particular cases, and usually operating in the future while executive action constitutes the process of performing particular acts, of issuing particular orders or of making decisions which apply general rules to particular cases. This distinction has been often, and justifiably, criticized. In making a decision involving a particular case, an administrator will frequently formulate a general principle that will apply to the determination of all such cases in the future. The executive action thus grades into the legislative. On the other hand, an Act of parliament, which is undeniably “legislative action”, may make provision for a particular case, eg the grant of a pension to a designated person. It is not, therefore, possible to classify the functions as sharply as the approaches postulated by the Donoughmore committee would suggest. Nonetheless, as a general guide to the difference between the two types of activity, the Donoughmore committee approaches are of assistance. If the committee’s description of legislative activity is used, one can define delegated legislation as instruments that lay down general rules of conduct af-
fecting the community at large which have been made by a body expressly authorized so to act by an Act of parliament.

For present purposes this definition will suffice, greater precision being unnecessary. This work is primarily concerned with two topics, parliamentary review of delegated legislation and judicial review of such legislation. The instruments that parliaments may review are defined, not by reference to what the instruments do, but by what form they take. Parliaments are not given a general right to review delegated legislation but are limited to a consideration of specific instruments. These instruments clearly fall within the definition set out above. As far as judicial review of delegated legislation is concerned, the principles adopted by the courts when considering the validity of such legislation are, for all practical purposes, the same as those used for judicial review of executive action. The terminology is sometimes a little different — the notions of jurisdiction and error of law are not applied to delegated legislation — but the general doctrine of *ultra vires* is adopted in like manner in regard to delegated legislation as it is to executive action. Hence there is no need to attempt fine distinctions between the two types of activity for the purposes of judicial review: cf the view expressed by Dixon J in *Arthur Yates & Co Pty Ltd v The Vegetable Seeds Committee* (1945) 72 CLR at 80 who denied that the question before the court could be resolved "by ascertaining whether upon a correct juristic analysis the power should or should not be described as legislative". Finally, one can but echo the words of the Privy Council in *The Commonwealth v Bank of New South Wales* (1949) 79 CLR at 642 in relation to arguments as to the meaning of s 92 of the *Constitution*. These were said to "illustrate the way in which the human mind tries, and vainly tries, to give to a particular subject matter a higher degree of definition than it will admit".

"Subordinate legislation". An alternative expression that is used to describe the instruments referred to in the preceding paragraphs is "subordinate legislation". This term is synonymous with delegated legislation and it could well have been used as the title for this book. The legislative instruments discussed hereafter are subordinate to Acts of parliament: if there is a conflict, the Act prevails. However, the description "delegated" legislation was preferred as it brings out the essential notion that the legislation is being prepared by a delegate of the parliament. It is not some lower form of legislation which could, in fact, emanate from the parliament itself. But this is not to suggest that the term "subordinate legislation" is incorrect, and it will be used from time to time.

Nomenclature of delegated legislation. Another reason why it is not important to define precisely what is meant by delegated legislation is that, in Australia and New Zealand, a fairly consistent nomenclature has been adopted for the instruments with which this work is concerned. The term "regulation" is used for legislation of general application emanating from the government and made by the Crown’s representative or by a minister. The term "rule" is used for legislation specifying procedural formalities, in particular the procedure relating to the conduct of actions in the courts. The term "by-law" is used to describe the legislation of a body having a limited geographical jurisdiction and is the expression most commonly used for the primary legislative instruments made by local government authorities. The
term “ordinance” is used for the primary legislation of the federal Territories and also some local government bodies, most notably those in New South Wales and the Brisbane City Council. The expression “proclamation” is limited to certain specific instruments taking a particular form that are made by the Governor-General or a Governor. Beyond this point however, the names applied to the instruments vary markedly and without apparent pattern. One encounters orders, determinations, notices, warrants and schemes, to name the more important. These instruments, while on occasions coming within the definition of delegated legislation set out above, are not referred to with any frequency in this work. They are rarely subject to parliamentary review.

[5] As will appear from the next chapter, in some jurisdictions an attempt is made to encompass the more important instruments referred to in the last paragraph within such general titles as “statutory instruments”, “statutory rules” or “statutory regulations”. The various instruments specifically defined above usually fall within this expression. In addition, an authority such as the Attorney-General is often given the power to select the more important from among the miscellaneous instruments there referred to. These are then published as statutory rules, statutory instruments or statutory regulations — thereby giving them a wider circulation and greater publicity than might otherwise have been the case.

[6] History of delegated legislation. The Donoughmore committee cited an enactment concerning the Staple made in 1385 as the earliest example in England of an Act empowering the making of delegated legislation. Perhaps the most famous of the early statutes delegating legislative power to an authority was the Statute of Proclamations passed in 1539. The main provisions of that Act stated that “The King for the Time being, with the Advice of his Council, or the more Part of them, 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”. The use of powers of this kind to make wide-ranging legislation underlay much of the dispute between the parliament and the Crown in the seventeenth century. The success of the parliament in this struggle resulted in a quiescent period of legislative activity on the part of the executive which lasted until the nineteenth century. From that time onwards, there has been a steady increase in the use of delegated legislation in the United Kingdom; the volume of such legislation now far exceeds that of Acts of parliament. (For a more detailed discussion of the development of delegated legislation in the United Kingdom, see Carr, Delegated Legislation (1921) ch 5.) From the first colonisation of both Australia and New Zealand, delegated legislation has formed a major part of the countries legislation. The proclamations of the first Governors were examples of delegated legislation. In terms of quantity, the annual volumes of delegated legislation produced in the various jurisdictions (admittedly a selection of the more important instruments) have, for many years, been roughly comparable in size with the annual volume of Acts produced by the parliaments in those jurisdictions.

[7] Opposition to use of delegated legislation. Despite the long history of use of delegated legislation, there have been times when opposition has been ex-
pressed to the notion that parliament may delegate the power to make legislation to another body. The primary arguments directed against the use of such legislation were, first, if the executive has power to make laws, the supremacy or sovereignty of parliament will be seriously impaired and the balance of the constitution altered. Secondly, if laws are made affecting the subject, they must be submitted for consideration and approval to the elected representatives of the people. (See for example, Allen, *Bureaucracy Triumphant* (1931) and the earlier editions of *Law and Orders*; Hayek, *The Road to Serfdom*.) In less temperate tones were the famous views of Lord Hewart in *The New Depotism* [1929] where he suggested at 14 "... a mass of evidence establishes the fact that there is in existence a persistent and well-contrived system, intended to produce, and in practice producing, a despotic power which at one and the same time places Government departments above the Sovereignty of Parliament and beyond the jurisdiction of the Courts". Lord Hewart's prospective despot was seen as being able to achieve his purpose if he could "(a) get legislation passed in skeleton form; (b) fill up the gaps with his own rules, orders, and regulations; (c) make it difficult or impossible for Parliament to check the said rules, orders, and regulations; (d) secure for them the force of statute; (e) make his own decision final; (f) arrange that the fact of his decision shall be conclusive proof of its legality; (g) take power to modify provisions of statutes; (h) and prevent and avoid any sort of appeal to a Court of Law" (at 21).

[8] The arguments of critics of delegated legislation proceed from basic assumptions as to the relative positions of the parliament and the executive in our form of government and as to the body that should be charged with the duty of producing legislation. Assuming, for the moment, that it is correct to say that, in our constitutional arrangements, the parliament is supreme, the fact that the parliament chooses to delegate part of its function to the executive does not mean that the parliament ceases to be supreme. The exercise of the power can be checked and, if it is being misused, it can be withdrawn. It must be stressed that legislative power can only be acquired if the parliament so provides. In any case, it is at least arguable that the parliament and the executive each have a role to play within the constitutional framework and neither is superior to the other (cf Griffith, "The Constitutional Significance of Delegated Legislation in England" (1950) 48 Michigan LR 1079). As far as the second assumption is concerned, that legislation should not emanate from the executive, this quite simply flies in the face of history. As pointed out in [6], the executive has always produced legislation. In practical terms also, it would be impossible for the parliament to attempt to become the sole source of legislation: see further [10]. It is suggested, therefore, that criticism of delegated legislation directed to its abandonment is invalid both in constitutional theory and from the viewpoint of sheer practicality. Nonetheless the dangers inherent in delegating legislative power that are pointed to by the critics need to be recognized. Merely because there are dangers in a system is not a reason for abandoning it — particularly when no other system seems practicable. But steps must be taken to limit the dangers: appropriate safeguards are considered at [16].

[9] Use of delegated legislation. While many commentators concede that delegation of legislative power is necessary, the nature of the power that
should be delegated is not a matter on which agreement has always been forthcoming. Freund, for example, writing in 1928, said "While it is extremely difficult to formulate a generally valid principle of legitimacy of delegation, the observation may be hazarded, that with regard to major matters the appropriate sphere of delegated authority is where there are no controverted issues of policy or of opinion", *Administrative Power Over Persons and Property* (1928) at 218. While this may indeed be a basis on which the concept of delegation could operate, in practice it cannot, and has not, been the basis adopted. This, quite simply, because it is too restrictive. There will be numerous occasions on which the parliament leaves the resolution of policy to its delegate because the nature of the subject matter is such that policy must be formulated on a day to day basis. On occasions, power may be delegated because the parliament has not sorted out the detailed policy that should be pursued. There may be agreement that controls should be exercised but there may be no consensus on the nature of that control. The device is then adopted of leaving it to the executive to determine how the controls are to be exercised.

The statement which, perhaps, most accurately encapsulates the reason why legislative power is delegated is that of Jaffe in "An Essay on Delegation of Legislative Power" (1947) 47 Columbia LR at 361: "Power should be delegated where there is agreement that a task must be performed and it cannot be effectively performed by the legislature without the assistance of a delegate or without an expenditure of time so great as to lead to the neglect of equally important business". This statement may be expanded by reference to four situations in which delegation can be considered both legitimate and desirable, subject to certain safeguards (cf Donoughmore Committee Report at 51-52).

1. **To save pressure on parliamentary time.** Parliaments in Australia and New Zealand meet for shorter periods than many of their counterparts in other countries. Governments have, therefore, fairly limited time within which to pass essential legislation; oppositions have few opportunities to demonstrate the deficiencies of governments. The upshot of this is that parliaments become places where only broad policy issues can be considered. Debate on such issues is, in any case, that which parliament is best equipped to carry on. It is also that which most readily and profitably attracts public attention. The details of administration fit ill in this scheme of things and hence are better left to delegated legislation. The decision whether there should be legislation on a topic is something of concern to the community at large. The arguments in favour and against must be publicly stated. But once the decision to legislate is taken, the details can be worked out by the executive — but within the limits specified in the empowering Act.

2. **Legislation too technical or detailed to be suitable for parliamentary consideration.** The considerations referred to under the last heading apply even more obviously where it is necessary in legislation to set out technical details or deal with matters of a scientific nature. Parliaments have neither the time nor the expertise to consider such matters. The parliament needs to resolve whether legislation on the question is wanted, but, having so determined, the detail is best included in delegated legislation. Two examples of legislation of this kind may be cited. First, on technical details, the acceptance by the Commonwealth of Australia of the "Safety of Life at Sea" Convention in 1967
required the government to specify safety requirements for ships. This led to the making of regulations running to over 400 pages dealing with such matters as life-saving appliances, fire prevention, emergency drills, construction of water-tight holds and so on. The Commonwealth parliament could not have coped with this mass of legislation; nor could it have made any really useful contribution to its content. Once having decided that Australia should enter into the Convention, the preparation of legislation following on from that decision was best left to a delegate. A good example of delegated legislation on a scientific matter was the inclusion in the Weights and Measures (National Standards) Regulations 1968 (Cth) of the definition of a second of time. The definition reads: “The second is the duration of 9,192,631,770 periods of the radiation corresponding to the transition between the two hyperfine levels of the ground state of caesium-133 atoms”. It is difficult to think of the parliament being able either to discuss or amend this constructively!

(3) Legislation to deal with rapidly changing or uncertain situations. One of the consequences of limited parliamentary sittings is that Acts cannot be readily amended. And even where a parliament is sitting, the process for amending Acts is laborious and slow. Accordingly, if an Act attempts to deal with a fact situation that is fluid, it is likely to impose controls that are too rigid. Similarly, where controls are needed over certain activities or benefits are to be attached to certain actions, the variables of human behaviour may be such that the conduct cannot be described on a once and for all basis. The inflexibility of an Act makes it an unsatisfactory legislative instrument in such cases. One alternative would be to vest a broad discretion in an official or tribunal. But this then creates the problem that no statement of “the law” is available to the public. Nor is there any effective parliamentary control over the actions of the recipient of the power. The middle course between excessive rigidity and unfettered discretion is the adoption of delegated legislation. The parliament can check the rules laid down by its delegate; the public can turn to the rules for information. One example of delegated legislation dealing with this type of situation is the regulations that specify the drugs that are available under the national health scheme. New drugs are constantly coming on the market: the list of such drugs therefore needs constant updating. Another example is the regulations that control the granting of financial assistance to students. The variables of courses, means, marital status and so on of students makes it highly desirable to have legislation that can be altered without undue difficulty when new fact situations or anomalies become apparent.

(4) Legislative action in cases of emergency. In cases of emergency, it may well be necessary for legislative action to be taken at a time when the parliament is not sitting. Delegated legislation is the only convenient or even possible way of dealing with such situations. The parliament should decide in advance the broad outlines of legislation that should be permissible to cope with an emergency but should not detail what steps may be taken as they may not be adequate for the particular emergency.

[11] To accept the foregoing approach is to recognize that there may well be differences of opinion as to the extent of the power that should be delegated under any one of the preceding headings. How broadly should the principles be stated in the Act? How much should be left to the delegate? The skeleton
Act that leaves the working out of its detailed implementation to the executive was one of the things against which Lord Hewart railed. It is tempting for a government to try to avoid parliamentary criticism of its legislation by leaving matters of substance to be included in delegated legislation. An apparent example of this approach is afforded by a recently reported decision of the Commonwealth government that "parliamentary counsel give particular attention in drafting bills to the possibility of leaving to regulations details that are liable to frequent change". In addition, the cabinet directed that bills not be drafted unless "they are necessary as a matter of law" (see the *Australian Financial Review* 27 October, 1976). While it might be said that this decision as reported does not embrace circumstances other than those set out above in which it was said delegated legislation was justifiable, the fact that the decision was taken perhaps indicates an intention to leave more matters for regulations than has occurred in the past. The question then becomes one of whether the parliament is being denied the opportunity to debate matters of substance that it is competent to consider and on which the public is entitled to the publicity of parliamentary debate.

[12] Amendment of Acts by means of delegated legislation. One of the matters to which the Donoughmore committee directed particular attention was the inclusion in an Act of a power to amend either that Act or other Acts by regulation. Such powers are known as "Henry VIII clauses". The committee recommended that the use of clauses of this kind should be abandoned in all but the most exceptional cases and then only for the purpose of bringing an Act into operation. Even then the clause should be subject to a time limit of one year from the passing of the Act (Report Cmd 4060 at 36-38, 59-60). The reason for the committee's conclusion is obvious: to enable regulations to amend Acts vests an enormous power in the executive. The committee hastened to add that it had no evidence of abuse of the power; nonetheless it considered that the power was capable of abuse and therefore should be avoided.

[13] Use of "Henry VIII" clauses in Australia and New Zealand has not been common except in war-time. An example is provided by s 137(2) of the *Re-establishment and Employment Act* 1945 (Cth) which read: "(2) Regulations may be made providing for the repeal or amendment of, or the addition to, any of the provisions of this Act". The section then went on to provide that any regulation made under the power was to cease at the termination of World War II. But such clauses do find their way into legislation on occasions. A recent example is provided by s 9 of the *Environment Protection (Impact of Proposals) Act* 1974 (Cth). That section allows the making of regulations to require authorities to take into account matters affecting the environment and continues "and regulations so made have effect notwithstanding any other law". See also s126 of the *Supreme Court Act* 1970 (NSW) which was repealed by s11(c) of the *Supreme Court (Amendment) Act* 1972. That section provided that Rules of Court were to "have effect notwithstanding anything in any Act in force immediately before the passing of [the Supreme Court] Act".

[14] A provision which on its face extended a most startling power to the executive to make regulations amending Acts was included in the *Acts In-
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Interpretation Act of South Australia in 1975. The section reads as follows:

52. (1) Where, in consequence of a provision of any Act or of any proclamation, regulation, rule, by-law or other instrument, the making of which has been authorized by or under any Act, or in consequence of the exercise of any power conferred by or under any Act on any person, body (whether incorporated or not) or authority of any kind, a provision, word or passage in an enactment which had previously been in operation and capable of application and interpretation has become inoperative or incapable of application or interpretation or has become inconsistent with that Act or instrument or with any action taken or anything done in exercise of that power, the Governor may, to the extent only necessary to make such provision as is consequential on and consistent with the first mentioned provision or with the action taken or thing done in exercise of that power, by regulation (which he is hereby empowered to make) direct that any specified provision, word, passage or reference in any such enactment shall be read as some other provision, word, passage or reference, as the case requires, and as shall be specified in the regulation and any such direction shall have effect according to the tenor thereof as if it had been expressly enacted by the Act in which the enactment occurs.

(2) The power conferred by subsection (1) of this section on the Governor to make regulations shall expire on the thirty-first day of December, 1977.

When introduced, the Bill did not include sub-s(2). The Attorney-General said that the provision was designed to facilitate the reprinting of the South Australian Acts as in force up till 1975. It was considered that it was likely that provisions in various Acts would be found to be inconsistent with one another and, rather than have a series of amending Acts, the requisite changes could be made by regulation. While the opposition in the House of Assembly expressed some doubts as to this method of procedure, the Bill was not opposed. However, in the Legislative Council the present sub-s(2) was added to the section. It was pointed out that the consolidation could be finished by then and that, without such a provision, regulations could be made at any time in the future to amend Acts. If the provision is, indeed, used for the purpose stated by the Attorney-General, undue objection cannot be taken to it. However, it does vest an extensive power in the executive the use of which will need to be scrutinized most carefully. (For problems arising out of the application of a similar provision in Tasmania, see Re Scully (1937) 32 Tas LR 3.)

The examples referred to in the preceding paragraphs can be justified on the basis that they deal with special circumstances where the passage of amending Acts is not practicable. But it is very tempting for governments to find reasons why such a situation exists and to make out an argument for the parliament to be by-passed. This is an approach to legislating that should be resisted. Parliamentarians at present pay too little heed to the regulation-making sections of Acts. If "Henry VIII" clauses are allowed to pass by default, the parliamentary institution is placed in jeopardy. In addition, where regulations are made under powers such as those referred to above, it behoves parliamentary committees charged with the duty of reviewing regulations to scrutinize those regulations with great care.

Safeguards against misuse of delegated legislation. While it has to be conceded that delegated legislation will always be with us, steps must be taken to ensure that executive convenience and paternalism does not lead to the making of legislation that is undesirable. There are four matters that need to
be borne in mind as safeguards against the abuse of delegated legislative power (cf Carr, *Delegated Legislation* (1921) ch 4 and Spann (ed), *Public Administration in Australia* (1973) ch 13 by Mr Justice R Else-Mitchell).

1. The delegate to which the power to legislate is given must be chosen carefully. The strictures of the critics mentioned in [7] were greatly influenced by that most indestructible of theories — the doctrine of separation of powers. It is this doctrine that suggests that only the legislative arm of government as represented by the parliament can produce legislation — notwithstanding the historical evidence to the contrary. But the doctrine has had another, and perhaps more important effect, in that it recognizes not only a tripartite division of functions but also only three arms of government — parliament, executive and judiciary. So when it was found that the parliament could not cope with the volume of legislation required, the excess legislative function had to be carried out either by the executive or by the judiciary. The latter was obviously not appropriate so the task devolved on the executive. The theory does not contemplate the possibility of certain functions of government being performed by a fourth body. Hence the creation of a lower order of legislature charged with the duty of dealing with the minutiae that the parliament is unable to cope with was not contemplated. It is now too late in the day to propose the establishment of a hybrid legislative-executive (and possibly judicial) body empowered to make legislation as the delegate of the parliament. The situation is firmly established that the body charged with the duty of administering the legislation made by the parliament is also expected to produce legislation itself (cf Stone "The Twentieth Century Administrative Explosion and After" (1964) 52 California LR 513). Probably this is not of major importance. The delegation of legislative power should be to "a trustworthy authority which commands the national confidence": Carr, *Delegated Legislation* at 27 and, in general, the executive will satisfy this description. Most of the delegated legislation with which this work is concerned is made by the Crown's representative on the advice of his ministers, by a minister or by a local government authority. These bodies can be called to account in a parliamentary chamber or ultimately by an electorate. However, the vesting of legislative power, either directly or by means of sub-delegation, in bodies not responsible in one of these ways is something that needs to be watched most carefully. Where power is vested in such authorities, it seems desirable for the legislation to have to be approved by a minister or by the executive council.

2. The form of the empowering provision must be such that it does not allow the making of whatever legislation on a matter seems appropriate to the delegate. Frequently, an Act of parliament does little more than determine that controls over particular conduct should be exercised. No attempt is made to indicate what those controls should be. In some circumstances this is inevitable as was mentioned at [10]. However, this situation is to be avoided if at all possible and empowering provisions should indicate with precision the matters on which delegated legislation can be made. Not only is this desirable from the point of view that there should be constraints on the power of the executive to make legislation, but also it is only where a defined legislative power is given that the courts can review legislative action by a delegate. Delegated legislation will be invalid if it exceeds the powers granted by the empowering Act: the wider the grant of power, the more limited is the courts' power of review. If the courts cannot review delegated legislation, there is one
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...check on the abuse of the delegated power. Following on from this, the adoption of provisions which prevent the courts reviewing delegated legislation should be avoided. There is no good reason why the executive should be empowered to make regulations within specified limits and not have the question whether those limits have been exceeded available for testing. The effect of clauses limiting judicial review is discussed in ch 29. The form of empowering clauses is a matter on which parliamentary committees that review delegated legislation could well act as advisers to the parliament: see [200].

(3) Adequate publicity must be given to delegated legislation. A person must know the law with which he must comply. This issue is returned to in greater detail at [63-68].

(4) Parliament must ensure that it has appropriate means available to it to review delegated legislation. The whole question of parliamentary review and the manner of its exercise in Australia and New Zealand forms Part 2 of this work.

...If these safeguards are built-in to the system permitting the making of delegated legislation, there is no reason to fear that the use of such legislation will undermine our Constitution. The failure to adopt these safeguards does, however, leave society vulnerable to a wide exercise of executive power that can be abused. While Lord Hewart's blueprint for despotism set out in [7] sounds of hyperbole, if it could be achieved it would go far towards allowing the executive arm of government to exercise wide ranging controls over society that could not be questioned. It is this that the suggestions set out in the last paragraph are directed against. However, the discussion in the succeeding chapters of this work will, it is thought, demonstrate that not all the suggested safeguards exist and not all of them are being fully exercised. There is a necessity for society in general, and the parliament and the judiciary in particular, to be aware of the possible misuse of delegated legislative power and to take steps to ensure that the safeguards are fully implemented.
CHAPTER 2

MAKING PUBLICATION AND COMMENCEMENT

[18] Introduction. The primary instruments of delegated legislation with which this work is concerned are usually made by the Governor-General or the Governor acting with the advice of his executive council, by a minister or by a local government authority. Where the consent of the Governor-General or Governor has to be obtained, the procedure followed is the same as that for any order-in-council. The minister responsible for the legislation brings the matter to the attention of the Governor and the Governor acts on his advice together with that of such other ministers as are necessary to constitute a quorum of the executive council. Instruments made by a minister or by some other authority specified in the empowering Act have only to be signed by that minister or other authority — unless some other form of procedure is set out in the empowering Act. Rules of the superior courts are usually made by the judges themselves and do not have to be confirmed by any other authority. Rules of inferior courts are usually made by the Governor-General or the Governor in the same way as regulations are made. It will be seen in the succeeding paragraphs of this chapter that, in regard to the foregoing forms of delegated legislation, the making procedures throughout Australia and New Zealand are fairly uniform. In regard to delegated legislation made by local government authorities, however, procedures are specified in the Local Government Acts of the various jurisdictions and these procedures vary between jurisdictions. It is proposed now to set out briefly the methods adopted for the making of delegated legislation in Australia and New Zealand, the requirements as to publication of such legislation and the standard commencement provisions applicable to such legislation.

COMMONWEALTH AND TERRITORIES

[19] Introduction. The general comments set out in [18] relating to the making of delegated legislation are applicable to delegated legislation made by the Commonwealth government and having effect throughout the Commonwealth. As far as the Territories are concerned, the practice varies according to the degree of responsibility for legislation delegated by the Commonwealth to the Territory.

[20] Commonwealth government. The formalities governing the making and publication of regulations made by the Commonwealth government are set out in s 48 of the Acts Interpretation Act 1901 and in the Rules Publication Act 1903. Section 48 of the Acts Interpretation Act provides that all regulations are to be notified in the Gazette and are to take effect from the date of notification or, where another date is specified in the regulations, from the date so specified. The fixing of a date is qualified by s 48 (2). That section prohibits regulations taking effect on a date prior to the date on which they are notified in a case where the rights of a person (other than the Commonwealth or an authority of the Commonwealth) existing at the date of notification would be affected in a manner prejudicial to that person. A
similar prohibition applies if liabilities would be imposed on any person (again except the Commonwealth or an authority of the Commonwealth) in respect of anything done or omitted to be done before the date of notification. Regulations made in contravention of these requirements are expressed to be void and of no effect. For the legal effect of these provisions, see [646-650]. The method of notification of regulations is defined in s 5 (3) of the *Rules Publication Act* — a notice is to be published in the *Gazette* simply stating that the regulations have been made and specifying the place where copies of them can be purchased.

[20A] It is to be noted that s 48 of the *Acts Interpretation Act* applies only to regulations. No general provision is made in Commonwealth legislation in regard to the notification, commencement, etc, of other delegated legislation. Provisions relating to such other instruments are included on an Act by Act basis. For example, s 315 of the *Bankruptcy Act* 1966 provides that the relevant sections of the *Acts Interpretation Act* apply to and in relation to rules made under the section. Section 87 of the *Judiciary Act* 1903, on the other hand, specifies that rules of court made by the judges of the High Court are to be notified in the *Gazette* and take effect from the date of notification or from a later date specified in the rules. Section 28 of the *Australian Capital Territory Supreme Court Act* 1990 makes similar provision to s 48 of the *Acts Interpretation Act* in regard to by-laws made by the minister under that Act. As with s 48(2), s 273C prohibits the back-dating of a by-law where the effect of that by-law is to increase the rate of duty payable in respect of the goods to which the by-law relates. It is to be noted, however, that s 273B(1)(c) provides that by-laws shall not be deemed to be statutory rules within the meaning of the *Rules Publication Act*.

[21] *The Rules Publication Act* deals with such matters as the numbering, citation, and reprinting of "statutory rules". This expression is defined in such a way as to include all rules, regulations or by-laws made under an Act by the Governor-General, a minister or any government department. Commonwealth regulations are published in loose-leaf form and subsequently in an annual volume of statutory rules.

[22] Northern Territory ordinances and regulations. The Northern Territory has a fully elected Legislative Assembly that has power to make ordinances for the peace, order and good government of the Territory. The width of this power is, however, limited by the fact that the administrator of the Northern Territory may withhold assent to an ordinance, reserve the ordinance for the Governor-General's pleasure or return ordinances to the Assembly with the amendments that he recommends. These powers are exercised from time to time. In addition, certain ordinances have to be reserved for the Governor-General's pleasure. The two major categories of such ordinances are those dealing with Crown lands and with aboriginals. Ordinances come into force on assent but the Governor-General may disallow an ordinance that has received the administrator's assent. Any such action must be taken within six months of the assent being given (see generally, *Northern Territory (Administration) Act* 1910 ss 4V-4Y). Northern Territory ordinances are required to be tabled before each house of the Commonwealth parliament within 15 sitting days of that house after the date of
assent to the ordinance. If assent is withheld by the administrator, or the Governor-General disallows an ordinance, the ordinance is also to be tabled before each house of the parliament together with a statement of the reasons for withholding assent or for disallowance of the ordinance. In none of these cases, however, is the parliament given any right either to disallow the ordinance or reverse the decision by which assent was withheld or the ordinance was disallowed (*Northern Territory (Administration) Act* 1910 s 42).

[23] Northern Territory Ordinances can empower the administrator to make regulations. Such regulations are made by the administrator acting with the advice of the Executive Council of the Northern Territory and, are, to all intents and purposes, similar to regulations made by a State. Section 15 of the Northern Territory *Interpretation Ordinance* 1931 contains similar provisions to s 48 of the Commonwealth *Acts Interpretation Act* in relation to the publication and commencement of the regulations. In particular, regulations cannot be back-dated in such a way as to affect prejudicially the rights of, or to impose liabilities on, persons other than the Commonwealth.

[24] All Northern Territory legislation is published in loose-leaf form as it is made and subsequently in annual volumes.

[25] Australian Capital Territory ordinances and regulations. Legislation for the Australian Capital Territory is made pursuant to the *Seat of Government (Administration) Act* 1910. It takes the form of ordinances which are made by the Governor-General and regulations which are made by a minister pursuant to an ordinance. Australian Capital Territory ordinances stand on all fours with Commonwealth regulations. While the Australian Capital Territory has a Legislative Assembly, this body has no legislative power but simply advises the minister on such ordinances as the minister refers to the Assembly.

[26] Ordinances and regulations (which term is defined to include rules and by-laws) are notified in the *Gazette*, the notification taking the same form as for Commonwealth regulations. They commence on the date of notification or, if another date is specified in the instrument, from the date so specified or from such date as is fixed by the minister by notice in the *Gazette*. It is noteworthy that s 12(2)(b)(ii) of the *Seat of Government (Administration) Act* permits the inclusion in an ordinance of a date of commencement earlier than the date of notification. There is no limitation on the fixing of such an earlier date comparable with that included in s 48(2) of the *Acts Interpretation Act* relating to the back-dating of Commonwealth regulations: see [19].

[27] Australian Capital Territory ordinances and regulations are published in loose-leaf form when made and are subsequently published in an annual volume.

[28] Delegated legislation of other Territories. The legislation for the other federal Territories follows the same pattern as that for the Australian Capital Territory.

[29] Drafting of Commonwealth and Territory delegated legislation. All
Commonwealth and Territory delegated legislation is drafted by officers of the federal Attorney-General's Department who are drafting specialists. Except in the case of the Northern Territory, all drafting is done at the head office of the department in Canberra. The legislation for the Northern Territory is drafted in the office of the Attorney-General's Department in Darwin. The procedure for drafting is the same as that in regard to bills, namely that written instructions are received from the responsible department and drafting is undertaken on the basis of those instructions. It is unusual for the instructions to be prepared in the form of a draft of the delegated legislation.

**New South Wales**

[30] General. The general comments set out at [18] relating to the making of delegated legislation are applicable to New South Wales. The procedure for the making of local government legislation is different in New South Wales from that followed in the other States. The primary instrument of local government legislation is called an ordinance and it is made by the Governor in the same way as are departmental regulations.

[31] Publication and commencement. Section 41 of the *Interpretation Act* 1897 which was inserted in 1969 sets out the formal requirements relating to regulations. The expression "regulation" is defined as meaning a regulation, rule or by-law that is made by the Governor or that is made by any other person or body and is required to be approved or confirmed by the Governor. Regulations are to be published in the *Gazette* and they take effect on and from the date of publication or a later date if specified in the regulations. Section 577 of the *Local Government Act* makes similar provision in regard to ordinances made under the Act. Ordinances are to be published in the *Gazette* and they take effect from the date of publication. Section 579 of the *Local Government Act* applies the *Interpretation Act* to ordinances made under that Act.

[32] The requirement of publication in the *Gazette* means that regulations and ordinances are set out in full when made. In addition, an annual volume of rules, regulations, by-laws and ordinances is published.

[33] Drafting. First drafts of all delegated legislation in New South Wales are prepared in the department responsible for the legislation. They are then transmitted to the Parliamentary Counsel's office for checking. Occasionally the Parliamentary Counsel will redraft regulations that are considered inadequate but such action is only taken with the consent of the department concerned. The draft regulations are subjected to a thorough check to determine whether they are within the regulation-making power. Before they are transmitted to the Executive Council, the Solicitor-General acting as the delegate of the Attorney-General, issues a certificate as to the validity of the regulations. The foregoing procedure applies in relation to all delegated legislation made or approved by the Governor, thus including local government ordinances.

**Victoria**

[34] General. The general comments appearing at [18] are applicable to
the making of delegated legislation in Victoria. The procedure for the making and the commencement of local government legislation is set out in ss 204, 205, 207 and 212 of the Local Government Act. By-laws are made pursuant to what is known as the special order procedure — a procedure which is defined in s 189 of the Act. A resolution adopting the by-law must be passed at a meeting of the council for which notice of the proposed resolution has been given as for extraordinary business. The resolution so passed must then be confirmed at a meeting of the council held not sooner than twenty days after the first meeting. The time for the holding of the subsequent meeting must be notified twice in a local newspaper and the substance of the proposed by-law set out in the notice. There is no general requirement that all local government by-laws be confirmed by the Governor. The Act provides rather that by-laws dealing with certain specific matters have to be so approved, for example, building control and the charging of fees (s 198). After either adoption of the by-law pursuant to the special order procedure or confirmation by the Governor in the cases when this is required, the by-law is published by one of two means referred to in s 207 — either at length in the Government Gazette or by the publication in the Gazette and in the local newspaper of a notice setting out the title of the by-law, a summary of its contents and the place where it can be inspected. By s 212 of the Local Government Act a by-law comes into operation either on the day named in it or on the day after the date on which it is published. There is no requirement for local government by-laws to be tabled before the parliament.

Publication and commencement. The general formalities relating to subordinate legislation in Victoria are governed by the Subordinate Legislation Act 1962. This Act applies to statutory rules which are defined as meaning any regulation or rule made by the Governor in Council or, if made by another body, which has to be approved by, or is subject to being disallowed by, the Governor in Council. The expression also includes rules of court. Paragraph (d) of the definition is of interest in that it includes among the instruments covered by the expression statutory rule “any instrument of a legislative character made pursuant to the provisions of any Act which is an instrument of a class which has been declared by notice in writing under the hand of the Attorney-General published in the Government Gazette to be statutory rules”. This paragraph has been used to apply the Act to some of the more important instruments which would otherwise not fall within the general description of a regulation. Examples are the Rules of the Council of Legal Education, proclamations of port rules and by-laws of statutory authorities. It is to be noted, however, that the definition of statutory rule expressly excludes local government legislation. The Act goes on to set out detailed provisions as to the manner in which statutory rules are to be published, numbered, reprinted, etc. Provision is also made for methods of citation of the statutory rules. An annual volume of statutory rules is published.

Section 4 of the Subordinate Legislation Act requires a notice of the making of a statutory rule and of the place where copies of the rule can be obtained to be published in the Government Gazette forthwith on the making of the rule. The section also provides that where any statutory rule is required to be published in the Gazette, a notice that the rule has been made and of the place where copies of the rules can be obtained is sufficient compliance
with the requirement for publication. Curiously there is no provision in the Act stating when statutory rules come into operation. In the absence of such a provision, it is to be assumed that the statutory rule commences on the day on which it is made and not when notice of making is published in the Gazette.

[37] Drafting. A first draft of subordinate legislation is prepared in the department responsible for the legislation and is then forwarded to the Parliamentary Counsel for checking. In general, it seems that the draft will not be altered by the Parliamentary Counsel unless it appears to be legally incorrect or its form or style does not conform to the general requirements of legislation. The draftsman puts it that he is looking for clarity, and the manner in which the regulations are presented does not worry him unduly. Statutory rules only are checked. Orders, proclamations, etc, which do not fall within the definition of "statutory rule" in the Subordinate Legislation Act do not have to be considered by the Parliamentary Counsel unless the relevant department so desires. The legislation of statutory authorities is not presented to the draftsman nor is local government legislation. Whether the legislation of these bodies is drafted by a lawyer is left to the discretion of the particular body.

QUEENSLAND

[38] General. The general comments set out at [18] relating to the making of delegated legislation are applicable to Queensland except in regard to rules of the Supreme Court. Under the Supreme Court Act 1921 s11(1), rules of the court are made by the Governor in Council acting with the concurrence of any two or more judges. Local government by-laws are made pursuant to s31 (27) of the Local Government Act by the passage of a resolution at a special meeting of the council called for that purpose and by the passage of a second resolution confirming the first resolution at a subsequent special meeting. Between the dates of the two meetings, the general purposes of the proposed by-law are required to be advertised in a local newspaper together with advice where a copy of the by-law is available for inspection. Acts amending the Local Government Act in 1969 and in 1973 inserted elaborate provisions for the lodging of objections to by-laws. These provisions were included primarily to deal with situations where by-laws embody town planning schemes. After confirmation, a by-law is submitted for approval to the Governor who may approve it in whole or in part. Once approved, the by-law is published in the Gazette and comes into force.

[39] Publication and commencement. Section 28A of the Acts Interpretation Act requires regulations to be published in the Gazette after making. The regulations then take effect from the date of publication or from such later date as is specified in the regulations. From this it can be seen that it is not possible to back-date the operation of regulations. The section applies only to regulations and does not encompass other forms of delegated legislation. In regard to these, any making formalities must be sought from the Act under which they are made.

[40] There is no annual volume of Queensland delegated legislation. Delegated legislation, whether emanating from the Governor, a minister or from a local government authority, is published in full in the Gazette.
[41] Drafting. The bulk of subordinate legislation in Queensland takes the form of departmental regulations and local authority by-laws. Regulations are generally prepared in the department that is concerned with the administration of the Act under which the regulations are made. The regulations are then submitted to the Solicitor-General's office where they are reviewed by a legal officer with a view to establishing that they are within power and are coherent. The extent of the examination will vary according to the nature of the instrument but the examining officer is expected to establish to his own satisfaction that each regulation is within the power conferred by the relevant Act. On occasions, regulations are refused approval by the Solicitor-General's office and are referred back to the department. The examining officer does not issue a certificate as to the validity of the regulations but, in effect, the approval of the Solicitor-General constitutes such a certificate. The regulations cannot be submitted to the Governor-in-Council unless the approval of the Solicitor-General's office has been given. There is one exception to regulations being submitted to the Solicitor-General's office and that is in the case of regulations emanating from the Department of Justice. These are prepared by legal officers in that department and it is not considered that the Solicitor-General's office need vet them. The Department of Justice and the Solicitor-General's office are both responsible to the Attorney-General.

[42] In regard to local authority by-laws, these are submitted for the approval of the Governor-in-Council through the Department of Local Government. Brisbane City Council by-laws are prepared by the City Solicitor or a member of his staff and, in the case of country local authorities, the local authority may employ a solicitor to draft the by-laws. At one time local authority by-laws had also to be submitted to the Solicitor-General's office for approval in the same way as regulations are submitted. This practice has now been abandoned.

**SOUTH AUSTRALIA**

[43] General. The general matters set out at [18] are applicable to the making of delegated legislation in South Australia. The procedure for making local government by-laws is set out in ss 673-675 of the *Local Government Act*. The procedure requires the passage of a resolution to adopt the by-law at a meeting of the council at which at least two-thirds of the members of the council then in office are present. The proposed by-law is then submitted to the Crown Solicitor who is required to certify whether or not the by-law is within the competence of the council to make and whether or not it is contrary to or inconsistent with the general law of South Australia. In issuing this certificate, the Crown Solicitor does not redraft the by-law; he is concerned only with whether there is power under the *Local Government Act* to make the by-law and a full check of each individual part of the by-law is not undertaken: see SA Parl Deb 1974-1975 vol 5 p 3191. If the Crown Solicitor refuses to certify that the by-law is within power, the council may require the by-law to be submitted to a judge of the Supreme Court who is empowered to issue a certificate of validity if he considers the by-law is within power. When a certificate has been issued by either the Crown Solicitor or a judge, the by-law is then laid before the parliament. The parliament may disallow the by-law within 14 sitting days of its having been laid. If no such resolution is
passed, the by-law is submitted to the Governor for confirmation. When confirmed, the by-law is published in full in the Government Gazette. It then takes effect one week after the date of publication.

[44] Publication and commencement. Section 38 of the Acts Interpretation Act sets out the general procedures applicable to regulations. The expression "regulation" is defined to include rules and by-laws. Regulations when made are to be published in the Gazette. The date of commencement of the regulations is the date of publication or such later date as is fixed by the order in council making that regulation. Again it can be seen that regulations cannot have a commencement date earlier than that on which they were made.

[45] An annual volume of delegated legislation is not published in South Australia. Delegated legislation, when made, is published in full in the Gazette.

[46] Drafting. Instructions for the drafting of regulations — the most common form of subordinate legislation in South Australia — are forwarded by the responsible department to the Crown Solicitor's office. If the instructions are sufficiently clear for the legislation to be prepared immediately, there is no further consultation with the department. The Crown Solicitor's office prepares a draft, obtains printed copies of the regulations from the Government Printer and forwards the regulations to the Premier's Department for submission to the Governor. The instructing department is not further involved in the process unless the instructions were such that regulations based on them could not be prepared. In such a case further consultation with the department will take place until satisfactory instructions are obtained. The Crown Solicitor is obliged to furnish the Executive Council with a certificate of validity of the regulations and this is prepared by the officer drafting the regulations.

[47] In relation to local government by-laws, while these must be sent to the Crown Solicitor for his certificate, see [45], before they can be submitted to the Executive Council, the Crown Solicitor does not redraft them. The major municipal councils employ private practitioners to prepare by-laws on their behalf but the smaller district and country councils have no such assistance. Other delegated legislation such as that made by Boards or under town planning legislation is prepared by the responsible authority which may or may not obtain professional assistance in preparing the legislation.

WESTERN AUSTRALIA

[48] General. The general comments relating to the making of delegated legislation set out at [18] are applicable to Western Australia. Local government by-laws are made pursuant to s190 of the Local Government Act. The procedure there laid down requires, first, that a resolution to adopt the by-laws be passed by the council. Notice of the purport of the by-laws is then published in a local newspaper and a copy of the by-laws must be available for inspection. The notice is required to indicate that objections will be heard by the council during a period of 21 days commencing on the publication of the notice. After the lapse of the required period, the by-laws are submitted to the minister together with a report by the council on any objections to the by-
laws. If the minister is satisfied that the by-laws comply with the requirements of the Act and that the objections should not be sustained, he presents the by-laws to the Governor for confirmation. After confirmation, the by-laws are published in the Gazette and tabled in the parliament.

[49] **Publication and commencement.** The general procedure for making regulations (which is defined to include rules and by-laws) is set out in s 36 of the *Interpretation Act*. The provisions of this Act are the same as those for South Australia — the regulations are to be published in the Gazette and take effect from the date of publication or from a later date fixed by the order making the regulations. Sub-section (4) of the section extends these provisions to regulations made by authorities other than the Governor thereby effectively embracing all regulations, rules and by-laws made in Western Australia.

[50] Delegated legislation is not published in annual volumes in Western Australia but the text of all such legislation is set out in full in the Government Gazette.

[51] **Drafting.** All regulations, rules and by-laws of general application, with the exception of rules of the superior courts, are drafted in the Parliamentary Counsel's Office. The practice followed is the same as that adopted in regard to bills in that instructions are prepared in the relevant department and are transmitted to the Parliamentary Counsel's office for the delegated legislation to be prepared. The Parliamentary Counsel's office also prepared model by-laws which may be adopted by local government bodies, (*Local Government Act*, s258). In addition the Parliamentary Counsel drafts uniform by-laws which may, by order-in-council, have the force of law in any municipal district specified in the order (*Local Government Act* s 259). Other instruments which are thought to have legislative effect, or which are regarded by a department as difficult, are also drafted by the Parliamentary counsel's office. When legislation has been drafted, it is customary for the officer drafting the legislation to issue a certificate as to its validity.

[52] As far as local government by-laws are concerned, apart from the practice in regard to model by-laws mentioned above, the drafting of the by-laws may be undertaken by a solicitor employed by a council but more usually a council officer will prepare the by-laws.

**Tasmania**

[53] **General.** The general description of delegated legislation making set out at [18] is applicable in Tasmania. The procedure for making and publishing local government by-laws is set out in ss188 to 192 of the *Local Government Act* 1962. It is somewhat different from the procedure in the other States. A simple resolution of the council to make the by-law is first passed. Confirmation of the by-law by the Minister for Local Government must then be sought. At least one month prior to the application for confirmation, notice of intention to apply has to be published in the Gazette and in a local newspaper (s 877). The notice is required to set out the title and purport of the proposed by-law. Copies of the proposed by-law are to be available to the public at the council office throughout the period between notice and application. The minister has a discretion to confirm or to refuse to confirm the by-law. If the
minister confirms it, he also fixes its date of commencement. The by-law is then published in full in the *Gazette* or, if the minister permits, the title and subject of the by-law is published in the *Gazette*. The minister's consent to the latter procedure is conditional upon him being satisfied sufficient copies of the by-law are available for the public need. The Governor may repeal the whole or a part of a by-law at any time (*Local Government Act* s198).

**Publication and commencement.** The formal procedures relating to delegated legislation in Tasmania are to be found in the combined effect of s 47 of the *Acts Interpretation Act* and s 5 of the *Rules Publication Act*. The latter Act applies in relation to statutory rules which cover a wide range of instruments: regulations, rules and by-laws made under the authority of an Act by the Governor or by a rule-making authority; instruments that fix the date of commencement of an Act or which repeal, amend or in other ways modify the operation of an Act; and instruments of a legislative character made in exercise of the prerogative rights of the Crown. Regulations, rules and by-laws made by a local authority are excluded from the operation of the definition. Section 5(2) of the *Rules Publication Act* specifies the manner in which statutory rules to which the Act applies are to be published. The requirement is that a notice be published in the *Gazette* of the rules having been made and of the place where copies of them can be obtained. The notice is also to contain a statement indicating the general purport or effect of the statutory rules. Section 47(3) of the *Acts Interpretation Act* then takes up the tale by requiring regulations (a term which is defined in s 2A of the Act to include rules and by-laws) to be published in the *Gazette* or, in the case of a statutory rule within the meaning of the *Rules Publication Act*, to be notified in the *Gazette* in accordance with that Act. The section then provides that the regulations are to take effect from the date of publication or notification in the *Gazette* or from such other date as is specified in the regulation. Section 47 (3A) makes similar provisions to s 48 (2) of the Commonwealth *Acts Interpretation Act* in preventing the back-dating of a regulation in such a way as to prejudice the rights of a person other than the Crown or to impose liabilities on a person other than the Crown. Any provision of a regulation that so provides is to be void and of no effect.

**Drafting.** By s 47(9) of the *Acts Interpretation Act*, no regulation is to be submitted to the Governor for making, approval, etc, unless the Attorney-General or some officer on his behalf has certified that it is "in accordance with the law". This requirement has led to draft regulations being sent to the Parliamentary Counsel's office for checking. This review is directed primarily to the validity of the legislation. The practice seems to be that if the regulation will work, then the Parliamentary Counsel regards it as adequate to be given the certificate of the Attorney-General. However, the Parliamentary Counsel does regard himself as having the responsibility for the regulations and in appropriate cases will feel obliged to entirely rewrite that which has been sent to him by a department. The Parliamentary Counsel does not check local government by-laws but does review the regulations, by-laws, etc, that
are prepared by statutory bodies. If requested, the Parliamentary Counsel will also look at other subordinate instruments such as proclamations, orders, etc.

NEW ZEALAND

General. The general comments set out at [18] relating to the making of delegated legislation are applicable to delegated legislation made by the New Zealand government with the exception that rules of the Supreme Court are, pursuant to s 3 of the Judicature Amendment Act 1930, made by the Governor-General with the concurrence of the Chief Justice and any two or more members of a body known as the Rules Committee which is set up under the Judicature Act 1908, as amended.

Local government by-laws are made pursuant to the powers set out in the Municipal Corporations Act 1954, the Counties Act 1956, the Local Government Act 1974 and in a number of other specific Acts relating to particular councils. The procedure for making by-laws is uniform. It is specifically set out in the Municipal Corporations Act and the Counties Act: other relevant Acts simply adopt the provisions of those Acts. The relevant sections of the Municipal Corporations Act are s 392 and s 77. Section 392 provides that by-laws are to be made pursuant to the special order procedure and this procedure is in turn set out in s 77. (The equivalent sections of the Counties Act are s 407 and s 87). The special order procedure requires a resolution adopting the by-law to be passed at one meeting of the council, notice having been given of intention to move the resolution at that meeting. The resolution so passed must then be confirmed at a subsequent meeting held not more than seventy days after the first meeting. Between the two meetings, public notice of the date and place of the second meeting and of the purport of the resolution to be considered at that meeting is to be given twice at times specified in the section. It is not necessary for the whole of the by-law to be set out in the notice; its purport is sufficient provided that copies of the by-law are available for perusal at the council office. If the by-law is confirmed at the second meeting, that meeting also fixes the date of commencement of the by-law which must be a day not less than seven days after the date of the meeting. By-laws made pursuant to the foregoing procedure require no further confirmation to be operative. However, the By-laws Act 1910 makes provision for confirmation of by-laws by the Minister for Local Government, acting on the request of a local authority. If the minister is satisfied that a by-law has been duly made and that all conditions of its validity and operation have been duly fulfilled and it has been duly published, he may confirm the by-law by issuing a certificate to that effect. Every such certificate is then published in the Gazette. Section 7 of the Act provides that any such certificate of confirmation shall, for all purposes, be conclusive proof of the existence and validity of the by-law so confirmed and of the date of its coming into force. However, the apparent width of this provision is markedly restricted by s 8 of the Act. Sub-section (2) of that section provides "Notwithstanding confirmation under

1 On delegated legislation in New Zealand generally see "Regulation-making Powers and Procedures of the Executive of New Zealand" by Gordon Cain (Occasional pamphlet No 7 Legal Research Foundation, School of Law, Auckland, New Zealand, 1973).
this Act, a bylaw shall be invalid so far as its provisions are repugnant to the laws of New Zealand, or unreasonable, or *ultra vires* of the local authority by which it is made*". This provision prompted Edwards J in *Parsons v The Devonport Borough Council* (1911) 14 GLR (NZ) 169 to say that the "only effect of [s 7] is to prevent any question being raised as to the regularity of the steps precedent to and attendant upon the passing of such by-law". The limited effect of confirmation of a by-law has resulted in few applications being made by councils. In the period 1968 to 1975, only thirty-seven such applications were made and granted. One other provision relating to local government by-laws is worth noting. The *Standards Act* 1965 s 27 enables a local authority to make by-laws adopting a standard specification either in whole or in part and with or without modification. The standards laid down under the Act relate to the characteristics of commodities, etc.

[59] Publication and commencement. In New Zealand there is no general requirement that delegated legislation made under an Act be notified or published in the *Gazette*. A number of Acts make such provision but the majority of Acts do not require formal publication or notification. Where publication is required, s 6 of the *Regulations Act* 1936 provides that a notice in the *Gazette* of the regulations having been made and of the place where copies of them can be purchased is sufficient compliance with the publication or notification requirement. In practice, a notification of making of most regulations is published in the *Gazette*. This seems to come about, as much for any reason, because there is no general statutory provision relating to the date of commencement of regulations. The regulations commence on the day on which they are made unless some other provision is made in them. It is common to find a commencement provision in regulations that they come into force on the day after notification in the *Gazette*. However, as there is no formal requirement relating to commencement, it can be expected that other dates will be used and this indeed is the case. Occasionally regulations commence on the day on which they are made (cf Victoria). On other occasions commencement is back-dated — something which cannot occur in Australian jurisdictions, except Victoria. It would seem that the New Zealand provisions relating to the notification and commencement of delegated legislation are unsatisfactory and the adoption of more general requirements would seem appropriate.

[60] As far as the printing and sale of regulations is concerned, the *Regulations Act* 1936 s 3 requires all regulations to be forwarded to the Government Printer after making and for the printer to number, print and sell them. The Act applies to a wider range of delegated legislation instruments than is found in equivalent Australian legislation. The definition of "regulations" in s 2 of the Act embraces regulations, rules and by-laws made under the authority of an Act by the Governor-General in council or by a minister or by any other authority; orders-in-council, proclamations, notices, warrants and instruments of authority made under an Act which extend or vary the scope or provisions of any Act; and regulations made under an Imperial Act or under the prerogative rights of the crown and having force in New Zealand. Section 6A of the Act extends the general printing requirements to orders-in-council, proclamations, notices, warrants or other instruments of authority made under the Act which are required by the Act to be published or notified in the
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Gazette but which do not fall within the definition of regulations. Section 2(2) of the Act allows the Attorney-General to determine whether any instrument is a regulation for the purposes of the Act. An annual volume of regulations (as defined by the Regulations Act) is published. One curious provision of the Regulations Act should be mentioned. Section 3(1) allows the Attorney-General to exempt any specified regulations or specified class of regulations from the operation of the printing requirements of the Act if “in his opinion it is unnecessary or undesirable that they should be printed under this Act”. This power of the Attorney-General, if exercised, would, when read with the fact that the provision requiring notification of making of regulations, enable regulations to be made and enforced which were not available to the public. The public need not even know of the existence of the regulations. While it is not suggested that this provision has been abused, it does seem an undesirable power to place in the hands of the Executive.

[61] Drafting. All regulations and other legislative instruments other than local authority by-laws are drafted by the New Zealand Parliamentary Counsel. The pattern followed is the same as that applicable to bills, namely, that instructions are received from the responsible department and the regulations are drafted to give effect to those instructions. Before regulations are submitted to the Governor-General in Council for approval, the Attorney-General is required to issue a certificate that they are in order. The practice has been adopted for some time for the Attorney-General to take independent counsel’s advice on the question whether any provision of the regulations would unnecessarily restrict the liberty of the subject and whether the regulations are otherwise within power. It would seem that the independent counsel has not, since the institution of the procedure, reported that a regulation unduly infringed the liberty of the subject. The general question of ultra vires is occasionally raised by the counsel and drafting suggestions are also made. At the time of writing, there is no counsel reviewing the regulations and the Attorney-General is relying for the issue of his certificate on a report from the Parliamentary Counsel’s office. This report may draw the Attorney’s attention to provisions in the regulations thought by the draftsman to be undesirable but which have been included at the insistence of the instructing department.

[62] Form of empowering clause. One interesting difference between the regulation-making practice in Australia and in New Zealand is to be found in the form that the empowering clause enabling the making of regulations takes. The standard clause in Australia commences with a general right to make regulations “necessary or convenient” or “necessary or expedient” for giving effect to the Act, and then goes on in many cases to list specific heads of regulation-making power which are said not to limit the generality of the opening words of the section. The interpretation of provisions in this form is discussed in ch. 16. Until 1961 New Zealand followed much the same form of words, in many cases without a list of specific matters on which regulations could be made. In 1961, following on a direction from the government, the enabling provision was changed to provide that “The Governor-General may from time to time, by Order in Council, make regulations for all or any of the following purposes” — and there then follows a list of specific purposes designated with as much particularity and precision as possible and concluding
with a general catch-all "providing for such matters as are contemplated by or necessary for giving full effect to the provisions of this Act and for the due administration thereof". The effect of the change has been described as follows:

What was previously a general power, which was expressly declared not to be limited by a list of specific topics which followed it, is now placed, in a more limited form, at the bottom of the list of specific topics and can fairly be regarded as dealing with subsidiary or incidental matters. In the more limited form, the substitution of the words "contemplated by or necessary" for the words "as in his opinion may be necessary or expedient" means, in effect, that when the validity of a regulation made in reliance upon it is challenged, even if the regulation can be seen within the ambit of the Act, the opinion of the Court as to whether the regulation is contemplated by the Act or necessary, etc., is substituted for the opinion of the Executive. Any previous restriction on the power of the Court to inquire into the matter is removed.2

While this formula has not always been adhered to in subsequent years, the majority of Acts empowering the making of regulations do follow the newer form. This new form is seen by New Zealand authorities as giving to the courts a greater power to review the validity of regulations made under an Act and to that extent seems desirable. Whether, in Australia, the change would produce any substantial effect on the interpretation of the enabling clause is somewhat doubtful: see the discussion of the effect of the words "in his opinion are necessary or expedient" at [224] and note the limited operation given to the "necessary or convenient" formula: [279-291].

CONCLUSION

[63] No advance notice of making of delegated legislation. The matters set out in this chapter indicate that a fairly uniform approach is adopted in Australia and New Zealand for the making of delegated legislation. A number of basic principles clearly underlie the making procedures. Publication of legislation is, of course, fundamental if society is not to be governed by secret laws. To this end, all jurisdictions provide for the publication of delegated legislation either in its entirety or by means of notification of making together with a place where the delegated legislation can be obtained. The consequences attending a failure to comply with the statutory requirements of publication or notification of making are discussed at ch 15. It is to be noted, however, that, unlike the text of an Act which is available as a Bill well before its commencement, the text of regulations is not available until after the regulations have been made and, in most cases, in force. It is unusual for any notification of intention to make regulations to be given in advance. The text of the regulations is rarely, if ever, released before making and only on occasions is a postponed commencement provision included in the regulations. These strictures are not applicable to local government, except in New South Wales (see [30]). In the other jurisdictions in Australia and in New Zealand, general provision is made for advance publicity to be given of an intention to make local government by-laws. The relevant local government provisions have been set out under the respective jurisdictions.

[64] It is interesting to note that the Commonwealth Rules Publication Act
1903, when first enacted, made provision for notice to be given of an intention to make statutory rules. Section 3 of the Act provided that at least sixty days before making any statutory rules, notice of the proposal to make the rules and of the place where copies of the rules could be obtained was to be published in the *Gazette*. During that period any person could make representations or suggestions in writing to the authority proposing to make the rule and the authority was to take these into consideration before finally settling the rules. On the expiration of the sixty-day period, the rules could be made by the rule-making authority either as originally drawn or as amended. Section 4 of the Act provided that where a rule-making authority certified that, on account of urgency or any special reason, any rules should come into force immediately, the authority was empowered to make the rules as provisional rules. These provisional rules continued in force only until rules made in accordance with s 3 of the Act were made. These sections were omitted from the Act in 1916. It seems unfortunate that this practice of providing for advance publicity has been abandoned. The arguments against advance publicity of this kind point to difficulties of delay and cost. However, it is doubtful whether it is necessary in all cases for regulations to come into force immediately they are made. In any case, s 4 of the *Rules Publication Act* set out a procedure enabling the provisional making of urgent legislation. It is wrong to suggest that departments are always aware of the ramifications of regulations. Regulations can impose an unwarranted obligation on persons of which the executive may be quite genuinely unaware. It is interesting to note that local government bodies in Australia and New Zealand seem able to function under a system which involves advance publicity for by-laws. It is also worth mentioning that s 553 of the United States *Administrative Procedure Act* requires notice of proposed rule-making by the federal government to be published in the federal register. An opportunity has then to be given to interested persons to make submissions to the agency making the rule. On the other hand, it should be pointed out that the former Commonwealth provision derived from a similar provision in the United Kingdom *Rules Publication Act* that was omitted in 1946 when the *Rules Publication Act* was replaced by the *Statutory Instruments Act*.

[65] Postponing commencement of delegated legislation. An alternative approach to the question of antecedent publicity would be for regulations to be made but to have their commencement postponed for a specified period. This would at least enable members of the public to inform themselves of the effect of the regulations. Provision could be made for regulations something along the lines of that made for Acts by s 5 (1A) of the *Acts Interpretation Act* (Cth). That section provides that Commonwealth Acts commence twenty-eight days after assent unless the Act provides to the contrary. This section was adopted to allow time for the printing and publication of Acts before they come into operation.

[66] Consultation before making delegated legislation. The concept of antecedent publicity contemplates that any person interested can make representations to the legislation-making authority. The reverse process of requiring the legislation-making authority to consult interested persons, while not established as a general rule in Australia or New Zealand, is required in a number of Acts. Advisory councils and boards set up either by the
government or by industry have frequently to be consulted before delegated legislation is made. The consultation may be just that or it may be that the regulations can only be made on the recommendation of the body concerned. Informally, of course, a minister or his department may well choose to consult interested parties before making the delegated legislation affecting those parties, but it is only where legislation has to be made on the recommendation of a body that the views of parties consulted are known. The limited opportunities available to persons to influence the form that delegated legislation takes points up clearly the need for there to be parliamentary committees to which persons affected by delegated legislation can present their views on the form of such legislation. As will be seen, most subordinate legislation committees in Australian parliaments are used by interested organisations who wish to call delegated legislation into question.

[67] Manner of publication of delegated legislation. As the quantity of delegated legislation increases, the ability of the public to know of the existence of that legislation becomes more difficult. Possible means of overcoming this communications gap would be for the making of regulations to be notified not only in the Gazette but also in the public notice columns of newspapers. It would also be advantageous if regulations were circulated to public libraries. (Cf Subordinate Legislation (Statutory Rules) Regulations 1976 (Vic) reg. 6(d) which requires copies of statutory rules to be sent to the public library and all law libraries in the State.) Above all else, copies of the legislation must be readily available to members of the public wishing to consult and purchase them. The publication of delegated legislation in annual volumes is therefore essential. Government Gazettes are not a satisfactory source of delegated legislation because they are bulky to handle, contain much information that would not be wanted by a person concerned with delegated legislation, and do not contain adequate indexes that enable a person to run amending regulations to ground easily. Annual volumes of delegated legislation should, therefore, be prepared in each jurisdiction. It seems desirable also to adopt the definition of "statutory rules" to be found in Victoria and Tasmania (or "regulations" as in New Zealand) to allow the widening of the category of instruments that can be published in statutory rules volumes. A note published at (1975) 49 ALJ 49 criticized the fact that a ministerial determination of classes of persons who are to be exempt from the provisions of the Migration Act 1958 (Cth) relating to entry permits had not been notified in the Gazette or otherwise published. The author of the note said at 50: "It should be possible for the Commonwealth Government to make publication of these and similar instruments, if not in the Gazette, then in some other collection of statutory instruments and directions, provided of course that the content of the instrument or direction concerned is of such generality as to be of a quasi-legislative character".

[68] Annual volumes should not, however, take the place of individual copies of delegated legislation. All too frequently a request for a copy of a regulation is met by the answer that it is out of print. Members of the public are entitled to access to the laws which govern them and it is simply not good enough for a person to be told that he can consult the relevant law in an annual volume or in a Gazette in a library. Equally, regulations are frequently amended. It becomes virtually impossible for a person to read a much amended set of
regulations by looking at annual volumes or indeed individual loose-leaf amendments. Reprinting of regulations is something that should be undertaken with much greater frequency than has occurred in the past in all jurisdictions.

[69] Drafting of local government legislation. As has been pointed out, delegated legislation, other than that made by local government authorities, is, in all jurisdictions, either drafted or checked by a lawyer before being made. This approach seems most desirable and it is unfortunate that some means is not available for local government legislation to be dealt with by a lawyer as a matter of course. It is noteworthy that the majority of judicial decisions relating to the validity of delegated legislation are concerned with local government legislation.

[70] Back-dating delegated legislation. One final general matter relating to the making of delegated legislation is worth noting. In all jurisdictions, except Victoria and New Zealand, regulations cannot be back-dated in a manner disadvantageous to members of the public. This apparent safeguard is, however, not quite what it seems. The mere inability to fix a date for the commencement of a regulation prior to that on which it was made does not prevent the making of legislation that has retrospective operation: see [646-650]. The effect of the judicial decisions there discussed should be borne in mind by parliamentary committees concerned with the operation of delegated legislation lest they be misled by the statutory prohibition on back-dating.
PART 2

Parliamentary Review of Delegated Legislation

CHAPTER 3

PARLIAMENTARY REVIEW: GENERAL

[71] Introduction. Delegated legislation cannot be made without the authority of an Act of parliament. The parliament must therefore consider the form of the provision empowering the making of such legislation in the course of its deliberations relating to the bill that subsequently becomes an Act. But while the parliament must be taken to have approved the subject-matter on which delegated legislation can be made, the mere approval of that subject-matter should not be assumed to give the executive an absolute discretion to make whatever legislation dealing with the subject-matter it thinks fit. The generality of the subject-matter or the form of the empowering section may be such that the delegated legislation can deal with issues of important principle. The parliament, while not itself wanting to legislate on the subject-matter, may (and indeed should) wish to keep itself informed of the way in which the power has been exercised. It is possible also that the executive, while acting with the best will in the world and within the scope of the power delegated to it, may include in the delegated legislation provisions which detract from the basic rights of a citizen. Because of this possibility it is clear that the parliament should be able to check whether there has been any misuse of the delegated power. These factors have resulted in most parliaments seeking to retain some oversight of delegated legislation. The usual method adopted to achieve this is to require that the delegated legislation be tabled before each house of the parliament. Action of this kind enables the parliament to see what use is being made of the delegated power. If the parliament disapproves of that use, it may call the responsible minister to account. In the case of a number of minor forms of delegated legislation, this right simply to criticise the delegated legislation is thought sufficient to ensure adequate parliamentary oversight of the use of the delegated power. (Whether this approach is satisfactory is returned to at [193]) Most parliaments have, however, thought it appropriate to exercise a greater degree of supervision of the more important forms of delegated legislation such as regulations, rules, by-laws, ordi-
nances, etc. — legislation that is similar, in many respects, to an Act of the parliament itself.

[72] Methods of parliamentary control of delegated legislation. There are various ways in which the parliament can exercise control over the form of delegated legislation. They include:

(a) requiring the legislation to be laid before the parliament and not to come into operation unless the parliament approves it;
(b) allowing the legislation to come into force immediately but providing that its continuance in operation is dependent upon a resolution of the parliament permitting that continuance;
(c) providing for the legislation to be tabled in the parliament and for it to come into force after a specified number of days unless the parliament resolves that it not come into operation;
(d) allowing the legislation to commence immediately it is made, but providing for its tabling and for the right of the parliament to disallow the legislation by resolution at any time or within a specified time.

The first two of these devices can be conveniently referred to as “affirmative resolution” procedures and the second two as “negative resolution” procedures. These methods of review all contemplate that the parliament must deal with the legislation as a whole. It must either be affirmed in its totality or vetoed entirely. A variation on these procedures would allow the parliament to amend the delegated legislation. This could be done by the parliament being empowered either to disallow or to decline to affirm specific provisions in the delegated legislation or to actually amend the wording of the legislation.

[73] Review of policy of delegated legislation. These various forms of parliamentary review posit the possibility of the parliament exercising its power in regard to both the policy underlying the legislation and the form that the legislation has taken to give effect to the policy. But the response of a government to the exercise by a parliament of this power is likely to vary markedly. In the same way as the government, once having settled the policy of a Bill, will be loath to accept amendments in the parliament that go to that policy, so it can be expected that it will resist attempts to change the policy on which delegated legislation has been based. Different questions arise where the policy is accepted and the criticism is made that, in giving effect to the policy, the executive has interfered with the rights and liberties of the citizen. Criticisms of this kind contemplate that the delegated legislation may be made, but in a different form. A further issue that arises is whether the parliament should oversee delegated legislation produced by local government bodies that are in themselves answerable to an electorate.

[74] Nature of review affected by parliamentary institution. When considering the form of procedure that a parliament might employ to review delegated legislation, regard must be paid to the nature of the parliamentary institution itself. The passage of Bills is the essential function of a parliament and the parliament’s rules are structured in such a way as to enable it to fulfil that function. It is also basic to the parliamentary institution that the opposition be enabled to call the government to account for its actions. Again,
means are provided in the rules of the parliament that enable this function to be performed. The oversight of delegated legislation does not fall within either of these categories of activity, except incidentally when the policy to which a piece of delegated legislation gives effect is used by the opposition as a means for calling the government to account. Machinery for review of delegated legislation finds little place in the parliamentary institution for two main reasons. First, it usually lacks political impact. Secondly, the quantity of delegated legislation and the technical matters with which it is concerned do not lend themselves readily to review in the parliamentary chamber.

[75] Form of review in Australia and New Zealand. The matters referred to in the two preceding paragraphs have had a marked effect on the methods adopted by the various parliaments in Australia and New Zealand to review delegated legislation. In all cases, the principle that delegated legislation should be reviewed by the parliament has been accepted — but to a somewhat variable extent. As will be seen, only certain types of delegated legislation are required to be laid before each parliament. In relation to the more important forms of this legislation, provision is made in all parliaments except New Zealand for a house of the parliament to be able to disallow the legislation. The method of disallowance used in Australia is uniformly that noted as (d) in [12] — the negative resolution procedure based on legislation that is in force. In all parliaments, it has also been recognized that the respective houses of the parliament, sitting as houses, cannot effectively exercise control over delegated legislation. The response to this has been to establish a parliamentary committee charged with the duty of scrutinizing the delegated legislation that the parliament can disallow. It is noteworthy, however, that the terms of reference of these committees all contemplate a distinction between review of the policy on which the legislation is based and review of the way in which that policy has been implemented. The committees are not empowered to question the reasons for implementing the legislation: their power of scrutiny is limited to the form of the legislation only. This is not to say that policy considerations cannot be questioned by the respective parliaments. Rather it is that the parliaments, in all cases, have required issues relating to the policy on which delegated legislation is based to be raised by motion in the parliament itself. Motions to this effect are moved occasionally. It is fair to say, however, that these motions are usually politically based and are moved by an opposition anxious to call the government to account. It is proposed now to consider parliamentary review as undertaken by each parliament: it will be seen that the pattern varies a little from parliament to parliament. After this consideration, the general question of parliamentary review is returned to (ch 13).
CHAPTER 4

PARLIAMENTARY REVIEW: COMMONWEALTH OF AUSTRALIA

[76] Power to review delegated legislation. Apart from review of Territory legislation, the main source of the Commonwealth parliament's power to review delegated legislation is provided by ss 48 and 49 of the Acts Interpretation Act 1901. These sections apply only to regulations made under Commonwealth Acts. Regulations are the most common form of federal delegated legislation and the sections therefore bring within Commonwealth parliamentary control the most significant delegated legislation. In addition, the various Acts establishing federal and Territory Supreme Courts also provide that the rules of those courts are to be laid before the parliament and are subject to disallowance; see, for example, Bankruptcy Act 1966, s 315; Australian Capital Territory Supreme Court Act 1933, s 28. The Judiciary Act 1901, s 87 requires rules of the High Court to be tabled before each house of the parliament and makes them subject to disallowance. Section 115 of the Postal Services Act 1975 and s 111 of the Telecommunications Act 1975 which permit the making of by-laws apply ss 48 and 49 of the Acts Interpretation Act to those by-laws "in like manner as they apply to regulations". It is to be noted, however, that the definition of "Statutory Rules" in the Rules Publication Act 1903 (which relates to the printing, etc, of delegated legislation) embraces not only regulations but also rules and by-laws made by the Governor-General, a minister, the Interstate Commission and any government department. Unless special provision is included in the Act empowering their making (cf the examples cited above) these instruments are not subject to parliamentary review. It would seem that they are of sufficient significance to warrant tabling in the parliament at least. Probably they should also be subject to disallowance.

[77] Section 48 of the Acts Interpretation Act requires regulations to be laid before each house of the parliament within fifteen sitting days of that house after the making of the regulations. If the regulations are not laid before each house of the parliament within the time specified, they are to be void and of no effect. Either house of the parliament may then, in pursuance of a motion of which notice has been given within fifteen sitting days of the date of laying of a regulation, pass a resolution disallowing the regulation. If, at the expiration of fifteen sitting days after notice of a motion to disallow the regulation has been given, the notice has not been withdrawn or has not been dealt with, the regulation specified in the motion is to be deemed to have been disallowed. Where a regulation has been disallowed or deemed to have been disallowed the effect is to be the same as if the regulation had been repealed. By s 49 of the Act, no regulation the same in substance as a regulation disallowed can be made within six months after the date of disallowance except with the approval of the house of the parliament that disallowed the regulation. Again any regulation made in contravention of this requirement is to be void and of no effect.

[78] Review of Territory legislation. Like provisions to those contained in
ss 48 and 49 of the *Acts Interpretation Act* are also to be found in s 12 of the *Seat of Government (Administration) Act* 1910 relating to Australian Capital Territory ordinances and to regulations made under those ordinances. The one difference is that it is possible for a house of the parliament to disallow a part only of an ordinance or set of regulations whereas the power in regard to Commonwealth regulations is to disallow only the whole set of regulations. Apart from the Northern Territory, similar provision for parliamentary review is made in regard to the other Territories of the Commonwealth with the one curious omission that regulations made under the ordinances of these Territories are not subject to parliamentary review. The reason for this omission is not apparent. As far as the Northern Territory is concerned, as mentioned at [23], Northern Territory ordinances are laid before the Commonwealth parliament but the parliament has no power to disallow those ordinances. Regulations made under Northern Territory ordinances are subject to review by the Northern Territory Legislative Assembly (see further ch 11).

**Exercise of review power.** Motions to disallow regulations are moved but rarely in the House of Representatives. When moved they are invariably opposition-sponsored and the merits of the complaints against the regulations are subordinated to party division. It may be that the House of Representatives would have taken a greater interest in delegated legislation were it not for the fact that the Senate has assumed to itself the role of scrutinizer of Commonwealth government regulations. The Senate's active role in this sphere has come about because of the operations of its Standing Committee on Regulations and Ordinances.

**Senate Standing Committee on Regulations and Ordinances**

**Establishment of committee.** The committee was established on 14 May 1931 following the recommendations of a Senate Select Committee on Standing Committees. The committee was established in the Senate because it was thought that a committee of this kind would function best in an upper house: cf [190]. The formal appointment of the committee was achieved by the adoption of a new *Standing Order* 36A. It is worth noting that the committee was very much a pioneer in the area of parliamentary oversight of delegated legislation. The House of Lords had set up a committee to review certain types of delegated legislation in 1925, but the jurisdiction of that committee was much more circumscribed than the Senate committee. It is fair to say that the establishment of like committees in other jurisdictions was influenced by the success of the Senate committee. During the second world war, the committee decided that it served no useful or practical purpose for it to attempt to review the mass of delegated legislation that was produced under the authority of the National Security Legislation. Much of this legislation offended the principles on which the committee reviews regulations but the wartime situation made this inevitable. The committee recommended that a special body be established to review this particular legislation. A committee, known as the Regulations Advisory Committee, was duly established by the Attorney-General and functioned until the end of the war.

**Composition of committee.** The committee comprises seven senators,
four from the government and three from the opposition. The turnover of members has been fairly low averaging less than three per parliament for the period 1951 to 1976. The committee has been noteworthy for the extreme longevity of membership of some senators. Senator Wood has been a member of all committees in that period; Senator Wright has been a member of eight of the committees and other senators have served on four or five of the committees. In all thirty-five senators have been members of the committee in the period 1951 to 1976. The committee chairman is drawn from the government senators. Senator Wood was chairman from 1951 to 1972 and resumed the chairmanship in 1976. After the change of government in 1972, Senator Devitt, a member of the committee of long standing, became chairman for the period from 1972 to 1975. It is interesting that it was apparently thought necessary that the government should have the chairmanship of the committee notwithstanding the fact that the committee has not been affected by party divisions.

[82] Jurisdiction of the committee. The Standing Order setting up the committee does not do other than establish it and provide that all regulations and ordinances laid on the table of the Senate are to be referred to the committee for consideration and, if necessary, report. It does not lay down any guidelines that the committee should follow in its consideration. To fill this hiatus, the committee resolved to adopt the approach that had been suggested by the Select Committee on Standing Committees when proposing the establishment of the Regulations and Ordinances Committee. This was that the Committee will scrutinize regulations to ascertain:

1. that they are in accordance with the Statute;
2. that they do not trespass unduly on personal rights and liberties;
3. that they do not unduly make the rights and liberties of citizens dependent upon administrative and not upon judicial decisions;
4. that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for parliamentary enactment.

This approach to its task by the committee has been accepted by the Senate without objection.

[83] Three other points relating to the jurisdiction of the committee should be noted. Senate Standing Order 36A relating to the committee provides that regulations tabled in the Senate are to stand referred to the committee. The committee has interpreted this to mean that it is its duty to keep the operation of regulations under review. An adverse report relating to a regulation that was presented after the time for disallowance of the regulation had passed could not achieve very much. The Senate could theoretically pass a Bill to annul the regulation, but it is extremely doubtful whether the House of Representatives, for its part, would ever agree to such a Bill. The effect, if any, of such an adverse report would lie in the publicity it would attract. Be that as it may, the committee undertook in its forty-third report to review old sets of regulations when they are being amended to ascertain whether they meet the committee's present requirements. In its forty-seventh report the committee indicated that it had examined the Australian Capital Territory Prices Ordinance 1949 when an amendment to activate the ordinance (which had
not been operative for many years) was made in 1973. The committee commented adversely on a number of provisions of the ordinance and reported that the minister had agreed to amend the ordinance to deal with the committee's objections. The ordinance was amended in 1974 to take account of the committee's criticisms.

Early in its existence, the committee, in its fourth report, noted that it had determined that "questions involving Government policy in regulations and ordinances fell outside the scope of the Committee". The committee has adhered to this decision but has not considered that the decision prevents it from criticizing regulations that include new policy issues. It has done this under its fourth head of review. Novel issues should, in the opinion of the committee, be included in a Bill for parliament's consideration. So in its eleventh report the committee criticized regulations that prohibited the importation of goods without departmental approval as giving effect to a policy that should have been included in an Act: see further [92].

The remaining matter that should be mentioned relating to the committee's jurisdiction is the one point that has roused any major controversy in regard to the committee's activities. In addition to recommending that a Regulations and Ordinances Committee should inquire into regulations along the lines ultimately adopted by that committee, the Select Committee on Standing Committees recommended that such a committee should review the clause of each Bill that conferred a regulation-making power to see whether it delegated to the executive a legislative power which ought to be exercised by the parliament itself. Such a power was not conferred on the Regulations and Ordinances Committee when it was established, nor did it claim any right to exercise such a power until 1959. In its fourteenth report the committee suggested to the Senate that certain regulation-making powers included in the proposed Civil Aviation (Carrier's Liability) Act 1959 were too wide. In particular, the committee pointed out that one of the clauses permitted the making of regulations that could amend the Act itself. When the Committee's report was tabled, the formal motion to print it was prevented by the President of the Senate upholding a point of order that the report went beyond the committee's terms of reference. The committee replied to this action in its fifteenth report by pointing to the recommendation of the Select Committee on Standing Committees and arguing that the committee had a preventive as well as a corrective role in regard to regulations. This report was debated at length in the Senate. The Senate ministers opposed the assumption by the committee of the right to review regulation-making clauses; all other senators who spoke, regardless of party affiliations, supported the committee's approach (Sen Deb 1959 Vol 15 pp 942-981, 996-1021). The resolution of the debate was to some extent lost in the complexities of procedure. However, it would seem that the committee has carried the day as criticism it made of a particular section of the Broadcasting and Television Act in its nineteenth report was allowed to pass without objection. The committee now, as a regular practice, reviews regulation-making provisions in Bills. It will only be the exceptional case that will attract the committee's attention but if, for example, a Bill purported to prevent parliamentary review of delegated legislation made under it, the committee would feel obliged to draw this to the attention of the Senate.
Operation of the committee. The committee receives copies of regulations immediately they have been made. It also receives an explanatory memorandum from the department responsible for the administration of the regulations. Since 1945 the committee has had made available to it the services of a lawyer in private practice as a legal adviser. The regulations to be reviewed by the committee are referred to the legal adviser and he advises the committee whether, in his view, the regulations offend any of the principles for review followed by the committee. The committee has often acknowledged the invaluable assistance provided by its legal adviser. The committee is entitled to summon witnesses to produce papers or give evidence. This power is frequently exercised to summon departmental officers and the draftsman of the legislation. It is rare for private individuals to appear before the committee. Individuals make written submissions to the committee on occasions and the committee may put any criticisms in those submissions to departmental witnesses for comment. The committee does not solicit comments from interest groups affected by regulations. If the committee considers that a regulation should be disallowed, it reports accordingly to the Senate. It is usual then for one of the members of the committee to move for the disallowance of the regulation. It should be noted that the committee itself cannot disallow a regulation; it can only recommend that the Senate so act.

In its thirty-eighth report, the committee outlined its activities for 1970 which it described as a typical year. The committee met thirty-one times. It had regular weekly meetings when the Senate was sitting and held additional meetings as circumstances required. In that year the committee reviewed two hundred and fourteen sets of federal regulations and seventy Territory ordinances and regulations. It conducted inquiries into forty-eight of these pieces of legislation. Formal evidence was taken from departmental officers on fourteen occasions (but there are numerous occasions on which information is sought from a department informally). Six reports were made to the Senate. These statistics were confirmed in a paper annexed to the fiftieth report of the committee in relation to the period 1971-1974. The additional information was added that approximately seven per cent of all regulations were either disallowed, amended as a result of action by the committee or appropriately treated to overcome the committee’s objections. The committee usually recommends disallowance only in cases where the minister or department concerned with the delegated legislation has not agreed to amend a provision that the committee regards as objectionable. If an undertaking is given that a regulation will be amended, the committee rests on the undertaking and does not take the matter further. It has, however, been anxious to point out that reliance on such undertakings does not compromise its independence (see forty-seventh and fiftieth reports).

Reports of the committee. The reports of the committee are readily available. They are by far the most comprehensive and informative of the various committees in Australia. The first twenty-six reports of the committee were reprinted in the twenty-eighth report of the committee. The forty-fifth report contains a list of members of the committee since its establishment and a digest of, and index to, the committee’s reports. The committee also now issues what it terms a general report but which is in effect an annual report.
setting out its activities in each year. The committee has furnished fifty-seven reports to the Senate. However, there has been a recent marked upturn in the number of reports — more than half have been presented since 1969. The main reason for this lies in the more vigorous approach to committee work evidenced in the Senate in recent years. The committee is also taking a stronger line on certain matters than used to be the case: see [90]. The committee used also to report only when it was recommending the disallowance of a regulation. It now also issues reports in relation to regulations that it has criticized but which have been amended to take account of the criticism if it thinks a point of principle was involved. Apart from its reports relating directly to particular regulations, the committee has also made recommendations relating to such matters as the consolidation of regulations, the numbering of regulations and the production of annual volumes of delegated legislation.

[89] Application by committee of review criteria. The application by the committee of its four criteria for reviewing regulations is best illustrated by example. The committee’s first criterion is that the regulation is not in accordance with the Act under which it is made. Objections under this heading arise but rarely. Federal regulations are drafted by lawyers in the Commonwealth Attorney-General's department and therefore the power to make the regulations will have been fully considered. There will, however, be occasions when differing views may be taken on the question whether an Act authorizes the making of a particular regulation. Such a dispute arose in 1956 in relation to a regulation made under the Air Force Act. The Senate committee took the view, doubtless on the advice of its legal adviser, that the regulation was not authorized by the Act. The parliamentary counsel, on the other hand, asserted the validity of the regulation. The committee preferred the view of its legal adviser and recommended the disallowance of the regulation (see tenth report). The government sensed the hostility of the Senate to the regulation and revoked it before the motion for disallowance was called on. In its thirty-ninth report, the committee indicated more precisely its approach to this first head of review. The committee said that it recognised that legal opinions might differ as to the validity of a regulation and it did not want to set itself up as an arbiter of which opinion was correct. Rather it would, under this ground of review, look to whether the regulation could be regarded as an unusual or unexpected use of the powers conferred by the Act. The committee seems generally to have maintained this approach but in its forty-eighth report it pointed out that an amendment of the Public Service (Parliamentary Officers) Regulations was beyond power. This view was apparently accepted by the government because the Public Service Act was amended to validate the regulation.

[90] The second criterion is that the regulations must not trespass unduly on the personal rights and liberties of individuals. This ground is frequently invoked to criticize a regulation. For example, in 1966 Air Navigation (Building Control) Regulations prohibited the building of certain structures exceeding a specified height in the vicinity of aerodromes. The regulations made provision for compensation for persons who had to alter buildings because of the prohibition but did not provide compensation for persons who were prevented, as a result of the regulations, from making optimum use of their land.
The committee considered that the prohibition was an invasion of the owner's personal rights and should only be permitted if adequate compensation were to be paid (see twenty-first report). The regulations were amended by the government to overcome the committee's complaints. The committee has also acted under this criterion to criticize regulations that allow the detention of persons without appropriate avenues of review; regulations that limit a person's commercial activities unduly; and regulations that have purported to reverse the onus of proof in criminal charges. It is interesting to note that the committee is apparently looking more closely at regulations under this heading than used to be the case. In its fifty-first report, the committee indicated that it had criticized provisions of the Telecommunications (General) By-laws which purported to exempt the Telecommunications Commission from damage resulting from the installation of equipment in a subscriber's premises. The committee noted that "Although it was acceptable some years ago to confer immunity of this nature upon statutory bodies, it is now regarded as not in accordance with accepted standards, and the Committee regards it as an undesirable type of provision ....". (The by-law was subsequently amended to overcome the committee's objections).

The second criterion often runs together with the third criterion that regulations should not unduly make the rights and liberties of citizens dependent upon administrative rather than judicial decisions. The committee has waged a continuous campaign to prevent the executive having the final say on such matters as a person's land use, his personal freedom, his right to import goods and so on. The committee has looked for administrative control to be based on the ascertainment of objective facts rather than administrative opinion. Thus regulations were criticized that allowed an official to order the detention for a period of up to twelve months of persons suffering from tuberculosis (twentieth report). Likewise an ordinance that vested an unappealable right in the minister to prohibit the use of land in the Australian Capital Territory for certain purposes was recommended for disallowance (twenty-third report). The committee has not, however, adopted an entirely rigid approach on this question. It has been prepared to allow ministerial discretions couched in wide terms if it can be shown that there is really no other effective way for the legislation to operate.

The fourth criterion is that the regulations should be concerned with administrative detail and not amount to substantive legislation which should be a matter for parliamentary enactment. This criterion has been invoked quite frequently. An example of its use was in relation to the Australian Capital Territory Evidence Ordinance 1971. This ordinance restated the law of evidence for the Territory and included some important reforms. The committee recommended the disallowance of the ordinance on the basis that it was "concerned that so important a matter as the law of evidence should be changed, and in some respects radically changed, by means of delegated legislation rather than by substantive legislation which is openly debated in Parliament" (thirty-sixth report). A similar approach was taken in the fifty-second report of the committee in relation to an ordinance of Cocos (Keeling) Islands. The ordinance vested a general discretion in the minister to acquire land in the Territory. No basis for the exercise of the power was set out in the ordinance because it was said that it was not possible to forecast the reasons
why land would need to be acquired. The committee took the view that the vesting of this sort of power in the minister was a matter of such importance that the policy question should be brought to the attention of the parliament in the form of a proposed statute. The Senate subsequently disallowed the ordinance. The committee has also recommended the disallowance of regulations on this basis in a number of cases involving retrospective payments of money. The view expressed by the committee is that parliament alone has the power to authorize expenditure of money. To include retrospective payments in regulations denies the parliament this right. In its twenty-fifth report, the committee stated that all regulations, of whatever character, having a retrospective operation would attract the attention of the committee. Close scrutiny would be paid to retrospectivity relating to the payment of moneys. It recognized that retrospectivity was, on occasions, inevitable but considered that, if it extended beyond a few months, it should be regarded as objectionable. The committee has applied this approach to recommend the disallowance of Conciliation and Arbitration Regulations that backdated allowances (thirty-first report). It has also criticized retrospective payments of salary to the armed services (see forty-first and forty-second reports). As the forty-second, forty-seventh and fiftieth reports show, changes in administrative procedures relating to the making of regulations fixing servicemen's pay and allowances have now been adopted to overcome the extraordinary delays (sometimes in excess of two years) that used at one time to occur. These changes would almost certainly not have occurred had it not been for the committee's action.

A decision was taken in 1976 by the committee that this fourth ground of review will no longer be applied to Australian Capital Territory ordinances (fifty-fifth report). As the Territory has a fully elected Legislative Assembly it was thought appropriate that matters of principle applicable to the Territory could be included in ordinances: this, notwithstanding the fact that the Assembly has no legislative but only advisory powers. The committee considered that it should continue to scrutinize Australian Capital Territory ordinances under its other three grounds of review. This decision was reached following upon the review of two Australian Capital Territory ordinances in 1976 (fifty-third and fifty-fourth reports). The committee was, for the first time in its existence, divided on the question whether the delegated legislation should be disallowed. (It is of interest to note that the division was across party lines). The ordinances were repealed thus giving effect to the recommendations of the majority on the committee but the committee agreed that, in future, it would limit its review in the manner set out above.

The committee's performance. From its outset the Regulations and Ordinances Committee has been favoured by three things — party co-operation within the committee, strong chairmanship, and, perhaps most importantly, parliamentary support. If the committee has recommended that a regulation be disallowed, the Senate has disallowed it. This has had a marked effect on executive relations with the committee. No Minister or government department relishes the prospect of going through the rather cumbersome procedure of making a regulation only to have it disallowed. (It must be remembered that once a regulation has been disallowed, a second regulation in like form cannot be made within six months after the date of disallowance
unless the disallowance motion is rescinded or leave is given to make the new regulation: *Acts Interpretation Act* 1901 s 49). Even more unpleasant is the thought that the departmental officer concerned might find himself appearing before the committee to try to explain why a regulation took a form that is regarded by the committee as objectionable. As mentioned previously, all federal regulations are drafted in the Commonwealth Attorney-General's Department. It is not uncommon for the draftsman to advise departments that if regulations take a certain form, they are likely to be criticized by the Senate committee. Because of this awareness of the power of the committee, it is unusual for regulations to be made that offend the committee's principles for review. Where regulations are made that do offend these principles, it is usually only necessary for the committee to point this out and the department will act immediately to amend the regulations to remove the offensive provisions. The department is left with little choice as it knows that if it refuses to act, the regulations are virtually certain to be disallowed. The reports of the committee give some idea of the undesirable provisions that would very likely be included in delegated legislation if no review machinery existed. Administrative convenience and paternalism can readily become considerations subsuming all else.

[95] The one criticism that can perhaps be levelled against the committee is that, on occasions, it has assumed a destructive rather than a constructive role in some of its criticism of regulations. For example, in the minutes of evidence annexed to the twenty-ninth report of the committee, it is revealed that the parliamentary draftsman sought advice from the committee as to guidelines that might be adopted to avoid leaving matters to administrative discretion yet not filling up the regulations with administrative details. The committee was not forthcoming with any ideas — it merely expressed sympathy for the draftsman's difficulties. Perhaps one cannot expect too much of a parliamentary committee on an issue of this kind. However, it did seem on this occasion that the committee was not prepared to come to grips with a difficult problem: and one that arose directly out of the application of the committee's criteria for review. This criticism aside, the committee has been remarkably effective and must rank as among the most successful of all Australian parliamentary committees.

[96] This being so, a brief comment is warranted on suggestions included in the Report of the Commonwealth Joint Committee on the Parliamentary Committee System dated 26 May 1976. At paras [267-273] that committee recommends a widening of the role of the Senate committee to include review of the policy underlying delegated legislation. While the scrutiny undertaken by the committee at present, on occasions, comes close to calling policy as well as form into account, the committee has endeavoured to avoid the policy area. This seems appropriate for a committee that is concerned with legislation, albeit delegated legislation. A committee is ill-equipped to make policy judgments without the assistance of the public service. A public servant, when questioned about the policy underlying a regulation, could, under our present system of government, legitimately refuse to answer any questions. Indeed, he probably should so refuse (cf the opinion of the Solicitor-General to the Regulations and Ordinances Committee set out in Odgers, *Australian Senate Practice* (4th ed) at 492). In addition to this problem, the committee
would quickly lose the bi-partisan support it has enjoyed in the Senate to date because the government senators would almost certainly feel obliged to support their government's policy. The same sort of issue would probably arise on the committee itself. The Joint Committee's proposal seems to overlook the basis on which the Senate and other delegated legislation committees function. It is to be hoped that the proposals are not implemented.
PARLIAMENTARY REVIEW: NEW SOUTH WALES

CHAPTER 5

PARLIAMENTARY REVIEW: NEW SOUTH WALES

[97] Power to review delegated legislation. The general power for the New South Wales parliament to review delegated legislation is that given in s 41 of the Interpretation Act. The section is expressed to apply to regulations which term is defined in sub-s v as embracing regulations, rules and by-laws made by the Governor or made by any other person or body and required to be approved or confirmed by the Governor. Regulations are to be laid before each house of the parliament within fourteen sitting days of that house after the date of publication of the regulations. No sanction is imposed for a failure to table such regulations. Section 41 (ii) provides that if either house of the parliament passes a resolution, of which notice has been given within fifteen sitting days of that house after a set of regulations has been laid before it, disallowing the regulations or any part of the regulations, the regulations or part cease to have effect. There is no prohibition on the remaking of any regulations so disallowed. Section 577 of the Local Government Act makes similar provision to the foregoing for the parliamentary review of ordinances made under the Act. Section 125 of the Supreme Court Act allows the parliament to disallow rules of the Supreme Court.

[98] Exercise of review power. Disallowance motions are moved in the New South Wales Parliament about once a year on average — and then only where political capital is to be gained from the motion. The reason for this is due in large measure to the fact that a committee of the Legislative Council charged with the duty of reviewing subordinate legislation is a rather inactive body.

COMMITTEE OF SUBORDINATE LEGISLATION

[99] Establishment of committee. The Committee of Subordinate Legislation was first established by resolution of the Legislative Council on 27 September 1960. The committee is a sessional committee only and therefore has to be reappointed in each session of the parliament if it is to continue to function. The committee has in fact been so reappointed since its establishment.

[100] Composition of Committee. Until 1975 the committee comprised five members. When the committee was re-appointed in that year, the membership was increased to six. The party balance on the committee in 1976 was three Australian Labor Party, two Liberal Party and one Country Party. A government member is the chairman. Party differences have not caused concern to the committee. Indeed, in making appointments to the committee, the Council, while endeavouring to preserve some balance between the parties as represented in the Council, has appeared to look to the individual's qualifications for appointment rather than their party connections. When the committee was first established, it had the most unusual feature of containing among its members the Attorney-General. The Attorney-General did not, however, continue as a member after 1962 and since that date a minister has
not been included on the committee. The committee has been noteworthy for the longevity of its membership. Mr. T P Gleeson served for fifteen years; Mr C A Cahill Q C for thirteen years, nine of them as chairman. Other members have served for similarly long periods. The committee has usually had three lawyers among its members. The chairman of the committee up until 1975 had always been a lawyer.

101 Meetings and procedure of committee. The committee now meets fortnightly when the Legislative Council is in session. In the early years after its establishment the committee met less frequently (the low point of its activity being in 1966 when it met only once). It is not usual for the committee to meet out of session but all members of the committee receive the New South Wales Government Gazette (in which regulations are published in full) and it was suggested that this would alert them to the need for a special committee meeting if occasion arose. The committee seldom conducts oral hearings but witnesses, both departmental and other, have given evidence to the committee (see, for example, reports dated 29 November 1961; 10 December 1964; 27 November 1969). The committee does not have the assistance of a legal adviser but it is to be noted that it has always had a number of lawyers among its members.

102 Jurisdiction of committee. When first appointed, the terms of reference of the committee required that it consider all regulations, rules, by-laws, orders or proclamations which, under any Act, were required to be laid on the table of the Legislative Council and which were subject to disallowance by resolution of either or both houses of the Parliament. The scope of the committee's powers was widened in 1961 to include ordinances among the various instruments referred to the committee. This was done following on the first report of the committee dated 23 November 1960 in which the committee had noted that it had received an opinion from the Attorney-General indicating that, as the word “ordinance” did not appear in the original resolution establishing the committee, the committee had no jurisdiction to consider ordinances made under the Local Government Act. The committee thereupon determined that such ordinances were within the intent of the resolution establishing it and resolved to consider them – if necessary, seeking amendment of its powers in order formally to include such ordinances. This was a desirable amendment as numerous ordinances are made under the Local Government Act. As these have to be tabled in the parliament and may be disallowed, there would have been a noticeable gap in the powers of the committee if they were not available for consideration by the committee. The resolutions reappointing the committee now use the general word “regulations” which is defined to mean regulations, rules, by-laws, ordinances, orders and proclamations.

103 The review criteria of the committee are very wide and appear to comprise an amalgam of the terms of reference of the Senate Committee and the United Kingdom Joint Parliamentary Committee on Subordinate Legislation. The resolution appointing the committee says:

The Committee shall, with respect to the Regulations, consider:
(a) whether the Regulations are in accordance with the general objects of the Act pursuant to which they are made;
(b) whether the Regulations trespass unduly on personal rights and liberties;
(c) whether the Regulations unduly make the rights and liberties of citizens dependent upon administrative and not upon judicial decisions;
(d) whether the Regulations contain matter which in the opinion of the Committee should properly be dealt with in an Act of Parliament;
(e) whether the Regulations appear to make some unusual or unexpected use of the powers conferred by the Statute under which they are made;
(f) whether there appears to have been unjustifiable delay in the publication or the laying of the Regulations before Parliament;
(g) whether for any special reason the form or purport of the Regulations calls for elucidation.

The resolution then continues to empower the committee, if it is of the opinion that any of the regulations ought to be disallowed, to report that opinion and the ground thereof to the Legislative Council before the end of the period during which it is possible to disallow the regulations. If the Council is not sitting, the committee may report its opinion and the grounds thereof to the authority by which the regulations were made. The committee is also empowered to bring any other matter relating to any of the regulations to the notice of the Council.

[104] Reports of the committee. The reports of the committee are published as parliamentary papers and are therefore available to the public. They were supplied readily on request. In the main they are short and deal with specific instances before the committee rather than giving a wide ranging review of the committee's activities in a particular year (cf the recent reports of the Senate committee which in many ways take the form of an annual report to the Senate). The reports, unfortunately, even when concerned with regulations upon which the committee is reporting adversely, do not contain details of the provisions of the regulations considered objectionable, nor, in one instance when disallowance was suggested, the basis on which the committee objected to the regulations. This has been left for airing in the Legislative Council when the motion for disallowance has been moved. It would be more useful if the reports of the committee contained this information as well.

[105] Performance of the committee. If one is to judge the committee solely by its reports, the appearance given is of a not particularly active body. The committee has reported adversely on only five regulations. The number is surprisingly few in light of the fact that there are usually more than 500 instruments tabled in the parliament each year and subject to scrutiny by the committee. The occasions on which the committee has indicated dissatisfaction with a regulation have been:

(1) Regulations under the Surveyors Act required all surveying students to obtain a degree from the University of New South Wales. The committee considered that the requirement that university studies be undertaken by all surveying students was a matter of principle that should have been dealt with in the Act (Report 29 November 1961). The committee did not recommend disallowance of the regulations and no further action was taken in regard to the report.
(2) Amendments of the Supreme Court Rules that allowed affidavit evidence to be given by medical practitioners in lieu of oral evidence were criticized as being concerned with a matter that should have been dealt with by Act of Parliament (Report 9 April 1964) The Bar Association and the Law Society
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had been critical of the rules. A motion for disallowance of the rules was moved by the chairman and passed by the Council.

(3) Regulations made under the Dentists Act 1934 were said not to be in accordance with the will of the Parliament as indicated in the provision of the Act under which the regulations were made (Report 7 December 1966). The report was tabled but no action taken in regard to it.

(4) A regulation made under the Pharmacy Act 1964 was criticized as unduly trespassing on rights and liberties (Report 28 February 1967). The regulation was "withdrawn" before the committee's report was tabled.

(5) A by-law made under the Metropolitan Water, Sewerage and Drainage Act 1924 was objectionable because it was (a) retrospective; (b) represented an unreasonable if not invalid exercise of power; (c) made the rights of a subject dependent upon administrative rather than judicial decision; and (d) trespassed unduly on the rights of citizens (Report 31 August 1967). A motion to disallow the regulation moved by the chairman of the committee was passed without debate.

Apart from these instances, the committee has recommended that alterations be included in regulations and the regulations were subsequently amended to take account of the committee's recommendations (reports 10 December 1964; 9 December 1965). On other occasions, the committee has expressed concern with operation of a regulation and the responsible authority has indicated that the views of the committee would be taken into account and the operation of the regulation watched closely (Reports 29 November 1961; 10 December 1964). The committee has also, on two occasions, had referred to it by the Legislative Council the question whether or not a regulation should be disallowed. On both occasions the committee enquired into the operation of the regulations and concluded that no action was warranted (Reports 27 November 1969; 5 March 1974).

[106] The committee has been critical of provisions in Acts relevant to delegated legislation on two occasions. It pointed out in its report dated 25 November 1970 that the Supreme Court Act enabled the making of rules amending other Acts and recommended that this power be repealed. In the same report it pointed out that the Teaching Service Act enabled the publication of regulations in the Education Gazette instead of the Government Gazette. The committee considered that it was unwise for there to be a proliferation of places in which regulations were published and recommended that all regulations be published in the Government Gazette. The committee in its report dated 25 November 1970 also criticized the introduction in a number of Acts of the concept of delegated legislation in the form of "resolutions" of certain authorities. The committee pointed out that the use of this type of instrument was undesirable because it avoided the need for tabling the instrument in the parliament.

[107] Finally, the committee has interested itself in the question of availability and reprinting of regulations and, in a number of reports, it has indicated that it intends to continue to examine these issues (Reports 9 November 1965; 30 March 1966; 21 November 1974; 25 March 1975).

[108] It is not readily apparent why so few regulations have been subject to
adverse criticism by the committee. It was suggested that the fact that the terms of reference of the committee are well known to the legal officers of the departments who prepare subordinate legislation and to the parliamentary draftsmen who check subordinate legislation before it is made has resulted in a high standard of legislation thereby relieving the committee of the need to criticize it. While this may be true in many cases, it seems unlikely that the makers of subordinate legislation in New South Wales achieve a standard that is not attained by those concerned with subordinate legislation in the other States and the Commonwealth. It is noteworthy that the number of subordinate legislative instruments coming before the committee is probably greater than that before other committees. This fact alone must present the committee with a major task if it is to review each instrument in depth. However, one cannot help but gain the impression that the committee does not regard its duties as being very important. Perhaps the committee would function better if it were provided with outside assistance in the form of a legal adviser. But if any effective parliamentary control is to be exercised over delegated legislation in New South Wales, the committee must be prepared to devote the time to scrutinizing subordinate legislation both during and out of session. It has a wider range of review criteria than any of the other committees in the Australian States: it should make use of them.
Power to review delegated legislation. Section 5 of the *Subordinate Legislation Act* 1962 requires a copy of every statutory rule to be laid before both houses of the parliament within fourteen days after the making thereof. In addition, a copy of every such statutory rule is to be posted or delivered to each member of parliament. The Act does not indicate that any consequences flow from a failure to comply with s 5. Section 6 of the Act sets out the power to disallow statutory rules. It is in terms different from that applicable to other parliaments in Australia. The right to disallow is conditional upon one of two possibilities. The power to make the statutory rule may be expressed to be subject to the statutory rule being disallowed by the parliament—such a provision is not common. Alternatively, the power to disallow can arise if a statutory rule has been adversely reported on by the Subordinate Legislation Committee of the parliament. Disallowance can occur only if each house of the parliament passes a resolution to that effect. Notice of such a resolution must be given within twelve sitting days after the laying before the house of the statutory rule and the resolution to disallow must be passed within the next period of twelve sitting days. The power of disallowance is of the whole or any part of a statutory rule. Where a statutory rule is disallowed, in whole or in part, the disallowance is stated to have the like effect to the repeal of an enactment (see further ch 26). There is no prohibition on the remaking of a statutory rule that has been disallowed. Section 27 of the *Supreme Court Act* provides that rules of the Supreme Court are subject to disallowance “by the Parliament”. Presumably this would require a motion to be passed by both houses of the parliament. No limits on the time within which action is to be taken are specified. Local government by-laws are not subject to parliamentary review.

Exercise of review power. Apart from the relatively few Acts that expressly allow disallowance of delegated legislation made under them, it can be seen that the right of the parliament to disallow delegated legislation is conditioned upon action first being taken by the Subordinate Legislation Committee. This acts as a marked limitation on any general right of disallowance. In particular, it deprives the opposition of the chance to move a motion of disallowance for the purpose of questioning the policy included in a statutory rule. While the outcome of any such motion might be a foregone conclusion, it is one of the essential functions of a parliament to provide a forum in which the government can be called upon to justify its policies. The provisions of the *Subordinate Legislation Act* impose a most undesirable limitation on this function. In addition, the requirement that a disallowance motion has to be passed in both houses of the parliament strengthens the hand of the government in resisting challenges to its delegated legislation. There seems no reason, (other than to protect the legislation) why disapproval by one house of a parliament should not be sufficient to disallow a statutory rule considered objectionable.
The form of the disallowance provisions in the Subordinate Legislation Act casts a heavy onus on the Subordinate Legislation committee to scrutinize statutory rules thoroughly, but the committee seems to have discharged this onus. While there have been only three recommendations from the parliament for disallowance of statutory rules (all of which resulted in the regulations being disallowed or repealed), the committee exercises a most active review function.

**SUBORDINATE LEGISLATION COMMITTEE**

Establishment of committee. The Subordinate Legislation Committee was established by the Subordinate Legislation Committee Act 1956. That Act has been repealed and the relevant provisions relating to the committee re-enacted as ss 41-43 of the Parliamentary Committees Act 1968 as amended. It will be to this latter Act that reference is made.

Composition of committee. The committee is a joint committee comprising two members of the Legislative Council and six members of the Legislative Assembly. There is considerable advantage in the committee being a joint committee because, as mentioned, subordinate legislation in Victoria can only be disallowed by a resolution of each house of the parliament. Three members of the committee constitute a quorum but the quorum cannot consist exclusively of members from one house of the parliament. The committee elects its own chairman and the practice has been for the chairman to be a member of the governing party. There is no custom whereby the chairman comes from one particular house although most chairmen have come from the Legislative Council. Party representation on the committee has varied with the size of the representation of the various parties in the parliament. The present representation is four Liberal Party members, three Labor Party members and one National Party member. Membership of the committee has been noted for some very long term holders of office. Mr. Birrell, the chairman of the committee in 1976, has been a member for nine years; Mr. Gross, his predecessor, had served for a similar period. As far as qualifications of members are concerned, the test of membership has been one of interest in the subject of the committee's work. Legal qualifications are not specifically looked for.

Meetings and procedure of committee. The committee meets with greater frequency than any other subordinate legislation committee—three meetings a week for forty to forty-five weeks of the year. Section 43 (2) of the Parliamentary Committees Act permits the committee to sit and transact business during any adjournment or recess of either house of parliament but does not permit the committee to meet during the sittings of the parliament except by leave. The committee is also empowered to sit at such times and in such places in Victoria or elsewhere convenient for proper and speedy despatch of its business. Decisions by the committee are usually reached by a consensus of opinion; when voting does occur, it is across party lines. The committee rarely summons witnesses. In the main it depends for its information on written submissions from the department administering the particular legislation and only calls witnesses if these submissions are insufficient for its purpose. Private witnesses have been heard by the committee on occasions.
(the inquiry of the committee into the *Standard of Habitation Regulations 1971* being an example of such action).

[J115] Jurisdiction of committee. The jurisdiction of the committee is set out in s 42 of the Act which reads as follows:

42 The functions of the committee shall be to consider whether the special attention of Parliament should be drawn to any regulations on the ground that —

(a) the regulations appear not to be within the regulation-making power conferred by, or not to be in accord with the general objects of, the Act pursuant to which they purport to be made;

(b) the form or purport of the regulations calls for elucidation;

(c) the regulations unduly trespass on rights previously established by law;

(d) the regulations unduly make rights dependent upon administrative and not upon judicial decisions; or

(e) the regulations contain matter which in the opinion of the committee should properly be dealt with by an Act of Parliament and not by regulations —

and to make such reports and recommendations to the Council and the Assembly as it thinks desirable as a result of any such consideration.

[J116] The committee is also given jurisdiction by reg 8 of the *Subordinate Legislation (Statutory Rules) Regulations* to give to the Attorney-General such advice as it thinks proper with respect to questions relating to:

(a) the numbering, printing and publication of statutory rules or any class or description of statutory rules;

(b) the declaration of instruments as statutory rules;

(c) the preparation and publication of annual volumes of statutory rules; and

(d) the administration of the *[Subordinate Legislation-]* Act generally.

The "regulations" that the committee is empowered to review are those covered by the definition of "statutory rule" in the *Subordinate Legislation Act*: see [35]. This includes all major delegated legislation, except local government by-laws. The latter are not tabled before the parliament. While there have been moves from time to time to bring them within the scope of parliamentary review, no action has resulted (see particularly the report from the committee upon the General Inquiry into Subordinate Legislation dated 18 March 1970; Parliamentary Paper No D9). Apart from this limitation, the effect of the definition of "statutory rule" results in the committee reviewing a wide range of subordinate legislative instruments. Noteworthy is the category of instruments declared by the Attorney-General to be statutory rules. This brings the more important proclamations, orders, etc, to the attention of the committee—instruments which none of the other subordinate legislation committees are able to review. Public Service Board determinations are also reviewed by the committee: *Public Service Act 1974*, s 42 (6).

[J117] The committee does not have to wait until regulations are tabled in the parliament before receiving copies. Regulation 6 of the *Subordinate Legislation (Statutory Rules) Regulations* requires the Government Printer to send
copies of the rules to the committee as soon as they are printed. In addition, a directive from the Attorney-General requires the preparation of an explanatory memorandum setting out in detail the purport of any proposed statutory rule. Copies of this memorandum are directed to be sent to the committee to reach it not later than the day on which the relevant rules are made. This is intended to enable the committee to consider the rules together with the explanatory memorandum as soon as the rules reach the committee.

[118] Reports of the committee. Only the general reports of the committee (of which there have been six) are printed as Parliamentary Papers. These reports do not provide a full description of the committee’s work. A document summarizing all of the reports of the committee was made available by the clerk to the committee and the comments in the succeeding paragraphs are based on that document. It is unfortunate that the reports are not generally available, but if for some reason it is thought unnecessary to publish them, consideration should at least be given to including a summary of the reports in the General Reports.

[119] Performance of the committee. The way in which the committee has carried out its task is affected markedly by the somewhat unusual disallowance provisions contained in s 6 of the Subordinate Legislation Act: see [109]. This section places a fairly heavy responsibility on the Subordinate Legislation Committee. A report in relation to regulations has to be prepared and tabled in the first twelve day period after the regulations have been laid before the parliament. But the device commonly adopted in the Senate and in the South Australian parliament of giving what is in effect a contingent notice of motion to disallow pending completion of investigation of a regulation is not available to the Victorian committee as any motion for disallowance must be based on a report of the committee. Thus fairly rapid action is required on the part of the committee and it often finds it difficult to meet the statutory deadline if the regulation warrants any detailed examination. The hurdle still has to be overcome that the disallowance motion must be passed by each house of the parliament. It is difficult at any time to persuade a majority of government members that a regulation should be disallowed, but this is more particularly so in a lower house where party control is usually more rigid than in an upper house. The result of all this has been that the committee has rarely recommended the disallowance of a regulation. There have been only three occasions on which this has occurred since the establishment of the committee. On 29 April 1964 motions were moved in both houses on behalf of the committee by members of the committee to disallow regulations made under the Melbourne Harbour Trust Act. The regulations were objected to on a number of grounds, principally that one provision was outside the regulation-making power in the Act. The committee had previously requested the Trust to amend the regulations but the Trust had declined to do so and the chairman of the Trust had made a public statement in which he said that the regulations would stand unless disallowed by the parliament. It was hardly surprising, when so challenged, that the committee should seek the disallowance of the regulation. In moving for disallowance, it was pointed out that this was the first occasion on which a regulation-making authority had refused to comply with a request made by the committee. The government supported the motion for disallowance and it was passed without division. (See Vic Parl Deb
The second occasion on which a motion for disallowance was moved related to the *Films (Fees) Regulations*. These regulations contained provisions requiring the payment of fees in excess of the monetary limits permitted to be prescribed by the *Film Act*. The motion was again moved by members of the committee acting on behalf of the committee. The motion was not opposed by the government and was duly passed in each house without division. It is not clear why the committee moved the disallowance of these regulations but one can but assume that there had been resistance to requests for amendment of the regulations. (Vic Parl Deb Vol 318 at 704 (Legislative Assembly) and 812 (Legislative Council)). The third disallowance motion was moved in 1976 when the committee concluded that the *Liquor Control (Orderly Marketing) Regulations 1975* were beyond power. When the report of the committee containing the disallowance recommendation was tabled, the government announced that the regulations had, that day, been repealed (Vic Parl Deb 25 May 1976 at 1065). On one other occasion a report of the committee resulted in parliamentary action being taken—this was in relation to the *Supreme Court (Readiness for Trial) Rules*. These rules had caused some considerable controversy and a motion for their disallowance was moved pursuant to s 27 of the *Supreme Court Act* independently of any action on the part of the committee. The committee subsequently tabled in the parliament a report which suggested that certain changes should be made to the rules. The Legislative Assembly moved to refer the report of the committee to the Supreme Court judges for urgent attention and the disallowance motion was abandoned. (Vic Parl Deb Vol 294 at 4699).

The foregoing gives hint of the practice that is followed in most cases by the committee, namely to press departments very strongly to amend regulations that the committee considers offend the criteria set out in the Act. Criticism from the committee appears to be taken most seriously by the authorities concerned and, apart from the instances mentioned above, action has always been taken to remedy the defects pointed out by the committee. Indeed, on occasions an authority has sent a draft of its regulations to the committee before making them to obtain the committee’s opinion as to whether or not the regulations offend the committee’s review criteria.

The committee reviews approximately three hundred and fifty pieces of legislation each year with occasional peaks, as in 1974, when over five hundred pieces of subordinate legislation were reviewed. The committee has reported in relation to regulations on approximately eighty occasions since its establishment. The reports have related to one set of regulations only on each occasion. From these reports it is clear that the most frequent ground of complaint voiced by the committee is, somewhat surprisingly, that referred to in s 42 (a) of the Act—that the regulations are not within the regulation-making power conferred by the Act. More than half the number of adverse reports are found under this heading. Some examples are:

(a) Report No 3 of Session 1956-57-58: *The Estate Agents Act* provided for the waiver of certain qualifications for an estate agent’s licence to be specifically prescribed by the rules. The rules gave this power but it was couched in
general terms and was not, in the view of the committee, sufficiently specific to be within the power given by the Act.

(b) Report No 6 of Session 1956-57-58: Camping regulations made under a power to regulate camping were expressed in terms of a prohibition on all camping without permission. The committee (it would seem correctly, see [309]) considered that the regulations were invalid.

(c) Report No 11 of Session 1956-57-58: The Act permitting the making of the Cancer Institute (Amending) Regulations required that the regulations be made on the recommendation of the Cancer Institute Board. The regulations did not refer to any such recommendation having been received and the committee ascertained that, in fact, no recommendation had preceded the making of the regulations. The committee accordingly considered that the regulations were invalid.

(d) Report No 6 of 1959-60: Regulations under the Land Settlement Act 1959 prescribed fees for which there was no statutory authority and also authorised the payment of rail fares and sitting fees to be paid to certain persons when the Act authorised the prescription only of the latter.

(e) Report No 2 of Session 1973-74: Regulations made under the Health Act prescribing inspectors' qualifications specified qualifications different from those required by the Act itself.

The second most frequent complaint made by the committee is that the form of the regulations warrants elucidation (S 42 (b)). The other grounds of review are cited most infrequently. The making of retrospective regulations seems not to have been a problem—it has not been the basis for complaint by the committee in regard to any particular legislation although it was mentioned in the committee's second General Report (Parliamentary Paper D 25 of Session 1956-57-58) as an issue that the committee keeps under review.

The committee does not formally review regulation-making sections of Acts. Committee members question these sections informally and may comment on them in their private capacity in the parliament but the committee as such does not express any opinion.

The committee has exercised its power under regulation 8 of the Subordinate Legislation (Statutory Rules) Regulations to advise the Attorney-General on issues relating to the printing, consolidating, indexing, etc, of statutory rules. The nature of this advice appears from the General Reports of the committee (see for example General Report, Parliamentary Paper D15 of Session 1963-1964).

Committee's adviser. Legal advice is provided to the committee in a manner quite different from that applicable to the Senate committee. The adviser is an officer of the Parliamentary Counsel's office. This officer submits to the committee a certificate relating to each piece of subordinate legislation that comes before the committee. Arrangements similar to those to provide copies of statutory rules and explanatory memoranda to the committee apply also to ensure early supply of copies to the committee's adviser. The certificate submitted by the adviser to the committee reports on the legislation in the light of the criteria that form the basis for the committee's review. If warranted, the certificate contains elaborate advice as to the deficiencies in
the legislation. It was estimated approximately one in five pieces of subordinate legislation attracts substantial commentary by the committee's adviser. The adviser deals directly with the committee and does not usually contact the department whose regulation is under review. The obvious problem of a conflict of interests or possible embarrassment in having to criticize the work of other members of the Parliamentary Counsel's office has apparently not caused difficulties for the officers designated at various times to perform the task of adviser to the committee. The committee is very satisfied with the service that it has received. The present encumbent of the office indicated that it has been possible to preserve a degree of independence from the departmental pressure that would at first sight appear to come from operating within the Parliamentary Counsel's office. It would seem that the operation of this sort of arrangement is dependent markedly upon the person appointed to the task being prepared to criticize colleagues. Also, the Chief Parliamentary Counsel must be prepared to back the right of the officer so to act. It is a curious arrangement that at present seems to be working very well. But it is questionable whether this will always be the case. It concerned the committee itself when it conducted its general inquiry into Subordinate Legislation (see General Report dated 18 March 1970, Parliamentary Paper No D9) The committee in its report, while acknowledging that it had been well served by the arrangement, stated that a conflict of duty could well arise and recommended that the committee be empowered to engage independent counsel to advise it. Nothing seems to have come of this recommendation.

Conclusion. The Subordinate Legislation Committee is clearly a most energetic body that takes its task of review very seriously. It is most unfortunate that the limitations on the Victorian parliament's power of disallowance are somewhat restrictive of the ability of the committee to recommend disallowance of subordinate legislation that offends the criteria for review. It may, however, be that the committee has achieved as much through persuasion as is necessary, but it will almost certainly be the case that on occasions the threat of disallowance will produce a result that criticism, however direct, will not. It would seem that the committee has a satisfactory working relationship with the authorities concerned in the production of subordinate legislation. It was suggested that authorities are tending to appoint senior officers to positions that are specifically responsible for the production of subordinate legislation. This, together with the fact that the committee is, on occasions, consulted prior to the making of subordinate legislation, shows that the authorities take the possibility of criticism from the committee seriously. The number of occasions on which the committee has reported adversely on regulations on the basis that they are beyond power is rather startling. This would seem to indicate that the checking process in the Parliamentary Counsel's office leaves something to be desired and that regulation-making authorities are somewhat cavalier in their attitude towards the exercise of their powers.
Chapter 7

PARLIAMENTARY REVIEW: QUEENSLAND

[127] Power to review delegated legislation. The general power of the Queensland parliament is, like the Commonwealth parliament, limited to the disallowance of "regulations". The relevant provision governing the matter is s 28A of the Acts Interpretation Act which was included in the Act in 1971. Prior to that, the right of disallowance was provided on an Act by Act basis where considered appropriate. Now all regulations must be tabled within fourteen sitting days after publication in the Gazette and, if not so laid, they are deemed to be void and of no effect. The parliament has power to disallow any regulations so tabled by resolution in pursuance of a motion of which notice has been given within fourteen sitting days after the regulations have been laid before it (s 28A(3)). Where a regulation is disallowed, the disallowance is to have the same effect as a repeal of the regulation (s 28A(4)). There is no provision preventing the remaking of a regulation that has been disallowed. By-laws made by local authorities pursuant to the Local Government Act are not subject to parliamentary review. But ordinances made by the City of Brisbane under s 38 of the City of Brisbane Acts have to be laid before the parliament and may be disallowed by a resolution passed within one month after the date on which they are tabled. The rules of the Supreme Court are also subject to disallowance: Supreme Court Act 1921 s 11(4).

[128] Exercise of review power. Until 1975, Queensland had no parliamentary committee that was concerned with review of regulations tabled in the parliament. The power of disallowance was, until this time, used most infrequently. For example, in the period 1966 to 1974 ten motions to disallow regulations were moved. Eight of these were defeated and the remaining two withdrawn. It would seem a fair comment that prior to the appointment of its committee, the Queensland parliament did not exercise any effective control over delegated legislation coming before it.

COMMITTEE OF SUBORDINATE LEGISLATION

[129] Establishment of committee. The committee was established by resolution of the Legislative Assembly (the only house in the Queensland Parliament) on 26 November 1975. Being appointed by resolution has the effect that the committee is in existence for the duration of each parliamentary session only. On the prorogation or dissolution of the parliament, it ceases to exist and has to await reappointment in the following session. If there is a lengthy period between parliamentary sessions, regulations will be made and be in force for some time before the committee has an opportunity to scrutinize them. The Subordinate Legislation Committee first met, after its initial appointment, on 11 February 1976. It then functioned until 14 April 1976 when the parliament was prorogued. Parliament resumed on 24 August 1976 and the committee was reappointed on 8 September 1976. In its first report (Parl Paper A39 - 1976) the committee expressed its concern about the foregoing matters and asked that steps be taken to place it on a permanent footing. It is understood that such action is to be taken.
Composition of committee. The political composition of the committee is three members of the National Party, two members of the Liberal Party and one member of the Australian Labor Party. The chairman is Mr. R A Armstrong, a National Party Member. The membership of the committee altered slightly between the first and second committees but the party balance remained the same. On both committees one member was a lawyer.

Legal adviser. The committee sought and was granted the assistance of legal counsel but, as with Victoria, the adviser is a departmental officer. The first committee had the services of an officer from the Crown Law office. The second has an officer of the Parliamentery Counsel's office to assist it. For the reasons mentioned at [125], this may not prove to be a satisfactory arrangement.

Jurisdiction of committee. The resolution establishing the committee sets out its jurisdiction and powers. The relevant paragraphs of the resolution read:

(4) That it shall be the duty of the Committee to consider all Regulations, Rules, By-laws, Ordinances, Orders in Council, or Proclamations (hereinafter referred to as the Regulations) which under any Act are required to be laid on the Table of this House, and which are subject to disallowance by resolution.

If the Regulations are made whilst the House is sitting, the Committee shall consider the Regulations before the end of the period during which any motion for disallowance of those Regulations may be moved in the House.

If the Regulations are made whilst the House is not sitting, the Committee shall consider the Regulations as soon as conveniently may be after the making thereof.

(5) The Committee shall, with respect to the Regulations, consider—
(a) whether the Regulations are in accord with the general objects of the Act pursuant to which they are made;
(b) whether the Regulations trespass unduly on rights previously established by law;
(c) whether the Regulations contain matter which in the opinion of the Committee should properly be dealt with in an Act of Parliament;
(d) whether for any special reason the form or purport of the Regulations calls for elucidation;
(e) whether the Regulations unduly make rights dependent upon administrative and not upon judicial decisions.

(6) If the Committee is of the opinion that any of the Regulations ought to be disallowed—
(a) it shall report that opinion and the grounds thereof to the House before the end of the period during which any motion for disallowance of those Regulations may be moved in the House;
(b) if the House is not sitting, it may report its opinion and the grounds thereof to the authority by which the Regulations were made.

(7) If the Committee is of the opinion that any other matter relating to any of the Regulations should be brought to the notice of the House, it may report that opinion and matter to the House.

(8) A report of the Committee shall be presented to the House in writing by a member of the Committee nominated for that purpose by the Committee.

(9) The Permanent Head of the relevant Department shall forthwith upon any Regulation, which is required to be tabled in Parliament, being approved by the Governor in Council, forward sufficient copies to the Clerk of the Parliament for the use of the members of the Committee.
(10) The Committee shall have power to send for persons, papers and records, pro­
vided that a Minister or members of the Public Service shall not be obliged to provide
information, oral or written, which has been—
(a) certified by a Crown Law Officer to be information which, if it were sought in
a Court, would be a proper matter in respect of which to claim Crown privilege; or
(b) certified by the responsible Minister, with the approval of the Ministers of the
Crown in Cabinet assembled, to be against the public interest to disclose.

(11) The Committee shall have power to act and, subject to paragraph(10), to send
for persons, papers and records and to examine witnesses whether the House is sitting
or not.

(12) The proceedings of the Committee shall, except wherein otherwise ordered, be
regulated by the Standing Orders and Rules of the Legislative Assembly relating to
Select Committees.

[133] Meetings and procedure of committee. The committee has been in
existence for too short a period for its procedures to have become firmly estab­
lished. It meets at least once, and often twice, a week. It has not yet taken
evidence from witnesses but it has the power to do so: see paragraph (10) of
the resolution establishing the committee. (The Crown privilege exemption in
that paragraph is novel and if misused could restrict the activities of the com­
mittee.) The committee has not consulted private interests affected by the
legislation that it is considering. On the other hand, other members of the
parliament have brought matters relating to regulations to the attention of
the committee. An explanatory memorandum relating to legislation coming
before the committee is supplied to the committee.

[134] Performance of the committee. It is too soon to make any assessment
of the committee's performance. It has tabled one report which was of a gen­
eral nature and related to the committee's first period of office. In that report
it said that it had perused three hundred and twenty regulations "several of
which were found to require further attention by the various Government
Departments". The reasons why this attention was necessary are not disclosed.
The committee has apparently encountered no refusal by departments to
meet the committee's requests. A number of aspects of the committee's devel­
opment will be interesting to observe. It is clear that it needs to be established
on a permanent basis if it is to exercise effective control over delegated legis­
lation. It is to be hoped that appropriate steps are taken to achieve this.
Whether its dependence for legal advice from a governmental officer is
satisfactory only time will tell. Finally, the committee is the only one operat­
ing in a single house legislature (apart from a moribund New Zealand com­
mittee: see [186-187]). This could impose constraints on the committee being
able to obtain parliamentary support if in dispute with a delegated legisla­
tion-making authority.
[135] **PARLIAMENTARY REVIEW OF DELEGATED LEGISLATION**

**CHAPTER 8**

**PARLIAMENTARY REVIEW: SOUTH AUSTRALIA**

[135] **Power to review delegated legislation.** The general right of the parliament to review delegated legislation is given by s 38 of the *Acts Interpretation Act*. The section refers to "regulations" but this expression is, by sub-s (5), defined to include rules and by-laws. The section provides that regulations are to be laid before both houses of the parliament within fourteen days after publication. No sanction is provided for a failure to table the regulations. If either house of the parliament passes a resolution disallowing any regulation, notice of which resolution has been given at any time within fourteen sitting days of the house after the regulation has been laid before it, the regulation is thereupon to cease to have effect. It would seem that the power of disallowance has to be exercised in regard to the whole of a set of regulations; a part of a regulation cannot be disallowed: see further [146]. There is no provision in the section limiting the right to remake regulations that have been disallowed. Similar provision is made by s 72 of the *Supreme Court Act* for the disallowance of rules of the Supreme Court. The disallowance power in relation to local government by-laws represents the one example in Australian parliaments of legislation not taking effect until the period for disallowance has passed. The by-laws are laid before the parliament and may not be submitted to the Governor for confirmation until the period for disallowance has elapsed without a resolution to disallow being passed.

[136] **Exercise of review power.** The South Australian Parliament was the second to establish a committee charged with the duty of scrutinizing delegated legislation. Since the appointment of that committee, review by the parliament of regulations has almost always been stimulated by action taken by the committee. An occasional motion to disallow regulations is moved by other than a committee member, but these are exceptional and are invariably defeated. Motions for disallowance stemming from the committee, on the other hand, are usually passed.

**JOINT COMMITTEE ON SUBORDINATE LEGISLATION**

[137] **Establishment of committee.** The committee was established in 1938 after s 55 of the *Constitution Act* had been amended to enable the making of Standing Orders to establish such a committee. The amendment followed a report of an honorary committee appointed by the government which had comprised members of parliament and representatives of interested bodies. That committee had recommended the appointment of a joint parliamentary committee with powers similar to those of the Senate committee. (Report dated 25 July 1935; Parl Paper No 52 of 1935). The Standing Orders set out the composition and the terms of reference of the committee. The provisions of the Standing Orders have to be read subject to s 55 (1) (g) of the *Constitution Act* which excludes orders made in judicial proceedings from review by the committee.
Composition of committee. The committee comprises three members of each house of the parliament. A quorum of the committee consists of two members from each house. The political composition of the committee under the recent Labor governments has been two Labor party members and one Liberal party member from the House of Assembly and one Labor party member and two Liberal party members from the Legislative Council. While there is no formal policy of seeking members with specific qualifications, the pattern of membership has been for there to be a spread of interests represented by the members. This is of some importance having regard to the way in which the committee operates: see [140-141]. A lawyer is always appointed to the committee as the committee has no independent adviser and looks to its legal member to give guidance on issues of law relevant to the legislation being considered by the committee. Other types of qualifications sought include that of knowledge of labour relations and of farming interests. Members of the committee have usually served for very long periods.

Meetings and procedure of committee. The committee meets once a week during parliamentary sessions and at such times out of session as the chairman considers necessary. The committee frequently takes oral evidence in the course of its review of regulations, departmental witnesses comprising the majority of persons from whom evidence is taken. Where a regulation affects a particular group or organisation, the group or organisation is invited to make representations to the committee. Groups and organisations usually respond to such invitations and, indeed, act without invitation on occasions. Organisations that have appeared before the committee include the Royal Automobile Association of South Australia and bodies representing rural interests. Individuals have on occasions appeared before the committee to express views relevant to particular subordinate legislation. The committee takes evidence from the draftsman of subordinate legislation in circumstances where the department concerned with the preparation of the legislation considers that the matter raised by the committee was a matter that was included in the regulations by the draftsman. The committee does not vote on party lines, its decision usually being reached by consensus.

A feature of the South Australian committee which distinguishes it from other committees of its kind is that where legislation affects a particular area — always, of course, the case with local government legislation and frequently so in relation to certain rural legislation — the committee supplies a copy of the regulations to the member representing that particular area. The member is requested to indicate whether he has any objection to the regulations. The committee expects the member to conduct informal inquiries in his electorate in relation to the legislation and report to the committee if there are objections to it. Where the regulation is of State-wide effect, this action is not taken but the committee will frequently defer immediate action on legislation until one of its members who is familiar with the particular subject-matter of the legislation has undertaken informal inquiries in relation to the operation of the legislation. It is for this last-mentioned reason that an endeavour is made to spread the membership of the committee over a number of fields of interest or expertise. The approach set out is apparently used in particular by country members who are familiar with the effect that legislation may have on rural industry.
This notion that the committee relies upon its own expertise in reviewing regulations is also evidenced by the fact that it is prepared to carry out personal inspections of areas to which regulations said to infringe its review criteria apply. For example, the committee visited the foreshore at Henley Beach to form its own view whether by-laws prohibiting the exercising of horses on the foreshore in the early morning were warranted. The objection had been taken by witnesses before the committee who asserted that no problems were caused to the public by the exercise of horses on the beach at that time and the committee's visit to the beach confirmed this in the committee's mind. The by-laws were subsequently disallowed at the instance of the committee (SA Pari Deb 1973-1974 Vol 1 at 291). Likewise, in the same year, the committee visited Encounter Bay which is about 100 kilometres from Adelaide, for the purpose of determining whether, in their view, by-laws imposing controls over caravan parks were needed. The committee also took evidence from caravan proprietors and from the local council while in the area. Again these by-laws were disallowed at the instance of the committee (SA Pari Deb 1973-1974 Vol 1 at 291).

The committee is not supplied with an explanatory memorandum relating to subordinate legislation but the Crown Solicitor issues a certificate as to the validity of regulations before they are submitted to the Executive Council for approval and this certificate is made available to the committee. The certificate of the Crown Solicitor has not, however, been taken to preclude the committee from questioning the validity of subordinate legislation to which it relates.

**Jurisdiction of committee.** The jurisdiction of the committee is set out in *Standing Order 26* which provides:

26. The Committee shall with respect to any regulations consider —
(a) whether the regulations are in accord with the general objects of the Act, pursuant to which they are made;
(b) whether the regulations unduly trespass on rights previously established by law;
(c) whether the regulations unduly make rights dependent upon administrative and not upon judicial decisions; and
(d) whether the regulations contain matter which, in the opinion of the Committee, should properly be dealt with in an Act of Parliament.

"Regulations" are defined in *Standing Order 19* as meaning regulations, rules, by-laws, orders or proclamations which under any Act are required to be laid before parliament and which are subject to disallowance by the resolution of either house or both houses of the parliament. The effect of this definition is to bring within the scope of the committee's powers of review all subordinate legislation including local government legislation. *Standing Order 27* gives the committee power to report to both houses if it considers that a regulation should be disallowed. If the parliament is not in session, the committee has power to report its opinion to the authority by which the regulations were made. The Standing Order concludes with a provision allowing the committee to bring any other matter relating to any regulations to the notice of the parliament. The committee reviews approximately four hundred pieces of subordinate legislation each year with the major part of its consideration being directed to departmental regulations and local government by-laws.
[144] Reports of the committee. During the period 1970-1975, the committee submitted forty-six reports to each house of the parliament. The reports of the committee are not published as parliamentary papers and, apparently, it is unusual for the committee to set out its reasons for suggesting that the regulations be or be not disallowed in the report. The minutes of the committee's meeting are tabled with the report and it is expected that interested members will glean the reasons for the committee's recommendation from those minutes. On any motion for disallowance of a regulation, it is usual for a member of the committee to speak and to indicate the committee's views on the regulations. In the period mentioned, it would seem that not each report recommended the disallowance of a regulation. A number of the reports indicate that regulations had been reviewed by the committee and objections raised had been remedied by the appropriate authority. On a number of occasions, reports have been, in effect, interim or holding reports. The report has then been used by a member of the committee as a basis for a motion for disallowance which has been moved only because the time for such a motion might otherwise have expired. The review of the regulations referred to in the motion can then proceed less hurriedly. If the committee's investigation is such as to satisfy it that no further action towards disallowance is warranted, it is usual then for the motion based on the committee's report simply to be discharged. It is to be noted that s 38 of the Acts Interpretation Act, which gives each house of the parliament power to disallow regulations, does not provide that if a motion for disallowance is not called on, the regulation is to be deemed to have been disallowed. The motion to disallow must be dealt with by the parliament if disallowance is to occur. However, as the motion is a private member's motion, it has to take its turn along with other private member's business and it is possible for the motion to be lost simply through not having been called on. It would appear that, on occasions, this has happened in that motions were still on the notice paper at the end of a parliamentary session and lapsed with the prorogation of the parliament or the dissolution of the Legislative Assembly.

[145] In the period 1970 to 1975, eleven regulations were disallowed by one or other house of the parliament after report by the committee. In only one of these instances, the disallowance of the Traffic Prohibition (Thebarton) Regulations by the Legislative Council on 18 June 1975 (SA Parl Deb 1974-1975 Vol 3 at 3424), did the government require a division on the disallowance motion. In that case the motion was passed by the opposition majority in the Legislative Council.

[146] The principle grounds on which the committee has acted to recommend disallowance of regulations is not entirely apparent from the debates relating to the disallowance motions. It would not seem that the committee confines itself closely to the grounds of review set out in [143]. Rather it indicates to the house the objections to the regulations and it is on that basis that the house determines whether or not disallowance should occur. It would seem from a perusal of the debates that the most frequent ground of objection is that the regulations unduly trespass on rights previously established by law. The question of general invalidity on ultra vires grounds seems the second most frequent basis of objection. One of the two occasions
in the period 1970 to 1975 on which a motion for disallowance was de­
fated in fact arose on the question of ultra vires. The motion related to the
validity of the *Builders Licensing (Pest Control) Regulations* which it was
suggested were beyond power. The Crown Solicitor had submitted an opin-
ion that the regulations were in fact valid. The motion to disallow the regu-
lations was defeated in the Legislative Council on 22 November 1972 (SA
Parl Deb 1972 Vol 3 at 3307). On another occasion in the period men­tion-
ed, a motion for disallowance of a zoning scheme was also defeated. This
case pointed up a difficulty in the disallowance procedure. Objection was
taken to one aspect only of the whole scheme. However, the view was taken
that it was not possible to disallow part only of a scheme (similarly, part only
of a set of regulations cannot be disallowed). Accordingly, it would have
been necessary to disallow the whole scheme to get rid of the objectionable
portions. A motion to that effect was moved following on an adverse report
from the committee, but, before it was dealt with, the committee in a sec-
ond report apparently recommended that there be no disallowance of the
scheme. The motion to disallow was defeated in both the Legislative Assem-
bly and the Legislative Council (SA Parl Deb 1972 Vol 2 at 2190 and Vol 3
at 3310, respectively). In the Legislative Council the motion resulted in
cross-party voting.

Two other reports to the parliament should perhaps be mentioned. In
1972 the committee pointed out that the *Mines and Works Inspection Re-
gulations* included matters that, when the Act was being debated, the
minister had said would not be dealt with in the regulations. However, the
committee did not move for the disallowance of the regulations. In the same
year, the committee recommended that a proclamation made under the
*Fisheries Act* be amended. The committee conceded that the proclamation
was not technically a matter that it could consider, but it was necessary to
read the proclamation with regulations that were before the committee and
the proclamation was thought to contain matters that were objectionable.
The committee could not move for the disallowance of the proclamation but
it felt obliged to bring the matter to the attention of the parliament.

Performance of the committee. The committee does not regard the
instances in which it has recommended the disallowance of a regulation as
representing its primary achievements. It considers that the better way to
attain its objectives is to persuade the responsible authority to amend regu-
lations that the committee regards as objectionable. It says that it is usual
for a request for an amendment to be met and hence disallowance proceed-
ings are infrequent. The committee also takes the view, as with the other
parliamentary committees, that the fact of its existence and the fact that
regulation-making authorities know that it will be examining their regula-
tions, results in a higher standard of regulation-making than would other-
wise be the case. The committee obviously takes its duties seriously but it
would seem perhaps that too great an onus is thrust on the lawyer member
of the committee and it would be better if it had an independent counsel to
advise it. Nonetheless, the community knows the body exists and uses it to
question the continuance in operation of delegated legislation. Instances of
organizations so acting are frequent and there are cases in which the com-
mittee has acted after a private individual has brought to its attention de-
fects in the legislation (see, for example, *Road Traffic (Mitcham) Regulations* disallowed by the Legislative Council on 12 March 1975; SA Parl Deb 1974-1975 Vol 3 at 2567, 2809 and *Police Offences Regulation* disallowed by the Legislative Council on 26 March 1975; SA Parl Deb 1974-1975 Vol 3 at 3191).

[149] The power to bring matters other than validity issues to the attention of the parliament has been used infrequently — see the examples mentioned in [147]. The usual approach is to go direct to the minister or other authority concerned. The power has been used to suggest such matters as reprinting, etc, of regulations.

[150] The committee insists that it does not question the policy underlying regulations — an example given was that it would not question an increase in fees provided for by regulations. However, the somewhat personal nature of the inquiries that the committee members make in regard to the desirability of legislation—see the examples mentioned in [141]—come very close to questioning the policy underlying the regulations. While it may be asserted that the committee's investigations indicate that it is concerned with the operation of the regulations, it is not always easy to draw the line between the operation of regulations and the reason why they were made in the first place. The committee does not review the subordinate legislation-making sections of the Acts. This is left to individual members to raise in the course of debate on a Bill, if so minded.
Power to review delegated legislation. The right of the parliament to review delegated legislation is to be found in s 36 of the Interpretation Act. The section refers to "regulations" but this term is defined by s 36 (5) to include rules and by-laws. (The Supreme Court Act s 170, also provides that rules of the Supreme Court may be disallowed by the parliament.) The procedure set out in s 36 requires the laying of regulations before each house of the parliament within six sitting days after publication. If this requirement is not complied with, the regulations are not void but merely cease to have effect: presumably from the commencement of the seventh sitting day after publication (s 36 (2)). Either house of the parliament may disallow a regulation by resolution, notice of which has been given at any time within fourteen sitting days of that house after the regulation has been laid before it. There is no provision that the regulation is to be deemed to have been disallowed if the motion is not called on within a specified period. Section 36 also contains a novel provision as far as parliamentary review in Australia is concerned in that it allows the parliament to amend regulations laid before it. Amendment is conditioned upon both houses resolving that the regulation should be amended. If such a resolution is passed, the amendments of the regulation are published in the Gazette and take effect after the expiration of seven days. A similar power in like terms is given to substitute a regulation or part of a regulation in place of a regulation disallowed.

Exercise of Review Power. Western Australia had no committee charged with the duty of reviewing delegated legislation until the passage in November 1976 of the Legislative Review and Advisory Committee Act, 1976. At the time of writing, that Act had not been proclaimed to come into operation. A motion to establish a committee to review subordinate legislation had been moved in the Legislative Assembly in 1967 but the motion was amended to institute an investigation of other like committees with a view to seeing whether the adoption of a general committee system was appropriate for the Western Australian Parliament (Parl Deb WA 1967 at 560-565, 662-682.) The matter came to nothing. The absence of such a committee has probably been a major factor contributing to the Western Australian parliament exercising very little effective review of delegated legislation. For example, in the period 1966 to 1975, 17 motions for disallowance of regulations were moved in the parliament; 13 of these motions were defeated and two withdrawn. Two disallowance motions were passed: one by the Legislative Assembly in 1973, the government not objecting to the disallowance, and the other by the Legislative Council in 1971 when the government was in a minority. In all other cases the disallowance motion was defeated with the members voting on party lines. In relation to the power of amendment, six motions to amend delegated legislation were moved in the period 1966 to 1975. Four of these were defeated in the house in which they were introduced. Of the other two, one was passed by the Legislative Council in 1972 but rejected by the Legislative Assembly. The other was withdrawn after the
government indicated that it would amend the regulations concerned in accordance with the motion. From this it can be seen that the amendment power was used effectively in one case only.

LEGISLATIVE REVIEW AND ADVISORY COMMITTEE

[153] Establishment and composition of committee. The committee that has now been established by Act of the Western Australian parliament is unique in that it is not a parliamentary committee. Section 5 of the Act provides that the committee shall consist of three members appointed by the Governor, one of whom shall be a practitioner as defined by the Legal Practitioners Act, 1893. There is thus no need for there to be a member of parliament on the committee and it is clear from the parliamentary debates on the bill that the government does not intend to appoint a member of parliament to the committee. The only requirement is that there shall be a legal practitioner on it. Members are appointed for a period of five years. The chairman of the committee is also to be appointed by the Governor. There is thus no direct parliamentary control over the membership of the committee. Staff may be appointed to the committee and the committee is permitted to obtain professional or technical assistance for the purpose of enabling it to carry out its functions (s 6).

[153A] Functions of committee. The functions of the committee are broader than those of other committees discussed in this Part. The first function of the committee - and probably that with which it will be primarily concerned - is set out in ss 7 and 8 of the Act. This follows generally the same line as the other committees discussed in this Part. The committee is to consider whether the special attention of parliament should be drawn to any regulation on the ground that:

(a) the regulations appear not to be within the power to make regulations conferred by, or not to be in accord with the general objects of, the Act pursuant to which they purport to be made;
(b) the form or purport of the regulations calls for elucidation;
(c) the regulations unduly trespass on rights or liberties previously established by law or inherent in the traditional freedoms of Her Majesty's subjects in Western Australia;
(d) the regulations unduly make rights dependent upon administrative, and not upon judicial, decisions; or
(e) the regulations contain matter which, in the opinion of the Committee, should properly be dealt with by an Act of Parliament and not by regulations.

Regulations are defined in s 4 of the Act as “any regulation, rule or by-law made under any Act which is or was after the making thereof required to be laid before each House of the Parliament”. (These are specified above at [151].) Where the committee is of the opinion that the special attention of parliament should be drawn to any regulations, it is to forward its report and any recommendation it wishes to make to the presiding officer of each house of the parliament. The presiding officer is to lay the report before the house of parliament immediately. Section 8(3) of the Act requires the committee so to conduct its affairs as to ensure that any report or recommendation concerning a regulation is received by the presiding officers not later than the
expiration of six sitting days after the regulation was laid before the house of the parliament pursuant to the requirements of section 36 of the Interpretation Act.

The second function of the committee is to conduct investigations and report on matters referred to it by either house of the parliament or by the minister. The matters that may be referred to the committee are set out in s 9. It is probably best to set that section out in full:

9 (1) Any Act, regulation or other statutory instrument may be referred by either House of Parliament or the Minister to the Committee for consideration and report on whether the Act, regulation or instrument —

(a) unduly trespasses on rights or liberties previously established by law or inherent in the traditional freedoms of Her Majesty's subjects in Western Australia; or

(b) unduly makes rights dependent upon administrative, and not upon judicial, decisions, or unduly restricts or inhibits rights of appeal against administrative decisions.

(2) Either House of Parliament or the Minister may request the Committee to consider and report upon what principles, if any, might be adopted in the preparation of future legislation either generally or in relation to legislation dealing with specified subject matters in order to reduce the likelihood of such legislation —

(a) unduly trespassing on rights or liberties already established by law or inherent in the traditional freedoms of Her Majesty's subjects in Western Australia; or

(b) unduly making rights dependent upon administrative, and not upon judicial, decisions, or unduly restricting or inhibiting rights of appeal against administrative decisions.

(3) The Committee shall consider any matter referred to it pursuant to subsection (1) or (2) of this section and shall submit a report of its conclusions arising from the examination to the presiding officer of the House of the Parliament which referred the matter to it or the Minister who referred the matter to it, as the case may be.

(4) Each presiding officer shall cause any report received by him from the Committee pursuant to this section to be laid before the House of Parliament over which he presides not later than the next sitting day after he has received the report.

It can be seen that this provision is entirely novel in so far as the committees in the jurisdictions discussed in this Part are concerned. It will be most interesting to see what use is made of this power. If references are forthcoming to the committee under this section, the committee would be in a position to make a valuable contribution to the form of Western Australian legislation.

Powers of committee. The establishment of a non-parliamentary committee required consideration of the compulsory powers that could be exercised by the committee. The parliamentary committees referred to in this Part obtain their powers from the general powers and privileges of the parliament establishing them. The Legislative Review and Advisory Committee Act, 1976 adopts a like approach by giving the committee the same powers in regard to the obtaining of evidence as may be exercised by a committee of a house of the parliament. A failure by a person to comply with a requirement of the committee may be referred to the presiding officer of either house of the parliament and the person may then be dealt with as if his action had been committed in relation to a parliamentary committee, ie, the
parliament may punish him for contempt. There is, however, one express reservation from this position. Section 10 of the Act provides that a person is not to be required or authorised to furnish any information or answer any question relating to proceedings of cabinet or to produce or inspect any document that relates to any such proceedings.

The establishment of this committee is a unique attempt to move away from the idea of having a parliamentary committee to review delegated legislation. This feature of the committee was vigorously attacked by the opposition in the Western Australian parliament as a denigration of the role of the parliament. It will be most interesting to see how the committee functions. There may be advantages in having subordinate legislation reviewed by a non-parliamentary committee in that any question of political involvement in the form of the legislation will be avoided. However, party politics has not intruded into the deliberations of the committees established in the other parliaments. One major problem that may be foreseen is that much of the strength of the committees established in other jurisdictions turns on the fact that parliamentary support for their recommendations has been forthcoming in almost all instances. This has meant that departments whose legislation is adversely commented upon know full well that if the complaints of a committee are not met, the legislation will almost certainly be disallowed. Unless the Western Australian parliament is prepared to give the same backing to this committee as other parliaments have given to their own committees, this key to the success of the other committees will have been lost.
PARLIAMENTARY REVIEW: TASMANIA

[154] Power to review delegated legislation. The general right of the Tasmanian parliament to review delegated legislation stems from s 47(3) of the Acts Interpretation Act. That section requires regulations to be laid before each house of the parliament within ten sitting days after the regulation has been published. The expression “regulation” is defined in s 2A of the Act to include rules and by-laws. This brings local government legislation within the control of the parliament. Either house of the parliament may disallow a regulation pursuant to a resolution of which notice has been given within fifteen sitting days after the regulation is laid before the parliament. Upon disallowance, it is provided that the regulation is to be void and thenceforth to cease to have effect except as regards anything done under it prior to the passing of the resolution (s 47(4)). Section 46(6) of the Acts Interpretation Act allows the parliament to disallow a section, division, or part of a regulation. Where a regulation is disallowed, no regulation the same or substantially the same in effect that is made within the next twelve months takes effect until the regulation has been laid on the table of the house that disallowed it and thirty sitting days of that house have elapsed after the regulation was so laid, unless that house sooner passes a resolution allowing the regulation.

[155] A special procedure is laid down in the Supreme Court Civil Procedure Act s 204 for the disallowance of rules of the Supreme Court. The section requires that the rules be laid before the parliament and thereafter the parliament may present an address to the Governor praying for the annulment of the rules. On receipt of such an address, the Governor may annul the rules, but such annulment is expressed to be without prejudice to any proceedings taken under the rules so disallowed.

[156] Exercise of review power. Motions for disallowance of delegated legislation are moved from time to time in the Tasmanian parliament. During the period 1968 to 1974, motions relating to eighteen regulations were moved in the two houses. In the case of seven of these regulations, motions were moved in both houses. Five regulations were disallowed and five were, in a sense, confirmed by the motion to disallow being negatived. In regard to the rest, the disallowance motions were either withdrawn or not dealt with before the parliament was prorogued or dissolved. All the disallowance motions that were passed had been moved in the Legislative Council — the government not being able to command a majority of supporters in that chamber. Perhaps most noteworthy is that only two of the disallowance motions moved in the period mentioned followed on reports from the Subordinate Legislation Committee. This is unlike the position in other parliaments where most disallowance proceedings are stimulated by a report from a review committee. The Tasmanian practice has come about largely as a result of the approach to its task that is followed by the Subordinate Legislation Committee.
Establishment of committee. The committee was established by the enactment of the *Subordinate Legislation Committee Act* 1969. This legislation was not preceded by an inquiry or any formal report to the parliament although the Victorian Subordinate Legislation Committee was apparently consulted before its Tasmanian counterpart was set up.

Composition of committee. The committee is a joint committee comprising three members from each house. The membership of the committee has been markedly affected by the somewhat unusual political composition of the Tasmanian Legislative Council. At the time of writing, seventeen of the nineteen members of the Council are independents, the remaining two being Australian Labor Party members. To take account of this, the committee comprises three independent members from the upper house and two government and one opposition member from the House of Assembly. Mr. Lowrie, who has been on the committee since its inception, is one of the independent Legislative Councillors and, at the time of writing, is one of two lawyers on the committee. There seems to be no policy of seeking members with legal qualifications for the committee. Two of the present members have, however, a particular interest in by-laws. Mr. Carins, who has been the chairman of the committee since its establishment, is the President of the Municipal Councils Association and Mr Bessell is the opposition spokesman in charge of by-laws. Apart from those two appointments there is no specific expertise among the members. The duration of membership of members other than Messrs Carins and Lowrie has been fairly short but in a small parliament the size of the Tasmanian parliament, this is not surprising. Section 3 of the *Subordinate Legislation Committee Act* 1969 precludes the President of the Legislative Council, the Speaker of the House of the Assembly, the Chairman of Committees of either house and a Minister of the Crown from membership of the committee. Members of the committee are appointed at the commencement of each parliament and hold office for the duration of the House of Assembly.

Legal adviser. The committee has, since 1974, been provided with the services of a lawyer in private practice to whom all subordinate legislation is forwarded and who advises the committee whether or not the legislation infringes any of the statutory grounds of review. The committee rates the assistance of its adviser very highly and, while not entirely dependent upon the matters that he points out, nevertheless appears to rely fairly heavily on his advice. This is particularly so in regard to the question whether the subordinate legislation is within power.

Meetings and procedure of committee. The committee meets every Tuesday when parliament is in session and is convened out of session when there is an agenda of sufficient length to justify a meeting. The committee's inquiries often involve the taking of oral evidence. Departmental officers form the majority of witnesses appearing before the committee but authorities concerned with the making of by-laws — statutory corporations and local government bodies — are also required to appear before the committee. In one respect the committee adopts an approach that is unique in Australia.
While other committees are willing to consider representations by bodies claiming to be affected by subordinate legislation, the Tasmanian committee actively seeks the views of outside bodies. Whenever regulations affect an identifiable organisation, the organisation is invited to give evidence to the committee if the committee thinks this will be of use to it in its deliberations. Bodies such as the Farmers' Federation, Fishermen's Cooperative, Outdoor Advertisers Association, Teachers' Federation and Police Association have been invited to comment on regulations under review by the committee. The parliamentary draftsman is not called to give evidence before the committee. If objection is made to a regulation, the department is invited to take up the matter with the draftsman separately. The Tasmanian committee is also unique among Australian subordinate legislation committees in, on occasions, voting on party lines in regard to a particular piece of legislation. This practice mainly emanates from the House of Assembly members who, apparently, feel a greater constraint is imposed upon them to vote in accordance with the wishes of the government in supporting delegated legislation.

The committee is not supplied with an explanatory memorandum relating to subordinate legislation but it is the practice in Tasmania for a short statement of the general effect of statutory rules to be prepared by the parliamentary counsel and published in the Gazette. This statement is available to the committee and presumably serves much the same purpose as the explanatory memorandum supplied to the Senate, Victorian, Queensland and Northern Territory committees.

Jurisdiction of committee. The jurisdiction of the committee is set out in s 8 of the Subordinate Legislation Committee Act 1969. That section provides:

8 — (1) The functions of the Committee are —
(a) to examine the provisions of every regulation, with special reference to the question whether or not —
(i) the regulation appears to be within the regulation-making power conferred by, or in accord with the general objects of, the Act pursuant to which it is made;
(ii) the form or purport of the regulation calls for elucidation;
(iii) the regulation unduly trespasses on personal rights and liberties;
(iv) the regulation unduly makes rights dependent on administrative decisions and not on judicial decisions; or
(v) the regulation contains matters that, in the opinion of the Committee, should properly be dealt with by an Act and not by regulation; and
(b) to make such reports and recommendations to the Legislative Council and the House of Assembly as it thinks desirable as the result of any such examination.

(2) The Committee, in its discretion, may, in accordance with sub-section (1) of this section, examine the provisions of any regulation that took effect before the commencement of this Act and make such reports and recommendations with respect thereto as it considers desirable.

This section must be read with s 2 of the Act which defines "regulation" in such a way as to embrace all subordinate legislation that is required by law to be laid before both houses of parliament but excludes rules of court. The effect of this provision is to bring within the ambit of the committee's scrutiny all subordinate legislation, including local government by-laws, but excluding proclamations, orders and so on. To this extent it departs from the
definition of "statutory rule" in the \textit{Rules Publication Act} 1953 which is discussed at [54].

[163] It will be noted that s 8(2) formally provides the committee with jurisdiction to look at regulations that have taken effect before the committee was established. The committee, in fact, does look at old regulations when it is considering current amendments to those regulations. If it considers that the regulations contain undesirable provisions, it reports accordingly. An example of this is provided by the report of the committee dated 23 June 1970 relating to the \textit{Dental Amendment Regulations} 1970. The committee indicated that existing regulations under the \textit{Dangerous Drugs Act} were making it difficult for dentists to fulfil the obligations imposed by the regulations because of obscurities in the legislation. The report on City of Glenorchy By-law No 121 tabled on 23 June 1970 recommended that all existing municipal by-laws be reviewed to ensure that the by-laws provide for maximum penalties that were in accordance with the Act — this being the basis of objection to the by-law then under consideration by the committee.

[164] Reports of the committee. The committee reviews approximately four hundred and twenty-five pieces of subordinate legislation each year. Its reports are published and are available to the public. They were supplied readily on request. Apart from one general report dated 19 September 1972, the reports have dealt with specific regulations that the committee considered warranted drawing to the attention of the parliament. The reports, while brief, clearly set out the concern of the committee with the subordinate legislation instrument under review. The general report contained a summary of the first seventeen reports of the committee. A further eight reports had been tabled up till the end of 1976. The committee tends not to report formally to the parliament unless there is a matter of substance or principle to raise. The result of this, in recent years, has been that very few reports have been tabled as the committee has found that subordinate legislation making authorities have complied with suggestions of the committee for amendment to their legislation.

[164A] Performance of the committee. It is clear from a study of the committee's reports that the committee views its role very much as one of overseer of delegated legislation in Tasmania. While the Act determines certain bases on which the committee is to review legislation and while those bases are indeed referred to by the committee, there are a number of reports in which the committee has been critical of delegated legislation on grounds that bear only a marginal relationship to the grounds of review set out in the Act. By far the most frequent ground of complaint by the committee is that the form or purport of the subordinate legislation calls for elucidation. Examples are the report on the \textit{Traffic (Miscellaneous) Amendment Regulations} 1970 tabled on 2 June 1970 where it was considered that regulations requiring the installation of seat belts in cars did not make clear to a car owner how many belts were to be provided nor what standard of belt had to be supplied. The expression "skin-diver" as used in the \textit{Circular Head Marine Board By-law} No 22 was criticized as uncertain in meaning in the report tabled on 20 July 1971.
The second most frequent ground of complaint has been that the regulations exceeded the power in the Act. An attempt, for example, to impose, by means of by-laws regulating caravan parks, an obligation on a person not to fire or discharge any firearm or throw any missile on "any adjacent land" was considered to be *ultra vires*. (Report tabled on 23 June 1970 relating to City of Glenorchy By-law No 121.) In its report tabled on 19 September 1972 relating to by-laws of the Evandale Municipality and the Brighton Municipality, the committee was of the opinion that by-laws relating to the slaughtering of animals were *ultra vires* the *Local Government Act* in that they applied to home slaughtering where the meat was intended for home consumption and not for sale.

The other grounds of review have been used most infrequently. Of greater interest is the fact already mentioned that the committee, on occasions, criticizes regulations for reasons that do not appear to fall directly within the grounds of review set out in s 8(1)(a). It is to be noted that s 8(1)(a) requires the committee to examine the provisions of every regulation "with special reference" to the matters set out in the section. It does not purport to limit the committee to review regulations solely on those grounds. Clearly the committee has interpreted the section in this way. Reports have, for example, been made in relation to the need for complementary legislation to be expedited in order to provide a comprehensive code of control of which the regulations before the committee can form part only (see report on *Building Amendment Regulations* dated 2 June 1970 and on *Dental Amendment Regulations* dated 23 June 1970). Suggestions have been made that persons affected by a regulation should receive adequate notice of amendments to those regulations, particularly when immediate obligations are imposed on persons by those amendments (see report dated 8 September 1970 relating to amendments to the *Racing and Gaming Regulations* whereby certain starting price limits were gazetted on a Wednesday to become operative on the following Saturday and no official notice was given to the bookmakers who were obliged to comply with the regulations). The committee has also suggested that matters contained in orders should be provided for by regulation to allow parliamentary scrutiny (see report on *Food and Drugs Amendment Regulations* dated 13 October 1971). On occasions, the committee has recommended the adoption of model by-laws when critical of provisions included in local government by-laws (see reports dated 30 June 1970 and 19 November 1970).

The committee asserts that it cannot and does not question the policy underlying a set of regulations. However, the line between elucidation of a regulation and the content of that regulation can sometimes be a fine one. Certainly the committee has not been reluctant to suggest that certain amendments should be made to regulations or to suggest that the effect of a regulation may be detrimental. An example of this is provided by the committee's report on the *Child Welfare Amendment Regulations 1970* tabled on 2 June 1970. The committee pointed out that alterations to the regulation resulted in the loss of liaison between the police and child welfare departments which had hitherto enabled the trained officers of the latter department to consider the need for preventive supervision or other action being taken in relation to persons prosecuted in the Children's Court. Like-
wise the reports on the *Poisons Amendment Regulations 1971* tabled on 21 April 1971 and the *Poisons Amendment Regulations (No 2) 1971* tabled on 28 September 1971 were critical of the manner in which controls were imposed on dentists in relation to the prescription of drugs. In regard to the second case, the committee felt obliged "in the public interest" to recommend that the regulations be disallowed. It would seem from the report that the committee was concerned more about the manner of operation of the regulations than their form. There seemed little doubt what their meaning was and it was this meaning that caused the committee concern. (A motion for disallowance of the regulations was moved on 8 July 1971 but withdrawn on 22 July 1971.)

The committee does not comment on the regulation-making power contained in Acts and it was suggested that to do so would be regarded as outside the committee’s powers. It is left to individual members of the committee to raise such an issue in the parliament – it is not a committee matter.

Regulations may be disallowed by either house of the parliament by virtue of s 47(4) of the *Acts Interpretation Act*. The committee itself does not move for disallowance of a regulation, this being regarded as not within its power. The committee has in fact only suggested that a regulation be disallowed on one occasion – that which was referred to at [167]: the *Poisons Amendment Regulations (No 2) 1971*. The view taken is that if a motion for disallowance is to be moved this should be done by a member acting in his private capacity. It is fairly common for a member of the committee, particularly the chairman, to so move even though the committee may not have reported adversely on the regulation concerned. This is in part due to the fact that the committee does not feel constrained to complete its investigation of a regulation within the disallowance period. It is not uncommon for the legal adviser’s report on a regulation not to be given to the committee until the disallowance period has passed. The committee does not seem to be concerned by the fact that any criticism that it makes may not be enforceable by way of disallowance of the regulation under review. As mentioned previously, the committee regards its role primarily as that of critic and overseer of subordinate legislation and endeavours to achieve that result by pointing out deficiencies in the legislation and leaving it for the legislation-making authority to correct the deficiencies by bringing in amending legislation.

The committee’s reports bear this out in that they usually take the form of suggesting that legislation be amended or repealed because the committee considers it deficient in some way. On occasions, the somewhat curious expression is used that the operation of the regulations should be suspended: see, for example, the report tabled on 8 September 1970 relating to the *Tourist and Immigration Department Amendment Regulations 1970*; the report on the *Poisons Amendment Regulations 1971* tabled on 21 April 1971; and the report on the *Sea Fisheries Amendment Regulations 1971* tabled on 13 October 1971. This notion of suspension of a regulation is returned to below when the operation of s 9 of the Act is being discussed. It would seem from the reports that authorities take seriously the committee’s
recommendations and act to meet its requests. The report of the committee
tabled on 11 September 1973 relating to the Municipality of Sorell By-law
No 19 Caravan Parks indicates one occasion on which the committee's
request that a regulation be amended was declined by the authority con­
cerned. The report sets out the correspondence between the council and the
committee and it is understood that the council ultimately agreed to meet
the committee's request. It is understood that there has been one other
occasion on which a similar difference of opinion arose between an authority
and the committee, but again the committee's views prevailed.

The committee has not always voiced adverse criticism of regulations
that have come to its attention. In its report tabled on 19 November 1970
relating to a by-law of the Queenstown Municipal Council, the committee
praised the by-law and suggested that it could form a model by-law for
adoption by all municipalities. Again, this approach demonstrates the com­
mittee seeing its role as overseer of delegated legislation.

Section 9 of the Subordinate Legislation Committee Act 1969 gives
the committee a power which is not to be found in other legislation relating
to subordinate legislation committees. The section provides:

9 If, in the opinion of the Committee, a regulation that is examined by the Com­
mittee should be amended or rescinded and the Committee's report thereon is
adopted by the Committee during any adjournment or recess, the Committee may
cause a copy of its report to be sent to the authority by whom or by which the re­
gulation was made and on receipt thereof that authority shall forthwith —
(a) amend the regulation in the manner indicated by the Committee, or, if the
Committee so recommends, rescind the regulation; or
(b) take such action as may be necessary for the purpose of suspending the operation
of the regulation, and ensuring that the operation thereof remains suspended, until
both Houses of Parliament have dealt with the report.

There are some curiosities in this section which warrant mention. It is to be
noted that the committee sends a copy of its report to the authority before
that report is tabled in the parliament — something which is most unusual
in parliamentary procedural terms. The right of the authority is then to do
one or other of two things — it may amend the regulation or rescind it in
the manner in which the committee has recommended or it may suspend the
operation of the regulation until both houses of the parliament have dealt
with the report. It was suggested that the second is the more likely course of
action for an authority to take and that this may not achieve the desire of
the committee, particularly if the committee is merely seeking an amend­
ment to a set of regulations which are otherwise necessary and desirable. In
addition, the requirement is that the suspension is to be until both houses
have dealt with the report. Since the report itself cannot lead to the dis­
allowance of a regulation, it is assumed that dealing with the report merely
means passing a resolution to indicate that the report has been noted. Once
this has been done, the regulation could then revive with its defects still in
it. The section has been used on two occasions. In both instances the com­
mittee succeeded in persuading the body concerned that it should comply
with the committee's request to rescind the regulation. An initial recali­
trant attitude on the part of one of the authorities concerned evoked a res­
ponse from the committee that a failure to comply with s 9 of the Act would
be brought to the attention of the parliament as constituting a breach of parliamentary privilege. This threat apparently produced the result desired. Whether or not a failure to comply with a direction of the committee constitutes a breach of parliamentary privilege is somewhat uncertain. However, the Tasmanian parliament has the same powers and privileges as the House of Commons and if the parliament chose to support the committee's action and treated the conduct as a breach of privilege, it would be unlikely that the decision could be questioned in a court of law: *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157.

**Conclusion.** The committee is obviously an active body and its members take their job most seriously. It is interesting to note that the committee does not see its role in quite the same light as do the other delegated legislation committees in Australian parliaments. The other committees, except perhaps that in Victoria, direct their inquiry more towards whether the power of disallowance should be invoked. The Tasmanian committee, in pursuing a role of general supervisor of subordinate legislation, undoubtedly performs an invaluable service that can be regarded quite properly as an important function of the legislature. Whether the committee should take a more active role in bringing regulations regarded as deficient to the attention of the parliament, thereby enabling disallowance action to be taken, is very much a question of approach. It would seem that the Tasmanian committee, like its Victorian counterpart, achieves as much by suggestion and persuasion as would be obtained if a more destructive role were assumed.
CHAPTER 11

PARLIAMENTARY REVIEW: NORTHERN TERRITORY

[174] Introduction. The Northern Territory legislature has followed a pattern familiar in colonial and territorial development of first being an advisory body only, then having limited legislative powers, and finally being granted the power to legislate generally. It has also followed the customary pattern in consisting initially of members some of whom were nominated by the government and some of whom were elected. At first the nominated members formed the majority; stage two was for the nominated members to be in a minority; stage three, which was attained in 1974, was for the Assembly to be fully elected. The legislature was formerly termed the Legislative Council but is now known as the Legislative Assembly. The latter expression will be used here to embrace the former.

[175] Power to review delegated legislation. Section 15 of the Interpretation Ordinance 1931 requires regulations made under an ordinance by the administrator to be laid before the Assembly on the first sitting day of the Assembly after the making of the regulations. If such regulations are not laid, they are to be void and of no effect. This requirement of, as it were, immediate laying is much more stringent than that which applies in any other jurisdiction in Australia. The Assembly has the right to pass a resolution, of which notice has been given at any time within fifteen sitting days after a regulation has been laid before the Assembly, disallowing the regulation or any part of the regulation. The disallowance is to have the same effect as a repeal of the regulation or part of the regulation. Section 16 of the Ordinance prohibits the remaking of regulations in like form to those disallowed within six months after the disallowance unless the Assembly rescinds its resolution to disallow the regulations. It should be mentioned that up till 1973, s 15 of the Interpretation Ordinance permitted the minister to disallow regulations made by the administrator under an ordinance. This power was exercised from time to time but has now been repealed. Section 15 of the Interpretation Ordinance refers only to “regulations”. Some other Northern Territory ordinances which empower the making of delegated legislation make specific provision for tabling of the legislation and for its disallowance by the Legislative Assembly: see, for example, Ports Ordinance s 29; National Parks and Gardens Ordinance s 22.

[176] Exercise of review power. It was only after the elected members of the former Legislative Council were permitted majority status that any effective control of delegated legislation could be exercised by the Council. The Council recognised that the best way to carry out this function was to set up a committee.

SUBORDINATE LEGISLATION AND TABLED PAPERS COMMITTEE

[177] Establishment of committee. In 1969, the then Legislative Council amended its Standing Orders to provide for the appointment of a Standing Committee on Subordinate Legislation and Tabled Papers. The Standing
Orders adopted by the Legislative Assembly in 1974 make like provision. The committee is appointed at the commencement of each Assembly.

[178] Composition of committee. When first established, the committee comprised three members of the Legislative Council. The membership has been increased to five in the Legislative Assembly. Party representation on the committee has varied markedly. The first committee comprised two Labor Party members and one Country Party member. The second committee comprised one Labor Party member, one Country Party member and one Independent. The third committee (the first of the Legislative Assembly) comprised four Country-Liberal Party members and one Independent member. The reason for the heavy representation of the Country-Liberal Party on the third committee stems from the fact that members of that party were returned in nearly all the electorates in the Northern Territory in the election held in 1974. The committee has had a lawyer among its members from its inception. Mr Ward (now Mr Justice Ward of the Northern Territory Supreme Court) was a member and chairman of the first two committees. Mr Withnall, the Independent member on the committee, is a barrister. He was elected chairman of the Assembly committee.

[179] Meetings and procedure of committee. The meetings of the committee are determined by the number of papers received and the nature of papers or regulations involved. Meetings seem to be dictated more by the existence of a sufficient agenda rather than there being a regular pattern of meetings. The first and second committees were each in existence for a period of three years. The first committee met on thirteen occasions and the second on twenty-two. The Assembly committee had met on four occasions up till the middle of 1976. The committee has a general power to send for persons, papers and records and to sit during any adjournment of the Assembly and to adjourn from place to place. The power to summon witnesses is exercised to call departmental officers before the committee to provide explanations relating to the matters being considered by the committee. The parliamentary draftsman has not been called before the committee although information has been sought from him from time to time. Private individuals and interest groups have not been called to give evidence to the committee although it is contemplated that this could occur if the committee thought it desirable to do so. The committee has, on at least one occasion, examined regulations after receiving complaints about their operation from private bodies. In the particular case, criticism of Explosives Regulations by mining companies was found to have been based on a misapprehension as to the meaning of the regulations.

[180] Jurisdiction of committee. The committee's jurisdiction is different from that of other committees in Australia in that it extends to a review of tabled papers as well as subordinate legislation. In regard to subordinate legislation, the committee's terms of reference are set out in Standing Order 19 of the Legislative Assembly. The review criteria have clearly been based on those applicable to the New South Wales Legislative Council committee: see [102]. The Standing Order provides as follows:

The committee shall, with respect to regulations, rules and by-laws consider —

(a) whether the regulations, rules or by-laws are in accordance with the general
objects of the Ordinance pursuant to which they are made;
(b) whether the regulations, rules or by-laws trespass unduly on personal rights and liberties;
(c) whether the regulations, rules or by-laws unduly make rights and liberties of citizens dependent upon administrative and not upon judicial decisions;
(d) whether the regulations, rules or by-laws contain matter which in the opinion of the Committee should properly be dealt with in an Ordinance;
(e) whether the regulations, rules or by-laws appear to make some unusual or unexpected use of the powers conferred by the statute under which they are made;
(f) whether there appears to have been unjustifiable delay in the publication or laying of the regulations, rules or by-laws before the Assembly;
(g) whether for any special reason the form or purport of the regulations, rules or by-laws call for elucidation.

The Standing Order then goes on to provide what the committee is to do if it considers any of these criteria offended:

The Committee, if it is of the opinion that any of the rules, regulations, or by-laws ought to be disallowed —
(a) shall report that opinion and the ground thereof to the Assembly before the end of the period during which any notice of the motion for disallowance of those regulations, rules or by-laws may be given in the Assembly; and
(b) if the Assembly is not sitting, may record its opinion and the grounds thereof to the authority by which the regulations, rules or by-laws were made.

In regard to papers tabled before the Assembly, the Standing Order provides:

The Committee, if it is of the opinion that any matter relating to any paper which is laid upon the Table of the Assembly should be brought to the notice of the Assembly, may report that opinion and matter to the Assembly.

It can be seen that the committee’s jurisdiction does not extend to commenting on the empowering provision in ordinances. The committee has not claimed the right to exercise such jurisdiction. Nor does the committee have power to report to the Assembly on general issues such as the reprinting, etc, of regulations. The committee would only so act if the question was specifically referred to it by the Assembly or a paper tabled in the Assembly dealt with such a question.

[181] Assistance to Committee. Research assistance for the committee is provided by the Clerk of Committees but the committee does not have an independent legal adviser. It is to be noted that the chairman of the committee since its inception has been a lawyer and the general task of considering the legal effect of regulations has fallen on this person. An explanatory memorandum purporting to set out the effect of each set of regulations is forwarded to the committee. However, on a number of occasions, the committee has been critical of the explanatory memorandum in that it has either not sufficiently explained the effect of the regulations or, worse, has misrepresented their effect.

[182] Reports and operation of committee. The committee has submitted thirty-eight reports in the period since its establishment in March 1969 to 30 June 1976. This figure is somewhat misleading as far as the number of regulations drawn to the attention of the Assembly is concerned as many of
the reports refer to a number of regulations. In most cases the reports do not recommend the disallowance of regulations but point out defects in them that warrant administrative attention. For example, in its tenth report to the Council tabled on 11 April 1973, the committee noted that there was some vagueness in defining the specific areas of Ayers Rock and Mount Olga over which the regulations purported to impose control and the committee suggested that a greater precision was warranted. In its twelfth report tabled on 30 October 1973, the committee pointed out that by-laws of the Municipality of Darwin appeared to have been taken from some other legislation without sufficient attention being paid to the need to define certain terms used in the by-laws or to adapt the by-laws to the conditions that existed in Darwin. In its third report to the Legislative Assembly tabled on 21 October 1975, the committee suggested that certain police arbitral tribunal determinations referred to the wrong regulations. It also suggested that the practice of legislating by reference should, in any case, be avoided. In its fifth report to the Assembly tabled 1 June 1976, the committee considered that regulations to control hang-gliding in reserves were perhaps not within the power given by the ordinance under which the regulations were made but suggested, not that the regulations be disallowed, but that the ordinance be amended to put the validity of the by-laws beyond doubt. Examples of this kind and general comments included in the reports indicate that the Northern Territory committee, like those of the State parliaments, operates primarily by suggestion for amendment of delegated legislation rather than acting to disallow legislation in every case.

The committee has, however, recommended the disallowance of regulations on nine occasions since its establishment. The Legislative Council or Assembly has acted on the committee's recommendation on eight occasions. Examples are as follows:

1. Amendments of the Crown Lands Regulations; fourth report to Council tabled 2 August 1972: the committee considered that the regulations were drafted in such wide terms as to defeat the whole purpose and requirement of the ordinance under which they were made. In particular, they unduly extended the administrator's powers in relation to the forfeiture of land. The committee considered that the regulations were beyond power and therefore offended para (a) of the committee's review criteria. The committee also considered that if the administrator was to be given these powers, they should be included in the ordinance itself — the regulations was therefore objectionable under para (g) of the committee's review criteria.

2. Fisheries Regulations; tenth report of committee tabled 11 April 1973: the committee considered that provisions of the regulation that penalised the possession of fish listed in the regulations was beyond the power given by the ordinance and was also oppressive. Criteria (a) and (b) were thereby infringed.

3. Veterinary Surgeons' Regulations; fourth report to Council tabled 19 November 1969: the regulations changed the qualifications for registration of veterinary surgeons by limiting markedly the institutions from which a qualification would be recognized. The committee considered that the institutions listed in the regulations did not conform with the definition of pre-
scribed institution in the ordinance and that the regulations also had the effect of debarring from registration persons who had appropriate qualifications. Criteria (a) and (b) would seem to have been contravened.

The one occasion on which the committee's recommendation for disallowance was not taken up by the Legislative Council was the subject matter of the seventh report of the committee tabled on 5 March 1970. The committee objected to an amendment of the *Fisheries Regulations* which removed a requirement that forms be set out in the regulations and empowered the administrator to determine the content of such forms. The committee considered that it was undesirable for the nature of the forms that had to be completed pursuant to the regulations to be removed from the supervision of the Legislative Council. It was claimed that this would allow an over-zealous person to design a form with a large amount of detail that could cause hardship to the persons completing it — and there was a penalty of $100 for failing to furnish appropriate forms. This report was the subject matter of vigorous criticism by the nominated members of the Legislative Council. It is clear from the debates (NT Deb 12 March 1970 at 275-285) that the government officials who were the nominated members of the Council did not like the approach of the committee on matters such as the delegation of power to the administrator. They considered that the committee was setting too high a standard and interesting itself in too much governmental detail. No motion to disallow the regulations was moved and perhaps the criticism of the nominated members was justified in regard to the particular regulations. However, the committee was clearly endeavouring to establish a matter of principle and the issues that it canvassed in its report are issues that have been at the forefront of criticism by other parliamentary committees concerned with the review of delegated legislation. The response of the nominated members of the Council was typical of that of governmental officials when first faced with having to prepare legislation that does not offend the standard criteria under which parliamentary committees review delegated legislation. The committee seems not to have had doubts cast upon its role after this initial reaction.

**Performance of committee.** It is not easy to assess the performance of the committee. It has not been functioning for very long and for the period from 1969 till 1974 it was operating within a Legislative Council that was not fully elected. It is apparent from the reports of the committee that, in the absence of the committee's review, regulations would almost certainly have continued in operation that were *ultra vires*; that interfered with persons, rights and liberties; and that, in other words, contravened the review criteria set out at [180]. One matter that the Northern Territory committee does which could perhaps be followed by other committees is to publish formally a list of regulations that the committee has reviewed and found not to offend its review criteria. (The South Australian committee also follows this practice.)
[185] Power to review delegated legislation. Until 1962 there was no general requirement that delegated legislation be laid before the New Zealand parliament. Individual Acts on occasions so required but such provisions were rare. In 1962 a Select Committee of the House of Representatives tabled a report (Parl Paper I 18) recommending that all regulations within the meaning of the *Regulations Act* 1936 should be tabled in the parliament. This recommendation was adopted by the insertion of s 8 in the *Regulations Act*. That section provides as follows:

"8. All regulations made after the commencement of this section and printed and published pursuant to this Act shall be laid before Parliament within twenty-eight days after the date of the making thereof if Parliament is then in session, and, if not, shall be laid before Parliament within twenty-eight days after the date of the commencement of the next ensuing session".

The meaning of the expression "regulations" was set out at [60]. The effect of that definition is to bring before the parliament a wide range of instruments of delegated legislation. However, it is to be noted that no consequences are visited upon a failure to table the regulations and the provision is in fact, treated as directory and not mandatory. More striking, however, is the fact that the parliament is given no power to disallow the regulations so tabled. Somewhat curiously the Select Committee on Delegated Legislation did not discuss whether such a power was warranted. In its report, it referred to the desirability of a review committee of the parliament (see para 26) and it endorsed the notion of statutory confirmation of certain regulations (see para 19) but it seemed to consider that it was sufficient for the regulations to be available for debate in the house rather than that the parliament should be able to take any positive action in regard to the continuance in force of the regulations.

[186] The committee did propose that a parliamentary committee be charged with the duty of looking at regulations if so requested by the parliament. The result of this recommendation was the adoption of Standing Orders 378 and 379. Those Standing Orders provide:

378. Statutes Revision Committee — At the commencement of every Parliament a Statutes Revision Committee shall be appointed to consider all Bills containing provisions of a technical legal character which may be referred to it; and to consider any regulation within the meaning of and published pursuant to the Regulations Act 1936 which may be referred to it, with a view to determining whether the special attention of the House should be drawn to the regulation on any of the following grounds:

(a) That it trespasses unduly on personal rights and liberties:
(b) That it appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made:
(c) That for any special reason its form or purport calls for elucidation:

The Committee to have power to sit during any adjournment or recess; to require any Government department concerned to submit a memorandum or to depute a
witness for the purpose of explaining any regulation which may be under its consideration; and to report to the House or the Government from time to time.

379. Delegated legislation — Any regulation within the meaning of and published pursuant to the Regulation Act 1936 may be referred to the Statutes Revision Committee during an adjournment or recess by the Chairman of that Committee, who may summon the Committee to meet for the purpose of considering that regulation:

Provided that if five members of the House request that any such regulation be referred to the Committee for consideration, the Chairman shall summon the Committee at the earliest convenient time:

Provided, also, that if it is desired to refer a regulation to the Committee at a time when there is no Chairman or the Chairman is absent from New Zealand, the Clerk of the House shall summon the Committee if requested to do so by five members of the House.

It is to be noted that Standing Order 379 contemplates that the Chairman of the committee can act during an adjournment or recess without having to wait for a reference from the parliament.

Exercise of review power. The limited ability of the New Zealand parliament to exercise any control over regulations is forcefully pointed up by the fact that the Statutes Revision Committee has had only one regulation referred to it since the adoption of Standing Orders in 1962. The Committee failed to report in regard to that regulation. This lack of activity has not been because the government has used its numbers to prevent regulations being referred to the committee. Motions for referral have simply not been moved. It can be seen from this that parliamentary review in New Zealand is almost non-existent. It has been suggested that the parliament is content to rely on the certificate of the Attorney-General (see [61]) to ensure that oppressive regulations are not made. The experience in Australia does little to justify this faith.

One method of parliamentary control over regulations exercised on an occasional basis in New Zealand that should be mentioned is that, under a few Acts, regulations made pursuant to the Acts expire at the end of the parliamentary session unless confirmed by Act of parliament. For regulations under such Acts to be kept in force, annual confirmation by statute is therefore necessary. Examples are the Agricultural (Emergency Powers) Act 1934 and the Primary Products Marketing Act 1953.
PARLIAMENTARY REVIEW: CONCLUSION

CHAPTER 13

PARLIAMENTARY REVIEW: CONCLUSION

Introduction. The preceding chapters demonstrate two things. First that the extent of parliamentary review of delegated legislation varies between the various jurisdictions. This variation is affected markedly by the existence of parliamentary committees to review delegated legislation and by the performance of those committees. Secondly, that the executive frequently makes delegated legislation containing undesirable provisions. This second fact indicates the need for parliaments to check the way in which delegated legislative power is being exercised. It was suggested at [16] that one of the safeguards that must be adopted to ensure that a delegate does not misuse legislative power was for a parliament to ensure that appropriate means were available to it to review delegated legislation. This safeguard cannot be said to exist in all the jurisdictions examined yet the need for it is demonstrated by the nature of some of the delegated legislation that has been questioned in those jurisdictions where the safeguard does exist. This chapter assumes that parliamentary review of delegated legislation is essential and considers the way in which such review might operate. It is convenient first to gather together for comparative purposes some of the common features of the various committees in the Australian parliaments. It will be seen that the performance of a committee depends little upon institutional or jurisdictional matters.

House in which committee established. The Commonwealth and New South Wales committees are established in the upper house of the parliament. The Victorian, South Australian and Tasmanian committees are joint committees comprising members of both houses. The Queensland, Northern Territory and New Zealand committees, are committees of the only house of the parliament. It is worth noting that the Commonwealth committee was established in the Senate on the recommendation of a select committee which quoted evidence given before it by a Mr Blakburn who said:

As your chairman pointed out in the Senate debate, the Commonwealth Parliament makes provision for the disallowance of statutory regulations by vote of either house ... The House of Representatives is not likely to do that work well or, in fact, to do it at all. Upon its vote turns the fate of the ministry. The regulation is made by the ministry, and a proposal for its disallowance would certainly be treated as a vote of want of confidence, and would be tested on party lines. No ministry depends upon the vote of the Senate, and it is quite likely that in that chamber a regulation would be considered on its merits.

While this reasoning may be correct in regard to the Commonwealth parliament (except in so far as it suggests that the ministry is dependent upon its ability to control the voting in the House of Representatives and not the Senate cf the dismissal of the Labor government in 1975), it is certainly not the experience in other parliaments that the committee to review subordinate legislation can operate effectively only if confined to upper house membership. The only other upper house committee, that in New South

1 Parl Papers No S 1 1929-1931 at 25
Wales, has been the least effective of the parliamentary committees. The joint committees in Victoria, Tasmania and South Australia are as effective as the Senate committee. On this question it will be interesting to see how the Queensland committee develops, it being a committee of the only house and therefore that in which the fate of the ministry is at stake. While the New Zealand committee has not functioned at all, this has not been because of governmental control of the parliament but because of the general disinterest shown by the New Zealand parliament in review of regulations.

[191] Review of regulations after disallowance period. The Commonwealth, Victorian and Tasmanian committees are entitled to review regulations even though the period for disallowance of those regulations has passed. The other committees are limited to review during the disallowance period. The Tasmanian committee actively uses its right to keep regulations under continuous review. The Commonwealth committee exercises this power rarely. The Victorian committee seems not to have used the power at all. There does seem to be an advantage in allowing the committee to examine regulations to see whether the review criteria have been offended notwithstanding the fact that no action to disallow the regulations may be possible. All committees operate primarily through their ability to persuade departments to make changes to regulations that are considered defective. There seems no reason why this power should not be exercised at any time — this is particularly applicable to regulations made before the parliamentary committee was established.

[192] Referral of criticism to legislation-making authority when parliament not sitting. All committees, except that of the Commonwealth, Victoria and New Zealand have the express right to refer criticism relating to subordinate legislation to the legislation-making authority if the parliament is not then sitting. In fact, the Commonwealth and Victorian committees operate as if such a power existed because their practice, as with the other committees, is to endeavour to persuade the legislation-making authority to amend the legislation to meet the committee's criticism. It seems therefore not to matter whether this power is expressly given to a committee.

[193] Nature of legislation referred to committee. All the Australian committees have referred to them all departmental regulations. Local government by-laws or ordinances come to all committees except the Victorian and Queensland committees but the latter can review City of Brisbane ordinances. The Victorian committee does not review local government legislation but it is to be noted that the special definition of "statutory rule" enables more important instruments of a legislative character to be brought to the attention of the committee. This means that the occasional proclamation or other similar instrument is dealt with by the committee; these instruments are not considered by the other parliamentary committees. The instruments scrutinized by the committees are, in all cases, those which are subject to disallowance by the parliament that has established the committee. All committees except the Tasmanian and, to a less extent, the Victorian, direct their inquiries towards the question whether the parliament should be advised to disallow a particular instrument of delegated legislation. Suggestions are sometimes made that a wider range of executive instruments should be referred to the parliamentary committees for review (cf paras 267-273 of the Report of the Commonwealth Parliament's Joint Com-
mittee on the Parliamentary Committee System dated 26 May 1976). However it is doubtful whether it is desirable to give the committees a wider jurisdiction to review all executive orders. A committee so empowered would change its character markedly as the review of instruments, other than regulations, etc, would almost certainly result in the policy implications of such instruments being questioned. Indeed, the Report referred to seemed to contemplate that the committee it proposed (which was to incorporate the Senate Standing Committee on Regulations and Ordinances) should review the policy underlying the exercise of delegated powers. This could well destroy the present satisfactory working relationship that the committees have established with the executive. It would also impose a very heavy burden on a committee if the number of instruments that it had to review were increased. Better, in the case of one or two of the committees, if they spent longer reviewing the delegated legislation that is referred to them now. Finally, if the parliament itself can take no action in relation to the instrument, the committee would lose its ultimate sanction and find itself in a much weaker negotiating position with the executive. It seems preferable to limit a committee's scrutiny to the delegated legislation that the parliament itself has indicated that it wants to be able to disallow. All that having been said, it must be noted that the Northern Territory committee reviews all papers laid before the Assembly. However, the number of these is very much smaller than in the case of the other parliaments.

[194] An issue that seems not to have arisen is whether it is appropriate for the parliament to review local government legislation. The notion, so frequently stated in relation to questions such as ministerial responsibility, that the body making the legislation is answerable to its own electorate has apparently not been thought applicable to delegated legislation even when made by an elected body. Perhaps this is largely a pragmatic approach as both the South Australian and Tasmanian parliamentary committees have found much to criticize in local government by-laws. It is worth mentioning too that a very large number of judicial decisions concerned with delegated legislation relate to local government by-laws. Until the status of local government authorities rises, it is unlikely that there will be any movement away from parliamentary oversight of the legislation made by those bodies.

[195] Legal adviser. It is noteworthy that the three most active committees, those of the Commonwealth, Victorian and Tasmanian parliaments, have legal advisers to assist the committee in its consideration of legislation. It must, at once, be said that the South Australian and Northern Territory committees are only marginally less active than the committees mentioned and those committees do not have a legal adviser. It is too soon to determine the effectiveness of the Queensland committee. The New South Wales committee almost certainly suffers as a result of it not having the services of an independent adviser. It is not really practicable to expect a member of a committee, even though he be a lawyer, to undertake the time-consuming task of carefully perusing the four hundred or so pieces of delegated legislation that are produced each year, reading them into the existing legislation if they are amending instruments, checking them against their empowering Acts, etc. This is something that should be done for the committee by a legal adviser who should be paid for his assistance. It does not seem appro-
priate that the adviser should be a governmental officer because conflicts of interest can too readily arise (but cf the Victorian experience). Alternatively, as is the position in the United Kingdom, a legally trained member of the parliamentary staff could provide the requisite assistance to the committee.

[196] Grounds for scrutiny of delegated legislation. The grounds on which the Senate committee scrutinizes delegated legislation (see [82]) have fairly clearly formed the model for the other committees in Australia. The South Australian committee, which was set up soon after the Senate committee, has precisely the same grounds as the Senate committee and these grounds have also been reiterated for the other committees, albeit in different language. The Tasmanian provision in requiring the committee to report on whether or not the delegated legislation is in accordance with the enabling provision, has expanded the first of the Senate criteria in such a way as to make it clear that it allows review on the basis of ultra vires as well as review to see whether the regulations fall within the general objects of the empowering Act (cf the Senate interpretation of this criterion: [89]). The other committees do not seem to have felt the same constraint as the Senate when applying this criterion. In addition to these grounds, the Victorian, Tasmanian, New South Wales, Queensland, Western Australian, Northern Territory and New Zealand committees have also the duty to report on regulations if the "form or purport of the regulations calls for elucidation".

[197] The New South Wales and Northern Territory committees have, on the face of it, the widest power of scrutiny in that, in addition to the grounds already mentioned, the committees, can also report if they consider that there has been an unusual or unexpected use of the legislation-making power and also if there has been an unjustifiable delay in the publication or laying before the parliament of the regulations. In fact, the second of these grounds forms an important part of the New South Wales committee's work, particularly in regard to delays in tabling legislation.

[198] In practice, it seems to matter little what grounds of review are expressly stated as the basis on which the committee is to consider delegated legislation. The New South Wales committee which has perhaps the widest grounds for scrutiny is probably the least active committee. The Senate committee has perhaps the narrowest terms of reference and is one of the most active committees. It has certainly not appeared to be constrained in its review by the fact that its grounds of review are more limited than those of other parliamentary committees. As much as anything, the activity or otherwise of the committee has turned on the interpretation placed on its criteria which are, after all, expressed in very general terms. For example, the Commonwealth, as has been mentioned, is loath to intervene under the first of the grounds of review on the basis that the delegated legislation is ultra vires. The Victorian committee, on the other hand, has frequently criticized regulations on this basis using the same ground of review as the Commonwealth. The Tasmanian committee has resorted most frequently to the elucidation ground, while the Senate and the South Australian committees seem to have based their criticisms primarily on two other criteria – that the regulations trespass on personal rights and liberties or that they make the rights and liberties of persons dependent upon administrative and
not upon judicial decisions. The Senate committee has interpreted the first of its grounds of review as including the matter specifically stated for the New South Wales committee of unusual or unexpected use of power.

[199] It is worth noting that the Joint Committee on Delegated Legislation established in the United Kingdom parliament has, as its grounds of review, criteria similar to those of the Australian committees but in addition: that the legislation imposes a charge; that it endeavours to oust the jurisdiction of the courts; that it has retrospective effect; and that its drafting appears to be defective. None of these grounds are specifically mentioned as grounds of review for the Australian committees but in all cases the committees have encompassed objections along these lines under their existing heads of review. It would seem, therefore, that while the grounds on which a committee can review delegated legislation obviously need to be stated widely, the actions of the committee in pursuance of those grounds of review tend to be dictated by the committee's views of the form delegated legislation should take. The grounds of review are but guidelines which will direct a committee in its scrutiny task but if a committee objects to the form the regulations take, there seems little difficulty in fitting the objection under a ground of review. In short, widening the grounds of review does not necessarily lead to an increased scrutiny of delegated legislation. Conversely, narrowing the grounds of review does not necessarily act as a constraining factor on the activities of a committee. The one major suggestion for a change in grounds of review has been that referred to at [193] in relation to the Senate committee - that the policy underlying delegated legislation should be examinable. For the reasons there stated, such a change would seem undesirable.

[200] Empowering provision. Only the Senate committee has indicated an interest as a committee in the form of empowering provisions in a Bill. Fairly clearly, the terms of reference of all the committees do not encompass consideration of empowering clauses in Bills and, consequently, the attitude of the committees is understandable. (The Senate has not felt the constraint of other committees as its terms of reference are self-adopted). Nevertheless, it would seem that the form of an empowering provision is crucial to the content of any subsequent delegated legislation and it would be appropriate for the body that has the most knowledge of delegated legislation to interest itself in the form of empowering provisions. A report from a committee which indicated that the provision could be used to produce delegated legislation of a wide or unusual nature would seem to be useful to the parliament in its consideration of the merits of the legislation. It seems unlikely, however, that such action will be taken (other than by the Senate committee) unless the terms of reference of the committees are amended.

[201] Availability to interested public. The existence of parliamentary committees to review delegated legislation has an important effect from the point of view of persons affected by the delegated legislation. They know that there is a means by which a view contrary to that of the legislation-making authority can be presented to a body that can affect the form of the legislation. Complaints relating to the difficulties encountered by members of the public in presenting their views to governmental officers are frequent-
ly aired and to have available a parliamentary committee to which these views can be put is desirable. The committee is in a position to weigh any competing claims of the interested public and the department. It can see whether or not a group seeking disallowance of the legislation is pressing the interests of a limited organisation to the detriment of the public at large and it can call governmental officers to explain why a particular approach has been followed in the legislation. Such an exercise can, however, come very close to questioning the policy underlying the legislation. If the issue is one on which the government clearly has a policy, it is most unlikely that a committee will act to alter it. However, most issues dealt with in delegated legislation are matters on which the government has no elaborated policy — much of the policy has been departmentally established — and in this circumstance there is little reason why the committee cannot question the form of the regulations, particularly if the use of the delegated legislation-making power appears to depart from the general policy laid down in the Act. The consultation by the Victorian, South Australian and Tasmanian committees with interested parties is therefore to be commended and is a practice that could well be followed by all committees.

[202] Directions by the committee to amend delegated legislation. The unusual power given to the Tasmanian committee to direct a legislation-making authority to alter or suspend delegated legislation was discussed at [172]. It is a provision that has been adopted in an attempt to overcome the very real problem of laws being made during a parliamentary adjournment in regard to which no action can be taken until the parliament resumes. (cf. the complaints of the Queensland committee in its first report referred to at [129]). Governments from time to time exploit the fact that the parliament is not sitting to make controversial delegated legislation. Even where there is no abuse of the system, legislation may be made that clearly offends a committee's review criteria. Short of recalling the parliament, there is no way at present for such delegated legislation to be called into question. Hence the adoption of the provision in Tasmania. However, the provision vests potentially extreme power in the committee which, if not used with caution, could result in the committee rather than the government being able to dictate the form of delegated legislation. Political factors probably ensure that this will not happen, but to entrust to a group of parliamentarians, rather than the parliament as a whole, the power of vetoing delegated legislation is a somewhat drastic provision. The difficulties really stem from the Australian practice of delegated legislation coming into force when it is made and only then being subject to parliamentary review. Thus the way to deal with the problem with which the Tasmanian provision is concerned is not to increase the power of the parliamentary committee but rather to look to the methods available to parliaments to review delegated legislation.

[203] Methods of parliamentary review. The means by which parliaments can control the form delegated legislation takes were referred to at [72]. The broad division there is between affirmative and negative resolution procedures. As has been demonstrated, all Australian parliaments use the negative resolution approach and the version adopted is that of allowing the legislation to commence immediately it is made but providing for its tabling and for the right of the parliament to disallow the legislation by resolution
within a specified time. There is one significant difference between the State and Commonwealth parliamentary approach. In the case of the federal parliament, if a motion for disallowance is moved and not called on within the time specified for disallowance, the regulations to which the motion relates are to be deemed to have been disallowed. This is not the position in the States or the Northern Territory. (The New Zealand parliament has no power to disallow regulations). In the States and the Northern Territory the motion for disallowance simply remains on the notice paper until parliamentary time is provided for it to be dealt with. If not called on before the parliament is prorogued or the lower house dissolved, the motion lapses. All the while the delegated legislation to which it relates continues in force. As can be seen, the distinction is of considerable importance. The difficulty of finding parliamentary time for general, as distinct from government, business is a problem that besets most parliaments. There is a strong temptation for a government simply not to make time available for a disallowance motion on the basis that there is more pressing government business. The federal parliamentary provision has the effect of obliging the government to deal with the motion if it wishes its delegated legislation to be saved. Such a provision clearly strengthens the hand of the parliament in checking any excess in the use of delegated legislation. It is a provision that should be adopted in the States and in the Northern Territory.

An alternative approach which was recommended by the South Australian committee referred to in [137] was that the power of disallowance be able to be exercised at any time upon resolution of both houses of parliament. This recommendation was not adopted. There can be no doubt that if this procedure were followed, the ability of the parliament to control delegated legislation would, at least in theory, be strengthened markedly. If it became apparent that particular delegated legislation was leading to undesirable results, the means would be open to the parliament to disallow the legislation. The check of the need for both houses of the parliament to act would prevent abuse of the power by an anti-government majority in an upper house of the parliament. However, it could be assumed that the government of the day would usually control the lower house of the parliament and the instances on which disallowance would occur with the consent of both houses would be rare. Any motion for disallowance would, in any case, encounter the same difficulties as are now encountered in that parliamentary time would not necessarily be available for the disallowance motion to be dealt with.

It is to be noted that the Victorian parliament can only disallow delegated legislation if a motion to that effect is passed by both houses of the parliament. This requirement seems most unreasonable as it is difficult enough to obtain appropriate time in one chamber, let alone two. Additionally, it is more than probable that a government will resist disallowance, at least in the lower house, and endeavour to ensure voting on party lines, regardless of the nature of the objection to the legislation. On the general question of time being available for disallowance of regulations, this has been a problem in the United Kingdom parliament as is pointed out in the Report from the Joint Committee on Delegated Legislation dated 3 August 1972 (H C 475). The means suggested for overcoming this problem was to
create a separate committee which took the debate on disallowance motions. This suggestion does not seem appropriate to parliaments of the size of Australian parliaments.

[206] Tabling of delegated legislation should be mandatory. A further issue relating to the question of parliamentary review in Australia turns on the fact that it is only in the Commonwealth, Queensland, Western Australia and the Northern Territory that tabling of delegated legislation before the parliament is mandatory. The cases on this point are referred to at [245-251]. It would seem from those cases that, in the absence of a statutory provision specifically stating that a failure to table the delegated legislation renders it ineffective, the obligation is regarded as directory only — except perhaps in Tasmania where old judicial authority expresses a contrary view. The failure to table delegated legislation seems to have caused real problems only in New South Wales. In the other States, administrative arrangements are such as to ensure that the legislation is presented to the parliament within the time specified in the relevant Act. However, it would seem to be desirable for New South Wales, Victoria, South Australia and Tasmania to make it clear that there is an obligation to table delegated legislation which, if not met, renders the legislation invalid.

[207] Affirmative resolution procedure. With one exception, the negative resolution procedure adopted in Australia is that variant which contemplates that the legislation comes into force on being made but can be disallowed by the parliament. The exception is in the case of local government by-laws in South Australia which do not come into force until the disallowance period has elapsed. Apart from this category of delegated legislation, the effect of the provision is to require the parliament to act in regard to legislation that is in force. This in itself can have an effect on proposals that action be taken to disallow regulations. While, on disallowance, the legislation is taken to be repealed and not nullified, matters will have been set in train pursuant to legislation and this imposes constraints on the setting aside of the legislation. A way to overcome these constraints, as well as the problem alluded to at [202], is to make use of the procedure which has been successfully followed in the United Kingdom of requiring an affirmative resolution procedure in regard to selected pieces of delegated legislation. The affirmative resolution procedure can take either of the forms referred to at [72], namely, that the delegated legislation does not come into operation unless the parliament by resolution affirms that it should, or, alternatively, that the legislation comes into effect on being made but cannot continue in force unless an affirmative resolution so permitting it is passed. The United Kingdom uses both affirmative and negative resolution procedures in respect of delegated legislation laid before it. For example, in the period 1966-1971, 464 instruments requiring an affirmative resolution were laid before the parliament and 2,660 instruments requiring a negative resolution were so laid: see para 54 of the Report referred to at [205]. In appendix 8 to that Report, an indication is given of the sorts of instruments for which the affirmative procedure is adopted. It is stressed there that a decision as to which form of procedure should be required is made during the course of drafting of the Bill empowering the making of the delegated legislation. No hard and fast approach is adopted — the usual pattern is to consider the extent
to which it might be expected that the parliament would want to exercise control over the delegated legislation.

[208] An affirmative resolution procedure has been adopted, for example, where the regulation-making power enabled regulations to modify an Act of parliament or to impose or increase a charge upon the public or to make other substantial financial provision. It has also been used in cases where regulations may be made to give effect to schemes and the enabling statute merely indicates the general purpose to be followed in the scheme. In Australia, delegated legislation relating to matters of this kind would be likely to attract the attention of the parliamentary committees and the operation of the legislation, if thought undesirable, would probably be brought to the notice of the parliament. However, it seems much more satisfactory for the exercise of powers such as these to be brought directly to the attention of the parliament. If the parliament must give its formal approval to the delegated legislation, then it cannot simply pass by default.

[209] Clearly it would not be practicable to expect every piece of delegated legislation to receive the formal affirmation of the parliament. One of the major reasons for delegating the legislation-making power is because the parliament does not have time to deal with the measure. This notion would be defeated if the parliament was required to affirm too many pieces of delegated legislation. However, the policy content of some delegated legislation will be higher than others and it seems desirable for Australian parliaments to be more involved in the policy implemented by delegated legislation than they are at present. There will, of course, be numerous occasions when delegated legislation will have to be made quickly. In such cases, the affirmative resolution procedure is not appropriate — at least where it postpones the commencement of the legislation until after a resolution of the parliament has been passed. However, the alternative form of affirmative procedure contemplates the immediate bringing into force of the legislation — it is its continuance in force that is subject to affirmation by the parliament. Where there is a high policy content in the delegated legislation, even though the legislation is in force, it is appropriate for its continuance to be considered by the parliament. If an affirmative resolution to this effect is required, then of course, the government is obliged to make time available for consideration of the motion. It should be noted that, in the United Kingdom, the Committee on Delegated Legislation reports to the house on delegated legislation subject to both the affirmative and the negative resolution procedure. It can be expected that, in most cases, if the committee reports favourably on the delegated legislation, the motion for affirmation of the legislation will be passed without debate.

[210] Another objection which is, quite reasonably, raised to the suggestion for the adoption of affirmative resolution procedure is that parliaments in Australia sit much less frequently than does the United Kingdom parliament. The commencement of delegated legislation which awaited passage of an affirmative resolution would therefore be postponed for a much longer period that is the case in the United Kingdom. This criticism is valid, but it could perhaps be overcome if the procedure were adopted whereby a limited time for affirmation were fixed and, if the parliament were
not then sitting, the power was given to the committee charged with the duty of scrutinizing delegated legislation to direct that the delegated legislation could come into force. If the committee were of the opinion that the legislation should not come into force, then it would seem to be appropriate that the final decision on that matter be taken by the parliament itself.

[211] There is no question but that the adoption of affirmative resolution procedures would, on occasions, delay the making of delegated legislation, but in many cases any such delay would not have a major effect on the community and would be justified by the fact that the parliament would be able to exercise increased control over the form of important delegated legislation. The fact that the two procedures — negative and affirmative resolution — were available should alert parliamentarians to the form of the empowering provision and they should consider which of the two procedures would be appropriate in relation to the legislation-making power.

[212] Laying of draft of proposed legislation. Another form of parliamentary control over delegated legislation used on occasions in the United Kingdom is to require the laying of a draft of the proposed legislation before the parliament prior to the making of the legislation. Usually this is intended only to enable the parliament to be aware of the content of the proposed legislation. It would of course, be possible for a motion relating to the proposed legislation to be moved in the parliament. More probably, the effect of laying the draft would be to enable individual members to make representations to the responsible minister in relation to the proposed legislation. An example of this procedure is provided by s 13 of the Local Authority Social Services Act 1970. That section required orders of the Secretary of State designating functions of local authorities under an enactment as being appropriate for discharge through a local authority social services committee to be laid in draft form. The section in fact, went further and provided that the order could not be made unless the draft had been approved by a resolution of each house of the parliament. A similar provision, without the necessity for the draft to be approved by resolution, is to be found in the National Savings Bank Act 1971 s 26(3). Provisions of this kind would seem not to have been used in Australia at any time. Obviously it would be necessary to be most selective of the instruments that were to be so laid, but there are cases in which the advance publicity given to the making of the delegated legislation by this method would be highly desirable.

[213] Disallowance of part of legislation. A further matter relating to parliamentary control of delegated legislation that is worth considering is whether the power to disallow delegated legislation should be exercisable in regard to the whole of the instrument or whether it should be possible for a part only of an instrument to be disallowed. The position varies between the parliaments in Australia. The New South Wales, Victorian, Tasmanian and Northern Territory parliaments may disallow the whole or a part of an instrument. The Queensland and South Australian parliaments can disallow only the whole instrument. The same applies to the Commonwealth parliament as far as regulations are concerned but it can disallow a part of a Territory ordinance. The Western Australian parliament, while having power to disallow only the whole of an instrument, can amend an instrument.
and presumably this would include the deletion of parts of the instrument. Two issues seem to arise here. One is whether the parliament should be able to disallow one portion of a set of delegated legislation. The other is whether it should be able to actually alter the wording of any such legislation. In regard to the first issue, problems of a kind similar to that encountered by the courts when considering questions of severance arise: see ch 30. The parliament will be confronted with the question whether it is possible to delete one part of the instrument and leave the rest standing. The courts have been loath to engage in an exercise of this kind largely because of the difficulty of judging correctly the interrelationship of various parts of a legislative instrument. But where this difficulty can be overcome, there seems no reason why an objectionable provision should not be removable from what might otherwise be a perfectly good law. The difficulties to which the all or nothing approach gives rise were evidenced by the dilemma in which the South Australian parliament found itself when considering a comprehensive town planning scheme which contained a relatively minor provision that it was considered offended the Subordinate Legislation Committee’s criteria: see [146]. The parliament felt obliged to allow the whole scheme to stand as its revocation would have had adverse effects greater than those which would flow from the continuance of the undesirable provision. It seems unfortunate for a parliament to have to be faced with this choice. The power to disallow a part as well as the whole of an instrument seems desirable and should be adopted in all jurisdictions.

[214] Amendment of delegated legislation. Different issues arise when considering whether a parliament should be able to rewrite a legislative instrument. The first question is who is to do the actual rewriting of the instrument? Parliamentarians are not notorious for their ability to draft comprehensive and coherent legislation — despite some of their own opinions to the contrary. In addition, once the task of rewriting the legislation is undertaken, policy questions will have to be resolved and the parliament is a body ill-equipped to determine these without the advantage of departmental assistance. It seems preferable, therefore, for the power of the parliament to be limited to disallowance (or affirmation) of the delegated legislation or any part of it. The fact that the parliamentary committees have, in most cases, established a working relationship with departments whereby undesirable provisions are in fact amended by the departments ameliorates most problems that arise from the inability of the parliament to amend delegated legislation.
PART THREE

Judicial Review of Delegated Legislation

CHAPTER 14

JUDICIAL REVIEW OF DELEGATED LEGISLATION: GENERAL

[215] Introduction. This chapter deals briefly with a number of general matters relating to the review by the courts of delegated legislation. Some of the matters are returned to in greater detail in later chapters. Others are mentioned because they qualify in a general way specific issues dealt with later.

[216] Right of courts to pronounce on validity of delegated legislation. The courts have, for many years, considered it to be within their power to rule delegated legislation invalid. For example, in 1702, Holt CJ said "... every by-law is a law, and as obligatory to all persons bound by it, ... as any Act of Parliament, only with this difference, that a by-law is liable to have its validity brought in question": The City of London v Wood (1702) 12 Mod at 678. Lord Herschell L C in Institute of Patent Agents v Lockwood [1894] AC at 360 reiterated this view in almost identical words. It is so deeply entrenched as a principle of our law that Australian judges have not felt it necessary to refer to it. Rather they have proceeded straight to the question whether the delegated legislation is valid.

[217] Test of invalidity. Lord Diplock in McEldowney v Forde [1969] 2 A11 ER at 1068 described the task of a court in determining the validity of delegated or subordinate legislation as a three-fold one: "first to determine the meaning of the words used in the Act of Parliament itself to describe the subordinate legislation which that authority is authorised to make, secondly to determine the meaning of the subordinate legislation itself and finally to decide whether the subordinate legislation complies with that description". A similar view was stated by Barwick CJ in Esmonds Motors Pty Ltd v The Commonwealth (1970) 120 CLR at 466. But the court does not limit its inquiry simply to placing a meaning on the delegated legislation. The further step is taken of determining the true scope of the measure and its legal effect: Swan Hill Corporation v Bradbury (1937) 56 CLR at 757 per Dixon J, see also [357]. The determination of the validity of regulations is thus a question of
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law. This is not to deny that in certain circumstances the courts may have to engage in fact-finding exercises relevant to the question of validity. As Dixon CJ said in Commonwealth Freighters Pty Ltd v Sneddon (1959) 102 CLR at 291-292 in relation to the operation of a law that was said to infringe s 92 of the Constitution:

In courts administering English law according to the principles which developed in a unitary system it must seem anomalous that the question whether a given statute operates or not should depend upon facts proved in evidence. How facts are to be ascertained is of course a question distinct from their relevance. Highly inconvenient as it may be, it is true of some legislative powers limited by definition, whether according to subject matter, to purpose or otherwise, that the validity of the exercise of the power must sometimes depend upon facts, facts which somehow must be ascertained by the court responsible for deciding the validity of the law.

In Todd v Payne [1975] WAR at 53 this statement was applied by Wickham J when determining the validity of certain regulations. Nonetheless, the question of validity remains ultimately one of law.

[218] Grounds on which delegated legislation may be invalid. Delegated legislation may be invalid for a number of reasons. While these reasons may, for convenience, be discussed separately (and are so treated in this work), in Australia they are regarded as branches of the general doctrine of ultra vires. The principle grounds of review of delegated legislation are:

(1) The formal requirements that have to be complied with when making the delegated legislation may not have been followed: see ch 15.
(2) The delegated legislation may deal with a subject not within the scope of the power provided in the empowering Act. Alternatively, it may deal with such a subject but may exceed the prescribed limits within which the legislation must fall: Young v Tockassie (1905) 2 CLR at 477 per Griffith CJ. When considering Australian law, this notion of invalidity can be described as simple ultra vires to distinguish it from the extended concept of ultra vires which embraces the other grounds of review set out below. In New Zealand and the United Kingdom, the concept of ultra vires is limited to this category and the grounds set out below are treated as separate heads of invalidity. In Australia also it must be remembered that the Act empowering the making of delegated legislation may itself be invalid as unconstitutional. In such a case, the delegated legislation falls with the Act.
(3) The delegated legislation may be invalid because it is inconsistent with, or repugnant to, the Act under which it is made, another Act or the general law: see ch 21.
(4) The delegated legislation may be invalid because the power to make the legislation has been exercised not for the purpose set out in the empowering Act but for another purpose: see ch 22.
(5) The delegated legislation may be invalid because its effect is so unreasonable that it cannot be regarded as falling within the contemplation of the legislature in passing the Act enabling the making of the legislation: see ch 23.
(6) The delegated legislation may be invalid because after its meaning has been determined by the court, its operation is such as to impose no certain obligation on the persons affected by it: see ch 24.
(7) The delegated legislation may be invalid because it makes no provision itself for the subject with which it is concerned but sub-delegates the power
to legislate on the matter to another body: see ch 25.

In New Zealand, the grounds (5), (6) and (7) are given a wider operation than that which is countenanced by the Australian courts and they are used more frequently to invalidate legislation than has been done in Australia.

[219] **Simple ultra vires.** Cases concerned with the issues referred to in (2) above — simple ultra vires — are, of necessity, dependent very much on their own facts. Rich J in *Footscray Corporation v Matze Products Pty Ltd* (1943) 67 CLR at 308 said: “Authorities are of little use in determining the validity of a particular by-law. The appropriate steps are to construe the statute under which the by-law is made and then interpret it to ascertain whether it is within the ambit of the statute”. Accordingly, it is not proposed to examine the large number of authorities in which the issues of ultra vires in relation to particular empowering words has been discussed. Examination will be limited to cases concerned with common empowering provisions such as the power to “regulate” an activity and the power to make regulations “necessary or convenient” for giving effect to an empowering Act: see chapters 17 and 16, respectively.

[220] **Reluctance to review legislation of elected bodies.** The courts in Australia and in England have indicated a reluctance to interfere with action taken by representative bodies. Rich J in the *Footscray Corporation* case at 308 said: “Municipalities and other representative bodies which are entrusted with power to make by-laws are familiar with the locality in which the by-laws are to operate and are acquainted with the needs of the residents of that locality and thus are, I venture to think, better fitted than judges to deal with their requirements”. See also *In Re the Mayor, etc, of the City of Hawthorn; Ex parte The Co-operative Brick Co Ltd* [1909] VLR 27 particularly per Cussen J at 50; *Arthur Yates & Co Pty Ltd v The Vegetable Seeds Committee* (1945) 72 CLR 37; *Kruse v Johnson* [1898] 2 QB 91. New Zealand courts have not, however, been affected by this self-imposed constraint; see in particular, ch 23 relating to review of delegated legislation on the ground of unreasonableness.

[221] **Valid end cannot be achieved by invalid means.** This principle is encapsulated by Gibbs J in *Pauli v Munday* (1976) 9ALR at 251: “A power to do one thing cannot be validly exercised by doing something different even if the effect of what is done is the same as that which would have resulted from doing what was permitted”. So, in that case, a power to regulate the emission of impurities from an air impurities source was held not to support a regulation prohibiting open fires. This even though it was conceded that the regulation of the emission of impurities from such a source would have the practical effect of prohibiting the source. The power did not permit the adoption of different means which happened to lead to the same end.

[222] **Review of delegated legislation made under discretionary regulation-making power.** It is common to find in Acts empowering the making of delegated legislation that the legislation may be made if “in the opinion” of a designated authority, or if the authority “is satisfied that”, it is expedient or desirable or necessary or convenient, etc, to make the legislation. The question that arises is whether this formula imposes any limitation on the power of a court to review delegated legislation made pursuant to the power.
The ability of the court to review legislation in these circumstances can be considered from three aspects. First, whether the opinion was held by the designated authority at all. Secondly, whether the opinion that was held was the opinion required by the Act for the operation of the power. Thirdly, whether the opinion precludes the court from considering whether the delegated legislation falls within the power itself.

[223] On the first question, the holding of the requisite opinion would, in most cases, be regarded as a prerequisite to the validity of the exercise of the power. But unless the point is taken, it will in most cases be assumed that this prerequisite has been satisfied. This question is discussed in ch 28, and need not be considered further here. On the second issue, this question is discussed in ch 22 relating to the use of a power for an improper purpose. The discussion there reveals that it is highly improbable that the courts will investigate whether the Crown representative was actuated by improper motives when making regulations but that action taken by other bodies is subject to such review.

[224] In regard to the question whether a court can review regulations made pursuant to a power expressed in subjective terms, it seems clear that the grant of a power in these terms does not mean that the court can only review the issue whether or not such an opinion was formed. Such an opinion must indeed be formed as a condition prerequisite to the making of the delegated legislation but it does not widen the power to make such legislation. The delegated legislation must still fall within constitutional power as was pointed out by Dixon J in *Stenhouse v Coleman* (1944) 69 CLR at 470 in regard to a power of the Governor-General to make regulations:

> as appear to him to be necessary or expedient for securing the public safety, the defence of the Commonwealth ... or the efficient prosecution of ... the “war”. [The regulations are] made under the constitutional power with respect to defence and cannot extend the power or affect the criteria or the materials that must be used in judging whether a regulation made by the Governor-General in Council falls outside the ambit of the constitutional power itself.

The same approach applies in regard to the exercise of a regulation-making power under the Act. Latham CJ and McTiernan J summarized the situation in *Reid v Sinderberry* (1944) 68 CLR at 511:

> When the powers of a legislative authority are limited by law the opinion of the authority that a particular exercise of its powers is within the law cannot be decisive of the question of the validity of a provision enacted by the authority, unless, indeed, the power was conferred by the law creating the power ... in terms which provided that the opinion of the authority should be so decisive.

See also *Reade v Smith* [1959] NZLR 996.

[225] It may be, however, that the nature of the subject matter to which a power relates will diminish the ability of the court to review delegated legislation made pursuant to the power. This can occur where the subject matter of the legislation is expressed in very general terms. An example of this type of provision is provided by the power considered in *Hackett v Lander and Solicitor-General* [1917] NZLR 947: to prohibit acts which, in the opinion of
the Governor, were injurious. In such cases, the broad nature of the conduct

to be controlled, when coupled with the opinion of the legislation-maker,
makes review of legislation by the courts more difficult. Nonetheless, as the
cases referred to in the last paragraph indicate, the legislation must fall
within what the courts consider is the scope of the power.

[226] Rules of court. Questions relating to the validity of the rules of the
superior courts rarely arise — for obvious reasons. A challenge to such rules
did, however, come before the House of Lords recently in Attorney-General
for Northern Ireland's Reference (No 1 of 1975) [1976] 3WLR 235 and it
brought to light a somewhat obscure empowering provision in the Interpretation
Act 1889 (UK), the counterpart of which is to be found in the Interpretation Acts of all Australian jurisdictions, except Victoria and South Australia, and in New Zealand. Section 14 of the United Kingdom Act provides —

14 In every Act passed after the commencement of this Act, unless the contrary
intention appears, the expression "rules of court" when used in relation to any court
shall means rules made by the authority having for the time being power to make rules
or orders regulating the practice and procedure of such court . . . .

The power of the said authority to make rules of court as above defined shall include a
power to make rules of court for the purpose of any Act passed after the commence­
ment of this Act, and directing or authorising anything to be done by rules of court.1

In the opinion of the House of Lords, the effect of this section was to confer
upon a court a power to make rules regulating the practice and procedure of
the court whenever a statute conferred on the court a new or extended juris­
diction and did not set out detailed provisions as to the practice and
procedure to be followed by the court.

[226A] Failure to make regulations: "as prescribed". A problem that has
come before the courts on a few occasions is the effect of a failure to make
regulations when an Act says that a subject-matter is to be "as prescribed". The
fullest discussion of the issue is that provided by the High Court in Dow­
ney v Pryor (1960) 103 CLR 353. What emerged from the judgments there was
that the effect of the failure to make regulations, when these are contemplat­
ed by the Act, depends very much on the nature of the matter that is to be
prescribed. If the right, authority, obligation, etc, with which the Act is
concerned can only be exercised or imposed if regulations are made pursuant
to the power of prescription, the making of the regulations will be a condition
precedent to the exercise or imposition of the right, authority or obligation. If,
on the other hand, the right, etc, can be exercised under the Act without
the need for regulations, a failure to make the regulations will not postpone
the operation of the Act. (See particularly Kitto J at 361-362). In that case, s
219 of the Local Government Act 1919 (NSW) provided: "Any elector may at
the council's office inspect the books of account . . . as prescribed". No
method of inspection had been prescribed. The court held that the prescrip­
tion of a method of inspection was not necessary to complete the right of
inspection granted by the section. Until such a method had been prescribed,
the right could be exercised in any appropriate manner.

[226B] Other cases in which the question has arisen also demonstrate that the courts will come to a conclusion based on the subject-matter of the Act and the importance of the things to be prescribed. Cases in which it was held that regulations had to be made before the Act could operate include: *Cameron v The Deputy Federal Commissioner of Taxation for Tasmania* (1924) 34 CLR 8 (no basis on which to calculate the value of livestock for taxation purposes existed in the absence of regulations); *The Gramophone Co Ltd v Leo Feist Inc* (1928) 41 CLR 1 (the making of a gramophone recording of a musical work constituted an infringement of the copyright in that work where regulations specifying compulsory licence royalties had not been made); *Hammond v Lavender* (1976) 11 ALR 371 (manner of providing specimen of breath for analysis by breathalyser); *Browne v The Commissioner for Railways* (1935) 36 SR (NSW) 21 (the suspension of an employee was invalid where the power was to suspend in the prescribed manner and no regulations had been made). Cases additional to *Downey v Pryor* holding that prescription was not necessary include: *Ex parte Greenfield; Re McCulloch* (1951) 51 SR (NSW) 305 (arrangements relating to the promotion of employees could be conducted in the absence of regulations); *Moate v Dartnell* (1948) 65 WN (NSW) 9 (a failure to make rules of court did not preclude a court from hearing an action; it could follow such procedure as it determined); *Ex parte Forster; Re University of Sydney* [1963] SR (NSW) 723 (the University could carry out certain functions by resolution in the absence of by-laws).

[226C] This essentially pragmatic approach of the courts unfortunately leads to some uncertainty. It becomes a matter of assessment whether a court will require regulations to have been made where there is an "as prescribed" requirement or will rule that they are unnecessary. The cases do not lend much assistance in predicting the likely ruling except perhaps that where a right is being given by the Act, regulations will probably not be regarded as essential (cf *Downey* and *Moate*). Conversely, where an obligation is being imposed, the details of that obligation will have to be spelled out (cf *Gramophone Co* and *Browne*). The real culprit in the matter is the executive in failing to produce appropriate delegated legislation. If, as part of a legislative scheme, certain matters are to be prescribed, the requisite regulations should be made immediately. Indeed, it is doubtful whether the relevant Act should be allowed to come into operation until the regulations have been drafted and either have been made or are ready to be made (cf s 4 of the *Acts Interpretation Act* 1901 (Cth) which allows the making of certain regulations before the commencement of the Act under which they are made).
CHAPTER 15

EFFECT OF NON-COMPLIANCE WITH FORMAL REQUIREMENTS

Introduction. The procedure to be followed in the various jurisdictions for the making of delegated legislation has been set out in ch 2. The question that now arises is what is the effect of a failure to comply with this procedure? The procedure embraces three matters: the actual making of the delegated legislation by an authorized body; its publication; and its laying before the parliament where this is required by the enabling legislation. These various requirements give rise to slightly different approaches by the court on the question whether strict compliance is essential for the validity of the legislation. One other issue going to the form of delegated legislation can also be conveniently dealt with in this chapter: whether delegated legislation must be self-contained or whether it can incorporate other material by reference.

PROCEDURE FOR MAKING AND REVOKING DELEGATED LEGISLATION

Compliance with procedure mandatory. It seems clear that where an Act empowers a body to make delegated legislation and specifies that certain steps are to be taken when making that legislation, the procedure set out must be complied with exactly. The clearest examples of this approach of the courts are provided by a series of Victorian cases. The procedure that is set out in the Local Government Act of Victoria for making by-laws has varied only slightly since 1874. In general terms, what is required is that a resolution to adopt a by-law be passed at one meeting of the council and confirmed at a subsequent meeting held not less than four weeks after the first meeting. In the interim period, the intention to make the by-law has to be advertised in newspapers circulating in the area. A number of cases have been concerned with the validity of by-laws made other than in accordance with this procedure.

The first case was In re the Local Government Act 1874; Ex parte Taylor (1885) 6 ALT 170. The by-law in that case had been passed at a council meeting on 25 November 1884 and confirmed on 23 December 1884. The court held that this did not meet the requirements of the Act as there had to be a passage of four clear weeks between the two council meetings. The day of passing and the day of confirmation of the by-law had to be excluded from this period on the basis that the law takes no notice of parts of days and therefore four weeks had not elapsed between the meetings. The requirements of the Act were mandatory and accordingly the by-law was invalid. In the following year a more obvious case arose in R v Shire of Benalla; Ex parte Redgate (1886) 8 ALT 80 where the by-law confirmed at the second meeting of the council was different in form from that adopted at the first meeting. The court had no difficulty in holding that there had been a failure to comply with the requirements of the Act. The most recent decision relating to the prescribed procedure is Robinson v City of Springvale (1970) 22 LGRA 166. On this occasion the resolutions to adopt the relevant by-law were in order but the
advertisement of the intention to make the by-law was held not to comply with the requirements of the Act in that it did not set forth either the proposed by-law or its general purport as required by the Act. This being so, again the by-law was held to be invalid. A similar approach to that followed in these cases was adopted in Attorney-General; Ex rel Graham Maiden Ltd v Northcote Borough [1972] NZLR 510. There special orders required for making a by-law by the Borough had not been made in accordance with the specified procedure relating to the date of advertisements of intention to make the orders. The court ruled that the orders were invalid.

[230] These cases demonstrate that where a formal procedure for making delegated legislation is set out in the empowering Act, that procedure must be followed if the legislation is to be valid. This issue is more likely to arise in relation to the legislation of local government bodies because, as can be seen from ch 2, formal procedures relating to making are more common for this type of legislation. But if a procedure is specified in regard to the making of other legislation, it can be expected that strict compliance will be required.

[231] Procedure for revocation of delegated legislation. Where a procedure is laid down for the revocation of a by-law, the courts will also require strict compliance with that procedure if the revocation is to be effective. For example, the Local Government Act of Victoria required a two-thirds majority of a council to support the revocation of a by-law. In R v Shire of Huntley; Ex parte Tootell (1887) 13 VLR 606 this requirement was held to be mandatory and a failure to secure a two-thirds majority of the council resulted in a by-law purporting to revoke an earlier by-law being held invalid. See also Barry v The City of Melbourne [1922] VLR 577; Boyd v Yockney [1920] NZLR 358.

[232] The procedure to be followed where there is no statutory requirement relating to revocation was considered by Wells J in Wattle Park Pty Ltd v Commissioner of Highways (1973) 6 SASR 69. The council there had purported by resolution to revoke a by-law made under the Building Act. The Building Act laid down a specific procedure which had to be followed for the making of by-laws under that Act but contained no provision relating to the revocation of such by-laws. It was argued that in the absence of any specified procedure, regard should be had to s 39 of the Acts Interpretation Act (SA) which provided that, unless the contrary intention appeared, the power given by any Act to make (inter alia) by-laws should be deemed to include the power from time to time to revoke them absolutely, in whole or in part. This, it was said, meant that no formal procedure had to be followed for the revocation of a by-law. Wells J rejected the argument. He took the view that when the section in the Acts Interpretation Act gave the power to revoke, it was intended that the procedure for revocation was to be the same as that prescribed for the making of the delegated legislation.

[233] The Interpretation Acts of New South Wales, Western Australia and New Zealand are expressed in terms similar to that of South Australia (ss 32 (II), 38 and 25(h), respectively). The equivalent provisions in the other jurisdictions1 put the issue beyond doubt by providing that the power of revoca-

1 Cth s 33(3); Vic s 30(3); Qld s 24; Tas s 22; ACT s 28; NT s 24.
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tion is exercisable in like manner to the power to make the delegated legis-
lation.

[234] It would seem from these cases, therefore, that where a formal proce-
dure is laid down for the revocation of delegated legislation, the courts will
insist on strict compliance with that procedure. Where there is no procedure
laid down for revocation but there is a procedure specified for the making of
the delegated legislation, revocation can only be effected by following the
same procedure.

[235] Procedural requirements for particular form of instrument to be
followed. Care must also be taken to ensure that the correct procedure for the
particular legislative activity is followed. Thus, while it is within the power of
councils in Victoria to amend an existing by-law by resolution, it must be
clear that it is truly an amendment that is being carried out. In *R v City of
Moorabbin; Ex parte Story* [1955] VLR 142 the council by resolution pur-
ported to amend a by-law that had been held invalid (see *R v City of Moorab-
bin; Ex parte Kans Food Products Pty Ltd* [1954] VLR 465, referred to at
[530]). The resolution simply omitted the words in the by-law that had led to
it being held invalid and substituted a new expression. The court held that
this procedure could not be adopted. The by-law was invalid and therefore
could not be amended. The council had to follow the procedure necessary for
making a new by-law.

[236] Requirement that third parties recommendation be followed. It is
common to find as a requirement for making delegated legislation that the
legislation-making authority is to act on the recommendation of a third party.
Questions relating to the need to prove that the legislation-making authority
has so acted have arisen on a number of occasions and this problem is dis-
cussed at [592-597]. But one thing is clear. If the legislation-making authority
makes the legislation without first having received a recommendation from
the stipulated third party, the legislation will be invalid: *Walter v Parry*
[1952] VLR 19; *Murphy v Matlock* [1926] VLR 170.

[237] Departure from recommendation. The question that next arises is
whether legislation made after receipt of a recommendation as required by
the Act, but which in fact departs from that recommendation, is valid. This
issue has been discussed in two South Australian cases. The first was a deci-
sion of Napier CJ in *Egarr v Registrar of Board of Optical Registration*
[1952] SASR 163. The power in question was for the Governor, acting on the
recommendation of the Board of Optical Registration, to make regulations
specifying the requirements that an applicant for registration had to comply
with. The recommendation put to the Governor set out certain educational
qualifications and also required that the applicant have been engaged “for at
least three years” in the practice of optometry in the United Kingdom or in
some part of the British Empire. The regulations as made followed the recom-
modation of the Board except that the reference to a person having been
engaged in practice “for at least three years” was omitted. No reason for this
omission was apparent. Napier CJ held that the regulation was valid. In his
view, the requirement was simply that the Governor had to act on the recom-
modation of the Board; he did not have to accept or reject the recommenda-
tion in its entirety. The Governor could not act other than at the instigation of
the Board but there was no responsibility on the court to compare the regulation with the recommendations of the Board and declare it *ultra vires* if it found any departure from the letter of the recommendation. His Honour considered that the court would be obliged to declare invalid any regulation made without consulting the Board or in opposition to its advice. He concluded (at 166) that in the last resort it was a question of fact and degree whether the regulation had been made on the recommendation of the Board. It is to be noted in this case that the machinery for making the regulations contemplated only that the Board make a recommendation to the Governor and the Governor act on that recommendation.

[238] This relatively simple machinery was considered to be of major importance in the other case dealing with this issue: *Myer Queenstown Garden Plaza Pty Ltd v Corporation of the City of Port Adelaide* (1975) 11 SASR 504. Wells J at 544-548 subjected the notion of a body acting on the recommendation of another to detailed examination. His Honour built on the view of Napier CJ in Egarr's case and, while not questioning the decision in that case, introduced further considerations which are to be taken into account when considering whether or not regulations departing from a recommendation should be regarded as invalid. In his Honour's view, a distinction has to be drawn between a power to make regulations "after consideration of a recommendation" and a power to make regulations "on the recommendation" of another person. The former expression does not bind the regulation-maker to strict adherence to the recommendation, but the latter imposes severe limitations on the ability of the regulation-maker to depart from the recommendation. The difference in emphasis in the two expressions is significant and, with respect, his Honour's view seems correct.

[239] Wells J also referred to the need for there to be a difference in approach depending upon the way in which the recommendation on which the regulation-making authority is to act is obtained. In the case before him, the regulations were concerned with planning requirements. Elaborate procedures were set out in the Act requiring the authority which was to make the recommendation to publish its proposed recommendation, receive representations from the public, take these into account when preparing its final recommendation and submit the recommendation together with a summary of any objections to its proposals. In his Honour's view, this elaborate consultative machinery imposed substantial limitations upon the ability of the regulation-making authority to depart from the recommendation. As his Honour said at 547: "Why invite and consider objections from the relevant public, and attempt, in advance, to ensure compliance with the authorised development plan, if such painstaking vigilance is to be set at nought by an interpretation . . . that enables the Governor to depart substantially from the recommended draft?" Wells J also considered that the form of recommendation itself had to be taken into account when considering the validity of regulations that departed from it. He posited the situation of a thing being recommended in general terms, in more specific terms, or in terms of great particularity. If the recommendation were in general terms, the plain implication was that the person receiving it would not forfeit the approbation with which the thing was introduced if he exercised his own discretion over detail. But if the thing recommended was propounded with a wealth of detail, every variation introduced
by the person making use of the recommendation tended to increase the probability that the requested approbation would not be given to the final result. His Honour summed up the issue at 548:

“A person may, in my opinion, only act on a recommendation if, after consideration of it, he adopts it in substance and makes only such variations in what was originally commended as would, in all the circumstances, not forfeit that commendation. In short, the more detailed the recommendation, the more complex and comprehensive the machinery by means of which the recommendation is reached, the less scope there will be for departure, by the person acting on the recommendation, from its terms”.

Applying this approach to the facts of the case, his Honour considered that the regulations departed too far from the recommendation to be valid.

[240] Reference to empowering provision on face of delegated legislation. Whether it is necessary to refer to the power under which delegated legislation is made in the instrument containing the delegated legislation has been considered in a number of cases with somewhat varying results. In Williams v Chief Inspector of Factories [1924] VLR 321 regulations made under the Factories and Shops Act made no reference to the section of the Act which empowered the making of the regulations. It was clear, however, on an examination of the Act, which section justified the regulations. McArthur J held that it was unnecessary for the regulations to state under which particular section of the Act they were made. This decision should be contrasted with that of Cussen J in Abbott v Shire of Heidelberg [1926] VLR 199 where a by-law purported to be made under a power in the Local Government Act which clearly could not support it. An attempt was made to argue that in fact the by-law could have been made under another section which was not recited in the by-law itself. Cussen J rejected the argument that the by-law could be supported as an exercise of the power not referred to. The by-law did not purport to be made under that section and therefore could not be supported by that section.

[241] The difference in approach to the issue evidenced by these two cases is somewhat curious. Seemingly, if no power is referred to, the court will search the empowering Act to find an appropriate power, but if a power is referred to and is found to be inappropriate the court will not consider whether another section of the empowering Act would have supported the making of the delegated legislation. It would seem from Abbott's case that once a body nominate the power under which it claims to act, it is bound by that nomination. This approach can be justified if the making of the delegated legislation under one particular power involves a certain procedure whereas under another power a different type of procedure would have to be followed. This position arose in Melbourne Corporation v Barry (1922) 31 CLR 174. A by-law which purported to be made under the Local Government Act was held not to be valid under that Act. An attempt was then made to argue that in fact the by-law should be treated as if it were a regulation made under the Police Offences Act. While it was possible for local government bodies to make regulations under the Police Offences Act, there were differences in the formalities that had to be complied with for the making of legislation under the two Acts and the court rejected an argument that the delegated legislation could, in effect, be regarded as made interchangeably under the Acts. This position seems clear enough but it is somewhat different when the mere refer-
ence to the empowering provision can lead to the validity or otherwise of the delegated legislation.

[242] The decision in Abbott's case should also be read in the light of the decision in Bysouth v City of Northcote [1924] VLR 587. A by-law was stated to have been made under s 197(21) of the Local Government Act which enabled a council to make by-laws "prohibiting, regulating or controlling quarrying or blasting operations". In the provision reciting the power under which the by-law was made, the section was properly referred to but the by-law was said to be one "for regulating or controlling" quarrying operations. The court held that as the by-law included an unfettered discretion, it amounted in reality to a prohibition and could not therefore be made under a power to regulate or control the activity (see [355]). But the court considered that the by-law could have been made under the power to prohibit quarrying operations and that the failure to recite that power in the by-law did not invalidate the by-law. The situation is, of course, different from that in Abbott's case in that the correct section was referred to and the omission was to describe the section in its fullest form. However, the court was prepared to look to the power in the Act and, notwithstanding the fact that the council had purported to act under one part of the empowering provision, the fact that another portion of the empowering provision supported the by-law was considered sufficient. A similar approach was adopted by Schutt J in Neptune Oil Company Limited v City of Richmond [1924] VLR 385 where again there had been a mis-description of the power rather than a reference to the wrong power. The only other Australian case that seems to have considered this point is Jenner v Shire of Mildura [1926] VLR 514. Again the problem there seemed to be one of mis-description of the power. The Local Government Act permitted the making of by-laws "for the suppression of nuisances". A by-law was made which stated that it was "for regulating the keeping of bees and thereby preventing the same from becoming a nuisance". The court was not prepared to hold that the use of the word "preventing" instead of "suppressing" was sufficient to invalidate the by-law.

[243] On the authorities cited, the position therefore seems to be that a failure to specify the empowering provision under which delegated legislation is made will not invalidate the legislation. A mere mis-description of the empowering provision will likewise not invalidate the legislation. But a reference to an empowering provision which will not support the delegated legislation will prevent reference being made to another provision contained in the empowering Act which might support the validity of the delegated legislation. However, this last proposition seems somewhat extraordinary in the light of the other decisions and raises doubts whether Abbott's case would be followed if the issue came before the courts again.

[244] Effect of privative clause. While the point is also discussed elsewhere (see [599]), attention should be drawn in the present context to Clugston v Montague [1936] VLR 172. The Local Government Act of Victoria required the tabling of regulations made under the Act and included a provision that, if not disallowed by the parliament, the regulation was to be of full force and effect. A regulation was made under the Act but the making procedure failed to comply with that laid down in the Act. The regulation was tabled and not
disallowed. It was argued that the effect of the section referred to above was to give the regulation full force and effect. This argument was rejected by Mann CJ at 179-180. He held that the provision did not give validity to a regulation that did not comply with a mandatory making procedure. While the case was concerned with a tabling requirement, his Honour’s remarks are at large and would indicate that a “full force and effect” clause can operate only after any formalities have been complied with. The same approach was followed in Foster v Aloni [1951] VLR 481 in relation to the operation of a provision requiring regulations to be read as if they were enacted in the empowering Act: see generally ch 29.

LAYING OF DELEGATED LEGISLATION BEFORE PARLIAMENT

[245] Nature of instrument to be laid. The requirement that certain delegated legislation be laid before the parliament is usually specified with some degree of specificity either in the Act which gives power to make the delegated legislation or in a general enactment such as the Acts Interpretation Act. There was, however, one period when this issue was somewhat clouded. During World War II the National Security legislation required the laying before parliament of “orders, rules and by-laws, which are of a legislative and not an executive character”. The difficulty of classifying orders as either legislative or executive troubled the court on a number of occasions: see Commonwealth v Grunseit (1943) 67 CLR 58; Arnold v Hunt (1943) 67 CLR 429; McIver v Allen (1943) 43 SR (NSW) 266; Victorian Chamber of Manufactures v The Commonwealth (Women’s Employment Regulations) (1943) 67 CLR 347. In these cases reference was usually made to a statement by Taft CJ in J W Hampton Jr & Co v United States (1928) 276 US 394 at 407; “The true distinction, therefore, [between legislative and executive power] is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law.” The former constituted a legislative action, the latter an executive action. This distinction is, of course, much easier to state than to apply and differing views were expressed by the judges in the cases cited. It is to be hoped that this formula is not used again in relation to the laying of delegated legislation before parliament as it serves only to confuse. Much the better course is to indicate whether a particular instrument is to be considered by the parliament and whether it is to be subject to disallowance.

[246] Effect of failure to table delegated legislation. A question which has not been altogether satisfactorily resolved is whether or not a failure to comply with a provision of an Act requiring delegated legislation to be laid before the parliament renders the legislation either inoperative or invalid. The issue first came before an Australian court in Darrach v Thomas (1914) 31 WN (NSW) 22. There a requirement in the Mining Act stated that rules for the conduct of proceedings in the Mining Court made by the Supreme Court judges were to be tabled in the parliament within fourteen days after their publication. The rules in question had never been tabled. The Full Court held that the provision was not a mandatory requirement and that, although the rules had not been tabled, they were valid. The view seemed to have been taken by the court that the requirement for tabling was intended
merely as a means of informing the parliament of the making of the rules and references was made to the fact that the parliament had no power to disallow the rules.

[247] The issue next arose in Bain v Thorne (1916) 12 Tas LR 57 where a contrary view was expressed. It was a requirement of the Fisheries Act that regulations be tabled before the parliament. There was no right of the parliament to disallow the regulations so tabled. Regulations made under the Act had not been tabled and this was set up as a defence to an action for breach of the regulations. Ewing J upheld this objection and quashed a conviction entered under the regulations. He considered that the requirement that the regulation be tabled formed part of the general publication requirements and therefore had to be strictly complied with. In addition, he considered that the requirement was an exercise by the parliament of its right to check the actions of its legislative delegate. In reaching his conclusion, Ewing J referred to the decision of the House of Lords in Institute of Patent Agents v Lockwood [1894] AC 347 where a tabling requirement had been held to be mandatory. It should be noted however that the regulations considered in Bain v Thorne could not be disallowed by the parliament whereas the regulations considered in Lockwood's case could. (No reference to Lockwood's case was made by the New South Wales court when deciding Darrach v Thomas.)

[248] The issue arose again (and perhaps finally) in Dignan v Australian Steamships Pty Ltd (1931) 45 CLR 188. That case was concerned with the disallowance by the Senate of regulations made under the Transport Workers Act. While it was not relevant to the point at issue in the case, three of the judges of the court expressed views on the question whether a failure to comply with the requirement in the Commonwealth Acts Interpretation Act that regulations were to be laid before each house of the parliament would lead to the invalidity of those regulations. Starke J at 202 expressed the view that the requirement was not one on which the validity of the regulations depended. His Honour said that no such sanction was to be found in the Act itself; nor was there any need to imply such a requirement into the Act, as the purpose of the provision was simply to apprise the houses of the parliament of the content of the regulations. Dixon J at 205 referred with approval to the decision of the New South Wales Full Court in Darrach v Thomas and added that the section did not indicate that the requirement was mandatory and "it would be strange if such an omission of which there could often be no public knowledge operated to annul an existing law". Evatt J, on the other hand, at 211, while indicating that the question did not arise for actual decision, referred to the statement of Lord Herschell LC in Lockwood's case and seemed to favour the view that the regulations had to be laid before the parliament if they were to be valid.

[249] Support for the view that tabling is not a mandatory requirement is also to be found in the New Zealand case of Atkinson v Munt, Cottrell, and Co. (Ltd) (1907) 26 NZLR 1153. The issue there related to a requirement that municipal by-laws be sent to the minister within seven days of their making. The minister had power to disallow the by-laws. Where there had been a failure to comply with this requirement, the Full Court, overruling the earlier decision of Adams v Basham (1906) 25 NZLR 864, held that the provision was
directory only and non-compliance did not render the by-law invalid.

The matter has now been put beyond doubt in the Commonwealth, Western Australia, Queensland and the Northern Territory in relation to regulations to which the relevant Interpretation Act provisions apply. In these jurisdictions, provisions have been enacted which indicate that a failure to lay a regulation before the parliament will result in the regulation being void, in the case of the Commonwealth, Queensland and the Northern Territory, and ceasing to have effect from the last day on which the regulation should have been laid before the parliament in Western Australia.\(^2\) In the other jurisdictions the position is not entirely clear. The New South Wales and New Zealand parliaments clearly accept the view that the tabling requirements of the Acts Interpretation Act and the Regulations Act respectively, are not mandatory. The New South Wales Subordinate Legislation Committee sees itself as having the duty to ensure that regulations are tabled before the parliament. In Victoria and Tasmania the administrative arrangements seem to be such as to imply an acceptance on the part of regulation-making authorities that they are obliged to table regulations before the parliament. In addition, as far as Tasmania is concerned, the decision of *Bain v Thorne* has not been overruled and would seem to require that regulations be tabled where an Act so provides. In South Australia the position is not entirely clear but the Local Government Act provides that by-laws do not come into force until the period of disallowance has expired thereby effectively creating a mandatory requirement that they be tabled before the parliament.

**Conclusion.** The view expressed in *Bain v Thorne* is, to my mind, the correct approach to this question. It is not, with respect to Starke and Dixon JJ, a case merely of informing the legislature of the content of the delegated legislation. The process of parliamentary review of delegated legislation should be regarded as an essential part of the law-making process and the parliament should not be denied the chance to review any legislation so made. It is really only by requiring that delegated legislation be tabled before the parliament at risk of being otherwise invalid that the parliament can be sure that legislation made by its delegates is brought to its attention. The use of delegated legislation is now so widespread that it would be most unfortunate and improper if parliament were denied the chance to review legislation so made. The better view from the point of view of policy would therefore seem to be that a provision requiring the tabling of legislation before the parliament should be regarded as mandatory and non-compliance with such a provision should render the regulation ineffective. If the courts are not prepared so to rule, then it is to be hoped that legislation along the lines of either the Commonwealth or Western Australian provisions will be adopted by the legislatures in the other jurisdictions.

**Disallowance of Delegated Legislation**

**Prescribed procedure for disallowance directory only.** The legislation that requires delegated legislation to be laid before the parliament may or may not include a further provision permitting the parliament to disallow

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\(^2\) Cth s 48; Qld s 28A; WA s 36; NT s 15.
that legislation. The various provisions of the States, the Commonwealth and New Zealand have been set out in Part 2. An earlier version of the present Commonwealth provision was considered by the High Court in *Dignan v Australian Steamships Pty Ltd* (1931) 45 CLR 188. That provision gave rise to an interpretation problem as to the meaning of the section as then drafted that is not relevant to the existing Commonwealth provision nor to any of the State provisions except perhaps that of Queensland. The issue was whether a house of the parliament could proceed to consider a resolution for disallowance of a regulation before notice of the intention to move that resolution had been given. The terms of the then Commonwealth provision were ambiguous, but the terms of the existing Act make it clear that a notice of a motion must be given before a house can move to pass a resolution disallowing any regulations. Be that as it may, the majority of the High Court in *Dignan's* case considered that the requirements in the section relating to disallowance were a matter of parliamentary procedure and strict compliance with the procedure there set out was not required for the validity of a resolution of disallowance.

[253] When disallowance can be moved. *Dignan's* case is also of importance for the discussion by Dixon J at 206-208 in regard to the question when the time for disallowance must be regarded as commencing. This is of relevance if there is no mandatory requirement for tabling the regulation. If, of course, the tabling of the regulation is mandatory and has not been complied with, then the regulation will cease to have effect. If there is no requirement of tabling, the question arises whether the power to disallow the regulation is in abeyance and does not arise until the regulation is laid before the house, or, alternatively, whether the power may be exercised at any time after the regulations have been made and the attention of the house drawn to their existence. The latter was considered by his Honour to be the better view. He considered that the time requirement was merely intended to fix a period after which a motion for disallowance could not be proposed. Thus it would seem that even if the executive chooses not to table delegated legislation, it is possible for a house of the parliament to disallow that legislation. On the same reasoning, the time within which the parliament must act does not commence until the regulations are tabled.

[254] Remaking of delegated legislation after disallowance. To round out the pattern of parliamentary disallowance of regulations, the Commonwealth and Tasmanian Acts Interpretation Acts and the Northern Territory Interpretation Ordinance include a provision preventing the making of a regulation, in the case of the Commonwealth and the Northern Territory, being the same in substance as the regulation disallowed, and in the case of Tasmania, being the same or substantially the same as that disallowed, without a resolution of the house permitting the making of the new regulation. The Commonwealth and Northern Territory embargoes last for six months from the date of disallowance and the Tasmanian for twelve months. The Commonwealth Act (s 49(2)) and the Northern Territory Ordinance (s 16(2)) go on to provide that any regulation made in contravention of the section shall be void and of no effect. The Tasmanian Act (s 47) contains no similar provision.

[255] The Commonwealth provision was included as a result of the practice.
that was adopted in regard to the regulations that were the subject matter of Dignan’s case (a practice which presumably could be followed also in the jurisdictions other than those referred to in the preceding paragraph). The government of the day could not command a majority in the Senate. Government regulations relating to waterside workers were disapproved of by the opposition and it used its Senate majority to disallow the regulations. The government replied by immediately remaking the regulations. The Senate again disallowed the regulations. Again the government remade them and so the process continued for some time. The effect of this action was to keep the regulations in force except for brief periods, despite the Senate’s disapproval of their content. This practice was in fact commented on in Victorian Stevedoring & General Contracting Co Pty Ltd and Meakes v Dignan (1931) 46 CLR at 129.

Prohibition on remaking regulations disallowed. The interpretation of s 49 of the Commonwealth Acts Interpretation Act came before the High Court in The Victorian Chamber of Manufactures v The Commonwealth (Women’s Employment Regulations) (1943) 67 CLR 347. Certain regulations made under the Women’s Employment Act had been disallowed by the parliament. Subsequently, a further set of regulations differing quite markedly in form but having the same legal effect were made by the Governor-General. A declaration was sought that the regulations were invalid because, among other things, they infringed s 49 of the Acts Interpretation Act. The question for decision came down to the meaning of the expression “the same in substance”. Was any variation in substance (however small) sufficient to enable the making of a second set of regulations? Alternatively, if the second set of regulations produced substantially the same result as the disallowed regulations even though they might be different in detail, was this an infringement of the section? The court held that the latter was the correct approach to take. Latham CJ at 364 put it as follows:

... the section prevents the re-enactment by action of the Governor-General, within six months of disallowance, of any regulation which is substantially the same as the disallowed regulation in the sense that it produces substantially, that is, in large measure, though not in all details, the same effect as the disallowed regulation. The adoption of this view prevents the result that a variation in the new regulation which is real, but quite immaterial in relation to the substantial object of the legislation, would exclude the application of s. 49.

McTiernan J at 389 stated the matter somewhat more succinctly:

In my opinion a new regulation would be the “same in substance” as a disallowed regulation if, irrespective of form or expression, it was so much like the disallowed regulation in its general legal operation that it could be fairly said to be the same law as the disallowed regulation.

See also Williams J at 405-406.
whole produced and compare that. See also Williams J at 406. Latham CJ also made the important point that where a new set of regulations covered the same issues as were included in a disallowed set of regulations but also included new material, the second set of regulations was still objectionable under s 49 and therefore would be void.

Finally, the attitude expressed by Latham CJ at 363 deserves attention. His Honour said that the court should not "hesitate to give the fullest operation and effect" to s 49. He considered that since the house which had disallowed the regulations had the power to rescind its earlier resolution and therefore clear the way for the making of the new set of regulations, the court should be willing to rule invalid a later set of regulations as it did not take the matter out of the power of the parliament to finally determine the question of substantial similarity. The legal effect flowing from a parliament disallowing a regulation is discussed at [539-544].

**Publication of Delegated Legislation**

Publication requirements mandatory. Various provisions are to be found in legislation of Australia and New Zealand requiring subordinate legislation to be published in some way or another. On occasions the requirement is that the legislation be published in full, usually in the Government Gazette. In other cases it is sufficient if notification be given of the fact of making of the regulations together with information as to where the legislation can be obtained. It is clear that the courts treat this requirement of publication of delegated legislation most seriously. As a person is assumed to know the law, and it is no defence for him to claim that he does not know it, it is essential that the law be made available to him and be brought to his attention in some public manner. Consequently, the courts have regarded publication requirements as mandatory and have insisted that they be complied with.

The earliest Australian case dealing with this question is *Shepparton Water Trust v Jeffrey* (1889) 16 VLR 42. A person who had been convicted of failing to pay water rates appealed to the Full Court. The Full Court ruled that a failure to publish the regulation fixing the rate in the *Gazette* as required by the *Water Conservation Act* rendered the rate fixed by the regulation unrecoverable. Consequently the appeal was allowed. The question was discussed in more detail in *Golden-Brown v Hunt* (1971) 19 FLR 438. Requirements as to the method of publication of Australian Capital Territory ordinances are set out in s 12 of the *Seat of Government (Administration) Act 1910*. Subsection (2) of that section provides that every ordinance is to be notified in the *Gazette*. Subsection (2A) states:

"(2A) A notice in the *Gazette* of any such Ordinance having been made, and of the place where copies of the Ordinance can be purchased, shall be sufficient compliance with the requirement of [subsection (2)]."

Blackburn and Connor JJ, Fox J dissenting on this point, held that a notification that was set out under a heading "Notification of the Making of Ordinances" and that simply stated the number, short title and price of the ordinance did not satisfy the requirements of the section. In addition, all judges of the court ruled that a notification that copies of the ordinance could
be purchased through the mail from the Assistant Director of the Australian Government Publishing Services (giving a post office box number) or over the counter from the "A.G.P.S. Book Centres in Canberra, Melbourne, Perth and Sydney" was not sufficient notification of the place where copies of the ordinance could be purchased (which was also required by sub-s 12(2A)). It is to be noted, however, that the effect of this defect in notification was held by all the judges to render the ordinance inoperative — but not void. The distinction is of considerable importance as it simply meant that the ordinance could be renotified in proper form and would then have operation. It would seem that the court in Shepparton Water Trust case also contemplated that the rate there had simply not been fixed because of the failure to gazette the regulation: the regulation was not itself void.

A little less strict approach on the technical requirements of publication was evidenced by Gibbs J in Sobania v Nitsche (1969) 16 FLR at 339. His Honour was prepared to regard a set of Workmen's Compensation Rules which had been misdescribed as "Workers" Compensation Rules in the notification of making as validly notified. He pointed out that there was no other ordinance or set of rules answering the description set out in the notification. The position could, it seems, have been different if there were another set of rules that could have been confused with those notified.

The importance with which the courts view the question of compliance with notification procedures is also illustrated by Tucker v Bishop [1936] SASR 345. A section of the Markets Clauses Act 1870-1871 required the publication of by-laws in a manner prescribed and also the putting up in the market of a printed copy of the by-laws. Another section of the Act provided that production of an authenticated copy of a by-law was to be evidence in all prosecutions of the existence, making and publication of the by-law. It was held by Reed A-J that the section did not constitute proof of the putting up of the by-law: this was a separate requirement from publication and its compliance had to be demonstrated.

Finally, on this general question of publication, reference can usefully be made to the case of Ling v Cornish (1971) 23 LGRA 137. In that case Nettlefold J held that s 5(2) of the Rules Publication Act 1955 (Tas) which provides:

Where, by or under an Act, statutory rules . . . are required to be published or notified in the Gazette, a notice in the Gazette of those statutory rules having been made and of the place where copies of them can be obtained and containing a statement indicating the general purport or effect of the statutory rules is a sufficient compliance with that requirement

should be read with s 39 of the Acts Interpretation Act 1931. That section provides:

Judicial notice shall be taken of every proclamation and Order-in-Council by the Governor made or purporting to be made in pursuance of any Act or Imperial Act and published in the Gazette.

The combined operation of the sections is to require judicial notice to be taken of a mere notification in the Gazette of the making of a statutory rule.
EFFECT OF NON-COMPLIANCE WITH FORMAL REQUIREMENTS

[264] Date of publication where no statutory requirement. Where no definition of notification or publication is provided in the Act requiring that delegated legislation be notified or published, a question arises as to when notification or publication has occurred. This issue was discussed by Wells J in *Myer Queenstown Garden Plaza Pty Ltd v City of Port Adelaide* (1975) 11 SASR at 536-538. The court was concerned with s 38 of the *Acts Interpretation Act* (SA) which requires simply that regulations be published in the Gazette and take effect from the date of publication. The date of publication was crucial to the issues raised in the case because it was asserted that the regulations impliedly repealed certain council by-laws. Wells J was of the view that the word "publish" in the context in which it appeared meant to make the regulations generally accessible or available to the public. There was evidence that, while the Gazette containing the regulations was printed on 9 June 1972, it was not available to the public until 13 June 1972. His Honour concluded that the later date was the date of publication of the regulations. He considered that this conclusion was not affected by s 37b of the *Evidence Act* 1929 which provided that the mere production of a paper purporting to be printed by the Government Printer was, in all courts, to be evidence that the paper was printed by the Government Printer. His Honour noted that in 99 cases out of 100 the mere production would be conclusive of the date of publication because no other evidence would be introduced in opposition to it. But his Honour considered that the word “evidence” meant “some evidence”, it did not mean “proof” or “incontrovertible proof”. Where the publication was disputed and evidence was led on the issue, the court could come to the conclusion on the date of publication independently of the operation of s 37b.

[265] Notification of place of purchase of delegated legislation. An issue related to that discussed in the *Myer Queenstown* case which seems not to have arisen stems from the requirement that is found in many Acts that the notification of the regulations also contain a provision indicating where copies of the delegated legislation may be obtained. The court in *Golden-Brown v Hunt* discussed the form that this notification should take: see [260]. But what is the position if a person who presents himself at the place specified in the notification cannot be supplied with a copy of the legislation because the printer has not yet run off his stock or the bookshop is out of copies? Can it be said that there has been a failure to notify properly the making of the regulation? The strict attitude shown by the judges in the *Golden-Brown* case and the views of Wells J in the *Myer Queenstown* case suggest that a court might well rule that there has been no “notification” and that the regulation is not operative. As ignorance of the law is no excuse for non-compliance, would such a ruling be unreasonable?

INCORPORATION OF MATERIAL BY REFERENCE

[266] Validity of delegated legislation incorporating other material. A question which has arisen when courts have been concerned with the issue of
publication of delegated legislation is whether a regulation is valid which
incorporates material set out in another instrument but which itself does not
set out that material. In short, is a regulation which incorporates another
instrument by reference only, valid? This issue has arisen in two ways. First, it
has been asked whether there has been a valid publication of the instrument
— it being argued that, to be published, all information must be set out in the
instrument itself. Secondly, it has been suggested that an instrument incor-
porating other material by reference is not sufficiently certain. The argument
runs that a person should be able to obtain all the requisite information from
the one instrument and, if he cannot, then the instrument is uncertain as to
its operation. It seems to be incorrect, however, to suggest that the mere fact
of incorporation by reference results in the incorporating instrument being
uncertain. When the two instruments are read together certainty is, or may
be, obtained. If, of course, the incorporated document is uncertain in the
manner discussed in ch 24, then it will be a valid objection to the validity of
the regulation incorporating the document. Be that as it may, the position in
regard to incorporation of other material by reference is the subject matter of
two distinct lines of authority.

Cases indicating invalidity of incorporating legislation. The earliest
case on the question, and one which was followed by Australian courts for
many years, is McDevitt v McArthur (1919) 15 Tas LR 6. The Marine Boards
Act 1899 empowered Marine Boards to make by-laws with reference to
certain matters and provided that such by-laws were to be published in the
Government Gazette. A by-law was made that incorporated, by reference
only, regulations made by the Sovereign-in-Council. The Full Court held that
the regulations were void either for non-publication or for uncertainty — the
court thought it unnecessary to decide the issue one way or the other. The
attitude of the court is summed up by Nichols CJ at 8: “I am prepared to lay
down that, when by-laws are to be published in the Gazette, then what is
there published must be sufficiently complete to leave a reader, who can and
will understand ordinary English, free from uncertainty as to any enacting
part of the by-law”. The court concluded that the failure to set out in the by-
law the matters that were contained in the Imperial regulations rendered the
by-law void. The same approach was adopted by Gavan Duffy J in O'Keefe v
City of Caulfield [1945] VLR 227. The Local Government Act s 204 provid-
ed: “Every by-law shall be published at length in the Government Gazette but
the publication of a notice of the making of any regulation or joint regulation
setting forth its title and that a copy thereof is open for inspection at the office
of the Council shall be deemed a sufficient publication of such regulation”. It
can be seen that the section contemplated a different method of publication
for by-laws than for regulations. A by-law made by the City of Caulfield was
published at length in the Gazette but it included in its text numerous refer-
ences to a regulation. This regulation was also published in the Gazette but
only by reference to its title — that being all that the Act required. It was
conceded that the by-law was incomprehensible without reference to the text
of the regulation. The court, following McDevitt v McArthur, held that the
by-law was invalid. There was not a “publishing at length” of the by-law as it
did not provide the reader with all the requisite information. In fact, the
judge seemed to have contemplated that even if the regulation had been
published in full concurrently with the by-law, this would not have been
sufficient as the by-law itself was required to convey all the requisite information.

[268] This general approach was also followed by the New South Wales Full Court in Mclver v Allen (1943) 43 SR (NSW) 266; and by the High Court in Arnold v Hunt (1943) 67 CLR 429, both cases being concerned with a regulation made by the Prices Commissioner under the National Security legislation. The Prices Commissioner had power to fix the maximum price at which goods could be sold. An order was made that fixed the price for liquor at a figure set out in a price list prepared by the United Licenced Victuallers Association and approved by the Commissioner. This list was in fact available only to Association members. The order was held invalid. The Commissioner had not fixed a price. The prices were identifiable only from a list prepared by a private organisation. The approach of both courts is summarized by Rich J at 432: "I consider that the price must be fixed and declared in the body of the order itself or in a schedule to the order and cannot be fixed by some extraneous document which is not part and parcel of the order". While these two cases are perhaps distinguishable as germane to the particular wartime legislation under which they were made, the approach of Rich J (and see also that of McTiernan J at 433) indicates that the same line of thinking as is illustrated in the cases mentioned above, was strongly influencing the view of the High Court.

[269] Cases indicating validity of incorporating legislation. None of the foregoing cases referred to the decision of Mann CJ in Holland v Halpin [1939] VLR 253. That case concerned the validity of a regulation made under the Health Act that provided "For the purposes of sections 235 and 236 of the Health Acts, the colour named 'saffron' (B.C.C.-54) in the British Colour Council Dictionary of Colour Standards (1934 Edition), is hereby prescribed as the 'prescribed colour'". His Honour held that the regulation was valid. He addressed his mind solely to the question of uncertainty and unreasonableness. He considered that there was no uncertainty as the Dictionary of Colour Standards was an identifiable document which was available for consultation. While McDevitt v McArthur was cited by counsel, it is not referred to in the judgment and the judgment does not address itself to the question whether or not a regulation is required to specify all the requisite requirements within itself.

[270] In Wright v TIL Services Pty Ltd (1956) 56 SR (NSW) 413 a view consistent with that in Holland v Halpin and rejecting the other authorities was taken by a majority of the New South Wales Full Court. Regulations made under the Inflammable Liquid Act specified requirements for buildings in which nitrocellulose products were being manufactured and included a requirement that electrical devices should "comply with the relevant rules of the Standards Association of Australia relating to electrical equipment in hazardous locations". It was not disputed that the rules of the Standards Association were identifiable and were not uncertain in the sense discussed in ch 24. It was argued, following McDevitt v McArthur, that the regulations were invalid because they did not themselves contain the requirements that had to be complied with. This argument was rejected by Walsh J, with whom Herron J agreed on this issue; Owen J, the third member of the court, did not allude to this point. Walsh J at 421-422 said:
The general proposition that in no circumstances can a regulation incorporate by reference something not set forth in it is, in my opinion, unsound. It is true that a regulation should indicate with sufficient certainty to those upon whom it imposes a penalty for a breach of it, what is the extent of the obligation. Where a regulation contains a reference to some other document the question whether or not the requirement just stated is fulfilled must depend upon a consideration of the particular regulation and of the nature and contents of the incorporated document. If there is uncertainty as to what is the document to which reference is made, no doubt the regulation would be held invalid. Again, if such document is not readily accessible it may be, in some cases, that the regulation would be held to be bad, the true ground for doing so being that it is unreasonable rather than that it is uncertain. Subject to the considerations mentioned, I can see no reason for holding that any uncertainty is created by the mere fact that the incorporated document is not set out in terms in the regulation itself. Whether the instrument with which a court is concerned is a statutory regulation, or is an instrument of a different kind, such as a written contract or a will, in my opinion no uncertainty arises from the circumstance that it has incorporated in it, by reference, some other document, if that which is incorporated is clearly identified, and contains no ambiguity in its own terms.

His Honour stated that if this reasoning ran contrary to that in McDevitt v McArthur, he was not prepared to agree with the reasoning in that case. His Honour also distinguished McIver v Allen and Arnold v Hunt as being cases which were "concerned with different problems from those which arise in these cases". This last statement must be treated with some reservation as the courts in both cases clearly took into account the fact that there was a failure to set out all the requirements in the regulations.

[271] The judgment of the court in Wright's case was accepted, and, to the extent that it is inconsistent with it, O'Keefe's case was distinguished, by Pape J in Medcraft v City of Box Hill [1959] VR 768. A by-law of the municipality defined "offensive trade" by incorporating by reference the definition of that expression in the Health Act. It was asserted that O'Keefe's case meant that the by-law was invalid. His Honour did not consider that O'Keefe's case decided this point one way or the other but, if it did, he rejected the approach in favour of that adopted by the New South Wales Full Court in Wright's case. Additionally, his Honour considered that whatever might be said for the supposed principle against legislation by reference where the document sought to be incorporated was what might be called a private document, he did not consider that the same considerations applied where it was an Act of parliament that was being incorporated. On that ground alone he would have been prepared to distinguish the earlier decisions. The judgment of Walsh J was also accepted and followed by Gibbs J sitting as the Australian Capital Territory Supreme Court in Sobania v Nitsche (1969) 16 FLR 329. His Honour in that case said that he preferred the reasoning of Walsh J in Wright's case to that of the courts in McDevitt's case and O'Keefe's case. It is of interest that his Honour mentioned that the earlier cases could be distinguished on the narrow ground that the publication requirement in those cases stipulated that the by-laws be published at length in the Gazette whereas in Wright's case the requirement was that the making of the by-law simply be notified in the Gazette. However, his Honour did not choose that as a basis for distinguishing the earlier cases but rejected the reasoning followed by the judges in those cases in preference to the reasoning of Walsh J in Wright's case.
One other case dealing with the question should perhaps be mentioned. In *Ex parte Ryan re Bowry* (1957) 57 SR (NSW) 438 regulations which referred to certain tables for use in the calculation of the proof of spirits were held valid. It would seem that the tables provided no more than the scientific basis for calculation and presumably merely made clear the method by which the proof should be ascertained. The case does not seem to take the issue any further.

Gibbs J and Walsh J in the cases referred to at [270] and [271] do not satisfactorily distinguish the approach adopted by the High Court and by the New South Wales Full Court in the two wartime cases of *Arnold v Hunt* and *Mclver v Allen*. If regard were paid only to the question of precedent, it seems doubtful whether the attitude taken in the recent cases could be sustained. However, from the point of view of the better statement of the law, there is much to commend the view expressed in the later cases provided always that the instrument which is incorporated by reference is readily available. There is surely a requirement that the law be available for consultation by persons concerned with it. Regulations should not, therefore, incorporate other documents which are unavailable to the public at large. Subject to this proviso, incorporation alone should not be a ground for invalidating delegated legislation. However, where other material is incorporated in a regulation, the instrument so incorporated should be available to the public from the same source from which regulations can be obtained.

Incorporation of material as in force from time to time. There is one other point which should be noted in relation to this question and that is whether or not it is possible to incorporate an instrument as in force from time to time. In 1964 the Commonwealth *Acts Interpretation Act* was amended by the inclusion of a new s 49A which authorized the making of regulations applying, adopting or incorporating with or without modification the provisions of any Act or of any regulations as in force at a particular time or any matter contained in any other instrument or writing as in force or existing at the time when the regulations took effect. The section, however, provides expressly that regulations are not to incorporate matter contained in an instrument other than another Act or regulations “as in force or existing from time to time”. Thus any reference to, for example, a Standards Association document can only be to that document as in force at the time when the regulations are made. Should the document be changed subsequently, an amendment of the regulations is necessary if the document is to be incorporated in its altered form. The question of incorporation of an instrument as in force from time to time was alluded to by Walsh J in *Wright's* case. It had been urged that the rules of the Standards Association were uncertain because the reference in the regulations to those rules did not indicate whether it was to the rules as in existence when the regulation was promulgated or to the rules as in existence from time to time thereafter. His Honour considered that the reference was in fact to the rules as current at the time when the product to which the regulations referred was being manufactured, repaired or used in the premises to which the regulations related. Thus it was apparently a reference to the rules of the Standards Association as in force from time to time and His Honour was prepared to accept that such a reference was valid. It would seem clear that this view could not be taken in the case of Common-
wealth regulations incorporating material from another instrument by reference only. In regard to the States (where there are no statutory provisions equivalent to that of the Commonwealth), the ruling of Walsh J would give some authority to the right to refer to an instrument as in force from time to time. It could be argued that this is undesirable as not only may the public be subjected to the problem of going to another source before being able to identify the law on a topic, but also they will be unsure to which particular instrument they should go as there is, of course, no obligation on other organizations to publish their instruments as amended from time to time. The point of policy is one which is fairly evenly balanced and a court in the future could choose whichever view it thought preferable.

Sub-delegation through incorporation. An issue which does not seem to have been raised directly in any of the cases is whether the fact of incorporating another document in regulations can be said to be a sub-delegation of the power to make the regulations. The general question of sub-delegation is discussed in ch 25. For present purposes it is sufficient to raise the point that the inclusion in delegated legislation of requirements stipulated by another organization means that the other organization is, in effect, stating the law on the topic. This may not be so if the incorporation is of a document as in force at a particular time. But if the incorporation is of the document as in force from time to time, this enables the organization writing the document to determine the content of the delegated legislation. Is this not a sub-delegation of the law-making power?

New Zealand position. The position in New Zealand is affected by the Standards Act 1941, as amended. That Act established a Standards Council and empowered it to fix standards in much the same way as the Standards Association of Australia functions. The further power was given (s 8) for the Minister to declare any specification to be a standard specification for the purposes of the Act. Where such a standard has been declared, ss 11-12A enable reference to be made to that standard in certain subordinate legislative instruments. Section 11 permits the making of regulations by the Governor-General prohibiting and preventing "the sale of any specified commodity or class of commodities, or the use in any trade or business of any commodity, process or practice, in respect of which one or more standard specifications have been declared, unless the same conforms to such one or more of those specifications as may be prescribed". Section 12 of the Act enables regulations made pursuant to a power in any Act to describe or define any characteristics of any commodity, process or practice, to prescribe or define those characteristics by reference to any standard specification. Section 12A enables a local authority to make by-laws adopting a standard specification but requires that the standard specification be attached to, or incorporated into, the by-law.

These provisions appear to enable the making of legislation in terms similar to that contemplated by s 49A of the Commonwealth Acts Interpretation Act. It would seem that the reference cannot be to a standard as in force from time to time; if a standard is amended the subordinate legislation would have in turn to be amended to refer to the altered standard. The operation of the Act is limited to reference to standard specifications within the meaning
of the *Standards Act* but the definition of specification was extended in 1950 to include a model form of by-laws. Thus it would seem that in New Zealand incorporation of standards approved by the Standards Council or of model by-laws will, if satisfying the requirements of the Act, be valid. As to the incorporation of other instruments, the Australian law as set out above would appear to be applicable.
CHAPTER 16

EMPOWERING PROVISIONS: GENERAL

As mentioned in ch 14, there seems little point in discussing the innumerable cases concerned with the validity of delegated legislation made under an Act where the validity of that legislation is dependent upon the particular empowering provision in the Act. But there are a number of general empowering formulae that are commonly found in Acts and the effect of these bears examination.

NECESSARY OR CONVENIENT (OR EXPEDIENT)

Introduction. The commonest provision enabling the making of delegated legislation is that which vests power in a designated authority to make regulations that are "necessary or convenient" for giving effect to a particular Act. This general power may or may not be coupled with a number of specific regulation-making powers. But, either on its own or as an addition to specific powers, it is the form of words most widely used in Australian legislation. Occasionally one sees the word "expedient" substituted for the word "convenient" but the courts have not treated the two expressions as having any different effect. The use of the words "necessary or convenient" import an element of vagueness into the regulation-making power and there are many cases which have considered whether or not particular regulations can properly be said to fall within the scope of the expression. These cases must, of necessity, depend very much upon their facts as the court will have to consider whether the regulation is necessary or convenient for giving effect to the particular Act. However, some broad principles have been enunciated and there are cases which indicate that certain regulations cannot be made under a necessary or convenient power.

General interpretation of necessary or convenient power. The most frequently cited case relating to the power to make regulations necessary or convenient for giving effect to an Act is Shanahan v Scott (1956) 96 CLR 245. That case also serves as a good factual illustration of the approach of the court to the resolution of the validity issue. Regulation 44 of the Egg and Egg Pulp Marketing Board Regulations 1953 (Vic) made under the Marketing of Primary Products Act 1935-1953 read: "No person shall without the consent of the Board place or cause to be placed any eggs in any cold storage premises nor subject any eggs to any preservative treatment". (There was then a proviso exempting domestic storage eggs from the operation of the regulation.) It was sought to argue that the regulation was valid under a power to make regulations necessary or expedient for the administration of the Act or for the carrying out of its objects. The High Court, after examining the Act, concluded that the regulation extended to eggs that were no longer (or indeed may never have been) part of a marketing scheme provided for under the Act. The Act was concerned with marketing schemes and not with the general sale and control of eggs and therefore the regulation was invalid. At 250 the High Court expressed the general approach to be adopted in regard to the resolu-
tion of the issues involved in this type of case. The court examined authorities relating to the topic and concluded that where there is a power to make regulations necessary or convenient for giving effect to an Act, the power . . . does not enable the authority by regulations 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 legislature has adopted to attain its ends. The court concluded that in this particular case the regulation extended to eggs with which the Board had, and could have had, nothing to do and also extended to those which the Board had sold unconditionally. The provision was therefore: . . . much more than an elaboration, filling in or a fulfilment of the plan or purpose which the main provisions of the Act have laid down or, if the expressions be preferred, have "outlined" or "sketched". It means that an attempt has been made to add to the general plan or conception of the legislation and to extend it into a further field of regulation, namely that of the use, handling or disposition of eggs independently of the board's marketing of the eggs vested in or otherwise acquired by the board. (at 253-254.)

The statements of the High Court were approved by the Privy Council in Utah Construction and Engineering Pty Ltd v Pataky [1966] AC 629. The passage quoted above from page 250 was also approved by the High Court in Willocks v Anderson (1970) 124 CLR at 298.

An earlier case which had taken a similar approach to that in Shanahan v Scott (and which was cited with approval in Shanahan v Scott) was Carbines v Powell (1925) 36 CLR 88. That case concerned a regulation made under the Commonwealth Wireless Telegraphy Act 1905-1919 that provided that no person was to manufacture equipment for use as broadcast receivers. The Act was concerned with the establishment and operation of wireless telegraphy stations but made no provision relating to the manufacture of equipment for use in such stations. It was argued that the regulation was justified under the power to make regulations necessary or convenient for carrying out or giving effect to the Act. But the High Court considered that the regulation went beyond the field marked out by the Act and was therefore invalid. The leading judgment is that of Isaacs J. His Honour conceded that the regulation may well have been eminently reasonable and that it may have been desirable for public safety and for the protection of private purchasers for restrictions of the kind set out in the regulation to have been made. But the question for the court was not whether the power should exist but whether in fact it did exist. At 92 he said:

It is not open to the grantee of the power actually bestowed to add to its efficacy, as it is called, by some further means outside the limits of the power conferred, for the purpose of more effectively coping with the evils intended to be met. The authority must be taken as it is created, taken to the full, but not exceeded. In other words, in the absence of express statement to the contrary, you may complement, but you may not supplement, a granted power.

This pithy summary of the approach of the court — to distinguish between complementing and supplementing a regulation-making power — is the nub of the issue which a court must resolve. Obviously there will be a fine line of distinction in many cases. But an examination of the Act which
contains the regulation-making power will usually indicate whether an attempt is being made to add something additional to the operation of the Act which cannot be related to the specific provisions of the Act or whether the regulation-making power has been used merely to fill out the framework of the Act in such a way as to enable the legislative intention to operate effectively. The Privy Council in *Utah Construction and Engineering Pty Ltd v Pataky* [1966] AC 629 stated the test somewhat more stringently. It indicated that in determining whether or not a regulation can be described as necessary or convenient for giving effect to the Act, it is necessary to point to a specific provision of the Act which is, in the words of Isaacs J, being complemented. It is not sufficient simply to make a regulation which fits in with the general scope and purpose of the Act but which cannot be attached, as it were, to any specific provision of the Act. Not all of the regulations which have been held valid would seem to meet this requirement: see, for example, *Milne v Westralian Farmers Ltd* and *Minister for Education v Hoezenroeder* at [291]. It is probably sufficient if the regulations fall within the general purpose of the Act in the sense that the Act could not function to best effect without the aid, as it were, of the regulations. The function of the Act must, however, be able to be spelled out of the specific provisions of the Act (cf the passage from *Shanahan v Scott* at [279]).

[282] Presumption of validity. The court will, of course, as with any attempt to attack the validity of a regulation, have to be persuaded that invalidity is made out. Perhaps the high water mark of the assertion of a presumption of validity is to be found in *Gibson v Mitchell* (1928) 41 CLR 275. There Isaacs J at 279, speaking of the argument that a regulation made under the *Post and Telegraph Act* was not necessary or convenient for carrying out that Act, said “Those words in that collocation mean necessary or convenient from the standpoint of administration. Primarily they signify what the Governor-General may consider necessary or convenient, and no Court can overrule that unless utterly beyond the bounds of reason and so, outside the power”. (Cf the approach of the courts to arguments of “unreasonableness” in regard to delegated legislation: ch 23). This statement of Isaacs J was referred to with approval by Chamberlain J in *Minister of Education v Hoezenroeder* [1967] SASR at 369. But other cases do not indicate quite so ready an acceptance of the notion that the courts should not intervene and declare a regulation invalid. Certainly the courts will need to be persuaded that the regulation is invalid, but the approach will be that set out in *Shanahan v Scott* and *Carbines v Powell* which does require that the validity of the regulation be shown by the Crown.

[283] Detail in Act determines scope of power. The scope of a necessary or convenient empowering clause will vary according to the Act in which it is included. The more detailed the Act, the more limited the power to make regulations; the more general the Act, the more it is apparent that the legislature has deliberately left it to the executive to spell out the details in regulations. This distinction is made in *Morton v The Union Steamship Company of New Zealand Ltd* (1951) 83 CLR 402 (see also under Repugnancy: ch 21). In that case, regulations were held invalid which purported to impose a liability for excise duty on certain persons where the Act had already made specific provision for other persons to be liable in like circumstances. The main
interest of the case in the present context is the following passage from the judgment of Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ at 410:

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.

The approach set out in Morton’s case was expressly followed in O’Sullivan v Hannagan [1960] SASR 266. The court there had to consider the validity of regulations made under an Act relating to the control of taxi cabs. The provisions of the Act itself were few and brief but among them was a lengthy regulation-making section which included a power to make regulations necessary or convenient for giving effect to the Act. The court ruled that the regulations were intended to add to what was very much a skeleton Act and therefore the necessary or convenient power should be interpreted very widely. A similar approach was adopted in Coles Foodmarket Pty Ltd v Boucher (1971) 2 SASR 323; see also Philpott v Boon [1968] Tas SR 97.

Non-interference with common law principles. At [425] the general reluctance of the courts to assume that delegated legislation, overrides the general principles of common law is discussed. The width and vagueness of the necessary or convenient power makes it less likely that the courts will countenance an intention on the part of the legislature to authorize the making of regulations departing from these principles. A reflection of this attitude is to be found in two cases concerned with regulations made under a Landlord and Tenant Act. In both cases it was held that the Act gave a person a power to act by an agent. However, regulations made under a necessary or convenient power in the respective Acts purported to limit the agent so appointed to a person designated in a specific way in a particular form. Sholl J in Sandhurst and Northern District Trustees Executors & Agency Co Ltd v Auldridge [1952] VLR 488 and the New South Wales Full Court in Ex parte Aston Investments Pty Ltd Re Hall[1960] SR (NSW) 620 held the respective regulations invalid. The common law rules could not be abrogated in the absence of an express power; a general necessary or convenient power was not sufficient.

A similar attitude is reflected in relation to the imposition of strict liability for offences. The courts are reluctant at any time to rule that a person is to be liable for an offence if he does not have mens rea: see Edwards, Mens rea in Statutory Offences (1955); Howard, Australian Criminal Law (2nd ed 1970). It would therefore not be surprising if the courts showed an unwillingness to hold a general power to make regulations necessary or con-
venient for giving effect to an Act enabled the making of regulations imposing strict liability. The only case which seems to deal specifically with this question, however, is *Miller v Bartholomew* [1936] SASR 38. There a regulation made under a general power in the *Road and Railway Transport Act* 1930 imposed obligations relating to the issue of tickets to passengers using licensed motor buses. The regulation provided that if an employee of a licence holder committed an offence, both the licence holder and the employee were liable. The regulation was held invalid. There was nothing in the Act to indicate that a liability could be imposed on a licence holder without mens rea.

**Alteration of rules of evidence.** *Barnfield v Calandro* [1964] VR 762 indicates that the courts do not equate provisions that endeavour to facilitate proof of matters with penal provisions. There are accordingly no assumptions made in favour of a person affected by such provisions. This attitude is reflected also in the approach of the courts to the interpretation of regulations that are concerned with evidentiary provisions relating to legal proceedings. There is a line of cases which has upheld the validity of regulations made under a necessary or convenient power which provided that a certificate of an appropriate authority was to be prima facie evidence of the facts stated in the certificate. The first case in this series is *Federal Commissioner of Taxation v Rooney* (1925) 36 CLR 305. Regulation 54 of the *Entertainments Tax Regulations* provided: "In any legal proceedings ... the certificate in writing of ... the Commissioner ... stating the amount of entertainment tax due by the defendant shall be *prima facie* evidence of the facts stated". This regulation was held valid. Knox CJ at 308 said: "[The regulation] merely does for the purposes of the Act what in other Acts is done by sections in the Acts themselves; that is, it provides that a certain certificate shall be prima facie evidence of the facts stated in it". This decision was followed in *Loughnan v Hopkins* [1940] VLR 42. There a regulation which related to proof that a motor vehicle was licensed and provided that a certificate to that effect by the Registrar of Motor Vehicles was prima facie evidence of that fact was held to be valid.

These cases were, however, distinguished by Fullagar J in *Australasian Jam Co Pty Ltd v Federal Commissioner of Taxation* (1953) 88 CLR 23. There the regulation made a certificate of the Commissioner stating that he was of opinion that the avoidance of tax was due to fraud or evasion conclusive evidence that the Commissioner was of that opinion. His Honour held that the regulation could not be supported by the power to make regulations necessary or convenient for giving effect to the Act. He distinguished *Rooney's* case and *Loughnan's* case on two grounds: first on the basis that in those cases the certificate was only prima facie evidence of the facts stated in it, whereas the regulation before him provided that the certificate was to be conclusive evidence of the Commissioner's opinion. Secondly, in the earlier cases the certificate related to factual matters capable of proof. In this case, even if the certificate were to be read as only prima facie proof of the Commissioner's opinion, it was nevertheless concerned with an opinion and would effectively put that opinion beyond challenge. This, in the view of his Honour at 36: would be neither necessary nor convenient for giving effect to the Act, though it might
be convenient for other purposes and from another point of view. ... When the Act makes the opinion of the Commissioner a criterion, and requires that opinion to be proved, it must be taken, in my opinion, to contemplate and require proof according to the rules of the common law, and any regulation which derogates from that requirement is inconsistent with the Act.

The second part of his Honour's opinion is, of course, relevant in any situation in which one is concerned with proof of an opinion. The more common situation is, however, the distinction that he draws between conclusive proof of a matter and prima facie evidence of that matter. This distinction was alluded to in Philpott v Boon [1968] Tas SR 97. There a regulation provided that a certificate of the Professor of Electrical Engineering at the University of Tasmania was to be prima facie evidence that a speed measuring device referred to in the certificate had been duly tested and was accurate. This regulation was made under a general power to make regulations convenient and expedient for giving effect to the Traffic Act. Burbury CJ distinguished the Australasian Jam case and followed Rooney's case in holding that the regulation was valid. The regulation provided only that the certificate was prima facie evidence of the accuracy of the device and this, his Honour considered, brought it within the test set out in Rooney's case. Further, the certificate of the Professor of Electrical Engineering merely went to proof of the accuracy of the machine; his opinion was not an essential element in the offence. Contrast the opinion of the Commissioner in the Australasian Jam case which was an element essential to the operation of the Act itself. Burbury CJ was reinforced in reaching his decision by an earlier unreported decision of the Tasmanian Full Court in Reid v Bond. A similar ruling had been given in that case, and, in argument before the High Court on an application for leave to appeal, the ruling seemed to have been accepted as valid by that court (see page 103 of the report of Philpott v Boon).

[288] Vesting of jurisdiction in court. In Willocks v Anderson (1970) 124 CLR 293 regulations vesting jurisdiction in the High Court to determine disputes arising out of elections to the Australian Apple and Pear Board were made under a necessary or convenient power in the Apple and Pear Organization Act (Cth). The validity of these regulations was challenged in the High Court. The court referred to what they described as an undecided issue as to whether jurisdiction could be conferred on the High Court by regulation. The court pointed to contrasting views expressed in LeMesurier v Connor (1929) 42 CLR 481 and Peacock v Newtown Marrickville and General Co-operative Building Society No 4 Ltd (1943) 67 CLR 25. The court considered it did not have to resolve this conflicting issue at this stage because, even assuming that it were possible to vest jurisdiction in the High Court by regulation, it could not be done under a necessary or convenient power. The High Court considered that parliament must clearly empower the making of regulations to vest such jurisdiction in the High Court. The New South Wales Full Court in an earlier decision had taken the matter a little further. In Ex parte McGuigan (1923) 40 WN (NSW) 129 a regulation made under the necessary or convenient power in the War Service Homes Act gave jurisdiction to a court of summary jurisdiction to order possession of land to be given to the War Service Homes Commissioner where a mortgagor was in default. This regulation was held to be invalid. The power would not support the conferring of a new jurisdiction on the court.
From these cases it would seem that a general regulation-making power will not support a regulation that vests a new jurisdiction in a court. Specific regulation-making power must be found to support such action. Indeed, in regard to the High Court, the situation may be that it is not possible to vest jurisdiction in that body by regulation at all.

Retrospectivity. The whole question of retrospective operation of regulations is dealt with in ch 31. At this point, however, it is to be noted that in *Broadcasting Co of Australia Pty Ltd v The Commonwealth* (1935) 52 CLR 52, the court held that a regulation that purported to reduce retrospectively moneys that otherwise would have been available for distribution to broadcasting station licence holders was invalid: a general regulation-making power would not permit the making of retrospective regulations.

Miscellaneous. There are numerous other cases which have considered the validity of regulations made under a power to make regulations necessary or convenient for giving effect to an Act. Many of these are discussed under appropriate headings elsewhere in the text. A few, however, warrant repetition in the present context because they demonstrate the approach of the courts to the interpretation of such a power.

*Grech v Bird* (1936) 56 CLR 228. Power was given under the *Marketing of Primary Products Act* (NSW) to require returns relating to the disposal of eggs. The regulations were also empowered to fix penalties not exceeding £50 for breach. The regulations required returns to be accompanied by a statutory declaration as to their accuracy thereby attracting the *Oaths Act* with its severe penalties for the making of false declarations. The regulation was held invalid. The general necessary or convenient power would not support the regulation as it attempted to make a poultry farmer liable for a heavier penalty than that permitted by the Act for breach of the regulations. The general power could not be used to enable the Governor-in-Council to make a regulation which varied or departed from a positive provision made by the Act itself (see particularly Dixon J at 239). See also *Bodley v Slaughter* [1916] NZLR 75.

*Bray v Milera* [1935] SASR 210. The *Aborigines Act* 1911 (SA) gave wide powers to the Chief Protector of Aborigines in relation, among other things, to Aboriginal Institutions. A regulation was made giving power to the Protector to ban aborigines from an institution. This regulation was held to be within the general necessary or convenient power as convenient to the carrying out of the Protector's supervisory role. It was conceded that the regulation had an incidental punitive effect but this was only incidental to its nature and not its object. Since the power conferred was indeed necessary or convenient, the incidental punitive effect did not go to the validity of the regulation.

*Minister of Education v Hoezenroeder* [1967] SASR 357. In that case it was held by Chamberlain and Mitchell JJ, Bray CJ dissenting, that a regulation made under the general power to make regulations necessary or convenient for carrying out the *Education Act* which limited the times at which a teacher could resign and required the payment of two months salary by a teacher who resigned at times other than those specified in the regulations was valid as
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being necessary for the carrying out the objects of the Education Act.

Milne v The Westralian Farmers Ltd (1936) 38 WALR 83. A regulation was made by the Dairy Products Marketing Board under a power given to it by the Dairy Products Marketing Regulation Act 1934 (WA) to make regulations necessary or convenient for carrying out the Act. The regulation required butter to be labelled with certain information as to its dimensions, the brand of the packer, its grade, etc. Northmore CJ held that the regulation was valid having regard to the provisions of the Act and the duties and obligations cast upon the Board under the Act.

“NECESSARY”

[292] Scope of power. There are two older decisions that relate to a regulation-making power where the only power was to make regulations “necessary” for giving effect to the Act. In the older of these cases, In Re Sonnadere (1903) 5 WALR 11, it would seem that the same result would have been achieved if the wider “necessary or convenient” provision had been included in the Act. The case was concerned with a regulation made under the Early Closing Act which prohibited persons “of the Chinese or other Asiatic race” from being registered as small shopkeepers for the purposes of exemption from the provisions of the Act. The regulation was held to be invalid. There was nothing in the Act that allowed discrimination against any person on the ground of race and the regulation was not “necessary” for carrying out the objects of the Act. In The Commonwealth and the Postmaster-General v The Progress Advertising and Press Agency Co Pty Ltd (1910) 10 CLR 457, however, the result might perhaps have been different if the words of the section had been “necessary or convenient”. A regulation was made under a power in the Post and Telegraph Act to make regulations “necessary for carrying out this Act or for the efficient administration thereof”. The regulation prohibited the publication and circulation of lists of telephone subscribers by private organizations and was clearly intended to give the Postmaster-General a monopoly in preparing lists of telephone subscribers. The regulation was held to be invalid in that it interfered with the liberty of persons to engage in business and there was no indication in the Act of this right to impose such a limitation. Higgins J at 469 said “The word ‘necessary’ may be construed liberally, not as meaning absolutely or essentially necessary, but as meaning appropriate, plainly adapted to the needs of the Department — to ‘the carrying out’ of its ‘efficient administration’ … But the power does not extend to everything which the Governor-General in Council considers to be necessary. The regulation must be necessary”. To this point the decision does not seem to be in any way remarkable. The same result could well have been achieved if the formula “necessary or convenient” had been included. However, in Gibson v Mitchell (1928) 41 CLR 275 a regulation made under the Post and Telegraph Act providing that a person who entered into occupation of premises and made use of a telephone service was liable for amounts owing in respect of that service was held to be a valid exercise of the power in the Act — which had been altered to “necessary or convenient”. Higgins J at 280 distinguished Commonwealth v The Progress Advertising and Press Agency Co Pty Ltd, which had been pressed on the court as resolving the issue in favour of the invalidity of the regulation, on the basis that the Post and
Telegraph Act as in force when the earlier case was decided only gave a power to make regulations "necessary" for giving effect to the Act. The words "or convenient" had been added by amendment and apparently, in the view of Higgins J, this extended the regulation-making power given by the Act. The point is perhaps moot as it seems highly unlikely that the stock formula "necessary or convenient" will now be departed from. The views of Higgins J are, however, of significance in pointing to the fact that there may well be a difference between the operation of what is necessary and what is convenient with the latter word extending the scope of what might otherwise be regarded as a sufficiently wide general regulation-making power.

"CARRYING OUT OR GIVING EFFECT TO LEGISLATION"

[293] Scope of power. As referred to in the previous paragraphs, it is common to find as an empowering clause the right to make regulations necessary or convenient for "carrying out or giving effect to" an Act. On occasions the words necessary or convenient are omitted and the power to make regulations is simply expressed to be that "for carrying out or giving effects to the Act" or "for carrying out the objects and purposes of the Act". As a result of a decision of the High Court in Clements v Bull (1953) 88 CLR 572, it would seem that these words standing on their own, in fact give the same regulation-making power as if the words "necessary or convenient" were included. In that case, the High Court held that regulations made under the Melbourne Harbour Trust Act 1928 were not supported by the power to make regulations "generally for carrying out the objects and purposes of this Act". The court reached that conclusion by having regard to cases concerned with the words necessary or convenient, and, indeed, made it clear that the approach to be adopted involved the same considerations as if those words were included. The judgement of the court was reached by a majority of three to two, but the division of opinion was only as to whether or not the regulations were supported by the power, not as to the scope of the power in general terms. An earlier case which had adopted a similar approach in regard to regulations made under the same Act was Kenneally v Berman [1949] VLR 362, a decision of Fullagar J. A further illustration of the approach of the courts to this regulation-making formula is provided by the decision of the High Court in Williams v The Silver Peak Mines Ltd (1915) 21 CLR 40. There power to make regulations “for carrying this Division of the Act into full effect” was held insufficient to support a regulation that provided that notice in the Gazette of the cancellation of a mineral lease was conclusive evidence that the lease had been cancelled. The reasoning of the court pursues the same line as that followed in Rooney's case and the Australasian Jam Co case: see [286-287].

[294] Finally, in regard to these words, mention should be made of the judgment of Isaacs J in Carbines v Powell (1925) 36 CLR at 91 where his Honour said, in relation to the words "carry out" and "give effect", that "there is little, if any, difference between the two expressions. They both connote that the Governor-General's regulations are to be confined to the same field of operations as that marked out by the Act itself".
“Without Limiting the Generality of the Forgoing Provisions”

[295] Effect of expression. Provisions empowering the making of delegated legislation frequently commence with a general power to make regulations necessary or convenient for giving effect to the Act and then continue to enumerate a number of specific powers under which regulations can be made. It is customary to introduce this list of specific powers by the words “without limiting the generality of the foregoing provisions” — words which refer to the general power to make regulations necessary or convenient. The effect of this interpolated provision was discussed by the New South Wales Full Court in Ex parte Provera; re Wilkinson (1952) 69 WN (NSW) 242 by Street CJ at 245. Herron J agreed with the judgment of Street CJ. Owen J dissented but did not discuss the point at issue here. However, in upholding the validity of the regulations, he must be taken to have disagreed with the interpretation of the regulation-making power held by the majority judges. Street CJ said that the effect of the “without limiting the generality” expression was not, as might at first sight be thought, to widen the regulation-making power. Rather the words were intended to prevent any argument that the enumeration of specific powers had a limiting effect on the general regulation-making power. This in turn resulted in the court interpreting the specific powers in such a way that they could not exceed the general regulation-making power — otherwise why would the words “without limiting the generality” of the broad regulation-making power have been included? As put by his Honour at 245: “I find it difficult to concede that the Legislature intended by these words [ie the specific regulation-making powers], which it was anticipated might be argued to have a limiting effect on the general regulation-making power of s. 34, to give a power to the Governor to make regulations covering the commodity under conditions to which the Act as a whole has no application”.

[296] The effect of specific provisions following on from a general necessary or convenient power was also discussed briefly by Fox J in R v Minister of State for Interior (1972) 20 FLR at 459. His Honour was concerned with an empowering provision which provided “the Attorney-General may make regulations, not inconsistent with this Ordinance prescribing all matters which by this Ordinance are required or permitted to be prescribed or which are necessary or convenient to be prescribed and in particular for the general government, management and discipline of the Police Force”. His Honour said that the phrase relating specifically to the Police Force could be read in conjunction with, and as governed by, what had gone immediately before. Alternatively, it could be related more to the opening words so that there was power “to make regulations, not inconsistent with this Ordinance prescribing all matters ... for the general government, management and discipline of the Police Force”. His Honour thought that the latter construction probably attributed less of a solecism to the draftsman than the former but he was not sure that it was to be preferred. Somewhat regrettably, his Honour did not have to resolve the matter because, in the case before him, the same result was achieved whichever construction was adopted.

[297] The significance of these decisions is to highlight the importance of the interpretation given to the necessary or convenient power to make regulations. The meaning placed on this power in a particular Act will, to a large
extent, influence the interpretation that is placed upon any specific powers in the Act. The "without limiting the generality" formula therefore has two effects. First, the specific powers will not limit the scope of the general regulation-making power. But, perhaps more importantly, the general regulation-making power will limit the scope of the particular powers.

"FOR THE PURPOSES MENTIONED IN THIS ACT"

[298] Effect of expression. It is a relatively common form of words to find in an empowering provision that delegated legislation may be made for the purposes mentioned in the Act and for the purposes then to be set out in a list of enumerated powers. It was argued in Springvale Washed Sand Pty Ltd v City of Springvale [1969] VR 784 that the words "for the purposes mentioned in this Act" should be regarded as a separate head of power independent of any other specific regulation-making power. This view was rejected by McInerney J. At 794 his Honour said that the phrase "requires that the purpose must be one expressly mentioned in the Act or for which power to make by-laws is expressly given".

"WITH RESPECT TO"

[299] Effect of expression. It was held in Paull v Munday (1976) 9 ALR 245 that a power to make delegated legislation "with respect to" matters specified in the empowering provision gives a wider regulation-making power than if the word "for" is used. At 251 Gibbs J considered that a regulation made pursuant to this power would be valid "if it substantially related to" the subject matter set out in the Act. Murphy J at 259 put it: "with respect to' means that a substantial connection between the power and the regulation is sufficient". His Honour cited the judgment of Kitto J in Herald & Weekly Times Ltd v Commonwealth of Australia (1966) 115 CLR at 436 in relation to the interpretation of the expression "with respect to" as used in s51 of the Constitution.

"GOOD RULE AND GOVERNMENT"

[300] Introduction. The general power to make by-laws for "the good rule and government" of a municipality is a frequent empowering provision found in local government legislation. Words of this kind were to be found in English legislation stretching back to the early nineteenth century. The use of the expression is traced in the judgment of Coppel A-J in Leslie v City of Essendon [1952] VLR 222. The interpretation of the expression has produced two fairly distinct lines of authority according to whether the by-law making power stands on its own or whether it is included as a catch-all together with a large number of specifically enumerated powers. It is convenient to deal with these two lines of authority separately.

(1) SEPARATE POWER TO MAKE BY-LAWS FOR THE GOOD RULE AND GOVERNMENT OF A MUNICIPALITY

[301] Scope of provision. The authority which sets the pattern for later interpretation of the empowering clause is the English Court of Appeal decision in Thomas v Sutters [1900] 1 Ch 10. The case concerned a by-law which prohi-
bited the use of streets for book-making purposes and which was made under a power to make by-laws for the good rule and government of the London County Council. The court held the by-law valid. Lindley MR said at 14, in a passage which is cited frequently in later cases:

Looking at this case as a whole, it appears to me that we should be going a great deal too far if we were to say that this by-law is not and cannot reasonably be construed as made for the "good rule and government" of the County of London. The county council have ample power to say that in their opinion it is so made, and unless there is some good reason to the contrary – unless there is some clear excess of jurisdiction – we ought rather to uphold than to invalidate the by-law.

It can be seen that the approach adopted by the court relies heavily on the approach postulated in *Kruse v Johnson* [1898] 2 QB at 99 (see [453]) that regulations and by-laws of local government authorities should attract the minimum of court intervention.

The leading Australian authority is of more recent date — the decision of the High Court in *Lynch v Brisbane City Council* (1960) 104 CLR 353 — but the same general attitude as appears in *Thomas v Sutters* is apparent in this case also. An ordinance of the Brisbane City Council provided that a person should not use a stall on any land for the sale or display of goods unless there was a subsisting licence under the ordinance for that stall. The ordinance was made under powers in the City of Brisbane Acts to make ordinances "for promoting and maintaining the peace, comfort, ... welfare, ... convenience, ... of the City and its inhabitants ..." and for the "good government of the City and the wellbeing of its inhabitants". Dixon CJ, with whom the other members of the court concurred, pointed out that these general words, while vague, were not to be rendered nugatory by treating them as if they said something like et cetera. At 364 his Honour said:

They give a power to lay down rules in respect of matters of municipal concern, matters that have been reasonably understood to be within the province of municipal government because they affect the welfare and good government of the city and its inhabitants. The words are not to be applied without caution nor read as if they were designed to confide to the city more than matters of local government. They express no exact limit of power but, directed as they are to the welfare and good government of a city and its inhabitants, they are not to be read as going beyond the accepted notions of local government.

He concluded that the ordinance fell within the power to make by-laws and distinguished authority that related to decisions where the general power to make by-laws for the good government of the city was included as an extra power after an enumeration of specific powers.

There are a number of older Australian authorities that pursue a similar line to *Lynch's* case. In *Myers v Condon* (1920) 22 WALR 30 the facts were exactly the same as in *Thomas v Sutters* and the Western Australian Full Supreme Court considered that that decision concluded the issue in favour of the validity of the by-law. In *Bremer v District Council of Echunga* [1919] SALR 288 it was held by the Full Court that a by-law prohibiting the keeping of bees within, or within 200 yards of, a township was a valid exercise of a power to make by-laws for the good rule and government of the district. In *Ex parte O'Neill* (1892) 13 NSWR 280 the Supreme Court accepted without any
real discussion that a by-law prohibiting blasting without first obtaining council approval could be made under a general good rule and government power. Darley CJ at 283 however, indicated that a general prohibition on blasting might be regarded as too wide. This should not be accepted as other than an impression and it seems doubtful whether the reservations expressed by his Honour are warranted.

Finally, mention should be made of *Ex parte Pritchard* (1876) 14 SCR 226. There the general power for the Sydney Municipal Council to make by-laws for the good rule and government of the city was exercised to make a by-law limiting the speed at which vehicles were permitted to round the corners of city streets. The court held that the by-law was valid but made considerable mention of the fact that the by-law merely regulated the activity involved. It appeared from the judgment that if there had been a prohibition in a regulation made under the general good rule and government power, its validity might be doubtful. This reservation does not stand happily with Bremer's case and in Lynch's case it would seem that the court expressly rejected the notion that a distinction had to be made between regulating and prohibiting the activity. In the latter case at 364, Dixon CJ seems expressly to reject the notion that the authorities which distinguish between a power to regulate a matter and a power to prohibit are relevant to the exercise of the general good government power. It would seem, therefore, that when the courts are considering a general power to make by-laws for the good rule and government of a municipality, they are influenced by much the same sort of considerations as apply when considering the power of a State government to make laws for the peace, order and good government of the State. The power is all embracing limited only by the fact that the right is to make by-laws for the municipality. Accordingly a by-law which strayed beyond either the territorial jurisdiction or the legal jurisdiction of the municipality would be invalid.

(2) *Good Rule and Government as One of an Enumerated List of Powers*

*Power not to be read eiusdem generis.* When considering the interpretation of a power to make by-laws for the good rule and government of a municipality where that power is included as one among a list of enumerated powers, it is desirable to dismiss at the outset a heresy which seems to have crept into the cases and which, while rejected from time to time, has a habit of recurring. In the old case of *In re The Municipal Council of Kyneton; Ex parte Gurner* (1861) 1 W & W (L) 11, counsel for the plaintiff, seeking to invalidate a by-law, asserted that where a general good rule and government power appeared at the conclusion of a list of specified powers, the general power had to be read *eiusdem generis* with the specified powers. No mention of this reasoning was made in the judgment, although the by-law was held invalid. In *Melbourne Corporation v Barry* (1922) 31 CLR 174 Isaacs J at 194 said of a similar provision to that considered in the *Kyneton* case "It confers a power, not of extending the other powers, but of aiding them if need be or of making independent ordinances in matters *eiusdem generis* with the specific powers of the Act". He then cited the *Kyneton* case as authority for this principle. Starke J in *Williams v Melbourne Corporation* (1933) 49 CLR 142 at
147 repeated the extract from Isaacs J’s judgment in *Melbourne Corporation v Barry*. This reference to the *eiusdem generis* rule is somewhat curious as the enumerated powers in the relevant Acts did not form a genus in other than the most general sense of matters pertaining to local government. It was in this sense that the court in *Seeligson v City of Melbourne* [1935] VLR 365 interpreted the power. But in so doing this involved them in reversing the decision of Gavan Duffy J in the lower court who, citing *Kyneton*’s case, had said that the power had to be read *eiusdem generis* thereby limiting the operation of the general good rule and government empowering provision. Notwithstanding these doubts as to the validity of Isaacs J’s comment, Dixon CJ in *Lynch v Brisbane City Council* (1960) 104 CLR at 362 again cites *Kyneton* as authority for the proposition that the power was to be construed by reference to the *eiusdem generis* principle.

**[306] Scope of power.** It would seem that the correct interpretation of the power is that set out in two decisions of the Victorian Full Supreme Court. The first of these was *Seeligson v City of Melbourne* [1935] VLR 365. By-laws of the City of Melbourne prohibited the handing out of hand bills, etc, and the littering of streets by scattering hand bills. This by-law was held valid under the good rule and government power. The court considered that there was no need to find some common characteristic in the specific heads of power but it was legitimate to refer to the specific powers to give guidance as to the operation of the general power. The matter was taken further in *Leslie v City of Essendon* [1952] VLR 222. There a by-law provided “No person on any street or footway shall after being required by any member of the police force or by any officer of the council or by any inmate of any premises shop or house within fifty yards of such person to desist ... (b) sing or harangue”. The by-law was held not to be an exercise of the general by-law making power. The reason for the court’s decision is most conveniently summarized in the judgment of Coppel A-J at 247. After referring to the basis on which the Full Court in *Seeligson’s* case reached its decision, his Honour said:

[The power to make by-laws for the good rule and government of the municipality] is not a power to legislate generally for the peace, order and good government of the municipality ... The power will justify the making of any by-law for the purpose of maintaining the good rule and government of the municipality provided that (a) it deals with a subject of the same kind as that over which subordinate legislative power is granted by any one or more of the preceding specific powers and (b) it does not extend the scope of any of the specific powers beyond the limits laid down by the Legislature.

It would seem from this that the power to make by-laws under this general power is very similar to the power to make by-laws necessary or convenient for giving effect to an Act. One must look to see whether there is a power in the Act which will support the making of the by-law; and if there is, it must still be apparent that the general scope of the Act is not being extended.

**[307] Two other cases on this topic should be noted.** In *President of the Shire of Tungamah v Merrett* (1912) 15 CLR 407 the High Court had to consider the effect of the *Local Government Act* (Vic) which gave power to make by-laws of a specific nature relating to the use of traction engines and then included a good rule and government provision in a list of other specific powers. A by-
law was made under the good rule and government provision requiring the 
permission of the council to use traction engines on specified roads. The High 
Court held that this by-law was valid. While the reasoning is not spelt out 
fully, it would seem that the same general approach to that in Leslie's case 
was adopted. The general power was seen as supplementing the specific heads 
of power and enabled the making of a by-law which added to, but did not go 
beyond, the general scope of the Act. The other case which should be men­
tioned is Williamson v City of Melbourne [1932] VLR 444. There a by-law 
prohibiting the use of premises for habitual prostitution was held valid as 
being properly made under the good rule and government power. But the 
power was in fact included in a long empowering provision which set out 
specific heads of power together with the general power. The Full Court 
relied on Thomas v Sutters as authority for the interpretation of the general 
words. It has been suggested above that Thomas v Sutters is in fact only good 
authority for the interpretation of general words where they appear on their 
own and not where they appear amongst other specific heads of power. It is 
noteeworthy that the High Court in declining leave to appeal from the decision 
of the Supreme Court said "We think this is not a case in which leave should 
be granted. We are not to be taken as founding our opinion on the basis 
which is the foundation of the Full Court's judgment, namely, that the by-law 
is good under the power to make by-laws for the good rule and government of 
the town": [1932] VLR 450; see also (1932) 47 CLR 641...
EMPOWERING PROVISIONS: REGULATE; PROHIBIT

CHAPTER 17

EMPOWERING PROVISIONS: REGULATE; PROHIBIT

[308] Introduction. Among the most frequently used provisions empowering the making of delegated legislation are those which enable legislation either to regulate or prohibit a specified activity. The extent of the power conferred by these words is therefore of considerable importance. The issue has been before the courts on a number of occasions and the scope of the power to regulate an activity is now fairly well defined. But the precise nature of regulations that can be made under a power to prohibit something is not finally settled. Where the empowering words are combined, further difficulties arise. Variations of these empowering words also occur. They include “restrain”, “control”, “govern” and “suppress”. Again these are often found in combination with the more commonly occurring “regulate” and “prohibit”. It is proposed now to look at the scope for making delegated legislation given by these various words both singly and in combination.

“Regulate”

[309] General scope of power. Any discussion of the scope of the power to “regulate” an activity must be prefaced by the warning sounded in a number of cases, but perhaps most clearly stated by Rich J in Swan Hill Corporation v Bradbury (1937) 56 CLR at 754-755 that the power must be viewed in its particular context. As Rich J put it:

In the interpretation of each of these powers all that can be done is to weigh the entire assemblage of words which expresses the power and apply the sum of meaning which can be discovered in them to the subject matter described, not forgetting that the nature of the subject is likely to contain the key to the intention which might otherwise be but ambiguously disclosed by the mere words.

With that warning in mind, perhaps the only certain interpretation of the power to regulate an activity is that which has been frequently repeated, but perhaps no more succinctly than by Dixon J in the Swan Hill case at 762: “a power to make by-laws regulating a subject matter does not extend to prohibiting it either altogether 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”.

[310] The application of this principle will be considered first in relation to cases in which a power to regulate an activity has been used to proscribe the whole or part of that activity directly. (The position where the power has been exercised to require the obtaining of a licence or consent is discussed below [355].) While an attempt will be made to provide some rationalization of the large number of cases on the point, it is stressed that the divisions adopted should not be regarded as in any way watertight. They are used primarily to group cases that demonstrate a somewhat similar approach being taken by the courts.
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Regulation constituting a prohibition: see also [355-361]. The regulation of any activity of necessity involves some constraint being placed upon what would otherwise be freedom of action. To this extent any regulation must constitute a prohibition. But as was stated in the Swan Hill case, the distinction must be drawn between interference with an activity and preventing the activity from continuing at all. Often the distinction will be a fine one but the leading cases do give some guidance as to the approach that the courts will adopt. Two Privy Council decisions illustrate the distinction and also the importance that must be attached to the nature of the activity being regulated. In Municipal Corporation of City of Toronto v Virgo [1896] AC 88 a by-law made under a power to regulate and govern a trade prohibited hawkers from plying their trade in certain streets in the City of Toronto. It was conceded that the streets were the busiest and most important in the city. The by-law was held invalid as constituting a prohibition against hawking rather than than a regulation of that trade. The court rejected an argument that only specified streets were affected and therefore the trade of hawking could be effectively pursued in other streets. The argument was upheld that the practical effect of the by-law was to prohibit the trade in that part of the city that would be most lucrative for hawkers. It is to be noted, however, that the court conceded that the situation could well have been different if it were necessary to prohibit the particular activity to prevent nuisance or to maintain order. It was not considered that this was the situation in the present case. Virgo’s case should be contrasted with Slattery v Naylor (1888) 13 App Cas 446. There a council by-law made under a power to regulate interment of the dead prohibited interment within 100 yards of a school, dwelling house, etc. It was conceded that this prevented the continued use of some, but not all, cemeteries in the council area. The Privy Council held the by-law valid. It considered that a prohibition of this kind was necessary in large and growing communities and it was not appropriate for the court to interfere with the discretion of the local council. (On this latter point see further [453].)

These two decisions that might, at first sight, appear to be contradictory, were explained by the High Court in The Co-operative Brick Co Pty Ltd v Mayor &c of the City of Hawthorn (1909) 9 CLR 301. The court there was concerned with the interpretation of a power to make by-laws regulating or controlling quarrying or blasting operations. A by-law prohibited blasting of rock within 100 yards of a street or within 200 yards of a dwelling. The High Court held the regulation to be invalid. It considered that the prohibition was absolute and therefore did not constitute a regulation of blasting operations. The effect of the regulation was that rock could not be blasted if it were within the area. Virgo’s case was followed and Slattery distinguished on two grounds. First, regard was paid to the nature of the activity concerned. Blasting was considered not to be necessarily dangerous whereas the place in which the dead were interred raised issues relating to public health. Secondly, the dead could be buried elsewhere notwithstanding the prohibition in the by-law whereas rock had to be blasted in situ. Some reliance in this case was also placed on the fact that other empowering provisions expressly gave a power to prohibit certain activities whereas the power exercised to make the particular by-law referred only to regulating. However, this approach was not essential to the decision and it would seem that the result would have been the same.
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had there not been references in other empowering provisions to the right to make by-laws prohibiting an activity.

[313] It will, of course, be a question for the court to determine whether there is in fact a prohibition of the activity and not a mere regulation. That fine distinctions can emerge is shown by the facts of Virgo's case and more recently by Minister of Education v Huezenroeder [1967] SASR 357. That case was determined primarily on the issue whether or not a power to make regulations necessary or convenient for carrying out the objects of the Education Act permitted the making of a regulation that limited the right of a person to resign during first term of a school year: see [291]. However, a secondary argument was put that a specific power which enabled the making of regulations "for regulating the . . . resignation . . . of teachers" would support the regulations. The plaintiff countered by asserting that the regulation, by requiring a person who resigned before the end of first term to pay a sum of money to the Education Department, constituted a prohibition on resignation. The only judge of the Full Court to discuss this issue, Mitchell J, held that the provision was valid as it did not prohibit or prevent resignations but merely regulated that conduct.

[314] Regard to be paid to activity to be regulated. As directed by Rich J in the Swan Hill case (see [309]), it is necessary to pay heed to the conduct or activity that is to be regulated. The mere imposition of a prohibition is not in itself the determining factor because it may be necessary to prohibit part of an activity in order to regulate the whole. An example frequently cited is that given by Lord Halsbury in the course of argument in Virgo's case and reported by Isaacs J in Shire of Tungamah v Merrett (1912) 15 CLR at 423-424. His Lordship said that a power to regulate trade would enable a total prohibition of the sale of wool. In such a case, the width of the empowering provision and the subject matter to be controlled would enable a prohibition to be imposed on an industry as a whole. Likewise, a power to regulate the practice of solicitors would, it seems, enable the making of a regulation prohibiting advertising (cf Goldberg v Law Institute of Victoria, [317]). See also Shire of Tungamah v Merrett, above; Hazeldon v McAra [1948] NZLR 1087. But the Brick Company case [312] properly stresses that it is necessary to look carefully at the activity which the delegated legislation purports to regulate and the nature of the limitations imposed on that activity. If the effect of the limitation imposed by the legislation is to make it impossible to pursue a particular course of conduct and pursuit of that conduct is essential to the carrying on of the activity that may be regulated, then the legislation will be invalid. The courts will recognize that its practical effect is that of prohibition and not regulation of the activity. Illustrations of this situation are provided by Virgo's case and the Brick Company case.

[315] Suppression of nuisance pursuant to power to regulate. An exception to the general notion that a power to regulate an activity will not permit its prohibition was mentioned in Virgo's case. If the activity has been prohibited in order to prevent a nuisance or to maintain order, the prohibition might be valid. This exception was expressly relied on by the Tasmanian Supreme Court in Smith v Leslie (1914) 10 Tas LR 111. There power was given to regulate carters and others using carts for conveying passengers to and from
wharves. A by-law was made which endeavoured to control carters by preventing them coming onto a wharf until summoned by an officer of the Marine Board. The carter was then permitted to pick up the passenger and his luggage and after delivering the passenger to his destination, the carter was obliged to return to the end of the queue of carters. The by-law was held valid. Whilst it was conceded that the by-law acted as a restriction on the right of the carter to use the highway in and around the wharves as he wished, it was considered necessary to impose some limited restrictions in order to maintain order. In addition, the carter was permitted to pursue his activities elsewhere. Dixon J in *Swan Hill Corporation v Bradbury* (1937) 56 CLR at 761 also made reference to a similar exception in the case of “things or conduct commonly regarded as in themselves an evil or . . . of a doubtful tendency”. In regard to such things, the power to regulate might authorize a complete suppression. See also Rich J at 755. But cf *Bell v Day* (1886) 2 QLJ 180 where the court held invalid a by-law made under a power to restrain “trade . . . of a noisome or offensive nature” because the by-law reserved a discretion to the council.

[316] Interference with common law rights. The courts have shown a general disinclination to accept as valid by-laws or regulations made under a power to regulate particular conduct which in fact interfere with the ordinary common law rights of members of the public. These cases are in essence examples of the doctrine of simple *ultra vires*, but they demonstrate that the approach of the courts is to read a power to regulate an activity most strictly.

(1) Interference with right to contract. In *Attorney-General v Metropolitan Meat Industry Board* (1917) 18 SR (NSW) 9 power was granted to make by-laws regulating “the conduct of all persons using [public saleyards] . . . or . . . buying, selling, or dealing therein”. A by-law was made which prohibited persons selling stock in the yards from collecting more than specified charges and commissions. The by-law was held invalid in that it attempted to interfere with the right of persons using the saleyards to enter into such contractual relationships as they thought fit. The power to regulate was limited to the control of the physical use of the yard and did not extend to the matter dealt with by the by-law. The same line of reasoning underlies the decision in *Atkins v Golding* [1963] SASR 285. There power was given to the South Australian Potato Board to make orders “regulating and controlling the sale and delivery of potatoes”. An order was made which required sale of all potatoes to a central marketing authority. The order was held invalid. There was nothing in the Act to allow the Board to assume a monopolistic control of the industry and prohibit the sale of potatoes to persons other than the Board. The court examined other sections of the Act to see whether a prohibition of the kind set out in the regulations was permitted. It also looked at other marketing Acts and noted that, in those Acts, where a person was forbidden from selling his goods to other than a central authority, rights of appeal were provided against a refusal by that body to purchase the growers’ goods. No equivalent rights were included in the Act or regulations in the case before the court.

(2) Imposition of tax. In *Kluver v Woolloongabba Divisional Board* (1884) 2 QLJ 87 a power was given to make by-laws regulating and licensing vehicles
plying for hire. The power was used to make a by-law charging a licence fee. The by-law was held invalid as a tax. The reasoning followed by the court was the same as that in Attorney-General v Wilts United Dairies Ltd (1922) 38 TLR 781: see [378].

(3) Right to use highway. Ex parte Stafford; In re Shire of Boroondara (1894) 20 VLR 23 and Re Shire of Moorabbin; Ex parte McLorinan (1895) 16 ALT 167 were cases which involved the interpretation of a similar by-law made under a power to regulate traffic. The by-law limited vehicles carting night soil to the use of roads in the respective council areas between certain hours at night. The evidence showed that the effect of the by-laws would be to prevent cartage from adjoining municipalities through the streets of the shires. The by-laws were held invalid. The limitation on the movement of traffic was too severe when weighed against the power to regulate traffic. In effect the power was a prohibition on the use of the streets for the purposes of carting night soil. The rights of persons to use the highways was thereby interfered with in a manner that went beyond the regulating of traffic on the highways.

(4) Entry on premises. Durieu v Vosz (1871) 5 SALR 27 clearly illustrates the attitude of the courts in regard to the interpretation of the power of regulating an activity. The power in question was one to make by-laws regulating the storage of inflammable materials. It was used to make a by-law enabling an inspector to enter premises and search for inflammable substances. The by-law was held, without any hesitation by the court, to be invalid. The right to enter upon a person's land without a warrant could not be given by exercise of a power simply to make by-laws regulating a particular activity.

(5) Compulsory acquisition of property. Jones v The Metropolitan Meat Industry Board (1925) 37 CLR 252 represents a departure from the preceding cases in that the High Court, by a narrow majority of three to two, was prepared to countenance an interference with the ordinary rights of persons at common law in regard to the acquisition of property. The Meat Industry Board had the power to make by-laws regulating and controlling abattoirs. A by-law was made that required the delivery to the Board, without payment, of certain parts of the carcase of animals slaughtered at the abattoirs. The High Court held the regulation valid. The majority took the view that the by-law merely regulated the use of the abattoirs. The minority took the view that the by-law constituted an acquisition of property without compensation and was therefore only permissible if express power to that effect was included in the Act. The case does seem somewhat out of line with the approach adopted in the other cases cited above. The narrowness of the majority would perhaps make it unwise to rely too strongly on the decision but it was cited with approval by the Court of Appeal in Smith v Blenheim Borough Council [1928] NZLR 536 in upholding the validity of almost identical by-laws.

[317] Regulation of members of professions. In two cases the courts have shown a willingness to allow fairly wide-ranging control to be exercised by professional bodies empowered to make regulations regulating a particular profession. The court in each case made mention of the fact that the regula-
tions were made by representatives of the profession and clearly considered that bodies of this kind should be permitted to act largely unchecked when dealing with matters relevant to the profession that they represent. In *The Board of Optical Registration v Williamson* [1945] Tas SR 1, a power given to the Board to regulate the practice of opticians was used to make a regulation forbidding licensed opticians from practising in the employment of unlicensed opticians. The regulation was held valid. The court looked at the nature of the Act, which was concerned to a large extent with professional standards, and concluded that the regulation was such as might be thought desirable for a professional body to make. *Goldberg v Law Institute of Victoria* [1972] VR 605 is a more obvious case. Power was given the Law Institute to make rules “Regulating ... the professional duties practice conduct and discipline of practitioners”. A regulation prohibiting signs on solicitors’ premises setting out the name of the solicitor where the sign was greater than a specified size was held valid. It did not prohibit a person from conducting the practice of a solicitor but only limited the method of advertising his place of business. It is difficult to see how any other conclusion could have been reached in the case.

[318] Regulating trades. The same general approach as that above is also shown in cases concerned with the way in which certain trades should be carried on. Provided that there is not such an interference with the trade that it is in practice prohibited (cf *Virgo’s case* [311]), the courts seem to have taken a fairly generous view of the right to regulate a trade. For example, *W Taylor Pty Ltd v Eldershaw* (1943) 60 WN (NSW) 96 was concerned with a regulation-making power in the Public Health Act that provided: “for the purpose of preventing ... disease and generally for the protection of the public health” the Governor could make regulations “for the regulation of trade in flock ....”. A regulation was made which provided “No person, who, for trade purposes uses or stores flock ... shall have on his premises any flock ... which is not clean”. The regulation was held valid. It was argued that the prohibition would extend to flock on premises for purposes not associated with the business. This argument was rejected. Herron J at 98 said “To say to a trader in a commodity you will not be permitted to keep such of the commodity as is not of a certain specification is to regulate the trade in that commodity”. *Ex parte Smidt* (1895) 16 LR (NSW) 163 and *Ex parte Parkinson* (1909) 9 SR (NSW) 174 both concerned a challenge to a by-law made by the Railways Commissioner which prohibited the sale of tickets by persons not authorized by the Railways Commissioner. The by-law was made under a power to make by-laws regulating the sale of tickets at places other than railway stations. The court had no difficulty in both cases in holding that the regulation was valid.

[319] Regulating traffic. As might be expected, the power given to local government bodies to make by-laws regulating traffic has been widely used by councils and the by-laws so made have been attacked on occasions. Three cases give some indication of the approach of the courts in regard to this empowering provision. In *Matthews v City of Prahran* [1925] VLR 469 by-laws were made dealing with traffic which was stationary at the kerb. These were held valid on the basis that a vehicle at the kerb had not ceased to be an element of traffic. But a different approach was taken in *Schilling v City of Melbourne* [1928] VLR 302. The by-laws in that case endeavoured to control
cars parked in designated areas, some in on-street parking and some in off-street parking areas. The by-laws had been made under a power to regulate traffic. The Supreme Court held them to be invalid. Once a vehicle had parked in a designated area it had ceased to be part of "traffic". Matthews' case was distinguished on the basis that there the vehicles were parked by the side of the road as an incident to their use of the highway whereas in this case the parking brought to an end the connection between the user of the highway and the vehicle. In *Keating v Cooke* [1960] VR 255 the by-law prohibited a person from leaving a vehicle standing on a highway for the purpose of displaying an advertisement on the vehicle. The by-law was held invalid in that there was no connection between the activity covered by the by-law and the regulating of traffic.

It can be seen from these cases that courts take a narrow view of what kind of activities fall within the description of traffic. Mere use of the highway is not sufficient in itself. It must be shown that the activity controlled has some connection with the use of the highway by traffic. On the other hand, once it is clear that the activity being controlled is use of the highway, the courts will look closely at any attempt to deprive the public of its general right of user: see *Ex parte Stafford; In re Shire of Boroondara and Re Shire of Moorabbin; Ex parte McLorinan*, [316].

Miscellaneous. While not forming any clear category for guidance, some individual cases concerned with a power to regulate an activity are worth mentioning. In *Harris v Hosking* [1917] SALR 81 power was given to make regulations "regulating the use of wharves". A regulation was made that prohibited retail trade in goods on the wharves without the permission of the Marine Board. The regulation was held valid. The power to regulate the use of wharves encompassed the notion of controlling the use of the wharves for the sale of goods. In *Abbott v Shire of Heidelberg* [1926] VLR 199 power was given to make by-laws regulating and restraining the erection and construction of buildings. A by-law made under this power provided "No buildings shall be transported or removed either whole or in part into the municipal district". Cussen J held the by-law invalid. "It would make the mere bringing of a building within the municipal boundary an offence" — this was the only reason given for his Honour's decision. If his Honour was meaning that the regulation would apply to a building on the back of a truck that was merely being transported through the council area, then the decision seems to be correct in that the council was in effect limiting the use of the highway. However, it the by-law could be read so as to be limited to buildings that were brought into the municipal district on a permanent basis, could it not be said that the by-law was indeed regulating building, albeit prohibiting a certain type of building, namely, transportable buildings? Ordinary building activities would be unaffected by the regulation.

Finally, mention should be made of the curious case of *Conroy v Shire of Springvale and Noble Park* [1959] VR 737. This case resulted in a by-law being held invalid, but the four judges involved in the case gave different reasons for the result that they thought ought to be achieved. Under a power to regulate "the keeping of animals or birds with power to limit the number of any such animals or birds kept on any property" the council made a by-
law which, among other things, prohibited the keeping of more than two dogs on premises without the consent of the council. To this was added a further rider that in the case of racing dogs, an application for council approval to keep more than two dogs had to be accompanied by the approval of the Dog Racing Control Board. Adam J at first instance held that the by-law was simply a prohibition on the keeping of dogs and not a regulation of that activity and was therefore invalid. This view was not advanced by any of the judges on appeal and, with respect, seems to have overlooked the fact that it was possible to keep two dogs on the premises. It was in effect a prohibition on keeping more than a certain number of dogs; it was not a prohibition on keeping dogs at all. The power was to regulate the keeping of animals and this was coupled with the power to limit the number of any such animals and his Honour’s conclusion does not seem supportable. On appeal from the decision of Adam J, Herring CJ ruled that the by-law was in effect a prohibition with a conditional alleviation and, following the Swan Hill case (see [357]), the by-law was invalid. This conclusion is also subject to doubt in that it overlooks the fact that a person could keep two dogs and was only required to obtain council permission if he wished to keep more than that number. The Swan Hill case was concerned with a situation in which no building was permitted without the approval of the council. The approach of Herring CJ would have been correct if the by-law forbade the keeping of dogs at all without the approval of the council. The other two judges on the appeal court, Gavan Duffy J and Sholl J both held the by-law valid in so far as it amounted to a regulation of the keeping of dogs. However, they differed on one point, namely, the effect of approval of the Dog Racing Control Board having to be sought in the case of the keeping of racing dogs. Both judges thought that this requirement was invalid. Gavan Duffy J considered that it was not severable from the rest of the regulation and therefore the whole was invalid; Sholl J thought that the requirement was severable and therefore the balance of the regulation was valid. With respect, the conclusion that the approval of the Dog Racing Control Board rendered that portion of the by-law invalid seems somewhat curious as the council was not bound by the recommendation of the Board — it was simply that the application had to be accompanied by the approval of that Board. The council was not delegating its own responsibility to the Board. Presumably it was merely seeking, in effect, proof of the fact that the applicant for permission was a recognized racer of dogs. Accordingly, the requirement should either have been regarded as severable from the rest of the by-law or, better, merely a reasonable matter for the council to take into account.

"Govern": "Control."

[323] Scope of words. It appears that the words "govern" and "control" are synonymous with "regulate". The power in Virgo's case, [311], was to regulate and govern particular trades. The judgement of the court does not allude to the word "govern" — the whole discussion is directed to the meaning of "regulate". It would seem therefore that the word added nothing to the empowering provision: see also Chandler and Co Ltd v Hawke's Bay County [1961] NZLR 746. Likewise, the word "control" was treated as if it were superfluous in the combination "regulate and control" in the Brick Company case, [312]; Atkins v Golding, [316]; Jones v The Metropolitan Meat Industry [140]
Board, [316]; and Keating v Cook [1960] VR 255. Presumably, if either of these words were used on their own to empower the making of delegated legislation, they would have the same scope as the word “regulate”.

“RESTRAIN”

[324] **Scope of power.** It is unusual to find the word “restrain” being used on its own to empower the making of delegated legislation. But it is encountered from time to time in combination with “regulate”. When so appearing, it seems that “restrain” may have a connotation different from “regulate” but the difference may be so slight as, in practice, to be illusory. The expression “regulating and restraining” as appearing in s 198 (1)(a) of the Local Government Act 1915 (Vic) seems to be the only instance of the combined expression coming before the courts. While this section has led to a number of cases, in only one instance is there any full discussion of the effect of adding the word “restrain” to the word “regulate”. The case in which the matter was discussed is Swan Hill Corporation v Bradbury (1937) 56 CLR 746 and then only by two judges, Latham CJ and Dixon J. The discussion by Latham CJ is relatively brief. His Honour endorsed an earlier opinion expressed by the Full Court of Victoria in King v The City of Footscray [1924] VLR at 110 that the reasoning in Melbourne Corporation v Barry (1922) 31 CLR 174 as to the meaning of the power to regulate (see [356]) is equally applicable to a power to restrain. This endorsement would seem to suggest that his Honour considered that the power to restrain added nothing to the power to regulate — that they were, in effect, synonymous terms. Dixon J, on the other hand, at 762-763, suggested that the compound expression “regulate and restrain” goes further than “regulation”. He considered that it describes an amount of control sufficient to restrict or hinder the activity to which it relates but stopping short of prohibiting it. It would seem from this that the difference between regulation and restraint is very slight, if indeed it exists at all. As has been referred to at [309], the notion of regulating an activity contemplates its continuing existence. Dixon J seems to require the same approach in regard to the word “restrain”. Perhaps, on his approach, a greater degree of interference is permissible under a power to restrain an activity than under a power to regulate it. But again he points out that one must be careful to view the matter in its context paying due regard to the activity that is to be “restrained”. One thing, however, is clear. The power to “restrain” an activity will not allow it to be prohibited.

**[325] The only other case of a general nature which should perhaps be mentioned is Righetti v City of Essendon [1925] VLR 126. In that case Mann J said that he considered that the authority to make by-laws regulating and restraining the erection of buildings would authorize a by-law forbidding the erection of buildings upon allotments of less than a certain size. The other two judges of the Full Court did not express an opinion on this point. Mann J did not refer to any distinction that may lie in the power to restrain an activity as distinct from regulating it. The other major cases concerned with regulating and restraining an activity are Brunswick Corporation v Stewart (1941) 65 CLR 88 and Ingwersen v Borough of Ringwood [1926] VLR 551. In both cases, the courts considered the validity of by-laws made under a power to regulate and restrain building and held the by-laws invalid on the basis of the**
reasoning followed by the High Court in the _Swan Hill_ case. In both cases it would seem that the same result would have been achieved if the power to make the regulations had simply been one for “regulating” the construction of buildings.

[326] There is one older case that was concerned with the expression “restrain”, this time on its own. In _Bell v Day_ (1886) 2 QLJ 180 the power in question was simply to restrain “trades ... of a noisome or offensive nature”. Consistently with the approach adopted in the cases set out above, the court held invalid a by-law that prohibited the carrying on of a tannery without a licence. This decision again confirms the fact that there seems to be little practical difference between the expressions “regulate” and “restrain”.

“PROHIBIT”: “SUPPRESS”

[327] **Scope of power.** Except in regard to one type of provision, the cases relating to the interpretation of a power to make delegated legislation prohibiting or suppressing an activity engage in very little discussion of the general scope of the empowering words. The exception is where the power has been exercised in such a way as to invest an authority with a discretion to alleviate a prohibition. These cases are discussed at [341-354]. This question apart, the cases are concerned more with the issue whether or not the particular by-law can be supported in the particular case.

[328] **Prohibition of part only of activity.** One point of a general nature that emerges is that a power to prohibit an activity can be validly exercised to prohibit part only of the conduct falling within the activity: see _Shire of Charlton v Ruse_ (1912) 14 CLR 220, in particular per Griffith CJ at 226-227. His Honour cited as an example of a valid law, the proscription of the possession of sword sticks in the streets made pursuant to a power to prohibit the possession of sword sticks. See also _Cottell v Hagen; Ex parte Hagen_ [1909] St R Qd 305, where a power to prevent bathing near a public thoroughfare was held to empower a prohibition on bathing within view of a public street during certain hours.

[329] **Prohibition power strictly construed.** It is also clear that the courts view the power to prohibit an activity with some care as, in the main, the by-law making power constitutes an interference with a person’s ordinary rights. They have, therefore, required by-laws made under a prohibition power, to fall clearly within the scope of the power granted. For example, in _Stewart v City of Essendon_ [1924] VLR 219, a power was given to prohibit the use of buildings for the purposes of such classes of trades, industries, etc, as were specified in the by-law. A by-law was made which prohibited all trades, industries, etc, being carried on in buildings within certain specified streets within the city area. The by-law was held to be invalid because it did not specify the classes of trades, industries, etc, which were prohibited. This specification was an integral part of the by-law making power.

[330] **Prohibition of nuisances.** The majority of cases that have come before courts in Australia in relation to the general question of prohibition of an activity have been concerned with powers in local government or health Acts
to suppress nuisances. Most of these cases have resulted in the by-laws being held invalid. Some early examples are: *Ex parte Abbott* (1875) 14 SCR (NSW) 191: a by-law limiting the driving of cattle on city streets was held invalid under the power to suppress nuisances on the basis that the driving of cattle was not necessarily a nuisance. *Ex parte Zuckerman* (1888) 9 LR (NSW) 468: similar reasoning was applied to invalidate a by-law which prohibited musical processions without the permission of the mayor. The court considered that the activity did not necessarily constitute a nuisance. In *R v Cowie; Ex parte Arddill* (1880) 6 VLR(L) 20 a by-law which prohibited the keeping of swine within a municipal boundary was held not to be valid under the power to suppress nuisances or to compel residents to keep premises free of offensive or unwholesome matters. The court considered that swine could be kept without offending either of these requirements.

A similar approach was adopted in a number of cases that concerned the removal of night soil through the streets of various shires and boroughs of Melbourne. Attempts were made by the local councils under the power to make by-laws suppressing nuisances to limit the hours during which night soil could be moved through the council areas. The courts took the view that the transport of night soil was not necessarily a nuisance and therefore the by-laws were invalid: see *Ex parte Steel, In re Borough of Oakleigh* (1893) 19 VLR 94; *Ex parte Stafford In re Shire of Boroondara* (1894) 20 VLR 23. With these cases may be contrasted the decision in *In the Matter of the City of Richmond; Ex parte Collins* (1900) 25 VLR 623. There a by-law limited the removal of night soil and other matters “being offensive to smell” to certain hours during the night. The by-law was held valid because the nature of the nuisance was clearly defined.

Nuisance to be prohibited need not be common law nuisance. There is one line of authority on the interpretation of the power to make by-laws for “suppressing nuisances” which is of some importance. It commenced with the decision of the Victorian Supreme Court in *Higgins v Egleson* (1877) 3 VLR(L) 196 where the court held that a by-law prohibiting the use of night soil for manure was invalid. Fellows J at 198 said “The use of nightsoil for manure is not a nuisance at common law, and if not, a by-law for preventing it is not authorised [under the power to make by-laws for suppressing nuisances]”. This approach was endorsed by Madden CJ delivering the judgement of the Full Bench in *Gunner v Helding* (1902) 28 VLR 303. There a similar by-law made under a power for suppressing nuisances limited the spreading of night soil for manure to the hours between midnight and 4 am. The court reiterated the view stated in *Higgins’* case that the activity was not a nuisance at common law and it therefore did not fall within the power given by the Act. Madden CJ also added the following statement at 319 which caused concern in later cases: “[The expression ‘suppressing nuisances’] possibly refers also to nuisances which in fact already exist, and therefore contemplates the getting rid of existing nuisances as contra-distinguished from the prevention of nuisances which do not exist”. This statement was approved by Isaacs J in the course of his judgment in *Melbourne Corporation v Barry* (1922) 31 CLR at 194. His Honour stated “It was not necessary to consider whether the ‘possibility’ was the ‘fact’, but the suggestion is a strong one, and I think it is right”. The relevance to the case there was that it was claimed that
a prohibition on processions without the approval of the city council was supported by the power to make by-laws for preventing nuisances. The court did not, however, consider that a procession was a nuisance at common law and therefore the empowering provision did not support the particular by-law.

The cases referred to above were reviewed again by the Victorian Supreme Court in *Jenner v Shire of Mildura* [1926] VLR 514. Under a power to prevent nuisances, the council had made a by-law forbidding the keeping of bees in certain areas where it was clear that bees caused damage to ripening fruit. The by-law was held valid. Irvine CJ, with whom the other judges of the Full Court agreed on this point, accepted the statement in *Higgins*’ case that the reference to nuisance in the empowering provision meant a nuisance at common law. However, he rejected the statement added in *Gunner*’s case that the suppression must be directed to a nuisance existing at the time of making of the by-law. This, he considered, would make the existence of the fact of a nuisance a condition precedent to the validity of the by-law and this was not intended by the empowering Act. It would seem from his judgement that it is sufficient that if the conduct were to occur, it would constitute a nuisance. Irvine CJ did not refer in his judgement to the endorsement by Isaacs J of the *Gunner* statement.

This issue now seems to have been resolved by the decision of the High Court in *Footscray Corporation v Maize Products Pty Ltd* (1943) 67 CLR 301. There a by-law made under a power to make by-laws for suppressing nuisances forbade the use of pulverised fuel in furnaces not fitted with a device designed to make it impossible for dust, grit, etc, to escape. The evidence showed that the burning of pulverized fuel in furnaces resulted in the spreading of dust and soot over the neighbouring area in such a manner as to constitute a nuisance at common law. The by-law was held valid by Rich and Starke JJ, Latham CJ dissenting. The principal interest is in the judgement of Starke J at 310-311. His Honour commended the judgment of Irvine CJ in *Jenner*’s case, but then went on to add the important point that the categories of acts or omissions constituting nuisances at common law is not closed. It is therefore, as he says, “not illuminating” to suggest that the power to suppress nuisances means the suppressing of nuisances which are nuisances at common law. It is not possible to lay down a general rule that certain conduct is or is not a nuisance — it must be considered in the light of the particular circumstances at the particular time. It would seem from these remarks that, if it can be said that the conduct prohibited constitutes a nuisance at the time when the legislation is to be enforced, then a by-law prohibiting it will be valid. (In view of Madden CJ’s endorsement in *Gunner*’s case of the earlier views of *Higgins*’ case, it is interesting to note his remarks made in the course of argument in *In the Matter of the City of Richmond; Ex parte Collins* (1900) 25 VLR at 625. There his Honour described *Higgins* as “an unsatisfactory case”; it was important for the courts to move with the time and the conduct referred to in that case as not constituting a nuisance was now accepted as being dangerous to health.)

“REGULATING AND/OR PROHIBITING”

Scope of provision. On occasions, instead of an empowering provision
permitting the making of delegated legislation either regulating or prohibiting a particular activity, a wider power is given by use of the expression “regulating and prohibiting” or “regulating or prohibiting”. It would seem that it matters not that the disjunctive “or” is used. In Country Roads Board v Neale Ads Pty Ltd [1930] 43 CLR at 154, Knox CJ, Starke and Dixon JJ, delivering a joint judgement, said that the disjunctive plainly meant to describe or define one power or purpose, not two, to be exercised in the alternative. This being so, it can be seen that the power given necessarily means that the various authorities cited previously in regard to the words “regulating” and “prohibiting” are equally applicable to the power. The limitation on the power to regulate, that it may not be used to prohibit an activity, is of necessity abrogated. Likewise, any doubt that the power to prohibit does not permit a prohibition subject to condition (see [341-354]) is also negated. This point was also made in the Country Roads Board case at 134 where their Honours said “it is clear that when the purpose of a power includes both prohibiting and regulating, it must authorize a by-law which forbids conditionally, although the conditions may properly be described as regulatory”.

[336] This approach was expressly followed by the Victorian Full Court in Templar v City of Prahran [1934] VLR 111, in particular in the judgement of Mann ACJ at 114. The Local Government Act empowered a municipal council to make by-laws prohibiting or regulating within a residential area the use of any land or the use of any building for the purpose of such classes of trades, industries, etc, as was specified in the by-laws. A by-law provided that no person should, in certain prescribed residential areas, use any building for the purpose of any trade, industry, etc, except a business or trade carried on by an individual without any employee or assistant in a private dwelling on which no advertisement or sign was displayed indicating the nature of the business or trade carried on therein, other than a plate approved by the council and affixed to the front of the dwelling. The by-law was held valid. Gavan Duffy J considered that there was a specification of an industry and did not go into the question whether or not the power of regulation was relevant. Macfarlan J and Mann ACJ did, however, rely on the regulating power in addition to that of prohibition. Mann ACJ at 114 summarized the position “... where in a like case there is undoubted power to except certain classes of business from a general prohibition, there is power, in my opinion, to make those exceptions conditional, when the conditions can properly be described as regulatory”.

[337] “Prohibit and regulate” power may be exercised severally. The Country Roads Board case indicates that the power to regulate or prohibit an activity is what might be termed a joint power. That the power can, however, be exercised, as it were, severally, is illustrated by two earlier cases. In Lindsay v Ward (1912) 14 WALR 128 a power to make by-laws “prohibiting or regulating any advertising through streets, ways and public places ...” was used to make a by-law providing: “No person shall in any street or public place give out or distribute to passers-by ... any advertising hand bill, ticket, placard or notice”. The by-law was held valid. In Lean v Barratt (1917) 19 WALR 86 a power to make by-laws “regulating or prohibiting bill posting, or the painting, stencilling, placing or affixing of advertisements” was used to make a by-law that provided: “No person shall post, paint, stencil, place or
affix any advertisement on any ... fence or wall, window or other portion of any building facing or abutting on any street or way". This by-law was also held to be valid. See also Barrat v Samuel (1916) 18 WALR 138.

The same general approach to that adopted in Australia was followed in New Zealand in Wilton v Mt Roskill Borough Council [1964] NZLR 957. There a prohibition on establishing or maintaining any hospital, home, or boarding kennel for dogs or cats unless the person was the holder of a licence for such purpose from the local authority was held to be a valid exercise of a power to make by-laws "Regulating or licensing the keeping within the district of any animals, reptiles, birds, or bees, and prohibiting the keeping thereof if the existence or keeping thereof within the district is ... a nuisance or injurious to health". The court expressly followed the decision in Country Roads Board v Neale Ads.

PROHIBITION COUPLED WITH A DISCRETION

Introduction. The discussion of one issue was postponed when the general scope of the empowering words "regulate" and "prohibit" was being considered. That issue was whether, in delegated legislation made pursuant to such powers, it is possible to prohibit an activity but to vest in a person or body a discretion to alleviate that prohibition. Somewhat curiously, the approach to the resolution of the issue has differed somewhat in Australia and in New Zealand. In Australia, as will be seen, an essentially analytical approach has been adopted. The questions posed are: What is the meaning of the power? and What is the practical legal effect of the delegated legislation? The New Zealand courts, on the other hand, have on occasions, been taxed by the application of the maxim "delegatus non potest delegare". The question asked then is: Does the delegated legislation sub-delegate the whole or a part of the legislative power conferred on the delegate? Where a discretion is given to a body to alleviate the operation of delegated legislation, it is possible to argue that there has been a passing on of the initial grant of power. This argument commonly arises in New Zealand but has rarely been considered in Australia. It is thought, therefore, that the most satisfactory way to deal with the issue is to discuss the Australian approach (referring also to the few relevant New Zealand cases) in the present chapter, dealing as it does with the general scope of the powers to regulate and to prohibit an activity. The question of sub-delegation of delegated legislative power is discussed in ch 25. It is in that context that the New Zealand cases relating to a prohibition with a discretionary alleviation can most usefully be considered.

The Australian law relating to a prohibition coupled with a discretionary alleviation is best discussed in two parts. First, where the delegated legislation is made pursuant to an express power to prohibit the particular activity. Then where there is no power specifically given to prohibit the activity but the prohibition is imposed under another power such as to regulate the activity concerned. Finally, the cases discussed here are concerned with the situation where there is no statutory right to invest a person with a discretion to exempt from compliance with the delegated legislation. Where there is such a power, different questions arise altogether. These are considered at [391-394].
EMPOWERING PROVISIONS: REGULATE; PROHIBIT

1. WHERE POWER TO PROHIBIT

[341] Early authorities. The courts have given different answers at various times to the question whether, under a power to prohibit an activity, a regulation can be made that prohibits that activity but allows a specified authority to give permission for the activity to occur. Even now the position is not entirely clear as will emerge from an examination of the decisions. The older cases on the question followed the English case of Williams v Weston-super-Mare Urban District Council (1907) 98 LT 537 in holding that the right to prohibit an activity allowed also a discretionary alleviation of that prohibition. The oldest Australian authority would appear to be Ex parte Kaye (1910) 10 SR (NSW) 350 where a power to make regulations prohibiting the obstruction of traffic in streets was held to have been validly exercised by the making of a regulation which required processions to have the consent of the Inspector General of Police. The judgment of the Full Court anticipates the approach taken in the later cases of Country Roads Board v Neale Ads Pty Ltd (1930) 43 CLR 126, [344] and Ex parte Cottman; Re McKinnon (1935) 35 SR (NSW) 7, [345]. The court considered, but dismissed as inapplicable, cases concerned with the question whether or not the power to regulate an activity would allow the adoption of a regulation prohibiting the activity with a discretionary alleviation. A similar approach was adopted in In re The Municipal Corporations' Act 1890; Ex parte Burford [1920] SALR 54 where the power to prohibit the passing or travelling in or along the streets of all vehicles was held to authorize the prohibition of horse and vehicular traffic on certain streets without the consent of the council. The court said that the greater power, namely, to prohibit, included the less, namely, to alleviate the prohibition, particularly as the less was an exception in favour of the public. Similar decisions were given in Bysouth v City of Northcote [1924} VLR 587 (power to regulate or prohibit blasting and quarrying operations authorized a by-law prohibiting blasting without council consent) and Neptune Oil Co Ltd v City of Richmond [1924] VLR 385 (power to regulate or prohibit the keeping or storage of dangerous things held to empower the making of a by-law that prohibited the construction or occupation of premises or storage of more than a certain quantity of petroleum products without the approval of the council).

[342] This line of authority was thrown into some confusion, however, by a remark of Higgins J in Melbourne Corporation v Barry (1922) 31 CLR at 208. That case was concerned with the validity of a by-law made under a power to regulate processions which prohibited processions without the approval of the council. The High Court held the by-law invalid as constituting a prohibition and not a regulation of the activity. In the course of his judgment, Higgins J referred to the by-law concerned being invalid even if it had been made under a power to prohibit processions as "the prohibition must be by by-law, not by the council acting at an ordinary meeting ....". On the other hand, Isaacs J at 199 drew a distinction between the by-law before the court and one made under a power to prohibit processions which he indicated would have been valid. It was Higgins J's comments, however, which were followed in two cases. The first was Miller v City of Brighton [1928] VLR 375. There a by-law prohibited the keeping of guinea pigs within 100 feet of a dwelling house without the permission of the council. The by-law was made under a power to
regulate or prohibit the keeping of animals. The Victorian Full Court held the by-law invalid. The basis for the decision was that Barry's case required the by-law to spell out the law, whether it be made under a power to regulate or to prohibit the activity concerned. The approval or disapproval of the conduct could not be left to a chance majority of the council. A similar decision was given by the Western Australian Full Court in Bailey v Conole (1931) 34 WALR 18. The power concerned in that case was one to prescribe stopping places for buses used for public transport and to prohibit the taking up or setting down of passengers other than at those stopping places. Regulations fixed a limited number of stopping places and prohibited the setting down of passengers other than at those places without the consent of the Commissioner of Police. That portion of the regulation which related to a prohibition was held invalid as not constituting a true prohibition but rather a reservation of an arbitrary power to the Commissioner of Police. Miller's case was referred to by Dwyer J in his judgment and the other judges adopted similar reasoning to that followed in that case.

The approach posited in these two cases was rejected by the South Australian Supreme Court in Fox v Allchurch [1926] SASR 384; [1927] SASR 328. The power under question in that case was one to make by-laws "for the more regular and efficient government of the [Botanical] Garden". This power was used to make a by-law which prohibited meetings in the garden without the consent of the Botanical Garden Board. The by-law was held by Napier J to be valid and his judgment was confirmed on appeal by the Full Court. The court rejected an argument based on the statements of Higgins J in Barry's case and preferred to follow the English decision in Williams' case.

High Court resolution of competing views. The difference of approach to the question demonstrated in these earlier authorities seemed to have been resolved by the decision of the High Court in The Country Roads Board v Neale Ads Pty Ltd (1990) 43 CLR 126. There power was given to the Board to make by-laws "regulating or prohibiting the erection and construction of hoardings on or in the vicinity of State highways ...". This power was used to make by-laws which prohibited the erection of hoardings without the approval of the Board. The case came initially before the Victorian Supreme Court which held the by-law invalid relying on Miller's case. The High Court reversed the decision and overruled Miller's case. Perhaps the most important extract from the judgment is that which appears at 135:

"But once it is realised that the power [to prohibit] 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? The answer that there is none was given by the Divisional Court and approved by the Court of Appeal in Williams v Weston-super-Mare Urban District Council; and we respectfully agree. The supposition or suggestion that the conditions or circumstances should be defined in which the consent, licence, or approval must be given can rest only upon some justification other than the words in which the power is conferred". The court then went on to reject the suggestions to this effect made by Higgins J in Barry's case. (It is to be noted that the decision in Bailey v Conole was given shortly after the Country Roads Board case, but presumably the judgment of the High Court was not available to the Western Australian Supreme Court.)
[345] The Country Roads Board case was followed soon after by the New South Wales Full Court in Ex parte Cottman; Re McKinnon (1935) 35 SR (NSW) 7. There power was given to the trustees of the Domain to make by-laws regulating its use and enjoyment. A by-law prohibited the distribution of printed material unless authorized by the Commissioner of Police. The by-law was held valid. Jordan CJ at 12, delivering the judgment of the court, said in regard to the power to prohibit an activity "... if it is within the ambit of the power to prohibit altogether either the doing of a class of things, or the doing of particular things within a class, such prohibition may be imposed simplier or sub modo, and it is no necessary objection to a modus that it involves the discretion of an individual".

[346] Legal basis for allowing prohibition with discretion to alleviate. The legal basis for the approach adopted by the courts in holding that a prohibition may be qualified by the adoption of a discretion is well stated by Napier J in Fox v Allchurch (see [343]) at 388:

It cannot be said that a prohibition qualified in this way [ie by the addition of a discretion] is necessarily ultra vires. Whether it is so or not must depend upon the proper construction of the Statute, and regard must be had to the context as well as to the words by which the by-law making power is actually conferred. The by-law in these terms is, in effect, a prohibition with a qualification or exception, which latter is incapable of any legal definition. Legally speaking, the exception has no parts or magnitude, and as a law the by-law is therefore seen to be equivalent to an absolute prohibition....

This statement may be compared with the approach of Dixon J in the Swan Hill case referred to at [357] when analysing the effect of a power to regulate an activity being used to prohibit the activity with a discretionary alleviation of that prohibition. The two statements are in accord with each other and represent the effective practical application of the law in this area.

[347] Cases following Country Roads Board decision. The approach adopted in the Country Roads Board case and Cottman's case has been followed in various jurisdictions. For example, in Potter v Daxns (1948) 48 SR (NSW) 523 the New South Wales Full Court held that the power of the committee of the Australian Jockey Club to make by-laws for the general management of Randwick Racecourse empowered the making of a by-law requiring the committee's approval of bookmakers operating on the course. It had previously been held that by-laws prohibiting bookmaking on the course were valid (Robinson v Knox (1916) 16 SR (NSW) 529) and the Full Court considered that, since there was a power to prohibit the activity, the like power could be made subject to a discretion. In that case, Jordan CJ reiterated the views he had expressed in Cottman's case. (Contrast the older decisions of Abbott v. Lewis (1902) 22 NZLR 552 and Colman v Miller [1906] VLR 622 holding similar rules invalid. It seems doubtful whether these decisions would now be followed.) In Northern Motors Pty Ltd v Marine Board of Devonport [1949] Tas SR 205 Gibson A-J held that there was no objection to a power to prohibit persons using a wharf being used to make a by-law that prohibited persons using the wharf without the consent of the harbour master. In Schulz v. Paige [1961] SASR 258 the South Australian Full Court held that the power to regulate, control or prohibit the use within a municipality of any
caravan or other vehicle as a place of habitation supported a by-law which prohibited such use without the approval of the council. In *Wilton v Mount Roskill Borough Council* [1964] NZLR 957 a by-law made under a power to prohibit the keeping of animals forbade the keeping of three or more dogs or cats on any premises without the licence of the local authority. Hardie Boys J expressly followed the *Country Roads Board* case in upholding the validity of the by-law. (It is also of interest that his Honour explained the apparently contrary decision in *Conroy v Shire of Springvale and Noble Park*: see [322]. He pointed to the fact that a majority of the judges there had upheld the validity of the prohibition in the by-law but that the by-law was ruled invalid as a result of the differing view over whether the requirement for the approval of the Dog Racing Control Board could be severed.) The *Country Roads Board* case was also followed by North J in *Ideal Laundry Ltd v Petone Borough* [1957] NZLR at 1054-1055.

[348] Authority supporting contrary view. There is a line of authority which does not accept the notion that a power to prohibit an activity of *necessity* allows the prohibition to be coupled with a discretionary alleviation. The genesis for this authority is found in the remarks of Higgins J in Barry's case set out at [342], but of greater weight has been the judgment of Evatt J in *Swan Hill Corporation v Bradbury* (1937) 56 CLR, commencing at 768. His Honour was not prepared to accept the suggestion that the judges in the *Country Roads Board* case were intending to lay down a hard and fast rule that was to resolve all cases. He pointed to their statement at 135 referring to "the danger which attends the formulation of principles and doctrines and all reasoning a priori in matters which in the end are governed by the meaning of the language in which the Legislature has expressed its will". Evatt J suggested that each and every instance of a prohibiting power must be looked at with considerable care. His starting point, however, was somewhat different from that of the High Court in the *Country Roads Board* case and the rationalisation suggested by Napier J in *Fox v Allchurch*. At 769 he said:

... if the authorized purpose of a by-law making power is "prohibition" simpliciter, in the sense of suppressing something undesirable, the presence in the by-law of an undefined, discretionary power, according to the exercise of which suppression will or will not follow, may tell more strongly against its validity than in the case of discretions retained in a by-law made under a power to regulate. Suppression is usually far more onerous and restrictive of the general liberty of the subject than mere regulation, so it may appear that the scope of a by-law making power is exceeded, if, aimed at suppression alone, it suppresses by reference to the uncontrolled discretion of a body or person, instead of by means of a broad general rule operating with "majestic quality".

His Honour then went on to indicate that this statement was not to be regarded as a complete statement of law on the topic. He contemplated that in regard to certain types of activities the prohibition might necessarily have to be coupled with a discretionary power. He posed as examples the prohibiting of noisy vehicles or offensive trades. The question of noise or offensiveness would be one that had to be resolved by an individual in a particular case. On this basis, he considered the decision in the *Country Roads Board* case was justifiable because the question of a prohibition of hoardings near the highway involved the taking into account of matters of an essentially subjective
nature such as the natural beauty of the landscape. But his Honour contemplated that, where the prohibition was of a defined activity involving no subjective element, a discretion to exempt from the prohibition was not permissible. He addressed himself specifically to the situation that was before the court in Cotman’s case: see [345]. He considered that the view expressed by Jordan CJ in that case did not accurately state the effect of the judgments in the Country Roads Board case. He considered that if there was a power to prohibit the distribution of handbills in a park subject to an alleviation of that prohibition by the Commissioner of Police, that did not constitute a prohibition on the activity but constituted a vesting of a discretion in the Police Commissioner as to the nature of materials that might be distributed in the park.

[349] It can be seen that his Honour contemplated a somewhat different approach to the interpretation of the prohibition power from that which emerged, at least initially, from the Country Roads Board case and like authorities. Each case would have to be looked at separately and the question posed whether or not it was possible to control the activity to be prohibited by a direct prohibition or whether some element was involved in the conduct to be prohibited which of necessity required the vesting of a discretion in an authority to alleviate the prohibition in certain circumstances. In the absence of the need for a discretionary power, it would seem that a power to prohibit an activity could be exercised for the purposes of prohibition only.

[350] Cases supporting approach of Evatt J in Swan Hill case. The views expressed by Evatt J have enjoyed some support either directly or indirectly in subsequent cases. Somewhat ambiguous support is provided by the judgment of Latham CJ in Radio Corporation Pty Ltd v The Commonwealth (1938) 59 CLR 170. Power was given to the Governor-General to make regulations prohibiting the importation of goods and such prohibition was expressly stated to be capable of being made “subject to any specified condition or restriction”. The regulations prohibited importation of certain goods without the consent of the minister. Latham CJ, Rich, Starke and McTiernan JJ; Dixon and Evatt JJ dissenting, held the regulation valid. Latham CJ, with whom the other majority judges agreed, followed the Country Roads Board case [344] and Williams’ case, [341], and concluded that the regulations amounted to no more than a prohibition with a discretionary alleviation. The dissenting judges considered that the Act required that the excepting conditions be specified. There was, in their view, no specification if there was simply a ministerial discretion to alleviate or not alleviate the prohibition. The dissenting judges were clearly influenced by the importance of the subject matter and stated that different considerations would arise where one was concerned with local government powers. The significance of the case for present purposes lies in the fact that in referring to the Country Roads Board case and indicating that the legislation in that case and in the present case were on all fours, Latham CJ at 184 added “If the subject matter is such as to require detailed supervision, the analogy with the Country Roads Board Case is complete”. This enigmatic statement perhaps indicates that if the subject matter is not such as to require detailed supervision, in his Honour’s view the Country Roads Board case is not clear authority for the idea that a prohibition coupled with a discretion will be valid. This is, in effect, what Evatt J was saying in the Swan Hill case.
The matter also arose in *R v The Shire of Ferntree Gully Ex parte Hamley* [1946] VLR 501. The Local Government Act of Victoria had been amended after the decision in the *Swan Hill* case to provide that councils could make by-laws not only for the purpose of regulating and restraining the erection of buildings but also for prohibiting such activity. The question then arose whether a council could simply state that a building could not be built in an area without council approval. The matter came before Herring CJ but, unfortunately, the decision did not require a final resolution of the point. Herring CJ at 509 did say that he thought Evatt J’s approach had much to commend it. Sholl J in *Conroy v Shire of Springvale and Noble Park* [1959] VR at 755 also cited Evatt J when saying “… there may be cases where the nature of the subject matter is such that the reservation of a power of dispensation, in completely general terms, may invalidate the purported exercise of the power, whereas in other cases it may tend to support validity”.

The final case in which the issue seems to have arisen is *Schofield v City of Moorabbin* [1967] VR 22 where there was a power to make by-laws “Prohibiting or minimizing noises in any public highway …”. A by-law was made which prohibited the use of amplifiers to make a noise in the vicinity of a road without the consent of the council. Menhennit A-J upheld the validity of the by-law. At 28-29, his Honour referred to Evatt J’s judgment and to Herring CJ’s apparent endorsement of it in the *Femtree Gully* case, together with the comments of Latham CJ in the *Radio Corporation* case. He found it unnecessary to express a final view on the question because he considered that noise control of necessity involved a matter of degree and that this was an appropriate type of case in which a discretion could be reserved by the authority making the by-law.

It is to be noted that, in the *Country Roads Board* case, the High Court had, after referring to the view expressed in Miller’s case that the word “prohibit” required nothing short of entire and unconditional suppression, gone on to say (at 134):

It may well bear this meaning in some contexts and in relation to some subject matters, but when prohibiting some course of conduct is expressed to be the purpose of a by-law-making power, it would more often be understood to confer authority to forbid all or any part of that course of conduct and to do so absolutely or subject to any condition which appeared convenient. At least it is clear that when the purpose of a power includes both prohibiting and regulating, it must authorise a by-law which forbids conditionally, although the conditions may properly be described as regulatory.

It would seem that the court here does contemplate the possibility that in some particular, but unspecified context, the power to prohibit an activity may have to be exercised by total suppression of the activity. In the absence of some indication of when this circumstance might arise, however, the passage quoted, when read against the subsequent statement referred to at [344], would make this a most unusual event.

Conclusion. The legal analysis of the effect of a prohibition coupled with a discretionary alleviation suggested by Napier J in *Fox v Allchurch* (see [346]) indicates that the objection raised by Evatt J in the *Swan Hill* case is
more one of policy than of law. Two factors seemed to weigh with him. First that the subject matter of one regulation might require absolute prohibition while that of another might require supervision. In the former case there should be no discretion; in the latter a discretion must be reserved. This is the consideration that seems to have been endorsed in other cases in which Evatt J’s views have been supported. But this places the court in a position of making a policy decision whether a particular activity is of such a kind as to require detailed supervision. This is a decision that the delegated legislative authority is in a better position to make than the court. “... questions of mere policy, as to the necessity or the wisdom of the enactment, are for the delegated body, and not for the courts” per Sholl J in Conroy v Shire of Springvale and Noble Park [1959] VR at 755 citing Griffith CJ in Widgee Shire Council v Bonney [1907] 4 CLR at 982-983. The second factor influencing Evatt J was that the vesting of a discretion in an authority would render the activity subject to the whim of that authority. But one can approach the matter from the other viewpoint. If the regulation-making body would be entitled to prohibit the activity altogether and is doing no more than allowing for an alleviation of that total prohibition where circumstances may indicate that the prohibition is unfair, surely the public is being better served than if the prohibition could not be alleviated no matter how desirable that was. The practical implications of not recognizing a right to couple a prohibition with a discretionary alleviation seem to be such that the courts should permit delegated legislation so to provide in all cases.

2. WHERE NO POWER TO PROHIBIT

[355] Power to regulate used to prohibit with discretion. Where a power is given to regulate an activity, it is tempting for the body concerned to prohibit the activity subject to the approval of that body or some other designated authority. It is then argued that there is no prohibition of the activity in the sense in which that was discussed in the cases referred to above at [311]. The activity is permitted to continue but its continuance is made subject to a discretion. While this view was accepted in some older cases in regard to a particular activity (see below), the general approach of the court has been that a prohibition coupled with an arbitrary discretion to alleviate that prohibition is not a valid exercise of a power to regulate an activity. The oldest authority to this effect in Australia seems to be the case of Gomm v Bennett (1895) 21 VLR 608 where a power to regulate the time and manner of cleansing and emptying earth closets and privies was exercised to make a by-law that forbade the removal or emptying of privy pans by any person unless authorized or licensed by the council. The Full Court held this by-law invalid. Cuthbertson v Cox (1918) 14 Tas LR 80 adopted a similar attitude in regard to a power to regulate dairies and cow sheds which was used to make a by-law prohibiting the use of a structure as a cow shed without the approval of the local authority. In both cases the respective courts considered that the by-law was attempting to prohibit the activity where the power was simply to regulate it. There had, however, been two older cases, Rider v Phillips (1884) 10 VLR(L) 147 and Bannon v Barker (1884) 10 VLR(L) 200 in which a contrary view had been taken. The courts there had upheld the validity of a by-law made under a power to regulate processions that prohibited all processions unless approved by the council. The apparent contradiction between these
cases and those referred to above was finally resolved in the important case of *Melbourne Corporation v Barry* (1922) 31 CLR 174.

The power to regulate processions given to the Melbourne Corporation was used to make a by-law prohibiting processions except with the consent in writing of the council. The by-law was held invalid. Considerable emphasis was placed by the judges on the fact that a discretion vested in the council in these circumstances could be exercised on any basis whatsoever and, in the words of Higgins J at 208, "by the chance majority at [a council] meeting". Isaacs J at 197 said:

"except where the Legislature has clearly empowered a council to make its own unfettered and unregulated will at the moment the test of legality or illegality, a council having the power of "regulating by by-law" should state its requirements in the by-law as explicitly as circumstances reasonably permit ... It would require very explicit words in an Act of Parliament to induce me to believe the Legislature, in the name of regulation, contemplated such unregulated authority as is assumed by the by-law before us."

The judgments discussed and distinguished *Rider v Phillips* and *Bannon v Barker* but, in effect, those decisions were overruled. *Barry's* case was followed two years later by the Victorian Full Court in *King v The City of Footscray* [1924] VLR 110 when interpreting a by-law made under a power to "restrain" building activity. The court considered that the reasoning in *Barry's* case was equally applicable to the word "restrain" and accordingly a power to prohibit building without the consent of the council was invalid.

**Basis of court's approach.** In *Barry's* case, and in the earlier discussion of the issue, the attitude taken by the courts turns very much on the unfairness and impropriety of a council assuming a power to licence an activity at will where the empowering provision permits only the regulation of the activity. Reference is made to the possibility of the political views of the council influencing a decision and to the body taking into account matters other than those which could be regarded as relevant to the decision in hand. It was not until the decision of the High Court in *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746 that the objection to a power to regulate being used to prohibit with a discretionary alleviation was discussed in strictly legal terms. The judgment of Dixon J at 757-758 is the *locus classicus* of the law on this question. His Honour, having referred to an activity being made subject to the approval of a public authority, continued:

"When a provision of this kind is made, it is incumbent upon the public authority in whom the discretion is vested not only to enter upon the consideration of applications for its exercise but to decide them bona fide and not with a view of achieving ends or objects outside the purpose for which the discretion is conferred. The duty may be enforced by mandamus. But courts of law have no source whence they may ascertain what is the purpose of the discretion except the terms and subject matter of the statutory instrument. They must, therefore, concede to the authority a discretion unlimited by anything but the scope and object of the instrument conferring it. This means that only a negative definition of the grounds governing the discretion may be given. It may be possible to say that this or that consideration is extraneous to the power, but it must always be impracticable in such cases to make more than the most general positive statement of the permissible limits within which the discretion is exercisable and is beyond legal control."
EMPOWERING PROVISIONS: REGULATE; PROHIBIT

His Honour then went on to consider the practical effect in legal terms of the by-law before the court. The by-law, which had been made under a power to make by-laws "regulating and restraining the erection and construction of buildings", prohibited building without the consent of the council. Dixon J considered that a person who made application for building approval and who was declined permission would not be able to seek the intervention of the court to obtain the consent of the council unless the council, in reaching its conclusion, had taken into account matters that were extraneous to the exercise of its discretion. In this particular case his Honour considered that, apart from the difficulty of establishing what in fact was the reason for the council's decision, no reason would be held outside the scope and purpose of the by-law unless it had no relation to municipal government. Thus, although the by-law coupled the prohibition of building with the right to engage in that activity with the council's consent, the fact that this discretion was not founded upon any specified grounds meant that, for all practical purposes, building was totally prohibited.

The type of provision that can be adopted under a power to regulate an activity is illustrated by *Brunswick Corporation v Stewart* (1941) 65 CLR 88. There building by-laws made under the same power as that discussed in the *Swan Hill* case — to regulate and restrain building — was exercised to make a code of requirements for buildings with a further provision that forbade the commencement of building without the consent of the surveyor. The court construed the by-law as requiring the surveyor's consent if the code was complied with and if consent was wrongly withheld, it could be compelled by mandamus. The by-law thus did not impose an unreviewable prohibition on building. The strictures of the *Swan Hill* case were therefore met and the by-law was valid in that it constituted a "regulation" of the activity. It is to be noted that Starke J at 96 referred to the fact that there was a right of appeal provided from a decision of the surveyor. However, it seems that too much should not be made of this allusion as it would not seem to have been essential to the decision. Cf also *Levingston v Shire of Heidelberg* [1917] VLR 263 which is discussed below [360].

**Application of court's approach.** The approach adopted in the *Swan Hill* case has been followed consistently by the courts since that date. Indeed, if anything, the courts have tended to impose more stringent demands on bodies making delegated legislation than seemed to have been contemplated in either *Barry's* case or the *Swan Hill* case. For example, in *Shanahan v Scott* (1957) 96 CLR 245, the High Court ruled that a power to make regulations "regulating the ... storage" of eggs did not empower the making of regulations that forbade the placing of eggs in cold storage without the authority of the Board. The High Court considered that the power to regulate had been used to prohibit the activity. But it could, perhaps, have been said that the regulation prohibited only one form of storage and therefore was a regulation of part only of the total activity of storing eggs. This interpretation was not alluded to by the High Court. A case which takes the matter even further is *Barker v Carr* (1957) 59 WALR 7. The power in question in that case was one to make regulations "to regulate traffic". A regulation was made that prohibited the carrying of pictures, prints, boards, placards or notices in roads, streets or public places without the approval of the Commissioner of
Police. It was held, following Barry's case, that the regulation was invalid as a prohibition with a discretionary alleviation. But it is to be noted that the power was to regulate traffic at large and the regulation was concerned with only one relatively minor aspect of traffic. Barry's case, on the other hand, was concerned with a power to regulate processions which was used to prohibit all processions. It is to be noted that the case was concerned with a prosecution against demonstrators opposed to nuclear armament. Is it possible that the courts are more likely to view with suspicion a by-law or regulation which affects civil rights such as the right of demonstration? (It is to be noted that the Full Court also ruled that the regulation was invalid as uncertain. The notion that a regulation is uncertain because it makes the carrying on of an activity subject to the approval of a designated authority is of somewhat questionable validity in the light of the approach adopted by the High Court in the King Gee case: see [473].) The views expressed in Barry's case and the Swan Hill case have also been adopted in the constitutional sphere: see McCarter v Brodie (1950) 80 CLR at 498. For a recent application of the Swan Hill case see In re Martin's Application [1974] Tas SR 43.

[360] Decisions upholding prohibition. The apparently clear line that emerges from the foregoing cases is blurred somewhat by three older Full Court decisions relating to a power to regulate hoardings. The cases are Bennett v Daniels (1912) 12 SR (NSW) 134, Ex parte Bolton (1913) 15 SR (NSW) 379 and Levingston v Shire of Heidelberg [1917] VLR 263. In each case, one of the judges expressed some doubts as to the outcome of the case but was prepared to go along with his brother judges' viewpoint. The cases were each concerned with a power to make by-laws regulating the erection of hoardings which had been used to prohibit the erection of hoardings without the consent of the council. The respective by-laws were held valid. The cases have not been overruled in subsequent decisions and only Levingston's case seems to have been cited - and then only for limited purposes: see Country Roads Board v Neale Ads Pty Ltd (1930) 43 CLR at 136; Swan Hill Corporation v Bradbury (1937) 56 CLR at 766; Radio Corporation Pty Ltd v The Commonwealth (1938) 59 CLR at 184. The reasoning in this group of cases seems to run counter to that followed by the courts since Barry's case and the Swan Hill case and, on that basis, it must be regarded as doubtful whether they would now be followed. But it may be that they could be supported as being concerned with the validity of delegated legislation dealing with "evil" things. It will be recalled that Dixon J in the Swan Hill case considered that a power to regulate such things could be exercised to prohibit them: [315]. Dixon J himself gives hint of this as the basis for the decision in Levingston's case: see the Swan Hill case at 763. But cf Bell v Day, [315].

[361] Prohibition of part of activity to be regulated. One point which should not be overlooked when considering the question of a reservation of a discretion constituting a prohibition is that it is possible under a power to regulate an activity to prohibit part of that activity: see [328]. The next step in the problem is whether that prohibition may be alleviated by a discretion. It would seem that such action is valid. In Ex parte Cottman; Re McKinnon (1935) 35 SR (NSW) 7 the trustees of the Domain were given power to make by-laws regulating its use and enjoyment. A by-law was made which prohibited the distribution of printed material unless authorized by the Commissioner.
of Police. The by-law was held valid by the Full Court. Jordan CJ, with whom Davidson and Stephen JJ concurred, said at 12:

If ... a particular partial prohibition of the doing at all of certain things falling within the class would be warranted, as not going beyond regulation, it is no objection to such a limited prohibition that, instead of being absolute, it is made applicable or removable at the discretion of a particular person or body, assuming always that so to qualify the partial prohibition does not in substance amount to an attempt to regulate by the discretion of some person or body and not by by-law.

The same conclusion was reached on somewhat similar facts in Hazeldon v McAra [1948] NZLR 1087. There a power to regulate the use of reserves was held to permit a by-law prohibiting the use of a named park for public meetings without the approval of the Town Clerk.

[362] Reservation of discretion generally. For cases dealing with the general question of reservation of a discretion in delegated legislation, see ch 20; in particular, [391-394] relating to a statutory right to invest a body with a discretion should be noted.
CHAPTER 18

EMPOWERING PROVISIONS: PENALTIES AND FORFEITURES

[363] Strict construction of power to impose penalties. As might be expected, the courts have shown considerable reluctance to hold delegated legislation valid where it imposes a penalty or some other liability upon an individual and there is no clear authorization for such a provision in the empowering Act. A good illustration of this is afforded by the case of In Re the Corporation of the City of Port Adelaide; Ex parte Groom [1922] SASR 35. Power was given to a local council to provide for the imposition of penalties not exceeding £10 for a breach of its by-laws. A by-law was made which dealt with the improper branding of goods and provided, in addition to penalties for a breach of the by-law, a requirement that any improperly branded goods should be forfeited. This latter provision was held invalid. The court described it as a penalty upon a penalty and it was not permitted by the empowering Act. The High Court adopted a similar approach in the case of Bishop v MacFarlane (1909) 9 CLR 370. Section 21 of the Metropolitan Traffic Act (NSW) provided for any unpaid taxi fares to be recoverable in a Court of Petty Sessions. A regulation made under the Act provided that, on such an action being brought, the Court of Petty Sessions could order that the fare be repaid together with compensation for loss of time on the part of the plaintiff. The High Court held the regulation invalid. The Act provided for the recovery of the fare but there was nothing in the Act that allowed the order for compensation to be made. This case and the preceding case are really examples of regulations being ultra vires the empowering Act in the sense that an attempt was being made to exercise the regulation-making power for a purpose for which no authority was given. But the cases do show that the general attitude of the courts will be that penalties and forfeitures may only be imposed when permitted by the empowering Act and then must accord with the provisions of the Act.

[364] A case which took the matter even further is Coleman v Marine Board of Victoria (1899) 5 ALR 138. The power the court had to consider there allowed the making of regulations relating to the conducting of examinations of persons desiring to obtain certificates of competency as masters, mates and engineers of ships and specifying the qualifications to be possessed by such persons. Regulations made under the Act provided that if the holder of an existing certificate sought to obtain a higher certificate but failed an examination for that higher certificate, the fact of his failure was to be endorsed on his existing certificate. This regulation was held invalid. The court laid much emphasis on the fact that this was an interference with the man's property and his status and ruled that this was not permissible without clear authority. However, the problem at issue was clearly that a penalty was in effect being imposed on a person who failed an examination. Not only did he fail, but the fact of his failure was publicized to the world and would obviously affect his employment prospects.

[365] A case in which a different approach from that evidenced in the fore-
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[367]
going cases was taken is *Hackett v Lander and Solicitor-General* [1917] NZLR 947. Power was given to the Governor to make regulations under the *War Regulations Act* to control the practice of "treating" (or, as it is more commonly called, "shouting") of liquor on licensed premises. The Act included a penalty for failure to comply with the regulations. The Governor made a regulation pursuant to this power for the suppression of "treating" which provided for the disqualification from employment in a similar capacity for a period of six months of any bar attendant who was convicted of treating contrary to the regulations. It was argued that this regulation purported to impose a penalty additional to that provided by the Act and was therefore invalid. Hosking J rejected this argument on the basis that it fell within the power of the Governor to prohibit certain classes of acts on the part of particular persons; that it was within his power to regulate the calling of bar attendants; and that the designation of the members of that class by reference to their having been convicted of an offence against the regulations was a valid description of that class. With respect, this approach seems to overlook the very obvious connection between the designation of the persons to be affected and the commission by them of an offence. The purpose of the regulation was to impose an additional penalty on bar attendants who offended against the regulations and this undoubtedly did mean that the penalty provided for by the Act was being extended by the regulations. The wartime situation clouds the decision but, it would seem, that it is not one that should be relied upon as authority for the general proposition that a power to control an activity authorizes the control of persons engaged in that activity if the control is conditional upon a conviction for an offence under the Act and a penalty is provided in the Act for that offence.

[366] Exercise of common law rights not a penalty. Care must be taken to distinguish between an additional penalty and the exercise of a right that a party may have independently of the empowering penal provisions. In *Hutchinson v Colls* (1905) 7 WALR 303 a by-law passed pursuant to the Railways Act made it an offence for persons to come upon railway premises for the purposes of soliciting custom or hire: there was no question but that such a by-law was valid. However, the by-law went on to provide, in addition to the penalty, that a person who so came onto railway premises could be summarily removed. It was argued that this power was not available under the power to impose a penalty but the court rejected the argument. The power to remove a person infringing the by-law was regarded as inherent in the railway authorities by virtue of their occupation of the railway premises. In fact it was probably unnecessary for the power to be included in the by-law.

[367] Imposition of civil liability. The preceding cases have been concerned with situations in which the regulations added to the permissible penalty some other penalty or forfeiture. There are two Australian cases in which the courts have had to consider the question whether the imposition of a civil liability for non-compliance with a regulation instead of a penal sanction was a valid exercise of a power to make regulations necessary or convenient for giving effect to the Act. In both cases the courts were narrowly divided on the proper view to be taken. The first case was *Gibson v Mitchell* (1928) 41 CLR 275. The *Post and Telegraph Act* gave power to make regulations imposing penalties not exceeding £50 for a breach of the regulations. A regulation was
made that required a person taking over a telephone service without the authority of the Postmaster General's Department to pay any outstanding debts due for the prior use of that telephone service. The High Court held, by a majority of three to two, that the regulation was a valid exercise of the necessary or convenient power. The dissenting judges, Knox CJ and Gavan Duffy J, took the view that it was only by means of a penalty that compliance with the regulations could be enforced. A somewhat similar situation arose in *Minister of Education v Huezenroeder* [1967] SASR 357. Power was given in the Education Act to impose penalties for a breach of the regulations. A regulation was made that required the forfeiture of a portion of a teacher's salary if the teacher resigned during the first term of the school year. This amount was specified as being recoverable as a civil debt. The South Australian Full Court held by a majority of two to one that the regulation was valid. The majority relied largely on *Gibson v Mitchell*: the regulation was necessary or convenient for giving effect to the Act and was not a penalty. Bray CJ, dissenting, held that the regulation, in effect, imposed a penalty on a teacher resigning during the first term. He endeavoured to distinguish *Gibson v Mitchell* on the basis that the Post and Telegraph Act gave a power to prescribe fees and that the regulation in that case did no more than that. This was not, however, the basis of the High Court judgment — the majority relied on the necessary or convenient power.

While the delegated legislation was upheld in both these cases, the division of opinion in the courts indicates that there may be some doubt whether a regulation purporting to impose a civil liability in lieu of a criminal liability expressly authorized by the empowering Act will, in all instances, be regarded as valid. The issue would be further complicated if there was no power to impose a penalty. In such a case the classification of the amount to be forfeited as either a penalty or as a sum necessarily recoverable under the Act would become crucial to the validity of the regulation. It should be noted that *Gibson v Mitchell* and *Huezenroeder*’s case were concerned with the rather special circumstance of a civil liability doubling, as it were, as a penalty. There is, in general, no principle that civil obligations may not be imposed by delegated legislation. The question is simply one of power: whether the regulation is authorized by the Act. Then the question arises, as it does in all cases, whether it was intended that the regulations impose a civil duty with its consequent civil right: see *Stoneman v Lyons* [1974] VR at 803-805; *Utah Construction and Engineering Pty Ltd v Pataky* [1966] AC 629.

Avoidance of civil liability by legislation-making authority. What might be regarded as a variation on the foregoing cases is the situation where a legislative authority not only imposes a penalty for failure to comply with a requirement of its delegated legislation but also endeavours to avoid civil liability for conduct on the part of a person who offends against the requirement. The validity of such a provision was discussed in *Henwood v The Municipal Tramways Trust (South Australia)* (1938) 60 CLR 438. A by-law made by the Trust made it an offence for a passenger on a tram to project any part of his body outside the tram. A person was injured when projecting his head out of a tram and it was asserted as a defence to an action in negligence against the Trust that the person, by infringing the regulations, had forfeited his right to bring an action against the Trust. The High Court rejected this
argument. The power given to the Trust was to make regulations "generally for regulating passenger traffic" and such a power would not support a by-law that affected the liability of the Trust in negligence. Accordingly, the fact that the person may have subjected himself to a penalty under the regulations could have no effect on the civil liability of the Trust.

[370] Incidental punitive effect. Where the operation of a regulation has an incidental punitive effect but is clearly within the authority given to make delegated legislation, the incidental effect will not result in the invalidity of the regulation. This is illustrated by the case of Bray v Milera [1935] SASR 210. A regulation enabled the Chief Protector of Aborigines to exclude from aboriginal reserves any aborigines whose presence was inimical to discipline and good order in the reserve. It was argued that this regulation had a punitive effect and, as there was no power to impose penalties other than a fine or imprisonment, the regulation was invalid. Richards J at 216 said: "It may be conceded that the exercise of the power conferred by the regulation has a punitive effect; but that is only incidental to its nature, it is not its object. Its incidental punitive effect does not render the regulation inconsistent, or in excess of, the Act, if the power conferred is necessary or convenient for carrying out the Act". As it was thought that the regulation was necessary or convenient for carrying out the Act, it was held valid.

[371] Imposition of strict liability. Mention should be made of two cases that could be somewhat misleading if taken at face value. In Brown v Burrow (1908) 14 ALR 460 and Miller v Bartholomew [1936] SASR 38 the judges hearing the cases showed a marked reluctance to infer that a power to make delegated legislation would support the creation of strict offences. In Foster v Aloni [1951] VLR at 488 it was indicated, however, that the cases are probably little more than illustrations of the general reluctance on the part of the courts to approve the creation of strict offences. This attitude is well established in regard to offences included in Acts (see for example Proudman v Dayman (1941) 67 CLR 536) and there is no reason why it should not be equally applicable to offences created by delegated legislation. It should be noted that the Privy Council held in Utah Construction and Engineering Pty Ltd v Pataky [1966] AC 629 that it was no objection to the validity of a regulation that it imposed absolute liability on persons to comply with the regulation where the obligation was enforceable by means of a civil action.

[372] Imposition of obligation without specifying penalty. Where a regulation purports to impose an obligation on a person but fails to include a penalty for non-compliance with the obligation, it is reasonable to suppose that there was nonetheless an intention on the part of the regulation-making authority that some penalty should be attached to a breach of the regulation. This situation is met by the decision in Willingale v Norris [1909] 1 KB 57 which held that a breach of a regulation is, in the absence of any other indication to the contrary, to be regarded as a breach of the Act under which the regulation is made. Accordingly, if there is contained in the Act a general provision imposing penalties for breach of the Act, that penalty will be applicable to a breach of the regulation. This decision was cited with approval by Dixon J in Meakes v Dignan (1951) 46 CLR at 102 and Jordan CJ in Ex parte Nomarhas re Comans (1944) 44 SR (NSW) at 190. Of course, if a contrary
intention can be spelled out, then this approach will not be applicable. An example of such a situation is provided by *Ex parte Berkeley re Morgan* [1963] NSWR 1172. The applicant was convicted of a breach of regulations made under the *Pure Food Act*. The regulations carried a penalty and he was fined in accordance with that penalty. However, an order was also made prohibiting him from engaging in the sale of food or drugs for a specified period. This penalty could be imposed on a person convicted for a breach of the Act. The applicant argued that he had not been convicted of a breach of the Act but only of the regulations and the prohibition could therefore not be imposed upon him. This argument was upheld by Taylor J who stated that the applicant had in fact been convicted of a breach of the regulations and that it was not the intention of the Act that a breach of the regulations should also be regarded as a breach of the Act. The factors that his Honour said he took into account in reaching this conclusion were (1) a consideration of the scheme of the Act and the regulations; (2) a distinction that was drawn in a number of sections in the Act between offences against the Act and offences against the regulations; (3) provisions made in the regulations for penalties; and (4) the nature of the penalties that could be imposed for a breach of the regulation under which the applicant was convicted.

**[373]** Imposition of penalty not to exceed specified maximum. The need to exercise care when drafting by-laws which are permitted to impose a penalty up to a specified maximum is illustrated by *Metropolitan Transit Commissioners v Berry; Ex parte Berry* (1899) 9 QLJR 117. Power was given to the Commissioners to make by-laws in respect of certain matters and to impose penalties for breaches of those by-laws, but no penalty was to exceed £20. The Commissioners made a by-law that prohibited persons using vehicles for commercial purposes without having first obtained a licence and provided that the penalty for non-compliance with the by-law was to be “a penalty of not less than £1 and not more than £5 for every day during which such vehicle is so used”. The court held that the offence created by the by-law was a single offence and not a continuing one. The penalty imposed by the by-law for breach of it could thus exceed £20 and it was therefore invalid.

**[374]** Injunction to compel compliance with legislation. It has long been recognized by New Zealand courts and somewhat belatedly by Australian courts that the mere fact that a penalty is provided for failure to comply with a regulation does not prevent an injunction being granted to enjoin non-compliance with that regulation. In *Southland Acclimatization Society v Otago Acclimatization Society* [1918] NZLR 524 the Court of Appeal held that while an acclimatization society had no proprietary right in the fish in the streams of its district, yet it was given by a regulation a right to refuse its consent to the taking during the closed season of trout from such streams by another acclimatization society. This right could be enforced by injunction even though non-compliance with the regulations attracted the penal provisions of the Act. The view was also taken in that case that as the society was given a right under the regulations, it was unnecessary for the action to be brought by the Attorney-General. The Australian position is defined in *Cooney v Ku-ring-gai Municipal Council* (1963) 114 CLR 582. There an injunction was granted by the High Court to restrain the carrying on of a business in an area that had been zoned as residential pursuant to local
government ordinances. Failure to comply with the ordinances attracted a penalty but the court was prepared to grant an injunction to restrain breach of the ordinances notwithstanding the existence of the penalty provision. In reaching this conclusion, the court disapproved a decision of the Victorian Full Court in Attorney-General (ex rel Lumley) and Lumley v T S Gill & Son Pty Ltd [1927] VLR 22 which had denied the right to grant an injunction where penalties were provided for non-compliance with the regulations. Up until Cooney's case, this case had been accepted as the law in Australia. It is to be noted that the council in Cooney's case could bring the action itself because of s 587 of the Local Government Act (NSW). In the absence of such a provision, it is probably necessary for an application for an injunction to enforce compliance with delegated legislation to be made by, or in the name of, the Attorney-General: cf, Kelberg v City of Sale [1964] VR 383.
EMPOWERING PROVISIONS: LICENCES AND FEES

Introduction. Two matters which may conveniently be discussed together are the interpretation of a power that requires a person engaging in a particular activity to take out a licence (or permit) and the right of a licensing authority to charge a fee for the issue of a licence (or permit). These issues can be considered separately from the question whether a body can prohibit an activity unless a licence or some other form of permission is obtained where no express power to so provide is given in the enabling Act. That question was discussed in ch 17 in relation to the right to reserve a discretion when making regulations under a power to regulate or prohibit an activity. This chapter is concerned with the issues that arise when there is a specific power to require the holding of a licence.

Licensing Powers

Licensing powers construed strictly. It would seem that, as a general proposition, the courts tend to the view that a licensing power must be used strictly for the purpose for which it is given. This is particularly apparent when it comes to the question of the imposition of licence fees but it also emerges in cases that are concerned with the issue of licences and the control to be exercised over them. For example, in In re By-law Number XXIII of the Corporation of the Town of Glenelg; Ex parte Madigan [1927] SASR 85 the Full Court was concerned with a power to make by-laws for licensing motor vehicles plying for hire within the municipality. A by-law made under this power prohibited plying for hire unless the motor vehicle was licensed and an absolute discretion whether or not to issue a licence was vested in a licensing officer. The court held this by-law invalid. The Act did not permit the licensing power to be used in such a way that the right to use vehicles for the carriage of passengers would be dependent upon the discretion of an official. In Banks v Transport Regulation Board (Victoria) (1968) 119 CLR 222 the issue was a little different but the court again took a strict view of a licensing power. The power in that case enabled the making of regulations specifying, among other things, the conditions attaching to licences, permits or certificates. The regulations stated that it should be a condition of every licence that the provisions of the Act and of the regulations and of any other Act relating to the vehicle should be observed. The regulation was held invalid. The court took the view that the regulations could not simply pick up a mass of other provisions as in force from time to time and make them conditions of the licence. The regulation-making power required the conditions that were to apply to licences to be specified in the regulations. This was not achieved by a regulation in the form adopted.

Act may give wide power. Notwithstanding the approach indicated in the last paragraph, when considering the nature of a licensing regulation regard must be paid to the empowering provision in the Act. For example, in Crowe v The Commonwealth (1935) 54 CLR 69, s 13 of the Dried Fruits
Export Control Act 1924 provided:

For the purpose of enabling the board effectively to control the export and the sale and distribution after export of Australian dried fruits, the Governor-General may by proclamation prohibit the export from the Commonwealth of any dried fruits except in accordance with a licence issued by the Minister subject to such conditions and restrictions as are prescribed after recommendation to the Minister by the board.

The regulations made pursuant to this power vested absolute control over the overseas sales of dried fruit in the Board. The conditions prescribed by the regulations enabled the Board to govern in detail every dealing with dried fruit from shipment to final sale, and to do so by means of an uncontrolled discretion directed to individual cases and transactions. The High Court ruled that the regulations were justified by the power under which they were made. The court suggested that no effective control of the export and of the sale and distribution abroad of dried fruits could be exercised except by a close supervision and a detailed direction of trade. This case again illustrates the need to avoid generalizations. It is necessary always to be aware that a particular power may authorize the making of a set of regulations which, on the face of them, seem to run counter to generally accepted principles. This will be so particularly when the power to make regulations licensing an activity is exercised in time of war: Taratahi Dairy Co Ltd and Mangorei Dairy Co Ltd v Attorney-General [1917] NZLR 1, [379].

Imposition of Fees

[378] No fee permissible without authority. A matter to which the courts pay close heed is that of the imposition by delegated legislation of fees for licences or other services. The courts approach the matter from the viewpoint that unless there is clear authority to do so, a body exercising delegated legislative authority has no right to impose a charge. The authority usually cited for this proposition is the English case of Attorney-General v Wilts United Dairies (1922) 91 LJKB 897. There the House of Lords ruled that a charge on milk producers imposed by regulation was in fact a tax and taxes could only be imposed by the parliament or by the clear authority of the parliament. Lord Wrenbury at 900 said:

The Crown in my opinion cannot here succeed except by maintaining the proposition that when statutory authority has been given to the Executive to make regulations controlling acts to be done by His Majesty's subjects, or some of them, the Minister may, without express authority so to do, demand and receive money as the price of exercising his power of control in a particular way, such money to be applied to some public purpose to be determined by the Executive.

And this proposition was untenable. Earlier authority to the same effect in Australia is provided by the case of Kluer v Woolloongabba Divisional Board (1884) 2 QLJ 37. The power there was to make by-laws for regulating and licensing vehicles plying for hire. Pursuant to this power, the Board established a licensing scheme with the requirement that a fee be paid. The by-laws were held ultra vires because the fee amounted to a tax and there was no authority to impose it. Similarly, in In re Hender; Hender v Smedley [1916] SALR 158, it was held that a power to make regulations necessary or convenient for giving effect to the Licensing Act did not allow the making of a regulation imposing fees for applications to the Licensing Court. It was pointed out
that, under the Act, the salaries and expenses of members of the Licensing Court were a charge on public revenue. No other justification for the regulations other than to lessen the expense of general administration of the Act could be seen and the Act did not provide authority for the imposition of fees for this purpose.

In New Zealand, a Full Court in *Campbell v MacDonald* (1902) 22 NZLR 65 held that a power to make regulations providing for the management of any waters in which fishing might be carried on did not permit the imposition of a fee for a fishing licence. This decision was distinguished but not overruled in *Taratahi Dairy Co Ltd and Mangorei Dairy Co Ltd v Attorney-General* [1917] NZLR 1. Under a wartime Act relating to trade and commerce, power was given to the Governor to make Orders-in-Council prohibiting the exportation of certain goods subject to conditions or restrictions. This power was exercised to make an order prohibiting the exportation of goods from New Zealand without a licence issued by a licensing authority. It was made a condition of the issue of the licence that the exporter had to pay to the authority a substantial sum of money which was to be disbursed in the manner set out in the order. The monies so paid were not to go into general revenue but were to be paid for purposes connected with the regulation of trade and commerce. The order was attacked on the basis that it imposed a tax without authority. This argument was rejected, the court saying that the general power of prohibition was such that a person could have been prevented from exporting his goods altogether. If he chose to export the goods it was subject to him doing so on the conditions set out in the Order-in-Council. The payment that he then had to make was not, in the view of the court, a tax or charge. It was a contribution lawfully and reasonably required by the conditions to be made to a fund necessary for the inauguration of a system for the regulation of the trade in the particular goods. This approach would seem to fit in with the cases set out at [381-382].

Reference should be made to the case of *Bennett v Daniels* (1912) 12 SR (NSW) 134 which at first sight appears to run counter to the preceding authorities. The power there was to regulate and control all hoardings in the council area. A by-law was made which required a licence from the council and the payment of a fee for the licence. The Full Court directed its attention solely to the question whether the regulation allowed a licence to be required and concluded that it did. The court did not allude to the issue whether or not a fee could be charged for that licence. This case should be contrasted with *Levingston v City of Hobart*, [383] and cf also *Porter v Mayor of Wellington* (1913) 32 NZLR 761.

Imposition of fee for service. When considering this question, a general statement of Irvine CJ in *Schilling v City of Melbourne* [1928] VLR 302 needs to be qualified. His Honour expressly followed *Wilts* case in holding invalid a by-law which fixed a parking fee and which had been made pursuant to a power to regulate traffic. In reaching this conclusion, he asserted, at 308, that no municipal authority can impose a charge without the sanction of parliament. This assertion would seem to overstate the issue as there are decisions that clearly recognize that it is permissible for a licensing authority to impose a charge in respect of a licence it grants provided that the
charge is related to the administrative cost of granting the licence. The earli­
est Australian case which appears to recognize this principle is In Re By-Law
Number XXV of the Corporation of the City of Adelaide; Ex parte Boucher
[1927] SASR 67. The power in that case was to make by-laws for regulating
the form and conditions of any licence granted by the corporation and the
fees to be paid on any licence. It was argued that the power was only
adjectival, that is, it could be used to regulate the manner of payment of fees
but could not impose fees. This view was rejected by the Full Court. Murray
CJ, delivering the judgment of the court, at 77, said that the conditions and
fees prescribed for a licence are not burdens or taxes.

[A] licence is a privilege, and imports conditions, otherwise it should be granted as a
matter of course, without restriction, to whoever might ask for it. Moreover, a licence
entails expense to the licensing body. If neither conditions nor fees could be imposed
licensing provisions would be almost entirely a burden on the licensing authority, and
for no intelligible reason. The true view, in our opinion, is that a licence being a
privilege, the person who seeks to obtain it may be required to submit to reasonable
conditions and to pay a reasonable fee.

This approach had been adopted some years earlier in New Zealand in
the case of In Re a By-Law of the Auckland City Council (1924) 43 NZLR
907. The court there held invalid a by-law which imposed a substantial
licence fee on taxis where it was admitted by the council that the fee was being
used as a revenue raising device. The court held that unless there was clear
authority in the empowering Act, there was no right to make such legislation.
But the rider was added that a fee could be demanded if it was intended to do
no more than compensate for the issuing and enforcing of the licence. This
decision was followed in In Re a By-law of the Hamilton Borough Council
(1926) 45 NZLR 685 and Hamilton v Yates [1930] NZLR 359. See also Tara-
tahi Dairy Co Ltd and Mangorei Dairy Co Ltd. v Attorney-General [1917]
NZLR at 25.

Determination of appropriate fee. The approach of the courts
involves them in the somewhat awkward exercise of having to determine what
is a reasonable fee for the services being provided. As usual, however, the
courts are prepared to undertake this task and, indeed, in most cases, it will be
apparent whether the fee imposed does represent a fee for services or
whether it is an attempt simply to raise revenue. For example, Levingston v
City of Hobart (1931) 26 Tas LR 164 was concerned with fees for hoarding
licences. The evidence showed that the administrative cost involved in licens-
ing the plaintiff’s hoardings would amount to approximately £10 whereas the
licence fee being demanded was £114. The court had no difficulty in con-
cluding that the fee bore no relationship to the administrative cost but was in
fact a revenue raising device. At first sight the case of Wroblewski v McLaren
(1926) 29 WALR 24 appears to run counter to this decision. But there the
court resolved that a fee of a somewhat similar size to that in Levingston’s case
did not constitute a prohibition and therefore was valid under a power to
regulate hoardings. The revenue raising point was not considered. See also
Porter v The Mayor of Wellington (1913) 32 NZLR 761 as explained in In re a
By-Law of the City of Auckland [1924] NZLR at 911; Bennett v Daniels,
[380].

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[384] Fee may be authorized as control device. Finally, and perhaps most importantly, the High Court decision in *Marsh v Shire of Serpentine-Jarrahdale* (1966) 120 CLR 572 should be noted. The case does not really depart substantially from the foregoing decisions but it does bring out the importance of yet again bearing in mind the fact that an empowering clause must be carefully scrutinized to determine whether it will support the regulation made. In that case, power was given to the shire to fix fees for licences, in particular for quarrying. The fee so fixed was based on the quantity of material quarried and, of course, varied substantially between licence holders. The court held that the by-law was invalid as what it did was, in effect, to fix a tax and not a fee. The amount that could be demanded bore no relationship to the management cost of the licensing scheme. However, at 580, Barwick CJ sounded a warning that the broad distinction between a fee for performing a service and a tax to raise revenue, while valid, would not necessarily provide an answer to the question of validity in all cases. He said: "What is authorized under the description of a fee may very well be a tax and yet within the actual authority given. The question remains one of interpretation of the statute, bearing in mind its relevant purposes and the part the issue of a licence plays in them or with respect to them". In the particular case, his Honour could not see how the payment of a sum of money rated to the volume of material capable of extraction was in furtherance of any purpose or policy discoverable in the Act. Nor, he said, was it a contemplated method of regulating or controlling the activity of quarrying in the public interest. This last mentioned point must be borne in mind when considering the question whether a charge is a fee or a tax. It may be that the legislature has contemplated that the payment of a substantial fee may be used as a method of controlling the activity with which the regulations are concerned.

[385] This was argued as the basis for upholding the validity of a by-law in *Springvale Washed Sand Pty Ltd v City of Springvale* [1969] VR 784. A by-law of the City of Springvale relating to the excavation of sand contained a provision whereby the council, before issuing a permit, was empowered to require the applicant to enter into an agreement with it specifying the terms and conditions upon which, and subject to which, a permit would be issued. Those terms and conditions were to include a provision relating to the payment to the council of royalties for all sand excavated. The by-law was made under a power to make by-laws for the purposes of "prohibiting regulating or controlling excavation operations". The right of the council to demand a royalty was attacked on the basis that it imposed a tax and accordingly offended the decisions in the *Wilts United Dairies* case and in *Marsh v Shire of Serpentine-Jarrahdale*. McInerney J pointed out that the power in this case, in extending to the prohibiting of excavating operations, was a wider power than that considered in previous cases relating to the imposition of a fee determined in this way. But he nonetheless rejected the argument that the fee represented an attempt by the council to recoup the costs the council would incur because of the use of its roads by heavy vehicles and the likely diminution in rate revenue consequent upon the decrease in value of properties in the vicinity of sand pits. His Honour considered that both these matters could have been dealt with by making by-laws under other provisions of the *Local Government Act*. He concluded that the by-law could not be regarded as anything more than an attempt to agrandize the revenues of the municipality.
generally and therefore it fell within the strictures imposed by Barwick CJ in Marsh's case. (But cf the "hoardings" cases, Wroblewski v McLaren (1926) 29 WALR 24 and Bennett v Daniels (1912) 12 SR (NSW) 134, at [383] where it could be said that the imposition of substantial fees was justifiable as part of the means of controlling what might be regarded as undesirable things.)
INCLUSION OF DISCRETIONS IN DELEGATED LEGISLATION

[386] Introduction. The effect of the inclusion in delegated legislation of a provision vesting a discretion in a person or body arises in a number of different contexts. Its major importance in regard to Australian law is in relation to the validity of regulations that prohibit an activity but allow a person or body to alleviate that prohibition. In New Zealand the issue arises primarily in regard to the question whether there has been a sub-delegation of legislative power to the person to whom the discretion is granted. These matters are discussed in detail in chs 17 and 25, respectively. It is pertinent at this stage, however, to allude to more general issues relating to the inclusion of discretions in delegated legislation.

[387] Inclusion of discretion does not invalidate delegated legislation. It is clear from a series of cases that the inclusion in delegated legislation of a provision vesting a discretion in a person or body does not necessarily invalidate that legislation. As the court is able to review the exercise of the discretion, it cannot be used for purposes wider than those permitted by the delegated legislation or the empowering Act and accordingly does not, in itself, constitute an excess of power. In *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR at 430 Latham CJ said of a discretionary power included in a regulation:

... where the existence of a particular opinion is made a condition of the exercise of power, legislation conferring the power is treated as referring to an opinion which is such that it can be formed by a reasonable man who correctly understands the meaning of the law under which he acts. If it is shown that the opinion actually formed is not an opinion of this character, then the necessary opinion does not exist. A person acting under a statutory power cannot confer power upon himself by misconstruing the statute which is the source of his power.

Similar views were expressed in *Shrimpton v The Commonwealth* (1945) 69 CLR 613 where the regulations gave the Treasurer what was termed an absolute discretion to approve certain action under the regulations. At 620, Latham CJ pointed out that

... a discretion, or a power to grant a licence, though conferred in very general terms, does not entitle the authority to which the discretion is granted, or upon which the power is conferred, to take into account what have been described as extraneous conditions. The discretion must be used and the power exercised bona fide and with the view of achieving ends or objects not outside the purpose for which the discretion or power is conferred. See also *Ideal Laundry Ltd v Petone Borough* [1957] NZLR at 1049.

[388] Application of principle. There are numerous cases in which the courts have applied the principle set out in the last paragraph. One case will serve as an example in the present context. Regulation 86 of the *Transport Regulations (Vic)* provided that the Transport Regulation Board could grant an application for the transfer of a licence "upon such conditions as it thinks
fit". The validity of this regulation was upheld in *R v Transport Regulation Board; Ex parte Ansett* [1946] VLR 166. Herring CJ pursued the same line of reasoning as is set out in the last paragraph, referring to the authorities there cited: see his judgment at 173-176, in particular. Having ruled the inclusion of the discretion valid, his Honour then entered upon the second part of the inquiry — whether the discretion had been properly exercised. And he concluded that, on the facts, it had not.

**[389] Contrary decisions.** Two cases should be contrasted with the foregoing decisions. In *Anchorage Butchers Ltd v Law* (1939) 42 WALR 40, the Western Australian Full Court ruled invalid a by-law made under a power to make by-laws with respect to the method to be observed for the transport of meat which required meat vans to be constructed of wood or "approved metal". The Act provided that "approved" meant approved by the inspector of the local authority. The by-law was held to be invalid because it vested an arbitrary discretion in the inspector. (The court also ruled that the by-law was uncertain because its operation depended upon the discretion of a designated authority. This reasoning is questionable in the light of the *King Gee* case: see [473]). A similar approach to that of the Western Australian court had been followed in the New Zealand case of *Riddiford v Collier (No 2)* (1896) 15 NZLR 344. There a regulation made under a power to regulate the lighting, ventilation and cleaning of cowsheds and dairies that provided that cowsheds and dairies were to be lighted, ventilated and cleaned to the satisfaction of the inspector was held invalid. The court talked in terms of the invalidity stemming from the regulation being uncertain but it is clear that the defect in the regulation was the practical handing over of the fixing of standards to be complied with to the inspector. It is doubtful whether these decisions would now be followed in Australia. The requisite "approval" and "satisfaction" required by the regulations would have to be "reasonable" in terms of the regulation-making power and the courts could supervise the exercise of the discretion. So in *Law's* case, approval would have to be given to vans constructed of metal suitable for the transport of meat. In New Zealand, it is possible that the regulations in the respective cases would be characterized as invalid; but not simply because of the discretion but rather because the regulations sub-delegated the regulation-making power: see ch 25.

**[390] Legal effect of discretion may lead to invalidity.** While the foregoing cases indicate that, in Australia at any rate, the inclusion of a discretionary power in regulations does not, of itself, lead to the invalidity of those regulations, the legal effect that flows from the discretion may indicate that there has been an improper exercise of the empowering provision and the regulations will be invalid on that ground. This position arises most clearly where a power to regulate an activity is used to prohibit that activity subject to the discretion of a designated body or person: see ch 17. An Australian case that illustrates the importance of looking at the effect of the inclusion of a discretion in delegated legislation is *Maggs v City Camberwell* (1925) 31 ALR 226. There a council was given power to prescribe residential areas. A by-law prescribed the whole of the municipality as residential except for certain streets specified in the schedule. But it also included a power to amend the schedule by adding to it further streets designated by the council by resolution. The by-law was held invalid because the reservation of the discretion by
the council resulted in there being no prescription of the residential area by by-law. The form of the discretion was such that the council could, in practice, designate the residential area by resolution.

Statutory power to incorporate discretion. Where specific power permitting the inclusion in delegated legislation of a discretionary power is included in an empowering Act, it might well be thought that no objection could thereafter be taken to the inclusion of such a discretion in the legislation. This did indeed seem to be the attitude of the courts when first the question came before them. In *Munt, Cottrell, and Co (Limited) v Doyle* (1904) 24 NZLR 417 the Full Court upheld the validity of a by-law which provided that traction engines could travel only on such streets and between such hours and times as the council from time to time by resolution prescribed. This by-law was made under a power to make by-laws regulating, controlling, or prohibiting exceptional traffic on streets. A section of the Act also provided “a by-law may leave any matter or thing to be determined, applied, dispensed with, prohibited, or regulated by the Council from time to time by resolution, either generally, or for any classes of cases, or in any particular case”. The court conceded that if a by-law had, before the granting of this power to councils, left any essential matters to be prescribed by a resolution of the council, as did the by-law in the present case, it would have been invalid, cf *Maggs* case, [390]. However, in the view of the court, the purpose of the power given to municipal councils was to allow them to deal by resolution which matters affecting the public which previously could only have been regulated by by-laws. The court considered that this was a wide power that, if not fairly administered, could result in hardship to particular persons. However, it considered that the words of the Act were clear and had to be given effect to by the court. This being so, the by-law before the court was valid. A like approach was endorsed by Isaacs J in *Cook v Buckle* (1917) 23 CLR at 320 in relation to a similar empowering clause in the *Queensland Local Authorities Act* 1902. After citing the provision, his Honour said “It would be difficult to imagine a fuller authority to reserve the power to deal with circumstances as they arise, even to the extent of dealing separately with each case as it arises”. His Honour concluded that the power had been specifically introduced to overcome decisions such as those referred to by the New Zealand court in *Munt’s* case that would have held invalid a dispensing power.

The general reservations expressed by the court in *Munt’s* case were however, soon reflected in Australia in a reluctance to widen the operation of sections permitting the adoption of a discretion. In *Olsen v City of Camberwell* [1926] VLR 58, the court, while referring to *Cook v Buckle*, confined the operation of the delegation power by a fairly narrow construction of the section in which it appeared. The matter was taken further by Mann J in *Dewar v Shire of Braybrook* [1926] VLR at 205. His Honour there ruled that the effect of a delegation clause, which was in the same terms as that discussed in *Munt’s* case, was to permit a by-law to “state certain matters or things which it is thought desirable to leave to the determination of the council, which is quite a different thing from saying, in effect, every matter or thing under this by-law is to be left to the regulation and discretion of the council”. (See *Shaw v City of Essendon* [1926] VLR 461 for a case in which these requirements were held to have been met by a by-law.) The approach enun-
ciated by Mann J in Dewar's case was endorsed in Swan Hill Corporation v Bradbury (1937) 56 CLR by Dixon J at 760 and Evatt J at 764. In the words of Dixon J: "It seems clear that the paragraph could not justify a by-law committing the whole subject matter of the power to discretionary authority exercisable in each particular case and prohibiting the individual from acting at all unless with the council's prior approval". Evatt J saw the power as being one to permit the intervention of the council or of its officers for the purpose of dealing with special situations which could not be dealt with in advance or of determining the application to particular cases of general rules discoverable in the by-laws themselves. The power did not permit a complete reservation to the council itself of the power of dealing with the whole subject of the by-law.

The approach taken in the later cases, while commendable, does not appear to give full effect to the words of the section, the true scope of which was noted in Munt's case and Cook v Buckle. However, the acceptance of the wider view would lead to the vesting of a wide discretion in local government bodies — a discretion which would be largely unreviewable by the courts — and the interpretation suggested in the Swan Hill case seems that which is to be preferred.

New Zealand interpretation of delegation power. The New Zealand courts have not limited the operation of delegation clauses in the way the Australian courts have done. Indeed, they seem to have extended the right of delegation in cases where the delegation clause was narrower in its terms than that considered in Munt's case. Section 15 of the Bylaws Act 1910 provides that no by-law shall be invalid because it "... leaves any matter or thing to be ... prohibited in any particular case by ... any officer ... of the local authority". This provision was first considered by Sim J in Meredith v Whitehead [1918] 1041. His Honour distinguished Munt's case and held that the section contemplated a delegation to deal with some particular case while the provision before the court in Munt's case was in wider terms and allowed a discretion generally or for any class of cases. This being so, a by-law empowering a council to determine that certain roads were unfit for heavy traffic could not be supported under a power to make by-laws providing that heavy traffic should cease to use roads during certain months of the year. The council was obliged to designate in the by-law the roads that could not be used and could not reserve to itself the power to determine these roads from time to time. This decision was overruled by a full bench of the Supreme Court in Bremner v Ruddenklau [1919] 444. The court considered that a by-law in identical terms to that ruled invalid in Meredith v Whitehead did preserve a discretion in relation to "a particular case" as required by the Act. Stout CJ went so far as to equate the delegation section with that considered by the court in Munt's case. Bremner's case was applied in Mandeno v Wright [1967] 385.

Validity of delegation dependent on validity of by-law. Finally, it must be borne in mind that the by-law must not itself exceed the by-law making power. It is only where the by-law is valid that a delegation pursuant to the Bylaws Act can have any operation: Chandler & Co Ltd v Hawke's Bay County [1961] 746.
CHAPTER 21

REPUGNANCY OR INCONSISTENCY

[396] Introduction. The standard regulation-making section used in Australian legislation provides that the Governor-General or the Governor "may make regulations not inconsistent with this Act for prescribing all matters which by this Act are required or permitted to be prescribed, etc.". (For the New Zealand clause, see [62].) It can be seen that this form of words contemplates that regulations are permitted to deal with a matter only in a manner that does not attempt to override the Act under which they are made. This statutory limitation is, in fact, probably unnecessary as the courts have always accepted the notion that subordinate legislation will be invalid if it contradicts — or, as it is usually stated, is repugnant to — the Act under which it is made. But the prohibition goes further. The most frequently cited statement of the law relating to repugnancy is from the judgment of Channell J in Gentel v Rapps [1902] 1 KB at 166:

A by-law is not repugnant to the general law merely because it creates a new offence, and says that something shall be unlawful which the law does not say is unlawful. It is repugnant if it makes unlawful that which the general law says is lawful ... Again, a by-law is repugnant if it adds something inconsistent with the provisions of a statute creating the same offence; but if it adds something not inconsistent, that is not sufficient to make the by-law bad as repugnant.

Thus delegated legislation must also fit in with "the general law" if it is to be valid. This expression embraces both Acts other than that under which the delegated legislation was made and the common law. Three possible areas for inconsistency therefore exist — empowering Act, another Act, common law — and it is convenient to discuss them separately. But before doing so, some general matters should be mentioned.

[397] Repugnancy and ultra vires. The concept of repugnancy tends to run together with the notion of simple ultra vires — that there is no power to make the particular regulation. Fox J in R v Minister of State for the Interior (1972) 20 FLR at 458 suggested that repugnancy is not an independent ground for invalidity but merely a consideration affecting power. This approach would accord with that adopted in regard to questions relating to uncertainty and unreasonableness in relation to delegated legislation and, while it does not seem to have been the subject of a High Court ruling, it can be expected that the view of Fox J would be accepted. It is convenient, however, to consider repugnancy separately from ultra vires. Ultra vires can best be discussed in relation to situations where there is no power to make the regulations at all. Repugnancy, on the other hand, contemplates that a regulation on the topic can be made, but the form which it takes contradicts the provisions of the empowering Act or another law. Sometimes, however, there is a fine line of difference between these two approaches to the resolution of issues of validity.

[398] Severance and repugnancy. The doctrine of severance (ch 30) has an important effect on the question whether delegated legislation is repugnant to
an Act. The wider concept of severance discussed at [621], that of reading down the regulations so as to avoid a conflict between the Act and the regulations, will be adopted by a court if possible, thereby preserving the regulations.

[399] Effect of regulations being regarded as if enacted in Act. When considering whether regulations are repugnant to the Act under which they are made or another Act, it is desirable to bear in mind the situation that occurs when the empowering Act states that the regulations are to be regarded as if they were enacted in the Act under which they are made. This issue is discussed in detail in ch 29 but it is pertinent here to note again the case of R v Minister of State for the Interior (1972) 20 FLR 449. That case was concerned with regulations that were validated by means of a validating Act which provided that the regulations were to be deemed to be of the same force and effect as if they were incorporated in the ordinance under which they were made. This elevated the regulations to the status of sections of the ordinance and therefore questions of repugnancy with other sections of the ordinance could not arise. In addition, however, the Act also had the effect that later regulations, in the absence of some provision to the contrary in the empowering ordinance, could be repugnant to the earlier regulations and the earlier regulations would prevail because of the status attributed to them.

[400] Inconsistency authorized by empowering Act. Although such provisions are rare, Acts from time to time enable delegated legislation to override other Acts. The inclusion in Acts of "Henry VIII clauses", as these kinds of provisions are called, has often been criticized, but, where included, the general problems relating to inconsistency that are discussed in this chapter are rendered otiose. For further discussion and examples of "Henry VIII clauses", see [12].

REPUGNANCY TO EMPOWERING ACT

[401] Delegated legislation directly contradicting Act. It is unusual to see a regulation being made that directly contradicts a provision of the Act empowering the making of the regulation. An example, however, of such a regulation is provided by the case of Macris v Lucas [1971] SASR 329. A provision of the Mining Act of South Australia provided "No person shall at the same time own more than one claim by virtue of the same miner's right; but any person may hold any number of miner's rights, and for each miner's right so held by him he may own one claim". A regulation was made which provided "Unless otherwise provided for in these regulations, no person shall at any one time hold more than one precious stones claim ...". Mitchell J had no difficulty in holding that the regulation was inconsistent with the Act and therefore invalid.

[402] Delegated legislation having effect inconsistent with parent Act. The most common situation in which delegated legislation is found to be repugnant to the Act under which it has been made is where it deals with a matter subsidiary to, but associated with, the principal Act in such a way as to run counter to the effect of the Act. The leading authority in Australia on this question is the High Court decision of Morton v The Union Steamship
Company of New Zealand Limited (1951) 83 CLR 402. In that case, a regulation under the Excise Act imposed a liability for the payment of excise duty on a person who had the custody of goods if those goods were stolen or destroyed. The regulation was held invalid on the basis that the Act already dealt at length with the responsibility for the safe-keeping of excisable goods and specified the persons who were liable to pay excise. The regulation was viewed as imposing a liability on another set of persons. It was, said the court at 412, "a distinct and independent addition of liability to the liabilities which the legislature has provided". Morton's case was followed two years later in R v Commissioner of Patents Ex parte Martin (1953) 89 CLR 381. That case was concerned with a regulation made under the Patents Act which provided "Any document, for the amending of which no special provision is made by the Act, may be amended ... if, and on such terms as, the Commissioner thinks fit". The Act itself included specific provisions relating to the amendment of documents lodged with the Commissioner of Patents. The High Court held the regulation invalid on the basis that the legislature had set out in the Act all cases in which it was thought amendment of documents should be allowed. In both these cases it can be seen that the courts considered that the regulations were adding additional material to a topic which had been fully dealt with in the Act. In both cases it was stated that the regulations endeavoured to take a new step in policy. The Act had, in effect, covered the field on the particular issue and to supplement it in the regulations was an attempt to interfere with the expressed wishes of the legislature.

[403] Regulation constraining permissible activity. Two older cases had taken a somewhat similar line to the cases referred to above but in regard to legislation which constrained otherwise permissible activity. In both cases the courts considered that the Acts in question had stated fully the extent to which the freedom of the individual was to be limited and any attempt by regulation to extend the limitation was invalid. The older of the two cases is Plunkett v Smith (1911) 14 CLR 76. The Municipalities Act 1906 (WA) included sections specifying the materials of which roofs and walls of houses were to be constructed. A building constructed of other material could be removed. A by-law was made under the Act providing "no fascia or projecting eave constructed of inflammable materials shall be erected at a less distance than 2 ft 6 in from the boundary of an adjoining property". The regulation was held invalid. O'Connor J at 83, after referring to the relevant sections of the Act, said "The legislature has thus indicated the limits of its interference with the liberty of persons within the Municipality to build their houses of such material and in such manner as they may think fit". A similar approach was adopted by the South Australian Full Court in the case of In Re The Metropolitan Abattoirs Act 1908-1930; Ex parte George Chapman Ltd [1932] SASR 184. A regulation made under the Metropolitan Abattoirs Acts required any person desirous of bringing certain specified kinds of meat into the Adelaide metropolitan area for the purpose of being manufactured into small goods, to make application for a permit. The court examined the sections of the Act and concluded that the Act did not prohibit the bringing of such meat into the area but merely imposed limitations on its use and sale. The court concluded that the regulation sought "to extend the control authorized by the Statutes to a new subject matter, without any special authority" and it was therefore "repugnant to the spirit and intention of the Act". The
regulation purported "to restrict the liberty which Parliament has seen fit to preserve" (per Napier J at 190).

[404] Inclusion in regulations of additional penalty. It will be recalled that in Gentel v Rapps, [396] Channell J had included among by-laws void for repugnancy those which added something inconsistent with the provisions of a statute creating the same offence. This situation arose in Australia in the case of Grech v Bird (1936) 56 CLR 228. A provision of the Marketing of Primary Products Act prohibited the disposal of eggs other than to the Egg Marketing Board. Failure to comply with the Act attracted a penalty. Regulations were made under the Act which required a person at the request of an official of the Egg Marketing Board to furnish a statutory declaration to the official relating to the manner of disposal of eggs. A producer who had failed to deliver eggs through the Board was deliberately placed in the situation whereby he was forced either to incriminate himself by the declaration thereby incurring the penalty under the Act or to make a false declaration thereby incurring the penalty applicable under the Oaths Act. This latter penalty was much higher than that for failure to deliver eggs to the Board. The High Court held the regulation invalid on the basis that its practical effect was to expose a person who furnished untruthful information to a liability that was heavier than, and different from, the punishment that the Act expressly authorized. The penal consequences that could be imposed for a failure to comply with the regulations could not go beyond the punishment which the Act specified.

[405] Grech v Bird was followed by the South Australian Full Court in R v Olsen; Ex parte Vahlberg (1975) 11 SASR 156. A regulation made under the Fisheries Act allowed the court to order the forfeiture of the fishing licence of a person convicted of certain offences against the Act. The Act included penalties for these offences. It was held that the regulation imposed a penalty additional to that included in the Act and, since the making of the regulation was not expressly empowered by the Act, it was invalid. An even stricter approach to the issue is evidenced in the case of Bodley v Slaughter [1916] NZLR 75. An Act required the keeping of a wages and overtime book and penalized failure to comply with this requirement. Regulations made under the Act prescribed the form of the book. A person was convicted of a failure to keep a book in the form so prescribed. On appeal the conviction was quashed. The court took the view that the regulations could not qualify the ordinary meaning to be placed on the expression "wages and overtime book" and, if the book kept by a person satisfied this description, the Act was complied with regardless of the form that the regulations specified the book should take.

[406] In New Zealand, in so far as by-laws are concerned, the question of penalties in by-laws differing from those in an Act is dealt with by statute. Section 15 of the Bylaws Act 1910 provides:

15. Bylaw may impose different penalty from that imposed by statute — No bylaw shall be invalid as being repugnant to the laws of New Zealand merely because it imposes in respect of any act or omission a penalty which is greater or smaller than, or different from, the penalty imposed by those laws for the same act or omission; but no greater penalty shall be inflicted upon a defendant than that fixed by statute law.
[407] Qualification of rights given by Act. The foregoing paragraphs have been concerned with situations in which an Act had limited the freedom of the individual and the regulations endeavoured to extend that limitation or penalize further the conduct proscribed. The courts have also intervened where regulations have imposed conditions upon rights that were granted by an Act. In *Ira, L & AC Berk Ltd v Commonwealth of Australia* (1950) 30 SR (NSW) 119 s 163 of the *Customs Act* permitted a refund of customs duty in cases where the goods to which the duty related had been damaged, pillaged, etc, through no fault of the person paying the duty. The section provided that such refund was to “be made in manner prescribed”. A regulation was made pursuant to this section prescribing the form and place of application for claims but it also provided that claims were to be made within a limited period. The New South Wales Full Court held this latter requirement invalid. No limitation as to the time in which an application was to be made was imposed by the Act and the effect of such a restriction by regulation limited the right otherwise given by the Act. A similar approach had been adopted in the older Western Australian case of *Wells v Finnerty* (1910) 12 WALR 41. Section 282 of the *Mining Act* 1904 (WA) provided for persons employed in a mining tenement to have a lien for wages which was to be a first charge on the tenement. A regulation was made under the Act requiring the registration of these liens and also stating that if a lien was not registered within a specified time, it was to lapse. It was conceded that the identification of such liens would be virtually impossible without some form of registration system. However, the court held the regulation invalid as there was nothing in the Act that required registration and to impose this obligation on persons was effectively to curtail the right given under the Act.

[408] The South Australian Full Court took this general approach a little further by implying certain rights out of the principle of an Act and holding regulations limiting such rights invalid: *Taylor v The Dental Board of South Australia* [1940] SASR 306. The South Australian *Dentists Act* specified four categories of educational qualifications for registration as a dentist. A dentist was entitled to use the “title” on which his registration was based in his practice. The Act also provided that the Registrar should enter on the register any new or additional qualifications which had been acquired by any registered dentist. The regulations were to specify what these qualifications might be. Regulations made by the Governor on the recommendation of the Board specified as the additional qualifications two only of the original four categories that had been set out in the Act. The court held the regulations invalid. The Act impliedly gave a person a right to have any qualifications falling within the four categories specified in the Act registered even though the qualification was obtained subsequent to the initial registration. The power to make regulations specifying additional qualifications that could be registered could not limit the categories already recognized by the Act.

[409] A case applying a similar approach to somewhat different circumstances is *Ex parte Lawes* [1908] SALR 130. The *Factories Act*, which required factories to be registered, provided that registration was to be effected by entering prescribed particulars on the register. Regulations made under the Act stated that the Chief Inspector of Factories was, if all requirements of the Act had been complied with, to issue a certificate of registration. But the
regulations then continued "and no factory shall be deemed to be registered until such certificate has been so issued". The court held this last part of the regulations invalid as in conflict with the Act. Registration was achieved on entry in the register as stated in the Act. The addition of a further administrative step that postponed registration was inconsistent and therefore invalid. (See also Wall v Commissioner of Railways at [411].)

[410] Delegated legislation limiting jurisdiction of court or tribunal. The court has also acted to prevent a regulation limiting the jurisdiction that was vested in a court by the Act under which the regulation was made. This situation is illustrated by the case of Australasian Jam Co Pty Ltd v Federal Commissioner of Taxation (1953) 88 CLR 23. Section 170(2) of the Income Tax Assessment Act 1936-1949 empowered the Commissioner of Taxation to amend an assessment to take account of tax avoided "where he is of opinion that the avoidance of tax is due to fraud or evasion". Regulation 43 of the Income Tax and Social Services Contribution Regulations provided that in proceedings upon an appeal against an assessment amended pursuant to s 170(2), a certificate in writing signed by the Commissioner stating that he was of opinion that the avoidance of tax was due to fraud or evasion was conclusive evidence that the Commissioner was of that opinion. Fullagar J held that this regulation was invalid as it precluded the court from deciding one of the questions which was committed to it for decision, namely whether the Commissioner had the opinion upon which his action under s 170(2) was founded. A more direct attempt to oust the jurisdiction of the court arose in R v Minister of State for the Interior (1972) 20 FLR 449. A number of sections of the Police Ordinance (A.C.T.) specified offences by police officers and provided for them to be dealt with in the ordinary courts. The ordinance also specified a penalty for persons convicted under the sections. Regulation 11A of the Police Regulations which were made under the ordinance set out a number of offences including some that were covered by the sections of the ordinance. The regulation also provided that disciplinary action was to be taken against any police officers alleged to have committed these offences — such disciplinary proceedings to be dealt with by an administrative type of procedure. Different penalties also were prescribed. Fox J held the regulation invalid as repugnant to the sections of the ordinance. A different liability was being imposed on the police officers from that which was provided by the ordinance and an administrative procedure was being substituted for the judicial procedure provided in the ordinance. (A similar decision is Commissioner of Customs and Excise v Cure & Deeley Ltd [1962] 1 QB 340.)

[411] A like approach to that evidenced by the courts in the foregoing cases was also shown in Wall v Commissioner of Railways (1905) 7 WAR 206 in relation to the ousting of the jurisdiction of an administrative tribunal. Under the Government Railways Act a person who was dismissed had a right of appeal to an Appeal Board. A regulation was made under the Act requiring an appellant to send his appeal to the Commissioner of Railways for transmission to the Appeal Board. To that point the regulation was considered to be valid. However, it went on to provide that the Commissioner need only forward the notice if, in his opinion, the Notice of Appeal disclosed a ground of appeal. The court held that this latter requirement was invalid. The Act gave a dismissed employee a right of appeal and the regulations could not
take away that right by allowing the Commissioner to decline to forward an appeal to the Board.

[412] Necessity for inconsistency to be clearly shown. The cases discussed so far indicate no great reluctance on the part of the courts to declare a regulation invalid if it is inconsistent with the Act under which it is made. However, the courts must be convinced that there is an inconsistency before they will be persuaded to act. This is, of course, but an example of the general approach adopted by courts that every endeavour is to be made to save legislation from invalidity. The *ut res magis valeat quam pereat* rule is based on this premise: see, for example, *Davies and Jones v The State of Western Australia* (1904) 2 CLR 29. So too is the interpretation principle that the words of an Act are to be given a construction "that produces the greatest harmony and the least inconsistency": *Australian Alliance Assurance Co Ltd v Attorney-General of Queensland* [1916] St R Qd 135 per Cooper CJ at 161. Consequently, where an Act deals with a topic but does not exhaust all its aspects, a regulation that deals with another aspect of the matter will not be invalid. An example of this is provided by the case of *Ex parte Kauter* (1904) 4 SR (NSW) 209. The *Government Railways Act* (NSW) prohibited travelling on a train without having previously paid the fare. A regulation was made under that Act making it an offence (with a greater penalty than that which was prescribed for travelling without a fare) to use a transferred ticket where that ticket had been purchased by another person. An attempt was made to argue that this regulation was invalid as dealing with the same subject matter (namely, travelling on a train without paying the fare) as did the Act. The Full Court held that the regulation was valid. While the user of a transferred ticket was indeed evading payment of the fare, he was nevertheless doing it in a particular way and a regulation could be validly enacted to deal with that. Darley CJ at 213 said: "It is clear law that where an Act of Parliament provides for a certain state of things, and imposes penalties for a breach, a by-law cannot be passed to provide for the same state of things". But in this case the regulation dealt with a specific situation, whereas the Act was dealing with the general offence of travelling without having paid the designated fare. See also *London, Midland and Scottish Railway Co v Greaver* [1937] 1 KB 367.

[413] A case which takes the matter even further, and which is not easy to distinguish from a number of the cases mentioned in the first part of this discussion, is *Seeley v Halpin Pty Ltd* [1935] ALR 219. Section 10 of the *Dairy Products Act* 1933 (Vic) required a manufacturer of dairy products to make and supply certain returns which were specified in the section. A power to make regulations necessary or expedient for carrying out or giving effect to the Act was used to make regulations requiring manufacturers to submit additional returns. This regulation was held valid. Irvine CJ could see no reason why returns other than those referred to in s 10 of the Act might not be required to give effect to the Act. It would seem that his Honour considered that the returns demanded by the regulation could not be those that were referred to in s 10 but he did not consider that s 10 exhausted the returns that could be required under the Act and therefore the regulation could impose an additional obligation. The case clearly turns on the interpretation of the Act and the Judge's view that no attempt was being made by s 10 to specify all returns that were to be submitted under the Act: cf *R v Commissioner of Pat-
ents; Ex parte Martin, [402]. A similar approach to that of Irvine CJ in Seeley’s case with adopted by Street J in Whitmore v Bohrsmann (1932) 49 WN (NSW) 72 in regard to a by-law made under the Municipal Council of Sydney Electric Light Act. Several sections of the Act made it an offence to interfere with certain property used in connection with an electric light undertaking and provided specific penalties for the offences in question. The by-law made it an offence to suspend, paste or otherwise affix a placard, etc, to any property of the council used for the purpose of generating or supplying electricity. It was argued that the by-law was inconsistent with the Act in that the Act made all required provision for interferences with the property of the council. This argument was rejected on the basis that the by-law merely added another and presumably necessary offence to the existing set of offences and there was nothing in the Act which made it appear that the Act was intended to specify all the offences involved. See also Coles Food Market Pty Ltd v Boucher (1971) 2 SASR 323 where it was held that the regulation-making power of the Act permitted the making of regulations that supplemented and to a limited extent overlapped certain sections of the Act.

[414] Regulation and Act dealing with associated but not inconsistent topics. The decision of the High Court in Hughes v Commissioner of Railways (WA) (1940) 14 ALJ 131 illustrates the need when considering questions of inconsistency to ascertain clearly what it is that the sections of the Act deal with and what it is that the regulations deal with. Section 37 of the Government Railways Act 1904 (WA) provided that no action was maintainable against the Commissioner unless commenced within six months of the cause of action arising. No action was to be commenced until one month after notice in writing of the cause of action to the Commissioner. A by-law was made under the Act providing that the Commissioner was not liable for damages for personal injury to a passenger unless a claim in writing was served on the Commissioner within twenty-eight days of the day on which the injury was sustained. An attempt was made to argue that the by-law was invalid as imposing a different obligation in relation to times of notices than did the Act. The High Court ruled the by-law was valid. The by-law dealt with the making of claims and the Act dealt with notice of actions. Reference should also be made to Russell v Brisbane City Council [1955] QSR 419. Section 38(10) of the City of Brisbane Act provided “An ordinance may leave any matter or thing to be determined, applied, dispensed with, prohibited or regulated by the Council from time to time by resolution or by the Mayor or any officer of the Council ...”. A Brisbane City Council Ordinance empowered a council committee to act on certain matters in emergencies or when the council was in recess. It was argued that this Ordinance was invalid as s 38(10) specified the manner, and the only manner, in which matters could be delegated on an emergency basis to a body other than the council. The court rejected this argument stating that s 38(10) was an enabling provision and not a restrictive one. It did not prohibit an ordinance from providing that a matter could be determined in another way.

[415] The decision in Russell’s case was, of course, based on the court’s interpretation of the provisions of the Act. A case in which a contrary conclusion was reached in relation to the use of differing procedures is Federal Capital Commission v Laristan Building and Investment Co Pty Ltd (1929) 42 CLR
582. In that case Dixon J had to unravel somewhat complicated interlocking Acts relating to the administration of the Australian Capital Territory. However, it became plain that the Federal Capital Commission was given a specific power in the Act to make by-laws relating to the administration of the Federal Capital. Any such by-laws had to be approved by the Governor-General and then laid before each house of the federal parliament and were subject to disallowance. The Governor-General, exercising another power under the relevant Acts, made an Ordinance which permitted the Commission to make regulations dealing with the same subject-matter as that which was included in the Act under the by-law making power. Regulations made by the Commission under the ordinance would not be subject to review of any kind. Dixon J held that the ordinance made by the Governor-General was repugnant to the by-law making section of the Act. This section had shown the legislature's intention in regard to the power of the Commission to make delegated legislation. As with all these cases, the difference between the decisions lies in the view that the court has taken of the meaning of the Act concerned. However, one can expect the courts to look with greater suspicion at attempts to evade a provision of an Act where that provision attracts some form of review or approval of delegated legislation.

[416] Delegated legislation subject to limitations set out in Act. Since delegated legislation will be read subject to the provisions of the Act under which it is made, it is unnecessary to spell out in delegated legislation all limitations on the operation of that legislation which are imposed by the Act. The regulations are read with the Act and the limitations are therefore attached to the regulations. This is illustrated by the decision in *Barnes v City of Coburg* [1928] VLR 334. Section 10 of the *Local Government Act* 1921 (Vic) allowed the making of by-laws relating to the use of land but provided that no such by-law was to preclude the use of a building for a purpose for which it was being used at the date of the by-law. By-laws were duly made relating to the use of land but they did not incorporate the specific limitation from s 10 of the Act that a building could continue to be used for its pre-existing purpose. It was argued that the by-laws were inconsistent with the Act and invalid but the court ruled to the contrary. The by-law did not have to repeat a section of the Act, because the operation of the by-law was subject to the Act. Indeed, as the court pointed out, any attempt to reiterate the section other than in its exact terms would have been invalid and to have reiterated the section precisely would have been otiose.

[417] Examples of invalid delegated legislation. It will be recalled that Channell J in *Gentel v Rapps* considered that a regulation could be invalid if it were repugnant not only to the Act under which it were made but to "the general law" [396]. The expression "the general law", in this context, embodies both other Acts and the common law. The clearest authority on the question of delegated legislation being invalid because it is inconsistent with an Act dealing with the same topic is probably *Powell v May* [1946] KB 330. The Glamorgan County Council had, by by-law, prohibited the frequenting of streets or public places for the purposes of book-making, betting, etc. However, the *Street Betting Act* and the *Betting and Lotteries Act* also dealt with
betting in public places. These Acts covered all matters to which the by-law related and provided certain defences to charges of betting in a public place that the by-law did not allow. In these circumstances the court had no hesitation in ruling that the by-law was invalid as it was inconsistent with the provisions of the two Acts mentioned. Similar decisions are to be found in Australia. For example, in Stevens v Perrett (1935) 53 CLR 449 an attempt had been made by a local authority to impose a charge on heavy vehicles using roads within the authority’s control. Charges for the use of such roads were also levied under a general Act. The High Court ruled that the local authority provisions were inconsistent with the general Act and were therefore invalid. In In Re the Corporation of the City of Port Adelaide; Ex parte Groom [1922] SASR 35, the Southern Australian Full Court held invalid a by-law made under the Municipal Corporations Act that penalized the sale of goods bearing a false trade description. The Trade Marks Act of South Australia contained similar provisions imposing penalties for selling goods bearing a false trade description but made it a defence if the person showed that he had acted innocently. The court took the view that the by-law, in failing to preserve this defence, was repugnant to the Act and therefore invalid. See also Burrows v Balderston (1927) 28 QJ P R 128 (by-law invalid as inconsistent with Criminal Code).

Delegated legislation made under Act passed after inconsistent Act. A case in which an interesting problem was alluded to without having to be resolved was Hotel Esplande Pty Ltd v City of Perth [1964] WAR 51. The Local Government Act gave power to councils to make by-laws enabling the council to require the removal of verandah support posts. Significantly, the power was expressed to be subject to the provisions of the Local Government Act and any other law in force. The City of Perth made a by-law allowing it to give notice to remove verandah posts to the owners of premises. A notice under this by-law was given to the plaintiff hotel, but the Licensing Act forbade the alteration of hotels without the approval of the Licensing Court. The plaintiff applied to the Licensing Court for permission to remove the verandah posts but approval was refused. Declarations and injunctions were then sought by the plaintiff to prevent the council exercising its power to remove the posts on the basis that, in its operation in regard to licensed premises, the by-law was inconsistent with the Licensing Act and therefore invalid. The court granted the declaration sought on the ground that the by-law was expressly stated to be subject to other laws and this meant that it was subordinate to the Licensing Act. In the course of his judgment, however, Hale J referred to the possibility that, had it not been for the clause stating that the council by-laws were subject to other laws, the Local Government Act, being the Act that was later in time, might have been taken to empower the making of by-laws that could override any prior Acts. This issue was not pursued in the judgement because it was not an essential part of the decision. It is a somewhat novel suggestion. It would, of course, be possible for an empowering Act to indicate that the delegated legislation made under it was to have priority over earlier Acts. This could be done by the inclusion of a specific provision to that effect. It would also seem to arise impliedly if an empowering Act provided that regulations made under it were to be treated as if they were enacted in the empowering Act: see R v Minister of State for the Interior, [397]. Such a provision elevates the regulations to the status of sec-
tions of the Act and presumably they would prevail over any earlier inconsistent enactment. In other than these circumstances it seems unlikely that a court would accept the suggestion that delegated legislation prevails over an inconsistent Act. The point seems not to have arisen in other than the Hotel Esplanade case but it is to be noted that in the Port Adelaide By-law case, the by-law in question was made under an Act that was passed after the Act with which the court held the by-law inconsistent. There seemed to be no question in the court's mind but that the by-law made under the later Act could not override the provisions of the earlier Act. In the other cases referred to above, the delegated legislation had been made under an Act passed earlier than the Act with which the delegated legislation was inconsistent. Where, of course, legislative provision is made indicating which of two inconsistent pieces of legislation is to prevail, the issue is resolved by that legislative directive: see Willing v Hollobone (No 2) (1975) 11 SASR 118.

Constitutional inconsistency. When considering the validity of State regulations, the operation of s 109 of the Constitution must be borne in mind. That section provides: "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid". The High Court held in Hume v Palmer (1926) 38 CLR 441 that this provision is applicable to inconsistent Commonwealth and State regulations. In that case the court held that New South Wales regulations relating to preventing collisions at sea were inconsistent with the Commonwealth Navigation (Collision) Regulations and the Commonwealth regulations, to the extent of the inconsistency, prevailed.

Meaning of inconsistency. In determining whether regulations are repugnant to, or inconsistent with, an Act, the courts have been influenced by the views expressed by the High Court in cases where a State Act has been said to be inconsistent with a Commonwealth Act and therefore invalid because of s 109 of the Constitution. The constitutional issues are discussed in Wynes, Legislative, Executive and Judicial Powers in Australia (5th ed 1976) 98-106. The primary test used in determining questions of inconsistency under s 109 is that known as the "covering the field" test. This test was described by Isaacs J in Clyde Engineering Co Ltd v Cowburn (1926) 37 CLR 489 in the following terms: "If ... a competent legislature expressly or impliedly evinces its intention to cover the whole field, that is a conclusive test of inconsistency where another legislature assumes to enter to any extent upon the same field". Like terminology was used by the High Court in regard to delegated legislation said to be inconsistent with an Act in the case of Cullis v Ahern (1914) 18 CLR 540. In that case, the Motor Car Act (Vic) required motor cycles to carry a front light but included no provision requiring the carrying of a rear light. A by-law of the City of Melbourne provided that motor cycles were to have a rear light. This by-law was held to be valid. The court considered that there was no intention in the Act to cover the field — only the minimum lighting requirement was prescribed and there was no reason why more detailed provisions as to lighting could not be specified by another body exercising legislative power on the topic. At 543, Griffith CJ (Issacs and Power JJ concurring) said: "In order to establish inconsistency between the by-law and the Statute the latter must be construed as covering the whole ground in respect of which
the legislature has legislated, that is, as prescribing completely and exclusively the limits within which the liberty of drivers of motor cycles shall be confined".

[421] The "covering the field test" as set out by Issacs J in Cowburn's case has not been accepted by all other judges as the basis for the operation of s 109 of the Constitution. In the State of Victoria v The Commonwealth (1937) 58 CLR at 627-628, Starke J purported to explain the meaning of Isaacs J's statement by saying that it was intended to apply "if the State law is entirely destructive of provisions of Federal law on the same subject". This interpretation of s 109 was expressly followed in relation to regulations said to be inconsistent with an Act by Macfarlan J in Hallion v Eade [1938] VLR 179. In that case a regulation made under the Road Traffic Act and a municipal by-law both set out identical requirements to be followed by a driver making a right-hand turn. It was argued that the by-law was invalid because of the provision in the Road Traffic Act saying that it was to prevail over all other laws on the same topic. Macfarlan J rejected this argument on the ground that the provisions were not mutually destructive of one another. His Honour did not consider that, on the same facts, two convictions could be obtained against the same individual though he was prepared to concede that the method of initiating proceedings was not the same in each case. It is clear that he was strongly influenced by the approach of Starke J set out above. But, with respect, Starke J's approach seems to require too great a conflict between the competing Acts before s 109 of the Constitution is attracted and it has not been followed in other cases: see Wynes, [420]. As far as delegated legislation is concerned, it would seem that the cases discussed in this chapter indicate that the test set out in Hallion v Eade does not satisfactorily describe the circumstances in which the courts have held inconsistency to exist between delegated legislation and an Act.

[422] Test of covering the field. The best test of covering the field in relation to delegated legislation can perhaps be stated by paraphrasing the words of Dixon J in Victoria v The Commonwealth (1937) 58 CLR at 630 relating to inconsistency under s 109: when delegated legislation, if valid, would alter, impair, or detract from the operation of an Act, then to that extent it is invalid. Moreover, where it would appear, from the terms, the nature or the subject matter of an Act, that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for delegated legislation to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Act and so as inconsistent.

[423] Inconsistency between laws in one jurisdiction. As a corollary to the suggested test set out in the previous paragraph, the observations of Wells J in Myer Queenstown Garden Plaza Pty Ltd v Corporation of the City of Port Adelaide (1975) 11 SASR at 540-542 should be borne in mind. His Honour cautioned against a too ready application of the learning relating to s 109 of the Constitution when determining cases concerned with supposed inconsistency between subordinate legislation and an Act of a particular State. In his Honour's view, the object of s 109 is to preserve the supremacy, within the constitutional framework of a federation, of the laws of one member of that
federation — the Commonwealth. In the case of alleged inconsistency between the laws of a State, it must be remembered that the Acts and the subordinate legislation are part of a single body of State law and should be construed accordingly. If a reasonable construction of the two laws can reconcile them, that construction should be adopted. It should be assumed that the authors of statutory instruments do not intend to produce contradictory laws and, accordingly, techniques of interpretation such as the reading down of provisos, the invocation of the maxim *generalia specialibus non derogant*, etc, should be turned to. It should only be if, at the end of the examination, inconsistency still exists that the court should rule the delegated legislation invalid.

**Effect of inconsistency.** The effect of s 109 of the Constitution is to supersede State law to the extent of any inconsistency with Commonwealth law. Accordingly, on the repeal of the Commonwealth law, the State law revives without the necessity of re-enactment: *Butler v Attorney-General for the State of Victoria* (1961) 106 CLR 268. In one case, it was suggested that a similar approach was applicable to delegated legislation that was inconsistent with other legislation. In *Mitchell v Casterton Hospital* [1935] VLR 90, Mann J was asked to rule that a by-law of the hospital was invalid because it was inconsistent with a regulation made under the *Hospitals and Charities Act*. That Act provided: "Where the by-laws or rules of management of any institution or benevolent society are inconsistent with or repugnant to any regulation made under this section such by-laws or rules . . shall to the extent of such inconsistency or repugnancy have no force or effect whatever". At the date on which the by-law was made, there was a regulation in existence under the Act and the by-law was inconsistent with it. By the time the case came on for hearing, the regulation had been repealed. Mann J held that the effect of the statute was simply to render the by-law to the extent of the inconsistency of no force or effect. As the regulation with which it was inconsistent had been repealed, the by-law was now of full force and effect. He pointed out that the Act did not direct that the by-law was invalid but only that its provisions were to have no force or effect. The same terminology was used in the Act with which it was asserted that the by-law was invalid in *Hallion v Eade* [1938] VLR 179 (see [421]). Macfarlan J in that case indicated at 183 that, in his view, the effect of the provision was to render the by-law invalid. *Mitchell's* case was not referred to. Other cases have merely talked in terms of the by-law being invalid and the wider point has not been considered. The difficulties that would arise in indentifying delegated legislation that has revived after the reason for its invalidity has gone militates against the s 109 approach being followed in regard to delegated legislation. In addition, the basis for the operation of s 109 spelled out by Wells J in the *Myer Queenstown* case (see [423]) indicates why State Acts are to be treated as superseded and not invalidated. The same considerations are not applicable to delegated legislation.

**Repugnancy to Common Law**

**Introduction.** In the absence of a Bill of Rights, the courts have adopted a number of basic assumptions on which they approach the interpretation
of legislation. It is assumed, for example, that legislation will not allow the acquisition of property without compensation or deprive a person of the right to appeal against a judicial decision adverse to him. These assumptions are discussed in Pearce, Statutory Interpretation in Australia (1974) ch 5. The assumptions are also applicable to delegated legislation but their effect in regard to such legislation is very different from their effect in relation to Acts. If an assumption is incompatible with the clear words of an Act, the assumption is taken to be rebutted. But with delegated legislation, if an assumption and the terms of the legislation are incompatible, it is the legislation which must give way. Unless there is clear authority in an empowering Act for delegated legislation to override an assumption, the delegated legislation will be invalid. The following cases provide examples of this approach of the courts.

[426] Reversal of onus of proof. In Willoughby Municipal Council v Homer (1926) 8 LGR (NSW) 3, a by-law which imposed a penalty on the owner of animals found straying in a public place “unless he proves that he has taken all reasonable means to prevent such animals from so straying” was held invalid because it reversed the onus of proof. This decision should be contrasted with that of Sheahon v Room [1917] NZLR 497. There a regulation made under the War Regulations Act provided, in relation to certain offences, that if the facts produced by the informant were sufficient to constitute a reasonable cause of suspicion that the defendant was guilty of the offence charged, the burden of proving that the offence was not committed should lie upon the defendant. It was argued that this reversal of the onus of proof was invalid, but the argument was rejected having regard to the fact that it was made to control a wartime situation. However, the tenor of the judgement of Chapman J indicates that, had the regulation not been passed in wartime, the objection would have carried far greater weight.

[427] Freedom of highway. In In Re The Municipal Corporations Act 1890 Ex parte Burford [1920] SASR 54 a by-law empowering a municipal corporation to erect barriers obstructing streets was held invalid as the barriers prevented free use of the highway and was therefore a common law nuisance. Unless expressly authorized, the council had no power to impede a person’s common law right of free use of the highway.

[428] Fair Trial. In Ex parte Reid Re Lynch (1943) 43 SR (NSW) 207 an order under the National Security Regulations that suspended the obligation under the Justices Act to take depositions in court proceedings was held invalid. The New South Wales Full Court said the regulation constituted an invasion of the basic right of a person in any court of justice to have the evidence recorded.

[429] Access to courts. The courts have been particularly concerned to protect the right of persons to access to the courts. Where delegated legislation has purported to prevent a person exercising his ordinary right to have a matter reviewed by the court, the courts have acted to strike down such legislation unless clearly authorized by the Act under which the regulations were made. For example, in Chester v Bateson [1920] 1 KB 829 a regulation made under the Defence of the Realm Act prohibited under penalty persons taking action without the consent of the minister, to recover possession of a
house in which a munition worker was living. The regulation was held *ultra vires* as repugnant to the law of the land in that it prohibited a person exercising his common law right of access to the courts. Similarly, in *R & W Paul Ltd v The Wheat Commission* [1937] AC 139 a regulation providing that disputes between the commission and other persons were to be referred to an arbitrator whose decision was to be final was held invalid. The empowering Act did not enable the making of a regulation which excluded a person's right to access to the courts and this the regulation attempted to do. More recently, in *Commissioners of Customs and Excise v Cure & Deeley Ltd* [1962] 1 QB 340 a regulation that purported to confer on the commissioners the power of a judge in relation to the determination of the amount of tax payable to the commissioners and to oust the jurisdiction of the courts to review the amount so determined was held invalid.

[430] **Imposition of tax.** The courts have indicated that the imposition by regulation of a charge will be closely scrutinized: see ch 19.

[431] **Self-incrimination.** Whether it is possible to require by regulation that a person give information even if that information be self-incriminating has come before the courts on a number of occasions. The cases indicate some conflict of authority. It could perhaps have been expected that the courts would rule that delegated legislation could not require a person to incriminate himself. This was indeed the ruling of the New South Wales Full Court in *Ex parte Grinham; Re Sneddon* [1961] SR (NSW) 862. There a regulation made under the *Transport Act* (NSW) empowered an authorized officer to stop a taxi and seek information from the driver. The driver was required to provide the information so requested under threat of a penalty. There was no limitation on the nature of the information that could be sought and clearly the information could be such as would implicate the driver of an offence under the Act. The Full Court ruled that, in the absence of statutory authority, a regulation could not violate the common law rule against self-incrimination. In so far as it attempted to achieve this result, the regulation was invalid. However, the position is not quite as clear as this decision would suggest. In two wartime cases, *R v Kempley* (1944) 44 SR (NSW) 416 and *Ex parte Zietsch re Craig* (1944) 44 SR (NSW) 360, the New South Wales Full Court held that a regulation made under the National Security Act entitled an authorized officer to interrogate a person and the person so interrogated could not decline to answer a question on the ground that his answer would incriminate him. The decisions were reached upon an examination of the form the regulations took, particular regard being paid to the fact that another regulation relating to the questioning of persons enabled a person to refuse to answer if he had lawful excuse so to do. The court interpreted lawful excuse to include the fact that the answer would incriminate him. The fact that the regulation before the court did not include such a provision was taken to indicate that there was an intention to exclude non-incrimination as a reason for refusing to answer. In addition, it was considered that the enforcement of the matters dealt with in the regulations required the exclusion of the assumption against self-incrimination. The defendant in *Kempley's case* sought leave to appeal to the High Court but leave was refused: see [1944] ALR 249. In the course of their judgement on this application, differing views were expressed by Latham CJ and Williams J. The former con-
considered that the regulations bound a person to answer all questions relevant to the inquiry; the latter considered that the rule against self-incrimination had not been rebutted by the regulations. Starke J at 253 perhaps stated the situation most clearly, although he did not have to give a final ruling on the issue of self-incrimination: "... but where authority is given to compel the examination of persons, the ordinary rule of the common law which protects a person from answering questions which tend to incriminate him applies unless expressly excluded. And whether the rule is excluded must depend upon the provisions of the legislative act or the nature of the subject". His Honour's reference to express exclusion seems to support the view of Williams J that the regulations before the court should not have been interpreted so as to exclude the rule against self-incrimination. Be that as it may, the view expressed by the Full Court in *Kempley* and *Zietsch* was followed by the New Zealand Full Court in *Hewett v Fielder* [1951] NZLR 755. In that case, the court laid emphasis on the statement of Starke J that one should look to the nature of the subject when considering whether or not the rule had been excluded. It concluded that, in the circumstances of the case before it (which included issues relevant to an emergency situation), the rule did not apply and a person was obliged to answer all questions put to him. In *R v Travers* [1958] SR (NSW) 85 the Court of Criminal Appeal held that a police officer could not decline to furnish a report which, if accurate, would contain statements incriminating him. This ruling was made on the basis that, by law, a police officer is obliged to submit a full report. The case was determined solely on the question whether the report was required and did not allude to the fact that the obligation was included in delegated legislation. In contrast with these decisions, Napier CJ and Abbott J in *Warnecke v Pope* [1950] SASR at 118 indicated, without having to decide the issue, that they would "have found it very difficult" to hold a regulation which purported to deny the right to refuse to answer incriminating questions valid under a general "necessary or convenient" regulation-making power.

The cases probably come to this point in the end. The approach of the courts in interpreting legislation will be to assume that the presumption that a person is not bound to answer a question that is self-incriminating is applicable, and they will be more inclined to reach such a conclusion when regulations are involved. However, if the nature of the legislation or the circumstances of the enquiry are such as to indicate that the principle is to be regarded as rebutted, then the regulations will be valid.
IMPROPER PURPOSE

[433] Introduction. The power to make delegated legislation presupposes that the legislation is to be made for a specified purpose. The purpose may be expressed generally — “necessary or convenient for giving effect to” the Act — but is usually more limited. In either case, the form of words posits that the legislation-making authority must have addressed its mind to the purpose specified and that the legislation has been adopted for that purpose. The issue that now falls for consideration is whether delegated legislation that purports to have been made for a specified purpose but which in fact has been made for another purpose is valid. This invites the court to consider the motives of the legislation-making authority. One preliminary point should be noted. The cases talk of “improper motives”, “impropriety”, “acting in bad faith”, etc. These terms do not go to the morality of the legislation-making authority. It may have acted with the best will in the world but if it has not acted for the purposes set out in the empowering Act, it will attract the terms of opprobrium referred to.

[434] No inquiry into motives of parliament or Crown. A court will not inquire into the motives that prompted the enactment of legislation by a parliament: British Railways Board v Pickvm [1974] AC 765. Nor, it seems, will there be an inquiry into the reason why the Crown or the Crown’s representative made a particular instrument. In Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan (1931) 46 CLR 73, Rich J at 87 and Dixon J at 103-104 stated categorically that the motives of the Governor-General in making a regulation are irrelevant to the question of its validity. Dixon J put it thus: “His discretionary power over the subject is as unqualified as that of a legislature, and the actual grounds upon which it is exercised are, therefore, immaterial.” The same view had been expressed in Duncan v Theodore (1917) 23 CLR 510 by Isaacs and Powers JJ (dissenting) at 544 in regard to the issue of a proclamation under an Act. The other judges of High Court did not have to consider this issue. (The views of Isaacs and Powers JJ were affirmed by the Privy Council: (1919) 26 CLR at 282.)

[435] Mention should, however, be made of the case of Bailey v Conole (1931) 34 WALR 18 which appears at first sight to be contrary to these authorities. There, regulations were made by the Governor-General that prevented buses picking up or setting down passengers on the routes followed by government trams. The regulations purported to have been made under a power to regulate the use of buses. It was conceded by counsel for the Crown that the real purpose for making the regulations was to prevent private competition with the government’s transport system. The court held the regulations invalid. The regulations had not been made for the purpose set out in the Act and there had therefore been no valid exercise of the legislative power But it is clear that the concession of counsel was all important. The court could take notice of the impropriety of motive without undertaking any inquiry. From this case it would seem that it is not that a court cannot take account of the motive of the Crown’s representative, but that it cannot inquire into those
motives. If the court is apprised of the motive without inquiry, it can take account of the motive — and if it is apparent that a power has been exercised improperly, the court can rule accordingly. A like approach to that in Bailey v Conole was followed in New Zealand in Jorgensen v Ridings [1917] NZLR 980: see [440]. (On the general question of judicial review of actions of the Crown’s representatives see Hogg (1969) 43 ALJ 215).

Inquiry into motives of other legislation-making bodies. The position in regard to the review of action taken by other bodies was fully canvassed in the leading case on the topic Arthur Yates & Co Pty Ltd v The Vegetable Seeds Committee (1945) 72 CLR 37. However, somewhat differing views were expressed by the members of the court. The case concerned the validity of certain orders that had been made by the Vegetable Seeds Committee which, it was alleged by the plaintiff, were made with a view to enabling the committee to dispose of its deteriorated seed in preference to the plaintiff’s quality seed. The matter came before the High Court on a summons to strike out the allegations of improper purpose that were contained in the statement of claim. Williams J, who heard the initial application in Chambers, decided the issue in favour of the defendant on the basis that the orders made by the committee were of legislative nature and could not therefore be questioned on the ground of the intended motive of the committee in making the orders. On appeal, Latham CJ accepted the principle that a court cannot inquire into the reasons motivating the making of legislation by a body, no matter what its level. But in his view the activities of the committee were more properly classified as administrative and, this being so, the motives of the committee could be inquired into. Rich J and Starke J also upheld the appeal but they were not prepared to accept the starting point of William J’s approach that the motives of a subordinate body, when producing legislation, can not be inquired into. Rich J at 73 put it succinctly by suggesting that there is no reason why dishonesty should be secure so long as it is systematic but becomes unsafe only if sporadic. Dixon J expressed views similar to Rich and Starke JJ. His Honour denied that there was any distinction between legislative and administrative acts in regard to the question of improper purposes. He said at 80:

I do not think that in English law such a question [whether impropriety of motives actuating a body is a ground of invalidity] will be found ever to be solved by ascertaining whether, upon a correct juristic analysis, the power should or should not be described as legislative. It will depend rather upon the nature of the authority in whom the power is reposed and upon the measure and extent of the power, its subject matter and its limitations and the conditions in or upon which it is exercisable.

The majority view would thus seem to be that the motives of a body, other than a parliament or the Crown, that makes legislation can be inquired into by the court. The cases referred to later in this chapter bear out this conclusion. Latham CJ too seemed to accept the views of the majority: see Brownells Ltd v The Ironmongers’ Wages Board, [440].

Relevance of motive of legislation-maker. In his judgment in Yates case, Dixon J distinguished two situations in which the motives of the legislation-maker are relevant. First, where the power to make legislation is dependent upon that legislation fulfilling a certain purpose and, secondly,
where a purpose is not made expressly, or by necessary intendment, a condition of the exercise of the power. The usefulness and indeed, validity, of this division is returned to below [442]. Accepting its validity for the present, Dixon J founded much of his judgment on dicta of Isaacs J in *Jones v Metropolitan Meat Industry Board* (1925) 37 CLR 252. That decision has been frequently referred to in cases concerned with improper motives in the making of delegated legislation. It concerned certain by-laws made by the Meat Board pursuant to a power to make by-laws "providing for the management and control of all public abattoirs and for regulating and controlling the use of the same." The by-laws made by the board allowed it to retain certain parts of an animal slaughtered at an abattoir on payment to the owner of the animal of a price that was fixed by the board. It was argued that this by-law was passed with the purpose of enabling the board to obtain the relevant parts of the animal more cheaply than would have been the case if it had had to come to an agreement with the owner of the animal. Isaacs J, with whom the majority of the court agreed, drew a distinction between delegated legislation that was made to fulfil an express purpose and like legislation made pursuant to a general legislation-making power. In regard to the first category, his Honour said that if a purpose was made an express condition of exercising a power and that purpose was not pursued, then the power would not have been validly exercised. In cases where a general legislation-making power was being exercised, however, it was only if the delegated legislation had not been made in good faith that the court could intervene — good faith being a matter which has to be considered in all cases. At 263 he said:

The good faith ... is that which is required in the common law sense in relation to the legal exercise of statutory powers, and is not dependent on any doctrine of equity. It is wholly distinct from the notion of mistakenly pursuing a by-purpose. Such a pursuit may in this connection be honest or dishonest. The body pursuing it may genuinely avow it, thinking it permissible. There the action adopted may be *ultra vires*, but not *mala fide*. On the other hand, there may be a pretended pursuit of a legitimate purpose that is *mala fide*. In the case before the court, it was not contested that the board was acting in good faith and as the by-law was made under a general by-law making power, it was therefore valid.

In the case before the court, it was not contested that the board was acting in good faith and as the by-law was made under a general by-law making power, it was therefore valid.

[439] Use of particular power for other than specified purpose. The approach of Isaacs J in *Jones* case, insofar as it related to an attempt to use a particular power for other than its specified purpose, was followed in Australia in two cases involving delegated legislation expressed in almost identical terms. In *re a By-Law made by the District Council of Prospect; Ex parte Hill* [1926] SASR 326 a by-law that prevented buses stopping to put down passengers within 30 feet of a tram car's stopping place was challenged. The by-law was made pursuant to powers to regulate the travelling, traffic and standing of vehicles in streets. It was argued that in fact the by-law had been made for the purpose of preventing buses competing with trams. The South Australian Full Court held that the by-law was within the authorized purpose and this being so, it was no ground for holding it bad that it may have served some other purpose as well. At 333 the court said "The motives of the by-law making body, unless shewn to be *mala fide*, that is, dishonest or morally wrong, cannot be inquired into." As the by-law was within the power given to the council, the fact that it helped the Tramways Trust was irrelevant in the
absence of bad faith — and there was no evidence of this. Contrast the decision of the Western Australian Supreme Court in *Bailey v Conole* mentioned above [435]. The facts there were similar to those in the *Prospect Council By-Law* case but in *Bailey v Conole* counsel for the defendants conceded that the sole purpose in making the regulations was to prevent competition between private buses and government tramways. There was no power for the regulations to be made for this purpose and accordingly the Full Court held that the regulations were invalid. Draper J, following the dicta of Isaacs J in *Jones* case, also asserted that the regulations were invalid because they had been made in bad faith.

[440] A later case in which the question of motives of a body came before the High Court was *Brownells Ltd v The Ironmongers' Wages Board* (1950) 81 CLR 108. The board, pursuant to its power to fix wages, determined the rates of pay for shop assistants. The rates so fixed included a very high figure if a shop assistant was obliged to work after 5.45 pm. The normal closing time for shops was 6 pm. The court had little difficulty in concluding that the wage was fixed with a view to achieving an earlier closing time for shops, thus reducing the length of a shop assistant's working day. This being so, the power had been used for purpose other than that for which it was given and the determination was therefore invalid. (The case is also noteworthy for the following statement of Latham CJ at 120. After citing *Yates* he continued "... and it was there held that subordinate bodies exercising powers conferred by statutes were bound to exercise their powers bona fide for the purposes for which the power was conferred and not otherwise." It would seem from this that he may have abandoned the distinction that he drew in *Yates* case between administrative and legislative action and accepted that the same rules apply to both.) A similar approach to the question was followed in the New Zealand case of *Jorgensen v Ridings* [1917] NZLR 980. In pursuance of a power to make regulations "for preserving good order among persons engaged in fishing" a regulation was made by the Governor-in-Council which prohibited the owner or crew of any licensed fishing boat from carrying on board any fire arms unless authorized to do so in writing by the Collector of Customs. Stringer J concluded that the regulation was not supported by the empowering provision because it was unreasonable but in reaching this conclusion he was influenced by the fact that the regulation was admitted in argument (cf *Bailey v Conole* at [435]) to have had the further object of restricting trespass by fishermen upon settlers' properties on the coast. His Honour considered that this object, however laudable, could not be achieved by means of regulations made under the power to preserve good order among persons engaged in fishing. The attempt to attain the collateral object of meeting the possible danger of fishermen engaging in marauding expeditions on land was said by his Honour to have led the draftsman to use language far too wide for purposes within the legitimate scope of the regulation-making power.

[441] Motives of legislation-maker acting under general power. The cases discussed in the preceding paragraphs support the view of Isaacs J in *Jones* case that a particular power must be exercised for the purpose specified. Accordingly, the courts can inquire into the reasons prompting the making of the legislation. But it will be recalled that his Honour said (at 262) that such
an inquiry cannot be undertaken where "purpose" is not made an express condition of the exercise of the power. He then referred to the power of the board in the case before him to make by-laws for the management and control of the public abattoirs as an example of such a purpose-free power. It would thus seem that, in his Honour's view, the exercise of a general regulation-making power is not conditioned by any purpose. With respect, this seems somewhat curious. The purpose underlying a general regulation-making power may have to be very broadly stated, but it nevertheless exists. Almost anything related to an abattoir would fall within the by-law making power considered in Jones case. But if a by-law dealt with a matter that appeared to be related to the abattoir but which in fact was intended to achieve a "by-purpose", should it not be invalidated as was, for example, the regulation in Bailey v Conole? The likelihood of showing that an improper purpose was being pursued is reduced in the case of legislation made pursuant to a general power, but if the proof is forthcoming, there seems no reason why invalidation should not follow.

Some support for Isaacs J's view — at least insofar as he contemplates that the power to make certain delegated legislation may not be founded upon a "purpose" — is supplied by Dixon J in Yates case. But here again the dicta does not bear close examination. After citing the statements of Isaacs J in Jones case relating to the need to pursue the purpose of an empowering provision, Dixon J continued (at 82):

"But where purpose is not made expressly, or by necessary intendment, a condition of the exercise of the power, then it is necessary to consider the composition of the body, and, if it is a deliberative assembly, to distinguish between the motives actuating individual members and the purpose disclosed by the character and operation of the measure in relation to the actual facts and circumstances."

His Honour then went on to discuss a number of Australian and Canadian cases that had been concerned with the validity of local council actions. But two problems arise from Dixon J's approach. First, it is difficult to envisage a situation in which a power would be invested in a body without some purpose governing its exercise. The purpose specified may be as vague as the notion "peace, order and good government" but some purpose will be stated. The empowering Act will not simply say that regulations can be made. As mentioned above in regard to the views of Isaacs J, if it could be shown that the action taken was with an intention to achieve something beyond the broad purpose stated in the legislation-making power, presumably the action would be invalid on the reasoning pursued in the cases set out at [438-440]. Secondly, the cases cited by his Honour in relation to the exercise of a power by deliberative bodies were concerned with the exercise of a power where a purpose was stated. It would seem in fact that Dixon J's remarks are applicable to any delegated legislation made by a deliberative assembly. His Honour was pointing to the extreme difficulty of establishing that such a body has been actuated by improper motives. But this difficulty arises equally whether the body is exercising a particular power or a general power. This is borne out by an examination of the cases his Honour cites and decisions after Yates case.

It is submitted that the better view is that questions of motive should be examinable by the court whether the power exercised be specific or in general
terms. All delegated legislation-making power should be seen as founded on a purpose — the degree of specificity of that purpose will, of course, vary according to the terms of the empowering provision. If a body, in making delegated legislation, has purported to exercise a power but in fact has acted for a purpose other than that set out in the empowering Act, the delegated legislation should be ruled invalid.

[444] Legislation-making in bad faith. In Jones case, Isaacs J said that it is a condition of all delegated legislation-making that it be done in good faith. See the passage set out at [438]. This statement has not been questioned in later cases. However, the difficulties of proving that delegated legislation within power has been made other than in good faith is formidable. Apart from the allusion to the issue by Draper J in Bailey v Conole (see [439]), there seem to have been no cases directly to point.

[445] Motives of elected bodies. The judgment of Dixon J in Yates case referred to a number of cases concerned with the establishment of the motives of elected bodies. His Honour made particular mention of the judgment of Cussen J in the case of In re the Mayor etc of the City of Hawthorn; Ex parte The Co-operative Brick Company Limited [1909] VLR 27. That case concerned an attack on the good faith of the council in making a by-law under a power to control quarrying or blasting operations that limited the activities of the brick company. At 51 Cussen J said:

So far as the question of bad faith is concerned, if it is meant by this that individual councillors were actuated by improper motives in giving their votes, I find no evidence of the fact, and even if there was, I find great difficulty in seeing how such a contention could be given effect to. Each councillor may be actuated by many reasons, each having some different reasons from the others, and it seems to me almost, if not quite, impossible to penetrate into their minds. It must at least be necessary to show that the improper motive was the sole or dominant one, and that but for it a majority would have voted against adopting the by-law. The ratepayers and councillors honestly voting for the by-law would be placed in a false position if the by-law could, perhaps after a long time, be upset on such a ground.

The question in these cases thus becomes largely one of proof. In the Hawthorn Council case, Cussen J suggested that the furthest a court can go is to look at the object and effect of the by-law, to be gathered from its language, and applied in a general way to the existing state of legislation and to the condition of things existing in the locality. Such a procedure, he thought, may result in the court coming to the conclusion that the council did not exercise the power given for the purposes intended and that therefore there had been an abuse of the power. The Privy Council in United Buildings Corporation Ltd v Corporation of City of Vancouver [1915] AC 350 made reference to the fact that evidence had been given to the court by three aldermen of the council denying that they were motivated by an improper purpose. The Privy Council said that this was not conclusive, but had to be weighed heavily when considering competing evidence which did not directly refute the statements of the aldermen but required an implication to be drawn from the nature of the transaction under attack. At 354 the Privy Council sounded the salutary warning that "Their Lordships cannot speculate about the unascertainable motives of unknown persons. They must act on the evidence as it stands."
[446] It can be seen, therefore, that the establishment of pursuit of an improper purpose by an elected assembly will present major difficulties to a party making such a claim. The court will not set off upon an inquiry into the state of mind of each member of the assembly when he voted to adopt the course pursued. Presumably, however, if there is available to the court evidence of the matters which motivated the council these will be taken into account together with the whole course of conduct pursued by the council and the result which was achieved. So in Municipal Council of Sydney v Campbell [1925] AC 338 the court looked at the council resolutions which in turn referred to a minute of the Lord Mayor and this indicated the intended purpose of the council's action. Information of this kind together with the result ultimately achieved may well be sufficient to establish the reason why the body concerned acted as it did: Jones v Township of Tuckersmith (1917) 47 DLR 684.

[447] Administration of interrogatories. The question arises whether it is possible for the court to go behind the resolutions of the council and seek the motives of the members in agreeing to the resolution. The position is unclear. In Tooth & Co Ltd v Lane Cove Municipal Council (1967) 87 WN (NSW) (Pt I) 361 Street J considered that interrogatories could be administered to a municipal council seeking information as to the oral statements made at a council meeting when a council decision, the formation of a council opinion or the formulation of a council purpose is under challenge. He relied for his authority on the fact that the Privy Council in Municipal Council of Sydney v Campbell, above, had indicated that some probative weight attached to discussions antecedent to a corporation decision. He reasoned that the fact that the Privy Council attached probative weight to these discussions established that they were an admissible subject of interrogatories. This view was denied by Else-Mitchell J in K C R Pty Ltd v Orange City Council (1968) 16 LGRA at 158 but his Honour did not discuss the matter in any detail. Clearly this is a matter of policy on which persons may differ according to whether they regard the freedom of speech in councils as something that should not be subject to later examination or whether they consider that the motives of a council in taking certain action should be identified regardless of any effect that this might have on the free discussion in council meetings. The matter at this stage cannot be regarded as finally settled.

[448] Courts reluctant to interfere with council decisions. Finally, reference should be made to the decision of the Ontario Supreme Court, Appellate Division, in Re Howard and City of Toronto [1928] 1 DLR 952, a case that was cited with approval by Dixon J in Yates case. The judgment of Masten JA provides an excellent summary of cases in which the courts have considered the question whether action taken by an elected body can be impugned as having been made for an improper purpose. The judgment points out that a by-law may be quashed if a council in passing it was not using its powers in good faith in the interests of the public but simply to subserve the interests of private persons. However, what is and what is not in the public interest is a matter to be determined by the judgment of the council and what it determines, if in reaching its conclusion it acts honestly and within the limits of its powers, is not open to review by the courts. Nor is it a valid objection to a by-law that it operates to the special benefit of some private individual if at the
same time it is in the public interest. Likewise, the question of the relative balance of convenience or detriment to different persons is a matter which the legislature is to be assumed to have committed to the consideration and determination of the council. Its judgment on that question, provided that it is honestly exercised in what the council believes to be the public interest, will not be interfered with by the court.
CHAPTER 23
UNREASONABLENESS

Introduction. The grounds of review discussed in the preceding chapters have been concerned with validity in what might be termed an objective sense. The issue has been whether the power enables the making of the particular delegated legislation. The notion of review on the ground of unreasonableness contemplates that the delegated legislation falls within the subject-matter on which legislation can be made, but takes a form that disentitles it to validity. This, of course, involves the court in what is largely a subjective assessment of the "reasonableness" of the provision. For this reason Australian courts have been reluctant to adopt unreasonableness as a ground of review of delegated legislation. New Zealand courts, on the other hand, have drawn a distinction between the review of delegated legislation made by the central government and that made by local authorities. The approach in regard to the former is similar to the Australian position. With the latter, however, the courts have not felt any constraint on reviewing by-laws on the ground of unreasonableness. The law applicable in the two countries is best discussed separately.

UNREASONABLENESS AS GROUND OF REVIEW IN AUSTRALIA

Unreasonableness not separate ground of review. The first major case that warrants consideration in relation to the review of delegated legislation on the ground that it is unreasonable is the Privy Council decision of Slattery v Naylor [1888] 13 App Cas 446. The case concerned a local council by-law which prohibited the use of existing cemeteries for the burial of the dead if the cemetery was within 100 yards of any public building, place of worship, schoolroom, etc. The relevant Act empowered the council to make by-laws for "Regulating the interment of the dead". It was argued that the by-law was unreasonable but this argument was rejected by the Privy Council. The Board considered (at 452) that a by-law could only be declared invalid on this ground if it were "a merely fantastic and capricious bye-law, such as reasonable men could not make in good faith". The matter was taken further in England by the decision of a specially constituted divisional court in Kruse v Johnson [1898] 2 QB 91. That case concerned the validity of council by-laws prohibiting any person from playing music or singing in any public place or highway within 50 yards of any dwelling house, after being requested by any constable, or an inmate of such a house, to desist. The by-laws were challenged as being unreasonable. The court held that they were valid and limited the notion of unreasonableness by suggesting that by-laws could only be so described "if they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; or if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men" (at 99-100).
[451] It is to be noted that in both Slattery v Naylor and Kruse v Johnson the courts regarded unreasonableness as a separate ground for review of delegated legislation. In Widgee Shire Council v Bonney [1907] 4 CLR 977 the High Court accepted the approach expounded in these cases with the one qualification — that if the by-law were regarded as unreasonable in the sense in which the word was used in those cases, the by-law could not then be regarded as being within the scope or ambit or purpose of the by-law making power: see Griffith CJ at 983 and Higgins J at 989. This view that unreasonableness is not a separate ground of review but merely an indication that the by-law is ultra vires, has been reiterated in numerous Australian cases since, the best known being perhaps Williams v Melbourne Corporation (1933) 49 CLR 142. In that case, Dixon J at 155 said:

The true nature and purpose of the [by-law making] 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 the power.

In that case, a by-law which limited the number of streets through which cattle could be driven to the abattoirs was held not to be an unreasonable use of the by-law making power. Reference may also be made to the statement of Williams J in Brunswick Corporation v Stewart (1941) 65 CLR at 99: "[A by-law] must not be unreasonable in the sense that it must not involve such oppressive or gratuitous interference with the rights of those who are subject to it as could find no justification in the minds of reasonable men. Such an interference would be an abuse of power and therefore not within it".

[452] Authority in Australia of decisions from other jurisdictions. In England the courts treat the requirement that delegated legislation be reasonable separately from questions of ultra vires: see for example, Kruse v Johnson, above, Sparks v Edward Ash Ltd [1943] KB 223 Maynard v Osmond [1976] 3 WLR 711 (but cf Diplock L J in Mixnam's Properties Ltd v Chertsey UDC [1964] 1 QB at 237 where a view along the lines expressed by the Australian courts is propounded). This difference in approach prompted Sugerman J in Warde v Parramatta City Council (1950) 17 LGR (NSW) 285 to say (at 292) that decisions of English courts are not a very reliable guide on the question of the validity of delegated legislation in Australia. But, because of the restrictive approach of the English courts to review for unreasonableness, it would seem to matter little in practice whether the Australian or English view is taken. The same result is probably reached whether unreasonableness be regarded as a separate ground of review or whether it be simply an indication of the fact that the power has been used for an unauthorized purpose. In either case, to support an argument for invalidity, the legislation must be so capricious or oppressive that the court must be able to conclude that parliament never intended to give authority to make such legislation. The position is different, however, in New Zealand (see [463-466]) and Sugerman J's warning is applicable to cases decided in that jurisdiction.

[453] Nature of legislation-making body considered by court. From the
时间的考量，法院在Slattery v Naylor (see [450])中，考虑了制定授权立法的性质，认为该立法是不合理的。在那种情况下，法院认为这一点是正确的，因为该法规是由一个议会制定的，即使它代表了该社区的感受和利益，但法院还认为它还必须经过确认并由议会颁布。Mention was also made of the requirement that the by-laws had to be confirmed by the Governor and laid before both houses of parliament: see [454].)

In Kruse v Johnson Lord Russell CJ referred to the fact that the by-laws were made by public representative bodies and asserted (at 99) that "They ought to be supported if possible. They ought to be ... 'benevolently' interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered". Similar regard was paid to the by-laws being made by a representative body in Widgee Shire Council v Bonney (1907) 4 CLR per Griffith CJ at 983; see also Brunswick Corporation v Stewart (1941) 65 CLR at 98,99.

This reluctance to interfere with the legislation of local councils is evidenced also in regard to regulations made by the representative of the Crown and laid before the parliament. In Ferrier v Wilson (1906) 4 CLR 785 Isaacs J at 802 said:

The reluctance of the court to declare void for unreasonableness a regulation made by a public authority, having no possible object but the general welfare, naturally approaches its extreme limit when the regulation, as here, is required by the legislature to be approved by the highest executive authority of the State, and to be brought under the direct notice of Parliament itself.

A similar view was expressed in England in Sparks v Edward Ash Ltd [1943] KB 223 in regard to regulations made by a minister and laid before the parliament. The matter was placed even higher by Latham CJ in Victorian Chamber of Manufactures v The Commonwealth (Industrial Lighting Regulations) (1943) 67 CLR at 418 where he suggested that reasonableness (however defined) cannot be taken into account in relation to regulations which have been laid before parliament and which may be disallowed by either house of the parliament. (Cf Menzies J (dissenting) in Esmonds Motors Pty Ltd v The Commonwealth (1970) 120 CLR at 479 for a similar reliance upon parliamentary review, but in this case when considering an attack on a regulation for simple ultra vires.)

Summary of unreasonableness as ground of review. The position adopted by Australian courts in regard to the question of review of delegated legislation on the grounds of unreasonableness was summarized by Poole J delivering the judgment of the South Australian Full Court in The Commissioner of Water Works v Colton Palmer and Preston Ltd [1926] SASR at 203:

"On the one hand, the by-law is not to be held bad for unreasonableness simply because it does not commend itself to the minds of any Judge or set of Judges; and, on the other, the mere fact that the existence of such a power would be convenient and tend to the advantage of the community is immaterial. It may be intrinsically a most reasonable thing that the Commissioner should have the power to make a by-law such as that under discussion, but that will not aid him unless the power has been given to him".

See also Golden-Brown v Hunt (1971) 19 FLR at 446.
UNREASONABLENESS

SPECIFIC AUSTRALIAN CASES IN WHICH DELEGATED LEGISLATION HELD INVALID AS UNREASONABLE

[456] Older authorities on unreasonableness. The courts in the latter part of the nineteenth century and the early part of this century seemed more ready to declare delegated legislation void as unreasonable than has been the practice in more recent times. As Gavan Duffy J put it in Proud v City of Box Hill [1949] VLR at 210: "The history of the doctrine of unreasonableness in considering by-laws has been a history of a growing disinclination on the part of the Courts to interfere with by-laws, at any rate of local government bodies acting under statutory powers, on that ground". It is doubtful whether bodies make legislation now that can be regarded as more reasonable than that made by by-law-making bodies of an earlier time. Rather it would seem to be that the courts have become steadily more influenced by the factors mentioned in the preceding paragraphs and view with reluctance the suggestion that they should substitute their own opinion as to the reasonableness of delegated legislation for that of the law-making body. It is of use, however, to note some of the older cases in which the courts were prepared to hold a by-law invalid as unreasonable and to compare those decisions with more recent cases in which a similar question has arisen. In Ex parte Stafford in re Shire of Boroondara (1894) 20 VLR 25 a municipal by-law which prohibited the carting through the shire of night soil not produced within the shire, except between the hours of 1 am and 3 am, was quashed as unreasonable. The court referred to the fact that there was a public right to use roads and they considered that this by-law imposed unreasonable restrictions on the right of user. Comparison should be made with the case of Williams v City of Melbourne (1933) 49 CLR 142 where the High Court expressly rejected an argument of unreasonableness in a case involving a by-law that limited the right to use roads for the driving of cattle. It would seem that a court nowadays is more likely to take the view that the appropriate user of roads within a municipality is the sort of question that should be determined by a local government body subject, perhaps, to correction by the State legislature. It is not for a court to substitute its view of what constitutes a reasonable control over the use of such roads.

[457] Colman v Miller [1906] VLR 622 concerned by-laws made by the Victoria Racing Club. The committee of the club had, by statute, the power to make by-laws "for providing for the due management of the affairs of the club", "for regulating all matters concerned or connected with the club's land", "for the admission to the land and expulsion therefrom of members of the club and the public", and "for the general management of the racecourse and of all races and race meetings". A by-law was made which vested in the committee the right to licence bookmakers and impose conditions upon the manner in which they exercised their vocation. This by-law was held invalid by the Victorian Full Court. The general discretion given to the committee to grant or refuse a license and the open-ended power to impose conditions upon the exercise of the vocation of a bookmaker were said by the court to be unreasonable. Contrast Potter v Davis (1948) 48 SR(NSW) 523 where the New South Wales Full Court held that the power of the committee of the Australian Jockey Club to make by-laws for the general management of Randwick Racecourse empowered the making of a by-law that prohibited bookmakers
operating on the course without the committee’s approval. It is also to be be noted that in Colman v Miller it was pointed out to the court that the by-laws of the racing association had to be approved by the Governor and that these by-laws had been so approved. This argument was rejected by the court. Indeed, it said that it was an additional reason why the court should investigate the reasonableness of the by-law, as it showed that the legislature was anxious to put restrictions on the by-law-making power of the racing club. Contrast the approach of the High Court in the same year in Ferrier v Wilson (1906) 4 CLR 785 where Isaacs J rejected an argument of unreasonableness, partly because the by-laws in question had been approved by the Governor. See also the views of Latham CJ in the Industrial Lighting Regulations case set out at [454].

What seems to be the last Australian case in which delegated legislation was declared invalid solely on the ground of unreasonableness is Ingwersen v Borough of Ringwood [1926] VLR 551. (There is a case after Ingwersen in which one member of the South Australian Full Court, Angas Parsons J, held a regulation invalid as unreasonable. The other judges in that case considered the regulation ultra vires for repugnancy: Taylor v Dental Board of South Australia [1940] SASR 306: see [408].) In Ingwersen’s case Schutt J held invalid as unreasonable a by-law which provided that no person should build, etc, any building of materials other than brick, stone or concrete, within 15 feet of any street. His Honour did not advance any detailed reasons why he considered this provision unreasonable but seemed to base his argument on the notion that it would require all interior walls, floors, ceilings, roof, doors, etc, to be built of the material mentioned. It seems doubtful whether this was the intention of the by-law. It is more likely that it was directed to avoiding wooden or asbestos buildings being constructed within 15 feet of the street. The decision in Ingwersen’s case was impliedly overruled by the High Court in Brunswick Corporation v Stewart (1941) 65 CLR 88 where a similar by-law was held valid. Starke J, in particular, at 98 commented unfavourably on the decision in Ingwersen.

Later authorities on unreasonableness. Since 1926 there have been a number of cases in which regulations and by-laws which appeared to impose unreasonable burdens on persons have been held valid. For example, in Ogilvie v Lowe [1963] VR 225 a regulation that permitted a non-aborigine to reside on an aboriginal reserve only if he or she were the holder of a permit or if she were the wife or relative of an aborigine, was held to be reasonable notwithstanding the fact that it had the effect of preventing the husband of an aboriginal woman from residing with her on the reserve. Other cases in which a court has rejected an argument that delegated legislation was unreasonable include Anchorage Butchers Ltd v Law (1959) 42 WALR 40; In re a By-Law made by the District Council of Prospect; Ex parte Hill [1926] SASR at 332; Lennon v Collings (1933) 11 LGR (NSW) 89; Schofield v City of Moorabbin [1967] VR at 30.

Basis of Australian approach. The reluctance of Australian courts to review delegated legislation on the ground of unreasonableness seems to have been conditioned by two things. First, a general unwillingness to substitute judicial opinion as to the reasonableness of a provision for that of the legis-
lation-maker. This attitude contrasts strongly with that of the New Zealand courts in relation to by-laws. The issue is returned to at \([470]\) after the New Zealand authorities have been discussed. The second constraining influence has been the adoption of the approach that where two possible interpretations can be placed on legislation, one reasonable and the other unreasonable, it is the reasonable which should be followed. This unexceptionable approach has, however, been expanded, in at least one case, to embrace a willingness to assume that authorities charged with the enforcement of delegated legislation will act reasonably. This development seems somewhat questionable.

\([461]\) The case of *Ex parte Hales* (1898) 19 NSWR 378 demonstrates an approach at one time extant that if a regulation could be interpreted in a way that imposed an unreasonable obligation, it was invalid. A by-law made it an offence for a driver of a public vehicle to arrive late at any public stand. This by-law was held unreasonable and *ultra vires* because the obligation fell on the driver no matter whether he had any reasonable excuse for the default. Darley CJ at 381 described the by-law as so monstrously and flagrantly unreasonable that it could not stand. This decision, and the approach underlying it, should be contrasted with the decision of the High Court in *Ferner v Wilson* (1906) 4 CLR 785. There a regulation provided that the owner of a lighter should be liable to penalty "should any ashes or other material be allowed to fall into the waters of the port from the lighter". The court held that the regulation was to be construed in such a way as to render the owner liable only if the material fell from the lighter by reason of the permission or default of the owner. The court was not prepared to disallow the regulation but was prepared to read it in such a way as to give it a reasonable operation. The approach underlying this case was stated by Irvine CJ in *Matthews v City of Prahran* [1925] VLR at 476-477 in the terms that if the by-law could be read alternatively reasonably or unreasonably, the reasonable construction should be placed upon it. (See also *White v Lepetit* (1914) 31 WN (NSW) 146; *McCrae v Downey* [1947] VLR 194.) A good example of this approach is afforded by the contrasting decisions of *Croagh v O'Sullivan* (1900) 6 ALR (CN) 17 and *Coysh v Elliott* [1963] VR 114. In the older case it was held that a by-law of the City of Warnambool that provided "All persons standing ... upon any ... streets ... shall discontinue to do so on being required by any member of the police force" vested an unreasonable power in a police officer and was invalid. In the later case, reg 202 of the *Road Traffic Regulations* 1960 provided "Every pedestrian and driver shall at all times obey the signal by hand or the reasonable directions or instructions of a member of the Police Force". It was argued that this regulation could place a person in the situation of having to obey unreasonable hand signals given by a police officer. The court declined so to interpret the legislation saying that it should be read as if the word "reasonable" also appeared before the reference to "signal by hand". Presumably this meant that a failure to comply with an "unreasonable" signal was not an offence. While the provisions in the two cases are not on all fours, it is interesting to note that there was no attempt in the earlier case to read in a qualification of "reasonable" request with a view to saving the legislation.

\([462]\) This general attitude of preserving the legislation if possible, is obviously the correct approach for the courts to take. It is but an assumption that the legislation-making body did not intend to make unreasonable legisla-
tion and is a corollary to the general rule that legislation is to be given such meaning as will preserve it rather than invalidate it. It is important to note that this approach posits that there is only one correct interpretation to be placed on the legislation — the reasonable interpretation. If, for example, the owner of a lighter were charged with allowing material to fall into the harbour and he were able to show that it happened without any fault on his part, *Ferrier v Wilson* would provide him with a good defence. But the situation is different where the court upholds the validity of a regulation that can impose an unreasonable obligation. This was the effect of the judgment of Gavan Duffy J in *Proud v City of Box Hill* [1949] VLR 208. There a by-law which provided that “No person shall in any public highway cause or permit or suffer to be caused any noise; (a) by shouting or calling out haranguing or singing ...” was held not to be unreasonable on the basis that the by-law had to be reasonably interpreted and the language read in its collocation. Gavan Duffy J conceded that it was possible that the law might be abused in the way in which it was carried into effect, but he said that judges have been warned to treat by-law making authorities as bodies that might be expected to act reasonably in the administration of the law. In these circumstances he considered that it was not proper for him to disallow the regulation. With respect, this seems to place a gloss on the earlier authorities that should not be followed in later cases. If a legitimate interpretation of a by-law can impose an unreasonable obligation on a person, it would seem that the by-law falls within the test of invalidity suggested in [451]. It is no answer that the by-law may be reasonably enforced. The question asked should be what can be required under the by-law; not what can it be expected that the enforcing authority will require? The latter is speculative and there can be no certainty that the administering body will enforce the by-law reasonably.

**UNREASONABLENESS IN NEW ZEALAND**

[463] Distinction between regulations and by-laws. The New Zealand courts have drawn a sharp distinction between review on the ground of unreasonableness of delegated legislation made on the one hand by the government and on the other by local authorities. As far as regulations are concerned, Callan J in *F E Jackson & Co Ltd v Collector of Customs* [1939] NZLR 682 put it thus (at 720):

“A Court is not entitled to disallow regulations which appear to be within the intention of Parliament merely because the Court thinks them unreasonable, nor has it any power to allow regulations which are not within the intention of Parliament merely because the Court thinks them reasonable. The duty of the Court is to search for the intention of Parliament and to support regulations that keep within that intention, and to disallow such as do not.”

This passage was cited with approval by Finlay ACJ in *Ideal Laundry Ltd v Petone Borough* [1957] NZLR at 1048; see also *Carroll v Attorney-General* [1933] NZLR 1461. This approach seems little different from that followed by Australian courts. Presumably if the legislation were unreasonable in the sense set out in *Williams v Melbourne Corporation* (see [451]), it would not be regarded as within the intention of parliament. However, a different approach is adopted in relation to by-laws of local authorities.
Reasonableness independent requirement for by-laws. The New Zealand courts, while acknowledging the strength of the views expressed in *Kruse v Johnson* (see [450], [453]), have felt no constraint in ruling local authority by-laws invalid as unreasonable. This is seen as a requirement that the by-laws must satisfy additional to that of generally being within the legislation-making power. The approach of the court is illustrated by a statement of Callan J in *Courtville Ltd v Paul* [1950] NZLR at 27: “But, although prima facie within [the legislation-making] powers, the by-law has still to be examined from the points of view of alleged unreasonableness and uncertainty, because, if either of these criticisms be established, the by-law is bad, since the Legislature does not authorise local authorities to make by-laws that are unreasonable or uncertain”. See also the approach of the Full Court in *Martin v Smith* [1933] NZLR 636. This attitude has been influenced by an early statement in *Grater v Montagu* (1904) 23 NZLR 904 in which Williams J asserted that the position in regard to by-laws in England provided checks and safeguards in the public interest that did not exist in New Zealand. In his Honour’s view, therefore, the statements in *Kruse v Johnson* relating to the approach that a court should adopt towards unreasonableness in regard to delegated legislation were not applicable to New Zealand by-laws. His Honour considered that: “The courts ... here, should deal with by-laws with a somewhat freer hand than they are dealt with in England, because such checks do not exist”. In that case, the judge described by-laws that required certain types of carts to have wheels not less than four inches in width as “ridiculously absurd”. It is not apparent from the report why this was so and it would seem that his Honour must have substituted his own view of what were appropriate requirements for that of the council that had made the by-law.

Test of unreasonableness. The principal New Zealand authority relating to the test of unreasonableness in regard to by-laws is *McCarthy v Madden* (1914) 33 NZLR 1251. The facts of that case were almost identical with those in *Williams v Melbourne Corporation*, [451] in that the by-laws challenged limited the hours during which cattle could be driven along public streets. Denniston and Edwards JJ, in a joint judgment with which Cooper J agreed (Stout CJ dissenting), set out at 1268-1270 a number of principles which they said were applicable to the question of the unreasonableness or otherwise of by-laws. These principles have been followed in a number of later cases. The propositions advanced by their Honours may be summarized as follows:

(a) Where a by-law affects only the rights and conduct of the inhabitants of the locality within the jurisdiction of the local body having authority to make the by-laws, the approaches adopted by the judges in *Slattery v Naylor* and *Kruse v Johnson* [450]) are applicable.

(b) *Grater v Montagu*, [464] indicates that the general principles set out in the cases referred to in clause (a) are to be qualified where the by-laws are enacted by a local body without the controls or safeguards that are referred to in the English cases. (But cf *Craig v Hutt Valley and Bays Metropolitan Milk Board*, [469].)

(c) Where a by-law affects a public right common to all members of the
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public, eg the right to use the highway, that by-law must be scrutinized with greater care than a by-law which affects only the particular rights of the inhabitants of the locality which is subject to the jurisdiction of the enacting local authority. A by-law which affects persons other than the local inhabitants may be held to be unreasonable in circumstances in which, if it affected only the local inhabitants, it would be regarded as reasonable.

(d) The reasonableness or unreasonableness of a by-law is to be ascertained by having regard to the surrounding facts, including the nature and condition of the locality in which it is to take effect and the evil or inconvenience which it is designed to remedy.

(e) Where other law on a subject matter exists, including laws which have been made by a neighbouring local authority, it is incumbent on a local authority to ensure that its law fits in with the other law on the topic. This is particularly so where a local law affects a public right existing under general legislation.

(f) A by-law which destroys or unnecessarily abridges or interferes with a public right without producing a corresponding benefit to the inhabitants of the locality over which it has jurisdiction must necessarily be unreasonable. Such a benefit must be real and not merely fanciful, and, though it need not necessarily be commensurate with the inconvenience or loss which it may cause to persons who are not inhabitants of the locality, it must be such as to justify, in the eyes of reasonable men, the interference with the public right.

The court in *McCarthy v Madden* concluded that the interference that the by-laws before it made with the movement of cattle through the streets of the municipality was so unreasonable that the by-law should be held invalid: cf the conclusion of the High Court in *Williams v Melbourne Corporation*.

[466] Two later cases, *Bremner v Ruddenklau* [1919] NZLR 444 and *Gisborne City v J E Openshaw Ltd* [1971] NZLR 538, qualified *McCarthy v Madden* by holding that the reasonableness of a by-law is not to be tested by taking possible, but extreme, cases. Apart from this qualification, the principles set out above have been followed and reaffirmed on a number of occasions: see, for example, *Martin v Smith* [1933] NZLR 636; *Page v Harvey* [1939] NZLR 325; *Courtville Ltd v Pauli* [1950] NZLR 18; *Thompson v Wellington City Council* [1957] NZLR 84.

[467] Final outcome same in Australia and New Zealand in some cases. In a number of cases in which the New Zealand courts have held by-laws invalid as unreasonable, the courts in Australia would probably have reached the same conclusion by following the reasoning adopted in *Williams v Melbourne Corporation* and declaring the by-law to be *ultra vires*. A good example of this is afforded by the case of *Sullivan Shipping Co Ltd v Marlborough Harbour Board* [1964] NZLR 814. A by-law made by the Harbours Board purported to exclude the liability of the board for negligence. The by-law was held invalid as unreasonable. This decision may be compared with dicta in *Henwood v Municipal Tramways Trust (South Australia)* [1938] 60 CLR 458, [369] where the High Court suggested that a by-law made by the Trust which
purported to exclude liability of the Trust for negligence would be *ultra vires*. Similarly, in *Jorgensen v Ridings* [1917] NZLR 980 (see [440]), the court discussed the validity of a by-law interchangeably in terms of unreasonableness and *ultra vires*. In Australia the discussion would have been limited to the question of power.

New Zealand decisions different from Australian. While it is possible that the courts in Australia and New Zealand may have reached the same end by different routes in relation to some delegated legislation, it is clear that there are cases in New Zealand in which by-laws have been held invalid as unreasonable where it would be highly unlikely that a like decision would be reached in Australia. The differing conclusions in *McCarthy v Madden* and *Williams v Melbourne Corporation* give one illustration of this point. Another is provided by the decision in *Craig v Hutt Valley and Bays Metropolitan Milk Board* [1956] NZLR 168. By-laws made by the board limited the hours during which milk could be delivered. McGregor J took evidence of the obligation that these limitations would impose on milk delivery men and weighed these against the advantages to the public that were said to accrue from the provisions of the by-laws. He considered that the hours were oppressive to milkmen and that the burden that was cast on them was not outweighed by the advantages to the public and concluded that the by-laws were unreasonable. It seems highly improbable that a court in Australia would engage in such an inquiry and hold by-laws of this kind to be invalid. A somewhat similar case is *Martin v Smith* [1933] NZLR 636, a decision of the Full Court. There a by-law which prohibited persons from, among other things, riding horses on nature strips adjoining a roadway was held to be invalid as imposing an unreasonable prohibition on the use of the highway. Again, it seems unlikely that an Australian court would have reached such a decision.

Amendment by court pursuant to *Bylaws Act*. The *Bylaws Act* 1910 of New Zealand allows a judge to direct that a by-law be amended in circumstances in which he considers such action to be desirable. In *Craig's case* (see [468]), the judge declined to use this power, saying that it was better for the board to act after considering the views that he had expressed in his judgment. It is of interest to note in that particular case that there was a power for the Governor-General to disallow the by-laws under the *Milk Act* at any time. It was suggested that, in the particular case, it was better for the court to act than for the Governor-General to be requested to intervene. But this ability of the Governor-General to disallow the regulation seemed not to affect the action of the judge in endeavouring to come to a conclusion as to the reasonableness of the regulation. This points up the extent to which New Zealand courts have moved away from the approach originally suggested in *Kruse v Johnson* which made considerable mention of the fact that the local government legislation was subject to review by another body. Contrast also the remarks of Williams J in *Grater v Montagu*, [464]. His Honour there made much of the fact that the local government by-laws he was considering were not subject to external review as a reason for rejecting the *Kruse v Johnson* approach. Here, the by-laws were subject to review but this did not attract the *Kruse v Johnson* limitations on judicial review.

Preferable approach. A question which falls for consideration is
whether the approach of the New Zealand courts is preferable to that followed in Australia. With due respect to the New Zealand viewpoint, it seems that the attitude expressed in *Kruse v Johnson* that cautioned against judges substituting their own opinion for that of local authorities and others when considering a matter as indefinite as reasonableness has much to commend it. A court should be particularly reluctant to intervene where the legislation-making authority is accountable to an electorate. Even in cases where the delegated legislation is produced by a body that is not so accountable, the court risks accusations of interfering in matters in relation to which it has no expertise if it sets itself up as a body to adjudicate on the reasonableness or otherwise of delegated legislation. It seems that the better view is to approach the matter from the standpoint of *ultra vires* and for the court to confine itself to a consideration of that issue. It will then only be if the regulation is so unreasonable that it can in fact be classified as a non-exercise of the power that the courts will intervene. In circumstances that do not approach this point, the standard of reasonableness becomes essentially subjective and the court should not adopt the role of arbiter of the wisdom or otherwise of the particular legislation.
CHAPTER 24

UNCERTAINTY

[471] Introduction. The notion that uncertainty is a ground for review of delegated legislation finds its origin in a statement of Mathew J in *Kruse v Johnson* [1898] 2 QB at 108: "From the many decisions upon the subject it would seem clear that a by-law to be valid must, among other conditions, have two properties — it must be certain, that is, it must contain adequate information as to the duties of those who are to obey, and it must be reasonable". It has been shown in ch 23 that in Australia and in New Zealand (except for by-laws) reasonableness is not a separate requirement for delegated legislation to meet although a regulation that can be described as so unreasonable that no body properly informed could use its regulation-making power to make such a rule may be held invalid on the basis that the regulation is beyond power. But does a regulation have to be certain if it is not to be struck down? It would seem that this is the law in England. It was a matter that was considered by the House of Lords in *McEldowney v Forde* [1969] 2 All ER 1039. The various members of the House of Lords directed their mind first to the question whether the regulations were *ultra vires* and then to whether the regulations were too vague to be valid. See, for example, Lord Pearce at 1064, Lord Pearson at 1067, Lord Diplock at 1074. There was a division of opinion on the certainty of the particular regulations but the law was encapsulated by Lord Diplock at 1074: "A regulation whose meaning is so vague that it cannot be ascertained with reasonable certainty cannot fall within the words of delegation".

[472] If the view that difficulty of placing meaning upon a regulation rendered it invalid were to be adopted, it would mean that delegated legislation was different in this respect from Acts of parliament. It seems clear that a court cannot declare an Act of parliament invalid on the basis that it is uncertain. No matter how difficult the Act is to interpret, the duty of the court is to put a meaning on the words of the statute: *Scott v Moses* (1958) 75 WN (NSW) 101; *Dunlop v Milton Timber & Hardware Co Ltd* [1960] NZLR 1096; *Brisbane City Council v Attorney-General for Queensland* (1908) 5 CLR 695 per O'Connor J at 720. Is it necessary then for draftsmen of delegated legislation to meet a higher standard of perfection than that which is expected of draftsmen of Acts of parliament? The Australian and New Zealand law is again best examined separately.

UNCERTAINTY IN AUSTRALIA

[473] Validity of uncertain delegated legislation: meaning of "uncertainty". Sholl J considered this question in *Parry v Osborn* [1955] VLR at 154 and concluded that, in general, the same approach should be adopted towards the interpretation of delegated legislation as is applicable to Acts of parliament. A court is thus under an obligation to place a meaning on the legislation if that is at all possible. But where an expression used in delegated legislation is so unintelligible that no meaning whatever can be attributed to
it, a difference in result does arise. In the case of an Act of parliament, the provision will simply be treated as inoperative. But if such an expression is used in delegated legislation, the provision is to be treated as *ultra vires*. As to what amounts to an unintelligible expression in this context, his Honour directed attention to the leading Australian authority on the law relating to uncertainty in regard to delegated legislation, *King Gee Clothing Co Pty Ltd v The Commonwealth* (1945) 71 CLR 184. In that case Dixon J at 194 expressly rejected authority in the United Kingdom, the United States of America and New Zealand that suggested that delegated legislation had to satisfy an independent test of certainty to be valid. He concluded that this view had come about, at least as far as the United Kingdom and New Zealand were concerned, because of a misunderstanding of historical factors. In his Honour's view there is no "doctrine that certainty is a separate requirement which all forms of subordinate legislation must fulfil, so that an instrument made under a statutory power of a legislative nature, though it is directed to the objects of the power, deals only with the subject of the power and observes its limitations, will yet be invalid unless it is certain". In his Honour's view, ambiguities and uncertainties arising from the form of expression used in regulations have to be resolved by construction and interpretation as in the case of any other document. But a different question arises, if, after a meaning has been placed on the subordinate legislation by this means, it is found that no certain objective standard has been prescribed. In such a case his Honour considered that the regulation would be invalid — not because it was uncertain but because the power to make the regulation had not been properly pursued. This was indeed the situation in the case in hand. The regulations set out a method of calculating the maximum price for certain goods by reference to a number of factors. But these factors were of such a nature that it was possible to adopt differing but tenable views as to the manner of their ascertainment. This being so, no standards for determination of the prices were fixed because the amount calculated varied according to whichever view of the essential factors was taken by the person making the calculation. In his Honour's opinion, such a provision was not bad for uncertainty but bad because it did not amount to a true exercise of the regulation-making power. In short, uncertainty as to meaning will not invalidate a regulation, but uncertainty as to the conduct which is prohibited after meaning has been placed upon the regulation will constitute invalidity. This approach of Dixon J in the *King Gee* case was expressly endorsed by the High Court in *Cann's Pty Ltd v The Commonwealth* (1946) 71 CLR 210.

The statement of Dixon J was not really breaking new ground — it was more a case of rationalizing views that had appeared in previous judgments but which perhaps had not taken the issue through to its logical conclusion. For example, in *Brunswick Corporation v Stewart* (1941) 65 CLR at 99 Williams J had said "A by-law must be certain in the sense that it must contain adequate information as to the duties of those who are to obey". In the year before the *King Gee* case, Jordan CJ in *Ex parte Zietsch; Re Craig* (1944) 44 SR (NSW) at 365 had advanced very much the same view as was subsequently propounded by Dixon J. His Honour there had talked about the need for the legislation to be "clear enough to serve the practical purpose which the provision is evidently intended to serve". After referring to the need to apply ordinary rules of construction if the expression was ambiguous, he
concluded (at 366) that “It is only if the provision is *prima facie* uncertain, and is also not reasonably capable of being regarded as sufficiently certain for practical purposes by an application of the considerations [of statutory construction] that it is proper to treat it as bad for vagueness”.

[475] Reluctance to hold some legislation uncertain. It is evident the Australian courts will, as in the case of claims that a by-law is unreasonable, be reluctant to intervene where the legislation has been produced by an elected body or has been laid before the parliament: see *Parry v Osborn* [1955] VLR at 154; *Brunswick Corporation v Stewart* (1941) 65 CLR at 99. Whether the courts should show this degree of reluctance in regard to matters of certainty as distinct from unreasonableness is an issue which is returned to at [500-501].

[476] Necessity to plead uncertainty. Before considering the cases in which the issue of uncertainty has arisen, a point on pleading should be noted. Notwithstanding the notion that uncertainty is not to be regarded as a ground of review distinct from the general question of *ultra vires*, one authority indicates that, in Victoria at least, it may have to be pleaded separately. Pape J so ruled in *Medcraft v City of Box Hill* [1959] VR at 780. His Honour would have been prepared to reject argument that a by-law was uncertain because the issue was not referred to in the order nisi to review the by-law. But this ruling does not appear to be consistent with the decisions in *Groom v Port Adelaide Corporation* (1922) 31 CLR 109 and *King v The City of Footscray* [1923] VLR 679 (see [559]) which held that once a regulation is before a court, the court may consider all available grounds of review. While those cases were not concerned with the issue of uncertainty, they did purport to lay down a general rule.

**Specific Cases relating to Uncertainty**

[477] Introduction. It is now proposed to look at cases in which the courts have considered the question of the certainty of delegated legislation. In regard to these cases, it should be borne in mind that decisions prior to the *King Gee* case tend to reflect the thinking that was applicable in the United Kingdom and should be read bearing in mind the High Court’s decision to move away from that approach to the issue.

[478] Building and construction regulations. Attempts have been made on a number of occasions to argue that regulations that set down building or construction standards are void for uncertainty. However, in only one case in Australia does this argument seem to have been successful. In the main the attitude of the courts seems to have been to approach the question with very much a reasonable man test in mind and hold that, if a person could reasonably put meaning on the requirements of the regulations, they should not be regarded as uncertain, notwithstanding the fact that they use terminology which is somewhat vague. For example, in *Brunswick Corporation v Stewart* (1941) 65 CLR 88 the High Court considered attacks on a number of by-laws of the corporation and ruled that they were valid. The by-laws concerned provided *inter alia*: “Such building [flats] shall not cover more than three-fifths of the area of the allotment of the land on which it is erected”.
The court considered that land would have been allotted to the buildings if a plan of subdivision existed and, if not, land for the flats would have to be allotted and the three-fifths area would therefore be determinable. Another provision provided “Flat’ means a suite of two or more rooms occupied or designed or intended or adapted to be occupied as a separate domicile”. It was argued that the word “intended” meant that whether the suite would be designated as a flat or not would depend upon the state of mind of the person using it. The court rejected this interpretation and ruled that the word “intended” was used objectively; it was not dealing with the thoughts of persons. Finally from that case the by-law also provided “Such building shall be constructed of brick stone concrete or other hard fire-resisting material approved by the surveyor”. The court considered that this expression was in no way uncertain. The reasonable man type of approach is also reflected in the case of Anchorage Butchers Ltd v Law (1939) 42 WALR 40. In that case a requirement that “The vehicle [a butcher’s delivery van] shall be properly ventilated” was held valid. The court expressly said that the standard to be applied was that which would be considered suitable by the reasonable, prudent and competent man.

The only instance in which there seems to have been a ruling that regulations specifying construction standards were invalid for uncertainty is to be found in the case of Code v Shoalhaven Paper Mills Pty Ltd (1957) 56 AR (NSW) 555. In that case, a regulation made under the Factories and Shops Act provided “Every sub-station shall be substantially constructed and so arranged that no person other than an authorised person can obtain access thereto otherwise than by the proper entrance, or can interfere with the apparatus or conductors therein from outside ...”. The regulation was made under a power to make such regulations as appeared to the minister “to be reasonably practicable and to meet the necessity of the case”. The court interpreted the regulation-making power as being such that it would not allow the regulation to impose absolute liability on the person obliged to construct a sub-station. Nor did the court consider that the words of the regulation could be read as meaning that persons acting reasonably were those in whose favour the regulation was to operate. This being so the court considered that the word “arrange” in the regulations gave no direction to the occupier of a factory in which a sub-station was installed as to the manner in which the sub-station was to be constructed. Nor, for the reasons previously mentioned, did the regulation indicate the extent of the exertions which an occupier had to take to prevent access to the sub-station. This being so, in the view of Beattie J, the regulation was bad for uncertainty. The case must be regarded as a borderline one if the test espoused by Dixon J in the King Gee case is to be used as the criterion. The regulations undoubtedly contained ambiguous expressions. It could also properly be said that there was no canon of construction which would enable the court to interpret the regulation in such a way as to give a clear indication to the persons to whom the regulation applied as to what precisely they had to do to satisfy the regulation. If this be a gloss on Dixon J’s test, then perhaps it is one which should be adopted.

An English case that provides a useful example of terminology of a general kind used in construction regulations being held valid is Leyton Urban District Council v Chew [1907] 2 KB 283. A by-law of the District
Council provided that where a street of a certain width was being constructed, the person constructing it should make on each side of the street “a proper channel not less than 12 inches wide and 6 inches deep either of granite cubes laid on a bed of cement concrete at least 6 inches in thickness or otherwise in a suitable manner and with suitable materials”. It was argued that the reference to the channel being made in a suitable manner and with suitable materials was too vague and rendered the by-law bad for uncertainty. The Divisional Court rejected this argument, Lord Alverstone CJ saying at 288 that the by-law really only set up a standard and then gave a reasonable latitude in cases in which the standard was found to be more than was actually necessary. He agreed that a man ought to know what he was required to do to comply with the by-law but considered that the by-law gave him sufficient information. It can be seen that the approach of the court here was to again adopt what might be termed a reasonable man test in holding, in effect, that what might be “otherwise suitable” could be determined having regard to the purpose of the by-law and the description of a channel which was set out in the by-law.

A case which did not concern building regulations but which related to specifications of a hot water system is most conveniently dealt with under this heading. The Victorian Full Court in Foster v Aloni [1951] VLR 481 had to consider the validity of an advertisement made pursuant to certain regulations. The advertisement was concerned with power rationing and a failure to comply with the terms of it made a person liable to a penalty. The advertisement prohibited the use of electricity for a number of purposes and included among these “For the operation of an electric element used for heating of water which can be drawn off at more than one tap or like outlet which element is not so wired as to operate continuously”. It was argued successfully that the words “which element is not so wired as to operate continuously” were so uncertain as to render the advertisement invalid. The court took into account the persons who would have to comply with the advertisement, namely, ordinary householders. Additionally it was clear from evidence given to the court that there was a marked lack of confidence among witnesses as to what precisely the words were intended to mean. The court referred to the King Gee case and based its judgment squarely on the approach there set out. In the view of the court, the language used in the advertisement was not such as would sufficiently describe the course of conduct that a consumer of electricity was required to pursue. On the basis of this finding the advertisement was held to be invalid.

Prescription of areas and places. The courts have shown a readiness to hold regulations invalid that impose obligations upon persons by reference to a specified area where the area is not described in terms that are certain. The best example of this approach is to be found in the case of Hitchener v Ham [1961] VR 97. The court was concerned with by-laws that prohibited the driving of a motor boat at a speed in excess of five miles per hour within 400 yards of low-water mark of the foreshore. The area of water to which this regulation related was the port of Port Phillip which had itself been defined as consisting “of all inlets, rivers, bays, harbours, and navigable waters not included in the ports of Melbourne and Geelong respectively north of and within that portion of the circumference of a circle described seawards of the
entrance between Points Lonsdale and Nepean with a radius of three (3) nautical miles from the Point Lonsdale Lighthouse as centre". Sholl J set out to determine the area so defined with the aid, apparently, of a map and produced four possible meanings as to the area comprised within the definition. Having reached this conclusion it was not surprising that he should have ruled that the definition was invalid for uncertainty. The definition was in fact contained in a proclamation but, following Foster v Aloni [1951] VLR 481, he considered that the general rules as to certainty were applicable to subordinate instruments of this kind as well as to delegated legislation in the narrower sense of that term. A similar finding that a regulation was invalid because of a failure to specify with sufficient certainty the area to which it related is Ingwersen v Borough of Ringwood [1926] VLR 551. In that case prohibitions on building on certain areas were set out in council by-laws and one of the areas was described as "land abutting on Station Street, adjoining Ringwood Station". This description of the land was held to be too vague and for that reason the part of the by-law in which it appeared was held to be invalid. See also Velachoutakos v City of Port Melbourne [1972] VR 720; Stewart v City of Essendon [1924] VLR 219; and Corless v City of Richmond [1924] VLR 408.

The case of In re A By-law made by the District Council of Prospect; Ex parte Hill [1926] SASR 326 illustrates a very sensible approach to the interpretation of an ambiguous provision in a by-law that related to a designated area. The by-law concerned was capable of two meanings, one of which clearly stated the area concerned and the other of which did not. The court accepted the certain meaning as being that which should be placed upon the by-law. The by-law in question prohibited motor omnibuses from taking up or setting down passengers "within 30 feet of any recognised stopping place for tramcars". It was argued that the stopping place for a tramcar (an undefined expression) could mean either the spot marked by a pole which indicated that tramcars would stop there or the whole area usually covered by the stationary tramcar. Murray CJ, delivering the judgment of the Full Court, stated that if the latter were the correct interpretation he would have had some doubt whether the by-law did state with certainty the area concerned. However, he indicated that as thirty feet could be measured with accuracy from the pole which designated the stopping place, this should be the interpretation placed on the by-law and its validity upheld.

Food standards. Cases which have been concerned with an attack on regulations prescribing food standards illustrate very clearly the distinction posited by Dixon J in the King Gee case between uncertainty as to the meaning of an expression and uncertainty in the operation of a regulation once meaning has been given to it. In Ex parte Ryan; Re Bowry [1957] SR (NSW) 438 the court was concerned with the conviction of the applicant under the Pure Food Act for selling adulterated liquor. The adulteration alleged, and found by the court to have been proved, consisted of a deficiency in or departure from the prescribed standard of alcohol content in a partly used bottle of rum purchased by the informant at the defendant's hotel. By virtue of the Act, an article of food or liquor was taken to be adulterated when it did not comply with the standard prescribed by regulation. The relevant regulation provided that "standards of strength for brandy, whisky, rum,
and gin, shall not be less than 35 degrees underproof’. There was no attempt in the regulations to define the expression “underproof” nor the expressions “proof spirit” and “overproof”. It was argued for the applicant that these expressions had no generally accepted or technical meaning and therefore the regulation did not prescribe a standard with the required degree of certainty. The Full Court engaged in an exercise which took them through old English legislation, Commonwealth legislation and technical reference books. The court concluded that “proof spirit” and the related phrases “underproof” and “overproof” had, by the date on which the regulations came into operation, acquired an identifiable meaning and therefore the regulation could not be said to be uncertain. In City Milk Supply Ltd v Rawlinson [1918] NZLR 679 a similar approach was adopted in regard to a requirement that milk be “clean”. It was argued by the defendant that this was a term without any fixed meaning but the court was satisfied that evidence of experts would identify an accepted meaning of the word “clean” in regard to milk. In the particular case the defendant’s milk did not comply with this standard and therefore he could properly be convicted of an offence against the regulations. In both these cases it can be seen that meaning could be given at what at first sight appeared to be an uncertain expression in the regulation.

These decisions should be contrasted with that in Brudenell v Nestle Co (Aust) Ltd [1971] VR 225. A regulation under the Health Act required among other things that instant coffee contain “not more than three-tenths of one part per centum of residue insoluble in boiling water”. In defence to a charge of non-compliance with this regulation, the defendant led evidence, which was not challenged, that, of a given amount of instant coffee, the residue which is insoluble in boiling water depends on the proportions of the coffee and the boiling water used and that, with greater quantities of boiling water, the percentage of a given amount of coffee which will be insoluble residue will be smaller than with smaller quantities of boiling water. The evidence showed that to make an accurate analysis of the degree of insolubility, it must be known how much coffee must be added to how much boiling water. In the light of this evidence, it was not surprising that Menhenitt J found the regulation concerned to be invalid as uncertain. It would seem that the regulation fell squarely within the King Gee test in that the result obtained by a person following the directions of the regulation must vary — no two persons following the regulation in good faith would of necessity come to the same result.

Trades and industries. In two cases an attempt was made to argue that an industry had been described with such inexactitude as to render the regulation void. In neither case was the argument successful. In Gill v City of Prahran [1926] VLR 410 Dixon A-J, in language that anticipates the King Gee case, held that an exception from a by-law of “business of a class usually carried on in a shop” was not so uncertain as to render the by-law void. In the later case of Walpole v Bywool Pty Ltd [1963] VR 157 O’Bryan J followed Gill v City of Prahran in upholding the validity of a proclamation made under a power in the Health Act to define offensive trades which included in a list of such trades “any of the trades usually carried on or in connection with wool dagging”.

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Subjective standards. In a number of cases an attempt has been made to argue that words used in delegated legislation are uncertain in that they prescribe standards which are so subjective as not to impose any ascertainable obligation on persons, thereby rendering the regulation invalid. Requirements that are couched in terms such as decorous, desirable, etc, do cause concern to persons having to comply with them. But, in regard to such requirements, the courts have taken a similar line to that pursued when dealing with unreasonableness (see [460-462]) and have used as their criterion the test of what the reasonable man would think was the conduct to which the regulation was referring. A too ready reliance on this approach must be guarded against as persons are entitled to know with some degree of certainty the way in which they can order their lives. However, there are areas in which it may be necessary to impose controls and in which the criterion of control cannot be other than a generally accepted community standard. As was said by Shearman J in United Billposting Co v Somerset County Council (1926) 95 LJKB at 901 in relation to a by-law that prohibited the display of advertisements that would “disfigure the natural beauty of the landscape” and which was said to be uncertain “... the only complaint of the appellants really is that the county council have not attempted to define the undefinable”. Lord Hewart CJ in the same case (at 900) pointed out that the degree of certainty had to be related to the subject matter of the regulation. The by-law here dealt with a “necessarily somewhat ambiguous matter”. In Country Roads Board v Neale Ads Pty Ltd (1930) 43 CLR 126 this approach was apparently accepted by counsel as a by-law which prohibited the erection of hoardings that would “disfigure the natural beauty of a landscape” was not attacked on the ground of uncertainty. Nor was any mention made in the judgment of that being a basis for objection to the by-law.

The approach suggested by Lord Hewart above is clearly reflected in the decision of Merrell v Roberts (1909) 26 WN (NSW) 73 where a regulation which prohibited driving “at such a rate of speed ... or in such a manner as to ... frighten or injure any ... animal” was held not uncertain as the regulation had to be read sensibly and not in such a way as to allow it to apply to speed that would frighten any animal at all. Likewise in Ireland v Wilson [1936] 3 All ER 358 a by-law which provided “Every driver of a motor hackney carriage shall when working or plying for hire ... conduct himself in a proper civil and decorous manner at all times” was held valid. What might be decorous could be judged by the circumstances of the particular case having regard to the ordinary requirements of the community and therefore the use of uncivil language by a taxi driver constituted an infringement of the by-law.

On this issue, mention should also be made of the Privy Council decision in Stephen v Naylor (1937) 37 SR (NSW) 127 which reversed the decision of the New South Wales Full Court and held valid a by-law of the Randwick Race Course that prohibited the admission of a person to the race course “who in the opinion of the Committee is not a desirable person”. The Full Court had taken the view that there was no indication that the desirability of the person had to be related to matters pertaining to racing. A person could be refused admission on the grounds that he was not desirable for personal or any other reason which the committee chose to take into account. The Privy Council did not consider that this was the appropriate construction to place on the regulation. It considered that the regulation was concerned with persons who...
“in popular language are sometimes known as ‘race course undesirables’” (at 140) and the regulation should not be considered invalid solely because under some conceivable circumstances its meaning could be strained and used to cover a case that it ought not to be used to cover. Here again it can be seen that the reasonable man is being used as the guideline. A person whom the reasonable man might regard as undesirable for admission to the racecourse is the standard against which the regulation is to be judged. In the Privy Council’s view, this person was identifiable and it was not to be assumed that the regulation would be used to deal with other situations than those for which it would be employed by the reasonable man.

Slightly greater difficulty is caused in cases where a physical standard of a particular substance is laid down and the words used have a somewhat subjective element about them. Two cases illustrate this problem. Both were concerned with regulations prohibiting the emission of smoke from chimneys. In *Wing v The New Brunswick Brick and Pottery Co Pty Ltd* [1958] VR 489 the court was concerned with a regulation under the *Health Act* that prohibited the emission from chimneys and funnels of “dense or opaque or black smoke”. It was argued that the regulation did not impose sufficiently certain standards and was therefore invalid. This argument was rejected by Gavan Duffy J. He considered that the words “black” and “opaque” had a clear dictionary definition and, when applied to smoke, the qualities as so defined were discernible by the eye. In relation to the word “dense” he thought it synonymous with the word “thick” and considered that a reasonable man would be able to determine whether smoke could be regarded as “thick”. A contrary, but not concluded, view on similar legislation was expressed by Hardie J in *Warringah Shire Council v Warringah Brick & Pipe Works Pty Ltd* (1962) 79 WN (NSW) 683 at 684. The prohibition in that case referred specifically to “thick” smoke and his Honour queried its validity “... because of the omission to provide any yardstick or measuring rod for use in determining when smoke becomes or ceases to be thick smoke”. *Wing’s* case was not referred to in the judgment. Short of providing for some form of technical standard and an appropriate testing device, Gavan Duffy J’s approach is probably the only realistic one in this area. A reasonable man can, it seems, express a view whether smoke can be regarded as thick and in the light of the approach adopted in the cases referred to previously, it seems more likely that *Wing’s* case will be followed if the issue should arise again.

The one case in which a court clearly ruled a by-law invalid where it used a general word in describing a material is *Riley v City of Oakleigh* [1939] VLR 384. In that case, a by-law prohibited the quarrying of “rock, stone, gravel, clay or other material of a hard or solid nature”. O’Bryan A-J at 392, without any real discussion, concluded that the word “hard” in the context in which it appeared was uncertain. On the other hand, he considered that the words “solid nature” were certain. In regard to the latter he said “The attribute of solidity ... is postulated at the time when the material is in the mass, i.e., prior to the quarrying operations”. Although the judgment is somewhat unclear, it would seem that he did not think that such a reading was permissible in regard to the word “hard”. It therefore failed to impose a sufficiently certain standard and was invalid. He did consider, however, that it was possible to sever the word from the rest of the by-law. The decision is
somewhat unsatisfactory in that the Judge does not spell out what was the nature of his objection to the word "hard". It could well be argued that, in the context in which the word "hard" appeared, it was intended to cover material that was neither soft, eg, silt or slush, nor compacted in solid form. It would thus extend to sand or soil.

Finally, mention should be made of *Nash v Finlay* (1901) 85 LT 682 if for no other reason than to distinguish it from the foregoing cases. That case concerned a by-law which provided "No person shall wilfully annoy passengers in the street". The by-law was held bad as being uncertain but, as is pointed out in *Ireland v Wilson* (see [488]), the decision would seem to have been based on the fact that other by-laws had spelt out specific nuisances. It was therefore difficult for the court to determine what this by-law covered that did not fall within the ambit of the other by-laws. It is suggested that *Nash v Finlay* should not be considered good authority for the suggestion that the words used in the by-law must, in all cases, be regarded as invalid.

**Price fixing cases.** The period during which courts in Australia had most frequently to consider arguments that delegated legislation was invalid for uncertainty was during World War II when the Commonwealth government imposed price controls on many commodities. The difficulties encountered by the pricing authorities in accurately specifying a price for goods was clearly demonstrated when a number of its orders were held invalid because they did not fix a price with such certainty as to constitute a valid exercise of the power. The first case decided during this period, and the one which set the pattern for future litigation, was *Vardon v The Commonwealth* (1943) 67 CLR 434. The case concerned an exercise of power vested in the Prices Commissioner under the *National Security (Prices) Regulations* to fix the maximum price for goods. An order was made fixing the price that the applicant, a tailor, could charge for his goods as "the cost of [the] goods or services plus 20% thereof". The High Court held that the provision was too vague and did not fix a price. The word "cost" had to indicate whether it included materials, labour, overhead charges, etc. Since this was not done, no price had been fixed. A person was not to be expected to guess what elements should be taken into account in determining the price that he should place on his goods. He was entitled to know precisely how he was to calculate the price that he was to charge. The case can be seen as an early indication of the approach which was finally stated in the *King Gee* case. As different persons could reach a different answer as to the price depending upon the factors that they took into account, the order was invalid.

The same reasoning was applied to rule invalid orders that the price of liquor should be "the cost plus 20% thereof" (*Ex parte Zietsch; Re Craig* (1944) 44 SR (NSW) 360); that the price of declared goods should be fixed by taking into account "all expenses directly incurred in the manufacture of those goods" (*Trief v Charles Parsons & Co Pty Ltd* (1946) 46 SR (NSW) 265); that dwelling houses should be let "at a reasonable rental" (*Ex parte Thomson; Re Clarke* (1945) 45 SR (NSW) 193); and that the price of certain articles was to be determined by having regard to the cost of the shortest length of material from which ten of the relevant articles could be cut (*Canns Pty Ltd v The Commonwealth* (1946) 71 CLR 210). The *King Gee* case itself
also reflected the approach espoused in *Vardon's* case. The prices order in that case set out considerable detail as to the methods of determining the cost of men’s, youth’s and boy’s outer-wear but the evidence showed that the ascertainment of a number of the items that had to be taken into account (in particular “indirect labour”) were “necessarily matters of judgment and experience and afford the subject no certain or any rule for ascertaining or allocating them” (per Starke J at 193). In these circumstances the court had no hesitation in holding the order invalid as not meeting the test that was propounded by Dixon J in that case.

There were, however, cases in which the courts retreated somewhat from this strict approach to certainty and turned to the reasonable man test apparent in the cases set out earlier in this chapter. For example, in *Bendixen v Coleman, Scott, and Croft* (1943) 68 CLR 401 a pricing order in exactly the same terms as that considered in *Vardon's* case was challenged in its operation to the fixing of the price of a bottle of whisky. On this occasion the High Court upheld the validity of the order. It distinguished *Vardon’s* case on the basis that many factors could be taken into account in determining the cost of making clothes but the “cost” of a bottle of whisky to a hotelier was ascertainable. This assertion loses some of its force when it is observed that Latham CJ thought that the cost was the wholesale price of the bottle while Rich, McTiernan and Williams JJ thought that the cost of a bottle included the cost of insurance, freight, etc. Because of this uncertainty Starke J dissented and followed *Vardon’s* case. To the extent that it could be said that the judgment of the three majority Judges amounted to a definition of the cost of a bottle, the case can be said to have been properly decided. It is no different from any other case in which Judges disagree as to the meaning of a statutory expression but the majority opinion is assumed to be that which the expression must bear. It was a different situation in *Vardon* where the judges did not consider themselves able to specify with certainty what factors were to be taken into account when determining the cost of tailored clothing. The court in *Bendixen v Coleman* also rejected an argument that the use of the expression “bottle” of whisky was uncertain. The court held that the word “bottle” was to be given its ordinary dictionary meaning and while bottles might vary in size the question of whether or not the container was a bottle was an ascertainable fact. With respect, this approach seems to be correct. The *Bendixen* case was followed by the NSW Full Court in *Ex parte McMillan; Re Craig* (1944) 45 SR (NSW) 229 in relation to a similar order fixing the price of bottled draft beer.

Another type of price fixing order containing apparently vague expressions that was upheld by the court was one in which the price of certain commodities was to be determined having regard to the price charged in previous years for “substantially identical goods” and for goods that were sold on “terms and conditions substantially identical” to the goods to which the pricing order related. This order was held valid in *Fraser Henleins Pty Ltd v Cody* (1945) 70 CLR 100 on the basis that it was merely a question of proof as to what were substantially identical goods and substantially identical terms and conditions. The approach adopted was the same as that used by the court in *Bendixen’s* case in regard to the expression “bottle”. The order in this case can be distinguished from that considered in *Vardon’s* case. There reasonable
persons could come to legitimate but different decisions as to the matters to be taken into account for the purpose of ascertaining the price of the goods. In the *Fraser Henleins* case, a "reasonable man" could determine whether goods were substantially identical with other goods. A like conclusion to that of the High Court had been reached in the preceding year by the New South Wales Full Court in *Ex parte O'Sullivan; Re Craig* (1944) 44 SR (NSW) 291. The *Fraser Henleins* case also considered an argument that an order which referred to the seller having "customarily allowed" a difference in price or rate was uncertain and therefore void. The court rejected this argument, saying that what was customary could be ascertained as a matter of proof.

Finally, in relation to these types of cases, in *Ex parte Ryan; Re Bellemore* (1946) 46 SR (NSW) 152 the New South Wales Full Court held invalid an order fixing the retail price of bananas. In a delightfully ironic judgment Jordan CJ analysed the plight of the unfortunate banana retailer who had to determine the price of his bananas by having regard to whether or not the wholesaler from whom he purchased the bananas had brought them either as ripe or unripe bananas and on or off the stalk and also had to take into account the price that was paid by the wholesaler. As all these facts were outside the knowledge of the retailer, the court considered that no certain test was laid down to which the retailer could have regard in determining the price that he should charge for the bananas. In addition, and along the same line as *Vardon* 's case, the court ruled that a provision in the order which allowed for the "cost of transport actually incurred in and properly attributable to conveying [the] bananas from the place of delivery to the retail seller to that retail seller's premises" was uncertain in that first, it did not indicate whether the retailer was allowed to include the cost if he transported the bananas himself and, secondly, it did not indicate a method of attributing the cost of transport if, as was very likely the case in the circumstances of a retail banana seller, a mixed load of goods was delivered to him.

Other cases in which uncertainty argued. There are a number of other types of cases that are sometimes said to involve questions of uncertainty. These cases relate to regulations which include a reservation of a discretion and regulations which incorporate other documents by reference. These types of cases are not true uncertainty cases in that the text of the regulations is not uncertain. They are dealt with in chs 17 and 15, respectively.

Uncertainty in New Zealand

Test of uncertainty. The courts in New Zealand, following United Kingdom precedents, have required subordinate legislation, at least when in the form of by-laws, to satisfy a criterion of certainty additional to that of being within power. It seems probable that certainty is required for the validity of all delegated legislation but the cases in which the issue has arisen have been concerned with by-laws. However, unlike review for unreasoneableness (see [463]), the basis for requiring certainty in by-laws is applicable also to regulations made by the central government. It would seem therefore that the expressions of the law in regard to by-laws would apply to all forms of delegated legislation. Certainty has been defined as requiring that the legislation contain adequate information as to the duties of those who are to obey
it so that they may arrange their affairs in such a way as to ensure that they do not offend the provisions of the by-law: *Masterton Co-operative Dairy Co Ltd v Wairarapa Milk Board* [1964] NZLR at 778. The adoption by New Zealand courts of the requirement that by-laws satisfy this standard of certainty was influenced by the decision in *R v Broad* [1915] AC 1110. There the Privy Council, on appeal from New Zealand, held that a railway by-law relating to level crossings was insufficiently certain in the direction that it gave to the public and was therefore invalid.

[499] New Zealand and Australian approaches compared. While, in many cases, Australian and New Zealand courts would probably reach the same conclusion in regard to the validity of a particular piece of delegated legislation, the attitude of the New Zealand courts in treating uncertainty as a separate requirement from *ultra vires* has on occasion led to by-laws being held invalid in circumstances in which the Australian courts would probably not have reached that conclusion. An example of this is provided by the decision in *Martin v Smith* [1933] NZLR 636. A by-law prohibited persons from riding horses or driving vehicles along or across “any prepared or cultivated grass plot situated upon any street or footpath”. The by-law was held invalid because there was no definition of “prepared or cultivated grass plot”. It seems probable that an Australian court would have endeavoured to place a meaning on the expression used in the by-law and would have upheld its validity. Similarly, in *Berry v Palmerston North Metropolitan Milk Board* [1959] NZLR 240, a by-law of the Board which required a milk vendor who employed persons to assist him in delivering milk to “personally carry out supervise and effectively control” the delivery of milk was held invalid on the ground that it provided no guidance to a vendor as to what control he was to exercise over his employees. Again it seems doubtful if an Australian court would have reached this conclusion. It would more likely have proceeded on the basis that each case arising under the by-law would have to be viewed separately and consideration given to whether or not there had been a breach of the terms of the regulation. But this is not to say that the same result would not be achieved no matter which line of reasoning was adopted. The *Masterton Dairy* case referred to at [498] provides an example of such a situation. A by-law there required a company which held a milk licence to apply for a new licence if, because of the sale of shares in the company, a change had occurred in “the effective management or control” of the business. The New Zealand Court of Appeal concluded that this by-law was void for uncertainty in that it did not give any indication as to the manner in which one determined whether the sale of shares had led to a change in the management or control of the company. An Australian court would probably have reached a like conclusion because, following the reasoning in the *King Gee* case, once the by-law had been interpreted, its application would vary according to the view taken of the effect of the change in shareholding.

[500] New Zealand approach preferred. When considering what approach should be adopted in regard to uncertainty as a ground of review, the case of *Otekiake Drainage Board v McKay* [1919] NZLR 669 is worth noting. A by-law of the Drainage Board required “every owner or occupier of land on which any water-race is situated” to maintain and repair the race. The by-law was held to be uncertain and therefore invalid because it did not indicate the
person upon whom the obligation fell. The court conceded that there were authorities relating to the expression "owner or occupier" but distinguished them as being concerned with the interpretation of Acts and not subordinate legislation. Subordinate legislation, it was said, had to be certain in its effect and any ambiguity led to its invalidity. As mere ambiguity is no basis for invalidity of Acts (see [472]), a higher standard of draftsmanship is thus thrust upon the subordinate legislation-making authority than is required of the parliament. The question that arises is whether this should be so. When the issue is considered in juxtaposition to the approach adopted in regard to Acts, it seems curious that a different standard should be expected of the lower form of legislation. However, this comparison clouds what is essentially an issue of policy.

[501] The notion of supremacy of the parliament has constrained courts not to question the content or wisdom of Acts of parliament: the courts' role is simply to place a meaning on the parliament's directions. If the discretion is not couched in clear language, theoretically the parliament is answerable to the people. But it is not open for a court to rule invalid the words of the legislature simply because they are not clear. Where a parliament's powers are limited by a written constitution, the courts are empowered to rule on whether the legislation is within power. But this is the limit of the courts' power — the general theory set out above still prevents it from holding an Act invalid because of uncertainty. This general theory does not, however, apply to the executive arm of government. The judiciary is not inferior to the executive and has always asserted a right to review its activity, but on questions of law not on the merits. For this reason, review of legislation made by the executive on the ground of reasonableness is of doubtful validity as this involves the court in reviewing the merits of the legislation. In regard to review for uncertainty, however, it is not a case of the policy of the legislation being called in question but merely a requirement that the executive make clear the obligation that it wishes to impose. One can argue that it is appropriate for the courts to insist upon a standard of intelligibility in delegated legislation and, if it is not attained, declare the delegated legislation invalid. While perhaps not amounting to review on an issue of law, it is certainly not a case of attempting to review the merits of the executive's action. If analogy is to be sought, it is most proximate to the natural justice requirement that a person is entitled to full and timely notice of the action that is being taken to affect his rights. It is suggested, therefore, that Australian courts look afresh at the question of uncertainty as a ground for reviewing delegated legislation, paying heed to New Zealand authorities.
Sub-delegation of delegated legislative power

Chapter 25

Sub-delegation of delegated legislative power

Introduction. A proposition that is frequently cited is that a person to whom power to do an act has been delegated is not in turn permitted to delegate the performance of that act. The maxim delegatus non potest delegare encapsulates this notion. Whether it is applicable to legislation in general and to delegated legislation in particular is the subject of this chapter. The issue has been before the courts on a number of occasions but more frequently in New Zealand than in Australia for the reasons discussed at [527]. It is convenient to discuss the cases under two broad headings: first, whether a parliament can invest another body with legislative powers; secondly, whether a body that has power to make legislation as a delegate of the parliament can sub-delegate that power.

Delegation of legislation-making power by a legislature

Delegation by State, etc, parliaments. In a series of cases commencing in 1878, the Privy Council took a generous view of the right of legislative bodies to delegate their legislative function. In R v Burah (1878) 3 AC 889 it was held that the legislature of the Indian Territories had plenary legislative powers and could therefore delegate law-making functions to another body. A similar view was taken in regard to the colony of New South Wales in Powell v Apollo Candle Co (1885) 10 AC 282; to Canada in Hodge v The Queen (1883) 9 App Cas 117; and to a territory forming part of a federated British dominion, but lacking the status of a province or state, in Riel v The Queen (1885) 10 App Cas 675. More recent authority has reaffirmed these decisions: see Cobb & Co Ltd v Kropp [1967] 1 AC 141 (Queensland State parliament); Chenard and Co v Joachim Arissol [1949] AC 127 (part-only elected legislature of the Seychelles). The primary point of the cases is that they have equated the various legislatures mentioned with the Imperial parliament for the purpose of interpreting the width of their legislative authority. In particular, where the legislature has been given power to legislate for “peace, order and good government”, the widest discretion of the enactment has been held to follow: cf Nelson v Braisby (No. 2) [1934] NZLR 559. Since there is no doubt that the Imperial parliament has the power to delegate its legislation-making authority, the equating of other legislatures with the Imperial parliament means that they too can delegate their powers. This approach would clearly apply in regard to the legislatures of the Australian States and New Zealand and the authorities cited indicate that no point can be taken that those legislatures cannot delegate legislation-making powers.

Delegation by Commonwealth parliament. The position with regard to the Commonwealth parliament in Australia is complicated by the fact that the Australian Constitution appears to adopt a strict separation of powers. Section 1 of the Constitution expressly vests the legislative power of the Commonwealth in the parliament; s 61 vests the executive power of the Common-
wealth in the Queen, it being exercisable by the Governor-General as the Queen's representative; and s 71 vests the judicial power of the Commonwealth in the High Court of Australia and in such other federal courts as the parliament creates and in such other courts as it invests with federal jurisdiction. However, from the outset, the federal parliament did not feel that this apparent separation of powers prevented it from delegating legislative power to the executive. The point was tested from time to time in various cases, see for example, Baxter v Ah Way (1909) 8 CLR 626, Roche v Kronheimer (1921) 29 CLR 329, but the High Court had little difficulty in rejecting suggestions that the action taken by the legislature was invalid. The question was discussed most fully in Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan (1931) 46 CLR 73, primarily by Dixon J and Evatt J. The court unanimously upheld the validity of sections of the Transport Workers Act which had delegated to the Governor-General a wide power to make regulations with respect to the employment of transport workers in interstate and foreign trade which laid down no guiding principles. The remarks of Dixon J and Evatt J are technically obiter but nonetheless must be noted.

[505] Both judges suggested that, in certain circumstances, a delegation of legislative power by the Commonwealth might be unconstitutional. The main point asserted by Dixon J appears at 101:

[The power to delegate] does not mean that a law confiding authority to the Executive will be valid, however extensive or vague the subject matter may be, if it does not fall outside the boundaries of Federal power. There may be such a width or such an uncertainty of the subject matter to be handed over that the enactment attempting it is not a law with respect to any particular head or heads of legislative power.

A similar point was made by Evatt J at 120. Both judges adopted what might be termed the abdication approach — that the power given the federal parliament does not enable it to create and arm with general legislative authority a new legislative power not created or authorized by the Constitution itself: see Dixon J at 96, Evatt J at 121. Evatt J also asserted that the delegation must be to a body, such as the executive, which is linked with parliament and the legislation produced by that body must be subject to parliamentary over-sight. This last requirement would seem to be satisfied in regard to bodies such as the Governor-General or a minister whom the parliament could call to account either directly or indirectly for action taken. But the question arises whether it would be possible to invest with delegated legislative authority a body over which the parliament could exercise no control other than by repealing the Act empowering the body to exercise delegated legislative functions. The issue seems not to have arisen as the Commonwealth invariably vests delegated legislative power in either the Governor-General or a minister or in a body which must seek the approval of one or the other of those authorities before its legislation can become law. The views of Evatt J have therefore not been put to the test. In cases subsequent to Meakes v Dignan, the attitude of the courts seems to have been to accept that the parliament can authorize the making of subordinate legislation under any of the heads of its legislative power in the widest and most general terms: see Fullagar J in Australian Communist Party v The Commonwealth (1951) 83
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CLR at 257; Menzies J in *Esmonds Motors Pty Ltd v The Commonwealth* (1970) 120 CLR at 476. (Compare the views expressed, perhaps somewhat provocatively, by Professor Sawyer in "The Separation of Powers in Australian Federalism" (1961) 35 ALJ 177. Professor Sawyer suggests that the decision of the Privy Council in the *Boilermakers' case* [1957] AC 288 calls in question the reasoning of the High Court in *Meakes v Dignan*. However, as was indeed pointed out by Sir Kenneth Bailey at 35 ALJ 195, the Privy Council at 320-321 specifically indicated that they were not throwing on the line of decisions which culminated in *Meakes v Dignan*.)

**[506] Authorization of sub-delegation by delegate.** In the *Esmonds Motors* case above, the point was raised whether a person to whom power to exercise delegated legislative power was granted could also be authorized to subdelegate that power further. The case concerned s 12 of the *Seat of Government (Administration) Act* 1910 which gave the Governor-General power to make ordinances for the peace, order and good government of the Australian Capital Territory and, in addition, contemplated that such ordinances could empower the making of regulations. Any such regulations were to be laid before the parliament and were subject to disallowance. Menzies J, with whom Walsh J agreed on this point, held that the section was valid. At 477 his Honour said: "I have found no reason for concluding that Parliament may not, in authorizing subordinate legislation, confer power to authorize the making of regulations or by-laws not inconsistent with the legislation which Parliament has directly authorized . . . if the regulations or by-laws so made are themselves subject to control by Parliament to its control . . .". His Honour cited the judgments of Dixon J and Evatt J in *Meakes v Dignan*. He also pointed out that legislation of this kind had been used without challenge during war time. Menzies J and Walsh J were in the minority on the general issue before the court but the point as to the validity of the section was not a matter that it was necessary for the majority judges to consider. However, Kitto J at 472, while stating that he was not expressing a concluded view, indicated that he doubted whether it was possible in a section delegating legislative power to provide for a further delegation of such power. It is suggested that the view of Menzies J and Walsh J is to be preferred. The effect of a delegation section in the form appearing in the *Seat of Government (Administration) Act* is to do no more than to indicate that a second body will also be entitled to exercise legislative power. The parliament is approving the right of sub-delegation: it is in effect designating two bodies that can exercise a legislative function as delegates of the parliament. (See also *The Welsbach Light Co of Australasia Ltd v Commonwealth of Australia* (1916) 22 CLR 268). It is to be noted that the provision discussed in the *Esmonds Motors* case stated that regulations made under ordinances were to be tabled in the parliament. The requirement urged by Evatt J that the parliament should maintain a supervisory role over the exercise of the delegated legislative power was thus satisfied.

**Sub-delegation of delegated legislation-making power**

**Delegatus non potest delegare** applicable to delegated legislation. The broad principle that a person cannot delegate legislative power that has been delegated to him has been accepted with only one or two minor
expressions of doubt. The sole judicial reservation seems to have been that expressed by Rinfret J in *Reference Re Regulations (Chemicals) under War Measures Act* [1943] 1 DLR 248. In Australia there seems to have been only one case in which the principle has been applied to invalidate delegated legislation. In *Sambell v Cook* [1962] VR at 450, Smith J said of an interim development order made under the *Town and Country Planning Act* that it was "a power of a legislative character". Accordingly, the discretion to make the order "cannot be delegated to any person whether a member or officer of the [Town and Country Planning Board] or a stranger." Similar conclusions have been expressed with greater frequency in New Zealand (The application of the general principle is discussed by Fox and Davies "Sub-Delegated Legislation" (1955) 28 ALJ 486.)

**Exclusion of principle that sub-delegation not permitted.** There are two circumstances in which the rule against sub-delegation is directly excluded. The first is the more obvious one of where the statute empowering the making of delegated legislation also enables that legislation-making power to be sub-delegated. See, for example, the decision in *Esmonds Motors Pty Ltd v The Commonwealth*, [505]. In *Hewett v Fielder* [1951] NZLR 755 the power of a Receiver to delegate to "any person . . . any of the powers conferred by this regulation" was held to empower the delegation of the whole of his powers in relation to a particular locality. The second circumstance in which sub-delegation may be permitted can be spelled out of the cases cited at [503] in relation to the powers of colonial, etc, legislatures. The power given those legislatures was a power as wide as that of the Imperial government within the constitutional jurisdiction of the bodies concerned. It was, in short, a plenary power. The courts have adopted the same principle in regard to the power to make regulations. If the delegation of power can be described as plenary, then sub-delegation of that power is permissible. The best example of the operation of this principle is provided by the case of *Nelson v Braisby (No 2)* [1934] NZLR 559. Power was there granted to the Governor-General to make regulations for the peace, order and good government of Samoa. A regulation purported to delegate to the Administrator of Samoa further legislation-making powers. The New Zealand Full Court, following *R v Burah* and *The Queen v Hodge* (see [503]), ruled that the power given to the Governor-General was plenary and accordingly a sub-delegation of legislative power to the Administrator was valid. See also *R v Lampe, Ex parte Maddalozzo* (1963) 5 FLR 160 in relation to the power of the Northern Territory Legislative Council to authorize the Administrator of the Territory to make regulations under ordinances. In the *Esmonds Motors* case the High Court indicated that this approach might be applicable to the ordinance making power of the Governor-General in the Australian Capital Territory but the question did not have to be determined.

**Approach of courts to sub-delegation.** Beyond the point referred to in the last paragraph, the issue becomes more complicated. A number of writers have suggested that the question is one of construction only: the empowering Act must be interpreted to see whether or not the legislature intended that the delegate exercise the power himself or whether he was to be permitted to sub-delegate that power. (See, for example, Willis, "*Delegatus non potest delegare*" (1943) 21 Can Bar Rev 257; Northey, "Sub-Delegated Legislation
and *delegatus non potest delegare*" (1953) 6 Res Judicatae 294; Thorp, "The Key to the Application of the maxim *delegatus non potest delegare*" (1972) 2 Auckland University LR 851.) While undoubtedly this observation is correct and must be the first task that is undertaken by a person who is determining whether or not sub-delegation is permissible, the cases do give a little more specific guidance than this to the approach that a court will adopt in interpreting the power to delegate. It is proposed therefore to look at the cases in an endeavour to isolate the likely attitudes of a court in regard to particular sub-delegations.

It should be interpolated that the application of the principle denying the right to sub-delegate legislative power has seldom been discussed in Australian cases apart from those concerned with the constitutional issue surrounding the power of the federal parliament. The reason for this is returned to at [527] but, at this point, it is worth mentioning that the only case in which a full discussion of the principle has occurred is *R v Lampe; Ex parte Maddalozzo* (1963) 5 FLR 160, a decision of the Northern Territory Supreme Court. This decision is returned to at [521]. The New Zealand courts, on the other hand, have been quick to apply the prohibition against sub-delegation and the issue has arisen there in a number of cases. It is primarily from these cases that such guidance as is available can be obtained.

**Sub-delegation of whole power invalid.** Where the delegate abdicates his responsibility and sub-delegates the whole of his power to another person or body, his action will be invalid. Two cases illustrate this point. In *Geraghty v Porter* [1917] NZLR 554 power was given to the Governor to make regulations for determining and regulating the mode in which number plates were to be fixed to cars. A regulation was made by the Governor which said that the plates were to be fixed in such a manner as the registering authority (a borough council) required. The Full Court held the Governor's regulation invalid. There was no express power to delegate given to the Governor and he had effectively handed over his powers under the Act to the registering authority. The court disposed of any suggestion that the Act contemplated sub-delegation by the Governor by pointing to the fact that it was to be expected that uniform provisions should operate throughout New Zealand. In *Hawke's Bay Raw Milk Producers Co-operative Co Ltd v New Zealand Milk Board* [1961] NZLR 218 the Full Court followed *Geraghty* 's case in holding invalid a regulation made by the Governor-General under the *Milk Act*. The power given to the Governor-General was to fix the price of milk produced or sold for human consumption, that price to be fixed in accordance with recommendations made to the minister by the Milk Board. A regulation was made which provided that the minister could, after consultation with the Milk Board, fix the town milk producer price. Again it can be seen that the Governor-General passed on to another the whole of the power that had been delegated to him. The case is also of interest because it rejected an argument that s 2(2) of the *Statutes Amendment Act* 1945 which provided: "No regulation shall be deemed to be invalid on the ground that it delegates to or confers on the Governor-General or on any Minister of the Crown or on any other person or body any discretionary authority" enabled the making of the regulation in this case. The court considered that the provision could have no operation where there was a delegation of the total regulation-making power. The court also considered it to be irrelevant that the Governor-General in fact

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acted when making a regulation on the recommendation of the Milk Board to
the minister. The court pointed out that the Act still required the Governor-
General to fix the price of milk by regulation and this he had failed to do.
This abdication approach seems also to be that on which the decision in
Samwell v Cook. [507] was based. See also Attorney-General of Canada v
Brent [1956] 2 DLR (2d) 503; Patterson v The Canterbury Jockey Club
(Registered) (1901) 19 NZLR 861.

[512] Adoption, in effect, of different procedure for making delegated
legislation. This is most likely to arise in relation to a power delegated to a
local government body. The by-law making power delegated to a council has
frequently to be exercised by some formal procedure and can but rarely be
exercised simply by the passage of a resolution by the council. If, therefore, a
council in the exercise of a by-law making power, reserves to itself the power
to deal with the subject matter of the delegated legislation by resolution, it is,
in effect, sub-delegating that power to a body which may be differently con­
ituted or which may operate in a different way from that when by-laws are
being made. The position is illustrated by Staples & Co Ltd v City of
Wellington (1900) 18 NZLR 857. Power there was given to the council to
make by-laws for the prevention of fire in buildings to which the public had
access. A by-law was made by the council which provided that the council
could impose such conditions on an approval to build or alter buildings as it
thought necessary for the protection from fire of members of the public using
the building. The by-law was held to be invalid. It clothed each meeting of
the council with legislative authority and therefore constituted a sub­
degregation to the council of the power given to make by-laws. Staples' case was
followed in Collins v Wolters (1904) 24 NZLR 499. There a council had power
under the Public Works Act to make by-laws providing in respect of all or any
roads under its control that the roads should not be used by heavy traffic
during specified (winter) months. A by-law was made which designated the
roads as being such as the council might, by resolution, order. The by-law was
held to be invalid. (It is to be noted that this case was concerned with a dif­
ferent empowering Act to that considered in Bremner v Ruddenklau, [394].

[513] Reservation of discretion. The last paragraph was concerned with the
position where a delegate, in effect, made no provision in the delegated
legislation in relation to the subject matter but reserved it to be dealt with by
resolution. An associated problem is where the delegate makes legislation
dealing with the subject matter but reserves to himself a wide discretion to
alter the effect of the legislation. The validity of so acting was discussed in ch
17 in regard, first, to a power to regulate an activity and, secondly to a power
to prohibit an activity. It was pointed out there that such regulations, when
made pursuant to a power to regulate an activity are invalid. This is because
the limited ability of the courts to review the exercise of the discretion
converts the regulation, in practice, into a prohibition. It is noteworthy that
the principal case on the question, Swan Hill Corporation v Bradbury (1937)
56 CLR 746, contained no discussion of sub-delegation. A somewhat similar
provision to that in the Swan Hill case arose for consideration in New Zealand
in F E Jackson and Co Ltd v Collector of Customs [1939] NZLR 682. Power
was given the Governor-General under the Customs Act to prohibit the
importation into New Zealand of any goods. The power was exercised to
make a regulation prohibiting the importation of all goods without a licence
from the minister. Callan J interpreted the power to mean that the Governor-General could not prohibit the importation of all goods but only specified goods or classes of goods. The power was thus more akin to one allowing the regulation of importation of goods rather than their prohibition. This being so, following the reasoning in the *Swan Hill* case, his Honour concluded that the prohibition on the importation of all goods, even though it was coupled with a ministerial discretion to allow goods to be imported, was beyond the power given in the Act. (Cf the different reasoning of the majority of the High Court in relation to a like provision in *Poole v Wah Min Chan* (1947) 75 CLR 218). The judgment could have rested on that conclusion. However, his Honour went further and, following Geraghty's case, indicated that the vesting of a discretion of this kind in the minister constituted a sub-delegation by the Governor-General of his power to determine the goods which could or could not be imported. On that basis also, the regulations were invalid.

It probably matters little, in cases where a regulatory power has been used to prohibit with a discretion, whether invalidity is said to stem from the delegated legislation constituting a prohibition or from it sub-delegating the power. But the issue is different where a power to prohibit an activity has been combined with a discretion to alleviate that prohibition. As was set out at [341-354], there is some difference of opinion in the authorities as to whether delegated legislation in this form is valid: the main weight of opinion being that it is. But can it be argued, along the line pursued by Callan J in Jackson's case, that there has been a sub-delegation of the power? Whether the prohibition is applicable to a person will depend upon how the person in whom the discretion is vested exercises that discretion. The delegated legislation does not impose the prohibition: it is the discretion holder. (This argument was that posited by Higgins J in *Melbourne Corporation v Barry*, [342] and is similar to that of Evatt J in the *Swan Hill* case, [348]. Evatt J did not, however, express himself in terms of sub-delegation nor was it discussed in the other cases in which Evatt J's opinion was cited with approval.) Persuasive though the argument on sub-delegation might at first sight seem to be, it has been rejected in both Australia and New Zealand.

In *R v McLennan; Ex parte Carr* (1952) 86 CLR 46, the High Court was concerned with the validity of regulations made under a power in the *Customs Act* to prohibit the exportation of goods, the exportation of which would, in the opinion of the Governor-General, be harmful to the Commonwealth. The regulations provided that no persons should export non-ferrous metals without the approval of the Department of Supply and Development. The court rejected the argument that the regulation sub-delegated the control over the export of non-ferrous metals to the department. At 59 the court said:

The fact that the regulation prohibits exportation of the goods unless the department approves does not mean that the decision of the question whether exportation is harmful is delegated. Nor does it mean that the Governor-General must have been of the opinion that to export the goods would be harmful subject to the department not thinking otherwise. It is quite consistent with an opinion that it would always be harmful but justice or wisdom required or made it desirable to permit exceptions pursuant to an administrative discretion. It is also consistent with the view that uncontrolled exportation would be harmful but that the harmful tendencies would be sufficiently reduced or mitigated by an administrative control by a system of permits.
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It will be noted that this reasoning is similar to that of the High Court in *Country Roads Board v Neale Ads Pty Ltd*, [344] and of the New South Wales Full Court in *Ex parte Cottman; Re McKinnon*, [345]. A like conclusion was expressed by the New Zealand Court of Appeal in *Ideal Laundry Ltd v Petone Borough* [1957] NZLR 1038: see, in particular, North J at 1056. See also *Wilton v Mount Roskill Borough Council* [1964] NZLR 957 where a prohibition with a discretion was held valid, the sub-delegation point not being discussed in the judgment.

Delegation of part only of delegated power. The categories of cases discussed to this point have been concerned with situations in which the body empowered to make delegated legislation has passed on the totality of that power, either expressly or in its practical legal effect, to another body. These circumstances are less common than those in which the delegate makes some provision in pursuance of his power but leaves part of that power to be exercised by another person or body. The cases concerned with this issue have often employed a dichotomy between sub-delegation of legislative power and of administrative power. This classification of functions brings with it all the problems usually associated with such an exercise. It is nonetheless the terminology that is used in the cases and it cannot be simply dismissed — and the cases do give some indication of the circumstances that the courts will regard as administrative and those which they will regard as legislative. The point at issue is that while it may not be possible to delegate a legislative power, the delegation of an administrative function has long been regarded as valid: see, for example, *Nelson v Braisby (No 2)* [1934] NZLR 559 per Myers CJ in particular; *The Wellsbach Light Co of Australasia Ltd v Commonwealth of Australia* (1916) 22 CLR 268; *Carltona Ltd v Commissioners of Works* [1943] 2 All ER at 563. What is an administrative, as distinct from a legislative, activity is often difficult to define with precision. The courts have used different nomenclature at various times to describe what is at heart very much a value judgment.

Legislating conditionally. This expression had a vogue in the early part of this century. Its application is illustrated by the High Court decision in *The Wellsbach Light Co of Australasia Ltd v Commonwealth of Australia* (1916) 22 CLR 268. Under the *Trading with the Enemy Act* 1914 (Cth) a person was to be deemed to trade with the enemy if he took part in "any act or transaction which is prohibited by or under any proclamation made by the Governor-General". A proclamation was made specifying certain transactions with certain companies to be prohibited but defined the companies, among other means, as those which were specified by the Attorney-General to be companies to which the proclamation was to apply. The validity of the proclamation was challenged but the High Court held it not to be a sub-delegation by the Governor-General to the Attorney-General. Griffith CJ at 275 considered that the word "under" in the Act permitted the employment of the device of an Attorney-General's notice. Of more importance to the present discussion, Isaacs J at 281 and Higgins J at 284 considered that the Attorney-General was not legislating but was simply exercising a machinery function. As Higgins J put it at 284, "The Attorney-General does not legislate; Parliament legislates conditionally on the declaration of the Attorney-General". This terminology was also used in *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR at 495 and *R v Burah* (1878) 3 App Cas at 906.
While there seem to have been no recent cases which have used the terminology "legislating conditionally", the reasoning followed in the earlier cases was pursued also in *Croft v Rose* [1957] ALR 148. A regulation made under the *Motor Car Act* provided that no person should drive a motor car at a speed exceeding 30 miles an hour on any part of the highway "(a) in which there is provision for the lighting of the said part by means of street lighting; or (b) which is defined by means of a restriction sign and a de-restriction sign". It was argued that this regulation did not exercise the power of the Governor to make regulations declaring speed limits in any specified locality or on any specified road because the speed limit would not apply until some third party had designated the road by providing lighting or signs. This argument was rejected by the Victorian Full Court. The approach of the court was summarized by Hudson J at 163: "If a law is so expressed that it will be without any subject matter upon which it can operate unless and until certain acts are done or circumstances created by others, it surely cannot be said that those others are the law makers or their delegates". It is important when considering this case to note that the power was to fix speed limits for specified roads, not to specify what the roads should be, and the speed limits were to be fixed by having regard to identified criteria.

Guidelines for administrator. A number of cases have defined the legislative-administrative borderline in terms of whether the legislature has sufficiently circumscribed the way in which that discretion is to be exercised by laying down guidelines within which the administrator must act. An example of this approach is provided by the case of *Godkin v Newman* [1928] NZLR 593. The power there was to make regulations for the classification of all streets and roads in New Zealand with reference to their suitability for use by different classes of motor lorries. A regulation was made which provided that the minister might, in respect of any road, declare that such road belonged to one of a specified series of classes designated simply as first class through to fifth class. The regulation was held invalid as no guidance was provided as to how the classes were to be determined. The view was expressed that the regulation deputed to the minister the power of fixing the basis on which the classification was to be made. It was conceded that the Governor-General did not have to make the actual classification himself but he did have to determine the basis on which the classification was to be made. Compare the decision in *MacKay v Adams* [1926] NZLR 518. Under a power to make regulations in relation to motor lorries, the Governor-General by regulation fixed speed limits for lorries but included a provision that, with the approval of a local authority, the limit so fixed could be increased but not by more than fifty per cent. The regulation was held valid. The court ruled that there was not a sub-delegation of legislative power to the authority as it was only given the right to determine whether the permission authorized by the regulations should be granted or not. In effect the regulation set out two speed limits, the second of which was to be determined by the local authority within a specified range. There was not a complete passing over to the local authority of the power to fix the limits although there was a vesting of a discretion in the authority to enable it to determine a limit within certain specified bounds.

Another way of stating that an administrator can act within guidelines laid down in the delegated legislation is to say that the activity under review is
but the administration of validly made regulations. This was the approach adopted by the court in *Hookings v Director of Civil Aviation* [1957] NZLR 929. The power in that case was for the Governor-General to make regulations generally for the regulation of civil aviation and specifically for securing the safety, efficiency and regularity of air traffic, etc. A regulation was made which provided that an aircraft was not to be used for towing any other aircraft without the permission of the Director of Civil Aviation. The appellant was prosecuted for towing a glider without the permission of the Director. It was argued that the regulation was invalid on two grounds, first, that it purported to prohibit the activity and the only power was to regulate it, and secondly, that there was a sub-delegation of legislative power to the Director of Civil Aviation. Both grounds were rejected by Turner J. As far as the first was concerned, his Honour ruled, following the reasoning in *Swan Hill Corporation v Bradbury*, [309] that there was here a regulation of the activity of civil aviation because only a part of that general activity was being prohibited. In relation to the question of sub-delegation, his Honour at 937 stated "When the administration, as distinct from the formulation of regulations is entered upon, there must of course be some point at which the decisions of administrative officials come into play". He then went on to cite a passage from the judgment of Issacs J in *Melbourne Corporation v Barry* (1922) 31 CLR at 199 where Isaacs J had stated that while the council could not prohibit processions under a power to regulate that activity, it could nonetheless deal with such matters as the routes which it thought were suitable for processions, the days or hours when processions were to be held, and the steps to be taken to prevent more than one procession being held on the same day and thereby interfering with one another. These were matters that, in his Honour's view, went to the administration of the regulations and had often, of necessity, to be performed by a person other than one to whom the power to make the regulations was delegated. In the particular case, his Honour concluded (at 938) that the power given to the Director of Civil Aviation to dispense with the prohibition on towing other aircraft was a power which could be used to enable the true purpose of the regulations to be more efficiently carried into effect. The power to be exercised by the Director was the "mere administration of regulations validly made" and was not a legislative power (at 935).

[521] As mentioned previously, the only Australian case which has discussed sub-delegation by reference to the legislative-administrative dichotomy is *R v Lampe; Ex parte Maddalozzo* (1963) 5 FLR 160. In that case Bridge J was concerned with an ordinance passed by the Legislative Council of the Northern Territory which empowered the Administrator of the Northern Territory to make regulations. Regulations made by the Administrator in turn empowered a building board which had been set up under the ordinance to make certain determinations relating to building in the Northern Territory. It was argued first, that the Legislative Council could not empower the Administrator to make regulations. Following the various authorities cited at [503], his Honour concluded that the Legislative Council had plenary power and could accordingly invest the Administrator with power to make regulations. On the question of sub-delegation to the building board, his Honour followed the New Zealand cases cited above and concluded that the Administrator could delegate to the board functions of an administrative nature but
not of a legislative nature. His Honour then related this approach to the determinations of the building board and concluded that, as far as the determinations before him were concerned, they were of an administrative nature and therefore were valid. Another Australian case in which the administrative-legislative distinction seemed to have been followed although not expressed in those terms was *Long v Knowles* [1968] Tas SR 46. Power was given to make regulations for the testing of measuring devices including loadometers. A regulation was made that provided that "testers" were to be appointed by the Professor of Engineering at the University of Tasmania. The regulation was attacked as involving a sub-delegation of power but the argument was rejected. The court stated that the empowering provision was couched in general terms and accordingly did not prevent the making of a regulation in the form adopted. However, a better basis for the decision would seem to have been that the appointment of testers was a matter of administration pertaining to the requirement that the relevant devices be tested. This power could therefore be given to a responsible authority. The method of testing could not, on the other hand, have been sub-delegated as this went to the very heart of the regulation-making power.

Summary of administrative-legislative approach. The effect of these cases would appear to have been correctly summarized by the Court of Appeal in *Hawke's Bay Raw Milk Producers Co-operative Co Ltd v New Zealand Milk Board* [1961] NZLR at 223 "The principle enunciated ... does not preclude the making of regulations which confer on a subordinate body or official authority to make decisions and exercise discretionary powers within the limits prescribed by the regulations; but it is always to be borne in mind that the legislative power itself cannot be deputed". That this distinction will not always be easy to draw is no reason for denying its existence. The wider the field of operation left to the sub-delegate, the more likely it is that the court will take the view that there has been a sub-delegation of legislative power. Where, on the other hand, the matters left to be carried out by the sub-delegate are questions of detail which merely fill the gaps left in the legislation itself or which are to be carried out in accordance with guidelines laid down in the legislation, the more likely it will be that the courts will determine that the sub-delegate is exercising administrative powers only and the sub-delegation will be valid. See further *Jackson Stansfield & Sons v Butterworth* [1948] 2 All ER at 565 and *Lewisham Borough Council v Roberts* [1949] 2 KB 608.

Incorporation of opinion of third party. Three English cases have dealt with situations in which a delegate has incorporated into his legislation a requirement that standards laid down by a third party be complied with. In *Ellis v Dubowski* [1921] 3 KB 621, the court was concerned with a by-law of a local authority made pursuant to a power that required the by-law to set out the conditions subject to which cinema licences would be granted. The by-law included as a condition for the grant of a licence that films shown had to be certified for public exhibition by the British Board of Film Censors. The court held that the condition was invalid. The defence counsel had talked of the condition constituting an illegal delegation of powers to the Board and, while the judges of the Divisional Court did not use that terminology, their judgments appeared to accept it. For example, Lawrence CJ at 625 said "... a condition putting the matter into the hands of a third person or body not
possessed of statutory or constitutional authority is ultra vires the committee". The issue came before the court again in *Mills v London County Council* [1925] 1 KB 213 where the same condition was set out as being applicable to the granting of cinema licences but with the additional provision that films not passed by the Film Censors could not be exhibited "without the express consent of the Council". This provision was held to be valid. *Ellis v Dubowski* was distinguished on the basis that in this case the council was involved in the final decision as to whether or not a film could be exhibited and, accordingly, the view of the third party did not determine the issue. Both these decisions have now been affirmed by the Court of Appeal in *R v Greater London Council; Ex parte Blackburn* [1976] 1 WLR 550. The Court of Appeal also confirmed that *Ellis's* case had been decided on the basis of sub-delegation, a conclusion that had been rejected by Shearmann J in *Mills* 'case.

**An Australian case** that was concerned with a somewhat similar situation was *Conroy v Shire of Springvale and Noble Park* [1959] VR 737. A by-law of the council prohibited the keeping of more than two dogs in municipal areas within the council boundaries without the permission of the council. The by-law also provided that, if the permission being sought related to racing dogs, the application for permission had to be accompanied by the approval in writing of the Dog Racing Control Board of Victoria. The Supreme Court held that this condition could not be required of applicants for permission and declared the by-law invalid. The court's discussion was not in terms of sub-delegation of the council's power but rather that the Dog Racing Control Board would not be guided by considerations related to the welfare of the municipality and the permission of the council could not be conditioned upon the views of this body. It may be noted in passing that the council was not obliged to give effect to the Board's approval, but this point does not seem to have been taken into account by the court.

One should not, perhaps, draw too heavily on the English cases as illustrations of the court rejecting the conditions because they constituted a sub-delegation of authority. The same conclusion can, it would seem, be reached by the application of the ordinary rules of *ultra vires* as was done in *Conroy's* case. Nonetheless they do represent a circumstance which can, without straining the language, be described as a sub-delegation of authority from the delegate to another body.

**Incorporation of material by reference.** The cases referred to in the preceding paragraphs should be borne in mind when considering the cases discussed at [266-275] relating to the incorporation of material by reference. Cases such as *Wright v TIL Services Pty Ltd* and *Sobania v Nitsche* there referred to were concerned with a situation in which the delegate handed over to another body the production of information that, by being incorporated into the rules, become a legislative enactment. Can it be argued that this is an exercise in sub-delegation, particularly where the reference is to the document produced by another body as in force from time to time? (cf the reasoning in *Mclver v Allen* and *Arnold v Hunt*, [268]).

**Reason why sub-delegation not often discussed in Australia.** As has been previously mentioned, the principle that sub-delegation of delegated legislative power is not permitted has not often arisen in Australian cases.
Instances where the issue has been discussed have been referred to above but the frequency with which the argument has been put to courts in New Zealand is in marked contrast to the Australian position. The reason for this lies perhaps in the fact that Australian courts have approached the interpretation of delegated legislation in a manner which may be termed legalistic. The pattern has been to determine whether or not the legislation is supported by the empowering provision and, in reaching this conclusion, maxims or approaches have been eschewed. This is apparent in regard to the rejection of uncertainty and unreasonableness as separate grounds of review. It is also apparent in the approach adopted in relation to cases in which a power to regulate an activity has been exercised to make delegated legislation that prohibits the activity subject to a discretion to alleviate the prohibition. This approach could be described as a sub-delegation of the legislation-making power to the discretion holder but the courts have analysed it analytically and concluded that in fact it constitutes ultra vires action. There are, however, two areas in which the issue of sub-delegation seems not to have been raised to any real extent but where a different conclusion could possibly be reached from that derived by the analytical approach. The first is where there is a power to prohibit an activity and that power is exercised, but with a reservation of a right in a person or body to alleviate the prohibition: see the discussion at [514-515], but note that this view seems to have been rejected both in Australia and New Zealand. The second is in regard to delegated legislation that incorporates other instruments by reference: see [526]. Overall, however, it seems that Australian courts have generally reached the same conclusion as to the validity of delegated legislation by their analytical approach as have those courts which apply the principle of delegatus non potest delegare.
CHAPTER 26

EFFECT OF REPEAL — EMPOWERING PROVISION; REGULATIONS

REPEAL OF EMPOWERING PROVISION

[528] Effect of repeal of empowering provision. The general rule is that when delegated legislation has been made under a section of an Act and that section of the Act (or the Act itself) is repealed, the delegated legislation is also repealed unless the repealing Act includes a saving clause intended to keep the delegated legislation in force. This rule was first laid down in *Watson v Winch* [1916] 1 KB 688 and has been endorsed by the High Court in *Bird v John Sharp & Sons Pty Ltd* (1942) 66 CLR 233 and *Victorian Chamber of Manufactures v The Commonwealth (Women's Employment Regulations)* (1943) 67 CLR at 372. (A statement to the contrary by Stout CJ in the course of argument in *Haines v Foster* (1902) 22 NZLR at 215 should perhaps be regarded as *per incuriam*). This general rule is, however, subject to a qualification which was spelled out by Williams J in *Bird's* case at 250. His Honour there said, after referring to the general rule:

"But a different result would follow where, from other sections which were not repealed, it was manifest that all that Parliament intended to do was to revoke the power to make further by-laws, leaving the existing by-laws in force, subject to their liability to be amended, varied or revoked under powers conferred by other sections contained in the Act at the time of the repeal or introduced into it by amendment at that time".

His Honour concluded that this was indeed the intention in the case before him. The views expressed by Williams J were endorsed by Dixon CJ delivering the judgment of the Full Court in *R v Kelly; Ex parte Waterside Workers' Federation of Australia* (1952) 85 CLR 601. That case concerned the continuation in force of awards relating to waterside workers which had been made by the Arbitration Court prior to the passage of an Act that abolished the jurisdiction of the court to fix the wages of waterside workers. The High Court considered that the awards fell within the description set out by Williams J; the intention was that they were to remain in force despite the revocation of the power of the Arbitration Court to make such awards in the future. But the situation contemplated by Williams J and endorsed in *Kelly's* case will be exceptional. The usual situation will be that which is set out above as the general rule and regulations will fall with the repeal of the parent Act.

[529] Meaning of repeal. The approach set out in the last paragraph gives rise to the question, when does an Act repeal an earlier Act and when does it merely amend an earlier Act? This question is discussed in Pearce, *Statutory Interpretation* (1974) paras 137-141, 149. The leading authorities in Australia are *Beaumont v Yeomans* (1934) 34 SR (NSW) at 569 and *Bird v John Sharp & Sons Pty Ltd* (1942) 66 CLR 233. Both cases indicate that the question cannot be answered by looking to the form of the legislation. It is the effect of the later Act that must be considered. Jordan CJ in *Beaumont v Yeomans* stated that an Act could amend another by repealing part of it. An amendment could also be effected either by the addition to a section of a
EFFECT OF REPEAL — EMPOWERING PROVISIONS: REGULATIONS [531]

particular phrase, or by the repeal of the section and the substitution of the same words with the phrase added. Further, where a provision of an Act was repealed and re-enacted in a form which enlarged its scope, this could amount in substance to an amendment, because the new provision could be regarded as retrospective so far as it was a mere repetition and prospective so far as it was new. These comments of his Honour have been followed in a number of cases concerned with the validity of delegated legislation. An examination of these cases shows that while the issue turns largely on the form of the particular enactment, the courts will, where appropriate, go behind the form of the amendment and ask whether or not there has been an amendment or a repeal.

[530] Cases relating to repeal of empowering provision. In Ex parte Barker; Re Luckett (1946) 46 SR (NSW) 235, a proclamation was made under a section of the Local Government Act. The section was subsequently altered by omitting from it a reference to "residential flat" and substituting a number of words including "residential flat building". The words "residential flat" had been used in the proclamation. It was argued that the proclamation had been impliedly repealed because of the alteration to the section and the use in the proclamation of the former terminology. This argument was rejected by the court. It considered that the section had not been repealed but had merely been amended, Beaumont v Yeomans and Bird's case being cited as authority on this question. The court pointed out that the section as re-enacted enabled more to be done by proclamation than had been possible under the section in its earlier form. The amendment added something to the section but subtracted nothing from it, and accordingly the former expression "residential flat" fell within the later form of the section. This case can be contrasted with R v City of Moorabbin; Ex parte Kans Food Products Pty Ltd [1954] VLR 465. There a council by-law had been made under the Uniform Building Regulations and, following the terminology of the regulations, used the expression "street alignment". The regulations were amended to substitute the word "frontage" for "street alignment". The by-laws were held to be invalid in so far as they used the earlier expression. In the view of the court, the expressions were different and therefore the earlier expression had been repealed by the latter and the by-laws using that expression went with it. Bird's case was followed on the question of the effect of a repeal and Barker's case distinguished on the basis that the expressions in that case both had the same effect. Finally, reference should be made to Slade v Reichhold Chemicals Inc (Australia) Pty Ltd (1954) 53 AR (NSW) 92. There the regulation-making power itself had been revoked and a new section substituted in a form that embraced all of the preceding powers and added additional powers. It was held by Richards J that this was an amendment of the power and not a repeal and therefore regulations made under the section in its earlier form did not lapse.

[531] Implied repeal because of repugnancy. It should, of course, be borne in mind that to constitute a repeal of regulations it is not necessary that the empowering provision be revoked — a repeal can be effected by creating a situation in which the regulations become repugnant to an Act of parliament. In these circumstances, an implied repeal of the regulations will be effected. Chapman v Shire of Werribee [1925] VLR 525 illustrates this point. Power was given to the Governor to make regulations relating to speed limits and an
additional provision was included in the Act that any regulations so made were to "supersede" any power in local government Acts for councils to make by-laws controlling speed limits. It was held that this provision impliedly repealed any local government by-laws relating to speed limits.

Summary of law where no savings clause. The situation can be summarized to this point that where there is a repeal of an empowering provision in an Act, regulations made under that empowering provision will also be repealed unless the court is satisfied that there was an intention to keep the regulations afoot in the manner set out by Williams J in Bird's case. Before this situation is reached however, the court must be satisfied that there is indeed an intention to repeal the empowering provision and not merely to amend it. It would seem from the cases that, if the effect of the later provision is but to add to the empowering provision, the court will be slow to hold that there has been an intention to repeal that provision. On the other hand, if the alteration to the empowering provision creates a situation in which there is an inconsistency between the regulations made under the preceding provision and the new provision, then it will be regarded as an implied repeal of that earlier section and thereby the regulations made under it.

Savings clauses. Where an empowering provision in an Act has been repealed, it is frequent to find a provision in the repealing Act continuing in force regulations or other forms of delegated legislation made under the repealed Act pending their replacement by subsequent provisions. These so-called savings clauses are of considerable importance when considering whether or not delegated legislation has lapsed with the repeal of an empowering provision. In Martin v Trigg [1931] VLR 62 the court interpreted a provision of the Acts Enumeration and Revision Act 1923 which provided that "things . . . existing or continuing under" an Act set out in the schedule to the Act were to continue in force. This wide general expression was held to include by-laws made under an Act listed in the schedule and accordingly the by-laws remained in force notwithstanding the repeal of the Act under which they were made. In Sobania v Nitsche (1969) 16 FLR 329 a complex series of savings clauses were held to keep afoot rules made under an ordinance which had been repealed where the repealing ordinance had in turn been repealed. But the form of the savings clause may be crucial to the validity of the delegated legislation. An important distinction was drawn by Latham CJ in Bird v John Sharp & Sons Pty Ltd (1942) 66 CLR at 239-240 between a clause which stated that regulations made under a repealed Act were "to be deemed to have been made" under the repealing Act and a savings clause which provided that regulations made under a repealed Act were "to remain in force" notwithstanding the repeal of that Act. The first-mentioned form of words had the effect that the regulations became regulations under the repealing Act. To this extent their validity depended upon the regulation-making power in the repealing Act not that in the repealed Act. Accordingly, if the repealing Act did not contain an empowering provision sufficiently wide to justify the making of the regulations, they would be invalid. In so ruling, Latham CJ confirmed a decision to this effect by the Victorian Full Court in Craven v City of Richmond [1930] VLR 153. On the other hand, if the regulations were expressed simply to remain in force, their validity would then depend upon whether there was power to make those particular regulations under the repealed Act. If the regulations were valid when made, then their future operation was ensured:
see also *Leaney v Sandland* [1933] SASR 285. The same argument would presumably apply if there were any question as to the validity of the Act itself. The regulations would stand or fall according to whether the Act on which they were based, be it the repealed or the repealing Act, was valid.

**[534] Change in regulation-making authority.** Another common type of savings clause was before the court in *Hill v Villawood Sheet Metal Pty Ltd* (1970) 91 WN (NSW) 943. An Act repealed and re-enacted a number of earlier Acts relating to factories and shops and provided “All . . . regulations . . . made under any enactment hereby repealed and re-enacted, with or without modification by this Act and being in force at the commencement of this Act, shall be and continue in force hereunder . . .” Regulations had been made by the minister pursuant to the provisions of a repealed Act and were in force at the date of repeal. The new regulation-making section in the replacement Act provided for regulations to be made by the Governor. It was argued that the regulations previously in force were thereby repealed as the substitution of the Governor for the minister as the regulation-making authority meant that there had been a repeal of the previous empowering clause and that there had been no re-enactment of that provision because of the nature of the change made. The court differed over what precisely was meant by the word “enactment” in the phrase “enactment hereby repealed”. Sugerman P and Mason JA considered that “enactment” referred to such part of the repealed Act as conferred power to make regulations on the subject matter in question. It was not necessary to point to the whole of a section or sub-section of the repealed Act but one could seek the power from within the formal structure of the Act. Asprey JA on the other hand, took the view that an enactment referred to a substantive provision in the repealed Act such as a section, sub-section or clause. This difference of opinion had no effect on the ultimate outcome of the case as all members of the court were of the view that the change in the form of the regulation-making section did constitute a modification of the section and not a substitution of something entirely different. Sugerman P at 948 put it thus:

> Here the essential nature of the object in question, which is a power to make regulations, is not altered. It was and remains a power to make regulations with legislative effect. Under that power, both as it originally stood and as it now stands, regulations may be made for the same objects or purposes, imposing the same duties, and enforceable in the same manner. There is thus a continuing identity in the regulation-making power in all those respects which mark out its essential nature. The only change is in the authority by which the regulations may be made. This, in my opinion, is a mere modification. It does not alter the essential nature of the power.

This view having been reached, it was held that the regulations previously in force were to continue in force.

**[535] Valid legislation only saved.** Finally, it must be borne in mind that a savings clause does no more than continue the operation of existing *valid* regulations. In *Sayers v Jacomb* (1872) 3 VR (L) 132 a provision was included in a repealing Act that: “All acts and by-laws done and made by any Mining Board existing at the time of commencement of this Act shall [be valid]”. It was argued that this validated action taken by a Mining Board that was clearly invalid when done. The court rejected this argument. It pointed out that the effect of such an interpretation would be to validate former actions
retrospectively. The section here was only intended to keep afoot existing valid acts and by-laws.

REPEAL OF REGULATIONS

Consideration of whether regulation has been repealed. Before considering the effect of repealing a regulation, mention should be made of two cases in which the question whether or not a regulation was in fact repealed arose for decision. In the earlier case, *Silk Bros Pty Ltd v State Electricity Commission of Victoria* (1943) 67 CLR 1, the court was pressed with an argument that, despite a clear statement in a statutory rule that existing regulations relating to fair renting were to be repealed, the intention of the statutory rule was that repeal was only to take effect if other provisions in the statutory rule were valid. These other regulations related to fair renting of premises and were clearly intended to be in substitution for the regulations repealed. However, they were held to be unconstitutional. The court rejected the argument that the former regulations had not been repealed basing its ruling on the fact that there was a clear statement in the statutory rule to that effect and that there was nothing in the statutory rule which made it appear that the repeal was conditional upon the validity of the later provisions. A different view was taken of the regulations before the court in *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29. There regulation 79 of the *Air Navigation Regulations* was amended by substituting a new sub-reg (3). This new sub-regulation was held invalid. Dixon J (with whom Rich J agreed on this point) at 96 considered that the original sub-reg (3) was unaffected by the unconstitutional amendment. His Honour said that there was no intention to repeal the earlier sub-reg (3) independently of the adoption of the new sub-reg (3). In effect, he treated the invalid amendment as if it had never existed and this therefore left the previous law unaltered.

The decisions are reconcilable when regard is paid to the form of the two sets of amending regulations. The amending Air Navigation regulation was invalid in its totality and therefore could be regarded as never having appeared on the statute book. The regulations dealing with fair rents which were invalid were different regulations from that which repealed the earlier set of regulations, although they were both contained in the one statutory rule. The mere striking out of the invalid regulations did not carry with it the removal from the statutory rule of the regulation which effected the repeal. Since this could stand independently of the invalid regulations, the repeal took effect accordingly.

Effect of repeal of Act. The effect at common law of the repeal of an Act was twofold. First, the Act was to be taken to be obliterated "as completely from the records of the parliament as if it had never passed; and it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded whilst it was an existing law" per Tindal CJ in *Kay v Goodwin* (1830) 6 Bing at 582. Thus rights acquired and duties imposed under the Act ceased to exist upon its repeal unless expressly saved by the repealing legislation. The second effect of a repeal was to revive any former Act or the common law that had been repealed or superseded by the Act now in turn repealed: *Marshall v Smith*
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(1907) 4 CLR 1617 per Barton J at 1634. These common law rules have, however, been negated, as far as Acts are concerned, by provisions in the Acts Interpretation Acts of all the jurisdictions in Australia and in New Zealand. These provisions have the effect, first of continuing in existence any rights and liabilities acquired under the repealed Act and, secondly, of negating the notion that the repeal of an Act revives an Act which had been repealed by the repealed Act: see Pearce, Statutory Interpretation paras 113-117. The position is not, however, so clear in regard to repealed regulations.

[539] Effect of repeal of regulations. In the absence of any statutory provisions, the common law rules apply in relation to repealed regulations. This was made clear in two decisions of the High Court. In The Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan (1931) 46 CLR 73, the court was concerned with regulations relating to the control of waterside workers that had been disallowed by the Senate. A person had been convicted under the regulations between the date of making of the regulations and the date of their disallowance by the Senate. It was argued that, as the Acts Interpretation Act provided that a regulation was to “cease to have effect” upon disallowance by the Senate, the regulation was to be taken to have been repealed and the conviction under the regulation could not stand. The court agreed that the effect of the disallowance was to repeal the regulation and in the absence of statutory authority to the contrary, the common law rules applied to the repealed regulation. Accordingly, a person who had committed an offence against the regulation but who had not been proceeded against prior to its disallowance could not be proceeded against after the disallowance of the regulation. But the court distinguished the situation where a conviction had already been secured. Dixon J at 106 summarized the matter as follows:

“... after a regulation has been disallowed, no one is liable to conviction for an offence committed while it was in force. His liability ceases when the law is revoked that imposed it. But if he has already been convicted, then because his liability has merged in the conviction, it no longer depends upon the law under which it arose, and it does not lapse with the revocation of the law. The conviction has become the source of his liability for his offence, and the conviction continues in force because its operation does not depend upon the law creating the offence, but upon the authority belonging to a judgment or sentence of a competent Court.

[540] Shortly after the decision in Dignan’s case, the High Court in South Australian Harbors Board v South Australian Gas Co (1934) 51 CLR 485 was concerned with the question of the effect of the repeal of a regulation on a liability incurred during the currency of the regulation. A regulation that had been made under the Harbors Act fixed the cost of coal delivered by the Harbors Board. This regulation was repealed. An action was brought to recover the amount due for coal delivered while the regulation was in force and it was asserted that the amount owing should be determined having regard to the price set out in the regulation. Section 16 of the South Australian Acts Interpretation Act provided that on the repeal of an Act, no liability that had been incurred under the Act was to be taken to be affected...
by the repeal, but no like provision was made specifically in regard to regulations. The court held that the repeal of the regulation had the effect that such action would have had at common law; it was to be treated as if it never existed except for actions already completed and therefore the amount fixed by the regulation for the cost of the coal could not be taken into account as the basis for ascertaining the rights and liabilities of the parties: see particularly Dixon J at 498. (The court fixed the amount due on a *quantum meruit* basis.) It is of interest to note in relation to the conclusion in that case, that the Act under which the regulation was made provided that regulations made under the Act were to have the same effect as if they were contained in the Act. The court rejected an argument that this had the effect of elevating the regulations to the level of the Act thereby attracting the *Acts Interpretation Act* provision relating to the effect of a repeal of an Act. Starke J at 489 distinguished a provision of the kind before the court and one which said that the regulations were to be incorporated in, and form part of, the Act. In the latter case, he said, the provisions of the *Acts Interpretation Act* would have been applicable. (It is to be noted in passing that the court did not refer to s 3(2) of the South Australian *Acts Interpretation Act* which provides "(2) The fact that any provision of this Act refers in terms to an Act and not to regulations also shall not, by itself, be taken to indicate that such provision is intended to apply to Acts only". It seems possible to argue that s 16, when dealing with the effect of the repeal of an Act, is also intended to deal with the effect of the repeal of a regulation.)

[541] Statutory provisions relating to repeal of regulations. The foregoing cases relate to a situation where there is no statutory provision applying to the repeal of regulations. In all States now, except South Australia, in the Commonwealth and its Territories and in New Zealand provision is included whereby rights and liabilities acquired or incurred under repealed regulations, penalties or punishments incurred in respect of offences committed against such regulations, and investigations, legal proceedings and remedies in respect of any such rights, obligations, etc, are unaffected by the fact that the regulations giving rise to them have been repealed. But only in Queensland and Tasmania is the additional provision included that the repeal of a regulation does not revive anything not in force prior to the making of the regulation. The like position also appears to be achieved in Victoria in relation to statutory rules that have been disallowed by the parliament. Section 6(3) of the *Subordinate Legislation Act* 1962 provides that a disallowance is to have the like effect to the repeal of an enactment. This provision would seem to attract s 7 (2) (a) of the *Acts Interpretation Act* 1958 which provides that the repeal of an enactment does not revive anything not in force at the time of the repeal.

[542] The position in the various jurisdictions may be summarized then that the common law rules relating to the effect of a repeal still apply to regulations in South Australia. That those rules have been entirely negated in Queensland and Tasmania and that they have been negated in Victoria in relation to disallowed regulations. In the other jurisdictions (including

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2 Cth s 50; NSW s 45; VIC s 7(4); QLD s 20; WA s 17; TAS s 16; ACT s 49; NT s 4; NZ s 20.
Victoria in so far as regulations are repealed by the regulation-making authority), statutes have partially negated the common law rules. But those statutes are silent as to the effect of a regulation which repeals a regulation which, in turn, has repealed an earlier regulation. Does the repeal of the repealing regulation lead to the revival of the earliest regulation in the series? A negative answer was given to this question by Latham CJ and Williams J in *Victorian Chamber of Manufactures v The Commonwealth (Women's Employment Regulations)* (1943) 67 CLR at 359 and 408, respectively. Their Honours reached this conclusion by considering ss 7 and 46 (a) of the Commonwealth *Acts Interpretation Act*. The latter section provides that, unless the contrary intention appears, the *Acts Interpretation Act* provisions are to apply to any instrument (which includes rules, regulations or by-laws) made under an Act as if the rules, regulations or by-laws were a section of an Act. This provision was held to attract s 7 of the *Acts Interpretation Act* which included the rule against non-revival on the repeal of an Act. It is of interest to note that the case was concerned with regulations that had been disallowed by the Senate and that were thereby to be treated as if they had been repealed. In reaching their conclusion, neither of the judges referred to s 50 of the *Acts Interpretation Act* the content of which was alluded to above. The omission is somewhat unfortunate as the existence of that section formed an important part of the reasoning adopted by Carmichael J in *Mangano v Mangano* (1974) 4 ALR 303 which is the only other cases in which the question has arisen.

*Mangano v Mangano* was also concerned with the effect of a disallowance of regulations by the Senate. Amendments of the *Matrimonial Causes Rules* had provided, among other things, for the repeal of the rules relating to the filing, etc, of discretion statements in matrimonial actions. The regulations were disallowed by the Senate and the question then arose whether the earlier regulations relating to discretion statements revived. The curious situation would have arisen if it had been held that the regulations did not revive of giving effect to the repealing regulations notwithstanding their disallowance. If the disallowance did not revive anything not in force at the date of the disallowance (see s 7 of the *Acts Interpretation Act*) then the former rules would have continued in their repealed state unless action were taken to remake them. Thus the disallowed regulation would achieve its end despite the fact of its disallowance. This factor was adverted to by Carmichael J at 319 and doubtless influenced the ultimate result of the case. However, his Honour did not found his judgment on that point alone. He pointed out, first, that the *Matrimonial Causes Act* expressly provided that ss 48, 49 and 50 of the *Acts Interpretation Act* were to be applicable to rules made under the *Matrimonial Causes Act*. Significantly, s 46 was not included. To attract s 7 of the *Acts Interpretation Act* relating to non-revival it would be necessary for s 46 to apply to the *Matrimonial Causes Rules*. His Honour concluded that the express mention of certain sections of the Act and the non-inclusion of s 46 indicated that there was an intention to exclude the operation of that section in relation to the *Matrimonial Causes Rules*. But his Honour went further and indicated that he considered that, in any case, s 46 did not apply to the repeal of regulations. He formed this view because of the inclusion in

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3 *Acts Interpretation Act* s 48 (4).
the Acts Interpretation Act of s 50 with its more limited, but nevertheless quite specific, statement as to the effect of the repeal of regulations. His Honour's view was that it was only by reading s 50 as the primary provision intending to cover the field that effect could be given to the words of that section. If s 50 were not to be so interpreted, and s 46 (a) and ss 7 and 8 were to govern the question, s 50 would be superfluous.

View in Mangano v Mangano preferred. There is much to support the view expressed by Carmichael J. One cannot lightly treat the inclusion of a section in an Act as surplusage and yet that is what must be done if ss 46 (a), 7 and 8 of the Acts Interpretation Act are to be held applicable to the repeal of regulations. There seems no good reason for the enactment of s 50 independently of those sections unless there were an intention to give a more limited effect to the repeal of a regulation than is the case with Acts. Somewhat uncertain support is provided for the view that s 50 was intended to cover the question entirely by a statement of Senator Brennan, the minister in charge of the bill in the debates on the Acts Interpretation Bill 1936 (Cth Parl Deb Vol 151 p 545) when he said in response to a question asking what would be the position when a regulation to repeal a regulation was disallowed: "In proposed new section 50, the effect of the repeal of a regulation is set out, and all that is now provided in section 48 (4) is that disallowance of a regulation shall have the same effect as the repeal of a regulation". Perhaps carrying more weight is the fact that parliament, when disallowing a regulation, is in a different position than when it is considering legislation to repeal an earlier enactment. In the latter case, it is possible for the parliament to re-enact provisions along the lines of those previously repealed. But the parliament can only disallow a set of regulations. It cannot, except by an Act of parliament, enact new regulations in place of those disallowed. Accordingly, the disallowance of regulations that repeal earlier repealing regulations would, in the absence of the common law rule of revival lead to the creation of a vacuum in the law. With this in mind, is it not better that the earlier legislation revive than that the repealing regulations, despite parliamentary disapproval, should achieve their object? Be that as it may, there is nevertheless the strong authority of Latham CJ and Williams J in the Women's Employment Regulations case expressing a view contrary to that of Carmichael J. The issue can at this stage only be regarded as unsettled.

Miscellaneous cases. Two other cases arising out of the repeal of regulations should be mentioned. In Ferrum Metal Exports Pty Ltd v Lang (1960) 105 CLR 647, the court was concerned with a situation in which the appellant carried on business on certain premises in contravention of a by-law which prohibited the use of such premises for that type of business. That by-law was repealed and a new by-law passed that expressly allowed unfettered use of land in the future if it had been used for lawful purposes in the past. It was argued that the effect of the common law rule was that the by-law, on being repealed, was to be disregarded for all purposes — that it was to be treated as never having existed — and that therefore the use of the premises in contravention of the by-law could not be described as unlawful. This argument, not surprisingly, was held by the High Court to be misconceived. While no action could be brought against the appellant under the repealed by-law, nevertheless his action up to the date on which the by-law was
repealed was still unlawful and accordingly he had not been lawfully using his land at the date of passing of the new by-law. The other case, *Hume v Higgins* (1949) 78 CLR 116, is of use only as pointing to the need to be quite certain whence liability for conduct stems. A regulation that limited the right to sell land without approval had been made under the *National Security Acts* passed during the Second World War but, at the date when action was brought against the defendant, the regulation had been expressed to have ceased to have had effect. It was agreed by the court that s 50 of the Commonwealth *Acts Interpretation Act* did not apply to preserve the liability of the defendant under the regulation as there had been no repeal of the regulation but merely a statement that it had ceased to have effect. However, the court pointed out that the liability for breach of the regulation did not stem from the regulations themselves but from a specific section of the Act which made a breach of the regulation punishable under the Act. The Act was still in force and therefore a conviction could be recorded against the defendant.
Collateral review. Probably the most frequent way in which the validity of delegated legislation is raised in the courts is as a defence to a charge alleging a breach of the legislation. Obviously a person cannot be convicted of an offence against a regulation that is invalid. It is, therefore, commonplace to find a defendant asserting that delegated legislation that he has been said to have broken is *ultra vires*. Except in cases where a specific provision endeavours to oust the right to challenge particular delegated legislation (see ch 29), it is only in Victoria that there is any limitation on a court considering the merits of a claim of invalidity. The Victorian provision is discussed at [611].

Declaratory Judgment. The other major non-statutory means of challenging delegated legislation is to seek an order declaring the legislation invalid. Such an order may be obtained only from a Supreme Court or the High Court. The remedy has been frequently used to challenge Commonwealth laws: see, for example, *King Gee Clothing Co Pty Ltd v Commonwealth* (1945) 71 CLR 184; *Arthur Yates & Co Pty Ltd v The Vegetable Seeds Committee* (1945) 72 CLR 37. It has also been used to challenge legislation of State governments or authorities: see, for example, *Jones v Metropolitan Meat Industry Board* (1925) 37 CLR 252; *Totalizator Agency Board v Wagner and Cayley* [1963] WAR 180. The examples can be multiplied extensively. The ordinary law relating to the obtaining of a declaratory judgment is applicable and apart from the matter mentioned in the next paragraph warrants no further exposition here: See further Young, *Declaratory Orders* (1975); Benjafield and Whitmore, *Australian Administrative Law* (4th ed 1971) ch 9.

Standing required to obtain declaration. The major problem that a person has to overcome when seeking a declaratory order challenging delegated legislation is to show that he has the requisite standing to obtain the remedy. If the person is directly affected by the legislation, no difficulty arises. In *Yates* case, for example, the plaintiff was a seed producer and seed producers were directly affected by the orders issued by the Vegetable Seeds Committee. (See the judgment at 70 and 77, in particular). Likewise in the *King Gee Clothing* case the plaintiff was a clothing company that was obliged to comply with the regulations; in *Jones v Metropolitan Meat Industry Board* the plaintiff was a butcher whose meat was killed in the abattoirs and who was, therefore, obliged to comply with the rules relating to the abattoirs laid down by the Board. But once one moves away from the situation where a person's private rights are directly affected by the delegated legislation, the issue becomes more difficult. The general cases relating to standing are set out in the textbooks cited in the last paragraph. The broad rule seems to be

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that a person whose private rights are not directly affected by delegated legislation may nevertheless have standing if he can show that he is affected more than other members of the community—or "peculiarly affected" as it was put by Porter J in *Stockwell v Southgate Corporation* [1936] 2 All ER at 1351. The assessment of whether a person is peculiarly affected by delegated legislation is not however, an easy task and some differences of opinion appear in the cases.

[549] In *Totalizator Agency Board v Wagney and Cayley* [1963] WAR 180 the court seemed to be satisfied that a bookmaker had standing to challenge a by-law of the Board relating to the fixing of amounts to be paid out by the Totalizator Agency. Presumably this was because the competition from the Totalizator run by the Board affected the prices that the bookmaker was obliged to offer to attract custom. But contrast *Pitcher v Lee Steere* (1935) 37 WALR 111. There a racehorse owner brought an action for a declaration that amendments made to the rules of racing by the Western Australian Turf Club which established an insurance scheme for injured jockeys were *ultra vires*. The moneys for funding the scheme were obtained by a levy on owners of racehorses. He was held not to have the requisite standing to challenge the by-laws. No really satisfactory reason for this is spelt out in the case and it is difficult to see whether the decision of Dwyer J was based on an exercise of his discretion or because the plaintiff had an inherent lack of standing. One would have thought that a racehorse owner was affected by these rules of racing as much as a bookmaker was by the Totalizator Agency Board's rules. Another case which indicates the difficulties of a person in this area is *Crouch v The Commonwealth* (1948) 77 CLR 339. The plaintiff sought a declaration that orders restricting the sale of new motor cars were invalid on the basis that they were beyond the defence power of the Commonwealth. The plaintiff had been served with summonses alleging offences against the order. Latham CJ and Williams J considered that the fact that the plaintiff had been served with summonses established a sufficient interest on his part to sustain the action for a declaration. Starke and Dixon JJ took the contrary view: no right of the plaintiff had been affected at the time when the summonses were served upon him and therefore he had no standing to seek a declaration. With respect, this latter view seems a very narrow approach to the problem and it would seem that if a defendant to a prosecution under delegated legislation chooses to challenge the legislation by means of a declaratory order as distinct from raising the invalidity of the legislation as a defence to the charge against him, he should be permitted to proceed in that way.

[550] When considering the question of standing for a declaration, a case that needs to be noted is *Wragg v New South Wales* (1953) 88 CLR 353. At first sight this case suggests that it is open to a private plaintiff to challenge the validity of delegated legislation where that legislation does not directly affect him. The somewhat curious situation existed there of the plaintiff, who was affected by prices orders, commencing proceedings seeking a declaration that the orders and the Act under which they were made were invalid, and then finding the orders fixing the price of his goods revoked. The High Court continued to hear the application but the proceedings were on a case stated not the actual application for a declaration. Taylor J at 392, delivering a
judgment with which all the judges agreed (although in some cases adding their own views for reaching the particular conclusion), referred to the fact that the order was no longer in force and said that this circumstance did not disentitle the plaintiff from having the questions which had been stated in the case considered. However, this statement needs to be qualified by reference to dicta of Dixon CJ at 388 expressing doubts whether a declaration of right in the plaintiff's favour concerning the operation of the revoked orders should be made; see also Webb J at 391. The basis of the plaintiff's claim that he could bring the action was that, while the orders had been revoked, the relevant minister had indicated that they would be revitalized at any time should circumstances demand. It would seem from the comments of Dixon CJ and Webb J that the views of Taylor J must be read bearing in mind the nature of the proceedings before the court. The case is not authority for the proposition that a person who is not affected by delegated legislation can seek a declaration challenging the validity of that legislation.

[551] Standing of ratepayers. One issue that has not been authoritatively resolved is whether a ratepayer has sufficient standing simply as a ratepayer to challenge by-laws made by his local council. There seems to be no case directly on this point. However, in two cases concerned with administrative action being taken by councils. *Kelberg v City of Sale* [1964] VR 385 and *Collins v Lower Hutt City Corporation* [1961] NZLR 250, ratepayers were held not to have sufficient standing to seek a declaration. The ratepayers sought declarations that their respective local councils had no power to fluoridate the town water supply. In both cases it was held that the action could only be brought at the relation of the Attorney-General. The Court of Appeal decision in *Prescott v Birmingham Corporation* [1955] Ch 210 runs contrary to this approach in that a ratepayer was permitted to challenge actions of the Corporation. The question of standing was not, however, discussed in the case. While these cases were concerned with administrative decisions of councils, not the making of by-laws, it seems probable that the view in *Kelberg's* case will be that which is followed in Australia and New Zealand. Accordingly, a ratepayer will not, merely by that status alone, be able to challenge the validity of local government by-laws.

[552] Time when delegated legislation may be reviewed. As has been seen a power is often vested in the parliament or some other body to disallow delegated legislation. Where this power operates in regard to regulations that are in force, the courts have shown no reluctance to intervene before the period for review has expired: see, for example, *Golden-Brown v Hunt* (1971) 19 FLR 438. The decision in *Australian Alliance Assurance Co Ltd v Attorney-General of Queensland* [1916] QSR 135 also makes it clear that the courts can review regulations made under an Act even though the Act itself is not in force where the regulations, by a special provision, are deemed to be in force.

[553] Review of delegated legislation before its commencement. A question to which no direct answer has been given by the courts is whether it is possible to seek review of delegated legislation before the legislation has come into force. The only means available for questioning the validity of such legislation would be by means of a declaratory judgment. Whether the court would be
prepared to entertain an application for a declaration before a person could demonstrate to the court that he had been affected by the regulations is doubtful. The courts require that there be a justiciable issue between the parties before they will exercise their jurisdiction to grant a declaration: *Australian Boot Trade Employees' Federation v The Commonwealth* (1954) 90 CLR 24. It is difficult to assert that such an issue has arisen unless a person can point to being affected by the disputed legislation. However, the courts have taken a much more lenient view towards the question whether or not a justiciable issue exists in cases in which Acts have been challenged as unconstitutional. In *Attorney-General for Victoria v The Commonwealth* (1945) 71 CLR 237 (*Pharmaceutical Benefits case*) and *Attorney-General for Victoria v The Commonwealth* (1962) 107 CLR 529 (*Marriage Act*), the court was prepared to consider the validity of the Acts concerned even though they were not then in force. In both cases, it was clear that the Act would be subsequently proclaimed to come into effect. Would it be possible for this approach to apply to regulations not in force but which were claimed to be unconstitutional? Dixon J in the *Pharmaceutical Benefits case* at 272 acknowledged that it was the traditional duty of the Attorney-General to protect public rights and to complain of excess of a power bestowed by law. In a federal system the result, he said, was to give the Attorney-General a *locus standi* to sue for a declaration wherever his public is or may be affected by what he sees as an *ultra vires* act on the part of the Commonwealth or of another State. It would seem, therefore, that is is unlikely that a private person could bring an action alleging that regulations yet to come into force were unconstitutional but such action may be permitted by an appropriate Attorney-General.

[554] **Intervention by Attorney-General.** A question that has arisen in three Australian cases is whether the Commonwealth Attorney-General can intervene in a case in which federal regulations are under challenge. The first such case was *McLennan v Brisbane Sawmills Pty Ltd; Ex parte Brisbane Sawmills Pty Ltd* [1947] QWN 13. In that case the validity of regulations made under the *National Security Act* was challenged. The Queensland Full Court, E A Douglas J and Matthews J, Philp J dissenting, granted leave to the Attorney-General of the Commonwealth to intervene. The majority judges advanced two reasons for so ruling. First, the court was exercising federal jurisdiction and it was pointed out that the High Court had frequently allowed the intervention of the Attorney-General. Secondly, the argument raised issues of grave public importance and were of such a nature that the views of the Attorney-General should be heard. Philp J, in his dissenting judgment, said that it had not been the practice of the Queensland court to allow the Attorney-General for the State or the Attorney-General for the Commonwealth to intervene. The majority judges advanced two reasons for so ruling. First, the court was exercising federal jurisdiction and it was pointed out that the High Court had frequently allowed the intervention of the Attorney-General. Secondly, the argument raised issues of grave public importance and were of such a nature that the views of the Attorney-General should be heard. Philp J, in his dissenting judgment, said that it had not been the practice of the Queensland court to allow the Attorney-General for the State or the Attorney-General for the Commonwealth to intervene in matters between subject and subject. He made one exception to this ruling, namely where issues of international law arose. His Honour distinguished the cases in which the High Court had allowed the Attorney-General for a State or for the Commonwealth to intervene on the basis that they concerned questions of constitutional law. Further, he considered that the practice of the High Court did not control the practice of the Queensland Supreme Court. He also pointed out that to allow intervention in this case would establish a precedent that would allow the Attorney-General to intervene in any case where legislation was in issue between subject
and subject. The views of Philp J were adopted, and the ruling of the majority of the Queensland Supreme Court rejected, by Jacobs J in *Amid Pty Ltd v Beck & Jones Pty Ltd* (1974) 11 SASR 16. An attack in that case was being made on the validity of the *Banking (Foreign Exchange) Regulations* and the Commonwealth sought leave to intervene. Jacobs J held that the Attorney-General was not entitled to intervene in the action for the reasons set out by Philp J.

Prior to *Amid*’s case the general question of intervention by an Attorney-General had been discussed at considerable length by the New South Wales Court of Appeal in *Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391. Hutley JA, with whom Reynolds JA and Glass JA agreed, examined the whole question of intervention by an Attorney-General in an action. The judgment was concerned only in passing with the question of the right of intervention where delegated legislation is under attack but it is clear from the discussion that the Court of Appeal would not accept a general right of intervention in all cases in which regulations were being challenged. The court expressly endorsed the dissenting judgment of Philp J in *McLennan*’s case and rejected the views of the majority. In *Amid*’s case and *Bradley*’s case a distinction was drawn between the right of the Attorney-General to intervene and the right of the court to accede to a request that the Attorney-General be heard as *amicus curiae*. It seemed clear in both cases that the courts would have been willing to hear the Attorney-General as *amicus curiae* if they had been persuaded that there was an argument that should be put which was not going to be put by counsel for the parties to the action. But a clear distinction was drawn between that situation and the right of intervention. This was because the right of intervention carries with it the right to present evidence to the court and to appeal against a decision of the court if adverse to the arguments put by the intervener.

It would seem, with respect, that the views of the New South Wales Court of Appeal and of Philp J and Jacobs J are to be preferred to those of the majority judges in *McLennan*’s case. There seems to be no reason why the Crown should have an automatic right of presence before the court in every case in which the validity of governmental regulations are being tested. If the Crown can intervene in such cases, there would seem to be no reason why a local government body should not be permitted to intervene in a case when its by-laws were under attack. The Attorney-General has sufficient opportunity to present any views relevant to the issue in the role of *amicus curiae*. The Queensland case can perhaps be distinguished on the basis that it involved issues going to the constitutional validity of the regulations. Additionally, the court, in that case, was exercising federal jurisdiction and did consider that the issues raised were of grave importance (cf Jacobs J in *Amid*’s case (1974) 11 SASR at 28).

**Procedure where Statutory Right of Challenge**

Statutes giving rights of challenge. Section 232 of the *Local Government Act 1958* (Vic) and s 178 of the *Supreme Court Act 1958* (Vic) make provision for an action to be brought to test the validity of a by-law of a local government body. The method used is to obtain a rule nisi calling on the
corporation to show cause why the by-law should not be struck out as invalid. It is somewhat curious to find two provisions of this kind in legislation although the Supreme Court Act provision is in wider terms than the Local Government Act in that the latter is limited to an action being brought by a ratepayer. The Supreme Court Act provision was formerly to be found in the Evidence Act 1890. That provision and its successor were both held to be available as a means of quashing local government by-laws notwithstanding the inclusion in the Local Government Act of a specific procedure. A person can thus elect to proceed under one or the other: see Ex parte Steel; in Re Borough of Oakleigh (1893) 19 VLR 94; Merrett v Shire of Tungamah [1912] VLR 248. Section 32 of the Evidence Act 1910 (Tas) makes like provision to that of the Supreme Court Act (Vic) in allowing any person to challenge the validity of by-laws in the Supreme Court: see In re Martin's Application [1974] Tas SR 43 for an example of the use of this procedure. Section 12 of the Bylaws Act 1910 (NZ) also provides for the challenging in the Supreme Court by any person of by-laws made by a local authority. But the section goes further than the Australian provisions in that the court is empowered not only to quash the by-law but also, if it thinks fit, instead of quashing it to amend it. Any such amendment is to have effect as if it had been made by the local authority and the local authority can, in turn, amend or repeal the court's amendment. South Australia at one time also had a provision enabling review by a rule nisi process of District Council and Municipal Council by-laws but these provisions were repealed by the Local Government Act 1934.

Interpretation of statutory challenge provisions. Where such a provision enabling the validity of delegated legislation to be challenged exists, the courts have taken a generous attitude towards its interpretation. In Bremer v District Council of Echunga [1919] SALR 288 the court would not accept an argument that because the section referred to by-laws "made" under the Act it did not apply to by-laws adopted under the Act. As far as the court was concerned it was applicable to all local government by-laws. A similar attitude was shown in Craven v City of Richmond [1930] VLR 153 where the court reviewed the validity of a by-law which had been continued in force after the repeal of the Act under which it had originally been made. The court considered that it was still, by virtue of the continuance in force, a local government by-law and therefore its validity could be challenged by means of the procedure set out in the Supreme Court Act.

The courts have also indicated that, once the by-law is brought before it, it will consider the validity of the by-law under the various heads of review discussed previously notwithstanding the fact that the rule calling on the council to show cause does not indicate all grounds of review. So in Groom v City of Port Adelaide (1922) 31 CLR 109 the High Court, by a majority, Knox CJ, Gavan Duffy and Starke JJ, Higgins J dissenting, held that the by-laws could be quashed notwithstanding that the affidavit in support of the rule did not allude to the basis on which it was asserted that the by-law was invalid. A similar decision was also reached by Weigall A-J in King v City of Footscray [1923] VLR 679 where the rule referred to the by-law having been made "in excess of any power whereof the said by-law purports to have been made". His Honour considered that the by-law could still be quashed on the grounds of
unreasonableness, notwithstanding that this ground had not been referred to
in the rule. A contrary view to the foregoing cases was expressed by Pape J in
Medcraft v City of Box Hill [1959] VR at 780-781. His Honour there
indicated that an argument that by-laws were uncertain could not be raised
before the Supreme Court where that ground of review was not referred to in
the order nisi. His Honour did not refer to the cases mentioned above and his
approach does not accord with the notion that uncertainty is not a separate
ground of review but is an alternative approach to the general question of
ultra vires: see ch 24.

Finally, mention should be made of Maggs v City of Camberwell (1925)
31 ALR 226. There a rule had been issued to quash a by-law. Counsel for the
respondent sought an adjournment on the basis that the council conceded the
invalidity of the by-law but had made a new by-law repealing the invalid by-
law and making new provision and that this by-law was awaiting the approval
of the Governor-in-Council. Irvine CJ held that the by-law should nevertheless
be quashed. He considered that the rule had either to be made absolute or
discharged so nothing was gained by granting an adjournment. Additionally
persons affected by the invalid by-law were entitled to have it quashed.

Collateral challenge not ousted by statutory means of challenge. A
series of older cases indicated that, where an Act empowering the making of
delegated legislation also included a method by which the validity of that
legislation could be tested, it was not possible to raise the validity of the
legislation as a defence to a prosecution under the legislation. This view was
later rejected by a specially constituted Full Court comprising all the judges
of the Victorian Supreme Court in Gunner v Helding (1902) 28 VLR 303.
The court overruled Mayor of Brighton v Lott (1892) 14 ALT 91, rejected a
dictum of Higinbotham J in Rider v Phillips (1884) 10 VLR (L) at 152 and
held that the validity of by-laws could be questioned by any person charged
with a breach of them. The same approach was followed by the South
Australian Supreme Court in Bishop v Deverix [1908] SALR 122. The court
followed Gunner v Helding in preference to the earlier Victorian authorities
and a Tasmanian decision to the contrary in Propsting v Perkins (1906) 2
Tas LR 27. The same view was also expounded. although perhaps
unnecessary to the decision, by Isaacs J in Widgee Shire Council v Bonney
(1907) 4 CLR at 985-986. Similar decisions in other jurisdictions are Bale v
Sorlie [1936] St RQd 259; Spreadborough v Walcott; Ex parte Walcott
[1904] St RQd 104; and Langley v Edwards (1908) 10 WALR 108.

Attacking validity of delegated legislation where facts do not raise
invalidity issue. An issue which remains to be determined by the courts is
whether it is possible to assert that delegated legislation is invalid if the facts
of the case do not directly raise that issue. If one regulation forming part of a
set of regulations is invalid because it is repugnant to the empowering Act,
can a person who has been charged with an offence under a regulation, other
than the regulation which can specifically be attacked, assert the repugnancy
as a defence to the charge brought against him? Frequently this situation will
be covered by the doctrine of severance — the invalid regulation can be
severed leaving the balance of the delegated legislation standing: see ch 30.
But if it is not possible to sever the invalid regulation from the other regula-
tions, can the court decline to take cognizance of an argument of invalidity where the invalidity is not directly related to the facts before the court? There is somewhat inconclusive authority in the South Australian Full Court decision of Willing v Hollobone (No 2) (1975) 11 SASR 118. The court there was concerned with a provision of the Road Traffic Act which provided "If a by-law made by a council is inconsistent with this Act or a regulation made under this Act, this Act or the regulation shall prevail and the by-law shall to the extent of the inconsistency be invalid". The appellant was charged with an offence against a section of a by-law made by a council. It was clear that the section under which the appellant was charged could not have been objected to as inconsistent with the Road Traffic Act or the regulations made under it. The appellant endeavoured to show that other by-laws were inconsistent with the Act and argued that this entailed the invalidity of the whole by-law including the section under which he was charged. The court rejected this argument, pointing out that the section applied only "to the extent of the inconsistency". The court therefore concluded that it was unnecessary for it to consider the general question raised by the appellant. To have held, in that case, that the whole by-law stood or fell according to whether or not every part of it was valid would have resulted in the invalidation of a very substantial range of controls imposed by by-laws. This may well be a factor that the court will take into account in determining the general issue of the validity of the delegated legislation in question. It will also be a matter that affects the question of severance. But if it is possible to argue successfully that an unseverable portion of a piece of delegated legislation is invalid, there seems no reason why this argument could not be taken, notwithstanding the fact that the defendant is not being charged with a breach of the invalid portion of the delegated legislation. The situation might well be different if the court is concerned with an application for a declaration because in such a case, it is necessary for the applicant to show that he has the requisite standing to bring the action, [548]. His standing presumably would not extend to challenge the validity of a regulation that did not affect him.
CHAPTER 28

PROOF OF DELEGATED LEGISLATION

Introduction. Three broad issues arise in relation to proof of delegated legislation. First, in what circumstances is it necessary formally to prove delegated legislation; secondly, by what method is such legislation to be proved; thirdly, what is the effect of proving such legislation. Matters pertinent to one issue may influence a decision in relation to the other. For example, s 6(7) of the *Acts Interpretation Act* (Tas) required all Acts to be judicially noticed. In *Rothwell v Riseley* [1946] Tas SR 22, an attempt was made to argue that that section also applied to regulations because s 5(2) of the *Acts Interpretation Act* provided “Every reference to an Act . . . shall include a reference to any regulations, rules, and by-laws made thereunder”. If judicial notice were to be taken of regulations it would be unnecessary formally to prove them, [571]. However, Morris CJ pointed out that s 73 of the *Evidence Act* provided that regulations were to be proved by production of a Government Printer’s copy thereof. In his view, this indicated a contrary intention to the *Acts Interpretation Act* and showed that regulations had to be proved. However, in most cases the issues are separate and it is proposed so to deal with them here.

Necessity to prove delegated legislation. The question whether it is necessary formally to prove delegated legislation that is relevant to an action before a court has arisen on a number of occasions. The views expressed in the cases unfortunately reflect a diversity of opinion.

Cases requiring formal proof. A number of authorities have clearly adopted the approach that formal proof is necessary. In *Dournie v Scripps* (1909) 5 Tas LR 9 and *Driscoll v Sparks* (1910) 6 Tas LR 9 the court quashed convictions for breach of a by-law because the relevant by-laws had not been strictly proved. (There was at this time no statutory means in Tasmania facilitating proof.) In *Ewert v Elder* [1922] VLR 779 Mann J, in quashing a conviction where a by-law had not been proved, said at 781: “The justices adjudicating may in fact be informed of the existence of the by-law and of the words of the by-law, but that does not do away with the necessity for their formal proof”. It is to be noted that in that case, s 76 of the *Evidence Act* 1915 was referred to by counsel. That section allowed proof of a by-law to be given by the production of an authenticated copy of the by-law. In addition, the prosecutor had a copy of the by-law in his possession but did not tender it to the court. The fact that these matters did not affect the outcome of the case is of importance when considering *Marshall v Wettenthal Brothers* and *R v Harm*, [568-569]. A like decision was reached by the court in *R v Yee Clun* [1929] 1 DLR 194 on very similar facts to those in *Ewert v Elder*. In relation to the question of proof by “production” of a copy of the relevant regulation, the court said that it was necessary for the regulation to be produced to, and made part of, the record of the court. In *Ex parte Normanby; Re Britliff* (1954) 54 SR (NSW) 299 the Full Court ruled that it was not sufficient for a
proclamation simply to be read to the court. Section 618 of the *Local Government Act*, which allowed evidence to be given of proclamations, etc, by the production of a copy of the *Gazette* containing the proclamation, was “not one which relieves the prosecution . . . of the necessity of tendering or otherwise making known to the court the document and its contents. It facilitates the proof of these cases by merely the production of the document, and at that stage it is necessary for the prosecution to tender it or otherwise make sure that it is part of the evidence of the case”: per Maxwell J at 304. See also Herron J at 306. The final case in this group that warrants mention is *Ex parte Madsen; Re Hawes* [1960] SR (NSW) 550. The Full Court, following English authorities, ruled that, in the absence of a statutory direction, judicial notice could not be taken of regulations. Accordingly, a conviction for a breach of a regulation recorded against the applicant could not stand where the magistrate had ruled that the regulation did not have to be tendered. Apart from reliance on English authorities, the court referred to *Ex parte Normanby; Re Britliff*, above, and to two cases concerned with the need to prove regulations where civil action was being brought for a breach of a duty created by the regulations: *Ryan v Australian Iron & Steel Ltd* [1956] SR (NSW) 329; *Long v Darling Island Stevedoring Co Ltd* [1956] SR (NSW) 387. (Both decisions were confirmed on appeal to the High Court: see (1957) 97 CLR 89 and 97 CLR 36, respectively.)

[566] From the foregoing cases two propositions can be extracted: (1) that, in the absence of a statutory provision so directing, judicial notice cannot be taken of delegated legislation and such legislation must be formally proved in proceedings based on the legislation; (2) that where an Act makes provision to facilitate proof of delegated legislation by providing that the production of a *Gazette* or other copy is to be evidence of it, the document containing the legislation must be tendered to the court or in some other way incorporated in the evidence in the case.

[567] Cases where formal proof of delegated legislation not required. One special category of instruments of which formal proof seems not to be required should be mentioned at the outset. These are proclamations that fix the date for commencement of an Act. Judicial notice can be taken of these, presumably on the basis that they are so closely related to Acts of parliament as to attract the judicial notice that is taken of Acts: *R v Wagner* [1951] 4 DLR 761; *Stokes v Samuels* (1975) 5 SASR 18; *R v Harm* (1975) 13 SASR 84 (it is to be noted in that case that Bright J at 105 referred to such proclamations as “a special sort of proclamation”).

[568] Proclamations of this kind aside, there is a line of cases in which a contrary approach to that taken in [565-566] has been adopted. The first case in the series, and that which has been followed in the subsequent decision is *Marshall v Wettenthal Brothers* [1914] VLR 266. There an Act empowered the making of proclamations declaring plants to be thistles for the purposes of the Act. After publication of such a proclamation, the word “thistle” in the Act was to be deemed to include any plant named in the proclamation. A person on whose land thistles were found was obliged under penalty to destroy them. The defendant was prosecuted for failing to destroy thistles after a notice so to do had been served upon him. The proclamation designating the plants that were to be thistles for the purposes of the Act was not produced in
the court. This point was taken by the defendant, but the justices said that they were aware of the contents of the proclamation and proof was not necessary. The justices did not have the proclamation before them. On appeal, it was argued that there had been no proof of the proclamation and that this meant that the proceedings were defective. A'Beckett J ruled that the approach adopted by the justices was correct. He said that the proclamation was part of the law of the land and if the justices were prepared to act on their recollection of the proclamation, no objection could be taken to this course. There was no obligation to require proof of that which the justices thought they knew. The decision, in effect, ruled that judicial notice could be taken of the proclamation. No cases were cited by A'Beckett J in reaching his conclusion. Marshall's case was cited by counsel for the respondent in Ewert v Elder, [565] but Mann J did not refer to it. However, the case was expressly endorsed by Latham CJ in Brebner v Bruce (1950) 82 CLR at 167. After saying that Marshall's case applied precisely to the case before him, his Honour continued: "The regulations [under review in this case] became part of the law and a tribunal takes judicial notice of the law, being at liberty to refresh memory by referring to the text of the regulations which, if there is any doubt about it, can be established by reference to a copy printed by the Government Printer". His Honour cited Grieve v Lewis (1917) 23 CLR 413, [573] as authority for the proposition that the method of proof laid down in the Evidence Act did not mean that the court could not take into account delegated legislation unless proved in the manner specified in the section. The statements of Latham CJ in Brebner v Bruce were not essential to the decision in that case because, as mentioned below [572], the regulations under consideration there were said to have effect as if enacted in the Act. Accordingly judicial notice could be taken of them. But his Honour's apparent approval of Marshall's case must be accorded considerable weight.

[569] Marshall's case has been discussed in two other cases. In Ex parte Madsen; Re Hawes (see [565]), Marshall's case was said to be concerned with a situation in which the proclamation, on being made, was to become part of the Act — and had therefore to be judicially noticed: see Owen J at 556; Clancy J at 560. Both judges expressed the view that this was also the extent of Latham CJ's endorsement of the case in Brebner v Bruce. Bray CJ in R v Harm (1975) 13 SASR at 98 also considered this to be a possible interpretation of Marshall's case. With respect, while this might be a convenient interpretation of both Marshall's case and Latham CJ's views in Brebner v Bruce, it is limiting what was there said. In Marshall, A'Beckett J said at 269: What weighs with me is the manifest intention of the Act under which the proclamation was made, that the proclamation should inform all persons of the state of the law, and the apparent absurdity of refusing to permit a judicial officer to act on his knowledge of the law so supposed to be made public. I hold that the magistrates were entitled to act on their knowledge of the state of the law without having before them the proclamation which formed part of the law.

It can be seen that his Honour here is speaking in general terms. The proclamation is to be treated as part of the "the law" which the magistrate is expected to know. The same thinking is apparent in the passage from the judgment of Latham CJ set out at [569]. His Honour refers to the regulations becoming "part of the law" — significantly not "part of the Act" — and a tribunal can take judicial notice of the law.
[570] Conclusion on need for formal proof of delegated legislation. Despite the views to the contrary set out in the last paragraph, it is suggested that Marshall's case and Brebner v Bruce are authority for the proposition that judicial notice should be taken of delegated legislation. Perhaps, in some circumstances, this would be no bad thing. Bray CJ in R v Harm at 99 seemed to think that such an approach had merit. But he said "there may well be a difference between a proclamation or regulation laying down some general rule of conduct and an executive notice specifying particular individuals as persons to whom certain legal consequences apply. . . . It seems more reasonable for a court to be able to take judicial notice without evidentiary proof of the first than of the second". Sangster J in Harm's case at 119 and, somewhat more cautiously, Wells J in Baskerville v Lippett (1974) 9 SASR at 582 expressed the opinion that judicial notice was to be taken of regulations made under Acts. It would seem, however, that the weight of judicial authority supports the propositions set out at [566]. Accordingly, except in the circumstances set out in the following paragraphs, delegated legislation has formally to be proved.

[571] Proof unnecessary where delegated legislation to be judicially noticed. The need for proof of delegated legislation may be obviated in certain circumstances. As has been alluded to in the preceding paragraphs, one such circumstance is where provision is included in an Act that judicial notice is to be taken of delegated legislation made under that Act or under other Acts. Provisions to this effect can be found, for example, in the Interpretation Act (NSW) s 34 in relation to proclamations or orders by the Governor and regulations, rules and by-laws made under an Act and approved or confirmed by the Governor. (The reference to regulations, rules and by-laws was added by amendment to s 34 in 1969, ie after the decision in Ex parte Madsen; Re Hawes, [565].) Likewise s 4A of the Evidence Act (Cth) requires judicial notice to be taken of, among other things, all proclamations and orders by the Governor-General, regulations, rules or by-laws made under an Act, ordinances of a Territory, and regulations, rules or by-laws made under a Territory law. Where a provision of this kind exists, it is unnecessary to prove formally the delegated legislation referred in the section: see Far North Coast County Council v O'Neill (1968) 88 WN (NSW) (Pt 1) 35 which relates to an ordinance made under the Local Government Act. That Act provided that judicial notice was to be taken of ordinances made under it. Similar decisions include Ex parte Sexton (1919) 19 SR (NSW) 51; Rolls v Bateman [1946] St RQd 34; Scheinwald v Harrop (1952) 52 SR (NSW) 229.

[572] Proof unnecessary where delegated legislation deemed to be part of enabling Act. Another circumstance in which the courts have held it to be unnecessary formally to tender delegated legislation is where the power to make the legislation indicates that, upon making, it is to be deemed to form part of the enabling Act. This view was stated in Sankey v Plover; Ex parte Plover [1903] St RQd 63 in relation to regulations made under the Defence Acts of Queensland. The regulations, on being made, were to have "the force of law as freely as if they were contained in this Act of which they shall be deemed to form a part". The approach was confirmed by the High Court in Brebner v Bruce (1950) 82 CLR 161 in relation to regulations made under the Post and Telegraph Act. The Act provided that, upon their making, regula-
tions were to have effect as if they were enacted in the Act. Other authority to the same effect is to be found in *Blake v Hatte; Ex parte Hatte* [1929] St RQd 271 and *Stewart v Parsons* [1949] QWN 27. The reason for this approach is that the courts are obliged to take judicial notice of Acts of parliament — Acts do not have to be formally proved in the courts. Accordingly, if the delegated legislation is to be treated as if it were enacted in the Act, it is to be given the same status as an Act and judicial notice is required to be taken of it.

[573] Proof unnecessary where legislation treated by all parties as if tendered. In circumstances where the regulations have not been formally tendered to the court but all parties in the case have acted as if they were before the court, there is authority that suggests that the failure formally to tender the regulations does not constitute a defect in the proceedings. This view was expressed early in the life of the High Court by Barton J in *Grieve v Lewis* (1917) 23 CLR at 417. His Honour there stated that s 6 of the Commonwealth *Rules Publication Act* which provided that the production of a copy of regulations issued by the Government Printer was to be accepted as proof of those regulations, was not exclusive of the means of proof. Accordingly, where a Government Printer copy had been used by all members of the court but not formally tendered to the court, sufficient proof of the regulation had been provided. A similar approach was adopted by the Victorian Supreme Court in *Hitchener v Ham* [1961] VR at 102 and *Anderson v Chigwidden* [1961] VR 564. In all these cases, the regulations in question were before the court but had not been formally tendered to the court. These decisions should be contrasted with that of the New South Wales Full Court in *Ex parte Normanby; Re Britliff* set out at [565]. The approach adopted in that case seems to be stricter than that of the Victorian courts and, indeed, of the High Court in *Grieve v Lewis*. But a similar approach was also taken by the Western Australian Full Court in *Hutchinson v Colls* (1905) 7 WALR 303. There the *Gazette* containing the relevant by-laws was before the magistrate having been given to him by the Clerk of the Court. The *Gazette* was not, however, formally tendered. The court held that the by-laws had not been proved and quashed the conviction.

[574] Effect of failure to prove delegated legislation. Assuming that none of the foregoing circumstances are applicable and that proof of delegated legislation is necessary, does a failure to prove the legislation before a court invalidate any decision taken by that court? The older Tasmanian cases of *Downie v Scripps* (1909) 5 Tas LR 9 and *Driscoll v Sparks* (1910) 6 Tas LR 9 so held without discussion of the issue. A like approach was also followed in Western Australia in *Hutchinson v Colls* (1905) 7 WALR 303. The matter was considered more fully in *Ewert v Elder* [1922] VLR 779 and some qualifications introduced. A magistrate had convicted the appellant without the relevant by-law being put in evidence. This failure was raised by the defendant at the trial but the magistrate ruled that the by-law did not have to be tendered. On appeal Mann J declined to allow the by-law to be tendered, saying that (a) by-laws must be formally proved, and (b) the by-law should not be allowed to be tendered on appeal because the point was taken in the lower court. A like approach was followed in New South Wales in *Ex parte Madsen; Re Hawes* [1960] SR (NSW) 550. There the Full Court upheld an
appeal against conviction for breach of a regulation on the basis that the regulation had not been proved in the lower court. As in *Ewert v Elder*, the point had been taken in the lower court that the regulation had not been proved but the magistrate had overruled the objection. The Full Court rejected the argument that a regulation was equivalent to an order by the Governor acting with the advice of the Executive Council and therefore came within s 34 of the *Interpretation Act* which required proclamations and orders by the Governor to be judicially noticed. This issue has become moot, at least so far as regulations made by the Governor are concerned, because s 34 of the *Interpretation Act* was amended in 1969 to require judicial notice to be taken of all such regulations. But the decision still indicates in principle that New South Wales courts will, in the absence of some statutory requirement that delegated legislation be judicially noticed or be treated as if it formed part of the Act, require the legislation to be strictly proved (cf also the approach of the court in *Ex parte Normanby; Re Britliff*, [565]).

**[575] Effect of failure to take point in lower court that legislation not tendered.** The decisions referred to in the last two paragraphs have to be read in the light of a line of Victorian decisions that indicate that, in one circumstance, a regulation not tendered in the lower court can be tendered in the Supreme Court on appeal: see *Lee v Irish* [1949] VLR 166; *Schuett v McKenzie* [1968] VR 225; *Kennett v Holt* [1974] VR 644. In all these cases no point had been taken in the lower court that the delegated legislation in question should be formally tendered. On this basis they can be distinguished from the decision in *Ewert v Elder* where the point had been raised but rejected by the magistrate and *Ex parte Normanby; Re Britliff* where the wrong method of proof had been allowed despite the objection of counsel. The reasoning applicable in the Victorian cases mentioned is clearly that if the issue had been drawn to the attention of the lower court, the prosecution would formally have tendered the regulations and there was no reason why a formal omission of that kind should be regarded as incurable. The same position may be reached in Queensland because in two cases, *Sankey v Plover; Ex parte Plover* [1903] St RQd 63 and *Blake v Hatte; Ex parte Hatte* [1929] St RQd 271, the court ruled that a technical objection of this kind not taken in the lower court could not be taken before the Supreme Court on appeal. Likewise in South Australia it was held in *R v Harm* (1975) 13 SASR 84 that where counsel for an accused had remained silent when counsel for the Crown produced a Gazette containing the regulations and the trial Judge had ruled that it was not necessary for the Gazette actually to be tendered in evidence, an argument based on a failure to tender the regulations could not be taken on appeal. See also *Baskerville v Lippett* (1974) 9 SASR 575. The position would presumably be different if the point were taken in the lower court but rejected.

**[576] Objection not available if validity of legislation questioned in lower court.** *Ex parte Grogan* (1906) 23 WN (NSW) 199 makes the important point that a defendant cannot approbate and reprobate by asserting in the lower court that regulations are ultra vires and then taking the point on appeal that the regulations had not been formally proved. The court held in that case that the defendant, by attacking the validity of the regulations, had waived the right to object to the regulations not being proved. This decision seems to
fit in with the cases cited at [573] that suggest that if the parties to the proceedings act as if the regulations were before the court then formal proof is not necessary.

[577] Whether necessary to prove that delegated legislation still in force. Two Queensland cases raise an interesting point that does not seem to have been pursued in other Australian cases, namely, whether it is necessary to lead evidence to show that delegated legislation is still in force. The first of the two cases, Elliott v Taylor [1947] St R Qd 210, seemed to take the view that evidence of this kind was necessary. The case concerned a prosecution brought under orders made by the Prices Commissioner pursuant to the National Security (Prices) Regulations. The court said that it was necessary to show that the orders were still in force. No reason was given for this assertion and the case seems out of line with other cases relating to proof of delegated legislation where this requirement does not seem to have been raised. However, in Hughes v Hi-Way Ads Pty Ltd, Ex parte Hughes [1963] Qd R 328 the issue was again raised in regard to ordinances made by the Brisbane City Council. Section 55 of the City of Brisbane Acts stated that the council was, at least once in every period of five years, to prepare and print in a book the provisions of the Acts and all delegated legislation made under the Acts. This requirement had not been complied with when proceedings were brought against the respondent for failure to comply with an ordinance made some 13 years previously by the council. The magistrate dismissed the action on the basis that no proof had been tendered that the ordinance was in force at the relevant time and that the presumption of continuance could not be applied to the ordinance by reason of s 55 of the City of Brisbane Acts. This view was not accepted in its entirety by the Full Court, on appeal. But the court stated at 332 that the existence of s 55 was a matter which a judicial tribunal could consider in determining the strength of the so called presumption of continuance in relation to ordinances more than five years old. The court pointed out that, while in England the common law maxim “ignorance of the law is no excuse” could be held by a court to have been rebutted, no such approach could be adopted in Queensland because s 22 of the Criminal Code enacted the maxim in statutory form. The courts therefore had no power to modify the operation of the section. This factor had to be borne in mind when considering the presumption of continuance as, in the view of the court, a person could not be convicted if he could not know the law. The magistrate, it was said, was bound to hold that the ordinance had the force of law in 1949 when it was made but was not bound to hold that it was still in force in 1962 when the action was brought. The continuance of the ordinance having been challenged, the onus lay on the council to satisfy the magistrate that there was in existence at the relevant time a law which the respondent had broken. As no action had been taken to satisfy this onus, the action had been correctly dismissed.

[578] These seem to be the only Australian cases in which the point of continuance in force of delegated legislation has been questioned. The presumption of continuance (for which see Wigmore on Evidence (3rd ed) para 437) must, it is assumed, have been followed by other courts concerned with the enforcement of delegated legislation. The issue was considered briefly in New Zealand in Lane v Doyle (1892) 11 NZLR 385. Prendergast CJ in that case
rejected an argument that proof of continuance had to be given. His Honour said at 389-390 “... where the making of the by-law is proved — that is, not only the making but the coming into force — there arises a presumption, till the contrary is proved, that it is still in force at any time thereafter, and that proof of the alteration or revocation lies upon the party asserting it”. This seems to be the most sensible approach for the courts to adopt as the task of proving non-revocation would, in many cases, involve a time consuming and unnecessary procedure.

[579] Proof of power to make delegated legislation. An issue which is closely associated to that of proof of delegated legislation is illustrated by Campbell v Hollander and Govett Ltd (1911) 1 LGR (NSW) 39. The power of a council to control hoardings was conditional upon the formal adoption of such powers pursuant to a designated procedure under the Local Government Act. It was held necessary in that case to prove that the council had formally adopted the requisite powers. In the absence of such proof, a conviction for an offence against the Hoardings Ordinance was quashed. The issue in this case is associated with that discussed below relating to the effect of proof of by-laws in that it is concerned with establishing the existence of a preliminary step in the law-making process. However, it does not fall squarely within that topic as it is concerned with the acquisition of power and not the manner of its exercise. It should therefore be regarded as an example of the necessity to prove delegated legislation. It is, however, an issue that will arise infrequently. The power to make delegated legislation will usually stem from a provision of an Act and it is unnecessary formally to prove Acts.

METHODS OF PROOF OF DELEGATED LEGISLATION

[580] Proof where no statutory means. In the absence of some statutory means of proving delegated legislation, the ordinary rules of evidence relating to proof of the validity of any document apply and evidence must be led to establish its validity: see Leonard v Creswell [1920] SALR 165. For the method of proof see Phipson on Evidence (11th ed) at 1713-1729.

[581] Statutory means of proving delegated legislation. In all jurisdictions in Australia and in New Zealand, statutory provision is made to facilitate proof of delegated legislation. This is achieved either by requiring judicial notice to be taken of the legislation or by allowing an official copy of the delegated legislation itself, or of the Government Gazette in which it appears, to be tendered. Numerous provisions relating to different forms of delegated legislation are to be found in the Evidence Act of each jurisdiction. Reference should also be made to the State and Territorial Laws and Records Recognition Act 1901 (Cth); s 34 of the Interpretation Act 1897 (NSW); s 8 of the Subordinate Legislation Act 1962 (Vic); s 7 of the Rules Publication Act 1953 (Tas); s 39 of the Acts Interpretation Act 1931 (Tas); and s 22 of the Bylaws Act 1910 (NZ). These sections should be read in the light of the decisions in Ex parte Normanby; Re Britliff and R v Yee Clun, [565] in relation to the meaning of the expression “produce” that is commonly found in them. The discussion of Normanby’s case by Bright J in R v Harm (1975) 13 SASR at 103 should also be noted.
JUDICIAL REVIEW OF DELEGATED LEGISLATION

EFFECT OF PROOF OF DELEGATED LEGISLATION

[582] Introduction. In the Evidence Act of each jurisdiction, s 15 of the State and Territorial Laws and Records Recognition Act 1901 (Cth), s 42 of the Interpretation 1897 (NSW), s 40 of the Acts Interpretation Act 1931 (Tas) and s 22 of the Bylaws Act 1910 (NZ) are to be found provisions in various terms that are intended to make it unnecessary to lead evidence to show that conditions and steps preliminary to the making of delegated legislation have been complied with. By way of example, the Interpretation Act (NSW) section reads:

"42(1) It shall be presumed, in the absence of evidence to the contrary, that all conditions and preliminary steps precedent to the making . . . of an instrument made under an Act have been complied with and performed."

Once legislation is before a court (either by way of judicial notice or by being proved), the effect of provisions of this kind is to move the onus of showing that there was some defect in the procedure adopted for making the delegated legislation on to the party asserting that fact. These statutory provisions probably go little further than the common law presumption of regularity summarized by the Latin maxim omnia praesumuntur rite esse acta. The approach of the courts was stated in the United States case of Knox County v Ninth National Bank cited by Griffith CJ in McLean Bros & Rigg Ltd v Grice (1906) 4 CLR at 850: "It is a rule of very general application, that where an act is done which can be done legally only after the performance of some prior act, proof of the later carries with it a presumption of the due performance of the prior act". The cases that deal with the consequences flowing from proof of delegated legislation refer to the various statutory provisions and the common law presumption of regularity somewhat indiscriminately. The end result is that it is doubtful whether there is any difference in effect between the statutes and the common law.

[583] General effect of presumptions of regularity. The effect of the statutory and the common law presumptions is, in regard to most delegated legislation, to render it unnecessary to establish that formalities such as publication, laying before parliament, etc, have been carried out. The mere proof of the delegated legislation assumes, in the absence of evidence to the contrary, that the various formalities have been complied with. So, for example, in McGregor v Australian Mortgage, Land and Finance Co (1898) 15 WN (NSW) 128 it was held by the Full Court that there was no need to prove the performance of conditions preliminary to the making of a proclamation declaring certain areas to be rabbit infested before action could be brought as a result of that proclamation. The procedure that was required was for the Governor to give notice of an intention to make the proclamation in the Government Gazette and in a local newspaper. It was asserted that evidence of these actions having occurred had to be presented to the court before an action could be commenced under the proclamation. The court ruled otherwise saying (at 129) "The public cannot go behind every proclamation; they must assume, and were intended to assume, that when a proclamation is made it is properly made". See also Leonard v Creswell [1920] SALR at 172. But the presumption of regularity is no more than a presumption. If it can be shown by extraneous evidence that the requisite formalities have not been complied with, the presumption is displaced: Clugston v Montague
[1936] VLR 172; and see ch 15 for cases where there had been a failure to comply with making formalities.

[584] Disclosing compliance with formalities on face of instrument. A problem that has arisen on a number of occasions before the Australian courts is whether an instrument that can only be made if some preliminary fact, condition or opinion exists, must indicate on the face of the instrument that the fact, condition or opinion did indeed exist before the instrument was made. Where the prerequisite facts, etc, are recited in the relevant instrument, the presumption of regularity is attracted immediately and avoids the need for independent proof of the issue. See, for example, Walter v Parry [1952] VLR 19 where the power to make certain determinations by the Milk Board under the Milk Board Act was conditional upon an inquiry first being conducted. Determinations made by the board recited the fact of the holding of an inquiry. It was held by Sholl J that it was not necessary to prove the holding of the inquiry independently. See also Shire of Lillydale v Gainey [1930] VLR 73; Marriott v City of Mordialloc [1939] VLR at 198; Foster v Aloni [1951] VLR 481 (as explained in Bolton v Dance [1968] VR at 641 by Gowans J).

[585] Where, however, there has been a failure to include a reference to the requisite facts, conditions or opinions, some difficulties have arisen. The types of pre-conditions which are encountered in relation to the making of delegated legislation can be grouped into three broad categories. In the first place an empowering provision may require that the person empowered to make the delegated legislation must himself be satisfied of the existence of certain facts or opinions before he exercises his power. The second category of cases is where certain formal procedures are required to be complied with before the delegated legislation is made or before it is enforced. The third category is where the person empowered to make the delegated legislation can only do so on the recommendation, or at the request, of a third party. The position under each of these various categories can conveniently be looked at separately, although, as will be shown, it would seem that the same general rule applies to each category.

[586] Existence of facts or opinions before making. The Australian case which most readily exemplifies the approach of the courts in regard to cases where some fact or opinion must exist before delegated legislation can be made is Slade v Reichhold Chemicals Inc (Australia) Pty Ltd (1954) 53 AR (NSW) 92. Power was given to the minister to make regulations relating to the safety or health of persons employed in a particular industry if the minister was satisfied that such special measures were necessary. Regulations were made by the minister but they contained no recital of him being satisfied that the special measures contained in the regulations were in fact necessary. It was argued that the minister's satisfaction had to be proved before an action could be brought under the regulations. The court, following Jones v Robson [1901] 1 Q B 673, ruled that proof of satisfaction was unnecessary: the fact of making the regulation was sufficient evidence in itself that the minister had formed the necessary opinion under the section. This approach to the issue was approved by the Court of Criminal Appeal in R v Martin (1967) 67 SR (NSW) 404. But in that case a different conclusion was reached in regard to a
somewhat similar pre-condition and at first sight it may seem that the authorities are not reconcilable. However, it is important when considering Martin's case to note the form of the section that empowered the making of the proclamation, the validity of which was in question. The Police Offences (Amendment) Act 1908 defined "drug" in s 18(1) to mean any drug to which the relevant part of the Act from time to time applied. Sub-section (2) of that section provided in paragraph (a):
The drugs to which this Part of this Act applies are morphine, cocaine, and ecgonine and their respective salts, and opium . . .
Paragraphs (c) and (d) of the same sub-section provided:
(c) If it appears to the Governor that any new derivative of morphine or cocaine . . . or any other drug of whatever kind is or is likely to be productive, if improperly used, of ill-effects substantially of the same character or nature as or analogous to those produced by morphine or cocaine, the Governor may by proclamation published in the Gazette declare that this Part of this Act shall apply to that new derivative . . . in the same manner as it applies to the drugs mentioned in paragraph (a) of this subsection.
(d) If it appears to the Governor that the use of any preparation, admixture, extract or other substance containing any of the drugs mentioned in paragraph (a) of this subsection in a percentage less than is therein mentioned, is having ill effects, the Governor may be proclamation published in the Gazette declare that this Part of this Act shall apply to such preparation, admixture, extract, or substance.
The Governor made a proclamation under the section listing a number of drugs as being drugs to which the section was to apply. There was no reference in the proclamation to the Governor having formed the opinion referred to in either paragraph (c) or paragraph (d) of the section. It was argued that it was unnecessary for this opinion to be mentioned in the proclamation on the basis of the reasoning that had been adopted in Slade v Reichhold Chemicals (although that case is not mentioned in the report or the judgments). Jacobs JA, with whom the other judges of the court expressed agreement, held to the contrary. His Honour did not, however, base his judgment on the application of the presumption of regularity. Indeed, he rejected its applicability in the particular circumstances of the case. The basis for his Honour's rejection of the validity of the proclamation was founded on the notion that it is not possible to canvass in a court of law the opinion or satisfaction of the Crown representative, cf [434]. His Honour seemed to consider that the presumption of regularity could only be used in circumstances where it was able to be rebutted by other more compelling evidence. Since this was not the case in regard to an opinion of the Governor, the presumption was not applicable. His Honour considered that the question that had to be answered by the court was whether the proclamation showed either expressly or by implication that the matters stated in s 18(2) had been apparent to the Governor when making the proclamation. To determine whether the requisite opinion had been formed, regard could be paid only to the proclamation. Accordingly, it had to be shown that the proclamation either expressly, or as a matter of construction, showed that the Governor had formed the opinion referred to in the section. There was, of course, no express statement and the question therefore was whether the requisite opinion could be implied from the terms of the proclamation. His Honour considered that if there were only one state of mind that was apposite or if the proclamation referred to one specific head of power to support its making, then, as a matter of construction, it would be possible to imply that the necessary state of mind existed (cf the situation in Slade v Reichhold Chemicals). But in the present
case there was no indication of which of the two bases for forming an opinion had been used by the Governor. Accordingly, it was not possible to draw an inference from the document as to which source of power had been used. This being so, the proclamation was invalid.

With respect, the same conclusion would have been reached if the presumption of regularity, as explained in *Slade's* case, had been applied. The making by the Governor, or any other person, of delegated legislation assumes that any prerequisite formalities have been complied with. Evidence may be led to rebut this presumption in cases where the law permits the opinion of the legislation-maker to be examined by the court. If the court cannot canvass the opinion of the legislation-maker, the presumption will be irrebuttable unless the circumstance arises, as in *Bailey v Conole* (1931) 34 WALR 18, where the absence of the requisite opinion was conceded before the court. But there is another way in which the presumption can be rebutted. Where an irregularity appears on the face of the document such as to give rise to doubts whether the prerequisite formalities have been complied with, the presumption is rebutted and evidence of compliance with the formalities is required: see further [595]. In *Martin's* case, the fact that the Governor could have acted under either of two powers and the proclamation did not indicate which of those powers he was exercising would raise doubts as to which opinion was held and this would be sufficient to rebut the presumption that the requisite opinion had been held.

Consideration is also necessary at this point of the case of *Shire of Flinders v T W Maw & Sons (Quarries) Pty Ltd* [1971] VR 484. That case was concerned with the making of an order by the Governor-in-Council relating to use of land that was affected by a planning order. The Governor was empowered to make certain orders limiting the use of land if he formed an opinion that the land should be preserved as an area of natural beauty. An order was made, but the recital in the order indicated that the Governor had formed an opinion in terms slightly different from that set out in the section of the Act. Smith J ruled that the presumption of regularity gave rise to the inference that an opinion in terms of the Act was duly held notwithstanding the recital of the different form of opinion. His Honour considered that the presumption provided evidence that all opinions which were conditions precedent to the making of the order had been duly formed. This case may at first sight appear to run counter to the decision of the New South Wales court in *R v Martin*. However, the power of the Governor to make an order in the *Shire of Flinders* case was, like that in *Slade's* case, a power dependent upon the formation of only one state of mind. This being so, the judgment of Jacobs JA is consistent with that of Smith J provided that the statement of Smith J that the presumption provides evidence that all opinions which are conditions precedent have been duly formed is read down to the situation where only one opinion must precede the making of the requisite instrument. The *Shire of Flinders* case could also be justified on the basis that the recital of opinion was only marginally different from the terminology used in the section and the notion of *de minimis* could well be applied.

Requirement that certain formal steps be complied with. The
presumption of regularity is also of importance where the making of delegated legislation, or its enforcement, must be preceded by specified formal steps. In both these circumstances it would seem that there is no need to prove that the formalities have been complied with before action can be taken under the delegated legislation. As far as compliance with pre-making formalities is concerned, McGregor v Australian Mortgage, Land and Finance Co (1898) 15 WN (NSW) 128 is illustrative of the approach of the courts. Power was given to the Governor to proclaim an area to be rabbit infested. The effect of such a proclamation was to enable the local authority to require persons to take steps to destroy rabbits and, if the person failed to do so, the local authority could destroy the rabbits and claim the cost of so doing from the person concerned. Before making the proclamation, the Governor had to give notice of his intention so to act in the Government Gazette and in a local newspaper. A proclamation was made which recited that notice had been given in the Gazette but no mention was made of a notice being published in the newspaper. It was argued for the defendant that the right of the local authority was dependent upon the making of a valid proclamation and here the proclamation was invalid because it failed to recite that all the prerequisite formalities had been complied with. The Full Court agreed with the first contention but held that the proclamation was valid. In the absence of evidence to the contrary, it was to be presumed that the formalities had been complied with and there was no need for the proclamation to refer to these. It would seem that there had in fact been no need to recite the giving of notice in the Gazette of intention to make the proclamation (and on later authorities, this could have been fatal to the validity of the proclamation: see further [595-596]). A similar approach to the question of the need to prove compliance with pre-making formalities was followed in Leonard v Creswell [1920] SALR at 172.

A case that was concerned with compliance with formalities after the making of delegated legislation is Ex parte Kauter (1904) 4 SR (NSW) 209. Power was given to the Railway Commissioners to make by-laws under the Government Railways Act. It was a requirement of that Act that short particulars of offences under the by-laws should be printed and fixed in the principal place of business of the Commissioners. On a prosecution for an offence against a by-law, it was proved that the by-laws were exhibited prominently at the places where the defendant began and ended his journey on the railway. It was argued that it was necessary for the prosecutor to show also that the by-laws were displayed at the principal place of business of the commissioners. The Full Court rejected this argument. It considered that the requirements of the Act were satisfied by establishing that the by-laws were published at the stations where the defendant began and ended his journey. This, it was said, raised the presumption that the by-laws were also published at the principal place of business of the commissioners. The court said that when a duty is imposed on public officers there is a presumption that that duty has been duly and properly carried out. The same decision would probably have been reached even if the by-laws were not posted at the railway stations. Unless evidence was led indicating a failure to post at the principal place of business of the commissioners, it would be presumed that this statutory requirement had been complied with.
A more recent case which has dealt with the question of both pre-making and post-making requirements is Bolton v Dance [1968] VR 631. Again the conclusion was reached that the presumption of regularity meant that, in the absence of evidence that raised some doubt in the mind of the court, all formalities were to be assumed to have been complied with. The case was concerned with rules made by the Trustees of the Shrine of Remembrance. The land occupied by the Shrine had, pursuant to the Land Act, been reserved by the Governor from sale permanently. The effect of the Governor so acting was to enable the Trustees to make rules for the care and protection of the land. Such rules had to be approved by the Governor, but before being submitted to him for approval they had to be published in the Gazette and in a local newspaper. After approval by the Governor, the rules had again to be published in the Gazette and also posted in a conspicuous place at the Shrine. The rules that were made by the Trustees of the Shrine referred to the section under which they were made but did not recite the fact of the Governor having reserved the land pursuant to the requirements of the Land Act nor any of the making and publication requirements. Gowans J held that the effect of the statutory presumption of regularity set out in s 64 of the Evidence Act was to make the Gazette copy of the rules prima facie evidence of their due making and it was not necessary to lead any further evidence unless the regularity of the making of the rules was questioned.

Prerequisite of action by third party. The two previous categories have been concerned with circumstances in which the person making the delegated legislation has had to satisfy certain requirements himself. The third circumstance in which the question of regularity has arisen is where the maker of the legislation has been permitted to act only after certain action has been taken by a third party. Here again the question has arisen whether it is necessary for the prerequisite action on the part of the third party to appear on the face of the instrument if it is to be enforceable. Two decisions would at first sight seem to indicate that this is in fact the case. In Murphy v Matlock [1926] VLR 170 power was given to the Governor-in-Council to make regulations under the Poisons Act on the recommendation of the Pharmacy Board of Victoria. Regulations were duly made which recited the fact of the Governor having acted on the recommendation of the board. A second set of regulations were later made which replaced most of the first set but continued some of the regulations in force for certain specified purposes. Again this second set of regulations recited the fact that the Governor had acted on the recommendation of the board. A third set of regulations were made which amended the first set as continued by the second, but this third set did not make reference to the Governor having acted on the recommendation of the board. On a prosecution for a breach of the regulations as amended, the Gazettes containing the original and the two sets of amending regulations were tendered to the court. The prosecution relied on s 57 of the Evidence Act, asserting that the Gazettes containing the Governor's regulations were to be prima facie evidence of all acts having been duly done. Mann J rejected this argument on the ground that there was no proof that the second set of amending regulations had been made on the recommendation of the board. He stated that the situation would have been different if the Gazette notification recited the satisfaction of the board because the presumption would then have arisen that the board had made the requisite recommendation. It is to
be noted in this case that the three relevant sets of regulations were before the court and in two of these the recommendation of the board was recited but in the third it was not.

The second case in which an argument of this kind has been upheld is *Lucerne v Collins* (1967) 86 WN (Pt 1) (NSW) 247 a decision of McClemens J. The case was concerned with the validity of an ordinance made under the *Main Roads Act* specifying load limits on roads. Ordinances under that Act were made by the Governor on the recommendation of the Main Roads Board. Load limits relating to roads other than main roads were fixed by the Governor by ordinance under the *Local Government Act*, but in this case no recommendation had to precede the action by the Governor. Identical ordinances were made by the Governor in one document, one ordinance purporting to be made under the *Main Roads Act* and the other under the *Local Government Act*. No reference was made in the Governor's instrument to a recommendation of the Main Roads Board having been considered prior to the making of the ordinance relevant to main roads. On a prosecution for breach of the ordinance relating to main roads, it was held that the presumption of regularity did not assist in establishing that the ordinance had been properly made after receipt of a recommendation. It was clear from the Governor's instrument that the same procedure had been used for the production of both ordinances and therefore, in the view of McClemens J, a defect appeared on the face of the document such as to rebut the presumption of regularity. His Honour expressly followed the decision in *Murphy v Matlock*. It is to be noted that in *Lucerne v Collins*, McClemens J laid great emphasis on the fact that the court was concerned with a prosecution and he considered that it was not correct to raise presumptions in favour of the prosecution if there was any doubt whatsoever as to the matters to be presumed.

The decisions in *Murphy v Matlock* and *Lucerne v Collins* have been considered in two subsequent cases. In *Shire of Flinders v T W Maw & Sons (Quarries) Pty Ltd* [1971] VR 484 a requirement for the making of an order by the Governor-in-Council relating to land use was that he formed the opinion whether or not to make the order after considering the recommendation of the Town and Country Planning Board. An order made under the Act recited the recommendation of the board but, as mentioned at [588], stated the opinion of the Governor in words different from those used in the Act. Smith J considered that the presumption of regularity gave rise to the inference that an opinion in terms of the Act was duly held. While it was not necessary perhaps for his Honour to consider *Murphy v Matlock* and *Lucerne v Collins*, those cases were cited to him as authority for the proposition that an error appearing on the face of the record rebuts the presumption of regularity. His Honour considered that if those cases stood for the general proposition that any error on the face of an instrument rendered it invalid, they took a too narrow view of the effect of the presumption of regularity. But at 491, his Honour said: “It may be, however, that they should be regarded as resting upon the view that in relation to the essential elements of a crime charged the presumption of innocence is too strong to be overcome by any presumption of regularity that can arise from the existence of an Order in Council which omits to recite the fulfilment of a condition precedent”. The other case in which *Murphy v Matlock* and *Lucerne v Collins* have been directly considered is *Bolton v Dance* [1968] VR 631; [591]. Gowans J
considered that the two cases should be limited to circumstances in which the defect in procedure appeared on the face of the document. At 641-642 his Honour said:

These cases, in my opinion, show no more than that the presumption of regularity will not be applied to the making of regulations, proclamations or ordinances if there is an apparent defect on the face of them. The absence of a statement that a preliminary step in the making of the instrument has in fact preceded its making may present the appearance of such a defect if by reason of the surrounding circumstances the absence of the statement appears significant. But there is no rule that there must always appear a statement specifying the preliminary steps that have been taken or that all preliminary steps have been taken.

Test of defect appearing on face of instrument. Griffin and Goldring in “Proof of the Due Exercise of Delegated Powers; Application of the Presumption of Regularity” (1974) 48 ALJ 118 rejected the suggestion that the test in these cases is whether or not the defect appears on the face of the instrument. The authors suggested that the presumption of regularity applies in the first two categories referred to at [585] and that a failure to recite the facts, opinions or conditions referred to there is not fatal to the validity of an instrument. But they concluded that a failure by a legislation-making authority to indicate that it had acted on the recommendation of a third party where this is required will be fatal to the validity of the delegated legislation, at least in respect of criminal actions brought in reliance of the delegated legislation. This conclusion is reached mainly on the basis of the decisions in Murphy v Matlock and Lucerne v Collins. The approach followed involves the authors in rejecting the decision in R v Martin, [586]. With respect, this decision, and all other decisions mentioned in this discussion, except McGregor v Australian Mortgage, Land and Finance Co (see [589]), are reconcilable on the basis of the statement made by Gowans J in Bolton v Dance, [594]. In Lucerne v Collins the defect appeared plainly on the face of the Governor’s instrument in that the same procedure had been used to make both ordinances yet in one case the ordinance had to be made on the recommendation of the Main Roads Board — and this recommendation was not recited. In Murphy v Matlock there were three sets of regulations before the court, two of which contained the requisite recital and the third of which did not. The presumption of regularity could hardly, therefore, stand in the face of these inconsistent documents. In R v Martin the proclamation failed to recite which of two possible but differing opinions was held by the Governor as the basis for his making of the proclamation. Again, the proclamation, without more, raised doubts whether the empowering provision had been complied with. The article referred to above also rejects the general statement in Foster v Aloni [1951] VLR at 485 that “the maxim omnia praesumuntur rite esse acta applies in the absence of evidence to the contrary to show that the regulations were in fact made by the Governor in Council on the recommendation of the Commission so that that condition precedent is satisfied”. This statement is consistent with the approach suggested if the expression “evidence to the contrary” is read as embracing both independent evidence and evidence appearing on the face of the instrument itself.

As mentioned, the only case that does not seem to fit in with this approach is McGregor’s case, [589]. There the recital of one only of the required two notices having been published should have raised doubts
whether the formalities laid down had been complied with. This doubt arose because of the form of the instrument and the presumption of regularity should have been regarded as rebutted.

[597] It is suggested that there is no reason in policy why the presumption of regularity should apply to one type of making formality and not to another. The true effect of the cases it is submitted is that, no matter into which category referred to above an instrument falls, it will be assumed to have been properly made unless there is something on the face of the instrument which clearly puts the court on notice that the requirements relating to the making of the instruments may not have been complied with. In the absence of such evidence, proof of compliance with the various making formalities will not be required. It should be reiterated, however, that the presumption of regularity is only a presumption and if there is evidence that the requisite formalities have not been followed, that evidence may be led and will have to be rebutted if the validity of the instrument is to be sustained: see Clugston v Montague [1936] VLR 172.
OUSTING OF JUDICIAL REVIEW

[598] Introduction. There is perhaps no clearer statement of the reluctance of the courts to allow their power to review the validity of delegated legislation to be ousted than the following from O'Bryan J in Wm Cook Pty Ltd v Read [1940] VLR at 217-218:

When a subordinate legislative body is given power to make rules limited to particular subject-matters, the ordinary principle is that it must not travel outside the area committed to it, and the protection of the subject against excursions by such a body beyond its prescribed area is the power of the Court to declare such excursions *ultra vires* and null and void. This is very important protection against excessive exercise of power by subordinate bodies. It would require a clearly expressed intention by the Legislature to remove this safe-guard against excess of the limited powers committed to such a body. It is an important encroachment upon the ordinary rule of law to make unimpeachable the acts of a subordinate body, even if it has gone beyond the express limits of the authority given to it.

This attitude has led the courts to reject a number of attempts to assert that certain formulae used in enabling provisions have the effect of making delegated legislation unreviewable. It is proposed now to consider the effect of the various expressions that at have been used from time to time.

[599] “Full force and effect”; “force of law”. In the *Wm Cook* case referred to in the last paragraph, O'Bryan J held that a provision stating that rules once made and laid before the parliament and not disallowed were to “be of full force and effect and be judicially noticed” did not prevent review of the validity of those rules by the court. Like views have been expressed by the courts in regard to sections which provide that after publication, etc, by-laws are “to have the force of law”: see *Crick v Harnett* (1907) 7 SR (NSW) 126; *Attorney-General v Metropolitan Meat Industry Board* (1917) 18 SR (NSW) 9; and *Widgee Shire Council v Bonney* (1907) 4 CLR 977 per Isaacs J at 985-986. See also [607].

[600] Conclusive evidence. Another formula which has not been given what at first sight appears to be its intended effect is the “conclusive evidence” clause. The court's approach to these words is illustrated by the decision of the High Court in *Carroll v Shillinglaw* (1906) 3 CLR 1099. A provision of the *Friendly Societies Act* 1890 (Vic) provided:

“The Registrar shall on being satisfied that any amendment of a rule is not contrary to the provisions of this Act issue to the society an acknowledgment of registry of the same which shall be conclusive evidence that the same is duly registered”.

It was argued that this provision prevented the court from reviewing the validity of a rule once registered. This was rejected by the High Court. Griffith CJ at 1108 said “I think the true view is that the acknowledgment of registration is only conclusive that the things which could lawfully be done have been done, and that it cannot have the effect of declaring that a thing which could not be lawfully done has been lawfully done”. See also *Municipal* 271
District of Gundagai v Norton (1894) 15 LR (NSW) 365 where it was held that a provision stating that the production of the Government Gazette containing a proclamation was conclusive evidence of the legality of the matters contained in the proclamation did not prevent the court ruling the matters referred to in the proclamation invalid for failure to comply with the Act.

As if enacted in empowering Act. The preceding paragraphs show the reluctance of the courts to permit their jurisdiction to review delegated legislation to be ousted. But the courts cannot simply ignore the words of an Act that purports so to provide. They may limit the operation of the words, but some effect must be given to the legislative directive. The expression which has been used most successfully by the legislature to limit judicial review of delegated legislation is that which states that the legislation, after having been made and notified, is to be treated as if it had been enacted in the Act giving power to make it. It has been conceded by the courts that this formula markedly limits the basis on which the courts can question the validity of delegated legislation to which it relates — but it is not sufficient to exclude judicial review entirely.

The clause was considered authoritatively for the first time by the House of Lords in Institute of Patent Agents v Lockwood [1894] AC 347. Lord Herschell LC ruled that the effect of the provision was to require that the delegated legislation was, for the purposes of construction, to be treated exactly as if it had been contained in the empowering Act. If there were a conflict between the delegated legislation and a provision of the Act, the duty of the court was to try to reconcile the conflict in the same way as it would endeavour to reconcile a conflict between competing sections of an Act or between competing Acts. His Lordship considered that it was necessary for the court to determine which was the leading provision and which the subordinate provision and the latter would give way to the former. He concluded that, in most cases, the Act under which the delegated legislation was made would be treated as the governing provision and the delegated legislation would have to give way if it were not possible to reconcile the conflict between the two.

This generous interpretation of this kind of ouster clause would have largely prevented courts considering the validity of regulations made under an Act. It was an approach that received a mixed reception from the Australian courts. The New South Wales Full Court in Ex parte Heffernan (1907) 7 SR(NSW) 774 followed the judgment unquestioningly and determined that rules of collieries that were expressed to be treated as if enacted in the enabling Act were to be regarded as valid for all purposes. The court could not inquire into the validity of the rules. The Queensland courts were not, however, so ready to accept this approach to the matter. The first occasion on which the issue fell for consideration was in Spreadborough v Walcott; Ex parte Walcott [1904] St RQd 104. In that case it was held that a provision that by-laws were to have the same force as if forming part of the Act had to be qualified in the light of the fact that there was a provision in the empowering Act setting out a method by which the by-laws could be challenged. This, in the view of the court, indicated that the words apparently ousting the jurisdiction of the court to review the by-laws on
grounds of *ultra vires* were not to have their apparently wide effect. The issue
next arose in *Australian Alliance Assurance Co Ltd v Attorney-General of
Queensland and John Goodwyn* [1916] St RQd 135 where it was considered
at greater length. In that case the provision stated that after gazettal, etc, the
regulations in question were to be read as one with the empowering Act and
were to be of equal validity. Cooper CJ and Lukin J rejected the argument
that this provision in any way limited the ability of the court to review the
regulations for *ultra vires*. In their view there was no difference between this
provision and the having “the force of law” provision referred to at [599]. The
other members of the court, Real, Chubb and Shand JJ, took a different view
and one which indeed anticipated later development in this area. They
conceded that the provision had to be given some effect but were not pre­
pared to see the power of the court to review delegated legislation ousted
entirely. They followed the view tentatively expressed by Lord Herschell in
*Lockwood’s* case that if there were a conflict between the regulations and the
Act, the regulations had to give way. But they also added the additional
qualification that the regulations would not be valid if they attempted to deal
with a matter that was wholly extraneous to the purpose of the Act. In the
particular case it was held that the regulations were in fact in direct conflict
with the Act and therefore invalid.

[604] *Later Interpretation of “as if enacted” clause.* Later cases have con­
firmed the approach of the majority judges in the *Australian Alliance As­
surance* case: see *Minister of Health v The King (on the prosecution of Yaffe)*
[1931] AC 494; *England v Penfold; Ex parte Penfold* [1934] St RQD
125; *Anderson v Wass; Ex parte Wass* [1935] St RQd 269. The clearest
statement of the law in Australian cases is to be found in the Victorian Full
Court decision of *Foster v Aloni* [1951] VLR 481. The judgement of the
court (which was read by Lowe ACJ) at 483-485 establishes that, notwith­
standing a provision that regulations are to be read as if they were enacted in
the enabling Act, a court can undertake an inquiry into three matters. If the
regulations do not satisfy any one of those matters, they will be regarded as in­
valid. These three matters are, first, that any procedure laid down for making
the regulations must be complied with. It is only if the regulations have been
validly made that they can be regarded as taking effect as if enacted in the
Act. The second requirement is that if there is inconsistency between the Act
and the regulations, the inconsistent section of the Act will normally be treat­
ed as the leading provision and the regulation as the subordinate provision.
Thirdly, the power to make regulations coupled with an ouster provision will
not prevent the court ruling that the regulations relate to a matter quite re­
moved from the regulation-making power. In the words of the court at 484:
“It may be patently or absurdly irrelevant to the head or heads of power the
Executive purports to exercise”. The provision will only validate “regulations
which genuinely purport to exercise one or more of the granted heads of
power upon a matter or matters connected with the [regulation-making au­
thorities] statutory purposes”. If the regulation cannot be objected to under
one of these various criteria “inquiry ceases and the regulations have statutory
effect”: and on this basis the regulations in the particular case were held
valid.

[605] “As if enacted in this Act” clauses in New Zealand. The issues
relating to the “as if enacted in this Act” clause seem not to have arisen with
any frequency in New Zealand. There is some indeterminate reference to the issue in Sheahon v Room [1917] NZLR 497. More important is the discussion in Hackett v Lander and Solicitor-General [1917] NZLR 947. Hosking J, in that case, ruled, again anticipating the approach that would be adopted by the House of Lords in Yaffe's case, that the clause limited the power of the court to review regulations on the grounds of ultra vires to circumstances in which "it plainly appeared that the regulations could have nothing to do with the objects for which they were authorised to be made" (at 950).

As if enacted clause and uncertainty as ground of review. The approach to the interpretation of an "as if enacted in this Act" clause set out at [604] was followed by the Queensland Full Court in the case of In Re a Solicitor [1953] St RQd 149 in relation to a provision that rules of the Law Society after being made and published were to "have the same force and effect as if they were embraced in and formed part of this Act". But in that case and in Stewart v Greacen [1936] QWN 19 the court went on to suggest that the regulations could be attacked as invalid for uncertainty notwithstanding the ouster clause. This approach must be regarded as somewhat doubtful in view of the decision in King Gee Clothing Co Pty Ltd v The Commonwealth (1945) 71 CLR 184, [473] that denies uncertainty to be a separate ground of review and equates it with the broad concept of ultra vires. Additionally, a section of an Act cannot be attacked on the ground that it is uncertain. As the effect of the "as if enacted" clause is to elevate the delegated legislation to the text of the Act, it is difficult to see how it is possible to attack it as invalid for uncertainty.

Refusal to extend interpretation of "as if enacted" clause to other similar clauses. The courts are not willing to extend the interpretation of the "as if enacted" clause to other clauses that do not elevate the regulations to the same position as the sections of the empowering Act. For example, in Parry v Osborn [1955] VLR 152, Sholl J had to consider a provision of the Local Government Act that stated that regulations were to have full force and effect notwithstanding anything in any by-law, etc, or any other part of the Act or any other Act and to the extent of any inconsistency any other such provision was to be of no force or effect. His Honour rejected an argument that this clause excluded the court from considering whether the regulation was ultra vires. He drew a distinction, in effect, between the right to challenge for inconsistency or repugnancy on the one hand and ultra vires on the other. The clause in question would prevent a challenge to the regulation as repugnant to the Act under which it was made or another Act but would not prevent a challenge on the basis that the regulation-making section of the Act did not enable the making of the particular section. (Cf the clause referred to at [610].) In somewhat similar vein, Starke J in South Australian Harbors Board v South Australian Gas Co (1934) 51 CLR at 489 drew a distinction between a provision which stated that regulations under the Act were to be of the same effect as if they were contained in the Act and a provision whereby the regulations were to be incorporated in, and form part of, the Act. However, his Honour was not addressing his mind to the question of the ousting of the court's power of review. He was concerned with the effect of a repeal of the Act under which the regulations were made. There seems to be a very fine distinction between the two expressions to which his Honour was
referring, but if the question arose whether or not the earlier provision prevented the court reviewing regulations for *ultra vires* it may well be that his Honour's view would be followed.

[608] Ordinances to be deemed to have been duly made and to have been within the powers of the Council. These words are used in s 38(4) of the *City of Brisbane Acts* and apply to an ordinance after the expiration of the tabling period. In *Brisbane City Council v Barnett* (1943) 39 QJPR 22, the Full Court held that the effect of the clause was that an ordinance made by the council in due form was not open to attack on the ground of validity. The basis for reaching this conclusion is not set out in any detail. In *R v Brisbane City Council ex parte Mackay* [1961] Qd R 241 Mansfield CJ and Hanger J affirmed the decision in *Barnett's* case stating that there was no reason for holding the decision to be wrong. Wanstall J, on the other hand, in a lengthy judgment in which he examined a large number of ouster clauses, concluded that the provision had an effect similar to that which was discussed in *Foster v Aloni*, [604]. In his view an ordinance should be held to be in excess of power if the making of it was not a real exercise of any power conferred; that is to say, that it was so fantastic and capricious as not to be capable of being regarded as the act of a reasonable body acting in good faith under the power conferred. Secondly, an ordinance would be invalid if it was inconsistent with or repugnant to some provision of the enabling Act. The interpretation of the section by Wanstall J seems to have been confirmed by the High Court in *Lynch v Brisbane City Council* (1960) 104 CLR 353. Dixon CJ at 365, with whom the other judges agreed, said:

> It may be that an ordinance the object and operation of which, ascertained from its contents and the known facts to which it would apply, are found to lie altogether outside the province of the Council as a subordinate legislative body could not gain the benefit of the conclusive presumption which sub-section(4) provides. That might be because such a measure ought not to be considered to purport to be made pursuant to the Act or it might be because of the general principles governing the interpretation of an enactment like sub-section(4)".

The latter part of his Honour's judgment is presumably referring to the attitude of the courts exemplified in cases such as *Foster v Aloni*. It would seem, therefore, that the correct view of the effect of the clause is that stated by Wanstall J in *Mackay's* case rather than the view expressed by the other members of the Full Court in that case and in *Barnett's* case.

[609] Disallowance by other authority. As has been discussed previously, many Acts empowering the making of delegated legislation provide also for the disallowance of that delegated legislation by some other authority — usually either the parliament or the Governor-in-Council. An attempt was made in *Colman v Miller* [1906] VLR 622 to argue that the fact of non-disallowance meant that the by-laws in question in that case were not subject to review by the court. This argument was rejected by the Full Court. The judgment makes it clear that the right of a body to disallow delegated legislation has no effect on the jurisdiction of the courts to consider the validity of the legislation. It may, however, be a matter that will be taken into account when considering the validity of particular regulations: cf [445], [453]. But the difficulty of drawing any safe conclusion from the failure of a parliament to disallow a regulation is demonstrated by the Judgments of Menzies J and
Kitto J in *Esmonds Motors Pty Ltd v The Commonwealth* (1970) 120 CLR 463. Both judges referred to the parliamentary action in support of differing conclusions as to the validity of the relevant legislation.

[610] **Direct exclusion of judicial review.** There is, of course, nothing to prevent a legislature directly preventing the review by the courts of delegated legislation. As has been shown, the provision of an "as if enacted in this Act" clause goes a long way towards achieving this end, but it is possible to deprive the courts of their powers of review altogether. Fortunately this has not occurred in Australia except for a short period in South Australia. A section was included in the *Local Government Act* which provided

No by-law made after the commencement of this Act in respect of which a certificate of a Judge or the Crown Solicitor has been given pursuant to section 674, shall be held to be invalid by any court on the ground that it is not a by-law which is within the competence of the Council to make, or that the by-law is contrary to or inconsistent with any provision in force at the date of the said certificate of this Act, of any other Act, or of any regulation made by the Governor under any Act.

It can be seen that this provision had the effect of making the Crown Solicitor the arbiter of whether or not a by-law was valid. The provision was challenged in *Ross Chenoweth Ltd v Hayes* [1955] SASR 66 but the court understandably felt that their jurisdiction had been successfully removed. However, the judges were critical of the section as depriving the individual of his right to protection by the courts of the land. After this criticism, and criticism from many other quarters, the section was repealed. It came before the courts again, however, in 1965 in the case of *Buss v Phillips* [1965] SASR 51 where it was argued that a by-law made prior to the repeal of the section and in respect of which a certificate had been given could not be challenged for validity. Hogarth J rejected this argument and ruled that, on the repeal of the section, the protection given to by-laws by the section disappeared.

[611] **Victorian Local Government by-laws not challengeable in Court of Petty Sessions.** The *Local Government Act* 1958 of Victoria sets out a procedure by means of which local government by-laws may be challenged in the Supreme Court, Section 232(2) of the Act then goes on to provide: "No by-law regulation or joint regulation shall be impeachable in any magistrates court or before justices". The section has come before the courts on three occasions. In *Hallion v Eade* [1938] VLR 179 Macfarlan J was inclined to the view (although it was not necessary for his decision) that the section applied to prevent a by-law being challenged as no longer being in force. This argument arose because of the enactment of a provision which expressly superseded but did not repeal the by-law. His Honour could see no distinction between repealing and superseding a by-law and there was no question in his mind but that the former action could not be set up in a Court of Petty Sessions as a ground for impeaching the by-law. In *Hickinbotham v Hudson* [1925] VLR 520 Weigall A-J held that the provision was applicable to by-laws made by the City of Geelong under the *Carriages Act* 1915. In short, the provision applied to all council by-laws, not merely those made under the *Local Government Act*. It should be noted however that the *Carriages Act* provided, in effect, that the *Local Government Act* provisions relating to the making of by-laws were to apply to by-laws made under the *Carriages Act*. Finally, attention should be drawn to the case of *Brudenell v Nestle Co (Aust) Ltd* [1971] VR
225. A regulation had been made by the Governor-in-Council relating to the quantity of insoluble residue permissible in instant coffee. This regulation had been made under the *Health Act* which provided, among other things, that for the purpose of the carrying into effect by any council of the provisions of the *Health Act*, the *Local Government Act* was to be read and construed as part of the provisions of the *Health Act*. An action was brought against the defendant by a council officer. The validity of the by-laws was attacked before a Court of Petty Sessions and the magistrate ruled that s 232(2) of the *Local Government Act* prevented him considering the validity of the regulation. Menhennitt J rejected this ruling. He considered that the word "regulation" as used in s 232(2) of the *Local Government Act* did not apply to a regulation made by the Governor-in-Council and in addition the provision that the *Local Government Act* should be read as part of the *Health Act* did not apply to the enforcement of regulations made under the *Health Act*. Perhaps most important is the approach adopted by his Honour. At 233 he said "It is the prima facie duty of every court to be satisfied that any provision which it is called upon to enforce is a valid operative law and it requires, I think, the clearest language to take away this duty". Again one sees the attitude being reaffirmed, that while the parliament may prevent the review of the validity of delegated legislation by the courts, the courts will be anxious to limit the operation of such provisions.
CHAPTER 30

SEVERANCE

[612] Introduction. The question whether invalid portions of an enactment may be severed from the enactment leaving the valid portions still standing has arisen frequently in disputes over the constitutional validity of legislation of the Australian Commonwealth parliament. The issue also arises in relation to delegated legislation but in a wider form because delegated legislation has to satisfy a twofold test of validity. First, it must be determined whether the delegated legislation falls within the legislation-making power included in the Act under which the delegated legislation has been made. Then it must be determined whether the delegated legislation falls within the constitutional power to make legislation. It might therefore be possible to sever delegated legislation in such a way as to bring the legislation within, for example, the constitutional requirements, but it might still be invalid as ultra vires the empowering Act. The issue is further complicated by the fact that, in some jurisdictions, there has been included in the Acts Interpretation Act a provision requiring the doctrine of severance to be applied in the interpretation of delegated legislation. The approach of the courts where such a provision exists makes it necessary to consider the common law rules relating to severance separately from the statutory position.

SEVERANCE WHERE NO STATUTORY REQUIREMENT

[613] Approach to be followed by court: differing views. The two leading Australian authorities on the question of severance are the decision of the Victorian Full Court in Olsen v City of Camberwell [1926] VLR 58 and the judgment of Dixon J in Bank of New South Wales v The Commonwealth (1948) 76 CLR at 368-371. It was suggested by Herring CJ in Dunkerley v City of Nunawading [1957] VR 630 that there is no real difference between the views expressed in the two cases. With respect, there is a difference of opinion in the cases on the onus that the doctrine of severance places on the court to endeavour to preserve the regulations under consideration. This difference can have a marked effect on the result of a case.

[614] Olsen's case represented a situation which has arisen in a number of cases concerned with the question of severance. A by-law, after dealing exhaustively with the requirements for building within the municipality, provided that the obligations imposed by the by-law could be dispensed with by the council. No grounds indicating the basis for the exercise of the dispensation were included. The court considered that this dispensation was invalid. The question that then arose was whether this dispensation could be severed from the by-law allowing the remaining provisions to stand. Cussen J at 68, delivering the judgment of the Full Court, stated what he described as a general rule that could be "roughly expressed" for determining issues of severance:

If the enactment, with the invalid portion omitted, is so radically or substantially different a law as to the subject-matter dealt with by what remains from what it would
be with the omitted portions forming part of it as to warrant a belief that the legislative body intended it as a whole only, or, in other words, to warrant a belief that if all could not be carried into effect the legislative body would not have enacted the remainder independently, then the whole must fail. We quite agree with the contention of counsel for the applicant that the conclusion at which the Court is to arrive must in such a case as the present be drawn from a notional comparison of two documents, one containing and the other omitting the invalid portions, and cannot depend upon what may be called outside speculations as to what the members of the legislative body would or would not be likely to do. But it would seem, from the cases we have mentioned, that the expressed intentions of the legislative body should be preserved as far as possible, and that before giving effect to the applicant's contention the Court should be satisfied that the parts are so interwoven that the rest should fall with the admittedly invalid part.

In the circumstances the court considered that it was possible to sever the invalid portion of the by-law and leave the rest standing and in force.

It can be seen that the emphasis in Olsen's case is that the court should be anxious to preserve as much of the legislation as is possible and it should only be where the court is satisfied that the individual parts of the delegated legislation are interdependent that they should declare that the whole falls with the invalid portion. Contrast this view with that of Dixon J in the Banking case at 370:

It was not to be assumed that connected or associated provisions were enacted as separate expressions of the will of the legislature. No severance can be effected unless an inference that the provisions are not to be interdependent can be positively drawn from the nature of the provisions, from the manner in which they are expressed or from the fact that they independently affect the persons or things within power in the same way and with the same results as if the full intended operation of the legislation had been valid.

The difference in approach between this statement and that of Cussen J in Olsen's case is readily apparent. One seeks to preserve the legislation if at all possible while the other contemplates severance in only the exceptional case. The views of Dixon J need also to be read in conjunction with his statement that where a clause specifically adopting a doctrine of severance is to be found in legislation, the effect is to reverse the presumption that the statute is to operate as a whole or not at all: see [624].

Cases in which severance permitted. It would seem from the decisions of Australian courts that the more generous attitude suggested by Olsen's case has, in fact, not been followed. There appear to have been only two cases, apart from Olsen's, in which an argument that the by-law can be severed has been acceded to by the court — in circumstances in which no statutory provision for severance has been applicable. In the same year as Olsen, Mann J in Dewar v Shire of Braybrook [1926] VLR 201 followed Olsen in allowing severance of a by-law that vested an unauthorized discretion in a council. Some years earlier severance had been permitted in Wall v Commissioner of Railways (1905) 7 WALR 208. The regulations in that case provided "Every notice of appeal to the Appeal Board shall be in writing . . . and shall be addressed to and lodged with the Commissioner within fourteen days of the date of the decision appealed from. If the notice discloses a ground of appeal within Section 69 of the Act, the Commissioner shall forward such notice to the Chairman of the Appeal Board . . ." The court ruled that the Act required the Commissioner to forward all appeals to the Appeal Board and he had no
discretion to consider whether or not a ground of appeal was made out. However, the court considered that the words “If the notice discloses a ground of appeal within Section 69 of the Act” could be excised from the regulations leaving them in intelligible form and valid. (Sholl J in Conroy v Shire of Springvale and Noble Park [1959] VR 737, [322] considered that the by-law in that case could be saved by the application of the principles of severance but Gavan Duffy J held to the contrary and Herring CJ, the third member of the court, did not have to consider the issue).

[617] Cases in which severance refused. The question of severance (other than under statute) has arisen in a number of other cases but in all instances the courts concluded that it was not possible to sever the invalid portion from the rest of the legislation and leave the balance standing. Reference to some of these cases as a means of demonstrating the courts’ approach is warranted. In Maggs v The City of Camberwell (1925) 31 ALR 226 a by-law prescribed the whole municipality as a residential area, with the exception of certain streets set out in a schedule to the by-law. Up to that point the by-law was unobjectionable. However, it went on to provide that any other streets might be excepted from the area prescribed if the council, by resolution, so determined. The court considered that this discretionary power to remove streets from the prescribed area was invalid but it was not prepared to sever the invalid portion because, in the words of Irvine CJ, “a by-law which . . . contains a kind of condition or provides for additions or alterations to the excepted streets by resolution of the Council is a totally different one from one which absolutely fixes the area”. It is to be noted that this case was not referred to in Olsen’s case although it would seem to have been concerned with a very similar issue. Other cases referred to below have also considered the question of severance of an invalid dispensing power and the view expressed by Irvine CJ seems to be that which has been followed in preference to the decision in Olsen’s case. It is to be noted, however, in relation to Olsen’s case, that the by-law there laid down an exhaustive code for building. With the discretion removed, the by-law presumably could still operate effectively and the law was not a drastically different law from that which existed with the discretion included. But cf the remarks of Dixon J at [619].

[618] In re By-law No XXIII of the Corporation of the Town of Glenelg; Ex parte Madigan [1927] SASR 85, a by-law prohibited the use of motor vehicles for hire within the council boundaries unless the vehicle and its driver were licensed by the licensing officer. The licensing officer also had a power to renew or revoke licences. These powers of the licensing officer were held invalid. It was argued that the by-law should continue in force with the licensing officer’s powers severed from the by-law but the court held this not to be possible as it would leave the by-law in a radically different form from that in which it was enacted. It would prohibit absolutely the right to use motor vehicles for hire within the council boundaries. The licensing scheme was seen as a vital part of the by-law. Shortly after this decision, the Western Australian Full Court in Bailey v Conole (1931) 34 WALR 18 pursued a similar line of reasoning. Regulations prohibited the setting down of passengers by private buses along prescribed routes without the consent of the Commissioner of Police. This requirement of consent was held invalid. It was argued that the by-law could stand with the invalid provision severed, but the court ruled to the contrary. Dwyer J summarized the view of the court at 25:
"Where there is a complete dispensatory condition coupled with a delegated power, and absolute prohibition was therefore not intended, it would appear improper to apply the doctrine of severability, and so attain a result never contemplated". A like approach was followed in Dunkerley v Shire of Nunawading [1957] VR 630; Springvale Washed Sand Pty Ltd v City of Springvale [1969] VR 784; Leahy v City of Camberwell [1973] VR 589.

[619] It can be seen from the foregoing cases, that, when considering whether severance is possible, a court will look closely at the scheme created by the legislation. If the court is in any way uncertain whether the scheme would have been made if it took the form that would result if the invalid portion were severed from it, the court will declare the whole scheme to be invalid. A court will not assume the role of legislator and produce a new scheme out of the remains of the original version with the invalid parts excluded. Dixon J in the Banking case at 370 referred to some of the provisions that will be regarded as interdependent and therefore not severable:

Thus unless Parliament has said otherwise, a uniform general rule including persons or matters some of which are outside the competence of the legislature must fall as a whole because there is no warrant for the introduction of unexpressed exceptions and limitations and only thus could the provision be given the more restricted operation. Further, if the invalid portion consists in or contains provisions, qualifications, exceptions or conditions affecting the operation of the other provisions severance is impossible. In the same way the invalidity of a clause which would operate by way of relief, compensation or alleviating brings down the provisions to which it has this relation. All these matters were considered to be incompatible with the supposition that the provisions were meant to receive an independent or distributive operation or, at all events, they were thought to tend too strongly against such an assumption. It was not to be assumed that connected or associated provisions were enacted as separate expressions of the will of the legislature.

[620] Approach of Privy Council to severance. It may well be that the Privy Council takes a more generous line on severance than has been evidenced in the Australian cases. In Hinds v The Queen [1976] 1 All ER at 372-374 a part of an Act was held invalid but the Privy Council considered that the invalid portion could be severed from the rest of the Act. Significant is the statement of Lord Diplock at 374: "This may be only half the loaf that Parliament believed that it was getting when it passed the 1974 Act but their Lordships do not doubt that Parliament would have preferred it to no bread". This approach smacks of the speculation as to parliamentary intent that was categorically rejected in the Banking case (and see also R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co (1910) 11 CLR at 26-27). While a like conclusion to that of the Privy Council might be reached by the High Court where a statutory severance provision exists, it is doubtful whether the High Court would go along with an approach expressed as widely as that of the Privy Council in the absence of such a provision.

[621] Reading provisions down to be within power. Severance can also arise where legislation uses terminology that, if taken at face value, would exceed the legislation-making power. In these circumstances, a court will endeavour to place a more limited meaning on the words used to ensure the validity of the legislation. This situation has arisen on a number of occasions in regard to the use of statutory severance clauses and the issue is discussed at
[623], [625]. A case in which the same approach was adopted in the absence of a statutory severance clause is *Montgomery v Gerber* [1907] VLR 428. A power was there given the City of Melbourne to make by-laws in respect of hackney carriages plying for hire. The by-laws referred generally to hackney carriages and did not include the reference to “plying for hire”. It was argued that the by-laws purported to apply to all carriages and were therefore invalid. A'Beckett J ruled that the by-laws could be read as if the qualifying expression “plying for hire” was attached to the words “hackney carriage” and thereby the by-laws could be regarded as valid. A similar approach has been evidenced by the courts when considering the meaning to be given expressions used in delegated legislation that appear in the Act empowering the making of the legislation, see [638]; and also when the courts have limited the operation of delegated legislation by having regard to the territorial limits of the legislation-making authority, see [639].

**SEVERANCE WHERE STATUTORY REQUIREMENT**

[622] Statutory provisions requiring severance. In all jurisdictions, except New Zealand, a provision is to be found requiring Acts to be read in such a way as to be within power.1 The provision in each case is in similar terms to s 15A of the *Commonwealth Acts Interpretation Act*. That section reads:

"15A Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power."

Similar provisions relating to delegated legislation are to be found only in the Acts Interpretation Acts of the Commonwealth and Queensland2 and the Interpretation Ordinances of the Australian Capital Territory and the Northern Territory.3 Again setting out the Commonwealth provision by way of example:

46. Where an Act confers upon any authority power to make, grant or issue any instrument (including rules, regulations or by-laws), then —

(a) . . .

(b) any instrument so made, granted or issued shall be read and construed subject to the Act under which it was made, and so as not to exceed the power of that authority, to the intent that where any such instrument would, but for this section, have been construed as being in excess of the power conferred upon that authority, it shall nevertheless be a valid instrument to the extent to which it is not in excess of that power.

It can be seen that the intention of this provision is to ensure that a regulation is construed as being within the legislation-making power of the authorizing Act. This statutory provision accordingly supersedes the common law doctrine of severance in the Commonwealth and Queensland. The effect of this is discussed at [624].

[623] Reading delegated legislation to be within constitutional power. The

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1 Chs 15A; NSW ss 14A; VIC s 3; QLD s 4; SA s 22A; WA 22A; TAS s 3.
2 Chs 46; QLD s 28 (c).
3 ACT s 49; NT s 4.
section set out in the last paragraph clearly applies in a situation where it appears that delegated legislation may be ultra vires the empowering Act. But the High Court in a number of cases: (see, for example, Bank of New South Wales v The Commonwealth (1948) 76 CLR at 371; Pidoto v Victoria (1943) 68 CLR at 107) has treated the provision as if it also requires instruments to be read in such a way as to be within constitutional power. The judgments refer to 46(b) as the basis for this requirement. The reason why this should be so is not perfectly clear as 46(b) refers only to the instrument being construed "subject to the Act under which it was made". However, it may be that the expression "and so as not to exceed the power of that authority" embraces the constitutional power of that authority. Whatever be the basis for the interpretation given to s 46(b) by the High Court, it now seems established. But could it be argued that s 46(a) of the Acts Interpretation Act also requires instruments to be read as within constitutional power? That section provides that the Interpretation Act is to apply to instruments made under Acts as if they were Acts and as if each rule, regulation or by-law were a section of an Act. Could it be said that this provision attracts s 15A of the Acts Interpretation Act? The references to an Act in s 15A would then have to be read as references to instruments, thus requiring instruments to be read as within constitutional power. The significance of asserting that questions of severance in regard to the constitutional validity of delegated legislation may be resolved by reference to s 46(a) combined with s 15A lies in the fact that the Interpretation Acts of South Australia and Western Australia have provisions equivalent to s 46(a) and s 15A but no provision equivalent to s 46(b). In addition, Tasmania has, in s 4 of its Interpretation Act, a provision that is somewhat similar to, but not as clear as, s 46(a). Section 3 of the Tasmanian Act is equivalent to the Commonwealth s 15A. Victoria and New South Wales, while having provisions in terms similar to s 15A of the Commonwealth Act, have no provision equivalent to that portion of s 46(a) mentioned above. If, in fact, the right to sever federal delegated legislation on constitutional grounds could be argued to stem from s 46(a) and s 15A independently of s 46(b), it would seem that the regulations of the States of South Australia, Western Australia and possibly Tasmania can also be severed on that basis under their Acts Interpretation Act provisions.

[624] Effect of statutory severance provision. The effect of a statutory severance provision was summarized by Dixon J in Bank of New South Wales v The Commonwealth (1948) 76 CLR at 371:

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

(The presumption to which his Honour was referring as being reversed is that set out at [615].) In this passage, Dixon J is referring to the effect of s 15A in relation to constitutional objections. In regard to delegated legislation, this statement is applicable in so far as a challenge is being mounted to that

4 SA ss 3 and 22a; WA ss 3 and 22A.
legislation on constitutional grounds. Where it is suggested that the regulation exceeds the power included in the Act, the same approach, would, it seems, apply with the substitution of the empowering Act for the reference to the Constitution in the passage cited. His Honour continued his discussion of ss 15A and 46(b) of the *Acts Interpretation Act* by saying:

But in applying s. 15A and s. 46(b) the courts have insisted that a provision, though in itself unobjectionable constitutionally, must share the fate of so much of the statute, regulation or order as is found to be invalid, once it appears that the rejection of the invalid part would mean that the otherwise unobjectionable provision would operate differently upon the persons, matters or things falling under it or in some other way would produce a different result. This consideration supplies a strong logical ground for holding provisions to be inseverable, whether the *prima facie* presumption be in favour or against severability. . . . For the inference in such a case is strong that provisions so associated form an entire law and that no legislative intention existed that anything less should operate as law. Further, where severance would produce a result upon the persons and matters affected different from that which the entire enactment would have produced upon them, had it been valid, it might be said with justice that unless the legislature had specifically assented to that result, contingently on the failure of its primary intent, it could not amount to a law.

[625] **Application of statutory severance.** Statutory severance clauses have been held, through a long series of cases, to apply in the same two situations in which the courts have employed the common law doctrine of severance. As mentioned earlier, the first application is where a statute deals explicitly with a number of subject matters some of which are, and some of which are not, within power. In these circumstances, the considerations referred to above relating to severance at common law are applicable, subject to the comments of Dixon J in the *Banking* case as to the reversal of the presumption of indivisibility. The second situation (also mentioned briefly previously: [621]) is where an Act deals in general terms with a subject matter and, if the general words were given their full meaning, would apply both to matters within power and matters beyond power. In these circumstances, the courts have taken the view that, if it is possible to spell out from the enactment a basis on which the law can operate in relation to the matters falling within power, then the Act should be read down so as to apply to those instances alone. Where, however, it is not possible to spell out from the law itself a working valid basis, the court will not indulge in an exercise of legislation and make a new statute out of that which the legislature has enacted. See, in particular, *Pitido v Victoria* (1943) 68 CLR at 110-111 per Latham CJ; *The King v Poole; Ex parte Henry (No 2)* (1939) 61 CLR at 652-653 per Dixon J. These cases were concerned with the constitutional validity of the legislation in question but the same general principles apply in regard to regulations made under an Act: *Ex parte Provera; Re Wilkinson* (1952) 69 WN (NSW) 242.

[626] Section 46(b) of the Commonwealth *Acts Interpretation Act* has been applied to delegated legislation on many occasions, but particularly during World War II to legislation made under the *National Security Acts*. Each case of necessity involved the court in an exercise of statutory interpretation and to that extent the decisions are not of great assistance other than as illustrations of the application of the general principles expounded above. Some of the more important cases that have considered the question and which, subject to the caveat mentioned, are worth listing are: *Fraser Henleins Pty*
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Ltd v Cody (1945) 70 CLR 100; Ex parte Thomson; Re Clarke (1945) 45 SR (NSW) 193; Australasian Jam Co Pty Ltd v Federal Commissioner of Taxation (1953) 88 CLR 23; Silk Bros Pty Ltd v State Electricity Commission of Victoria (1943) 67 CLR 1; Ex parte Zietsch; Re Craig (1944) 44 SR (NSW) 360; Adelaide Company of Jehovah’s Witnesses Inc v The Commonwealth (1943) 67 CLR 116; Victorian Chamber of Manufactures v The Commonwealth (Industrial Lighting Regulations) (1943) 67 CLR 413. For a general discussion of the question of severability, particularly in regard to its constitutional aspects, see Howard Australian Federal Constitutional Law (2nd ed) 18-27.

Finally, it should be mentioned that, even if a regulation can be read in such a way as to bring it within the Constitution and the empowering Act, it must still satisfy the other general vires requirements if it is to be valid: see Jordan CJ in Ex parte Sinderberry; Re Reid (1944) 44 SR (NSW) at 269. The court there was concerned with the question whether a regulation once read down so as to bring it within the legislative power of the Commonwealth satisfied the general requirements of certainty.
CHAPTER 31

INTERPRETATION OF DELEGATED LEGISLATION

GENERAL PRINCIPLES

Introduction. The general principles relating to the interpretation of Acts of Parliament are applicable also to the interpretation of delegated legislation: Parry v Osborn [1955] VLR 152. Some of the many cases that have applied specific interpretation principles to delegated legislation are: Johnston Fear & Kingham & The Offset Printing Co Pty Ltd v The Commonwealth (1943) 67 CLR at 329 (acquisition presumed to be subject to compensation); Dillon v Gange (1941) 64 CLR 253 (re-making of by-law after judicial interpretation assumed to affirm that interpretation); Code v Shoalhaven Paper Mills Pty Ltd (1957) 56 AR (NSW) at 560 (construction of penal provisions); Silk Bros Pty Ltd v State Electricity Commission of Victoria (1943) 67 CLR 1 and Jenner v Shire of Mildura [1926] VLR 514 (use of headings for the purposes of interpretation). It seems unnecessary to pursue these general principles further here. The rules of interpretation are fully discussed in Pearce, Statutory Interpretation (1974).

Interpretation having regard to nature of instrument. There is one approach to the interpretation of subordinate legislation which is different from that used for Acts of parliament. It was stated by Lord Reid in Gill v Donald Humberstone & Co Ltd [1968] 3 All ER at 183. The court there was concerned with the interpretation of regulations made under the Factories Act relating to the use of scaffolding, ladders, etc. His Lordship said:

I find it necessary to make some general observations about the interpretation of regulations of this kind. They are addressed to practical people skilled in the particular trade or industry, and their primary purpose is to prevent accidents by prescribing appropriate precautions . . . They have often evolved by stages as in the present case, and as a result they often exhibit minor inconsistencies, overlapping and gaps. So they ought to be construed in light of practical considerations, rather than by a meticulous comparison of the language of their various provisions, such as might be appropriate in construing sections of an Act of Parliament . . . difficulties cannot always be foreseen, and it may happen that in a particular case the requirements of a regulation are unreasonable or impracticable; but, if the language is capable of more than one interpretation, we ought to discard the more natural meaning if it leads to an unreasonable result, and adopt that interpretation which leads to a reasonably practicable result.

This approach was endorsed by Murphy J in Driscoll v Scott (1976) 8 ALR at 598 in regard to regulations relating to scaffolding. With respect, the adoption of an approach of this kind to the interpretation of regulations that are endeavouring to deal with day-to-day situations and which impose obligations on persons who are in no position to consult a lawyer as to the meaning of the legislation seems eminently sensible.
Uncertain or vague legislation. A court cannot decline to place a meaning on the words of an Act on the basis that those words are too uncertain to be given meaning. The most that can occur is for a court to treat the section of the Act as inoperative. However, as is discussed in ch 24, the courts will approach the question of uncertainty in delegated legislation from a slightly different viewpoint. If a provision is so ambiguous that no meaning can be given to it, the court will rule that the power to make the delegated legislation has not been properly exercised and the provision will be held to be ultra vires. Another aspect of the interpretation of vague delegated legislation that is worth mentioning (although it is far from certain that it would be adopted in Australia or New Zealand) was the approach taken by the Ontario High Court in Re LDCM Investments Ltd and Town of Newcastle (1975) 58 DLR (3d) 376. The court in that case held that where there is a dispute between a municipality and a land owner and doubt exists as to the meaning to be given to expressions used in a by-law, the doubt must be resolved in favour of the land owner. This view was reached largely as a result of the general approach that a person is entitled to use his land how he wishes and if a council wants to diminish the use that may be made of that land, it must indicate that diminution with clarity.

Interpretation to bring within power: *Ut res magis valeat quam pereat*. This general principle is used where there are possible competing interpretations which may be placed upon a by-law. The issue is best summarized in the words of Griffith CJ in *Widgee Shire Council v Bonney* (1907) 4 CLR at 985 "When a by-law is open to two constructions, on one of which it would be within the powers of the local authority, and on the other outside of these powers, the former construction should be adopted". See also *Matthews v City of Prahran* [1925] VLR 469 per Irvine CJ at 476-477. This approach was used by the High Court in *Birch v The Australian Mutual Provident Society* (1906) 4 CLR 324 when determining whether or not a by-law imposed what would have been an ultra vires liability upon citizens: see particularly Barton J at 343. The approach cannot of course be adopted if the words of the delegated legislation do not lend themselves to acceptable alternatives. So an attempt to argue that by-laws made by the City of Adelaide should be read down as being within power was rejected in *In re the Corporation of the City of Adelaide; Ex parte Mitchell* [1925] SASR 179 because it would have involved the court in virtually rewriting the by-laws. The court drew a distinction between construing the by-laws and amending them so as to bring them within power. See further ch 30 relating to severance.

Benevolent construction of by-laws of elected body. The Divisional Court in *Kruse v Johnson* [1898] 2 QB at 99 stated an approach which has been reaffirmed by the courts on numerous occasions since that date. The court said that by-laws made by public representative bodies should be benevolently interpreted and credit should be given to those who had to administer the by-laws that they would be reasonably administered. Australian courts have adopted a similar approach to this question: see, for
example, Arthur Yates & Co Pty Ltd v The Vegetable Seeds Committee (1945) 72 CLR 37 and the cases cited therein. Perhaps the clearest statement is that of Herron J in Ex parte Grinham; Re Sneddon (1961) 61 SR (NSW) at 870:

In determining the validity of regulations conferring powers upon public representative bodies acting under statutory power their consideration is approached from a standpoint different from that adopted towards by-laws of corporations which carry on business under statutory authority for their own profit although incidentally for the benefit of the public. Courts of justice tend to support regulations of the former category by a benevolent interpretation by according those who have to administer them with an intention to do so in a reasonable manner and where these are made upon the recommendation of the authority with being the best judge whether a particular regulation is required for the purposes of the administration of the Act in question.

Interpretation of expressions used in regulations that appear in Act. A referential provision of some importance that is common to all interpretation Acts in Australia and New Zealand provides that when an Act confers upon any authority power to make regulations, etc, expressions used in the regulations are, unless the contrary intention appears, to have the same meaning as in the Act conferring the power. The purpose of this provision is to avoid the need to go through the process of redefining in regulations the expressions used in the Act under which the regulations are made. There is, however, one important matter with which the provision does not deal. An expression used in the regulations could have the same meaning as in the Act at one of two points of time — either at the date when the regulations were made or at the date when the meaning of the regulations is under discussion. If the former is to be the date, it will be necessary to look at the Act as it stood when the regulations were made. The expression as then used will determine the meaning of the expression in the regulations unless the regulations are amended to change it. If the second alternative is to be followed, the expression as used in the regulations will change whenever the expression in the parent Act is changed. This issue has come before the High Court on two occasions and differing answers seem to have been given. In Birch v Allen (1942) 65 CLR 621 the court unanimously supported the second approach set out above. In the more recent case of Kostrzewa v Southern Electric Authority of Queensland (1969) 120 CLR 653, Barwick CJ adopted the first approach. Windeyer J also seemed to favour this view although he did not feel the need to determine it finally. (Owen J, who agreed with and adopted the judgment of the late Mr Justice Taylor, decided the case on another ground. Kitto J “agreed”, but it is not clear with which view of the case.) To find such different views being taken on so basic a point warrants further examination of the cases concerned.

Birch v Allen. Regulation 42 of the National Security (General) Regulations made it an offence for a person to endeavour to influence public opinion in Australia or elsewhere in a manner likely to be prejudicial to the defence of the Commonwealth or the efficient prosecution of the war. In 1942

1 Cth s 46; NSW s 18; VIC s 29; QLD s 28; SA s 40; WA s 39; TAS s 9; ACT s 49; NT s 4; NZ s 7. The common law had in fact adopted a similar approach in Blashill v Chambers (1884) 14 QBD 479.
the defendant asked various persons to sign a petition calling upon the Prime
Minister to negotiate a peace settlement with Japan. He was charged under
the second part of regulation 42, namely, with endeavouring to influence
public opinion in a manner likely to be prejudicial to the efficient prosecution
of the war. The question that arose for decision by the court was what did the
words “the war” as used in the regulations mean? The National Security
(General) Regulations contained a definition which provided that “the war
means the present war”. The Regulations had been made under the National
Security Act 1939. That Act had defined “the present war” as the war
between His Majesty the King and Germany. It was thus clear that when the-
National Security (General) Regulations were originally made in 1939, the
expression “the war” meant the war with Germany. It was argued for the
defendant that that was still the meaning of the expression. However, the
prosecution pointed out that the National Security Act 1939 had been
amended to provide that it applied to “any war in which His Majesty is or may
be engaged”. In these circumstances, the prosecution argued, the expression
“the war” in the regulations should have the same connotation as in the Act.
Accordingly, it covered any war in which His Majesty was engaged, thereby
including the war against Japan. Latham CJ (with whom the other members
of the court agreed) accepted this argument. His Honour said at 626-627:

It is the duty of the Court to construe [the regulations] in their legal setting as it
exists. What is that legal setting? The regulations refer to the National Security Act as
amended from time to time. That Act has been amended, and the regulations must,
in my opinion, be regarded as regulations which are made under and by virtue of the
Act as amended and not merely by virtue of the original Act. Any other view would
lead to a possible diversity of interpretation of identical words or phrases in the
different regulations . . . I approach the matter from this point of view: either there
is an Act conferring the power to make these regulations, or there is no such Act. In
my opinion there is such an Act and that Act is the National Security Act 1939-1940
— that is, the original Act as amended. The regulations must be read in the setting of
that Act, and words and phrases such as “the war” must be construed having regard to
the provisions as they existed at the time of the offence.

These statements seem to make it clear that, in his Honour's view, one
regards the Act and the regulations as a composite piece of legislation. When
the meaning of an expression appearing in the parent Act is changed, that
change flows through to the regulations without the need for amendment.

[635] Kostrzewa v Southern Electric Authority of Queensland. The
plaintiff in this case was involved in an industrial accident. He claimed that
this was due to a defect in the scaffolding being used on the building premises
on which he was working and he sued the owner of the land on which the
building was erected alleging a failure to comply with regulations made under
the Inspection of Scaffolding Acts 1915 to 1966 (Qld). The preliminary point
was taken that the defendant was not the appropriate person to sue. The
resolution of this question turned on whether the defendant was the “owner”
referred to in the relevant regulation in which the statutory obligation was set
out. The Inspection of Scaffolding Act was first passed in 1915 and it
included a definition of “owner”. This definition was subsequently amended
but the regulation on which the plaintiff relied was made before that
amendment. The trial judge and the Queensland Full Court proceeded on
the basis that the definition of “owner” as it stood at the date of the accident

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was applicable. This was summarily rejected by Barwick CJ. Referring to the approach of the courts below, his Honour said at 656: "That course would seem to have been unwarranted as it now appears that the Regulation upon which the appellant as his case is pleaded must necessarily rely is a regulation which was made in 1915 under The Inspection of Scaffolding Acts as they then stood. Thus it is to the Acts in their 1915 form that one must look for the interpretation of the Regulation as well as for its validity if that comes in issue." Support for this view is to be found in the judgment of Windeyer J. His Honour said at 658 that he did not have finally to decide the issue but "That the giving of a new meaning to words in the Act, without more, can give a new meaning to Regulations which were made under the Act, before it was amended, seems to me a questionable proposition." The other judges of the High Court did not consider the question. Birch v Allen was not referred to by any members of the court.

Birch v Allen to be preferred. The decision in Birch v Allen and the views of Barwick CJ and Windeyer J in the Kostrzewa case seem irreconcilable. It is suggested that the views of the High Court in Birch v Allen are to be preferred. If the meaning of an expression in a regulation is fixed by the meaning of the expression in the parent Act at the time the regulation is made, it would be readily possible for that meaning to vary from regulation to regulation in one particular set of regulations. In the absence of some express provision, a term used in newer regulations included in a particular set might have a different meaning from the same term in older regulations in that set. Likewise, if an original regulation in a set of regulations were to be remade, expressions in it would follow the parent Act as then in force, while the regulations each side of it in the set (if they had not been remade) would still have to be interpreted in the light of the Act as in force when they were made. It is true that confusion of this kind can be overcome by suitable amendments to the regulations. But it would surely be simpler to allow the meaning of an expression in the regulations to follow the meaning in the Act and amend the regulations if it should be desired to retain the old meaning. An Act and the regulations made under it are all part of one legislative scheme. The occasions would be rare when expressions used in the Act would be intended not to have the same meaning in the regulations made under that Act.

Finally, to take a more technical argument, the Interpretation Acts of all jurisdictions provide that a reference to an Act is to be read as a reference to the Act as in force from time to time. Regulations are always expressed to be made under a specific Act which is referred to by its citation. It would seem that one could argue from this fact that the regulations are made under the Act as in force from time to time. Expressions used in the regulations would then have the meaning that they have in the Act "from time to time". It would seem that only confusion can result from the approach set out in the Kostrzewa case and it is to be hoped that the views of the High Court in Birch v Allen will prevail.

Two other cases on the general question of the interpretation of expressions used in both Act and delegated legislation should be mentioned. In Riley v City of Oakleigh [1939] VLR 384, O'Bryan A.J first asserted, without citing the Acts Interpretation Act provision, that expressions used in
delegated legislation are to be assumed to have been used in the same sense as the like expressions in the Act. His Honour then went on to add that where a word was used in by-laws with the intention of it being given a wider meaning than the like expression in the enabling statute, the by-laws might, to that extent, be invalid. The courts will, however, endeavour to avoid such an approach as is indicated by Irvine CJ in *Barnes v City of Coburg* [1928] VLR at 339. There his Honour had to consider the validity of by-laws that talked in general terms. There was a proviso in the empowering Act which limited the effect of by-laws made under the Act. It was argued that as this proviso was not incorporated in the by-laws, the by-laws were too widely expressed and therefore were repugnant to the Act. His Honour considered that the proviso operated to limit the effect of the by-laws notwithstanding the fact that the proviso was not included in the by-laws and therefore they were within the power granted by the Act.

**[639] Extra-territorial operation of delegated legislation.** The authority of councils to make delegated legislation is, of course, circumscribed by the council area itself. The council has no power to make laws that extend in operation beyond the council boundaries. If a by-law purports to do so it must, of necessity, be invalid: *McCurrie v Nazia* (1900) 2 WALR 15. However, as with other legislation, the court will assume that the council has not intended to pass legislation having extra-territorial effect. If, therefore, the by-law can be read down so as to have operation only within the jurisdiction of the by-law making body, it will be so read and be valid to that extent. This principle is well illustrated by *Taylor v Harris* [1953] VLR 105. There a regulation by the Melbourne Harbour Trust was expressed in general terms in prohibiting smoking in sheds. The court ruled that the regulation had to be read as if the words “within the port” were included after the reference to sheds and, as so construed, the regulation was valid. This approach accords with the general attitude taken by the courts in regard to the use of general words in Acts: Pearce; *Statutory Interpretation* para [93].

**[640] Effect of inclusion of objects clause.** In an endeavour to give an indication to the court of the basis on which regulations have been made, provisions have, on occasions, been included which state the objects of the regulations. For example, reg 4 of the *National Security (Land Transport) Regulations* provided

> The objects of these Regulations are to secure, in the interests of the defence of the Commonwealth and the effectual prosecution of the war, the control by the Commonwealth of rail and road transport and for that purpose to provide that rail facilities, equipment and rolling stock and road services and vehicles shall be subject to control, regulation and direction, and these Regulations shall be administered and construed accordingly.

Provisions of this kind have been before the court on a number of occasions but it is clear that they have very little effect on the resolution by the court of the issue of whether or not the regulations are valid. The approach of the court is that it “should treat this expression . . . with respect. In a doubtful case it might turn the scale, the presumption being in favour of the validity of Acts rather than of invalidity. But such a declaration cannot be regarded as conclusive. A Parliament of limited powers cannot arrogate a power to itself by attaching a label to a statute”. The foregoing is taken from South
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Australia v The Commonwealth (1942) 65 CLR at 432 and relates to the preamble to an Act. However, the passage has been cited with approval in cases dealing with delegated legislation as the approach to be adopted in regard to objects clauses in such legislation: see The King v University of Sydney; Ex parte Drummond (1943) 67 CLR at 113; Australian Woollen Mills Ltd v The Commonwealth (1944) 67 CLR at 483. The effect of the courts approach is well illustrated by Gratwick v Johnson (1945) 70 CLR 1. The legislation in question in that case provided that a person should not travel interstate by train without a permit. It was argued that the objects clause of the National Security (Land Transport) Regulations (which is that set out above) indicated that the regulations were to be read as an exercise of the defence power but this was rejected. It was held that the provision did not dispense with the necessity of examining the regulations in order to determine their substantial character when a question of constitutional validity arose and that the regulations contravened s 92 of the Constitution (see particularly Latham CJ at 15).

RETROSPECTIVE OPERATION OF DELEGATED LEGISLATION

Presumption against retrospectivity. When interpreting legislation, the courts assume, in the absence of some clear statement to the contrary, that the legislation is not intended to operate retrospectively. The leading case on this question in Australia is Maxwell v Murphy (1957) 96 CLR 261. In that case, Dixon CJ at 267 summarized the approach of the courts as follows: "The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events". But the approach adopted by the courts is but an assumption and can be displaced if there is clear evidence that the legislature intended the legislation to have retrospective operation. See further Pearce, Statutory Interpretation ch 10.

This general approach is applicable to delegated legislation as well as to Acts of parliament. While it will be assumed that there is no intention for the delegated legislation to operate retrospectively, if it is plain that it is intended to have such operation, the court will treat it as valid and enforce it accordingly. This position was made clear by the Privy Council in Marshall's Township Syndicate, Ltd v Johannesburg Consolidated Investment Co Ltd [1920] AC 420. An ordinance of the Transvaal Province purported to invalidate any contract, existing or thereafter to be entered into, in which the person primarily liable for rates endeavoured to transfer that liability to the lessee of the rated property. The ordinance was held valid. At 425-426 the Privy Council said:

The fact that legislation is retrospective may be a strong argument on the inquiry whether it is just or expedient. But if power is given to the Provincial Councils to deal with rating by ordinance, they have the same power of making any enactment relating thereto with retroactive effect as Parliament would have had . . . That the enactment is retrospective does not make it ultra vires.

The same approach had been adopted by the High Court in Worrall v Commercial Banking Co of Sydney Ltd (1917) 24 CLR 28. Regulation 8C of the War Precautions (Moratorium) Regulations provided that "Any
determination decision . . . made or given by any Court in any matter arising under these Regulations shall be final and conclusive and without appeal". The court held that the intended effect of the regulation was to affect retrospectively determinations of a Supreme Court made before the commencement of the regulation. The court considered that the regulation was valid. It approached the question on the basis of the ordinary rules as to the presumption against retrospectivity — there was no suggestion in the judgment that because the legislation was contained in a regulation, any different rules applied. It may be thought that a more generous approach was adopted because the regulation involved a wartime situation but only a passing reference to this fact was made in the judgment. The decision in Worrall's case was expressly followed by a differently constituted bench of the High Court in Pearson v Swannell (1920) 28 CLR 390. The same approach was also adopted in Minister for the Army v Pacific Hotel Pty Ltd [1944] ALR 430 where a regulation was held to authorize the making of a retrospective order by a minister. See also Australian Coal and Shale Employees Federation v Aberfield Coal Mining Co Ltd (1942) 66 CLR 161 particularly per Starke J at 185.

Retrospectivity may go to validity. It would seem from the preceding paragraphs that delegated legislation will not be invalid merely because it has retrospective operation. Nevertheless, when considering regulations made under an Act, regard must always be had to the power authorizing the making of the regulation. It is to be noted that, in the passage from the Marshall's Township case set out in the last paragraph, the Privy Council alluded to the possibility that the fact that the legislation was retrospective could be an argument relevant to the inquiry whether the regulation was just or expedient. A court will inquire whether or not the regulation can be described as just or expedient for giving effect to the Act and as part of that inquiry it will ask the question whether it is necessary for the regulation to have retrospective operation. This issue arose before the High Court in Broadcasting Co of Australia Pty Ltd v The Commonwealth (1935) 52 CLR 52. The plaintiff broadcasting company was, pursuant to regulations made under the Wireless Telegraphy Act, entitled to a portion of the radio receiver licence fee that was payable by members of the public who had radio receivers. The regulations were made under a "necessary or convenient" power in the Wireless Telegraphy Act. An amending regulation reduced the amount payable to the plaintiff and other holders of broadcasting transmission licences with effect from a date earlier than the date of notification of the regulation. The High Court, Gavan Duffy CJ, Rich, Evatt and McTiernan JJ, Starke J dissenting, held that the regulation was invalid. They considered that the necessary or convenient power would not support retroactive legislation in this case. But the court was not speaking at large in regard to the interpretation of a necessary or convenient power; it was directing its remarks to the regulation made under the particular Act. It may be more likely that a court will hold delegated legislation having retroactive effect invalid if it is made under a general regulation making power in an Act. However, if it can be said that it is necessary or convenient to give effect to the Act for the legislation to have retrospective operation, the regulation will be valid.

Other matters inhibiting making of retrospective delegated legislation. Two other factors militate against the adoption of retrospective
delegated legislation. The first is that the parliamentary committees which examine delegated legislation, look closely and unfavourably on legislation that has retrospective operation. The second factor is that even if a committee does not move to have retroactive delegated legislation disallowed, there is a provision in the Interpretation Acts of all jurisdictions except Victoria and New Zealand that imposes a limitation on the making of such legislation. The form of limitation, however, varies. In New South Wales, Queensland, South Australia and Western Australia the prohibition against backdating is absolute. Section 41(1) (b) of the New South Wales Interpretation Act, for example, provides that, unless a contrary intention appears in the enabling Act, a regulation shall "take effect on and from the date of publication or a later date specified in the regulation". The Commonwealth, Tasmanian, Australian Capital Territory and Northern Territory provisions (the last two relating to regulations made under ordinances) take a different form. Section 48(2) of the Commonwealth Acts Interpretation Act will serve as an example. It reads:

(2) Regulations shall not be expressed to take effect from a date before the date of notification in any case where, if the regulations so took effect:
(a) the rights of a person (other than the Commonwealth or an authority of the Commonwealth) existing at the date of notification, would be affected in a manner prejudicial to that person; or
(b) liabilities would be imposed on any person (other than the Commonwealth or an authority of the Commonwealth) in respect of anything done or omitted to be done before the date of notification.
And where, in any regulations, any provision is made in contravention of this subsection, that provision shall be void and of no effect."

Interpretation of statutory prohibitions on retrospectivity. Prior to the enactment in 1937 of s 48(2) of the Acts Interpretation Act, as set out in the last paragraph, the Commonwealth provision was in similar form to s 41(1)(b) of the New South Wales Interpretation Act. The operation of the Commonwealth provision was considered by the High Court in the case mentioned in [643], Broadcasting Company of Australia Pty Ltd v The Commonwealth (1935) 52 CLR 52. It is necessary to set out the form of the amending regulation in that case. It provided as follows:

3(1) After regulation 67 of the Wireless Telegraphy Regulations the following regulation is inserted:
"67A In addition to the amount deductible from the licence-fees specified in the last preceding regulation, the Postmaster-General may deduct from the respective licence-fees an amount not exceeding fivepence for each month of the currency, after 1st November 1927, of any such licence issued before 1st January 1928...."
(2) This regulation shall be deemed to have commenced on 1st November 1927.

Gavan Duffy CJ, Evatt and McTiernan JJ simply said that sub-reg (2) of this regulation, by deeming the regulation to have commenced on a date earlier than the date of notification of the regulation (which was 7 August 1928), was inconsistent with the Acts Interpretation Act provision and therefore the regulation was void (this being additional to the ground of invalidity set out at

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2 Cth s 48; NSW s 41; QLD s 28A; SA s 58; WA s 56; TAS s 47; ACT s 50; NT s 15 (The Seat of Government (Administration) Act 1910, s 12, specifically allows the backdating of Australian Capital Territory Ordinances).

3 Acts Interpretation Act 1904-1930 s 10(b).
Rich J and Starke J, the other two judges of the court, did not allude to this question in their judgments. It is not entirely clear from the judgment of the majority judges whether the regulation would have offended the Interpretation Act provision if sub-reg(2) had not been included in the amending regulation. There is some suggestion in the judgment that sub-reg (1), on its own, may have been valid at least on this score. In the joint judgments at 60 it is said “it is not possible to discard clause (2) of the regulation and allow clause (1) of it to have effect as from the date of Gazette notification. For it is clear that the executive authority regarded clause (2) as an essential part of the scheme embodied in the regulation”. It could, it seems, be argued that sub-reg (1) did not contravene the Interpretation Act provision as it would not take effect from a date prior to the date of notification but would merely redetermine for the future the amount that was to be deducted from licence fees. A factor in determining the amount to be deducted would, it is conceded, be fixed by having regard to a period of time prior to the date of notification of the Gazette. But the deductions would occur in the future and therefore the regulation itself would not take effect from an earlier date. Somewhat curiously, the interpretation of this type of limitation on backdating seems not to have come before the courts again but perhaps this is because draftsmen have taken care to ensure that there is not a blatant backdating of a regulation but merely a future operation given to regulations, such operation being made dependent on past events.

The Commonwealth Government responded to the decision referred to in the last paragraph by enacting s 48(2) of the Acts Interpretation Act as set out in para [644]. It can be seen that this provision could be interpreted in either of two ways. The section could be viewed literally and, if regulations are not expressed “to take effect” from an earlier date, retrospective operation of the regulations will be permissible, subject to the Broadcasting Company case above and the general question whether retrospective legislation was contemplated by the empowering provision. The alternative interpretation is to say that any regulation having retrospective effect is invalid if the conditions set out in paragraphs (a) and (b) are satisfied. The High Court, with some division of opinion, seems to have taken the former view of the operation of the section.

The matter came before the court first in Australian Coal and Shale Employees Federation v Aberfield Coal Mining Co Ltd (1942) 66 CLR 161. The legislation in that case, put shortly, provided that certain awards of conciliation commissioners, including awards made before the notification of the regulation, could no longer be appealed against to the Arbitration Court. The regulation did not, however, in so many words, say that it took effect from a date prior to its notification. It was agreed by all judges of the court that a right of appeal was indeed a “right” and so a right in law was being affected by the regulation. Latham CJ, with whom McTiernan J agreed, and Starke J held that the regulation did not contravene s 48(2) of the Acts Interpretation Act. Rich J and Williams J expressed a contrary view. The approach of the majority is summarized by Starke J at 185:

The regulation is so expressed that it acts retrospectively as well as prospectively in respect of awards, orders, or decisions made or given by the Conciliation Commissioner, and this is so because the regulation is expressed to take effect upon
awards and orders made before its commencement or the date of its notification. Still the regulation is not expressed to take effect from a date before its notification. No doubt it operates retrospectively, that is, upon awards made before the date of notification. But it did not take effect or come into force as a regulation or law until the date of notification. It may be, that the purpose of section 48 was to prohibit the retrospective operation of regulations, but if so the words of the section have failed to express the necessary intention. There is nothing in the section which prohibits the making of regulations having a retrospective or retro-active operation; all that is prohibited is giving them effect in certain cases as regulations before notification.

Williams and Rich JJ both considered the practical effect of the regulations which as Starke J had indeed pointed out, was to affect retrospectively rights arising under the awards of the Conciliation Commissioners. In the view of these judges, it was such action that the section of the Interpretation Act was intended to prevent. Williams J reiterated this view in two subsequent cases: in Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth (1943) 67 CLR at 168 in regard to a regulation that validated seizures of goods that had occurred in the past and in Peacock v Newtown Marrickville and General Co-operative Building Society No 4 Ltd (1943) 67 CLR 25 in regard to a regulation that affected contracts made before the date of the regulation. In neither of these cases did the other judges of the High Court express views similar to that of Williams J.

[648] The next major consideration of s 48(2) arose in Toowoomba Foundry Pty Ltd v The Commonwealth (1945) 71 CLR 545. The regulation before the court in that case was notified in the Gazette of 12 October 1944. It provided that certain decisions of the Women's Employment Board which had been held invalid by the High Court “shall, by virtue of this regulation, have full force and effect for all purposes, according to their tenor”. There was some difference of opinion in the court as to whether the regulation intended to validate the decision only from the date of its notification or whether the words “according to their tenor” endeavoured to validate the decisions from the dates on which they were made. Latham CJ (with whom McTiernan J agreed) took the latter view as to the construction of the regulation and, consistently with the approach that he had taken in the Aberfield case, held that the regulation was invalid to the extent that it purported to validate the decisions retrospectively. At 568, his Honour distinguished the Aberfield case:

In that case, it was held that a regulation which terminated a right of appeal as from a particular date took effect only as from that date, and did not take effect at any past date. Nothing can alter the past, but a law may be said to take effect from a past date if the operation of the law is such as to destroy as at a past date rights which then existed or to impose as at a past date liabilities which did not then exist.

The effect of the regulation in this case was, in his Honour's view, to give effect to determinations and impose obligations on persons from a date prior to the date of notification of the regulation. The other judges in the Toowoomba Foundry case would seem to have endorsed Latham CJ's approach: see Dixon J at 574-575 and Williams J at 586-587 (although his Honour seems to have taken a different view as to the construction of the regulation). The view expressed in the Toowoomba Foundry case is consistent with that expressed in Aberfield's case given the construction placed upon the regulation by the Chief Justice. One other point to note about the
Toowoomba Foundry case is that Latham CJ at 569 considered that the effect of s 48(2) of the Acts Interpretation Act was to render the regulation void only in so far as it contravened that sub-section. Accordingly, the regulation could still have future operation in so far as it purported to validate the decisions for the future. It was only the retrospective validation that was bad.

[649] The final case in which this issue seems to have arisen was that of The Commonwealth v Welsh (1947) 74 CLR 245. A regulation there reduced retrospectively air force officers' pay. The court agreed that, if, in law, an air force officer would have had a right to recover his pay, then his rights were being affected and the regulation would have been rendered invalid by s 48(2). However, it was held by Latham CJ, Starke, Dixon and McTiernan JJ, Rich and Williams JJ dissenting, that there was no right to the pay and accordingly s 48(2) allowed the backdating of the regulation as no rights of a person were being affected by the action being taken.

[650] Legal effect of statutory prohibition on retrospectivity. The operation of s 48(2) in the light of the decisions of the High Court was discussed fully by Comans: "Retrospective Commonwealth Regulations" (1953) 27 ALJ 231. Mr Comans (later First Parliamentary Counsel of the Commonwealth) concluded that the interpretation placed on the section by the High Court has done little more than impose drafting limitations on the form which retroactive regulations must take. He asserted that s 48(2) of the Acts Interpretation Act can only be infringed by a regulation which directly provides, or which has the effect, by a commencement provision or otherwise, of providing, that, as at a past date, the law shall be deemed to have been that which it was not. This, he considered, was unsatisfactory because the substantial effect of a regulation which would be bad if "expressed to take effect from a date earlier than the date of notification" may often be validly achieved by a regulation not so expressed. With respect, the views expressed by Mr Comans seem correct. This being so, it would seem that s 48(2) does not achieve the effect that, on its face, it sets out to achieve (cf the views of Starke J set out at [647]). If it is considered that delegated legislation should not adversely affect a person's rights retrospectively (and it seems undesirable that such legislation should), s 48(2) should be repealed and an effective prohibition should be adopted.
CHAPTER 32

JUDICIAL REVIEW — CONCLUSION

Role of courts. The preceding chapters indicate that the courts have adopted an approach to the review of delegated legislation that has carefully avoided any consideration of the merits of the legislation. Apart from the entry by New Zealand courts into the question whether by-laws in that country are unreasonable, the courts have limited their enquiry to the issue whether the empowering Act authorizes the making of the delegated legislation. The enquiry has been even more confined than that which is undertaken by the courts in regard to executive action. The courts there will enquire whether a decision had been reached by taking into account only relevant factors and discarding irrelevant factors. The identification of these factors involves an enquiry that can come very close to a review of the merits of a decision; this is particularly so as the question of what is, and what is not, relevant is an issue of law determinable solely by the courts. Likewise, the question of review for error of law as distinct from error of fact lends itself to the courts determining whether or not the decision was "correct". In all these cases, the courts deny that they are entering upon an enquiry into the merits of a decision, but in fact the line between merits and method of making is a fine one. This position seems not to arise in relation to delegated legislation. The courts have demonstrated a marked reluctance to rule invalid regulations made for an improper purpose. Yet this is the only ground of review that comes close to the administrative law grounds mentioned above.

Once it is accepted that the review undertaken by the courts is truly directed to whether the delegated legislation falls within the empowering provisions, there is less reason for the parliament or the executive to endeavour to limit judicial review. The exclusion clauses discussed in ch 29 could be more readily justified if it were apparent that the courts were substituting their discretion for that of the executive as to whether the delegated legislation should have been made. The absence of such an enquiry on the part of the courts reduces the purpose of an ouster clause to the more blatant one of wishing the delegated legislation to survive notwithstanding the fact that it exceeds the empowering provision.

Enabling clauses. A matter that can substantially limit the ability of a court to review delegated legislation is where the enabling clause is couched in very wide language. Parliamentarians cannot object if regulations made pursuant to a wide empowering provision deal with matters in such a way as to constitute an unexpected use of the power. For the reasons set out in the preceding chapters, the courts cannot strike down delegated legislation that imposes oppressive obligations on persons if those regulations fall within the terms of the enabling Act. The courts have, nonetheless, indicated that they are not prepared to allow wide use of delegated legislation unless an express power so to do is included in the Act. The general necessary or convenient formula adopted in Australian legislation could, if the courts had been so minded, have enabled the making of delegated legislation that, rather than
supplementing an Act, built upon it and moved control into new fields. As indicated in ch 16, the courts have resisted this interpretation and have limited general regulation-making powers by requiring that a provision in the Act must exist as a basis for the legislation made pursuant to a general power.

[654] Extension of review powers. It has been suggested that the courts are reluctant to review questions of policy underlying delegated legislation and this does seem an appropriate approach for the courts to adopt. However, as mentioned at [500-501], there is one area of development which could be contemplated by the courts. This is in regard to review of delegated legislation for vagueness or uncertainty. While our constitutional theory does not contemplate the possibility of the courts declaring Acts of parliament to be invalid because they are uncertain, no such constraint applies in regard to legislation made by the executive. If a court is satisfied that delegated legislation does not adequately state the obligations imposed on persons, there is much to be said for it declaring the legislation to be invalid. It seems that little harm would be done if the executive were required to state the obligations it imposes upon citizens in clear terms.

[655] Procedure for review. It is suggested that two changes relating to the procedure for review of delegated legislation would be desirable. First, the approach suggested by Bray CJ in R. v Harm (1975) 13 SASR at 99 (see [570]) that judicial notice be taken of delegated legislation laying down a general rule of conduct should be adopted. There seems no reason why the formalities of proof should attend delegated legislation when this is not required in regard to Acts. But this should be subject to one important proviso — that the delegated legislation is published in an available form. An available form ought not to include publication in the Gazette. Where delegated legislation is not available in loose leaf form or in an annual volume of such legislation, formal proof of the legislation should be required. A person should not be liable to be convicted for an offence under legislation that is unavailable to him.

[656] The second procedural change that would seem to be desirable is to provide some statutory means to challenge delegated legislation. Section 178 of the Supreme Court Act 1958 (Vic) provides a means for challenging the validity of local government by-laws. A like provision enabling any delegated legislation to be questioned in the Supreme Court would seem preferable to the present rather haphazard position whereby the validity of delegated legislation has to await challenge as a result of a prosecution or other action being taken under the legislation. There would also be some advantage in making provision similar to s 27 of the Administrative Appeals Tribunal Act 1975 (Cth) which enables any person or persons whose interests are affected by a decision to challenge the validity of that decision. Sub-section (2) of the section provides that an organisation or association of persons are to be taken to have interests affected by a decision if the decision relates to a matter included in the objects or purposes of the organisation or association. This statutory form of standing enables interest groups to question decisions that may be reviewed by the Tribunal. Would not a like provision to enable delegated legislation to be questioned before the Supreme Court be appropriate?
Conclusion. Other matters that warrant tidying up by the courts when occasion offers have been mentioned from time to time in the preceding chapters. There is no point in repeating them here. Overall, judicial review is as satisfactory as it can be within the constitutional framework in which it operates. However, the courts need to be ever alert to ensure that their ability to review the validity of delegated legislation is not whittled away. While the courts cannot ignore a legislative directive limiting review, they must continue their present practice of interpreting the effect of such provisions narrowly. Judges, like parliamentarians, have recognised that delegated legislation is not illegitimate in some way. But this is not to say that delegated legislation cannot be misused and the courts have their part to play in preventing any such misuse.
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