

# Judicial Review of Delegated Legislation

A paper delivered by Mark Robinson SC to a NSW Bar Association  
CPD Conference held in Sydney on 18 August 2014

I am asked to speak to you today about judicial review of delegated legislation.

Much of what I have to say is derived from the primary sources and texts in this area, namely:

1. MA Robinson SC, ed, *Judicial Review – The Laws of Australia*, 2014 Thomson Reuters;
2. DC Pearce and S Argument, *Delegated Legislation in Australia* (4th ed, 2012, LexisNexis);
3. DC Pearce and RS Geddes *Statutory Interpretation in Australia*, 7<sup>th</sup> edn, 2011, LexisNexis; and
4. P Herzfeld, T Prince and S Tully, *Interpretation and Use of Legal Sources*, 2013, Thomson Reuters.

Delegated legislation is a form of legislation made by persons or bodies other than Parliament who have been given the authority to make such legislation by an Act of Parliament (referred to as “primary legislation”).

Delegated legislation (also referred to as “subordinate legislation”) consists of instruments which lay down general rules of conduct affecting the community.

The administrative function embodied in delegated legislation consists in the application of general rules to particular cases.

Delegated legislation often takes the form of regulations and encompasses instruments such as ordinances, by-laws, rules, rules of court, proclamations, statutory instruments, statutory regulations and statutory rules.

A “legislative instrument” for federal purposes is comprehensively defined in s 5 of the *Legislative Instruments Act 2003* (Cth).

That definition focuses on the “legislative character” of the instrument, in that it must determine or alter the content of the law and affect a privilege or interest, impose an

obligation, create a right, or vary or remove an obligation or right.

Some instruments are specifically declared to be legislative instruments in s 6 of the Act. In addition, numerous categories of instruments have been exempted from the definition of legislative instrument. The list of excluded instruments may be further expanded by regulation. Instruments are generally excluded from the definition where there is some “prospect of doubt” or in recognition of policy considerations making registration undesirable or inappropriate.

Rules of court are not legislative instruments for the purposes of the Act. However, they are treated as legislative instruments for most purposes and interpreted in the same fashion.

The making of delegated legislation and parliamentary review of it are topics well covered in *Judicial Review – The Laws of Australia* at pages 25 to 40.

As to judicial review of delegated legislation, Australian courts have jurisdiction to rule on the validity of delegated legislation. This was best described in *Melbourne CC v Barry* (1922) 31 CLR 174.

Recognition of the significance of the judicial role in the review process has come with the proliferation of delegated legislation.

In deciding on the validity of an instrument, the court has a threefold task:

1. It must determine the meaning and scope of the words used in the empowering or enabling Act of Parliament under which the delegated legislation is made.
2. The court must determine the meaning and scope of the delegated legislation in question.
3. It must determine whether or not the delegated legislation comes within the words used in the empowering Act. The leading authority here is *Shire of Swan Hill v Bradbury* (1937) 56 CLR 746

If the court finds that the delegated legislation is not authorised by the enabling Act, the result should be that the legislation is *ultra vires* and invalid. There are several cases in which the court has made such a finding (eg: *McEldowney v Forde* [1971] AC 632 and *Shire of Swan Hill v Bradbury* (1937) 56 CLR 746).

Challenges to the validity of delegated legislation are commonly made on the ground that the formal requirements in the relevant Act were not met when the legislation was made.

This ground is referred to as “procedural ultra vires”.

If the empowering legislation sets out a formal procedure for making delegated legislation, that procedure must ordinarily be followed if the delegated legislation is to be valid. In addition, the formal procedures for making, publishing and tabling must be complied with (see, for example, *Watson v Lee* (1979) 144 CLR 374 and *Thorpe v Minister for Aboriginal Affairs* (1990) 26 FCR 325, Northrop J at 327–334).

A challenge to delegated legislation on this ground requires the court to determine the effect of the failure to comply with the relevant requirement, in particular, whether the failure rendered the delegated legislation invalid. To determine this, the court must, in terms, now unfashionable (since *Project Blue Sky v ABA* (1998) 194 CLR 355), in effect decide whether or not the requirements of the enabling Act are mandatory or directory. If mandatory, failure to comply with them renders the delegated legislation invalid. If, on the other hand, they are merely directory, failure to comply does not invalidate the delegated legislation. For instance, in the absence of any express provision, formal requirements for tabling are mandatory. Therefore, non-compliance renders the delegated legislation invalid. There are, however, judicial statements to the contrary (see, *Dignan v Australian Steamships Pty Ltd* (1931) 45 CLR 188, Dixon J at 205–206).

Australian courts are reluctant to find delegated legislation invalid on the ground of procedural ultra vires.

In *Watson v Lee* (1979) 144 CLR 374, the High Court ruled that certain regulations made

under the *Banking Act 1974* (Cth) (now repealed) were valid, although none of the regulations challenged were available for purchase on the day on which their making was notified in the Commonwealth of Australia Gazette, as required by the *Statutory Rules Publication Act 1903* (Cth) (now repealed). The reasoning of the members of the Court varied. Barwick CJ said that there was a presumption in favour of validity, and that the plaintiffs failed to establish that copies of the regulations were not available at the relevant time. Gibbs J found that there had been a “substantial compliance” with the notification requirement. Stephen and Aickin JJ found that the regulations in question had (with one exception) been validated by a subsequent Act. Mason J found that there was no requirement in Australia that a statute should be notified before it came into operation, and that, in any event, these regulations were validated by the subsequent Act.

However, rights are protected from the adverse effects of the retrospective operation of Commonwealth legislative instruments (*Legislative Instruments Act 2003* (Cth), s 12(2)). Instruments have no effect where they commence before registration and as a result would disadvantage or impose liabilities relating to acts committed or omitted prior to registration.

The consequences of a failure to meet formal requirements are expressly provided for by statute in all jurisdictions except Tasmania. Failure to comply with the tabling requirements results in the delegated legislation either ceasing to have effect (as in the case of the Commonwealth, the Australian Capital Territory, Queensland and Western Australia) or being void and of no effect (as in the case of the Northern Territory). Conversely, in New South Wales, South Australia and Victoria, it is expressly provided that a failure to comply with the tabling requirements does not affect the operation of the delegated legislation in question. Furthermore, some Australian jurisdictions have made specific provision for “sufficient compliance” with the requirements of publication and notification. In the Australian Capital Territory, New South Wales, Queensland and Victoria, copies must be available “as soon as practicable”. In the Australian Capital Territory and Queensland, if no copies are available at the notified places at the time of publication, the relevant Minister is required to table in Parliament a statement of the reasons why copies were not available. However, a failure to comply is not a failure to comply with the requirement to publish and notify contained in the legislation in these jurisdictions.

There are a number of established grounds for invalidating delegated legislation. More grounds are yet to be established. The proven grounds are as follows:

1. Beyond power of the enabling legislation – simple ultra vires;
2. Inconsistency or repugnancy;
3. Improper purpose or motive;
4. No power to delegate or to sub-delegate;
5. Legal unreasonableness or lack of proportionality; and
6. Uncertainty

These grounds are discussed below. The grounds yet to be established in this area are the remaining grounds of judicial review of administrative decisions, such as denial of procedural fairness, failure to take into account relevant considerations and so on. It is not a perfect fit, since most of the other grounds of judicial review are individually specific and delegated legislation is not – it applies, usually, to all persons equally.

As to the first ground, delegated legislation must not deal with subject matter that is beyond the power conferred by the enabling Act. This ground of challenge is termed “*simple ultra vires*”. There are two elements to this ground: first, if the empowering legislation grants authority to a person or a body to make delegated legislation, that person or body must exercise the power. Moreover, such a body exercising the law-making power must be properly constituted. Second, the court must determine whether the delegated legislation challenged, in fact exceeds the scope of the empowering legislation.

A challenge on the second count generally arises where the empowering legislation authorises the making of such regulations as are “*necessary or convenient ... for carrying out or giving effect to*” the Act, and where it is contended that the delegated legislation in question goes beyond what is “*necessary or convenient*”.

In these circumstances, the courts have held that the regulation-making power is only incidental or ancillary to the purposes of the empowering Act (*Shanahan v Scott* (1957) 96 CLR 245 and *Willocks v Anderson* (1971) 124 CLR 293) and that, to be properly incidental or ancillary to these purposes, it must be able to be referenced to a specific provision in the Act

(*Utah Construction & Engineering Pty Ltd v Pataky* [1966] AC 629). Further, the scope of a clause empowering the making of delegated legislation varies from Act to Act. The more detailed the Act, the more limited the power is to make delegated legislation; the more general the Act, the greater the scope will be for delegated legislation made under it (because it will be assumed that the legislature has consciously decided to leave the detail to be filled out by delegated legislation) – see, *Morton v Union Steamship Co of New Zealand Ltd* (1951) 83 CLR 402.

An additional ground on which to challenge delegated legislation is that it is repugnant to, or inconsistent with, the empowering Act, any other statute, or the common law.

This ground of review is often self-evident on the face of the relevant empowering provision, which will state that the Governor-General (or Governor, Administrator) may make regulations “*not inconsistent with this Act*” for certain nominated purposes. Further, the court finds delegated legislation invalid if it is inconsistent with the provisions of the enabling Act without such a statement in the empowering provision. However, the court's willingness to find legislation valid ensures that the alleged inconsistency must be clearly shown. An example is found in *Sydney CC v Garbett Pty Ltd* (1995) 69 ALJR 616. In that case the High Court considered the validity of an Ordinance made under the *Local Government Act 1919* (NSW) (now repealed) which required rates made by Councils to be levied during the year in which they are made. As the whole purpose of a section of the Act was to preserve the liability of a ratepayer outside the year in which a rate was made, it was held that the Ordinance must yield to the inconsistent statutory proviso.

Similarly, in terms of inconsistency with, or repugnance to, other statutes, the court requires that the intention for such inconsistency be either: clearly and expressly stated or the subject of an overwhelmingly strong implication.

In *Plaintiff M47/2012 v Director General of Security* (2012) 86 ALJR 1372; [2012] HCA 46 (5 October 2012), the plaintiff was a refugee. He was refused a protection visa and placed in detention because the Australian Security Intelligence Organisation (ASIO) assessed him as a risk to security within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*(Cth). Because of that assessment the plaintiff did not meet public

interest criterion 4002 set out in the *Migration Regulations* 1994 and he could not be granted a visa or released from detention. Unsuccessful attempts were made to remove the plaintiff to a safe third country and these failed. He was a refugee from Sri Lanka. As a former member of the Liberation Tigers of Tamil Eelam (LTTE) he was at risk of being targeted by the Sri Lankan Government and/or paramilitary groups in Sri Lanka. As a person who had refused to re-join the LTTE he was at risk of persecution from Tamil separatist groups. He came to Australia by boat to Christmas Island.

He challenged the validity of the public interest criterion 4002, the legality of the refugee status decision and challenged whether section 198 of the *Migration Act 1958* (Cth), authorised his removal.

The High Court held public interest criterion 4002 was invalid and that his application for a visa had not been finally determined and he could lawfully be detained pursuant to section 196. The plaintiff was validly detained for the purposes of the determination of his application for a protection visa.

Public interest criteria 4001 requires that in order to get a visa, one must satisfy the Minister that the person passes or would have passed the character test. Public interest criteria 4002 said that one can get a visa if one is not assessed by ASIO to be directly or indirectly a risk to security.

Chief Justice French held that public interest criteria 4002 and the provisions of ss 500-503 of the *Migration Act* “*spells invalidating inconsistency*” (at [71]). This is because:

“That is primarily because the condition sufficient to support the assessment referred to in public interest criterion 4002 subsumes the disentitling national security criteria in Art 32 and Art 33(2). It is wider in scope than those criteria and sets no threshold level of threat necessary to enliven its application. The public interest criterion requires the Minister to act upon an assessment which leaves no scope for the Minister to apply the power conferred by the Act to refuse the grant of a visa relying upon those Articles. It has the result that the effective decision-making power with respect to the disentitling condition which reposes in the Minister under the Act is shifted by cl 866.225 of the Regulations into the hands of ASIO. Further, and inconsistently with the scheme for merits review provided in s 500, no merits review is available in respect of an adverse security assessment under the ASIO Act made for the purposes of public interest criterion 4002. Public interest criterion 4002 therefore negates important elements of the statutory scheme relating to decisions concerning protection visas and the

application of criteria derived from Arts 32 and 33(2). It is inconsistent with that scheme. In my opinion cl 866.225 of the Regulations is invalid to the extent that it prescribes public interest criterion 4002.”

In other words, the regulation effectively vested in ASIO the power to refuse a visa on security grounds and it was not consistent with the scheme of the Act, including the responsibility it imposes on the Minister and officers, the system of merits review which it establishes and the personal responsibility and accountability of the Minister for decisions precluding review.

Justice Hayne held that public interest criterion 4002 created a hurdle to the grant of a protection visa that circumvents the special review provisions made by the Act. If that criterion were valid, a decision to refuse to grant a protection visa may always be made relying on that criterion, and not relying on Art 32 or Art 33(2) and applying s 501, thereby giving s 500(1)(c) no work to do. Prescribing public interest criterion 4002 as a criterion for the grant of a protection visa was inconsistent with a statutory scheme in which all of the elements of s 500(1)(c) are given work to do.

Justice Kiefel held that the Migration Regulations established a regime different from that applying under the Act, the clear intention of the latter being that the Minister, or delegate, would consider for him- or herself whether a protection visa should be refused on grounds of national security. Public interest criterion 4002's statement that the non-existence of an adverse security assessment is a criterion, impermissibly cuts across the process intended by the Act. Public interest criterion 4002 has the effect of bringing the consideration by the Minister to a premature end and rendering such decision non-reviewable.

Justice Crennan also found the criterion invalid for similar reasons. Justices Gummow Heydon and Bell dissented.

An important lesson from the case is that on the rules relating to invalidating regulations or delegated statutory instruments.

Here, the instrument was set aside by majority of 4 to 3 justices. Chief Justice French discussed the topic of invalidating regulations in classic terms (from [53]).

He said (at [53]) The source of the regulation-making power was section 504 of the Migration

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

He then said (at [54]): Regulations made under s 504 must be "not inconsistent with" the Migration Act. Even without that "expressed constraint" delegated legislation cannot be repugnant to the Act which confers the power to make it. Repugnancy or inconsistency may be manifested in various ways. An important consideration in judging inconsistency for present purposes is "the degree to which the legislature has disclosed an intention of dealing with the subject with which the statute is concerned." A grant of power to make regulations in terms conferred by s 504 does not authorise regulations which will "extend the scope or general operation of the enactment but [are] strictly ancillary." In considering whether there has been a valid exercise of the regulation-making power "[t]he true nature and purpose of the power must be determined".

This is how his Honour got (ultimately) to his finding of repugnancy.

As to the improper purpose ground, delegated legislation must be made for the purpose, if any, set out in the empowering Act and not for any other purpose or motive. This ground is part of the wider ground known as "extended ultra vires".

If delegated legislation is challenged on this ground, the court must first determine the true nature and purpose of power under which it is made. The court must then determine whether the delegated legislation in question is reasonably proportionate to the pursuit of the enabling purpose (*South Australia v Tanner* (1989) 166 CLR 161, Wilson, Dawson, Toohey and Gaudron JJ at 165) in order to decide this, the court must be satisfied that there is a sufficient nexus between the end the legislation seeks to achieve and the means adopted in pursuit of this end.<sup>4</sup> The High Court stated, in *South Australia v Tanner* (1989) 166 CLR 161 that, in attempting to reach a decision on reasonable proportionality, the court must not "impose its own untutored judgment on the legislator", and that (at 168):

[I]t is not enough that the court itself thinks the regulation inexpedient or misguided. It must be so lacking in reasonable proportionality as not to be a real

exercise of the power.

The decision in *South Australia v Tanner* was applied in *Re Gold Coast CC By-laws* [1994] 1 Qd R 130, where Thomas J held that a provision in the *Local Government Act 1936* (Qld) (now repealed) regarding footpath trading did not entitle the Council to pass by-laws which had the effect of prohibiting street vendors.

The High Court decision in *Nationwide News Pty Ltd v Wills (Free Speech Case)* (1992) 177 CLR 1; 66 ALJR 658; 44 IR 282; 8 BR 117; 108 ALR 681, according to Bayne, indicates that:

[I]n the application of the reasonable proportionality test of validity the courts will have regard to the extent to which delegated legislation affects the exercise or the enjoyment of those rights and freedoms “traditionally protected by the common law”... and ... those rights and freedoms which are either explicitly or implicitly protected by the Commonwealth Constitution.<sup>7</sup>

In examining the propriety of the purpose of delegated legislation, the court is not, in the absence of an express and valid exclusion of judicial review, constrained by the fact that the delegated legislation was made by the Governor-General, a Governor, Administrator or a Minister (*R v Toohy; Ex parte Northern Land Council* (1981) 151 CLR 170, per Stephen J at 202–217).

As to delegation, if an empowering Act grants delegated law-making power to a particular person or body, that person or body must not sub-delegate the power. This is in accordance with the legal maxim *delegatus non potest delegare*, to effect that a delegate cannot delegate without lawful authority. It is also consistent with a concern of the courts that the “representative, public, and procedurally more formal characteristics typical of the ‘legislative’ process should not be bypassed without good reason” (*Dainford Ltd v Smith* (1985) 155 CLR 342).

Delegated legislation may be challenged on the ground of legal unreasonableness or for a lack of proportionality. It has been suggested that while there is authority for unreasonableness as a ground for review of delegated legislation, it is “fraught with analytical difficulty” (see the citations at footnote 3, Judicial Review The Laws of Australia, page 50). This is a reflection of the reluctance of Australian courts to substitute their opinion for that of the person or body making the delegated legislation on the basis of what is and is not reasonable. The courts' reluctance is relevant in situations where the body making the delegated legislation is answerable to an electorate. A court will intervene under this ground only if an instrument is so unreasonable

as to be classified as a non-exercise of the power to make it.

However, this constriction might change after the High Court's recent widening of the ground in *Minister for Immigration and Citizenship v Li* (2013) 87 ALJR 618. It is yet to be tested as against delegated legislation.

Some judges treat unreasonableness as a way of stating that delegated legislation is beyond the power of the enabling statute rather than as an independent ground of challenge. In *Minister for Primary Industries & Energy v Austral Fisheries Pty Ltd* (1993) 40 FCR 381, Lockhart J stated that (in dissent at 384, but see also see Beaumont and Hill JJ at 399–400):

Delegated legislation may be declared to be invalid on the ground of unreasonableness if it leads to manifest arbitrariness, injustice or partiality; but the underlying rationale is that legislation of this offending kind cannot be within the scope of what Parliament intended when authorising the subordinate legislative authority to enact laws.

Proportionality as a ground of review of delegated legislation is by no means universally accepted, but has been the subject of judicial scrutiny on which some challenges have been successful and some have not.

As to uncertainty, delegated legislation may be challenged on the ground of uncertainty.

The general approach of courts to this ground (as it is on several others connected with the validity of legislation) is to invest the impugned provision with some workable meaning (*King Gee Clothing Co Pty Ltd v Commonwealth* (1945) 71 CLR 184).

If the meaning of the delegated legislation is clear, but the course of conduct authorised or prohibited is uncertain, then the legislation will be declared invalid. Alternatively, if the terms of a piece of delegated legislation are so vague as to be beyond interpretation, they are meaningless and cannot be applied.

Thank you