

# **ADMIN LAW**

# **FINAL EXAM**

# **NOTES**

Blue = Less important stuff

Green = Cases and section in Acts

Yellow highlighted for easy to find

Red = for important stuff

# **Topic 1: Judicial Review of Delegated Legislation**

# **Step One: Is there a delegated legislation on the facts?**

1. A delegated legislation is an instrument that lays down general rules of conduct affecting the community at large made by authority allowed to act by an Act of Parliament
2. Examples include: Orders in Council, Regulations, Statutory Rules, By-Laws, and Ordinances

2.1. Note: Delegated legislation are not non-legislative instruments such as guidelines or policies (soft law). This is important as non-legislative instruments such as guidelines cannot be judicially reviewed, only the manner of an exercise of power under it can be reviewed.
3. Distinguishing delegated legislation (executive act) from a parliamentary act:

Legislation creates rules and law of general application whereas executive authority applies the law in particular cases (*Minister for Industry and Commerce v Toohey*). *RG Capital Radio v Australian Broadcasting Authority* set out some factors which assist in distinguishing between parliamentary exercise of power and administrative power (reviewable under the ADJR). The factors are:

  - A.1.whether the rule was of general application
  - A.2.level of parliamentary control
  - A.3.publication requirements
  - A.4.consultation procedures
  - A.5.absence of merits review
  - A.6.binding legal effect of the instrument
4. Note: Cth DL prevails over inconsistent state legislation (*Clyde Engineering v Cowburn; Hume v Palmer*)

# **Step Two: Ground of Judicial Review for Delegated Legislation**

## **2. Checklist:**

1. Failure to Comply with Formal Requirements
2. Exceeding the Scope of the Primary Act
3. Inconsistent with or Repugnant to Law
4. Improper Purpose
5. Unreasonableness and Proportionality
6. Uncertainty
7. Sub-delegation of Legislative Power

# **Ground 1: Failure to Comply with Formal Requirements**

3. Formal requirements regarding procedure are specified as a general rule or as specific rules in the primary Act. The consequence of a breach of the rule will depend on the specific rule that is breached

## **Commonwealth delegated legislation: General procedural rules**

4. General rules relating to Commonwealth delegated legislation are found in Legislation Act 2003 (Cth). This Act applies to ‘legislative instruments’ (s 8(4)- An instrument is a **legislative instrument** if: (a) the instrument is made under a power delegated by the Parliament; and (b) any provision of the instrument: (i) determines the law or alters the content of the law, rather than determining particular cases or particular circumstances in which the law, as set out in an Act or another legislative instrument or provision, is to apply, or is not to apply; and (ii) has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

5. Rule 1: Sunsetting

5.1. **Section 50(1) of the Legislation Act** provides that Cth delegated legislation have a sunsetting clause of 10 years. It provides “*This subsection repeals a legislative instrument on the first 1 April or 1 October falling on or after the tenth anniversary of registration of the instrument, unless the instrument was registered on 1 January 2005.*”

## 6. Rule 2: Public Consultation

6.1. Section 17(1) of the Legislation Act requires that before a legislative instrument is made, “rule-maker must be satisfied that there has been undertaken any consultation that is : (a) considered by the rule-maker to be appropriate; and (b) reasonably practicable to undertake”. But then, section 19 notes that a failure to undertake public consultation “*does not affect the validity or enforceability of a legislative instrument*”.

## 7. Rule 3: Registration

7.1. Section 15G(1) provides that a legislative instrument must be lodged for registration as soon as practicable, and section 15K(1) provides that the *delegated legislation is not enforceable unless the instrument is registered*.

## 8. Rule 4: Tabling

8.1. Within 6 days of registration, the legislation must be tabled before each House of the Parliament (s 38(1)) and if it is not tabled, “*the legislative instrument ceases to have effect*” at the end of 6 days (s 38(3)).

8.2. This creates a situation where the DL is effective at registration but ceases to have effect if the government fails to table it in Parliament ( Thorpe v Minister for Aboriginal Affairs)

## 9. Rule 5: Disallowance

9.1. If within 14 days of the House of Parliament receiving a notice of motion to disallow a delegated instrument, a resolution is passed disallowing the instrument, then the delegated legislation ceases to have effect (s 42(1)).

## **NSW Delegated Legislation: General procedural rules**

10. In NSW, the Subordinate Legislation Act (NSW) and the Interpretation Act 1987 (NSW) together provide some procedural rules for delegated legislation.

11. Rule 1: Sunsetting

11.1. **Section 10(2) of the Subordinate Legislation Act** provides the general rule relating to sunset clauses for NSW delegated legislation being 5 years. The provision states “*Unless it sooner ceases to be in force, a statutory rule published on or after 1 September 1990 is repealed: (b) on 1 September following the fifth anniversary of the date on which it was published*”

12. Rule 2: Public Consultation

12.1. **Section 5(1) of the Subordinate Legislation** provides that a Minister, before making a delegated legislation must “*ensure that, as far as is reasonably practicable, a regulatory impact statement*” is prepared, however, **section 6(1)** notes that a regulatory impact statement is not necessary in some circumstances, and **section 9(2)** notes that **if requirements under section 5 are not met, the validity of the delegated legislation is not affected.**

13. Rule 3: Registration

13.1. **Section 39(1) of the Interpretation Act** requires that the delegated legislation must be published on the NSW legislation website, and **section 39(2A)** provides that the **delegated legislation will not commence until after it is published.**

## 14. Rule 4: Tabling

14.1. Written notice of the delegated legislation, within 14 days after its registration, must be tabled before each House of Parliament (**s 40(1) of the Interpretation Act**). However, **s 40(4) of the Interpretation Act** notes that “*Failure to lay a written notice before each House of Parliament in accordance with this section does not affect the validity of a statutory rule*”

## 15. Rule 5: Disallowance

15.1. **Section 41(1) of the Interpretation Act** provides that House of Parliaments may pass a resolution disallowing a delegated legislation. This will mean the delegated legislation ceases to have effect (**s 41(2) of the Interpretation Act**).

# Specific Procedural Rules

16. Specific procedural rules may be specified in the primary act ("Minister must satisfy this before the act can be passed"). The consequences of a breach of this rule will depend on whether the requirement is mandatory or not. A failure to meet the process required generally makes the delegated act invalidity (unless stated otherwise). - Consider Project Blue Sky

## 17. **Concore v Mulgrave Shire Council (1988):**

17.1. In this case, the delegated legislation required notice before the legislation came into place. The notice did not indicate what was put in the legislation, it was broad as to the subject matter.

17.2. Held: The Notice and the by law did not go far enough to notify the height of building was to be limited. Thus, the ad was defective. Because the defect is so significant in its failure to give reasonable notice, the legislation should be disqualified

## Ground 2: Exceeds the Scope of the Primary Act

### [Alternative 1]: Necessary or Convenient

18. Where primary act confers power to create delegated legislation where it is 'necessary or convenient' or 'necessary or expedient'

18.1.In *Shanahan v Scott (1957)*, it was held that where the legislation confers power to create delegated legislation where it 'necessary or expedient', the delegated legislation must complement the primary Act not supplement it. It cannot be used to widen the purpose of the primary Act or extend the primary Act into a further field or regulations.

18.1.1.Facts: The *Marketing of Primary Products Acts* established an Egg Board for the marketing of eggs. A regulation was made to prevent placing eggs in cold storage or subjecting them to preservative treatment – the purpose of this was to make it difficult in Victoria to sell eggs from NSW.

18.1.2.Held: The parent legislation only concerned eggs vested in the Vic board. The regulation attempted to extend or 'widen' the legislation into a further field of regulation (ie, to NSW eggs), which is invalid and *ultra vires*. Found that regulations cannot "*widen the purposes of the Act, add new and different means of carrying them out or depart from or vary the plan which the legislature has adopted to attain its means*"

18.2.Note: If the primary Act is very clear and precise, the delegated legislation will have less room (*Morton v Union Steamship Company of NZ*)

## **Alternative Two: Regulate or Prohibit**

19. Where primary Act confers power to create delegated legislation to ‘regulate’ or ‘prohibit’

19.1. In *Swan Hill Corporation v Bradbury*, it was held that even where the power is to ‘regulate and restrain’, as it was under the Local Council Act to regulate and restrain erection of buildings, this power cannot be used to prohibit something altogether. ‘Regulating’ power must stop short of preventing or suppressing

19.1.1. Swan Hill Council made a bylaw prohibiting the erection of any building except with council’s approval. It was found that the object of the Act was not to make building an exceptional privilege bestowed by the Council.

20. **NOTE:** This ground does not apply where the delegated legislation expressly includes a **Henry VIII clause** which expressly allow DL to override, repeal or amend particular provision of the empowering Act as a whole ( *R v Minister of State for the Interior (1972)*).

## **Ground 3: Inconsistent with or Repugnant to Law**

### **Inconsistency with Primary Act:**

21. Delegated legislation cannot be repugnant to the primary Act ([Plaintiff M47/2012 v Director General of Security](#))
22. Inconsistency can be demonstrated by **direct inconsistency** (for example, the terms are defined differently in the primary act and delegated legislation) and by **inconsistent effect**, where the delegated legislation imposes new liabilities beyond those contemplated by the primary Act such as adding a new penalty or qualifying rights in the primary Act

### **Inconsistency with the general law**

23. The delegated legislation cannot be inconsistent with the constitutional limits placed on Parliamentary power, or with other primary legislation as delegated legislation cannot trump other primary legislation ([Powell v May](#)).
  - 23.1. Some constitutional limitations on the delegation of the power of Parliament to a delegated body ([Victorian Stevedoring And General Contracting v Dignan](#)):
    - 23.1.1. DL cannot be framed in terms that were so wide and uncertain that it could not be characterised as a law with respect to one of the Cth Heads of Legislative Power
    - 23.1.2. Parliament cannot abdicate its power by a DL which gave all of the Parliament's law making authority to another body
    - 23.1.3. DL must be made by a body which is responsible to parliament in order for the law to be characterised as a law in its constitutional sense.

24. When interpreting the delegated legislation, the courts will apply the principle of legality and hold that an Act may only interfere with fundamental rights if it explicitly clear of its intention to do so.

25. The delegated legislation cannot contravene fundamental rights UNLESS it is clear that the primary empowering Act interferes with the rights ([Evans v NSW](#), protestors aimed to challenge World Youth Day Regulations (made under s 58 of the World Youth Day Act) in order to protest on World Youth Day against the Catholic Church. The Regulation provided the power to remove individuals that were causing ‘annoyance or inconvenience’ on World Youth Day. It was held that ‘causes annoyance’ affects the fundamental freedom of speech because it could relate to to expressions of opinion which neither disrupt nor interfere with the freedoms of others, nor are objectively offensive. Section 58 of the Act, applying the principle of legality, while wide, did not explicitly allow for interference with the freedom of speech. The Regulations could not be read down and thus were invalid.)

## Ground 4: Improper Purpose

26. The delegated legislation may be questioned if it goes beyond the purpose of the primary Act. Where there are many purposes, the improper purpose must be a substantial purpose for the creation of the provision ([Haines v Annwrack](#))
27. It is necessary to identify the purpose of the primary Act. This may be expressly stated or may be implied. Where the purpose is hard to identify, the delegated legislation would only be improper if it was not created in good faith.
28. [Brownells v Ironmongers Wages Board](#): The purpose of the primary Act was to create relationships between the employer and the employees. The delegated legislation was created for an improper purposes because it uneconomical to open the shops after 5:45.
29. Note: Mason J in *R v Toohey; Ex Parte Northern Land Council* suggested that this ground is only applicable for powers and whether powers exercised for the end of achieving the purpose, as opposed to subject matter power which are defined by reference to a subject matter. But in practicality, this distinction between power is difficult to apply ([Brownells v Ironmongers' Wages Board](#))

## **Ground 5: Unreasonableness and Proportionality**

### **Unreasonableness**

30. Due to its high threshold test set in [City of Brunswick v Stewart](#), requiring that the delegated legislation is so oppressive or capricious that no reasonable mind can [justify it](#), this ground will be hard to make out and is not worth considering.

### **Proportionality**

31. **NOTE:** Proportionality only applies to grant of delegated power which is purposive (with the delegated instrument being proportional to the purpose of the Act) **BUT it does not apply to grants of power where the power was a subject matter power** ([Minister for Resources v Dover Fisheries](#)). For subject matter power the test was whether there was a 'real and substantial connection between the DL and grant of power'

32. The different tests for proportionality were set in [South Australia v Tanner](#). In this case, Tanner wanted to construct an aviary on his property but was prevented from doing so by a regulation created under the Waterworks Act. The Act related to water pollution and the regulations were created to prevent the construction of buildings that related to animals and birds. Tanner challenged its validity.

32.1. For the majority, [a broad approach](#) should be applied to the ground of proportionality. The test applied was whether the regulation was reasonably proportionate to the end to be achieved or the purpose of the primary Act. The issue is of establishing a 'sufficient nexus'. It must be so lacking in reasonable proportion as to be unjustified. The purpose of the Act was found to be regulating, controlling and prohibiting deterioration of water, and to reduce water pollution.

This was a BROAD purpose, with the aim to prevent pollution. It was found that the Regulation was sufficient connected to the purpose of reducing and preventing deterioration and pollution of the water supply and was therefore valid.

32.2. Justice Brennan was in dissent. He preferred the view that a power of delegated legislation should be interpreted narrowly, and deferring to the intention of the executive should be limited.

33. Considering proportionality can require considering alternative means of exercising the power and staying consistent with the objective of the primary Act (Street Preachers case).