

Delegated Legislation in Australia and New Zealand by D. C. PEARCE, LL.B. (Adel.), LL.M. (A.N.U.), Barrister and Solicitor of the Supreme Court of South Australia and the Australian Capital Territory and of the High Court of Australia; Reader in Law, Law School, Australian National University. (Butterworths, 1977), pp. i-xxvi, 1-310. Cloth, recommended retail price \$17.50 (ISBN: 0 409 31820 5).

In his Foreword to this book, Sir Anthony Mason of the High Court of Australia records:

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 over-simplification 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.

Every reader of this book will agree without hesitation with Sir Anthony Mason's views. The author, in the introduction, provides a brief history of delegated legislation. The reference to the 1385 Act will no doubt be a matter of surprise to many. He outlines the arguments in favour of and against the use of delegated legislation and he lists four matters that need to be borne in mind against the abuse of delegated legislative power. He expresses the view that the discussion in the succeeding chapters of the book demonstrates that not all the suggested safeguards exist and not all of them are being fully exercised. The remainder of Part 1 dealing with the making, publication and commencement of delegated legislation and Part 2 dealing with the parliamentary review of delegated legislation justify the author's view in relation to the suggested safeguards. In particular his conclusion to Part 1 in paragraphs 63-70 and his comments on the performance of the various parliamentary committees at the end of each of Chapters 4-11 and his conclusion to Part 2 in Chapter 13 should be noted.

It is however Part 3, Judicial Review of Delegated Legislation, that gives the book its real value and justifies Sir Anthony Mason's conclusion that it will be welcomed by the administrative lawyer and by all those who are interested in administrative law. I would add, with respect, all those concerned in the preparation and enactment of legislation, whether as policy-makers, draftsmen or legislators. Part 3 occupies some 208 pages of the 300 pages in the volume. The fact that the Table of Cases contains references to well over 600 reported cases (many are referred to in several places) indicates the extent of the author's research and appreciation of the approach adopted by the courts in Australia and New Zealand to the "control" of delegated legislation. In Chapter 14, he deals with a number of general matters relating to the task of the courts in reviewing delegated legislation. Amongst other matters, he refers to Lord Diplock's statement in

McEldowney v. Forde,¹ one of the few United Kingdom authorities referred to, that the task of a court in determining the validity of delegated legislation is 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.

Nowhere in the succeeding Chapters in Part 3 does the author lose sight of the three points made by Lord Diplock. In his discussions on the many matters to which the courts have directed their attention, the three principles enunciated by Lord Diplock appear again and again.

Space does not permit this review to deal with the many matters covered by Part 3. It is, I think, sufficient to list the principal matters dealt with in that Part. They comprise:

- the effect of non-compliance with formal requirements, including the procedures for making and revoking delegated legislation, the laying of delegated legislation before the Parliament, the disallowance of delegated legislation, the publication of delegated legislation
- the incorporation of material by reference to extraneous documents
- the empowering provisions including the necessary or convenient or expedient power, the power to make regulations carrying out or giving effect to legislation, the power for purposes mentioned in the Act and the good rule and government power
- the power to regulate, govern, control, restrain and prohibit
- the power to impose penalties and forfeitures
- the power to require licences
- the power to impose fees
- questions of repugnancy or inconsistency
- the extent to which improper purpose for making delegated legislation, unreasonableness, uncertainty, sub-delegation of delegated power provide grounds for invalidity
- the repeal both of empowering provisions and of the regulations themselves
- the proof of delegated legislation
- attempts to oust judicial review
- the interpretation of delegated legislation
- severance of invalid provisions.

In dealing with these topics, the author does not present a digest of the authorities. He does not merely state the decision. He analyses the reasons for the decision, he compares, where necessary, conflicting decisions and again, where necessary, expresses what he considers to be the correct approach, as for instance in paragraphs 354, 357, 360, 361, 432, 470 and 527.

¹ [1971] A.C. 632, 658.

There will, no doubt, be further editions of this work or, at least, the work will be reprinted. May I suggest that consideration be given to the inclusion of the following:

- (1) Paragraph 218 deals with the principal grounds of review of delegated legislation, including the ground that if the Act empowering the making of delegated legislation is invalid as unconstitutional, the delegated legislation falls with the Act. In addition, the delegated legislation may itself contravene the Constitution: *Gratwick v. Johnson*² and *Johnston Fear and Kingham and The Offset Printing Company Pty Ltd v. Commonwealth*,³ which are referred to later in the book.
- (2) Paragraph 226A deals with the failure to make regulations. A reference to *Commonwealth v. Huon Transport Pty Ltd*⁴ in which the High Court decided that the absence of regulations requiring provisions recompensing an owner whose goods had been requisitioned for defence purposes could not deprive the owners of their right to compensation on just terms might be included.
- (3) Paragraphs 236-239 refer to the cases where a recommendation by a third party is required to be followed. A reference to the views expressed in *Carmody v. F.C. Lovelock Pty Ltd*,⁵ although dealing with ministerial and not legislative power, would be useful. A reference in paragraphs 592-597 to this case would also be appropriate.
- (4) Paragraphs 259-262 deal with the mandatory nature of provisions for the publication of delegated legislation. Reference is made to the decision of the Full Court of the Supreme Court of the A.C.T. in *Golden-Brown v. Hunt*.⁶ A note that the Parliament subsequently enacted the Ordinances and Regulations (Notification) Act 1972 and its effect might be included.
- (5) In paragraphs 316, 323, 438, 441, 442, 444, 547 and 548 reference is made to *Jones v. Metropolitan Meat Industry Board*.⁷ In *Burland (C.J.) Pty Ltd v. Metropolitan Meat Industry Board*,⁸ *Jones's* case was distinguished. Both the regulations under attack in *Burland's* case and the empowering legislation had been changed since the decision in *Jones's* case and the High Court rejected the argument that the validity of the by-law under attack could be supported by the decision in *Jones's* case. To the extent that the comments in the paragraphs in which the reference to *Jones's* case depend upon the validity of the by-law, those comments may need revision. For those interested in "retrospective" legislation, it should be noted that the *Burland Company's* victory was short-lived. The Meat

² (1945) 70 C.L.R. 1.

³ (1943) 67 C.L.R. 314.

⁴ (1945) 70 C.L.R. 293.

⁵ (1970) 123 C.L.R. 1.

⁶ (1972) 19 F.L.R. 438.

⁷ (1925) 37 C.L.R. 252.

⁸ (1968) 120 C.L.R. 400.

Industry (Amendment) Act, 1968 (N.S.W.) provided that all parts of animals which had been retained by the Board shall be deemed to have been lawfully retained by the Board and that no compensation was, unless the Board otherwise determined, payable in respect of the previously unauthorised retention.

- (6) Paragraph 363 refers to the strict construction of provisions conferring power to impose penalties. A reference to *Grech v. Bird*,⁹ referred to in paragraphs 291, 404 and 405, would also be appropriate in paragraph 363.
- (7) In Chapter 26 (paragraphs 528 ff.), the effect of the repeal of the empowering provisions and the repeal of the regulations is considered. Perhaps it would be relevant to include a reference to the fact that, if the empowering statute or the regulations expired by effluxion of time, the Interpretation Act provisions do not apply and the matter is governed by the common law rule that when an Act expires everything is finished.
- (8) In paragraph 372, reference is made to a regulation imposing an obligation but failing to include a penalty for non-compliance with the obligation. But no reference is made to the more difficult question whether, in the absence in an Act of a penalty for a breach of the Act or regulations or in the regulation-making power conferred by the Act, a penalty may be imposed for a breach of the regulation.
- (9) Paragraphs 624-627 deal with the effect of the statutory severance provisions contained in section 15A and section 46(b) of the Acts Interpretation Act (Cth). A reference to the High Court's decision on section 15A in the more recent case of *Strickland v. Rocla Concrete Pipes Ltd*¹⁰ would complete the study of the approach by the Courts to this question.

Mr Pearce's excellent work has, as Sir Anthony Mason points out, arrived at the right time. It is a most valuable addition to Australian legal literature.

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⁹ (1936) 56 C.L.R. 228.

¹⁰ (1971) 124 C.L.R. 468.

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