CASE NOTE

1984 REVISITED – REGULATING BY UNFETTERED DISCRETION: FOLEY v. PADLEY

A decision of the High Court of Australia in 1984[1] which came on appeal from the Supreme Court of South Australia[2] is remarkable for its failure to grasp an opportunity to re-examine a difficult area of administrative law in the light of recent trends in this subject, and in the light of the approach of the New Zealand courts in a number of cases.[3]

As will be seen from the facts of this case, it involved a power to prohibit with a reservation of a right to alleviate that prohibition, which power of dispensation was unfettered by the application of any specific criteria. It has been suggested that in such a situation it is possible to argue that there has been a passing on of the initial grant of power[4] which could amount to a subdelegation of a delegated legislative power. This was combined in this case with a power subject to a subjective expression of opinion. Unfortunately, the High Court did not respond to the challenge to deviate from the approach of previous Australian decisions to adopt an other than legalistic approach[5] to this issue.

[1] *Foley* v. *Padley* [1984] ALJR 454.

[2] *Padley* v. *Foley* (1983) 32 SASR 122.

[3] For a discussion of the cases see, for example, Aickman, C. C. (1960) 'Subdelegation of the Legislative Power' 3 *Victoria University of Wellington Law Review* 69; Keith, K. J. (1977) 'The Courts and the Administration: A Change in Judicial Method' (1977) 7 *New Zealand University Law Review* 325; Kilbride, P. E. 'Regulation, Prohibition and Subdelegation' (1965) 1 *Otago Law Review* 97; Lanham, D. 'Deregulation, Legislation and Dispensation' (1984) 14 *Melbourne University Law Review* 634; Northey, J. F. 'Subdelegated Legislation and Delegatus Non Potest Delegare' (1953) 6 *Res Judicata* 294; Pearce, D. C. *Delegated Legislation in Australia and New Zealand*, Sydney, Butterworths, 1977, chs. 17, 20 and 25; Thorp, P. H. 'The Key to the Application of the Maxim 'Delegatus Non Potest Delegare' (1972) 2 *Auckland University Law Review* 85; Willis, John, 'Delegatus Non Potest Delegare' (1943) 21 *Canadian Bar Review* 257.

[4] See *Melbourne Corporation* v. *Barry* (1922) 31 CLR 174, per Higgins J., pp. 208–9. See also *Olsen* v. *City of Camberwell* [1926] VLR 58; *Conroy* v. *Shire of Springvale & Noble Park* [1959] VR 737; *Attorney-General & Robb* v. *Mount Roskill Borough & Wainwright* [1971] NZLR 1030; *In Re Martins' Application* [1974] Tas. S.R. 43. Support for this view comes from the dissenting judgement of Murphy J. in *Foley* v. *Padley*, supra.

[5] Pearce, op. cit. para. 527, p. 235, suggests that the reason Australian courts have adopted a legalistic approach as cf. the New Zealand courts' approach as an aspect of the *nondelegatus* maxim is that Australian courts eschew maxims or approaches.

1. *The Decision:*

This case concerned the Rundle Street Mall in Adelaide, South Australia, the powers of the Adelaide City Council to control activities in the Mall, and a Hare Krishna.[6]

Section 11(1)(a) of the *Rundle Street Mall Act* 1975 (South Australia) provides that the Council may make by-laws "regulating, controlling or prohibiting any activity in the Mall ... that is, *in the opinion of the Council*,[7] likely to affect the use or enjoyment of the Mall". By-law No. 8, Section 1, made pursuant to that empowering section provides that "No person shall give out or distribute anything in the Mall or in any public place adjacent to any bystander or passer-by without the permission of the Council". Section 21 of the by-law provides that permission under the by-law "may be general or specific and may relate to a person or class of persons". It was held that the by-law was valid.

Pausing here, it can be seen that the empowering statute is couched in extremely wide terms, that the by-law in question is also very general in its application, and that the dispensing power provided by Section 21 is undefined to say the least. It is equally clear that a member of the public who intended to apply for a permit would have no means of knowing in advance by what criteria his application would be assessed. Furthermore, it was clearly envisaged by some of the judges in this case that it would be possible to apply reasons extraneous to those contemplated by the Act in reaching a decision,[8] and that it would be extremely difficult for a disappointed applicant to either ascertain reasons for a contrary decision or grounds upon which such a decision could be challenged,[9] thus in effect rendering a decision virtually unreviewable.[10] But the other equally alarming aspect on the facts of this case is that although the South Australian *Local Government Act* provides[11] that by-laws are to be made at a meeting at which two-thirds of the members of the Council are present, for the purpose of exercising the discretion under Section 21 (set out above), a resolution by the Council sitting in ordinary meeting is apparently sufficient, thereby avoiding the procedural safeguards

[6] Apparently he was a member of the International Society for Krishna Consciousness. See the very vivid description of the facts set out in the judgement of Matheson J. in the Supreme Court, supra, p. 125.

[7] The writer's emphasis.

[8] See, e.g., Gibbs C. J., supra, p. 456 and Dawson J., supra, p. 465; King C. J., supra, p. 123. It was seen to be a by-law for preventing the handing out of articles of a political or philosophical nature and the ensuing litter.

[9] There is no equivalent of the Victorian Administrative Law Act 1978 in South Australia pursuant to which a person affected by a decision of a Tribunal may request reasons for the decision (s. 8). It is arguable whether a Municipal Council would be considered to be a 'Tribunal' (see s.2) for the purpose of the Victorian Act. See *FAI Insurances Ltd* v. *Winneke* (1982) 56 ALJR 388.

[10] Further, the construction that the court placed on the words 'in the opinion of' in the empowering legislation was such that it narrows the scope of review, as will be seen below.

[11] *Local Government Act* 1934 (SA), s. 668.

for the by-law making power.[12] What this could mean in effect is that there has been a sub-delegation of the by-law making power to the Council sitting in ordinary meeting, and the by-law could be challenged on that aspect alone,[13] depending on how the dispensing power is characterised.[14]

Thus, on the facts themselves, a number of arguments arise as to the validity of the by-law. First, in simple terms, was the by-law making power in accordance with the empowering statute? That exercise in the words of Dawson, J.,[15] "is one of construing the words of the statute to see whether they confer the power to make the by-law in question", and that, he said, "of its very nature is an exercise in which other cases dealing with other statutes and other by-laws are of limited assistance".[16] Yet, an analysis of the cumulative judgements of both courts reveals that to a very great extent the decision *was* based upon an analysis of previous decisions rather than on the nature of the legislation in issue. The only judge of the eight judges in both courts who based an argument on a construction of the provisions of the statute and the by-law was Brennan J. in the High Court. His judgement is compellingly logical, depending as it does on recognising that for the by-law to be valid the opinion of the Council as to the undesirability of a particular activity must precede the making of the by-law. He was clearly troubled by the width of the power, and said that "... where, as in the present case, the ambit of the power ... and the activities ... are at large, an opinion which carries otherwise innocent activities within the scope of the power excites careful if not jealous scrutiny by the court".[17] As a matter of construction, he felt that the by-law was intended to prohibit all activities of the sort described which could not be in accordance with the enabling legislation, because the Council could not reasonably have formed the opinion that *all*[18] such activities were likely to affect the use or enjoyment of the Mall. As Brennan J. pointed out, not all activities would affect the use and enjoyment of the Mall. It would depend very much on the nature of the thing distributed. Activities where pedestrian traffic is not impeded or where distribution of articles is not accompanied by noise are examples of those where the Council could not have reasonably formed the requisite opinion.[19]

2. *Judicial Review of Subjectively Referred Empowering Provisions*

Although all the judgements in both courts, other than that of Murphy J., refer to the use of subjective language in Section 11(1)(a) of the *Rundle Street Mall Act*, it is suggested that they did not apply the right test as to the effect of such language.

[12] See the details set out in the dissenting judgement of Murphy J., supra, p. 459.
[13] However, as will be seen, this argument was not favourably received.
[14] As will be seen, the majority in *Foley* v. *Padley* characterised it as a conditional prohibition.
[15] (1984) ALJR 454, 466.
[16] Ibid.
[17] Id, p. 463.
[18] The writer's emphasis.
[19] Op. cit., p. 464. See also, footnote 81 infra.

The approach taken by the majority in this case to the use of subjective language is that once an opinion is shown to have existed it is not open to the court to enquire whether such a belief was justified.[20] It is rather a question of whether a reasonable person or Council could have held such opinions.[21] The majority based this view on the interpretation that was given in the New Zealand decision of *Edwards* v. *Onehunga High School Board*[22] of the dissenting judgements in *McEldowney* v. *Forde.*[23] The distinction made in the *Edwards* case between the use of words such as "necessary or desirable", which the court in that case said implied an objective test, and the use of words such as "in the opinion of", which in *Edwards'* case were said to indicate a subjective test, was accepted in *Foley* v. *Padley.*

This view does not seem to command support from other decisions where an empowering provision has been qualified by a subjective opinion.[24] Moreover, in the decision of the House of Lords in *Secretary of State for Education and Science* v. *Tameside Metropolitan Borough Council,*[25] the court held that despite the existence of subjective wording, the court could still enquire into whether the requisite facts to satisfy the opinion existed. That was a case which was concerned with Section 68 of the *Education Act* 1944 (UK) which provided:

> "If the Secretary of State is satisfied . . . that any local education authority . . . [is] proposing to act unreasonably with respect to the exercise of any power conferred or the performance of any duty imposed by or under this Act, he may . . . give such directions as to the exercise of the power or the performance of the duty as appears to him to be expedient."

Although it is not clear from the judgements whether the actual basis of the decision was that the Secretary of State had acted on insufficient evidence[26] or had failed to give sufficient weight to any one factor,[27] or had

[20] See, op. cit., Gibbs C. J., p. 455; Dawson J., p. 465.
[21] See Gibbs C. J., op. cit., p. 455.
[22] [1974] NZLR 238.
[23] [1971] AC 632 (House of Lords), Lords Pearce and Diplock.
[24] E.g. *Sinclair* v. *Mining Warden of Maryborough* [1975] 132 CLR 473; *Padfield* v. *Ministry of Agriculture, Fisheries & Food* [1968] AC 997.
[25] [1977] AC 1014.
[26] See the judgement of Lord Wilberforce, op. cit., p. 1047. It is an interesting question to what extent an administrative decision can be challenged on the 'no evidence' (which may mean insufficient evidence) ground, and to what extent it is a separate ground for judicial review. One recent line of cases associates this ground with natural justice so that it is unclear whether it is an aspect of natural justice or has an independent existence. See, e.g., *R.* v. *The Corporation of the Town of Glenelg ex parte Pier Hause Pty Ltd* [1968] SASR 246, and in particular the judgement of Bray C. J.; *Minister for Immigration and Ethnic Affairs* v. *Pochi* (1980) 4 ALD 139; (1980) 31 ALR 666 ('material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined'); *Mahon* v. *Air New Zealand & Others* (Privy Council) (1983) 50 ALR 193; [1983] NZLR 662 ("logically probative evidence"); but cf. *Barbaro* v. *Minister for Immigration & Ethnic Affairs* (1982) 46 ALR 123, where the *Tameside* case was followed in support of the finding that a decision may be reviewed where findings are based upon an incorrect basis of fact *or* where it has been exercised unfairly, cf. *Coleen Properties Ltd* v. *Minister of Housing and Local Government* [1971] 1 WLR 433 (CA) and *Ashbridge Investments Ltd* v. *Minister of Housing & Local Government* [1965] 1 WLR 1320.
[27] See Lord Wilberforce, *ibid.*

misconceived and misdirected himself,[28] or had acted unreasonably,[29] or had taken into account irrelevant considerations,[30] there was no hesitation by the court in lifting the "administrative veil" to enquire as to the reasonableness of the decision. It is clear that the recent trend is to "an ingrained repugnance to legislative devices" such as the use of subjective language and tests for exempting administrative decisions from judicial control.[31] It is equally clear that the approach of the majority of judges in *Foley* v. *Padley* runs counter to this trend.

The approach to judicial review on this aspect is also inconsistent with previous Australian decisions,[32] including the statement of Latham C. J. which was expressly relied upon in the judgements.[33] Latham C. J. has said that ". . . where the exercise 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."[34] This "construction-characterisation" approach requires an objective assessment of subordinate legislation to determine whether it falls within the scope of the empowering legislation, where the exercise of power is referrable to a subjectively phrased opinion.[35]

It is interesting to note that Brennan J., in his clear dissenting judgement discussed above, seems to be moving towards the view that *Foley* v. *Padley* involved a "jurisdictional fact" issue. Brennan J. began his judgement from the position that as the opinion of the Council is the criterion by reference to which activities may be made the subject of a by-law, such opinion must precede the making of the by-law.[36]

[28] E.g., Lord Wilberforce, Id., p. 1052; Viscount Dilhorne, Id., p. 1062; and Lord Diplock, Id., p. 1065.

[29] E.g., Lord Wilberforce, *ibid*; Lord Diplock, *ibid*.

[30] E.g., Lord Diplock, *ibid*; see also Lord Salmon, Id., p. 1071.

[31] Wade, op. cit., pp. 393–9 and pp. 753–4, and see the cases he discusses there. See also, E. I. Sykes, 'Sense and Nonsense in Administrative Law' (1983) 57 *Australian Law Journal* 221. See also the recent House of Lords decision in *R.* v. *Secretary of State for the Home Department ex parte Khawaja* [1983] 2 WLR 321, where it was held the court's duty to enquire whether there was sufficient evidence to justify the officer's belief.

[32] E.g., *Television Corporation Limited* v. *The Commonwealth* (1963) 109 CLR 59; *Sutherland Shire Council* v. *Finch & Another* (1970) 123 CLR 657; *Sinclair's* case, op. cit.; *cf. R.* v. *Australian Stevedoring Industry Board ex parte Melbourne Stevedoring Company Pty Limited* (1953) 88 CLR 100.

[33] See, e.g., King C. J. in *Padley* v. *Foley*, supra, p. 124; Gibbs C. J., Brennan and Dawson J. J., in *Foley* v. *Padley*, pp. 453, 462, 465, respectively, relying on the statement of Latham C. J. in *R.* v. *Connell & Another; ex parte Hetton Bellbird Collieries Limited & Others* (1944) 69 CLR 407, at p. 430.

[34] Ibid.

[35] Cf., *Stenhouse* v. *Coleman* (1944) 69 CLR 407, 430, and *Reid* v. *Sinderberry* (1944) 68 CLR 504, where the same 'characterisation-construction' approach was applied.

[36] Supra, p. 460.

3. *Foley v. Padley in the Line of Authorities*

It is beyond the scope of this case note to discuss at length the nature of a prohibition coupled with a discretion.[37] It is sufficient here to lament the passing of an opportunity by the High Court to reassess this difficult area of administrative law. It is proposed now to examine the judgements in the light of the classic line of authorities. It is submitted that the majority in *Foley* v. *Padley* adopted the decision of *Country Roads Board* v. *Neale*[38] too readily and that they overlooked the significance of *Melbourne Corporation* v. *Barry*[39] as it was applied in the decision of *Swan Hill Corporation* v. *Bradbury*.[40]

Barry's case concerned a by-law which provided that no processions should take place (except for funeral or military purposes) unless with the previous consent in writing of the Council. It was held to be invalid.

It is unfortunate that much of the discussion of that case has turned on the fact that the by-law was made under a power to regulate rather than a power to regulate *and* prohibit.[41] The main thread running through the judgements of Higgins J. in *Barry's* case was that a by-law made under a power to regulate must do just that,[42] and that the by-law in question did not regulate because it granted an arbitrary power to the Council to grant permission – arbitrary because there were no criteria specified by which the Council was to be guided in the exercise of its discretion. The effect of the by-law was thus to prohibit absolutely[43] rather than to regulate. The power of dispensation granted to the Council was in other words a completely unfettered discretion.[44] It was not denied that under a power to regulate there may be prohibition of some aspect[45] of the subject matter. This is overlooked in the subsequent cases.

Both Isaacs J. and Higgins J. also stress the nature of the subject matter with which they were dealing – namely, the holding of processions. This emphasis has two aspects. First, because of the very nature of the subject matter, it may require a continued existence, as contrasted with, for example, a power to regulate "the interment of the dead";[46] secondly, because the subject matter concerns a basic civil or common law right, namely, the freedom

[37] See the reference in footnote 3, above.
[38] (1930) 43 CLR 127.
[39] (1922) 31 CLR 174.
[40] (1937) 56 CLR 746.
[41] See, for example, Gibbs C. J. in *Foley* v. *Padley*, supra, p. 457, where he says in discussion of this case, "It was held that the by-law enabled the Council to prohibit processions, and that it went beyond regulation and was accordingly invalid". See also, Dawson J., op. cit., p. 466. See also the judgement of Knox C. J., Starke and Dixon J J., in the *Country Roads Board* case, supra, pp. 133–4.
[42] See also the judgement of the Privy Council in *Utah Corporation* v. *Pataky* [1966] AC 629.
[43] See Isaacs J., supra, p. 200.
[44] See also, Higgins J., Id, p. 209.
[45] See Isaccs J., Id, pp. 190, 195.
[46] See his discussion of *Slattery* v. *Naylor* (1888) 13 App. Cas. 446, Id, p. 189. This he contrasted with a power to regulate hawkers, as arose in *Toronto Municipal Corporation* v. *Virgo* (1896) AC 88. See his discussion, Id, pp. 188–189.

of assembly. It is a well-accepted principle of construction that legislation should not be interpreted so as to abrogate a common law right unless there are very clear words to the contrary.[47]

There was recognition of the importance of the second aspect of the subject matter in *Swan Hill Corporation* v. *Bradbury*,[48] but it appears to have been held to be of little consequence in *Foley* v. *Padley*.[49] The Chief Justice, in dismissing an argument based on the rule of construction referred to in the preceding paragraph, said: "However, the unrestrained exercise in or near the mall of the freedom to speak or to communicate opinions might, in some circumstances, have an adverse effect on the use or enjoyment of the mall". It is recognised that there are sometimes difficulties in applying the presumption concerning common law rights and that there is a necessity to balance the individual's rights and the general public interest with which the legislation is intending to deal.[50] The Chief Justice then went on to say:

> "The legislature has left it to the Council to decide whether it should regulate, control or prohibit an activity if, in the opinion of the Council, it is likely to affect the use or enjoyment of the mall, even if the regulation, control or prohibition, will to some extent limit the freedom of speech or communication or those engaging in the activity. It has been left to the Council, and not to the courts, to weigh the need to respect the freedom of speech and communication against the desirability of protecting other users of the mall from an activity which may adversely affect their use or enjoyment of it."[51]

With respect, it would seem that there must be a very clear intention indeed before it can be said that a legislature has delegated such an important function to a municipal council. One can only agree with Murphy J. on this point when he says: "If freedom of expression is to be maintained, by-laws which may be used to restrict expression must be clearly authorised by the enabling legislation and procedural safeguards must be strictly observed."[52]

The decision in *Swan Hill Corporation* v. *Bradbury*[53] turns very much upon the nature of the subject matter when considered in relation to the nature

[47] See Pearce D. C., *Statutory Interpretation In Australia* (Sydney, Butterworths, 2nd Ed., 1981) para. [116], and see the examples that he gives. It will be noted that these examples (e.g. the right to trade, the right to be heard, the right to enter into a legal contract) concern rights that could be considered to be more substantive than a right such as freedom of assembly.

[48] Supra. See, for example, Latham C. J., at p. 754, referring to the fact that building is prima facie a lawful activity. See also, Dixon J. at p. 759.

[49] Other than in the dissenting judgement of Murphy J., op. cit., p. 459.

[50] See Pearce D. C., *Statutory Interpretation In Australia*, op. cit., para. [118]. See also, Matheson J., in the South Australian Supreme Court, op. cit., p. 129, referring to *Seeligson* v. *City of Melbourne* [1935] VLR 365, 369–370, and adopting a passage from the judgement of Mann C. J. in which it was stated, inter alia, 'It may well be a matter of opinion about many by-laws, as to whether they are not what might be called a somewhat fussy exercise of legislative powers, that they trench on the liberty of a great many people because of the use made of that liberty by comparatively few'.

[51] Supra, p. 456.

[52] Supra, p. 459. One can also speculate as to the likely effect that the proposed Commonwealth Bill of Rights would have on this aspect of the case.

[53] Supra.

of the discretion granted. In that case a municipal by-law made under a power to regulate and restrain the construction of buildings or hoardings abutting or within ten feet of a highway provided that "no person shall proceed to erect, or cause to be constructed, any shop, house, building (etc.) ... unless with the approval of the Council". In the *Country Roads Board*[54] case the court was concerned with a by-law made under a power to regulate the exhibition of advertisements near highways. In the by-law itself it was provided that the Board could refuse its consent to the exhibition of advertisements if *in the opinion of the Board*[55] it would be an obstruction to the vision of persons using the highway or would be likely to *affect injuriously the amenities*[56] of a public park or to *disfigure the natural beauty of a landscape*.[57] Evatt J., in the *Swan Hill* case, was at pains to point out[58] that unlike the by-law with which he was concerned, the by-law under discussion in the *Country Roads Board* case laid down actual standards by which the discretion of the Board had to be governed. The standards as he observed[59] were expressed in general terms, but that was, in the nature of things, impossible to avoid – because of the subject matter. The standards were, as he said,[60] essentially ones "of good taste and right feeling". Dixon J., whilst not expressly referring to the *Country Roads Board* case, emphasised the nature of the subject matter and the practicality of laying down criteria by which a discretion is to be exercised. He refers[61] to the nature of discretions generally, and recognises that in some instances it may not be possible to lay down any definite rule for the exercise of the discretion either because it cannot trust itself to formulate in advance standards that will prove apt for the variety of facts which may present themselves or because no general principles or policy for governing the particular matter are discoverable. But he did not see the *Swan Hill* by-law as coming within either category. Indeed, he said an applicant "would never be able to compel the Council actually to decide his application in his favour".[62]

There does not seem to have been sufficient awareness in *Foley* v. *Padley* of these arguments, nor of the similarity between the nature of the subject matter and the discretion in this case and that in the *Swan Hill* case.[63] Gibbs C. J. seems to refer to this argument when he says:[64] "The power to regu-

[54] Supra.
[55] The writer's emphasis.
[56] The writer's emphasis.
[57] The writer's emphasis.
[58] Supra, p. 768. This point was also recognised by the majority in *Radio Corporation Proprietary Limited* v. *The Commonwealth & Others* (1938) 59 CLR 170, 183–4.
[59] Ibid.
[60] Ibid.
[61] Id., p. 757
[62] Id., p. 758. He also pointed out that "no reason would ... be held outside the scope and purpose of the by-law unless it had no relation to municipal government".
[63] In the sense of it being a matter which could and should be governed by defined criteria, and quite unlike the discretion in the *Country Roads Board* case.
[64] Supra, p. 458.

late, control or prohibit, is in *terms*[65] wide enough to include any degree or form of conditional prohibition and the subject of the power is not something indispensable to the life of the community, such as the erection of buildings". With respect, this places emphasis on the words used[66] rather than upon the nature of the subject matter, the nature of the discretion, and the practicality and indeed desirability of laying down standards for the exercise of such discretion. It also overlooks the fact that a common law right is involved, as discussed above.

Returning again briefly to *Barry's* case,[67] it is in the judgement of Higgins J. that the subdelegation argument arises. He stressed the fact that because of the nature of the dispensing power, the procedure for making by-laws, and its attendant procedural safeguards, is by-passed.[68] The same argument arises on the facts of *Foley* v. *Padley*. In effect this means that the Council is subdelegating its by-law making power to a differently constituted body.[69] Lamentably, this argument has received little favourable notice in subsequent Australian[70] decisions. In the *Country Roads Board* case, in the joint judgement of Knox C. J., Starke and Dixon J J., this argument is referred to[71] and dismissed with these words: "But this view rests upon an implication which the canons of interpretation scarcely warrant . . .".[72] This rejection enabled Gibbs C. J. and Dawson J., in *Foley* v. *Padley*, to dismiss the delegation argument.[73] The only support for the subdelegation argument suggested by Higgins J. comes from the dissenting judgement of Murphy J. who characterised the by-law making power as a legislative power.[74]

Murphy J. also saw the possibility of a delegation argument arising from the lack of guidelines or criteria to regulate the exercise of the discretion to alleviate the prohibition. He said that the absence of any guidelines means that the control and regulation is not by by-law but by the Council's discretion.[75] This is an argument which arises by implication from the judgements of Evatt and Dixon J J. in the *Swan Hill* case (discussed above). However, the statements of Evatt J. in particular in the *Swan Hill* case were dismissed by the majority in *Foley* v. *Padley* as obiter.[76] Overall, the majority in *Foley*

[65] The writer's emphasis.

[66] An approach which is consistent with the *Country Roads Board* case, supra.

[67] supra.

[68] Id., p. 208. He was the only judge in this case to raise that argument.

[69] The delegation argument also arises in respect to the reservation of an unfettered discretion to alleviate the prohibition. This is perhaps an even stronger inference in a *Foley* v. *Padley* type situation where the empowering provision is dependent upon a subjective opinion.

[70] Cf: *Olsen's* case, supra; *Conroy's* case, supra; *Sambell* v. *Cook* [1962] VR 448; *Morrison* v. *Shire of Morwell* [1948] VLR 73; *Dewar* v. *Shire of Braybrook* [1926] VLR 201.

[71] Supra, p. 135

[72] Ibid.

[73] Supra, pp. 457 and 467 respectively. Brennan J. also rejected the argument on the basis that the power under examination in *Barry's* case was not a 'conditional prohibition' as in *Foley* v. *Padley*, supra, p. 462.

[74] Supra, p. 459.

[75] Ibid. See in particular the judgement of Evatt J. at p. 769.

[76] Supra. See Gibb C. J., p. 458, Dawson J., p. 467, cf. Brennan J., at p. 462 who suggests that a discretionary power would be invalid only if it is used for an extraneous purpose. But this, as has been discussed above, would be difficult to establish having regard to the nature of the discretion.

v. *Padley* support what is known as the 'conditional prohibition' approach which derives from the *Country Roads Board* case where the majority held that a power to prohibit included a power to prohibit conditionally, and that there was no reason that the condition might not be the consent of a person or body.

Conclusion

It is submitted that the High Court in *Foley* v. *Padley* placed too much reliance upon the *Country Roads Board* decision. Too much emphasis is placed on the words used[77] rather than upon examining the nature of the subject matter and the discretion granted in the light of the empowering statute. As a matter of practicality, it is suggested that it would have been possible to create a by-law which precisely defined the activities which were thought to be undesirable.[78] This is not a situation like that referred to by Dixon J. in the *Swan Hill* case,[79] where only a negative definition of the grounds of discretion was possible, as in the *Country Roads Board* case, where questions of aesthetic standards and good taste were involved.

This decision is unfortunate for the effect it has on common law rights, as discussed above. It is clear from some of the judgements[80] that the by-law was actually intended to prevent persons from distributing literature of a political, religious or philosophical nature. A preoccupation with littering is also apparent.[81] And because of the generally wide nature of the power and the discretion granted under the by-law, review of a decision is tantamount to being excluded.

Perhaps, if the High Court had taken a less legalistic approach, the delegation arguments might have received more considered attention. But as it is, we shall have to await an authorative decision in Australia along the lines of the New Zealand courts.

SUSAN KNEEBONE*

[77] This is an unfortunate result of the discussion of the terminology in the *Swan Hill* case – see in particular the judgement of Latham C. J., supra, pp. 752–753. But cf. the judgement of Evatt J., referring to the *Country Roads Board* case, where he said (supra, p. 770) that even if the word 'prohibiting' had not been used, the by-law would still have been valid because the standard upon which its judgement was to be given was clearly ascertainable in the by-law itself.

[78] One cannot agree with the submission of Mr Jarvis, counsel for the Council, referred to with approval by Matheson J. in *Padley* v. *Foley*, supra, p. 131, that it would be extremely difficult for the Council adequately to have defined a range of things which could not be distributed.

[79] Supra, p. 757

[80] See, e.g., *Foley* v. *Padley*, supra, per Gibbs C. J., p. 467, and Dawson J., p. 465; *Padley* v. *Foley*, supra, per King C. J., p. 124, and Matheson J. pp. 130–131.

[81] *Ibid.* Also, there is some suggestion that what the by-law was really intended to avoid was congestion of pedestrian traffic. But as Brennan J. points out (supra, p. 464), Section 1 of the by-law is not properly characterised as regulation of pedestrian traffic and could not be supported on that ground under the empowering Act.

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