

# Class 5 Topic 5 Judicial review of rule-making

- Statutory interpretation
  - Ordinary meaning of text + context (other provisions, purpose of Act, constitutional principles etc.)
    - **S 15AA of the Acts Interpretation Act 1901 (Cth)** – requires a purposive approach – **interpretation that best achieves the purpose or object of the Act is to be preferred.**
- Delegated legislation
  - Only valid if authorised by parent Act.
- Issue: Is the regulation within power of Act?
  - Rule of thumb
    - **[Evans v NSW] - interpret Act, interpret regulation, see if regulation falls within the grant of rule-making power by Act**
      - In determining whether the relevant clause of the regulation is within the regulation making power conferred by the particular Act it is necessary to
        1. Consider the proper construction of the section conferring that power in light of the scope and objects of that Act.
          - ♦ Consider the words of section + object of the whole Act to properly interpret the section and determine the scope of power
        2. The regulation is then to be examined to determine whether, on its proper construction, it falls within the statutory authority.
          - ♦ Interpret regulation based on its words and purpose
    - **Complement/supplement distinction**
      - **[Shanahan v Scott] - if Act delegate power to make regulation 'for the purpose of...', regulation cannot go beyond that purpose**
        - Facts
          - ♦ Marketing of Primary Products Act (Vic) authorised egg producers in Vic to establish an Egg Board for the marketing of eggs.
          - ♦ The Act granted power to Governor to make regulations **for all or any purposes 'necessary or expedient' for the administration of the Act or for carrying out the objects of the Act.**
          - ♦ Regulation made, prevent anyone from placing eggs in cold storage or subjecting them to preservative treatment without Board's consent, even sold ones
          - ♦ S has a firm carrying on business in NSW. He placed eggs produced in NSW in cold storage in Vic.
          - ♦ Board argue that the action contravenes regulation.
        - Issue:
          - ♦ Is regulation valid?
        - Held:
          - ♦ NO
            - ◇ The purpose of the Act is to provide for the collective marketing of a primary product of Victoria. To achieve this purpose, it is 'necessary and expedient' that the Board has control over Vic eggs within the Board.
              - ▶ If the regulation were concerned **only with eggs vested in the board in Vic**, then it will be valid since 'necessary or expedient'
                - Regulation fulfil purpose, complement Act, take it into action.
              - ▶ However, here, the regulation extends to eggs sold unconditionally and eggs in NSW.
                - This is for the purpose of preventing NSW eggs from being sold in Vic.
                - This is an extension of power into a further field, extension of legislative plan, rather than carrying it into effect. This is neither 'necessary or expedient' for the purpose of Act.
        - **Rule:**
          - ♦ **If a regulation attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends, then invalid.**
      - Regulate/prohibit distinction
        - **[Swan Hill v Bradbury] - regulate and restrain does not include prohibit**
          - Facts
            - ♦ Local Government Act 1915 (Vic) - The council of every municipality ... may make by-laws for the following purposes
              - (a) **Regulating and restraining** the erection and construction of buildings, erections, or hoardings or of fences abutting on or within ten feet of any street or road
            - ♦ By-law for construction of buildings - **No person** shall proceed to erect, or cause to be constructed any

shop, house, building, tent, hoarding, or addition to any existing building, unless with the approval of the council

□ Issue:

◆ Is by-law valid?

□ Held:

◆ NO

◇ **The power to make by-laws REGULATING an activity does not extend to PROHIBITING it either altogether or subject to a discretionary licence or consent**

▶ Similarly, to **restrain an activity usually means something less than complete prohibition** (but depends if subject matter indicates otherwise)

◇ Look more closely

▶ The consequence and scope of regulation is unstructured discretion, Council can do whatever they like.

▶ But, Act used specific words, scope of power conferred is smaller.

◇ The **subject-matter of the power important**

▶ If subject matter is something 'indispensable to the life of the community', then cannot prohibit.

– Erection and construction of buildings 'is not in itself a thing to be repressed and could not be so considered by the legislature. It is indispensable to the life of the community'

▶ If something evil, then can prohibit

▪ **[Foley v Padley] - the regulation, properly construed, must be within scope of power conferred by Act**

□ Facts

◆ Rundle Street Mall Act 1975 (SA) s 11(1)(a) provided that the Adelaide City Council may make by-laws **regulating, controlling or prohibiting** any activity in the Mall or any activity in the vicinity of the Mall that is, **in the opinion of the Council**, likely to **affect the use or enjoyment of the Mall**

◆ Council's by-law - No person shall **give out or distribute anything** in the Mall or in any public place adjacent to the Mall to any bystander or passer-by without the permission of the council

◆ F charged with breaching by-law, F Harry-Christian, distribute things on street

□ Issue:

◆ Is by-law valid?

□ Held:

◆ YES.

◇ By-law is prohibition - cannot do this without permission of the council. Act confer Council power to prohibit subjects to an unstructured discretion, but only for the purpose for which the power was conferred.

◇ Is 'distributing things to by-stander' disturbing the enjoyment of the Mall?

▶ Yes.

– Although 'distributing things to by-stander' can involve many activities, some of which are totally innocent (such as mother give child candy), it is clear from the construction of by-law that it does not apply to such situations.

– 'distribute' connotes large volumes, and 'passer-by' connotes strangers. The intention of the by-law is to prevent the distribution of articles to members of the public who are unconnected with the person making the distribution

– Upon its proper construction, within scope of power conferred by Act - prohibit activity likely to 'affect the enjoyment of the Mall'

◇ 'in the opinion of the Council'

▶ The Council is to decide whether activity affecting enjoyment.

– Opinion does not have to be right. The existence of opinion is enough. But must be reasonable - can't take into account irrelevant considerations or misconstrue terms of the legislation (Topic 9 subjective jurisdictional fact)

▶ So, Council can decide distributing is disturbing the enjoyment of Mall and include it in its by-law.

◇ Principle of legality argument

▶ Provision of Act should not be construed so as to interfere with liberty unless there is a clear intention to do so.

▶ But, left to the Council, not the courts, to weigh need for freedom of speech against impact on enjoyment of the Mall.

◆ Dissenting

◇ Opinion unreasonable. Distributing can do no harm, so not 'affecting enjoyment'.

◇ The by-law too wide. Caught too many interactions that would not have an impact on the enjoyment of the mall.

○ Principle of legality

▪ **[Evans v NSW] - Act should be interpreted with presumption that Parliament does not have intention to give power to interfere with fundamental rights**