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DELEGATED LEGISLATION

HOW TO ARGUE

1. Argue the decision is invalid

2. Argue the Del Leg is invalid

(either due to a technicality (eg. tabling) or “beyond the scope of Parent Act”)

3. Argue the Parent Act is invalid

(Because unconstitutional (very hard! Remember Dignan!))

Validity is tested by:

1. Compliance with the legislation,
2. Justiciability – is there a live dispute?
3. Publication,
4. Parliamentary review and
5. Limited traditional grounds of judicial
review

s39B(1A)(c) JA via FC

=

**avenue to challenge
validity of DL directly**

What is DL?

***Cth v Grunseit (1943)*, Latham CJ at 82:**

“General distinction between legislation and execution of legislation is that legislation determines content of law as rule of conduct or declaration as to power, right or duty whereas executive authority applies law in particular cases.”

- DEFINITION: Laws made by the **Executive** (and **sometimes Judicial**) branch, after **Parliament delegates** to them their **law-making powers**
 - Delegated legislation = Subordinate legislation = Legislative Instruments
- Delegated legislation made accountable in 2 ways:

1. Through Parliamentary oversight of the delegation
 2. Judicial oversight
- **Statutory Interpretation:** (Acts Interpretation Act 1901: s15AA, s15AB) Delegated legislation is treated as law – ordinary principles of statutory interpretation apply. *Collector of Customs v Agfa-Gevaert Ltd (1997)*
 - **Legislative review of delegated legislation (NSW):** In each jurisdiction, there exist special statutory requirements with respect to the making, publication and commencement of statutory rules.
 - Delegated legislation **cannot** be made by a body other than the parliament **without** the authority of parliament. Authority is given by an Act of Parliament

Types of DL

- Regulation = made by Ministers or GG
- Orders-in-council = orders made by the GG on the advice of the Executive Council → they usually proclaim the commencement of legislation
- By-laws = made by Councils → also describe DL made by universities
- Court Rules = made by courts → set out procedural requirements e.g. Federal Court Rules 2011 (Cth)
- Ordinances = made by eg. Territories (old term) → delegated under s 112 Const
- Plans of Management = made by eg. fisheries

Legislative Requirements

Basic rules can be found in:

- Subordinate Legislation Act 1989 (NSW)
- Legislative Instruments Act 2003 (Cth)

Section 5 –*Legislative Instruments Act 2003 (Cth)*

(1) ... a **legislative instrument** is an instrument in writing:

- (a) that is of a **legislative character**; and
- (b) that is or was made in the exercise of a power delegated by the

Parliament.

(2) Without limiting the generality of subsection (1), an instrument is taken to be of a legislative character if:

- (a) it determines the law or alters the content of the law, rather than applying the law in a particular case; and
- (b) it 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

- S5 → sets out a general scheme for the creation and review of legislative instruments at the federal level
 - It does not apply to instruments based on what they are called; rather, it applies to instruments based on their legislative character
- S6 → declared certain instruments to be legislative instruments:
 - Include instruments described as regulations by enabling legislation, statutory rules to which the Statutory Rules Publication Act 1902 (Cth) applies
 - Include instruments made by a non-self-governing party, that is, territory ordinances and instruments made under those ordinances
 - Instruments declared to be disallowable under now-repealed provisions of the Acts Interpretation Act 1901 (Cth)
 - Proclamations
- S7 → declares a number of instruments not to be legislative instruments, including those explicitly listed in s 7 and those declared by regulation not to be a legislative instrument for the purposes of the LIA 2003
 - Gives the executive the discretion to exclude legislative instruments from the operation of and the scrutiny afforded by the Act
- S9 provides that rules of court are not legislative instruments

Meaning of 'legislative character'

Full Federal Court in *Minister for Industry and Commerce v Tooheys*:

‘the distinction [between delegated legislation and administrative decisions] is essentially between the creation or formulation of new **rules of law having general application** and the **application of those general rules to particular cases**’

- Without limiting the generality of subsection (1), an instrument is taken to be of a legislative character if:
 - (a) It determines the law or alters the content of the law, rather than applying the law in a particular case; and
 - (b) It 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

Stephen J in *Watson v Lee (1970)*:

“[T]he history of delegated legislation ... reflects the **tension between the needs of those who govern and the just expectations of those who are governed**. For those who govern, subordinate legislation, free of the restraints, delays and inelasticity of the parliamentary process, offers a **speedy and flexible mode of law-making**. For the governed it may threaten subjection to laws which are **enacted in secret** and of whose commands they cannot learn: their reasonable expectations that laws shall be both announced and accessible will only be assured of realisation by the imposition and enforcement of appropriate controls upon the power of subordinate legislators...”

Constitution & the Parent Act

Restriction arising from separation of powers (Cth)

- Parliament can delegate HUGE areas of law-making power over to the Executive
- The HC in the case of Dignan (1931) found that the separation of powers can be infringed by the delegation of legislative power from parliament to the executive in certain cases
 - **FACTS:** Transport Workers Act 1928 gave GG (ie. Cabinet) broad powers to make any regs he wants on transport workers. Labor Govt couldn't get bill through that union wharfies must be prioritised over non-union ones, so used the reg-making powers to make this law.
 - **QUESTION FOR COURT:** Can legislative power of the Commonwealth only be exercised by the Commonwealth Parliament → Was the circumvention of the Senate in this case constitutional?
 - **HELD:** Yes. As long as it fits within a constitutional "head of power", it can be delegated to Exec. HC suggested, however, that you can't delegate an ENTIRE head of power over to the Exec
- **DELEGATED LEGISLATIVE POWER BY CTH PARLIAMENT** → Necessary to look at:
 - 1) Whether it conforms to the source of power itself
 - 2) Whether it is outside the delegation
 - 3) whether the delegation is constitutional
- However this constitutional limit has never been used to invalidate a legislative provision → unlikely chance of success here
- State level? → It is unlikely these limits will apply where there is no requirement for legislation to be connected to a grant of constitutional power

Implementation:

Legislative Regulation and Parliamentary Review

Legislative Regulation

The executive must abide by proper processes for making delegated legislation.

	Commonwealth	New South Wales
1. <u>Sunset Clauses</u>	<i>s50, Legislative Instruments Act 2003 Cth:</i> Delegated legislation is automatically repealed after 10 years and then must be remade.	<i>Subordinate Legislation Act 1989 (NSW)</i> <ul style="list-style-type: none"> • <i>s10(2): Introduced Sunset Clause-</i> any SubLeg made on or after 1 Sept 1990 to be repealed 5 years after publication. • <i>s10(1): Repealed all NSW Statutory Rules (SR) made before Sept 1990 in 5 stages ending on 1 Sept 1995</i>
2. <u>Public Consultation</u>	<ul style="list-style-type: none"> • <i>s17 Legislative Instruments Act</i> encourages public consultation. • <i>s19:</i> There is no sanction for failure to consult → will not invalidate the final delegated legislation if not done 	<i>Subordinate Legislation Act 1989 (NSW)</i> <i>s3(1):</i> <ul style="list-style-type: none"> • consultation with affected persons • definition of “statutory rule”. Contains statutory guidelines as to the making of such rules, and imposes requirements with respect to the responsible Minister preparing a <u>Regulatory Impact Statement</u>.
3. <u>Publication</u> Required by the rule of law (Watson v Lee 1979)	<i>Legislative Instruments Act 2003 (Cth):</i> <ul style="list-style-type: none"> • <i>s20, 29:</i> Legislative Instrument must be published on Federal Register of Legislative Instruments online • <i>s31, 32:</i> Legislative Instrument which is not registered is not enforceable → not clear of this position in NSW <i>Acts Interpretation Act 1901 Cth:</i> <ul style="list-style-type: none"> • <i>s48(1):</i> requires that legislation be notified in the Gazette 	<i>Interpretation Act 1987 (NSW):</i> <ul style="list-style-type: none"> • <i>s39(1):</i> Legislation is to be published in full; takes effect on the day it is published; OR • <i>s39(2):</i> on a later day as specified in the rule for that purpose. <i>Subordinate Legislation Act 1989 (NSW)</i> <ul style="list-style-type: none"> • <i>s3(1):</i> The publication of information relating to proposed statutory rules
4. <u>Retrospectivity</u>	<i>Acts Interpretation Act 1901 Cth:</i> <ul style="list-style-type: none"> • <i>s48(2):</i> Legislation can be retrospective 	<i>Interpretation Act 1987 (NSW):</i> <ul style="list-style-type: none"> • <i>s39(2a):</i> Retrospective legislation is not ineffective but only effective from the day it is publicised.

Golden -Brown v Hunt (1972) 19 FLR 438:

Aboriginal tent embassy in Canberra. Reg was notified at 9.45am in the Gazette, giving police power to remove tent embassy. Court held that Ordinance was not operative at time of raid. The notice in Gazette was not clear and specific enough in announcing where copies of the Ordinance could be purchased. Notice said copies available by mail or at ‘AGPS outlets’. This didn’t amount to notification of Ordinance. Ordinance not invalid but inoperative. However, this did not invalidate the Del Leg, for it was just a technicality. ACT Govt ended up passing retrospective laws to protect police to cover all their bases.

Watson v Lee (1979) 144 CLR 374:

Foreign exchange regulations. *S 48(1)(a) Acts Interpretation Act 1901* said that regs must be published in the Gazette and was effective from the date of notification. *s 5(3) Statutory Rules Publication Act 1903* said the publication requirement in the AIA was satisfied either by publication in full or by a notification in the Gazette of the making of the rules and of the place where copies could be purchased. Notice of Regs in the Gazette. But copies of the Regs were not available in stores on the day they came into effect.

Held: Not invalid but inoperative.