

Judicial Review

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Delegated Legislation; Subordinate Legislation; Legislative Instruments

How do determine the validity of that piece of subordinate legislation and how to deal with decisions made under it.

See whether or not the delegated legislation has been validly made

Comparing legislation side by side

What is delegated legislation?

- Delegated legislation can be seen as legislation made by a non-parliamentary body, acting pursuant to an Act of Parliament.
- Generally made by the executive
- Delegated legislation refers to 'a legislative instrument made by a body to which (or a person to whom) parliament has delegated the power to legislate.'
- Parliament itself has not passed but has delegated authority to another body to make a decision. Parliament commonly delegates rule making powers to a Minister, tribunal, local council. These terms are all talking about the same things. Made by someone outside of Parliament.

Make sure you are not dealing with policy!

Types and volume of delegated legislation

There are over 100 types!

- Regulations
 - o general in application – what is the difference?
 - o Act is a skeleton, regs are fleshed out
 - o Made by governor or governor general
 - o may be left to regulations to set out detail of the Act, may also include fees, costs etc that can be changed a lot more easily. Can be changed more easily.
- Rules
 - o by courts regarding processes
- By-laws of statutory authorities
 - o typically by local council
- Ordinances of territories
 - o NT/ACT
- Determinations
- Plans of Management e.g. fisheries
- Proclamations
- Directives

- Guidelines

Separation of Powers?

- Delegated legislation **cannot** be made by a body other than the parliament **without** the authority of parliament.
 - o Here, executive is making legislation! Minister, GG, local council
 - o the reason it is valid is that Parliament has set out the power and delegated the power to another agency to make the law. Still conforms to the law that regulation can't be made by another body
 - o Parliament is delegating power
- Authority is given by an Act of Parliament
- Validity is tested by:
 - o compliance with the legislation,
 - o publication,
 - o parliamentary review and
 - o limited traditional grounds of judicial review.

Arguments against desirability of delegated legislation

- Giving the executive the power to make laws seriously impairs parliamentary sovereignty and the constitutional balance.
- If laws are made affecting the subject, they should first be submitted to the elected representatives of the people for consideration and approval.
- Often in vague language and lead to uncertainty.
 - o Poorly drafted
 - o Ground for having the DL determined invalid

Regarded at best as a necessary evil – modern society demands it. Legislative in form but created by executive- not subject to same parliamentary controls (doesn't get introduced as a bill).

Rationales for delegated legislation

- Ease pressure on parliamentary time;
- Encourage consistency in bureaucratic decision-making;
- Keep detail out of legislation so that statute easier to understand, debate and implement;
- Cope with legislation that is too technical for parliamentary consideration;
- Provide the flexibility to deal with rapidly changing or uncertain situations. (It is much easier and faster to amend subordinate legislation so this allows for change in areas where flexibility or adaptation in legislative criteria is required.); and
- Attractive to governments because can avoid a hostile upper house.
- More explicit more focussed legislation

Stephen J in *Watson v Lee (1970) 144 CLR 374*:

“[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