

DELEGATED LEGISLATION

SUMMARY:

The validity of subordinate legislation is not directly reviewable under the ADJR as it is legislative, or administrative in character. However, a decision made under subordinate legislation IS reviewable under the ADJR.

Decisions made under delegated legislation

- **Argue the decision is invalid!**
 - (in MR or JR).
- **Argue the Del Leg is invalid!**
 - either due to a technicality (eg. tabling) or “beyond the scope of Parent Act”
- **Argue the Parent Act is invalid!**
 - Because unconstitutional (very hard! Remember Dignan!)

Parliament delegates their legislation making powers to an Executive Body for the sake of efficiency and expediency. Specialist bodies are able to go into extensive detail in an area that Parliament may not specialise in.

Delegated Legislation may be the subject of judicial review for the following reasons

- Parliament was not entitled to delegate the law making power in question
- One of more of the technical requirements regarding the implementation of the subordinate legislation are not satisfied
- The subordinate legislation falls outside the scope of the parent legislation
- The decision made under the subordinate legislation is unlawful

WHAT CAN BE DELEGATED?

Parliament may delegate extremely large subject matter areas, as long as it fits within a constitutional ‘head of power’ (*Meakes v Dignan (1931)*).

but the High Court has suggested that the Federal Parliament may not delegate an **entire** head of power under the constitution, as this would go against the entrenched principle of the separation of powers (*Meakes v Dignan 1931; Plaintiff S157/2002 (2003)*).

IMPLEMENTATION

There are several technicalities when implementing subordinate legislation. If these technical steps are not followed, the subordinate legislation may be rendered invalid.

Public Consultation (not enough on its own to make the DL invalid).

- before certain types of delegated legislation are implemented in NSW, the responsible minister must draft impact statements, make them publically available, and consider any comments or objections submitted by the public (Subordinate Legislation Act 1989 (NSW s 5)).
- At the Federal Level, drafters of certain types of subordinate legislation are encouraged to consult with the Australian business community where appropriate (*Legislative Instruments Act 2003 (Cth)*, s 17).
- Despite this, the public consultation requirements are not likely to affect the validity of implemented subordinate legislation.

Publication

- Subordinate legislation must be available to the public once it is created.
- At the Federal level, this is “announced to the public” by placing the subordinate legislation on an online register that is run by the government (*Legislative Instruments Act 2003 (Cth)* s 20).
- At the NSW level, ‘published’ means published online (*Interpretation Act 1987 (NSW)*).
- If subordinate legislation is not made properly available to the public, its validity may be challenged
 - Commonwealth delegated legislation that is not published online is unenforceable (*Legislative Instruments Act 2003* ss 31, 32)
 - Unclear what the NSW position is.

Golden-Brown v Hunt (1979)

- **FACTS:** Del Leg (ordinance) quickly passed to allow police to forcibly remove protesters at the first Aboriginal Tent Embassy. Police moved in mere minutes after “notification” placed in Gazette.

HELD: The notice provided was not clear and did not give info on where one could find the actual Del Leg. 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.

NOTE: This is a famous case, but modern legislative changes suggest this no longer good precedent.

Parliamentary Review

For Subordinate Legislation to be implemented, it must be approved by Parliament. There are typically 3 stages involved:

1. Tabling
 - a. The delegated legislation must be laid before each house of parliament soon after it has been created and made available to the public via publication.
 - b. If Tabling of the delegated legislation does not occur within 6 Parliamentary sitting days after being registered online, it ceases to have legal effect (*Legislative Instruments Act 2003*, s 38)

2. Scrutiny
 - a. Once tabled, the subordinate legislation will be scrutinised to see if it is in line with the parent legislation and if there is anything otherwise objectionable about its content
 - b. This is usually done by an Upper House Committee
3. Disallowance
 - a. Upon scrutinising the delegated legislation, a member of parliament may move that it be disallowed. If the motion is accepted by the member's House, a resolution of disallowance is passed. The member must usually make this motion within 15 sitting days after tabling (LI Act, s 42).

If Tabling has not occurred, the DL will cease to have effect immediately after the last day for it to be laid (LI Act s 38). This means that the subordinate legislation will have legal effect up until that time, as was the common law approached before it was implemented.

Set-Set Clauses

Delegated legislation is automatically repealed after 10 years (in Cth: s5) or 5 years (in NSW: s10) and then must be remade: Cth Act, s50.