Drafting

2.52 Most subsidiary legislation is drafted by the Office of the Parliamentary Counsel, which does so on the basis of instructions from the relevant government department or agency. Once subsidiary legislation has been drafted and settled, the Parliamentary Counsel's Office prepares a final draft and returns it to the department or agency with a Parliamentary Counsel's Certificate (which certifies that the regulations meet the purpose of the instructions given and are in accordance with the empowering Act) and an Executive Council Minute Paper. Local laws are an exception, in that they are drafted by external consultants, administrative officers within local governments or by legal practitioners experienced in local law making. Local laws are often drafted by using pro formas provided by the Western Australian Local Government Association or by adopting or modifying some other local government's local law on a particular subject matter. As a result, the standard of drafting of local laws is highly variable.

Publication and Commencement

2.53 Section 41 of the Interpretation Act provides that subsidiary legislation must be published in the *Gazette*. Publication is the responsibility of the relevant department or agency to organise. Section 3.15 of the Local Government Act 1995 (WA) requires that a local government take reasonable steps to ensure that the inhabitants of the district are informed of the purpose and effect of all of its local laws.

Section 41 of the Interpretation Act provides that subsidiary legislation comes into operation either on the day of publication or on the day specified in the subsidiary legislation. It also provides that the power to fix a day on which subsidiary legislation shall come into operation does not include the power to fix different days for different provisions of that legislation, unless the power is expressly provided in the enabling legislation. For local laws, s 3.14 of the Local Government Act provides that they commence on the 14th day after being published in the *Gazette*, some later day specified in the local law or, if they are made under s 3.17, either on the day that they are published in the *Gazette* or some later day specified in the local law.

CHAPTER 3

Parliamentary Review

Introduction

3.1 The Donoughmore Committee Report[1] states that one of the problems with delegated legislation is that '[t]he facilities afforded to Parliament to scrutinise and control the exercise of powers delegated to Ministers are inadequate. There is a danger that the servant may be transformed into the master'. One of the strengths of the management of delegated legislation in Australia is that, arguably, parliaments *do* have, through their various legislative scrutiny committees, adequate facilities to scrutinise delegated legislation. This relies on experience and expertise developed over 80 years.

The cornerstone of legislative scrutiny (by parliamentary committees) in Australia was the establishment, in 1932, of the Senate Standing Committee on Regulations and Ordinances (Senate Committee). Its establishment was a cornerstone because the committees that were subsequently established, in all Australian jurisdictions, largely followed its model for operation.

3.2 Given the 1932 establishment date, it might be assumed that there is some connection between the publication of the Donoughmore Committee Report and the establishment of the Senate Committee. In fact, there is no link. The establishment of the Senate Committee was an innovation that was entirely the work of the Australian Senate.

In 1929, the Senate appointed a select committee to consider, report and make recommendations on the advisability or otherwise of establishing a standing committee system and, in particular, on establishing standing committees on:

(a) regulations and ordinances;

(b) international relations;

(c) finance; and

(d) private members' bills.

1. Donoughmore Committee (the Committee on Ministers' Powers) of the United Kingdom Parliament (Report, 1932, Cmd 4060), p 53.

The Senate Select Committee on Standing Committees (Select Committee) produced two reports. The first, tabled in 1930, duly recommended that a Standing Committee on Regulations and Ordinances be established. The basis of the recommendation appears primarily to have been the volume of regulations that were, at that time, being promulgated. The report referred to evidence before the Select Committee that 'no fewer than 3,708 pages' of Commonwealth Acts had been passed between 1901 and 1927, compared to 11,263 pages of regulations, etc in the same period.[2]

The Select Committee stated:

> The power to make regulations is necessarily used very freely by Governments and as a result a very large number are submitted to Parliament every Session. They are so numerous, technical and voluminous that it is practically impossible for Senators to study them in detail and to become acquainted with their exact purport and effect. It is admitted that Senators receive copies of these regulations or Statutory rules, but the many calls upon their time render it almost impossible for them to make a detailed examination of every regulation.

The Select Committee went on to state:

> A very strong case has been made out by various witnesses before the Committee in favour of some systematic check, in the interests of the public, on the power of making statutory rules and ordinances.[3]

The Select Committee went on to refer to a number of bills (six are listed), 'the chief effect of which was to give a regulation-making power'.[4] It is interesting to note that one of the reasons canvassed for the establishment of the Regulations and Ordinances Committee was the availability of such a committee to receive submissions critical of regulations. The Select Committee refers to the 'probable usefulness' of affording the public such an opportunity, noting that this would be 'both more timely and cheaper' than taking matters to the High Court, as had recently been required in relation to various regulations that the Select Committee listed in the report.

The Select Committee recommended that a 'proper and sufficient check' was required on the power to make regulations and that such a check could be provided by the establishment of a Regulations and Ordinances Committee.[6]

2. See Parliamentary Paper S1/1929–31, p ix. As an interesting aside, note that, according to the most recent Office of Legislative Drafting and Publishing statistics, in 2010, the Commonwealth jurisdiction passed 150 Acts, amounting to 6,157 pages, and made 3,080 legislative instruments, amounting to 24,494 pages. In 2008, the Commonwealth jurisdiction passed 159 Acts, amounting to 6,930 pages, and made 4,502 legislative instruments, amounting to 28,608 pages.
3. See Parliamentary Paper S1/1929–31, p ix.
4. See Parliamentary Paper S1/1929–31, p x.
5. See Parliamentary Paper S1/1929–31, p x.
6. See Parliamentary Paper S1/1929–31, p x.

It is interesting to note that the Select Committee's recommendation was that the proposed Regulations and Ordinances Committee 'would be charged with the responsibility of seeing that the clause *of each bill* conferring a regulation-making power does not confer a power which ought to be exercised by Parliament'[7] (emphasis added). The fascinating element of this recommendation is that what is, in fact, recommended here is a role (in relation to subordinate legislation) similar to that performed (since 1981) by the Senate Standing Committee for the Scrutiny of Bills. This is an issue that is returned to in Chapter 9.

The final thing to note was the following observation about the proposed Regulations and Ordinances Committee's role in relation to 'policy' issues:

> It is conceivable that occasions might arise in which it would be desirable for the Standing Committee [on Regulations and Ordinances] to direct the attention of Parliament to the merits of certain Regulations but, as a general rule, it should be recognized that the Standing Committee [on Regulations and Ordinances] would lose prestige if it set itself up as a critic of governmental policy or departmental practice apart from the terms [of reference] outlined above.[8]

For completeness, it should be noted that the Select Committee's second report, tabled in 1930, again recommended that a Regulations and Ordinances Committee be established, though the recommendation did not, on this occasion, contain recommended terms of reference for the Senate Committee.

Parliamentary Review: Commonwealth

Power to Review Delegated Legislation

3.3 The key to parliamentary review of delegated legislation in the Commonwealth Parliament is Pt 5 of the Legislative Instruments Act 2003 (Cth), which sets out the requirements for tabling in the parliament and the circumstances, manner and consequences of disallowance. From the point of view of scrutiny, the most significant provision is s 38(1), which requires that all legislative instruments be tabled in each House of the Parliament.

Part 5 of the Legislative Instruments Act

3.4 As noted above, s 38(1) requires legislative instruments to be tabled in each House of the Parliament within six sitting days of the instrument being registered.[9] Section 38(3) of the Legislative Instruments Act provides that failure to observe this requirement results in the legislative instrument ceasing

7. See Parliamentary Paper S1/1929–31, p x.
8. See Parliamentary Paper S1/1929–31, p xi.
9. This replaces the requirement in s 48 of the Acts Interpretation Act that all regulations be tabled in each House of Parliament within 15 sitting days of being made by the Governor-General.

to have effect immediately after the last day for it to be so laid. Section 39 provides that the explanatory statement required by s 26 of the Legislative Instruments Act to be registered with a legislative instrument must also be delivered to each House of the Parliament. If an explanatory statement has been lodged for registration with the Attorney-General's Department prior to the relevant legislative instrument being delivered to a House of the Parliament, the requirement to deliver the explanatory statement to the House rests with the Attorney-General's Department: s 39(1). If it has not, the requirement lies with the rule-maker, who must also provide a written statement as to why the explanatory statement was not provided to the Attorney-General's Department in time for it to be delivered to the House with the instrument: s 39(2).

Section 42 of the Legislative Instruments Act deals with disallowance. It provides that if either House of Parliament, pursuant to a motion of which notice has been given within 15 sitting days after any legislative instrument has been laid before it, passes (within a further 15 sitting days) a resolution disallowing the instrument or a provision of the instrument, then the instrument (or the provision) ceases to have effect: s 42(1). This formulation of the disallowance mechanism is significant because it makes clear that either House can disallow a provision of a legislative instrument and is not required to disallow the whole instrument.

Section 44 of the Legislative Instruments Act explicitly exempts 37 categories of legislative instruments from disallowance, with the capacity for further instruments to be exempted by regulation.

Disallowance by the Effluxion of Time

3.5 If a notice of motion has not been called on within 15 sitting days of having been given, the legislative instrument is deemed to have been disallowed. This is intended to ensure that a motion of disallowance cannot be adjourned indefinitely and constitutes the form of disallowance commonly referred to as 'disallowance by effluxion of time'. Further provisions deal with such matters as the effect on such a motion of the dissolution, etc, of the House of Representatives (s 42(3)) and the effect of disallowance: s 45. Restrictions are also imposed on the remaking of legislative instruments while they are required to be tabled, while they are subject to disallowance and once they have been disallowed: ss 46–48. In the context of parliamentary review, however, it is those provisions dealing with tabling and disallowance that are the most significant.

Exercise of the Review Power

3.6 Legislative instruments can be disallowed by either House for any reason. While it remains to be seen how the new regime provided by the Legislative Instruments Act will operate, it should be noted that motions to disallow regulations have been moved very rarely in the House of Representatives.

When they have been, they have invariably been moved by the Opposition and have been politically motivated, rather than based on the merits. It may be that the House of Representatives would have taken a greater interest in the scrutiny of delegated legislation were it not for the fact that the Senate has assumed the role of scrutineer of Commonwealth Government regulations. The Senate's active role in this sphere is, in turn, a reflection of the work of its Standing Committee on Regulations and Ordinances.

Senate Standing Committee on Regulations and Ordinances

Establishment of the Senate Committee

3.7 As indicated above, the Senate Committee was established on 11 March 1932. It was established in the Senate because it was thought that a committee of this kind would function best in an Upper House. This sentiment is also, in large part, a reflection of the Senate's function as a 'house of review'. The appointment of the Senate Committee was formally achieved by the Senate adopting a new standing order. This practice has continued to the present day.

Composition of the Senate Committee

3.8 Under Senate Standing Order 23, the Senate Committee comprises six senators, three from the government and three from the non-government parties. The standing orders prescribe that a senator appointed to the Senate Committee on the nomination of the Leader of the Government in the Senate be elected as chairman and that the chairman have a casting vote. However, the Senate Committee has always been at pains to point out that it operates in a non-partisan fashion.

Jurisdiction of the Senate Committee

3.9 The Senate Committee's jurisdiction is also provided for by Senate Standing Orders. Standing Order 23(2) states:

> All regulations, ordinances and other instruments made under the authority of Acts of the Parliament, which are subject to disallowance or disapproval by the Senate and which are legislative in character, stand referred to the [Senate Committee] for consideration and, if necessary, report.

It is important to note that, while this standing order operates in relation to instruments that are 'legislative in character', it is a prerequisite that those instruments be subject to 'disallowance or disapproval by the Senate' before the jurisdiction of the Senate Committee is invoked. In that sense, Standing Order 23(2) could be regarded as having anticipated the regime now applicable under the Legislative Instruments Act.

Standing Order 23(3) requires the Senate Committee to scrutinise each instrument referred to it to ensure:

(a) that it is in accordance with the statute;

(b) that it does not trespass unduly on personal rights and liberties;

(c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and

(d) that it does not contain matter more appropriate for parliamentary enactment.

These scrutiny principles (discussed in more detail in Chapters 4–6) have been amended only once since the establishment of the Senate Committee. This was in 1979, when principle (c) above was re-stated, to reflect the establishment of the Administrative Appeals Tribunal.

Nature of Senate Committee's Scrutiny

3.10 In its Annual Report for 1996–97, the Senate Committee stated:

> The Committee engages in technical legislative scrutiny. It does not examine the policy merits of delegated legislation. Rather, it applies parliamentary standards to ensure the highest possible quality of delegated legislation, supported by its power to recommend that a particular instrument, or a discrete provision in an instrument, be disallowed. This power, however, is rarely used, as Ministers almost invariably agree to amend delegated legislation or take other action to meet the Committee's concerns.[10]

More recently, the Senate Committee stated:

> In keeping with an approach adopted in 1933, the Committee considers that questions involving government policy in regulations and ordinances fall outside its scope. Accordingly, the Committee does not consider policy issues arising in delegated legislation, but does not refrain from finding provisions contrary to its principles and recommending their disallowance simply on the basis that they reflect government policy.[11]

This is consistent with a decision taken early in the history of the Senate Committee when, in its fourth report, it noted that it had determined that 'questions involving Government policy in regulations and ordinances fell outside the scope of the Senate Committee'. This has not, however, prevented the Senate Committee from commenting on regulations that include new policy issues. Such comments have been made on the strength of principle (d) of its terms of reference, on the basis that novel issues are more appropriately the subject matter for primary legislation.

10. Senate Standing Committee on Regulations and Ordinances, *One Hundred and Fifth Report, Annual Report 1996–97*, June 1998, p 1.
11. Senate Standing Committee on Regulations and Ordinances, *One Hundred and Ninth Report, Annual Report 1999–2000*, October 2000, p 3.

Operation of Senate Committee

3.11 Under the procedures for tabling legislation that operated under the Acts Interpretation Act 1901 (Cth), the Senate Committee received copies of regulations (and other disallowable instruments) immediately they had been made. It also received an explanatory statement prepared by the department responsible for the regulations. That process continues under the new regime introduced with the enactment of the Legislative Instruments Act, with the Senate Committee instead receiving copies of all legislative instruments. Requirements in relation to explanatory statements for legislative instruments (previously a matter for the *Federal Executive Council Handbook* and the requirements of the Senate Committee) are also given statutory force, in s 6 of the Legislative Instruments Act and in the definition of 'explanatory statement' in s 3(1) of that Act.

Since 1945, the Senate Committee has had made available to it the services of a non-government lawyer as its independent legal adviser. Legislative instruments received by the Senate Committee are referred to the legal adviser, who provides expert advice about whether or not they offend against any of the Senate Committee's scrutiny principles. The Senate Committee has, over the years, acknowledged the invaluable assistance provided by the legal adviser. The Senate Committee is also assisted by a committee secretary, a research officer and two administrative officers.

The standing orders give the Senate Committee the power to summon witnesses to produce papers or give evidence. While this power has been exercised to summon departmental officers and the drafter of legislative instruments, it is used relatively infrequently. Similarly, while the Senate Committee may receive written submissions from individuals or organisations affected by legislative instruments, it does not generally solicit such submissions. An example of the Senate Committee doing so occurred in the course of its inquiry into the Legislative Instruments Bill 2003.[12]

It has been the Senate Committee's practice to meet weekly while the Senate is sitting and to hold such additional meetings as the workload requires. At these meetings, the Senate Committee receives and discusses reports from the legal adviser on new legislative instruments and also discusses progress (and future action) of issues that have been raised in relation to legislative instruments under consideration.

The Senate Committee's approach to problems with legislative instruments is to attempt to resolve those problems by correspondence with the relevant minister or 'other law-maker'. Resolution of those problems generally occurs either by the minister being able to provide further information on the

12. See Senate Standing Committee on Regulations and Ordinances, *One Hundred and Eleventh Report, Legislative Instruments Bill 2003, Legislative Instruments (Transitional Provisions and Consequential Amendments) Bill 2003*, October 2003.

CHAPTER 12

JUDICIAL REVIEW OF DELEGATED LEGISLATION: GENERAL

INTRODUCTION

12.1 This chapter deals with a number of general matters relating to the review by the courts of delegated legislation. Some of the matters are returned to in greater detail in later chapters. Others are mentioned because they qualify in a general way specific issues dealt with later.

RIGHT OF COURTS TO PRONOUNCE ON VALIDITY OF DELEGATED LEGISLATION

12.2 The courts have, for many years, considered it to be within their power to rule delegated legislation invalid. For example, in 1702 Holt CJ said '... every by-law is a law, and as obligatory to all persons bound by it, ... as any Act of Parliament, only with this difference, that a by-law is liable to have its validity brought in question': *The City of London v Wood* (1702) 12 Mod 669 at 678; 88 ER 1592 at 1597. Lord Herschell LC in *Institute of Patent Agents v Lockwood* [1894] AC 347 at 360 reiterated this view in almost identical words. It is so deeply entrenched as a principle of our law that Australian judges seem not to have felt it necessary to refer to it. Rather, they have proceeded straight to the question whether the delegated legislation is valid.

SEPARATION OF POWERS

12.3 The doctrine of separation of powers affects delegated legislation in three respects. First, it is not permissible for legislation to be made by a body other than the parliament without the authority of the parliament. Second, while the parliament may empower another body to alter an Act of the parliament, that power will be strictly construed and the delegate may not destroy the purpose of the empowering Act: *New South Wales v Law* (1992) 29 ALD 215: see 19.8. Third, despite the theory of separation of powers, the ability of a legislature with plenary powers to empower another body or person to make legislation has been recognised as an essential adjunct to the practice of government. More difficulties have arisen in regard to legislatures

with limited powers, such as the territory legislatures and local authority representative bodies. The issue has also confronted the courts in Australia when considering the effect of the separation of powers structure that is to be found in the Commonwealth Constitution. These issues are discussed in Chapter 23, along with the general question whether a person or body delegated legislative power can delegate that power further.

GENERAL TEST OF INVALIDITY

12.4 Lord Diplock in *McEldowney v Forde* [1969] 2 All ER 1039 at 1068 described the task of a court in determining the validity of delegated or subordinate legislation as a threefold one:

> ... first to determine the meaning of the words used in the Act of Parliament itself to describe the subordinate legislation which that authority is authorised to make, secondly to determine the meaning of the subordinate legislation itself and finally to decide whether the subordinate legislation complies with that description.

A similar view was stated by Barwick CJ in *Esmonds Motors Pty Ltd v Commonwealth* (1970) 120 CLR 463 at 466.

The *McEldowney v Forde* test was endorsed in *Vanstone v Clark* (2005) 147 FCR 299 at 331; 224 ALR 666 at 695 and *O'Connell v Nixon* [2006] VSC 456 at [85].

However, the court does not limit its inquiry simply to placing a meaning on the delegated legislation. The further step is taken of determining the true scope of the measure and its legal effect: *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746 at 757 per Dixon J; see also 15.37. The determination of the validity of regulations is thus a question of law.

This is not to deny that in certain circumstances the courts may have to engage in fact-finding exercises relevant to the question of validity. As Dixon CJ said in *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280 at 291–2, in relation to the operation of a law that was said to infringe s 92 of the Constitution:

> In courts administering English law according to the principles which developed in a unitary system it must seem anomalous that the question whether a given statute operates or not should depend upon facts proved in evidence. How facts are to be ascertained is of course a question distinct from their relevance. Highly inconvenient as it may be, it is true of some legislative powers limited by definition, whether according to subject matter, to purpose or otherwise, that the validity of the exercise of the power must sometimes depend upon facts, facts which somehow must be ascertained by the court responsible for deciding the validity of the law.

In *Todd v Payne* [1975] WAR 45 at 53, this statement was applied by Wickham J when determining the validity of certain regulations; see also *Gerhardy v Brown*

(1985) 159 CLR 70; 57 ALR 472. Nonetheless, the question of validity remains ultimately one of law.

Validity is Jurisdictional Issue

12.5 The fact that the parties involved in a matter before a court do not raise issues as to the validity of delegated legislation relevant to that matter does not excuse the court from considering the validity of the legislation. A court must be satisfied of the validity of the legislation before it can enforce it: *Anisimoff v Fraser (No 2)* (1983) 33 SASR 458.

Invalidity Operates Retrospectively

12.6 If a court declares legislation to be invalid, that pronouncement means that it was always invalid. It is not possible for it to have had some period of operation such as is the case if the legislation is repealed. This will mean that persons may have wrongly incurred liabilities under the legislation or action may have been taken against persons that may now expose officials to liability, such as for wrongful imprisonment. See generally *Ha v New South Wales* (1997) 189 CLR 465; 146 ALR 355 and Enid Campbell, 'The Retrospectivity of Judicial Decisions and the Legality of Governmental Acts' (2003) 29 *Monash University Law Review* 49. See also 26.2 relating to collateral review of the validity of delegated legislation.

Court Not Bound by Parties' Arguments

12.7 It is the duty of courts to place meaning on delegated legislation, and for this reason a court is not bound to consider only the construction argued by counsel. It is obliged to adopt its own view of the meaning and effect of the legislation: *Accident Towing and Advisory Committee v Combined Motor Industries Pty Ltd* [1987] VR 529.

Grounds on Which Delegated Legislation May be Invalid

12.8 Delegated legislation may be invalid for a number of reasons. While these reasons may, for convenience, be discussed separately (and are so treated in this work), in Australia they are regarded as branches of the general doctrine of ultra vires. The principal grounds of review of delegated legislation are:

1. The formal requirements that have to be complied with when making the delegated legislation may not have been followed: see Chapter 13.
2. The delegated legislation may deal with a subject not within the scope of the power provided in the empowering Act. Alternatively, it may deal with such a subject but may exceed the prescribed limits within which the legislation must fall: *Young v Tockassie* (1905) 2 CLR 470 at 477

per Griffith CJ. This statement was endorsed by a Full Federal Court in *Queensland v Central Queensland Land Council Aboriginal Corporation* (2002) 125 FCR 89 at 105; 195 ALR 106 at 119.

When considering Australian law, this notion of invalidity can be described as simple ultra vires to distinguish it from the extended concept of ultra vires which embraces the other grounds of review set out below. In New Zealand and the United Kingdom, the concept of ultra vires is limited to this category and the grounds set out below are treated as separate heads of invalidity. In Australia also, it must be remembered that the Act empowering the making of delegated legislation may itself be invalid as unconstitutional. In such a case, the delegated legislation falls with the Act. It is also possible for the delegated legislation to be unconstitutional and this is not limited to legislation of the Commonwealth: *James Paterson & Co Pty Ltd v Melbourne Harbor Trust Commissioners* [1961] VR 343.

3. The delegated legislation may be invalid because it is inconsistent with, or repugnant to, the Act under which it is made, another Act or the general law: see Chapter 19.
4. The delegated legislation may be invalid because the power to make the legislation has been exercised not for the purpose set out in the empowering Act but for another purpose: see Chapter 20.
5. The delegated legislation may be invalid because its effect is so unreasonable that it cannot be regarded as falling within the contemplation of the legislature in passing the Act enabling the making of the legislation or is not reasonably proportionate to the empowering provisions of that Act: see Chapter 21.
6. The delegated legislation may be invalid because, after its meaning has been determined by the court, its operation is such as to impose no certain obligation on the persons affected by it: see Chapter 22.
7. The delegated legislation may be invalid because it makes no provision itself for the subject with which it is concerned but subdelegates the power to legislate on the matter to another body: see Chapter 23.

Distinction from Review of Administrative Decisions

12.9 It can be seen that many of these grounds for reviewing delegated legislation also provide a basis for reviewing administrative decisions. To that extent, assistance can be obtained from cases concerned with broader administrative law issues. However, a distinction has traditionally been drawn between the grounds available to review decisions of a legislative and of an administrative character.

The approach adopted by the courts has been to confine review of legislation to the issue of power. Is the legislation authorised by the empowering provision in the Act providing for its making? This has resulted

in the grounds of review being more limited. This has particularly been the case in regard to the bases adopted for making the legislation.

Relevancy and irrelevancy have not been taken up as grounds for review. Motive for making as a ground has required an example of blatant use of the power for an unauthorised purpose. Acting under dictation or inflexible application of policy have not been seen as appropriate grounds for review of legislation, presumably because the content of legislation is almost by definition driven by these factors. Unreasonableness has been rejected as a separate ground of review, although it might come in by the back door of being an abuse of the making power. Natural justice is not required unless the persons affected by the legislation are so circumscribed that the legislation can be seen as really being a decision directed at them.

This differentiation between the bases for reviewing legislation and administrative decisions was strongly influenced by the fact that delegated legislation was, in times past, almost exclusively made by local government bodies, the Crown representatives and ministers. The courts deemed it inappropriate for them to concern themselves with the issues dealt with in legislation made by these bodies whose primary accountability lay to their electors. Further, the content of much of this legislation was likely to be influenced by political considerations.

The courts have expressly indicated that they are not prepared to interfere too readily with legislative instruments. In *Austral Fisheries Pty Ltd v Minister for Primary Industries and Energy* (1992) 37 FCR 463 at 477; 27 ALD 633 at 645 and *Donohue v Australian Fisheries Management Authority* (2000) 60 ALD 137 at 143 the courts referred to a challenge to the validity of legislation having to meet 'a much sterner onus' than that applicable where an administrative decision is under review: see also 12.13.

The administrative review remedies are not generally available to challenge the validity of delegated legislation. The Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act) and like legislation that requires the giving of reasons for a decision is not applicable to legislative instruments.

For these reasons, it will often be crucial to a case to identify correctly the nature of the instrument that is in question.

A guideline or statement of policy, for example, will not have the status of legislation unless its making is authorised by an Act and it is clear that it is intended to have that status. If an instrument is not legislative, it means, among other things, that it will not be binding on either a decision maker or the affected public, a refusal to depart from it will be challengeable, an administrator will not be bound to follow it in reaching a decision and the ADJR Act will be able to be invoked if it is a Commonwealth instrument. Reasons will have to be given justifying the making of the instrument.

These are significant issues for both administrators and persons affected by a decision made in reliance upon an instrument: cf *Gerah Imports Pty Ltd v Minister*

for Industry, Technology and Commerce (1987) 17 FCR 1; 14 ALD 351; *Carroll v Sydney City Council* (1989) 15 NSWLR 541. Care must be taken to understand precisely the status of instruments that are given some form of approval by the parliament or some other authority. Parliamentary approval of an instrument does not confer legislative status upon it: *Naval, Military and Airforce Club of SA (Inc) v Federal Commissioner of Taxation* (1994) 51 FCR 154 at 179; 122 ALR 201 at 224.

12.10 It is not always easy to distinguish between legislative and non-legislative instruments, as the many cases dealing with the classification of decisions as 'administrative' as distinct from 'legislative' under the ADJR Act testify: see *Australian Administrative Law Service*, LexisNexis Butterworths, Sydney, para [312B]. See also the summary of indicia in *RG Capital Radio Ltd v Australian Broadcasting Authority* (2001) 113 FCR 185; 185 ALR 573 which were applied in *Harbour Radio Pty Ltd v Australian Communications and Media Authority* [2012] FCA 614 at [127]–[140]. See further 26.7. Note also the definition of 'legislative instrument' in the Legislative Instruments Act 2003 (Cth). Nonetheless, for the reasons set out above, and probably for the future, it is important to draw the line.

However, at least at the Commonwealth level, following the passage of the Legislative Instruments Act and its broadening of the range of instruments deemed to be legislative, the basis for making the distinction between legislative and administrative decisions for review purposes may be thought to have less relevance. Many legislative instruments will be made by the same persons who make administrative decisions. In this context reference needs to be made to *Roche Products Pty Ltd v National Drugs and Poisons Schedule Committee* (2007) 163 FCR 451; 243 ALR 381.

The schedule of poisons and drugs had been regarded as an administrative instrument. A challenge under the ADJR Act to a scheduling decision made by the Committee was rejected in the *Roche* case as unavailable because the schedule was properly to be classified as a legislative, not an administrative, decision. As the schedule had not been registered within the required period on the Federal Register of Legislative Instruments, it had expired. (This necessitated validating legislation to ensure the operation of the schedule in the future and to preserve the validity of actions taken in reliance on the schedule in the past.)

Having ruled that the schedule was a legislative instrument, Branson J then proceeded to consider whether its validity could be challenged under s 39B of the Judiciary Act 1903 (Cth) which permits review of matters arising under laws made by the Commonwealth. The relevance of the case for present purposes is that her Honour reviewed the schedule having regard to all the standard grounds for administrative review. She ignored any distinction that might exist between the bases for reviewing legislative as against administrative decisions. So the validity of the Committee's action was considered under the heads of relevancy and irrelevancy, unreasonableness, no evidence, acting under dictation, inflexible application of policy and natural justice. No reference was made to the older delegated legislation decisions that either reject or qualify the application of these grounds of review to legislative action.

Is this a portent for the future? Does it mean that the reluctance shown in the older cases to subject legislation to the level of scrutiny afforded administrative decisions is to be abandoned? Or is there going to be a differentiation drawn between what might be referred to as upper and lower level legislation? Perhaps those legislative instruments that are made by representative bodies and by the upper echelons of government will continue to be treated with a degree of deference while those that are made by administrators will be given the same oversight as administrative decisions made by those persons.

On the other hand, perhaps *Roche* points the way to the future. It was not long ago that the courts declined to review administrative decisions of ministers and the Crown representatives on grounds such as motive and natural justice. That self-imposed judicial restraint has been abandoned. Is there any reason why such restraint should still be adopted where legislative decisions are concerned?[1]

For the present, it should probably be taken that the grounds of review of delegated legislation are limited to those referred to in 12.8.

Simple Ultra Vires

12.11 Cases concerned with the issues referred to in 12.8 — simple ultra vires — are, of necessity, dependent very much on their own facts. Rich J in *Footscray Corporation v Maize Products Pty Ltd* (1943) 67 CLR 301 at 308 said:

> Authorities are of little use in determining the validity of a particular by-law. The appropriate steps are to construe the statute under which the by-law is made and then interpret it to ascertain whether it is within the ambit of the statute.

Accordingly, it is not proposed to examine the large number of authorities in which the issues of ultra vires in relation to particular empowering words has been discussed. Examination will be limited to cases concerned with common empowering provisions, such as the power to make regulations 'necessary or convenient' for giving effect to an empowering Act and the power to 'regulate' or 'prohibit' an activity: see Chapters 14 and 15, respectively. However, many of the cases that are examined under other headings reveal the approach followed by the courts in determining simple ultra vires issues. Reference should also be made in particular to Chapter 30 which discusses relevant interpretation principles.

Power to Make Delegated Legislation Purposive

12.12 In *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 204; 38 ALR 439 at 467, Stephen J said:

1. See further, D C Pearce, 'The Importance of Being Legislative — A Reprise' (2008) 57 *ALAL Forum* 20.

> Where a Parliament confers powers they will seldom if ever be conferred in gross, devoid of purposes or criteria, express or implied, by reference to which they are intended to be exercised.

So, for example, the power of the Governor simply to repeal a by-law of a local authority provided in the Local Government Act 1958 (Vic) without any constraining conditions stated was held to be purposive, in that it could only be exercised having regard to considerations germane to the provisions of the Local Government Act: *Lyster v Camberwell City Council* (1989) 69 LGRA 250 at 259. This same approach governs the exercise of delegated legislation making. The purpose may be clearly indicated in the specific empowering provision, for example, 'controlling and regulating the use of premises with a view to preventing objectionable noises at unreasonable times': cf *Lyster's* case. On the other hand, the power may appear to be open and unconstrained: cf *Sremcevic v Gurry* (1994) 51 FCR 194; 123 ALR 255, where the power in question under the Banking Act 1959 (Cth) was to make regulations related to 'foreign exchange'. Even in such a case, the scope of the Act itself controlled the purposes for which regulations could be made. This may give a wider scope than where purpose is more directly stated. (In that case, a contrast was drawn between this power and one to make regulations 'for the protection of the currency'.) Nonetheless, the overriding purpose has still to be recognised and taken into account when considering validity issues.

Self-Imposed Constraints on Review of Some Legislation

12.13 The courts in Australia and in England have from time to time indicated that there should not be too great a willingness to overturn legislation made by some bodies. This is most apparent in regard to representative bodies. Rich J in *Footscray Corporation v Maize Products Pty Ltd* (1943) 67 CLR 301 at 308 said:

> Municipalities and other representative bodies which are entrusted with power to make by-laws are familiar with the locality in which the by-laws are to operate and are acquainted with the needs of the residents of that locality and thus are, I venture to think, better fitted than judges to deal with their requirements.

See also *Re Mayor, City of Hawthorn; Ex parte Co-operative Brick Co Ltd* [1909] VLR 27, particularly at 50 per Cussen J; *Arthur Yates & Co Pty Ltd v Vegetable Seeds Committee* (1945) 72 CLR 37.

This approach is carried through in relation to arguments that legislation made by such bodies is invalid if it is capable of being applied in a manner that takes it beyond the scope of the empowering provision. In *Kruse v Johnson* [1898] 2QB 91, Lord Russell of Killowen, in a passage that is often cited, said that by-laws of representative bodies should be benevolently interpreted. 'Credit ought to be given to those who have to administer them that they will be reasonably administered': at 99. This approach was applied expressly by the Tasmanian Full Court in *Southorn v Jovanovic* (1987) 63 LGRA 277 to uphold a by-law limiting the placing or hanging of things outside shops. Hypothetical

CHAPTER 31

RETROSPECTIVE OPERATION OF DELEGATED LEGISLATION

INTRODUCTION

31.1 Backdating any legislation so that it operates retrospectively has attracted the attention of both parliamentary scrutiny committees and the courts. It has caused particular concern where the executive attempts to bring this about by the backdating of delegated legislation to impose obligations from a date earlier than the commencement of the legislation. This chapter examines the courts' approach to such action and also the legislative measures that have been adopted to control retrospectivity.

PRESUMPTION AGAINST RETROSPECTIVITY

31.2 When interpreting any legislation, the courts assume, in the absence of some clear statement to the contrary, that the legislation is not intended to operate retrospectively. The leading case on this question in Australia is *Maxwell v Murphy* (1957) 96 CLR 261. In that case, Dixon CJ (at 267) summarised the approach of the courts as follows:

> The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events.

However, the approach adopted by the courts is but an assumption, and can be displaced if there is clear evidence that the legislature intended the legislation to have retrospective operation.[1]

Before the presumption can arise, it must be clear that the provision in question does have retrospective effect. Legislation may be based on events

1. See further, D C Pearce and R S Geddes, *Statutory Interpretation in Australia*, 7th ed, LexisNexis Butterworths, Sydney, 2011, Ch 10.

that have already occurred but if the effect of the legislation is to change the law for the future, that does not constitute retrospectivity.[2]

PRESUMPTION APPLICABLE TO DELEGATED LEGISLATION

31.3 This general approach is applicable to delegated legislation as well as to Acts of Parliament. While it will be assumed that there is no intention for the delegated legislation to operate retrospectively, if it is plain that it is intended to have such operation, the court will treat it as valid and enforce it accordingly. This position was made clear by the Privy Council in *Marshall's Township Syndicate Ltd v Johannesburg Consolidated Investment Co Ltd* [1920] AC 420. An ordinance of the Transvaal province purported to invalidate any contract, existing or thereafter to be entered into, in which the person primarily liable for rates endeavoured to transfer that liability to the lessee of the rated property. The ordinance was held to be valid. The Privy Council said (at 425–6):

> The fact that legislation is retrospective may be a strong argument on the inquiry whether it is just or expedient. But if power is given to the Provincial Councils to deal with rating by ordinance, they have the same power of making any enactment relating thereto with retroactive effect as Parliament would have had … That the enactment is retrospective does not make it ultra vires.

The same approach had been adopted by the High Court in *Worrall v Commercial Banking Co of Sydney Ltd* (1917) 24 CLR 28. Regulation 8C of the War Precautions (Moratorium) Regulations (Cth) provided that: 'Any determination decision judgment … made or given by any Court in any matter arising under these Regulations shall be final and conclusive and without appeal.' The court held that the intended effect of the regulation was to affect retrospectively determinations of a Supreme Court made before the commencement of the regulation. The court considered that the regulation was valid. It approached the question on the basis of the ordinary rules as to the presumption against retrospectivity — there was no suggestion in the judgment that because the legislation was contained in a regulation, any different rules applied. It may be thought that a more generous approach was adopted because the regulation involved a wartime situation, but only a passing reference to this fact was made in the judgment. The decision in *Worrall's* case was expressly followed by a differently constituted bench of the High Court in *Pearson v Swannell* (1920) 28 CLR 390. The same approach was also adopted in *Minister for the Army v Pacific Hotel Pty Ltd* [1944] ALR 430, where a regulation was held to authorise the making of a retrospective order by a minister: see also *Australian Coal and Shale Employees Federation v Aberfield Coal Mining Co Ltd* (1942) 66 CLR 161, particularly per Starke J at 185.

2. See Pearce and Geddes, [10.4]

Presumption Applicable to Changes in Substantive Law

31.4 The presumption against retrospectivity is concerned with changes in the law that affect substantive rights. Changes in procedure are assumed to apply to actions brought after the change is made, even though they may relate to conduct that occurred before the change: *Rodway v R* (1990) 169 CLR 515.[3]

This approach was applied in *O'Connell v Palmer* (1994) 53 FCR 429 to regulations that changed the standard of proof to be applied in disciplinary proceedings. No question of the validity of the regulations was raised.

Retrospectivity May Go to Validity

31.5 It would seem from the preceding paragraphs that delegated legislation will not be invalid merely because it has retrospective operation. It must also be remembered that retrospective legislation is not proscribed by the Constitution and this extends to delegated legislation: *Tiutupou v Minister for Immigration and Multicultural Affairs* (2000) 60 ALD 361 at 363.

Nevertheless, when considering regulations made under an Act, regard must always be had to the power authorising the making of the regulation. It is to be noted that, in the passage from *Marshall's Township Syndicate Ltd v Johannesburg Consolidated Investment Co Ltd* set out in 31.3, the Privy Council alluded to the possibility that the fact the legislation operated retrospectively could be an argument relevant to the inquiry whether the regulation was 'just or expedient', the form of the empowering provision in that case. A court will inquire whether or not a regulation falls within a general empowering provision and, as part of that inquiry, it will ask the question whether it is necessary for the regulation to have retrospective operation.

This issue arose before the High Court in *Broadcasting Co of Australia Pty Ltd v Commonwealth* (1935) 52 CLR 52. The plaintiff broadcasting company was, pursuant to regulations made under the Wireless Telegraphy Act 1905 (Cth), entitled to a portion of the radio receiver licence fee that was payable by members of the public who had radio receivers. The regulations were made under a 'necessary or convenient' power in the Wireless Telegraphy Act. An amending regulation reduced the amount payable to the plaintiff and other holders of broadcasting transmission licences with effect from a date earlier than the date of notification of the regulation. The High Court, Gavan Duffy CJ, Rich, Evatt and McTiernan JJ, Starke J dissenting, held that the regulation was invalid. They considered that the necessary or convenient power would not support retroactive legislation in this case.

However, the court was not speaking at large in regard to the interpretation of a necessary or convenient power; it was directing its remarks to the

3. See D C Pearce and R S Geddes, *Statutory Interpretation in Australia*, 7th ed, LexisNexis Butterworths, Sydney, 2011, [10.21].

regulation made under the particular Act. It may be more likely that a court will hold delegated legislation having retroactive effect invalid if it is made under a general regulation-making power in an Act. However, if it can be said that it is necessary or convenient to give effect to the Act for the legislation to have retrospective operation, the regulation will be valid.

Where there is no power in an empowering Act to backdate regulations, the nature of the regulations may point to invalidity. This seems to be the explanation for the decision in *Beard v South Australia* (1991) 57 SASR 65, where the backdating of the operation of a notice fixing water rates was held to be invalid as not supported by any power in the enabling Act. The fact that the notice imposed a tax was significant in the conclusion that retrospectivity was not permissible in the absence of express power.

See also *Rokobatini v Minister for Immigration and Multicultural Affairs* (1999) 90 FCR 583 at 594; 57 ALD 257 at 267.

Other Matters Inhibiting Making of Retrospective Delegated Legislation

31.6 Two other factors militate against the adoption of retrospective delegated legislation. The first is that the parliamentary committees which examine delegated legislation look closely and unfavourably on legislation that has retrospective operation. The second factor is that even if a committee does not move to have retroactive delegated legislation disallowed, a provision is to be found in all jurisdictions except Western Australia that imposes a limitation on the making of such legislation.[4] However, the form of limitation provided in the different jurisdictions varies.

Statutory Limits on Retrospectivity

Summary of Provisions

31.7 In New South Wales, Victoria and South Australia, the prohibition against backdating is absolute. The relevant Acts provide that delegated legislation may not take effect before its date of making and notification. From this, it would seem that, in the absence of power in the enabling Act, even regulations favourable to the interests of members of the public cannot be made with retrospective effect.

Queensland contains a similar prohibition but qualifies the prohibition by expressly permitting backdating if beneficial to a person affected or if no liability is imposed on a person.

4. Cth Legislative Instruments Act 2003 s 12 (Acts Interpretation Act 1901 s 48); ACT Legislation Act 2001 s 76; NSW s 39; NT s 63; Qld Statutory Instruments Act 1987 ss 32, 34; SA Subordinate Legislation Act 1978 s 10AA (regulations, rules and by-laws), Acts Interpretation Act 1915 s 10A (other statutory instruments); Tas s 47; Vic Subordinate Legislation Act 1994 s 16.

The Commonwealth, the Australian Capital Territory, the Northern Territory and Tasmania achieve the same result by prohibiting delegated legislation taking effect before publication if it would be prejudicial to the interests of a person. Prejudice results if a person would be deprived of existing rights or would have liability imposed in respect of things done or omitted before the date of publication. However, the formula used to achieve this differs in the jurisdictions and, as is discussed below, this difference may be significant.

Western Australia, unlike the other jurisdictions, provides for delegated legislation to commence on the day of publication or such other day as is specified.[5] This could be a day earlier than the day of commencement.

Interpretation of Statutory Prohibitions on Retrospectivity

31.8 The Commonwealth provision was initially expressed in similar terms to the state Acts that presently proscribe the commencement of delegated legislation before its date of making and notification. The operation of the provision[6] was considered by the High Court in the *Broadcasting Company* case mentioned above 31.5. It is necessary to set out the form of the amending Wireless Telegraphy Regulation:

> 3(1) After regulation 67 of the Wireless Telegraphy Regulations the following regulation is inserted: "67A In addition to the amount deductable from the licence-fees specified in the last preceding regulation, the Postmaster-General may deduct from the respective licence-fees an amount not exceeding fivepence for each month of the currency, after 1st November 1927, of any such licence issued before 1st January 1928 ..."
>
> (2) This regulation shall be deemed to have commenced on 1st November 1927.

Gavan Duffy CJ, Evatt and McTiernan JJ simply said that subreg (2) of the regulation, by deeming the regulation to have commenced on a date earlier than the date of notification of the regulation (which was 7 August 1928), was inconsistent with the Acts Interpretation Act provision and therefore the regulation was void (this being additional to the grounds of invalidity set out in 14.14). Rich and Starke JJ, the other two judges of the court, did not allude to this question in their judgments. It is not entirely clear from the judgment of the majority judges whether the regulation would have offended the Interpretation Act provision if subreg (2) had not been included in the amending regulation. There is some suggestion in the judgment that subreg (1), on its own, may have been valid at least on this score. In the joint judgments, it is said (at 60):

> ... it is not possible to discard clause (2) of the regulation and allow clause (1) of it to have effect as from the date of Gazette notification. For it is clear that the executive authority regarded clause (2) as an essential part of the scheme embodied in the regulation.

5. Interpretation Act 1984 (WA) s 41.
6. Acts Interpretation Act 1904–1930 s 10(b).

It could, it seems, be argued that subreg (1) did not contravene the Interpretation Act provision, as it would not take effect from a date prior to the date of notification but would merely redetermine for the future the amount that was to be deducted from licence fees. A factor in determining the amount to be deducted would be fixed by having regard to a period of time prior to the date of notification of the *Gazette*. However, the deductions would occur in the future and therefore the regulation itself would not take effect from an earlier date.

Somewhat curiously, the interpretation of this type of limitation on backdating seems not to have come before the courts again, but perhaps this is because drafters have taken care to ensure that there is not a blatant backdating of a regulation but merely a future operation given to regulations, such operation being made dependent on past events. However, the case is of relevance to those provisions forbidding retrospectivity noted in 31.7.

Section 48 Commonwealth Acts Interpretation Act

31.9 The Commonwealth Government responded to the *Broadcasting Company* decision by enacting s 48(2) of the Acts Interpretation Act 1901 (Cth), to provide that regulations were not to be 'expressed to take effect from a date before the date of notification' if a person's rights existing at the date of notification would be affected prejudicially or a liability would be imposed in respect of anything done or omitted before the date of notification. It can be seen that this provision could be interpreted in either of two ways. The section could be viewed literally and, if regulations were not expressed 'to take effect' from an earlier date, retrospective operation of the regulations would be permissible (subject to the *Broadcasting Company* case above and the general question whether retrospective legislation was contemplated by the empowering provision). The alternative interpretation would be to say that any regulation having retrospective effect is invalid if the limitations set out in the section are satisfied. The High Court, with some division of opinion, seemed to have taken the former view of the operation of the section. This conclusion is pertinent to the present provision in Tasmania and the Northern Territory and needs therefore to be examined.

The matter came before the court first in *Australian Coal and Shale Employees Federation v Aberfield Coal Mining Co Ltd* (1942) 66 CLR 161. The legislation in that case, put shortly, provided that certain awards of conciliation commissioners, including awards made before the notification of the regulation, could no longer be appealed against to the Arbitration Court. The regulation did not, however, in so many words, say that it took effect from a date prior to its notification. It was agreed by all judges of the court that a right of appeal was indeed a 'right' and so a right in law was being affected by the regulation. Latham CJ, with whom McTiernan J agreed, and Starke J held that the regulation did not contravene s 48(2) of the Acts Interpretation Act. Rich and Williams JJ expressed a contrary view. The approach of the majority is summarised by Starke J (at 185):

> The regulation is so expressed that it acts retrospectively as well as prospectively in respect of awards, orders, or decisions made or given by the Conciliation Commissioner, and this is so because the regulation is expressed to take effect upon awards and orders made before its commencement or the date of its notification. Still the regulation is not expressed to take effect from a date before its notification. No doubt it operates retrospectively, that is, upon awards made before the date of notification. But it did not take effect or come into force as a regulation or law until the date of notification. It may be, that the purpose of section 48 was to prohibit the retrospective operation of regulations, but if so the words of the section have failed to express the necessary intention. There is nothing in the section which prohibits the making of regulations having a retrospective or retro-active operation; all that is prohibited is giving them effect in certain cases as regulations before notification.

Williams and Rich JJ both considered the practical effect of the regulations which, as Starke J had indeed pointed out, was to affect retrospectively rights arising under the awards of the Conciliation Commissioners. In the view of these judges, it was such action that the section of the Interpretation Act was intended to prevent. Williams J reiterated this view in two subsequent cases: in *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 at 168 in regard to a regulation that validated seizures of goods that had occurred in the past, and in *Peacock v Newtown Marrickville & General Co-operative Building Society (No 4) Ltd* (1943) 67 CLR 25 in regard to a regulation that affected contracts made before the date of the regulation. In neither of these cases did the other judges of the High Court express views similar to that of Williams J.

The next major consideration of s 48(2) arose in *Toowoomba Foundry Pty Ltd v Commonwealth* (1945) 71 CLR 545. The regulation before the court in that case was notified in the *Gazette* on 12 October 1944. It provided that certain decisions of the Women's Employment Board which had been held invalid by the High Court 'shall, by virtue of this regulation, have full force and effect for all purposes, according to their tenor'. There was some difference of opinion in the court as to whether the regulation intended to validate the decision only from the date of its notification or whether the words 'according to their tenor' endeavoured to validate the decisions from the dates on which they were made. Latham CJ (with whom McTiernan J agreed) took the latter view as to the construction of the regulation and, consistently with the approach that he had taken in the *Aberfield* case, held that the regulation was invalid to the extent that it purported to validate the decisions retrospectively. His Honour distinguished the *Aberfield* case (at 568):

> In that case, it was held that a regulation which terminated a right of appeal as from a particular date took effect only as from that date, and did not take effect at any past date. Nothing can alter the past, but a law may be said to take effect from a past date if the operation of the law is such as to destroy as at a past date rights which then existed or to impose as at a past date liabilities which did not then exist.

The effect of the regulation in this case was, in his Honour's view, to give effect to determinations and impose obligations on persons from a date prior to the date of notification of the regulation. The other judges in the *Toowoomba Foundry* case seem to have endorsed Latham CJ's approach: see Dixon J at 574–5 and Williams J at 586–7 (although his Honour seems to have taken a different view as to the construction of the regulation). The view expressed in the *Toowoomba Foundry* case is consistent with that expressed in *Aberfield's* case, given the construction placed upon the regulation by the Chief Justice. One other point to note about the *Toowoomba Foundry* case is that Latham CJ (at 569) considered that the effect of s 48(2) of the Acts Interpretation Act was to render the regulation void only in so far as it contravened that subsection. Accordingly, the regulation could still have future operation in so far as it purported to validate the decisions for the future; it was only the retrospective validation that was bad.

The final case in which this issue seems to have arisen was that of *Commonwealth v Welsh* (1947) 74 CLR 245. A regulation there reduced retrospectively an air force officer's pay. The court agreed that if, in law, the officer would have had a right to recover his pay, then his rights were being affected and the regulation would have been rendered invalid by s 48(2). However, it was held by Latham CJ, Starke, Dixon and McTiernan JJ, Rich and Williams JJ dissenting, that there was no right to the pay, and accordingly s 48(2) allowed the backdating of the regulation as no rights of a person were being affected by the action being taken.

Returning to the point made in 31.2, the issue does not arise where the legislation in question only affects the future operation of existing rights. Legislation having this effect is not retrospective: see, as examples, *Quarm v Minister for Immigration* [2008] FMCA 287; *Re Zillin and Minister for Infrastructure, Transport, Regional Development and Local Government* (2011) 120 ALD 454 at 463 referring to s 12(2) of the Legislative Instruments Act 2003 (Cth).

Summary

31.10 The operation of the version of s 48(2) referred to in 31.9 (and thereby the present 'take effect' provisions in Tasmania and the Northern Territory) in the light of the decisions of the High Court was discussed fully by C K Comans, 'Retrospective Commonwealth Regulations' (1953) 27 *Australian Law Journal* 231. Comans (later First Parliamentary Counsel of the Commonwealth) concluded that the interpretation placed on the section by the High Court had done little more than impose drafting limitations on the form which retroactive regulations must take. He asserted that s 48(2) of the Acts Interpretation Act could only be infringed by a regulation which directly provided, or which had the effect, by a commencement provision or otherwise, of providing that, as at a past date, the law was to be deemed to have