JUDICIAL REVIEW OF DISCRETIONARY PROHIBITIONS – A NEW BASIS?

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INTRODUCTION

The effect of a recent decision of the High Court of Australia in *Foley* v *Padley*[1] is to severely curtail the extent of judicial review of the exercise of discretionary prohibitions. In the light of this decision, the question of the nature of a prohibition contained in subordinate legislation when coupled with a dispensing power becomes of more than academic interest.[2] In *Foley* v *Padley*, the effect of an empowering provision referable to the opinion of the subordinate legislator (a municipal council) was considered in relation to a broad unfettered discretion to dispense with a prohibition. Thus this decision brought directly into issue the role of the administrator/policy-maker as against the rights of an individual.

In brief, *Foley* v *Padley* decided that a dispensing power attached to a power to prohibit in a by-law was a valid condition of the power to prohibit, thus following the decision in *Country Roads Board* v *Neale Ads.*[3] As the decision of the High Court in *Swan Hill Corporation* v *Bradbury*[4] was the last occasion on which this issue had been fully considered by the High Court[5] one can only lament the passing of an opportunity to re-open the debate as to dispensing powers.

In this article the decision in *Foley* v *Padley* will first be discussed in relation to its background. The second section will deal with the approach taken to judicial review of the discretion contained in the empowering act in *Foley* v *Padley*. The third section will deal with the maxim against subdelegation and its application in the decided cases.

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[1] (1984) 58 ALJR 454, on appeal from the Supreme Court of South Australia: *Padley* v *Foley* (1983) 32 SASR 122.

[2] See for example: C C Aickman, "Subdelegation of the Legislative Power" (1960) 3 Victoria University of Wellington L Rev 69; K J Keith, "The Courts and the Administration: A Change in Judicial Method" (1977) 7 NZUL Rev 325; P E Killbride, "Deregulation, Prohibition and Subdelegation" (1965) 1 Otago L Rev 97; D Lanham, "Delegation, Legislation and Dispensation" (1984) 14 Melb U L Rev 634; J F Northey, "Subdelegated Legislation and Delegatus Non Potest Delegare" (1953) 6 *Res Judicata* 294; P H Thorp, "The Key to the Application of the Maxim 'Delegatus Non Potest Delegare' " (1972) 2 Auck U L Rev 85; J Willis, "Delegatus Non Potest Delegare" (1943) 21 Canadian Bar Rev 257.

[3] (1930) 43 CLR 126 – the "conditional prohibition" approach.

[4] (1937) 56 CLR 746 – the "unfettered discretion" approach.

[5] Other than in *Radio Corp* v *Commonwealth* (1938) 59 CLR 170 where the conditional prohibition approach was followed. However, *Radio Corp* is not a strong authority. Latham CJ delivered a written judgment for the majority (Latham CJ, Rich, Starke & McTiernan JJ), but his judgment in fact lends support to the view of Evatt J in the *Swan Hill* case, which view was repeated in the joint dissenting judgment of Dixon and Evatt JJ in the *Radio Corp* case. In any event, on the facts of the *Radio Corp* case, as a matter of construction no condition was specified as required by the empowering Act.

1 1984 REVISITED – THE DECISION IN *FOLEY* V *PADLEY*

This case, on the face, concerned the Rundle Street Mall in Adelaide, South Australia and the powers of the Adelaide City Council to regulate activity in the Mall pursuant to the Rundle Street Mall Act 1975 (SA). Section 11(1)(a) of the Act provides that the Council may make by-laws "regulating, controlling or prohibiting any activity in the Mall ... that is, in the opinion of the Council, likely to affect the use or enjoyment of the Mall". By-law No 8 s 1, made pursuant to that empowering section provides that "No person shall give out or distribute anything in the Mall or in any public place adjacent to any bystander or passer-by without the permission of the Council". Section 21 of the by-law provides that permission under the by-law "may be general or specific and may relate to a person or class of person".

Pausing here, it can be seen that the power to regulate (*viz* "any activity") is extremely wide, particularly as the opinion of the Council is the criterion by reference to which it may legislate. Similarly, the chosen activity is described in very general terms, namely to "distribute anything".[6] The power to dispense with the prohibition contained in s 21 of the by-law is also couched in very wide terms, and leaves the discretion to dispense entirely to the Council. Dispensations under s 21 may be "general or specific", and thus it is open to the Council to determine that some activities can be generally permitted as well as to make specific decisions.[7]

It is also apparent that a member of the public who intended to apply for a permit would have no means of knowing in advance whether his proposed activity was one prohibited by the by-law,[8] and further, by what criteria his application for a permit would be assessed. Having been refused a permit, he would have difficulty ascertaining the reasons for a decision or grounds upon which the decision could be challenged because of the nature of the "unfettered discretion". Further, because the power to legislate is referable to the Council's opinion, and the "purpose" of the legislation is not easily discernible,[9] it would seem that the scope of judicial review of similar discretionary prohibitions will be limited in the wake of *Foley* v *Padley*.

On another level, this decision focusses on the impact that such by-laws have on an individual. This case was a successful attempt to prosecute a member of the Hare Krishna sect[10] for carrying on activities in the Rundle Street Mall which were apparently considered to hinder the use and enjoyment

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[6] See the explanations given by Gibbs CJ (1984) 58 ALJR 454, 456.

[7] *Quaere* whether this power to make general dispensations amounts to the exercise of a legislative power – considered below.

[8] Unless on enquiry he were to be told that it was of a "general" type that was not permitted under s 21. But see below; should there be an obligation on the council to publish its "rulings" of this type?

[9] As Murphy J remarked in his dissenting judgment in *Foley* v *Padley*, the difficulty with the legislation under review was that the purposes were not to be distilled by the by-law itself. His Honour continued "It is necessary to go beyond the by-law to find the purposes and an aggrieved member of the public can only establish whether the principle [that all powers must be exercised *bona fide*] has been breached by challenging a Council decision in court": (1984) 58 ALJR 454, 459.

[10] *Ie* the International Society for Krishna Consciousness. It is to be noted that this fact is not referred to directly in any of the judgments in either Court. But see the summary of the evidence in the judgment of Matheson J in the Supreme Court: (1983) 32 SASR 122, 125.

of the Mall.[11] In two previous decisions of the South Australian Supreme Court, which also concerned members of the Hare Krishna sect, *Hollobone* v *Foley*[12] and *Rice* v *Daire*,[13] it was decided that the Council could not have held the opinion that the prescribed activity was likely to affect the use and enjoyment of the Mall in accordance with the provisions of s 11(1)(a) of the Rundle Street Mall Act. In *Hollobone* v *Foley* the relevant by-law provided that "no person shall without permission ask for or receive or indicate that he desires a donation of money or any other thing in the Mall".[14] It was held that, in these circumstances, the requisite opinion could not be implied, and that there was no evidence that the Council had formed the required opinion.[15] Similarly, in *Rice* v *Daire* Bollen J followed *Hollobone* v *Foley* and held, *inter alia*, that the by-law was invalid as there was no evidence that the Council had formed the requisite opinion. In that case, the relevant by-law[16] prohibited a person from singing, preaching, haranguing, or sounding or playing upon any musical instrument except with the permission of the Town Clerk. The defendant was charged with loitering under the Police Offences Act[17] and was challenged on the basis that he was in breach of the above by-law.[18] Although the issue was not raised directly in that case, there is a suggestion that Bollen J was concerned at the use of the criminal law to control someone who was "undoubtedly acting out of religious conviction".[19]

There is a well-known presumption in statutory interpretation against the interference with common law rights[20] such as freedom of assembly[21] and communication.[22] As a presumption, it is rebuttable by clear indication to the contrary. The application of the presumption will depend upon establishing first, that a common law right is involved, and secondly, balancing that right against the rights of the general public. In *Foley* v *Padley*

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[11] *Ibid.* Apparently the defendant distributed books to passers-by after half an hour of chanting and singing.

[12] (1980) 23 SASR 251 (Mitchell J).

[13] (1982) 30 SASR 560 (Bollen J).

[14] By-law No LXXVI s 2.02.

[15] Mitchell J seems to regard a statement evidencing the formation of the required opinion as being akin to a mandatory procedural requirement: (1980) 23 SASR 251, 255 citing in support *Jones* v *Robson* [1901] 1 QB 673 (whether a requirement to give notice upon being satisfied of a certain state of facts was a mandatory or directory requirement), *R* v *Martin* (1967) 67 SR NSW 404 (empowering legislation referred to two different states of mind and thus the necessary opinion had to be expressly stated), and *R* v *Comptroller General of Patents; ex parte Bayer Products* [1941] 2 KB 306 (implied because of nature of subject-matter, *viz* defence power). *Quaere* whether the decision would have been the same if there had been evidence by way of a resolution as to the formation of the opinion. *Cf Cooper* v *Bormann* (1979) 22 SASR 589.

[16] By-law IX s 3 para 32(a).

[17] Police Offences Act 1953-81 (SA) s 18.

[18] On being asked to cease loitering the defendant replied "I object. I'm just practising my religion": (1982) 30 SASR 560, 564.

[19] *Ibid* 566. His Honour thought that proceeding by way of the Police Offences Act lent itself to "a possible view that such proceeding is inappropriate", *ibid.* But note that in *Padley* v *Foley* (1983) 32 SASR 122 Bollen J agreed with the reasoning of Matheson J.

[20] See D C Pearce, *Statutory Interpretation in Australia* (2nd ed 1981) Ch 5.

[21] *Eg Melbourne Corp* v *Barry* (1922) 31 CLR 174.

[22] *Eg Bradley* v *Commonwealth* (1973) 128 CLR 557.

there was no reference to the defendant's religious beliefs,[23] although there was some argument that the freedom to communicate opinions was involved.[24] The Chief Justice represented the majority view in holding that the Council was reasonably "of the opinion" that the exercise of such freedom had to be curbed in the interests of the general public.[25]

The decisions in *Rice* v *Daire* and *Hollobone* v *Foley* can be explained on the basis that the court was unwilling to accept that the Council could reasonably hold an opinion to prohibit an activity which was clearly directed at a religious group.[26] However, in *Foley* v *Padley* the activity was of a general type (distributing "things"). The interpretation which the court gave to the expression "distribute anything ... to any bystanders"[27] was that it applied to generally handing out articles of a political or philosophical nature.[28] One can only query whether such objectives are consistent with the purposes of the Act.

The actual basis of the decision in *Foley* v *Padley* is twofold. The first part of the decision relates to the empowering provision, and the requirement that the Council form an opinion as a prerequisite to the exercise of the power to enact subordinate legislation. The second part of the decision relates to the nature of the dispensing power, and the view the court took in the light of previous authorities. It is proposed now to examine the reasons for the decision under each heading.

2 JUDICIAL REVIEW OF THE EXERCISE OF A POWER REFERABLE TO AN OPINION

The approach which the majority[29] took in this decision is that judicial review of the exercise of power depended upon whether the Council could "on any reasonable basis have reached that decision",[30] namely that the by-law was necessary to control activities in the Mall. The Chief Justice said that:

> it is sufficient to enquire whether the activity described in [the] by-law ... could reasonably have been regarded as likely to affect the use or enjoyment of the Mall.

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[23] Even if it had been established that he was "practising" his religion (*cf Rice* v *Daire* (1982) 30 SASR 560 and the comments of Bollen J), it probably would have been successfully argued that his "freedom" was overriden by the greater public "freedom" to move freely through the Mall. See E Campbell & H Whitmore, *Freedom in Australia* (1967) Ch 6.

[24] (1984) 58 ALJR 454, 456 *per* Gibbs CJ; *cf* 459 *per* Murphy J. Williams J agreed with the reasoning of Gibbs CJ, while Dawson J made no reference to this issue. *Cf* Matheson J in the Supreme Court (1983) 32 SASR 122, 129.

[25] (1984) 58 ALJR 454, 456; *cf* 459 *per* Murphy J, who saw this as a case where freedom of expression had been abused.

[26] And therefore possibly contrary to s 116 of the Constitution (Cth). These decisions point to the difficulty in attacking the exercise of powers which discriminate against a particular group. The issue would not have been relevant to the Prohibition of Discrimination Act 1966-75 (SA).

[27] (1984) 58 ALJR 454, 456 *per* Gibbs CJ.

[28] *Ibid*, 456 *per* Gibbs CJ, 465 *per* Dawson J. See also in the Supreme Court (1983) 32 SASR 122, 123-4 *per* King CJ, 130-1 *per* Matheson J. There is also a suggestion in the judgments that the by-law was directed against controlling the ensuing litter.

[29] Gibbs CJ, Wilson & Dawson JJ. See also the dissenting judgment of Brennan J (1984) 58 ALJR 454, 460. See also in the Supreme Court *per* King CJ and *cf* the more extreme view expressed by Matheson J (1983) 32 SASR 122, 128.

[30] (1984) 58 ALJR 454, 455 *per* Gibbs CJ.

> If that question is answered in the affirmative – there is no ground on which it could be concluded ... that the Council has misconstrued the [Act] ... or has taken into consideration matters which it was improper for it to consider.[31]

Thus what is meant by "reasonable" seems to depend, on this view, upon there being no grounds for attacking the decision on the basis of improper purposes or any other ground which would come under the general heading of "abuse of discretion".[32] Yet, the rationale the majority accepted for the by-law is arguably outside the scope of the Act. As mentioned above, it was seen as a by-law to control the distribution of philosophical and political propaganda and the ensuing litter.

Further, this approach seems to be a somewhat circular way of approaching the question of the validity of the exercise of a by-law-making power. It suggests that the question of validity is dependent upon reasonableness, and that once the reasonableness of an exercise of power has been established, no other ground of judicial review remains. Such a view therefore gives "reasonableness" the status of a separate and independent ground of judicial review, a view which is the subject of considerable debate.[33]

However, the most controversial aspect of the court's approach to judicial review arises from the emphasis and interpretation the court gave to the words "in the opinion of" employed in the empowering Act. In the court's view these words implied a lesser standard of review, and increased the court's reluctance to interfere with the exercise of a discretion.

The majority based this view on the interpretation given in the New Zealand decision of *Edwards* v *Onehunga High School Board*[34] of the dissenting judgments in *McEldowney* v *Forde*.[35] In *McEldowney* v *Forde*,[36] Lord Diplock distinguished subordinate legislation described by reference to the effect to be achieved, as indicated by the use of such words as "necessary or desirable", from that described by reference to a belief in an effect to be achieved, as indicated by the use of such words as "in the opinion of". In *Edward's* case it was suggested that, whereas the former words implied an objective test, the latter indicated a subjective test "which would lessen considerably the control which the Courts could exercise over this subordinate power".[37] This view was received with approval by the Chief Justice in *Foley* v *Padley* when His Honour said that "it is the existence of the opinion, and not its correctness, which satisfies the condition".[38]

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[31] *Ibid.*

[32] G D S Taylor, "Judicial Review of Improper Purposes and Irrelevant Considerations" [1976] Cambridge LJ 272.

[33] See A Wharam, "Judicial Control of Delegated Legislation – The Test of Reasonableness" (1973) 36 Mod L Rev 611; D F Patterson, "Aspects of Unreasonableness in New Zealand Administrative Law" (1968-69) 3 NZULR 52; J L Caldwell, "Statutory Powers – the Duty to Act Reasonably" (1980) NZLJ 87. *Cf* E I Sykes, D J Lanham & R R S Tracey, General Principles of Administrative Law (1979) Ch 11. The court in *Foley* v *Padley* appears to have applied a "narrow test" of unreasonableness and to that extent it is consistent with other High Court decisions, although there is a conflict in the authorities. See Sykes *et al* for a discussion of the authorities.

[34] [1974] NZLR 238.

[35] [1971] AC 632 (HL), Lords Pearce and Diplock.

[36] [1971] AC 632, 660.

[37] [(1974)] NZLR 238, 243.

[38] [(1984)] 58 ALJR 454, 455; *cf* 465 *per* Dawson J.

It is suggested, however, that Lord Diplock's distinction on which *Edward's* case was based was not intended to lay down an inflexible approach to judicial review. It is a commonplace observation to note that, where a power is dependent upon the formation of a certain opinion, that opinion goes to the very purpose of the legislation, and to a certain extent it can be said to obviate the necessity for establishing an objective purpose for the legislation. By dint of the same reasoning, it can also make review for improper purposes difficult where there is no evidence of alleged wrong reasons.[39] It is submitted that Lord Diplock's *obiter* comments are consistent with these observations. Moreover, it will be noted that in numerous decisions where the empowering provision has been qualified by a subjective opinion, the court was not deterred from objectively examining the exercise of the discretion.[40] Many of these decisions can be seen as examples of "judicial activism".[41]

In *Edward's* case only one other authority was cited,[42] and no reference was made to *Reade* v *Smith*,[43] a decision in the same jurisdiction concerned with similar subject-matter.[44] Moreover, in *Edward's* case the empowering words were in any event objectively phrased ("make such by-laws as are necessary to . . ."), and the statements about subjectively phrased empowering words are *obiter*.

The approach to judicial review of discretions expressed in *Edward's* case is also to be avoided because of the reliance in that case on the so-called "presumption of regularity".[45] In New Zealand the presumption of regularity approach has been applied in cases subsequent to *Edward's* case.[46]

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[39] *Foley* v *Padley*, *ibid*, 459 *per* Murphy J.

[40] *Eg Sinclair* v *Mining Warden of Maryborough* (1975) 132 CLR 473; *Padfield* v *Ministry of Agriculture, Fisheries and Food* [1968] AC 997; *Roberts* v *Hopwood* [1925] AC 578; *Prescott* v *Birmingham Corp* [1955] Ch 210; *Hall* v *Shoreham-by-Sea UDC* [1964] 1 WLR 240; *Parramatta City Council* v *Pestell* (1972) 128 CLR 305. See also *R* v *Corp of the Town of Glenelg; ex parte Pier House* (1968) SASR 246; D C Pearce, *Delegated Legislation in Australia and New Zealand* (1977) Ch 22; H Whitmore & M Aronson, *Review of Administrative Action* (1978) 198-204.

[41] See H W R Wade, *Administrative Law* (5th ed 1982) 394-99.

[42] *Ie Nakkuda Ali* v *Jarayatne* [1951] AC 66 – a decision concerned with whether an official had "reasonable grounds" to act, and going to the issue of the reasonableness or sufficiency of evidence. *Cf Khawaja* v *Secretary of State for the Home Department* [1983] 2 WLR 321; *Coleen Properties* v *Minister of Housing & Local Government* [1971] 1 WLR 433; *Secretary of State for Education & Science* v *Tameside Metropolitan Borough Council* [1977] AC 1014; cases which support "no evidence" as a ground of judicial review. See also R R S Tracey, "Absence or Insufficiency of Evidence and Jurisdictional Error" (1976) 50 ALJ 568; R L Towner, " 'No Evidence' and Excess of Jurisdiction in Administrative Law" (1978) NZLJ 48. *Quaere* whether "no evidence" is a separate ground of review.

[43] [1974] NZLR 238.

[44] Both cases concerned regulations made under the Education Act 1964 (NZ). In *Edward's* case the court upheld a regulation governing the length of school boys' hair. In *Reade* v *Smith* the court held invalid a regulation empowering the transfer of students to other schools. In that case such regulations could be made as "in the opinion of the Governor-General" were necessary. Contrary to the theory propounded in *Edward's* case the court was not deterred by the use of subjective language (nor, it seems, by the status of the power holder. *Cf* Whitmore & Aronson, *supra* n 40, 200-2, especially 200 n 375).

[45] [1974] NZLR 238, 244; "We start then with the presumption that the board acted within its powers."

[46] *Eg NZ Shop Employees Industrial Assn of Workers* v *A-G* [1976] 1 NZLR 521; *CREED NZ* v *Governor-General* [1981] 1 NZLR 172; *Brader* v *Ministry of Transport* [1981] 1 NZLR 73. *Cf Shire of Flinders* v *TW Maw & Sons* [1971] VR 484 and the approach of Dixon J in *Stenhouse* v *Coleman* (1944) 69 CLR 457, 469-70. See J L Caldwell, "Delegated Legislation and the Court of Appeal" [1983] NZLJ 344.

In *Edward's* case, the court relied heavily upon the fact that the appellant did not put evidence of the matter to the court. On the other hand, it accepted as "evidentiary fact" that the school board thought it necessary to prescribe hair length.[47] This approach means that the onus of proof[48] will lie on the person who seeks to establish the invalidity of the subordinate legislation – in a situation where the basis for the exercise of the discretion is exclusively within the purview of the authority – which, it is submitted, imposes an unreasonable burden on a member of the public.

It is also suggested that the approach to judicial review taken in *Foley* v *Padley* is inconsistent with that taken in previous Australian decisions.[49] Strong reliance was placed[50] in *Foley* v *Padley* upon a much quoted statement of Latham CJ in *R* v *Connell; ex parte Hetton Bellbird Collieries* that:

> ... where the existence of a particular opinion is made a condition of the exercise of power, legislation conferring the power is treated as referring to an opinion which is such that it can be formed by a reasonable man who correctly understands the meaning of the law under which he acts. If it is shown that the opinion actually formed is not an opinion of this character, then the necessary opinion does not exist.[51]

This "construction-characterisation" requires that, where the exercise of power is referable to an *ex facie* subjective opinion, a court must objectively assess subordinate legislation to determine whether it falls within the scope of the empowering legislation.

The approach in *R* v *Connell* is consistent with that taken in the contemporaneous decisions of *Stenhouse* v *Coleman*[52] and *Reid* v *Sinderberry*.[53] All were decisions involving war-time legislation, and in each instance the power to legislate depended upon the authority being of a certain opinion.[54] In both *Reid* v *Sinderberry* and *Stenhouse* v *Coleman* the subordinate legislation was upheld on what may be called a "characterisation-construction" approach; namely, in each case the subordinate legislation could

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[47] [1974] NZLR 238, 244.

[48] In the sense of a "provisional burden of proof"; *ie* "a burden raised by the state of the evidence – from which the court may draw an inference one way or another but is not bound to do so": *Huyton-with-Roby UDC* v *Hunter* [1955] 2 AII ER 398, 400-1 *per* Denning LJ.

[49] *Eg Television Corp* v *Commonwealth* (1963) 109 CLR 59; *Sutherland Shire Council* v *Finch* (1970) 123 CLR 657; *Sinclair* v *Mining Warden of Maryborough* (1975) 132 CLR 473. *Cf R* v *Australian Stevedoring Industry Board; ex parte Melbourne Stevedoring Company* (1953) 88 CLR 100.

[50] *Eg Padley* v *Foley* (1983) 32 SASR 122, 124 *per* King CJ; *Foley* v *Padley* (1984) 58 ALJR 454, 455 *per* Gibbs CJ, 462 *per* Brennan J, 465 *per* Dawson J.

[51] (1944) 69 CLR 407, 430.

[52] (1944) 69 CLR 457.

[53] (1944) 68 CLR 504.

[54] *R* v *Connell* (1944) 69 CLR 407; "if ... satisfied" that certain rates of remuneration are "anomalous"; *Stenhouse* v *Coleman* (1944) 69 CLR 457; "so far as it appears to him to be necessary"; *Reid* v *Sinderberry* (1944) 68 CLR 504; "as appear to him to be necessary or expedient for securing ... defence" (cited in *Foley* v *Padley* (1984) 58 ALJR 454, 463 *per* Brennan J, 465 *per* Dawson J). *Cf* Hackett v *Lander* [1917] NZLR 947; *R* v *Comptroller General of Patents; ex parte Bayer Products* [1941] 2 LB 306, both of which can be explained on the same basis despite statements suggesting that the exercise of the discretion was unreviewable.

be characterised as a law with respect to defence within the terms of the empowering legislation. The subordinate legislation in *R* v *Connell* was not upheld, and it is submitted that the difference in result lies in the nature of the discretion to be exercised, rather than in the approach. Whereas the legislation in *Reid* v *Sinderberry* and *Stenhouse* v *Coleman* involved a matter of judgment, in *R* v *Connell* the court was dealing with the application of objectively defined criteria, and it was thus open to the court to review the exercise of the discretion objectively.

It seems that when the power to legislate is dependent upon the opinion of an authority, the approach to judicial review is, in effect, analogous to the application of "jurisdictional fact" doctrine,[55] and the same policy questions as to which body should have jurisdiction over the "jurisdictional fact" arise.[56] In this sense, it can be seen that the majority of the High Court in *Foley* v *Padley* has taken the view that, where such condition precedent is dependent upon the opinion of an authority, the intention of the legislature is clearly that the authority should decide the "jurisdictional fact" or "threshold issue".

It is interesting to note that Brennan J, in a clear dissenting judgment, seems to be moving towards the view that *Foley* v *Padley* involved a "jurisdictional fact" issue. Brennan J began his judgment from the logically indefensible position that, as the opinion of the Council is the criterion by reference to which activities may be made the subject of a by-law, such opinion must precede the making of the by-law.[57] The question, His Honour said, is "whether the repository of the power could have formed the opinion reasonably".[58] It is clear that Brennan J was troubled by the width of the power, and that this was a factor which led him to the conclusion that the opinion was not formed reasonably. His Honour said that:

> where, as in the present case, the ambit of the power ... and the activities ... are at large, an opinion which carries otherwise innocent activities within the scope of the power excites careful if not jealous scrutiny by the court.[59]

Applying this test of reasonableness His Honour concluded that, because of the existence of a dispensing power, it seemed that the Council had resolved to prohibit *all*[60] acts of distribution or giving out, whether or not they were

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[55] *Cf Sykes et al, supra* n 33, 52 para 411 where *R* v *Connell* (1944) 69 CLR 407, *Stenhouse* v *Coleman* (1944) 69 CLR 457 and *Reid* v *Sinderberry* (1944) 68 CLR 504 are discussed in this context.

[56] *Cf* Whitmore & Aronson, *supra* n 40, 144-9. See the various articles by D M Gordon, from "The Relational Facts to Jurisdiction" (1929) 45 LQR 459, to "What did the *Anisminic Case Decide?" (1971) 34 Mod L Rev 1. See also P W Hogg, "The Jurisdictional Fact Doctrine in the Supreme Court of Canada: Bell* v *Ontario Human Rights Commission*" (1971) 9 Osgoode Hall LJ 203; D Mullan, "The Jurisdictional Fact Doctrine in the Supreme Court of Canada – A Mitigating Plea" (1972) 10 Osgoode Hall LJ 440.

[57] (1984) 58 ALJR 454, 460.

[58] *Ibid* 462-3. Note that His Honour also relies on the statement of Latham CJ in *R* v *Connell* (1944) 69 CLR 407. The only other authority referred to by way of contrast is *Reid* v *Sinderberry* (1944) 68 CLR 504.

[59] *Ibid* 463. His Honour is here referring to improper purposes.

[60] Emphasis supplied.

likely to affect the use and enjoyment of the Mall. "Such a construction", His Honour said,[61] "would bring initially within the prohibition those activities in respect of which the Council had not formed the opinion".[62]

Thus it can be seen that the High Court in *Foley* v *Padley* has done little to clarify the approach to judicial review of powers referable to an opinion. On the one hand the court said that it is a question of reasonableness, and that if it is a reasonable opinion, there can be no grounds for impugning the exercise of power on the grounds of improper purpose *etc.* On the other hand, it has said that the fact that the exercise of power is referable to an opinion implies a lesser standard of review, as the test of "reasonableness" is subjective. The High Court may have impliedly treated the existence of the opinion as being a "threshold" or "jurisdictional" issue, in which case it is arguably a matter of objective assessment.[63] With respect, it seems that the approach of Brennan J on this question is to be preferred.

3 *FOLEY* V *PADLEY*; PROHIBITIONS COUPLED WITH DISPENSING POWERS, AND INVALID DELEGATIONS

The second part of the decision in *Foley* v *Padley* relates to the view the court took of the argument that there had been an unauthorized delegation of a delegated legislative power. This argument arose on the facts because of two factors. The first basis on which it could be argued that there had been an unauthorized subdelegation arises from the width of the discretion itself. It can be argued that, in the absence of criteria specifying how the discretion to dispense be exercised, the exercise of the discretion itself amounts to an exercise of a legislative power,[64] or at least amounts to the handing over of the power to an unauthorized body. The second basis on which the subdelegation argument could proceed arises from the procedural aspect of the by-law-making power. Under the provisions of the Local Government Act all by-laws are to be passed by a special meeting of the council at which two-thirds of the members are present,[65] whereas the dispensing power could be exercised by the council sitting in ordinary meeting.[66] Thus, the argument runs, the council had delegated its law-making powers to an improperly constituted body.

The only judge who accepted the subdelegation argument in this decision

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[61] *Ibid. Cf* the remarks of Callan J in *F E Jackson & Co* v *Collector of Customs* [1939] NZLR 682, 703-4.

[62] It is important to note that His Honour here clearly envisages the dispensing power as a separate act or exercise of power.

[63] See Hogg, *supra* n 56, 209.

[64] See *Melbourne Corp* v *Barry* (1922) 31 CLR 174, 209 *per* Higgins J. *Cf Swan Hill Corp* v *Bradbury* (1937) 56 CLR 746, 741 *per* Dixon J, 763 *per* Evatt J, suggesting that the discretion was so wide "that no general law or code or rule remains"; see also 765, 769. Note that pursuant to s 21 of the by-law the power to dispense could be "general" or "specific".

[65] Local Government Act 1934 (SA) s 668(1).

[66] At which only one half of the members need be present.

was Murphy J, one of the two dissenting judges.[67] With respect to the dispensing power, His Honour said: "The by-law thus delegates power to the Council to negative completely the prohibition. In substance the regulation, control or prohibition is not by by-law but by grant or denial of Council permission."[68]

As to the second basis of the argument, His Honour saw this as an avoidance of the procedural safeguards laid down by the Local Government Act,[69] and seems to regard it as an attempt to subdelegate the legislative power to the Council sitting in ordinary meeting. His Honour said: "Thus, an ordinary resolution of the Council could determine the issue . . .".[70]

The majority in *Foley* v *Padley*[71] adopted what is known as the "conditional prohibition" approach,[72] which depends on characterising the dispensing power as a condition of the power to prohibit. In the words of Brennan J:

> The power conferred by s 11(1)(a) authorises the making of a by-law which prohibits an activity conditionally, and there is no reason why the Council should not make the condition dependent upon its own discretion exercised by resolution from time to time.[73]

The status of the so-called rule against implied delegations of important functions, often expressed by reference to the maxim *delegatus non potest delegare*, is unclear. It is said by some to amount to a principle of law,[74] by others to be simply a rebuttable presumption in statutory construction.[75]

The basis for applying the maxim is also unclear. Is it a rule of construction,[76] or is it simply an indication of *ultra vires*,[77] or of what is "not normally allowable"?[78]

It is proposed now to briefly examine the historical basis of the maxim in its application to legislative powers.

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[67] As noted above, Supra n2, Brennan J considered that the dispensing power was a separate act which disqualified the Council from prohibiting all distribution of "things". But as will be seen below, His Honour joined with the other justices in holding that the dispensing power was a condition of the prohibition.

[68] (1984) 58 ALJR 454, 458. At 459 His Honour further says that "the width of the discretion . . . and the absence of any guidelines mean that the control and regulation is not by a law but by Council's discretion".

[69] *Ibid.* These requirements are: (i) to be signed by the Mayor [s 668(2)]; (ii) to be submitted to the Crown-Solicitor for an opinion [s 669(1)]; (iii) to be certified by the Crown-Solicitor and forwarded to the Governor for confirmation [s 669(2)]; and (iv) to be published in the Gazette and laid before both houses of Parliament [s 670(1)].

[70] *Ibid. Cf Melbourne Corp* v *Barry* (1922) 31 CLR 174, 208 *per* Higgins J.

[71] Including the other dissenting judge, Brennan J. The judges in the Supreme Court did not decide on this issue: *Padley* v *Foley* (1983) 32 SASR 122.

[72] Following *Country Roads Board* v *Neale Ads* (1930) 43 CLR 127.

[73] (1984) 58 ALJR 454, 462.

[74] *Eg* S A de Smith, *Judicial Review of Administrative Action* (4th ed 1980) 298.

[75] Willis, *supra* n 2; Wade, *supra* n 41, 320; Thorp, *supra* n 2; Northey, *supra* n 2; de Smith, *supra* n 74. See also the remarks of Wilson J in *Dainford* v *Smith* (1985) 59 ALJR 438, 444.

[76] *Ibid.*

[77] Keith *supra* n 2; Whitmore & Aronson, *supra* n 40, 194. *Cf R* v *Lampe; ex parte Maddalozzo* (1963) 5 FLR 160.

[78] Wade, *supra* n 41, 320.

A *The historical and theoretical basis of the maxim against subdelegation and its application to legislative powers*

The maxim against subdelegation of powers is expressed in the form *delegatus non potest delegare*[79] or *delegata potestas non potest delegari.*[80] From each form can be seen the origins of the maxim. The first notion, as implied by the former expression, is that it is an aspect of constitutional government. Historically it was applied to prevent delegation of the delegated jurisdiction of judges.[81] On this basis it can be seen to have arisen from early constitutional principles based on a primitive separation of powers doctrine, arising from the concept of Kingship.[82]

The second notion, implicit in the latter expression, is that the maxim is an aspect of the law of agency.[83] Indeed, early works on the common law of England do not deal with it as a separate maxim, but as an aspect of the maxim of agency law *qui per alium facit per seipsum facere videtur.*[84] In the United States both notions have been synthesised, and it is argued that the maxim is a "cross fertilisation of agency and constitutional law", based on notions of "confidence" and "trust".[85] According to one writer,[86] it is the "trust" concept which ties the agency maxim to American constitutional principles. He concludes that the maxim is, in essence, a "political trust concept".

Ehmke's conclusion is borne out by other American commentators.[87] Drawing on the philosophy of Locke[88] and Montesquieu,[89] the maxim as applied to the delegation of legislative powers has come to be equivalent to an American constitutional doctrine based on concepts of representative democracies,[90] political accountability[91] and the separation of powers doctrine.[92] However, current thinking suggests that American judicial

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[79] Literally, "a delegate cannot delegate".

[80] Literally, "delegated power cannot be delegated". See *eg Judicial and Statutory Definitions of Words and Phrases* (1914) I. *Cf* R H Kersley, *A Selection of Legal Maxims* (10th ed 1939) 558-72, where both expressions are used in different contexts.

[81] Kersley, *supra* n 80, 571; P W Duff & H E Whiteside, "Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law" (1928-29) 14 Cornell LQ 168.

[82] See H P Ehmke, " 'Delegata Potestas Non Potest Delegare', A Maxim of American Constitutional Law" (1961) 47 Cornell LQ 50, where Duff & Whiteside are taken to task for ignoring the agency aspect of the doctine's origin. *Cf* P H Aranson, E Gellhorn & G Robinson, "A Theory of Legislative Delegation" (1982) 68 Cornell L Rev 1.

[83] *Cf* Ehmke, *ibid.*

[84] "He who does an act through another is deemed in law to do it himself." Kersley, *supra* n 80; Sir Henry Finch, *A Summary of the Common Law of England, 1655* (1979); W Phillips, *The Principles of Law Reduced to Practice, 1660* (1979); W Noy, *The Principle Grounds and Maxims, with an Analysis of the Laws of England, 1845* (1980) 509-51; *Halsbury's Laws of England* I, para 396.

[85] Ehmke, *supra* n 82, 51-2.

[86] *Ibid.*

[87] *Eg* Aranson *et al, supra* n 82; Duff & Whiteside, *supra* n 81; M E Fine, "Rethinking the Non-delegation Doctrine" (1982) 62 Boston UL Rev 257.

[88] *Eg* Fine, *ibid* 262; Aranson *et al, ibid* 4; Duff & Whiteside, *ibid* 176 n 33.

[89] Aranson *et al, ibid.*

[90] Duff & Whiteside, *supra* n 81, 174.

[91] Fine, *supra* n 87, 263-4; Aranson *et al, supra* n 82, 5.

[92] Duff & Whiteside, *supra* n 81, 174; Aranson *et al, supra* n 82, 2.

attitude to review of legislative delegations rejects constitutional review in favour of a broad ultra vires review.[93] This has led to a call to return to the constitutional basis of the maxim in terms of accountability to the elected legislature,[94] and providing standards in the form of basic government policy.[95]

When the constitutionality of a delegation of Parliament's legislative power has been considered in Australia, the philosophical basis of the maxim has been eschewed,[96] the separation of powers doctrine has been applied less strictly,[97] and the question has been treated as basically one of construing the empowering statute.[98] The question has been dealt with on a basis that equates the conferring of power with the conferring of plenary powers in the light of older cases concerned with colonial legislative enactments.[99]

Despite the eschewing of philosophical notions in Australia at the level of delegation of legislative power by Parliament, it can be argued that the concepts of confidence and trust, accountability and responsibility, apply when the maxim is considered in relation to subordinate legislation.

What remains, then, of the historical basis of the maxim? As discussed above, the maxim was considered by early commentators to be an aspect of the maxim *qui per alium facit per seipsum facere videtur*[100] – literally, delegated authority cannot be re-delegated,[101] or one agent cannot lawfully appoint another to perform the duties of his agency.[102] It is said that this rule applies wherever the authority involves a trust or discretion in the agent for the exercise of which he is selected, but does not apply where it involves no matter of discretion.[103] Thus it can be seen that the concepts of confidence, trust and discretion are central to this aspect of the historical basis of the maxim.

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[93] Fine, *supra* n 87, 307. He traces the history of judicial review of legislative delegations and perceives that the maxim as applied to judicial review has acquired a second aspect, *viz* "ultra vires review" based on (a) interpretation of the enabling statute to determine the scope of the delegation and whether the agent remains within that scope, and (b) inferring the requirement of reasonableness from the terms of the delegation to ensure that administrative action is not exercised arbitrarily: *ibid* 321-3. *Cf* Aranson *et al*, *supra* n 82, 63-4. For an earlier history of judicial review see Duff & Whiteside, *supra* n 81, 173-196.

[94] Fine, *supra* n 87, 321.

[95] *Ibid* 257, 260, 321-3. *Cf* Aranson *et al*, *supra* n 82, 63-4.

[96] *Victorian Stevedoring* v *Dignan* (1931) 46 CLR 73, 94-5 *per* Dixon J, *Cf* 114 *per* Evatt J. Appeal is made to the historical basis of responsible government as the justification for such delegation. See also *R* v *Lampe; ex parte Maddalozzo* (1963) 5 FLR 160.

[97] Pearce, *supra* n 40, 223-5, paras 503-6; *Cf Victorian Stevedoring* v *Dignan* (1931) 46 CLR 73, 114 & 118 *per* Evatt J.

[98] *Victorian Stevedoring* v *Dignan* (1931) 46 CLR 73, 101-2 *per* Dixon J. *Cf R* v *Lampe; ex parte Maddalozzo* (1963) 5 FLR 160.

[99] *Victorian Stevedoring* v *Dignan* (1931) 46 CLR 73, 95 *per* Dixon J, 119 *per* Evatt J. *Eg R* v *Burah* (1878) 3 App Cas 889; *Powell* v *Appollo Candle Co* (1885) 10 App Cas 282; *Hodge* v *R* (1883) 9 App Cas 117; *Cobb & Co* v *Kropp* [1967] 1 AC 141; *Chenaid & Co* v *Joachim Arissol* [1949] AC 172; *R* v *Lampe; ex parte Maddalozzo* (1963) 5 FLR 160. *Cf Nelson* v *Braisby (No 2)* [1934] NZLR 559. See also Northey, *supra* n 2.

[100] Kersley, *supra* n 80.

[101] *Delegata potestas non potest delegari.*

[102] As expressed in the alternative rule *vicarius non habet vicarium*: See Kersley, *supra* n 80, 570.

[103] Kersley, *supra* n 80.

In Australia, the only real difference between delegation and agency which appears from the decided cases is that a delegate, unlike an agent, acts in his own name and exercises his own power.[104] In relation to both agency and delegation, the better view seems to be that there is no transfer of power in the sense of a denudation of the delegator's or principal's power.[105] It seems that in this context a more useful distinction can be made between delegations and authorisations.[106]

However, such authorisations as the cases recognize constitute an extension of the *Carltona* principle,[107] and are limited to situations of real administrative need, which probably would not include local authorities[108] administering subordinate legislation.

In summary, it is suggested that greater regard should be had to the historical basis of the maxim in terms of its "constitutional" aspect; namely, that in assessing the validity of a purported delegation, apart from considering the matters of confidence and trust, emphasis should also be given to the degrees of accountability and responsibility involved.

B *The basis of the application of the maxim to subdelegated legislation*

It is well settled that the maxim applies to subdelegated legislation.[109] Willis' article, written in 1943,[110] is accepted as the classic authority as to the basis of the application of the maxim to subdelegated legislation. In his view the maxim is no more than a rule of construction which depends on the interpretation of the statute conferring the discretion.[111] He suggests that a discretion conferred by statute is *prima facie* intended to be exercised by the authority on which it is conferred, but that such intention may be negatived by any contrary indications found in the language, scope or object

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[104] See *O'Reilly* v *Commissioner of State Bank* (1982) 44 ALR 27; *Re Reference under s 11 Ombudsman Act 1976* (1979) 2 ALD 86. *Cf Huth* v *Clarke* (1890) 25 QBD 391, 395 where Willis J said that "the word 'delegate' means little more than an agent". See Public and Administrative Law Reform Committee [NZ], *Powers of Delegation* (1984) 5-8. *Contra* de Smith, *supra* n 74, 301-2.

[105] Public and Administrative Law Reform Committee [NZ], *ibid* 7-8; *Huth* v *Clarke* (1980) 25 QBD 391. *Contra Blackpool Corp* v *Locker* [1948] 11 All ER 85; de Smith, *supra* n 74, 302.

[106] See *O'Reilly* v *Commissioner of State Bank* (1982) 44 ALR 27; *Re Reference under s 11 Ombudsman Act 1976* (1979) 2 ALD 86; *Esmonds Motors* v *Commonwealth* (1969) 120 CLR 463; *London County Council* v *Agricultural Food Products* [1955] 2 All ER 229.

[107] *Carltona* v *Commissioners of Works* [1943] 2 All ER 560; *Re Reference under s11 Ombudsman Act 1976* (1979) 2 ALD 86, 93 *per* Brennan J. *Eg Ex parte Forster* (1963) 63 SR (NSW) 723 (Universities); *R* v *Skinner* [1968] 3 All ER 124 (Secretary of State's approval under Road Safety Act 1967 (UK)); *O'Reilly* v *Commissioner of State Bank* (1982) 44 ALR 27 (Permanent and deputy heads of department). *Cf Hinton Demolitions* v *Lower* [1968] SASR 370.

[108] D Lanham, "Delegation and the Alter Ego Principle" (1984) 100 LQR 587, 608.

[109] R Fox & O M L Davies, "Subdelegated Legislation" (1955) 28 ALJ 486.

[110] Willis, *supra* n 2.

[111] *Cf* Pearce, *supra* n 40, 226-7 para 509 (pointing out that the cases also give specific guidance); Northey, *supra* n 2, 303; Thorp, *supra* n 2, 86; de Smith, *supra* n 74, 301; Whitmore & Aranson, *supra* n 40; Wade, *supra* n 41, 320; *R* v *Lampe; ex parte Maddalozzo* (1963) 5 FLR 160, 171.

of the statute.[112] This question, he said,[113] is answered in practice "by comparing the *prima facie* rule with the known practices or apprehended needs of the authority in doing its work".

It should be noted that Willis' article was written following the decision in *Reference re Regulations (Chemicals) under War Measure Act*.[114] In that decision the issue was treated as a matter of construction,[115] but the presumption against subdelegation was rebutted because of the particular circumstances surrounding the enactment.[116] It was stressed in that decision that the War Measures Act was an enactment of the highest political nature and, furthermore, that Parliament retained ultimate control of the sub-delegated legislation.[117]

However, in subsequent Canadian cases[118] subdelegations on other matters have been held invalid because of the width of the discretions delegated and the lack of directions or standards by which the discretions were to be controlled.[119]

It is submitted that it is simplistic to approach the question of the validity of a delegation as a question of construction without paying heed to the basis of the maxim against delegation. The construction approach treats the maxim as no more than a rebuttable presumption, whereas the discussion above has shown a firm historical and theoretical basis derived from constitutional and agency principles.

It is further submitted that the construction approach narrows the focus of review by over emphasizing the actual words used in the legislative provisions under review. The High Court decision in *Foley* v *Padley* is one such example. It is submitted that the discussion of the previous authorities in that decision, *Melbourne Corporation* v *Barry*[120] and *Swan Hill Corporation* v *Bradbury*,[121] supports this conclusion.[122] It is suggested that,

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[112] Willis, *supra* n 2, 259. He suggests that words such as "personally" would indicate a conferring of authority on that person alone. Express authorisation is, of course, a counter indication.

[113] *Ibid* 261. *Cf* Fox & Davies, *supra* n 109, 490; "The best basis for finding a power to subdelegate ... is the sheer impossibility from a practical point of view of one person legislating over such a wide sphere."

[114] [1943] 1 DLR 248. See R F Reid & H David, *Administrative Law and Practice* (2nd ed 1978) 289-92.

[115] [1943] 1 DLR 248, 276 *per* Hudson J.

[116] *Viz* the 1939-45 war. See Whitmore & Aronson, *supra* n 40, 197; de Smith, *supra* n 74, 300; Northey, *supra* n 2, 298; Willis, *supra* n 2, 262.

[117] *Cf* Northey, *supra* n 2, who sees it as an example of a plenary discretion. *Cf Hawkes Bay Raw Milk Producers' Co-op* v *NZ Milk Board* [1961] NZLR 218, 223 *per* Cleary J, who saw it as a case where the delegation was implicitly authorised.

[118] *Eg Ex parte Brent* (1955) 3 DLR 587 (noted in (1956) 29 ALJ 504) (immigration); *Victoria Restaurant* v *Montreal* [1959] SCR 58 (licensing of restaurants). But *cf Lamoureux* v *City of Beaconsfield* [1978] 1 SCR 134, where a "condition precedent" approach was taken.

[119] See Reid & David, *supra* n 114, 289, 291.

[120] (1922) 31 CLR 174.

[121] (1937) 56 CLR 746.

[122] (1984) 58 ALJR 454, 457-8 *per* Gibbs CJ, 460-2 *per* Brennan J, 466-8 *per* Dawson J. Basically, the previous decisions were distinguished on the basis of the difference in the wording, and important statements were dismissed as obiter.

in the light of the result in *Foley* v *Padley*, the trend in judicial review should be to a broader ultra vires review.[123]

When one turns to the decided cases and to the writers on this topic, it can be seen that basic principles are overlooked in favour of an emphasis on principles of construction. From a study of the writers and decisions, the following approaches can be extracted.

(a) *A subdelegation of legislative power will not be upheld where the delegated power involves a special confidence.*[124]

No decisions on prohibitions coupled with dispensing powers appear to have been decided according to this principle, which is entirely consistent with the basis of the maxim against subdelegation. The corollary is that some powers are too important to be delegated.[125]

(b) *A subdelegation will be upheld where the degree of control is tight.*

In practice delegations and subdelegations of legislative power have been upheld where the degree of control exercised over the delegate is tight.[126] In such instances it can be argued, consistently with the characteristics of a delegation discussed *supra*, that there is no real delegation. Thus, whether or not there has been a valid delegation will depend upon the amount of discretion handed over to the delegate. So that where the whole power[127] is handed over, as distinct from only a small part[128] of the discretion, the delegation will be invalid.

A comparison of *Hookings'* case[129] and *Jackson's* case[130] illustrates the application of this principle. In *Hookings*, the Governor-General was empowered to make regulations for civil aviation. A regulation made pursuant to this power provided that no person should use an aircraft for certain purposes without the prior permission of the Director of Civil Aviation.[131]

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[123] *Cf* Fine, *supra* n 87; Keith, *supra* n 2, 332.

[124] Keith, *supra* n 2, 333 (citing *Vine* v *National Dock Labour Board* [1957] AC 488; Aikman, *supra* n 2 (not citing any authority). *Cf Radio Corp* v *Commonwealth* (1938) 59 CLR 170; *Schofield* v *City of Moorabbin* [1967] VR22; Wade, *supra* n 41, 319-20, who says the maxim should be applied to "inalienable discretions".

[125] *Cf* Wade, *supra* n 41. Some of the examples given by Keith, *supra* n 2, 334 are powers to initiate prosecutions and ministerial powers of deportation.

[126] de Smith, *supra* n 74, 301, 304; Thorp, *supra* n 2, 88. *Eg Reference re Regulations (Chemicals) under War Measure Act* [1943] 1 DLR 248; *Schofield* v *City of Moorabbin* [1967] VR 22; *Radio Corp* v *Commonwealth* (1938) 59 CLR 170 *per* Latham CJ; *Victorian Stevedoring* v *Dignan* (1931) 46 CLR 73 *per* Evatt J; *Esmonds Motors* v *Commonwealth* (1969) 120 CLR 463.

[127] *Eg Geraghty* v *Porter* [1917] NZLR 554; *F E Jackson & Co* v *Collector of Customs* [1939] NZLR 682; *Hawkes Bay Raw Milk Producers' Co-op* v *NZ Milk Board* [1961] NZLR 218; *Rajah Ratnagopal* v *A-G* [1970] AC 975; *Sambell* v *Cook* [1962] VR 448; *Stewart* v *City of Essendon* [1926] VLR 219. *Cf Blackpool Corp* v *Locker* [1948] 1 KB 349.

[128] *Eg Bremner* v *Ruddenklau* [1919] NZLR 444 *per* Sim J; *Munt, Cottnell & Co* v *Doyle* (1904) 24 NZLR 417; Olsen v *City of Camberwell* [1926] VLR 58; *Hookings* v *Director of Civil Aviation* [1957] NZLR 929; *Transport Minister* v *Alexander* [1978] 1 NZLR 306. *Cf Foley* v *Padley* (1984) 58 ALJR 454, 467 *per* Dawson J, who considers that case an example of this principle; *Mackay* v *Adams* [1926] NZLR 518.

[129] *Hookings* v *Director of Civil Aviation* [1957] NZLR 929.

[130] *F E Jackson & Co* v *Collector of Customs* [1939] NZLR 682.

[131] This case thus involved a prohibition coupled with a dispensing power – see below.

The second ground of the decision was that there had been no subdelegation of the Governor-General's power to the Director. Turner J emphasized that the prohibition covered only a small area of the field of regulation,[132] but recognised that if the regulation had purported to prohibit the use of all aircraft, except as authorized by the Director, the position would have been different.[133]

In *Jackson's* case,[134] regulations were made to control the importation of "any goods" into New Zealand, unless granted a licence by the Minister of Customs.[135] The Minister had a wide discretion to grant a licence.[136] It was held that the regulation was invalid. It is worth quoting from the judgment of Callan J. After dealing at length with the broad nature of the discretion, and the difficulty in either reviewing or enforcing the discretion,[137] His Honour said that "no such power of total prohibition is conferred", and that it was "but ... an attempt to hand over to someone else to whom Parliament entrusted no powers ... a power which the Customs Act does not confer upon anyone".[138] It is clear that he saw it as an unauthorized delegation of legislative power.[139]

(c) *An "unfettered discretion": Lack of criteria may lead to invalidity*

The control principle (b) above has also come to mean in practice that a delegation will be invalid where standards or criteria for the exercise of the discretion are not laid down in advance.[140] Sometimes this is expressed by referring to a basic principle of statutory construction, namely that there

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[132] Thereby distinguishing *Jackson's* case [1939] NZLR 682.

[133] [1957] NZLR 929, 934. Reliance was placed on *Mackay* v *Adams* [1926] NZLR 518, while *Geraghty* v *Porter* [1917] NZLR 554 was distinguished. *Cf* Aickman, *supra* n 2, 87 who suggests that this decision "leaves at large the issue whether a subdelegation was involved". It is submitted that it is a clear decision. The actual basis of the decision has been doubted by the writers as a result of Turner J's obiter comments towards the end of his judgment, remarking that he had been disturbed by the way in which the regulation had been administered. But having been persuaded that the Director considered each case on its merits, and made an administrative rather than a judicial or legislative decision, His Honour adhered to his conclusion that it was valid: [1957] NZLR 929, 938. This has led some writers to view the case as supporting proposition (i) below concerning "administrative functions". See Whitmore & Aronson, *supra* n 40, 197; Keith, *supra* n 2, 327-8; Pearce, *supra* n 40, 231-2 para 520; Sykes *et al*, *supra* n 33, 36 para 315. *Cf* Aikman, *supra* n 2, 85 and Thorp, *supra* n 2, 90, who suggest it was a case where standards to regulate the discretion were implicitly laid down.

[134] *F E Jackson & Co* v *Collector of Customs* [1939] NZLR 682.

[135] *Ie* a prohibition coupled with a dispensing power.

[136] See regulations 10 and 11: [1939] NZLR 682, 705.

[137] *Ibid* 703-4. *Cf Foley* v *Padley* (1984) 58 ALJR 454.

[138] *Ibid* 707.

[139] *Ibid* 732, following *Geraghty* v *Porter* [1917] NZLR 554. *Cf* Keith, *supra* n 2, 330 who sees it as a case where there was a failure to "regulate". Similarly, Thorp, *supra* n 2, 92 and Aikman, *supra* n 2, 74-6. But *cf* Pearce, *supra* n 40, 228-9 para 513 and Whitmore & Aronson, *supra* n 40, 197, who accept it as authority for the proposition stated.

[140] *Eg Swan Hill Corp* v *Bradbury* (1937) 56 CLR 746 *per* Dixon J; *Cooper* v *Bormann* (1979) 22 SASR 589; *Hawkes Bay Raw Milk Producers' Co-op* v *NZ Milk Board* [1961] NZLR 218; *Ex parte Brent* (1955) 3 DLR 587; *Victoria Restaurant* v *Montreal* [1959] SCR 58; *Smithy's Industries* v *A-G*[1980] 1 NZLR 355; *In re Martin's Application* [1974] Tas SR 43; *Radio Corp* v *Commonwealth* (1938) 59 CLR 170, 192 *per* Dixon and Evatt JJ.

has been a failure to do what the Act requires, which is to "regulate".[141] This approach is unfortunate as it deflects attention from the main focus of the inquiry, and has led many writers and courts to decide that there has been no delegation because of the impossibility of laying down standards in advance.[142] Thus debate as to the delegation argument has centred on this question. In many decisions, a purported delegation has been upheld where it has been held that standards were implied because of the nature of the subject matter.[143]

The Australian decision of *Swan Hill Corporation* v *Bradbury*[144] is the classic exponent of the "unfettered discretion" approach. In that case, under a power to make by-laws for "regulating and restraining" the construction of buildings and hoardings near highways, the council made a by-law prohibiting such activity unless the council dispensed with the requirement. It was held that the by-law was invalid. To a certain extent, the decision could be taken to have turned on the use of the words to "regulate and restrain" rather than "prohibit" – there had simply been a failure to regulate.[145] However Evatt J, and to a certain extent Latham CJ, were at pains to de-emphasize the significance of the words used.[146] The decision of the whole court stresses the nature of the unfettered discretion[147] and the interference with the right to build.[148] Evatt J was quite explicit about his views. His Honour said that:

> the presence of a discretionary power to give approval or dispensation may tell against the validity of a by-law as much where its authorized purpose is prohibition ... as where its authorized purpose is regulation.[149]

Dixon J emphasized the individual's denial of rights due to the unfettered nature of the discretion. An individual, he said, would have difficulty in

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[141] *Eg Stewart* v *City of Essendon* [1926] VLR 219; *F E Jackson & Co* v *Collector of Customs* [1939] NZLR 682; *Cooper* v Bormann (1979) 22 SASR 589, 594; *Smithy's Industries* v *A-G* [1980] 1 NZLR 355; *Conroy* v *Shire of Springvale & Noble Park* [1959] VR 737 *per* Adam J. *Cf Neptune Oil* v *City of Richmond* [1924] VLR 385; *Shanahan* v *Scott* (1957) 96 CLR 245; *Utah Corp* v *Pataky* [1966] AC 629. Note that the first ground in *Hookings'* case [1957] NZLR 929 was that it did not regulate.

[142] *Eg Schofield* v *City of Moorabbin* [1967] VR 22; *A-G & Robb* v *Mount Roskill* [1971] NZLR 1030; *Country Roads Board* v *Neale Ads* (1930) 43 CLR 127; *Fox* v *Allchurch* [1927] SASR 329; *Conroy* v *Shire of Springvale & Noble Park* [1959] VR 737, 752, *per* Gavan Duffy J; *R* v *Statutory Committee; ex parte Frisken* [1979] 22 SASR 117, 127; *Mackay* v *Adams* [1926] NZLR 518; *Ideal Laundry* v *Petone Borough* [1957] NZLR 1038; *R* v *Shire of Ferntree Gully; ex parte Hamley* [1946] VLR 501.

[143] *Eg Country Roads Board* v *Neale Ads* (1930) 43 CLR 127; *Hookings* v *Director of Civil Aviation* [1957] NZLR 929; *Mackay* v *Adams* [1926] NZLR 518. See *Swan Hill Corp* v *Bradbury* (1937) 56 CLR 746, 768 *per* Evatt J, saying of the *Country Roads Board* decision: "The matter was essentially one of good taste and right feeling"; *Conroy* v *Shire of Springvale & Noble Park* [1959] VR 737, 756 *per* Scholl J.

[144] (1937) 56 CLR 746.

[145] *Ibid* 752 *per* Latham CJ, 762-3 *per* Dixon J.

[146] *Ibid* 753 *per* Latham CJ, 769-70 *per* Evatt J.

[147] *Ibid* 750-1 *per* Latham CJ, 756-9 *per* Dixon J, 765, 769-70 *per* Evatt J.

[148] *Ibid* 753 *per* Latham CJ, 759 *per* Dixon J, 765 *per* Evatt J.

[149] *Ibid* 770.

establishing that the council had acted outside the scope of its authority[150] because only a "negative definition of the grounds governing the discretion" had been given.[151]

(d) *The "conditional prohibition" approach*

An alternative to the "unfettered discretion" approach, and one which demonstrates the artificiality of the construction approach when used without recourse to broader principles, is the "conditional prohibition" approach. This approach suggests that a power to dispense with a prohibition is but a condition of the prohibition, impliedly laid down by the legislation. A number of decisions[152] illustrate this approach, but once again the classic authority is an Australian one – the *Country Roads Board* case.[153] In that decision the court had to consider whether, under the power of "regulating or prohibiting" the construction of hoardings near highways, a regulation prohibiting the same activity subject to a power of dispensation was valid. It was held to be valid. It was said:[154]

> ... once it is realized that the power authorizes prohibition, complete or partial, conditional or unconditional, what reason is there for denying that the condition may be the consent, or licence, or approval of a person or body?

This case was distinguished by Latham CJ in *Swan Hill* on the basis of the words used in the empowering act,[155] but it is to be noted that Dixon J made no reference to the decision, and Evatt J saw it as a case where actual standards had been laid down to govern the exercise of the discretion. "The matter" he said "was essentially one of good taste and right feeling."[156]

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[150] *Ibid* 758-9.

[151] *Ibid* 758. Note that His Honour's dictum concerning undefined discretions (757-8) has been applied in the following cases on uncertainty in delegated legislation: *Re Australian Broadcasting Tribunal; ex parte 2 HD* (1980) 27 ALR 321; *Executors of Will of Lady Vestey* v *Minister for Lands* [1972] WAR 98; *King Gee Clothing* v *Commonwealth* (1945) 71 CLR 184; *Canns* v *Commonwealth* (1945) 71 CLR 210; *Racecourse Co-op Sugar Association* v *A-G (Qld)* (1979) 142 CLR 460.

[152] *Country Roads Board* v *Neale Ads* (1930) 43 CLR 127; *Munt, Cottrell & Co* v *Doyle* (1904) 24 NZLR 417l; *Hazeldon* v *McAra* [1948] NZLR 1087; *Mackay* v *Adams* [1926] NZLR 518; *Fox* v *Allchurch* [1927] SASR 329; *Ideal Laundry* v *Petone Borough*[1957] NZLR 1038; *Neptune Oil* v *City of Richmond* [1924] VLR 385; *Bysouth* v *City of Northcote* [1924] VLR 587; *Conroy* v *Shire of Springvale & Noble Park* [1959] VR 737; *Poole* v *Wah Min Chan* (1947) 75 CLR 218; *Radio Corp* v *Commonwealth* (1938) 59 CLR 170, 183-4 *per* Latham CJ; *R* v *Shire of Ferntree Gully; ex parte Hamley* [1946] VLR 501; *R* v *Statutory Committee; ex parte Frisken* [1979] 22 SASR 117; *Schofield* v *City of Moorabbin* [1967] VR 22; *Shaw* v *City of Essendon* [1926] VLR 461; *Wilton* v *Mount Roskill* [1964] NZLR 957. *Cf* Lanham, *supra* n 2, 637: "Every delegation by way of a dispensation can be dressed up as a condition."

[153] (1930) 43 CLR 127.

[154] *Ibid* 135, referring to *Williams* v *Weston-super-Mare UDC* (1907) 98 LJ 537 and other older authorities.

[155] (1937) 56 CLR 746, 752.

[156] *Ibid* 768. As has been discussed above, Evatt J saw no distinction between a power to "prohibit" and one to "regulate" where an unfettered discretion was involved.

(e) *The validity of a subdelegation of legislative power depends on the importance of the power*[157]

This is really the corollary of (a) and is sometimes associated with (g). Associated with this approach is the following:

(f) *The validity of a subdelegation of legislative power depends on the nature of the legislation and the practicalities of administering the discretion*[158]

This principle is a restatement of the justification for "unfettered discretions" discussed above, and refers to the impossibility of laying down standards in advance for the exercise of the discretion. This, however, is no justification as such for implying a delegation without regard to the broader principles discussed above. What is suggested under this heading is the argument of administrative necessity which is invoked by a number of writers.[159] This raises questions similar to those considered under the above discussion of authorizations and the *Carltona* principle. It also raises issues of broad policy as to the rights of individuals over administrative necessity. As will be seen, the rights of individuals are frequently overridden in this context.

(g) *A subdelegation of legislative power will not be upheld where a common law right is involved*[160]

The authority for this proposition is *Melbourne Corporation* v *Barry*.[161] However, subsequent decisions, other than the *Swan Hill* case,[162] do not readily bear out this proposition.[163] In *Foley* v *Padley* little weight was placed on the fact that the exercise of the power possibly involved interference with common law rights.[164]

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[157] Keith, *supra* n 2, 335-6 citing *Vine* v *National Dock Labour Board* [1957] AC 488, *Hazeldon* v *McAra* [1948] NZLR 1087, and *Jackson's* case [1939] NZLR 682 — he equates them with cases involving freedoms. Possibly the decisions involving defence powers are explicable on the basis of this principle. See *eg Re Reference re Regulations (Chemicals)* [1943] 1 DLR 248 and the customs regulations cases, *eg Radio Corp* v *Commonwealth* (1938) 59 CLR 170; *R* v *McLennan; ex parte Carr* (1952) 86 CLR 46; *Poole* v *Wah Min Chan* (1947) 75 CLR 218. But *cf Jackson's* case [1939] NZLR 682.

[158] Keith, *supra* n 2, 338; Fox & Davies, *supra* n 109, 490.

[159] *Eg* Wade, *supra* n 41, 321.

[160] Aikman, *supra* n 2, 84. See discussion above as to common law rights.

[161] (1922) 31 CLR 174, 206 *per* Higgins J. *Cf Conroy* v *Shire of Springvale & Noble Park* [1959] VLR 737, 746 *per* Herring CJ.

[162] (1937) 56 CLR 746, 754 *per* Latham CJ, 759 *per* Dixon J (the right to build). *Cf Fox* v *Allchurch* [1927] SASR 329, 335-6; *Rice* v *Daire* (1982) 30 SASR 560.

[163] *Eg Edwards* v *Onehunga High School Board* [1974] NZLR 238; *Conroy* v *Shire of Springvale & Noble Park* [1959] VLR 737, 752 *per* Gavan Duffy J. *Cf Brader* v *Ministry of Transport* [1981] 1 NZLR 73, where it was suggested that the proposition applied only to the natural rights of man (not the right to use a motor car).

[164] See *eg* (1984) 58 ALJR 454, 458 *per* Gibbs CJ: "the subject of the power is not something indispensable to the life of the community, such as the erection of buildings." Other than in the dissenting judgment of Murphy J, no mention was made of the possibility. *Cf Padley* v *Foley* (1983) 32 SASR 122, 129 where Matheson J indirectly refers to the issue, citing the judgment of Mann CJ in *Seeligson* v *City of Melbourne* [1935] VLR 365, 369-70 when he says *inter alia* "It may well be a matter of opinion about many by-laws, as to whether they are not what might be called a somewhat fussy exercise of legislative powers, that they trench on the liberty of a great many people because of the use made of that liberty by comparatively few."

(h) *The review of the validity of a subdelegation will depend on the status of the delegate*

It has been suggested, for example, that review is stricter where a local government is involved.[165] This would be consistent with the basis of the maxim in terms of accountability of the body exercising the power to enact subordinate legislation.

(i) *Delegation will be permitted where the task delegated can be classified as an administrative function*[166]

There is ample authority for this proposition, although it has been suggested[167] that there is a movement away from classifying functions for these purposes because of the difficulties in applying the distinctions.[168] In *Foley* v *Padley* no use was made of the distinction between legislative and administrative acts, other than indirectly by Brennan J in his dissenting judgment. Referring to the argument that the Council could not have formed the requisite opinion, His Honour said:[169]

> A by-law which purports to prohibit activities which are not of the prescribed kind as well as activities which are of the prescribed kind is too wide and is invalid[170] ... It is not saved from invalidity by the creation of an unfettered administrative discretion to exempt an activity from the operation of the by-law.

It is suggested, however, that the classification of functions has limited relevance in considering the maxim against subdelegation.[171]

C *Subdelegation by a dispensing power?*

The bases of the argument under this heading have been set out above. There is some direct authority on each basis of the argument.

(a) *The discretion to dispense with a prohibition*

It has been suggested by one writer that where there is a wide unfettered

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[165] Aickman, *supra* n 2, 84 citing *Taylor* v *Brighton Borough Council* [1947] KB 736, *Kruse* v *Johnson* [1898] 2 QB 91, *McCarthy* v *Madden* (1914) 33 NZLR 1251. See also Keith, *supra* n 2, 334 who includes it under principle (a).

[166] *Eg R* v *McLennan; ex parte Carr* (1952) 86 CLR 46 (in which *Radio Corp* v *Commonwealth* (1938) 59 CLR 170 and *Poole* v *Wah Min Chan* (1947) 75 CLR 218 were followed); *King-Emperor* v *Benoari Lal Sarma* [1945] AC 14; *R* v *Lampe; ex parte Maddalozzo* (1963) 5 FLR 160; *Nelson* v *Braisby (No 2)* [1934] NZLR 559; *Mandeno* v *Wright* [1967] NZLR 385. The *Carltona* principle is an application of this proposition. See *Carltona* v *Commissioners of Works* [1943] 2 All ER 560; Lanham, *supra* n 108. Possibly *Hookings'* case [1957] NZLR 929 is also a decision on this basis. *Cf R* v *Statutory Committee; ex parte Frisken* [1979] 22 SASR 117. See Sykes *et al*, *supra* n 33, 35-6; Aickman, *supra* n 2, 73.

[167] Sykes *et al*, *supra* n 33, 29; Keith, *supra* n 2, 325. *Cf* Wade, *supra* n 41, 319-20 who suggests the basis should be whether the discretion is "inalienable".

[168] Aickman, *supra* n 2, 70; Keith, *supra* n 2, 532; Thorp, *supra* n 2, 90.

[169] (1984) 58 ALJR 454, 463.

[170] *Footscray Corp* v *Maize Products* (1943) 67 CLR 301, 306, 313 is cited as authority.

[171] *Cf* Thorp, *supra* n 2, 99 and his plea to adopt a functional rather than a conceptual approach.

discretion to dispense with a prohibition, it clearly suggests a delegation of the power to legislate.[172] It may be that such an argument can also be presented in ultra vires terms[173] – because of the width of the discretion, it can be argued, the power to enact legislation is exceeded. It can also be argued that the decisions discussed above, where undefined discretionary powers to dispense were held invalid,[174] are consistent with this view.

The decision in the *Swan Hill* case, in particular the judgment of Evatt J,[175] seems to support this argument. His Honour was clearly of the view that the by-law making power was exceeded as "it suppresses by reference to ... [an] uncontrolled discretion".[176] Other decisions where an undefined discretionary power has been held invalid also tend to support this view.[177]

(b) *The procedural aspect*

It has been suggested that where the power to dispense enables an authority to avoid procedural safeguards, this amounts to an invalid delegation.[178] It can be argued that, in effect, there has been a delegation to a body other than that in which the power of delegation was vested. For example, in the early decision of *Melbourne Corporation* v *Barry*,[179] which was discussed *supra* in the context of common law rights, Higgins J was of the opinion that, as the power of dispensation could be exercised by the Council sitting in ordinary meeting, it was in effect a different body which carried out the power to prohibit. His Honour said: "... the prohibition must be by by-law,[180] not by the council acting at an ordinary meeting, and by the chance majority of that meeting."[181] Higgins J was clearly of the view that there was a delegation "from what I may call the by-law making Council to the ordinary meeting of the Council".[182]

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[172] Aickman, *supra* n 2, 94.

[173] See Keith, *supra* n 2, 335.

[174] See also the decisions on failure to "regulate" discussed above.

[175] (1937) 56 CLR 746, 765, 769.

[176] *Ibid* 769.

[177] *Eg Olsen* v *City of Camberwell* [1926] VLR 58; *Conroy* v *Shire of Springvale & Noble Park* [1959] VLR 737 *per* Herring CJ; *A-G & Robb* v *Mount Roskill* [1971] NZLR 1030 (note that in this decision it was suggested that the *Ideal Laundry* case [1957] NZLR 1038 had left open the question as to the validity of the specific dispensing power: [1971] NZLR 1030, 1039); *In re Martin's Application* [1974] Tas SR 43. But note that in *Foley* v *Padley* (1984) 58 ALJR 454 the majority answered this argument by relying on the "conditional prohibition" approach discussed above.

[178] Keith, *supra* n 2, 334.

[179] (1922) 31 CLR 174.

[180] Referring to the procedural requirement that by-laws be enacted at special meetings of the Council and then duly published *etc.*

[181] (1922) 31 CLR 174, 208. *Cf* Murphy J in *Foley* v *Padley* (1984) 58 ALJR 454 who takes a similar view. Brennan J also refers to this aspect of the delegation argument, saying (after referring to Higgins J) that in effect the two cases are distinguishable because the power in *Barry's* case was "quite unlike" the power in *Foley* v *Padley*: (1984) 58 ALJR 454, 462.

[182] (1922) 31 CLR 174, 208. His Honour continues: "In short, this by-law leaves every procession to the mere will of the Council – the very thing that [the procedural provisions] were intended to prevent." *Cf Foley* v *Padley* (1984) 58 ALJR 454 *per* Murphy J.

Support for this view comes from other decisions.[183] In one decision it was held that a power to dispense with requirements by council resolution amounted to a usurpation of the by-law-making power of the council by resolution.[184] Another early decision which upholds this view is *Staples & Co* v *The Mayor, Councillors & Citizens of the City of Wellington*,[185] in which Stout CJ said: "The vice of the by-law is that it purports to clothe each ordinary meeting of the Council with a legislative authority."[186]

It is clear that Stout CJ was concerned about the avoidance of the procedural safeguards, and in particular those concerned with publication of the by-laws.[187]

Thus there is clear authority for the argument propounded here, as well as, it is submitted, firm theoretical reasons why a delegation should be held invalid where a different procedure is invoked. In terms of accountability and parliamentary responsibility it seems clear that such a delegation is bad.

CONCLUSION

As has been seen, it is common to justify the use of wide unfettered discretions in dispensing powers by reference to administrative necessity, or the impracticability of laying down standards for the application of the discretion in advance.[188] But where one is dealing with subordinate legislation enacted by a local authority dealing directly with the public there is no justification for such administrative necessity. Indeed, in terms of accountability to the legislature the argument for controls on the exercise of such discretions is stronger.

At the same time, it must be recognised that it may be impossible or even undesirable to prescribe standards for the exercise of the discretion in advance.

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[183] *Eg Sambell* v *Cook* [1962] VR 448 (delegation by Planning Board of power to make interim development orders invalid); *Morrison* v *Shire of Morwell* [1948] VLR 73 (a subcommittee of council set up to manage town hall — delegation held invalid); *Dewar* v *Shire of Braybrook* [1926] VLR 201 (under a power to make by-laws regulating and restraining the construction of buildings, the by-law left the dispensing of requirements to the council by resolution). *Cf Hazeldon* v *McAra* [1948] NZLR 1087, where it was recognised that a power of dispensation given to a Town Clerk was a delegation, but was valid as the relevant By-law Act authorised it.

[184] *Dewar* v *Shire of Braybrook* [1926] VLR 201.

[185] (1900) 18 NZLR 857. This decision was followed in *Collins* v *Wolters* (1904) 24 NZLR 499 and was referred to with approval in the recent New Zealand decision of *Smithy's Industries* v *A-G* [1980] 1 NZLR 355, 360. *Cf* Aikman, *supra* n 2, 76 n 13 who says that it is a case where legislative and administrative functions were confused.

[186] *Ibid* 863.

[187] *Ibid* 862. *Cf Bremner* v *Ruddenklau* [1919] NZLR 444 where it was thought that this was not a significant factor as council proceedings were in any event open to the public. Legislation passed consequent upon *Staple's* case was considered in *Munt, Cottrell & Co* v *Doyle* (1904) 24 NZLR 417. The relevant Municipal Corporations Act specifically provided that a by-law could leave anything to be regulated by Council from time to time by resolution. Cooper J discusses the amendment and, though troubled by the width of the power and possibility of hardship, sees that his duty is to construe the legislation: (1904) 24 NZLR 417, 425.

[188] In many cases, there is no such difficulty, *eg* in the by-law under consideration in *Foley* v *Padley* it would have been possible to prescribe what type of things may not be distributed. *Cf* (1984) 58 ALJR 454, 463-4 *per* Brennan J.

A wide discretion might be desirable to ensure individualised justice,[189] or because the subject matter can only be generalised in advance, or is highly controversial.[190] From one perspective, it can be said that the whole issue of discretionary prohibitions involves a balancing of the rights of an individual to be treated fairly against the right of an authority to determine its policy. From this perspective it can be seen that the High Court decision in *Foley* v *Padley* reflects a policy favouring the right of the authority to determine its policy.

The question of the individual's rights arises broadly at three stages. First, when he is considering undertaking an activity, he has the right to know what restrictions govern his activity. Secondly, if he is refused permission to undertake the activity, it is submitted that he has the right to know why permission is refused unless there are good reasons of confidence or public interest which negate this right. And thirdly, it is submitted, he has the fullest right to judicial review of the authority's decision.

If one considers the last issue first, it has been the view expressed consistently throughout this article that the current approaches, dependent as they are on applying the maxim against subdelegation as a rule of construction, are restrictive and "legalistic".[191]

It may be that judicial review of discretionary prohibitions would achieve a function consistent with the basis of the maxim against subdelegation if review were to be based on broader ultra vires terms. This would enable a court to consider such factors as the importance of the power, the nature of the delegate, safeguards on the exercise of the power – in other words, all relevant factors when considering the exercise of the power under review.[192] Consistent with the basis of the maxim, such factors should be considered in the light of the overriding consideration that all such powers should be exercised reasonably, responsibly, and in an accountable manner.[193]

With respect to the second stage of the issue, this could be met by requiring all bodies exercising "administrative" functions to give reasons for their decisions upon request.[194] Legislation enacted for such purpose would include provisions excluding the duty in cases involving confidential matters and matters of public interest,[195] thus preserving the interest of the authority in situations where it is undesirable to lay down criteria in advance for the exercise of the discretion.

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[189] K C Davis, *Discretionary Justice – A Preliminary Inquiry* (1969) 20.

[190] *Ibid* 44.

[191] Pearce, *supra* n 40, 235 para 527.

[192] Keith, *supra* n 2, 332. *Cf* de Smith, *supra* n 74, 307.

[193] Fine, *supra* n 87, 260.

[194] It is to be noted that South Australia has no equivalent to the Administrative Law Act 1978 (Vic.). This Act requires a "tribunal" (see s 2) to give reasons for its decision (see s 8). However, it is doubtful whether a local government exercising a dispensing power is a "tribunal" for these purposes. *Cf Osmond* v *Public Service Board* (1984) 3 NSWR 447 where the duty to give reasons is considered as an aspect of natural justice reversed on appeal by the High Court; *Public Service Board* v *Osmond* (1986) 60 ALR 209.

[195] *Cf* Administrative Law Act 1978 (Vic) s 8(5); Administrative Decisions (Judicial Review) Act 1977 (Cth) ss 13A, 14; Administrative Appeals Tribunal Act 1975 (Cth) s 28(2).

But finally, it must be seen that the responsibility for policy-making lies in the hands of the authority. The duty to inform the public need not be performed in the formal manner suggested by Davis,[196] namely by subsequent "rulings".

Indeed, it should be recognised that it may be undesirable to structure the exercise of discretions in this way.[197] To a large extent it can be said that this issue involves a question of the certainty or reasonableness of the legislation which governs the exercise of the discretion.[198] The legislation in *Foley* v *Padley* represents an extreme example of very non-specific legislation. There may be situations where the making of policy should be left to the subordinate legislator, but it is submitted that those cases are few, and that unless a matter of confidentiality is involved, there is rarely justification for such broad discretions. In situations where the implementation of a general policy is left to a subordinate legislator, it is submitted that it is incumbent on the subordinate body to inform the public of its policy, in whatever manner is suitable to its exercise of power.

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[196] Davis, *supra* n 189, 58-9.

[197] R Baldwin & K Hawkins, "Discretionary Justice: Davis Reconsidered" [1984] Public Law 570, 595-6.

[198] Lanham, *supra* n 2, 636, 659.