DELEGATION, LEGISLATION AND DISPENSATION

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[*While it is accepted that a body which has power to make rules relating to certain matters may not delegate that power to another body, it is less clear whether the subordinate legislator may simply prohibit particular conduct and confer upon itself or another body a power of dispensation. Professor Lanham examines whether this is an improper delegation of legislative power or a legitimate granting of another power, and in so doing undertakes a thorough analysis of the rule against delegation in this context.*]

It is well established that subordinate[1] legislators may not delegate their legislative powers.[2] A body with power to make rules in respect of certain conduct cannot delegate to another the power to make those rules. But what if the subordinate legislator simply prohibits the conduct concerned and confers upon himself or another a power of dispensation? Is this to be regarded as *prima facie* an improper delegation of the legislative power or a legitimate conferment of some other kind of power? This problem, though not always presented in these terms, has exercised the minds of judges in many common law jurisdictions, and, understandably, different solutions have been found at different times and in different places.

In this article a number of leading cases from the United Kingdom, Australia, New Zealand, Canada, South Africa, and the United States will be examined in an attempt to assess the extent to which the rule against delegation applies or should apply to cases of dispensation. The article will be divided into three parts. Part I will examine the scope of the rule against delegation in relation to dispensation; Part II will examine the reasons which lie behind the rule and Part III will be concerned with limitations on the rule against delegation in this context.

PART I THE SCOPE OF THE RULE

Before the rule against delegation can exercise any controlling power over subordinate legislators who confer powers of dispensation, there must be some recognition that *prima facie* there is something which requires critical attention. As will be seen in Part II, the unease, if it exists, may not be articulated in terms of undesirable delegation: it may be voiced in terms of unreasonableness, arbitrary power, uncertainty or vagueness or simply replacement of rule-making with another kind of power. These matters will be examined in more detail later. For the moment what is important is the notion that the conferment of a power of

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[1] In U.S.A. the rule against delegation theoretically applies to Congress and to state legislatures as well: Davis K. C., *Administrative Law Treatise* (2nd ed. 1978) Chap. 3.

[2] *Barnes v. Bremner* (1895) XVI A.L.T. 207 (Vic.); *Godkin v. Newman* [1928] N.Z.L.R. 593; *Geraghty v. Porter* [1917] N.Z.L.R. 554; *Re Clements* (1959) 19 D.L.R. (2d) 476; *Blais v. Ville de Berthierville* [1961] Que S.C. 176 (Quebec). The rule was stated *obiter* by the Privy Council in *King Emperor v. Benoari Lal Sarma* [1945] A.C. 14.

dispensation requires some kind of justification. As will appear, the most familiar way of expressing the law's concern is to approach the problem in the light of the rule against delegation.

While there is no one overall theme common to every jurisdiction considered, one question which has assumed considerable importance and attracted a deep conflict of opinion is the significance of a power to prohibit. Accordingly, the cases will be examined first where the legislator has been given some power falling short of prohibition and secondly where a power of prohibition has been conferred.

1. *Cases where the legislator has no power of prohibition*

There are all sorts of expressions which Parliament may employ to confer on a delegate legislator rule-making powers falling short of prohibition. For example, the subordinate legislator may be given power to regulate, restrain, restrict, govern or license. Where the legislator has been given such relatively limited powers, the weight of authority recognises that there is something *prima facie* improper about allowing the legislator to enact a prohibition subject to a power of dispensation, whether that power is reserved to the legislative body or vested in another.

The leading English case is *Parker v. Mayor of Bournemouth*[3] in which the local authority had statutory power to make by-laws regulating the selling of articles on the beach. The authority passed a by-law prohibiting sales on the beach except in pursuance of an agreement with the corporation. The court held that the by-law was invalid on the ground that it reserved to the authority power to make unreasonable and discriminatory agreements.

A similar view has been taken by courts of high authority in other jurisdictions. Thus in *Melbourne Corporation v. Barry*[4] the High Court of Australia held that a local authority given power to regulate processions could not lawfully prohibit processions and confer on the town clerk power to exempt persons from prohibition. One of the majority judges, Higgins J., based the objection specifically on the rule against delegation.[5] A similar approach has been taken in New Zealand,[6] Canada,[7] South Africa[8] and the United States.[9]

The point is worth making forcefully because, from time to time, some courts overlook the rule against delegation and all that it implies and come to an

[3] (1902) 86 L.T. 449; see also *Baxter v. Bedford Corp.* (1885) 1 T.L.R. 424 (no implied power to dispense with by-laws); *Elwood v. Bullock* (1844) 6 Q.B. 383. *Cf. R. v. British Airports Authority; ex parte Wheatley* [1983] R.T.R. 147: see *infra* nn. 29-33.

[4] (1922) 31 C.L.R. 174. See also *Swan Hill v. Bradbury* (1937) 56 C.L.R. 746 where the power was to 'regulate and restrain'; *Olsen v. City of Camberwell* [1926] V.L.R. 58; *King v. City of Footscray* [1924] V.L.R. 110.

[5] (1923) 31 C.L.R. 174, 208.

[6] *Smitty's Industries v. A.-G.* [1980] 1 N.Z.L.R. 355; *Chandler v. Hawkes Bay County* [1961] N.Z.L.R. 746.

[7] *Barthropp v. West Vancouver* (1979) B.C.L.R. 202; *Re Clark* (1977) 81 D.L.R. (3d) 33; *Vic Restaurant v. Montreal* (1958) 17 D.L.R. (2d) 81 (S.C.) (power to licence); *Hall v. Moose Jaw City* (1910) 3 Sask. L.R. 22; 12 W.L.R. 693; *Re Kiely* (1887) 13 O.R. 451; *R. v. Webster* (1888) 16 O.R. 187.

[8] *Arenstein v. Durban Corp.* 1952 (1) S.A. 279 (A.D.) (*infra* n.64); *Natal Organic Industries v. Union Government* 1935 N.P.D. 701.

[9] *Washington, ex rel. Seattle Title Trust v. Roberge* (1928) 278 U.S. 116 (Supreme Court of U.S.A.); see also *City of Chicago v. Pennsylvania Railroad Co.* (1968) 242 N.E. 2d 152.

undesirable conclusion. An early Australian example is *Rider v. Phillips*.[10] A council had power to regulate processions. It made a by-law prohibiting processions except with the consent of the mayor. Though counsel argued that the by-law was void for unlawful delegation, Higginbotham and Holroyd J.J. held that the by-law was valid. The court got off to a bad start by saying that all the objections, including the rule against delegation, resolved themselves into an attack on the reasonableness of the by-law. Any controlling influence that the unreasonableness principle might have had was negatived by the court's applying a presumption that the by-law would be administered reasonably and observing that if that were not the case the Governor could repeal the by-law.

None of this is convincing. One of the central concerns of administrative law is to provide a check against unreasonableness in the sense of arbitrary, capricious or improperly discriminatory action. This means that at some point in the administrative process the courts will have to be prepared to prevent such action. The courts have recognised intense difficulties in invalidating individual exercises of discretion on these grounds, especially in discovering proof of capriciousness and the like.[11] If this cannot be guarded against at the level of exercise of discretion in the individual case the only effective safeguard is to prevent the potential for abuse by invalidating the conferment of arbitrary power. A presumption on the part of the courts that the person with the dispensing power will exercise it reasonably completely subverts the court's power to prevent abuse. In general, the courts are alive to this problem and the weight of authority rejects the presumption of reasonable administration and looks to the potential for abuse.[12]

The second argument in *Rider v. Phillips* is also unconvincing. In every case where a wide discretion has been conferred, there will exist the possibility of withdrawing the power if it is abused. The power will normally be revocable by the body which conferred it, for example, the local authority. There will always be the possibility of parliamentary revocation. But the fact that the power is revocable does not excuse the courts from exercising control while it remains unrevoked. Political control, while not to be discounted, is no substitute for judicial review.

As far as Australia is concerned *Rider v. Phillips*[13] and its companion case *Barron v. Barker*[14] have now been overruled by *Melbourne Corporation v. Barry*,[15] but their spirit appears to have survived in other jurisdictions. No less a court than the Supreme Court of Canada seems to have taken an approach similar to that of the Victorian courts in the older cases. In *Lamoureux v. City of Beaconsfield*[16] no person could lawfully build a service station without a permit from the Council. The relevant by-law further provided that no permit should be

[10] (1884) 10 V.L.R. (L) 147. See also *Bannon v. Barker* (1884) 10 V.L.R. (L) 200 (applying the same rule to regulations).

[11] *Arenstein v. Durban Corp.* 1952 (1) S.A. 279, 293 (Schreiner J.A.); *R. v. Maroochy Shire* (1926) Q.S.R. 59.

[12] *Rossi v. Edinburgh Corp.* [1905] A.C. 21; *Melbourne Corporation v. Barry* (1923) 31 C.L.R. 174; *Re By-law XXIII of Glenelg Corp.* [1927] S.A.S.R. 85; *R. v. Nyandoro* 1959 (1) S.A. 639; *Ellis v. Dubowski* [1921] 3 K.B. 621.

[13] (1884) 10 V.L.R. (L) 147.

[14] (1884) 10 V.L.R. (L) 200.

[15] (1923) 31 C.L.R. 174.

[16] [1978] 1 S.C.R. 134; also *Re Lem Yuk and Kingston City* (1926) 31 O.W.N. 14.

issued if two-thirds of the neighbouring landowners objected. An applicant for a permit sought to have the by-law declared invalid on the grounds of improper delegation. By a majority,[17] the Supreme Court of Canada held that there was no delegation but merely a condition precedent to the issue of the permit that the neighbouring landowners do not object. This reasoning is no more satisfactory than that in *Rider v. Phillips*. Every delegation by way of dispensation can be dressed up as a condition. In *Parker v. Mayor of Bournemouth*[18] the condition was the agreement of the council; in *Melbourne Corporation v. Barry*[19] it was the permission of the town clerk. It is impossible to believe that the courts concerned would have decided the cases differently if it had been pointed out that there was merely a condition requiring consent. The answer to the condition argument is that there is no true antithesis between a condition and a delegation. The condition takes the form of a delegation and its legality must be judged with due regard to the rule against delegation. This point is clearly brought out by Pigeon J. in his dissenting judgment in the *Lamoureux case*.[20] The fact that the condition takes the form of a delegation of power does not necessarily mean that it is invalid. The rule against delegation is itself subject to qualifications.[21] What is important at this stage is that the fact that there is a delegation should be recognised so that if the delegation is unjustified the rule can exert its controlling influence. If the conferment of power is seen as a condition as opposed to a delegation then the most objectionable form of delegation may survive uncontrolled.

The delegation in *Lamoureux v. City of Beaconsfield* was to private individuals, a problem which has caused immense concern and a considerable conflict of opinion in the United States.[22] Out of the confused tangle of cases from the American jurisdictions there can be found at least one case of highest authority which supports the *Rider/Lamoureux* approach. In *Thomas Cusack v. City of Chicago*[23] a statute gave power by ordinance to regulate the construction of billboards. An ordinance prohibited the erection of billboards without the consent of neighbouring owners. The Supreme Court of the United States rejected the argument that there had been a delegation of legislative power, regarding the power of dispensation instead as a familiar provision affecting enforcement. The court also observed that the dispensing power could only operate to the benefit of billboard owners since the prohibition would otherwise be absolute.

Again these arguments are specious. There is no necessary dichotomy between delegation and provisions affecting enforcement. If the requisite majority of landowners in a neighbourhood had drawn up a detailed code of rules indicating the circumstances under which they would have been prepared to grant consent,

[17] Martland, Ritchie, Dickson and de Grandpré J.J.
[18] (1902) 86 L.T. 449; *supra* n.3.
[19] (1922) 31 C.L.R. 174; *supra* n.4.
[20] [1978] 1 S.C.R. 134, 146.
[21] See Part III *infra*.
[22] See Davis K. C., *Administrative Law Treatise* (2nd ed. 1978) s. 312; Cooper F. E., *State Administrative Law* (1965) Chap. 3; Liebmann G.W., 'Delegation to Private Parties' (1975) 50 *Indiana Law Journal* 650; Jaffe L. L., 'Law Making by Private Groups' (1937) 51 *Harvard Law Review* 201; Freedman, Delegation of Power and Institutional Competence (1976) 43 *University of Chicago Law Review* 307, 331 ff.
[23] (1917) 242 U.S. 526.

the legislative nature of the delegation would have been instantly recognisable. The nature of the delegation is not changed by the fact that the landowners leave every case to be decided as it arises either on its merits or at whim.

Nor is the benefit argument any more convincing. From the point of view of a successful or potentially successful applicant every scheme of prohibition subject to dispensation is more beneficial than an absolute prohibition. It is not the successful applicant who is going to complain. It is the unsuccessful applicant: to unsuccessful applicants the fact that others may have received a benefit under the scheme is likely to be far more irritating and even economically damaging than an outright prohibition where everyone is in the same boat. It is the potential for unfair discrimination which contributes to the law's resolve to prevent certain delegations of power.

Whether or not the *Cusack* case might still be justified on its facts, that part of the reasoning which refused to recognise the relevance of the rule against delegation has been implicitly rejected by a later decision of the Supreme Court of the United States. In *Washington; ex rel Seattle Title Trust v. Roberge*,[24] delegated legislation prohibited the erection of nursing homes without the consent of two-thirds of the neighbouring landowners. The Supreme Court held the legislation invalid. The Court did not overrule its earlier decision in *Cusack* but distinguished it in such a way as to show that it found the enforcement and benefit arguments totally without merit.[25]

Nonetheless, the reasoning in *Cusack* still appears to wield some influence in modern American cases. In *State Theatre Co. v. Smith*[26] a statute[27] required the consent of certain landowners to the waiver of zoning laws. The State Court identified two classes of case: one where the legislature delegated the power to impose restrictions and the other where the power delegated was to waive restrictions. The Court held that the first kind of delegation was unlawful,[28] but following *Cusack*, held the second, of which the instant case was an example, valid. The triumph of form over substance seems complete.

A different ground was found to justify a dispensing power in a recent English case. Doubt has been cast on the reasoning in *Parker v. Mayor of Bournemouth*[29] by Woolf J. in *R. v. British Airports Authority; ex parte Wheatley*.[30] A by-law prohibited the offer of services at Gatwick Airport without the permission of the Authority. His Lordship held that the by-law was not invalid by virtue of the rule in *Parker's* case because the courts could now control the exercise of the power of dispensation itself and intervene if the Authority acted arbitrarily. It is not entirely clear what has changed between 1902 and 1983 to lead to such a dramatically different approach. It is true that in some respects judicial review has widened in

[24] (1928) 278 U.S. 116.
[25] See also Liebmann *op. cit.* 676.
[26] (1979) 276 N.W. 2d 259.
[27] *Supra* n.1.
[28] See also *Eubank v. City of Richmond* (1912) 226 U.S. 137 (S.C).
[29] (1902) 86 L.T. 449. (*supra* n.3).
[30] [1983] R.T.R. 147. There was an appeal to the Court of Appeal. The Court affirmed Woolf J.'s view that the regulation was not an *ultra vires* prohibition but did not discuss *Parker's case: R. v. British Airports Authority; ex parte Wheatley* [1983] R.T.R. 466.

recent years but it is not clear that this has happened in the delegation/dispensation area. In 1902 the Courts had power to declare even local authority by-laws invalid if they were unreasonable. Unreasonableness has a fairly narrow meaning but improper discrimination was covered. The leading case was *Kruse v. Johnson*[31] which also recognised that a wider test of unreasonableness might apply in the case of non-representative authorities. This wider test of unreasonableness has recently been revived by Lord Denning M.R. in *Cinnamond v. British Airports Authority*.[32] Woolf J. relied on that case in *Wheatley* but the wider test of unreasonableness has subsequently received a set-back at the hands of the House of Lords in *Chief Constable of the North Wales Police v. Evans*.[33] It may be, therefore, that the right to review for unreasonableness is narrower now than at the time *Parker* was decided. In any event, it is the difficulty of detecting the discrimination rather than absence of a theoretical power of control which appears to be the main concern. Finally, the *Wheatley* case seems to have omitted any consideration of the rule against delegation.

In summary, most of the cases so far referred to demonstrate unease on the part of the courts when a rule-making body prohibits conduct subject to a power of dispensation. While that unease is not always articulated with reference to the rule against delegation, that appears to be the most familiar and as will be suggested later the most appropriate vehicle for control. A few courts, even in modern times, have refused to see the element of delegation inherent in this situation and in so doing deprive themselves of the power to guard against the dangers which the rule is designed to avoid. While the discussion so far has not indicated fully the nature of those dangers or suggested any limitation on the scope of the rule against delegation, it is hoped that enough has been said to throw courts on their guard whenever they are faced with a power of dispensation.

2. *Cases where the subordinate legislator has a power of prohibition*

In the discussion so far, little emphasis has been put on the concept of prohibition. However, where the rule-maker's power over given conduct falls short of a power to prohibit that conduct another principle can be invoked to hold a prohibition subject to dispensation invalid. That is to regard a prohibition subject to dispensation as a substantial prohibition.[34] It can then be said that a body with power only to regulate, restrain, control or govern or with similarly worded powers has acted *ultra vires* if it goes further and substantially prohibits.[35] This rather mechanical approach looks quite tidy but it is dependent upon the same assumptions as the rule against delegation. A prohibition subject to a dispensation may in fact operate as a very effective way of regulating conduct if the power of

[31] [1898] 2 Q.B. 91.
[32] [1980] 2 All E.R. 368.
[33] [1982] 3 All E.R. 141.
[34] *Municipal Corporation of the City of Toronto v. Virgo* [1896] A.C. 88; *Tarr v. Tarr* [1973] A.C. 254.
[35] *Shanahan v. Scott* (1956-7) 96 C.L.R. 245; *Cuthbertson v. Cox* (1918) 14 Tas. S.R. 80.

dispensation is operated fairly and as liberally as the circumstances render desirable.[36] What makes the reasoning, that a prohibition subject to a power of dispensation is a substantial prohibition, valid is the court's recognition that it has the potential for unreasonable, arbitrary or discriminatory exercise — one of the principal concerns of the rule against delegation.

If this is borne in mind the next group of cases becomes easier to evaluate. In these cases the rule-maker is given a power to prohibit certain conduct. This means that the *ultra vires* argument based on substantial prohibition will not work. Does this mean that there is no room for the rule against delegation in cases where the prohibition of the conduct is coupled with a power of dispensation? There is a marked degree of conflict in the authorities.

The starting point is a relatively early English case, *Williams v. Weston Super Mare Urban District Council*.[37] The local authority had power to make by-laws regulating or prohibiting the erection of booths on their foreshore. The authority made a by-law prohibiting the erection of booths on the foreshore except with the permission of the local Commissioners. The Court recognised that the by-law conferred an arbitrary power, but far from holding this a ground of invalidity observed that it was this power which prevented the by-law from being unreasonable. The Court distinguished *Parker's* case on the ground that in that case the authority had a power only to regulate not to prohibit.

Williams' case has been influential in Australia where a considerable body of opinion gives it support. The leading case is *Country Roads Board v. Neale Ads*.[38] The Board had power to regulate or prohibit hoardings and passed a by-law prohibiting the erection of advertising hoardings without the consent of the Board. Clause 4 in the by-law empowered the Board to refuse consent if the proposed hoardings would obstruct the vision of road users or affect injuriously certain amenities. The High Court of Australia held the by-law valid. Three judges, Knox CJ., Starke and Dixon JJ., appeared to go little further than to accept the reasoning in *Williams v. Weston Super-Mare*. They held that the power to prohibit was a power to prohibit completely or partially, unconditionally or conditionally and that there was no reason why the condition should not be the consent or licence of a person or body. For these judges it did not matter whether clause 4 of the by-law stated the grounds for refusing consent exhaustively or not.[39] In other words, even if the Board was free to invent its own additional grounds for refusal and might have exercised its power in a capricious or arbitrary way the by-law was still valid.

[36] The Court acted on this view in *De Morgan v. Metropolitan Board of Works* (1880) 5 Q.B.D. 155.

[37] (1907) 98 L.T. 537 affirmed by the Court of Appeal (1910) 103 L.T. 9. In England this case seems to have had little influence. In part this may be because the principal by-law making powers of local authorities have been expressed in general terms rather than in terms of prohibition *e.g.* Local Government Act 1933 (repealed), s. 249; Local Government Act 1972, s. 235. In part it may be because the nearly opposite view expressed in *Parker v. Mayor of Bournemouth* (1902) 86 L.T. 449 has been enforced by refusal of the confirming authority generally to allow by-laws which contain powers of dispensation: see *Halsbury's Laws of England* (4th ed. 1973) XXVIII; para. 1332. For further discussion see n.78. It would have been open to Woolf J. to rely on *Williams v. Weston-Super-Mare* in *R. v. British Airports Authority; ex parte Wheatley*, but he held the power of dispensation valid for other reasons: *supra* nn. 29-33.

[38] (1930) 43 C.L.R. 126.

[39] *Ibid.* 132.

There were traces of this approach before the *Neale Ads* case was decided[40] and some later Australian cases take the same mechanical view.[41]

Even so it would be wrong to suggest that Australian judicial opinion consistently favours the conditional prohibition approach. Two years before the *Neale Ads* case, in *Miller v. City of Brighton*,[42] the Full Court of Victoria had held a wide power of dispensation invalid even though it was created under a power to prohibit. The dispensing power was vested in the council itself but the court pointed out that all the evils likely to arise from the council's acting at chance meetings to grant dispensation would arise where the power was contained in a by-law made under a power of prohibition.[43] The court also noted that the condition argument based on *Williams v. Weston Super Mare* would allow the power of dispensation to be vested in a non-official person. Dixon K.C. who had argued for the validity of the by-law conceded that point.[44]

Then in *Country Roads Board v. Neale Ads*[45] itself, two of the judges, Isaacs[46] and Gavan Duffy JJ.[47] appear to have upheld the validity of the by-law largely on the basis that there was not an arbitrary power of dispensation but a power governed by the standards laid down in the by-law itself. At about the same time as the High Court upheld a power of dispensation on the condition argument the Full Court of Western Australia in *Bailey v. Conole*[48] held invalid, for conferring an unfettered power of dispensation on the Commissioner of Police, traffic regulations made by the Governor-in-Council. *Bailey's* case relied on *Miller v. City of Brighton* and so in terms of the doctrine of precedent must share its fate.[49] But in *Swan Hill Corp. v. Bradbury*,[50] Evatt J. threw some doubt on the extent of the *ratio decidendi* in *Neale Ads* and regarded the case as justifiable only on the basis that the dispensing power was governed by standards.[51] In other words, a power of prohibition does not in itself justify the conferment of an absolute power of dispensation. Another blow to the conditional prohibition approach favoured by the majority in *Neale Ads* was dealt by the High Court itself in *Radio Corp. v. Commonwealth*.[52] A Customs Act conferred a power to prohibit importation. The

[40] *Barrat v. Samuel* (1916) 18 W.A.L.R. 138 *(sub silentio); Fox v. Allchurch* [1926] S.A.S.R. 384; *Neptune Oil v. City of Richmond* [1924] V.L.R. 385; *Bysouth v. City of Northcote* [1924] V.L.R. 587.

[41] *R. v. McLennan; ex parte Carr* (1952) 86 C.L.R. 46; *Padley v. Foley* (1983) 32 S.A.S.R. 122; *Schulz v. Paige* [1961] S.A.S.R. 258; *Potter v. Davis* (1948) 48 S.R. (N.S.W.) 523; *ex parte Cottman; Re McKinnon* (1935) 35 S.R. (N.S.W.) 7.

[42] [1928] V.L.R. 375. See also the *dictum* of Higgins J. in *Melbourne Corp. v. Barry* (1922) 31 C.L.R. 174, 206.

[43] [1928] V.L.R. 375, 382-3.

[44] *Ibid.* 383. Sir Owen Dixon's defeat did not last long. In the *Neale Ads* case, as Dixon J., he was able to participate in a majority judgment which overruled *Miller v. City of Brighton* paying scant attention to the dangers and difficulties noted by the Full Court of Victoria.

[45] (1930) 43 C.L.R. 126.

[46] *Ibid.* 138.

[47] *Ibid.* 139.

[48] (1931) 34 W.A.L.R. 18.

[49] Though it is interesting to note that the other principle in *Bailey v. Conole* relating to bad faith now represents the law despite its apparent conflict for many years with strong dicta in the High Court: see *Re Toohey; ex parte Northern Land Council* (1981) 56 A.L.J.R. 164.

[50] (1937) 56 C.L.R. 746.

[51] *Ibid.* 769-70.

[52] (1938) 59 C.L.R. 170; *Poole v. Wah Min Chan* (1947) 75 C.L.R. 218.

Act went on to provide that the power of prohibition authorised prohibition subject to any specified condition. Acting under these powers the Governor-General made regulations prohibiting the imporation of specified goods without the consent of the Minister. At first sight the Act looks like a partial statutory version of the *Neale Ads* principle, and the majority of the High Court, Latham C.J.[53], Rich and Starke JJ.[54] and McTiernan J.[55] upheld the regulation in part by analogy with the principle in that case. It may then seem paradoxical to suggest that the *Radio Corporation Case* undermines the *Neale Ads* approach, but two features of the more recent case justify this suggestion. First, the majority, though apparently approving *Neale Ads*, went on to consider other factors which tended to justify the delegation including the body given the power, the power itself and the subject matter. If these factors are to be taken into account the conditional prohibition approach loses its force. The fact that the power of dispensation is conferred under a power of prohibition is no longer determinative as it seemed to be for the majority in *Neale Ads* but is merely one of the factors to take into account, not always in favour of the dispensing power as will be seen below.

The other feature of the *Radio Corporation* case which undermines *Neale Ads* is that Dixon and Evatt JJ., in a joint dissenting judgment, refused even to recognise the applicability of the *Neale Ads* principle. It is worthy of remark that these two judges who took such differing views of the conditional prohibition principle were able to produce a joint judgment. But the main point is that, like the majority, they took into account the subject matter of the power in interpreting the apparently clear statutory words. In the event, they came to the opposite conclusion to that of the majority in deciding that in the context of the legislation before them a condition could not take the form of a power of dispensation.[56] Their alternative explanation of the non-applicability of the *Neale Ads* principle — that the condition had to be a 'specified' condition[57] — is utterly unconvincing. The overall result of the case is that, while there was a dissent on the applicability of the relevant principles, all the judges, including Dixon J., moved away from the pure conditional prohibition approach and took other factors into account.

At the state court level, a number of later Australian cases have shown some reluctance to rely on the conditional prohibition principle set out in *Neale Ads*. In *R. v. Shire of Ferntree Gully*,[58] Herring C.J. doubted whether a power to prohibit the erection of buildings would permit a discretionary power of dispensation. In a rather complex case *Conroy v. Shire of Springvale and Noble Park*[59] Gavan Duffy and Sholl JJ. were able to discover an implied power of prohibition and applied the conditional prohibition principle from *Neale Ads* to justify a power of dispensation

[53] *Ibid.* 184.
[54] *Ibid.* 186.
[55] *Ibid.* 193.
[56] *Ibid.* 192.
[57] *Ibid.* 188.
[58] [1946] V.L.R. 501, 509, Herring C.J. based the doubt on the judgment of Evatt J. in *Swan Hill Corp. v. Bradbury supra* n.50.
[59] [1959] V.R. 737. The *ratio* of this case is hard to state because of differing views between Gavan Duffy and Sholl JJ. on a severance point. In substance Herring C.J. dissented on the question of the validity of the dispensing power given to the Council.

conferred on the council itself. However they did not rely exclusively on that principle but took the subject matter into account. Furthermore, they refused to allow the conditional prohibition principle to justify the conferment of a dispensing power on a private body, the Dog Racing Control Board. This is in marked contrast with the concession made, very much against his clients' interest, by Dixon K.C. in *Miller v. City of Brighton*.[60] In *Schofield v. City of Moorabbin*,[61] Menhennitt J. tested the validity of the power of dispensation both by reference to the *Neale Ads* principle and the approach of Evatt J. in *Swan Hill v. Bradbury*. Then in *Wanneroo Shire Council v. BP Australia*[62] and *Re Martin's Application*[63] the courts took a narrow view of express powers of prohibition which enabled them to avoid the application of the *Neale Ads* principle.

The conditional prohibition approach has been rejected by the South African courts. The leading authority is the decision of the Appellate Division in *Arenstein v. Durban Corporation*.[64] A provincial ordinance gave the corporation power to make by-laws regulating, restricting or prohibiting processions. The corporation made a by-law providing that no person should take part in a procession without permission from the mayor. Two dissenting judges, Centlivres C.J. and Fagan J.A. would have followed *Williams v. Weston Super Mare* and held the by-law valid on the ground that there was a power of prohibition. The majority, Greenberg, Schreiner and Hoexter JJ.A., held the by-law invalid. The answer to the conditional prohibition argument which so appealed to the majority of the High Court of Australia in the *Neale Ads Case*[65] was neatly put by Hoexter J.A. who pointed out that the by-law did not prohibit but left the prohibition to the mayor[66] and that the legislation authorised prohibition, not delegation.[67] Greenberg J.A. agreed. The judgment of Schreiner J.A. is more qualified. While he recognised the dangers of leaving the mayor with an unfettered discretion, his judgment turned in part on the view that a provincial legislature, unlike a sovereign one, could not confer a power of prohibition. This would leave the way open for a different conclusion where the power to prohibit is conferred by the United Kingdom or Australian Parliaments, which within their area of power are regarded as sovereign.[68] Nonetheless, the view that a power to prohibit does not permit a prohibition subject to an unfettered power of dispensation has been adopted in later South African and Southern Rhodesian cases.[69]

[60] [1928] V.L.R. 375: *supra* n.44.
[61] [1967] V.R. 22.
[62] [1965] W.A.R. 179.
[63] [1974] Tas. S.R. 43. See also *Cooper v. Bormann* (1980) 22 S.A.S.R. 589 (a more borderline case).
[64] 1952 (1) S.A. 279; some Canadian cases also support this view *e.g. Re Nash* (1873) 33 U.C.R. 181; *Country View Ltd v. City of Dartmouth* (1974) 10 N.S.R. (2d) 361; but contrast *Lamoureux v. City of Beaconsfield* [1978] 1 S.C.R. 134 *supra* n.16.
[65] *Supra* n.38-9.
[66] 1952 (1) S.A. 279, 296.
[67] *Ibid.* 297-8.
[68] *Powell v. Apollo Candle Co.* (1885) 10 App. Cas. 282; *Roche v. Kronheimer* (1921) 29 C.L.R. 329; *Victorian Stevedoring and General Contracting Co. v. Dignan* (1931) 46 C.L.R. 73.
[69] *R. v. Nyandoro* 1959 (1) S.A. 639; *R. v. Sibango* 1957 (4) S.A. 284; *R. v. Tanci* 1958 (4) S.A. 534 (delegation justified but principle recognised).

There is some support for the South African approach in a New Zealand case *Jackson v. Collector of Customs*.[70] The Customs Act gave the Governor-General power to prohibit the importation of goods where necessary in the public interest, for the protection of revenue or the prevention of fraud. The Governor-General made regulations prohibiting imports without the licence of the Minister of Customs. The case contains a number of interesting features. First, it was pointed out by counsel in argument that in *Williams v. Weston Super Mare*,[71] the case which has been so influential on the question of conditional prohibition, the questions of delegation and discrimination were not argued.[72] This observation seems to have carried weight with Callan J., who refused to regard the regulation as a conditional prohibition, but recognised it as an unauthorised attempt to hand over power.[73] Secondly, the learned judge recognised that as the regulations were made by the Governor-General they were, unlike local authority by-laws, under New Zealand law, immune from challenge for unreasonableness.[74] This left the rule against delegation to carry the burden of challenge without the supporting strength of the *Kruse v. Johnson*[75] principle. Thirdly, the Court recognised that the same problem would have arisen if the licensing authority had been the Governor-General in Council rather than the Minister. In that case, the rule against delegation would not have been literally in point because it suggests a case where power has been transferred from one body to another. However an analogous rule which prevents the substitution of one kind of power for another would have been relevant. Whether it would be better to recognise a separate rule or to bring this situation within the rule against delegation will be considered below. The vice of arbitrary power is common to both situations. Finally, the case is weakened by the judge's view that there was not a power of total prohibition and that if there had been such a power the principle in *Neale Ads* would have needed consideration. Nonetheless, the reasoning in the case is very different from that of the majority in *Neale Ads* and suggests a much greater regard for the rule against delegation.

It cannot be claimed, however, that New Zealand law is uniformly unsympathetic to the *Williams/Neale Ads* approach to prohibition and delegation. In *Ideal Laundry Ltd. v. Petone Borough*,[76] North J., one of the judges in the Court of Appeal, detected a power of prohibition and applied the conditional prohibition approach to uphold the validity of the dispensation.[77]

Before the merits of the conditional prohibition approach are examined, it is important to realise that it has, if valid, a potential operation far beyond cases where the power to prohibit is conferred in express terms. It is not necessary that the legislature use words like 'prohibit' or 'prevent'. A power to prohibit can be

[70] [1939] N.Z.L.R. 682. *Staples v. Mayor of Wellington* [1900] N.Z.L.R. 857.
[71] (1908) 98 L.T. 537; (1910) 103 L.T. 9 *supra* n.37.
[72] [1939] N.Z.L.R. 682, 691.
[73] *Ibid.* 707.
[74] *Ibid.* 720.
[75] [1898] 2 Q.B. 91.
[76] [1957] N.Z.L.R. 1038 (N.Z.C.A.). See also *Wilton v. Mount Roskill Borough Council* [1964] N.Z.L.R. 957; *Re Foley and Wallace, ex parte Wallace* (1897) 15 N.Z.L.R. 501; *cf. A.-G. and Robb v. Mount Roskill Borough and Wainwright* [1971] N.Z.L.R. 1030.
[77] [1957] N.Z.L.R. 1038, 1054.

implied where the legislative power is conferred in wide, non-specific terms. Thus, in *Cook v. Buckle*[78] the High Court of Australia held that a power to legislate 'with respect to' contained an implied power to prohibit and in *Potter v. Davis*,[79] the Full Court of New South Wales took the same view of a power of general management. Even where a more specific power apparently falling short of a power of prohibition is conferred, for example, in terms of regulating[80] or governing,[81] the *Neale Ads* principle can operate on the theory that such powers over a given subject matter contain a power of prohibition over a non-substantial part of that subject matter.[82]

The reasons against the grant of wide dispensing powers have been frequently articulated in the cases which have held such powers invalid and in dissenting judgments where such powers have been upheld. Some of those reasons have emerged in the course of the discussion of the authorities examined above. Little, however, has emerged by way of supporting argument by courts which favour the conditional prohibition approach. Once there is a power of prohibition, express or implied, all else is presumed to follow as a matter of inexorable logic. Apart from that, the main argument appears to be that a prohibition subject to a power of dispensation is more beneficial to the public than an absolute prohibition.[83] Professor Pearce puts forward a similar argument, that it is better to have a discretionary power of dispensation to any prohibition so that the prohibition can be lifted where it is desirable to do so.[84] At first sight this is an attractive argument but it assumes that the power will be exercised properly. As stated above this is not an assumption which the law should be prepared to make. Instead of making this assumption, the law should frame its rules so that as far as possible, proper administration is brought about. There will frequently be a number of intermediate positions between absolute prohibition and prohibition coupled with a discretionary power of dispensation. The *Neale Ads* conditional prohibition approach appears to exert no influence on the rule-making body either with regard to the width of the discretion conferred or the type of person or body on whom it is conferred. Where an intermediate position, for example, a discretionary power subject to standards, is possible, the rule against delegation can be used as a vehicle for ensuring that it is adopted. Where no intermediate position is possible, the rule is sufficiently flexible to accommodate the need for proper administration.[85]

In summary, it is suggested that the law should not follow the Anglo-Australian approach represented by such cases as *Williams v. Weston Super Mare*[86] and

[78] (1917) 23 C.L.R. 311. This reasoning would support the applicability of the conditional prohibition approach to by-laws made under the good order and government powers conferred by the English Local Government Act 1972 s. 235. But see n.37.

[79] (1948) 48 S.R. (N.S.W.) 523.

[80] *Ex parte Coffman; Re Mackinnon* (1935) 35 S.R. (N.S.W.) 7.

[81] *Fox v. Allchurch* (1927) S.A.S.R. 328.

[82] *Slattery v. Naylor* (1888) 13 App. Cas. 446.

[83] See *Williams v. Weston Super Mare U.D.C. (1908) 98 L.T. 537; Re Municipal Corporations Act, 1890; ex parte Burford* (1920) S.A.S.R. 54.

[84] *Delegated Legislation* (1977) para. 354; see also De Smith S.A., *Judicial Review of Administrative Action* (4th ed. 1980) 306 for a more hesitant statement of the same argument.

[85] See Part III *infra*.

[86] (1908) 98 L.T. 537; (1910) 103 L.T. 9.

Country Roads Board v. Neale Ads,[87] which seek to justity all sorts of powers of dispensation on the basis that there is merely a conditional prohibition. The law should follow the South African approach represented by *Arenstein v. Durban Corporation*[88] and, subject to the rule against delegation, all dispensation powers whether conferred under a power to prohibit or some less drastic rule-making power. In this way the dangers set out in Part II of this article will be minimised but the by-law may still be upheld if the power of dispensation can be justified under the principles in Part III.

PART II REASONS BEHIND THE RULE AGAINST DELEGATION

Many, though not all, of the cases where a power of dispensation has been held invalid have based the invalidity on the rule against delegation. But the reasoning makes it clear that it is not simply the transfer of power from one person or body to another which is the principal concern. In some cases it is not a consideration at all. In some ways it would be more appropriate to seize upon a wider concept which is capable of encompassing the various concerns which at present are with varying degrees of comfort subsumed under the head of the rule against delegation. One such term might be the 'Rule of Law'. That term is wide enough to cover all the considerations involved but it suffers from two defects. First, it is too imprecise to stand as a legal as opposed to a political concept. Secondly, and related to the first point, it is not a term which the courts, or a majority of them, have in fact used in trying to solve the problems. Accordingly, it is better to accept the rule against delegation as a useful shorthand term to embrace the various objections which can be urged against the conferring of wide powers of dispensation. Those objections will now be described in terms of other legal concepts which in some cases have been seized upon directly as vehicles of control but in most cases have simply been implied in or added to the delegation objection. Not all the objections are present in every case.

1. *Unreasonableness*

While the label attached to the objection may be the rule against delegation, a large number of cases make it clear that the principal concern is unreasonableness in the sense of capricious, arbitrary or improperly discriminatory administration.[89] Some cases indeed place the objection squarely on this ground.[90] In some ways this is a more appropriate way of approaching the problem and deals with at least one kind of case more naturally than the rule against delegation. That kind of case will be considered a little later but first the difficulties with the unreasonableness approach will be examined. The main difficulty is that what is being challenged is

[87] (1930) 43 C.L.R. 126.
[88] 1952 (1) S.A. 279.
[89] See *Kruse v. Johnson* [1898] 2 Q.B. 91.
[90] E.g. *Parker v. Mayor of Bournemouth* (1902) 86 L.T. 449; *Conservators of Mitcham Common v. Cox* [1911] 2 K.B. 854, *Cf. Harris v. Harrison* (1914) 111 L.T. 534; *Re By-Law No. XXIII of the Corporation of the Town of Glenelg; ex parte Madigan* [1927] S.A.S.R. 85; *Colman v. Miller* [1906] V.L.R. 622.

the subordinate legislation conferring the power of dispensation rather than the administration of the power. Where the power is given to an apparently responsible person or body, who in the normal course of things can generally be trusted to act properly, the conferment of power does not look so unreasonable that no reasonable body could confer it.[91]

It is only when attention is focussed on the fact that it is the potential for arbitrary, capricious or discriminatory action which is of concern that the unreasonableness of the measure becomes apparent. A second problem is that unreasonableness is a concept which is used in many branches of the law and one which usually has a wide meaning. Used in its normal way it could become a vehicle whereby the courts would become courts of appeal on the merits over a wide range of administrative, legislative and judicial decisions. To avoid this the courts have kept unreasonableness within narrow bounds.[92] While it is wide enough to cover arbitrary and discriminatory acts, it has nonetheless become something of a term of art. Challenge under the rule against delegation to some extent avoids these problems since that rule can be used to focus attention on the potential for rather than the actuality of abuse and does not run into the problem of use of a term which may be given too wide a meaning. In most cases where the danger of arbitrary action in this area arises, there will in fact be a delegation. This is manifest where the delegation is by a body like a local council to a committee or officer or a private individual or body. It is also reasonably clear when the delegation is by a body composed in a special way or subject to a special procedure for the purpose of legislating to that same body composed differently or subject to a different procedure.[93] The notion of improper delegation becomes stretched, however, where the rule-making body confers a power of dispensation upon itself and where there is no distinction between the composition or procedure of that body for rule-making and for individual decisions. This was the position in *Country Roads Board v. Neale Ads*,[94] a point made by the majority,[95] though in the event nothing turned on it. Clearly, attack for unlawful delegation looks a little artificial in such cases unless the concept of unlawful delegation is stretched to cover not only transfer of power from one person or body to another but substitution of one kind of power, a power to decide individual cases as they arise, for another, a legislative or rule-making power. It is in cases like this that challenge under a broad head like 'Rule of Law' or under 'unreasonableness' would look more natural, but as has been seen those approaches have their own difficulties. The two remaining possibilities seem to be to accept that the rule against delegation should be stretched to cover the situation or to recognise the existence of an analogous rule, which shares many of the features of the rule against delegation. Such a rule could be called the rule against substitution. On the whole the former

[91] *Cf. Rider v. Phillips* (1884) 10 V.L.R. (L) 147.

[92] *Kruse v. Johnson* [1898] 2 Q.B. 91; *Associated Provincial Picture Houses Ltd v. Wednesbury Corp.* [1948] 1 K.B. 223; *Secretary of State for Education v. Tameside Metropolitan Borough Council* [1977] A.C. 1014; *Chief Constable of North Wales Police v. Evans* [1982] 3 All E.R. 141.

[93] As observed by Higgins J. In *Melbourne Corp. v. Barry* (1922) 31 C.L.R. 174, 206.

[94] (1930) 43 C.L.R. 126.

[95] *Ibid.* 135.

solution is the better, since it is already apparent that the rule against delegation is not solely concerned with preventing the transfer of power from one to another. Whatever the name the courts clearly recognise the existence of such a rule.[96]

2. *Uncertainty*

Another concern lying behind the rule against delegation in this area is the uncertainty that the conferment of a wide power of dispensation creates. As with unreasonableness this concern is not so much directed to the transfer of power from one to another but the replacement of a rule-making function with an administrative one. If, having a power to regulate or prohibit or to make rules under some other formulation, the authority draws up detailed rules, the public affected know where they stand. If the matter is dealt with by a blanket prohibition subject to a power of dispensation the legislation itself is almost useless as a guide to conduct. This has been frequently recognised and in some cases has been made the, or a direct basis for, decision.[97] Again this is a perfectly valid concern, but there are difficulties with the concept of uncertainty. It is unclear how far uncertainty is a ground for holding delegated legislation invalid. Where the uncertainty takes the form of the use of vague words there is a growing body of judicial opinion that the legislation is not to be held invalid but merely interpreted strictly.[98] In the case of the conferment of a power of dispensation the uncertainty is of a different kind. It is an uncertainty which arises not from any doubt as to the meaning of words but from the fact that one must travel beyond the legislation itself — to the person with the dispensing power — to see the full picture. This kind of uncertainty should *prima facie* render the delegated legislation invalid. But as the uncertainty arises from the delegation of a dispensing power (or the substitution of a power to decide on the merits for a rule-making power) it seems more appropriate to regard this as the basis for challenge.

3. *Transfer of power*

The most direct concern of the rule against delegation is to prevent a person or body entrusted with a power from transferring that power to another.[99] This aspect of the rule is most apparent when an attempt is made to delegate the power directly, for example, when a rule-maker delegates to another the actual making of rules. Where the rule-maker makes a general rule subject to a power of dispensation the

[96] For example: *Jackson v. Collector of Customs* [1939] N.Z.L.R. 682; *Canadian Institute of Public Real Estate Agencies v. City of Toronto* (1979) 103 D.L.R. (3d) 226; *Brant Dairy v. Milk Commission of Ontario* (1972) 30 D.L.R. (3d) 559; *Verdun v. Sun Oil Co. Ltd.* (1952) 1 D.L.R. 529 *Cf. Re C.R.T.C. and C.T.V.* unrep. in Evans *et al.*, *Administrative Law Text and Materials* Supp. (1982).

[97] *E.g. Miller v. City of Brighton* [1928] V.L.R. 375; *Bailey v. Conole* (1931) 34 W.A.L.R. 18; *Benoni Town Council v. Mallela* 1930 T.P.D. 671; *Barker v. Carr* (1957) 59 W.A.L.R. 7; *Re By-Law XXIII of Glenelg Corp.* [1927] S.A.S.R. 85; *Colman v. Miller* [1906] V.L.R. 622.

[98] See Sykes, Lanham and Tracey, *General Principles of Administrative Law* (2nd ed. 1984) Chap. 12.

[99] See *e.g. Re By-Law No. 92, Winnepeg Beach* [1919] 3 W.W.R. 696 (Can.); *Country View Ltd v. City of Dartmouth* (1974) 10 N.S.R. (2d) 361 (Can.).

focus is more on the potential for arbitrariness and secrecy than on transfer. Nonetheless, except where the power of dispensation is vested by the rule-maker upon itself, there is an element of possible improper transfer which is appropriately made subject to control by the rule against delegation.

It is then perhaps a coincidence that the rule against delegation has come to assume such prominence in an area where it is the potential for arbitrary and secret action which is of the greater concern. In the rest of this article the main reference will be to the rule against delegation, but, except where special considerations apply, the same qualifications are relevant even where the 'delegation' is to the delegator himself.

PART III QUALIFICATIONS TO THE RULE AGAINST DELEGATION

The rule against delegation is not absolute. If it were, governmental administration would become impossible. There have been many cases in which the rule against delegation has been recognised but held inapplicable because of some exception or qualification. Various tests have been devised to mark the line between unlawful and permissible delegation. It is not proposed to attempt a full review of the scope of the rule against delegation but an outline of the approaches most relevant in the context of dispensation will be given. Two main approaches have been adopted to place limits on the operation of the rule against delegation in this context. They may for convenience be called the conferment approach and the multiple factors approach. They will be examined in turn.

1. *The Conferment Approach*

This approach is heavily dependent on the classification of powers. It is quite clear that when Parliament delegates power to a subordinate legislator over certain conduct, it does not expect that legislator to exercise the whole of the power so delegated. The legislator is expected to make rules with respect to the conduct concerned. It is not expected to administer or enforce those rules. In some cases indeed it would be quite improper for the subordinate legislator to do so. Take the case of a local authority with power to make a by-law prohibiting processions in the streets. If the local authority makes a by-law prohibiting processions in the streets it thereby does three things: first it makes a rule, so exercising the legislative power conferred upon it. Secondly, it confers upon the police or other prosecutor the power to prosecute for the offence (in terms of classification of powers, an administrative power). Thirdly, it confers upon the relevant court a judicial power to try and punish persons who commit the offence. No one suggests that the local authority should pass a by-law to prosecute each individual suspect, much less that it should attempt to determine guilt and mete out punishment by trying individual cases under its by-law making procedures. It is clear than that the rule against delegation does not in itself prevent the conferment of administrative or judicial powers (though it may prevent their conferment on inappropriate bodies).[1]

[1] See *Lunghi v. Minister for Education* [1982] W.A.R. 227.

The notion of legitimate conferment has sometimes been used to uphold delegations of dispensing powers. In *Hookings v. Director of Civil Aviation*[2] the New Zealand Governor-General made a regulation prohibiting the towing of aircraft by other aircraft except with the permission of the Director of Civil Aviation. The regulation was challenged on the ground that it illegally delegated legislative power to the Director. With some hesitation, Turner J. held that the Governor-General had not delegated legislative power but had merely placed administrative power in the hands of the Director. At first sight this seems an attractive solution to the problem. But the difficulty is that it gives no clear test for deciding what is legislative and what administrative. In one sense every dispensing power is administrative in that it is expected to be operated on a case by case basis. But in another sense it is legislative since it can be operated under rules or practices which fundamentally affect the scope of the prohibition. Those rules may be capricious and secret with the result that the various dangers which are the concern of the rule against delegation in this area are fully present. Unless some test is devised for marking off the legislative from the administrative in this context the conferment principle is merely an empty shell.

2. *The Multiple Factors Approach*

In *Swan Hill Corp. v. Bradbury*[3] Evatt J. pointed out that the legality of dispensing powers could not be determined by reference to whether the subordinate legislator had a power of prohibition or some lesser power, but had to be determined by reference to three factors: the body entrusted with the power, the power itself and the subject matter of the power.[4] While this provides a useful corrective to the blanket conditional prohibition approach it serves only as a starting point for the proper development of this branch of the law. Despite words of caution expressed by Evatt J. himself it is desirable to supplement or expand the list of relevant factors. There is need for caution but that need is met by recognising that not all the factors will be present in every case and that in general none of them in itself necessarily provides a clear cut answer. To allow caution to go any further and to forbid explanation of the factors listed or to refuse to add to the list is to stand in the way of any orderly development of the law. What follows does not claim to be an exhaustive list of factors and no closed list could be drawn up in any case. However some of the factors which courts have acted on or which otherwise seem relevant will be identified.

A. The Power Itself

It is clear that, in every case, attention must be paid to the terms in which the rule-making power is conferred. It may be that the statute, in creating a legislative power over certain subject matter, expressly authorises the conferment of a power

[2] [1957] N.Z.L.R. 929. See also *R. v. Lampe; ex parte Maddolozzo* (1963) 5 F.L.R. 160.
[3] (1937) 56 C.L.R. 746.
[4] *Ibid.* 766.

of dispensation. If Parliament expresses itself clearly enough there is no need to look further, but there may well be room for doubt as to what kind of dispensing power was intended and then other factors become material. The *Radio Corporation* case[5] examined above[6] provides an illustration of the point.

Instead of attaching authority to confer a power of dispensation to a particular rule-making power, Parliament may confer a general power to permit dispensation. Such powers may or may not be determinative of the issue. In some cases such clauses have been given a narrow construction. In *Swan Hill Corp. v. Bradbury*,[7] a Victorian statutory provision which permitted the council to leave any matter to be determined applied, dispensed with or regulated by the council or an officer was held not to authorise a discretionary power of dispensation. On the other hand in *Stevens v. Perrett*,[8] the High Court of Australia (*obiter*) took the view that a similarly worded Queensland provision saved a dispensing power which would otherwise have been regarded as invalid. A similar conflict of opinion exists over section 13 of the New Zealand By-Laws Act 1910 which provides that no by-law shall be invalid because it requires anything to be approved by the local authority, its officer or servant or any other person unless the discretion is so great as to be unreasonable. In *Stanley v. Scott*[9] an unfettered power of dispensation conferred by by-law on the Council itself was held to be saved by the section. Reed J. met the unreasonableness argument by holding that it had to be assumed that the Council would act reasonably.[10] This assumption undermines the reasonableness requirement and is as much out of place here as it is at common law.[11] Later New Zealand cases have treated the provision with greater caution. In *Hanna v. Auckland City Corp.*[12] a discretionary dispensing power vested in a city engineer was held to be unreasonable and thus outside the protection of section 13. In *Chandler v. Hawkes Bay County*[13] a wide power of dispensation was vested in the Council itself. It was held that section 13 did not save it from invalidity.

Other kinds of general sections conferring apparently wide powers of delegation have also been received with caution by the courts.[14] It is submitted that this caution is justified and that general clauses permitting dispensing powers or delegation should be interpreted as saving powers of dispensation in borderline cases rather than authorising full scale delegation of legislative authority by the device of prohibitions subject to dispensation.[15]

[5] (1938) 59 C.L.R. 170.
[6] Nn. 52-7
[7] (1937) 56 C.L.R. 746; see also *Dewar v. Shire of Braybrook* [1926] V.L.R. 201.
[8] (1935) 53 C.L.R. 449, 461; see also *Cook v. Buckle* (1917) 23 C.L.R. 311.
[9] [1935] N.Z.L.R. (S) 15. See also *Bremner v. Ruddenblau* [1919] N.Z.L.R. 444.
[10] [1935] N.Z.L.R. (S) 15, 16.
[11] See the discussion of *Rider v. Phillips supra* n. 10.
[12] [1945] N.Z.L.R. 622.
[13] [1961] N.Z.L.R. 746.
[14] See *Citimakers v. Sandton Town Council* 1977 (4) S.A. 959; *H.B. Milk Producers v. New Zealand Milk Board* [1961] N.Z.L.R. 218; see also Aikman C. C., 'Subdelegation of the Legislative Power' (1960) 3 *Victoria University of Wellington Law Review* 69, 101-4; *Leather v. Doolittle Co.* [1928] 2 D.L.R. 805.
[15] Apparently wide powers of delegation are conferred on local authorities in England by s. 101 of the Local Government Act 1972. Garner J. F., *Administrative Law* (5th ed. 1979) 413 suggests that this section should be used for routine and detailed issues rather than matters of major policy.

B. The body entrusted with the power

Even though this is one of the factors expressly mentioned by Evatt J. in *Swan Hill Corp. v. Bradbury*[16] little attention has been paid to the weight to be given to this matter. Where the body entrusted with the rule making power is a large deliberative body which acts formally and meets relatively infrequently it would be appropriate to vest the power of dispensation, if such a power is justifiable at all, in an official, at least where decisions must be taken quickly.

But in general the nature of the body in which the rule-making power is vested is not likely to be very material since in the area of dispensation powers it is the potential for arbitrary and secret decision-making which is the primary concern and this potential exists whatever the nature of the subordinate legislator.

C. The subject matter of the power

There is much more recognition in the cases of the importance of this factor. In general, the assumption seems to be that the more objectionable the conduct to be brought under control, the more easy it is to justify a wide power of dispensation.[17] So in *Melbourne Corporation v. Barry*[18] where processions were prohibited subject to a dispensing power, Isaacs J. observed[19] that a procession is not necessarily unlawful and is not to be regarded as a wild beast which needs strict control. The by-law was held invalid. Similarly in *Swan Hill v. Bradbury*,[20] Rich J. pointed out that the subject matter of the by-law was not some evil practice or noxious condition, pest or pestilence: it was one of the essential services of human life — the provision of habitation. Seen in this perspective it may be that the decision in *Country Roads Board v. Neale Ads*[21] can in part be explained by the less kindly view taken by the Court to advertising hoardings. Certainly the relative merits of residences and billboards were made the explicit ground on which the Supreme Court of the United States in *Washington; ex rel Seattle Title Trust v. Roberge*[22] distinguished its earlier decision in *Thomas Cusack v. City of Chicago*,[23] though such a distinction may not appeal to everyone.[24]

Another case where the nature of the evil to be overcome was stressed was *Beetham v. Tremearne*,[25] where a by-law limiting the movement of stock without the permission of an inspector was regarded as valid partly because it was designed to stamp out tick pest.[26]

[16] (1937) 56 C.L.R. 746, 766.
[17] See Dixon J. in *Swan Hill v. Bradbury* (1937) 56 C.L.R. 746, 762.
[18] (1922) 31 C.L.R. 174.
[19] *Ibid.* 196.
[20] (1937) 56 C.L.R. 746, 755-6.
[21] (1930) 43 C.L.R. 126.
[22] (1928) 278 U.S. 116.
[23] (1916) 242 U.S. 526.
[24] Liebmann G. W., 'Delegation to Private Parties in American Constitutional Law', (1975) 50 *Indiana Law Journal* 650, 666.
[25] (1905) 2 C.L.R. 582.
[26] See also *Lewis v. R.* 1910 T.S. 413 (mining under buildings); *Sutton Harbour Improvement Co. v. Foster* (1920) 89 L.J. Ch. 540 (gutting fish).

It is perhaps pointless to try to multiply examples. The principle seems clear enough though differing opinions may be held as to what is objectionable. However, there may be a cut-off point where the conduct in question is so anti-social that far from supporting a dispensing power it argues against it altogether. For example, an authority with power to prohibit spitting or expectoration in the streets may or may not wish to take advantage of that power by prohibiting such conduct entirely. However it seems unlikely that the courts would look with gladness upon a by-law which prohibited such conduct unless performed with the consent of the council, the town clerk or for that matter anyone at all.

D. The need for expertise

A number of cases recognise that the question whether to dispense with a prohibition may require special skill or expertise. Where that is the case, the conferment of dispensing power on a person with the requisite qualification is likely to be held valid. In a South African case *Lewis v. R.*,[27] regulations prohibited mining under buildings except with the consent of the inspector of mines. The regulations were challenged on the ground that they did not set out the conditions under which the inspector should grant or refuse consent. Innes C.J. held that the regulations were valid. However carefully drawn up, regulations would not guarantee completely that in a given situation the undermining would be entirely safe so that it was safer to leave discretion to a skilled and competent official. Other cases not explicitly decided on this basis could have justified the delegation on the grounds of the need for expertise.[28]

E. The need for an on-the-spot decision

In the leading South African case on dispensation, *Arenstein v. Durban Corp.*,[29] Hoexter J. recognised that a discretionary power of dispensation can lawfully be given to an official where there is need to make an on-the-spot decision. A delegation, though not in the form of a power of dispensation was upheld in *Farah v. Johannesburg Municipality*.[30] There, police constables were empowered by by-law to order any hawker who appeared to be loitering to move on. It was argued that the by-law was invalid because it gave arbitrary power to the constables. The Court upheld the by-law on the ground that it gave authority to an official on-the-spot to decide a question which needed an immediate decision. The principle has been recognised in the case of police officers, though not articulated in quite the same way by the High Court of Australia in *Melbourne Corp. v. Barry*.[31] Higgins J., in holding the power of dispensation in that case to be invalid, nonetheless pointed out that a by-law passed under a power to regulate traffic

[27] 1910 T.S. 413; see also *State v. Antrim Court Pty. Ltd.* 1962 (4) S.A. 405, 407; Contrast *Re Minto Construction Ltd* (1979) 96 D.L.R. (3d). 491.

[28] *E.g. R. v. House of Stein* (1964) 44 D.L.R. (2d) 103 (B.C.C.A.) (safety standards); *Long v. Knowles* [1968] Tas. S.R. 46 (appointment of testers by Professor of Engineering).

[29] 1952 (1) S.A. 279, 297; see also *State v. Antrim* 1962 (4) S.A. 405, 407.

[30] 1928 T.P.D. 169.

[31] (1922) 31 C.L.R. 174.

might lawfully empower policemen to direct traffic.[32] Similarly, the decision in *Kruse v. Johnson*[33] which upheld the delegation to a police officer of a power to forbid singing in the vicinity of a dwelling house, could have been based upon this principle.

While police officers are the most obvious kind official in whom on-the-spot powers have to be vested, the principle is not limited to members of the police force. In *Smith v. Leslie*[34] a by-law prohibited carters from approaching passenger vessels at certain times without the permission of an officer of the Marine Board. Crisp J. held that the by-law was valid. Similarly in a Canadian Case, *Russell v. Toronto Corp.*,[35] a council with power to purchase lands was held lawfully to have delegated to its assessment officer a discretion on whether to make a purchase. And in *Taylor v. Peoples Loan Corporation*[36] the Supreme Court of Canada recognised *sub silentio* that an authority might lawfully delegate to an inspector of buildings power to decide whether a building was in a dangerous condition.

F. The narrowness of the power delegated

It is one thing to delegate the whole or substantially the whole of a head of power. It is another to delegate discretion over a small part of that power. The narrower the area over which discretion has been delegated, the less the delegation is open to objection. The point is well illustrated by a pair of cases involving a golf club on Mitcham Common. In *Conservators of Mitcham Common v. Cox*,[37] a by-law giving power to license inhabitants of Mitcham to play golf on the golf course was held invalid. When the by-law was changed to allow a caddy master to refuse to supply a caddy and thus effectively prohibit a member of the public from playing golf for a short period of time the by-law was held valid.[38] This principle was relied on expressly in a South African Case *R. v. Tanci*.[39] Regulations prohibited meetings of more than 10 natives without the approval of the Secretary of Native Affairs. The same regulation however exempted seven kinds of meeting. The regulations were challenged on the ground that they delegated absolute power to the Secretary. The Court held that when the exemptions were taken into account the prohibition operated over a circumscribed field and so the regulations were not invalid on the ground of unlawful delegation. Again, in *Mackay v. Adams*[40] regulations which prescribed a speed limit but conferred power to increase the limit by up to 50 *per cent* were held valid. The Court observed that if the authority had been given power to waive the limit completely, the regulations would have been invalid.

[32] *Ibid.* 209.

[33] [1898] 2 Q.B. 91. Contrast the approach of Mathew J. who dissented. Contrast also *Alty v. Farrell* [1896] 1 Q.B. 636 which impliedly rejected this principle but which was in effect overruled by *Kruse v. Johnson*.

[34] (1914) 10 Tas. L.R. 111.

[35] (1907) 15 O.L.R. 484 (Reversed on other grounds); [1908] A.C. 493.

[36] [1930] 2 D.L.R. 891. The case is also an example of the expertise principle in D above.

[37] [1911] 2 K.B. 854.

[38] *Harris v. Harrison* (1914) 111 L.T. 534.

[39] 1958 (4) S.A. 534.

[40] [1926] N.Z.L.R. 518 following *Piper v. Chappell* (1845) 14 M and W 625; 153 E.R. 625. *Goldberg v. Law Institute of Victoria* [1972] V.R. 605 could be rationalized in part on this basis.

G. Property and other Private Law Rights

A private owner of property has all sorts of arbitrary powers the exercise of which cannot be challenged in the courts. Thus landowners can act in the most blatantly discriminatory fashion in deciding whom to invite on to their land. Where a public authority owns property, the courts have sometimes accepted the conferment of arbitrary power as an exercise of proprietary rights. A strong case is *Sutton Harbour Improvement Co. v. Foster*.[41] The company had power to make by-laws for regulating its market. It made a by-law prohibiting the gutting of fish except with the leave of the wharf-master. One difficulty was that wharf-master was defined to include assistants as well as the master himself. However the Court upheld the by-law, in part because the gutting of fish could become a nuisance and in part because the company had proprietary rights and was under no obligation to permit gutting at all.

It will not always be possible to justify a wide dispensing power on the basis of proprietary rights. In *Colman v. Miller*,[42] a statute vested a racecourse in the chairman of a committee and gave the committee power to regulate admission to the racing club. A committee by-law prohibited the carrying on of bookmaking on the racecourse without the approval of the committee. The chairman sought to justify the by-law on the ground that he was owner of the racecourse. The Court accepted that that would have been a good argument had the racecourse been a private one, but held that as the chairman held the property for the purpose of a public racecourse the argument failed.

H. Internal appeals

One factor which may affect the legality of a power of dispensation is the provision of a right of appeal. Whether such provision will save an otherwise invalid power of dispensation will depend upon the nature of the objection to that power. If the only basis for objection is that the person in whom the power is vested is not a suitable donee of the power, the provision of an appeal may induce the court to uphold the power. Thus in *Elves v. McCallum and the City of Edmonton*[43] a by-law provided that no licence to run a shooting gallery should be issued unless the applicant obtained a favourable character report from the Chief of Police. The by-law also provided an appeal to the City Commissioners against refusal to issue the licence. The Court treated the right of appeal as an appeal against the decision of the Chief of Police and upheld the by-law on this basis.

On the other hand, where the objection to the power of dispensation is not the unsuitability of the donee of the power but the fact that the power is unfettered and open to abuse, the provision of an appeal will not save the legislation. In *Benoni*

[41] (1920) 89 L.J. Ch. 540; see also *Ismail v. Durban City Council* 1973 (2) S.A. 362 (leasing power); *Melbourne Corp. v. Barry* (1922) 31 C.L.R. 174, 198; *R. v. Sokkies* 1916 T.P.D. 482 (freedom of contract).

[42] [1906] V.L.R. 622.

[43] (1916) 28 D.L.R. 631. See also *R. v. Greater London Council; ex parte Blackburn* [1976] 1 W.L.R. 550.

Town Council v. Mallela,[44] a regulation prohibited the occupation of any stand without a site permit signed by the superintendent of locations. A further regulation gave a right of appeal from the superintendent to a magistrate. The Court held that the power given to the superintendent was invalid because the regulation gave no guidance on how the discretion should be exercised, and that the provision of a right of appeal to the magistrate, whose powers were similarly unfettered, did not save the regulation. In this latter kind of case the legislation would be equally invalid if the appellate body were the subordinate legislator itself. In *Forst v. City of Toronto*,[45] Middleton J. pointed out that when a council is given power to regulate, it cannot confer an arbitrary power of dispensation upon itself, much less on an officer. It follows that if such power is conferred on an officer subject to an appeal to the council itself, the appeal will not save the delegation.

I. The Provision of standards

A vast number of cases recognise that delegated legislation conferring a power of dispensation is valid if the legislation subjects that power to sufficiently defined standards, guidelines, rules or conditions. Thus, in *Brunswick Corp. v. Stewart*,[46] a building by-law contained detailed rules relating to specification and plans to be provided by applicants for a permit. The by-law also prohibited the erection of any building without the consent of the municipal surveyor. The High Court held that this latter provision did not confer an arbitrary power on the surveyor but required him to issue a permit if the other conditions in the by-law were satisfied. On this interpretation the by-law was held valid. It seems implicit in the proposition that a power of dispensation subject to standards can lawfully be conferred that a power to determine whether facts exist to meet the standards laid down is lawful. A number of Canadian cases, however, seem to regard the conferring of a power to decide facts as an improper delegation. A clear case is *Re Pride Cleaners and Dyers Ltd.*[47] A by-law prohibited noise between certain hours but empowered the mayor to give consent in writing if it was impracticable or impossible to comply with the by-law. The Court held that this part of the by-law was invalid because it delegated a judicial or discretionary power to the mayor. But this seems to misconceive the purpose of the rule against delegation. If the language of classification of powers is used it is certainly true, as a general rule, that a person given judicial powers cannot delegate the power to judge, just as it is true that a person

[44] 1930 T.P.D. 671.

[45] (1923) 54 O.L.R. 256, 278. The case involved an action for damages and it was not necessary to determine the validity of the by-law in question. But see the rather different analysis of the by-law by Hodgins J.A. at p.275.

[46] (1941) 65 C.L.R 88; see also *Country Roads Board v. Neale Ads* (1930) 43 C.L.R. 126, 138, 139 (Isaacs and Gavan Duffy JJ.); *Swan Hill Corp. v. Bradbury* (1937) 56 C.L.R. 746, 770 (Evatt J.); *Beetham v. Tramearne* (1905) 2 C.L.R. 582; *R. v. Podbrey* 1948 (2) S.A. 181; *R. v. Joy Oil Co. Ltd.* [1951] 1 D.L.R. 632. Sometimes the standards are implied by the legislation rather than expressed. See the explanation of *Hookings v. Director of Civil Aviation* [1957] N.Z.L.R. 929 in *Transport Ministry v. Alexander* [1977] 1 N.Z.L.R. 58; see also *Ex parte Kaye* (1910) 10 S.R. (N.S.W.) 350; *Padley v. Foley* (1982) 32 S.A.S.R. 122, 164 (*per* King C.J.).

[47] (1964) 50 W.W.R. 645; see also *Re Kirkpatrick* (1980) 119 D.L.R. (3d) 598; *Bridge v. R.* [1953] 1 D.L.R. 305. Contrast the South African case *Shangase v. Minister of Native Affairs* 1958 (4) S.A. 554.

with legislative powers cannot delegate the power to make rules. But it does not follow that the legislator may not by making rules confer on another the power to judge. If the problem is seen in terms of discretion rather than classification, it is not true that discretion can never be delegated. What the courts are trying to achieve is a measure of control over the discretion, not its elimination. How great the measure of that control will be will depend on how far the courts are prepared to go in reviewing questions of fact or sufficiency of evidence, but at the least if standards are laid down the courts can ensure that it is those standards and not other, self-made, ones which the donee of the power applies.

J. The need for flexibility

In some cases the subject matter to be regulated may be so intractable or give rise to issues of such complexity that it is not possible to lay down standards. In *Shire of Tungamah v. Merrett*,[48] a by-law prohibited the use on roads of vehicles with spikes on their wheels except with the consent of an officer of the council. The High Court of Australia observed that the variations of soil in Australia were infinite and that in some parts of the country the use of heavy traction engines on roads could practically destroy them so that it was perfectly reasonable for the council to prohibit such use without consent.[49] In *Levingston v. Shire of Heidelberg*,[50] a by-law prohibited the erection of hoardings except with the consent of the council. Hodge J. said that there might be cases in which it would be very easy to frame regulations and others where it would be almost impossible to do so.[51] The learned judge admitted that he had been unable to draft a suitable regulation and held that by-law valid.[52] An excellent discussion of the need for flexibility is contained in a South African case, *Ex parte Minister of Bantu Administration; In Re Jili v. Duma*.[53] Native customary rules of succession differed from the common law. In order to meet the problem that different natives were at different stages of detribalisation, regulations provided the Minister with a residual discretion to decide on the appropriate method of succession where the situation did not fall within any of the more specific rules. The Appellate Division held the conferment of discretion valid. Whether in any given case there is a need for flexibility which justifies the conferment of a wide power of dispensation is a matter of judgment for the reviewing court. So in *Arenstein v. Durban Corp.*,[54] the Appellate Division was able to point out that it had been found possible to draw up detailed rules governing processions in other by-laws.[55] What may need to be controlled in one generation by wide discretion in another may be regarded as

[48] (1912) 15 C.L.R. 407.
[49] *Ibid.* 414. See also *Crowe v. Commonwealth* (1935) 54 C.L.R. 69.
[50] [1917] V.L.R. 263.
[51] *Ibid.* 275.
[52] *Ibid.* 276. See also Hood J. at p. 277; Madden C.J. agreed on other grounds. See also *Bennett v. Daniels* (1912) 12 S.R. (N.S.W.) 134; *ex parte Bolton* (1913) 13 S.R. (N.S.W.) 379; *Schofield v. City of Moorabbin* [1967] V.R. 22; *Fox v. Allchurch* [1927] S.A.S.R. 328.
[53] 1960 (1) S.A. 1. This case is not a prohibition and dispensation case but on this point it confronts the same kind of difficulty. See also *State v. Antrim Court Pty Ltd* 1962 (4) S.A. 405; *Attorney-General v. Cyril Anderson Investments* 1965 (4) S.A. 628.
[54] 1952 (1) S.A. 279.
[55] *Ibid.* 297.

susceptible to standards. It is likely that, if the court in *Levingston v. Shire of Heidelberg* had been transported forward through time a couple of decades, Hodges J. would have felt less difficulty[56] in framing a regulation.

It is, however, one thing to recognise that it is a matter of judgment for the court as to whether it is possible to draw up detailed rules or standards. It is another thing to insist that discretion may not be conferred even where the drafting of such standards is not possible. A Canadian and a New Zealand case seem to have gone too far in this direction. In *Canadian Institute of Public Real Estate Companies v. City of Toronto*,[57] the council had power to enact a planning by-law prohibiting or requiring the maintenance of certain facilities. Instead of enacting rules the council conferred on itself a discretion to deal with each problem as it arose. The Divisional Court and Court of Appeal had upheld the by-law on the ground that the great variety of conditions existing within the area covered by the by-law meant that, before a specific by-law could have been drafted, conditions would have changed making the by-law obsolete. The Supreme Court of Canada was unmoved by these considerations and held the by-law invalid, observing that if the council found it impossible to draw up a by-law it should seek further powers from the legislature.[58] A similar view was taken in *Jackson v. Collector of Customs*.[59] It was argued that a wide power of dispensation was necessary because it was impossible to draw up detailed rules. Callan J., in holding the legislation invalid, observed that if it was impossible to draw up rules the appropriate course was for the subordinate legislators to seek extended powers.

It is submitted that this approach is unrealistic. If Parliament wishes to bring certain kinds of activity under control it is to be assumed that it confers on its delegate the duty of doing so in the most effective way possible consistently with justice. If it is not possible to draw up rules when the problem is first approached then there is an implied power to proceed on a case by case basis. In course of time policies may be formulated and adopted by the delegate or by other delegates dealing with a similar problem. Once the situation becomes one in which it is possible to lay down standards, then the argument of impossibility disappears. Until that position is reached it is necessary to accept the risks which the rule against delegation is designed to minimise.

CONCLUSION

A rulemaker should make rules rather than confer discretion. One manifestation of this principle is the suspicion with which the courts greet discretionary powers of dispensation. Such powers, in substance, amount to a delegation of the power to rewrite legislation or to legislate in a discriminatory, informal and secret way even if there is no actual delegation to another body. The evils are there, whether the

[56] In the light of the discussion in *Country Roads Board v. Neale Ads Pty Ltd* (1930) 43 C.L.R. 126 and *Swan Hill Corp. v. Bradbury* (1937) 56 C.L.R. 746.
[57] (1979) 103 D.L.R. (3d) 226.
[58] *Ibid.* 232.
[59] [1939] N.Z.L.R. 682.

rule making power is expressed in wide or narrow terms, in terms of prohibition, prevention, regulation, control, restraint or any other terms. The safeguard is there, whether expressed in terms of the rule against delegation, the rule of law, reasonableness or certainty. The element of realism necessary to keep the wheels of government turning is available in the recognition that the safeguard, however expressed, allows that discretion may sometimes have to be conferred. What is important is not the labels, but that the dangers should be recognised and the safeguards, where appropriate, and only where appropriate, applied.