

tional wisdom. But in one of the recent marketing cases prior to the *Barley* case, the High Court upheld the validity of the Commonwealth-State wheat marketing scheme, notwithstanding that it totally prohibited private trading in wheat.⁵² Without going into the reasons for that decision, and without speculating about whether it will survive further attack,⁵³ the point is that the invalidity of the barley scheme could not merely be assumed, even if counsel on both sides failed to argue the point. The High Court here failed to discharge its responsibility.⁵⁴

There is some evidence of a trend in recent cases to narrowing the meaning of freedom in section 92 in such a way that the emphasis is on securing the freedom of interstate trade from measures which are discriminatory or protectionist by favouring the traders of one State over the traders of another, rather than on giving individuals the right to trade interstate free of certain restrictions whether those restrictions are protectionist or not.⁵⁵ Mason J. is one justice who has expressed the desire, if not the intention, to move in that direction.⁵⁶ The *Barley* case is silent on this question, but is not inconsistent with the trend, such as it is. This is because a State marketing scheme is obviously more likely to be, and has more potential to be, protectionist in its operation than a national scheme such as the wheat scheme, and so the Court found ten years ago in relation to the New South Wales milk marketing scheme.⁵⁷ Whether the barley scheme is protectionist in any relevant sense was not discussed, and no view is offered here. But it is regrettable that the validity or otherwise of the scheme should have been decided in such an offhand manner, thus leaving its place in the never-ending story of section 92 to be determined by retrospective explanation.

MICHAEL COPER

FOLEY v. PADLEY¹

Administrative law — Delegated legislation — By-law — Validity Power to make by-laws where Council of certain opinion — Whether opinion reasonable — By-law prohibiting activity without Council permission — Whether a deferral of formation of necessary opinion — Whether an improper delegation to Council in ordinary meeting — Rundle Street Mall Act 1975 (S.A.) ss. 3, 11(1)(a), Local Government Act 1934 (S.A.) ss. 668-70.

THE FACTS

S. 11(1)(a) of the Rundle Street Mall Act 1975 (S.A.) (The Act) provides that the Council of the Corporation of the City of Adelaide (the Council) may make by-laws —

regulating, controlling or prohibiting any activity in the Mall or any activity in the vicinity of the Mall that is in the opinion of the Council, likely to affect the role or enjoyment of the Mall.

The Council, adopting recommendations made by a Committee of the Council, and pursuant to s. 11(1)(a) and the Local Government Act (S.A.) 1934-1978 passed By-law No. 8 in the following terms:

⁵² The *Clark King* case, *supra* n.43.

⁵³ See Coper, M., *op. cit. supra* n.17 at 277.

⁵⁴ The same Act had been held invalid in the *Peanut* case (*supra* n.11), but the correctness of decisions prior to the *Bank Nationalisation Case* (1949) 79 C.L.R. 497, the beginning of the modern law on section 92, cannot be assumed. In any event, the point is that the court failed even to discuss the issue.

⁵⁵ See Coper, M., *op. cit. supra*, n.17, ch.32; Coper, M., 'Section 92 and the Impressionistic Approach' (1984) 58 *Australian Law Journal* 92.

⁵⁶ *Finmore's Transport Pty Ltd v. New South Wales* (1978) 139 C.L.R. 338, 352.

⁵⁷ The *North Eastern Dairy* case, *supra* n.13.

** Associate Professor of Law, University of New South Wales.

¹ (1984) 54 A.L.R. 609. Full High Court of Australia, Gibbs C.J., Murphy, Wilson, Brennan, Dawson JJ.

No person shall give out or distribute anything in the Mall or in any public place adjacent to the Mall to any bystander or passer-by without the permission of the Council.

It appears from s. 26 of the by-law that 'Mall' means Rundle Mall, 'Council' means the Council of the Corporation of the City of Adelaide, 'adjacent to the Mall' means within a distance of ten metres from the Mall and 'permission' to mean permission in writing. S 21 provides that permission may be general or specific and may relate to a person or a class of persons. S. 22 empowers the Council to attach conditions to the grant of permission.

It is to be noted that the passing of all by-laws was subject to comprehensive procedural controls and requirements under ss. 668-70 of the Local Government Act (S.A.) 1934-1978 (*i.e.* by-laws shall be passed by a meeting of council with a quorum of two-thirds of the members present; require the signature of the Mayor and clerk and certification of the Crown Solicitor before confirmation by the Governor and publication in the Gazette and the laying before both Houses of Parliament).

The appellant, Foley, was charged before a Court of Summary Jurisdiction in Adelaide with contravening s. 1. The stipendiary magistrate reserved for consideration by the Supreme Court the question whether s. 1 of the by-law was valid. The Full Court of the Supreme Court of South Australia upheld the validity of the by-law.²

The High Court, Gibbs C.J., Wilson, Dawson JJ. (Murphy and Brennan JJ. dissenting) dismissed the appeal and in so doing made comments on some of the developments in administrative law in relation to the rule against delegation, unreasonableness in the formation of an opinion and implied *ultra vires*. The leading issue in the High Court was the application of the rule against delegation where there is a power to prohibit vested in a subordinate legislative authority, but it is not without significance that in the opinions of several of the judges the decision also turned on alternative grounds which will be briefly examined.

THE ISSUES

The Rule Against Delegation and Subordinate Legislation

The facts of the present case clearly raised the question of the future direction of Australian law in this area. The High Court had the opportunity to express its preference for the so called 'conditional prohibition'³ approach as evidenced in the majority decision in *Country Roads Board v. Neale Ads*.⁴ This approach holds that where there exists a power to prohibit there is a power to prohibit completely or partially, unconditionally or conditionally and there is no reason why the condition should not be the consent or licence of a person or body.

The alternative approach is the 'unlawful delegation'⁵ approach and it is supported by the minority view in *Neale Ads* case⁶ and *dicta* of Higgins J. in *Melbourne Corporation v. Barry*⁷ and Evatt J. in *Swan Hill Corporation v. Bradbury*.⁸ According to this view, a prohibition subject to an unfettered power of dispensation vested in another body is to be classified as an unlawful delegation of legislative power. The power to prohibit does not in itself justify the conferment of an absolute power of dispensation without standards.

The middle approach is the 'multiple factors'⁹ approach which requires the court to take into account a series of specific factors in determining the validity of the by-law. In the *Bradbury* case,¹⁰

² *Padley v. Foley* (1983) 32 S.A.S.R. 122.

³ See, Lanham, D.J., 'Delegation, Legislation, Dispensation' (1984) 14 *M.U.L.R.* 634.

⁴ (1930) 43 C.L.R. 126. The majority judges were Knox C.J., Starke and Dixon JJ.

⁵ Lanham, *supra* n.3.

⁶ (1930) 43 C.L.R. 126. Isaacs J. at p.138, Gavan Duffy J. at p.139.

⁷ (1922) 31 C.L.R. 174, 208-9.

⁸ (1937) 56 C.L.R. 746, 764, 771.

⁹ Lanham, *supra* n.3.

¹⁰ (1937) 56 C.L.R. 746, 766.

Evatt J. suggested that the body entrusted with the power, the power entrusted to that body and the subject-matter of the power are all relevant considerations in determining the validity of a prohibition subject to an unfettered power of dispensation. The nature of the body to whom the subordinate legislator vests the power of dispensation could usefully be added to this formula.¹¹

The Decision of Individual Judges as to the Preferred Approach

Gibbs C.J. acknowledges the improper delegation approach¹² but approves the reasoning of the majority judges in *Neale Ads* case. In the view of the learned Chief Justice, at p.616:

If power is given to make a by-law for the purpose of "prohibiting" something, the power will, in the absence of a contrary indication, enable the making of a by-law which will prohibit entirely absolutely or subject to any condition, including the condition that some person or body gives consent, and the fact that the circumstances in which consent may be given or refused are not defined makes no difference.

In applying the conditional prohibition approach, Gibbs C.J. did, however, make reference to the subject-matter of the power and the words of the Act and therefore lends some support to the 'multiple factors' approach. On concluding his judgment, dismissing the appeal the Chief Justice said, at p.617:

There is nothing in the subject-matter of the power or the words of the Act that suggests that the Council could not give itself the discharging power to decide at an ordinary meeting whether permission to carry on the activity should be given in a particular case.

Dawson J. also applies the 'conditional prohibition' approach and dismisses the appeal on that basis at p.632.

The power [under S 11(1)(a)] includes an authority to prohibit and a prohibition subject to the consent of the Council, is upon the reasoning in *Country Roads Board v. Neale Ads Pty. Ltd.* within the power.

His Honour does, however, give lengthy considerations to the conflicting approaches in the authorities¹³ and presents the unlawful delegation approach in a slightly different form. It was argued on the basis of the *Barry* case,¹⁴ that the effect of the prohibition subject to the power of dispensation vested in ordinary Council, was that the prohibition or nature of the regulation did not appear in the by-law itself but was to be found only in the decisions of the Council made by ordinary resolution. It followed that this was a form of regulation not authorized by the Statute which requires the regulation to be made by the by-law itself. Dawson J. dismisses the argument holding that the prohibition was imposed by the by-law — it was relief from the prohibition which could be obtained at ordinary meetings of Council and in the present case the prohibition was authorized by the Statute. His Honour therefore seems unconcerned as to whether the nature of the regulation is set out in the by-law itself. The learned Judge was similarly unconvinced as to the need for standards to be set out expressly in the by-law for the exercise of the power of dispensation.¹⁵ According to Dawson J., even if such standards were expressly set out, it would still be difficult for an individual to establish that the power of dispensation had not been exercised in accordance with those standards and therefore the validity of the by-law should not depend on their presence.

In a very short judgement Wilson J. stated that he agreed with the reasoning and decisions of Gibbs C.J. and Dawson J.

Brennan J. also applied the 'conditional prohibition' approach but not to the exclusion of the 'multiple factors' approach. At p.621 his Honour said:

¹¹ *Conroy v. Shire of Springvale and Noble Park* [1959] V.R. 737.

¹² As put by Higgins J. in the *Barry* case, *supra* n.7, Evatt J. in the *Bradbury* case, *supra* n.8.

¹³ *Neale Ads* case *supra* n.4. *Barry* case *supra* n.7 as per Higgins J. *Bradbury* case *supra* n.8 as per Evatt J.

¹⁴ *Melbourne Corporation v. Barry* (1922) 31 C.L.R. 174.

¹⁵ The standards requirement was emphasised by the minority in *Neale Ads* *supra* n.6 and Evatt J. in *Bradbury* *supra* n.8.

It follows that a power to make a by-law prohibiting an activity absolutely authorizes the making of a by-law prohibiting that activity without permission, at least in the generality of cases. But there may be cases where the nature of the activity governed by the law and the terms in which the discretion to dispense with the prohibition is created tell against the validity of the by-law.

In relation to the 'unlawful delegation' approach, Brennan J. approved the majority view in the *Neale Ads* case¹⁶ and distinguished the *Barry* case on the basis there was only a power to regulate in that case. According to his Honour, a by-law imposing a prohibition subject to a power of dispensation is not invalid as an improper delegation but may be where the dispensation could be exercised for a purpose other than the purposes for which the statute conferred power to make the by-law. In relation to the present case, the creation of an exempting discretion by s. 1 of By-Law No. 8 is within the power conferred by s. 11(1)(a) of the Act, assuming the discretion is only exercised for exempting those activities which do not affect the use or enjoyment of Rundle Mall or have a countervailing public benefit.

In a dissenting judgment, Murphy J. applies the 'unlawful delegation' approach and holds that s. 1 of By-Law No. 8 is an invalid attempt to avoid the provisions of Local Government Act 1934-1978 (which imposes various procedural requirements in the making of by-laws). Murphy J. approves the *Barry* case reasoning where he holds, at p.617:

In substance, the regulation, control or prohibition is not by by-law but by grant or denial of Council permission.

The learned Judge can also be seen to be taking account of the subject-matter of the power where he states, at p.619:

If freedom of expression is to be maintained, by-laws which may be used to restrict expression must be clearly authorised by the enabling legislation and procedural safeguards must be strictly observed.

At the end of the day, it can be seen that the majority of the High Court (4-1) rejected the unlawful delegation approach, and in applying the 'conditional prohibition' approach refused to make it a requirement that the nature of the prohibition or regulation appear from the by-law itself.

It is submitted that while the 'conditional prohibition' approach is sound as a matter of literal statutory interpretation, it fails to take sufficient account of the public policy considerations operating in this area. A blanket prohibition, subject to an unfettered power of dispensation vested in an alternative body, is less than satisfactory for the individual citizen trying to determine his legal rights and obligations in a particular situation at a given moment. The citizen is likely to find the administration of delegated legislation more accessible and responsive to his needs where legislative guidelines are known in advance. It is to be noted that two of the majority Judges specifically adverted to this issue. Brennan J., while acknowledging that the 'conditional prohibition' approach added to the plethora of administrative discretions which '... already constitute a large well of power', observed that if a by-law created a discretion wider or foreign to the purpose of the statute it could be reviewed and set aside by the Court.

Further at p.623:

If the reasons affecting the exercise of the discretion under a by-law are shown to be extraneous to any objects which the legislature could have had in view in enacting the statute conferring the power to make the by-law the remedies of judicial review are available to deny operation to the exercise of the discretion.

Dawson J. was of the view that while it is not easy for an individual to challenge the exercise of a discretion conferred by a by-law, at p.634:

... it would be unlikely to be any easier if the limits upon the discretion were set out in the by-law.

The public policy issue is therefore ultimately concerned with the question of the means to be adopted to protect the individual from an arbitrary exercise of the power of dispensation. The High Court in the present case chose to follow the approach gaining acceptance in the United Kingdom,¹⁷

¹⁶ *Country Roads Board v. Neale Ads supra* n.4.

¹⁷ *R. v. British Airports Authority; ex parte Wheatley* [1983] R.T.R. 147. The decision of Woolf J. at first instance was affirmed by the Court of Appeal in *R. v. British Airports Authority; ex parte Wheatley* [1983] R.T.R. 466.

and control the exercise of the power of dispensation itself, rather than the traditional approach which outlaws the system of prohibition and dispensation upon its establishment.¹⁸

Unreasonableness

Under s. 11(1)(a) of the Act, the Council only had power to make by-laws 'regulating, controlling or prohibiting any activity in the Mall or any activity in the vicinity of the Mall, that is, in the opinion of the Council, likely to affect the use or enjoyment of the Mall'.

It follows that the existence of the opinion was a pre-condition to the exercise of the by-law making power under s. 11(1)(a) and that the opinion must be such that it could be formed '... by a reasonable man who correctly understands the meaning of the law under which he acts'.¹⁹

It was argued by the appellant that the range of activities covered by By-Law No. 8, s. 1 was so wide that no Council could reasonably have formed the opinion that they would be likely to affect the use or enjoyment of the Mall.

Gibbs C.J., Dawson J. and Wilson J. (in a concurring judgment) rejected this submission, and held that when the terms used in the by-law like 'distribute', 'bystander' or 'passer-by' were properly construed in the context of the by-law itself, it was not possible to say that the Council could not reasonably have formed the opinion that the prohibited activity was not likely to affect the use or enjoyment of the Mall.

Brennan J. (Murphy J. agreeing) reached a different conclusion based on his own interpretation of the language used in the by-law, and its application to activities not affecting the use or enjoyment of the Mall but covered by the by-law. According to his Honour, at p.626:

... the prohibition expressed in s. 1 of the by-law is all-embracing and I am unable to read it down so that it prohibits no more than s. 11(1)(a) authorizes.

Implied Ultra Vires

The appellant argued that as a general proposition a statutory provision will not be construed as interfering with the liberty of the individual unless an intention to do so clearly appears and therefore in the present case s. 11(1)(a) should not be understood as giving power to make a by-law like s. 1 of By-Law No. 8 which may restrict the freedom of communication of ideas and opinions.

Murphy J. dissenting, approved this submission when, at p.619, he stated:

If freedom of expression is to be maintained by-laws which may be used to restrict expression must be clearly authorized by the enabling legislation and procedural safeguards must be strictly observed.

Gibbs C.J., directly addressed the implied *ultra vires* point but held that s. 1 of By-Law No. 8 was within power even if it restricted the communication of ideas and opinions, because (at p.613):

It has been left to the Council, and not the courts, to weigh the need to respect the freedom of speech and communication against the desirability of protecting other users of the Mall from an activity which may adversely affect their use or enjoyment of it.

TIMOTHY GREENALL*

¹⁸ See *Melbourne Corporation v. Barry* *supra* n.14. And in other jurisdictions see: South Africa:

Arenstein v. Durban Corporation (1952) 1 S.A. 279.

Canada:

Re Nash (1873) 33 U.C.R. 181.

Country View Ltd v. City of Dartmouth (1974) 10 N.S.R. (2d) 361.

But contrast:

Lamourex v. City of Beaconsfield (1978) 1 S.C.R. 134.

New Zealand:

Jackson v. Collector of Customs [1939] N.Z.L.R. 682.

But contrast:

Ideal Laundry Ltd v. Petore Borough [1957] N.Z.L.R. 1038.

¹⁹ *R v. Connell; ex parte Hetton Bellbird Collieries Ltd* (1944) 69 C.L.R. 407 per Latham C.J. at p.430.

* Student of Law, University of Melbourne. The writer wishes to acknowledge the assistance of Professor David Lanham in the preparation of this case note.