

"Delegated Legislation"

Book Review*

[Dennis Pearce, Stephen Argument, *"Delegated Legislation in Australia"* 2nd ed., Butterworths, 1999, RRP \$95.00, p 374, ISBN 0409311332]

It is a somewhat daunting task for a student to be confronted with the review of a book written by Professor Dennis Pearce, one of Australia's foremost academics and practitioners of administrative law, and Stephen Argument, a quite prolific academic writer.

Unlike restaurant reviews where one might be tempted to complain that there was insufficient mustard in the sauce, or the food was served lukewarm, one is expected to provide some intellectual input to assist the prospective purchaser in decision-making as to precisely where the publication fits; not merely within the overall scheme of studies, but also in its applicability to the practice of law.

This is only the second edition of this book, the first having been published 22 years ago in 1977, at a time when modern delegated legislation was in a somewhat embryonic form (although we are told that delegated legislation in Australian and New Zealand was first proclaimed by Governors Phillip and Hobson). Today, delegated legislation is not merely becoming weightier as parliaments abrogate more of their basic lawmaking function, the form that it takes and the complexity of its coverage is becoming all too evident.

The book sets out the method of making, publication, commencement and parliamentary review of delegated legislation in each of the States, Territories and the Commonwealth in a comprehensive and readable style. As the book traverses the subject it poses essential questions, and provides clear and unambiguous answers from the available resources. The clear advantage here is the avoidance of turning to a variety of resources to seek those answers. This is a significant research time-saver for both the student and the practitioner alike.

There is a brief section on the generalities of judicial review of delegated legislation, which is essential to learning the process; thus leading to a better understanding of the specifics in later chapters. Similarly the effect of non-compliance with the formal requirements of the enabling legislation is comprehensively analysed and discussed, and

the chapter on empowering provisions give depth to the subject for the practitioner, but may be too detailed for the student. This does however contribute to an overall deeper understanding of the requirements for legislative validity, so often found wanting in other publications.

The chapter on repugnancy or inconsistency contains an excellent analysis and discussion on self-incrimination, and I gained instant enlightenment from the five lines on reversal of the onus of proof and its repugnancy to common law. If you think, as I did, that you could readily apply the phrase, 'necessary or convenient for giving effect to the Act', it is time to think again. For the complexity of its application is belied by the seeming simplicity of the words; which is evidenced by the application of a whole chapter to their almost exclusive interpretation and application.

Unreasonableness and proportionality are often looked upon as shared concepts; however Professor Pearce, on sound authority, treats them as separate concepts and each is analysed and commented upon as such.

Particularly, but not exclusively, those engaged in administrative law will find the chapter on sub-delegation of delegated legislation, and the maxim of *delegatus non potest delegare*, interesting reading. Gaps in the Australian case law are filled by reference to New Zealand case law where applicable.

The incorporation of material on delegated legislation by reference to other material is an issue to which I had never seriously turned my mind, save for those few well-known cases concerning published standards of the Australian Standards Association. Whilst probably an infrequent occurrence, it is as well for the student to have outline knowledge of this subject along with the relationship between this chapter and that on sub-delegation.

The effect of repealed legislation is often a problem for students, and a first reading of the chapter still left me with a number of unanswered questions. The answers to those questions may well be in the text, and a second detailed reading is definitely called for.

You may recall that an earlier chapter of the book dealt with the generalities of judicial review of delegated legislation, and at chapter 26 the specifics are addressed. This is an important chapter for the student and practitioner alike, as it deals with the specifics of attacking the validity of delegated legislation

and the remedies available. Students are unlikely to encounter the requirement for proof of delegated legislation and the circumstances in which such proof is required, as this is more likely to form part of practice at the bar as opposed to detailed instruction in the lecture theatre. Nonetheless, students can gain valuable insights into the requirements and applicability of proof and equally into the circumstances in which it is required.

Ouster clauses are dealt with in only a cursory manner in the standard textbooks on administrative law. It is here that the depth of knowledge on this will be found, within the tension between the courts on the one hand, and parliament and the public service on the other.

Severance is a matter to which much attention is given in contract law, but little is to be found on severance as it applies to delegated legislation. The chapter looks at whether invalid portions of an enactment may be severed from it, leaving the remainder intact, and the difficulties this may cause in reading the enactment as a whole.

The final chapter, chapter 30, is where the interpretation of delegated legislation is examined; but this is not a book on statutory interpretation and the author, quite rightly, leaves that to other publications to provide the grounding, concentrating as he does on certain specifics applicable as they are to delegated legislation.

The referencing is excellent; the referencing and the tables of cases and statutes refer to paragraph numbers in preference to page numbers. I have a personal preference for full citations in tables of cases, but it would seem that is contrary to current law publishing style.

I should like to see students of law introduced to this book in administrative law and other subjects that deal with delegated legislation, by incorporating relevant parts of it into the reading materials. Particularly those sections specifically mentioned in this review.

In summary, *Delegated Legislation in Australia* is an excellent reference book, and solicitors will find it invaluable for preparing briefs. If you intend to practice at the bar, don't go to court without it!

* Glen Mylne, LLB Student Southern Cross University