

The High Court's acceptance in *Dignan's Case (Victorian Stevedoring & General Contracting Co Pty Ltd & Meakes v Dignan)* (1931) 46 CLR 73) of the practice of delegated legislation was not unqualified. Dixon J warned that it did not mean that a delegation would be valid "[101] however extensive or vague the subject matter may be", and added that: "There may be such a width or such an uncertainty of the subject matter to be handed over that the enactment attempting it is not a law with respect to any particular head or heads of power." Evatt J suggested that it would *not* be valid to enact a provision in the form: "[119] The Executive Government may make regulations having the force of law upon the subject of trade and commerce with other countries or among the States":

Victorian Stevedoring & General Contracting Co Pty Ltd & Meakes v Dignan
(1931) 46 CLR 73

Evatt J: [119] I think that in ordinary circumstances a law in the terms described would be held to be beyond the competence of the Commonwealth Parliament. The nature of the legislative power of the Commonwealth authority is plenary, but it must be possible to predicate of every law passed by the Parliament that it is a law with respect to one or other of the specific subject matters mentioned in secs 51 and 52 of the Constitution. The only ground [120] upon which the validity of such a law as I have stated could be affirmed, is that it is a law with respect to trade and commerce with other countries or among the States. But it is, in substance and operation, not such a law, but a law with respect to the legislative power to deal with the subject of trade and commerce with other countries or among the States ...

[121] On final analysis therefore, the Parliament of the Commonwealth is not competent to "abdicate" its powers of legislation. This is not because Parliament is bound to perform any or all of its legislative powers or functions, for it may elect not to do so; and not because the doctrine of separation of powers prevents Parliament from granting authority to other bodies to make laws or by-laws ..., for it does so in almost every statute; but because each and every one of the laws passed by Parliament must answer the description of a law upon one or more of the subject matters stated in the Constitution. A law by which Parliament gave all its law-making authority to another body would be bad merely because it would fail to pass the test last mentioned.

These reservations were invoked by the plaintiffs in *New South Wales v Commonwealth (WorkChoices Case)* (2006) 231 ALR 1 as a basis for the submission that certain provisions in the amended version of the *Workplace Relations Act 1996* (Cth) were invalid. In particular, s 358 provided that a workplace agreement entered into under the new provisions should be "void to the extent that it contains prohibited content", and other provisions dealt with contractual attempts to include "prohibited content", and procedures for its variation or removal if included. However, the expression "prohibited content" was not defined in the Act. Instead s 356 provided: "The regulations may specify matters that are *prohibited content* for the purposes of this Act."

The joint majority judgment in *WorkChoices* did not extend a judicial imprimatur to this drafting technique, but was not prepared to strike it down, either.

New South Wales v Commonwealth (WorkChoices Case)
(2006) 231 ALR 1

Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ: [105] It should be said that the technique employed in s 356 is an undesirable one which ought to be discouraged. For one thing it requires the lawyers (and the many non-lawyers) who have to work with the new Act to look outside it in order to apply it: identifying what regulations are in force is a task which many inquirers have found difficult. And it creates difficulty in assessing whether particular regulations made under the legislation are *intra vires*. However, to make these criticisms is one thing; to conclude that there is constitutional invalidity is another ...

[106] The AWU accepted that it was open to Parliament to authorise subordinate legislation “in wide and general terms ... under any of the heads of its legislative power” [*Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 512]. The AWU also accepted that by reason of s 846(1) any regulations to be made specifying matters that were prohibited content could not be inconsistent with the new Act. But the AWU submitted that no provision in the Act, not even s 3, defining its principal object, indicated the permissible parameters of the regulations contemplated by s 356. The AWU submitted that to confer on the Governor-General a power to make regulations as broadly expressed as ss 356 and 846(1) without also stipulating matters stated in the new Act, or to be implied from it, as indicating the parameters within which those regulations could extend, was invalid for two distinct reasons. The first was that no “law” had been enacted, because, in the words of Latham CJ, there had been no indication of “a rule of conduct”, and no “declaration as to power, right or duty” [*Commonwealth v Grunseit* (1943) 67 CLR 58 at 82]. The AWU went so far as to submit that the legislation said no more than that “[p]rohibited content is whatever the Executive Government says should not be contained in a workplace agreement”. The second reason advanced by the AWU was that even if a “law” had been enacted, there was, in the words of Dixon J [46 CLR at 101], “such a width or such an uncertainty of the subject matter ... handed over” by the Parliament to the Executive that it was not a law with respect to any identifiable head of Commonwealth legislative power.

The first of these arguments was rejected. The joint judgment pointed out that the content to be ascribed to the expression “prohibited content” was not wholly at the discretion of the executive government, since other provisions of the Act specified various examples of “required content” which a workplace agreement must contain. (That is, whatever was “required content” could not be “prohibited content”.) The range of matters that might be specified as “prohibited content” would also be constrained by s 172, which provided that the “key minimum entitlements” set out in the new statutory “Pay and Conditions Standard” must prevail over workplace agreements to the extent to which they represented a more favourable outcome for the employee; and by 173, which provided that any term in a workplace agreement purporting to exclude the Pay and Conditions Standard should be of no effect. Again, it would not be possible to specify such a wide range of “prohibited content” “[109] as to undermine the possibility of making a workplace agreement capable of practical operation”. In any event, the joint judgment relied on the fact that the regulatory power to specify “prohibited content” was sufficiently constrained by the general requirement derived from s 846(1) that regulations be “necessary or convenient ... for the purposes of this Act”.

Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ: [109] [E]ven if the AWU had modified its submission to accommodate the points just made by conceding that some things were prohibited and contending that no ambit was defined beyond the limit of those prohibitions, the submission would fail. Section 356 provides that the regulations *may* specify matters that are prohibited content. Regulations of that kind would be regulations “prescribing ... matters ... permitted by this Act to be prescribed”, and hence would fall within s 846(1)(a). In the absence of express language precisely defining the ambit of the permitted prescription beyond the four matters just mentioned, that ambit would be identical with the ambit of the prescription contemplated by s 846(1)(b), namely that the regulations prescribe all matters “necessary or *convenient* to be prescribed for carrying out or giving effect to this Act” (emphasis added). It would be absurd if regulations could be made under s 846(1)(b) by reference to [110] wider criteria than those applying to s 846(1)(a). In a case considering a formula to the effect of s 846(1)(b), but in language relevant to s 846(1)(a), Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ said: “The ambit of the power must be ascertained by the character of the statute and the nature of the provisions it contains” [*Morton v Union Steamship Co of New Zealand Ltd* (1951) 83 CLR 402 at 410]. Here the character of the statute is one which, *inter alia*, makes provision for workplace agreements in Pt 8 and attaches significant consequences to the existence of those agreements. Their Honours continued:

“An important consideration is the degree to which the legislature has disclosed an intention of dealing with the subject with which the statute is concerned.

In an Act of Parliament which lays down only the main outlines of policy and indicates an intention of leaving it to the Governor-General to work out that policy by specific regulation, a

power to make regulations may have a wide ambit. Its ambit may be very different in an Act of Parliament which deals specifically and in detail with the subject matter to which the statute is addressed.”

While the provisions about workplace agreements in Pt 8 are in many respects detailed, the main outlines of the policy it lays down as to what workplace agreements are to contain and are not to contain [are] not specific or detailed. It provides for some things workplace agreements must contain, but, apart from the matters already mentioned, it does not state what they may not contain save through the use of regulations made under s 356. The new Act has laid down the main outlines of policy in relation to workplace agreements but has indicated an intention of leaving it to the Executive to work out that policy in relation to what workplace agreements may not contain by specific regulation. Section 356 thus has a wide ambit. Its ambit must be construed conformably with the scope and purposes of the new Act as a whole, and with the provisions of Pt 8 in relation to workplace agreements in particular. The extent of the power is marked out by inquiring whether any particular regulation about the prohibited content of workplace agreements can be said to have a rational connection with the regime established by the new Act for workplace agreements.

It follows that although the ambit [of the power] ... is imprecise, with the result that assessing whether particular regulations are ultra vires may not be easy, s 356, read with s 846(1), is a “law”.

Is the “law” a law with respect to any identifiable head of power? In *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* [46 CLR at 121], Evatt J said that a provision in a statute conferring the power to make regulations “ordinarily ... will ... retain the character of a law with respect to the subject matter dealt with in the statute”. The AWU pointed out that Evatt J’s statement was predicated on the existence of “a scheme contained in the statute itself” which the regulations were to carry out. That is true, but the AWU’s first challenge failed on the ground that there is a scheme here of the kind just discussed, and there is no reason not to conclude that the regulation-making power is a law with respect to the same heads of legislative power as supported the other provisions of the new Act.

The dissenting judgment of Kirby J took a less indulgent view.

Kirby J: [123] The joint reasons conclude that the challenge to s 356, to s 846(1) and to the other regulation-making powers, as mounted specifically by the Australian Workers’ Union (“the AWU”), fails. The joint reasons reject the AWU’s argument that those provisions are impermissibly vague and devoid of content. They conclude that the provisions confine the impugned regulations to matters adequately identified by the Parliament itself.

The joint reasons content themselves with chastisement of the impugned legislation as instancing an “undesirable” technique of drafting “which ought to be discouraged”. They point to the burden [124] which the challenged provisions present to lawyers and non-lawyers forced to look outside the statute in order to find the criteria for lawmaking which the Parliament has approved.

With all respect, this is an inadequate response. It is redolent of the judicial attitude that sustained the majority reasoning in *Combet v Commonwealth* [(2005) 221 ALR 621]. Under the Constitution, it is the duty of this Court to uphold the law-making and supervisory powers of the Parliament. We should not sanction still further erosion of those powers and their effective transfer to the Executive Government, whether appearing in vague, indeterminate and open-ended appropriations (as upheld in *Combet*) or in vague, indeterminate and open-ended regulation-making powers (as purportedly provided in ss 356 and 846(1) of the new Act). There comes a point when a regulation-making power becomes so vague and open-ended that the law which establishes it ceases to be a law with respect to a subject of federal law-making power, becoming instead a bare federal attempt to control and expel State laws. When that line is crossed, this Court has a duty to say so.

Until this Court exhibits its disapproval in a judicial fashion, by invalidating such provisions, the lesson of history is that executive governments will present such provisions in increasing number to distracted or inattentive legislators. The legislators will be unlikely to notice them in the huge mass of legislative materials, such as those presented in the present case, and contest them. They will overlook the affront to proper parliamentary supervision, particularly in the context of regulation-making provisions that are typically found at the end of bills and ordinarily attract little parliamentary attention because they are assumed to be in the standard form.

The relationship between the Parliament's function of lawmaking and the legitimate delegation [of regulatory power] to the Executive Government ... is a point of great constitutional significance. Contemporary debates in the Parliament of the United Kingdom illustrate this fact. The plaintiffs' challenge to the constitutional acceptability of the mode of delegation adopted in the present legislation should be upheld both to defend the proper constitutional role of the Federal Parliament and to discourage future similar measures. The impugned provisions border on an endeavour to enact an abdication of the Parliament's responsibilities. This Court should say so and forbid it ...

[B]ecause on other grounds the entirety of the Amending Act falls, the separate disposition of the particular issue concerning the regulation-making power is not essential in order to arrive at the orders that I favour. Nevertheless, this instance does illustrate, in a most vivid way, the indulgent approach of the majority, expressed in the joint reasons, to the entirety of the legislation. I find it impossible to believe that in earlier times this Court would have [125] approved such an open-ended delegation by the Parliament to the Executive of the Parliament's proper law-making functions.