SUBDELEGATION OF THE LEGISLATIVE POWER

The subject of subdelegation of powers conferred by statute is one on which Commonwealth jurisdictions provide relatively few authorities; and such authorities as there are do not give a clear picture of the extent to which the doctrine delegatus non potest delegare applies in the field of administrative law. So far as New Zealand is concerned, it is becoming appreciated that our Courts have in recent years made a significant contribution to Commonwealth jurisprudence on the circumstances in which an administrative body has a 'duty to act judicially'; but it is not so well known that our Courts have had something to say on the question of subdelegation. This has been drawn to our attention in three recent decisions: Hookings v. Director of Civil Aviation [1957] N.Z.L.R. 929, Ideal Laundry Ltd. v. Petone Borough [1957] N.Z.L.R. 1038 (S.C. & C.A.)[1] and Hawke's Bay Raw Milk Producers' Co-operative Co. Ltd. v. New Zealand Milk Board [1961] N.Z.L.R. 218 (C.A.).[2] These decisions have reminded us of earlier New Zealand decisions in which subdelegation has been in issue.

The Milk Board case is also important because it is the first occasion on which s. 2 of the Statutes Amendment Act 1945 has been considered by the Courts. That section reads:

> (1) This section shall be read together with and deemed part of the Acts Interpretation Act 1924.
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> (2) No regulation shall be deemed to be invalid on the ground that it delegates to or confers on the Governor-General or on any Minister of the Crown or on any other person or body any discretionary authority.

An analysis of this provision will be attempted later in this article, but that analysis must necessarily be preceded

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1. The judgment of Turner J. in the Supreme Court is also reported in [1955] N.Z.L.R. 186.
2. The judgment of Henry J. in the Supreme Court is reported in [1959] N.Z.L.R. 1217.

by some consideration of the common law position, especially as it emerges from the New Zealand cases.

The first difficulty encountered is one of terminology. As has recently been said by an English writer: 'the judgments abound in terminological inconsistencies'[3] - a comment which is evidently intended to include the New Zealand decisions. There is the problem presented by the traditional, but often artificial, classification of functions as being legislative, judicial and executive or administrative,[4] and the further problem of the relationship of these functions to 'discretionary authority', to use the language adopted in s.2(2) of the 1945 Amendment. It is, however, proposed to use the traditional classification as a framework for a treatment of the common law position. That treatment will itself demonstrate some of the obscurities of the classification.

Subdelegation of judicial and administrative power

The conventional classification of functions must, in the first place, be used as a means of limiting the scope of this article. A statute may authorise an individual or authority to make decisions with reference to particular cases. The discretion thus given may be classified as 'judicial' or as 'administrative' - it is often difficult to determine which. In general, the legislature can be assumed to have intended that the delegate, be he required to act judicially or administratively, should actually exercise the discretion himself and not subdelegate it to another person. These points are illustrated by Vine v. National Dock Labour Board [1957] A.C. 488 where the House of Lords held unanimously that the local dock labour board had no authority to delegate

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3. S.A. de Smith, Judicial Review of Administrative Action (1959), 175. This notable contribution to English Administrative Law contains (at 173-181) the best review of Commonwealth decisions on subdelegation. See also Willis 'Delegatus non potest delegare' (1943), 21 Can.B.R. 257; Fox & Davies, 'Sub-Delegated Legislation' (1955), 28 A.L.J. 486; and Sir Carleton Allen Law and Orders (2nd ed. 1956), 204 ff., 222 ff.
4. The term 'administrative' will henceforth be used, although for present purposes it can be regarded as interchangeable with 'executive'.

its disciplinary powers to a disciplinary committee. Whereas three of the law lords found that the function was a judicial one, the remaining two did not find it necessary to decide whether it was judicial or administrative.[5]

This article will not examine possible qualifications to the statement that a judicial or administrative function cannot be subdelegated.[6] It will concern itself with the third class of cases - those in which the delegate, who purports to subdelegate, has been authorised to make rules of general application, i.e. to exercise a legislative function.[7] Nevertheless, the difficulty that can occur in deciding whether a particular function is administrative, judicial or legislative[8] suggests that what is said below may have some application to the subdelegation of judicial or of administrative functions.

Subdelegation of the legislative power

Parliament is the legislative authority and Courts will not readily assume that Parliament, having authorised any body or person to make delegated legislation, i.e. to make rules of general application, has also authorised that body or person to subdelegate that authority.[9] The New Zealand case

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5. Allingham v. Minister of Agriculture and Fisheries [1948] 1 All E.R. 780 can be regarded as a case in which an attempt by a delegate to subdelegate to another an administrative discretion conferred upon himself was held to be invalid.
6. See de Smith, op. cit., 173 ff. Cf. for instance Denning L.J. (as he then was) in Barnard v. National Dock Labour Board [1953] 2 Q.B. 18 (C.A.) at 40: 'While an administrative function can often be delegated, a judicial function rarely can be'. In Devlin v. Barnett [1958] N.Z.L.R. 828 it was held that the Police Force Promotion Board, in allowing others to conduct tests on its behalf, was not delegating its functions.
7. de Smith, op. cit., 31, says: 'A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act is the making and issue of a specific direction, or the application of a general rule to a particular case in accordance with the requirements of policy.'

of Geraghty v. Porter [1917] N.Z.L.R. 554 contains an early statement of the principle. Referring to an authority given to the Governor by the Motor Regulation Act 1908 to make regulations by Order in Council, the Full Court (Denniston, Sim and Stringer JJ.) said (at 556):

> In making regulations such as these the Governor is exercising a delegated power of legislation. Such a delegated authority must be exercised strictly in accordance with the powers creating it: . . .; and in the absence of express power to do so the authority cannot be delegated to any other person or body. The rule on the subject is expressed in the maxim Delegatus non potest delegare, and is of general application, although the cases in which for the most part it has been applied have been those arising out of the relation of principal and agent.[10]

This statement is not quite as straight-forward as appears on first reading. In circumstances raising an issue of

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8. See New Zealand Shop Assistants Industrial Association of Workers v. Lake Alice Stores Ltd. [1957] N.Z.L.R. 882, where it was held that a decision of the Magistrate's Court under s.10 of the Shops and Offices Act 1955 was not a judicial, but a legislative, act.
9. See de Smith, op.cit., 174-5; and Fox & Davies, loc.cit. The latter article discusses (at 487) the favourable position of legislatures having 'plenary' powers and also 'conditional' legislation, on the latter of which see infra.
10. See also Turner J. in Hookings v. Director of Civil Aviation [1957] N.Z.L.R. 929, 938, 'it must . . . have been an example of the sub-delegation of legislative power, and bad'; and Rex. v. Holmes [1943] 1 D.L.R. 241, a decision of an Ontario County Court. The latter case was not followed by the Supreme Court of Canada in Reference Re Regulations (Chemicals) [1943] 1 D.L.R. 248, it being held that the provisions of the War Measures Act which were under consideration in each case were wide enough to authorise the Governor in Council to confer legislative functions upon subordinate agencies.

subdelegation, a delegate, who will often be the Governor-General in Council, can exercise an authority to make regulations in a number of ways. These can be conveniently classified in five categories:

Category I. The delegate may subdelegate substantially all of his own authority in such language that it is apparent that the subdelegate is required to legislate, i.e. to make rules of general application.

Category II. The delegate may subdelegate substantially all of his own authority in such language that it is apparent that the subdelegate is required to take administrative action, i.e. to act according to his discretion in each individual case as it arises.

Category III. The delegate may subdelegate substantially all of his own authority in such general terms that the subdelegate may choose either to make rules of general application or to act according to his discretion in each individual case as it arises.

Category IV. The delegate may himself make regulations laying down rules of general application but at the same time pass over to a subdelegate residual authority which may be (a) to make further general rules implementing the regulations, or (b) to exercise some administrative function in relation to the rules laid down in the regulations, or (c) to exercise a choice as to whether to proceed under (a) or under (b).

Category V. The delegate may, in exercise of his authority to make rules of general application, impose a prohibition and purport to confer on himself, or on another person, power to dispense with that prohibition,

with or without stating the circumstances in which the dispensing power is to be used.

These types of subdelegation have necessarily been described in general terms: and it can be expected that many cases will not fit neatly into any of the categories suggested. As an American authority has said: 'The degree of subdelegation is seldom either zero or one hundred per cent but is usually some intermediate degree, depending on the extent of instruction and supervision. The assumption that power is delegated either altogether or not at all does not accord with the facts.'[11] The classification is also open to the criticism that it introduces question-begging terms like 'administrative' and 'discretion'.

One value of the classification is that it immediately suggests that there are a number of different kinds of situation in which the statement made in Geraghty v. Porter might apply. New Zealand cases can be cited in further illustration of this difficulty.

Some New Zealand cases

In F.E. Jackson & Co. Ltd. v. Collector of Customs [1939] N.Z.L.R. 682, the validity of the Import Control Regulations 1938 (Serial No. 1938/161) was in issue. The Regulations, made by the Governor-General in Council, prohibited the importation into New Zealand of any goods except pursuant to a licence granted by the Minister and purported to confer on the Minister power to delegate to any licensing officer the Minister's own authority to grant, revoke and modify licences. The procedure to be followed by applicants for licences was set out but no criteria as to who was to be given a licence were provided. The Collector of Customs claimed that the Regulations were a valid exercise of powers conferred by s.46 of the Customs

11. K.C. Davis, Administrative Law (1951), 74. Davis also points out (at 88) that American experience has shown the need for increased subdelegation - 'Subdelegation . . . like delegation, is usually essential to the proper performance of regulatory tasks.'

Act 1913 and s.10 of the Reserve Bank of New Zealand Amendment Act 1936. In discussing the latter provision, which empowered the Governor-General to make by Order in Council regulations regulating credit and currency in New Zealand to the end that the 'economic and social welfare of New Zealand may be promoted and maintained', Callan J. recognized (at 729) that the 'pith and substance' of the regulations was 'to hand over the whole of this vital topic to a single Minister without the formulation of any principles to guide him in the performance of duties which might be of far-reaching and long-enduring importance, because Parliament, when it authorized any Government to impose exchange control, placed no limit on the amount of exchange control that might be imposed.' Jackson's case was therefore an example of Category II in that the regulating authority specifically handed over its authority to a sub-delegate who might, according to Reg.10 of the Import Control Regulations 1938, 'in his discretion grant a licence . . . or may decline to grant any application'.[12] But here, again, we run up against imprecision in language. Callan J. relied on the passage from Geraghty v. Porter already quoted (supra) and said at 733 (emphasis provided):

> I assume, for the moment, that [the language of s.10 of the Reserve Bank of New Zealand Amendment Act 1936] sufficiently empowers the Governor-General in Council to choose the fields as to which he may legislate by regulation, although no such fields were mentioned by Parliament. But, in my opinion, it does not go further and allow

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12. Callan J. (at 704) conceded that the Minister (and his delegates) might apply particular principles to the cases before them. Those principles would presumably be laid down in circulars. Would the promulgating of these circulars be an administrative or a legislative act? As to circulars, see the Hookings case (at 938-9) (supra); Blackpool Corporation v. Locker [1948] 1 K.B. 349 (C.A.); A.E. Currie, 'Delegated Legislation' (1948), 22 A.L.J. 110, and S.A. de Smith, 'Subdelegation and Circulars' (1949), 12 M.L.R. 37. For a Canadian illustration of Category II see Ex parte Brent [1955] O.R. 480 (C.A.); [1955] 3 D.L.R. 587 in which Geraghty v. Porter was cited.

> him, instead of regulating such a field, to hand it over to be regulated or controlled by someone else. Delegated legislative power cannot be sub-delegated except in so far as Parliament, which created the power, has said that it might be sub-delegated.

Callan J. had interpreted the regulations as conferring a power on the Minister and his delegates to exercise a discretion in individual cases, but here he is suggesting that the Minister has attempted to regulate, i.e. to lay down rules of general application. The use of the word 'controlled' could, of course, cover both the exercise of discretion in individual cases and the laying down of rules.[13]

Geraghty v. Porter (supra) illustrates the different kinds of situation that can arise. Section 3 of the Motor Regulation Act 1908 empowered the Governor in Council to make regulations 'Providing generally for facilitating the identification of motors, and in particular for determining and regulating the size, shape, and character of the identification-marks to be used, and the mode in which they are to be fixed and to be rendered easily distinguishable, whether by night or by day.' Regulation 4 of an Order in Council of 29 August 1910 provided:

> 4. Every such registering authority shall assign to each motor a separate number. Such registration shall have effect throughout the whole Dominion. The registered number of the motor shall be fixed upon the motor or upon any vehicle drawn by it, or upon both, in such manner as the registering authority may require, and the size and arrangement of the letters and numerals composing such registration numbers shall be in accordance with the Form No.3 hereto.

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13. Staples & Co. Ltd. v. Mayor etc. of Wellington (1900) 18 N.Z.L.R. 857 is an early case in which legislative and administrative functions were confused. Thus (at 862) Sir Robert Stout C.J. says: '[The by-law] leaves to the ordinary meetings of the Council the power to legislate on each particular building as the application

The provision relating to the method of affixing registered numbers was in language wide enough to enable the registering authority, as the subdelegate, to choose either to make general rules relating to the affixing of numbers or to make up its mind in respect of each separate vehicle as to how the number was to be affixed. If this is to be regarded as the handing over of substantially all of the authority given to the Governor in Council by s.3, the subdelegation can be placed in Category III. Alternatively, it can be argued that the Governor in Council, by prescribing the form of the registered number, had laid down general rules of action, leaving only residual authority to the registering authority. Under this argument, the subdelegation falls within Category IV (c). It was hardly practicable, however, for the registering authority to make a separate decision in respect of each vehicle, and the provision relating to the affixing of registered numbers is more realistically an example of Category I (or of Category IV (a)). On the other hand, that part of Regulation 4 which related to the assignment of a separate number to each motor is an example of Category IV (b), in that the assignment of numbers was an administrative act which would have to be exercised within the ambit of general rules laid down as to the form of the registered number and the method by which it was to be affixed to the vehicle.

The Timaru Borough Council, as a registering authority, chose to make a by-law relating to the affixing of numbers and Geraghty v. Porter arose out of a prosecution for failure to comply with the by-law. The Full Court upheld the dismissal of the prosecution on the grounds that Regulation 4 was bad in so far as it purported to delegate the power of determining the manner in which the identification marks were to be affixed, and that the by-law was bad as an intended exercise of the power. The judgment of the Court contained the passage quoted at 72 above. There was no separate discussion of the subdelegation of the administrative authority to assign numbers.

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for a building-license comes in. No one intending to build can know what the decision - what the law of the Council may be.'

The judgment does not, of course, analyse Regulation 4 in the way attempted above, but the language used by their Honours suggests that they felt that the Governor in Council had handed over substantially all of his authority, i.e. it was a case falling within Category I or Category III.

Sim J., in delivering the judgment of the Full Court in Godkin v. Newman [1928] N.Z.L.R. 593, developed more fully the issues involved. Section 19 (2) of the Public Works Amendment Act 1924 authorised the Governor-General by Order in Council to make regulations classifying motor-lorries according to their weight and carrying capacity and classifying roads and streets with reference to their suitability for use by different classes of motor lorries. Clause 7 of the Motor-lorry Regulations 1925 (as later amended) authorized named authorities to declare that a road or street belonged to one of five named classes and proceeded to specify the types of motor-lorries which might use each class. The 1925 Regulations were replaced by the Motor-lorry Regulations 1927, which did no more than authorise the named authority to 'declare that such road belongs to some one of the following classes, namely: First class, second class, third class, fourth class, and fifth class.' The Full Court considered, obiter, that the 1925 Regulations were a valid exercise of the power conferred by s.19:

> It is not necessary, we think, for the Governor-General himself to make the actual classification. He may entrust the duty to others; but if he does that he must first determine the basis on which the classification is to be made. Now, clause 7 of the Motor-lorry Regulations, 1925, appears to supply such a basis - namely, availability for use thereon of different classes of motor-lorries. ... The regulation, therefore, fixed a standard by which the roads were to be classified according to their suitability for use by different classes of motor-lorries . . . . ibid. 596.

The Full Court went on to point out that the 1927 Regulations did not specify any basis for the classification of roads: 'In effect it deputes to the controlling authority the power, which the Governor-General alone can exercise, of fixing the

basis on which the classification is to be made.' ibid. 597.

The 1927 Regulations can be regarded as an example of Category II, i.e. the Governor-General was subdelegating substantially all of his authority to the subdelegate who was to exercise that authority in each individual case as it arose. Such a subdelegation, Godkin v. Newman decides, is invalid. On the other hand, the 1925 Regulations were an example of Category IV (b) in that they laid down a general classification and then handed over to the controlling authority residual authority to exercise an administrative function in relation to that classification. It is submitted that this case, and Sim J.'s judgment in Mackay v. Adams [1926] N.Z.L.R. 518 (discussed below), establish that where a power to regulate is exercised by the conferment of a discretion upon another person or authority, and presumably upon the regulating authority itself, that conferment may be effective if the regulating authority lays down the principles or a standard on or within which the subdelegate is to exercise his discretion.

The rational justification for this statement is obvious enough. There are many occasions when the effective administration of regulations demands that particular decisions should be subdelegated. Nevertheless, the statement gives no clear guidance as to the extent to which the regulating authority is required to indicate the limits within which the subdelegate's decision-making authority is confined. This issue was one of those raised by the Hawke's Bay Raw Milk Producers' Co-operative Co. Ltd. v. New Zealand Milk Board case (supra).

Section 18 (1) of the Milk Amendment Act 1951 (as amended) empowered the Governor-General by Order in Council, 'in accordance with recommendations made by the New Zealand Milk Board to the Minister [of Agriculture]', to fix the prices at which milk produced or sold for human consumption might be bought or sold. However, a 1953 amendment[14] added a proviso to s. 18 (1) to the effect that while subsidies were being paid in respect of the town milk industry the prices etc. payable

14. Section 11 (2) of the Milk Amendment Act 1953. The subsidies referred to are still being paid.

to milk producers might be fixed by Order in Council 'in accordance with recommendations made by the Minister after consultation with the New Zealand Milk Board'. In reliance on these provisions, the Milk Marketing Order (Serial No. 1955/142) lays down a procedure for fixing the prices and allowances for the handling of milk and sets out machinery by which each person involved in the industry is to obtain his appropriate price or allowance. This machinery is based on a 'town milk producer price', a price payable to producers to which other prices or allowances are related. Under Clause 4 of the Order:

> The Minister may, after consultation with the Board, from time to time by notice to the parties concerned fix the town milk producer price.

The effect of the Order is therefore to lay down detailed provisions relating to prices and allowances in varying circumstances and to delegate to the Minister an essential ingredient of the whole price structure, i.e. the town milk producer price.

Cleary J., delivering the judgment of the Court of Appeal (Gresson P., Cleary and McGregor JJ.), referred to the requirement that the price payable to producers should be fixed by Order in accordance with recommendations made by the Minister after consultation with the Board, and said that 'ex facie the Order does not purport to do what the statute authorises it to do, but instead purports to empower the Minister to perform the authorised act.' He continued:

> There is accordingly raised, quite directly, the question whether the power delegated by the statute can in turn be delegated by the Order. ibid. 222.

The Court of Appeal, perhaps too readily in view of Australian dicta,[15] decided (at 222) that the power to fix the price at

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15. Rich J. and Williams J. have suggested that Orders fixing prices may be 'executive in character' rather than of a legislative character (Arnold v. Hunt (1943) 67 C.L.R. 429, 432, 433 H.C.); but cf. McTiernan J., ibid. 433 and McIver v. Allen (1943) 43 S.R. (N.S.W.) 266.

which a commodity may be sold is essentially [a legislative power] and went on to quote the passage from Geraghty v. Porter and to assert that 'the rule so expressed is correct'. However, Cleary J. went on to say:

> The principle enunciated in Geraghty v. Porter does not preclude the making of regulations which confer on a subordinate body or official authority to make decisions and exercise discretionary powers within the limits prescribed by regulations; but . . . the legislative power itself cannot be deputed. ibid. 223.

In making this distinction between discretionary and legislative powers the Court relied on Godkin v. Newman (supra), Mackay v. Adams (supra) and Hookings v. Director of Civil Aviation [1957] N.Z.L.R. 929 (discussed below). In the Milk Board case itself the Solicitor-General had relied on the distinction in his argument that what had been delegated was not the legislative power itself, but rather authority to prescribe administrative details. This argument was rejected by Cleary J.:

> The fixation of a 'town milk producer price' is basic to the Order and permeates its other provisions. It is the fixation of that price which constitutes an exercise of the legislative powers conferred by the proviso, which authorised the Governor-General by Order-in-Council to fix 'the prices . . . payable to milk producers'. We do not think it is possible to say here, adapting the language used in Godkin v. Newman, that the Governor-General determined a basis or formula upon which, or within which, prices were to be fixed. ibid. 225.

That is, the Court was saying that the case fell within Category I. Their Honours did not consider that the Milk Amendment Act 1951 authorised the delegation by the Governor-General of the very matter entrusted to him, namely, the power to fix prices.

It is perhaps unfortunate that in the Milk Board case their Honours placed as much emphasis as they did on the distinction between the handing over to a subdelegate of the legislative power and the handing over of a discretionary authority. It has already been suggested that the function of 'price-fixing' is not so obviously a legislative as distinct from an administrative function as the Court appeared to believe. Their Honours could have arrived at the same result without attempting an answer to this debatable issue if they had found that a delegate with legislative powers cannot pass on his functions to a subdelegate unless the delegate determines the limits within which the subdelegate is to act.[16] Whether such a subdelegation will be upheld in a particular circumstance must depend on the language, scope and object of the statute involved; and it is submitted that in looking at the statute the Courts should also have regard to administrative effectiveness. This would be in accord with the approach proposed by Willis:[17]

> [The Court] weighs the presumed desire of the legislature for the judgment of the authority it has named against the presumed desire of the legislature that the process of government shall go on in its accustomed and most effective manner and where there is a conflict between the two policies it determines which, under all the circumstances, is the more important.

The application of such an approach does not demand an arbitrary distinction between legislative and administrative functions. Normally, the fact that the legislative function involves the laying down in advance of rules of general application will mean that the delegate cannot justify an attempt to authorise a subdelegate to lay down these rules - such a subdelegation will be invalid. But circumstances can be envisaged in which administrative effectiveness demands that the delegate, after laying down the broad limits

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16. It is, of course, assumed that there is no express or implied authority to subdelegate.
17. Loc. cit. note 3 supra, 261.

within which a subdelegate should act, must contemplate that the subdelegate will work out for himself rules as to the circumstances in which he will act. Surely, in such a case, insistence that the subdelegation is valid if the subdelegate exercises his discretion in each individual case, but invalid if he lays down rules as to the circumstances in which he will act - and duly publicises those rules to the persons involved[18] - is inconsistent with any approach to the rule of law which looks critically at grants of discretionary power because their exercise may be arbitrary. It is on these grounds, it is suggested, that the issue of departmental circulars can often be justified.

The cases we have considered suggest that any attempt by a delegate to hand over substantially all of his authority to a subdelegate, that is, situations falling within Categories I, II and III, will be held to be invalid. This will not be the result where the delegate exercises his regulatory function by laying down general rules within which the subdelegate is to take administrative action, i.e. situations falling within Category IV (b). There are dicta to the effect that the delegate cannot lay down general rules and leave to a subdelegate residual authority to make further rules implementing those general rules (Category IV (a)). It has, however, been submitted that there may be circumstances in which such a subdelegation should be upheld.

The cases do not provide a formula under which the Courts can readily determine whether a particular case properly falls within Category IV (b), but some of the factors the Courts will take into account can be suggested:

(a) It is the function of Parliament to legislate, and it will not be readily assumed, in a case where Parliament has delegated its legislative authority, that the delegate can himself subdelegate that authority.

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18. Scott L.J., in Blackpool Corporation v. Locker [1948] 1 K.B. 349, 361 ff. and in Jackson Stansfield & Sons v. Butterworth [1948] 2 All E.R. 558, 564, has stated with no little emphasis that subdelegated legislation, even if it is valid, can be objectionable because of the

(b) A subdelegation will not be upheld where the legislature has clearly reposed special confidence in the delegate it has named. A particular illustration is provided by the attitude of the Courts to the subdelegation of judicial power.

(c) The Court may apply a stricter test if the delegate who is purporting to subdelegate is a subordinate body like a local authority than if it is the Governor-General subdelegating to a Minister or departmental officer. In the latter case there is a direct channel of responsibility to Parliament.[19]

(d) Where there is an element of control or supervision over the subdelegate, the subdelegation is likely to be more acceptable.[20]

(e) The Court will look more critically where the subdelegation is of a power to interfere with common law rights.[21]

(f) The Court will have regard to the social desirability of the authority to be exercised by the subdelegate. Thus, in cases involving a prohibition accompanied by a dispensing power, the dispensing power is likely to be more acceptable if the prohibition relates to 'things or conduct regarded as

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liklihood that it has not been given adequate publicity. See also Turner J. in the Hookings case (supra) at 938-9.

19. Taylor v. Brighton Borough Council [1947] K.B. 736 (C.A.); Kruse v. Johnson [1898] 2 Q.B. 91; McCarthy v. Madden (1914) 33 N.Z.L.R. 1251 (F.C.).

20. Kruse v. Johnson (supra); in holding a discretion given to a policeman under a by-law Lord Russell C.J. said at 101: 'If [the policeman] acts capriciously or vexatiously, he can be checked by his immediate superiors, or he can be taught a lesson by the magistrates should he prefer vexatious charges.' Cf. direction of traffic by a police officer: Melbourne Corporation v. Barry (1922) 31 C.L.R. 174, 200.

21. Melbourne Corporation v. Barry (supra), 197.

in themselves an evil or as at any rate as of a doubtful tendency' than if it relates to 'a subject matter the discouragement of which would not have been intended'.[22]

Dispensing powers

Special considerations arise where the delegate, in the exercise of his power to make general rules, has imposed a prohibition and has conferred upon himself or upon some other person the power to dispense with that prohibition. This type of case falls under Category V and must now be examined.

A typical set of facts is presented by Hookings v. Director of Civil Aviation [1957] N.Z.L.R. 929. The statutory authority under consideration in the Hookings case is contained in the Civil Aviation Act 1948, s.3 of which authorizes the Governor-General to make regulations, inter alia, making provision generally for

> the safety of aircraft and of persons . . . carried therein.

The Civil Aviation Regulations 1953 (Serial No. 1953/108), made under the Act, provide in Reg. 43:

> Except with the prior permission of the Director and in accordance with such conditions as he may specify, an aircraft shall not be used for the purpose of:
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> (a) Towing any other aircraft or any drogue, banner, flag, or similar article; . . .

The Director of Civil Aviation had issued circulars in which he prescribed procedures and qualifications for applicants for permission to use aircraft for towing. The existence of these circulars might have suggested that this was a case in which the authority of the subdelegate to make general rules was in issue, i.e. that it fell within Category I or

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22. Dixon J. in Swan Hill Corporation v. Bradbury (1937) 56 C.L.R. 746, 761-2; and see also Rich J. at 755-6 and Evatt J. at 769.

Category IV (a). However, Turner J., although he concluded his judgment by indicating that he was disturbed as to the form of the circulars, accepted an argument that they were of no legal effect in the proceedings because they had not been formally issued under the Regulations. In other words, they did not deprive the Director of the duty of 'personal consideration of each application for permission'. His Honour was thus spared more than a passing glance at the difficult question, 'no doubt an interesting one', of the points of distinction between the making by the Director of general rules under which he would prescribe blanket conditions to be met by all applicants, and the exercise by him of an administrative discretion under which he would prescribe conditions in each particular case.

The Hookings case arose on an appeal from a conviction of Hookings by a Magistrate on a charge of using an aircraft for the purpose of towing a glider without the prior permission of the Director of Civil Aviation in contravention of Reg. 43 (a).

Turner J. first dealt with a question which has arisen most frequently in by-law cases: Did not Reg. 43, by taking the form of a prohibition on the use of aircraft towing other aircraft, go beyond the power to regulate given by s.3 of the Civil Aviation Act 1948? Evidently conceding that Reg. 43 did amount to a prohibition, in spite of the permissive authority given to the Director, the learned Judge pointed out that the prohibition (relating to aircraft towing other aircraft) did not cover the whole field to be regulated (the safety of aircraft, etc.). He was thus able to bring the circumstances before him within the many authorities for the proposition that 'all regulation imports some degree of prohibition, and that, in regulating the whole, it may be necessary to prohibit a part only'. ibid.934.

The learned judge then went on to consider the argument that the Regulation 'though it purported to regulate, really did not, since it left the decision in each case in the hands of the Director.'[23] Turner J. dealt with this question

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23. The treatment in this article of the prohibition-dispensing power cases is open to the criticism that it does not

as if it raised the issue of subdelegation of discretionary authority to the Director and he summarised his finding in these words (at 938):

> Neither is the regulation invalid by reason of sub-delegation; Reg. 43 does not purport completely to sub-delegate the legislative power given to the Governor-General, as in Geraghty v. Porter, nor even any substantial part thereof, but is analogous to the dispensing power granted by the regulations in Mackay v. Adams. The Director is empowered by Reg. 43 to grant or withhold permission in certain cases in order the more efficiently to carry into effect the true purpose of the regulations - namely, 'the safety of aircraft and of persons . . . carried therein'.

The learned judge thus leaves at large the issue whether a subdelegation was involved; but he evidently regarded the case as falling within Category V in that Reg. 43 had imposed a prohibition and given authority to the Director to dispense with that prohibition.[24] The remainder of Turner J.'s statement calls for examination in relation to a confusing series of decisions relating to the validity of dispensing powers.

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take sufficient account of the terms of the statutory authority which gives the delegate power to prohibit; for example, in one case there may be a statutory power to prohibit, in another a partial prohibition may be made under a power to regulate. The difficulties that can occur are illustrated by Conroy v. Shire of Springvale and Noble Park [1959] V.R.737; [1959] A.L.R. 1314 (Vic. S.C. & F.C.), in which the Australian cases are considered. Although it is likely that the terms of the statutory power to prohibit have influenced the decisions in the cases, the writer doubts whether this has been a major factor in the decisions he cites, with the possible exception of Hookings case, on which see infra at 94.

24. In Country Roads Board v. Neale Ads. Pty. Ltd. (1930) 43 C.L.R. 126, 134 a dispensing power was referred to as 'a power to suspend the obligation of a law, or to

It is appropriate to begin with another recent New Zealand decision, Ideal Laundry Ltd. v. Petone Borough [1957] N.Z.L.R. 1038 (C.A.). In this case the validity of a scheme prepared by the Petone Borough Council under the Town-planning Act 1926 (and later operative under the Town and Country Planning Act 1953) was in question. Ideal Laundry Limited, having been refused permission to erect a new building in an area designated a 'general residential district', attacked the validity of the scheme under four headings (set out in the judgment of North J. at 1051), the third of which was: 'The scheme contained a large number of clauses enabling the respondent Borough either to dispense at its discretion with the full requirements of the scheme or to impose conditions and, consequently, these provisions are ultra vires because a dispensing power was not authorised by the statute . . . .' After examining the provisions of the Town-planning Act 1926, North J. decided that the legislation conferred upon local bodies, required to prepare a scheme, the power to prohibit as well as to regulate. Later in his judgment, the learned Judge set out certain clauses of the town-planning scheme which he considered contained dispensing powers. An example of these was clause 8:

> The Council may permit the erection and use of a building for a temporary purpose.

In deciding that these dispensing powers had been validly assumed by the Borough Council the learned judge said (at 1055):

> . . . a town-planning scheme . . . could scarcely with propriety be couched in final and positive language, for the scheme in its very nature is required to make provision for both present and future needs, and a degree of elasticity is both desirable and in the public interest.

After rejecting the submission of counsel for Ideal Laundry Ltd. that 'the reservation of a dispensing power amounts to a sub-delegation to future councils', North J. went on to say (at 1057):

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excuse from obedience to its commands.'

> . . . I think sufficient may be extracted from the more general language used in our Act to show that local authorities were given the power both to regulate and to prohibit the erection of buildings and to impose restrictions on their subsequent use; and, in these circumstances, I am not prepared to hold that the appellant can successfully attack the validity of the scheme on the ground that it contained discretionary powers by way of relaxation of the positive requirements of the scheme.

Finlay A.C.J. said (at 1049):

> Section 15 of the Town-planning Act 1926 seems to me to envisage a power of dispensation by its prescription that the scheme is to 'make provision for' the matters referred to in the Schedule to that Act. . . . Such provisions invite liberal construction to give effect to the purposes of the legislation. The manner and method are left to the discretion of the Council and the reservation of a dispensing power is an obvious method of giving effect to the purpose of the Legislature.[25]

In his judgment North J. referred to the decision of the High Court of Australia in Country Roads Board v. Neale Ads. Pty. Ltd. (1930) 43 C.L.R. 126. There is a passage from the joint judgment of Knox C.J. and Starke and Dixon JJ. in this case which suggests that their Honours regarded the conferment of authority to dispense with a prohibition as a condition to which the prohibition was subject rather than as a subdelegation:[26]

> The consent of the Board . . . is not an independent power of abrogation, but a condition

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25. See also Henry J. at 1061.
26. Followed in Radio Corporation Proprietary Ltd. v. The Commonwealth (1938) 59 C.L.R. 170, 183-4, and see also Edwards & Chapman JJ. in Taratahi Dairy Co. Ltd. v. Attorney-General [1917] N.Z.L.R. 1, 26 ff., 33 ff. (F.C.). Cf. Myers C.J. in Nelson v. Braisby (No.2) [1934] N.Z.L.R. 559, 588-9 (F.C.).

> upon which the tenor of the by-law makes its operation depend . . . . once it is realized that the power authorizes prohibition, complete or partial, conditional or unconditional, what reason is there for denying that the condition may be the consent, or licence, or approval of a person or a body? ibid. 134-5.

These two decisions must be examined more carefully in order to discover whether they are as favourable to the validity of a dispensing power as a first reading suggests; but it is convenient to look at another line of decisions which has regarded a dispensing power as the subdelegation of a discretion. In Melbourne Corporation v. Barry (1922) 31 C.L.R. 174 Higgins J. said (at 208) of a by-law prohibiting processions 'unless with the previous consent in writing of the Council':

> If, in place of the consent of the Council to a procession, the consent of the Mayor or anyone else were prescribed by the by-law, there would be an obvious delegation of power, and the by-law would, to my mind obviously, be bad; but here there is a delegation too - from what I may call the by-law making Council to the ordinary meeting of the Council.[27]

In Hazeldon v. McAra [1948] N.Z.L.R. 1087 the Full Court held that a statutory power of 'regulating the use of any reserve' authorized a by-law making it an offence to hold meetings on a reserve without the prior written authority of the Town Clerk. O'Leary C.J. (at 1097) said of the power of dispensation given to the Town Clerk:

> Apparently the by-law-making authority realizes that prohibition at all times for certain persons or certain activities might well be too drastic . . . . It therefore delegated to the Town Clerk

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27. In the writer's view this statement is obiter, because it had been held that the Corporation had no authority to make a by-law prohibiting processions.

> the power to authorize a suspension of the prohibition. This seems to me to be an eminently reasonable and suitable and fair way of dealing with the matter.

In this case the Court was able to uphold the subdelegation by reference to the provisions of s.13 of the Bylaws Act 1910 under which no by-law is to be invalid because it 'leaves any matter or thing to be determined, applied, dispensed with, ordered or prohibited from time to time in any particular case by the local authority making the by-law, or by any officer or servant of the local authority, or by any other person.'[28]

Jackson & Co. Ltd. v. Collector of Customs (supra) would appear to be the only New Zealand case in which the 'subdelegation' approach was accepted after consideration and rejection of the 'condition' approach. In so far as Crown relied on s.46 of the Customs Act 1913 to support the validity of the Import Control Regulations, the issue turned on whether an authority to prohibit the importation of 'any goods' was an authority to prohibit the importation of all goods except pursuant to a licence granted by the Minister or his delegate - i.e. there was a prohibition accompanied by a dispensing power. Callan J. was able to decide that an authority to prohibit any did not authorise a prohibition of all, but he went on to distinguish two cases[29] in which a dispensing power had been interpreted as a condition. Although Callan J.'s judgment is not specific on the point, he evidently rejected the argument that the dispensing power was a valid condition in favour of the argument that it was an invalid subdelegation of discretionary power: 'there has been an attempt to pass [the statutory authority] to a person not authorized by Parliament to have it, and an attempt to substitute, for such a uniform and certain rule as the Customs Act intended, a system of dealing with importations by individual and unpredictable exercises of uncontrolled discretion applied to each particular case as it arises.' ibid. 719-20.

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28. Under s.13(2) the section is not to apply if the discretion left to the local authority etc. is so great as to be unreasonable. See also Bremner v. Ruddenklau [1919] N.Z.L.R. 444 (F.C.).
29. The Taratahi and Radio Corporation cases - see note 26.

The approach adopted in the Melbourne Corporation case in Hazeldon v. McAra and in Jackson's case would involve classifying a dispensing power as a subdelegated discretionary power falling under either Category II or Category IV. (Jackson's case has been used above as an illustration of Category II.) Canadian decisions can be cited to support the view that this is its proper classification. In a recent series of by-law cases, the Canadian Courts have not drawn a distinction between the action of a municipal body in conferring a discretionary power on a subdelegate, for example, giving the Commissioner of Parking the power to prohibit parking,[30] and the action of a municipal body in itself imposing a prohibition and granting to another person a discretion to dispense with that prohibition. In both types of case, the action of the municipal body will be invalid unless the standards on which the discretion is to be exercised are clearly laid down. This Canadian approach is stated in the following passage from McQuillin on Municipal Corporations, 3rd ed., volume 9, 138, relied upon by Cartwright J. in a judgment delivered in the Supreme Court of Canada:[31]

> The fundamental rules that a municipal legislative body cannot delegate legislative power to any administrative branch or official, or to anyone, that it cannot vest arbitrary or unrestrained power or discretion in any board, official or person, or in itself, and that all ordinances must set a standard or prescribe a rule to govern

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30. Re Clements and Toronto (1959) 19 D.L.R. (2d) 476; [1959] O.R. 280 (a decision of the Ontario High Court set aside by the Court of Appeal on jurisdictional grounds and not on merits: (1960) 20 D.L.R.(2d) 497, [1960] O.R.18).
31. Vic Restaurant Inc. v. City of Montreal (1959) 17 D.L.R. (2d) 81, 105-6; [1959] S.C.R. 58, 99. In this case a by-law, under which no person was to operate any industry, business, etc. within the limits of the city without a permit from the Director of Finance of the city and the approval of the municipal department concerned, was held to be invalid. See also Musty's Service Stations Ltd. v. City of Ottawa (1960) 22 D.L.R. (2d) 311; [1959] O.R.342 (Ont. C.A.).

> in all cases coming within the operation of the ordinance and not leave its application or enforcement to ungoverned discretion, caprice or whim are fully applicable to the administration and enforcement of ordinances requiring licences or permits and imposing licence or permit fees or taxes.

Mackay v. Adams [1926] N.Z.L.R. 518 is a case in which a New Zealand judge adopted an approach comparable to that of the Canadians. The Governor-General in Council, under a statutory authority to make regulations in relation to the use of motor-lorries, had made regulations which, inter alia, divided motor-lorries into sixteen classes and prescribed a maximum speed for each class. The regulations went on to say that a 'controlling authority' - in this case the Bruce County Council - could give written permission in respect of particular motor-lorries or classes of motor-lorries for those lorries to travel at a greater maximum speed. However, the limits within which this dispensing power was to operate were set out in some detail. Sim J. said of the Regulations (at 521-2):

> [The] enactment does not involve any delegation of legislative function. It merely fixes the conditions under which the limits of speed fixed by subclauses 2 and 3 may be exceeded up to the final limit specified in subclause 6. The controlling authority, in granting permission to exceed within its territory the primary speed-limit, is not legislating. It merely determines whether, in the case of a particular lorry or particular class of lorries, the permission authorized by the clause shall be granted or not.

After distinguishing the Geraghty case (supra), Sim J. added:

> The fact that a by-law or regulation provides for permission being given by a specified body or person to do a particular thing which otherwise is forbidden does not involve necessarily a delegation of legislative power, and does not prevent the

> by-law or regulation from being a valid exercise of legislative power.

The language used by Sim J. does not specifically say that the subdelegation of a discretionary or administrative power is involved, but it is submitted that Mackay v. Adams is a situation falling squarely within the learned judge's own words in Godkin v. Newman (at 596): '[The Governor-General] may entrust the duty to others; but if he does he must first determine the basis on which the classification is to be made.'

If the cases which deal with a dispensing power as a 'condition' are looked at again, it will be found that they can be explained on grounds that are consistent with the approach in Mackay v. Adams. Thus Evatt J., in Swan Hill Corporation v. Bradbury (1937) 56 C.L.R. 746, 768, pointed out that in the Country Road Boards case the power conferred had actually laid down standards by which the discretion of the board had to be governed. He added: 'These standards were expressed in general terms, but that was, in the nature of things, impossible to avoid.' In the Swan Hill Corporation case itself the High Court unanimously declared invalid a by-law which prohibited all building within the municipality unless the approval of the Council was obtained and which gave no indication of the factors the Council was to take into account in granting its approval. In the Hookings case the Civil Aviation Regulations 1953 did not lay down any standards which the Director was to take into account in dispensing with the prohibition on the towing of aircraft, etc. However, as the passage quoted at 87 above shows, Turner J. chose to find an analogy with Mackay v. Adams by importing into the regulations the standard laid down in s.3 of the empowering statute - ' . . . securing . . . the safety of aircraft and of persons . . . carried therein . . . .' On the other hand, in the Ideal Laundry case, Finlay A.C.J. specifically said (at 1049) that the 'manner and method are left to the discretion of the Council. . . .'

It remains to be seen which line of authority - Mackay v. Adams or Ideal Laundry - will be followed by the New Zealand Courts. There are strong grounds why the making of a prohibition accompanied by the grant of a dispensing power should be recognised for what it is - a subdelegation to the

holder of the dispensing power. In that event, the grant of the latter power would be effective only if the delegate laid down the limits within which it was to be exercised. A Category IV situation would then exist. But there is a difficulty: if the Legislature has authorised the making of a prohibition there will be many cases - particularly those involving any infringement of individual liberty - in which the Courts will be reluctant to find themselves in the position that they must find valid a straight-out prohibition, but not a prohibition accompanied by an ameliorating dispensing power. As one English judge has said: 'That is just the thing that prevents an otherwise too general prohibition from being unreasonable.'[32] This is clearly what the Court of Appeal in the Ideal Laundry case had in mind.

Section 2 of the Statutes Amendment Act 1945

Now that the common law position with regard to the subdelegation of legislative powers has been examined, consideration must be given to the effect on this position of the provisions of s.2 of the Statutes Amendment Act 1945. Subsection (2) of this section deserves repetition:

> (2) No regulation shall be deemed to be invalid on the ground that it delegates to or confers on the Governor-General or on any Minister of the Crown or on any other person or body any discretionary authority.

This is hardly the language which would have commended itself to Dicey, the traditional critic of discretionary power.[33]

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32. Channell J. in Williams v. Weston-super-Mare Urban District Council (1907) 98 L.T. 537, 540. (Div.Ct.)
33. The explanatory note to the Statutes Amendment Bill 1945 said: 'The Health Department and other Departments administering technical regulations find difficulty in laying down absolute rules without leaving anything to "approved by" or "done to the satisfaction of" a Medical Officer of Health or some other official. In this respect they are more fettered than local authorities are

It may be said that once Parliament has spoken it is the duty of the Courts to give effect to the intention of Parliament, but when the provision is analysed it is apparent that this is an occasion on which Parliament has not made its intentions at all clear.

(i) The history of s. 2(2)

In the New Zealand Milk Board case Henry J. (at 1219) said in the Supreme Court that it seemed that s. 2(2) had been designed 'to meet either in whole or in part the effect of the decision of Callan J.' in Jackson's case. However, as the Court of Appeal has pointed out (at 224), the attention of Henry J. was evidently not drawn to the provisions of s. 11 of the Customs Act Amendment Act 1939 under which the Import Control Regulations 1938 were declared 'to be and to have always been valid'; nor to the fact that a similar section had appeared in earlier New Zealand legislation.[34] It follows that s. 2(2) cannot have been drafted with the express object of validating the Import Control Regulations.

(ii) Meaning of 'Regulation'

According to s. 4 of the Acts Interpretation Act 1924, '"Regulations" means regulations made by the Governor-General in Council' and, since s. 2(2) is to be read with and deemed part of the Acts Interpretation Act 1924, no doubts can be raised as to the application of s. 2(2) to the conventional statutory regulation.

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in relation to by-laws. This clause will permit regulations to be made leaving discretionary authority in the hands of the Minister or some other person.' See also 272 Parliamentary Debates 4 December 1944, 335. The by-law reference was presumably to s. 13 of the Bylaws Act 1910. (See supra at 91).

34. S. 28, Board of Trade Act 1919 (repealed); s. 21(3), War Damage Act 1941 (repealed); s. 26(3), Earthquake and War Damage Act 1944; s. 41(3), Nurses and Midwives Act 1945; s. 34(2) New Zealand National Airways Act 1945; and s. 100(4), Factories Act 1946. Cf. s. 38(4), Cook Islands Amendment Act 1957; and s. 31(4), Samoa Amendment Act 1957.

The Milk Board Amendment Act 1951 authorised the Governor-General by Order-in-Council to 'fix', 'prescribe' etc. and the instrument under examination in the Milk Board case was described as 'The Milk Marketing Order 1955'. In the Supreme Court, counsel for the plaintiff did not dispute the Solicitor-General's claim that the Milk Marketing Order was a 'regulation'. Henry J. accepted this argument, saying (at 1221) that a 'regulation is, generally speaking, a rule or order prescribed for management or government' and that, since the nature of the power in issue was one 'to control, govern and regulate the sale of milk', the Milk Order was within the term 'regulation' in the sense in which it is used in s. 2(2). The Court of Appeal did not refer to this issue, but their Honours evidently agreed with Henry J. on this point.[35]

(iii) Section 2(2) does not cure regulations falling outside scope of statutory authority

In many of the decisions on subdelegation, particularly those relating to the validity of a dispensing power, the question of the validity of a subdelegation is difficult to isolate from the fundamental question of whether the delegated legislation which purports to effect the subdelegation falls, from the point of view of subject-matter, within the scope of the statutory authority. Thus, in the Chemicals Reference [1943] 1 D.L.R. 248, Sir Lyman P. Duff C.J.C. said, in discussing an issue of subdelegation (at 252):

> No doubt has been suggested that the various subject matters which have been dealt with by

35. The English authorities recognise that there is a great deal of imprecision as to the differences, if any, between an order, a rule and a regulation. We are back again on the difficult question of the difference between legislative and administrative instruments. See Allen Law and Orders (2nd ed.,1956) 110 ff.; Griffiths and Street, Principles of Administrative Law (2nd ed.1957) 44 ff.; and Report of Committee on Ministers' Powers, Cmd. 4060, 64. Cf. s. 2 of the Regulations Act 1936.

> regulation and order, whether by the Governor-General in Council direct or by subordinate agencies under a delegated authority, are within the ambit of the powers with which His Excellency is invested by force of s.3. The cardinal matter for consideration is that which concerns the validity of delegation to subordinate agencies of the character explained.

In Melbourne Corporation v. Barry (supra) the majority of the High Court were not prepared to accept the subdelegation, if that is the correct expression, to the Town Clerk as being proper; but it is submitted that the decision really turned on the point that the power to regulate processions did not include a power to prohibit processions altogether, and, this having been decided, the comments on subdelegation became obiter. The invalidity arose from the prohibition and this was not to be cured by the discretionary power given to the Council to dispense with the prohibition. As Isaacs J. said in Country Roads Board v. Neale Ads Pty. Ltd. (1930) 43 C.L.R. 126, 138: '. . . if the by-law [in Barry's case] had been in the form of an absolute prohibition, it would have been equally invalid.'[36]

The same distinction arose in the Jackson case. Callan J., in discussing whether the Import Control Regulations 1938 were authorised by s. 10 of the Reserve Bank of New Zealand Amendment Act 1936, chose to deal at length with the subdelegation issue, but his Honour was clearly prepared to hold the regulations invalid on broader grounds. He said later in his judgment that, independently of that issue:

> . . . the powers conferred upon the Minister are so great that the attempt to confer them cannot be justified by anything short of much clearer language than Parliament has employed. ibid. 735.

It follows that this approach would, on its own, have disposed of the matter.

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36. See also Conroy v. Shire of Springvale and Noble Park (note 23 supra), especially the judgment of Sholl J., 1331.

Reference has already been made to the suggested relationship between s. 2(2) and Jackson's case. In the writer's view, even if it is conceded that s. 2(2) was an attempt to meet the kind of situation which arose in Jackson's case, the section would not have validated the regulations in that case. Section 2(2) states that no regulation shall be deemed to be invalid on the ground that it delegates to or confers upon any person a discretionary authority. Callan J. was evidently of the opinion that the statutes relied upon by the Crown just did not in their terms authorise the making of the Import Control Regulations 1938. They were invalid on broader grounds than that of subdelegation.

It can be concluded, therefore, that s. 2(2) cannot be expected to cure regulations which do not, as regards subject-matter, fall within the scope of the statutory authority involved.

(iv) Whose 'discretionary authority'?

The interpretation of s. 2(2) must depend a great deal on the meaning to be attached to 'discretionary authority'. It can be used in a wide sense to include the exercise of any statutory authority, be it legislative, judicial or administrative. Thus, in the present context, the act of the regulation-making authority in making regulations can in this wide sense be regarded as the exercise of a discretionary authority. Again, any Court or tribunal, in so far as it is not bound by fixed rules, is said to have a 'judicial discretion'. But the most usual sense in which the expression is used is to describe executive or administrative action - that is, it describes a situation where an authority has to make, in accordance with individual judgment, a decision in relation to a particular set of circumstances. Dixon J. (as he then was) used 'discretion' in this sense in the Swan Hill Corporation case (supra) at 757:

> In the course of the modern attempt by provisions of a legislative nature to reconcile the exercise and enjoyment of proprietary and other private rights with the conflicting considerations which are found to attend the pursuit of the common good, it has often been thought necessary to arm

> some public authority with a discretionary power to allow or disallow the action of the individual, notwithstanding that it has been found impossible to lay down for the guidance of the individual, or of the public authority itself, any definite rule for the exercise of the discretion. The reason for leaving the ambit of the discretion undefined may be that legislative foresight cannot trust itself to formulate in advance standards that will prove apt and sufficient in all the infinite variety of facts which may present themselves. On the other hand, it may be because no general principles or policy for governing the particular matter it is desired to control are discoverable, or, if discovered, command general agreement. Whatever may be the cause, the not infrequent result has been a general embargo or fetter upon the exercise of the individual's private or proprietary rights unless he obtains the sanction of the public authority.

It was this type of discretionary power that Turner J. had in mind in Hooking's case when he was discussing (at 938) the dispensing power there in issue:

> Mr. Rosen . . . was constrained to submit that it gave to the Director power to consider each case on its merits, and to make an administrative, and not a legislative or judicial, decision thereon. This argument, which I have accepted, . . . seems to me to oblige the Director to assume as a duty the personal consideration of each application for permission.

The problem of what is meant in s. 2(2) by 'discretionary authority' is complicated again by the difficulty, already emphasized, of clearly distinguishing the three basic functions of government. As Friedmann has said: 'Law-making shades into administration, and administration into decision-making of a more or less judicial character.'[37]

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37. W. Friedmann, Law in a Changing Society (1959), 354. This work gives a useful account of the issues involved.

Reference is made in s. 2(2) to a regulation which 'delegates to or confers on the Governor-General or on any Minister of the Crown or on any other person or body any discretionary authority' (italics provided). One would expect to find the words 'to or on any Minister' rather than simply the words 'on any Minister' and the subsection is open to the interpretation that it authorises the delegation of a discretionary authority to the Governor-General alone, and the conferment of a discretionary authority on the Governor-General, any Minister, or any other person or body. If this distinction between the acts of delegating and conferring is material, it suggests that the section authorises the Governor-General in Council, as the regulation-making authority, to entrust or commit (i.e. delegate) its own discretionary authority to make regulations or rules of general application to the Governor-General; and to grant or bestow (i.e. confer) some other discretionary authority on any of the persons named in the section. In other words, 'delegate' is used of discretionary authority already possessed by the delegate, while 'confer' is used of discretionary authority placed in the hands of another person.

This semantic approach could be further developed, but it was not adopted in the Milk Board case by either the Supreme Court or the Court of Appeal. Henry J. considered (at 1221-2) the difference between 'delegating' and 'conferring', but his decision to uphold the Milk Order was evidently based on the view that s. 2(2) justified the delegation by the Governor-General in Council to the Minister of the former's power to make regulations. In his view, s. 2(2) 'dispenses with the necessity for the exercise of the discretionary authority by the person to whom it is entrusted by Parliament . . . .' ibid. 1220-1. There are other passages in Henry J.'s judgment which confirm the impression, created by this extract, that he was finding that a delegation, as distinct from a conferment, might be to a Minister, and presumably to any other person or body, as well as to the Governor-General.

The Court of Appeal emphatically rejected Henry J.'s conclusion. After stating that it was difficult to say what

was contemplated by the use of the phrase 'any discretionary authority', it decided (at 225) that 'a delegation of the legislative power itself . . . is not authorised, and accordingly that s. 2(2) . . . cannot be invoked to render valid clause 4 of the order.' This language must mean that the 'discretionary authority' in the hands of the regulation-making authority cannot by virtue of s. 2(2) be entrusted to a subdelegate, be he the Governor-General, a Minister or any other person or body. Their Honours could perhaps have reached the same result as they did in the Milk Board case on the narrow ground that the only delegation the section permitted was one to the Governor-General himself, but there are passages in their judgment which suggest that they did not read the section in this way.[38]

It follows from what has been said that, if the phrase 'discretionary authority' as used in s. 2(2) is to have any meaning at all, it must refer to an authority in the hands of a subdelegate. If we accept that the phrase is wide enough to include a legislative, a judicial or an administrative discretion, the insistence in the Milk Board case that the legislative power cannot be subdelegated must mean that s. 2(2), at its widest, authorises the placing of a judicial or administrative discretion in the hands of a subdelegate.

(v) 'or on any other person or body'

The Court of Appeal in the Milk Board case gave as one of its reasons for giving a narrow scope to s. 2(2) the reference in the section to a delegation to 'any other person or body'. Certainly, the judgment of Henry J., if it had been upheld, would have led to an extraordinary result. The increasing extent to which Parliament is passing over its legislative function to the executive has been much criticised, but it has come to be accepted that this is a necessary and even desirable aspect of modern government, provided the delegation is made with proper safeguards - and these include delegation to a responsible authority, opportunity for Parliamentary review (which in New Zealand usually takes the form of a requirement that the Regulation be laid before Parliament) and the

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38. See lines 4-6 at 225.

requirement of publication. But here is a section which was in danger of being so interpreted that the Governor-General in Council could avoid all these safeguards by the mere act of subdelegating his authority to any person or authority.

Even if we accept the interpretation that s. 2(2) authorises the giving of any form of discretionary authority, other than legislative authority, to a subdelegate, the result is still alarming. The Governor-General in Council could, for instance, pass over the whole of the field to be regulated to the administrative discretion of an individual who was in no way responsible to Parliament. And there is Australian[39] authority as to the undesirability of a dispensing power, created by a municipal by-law, being exercised only with the approval of a body quite apart from the Council. The body in question would be under no obligation even to consider or deal with a request for approval and, if it did consider it, would not be bound to have regard to matters relevant to the good rule and government of the municipality in general.

(vi) Scope of s. 2(2)

We are still faced with the question: what is the scope and meaning of s. 2(2)? The Court of Appeal carefully avoided giving an answer. It referred (at 226) to the expression 'discretionary authority' as 'sadly lacking in precision . . . . It is so comprehensive, so broad and general, that one is unable to define its limits . . . .' Their Honours, after rejecting the attempt to use s. 2(2) to validate the Milk Order said, in concluding their judgment: 'What more limited power of delegation the section could be held to authorise we do not attempt to define.'

It has been argued above that at its very widest the section can now mean that a judicial or administrative discretion can be given to a delegate. But it would not be in keeping with the spirit of the Milk Board decision if a regulation-making authority could give to a subdelegate a judicial or administrative discretion covering all or a substantial part of that authority's competence. As has

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39. Conroy v. Shire of Springvale and Noble Park (note 23 supra), especially at 1330 and 1335.

been suggested above, it would be preferable that the subdelegate should be given a power to make rules of general application covering a particular field than that he should be allowed to exercise a discretion over that field. We must, therefore, arrive at the conclusion that at most s. 2(2) authorises a subdelegation in which the limits or a standard within which the subdelegate can act are clearly set out. In other words, we arrive back at the common law rules relating to subdelegation which have been discussed above.

This approach raises the question as to whether s. 2(2) made any change in the law. On the basis of the reasoning adopted by the Court of Appeal in the Milk Board case, the conclusion of the present article is that it may not have done so. It might be argued that the Courts should ensure that the section is given some effect, having regard to the provisions of s. 5(j) of the Acts Interpretation Act 1924 which require the Courts to adopt 'such fair, large, and liberal . . . interpretation as will best ensure the attainment of the object of the Act . . . .', but the difficulty they face is how to determine the object of a solitary section contained in a Statutes Amendment Act when they are not entitled to look outside the terms of the section itself.[40] Moreover, there is no presumption that a statute is intended to change the law. The inference may be, in the words of Maxwell on Interpretation of Statutes, 'that the legislature was either ignorant or unmindful of the real state of the law, or that it acted under the influence of excessive caution'.[41] In a case like the present, the presumption is, if anything, against a change in the law because it is presumed that the legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by clear implication.[42] It can hardly be said that s. 2(2) amounts to an explicit declaration in favour of significant changes in the law relating to the subdelegation of statutory powers.

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40. Henry J., in the Supreme Court, evidently relied on s. 5(j) because lines 27-29 at 1221 are a paraphrase of s. 5(j).
41. 10th edition, 317.
42. Ibid. 81-2.

Nevertheless, there could be instances in which the Courts would use s. 2(2) to uphold the validity of borderline cases of subdelegation. The section can justify the most liberal of approaches to the common law rules and, in particular, it could be regarded as giving statutory confirmation to the approach, propounded by Willis, that, rather than give effect to the presumed desire of the legislature for the judgment of the authority it has named, the Courts should adopt an interpretation which would ensure that the process of government goes on in its most accustomed and effective manner. One result of such an approach might be that dispensing powers to which few, if any, limits are attached, might be upheld in cases where an unqualified prohibition would be unnecessarily restrictive. Again, the specific reference in s. 2(2) to 'any other person or body' could make the New Zealand Courts less demanding than the Australian Courts have been as to the relationship between the regulation-making authority and the person upon whom a discretion has been conferred.

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