

DELEGATION OF GOVERNMENTAL POWER TO PRIVATE PARTIES

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1 INTRODUCTION

The rule against delegation provides that, as a general principle, authorities entrusted with governmental power should exercise that power themselves and should not delegate it to others. The rule is by no means absolute, but it is likely to be applied with greater vigour where power is delegated to private parties than where the delegation is to an official party. The problem has generated a vast amount of case law and comment in the United States,¹ but has attracted relatively little interest in other jurisdictions. The problem has however emerged from time to time in English and other Commonwealth courts. The object of this article is to examine some of the problems raised.

There will be no attempt to make an exhaustive review of the vast American case law, but certain leading cases will be examined to supplement the Commonwealth authorities. The main distinction between the American position and that in other common law countries is the insistence in the United States that the rule against delegation binds Congress and the State legislatures.² It is well recognised that this aspect of the rule against delegation is of theoretical rather than practical importance, at least at the federal level,³ but many of the cases involving delegation to private parties start from the assumption that Congress and State legislatures are bound by the rule. In other jurisdictions Parliaments are not subject to the rule against delegation.⁴ This difference of approach means that two considerations must be borne in mind in evaluating American cases. First, where the legislation under challenge is that of Congress or a State legislature, and is upheld, courts outside the United States would in dealing with similar legislation come to the same conclusion through holding that Parliament is not subject to the rule against delegation. The reasoning in those cases can only be relevant if projected on to cases where a

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1 See eg Davis, *Administrative Law Treatise* (2nd ed) Vol 1 Ch 3; Cooper, *State Administrative Law* (1965) 84-85; Jaffe, "Law Making by Private Groups" (1937) 51 *Harvard LR* 201; Liebmann, "Delegation to Private Parties" (1975) 50 *Ind LJ* 650; Freedman, "Delegation of Power and Institutional Competence" (1976) 43 *University of Chicago LR* 307 at 331 ff; Dubinski, "Delegation of Powers to Private Groups in Missouri" (1941) 26 *Wash ULQ* 540.

2 *Panama Refining Co v Ryan* (1935) 293 US 388; *ALA Schechter Poultry Corp v US* (1935) 295 US 495; *Carter v Carter Coal Co* (1936) 298 US 238. See also Schwartz, "The Heraclitean Nature of Administrative Law" (1982) 17 *New England LR* 1129 at 1131-1132.

3 See Davis *supra* n 1, Freedman *supra* n 1.

4 Eg *Powell v Apollo Candle Co* (1885) 10 *App Cas* 282 (NSW); *Victorian Stevedoring and General Contracting Co v Dignan* (1931) 46 *CLR* 73 (Australia). *Hodge v R* (1883) 9 *App Cas* 117 (Ontario).

subordinate legislator attempts the delegation. But that reasoning must be greeted with caution. It is quite obvious that the rule against delegation cannot be applied with any rigour to a body which has legislative power over a whole state or country. Far different considerations apply to bodies which have relatively narrow powers. Certain recent American cases in dealing with delegations of power by legislatures have denied that any delegation is involved. The reasoning is unconvincing but what may lie behind it is recognition that Parliamentary legislators are not appropriate subjects for the operation of the rule.⁵

Where on the other hand American courts apply the rule against Parliamentary legislators, Commonwealth courts would on the facts decide the case differently on the basis of Parliamentary sovereignty. However, the reasoning in such cases would be readily applicable to subordinate authorities both in the United States and elsewhere: if, despite the difficulties of applying the rule against legislatures, the courts are prepared to do so, then a fortiori they would apply the rule to subordinate bodies.

As a starting point there is little doubt that where a delegation to an official body would be regarded as unlawful, a delegation to a private party will generally also be held unlawful. But where the courts may be prepared to recognise the legality of a delegation to an official body, a delegation of a similar power to a private individual or organisation may well be held invalid.⁶ An Australian case provides a good illustration. In *Conroy v Shire of Springvale and Noble Park*,⁷ a by-law prohibited the keeping of more than two dogs without the permission of the Council. In the case of greyhounds, the by-law required application for permission to be accompanied by the approval of a private body, the Dog Racing Control Board. By a majority the Court upheld the delegation to the council itself but the court unanimously held the delegation to the Board invalid. Sholl J pointed out that the Board was not under any duty to have regard to the good rule and government of the locality, and indeed that the Board was under no duty even to consider applications for its approval.⁸ Gavan Duffy J observed that the interests of the Board might be adverse to those of the council.

The Australian Court was able to deal with the problem of private power because it recognised that a delegation of power had taken place and had to be justified in the light of the rule against delegation. Not all courts have recognised a delegation of power for what it is. Since the rule against delegation will not be brought into play at all if the court omits or refuses

5 Eg *New Motor Vehicle Board of California v Fox* (1978) 439 US 96; *James v Valtiera* (1971) 402 US 137 (State Constitution); *Currin v Wallace* (1939) 306 US 1. For more recent cases on delegation generally see Schwartz, "Some Recent Administrative Law Trends" [1982] Wisconsin LR 208.

6 This phenomenon reveals one of the difficulties in the construction approach adopted by Willis, "Delegatus Non Potest Delegare" (1943) 21 CBR 257. He proposes the test of whether in conferring power the statute should be read as implying the word "personally" or the words "or any person authorised by it". A more appropriate test is whether the statute contemplated the delegation of the power to the kind of delegate selected.

7 [1959] VR 737; see also *PEI Potato Marketing Board v HB Willis Inc* [1952] 2 SCR 392 (SCC); *Re Steve Dart Co* (1974) 46 DLR (3d) 745; *Ellis v Dubowski* [1921] 3 KB 621.

8 [1959] VR at 758. See also Note, (1950) 36 Virginia LR 391.

to recognise a delegation when it occurs, it is necessary to confront the problem of recognition at the outset.

II THE PROBLEM OF RECOGNITION

One aspect of the rule against delegation is that a rule-making power may not be delegated. It will be rare indeed for a subordinate legislator to hand over a whole rule-making power directly to a private party. It is more likely that the private party's contribution will appear as part of the legislative process rather than as a piece of legislation in its own right. While this may avoid certain problems of form and difficulties of publication, there will remain the substantial objection that governmental power is being wielded by a private body. This was brought out well in a leading American case, *Eubank v City of Richmond*.⁹ A statute empowered the local authority to regulate building and establish building lines. A municipal ordinance made under this power required the Committee on streets to establish a building line if requested to do so by the owners of two-thirds of the abutting property. The Supreme Court of the United States held the ordinance invalid because it gave the property owners a power which might be exercised capriciously or in their own interests.

In *Eubank* the reality of the delegation was easy to perceive. But it is possible for power to be delegated in a more disguised form. This can occur when the subordinate legislator enacts a prohibition and then confers on a private party power to dispense with the prohibition. It is not then quite so obvious that a rule-making power has been delegated. An American case of high authority which rejected the argument that there had been a delegation in these circumstances is *Thomas Cusack v City of Chicago*.¹⁰ A municipal ordinance made under a statutory power to regulate billboards prohibited the erection of certain kinds of billboard without the consent of neighbouring property owners. The Supreme Court of the United States rejected the contention that there had been an unlawful delegation to the property owners concerned. The Court distinguished *Eubank* on the ground that the power to impose restrictions was delegated. The power in the *Cusack* case was to remove restrictions; it could only be operated to benefit people otherwise caught by the prohibition, and instead of being a delegation of legislative power it was merely a familiar provision affecting the enforcement of laws and ordinances.

None of these arguments is convincing. First, the conferment of benefits is just as capable of being a rule-making matter as the imposition of obligations and in this context the conferment of benefits also meant deciding against whom the prohibition should operate. Nor is there any necessary antithesis between a legislative provision and a provision affecting the enforcement of laws. An exception written into the by-laws, say exempting X Co from the prohibition, would have been a provision affecting the enforcement of the prohibition. The fact that the same exception could be brought into being by the action of the property owners reveals the fallacy

9 (1912) 226 US 137.

10 (1917) 242 US 526. See also *City of Eastlake v Forest City Enterprises Inc* (1976) 426 US 668, criticised by Davis *supra* n 1 at 195-196.

in drawing a sharp division between legislation and provisions affecting enforcement.

This seems to have been the view of the Supreme Court of the United States in a later case *Washington; Ex Rel Seattle Title Trust v Roberge*.¹¹ In this case the municipal ordinance prohibited the erection of nursing homes without the consent of neighbouring property owners. The Court held the ordinance invalid on the ground that it conferred an arbitrary power on the landowners. No weight was given to the reasoning in the *Cusack* case.¹² However, the Supreme Court did not overrule that case but distinguished it on the basis of the different subject matter of the ordinance.¹³ Whether that distinction is valid or not is not important for present purposes. What is important is that after a false start, the Supreme Court soon came to recognise in the dispensation kind of case that a delegation of power occurs and requires justification if it is to be upheld.

In the *Cusack* and *Roberge* cases the participation of the landowners in the governmental process was framed in terms of consent. However, there can be just as much a delegation of power if the private parties are given a right of objection rather than consent. This point seems to have been missed by the majority judges in a recent Canadian case, *Lamoureux v City of Beaconsfield*.¹⁴ A municipal by-law provided that a permit for certain land development should not be granted if the owners of two-thirds of the neighbouring land objected. The by-law was challenged on the ground that it illegally delegated power to the neighbouring landowners. By a majority the Supreme Court of Canada held the by-law valid: the by-law did not involve a delegation but spelt out the conditions which were required to be met by an applicant for a permit and one of the conditions was that if a substantial majority of the landowners objected, no permit should be issued. Pigeon J dissented and would have held the by-law invalid on the ground that it delegated power illegally. The reasoning of the majority in *Lamoureux* is open to the same kind of objection as that in the *Cusack* case.¹⁵ There is no antithesis between a condition and a delegation of power.¹⁶ A condition may take many forms. Where it takes the form of a delegation of power, it brings into play the rule against delegation. That rule is subject to qualification and there may in a given case be good reason for upholding the legislation notwithstanding the delegation. On the other hand there may be no sufficient reason for allowing the delegation. In such cases failure to recognise that a delegation has taken place

11 (1928) 278 US 116. See also *City of St Louis v Russell* (1893) 22 SW 470. Predictably the conflict inherent in the *Eubank/Cusack/Roberge* cases has caused confusion at the State court level: see Liebmann supra n 1 at 675-680.

12 See Jaffe supra n 1 at 228.

13 For criticism of the distinction, see Liebmann supra n 1 at 676.

14 [1978] 1 SCR 134; see also *Canadian Petrofina Ltd v City of Montreal* (1959) Que QB 211; *State Theatre Co v Smith* (1979) 276 NW (2d) 259. The *Lamoureux* decision has been described as an eyebrow-raising decision by Rogers, *Canadian Law of Planning and Zoning* (loose leaf) at 129.

15 Supra n 10.

16 Compare Jaffe's treatment of an attempt to create a distinction between a "happening" and the exercise of a power: supra n 1 at 205.

means that the control which the courts exercise through the application of the rule against delegation will be emasculated.

What then is important is that whether the private party is given the right to impose restrictions, to consent to the removal of restriction or to object to their removal, the fact that there has been a delegation of governmental power should be recognised. The court can then move to the next question, whether the delegation is justifiable.¹⁷

III DELEGATIONS TO HOUSEHOLDERS TO DECIDE MATTERS OF PUBLIC INTEREST

All the cases considered so far are cases in which in effect private parties have been given governmental power over the use or development of their neighbourhood. The law has long looked with suspicion on the conferment of such powers. In a relatively early English case *Elwood v Bullock*,¹⁸ a by-law prohibited the erection of entertainment booths except with a licence granted by the mayor. It further provided that the mayor should not grant the licence if three householders residing within 100 yards objected in writing to the application. The by-law also gave any three householders living within 100 yards a power to demand revocation. The court held that the by-law was invalid. Lord Denman¹⁹ observed that the by-law conferred an absolute power of prohibition or removal and could not be supported. The ground of challenge was stated to be unreasonableness rather than unlawful delegation but in this area of the law the two grounds of challenge go very closely together. It is the high potential for discriminatory or self-interested exercise of power arising from the delegation which leads to the charge of unreasonableness.²⁰

The approach in *Elwood v Bullock* has been followed and developed in a line of Canadian cases. In *Re Kiely*²¹ a by-law prohibited the keeping of a livery-stable unless a majority of owners within an area of 500 feet consented. Wilson CJ held the by-law invalid *inter alia* because it unlawfully delegated power to the landowners. The judge observed that the keeping of livery-stables was not necessarily a nuisance. If it became one the proper course was to prosecute and suppress the nuisance.²² Moreover, the fact that the private parties may not have the last word does not necessarily²³ save the delegation. This was made clear in *R v Webster*,²⁴ where a by-law prohibited the carrying on of "manufactures or trades dangerous in causing fire" within 300 feet of any other building. The by-law was later amended to allow such trade if the owners of any building within 300 feet consented and the consent was approved by the Chairman of the Board of Works. Even though only part of the power to dispense with the prohibition was vested in the private parties, the court held the by-law invalid. The delegation to the Chairman was also held to be invalid.

17 See also Liebmann *supra* n 1 at 656.

18 (1844) 6 QB 383.

19 *Ibid* at 401.

20 See *Country View Ltd v City of Dartmouth* (1974) 8 NSR (2d) 1; see *infra* n 26.

21 (1887) 13 OR 451.

22 *Ibid* at 457.

23 See section VII *infra*.

24 (1888) 16 OR 187.

In *R v Webster* the by-law was passed under a fairly tightly-drawn statutory power. But the same view has been taken where the statutory power is expressed in broad terms. In *Re Davies and Village of Forest Hill*²⁵ the local authority had power to make by-laws for the health, safety, morality and welfare of local inhabitants. A by-law prohibited the construction of swimming pools without the consent of neighbouring land-owners. Wells J held that even though the by-law was designed to prevent the swimming pools becoming a nuisance to the neighbours, it was invalid as an unlawful delegation. The fact that it was made under a broad head of power did not save it.

The twin concerns of improper transfer of power and risk of discrimination lying behind the rule against delegation in this area are brought out in *Country View Ltd v City of Dartmouth*.²⁶ A by-law prohibiting the grant of a building permit without the consent of a majority of the owners of real property within 1000 feet of the proposed building was held to be invalid. The court pointed out that the legislature had placed a special confidence and trust in the local authority which was expected to exercise its own judgment and discretion. The placing of power in the hands of private persons could lead to discrimination and unequal treatment.

*Lamoureux v City of Beaconsfield*²⁷ is out of line with these authorities in upholding a by-law which prevented the issue of a permit where neighbouring landowners objected. The *Kiely* and *Webster* cases were considered by the Supreme Court of Canada. *Kiely* was treated as dealing with the matter *obiter*²⁸ and *Webster* was dismissed in part because the by-law in question also required the approval of the Chairman of the Board of Works.²⁹ Both cases were treated as weakened by the fact that they were decided long before the existence of zoning by-laws.³⁰ The Court also distinguished an earlier judgment of its own³¹ where a by-law had been held invalid in giving an unlimited discretion to the council to decide whether a permit should issue. None of these arguments is convincing. Even if the delegation point was decided *obiter* in *Re Kiely*, that part of the decision was firmly based on authority. The fact that power was shared between private persons and an official in the by-law in the *Webster* case makes the by-law a little more defensible than it would otherwise have been; it is not a ground for regarding the case as weakened. On the zoning point, it is not easy to see why the delegation of governmental power to private individuals should be regarded as any more defensible under zoning laws than under any others. Zoning laws are not concerned with the protection of property values but with the protection of the environment for the benefit of the public generally.³² This means that delegation to private parties is

25 (1965) 47 DLR (2d) 392; see also *Mitchie v MD of Rocky View* No 44 (1968) 64 WWR 178; *Re Niagara Wire Weaving Co Ltd* (1972) 3 OR 129.

26 (1974) 8 NSR (2d) 1.

27 [1978] 1 SCR 134; see notes 14-16.

28 [1978] 1 SCR at 141.

29 *Idem*.

30 *Idem*.

31 *City of Verdun v Sun Oil Company Ltd* [1952] 1 SCR 222.

32 See Note, "Delegation to Private Parties" (1937) 37 Columbia LR 447 at 452.

no more appropriate than in cases like *Elwood*, *Kiely* and *Webster*. Finally, if it is unlawful to delegate discretion to an official body, then in the absence of compelling reasons to the contrary it is also unlawful to delegate that power to private parties. Had it been recognised that there had been a conferment of discretion on the landowners, the serious objections lying behind the rule against delegation would have been brought to the fore.

IV DELEGATION OF THE POWER TO PROTECT SELF INTEREST

What was delegated, at least in part, in the cases discussed so far was a power to make judgments about the requirements of public interest. That kind of judgment should not generally be left to private individuals. But it is permissible for delegated legislation to decide that the public interest requires the protection of individuals from annoyance and to delegate to those individuals the right to provide evidence of that annoyance. In such a case what is delegated is not the policy judgment which must be taken by the official body itself or an appropriate official delegate, but the determination of a question of fact peculiarly within the knowledge of the private party concerned. The point can be illustrated by reference to a leading English case, *Kruse v Johnson*.³³ A by-law prohibited singing within 50 yards of a dwelling house after a request to desist by a constable or an inhabitant of the house concerned. Attention was mainly focused on the legality of the delegation to the constable. The court held that delegation valid. There was less discussion of the delegation to the private party. However, Jeune P observed that the objection by the inhabitant supplied the element of annoyance and that it was not unreasonable to give the inhabitant a power of veto.³⁴ This seems correct. It is nothing to the point that the council if assembled at the house would find the singing enjoyable rather than annoying. Nor does it matter that a householder may exercise his power arbitrarily or in a discriminatory fashion. The householder may welcome the first group of carol singers and yet complain of the second group which is in every way more tuneful and more worthy. What in effect is delegated is the right to provide conclusive evidence that annoyance has been caused to the inhabitant. No more suitable delegate could be found.

Kruse v Johnson must be contrasted with what at first sight looks a similar case, *Transport Ministry v Alexander*.³⁵ The Governor-General of New Zealand had power to make regulations for securing the safety of aircraft and for preventing aircraft endangering other persons and property. A regulation prohibited aircraft from taking off from or landing on places other than aerodromes except with the approval of the occupier of the place concerned. Roper J held that the regulation was invalid on the ground of unlawful delegation. The judge observed that the reasons an occupier might have for granting or refusing approval would be far removed from further-

33 [1898] 2 QB 91; see also *New Motor Vehicle Board of California v Fox* (1978) 439 US 96; *McFall v City of St Louis* (1911) 135 SW 51; Dubinski, supra n 1 at 553.

34 [1898] 2 QB 91 at 106.

35 [1977] 1 NZLR 58.

ance of the objects of the Civil Aviation Act.³⁶ This case is distinguishable because in effect the occupier was empowered to decide questions involving the safety of aircraft, a role for which occupiers of land are not necessarily qualified. Had the power been conferred to protect occupiers from trespass on or interference with their property, the delegation would have been justifiable.

V DELEGATING POWER TO DECIDE ON MATTERS INVOLVING EXPERTISE

It is recognised that a public authority may delegate the determination of matters requiring expert judgment to officials who possess the relevant expertise.³⁷ Since such judgments do not involve making policy choices on the basis of public interest but simply applying the policies already determined, there is little objection in delegating such powers to non-official experts. In *Long v Knowles*,³⁸ regulations provided for the appointment of testers to test loadometers used to establish the weight of lorries alleged to be overweight. The regulations delegated to the Professor of Engineering at the University of Tasmania the power to appoint the testers. Burbury CJ held that the delegation to the Professor was valid.

Another example of this kind of delegation is the conferment on a standard institution of a power to set standards. The matter was considered in *R v House of Stein*.³⁹ The city of Vancouver passed a by-law prohibiting the sale or display of any electrical equipment which was not approved by the Canadian Standards Association. The by-law was challenged on the ground that it delegated to the Association the function of deciding what electrical equipment could be sold. The British Columbia Court of Appeals held that there was no delegation but that even if there were it had been expressly authorised by the city's charter. A different view was taken in *R v Ciarniello*.⁴⁰ The Superintendent of Motor Vehicles had been given power to make regulations approving safety helmets. He made a regulation approving those helmets which might be accepted from time to time by various specified standard institutions including the Canadian Standards Association, the British Standards Institute and certain American institutions. Romilly Prov J held the regulation void inter alia because it improperly delegated uncontrolled power to the private bodies concerned. It is submitted that the case is wrongly decided on this point. What was delegated was judgment on a matter of expertise to bodies which were able to bring that expertise to bear. It would seem fruitless to set up a standing review mechanism whereby the superintendent could overrule the private bodies, since his expertise would presumably not be as great as that of the bodies under review. On the other hand if it became apparent that one of the bodies was failing to set proper standards the regulation could be suitably amended.

36 Ibid at 62.

37 *Lewis v R* 1910 TS 413; *State v Antrim Court Pty Ltd* 1962 (4) SA 405 at 407.

38 [1968] Tas SR 46. See also *Brooker v Attorney General of Canada* [1973] FC 327 (appointment of private individual to serve on public service selection board).

39 (1964) 44 DLR (2d) 103. See also *Wright v TIL Services Pty Ltd* (1956) 56 SR (NSW) 413 discussed by Pearce, *Delegated Legislation* (1977) paras 270-274.

40 (1979) 12 BCLR 394.

Courts in the United States have recognised the validity of some delegation to expert private bodies. In *State v Wakeen*⁴¹ a statute prohibited the sale of drugs except by registered pharmacists. The term drug was defined as articles recognised as having certain properties by the United States Pharmacopoeia and any supplement to that work. It was contended that as the definition referred to articles recognised as drugs in future supplements to the Pharmacopoeia, there was an unlawful delegation. The Supreme Court of Wisconsin held the delegation valid, inter alia because of the integrity and high standards of the members of the Pharmacopoeia Convention.⁴² Another reason for upholding the delegation was that the private body did its work of classification quite independently of the statute and not in response to it.⁴³

However, expertise is not always a guarantee against self-interest and where the latter danger outweighs the benefit to be derived from the use of the expertise the delegation to the expert should be invalid.⁴⁴ Furthermore an expert body may come to its decision not by applying its own expertise but by a semi-governmental attempt to reconcile competing interests. This was the position in *Hillman v Northern Wasco County People's Utility District*⁴⁵ where an order which required that electrical installation should comply with the National Electric Code approved by the American Standard Association was held invalid.

Another problem in this kind of case is that of publication. In *State v Crawford*⁴⁶ the Supreme Court of Kansas held invalid a statute which required that "all electric wiring shall be in accordance with the National Electric Code". The Court pointed out that the Code might be changed from time to time without the knowledge of the persons affected by it and that there was no official or practical way for the average property owner to know what the Code rules were. The Court suggested that if the legislature wished to make the Code law it should adopt it by proper legislative procedure and require the Secretary of State to publish it.

The problem of publication is a very proper concern but the rule against delegation is not the best way of solving it. In jurisdictions other than those in the United States the rule will not operate where the private party has been given power by Parliament rather than by a subordinate legislator,⁴⁷ and in some cases even governmental delegated legislation may not always be accessible.⁴⁸ The solution is to hold that delegated legislation, public or private, does not come into effect until published and that no person can be convicted under or affected by such legislation unless it has been

41 (1953) 57 NW (2d) 364.

42 See also *White v State Board of Pharmacy* (1955) 138 NYS 448; *Niagara of Wisconsin Paper Corp v Wisconsin Dept of Natural Resources* (1978) 268 NW (2d) 153 at 161-162; Freedman, supra n 1 at 333; Liebmann, supra n 1 at 685; Morrison [1954] Wisconsin LR 500.

43 57 NW (2d) 364 at 369; see section VI infra.

44 See Jaffe, supra n 1 at 229-230; Freedman, supra n 1 at 335.

45 (1958) 323 P (2d) 664.

46 (1919) 177 P 360; Note (1950) 36 Virginia LR 391; *R v Ciarnello* (1979) 12 BCLR 394 also adverts briefly to this point at 398.

47 See supra n 4.

48 See *Lim Chin Aik v R* [1963] AC 160 and Jaffe, supra n 1 at 229.

made reasonably accessible to him.⁴⁹ A public authority which wished to utilise the expertise of private bodies but to overcome the problems of evidence presented by the publication rule would have an incentive to make provision for orderly publication but would not be under a duty to judge the substantive merits of the rules laid down by the private expert body.⁵⁰

The common law power to delegate in this way may be excluded by statute, for example by providing that delegate legislators shall incorporate rules like those of standard institutes only as they exist at the time of incorporation and not as amended from time to time.⁵¹

VI INCIDENTAL RULE-MAKING

The standards institutes cases permitting delegation can be justified in part on the basis that the private body concerned is not making its rules in response to the delegation but independently of it.⁵² Such delegations are permissible even where there is no element of expertise involved. In *Bendixen v Coleman Scott and Croft*⁵³ a prices order fixed the price of liquors sold at retail as cost plus 25 percent of that cost. The High Court of Australia held that the term "cost" was not so uncertain as to make the order invalid. The cost was the price the retailer was liable to pay for the liquor to the supplier. The Court found no objection in the element of delegation inherent in this method of defining cost.

The question arose sub silentio in the *Bendixen* case but arose for direct decision in *Croft v Rose*.⁵⁴ A regulation prohibited driving over 30 mph in streets where there was provision for lighting by means of street lighting. It was argued that the regulation was invalid because it delegated the imposition of the speed limit to those who installed the street lighting. Hudson J held that there was no delegation of power and observed that in *Bendixen v Coleman Scott and Croft* and other High Court cases⁵⁵ there was no suggestion that there had been an illegal delegation.

There is a point however at which the decision-making by the private party is so nearly parallel to that of the delegator that it becomes a direct rather than an incidental exercise of power. That point was reached in *Ellis v Dubowski*.⁵⁶ A local authority had power of censorship over films. Its licensing committee attached to a licence a condition that no film should be shown which had not been certified for public exhibition by a private

49 See Pearce, *Delegated Legislation* (1977) para 273; Lanham, "Delegated Legislation and Publication" (1974) 37 MLR 510. Cf Campbell, "The Publication of Delegated Legislation" [1982] PL 569 and see Lanham [1983] PL 395.

50 For the position in the United Kingdom see eg Medicines Act 1968, s 99 which imposes on the British Pharmacopoeia Commission an obligation to publish the British Pharmacopoeia. Under earlier legislation, responsibility for publication was placed on the General Medical Council: Medical Act 1956, s 47.

51 See eg the Australian Commonwealth Acts Interpretation Act 1901, s 49A and the New Zealand Standards Act 1965, especially s 27.

52 Davis, *supra* n 1 at 196.

53 (1943) 68 CLR 401.

54 [1957] ALR 148.

55 *King Gee Clothing Pty Ltd v Commonwealth* (1945) 71 CLR 184 and *Canns Pty Ltd v Commonwealth* (1946) 71 CLR 210.

56 [1921] 3 KB 621.

body, the British Board of Film Censors. The court held that the condition was invalid on the ground of unlawful delegation. In cases like this the law-making aspect of the act of the private party is not merely incidental. It is deliberately exercising its own regulatory function. The *Ellis* case is supported by the decision of the Supreme Court of the United States in *Carter v Carter Coal Co.*⁵⁷ An Act of Congress provided for the regulation of the bituminous coal industry. Boards were set up to determine marketing prices and practices. The Act provided that where the maximum daily and weekly hours of labour were agreed upon by the producers of more than two-thirds of the annual national tonnage of coal and the representatives of more than half of the mine workers employed, the maximum hours were to be binding on effectively the whole industry. Sutherland J observed that this arrangement subjected the minority to the will of the majority and was a delegation in its most objectionable form, in conferring power on private persons whose interests might be and often were adverse to others in the industry.⁵⁸

Later US Supreme Court cases seem more favourably disposed to such delegations but the reasoning is unconvincing. For example in *Currin v Wallace*⁵⁹ a statute authorised the Secretary of Agriculture to designate a tobacco market if two-thirds of growers of tobacco who had sold at the market favoured such designation. Designation involved liability to governmental inspection. the statute was challenged on the ground that it unlawfully delegated power to the growers. The Supreme Court held that there was no delegation of legislative authority. Congress had made the regulation and had prescribed the conditions of its application. The required favourable vote was one of the conditions.⁶⁰ The argument is familiar but specious. There is no antithesis between condition and delegation. Where a condition takes the form of a delegation it must come within an exception to the rule against delegation or it will be invalid. It is not clear what exception to the rule would have justified the delegation in this case.⁶¹

VII DELEGATION AND INTERNAL REVIEW

An otherwise invalid delegation to a private party may be saved if the delegator reserves a power to review. This point was made obiter in *Ellis v Dubowski* itself.⁶² The matter arose for direct decision by the Court of Appeal in *R v Greater London Council; Ex parte Blackburn*.⁶³ As in the *Ellis* case, a local authority delegated its film censorship powers to the British Board of Film Censors, but this time the authority retained the power to review the Board's decisions. The Court of Appeal held that the delegation was lawful. The power of review may be vested in someone other

57 (1936) 298 US 238; see also *ALA Schechter Poultry Corp v US* (1935) 295 US 495.

58 (1936) 298 US 238 at 311.

59 (1939) 306 US 1; there is considerable conflict of opinion at both federal and state level, see Davis, *supra* n 1 at 193-198 and 1982 Supplement at 21-22; Jaffe, *supra* n 1; Liebmann, *supra* n 1.

60 (1939) 306 US at 15.

61 But see *supra* n 5.

62 *Supra* n 56.

63 [1976] 1 WLR 550; see also *Mills v London County Council* [1925] 1 KB 213 (DC).

than the delegator provided that the body given the review power is one to whom the power could lawfully be delegated. So if in *Conroy v Shire of Springvale and Noble Park*⁶⁴ the Dog Racing Control Board had been given only an initial power to decide whether permission should be granted for the keeping of more than two greyhounds and if that decision had been subject to review by the council in ordinary meeting (a body different from the by-law making council), the delegation would have been valid. If the official person or body is not a suitable delegate a power of review vested in such a person or body will not save the delegation to the private body.⁶⁵

VIII CONCLUSION

There are good reasons why the courts should look with a critical eye on attempts to delegate power to private parties. Private parties will not always have the welfare of the public at heart when making their decisions and may well be motivated by self-interest. Even so there will be occasions on which a delegation to private parties will be permissible. For example in cases where the very object of the legislation is to protect persons if they wish to have that protection the delegation of the decision to seek the protection is clearly justifiable. Moreover when a private person or body has the expertise necessary for a proper fulfilment of a governmental plan, delegation to such a person of decisions involving that expertise is proper. Subordinate legislators may also wish to draw on the work done by private bodies for purposes other than exercising the governmental power, to contribute to a regulatory scheme. The line is crossed however where the private body concerned is given the power to make governmental decisions purposefully rather than incidentally. On the other hand, a delegation to a private body may be saved if there is a power of review retained by the delegator or vested in a suitable delegate.

While the rule against delegation strikes at delegations both of the power to make rules and the power to dispense with rules, the former kind of delegation raises an additional problem relating to publication. This problem is in principle no different from that relating to delegated legislation made by officials or official bodies. The way to solve this problem is not by applying the rule against delegation but by insisting on reasonable publication as a condition for the application of such rules.

For the rest, while the rule against delegation is likely to be more vigorously applied in the case of delegation to private parties than in the case of delegation to officials, in neither case is the rule absolute. In each case the dangers and benefits of the given delegation must be weighed against each other.

64 [1959] VR 737; see supra n 7. See also Jaffe, supra n 1 at 225-226, 237, 247.

65 *R v Webster* (1888) 16 OR 187, supra n 24.