

47/08; [2008] VSC 427

SUPREME COURT OF VICTORIA

**CLARKE v ELIAS & ANOR**

Hollingworth J

6 May, 22 October 2008

**ADMINISTRATIVE LAW – DELEGATION OF POWER TO A DISCRETIONARY AUTHORITY – REGULATIONS AUTHORISED DEPARTMENTAL SECRETARY TO DEFINE UNIFORM STANDARDS – THE UNIFORM FOR TAXI DRIVERS EXCLUDED THE WEARING OF JEANS – TAXI DRIVER INTERCEPTED WHILST WEARING JEANS – WHETHER LEGISLATIVE POWER TO APPROVE UNIFORMS WAS IMPROPERLY DELEGATED: TRANSPORT ACT 1983, S162; TRANSPORT (TAXI-CABS) REGULATIONS 1994, R25.**

1. When a discretionary power is conferred by statute on a particular person or body, as a general rule, the power can only be validly exercised by the person or body upon whom it was conferred. Its exercise cannot be delegated to someone else, unless the statute, upon its proper construction, permits such delegation. Where the power has been delegated by regulation, the statute must be read as a whole with the object of finding in its expressions the intention with which it is made and, in particular, the intended extent of the regulation making-power given to the delegator; and an examination of the ambit of the regulations considered in relation to the scope and purpose of the statute so ascertained.

2. In deciding whether there has been an impermissible delegation, courts often have regard to a number of matters, including the following:

- (a) The nature of the power: whether it can be categorised as legislative, judicial or executive (delegation being more likely to be permitted in the case of executive powers);
- (b) The subject matter of the power;
- (c) The identity of the person to whom the delegation has been made; and
- (d) The form of exercise of the relevant power.

3. Where a statutory provision provided that the regulations made under the Act may confer a power or a discretionary authority on a person, this envisaged a delegation in the broadest possible terms. Accordingly, the delegation of power to a Departmental Secretary to set taxi-driver uniforms was a valid delegation and a Court was not in error in convicting a taxi-driver who was in breach of the Regulation.

**HOLLINGWORTH J:**

**Introduction**

1. Douglas Clarke is a taxi driver. On 17 May 2005, Mr Clarke was intercepted by the first defendant, then a senior constable with the Melbourne Traffic Management Unit, about a parking infringement. The police officer noted that Mr Clarke was wearing denim jeans, and charged him on summons with not wearing the prescribed taxi driver's uniform whilst on duty, contrary to reg 25 of the *Transport (Taxi-Cabs) Regulations* 1994 (Vic) ("the 1994 regulations").

2. In November 2005, Mr Clarke was convicted of that offence in the Magistrates' Court. He was fined \$100 and ordered to pay costs of \$36.80.

3. Mr Clarke appealed to the County Court. He raised a large number of grounds of appeal, including that there had been an invalid delegation of the power to regulate the dress and appearance of taxi drivers, to a person other than the one who had been authorised to do so.

4. On 6 June 2006, the learned County Court judge set aside the orders of the magistrate, found the charge was proven, re-imposed the conviction and ordered the same fine and statutory costs as ordered by the magistrate.<sup>[1]</sup> Regrettably, the learned judge gave no oral or written reasons for decision, notwithstanding the large number of grounds of appeal, and despite being specifically requested to do so.

5. On 4 August 2006, Mr Clarke filed an originating motion seeking judicial review of the

County Court decision. The originating motion was first amended in May 2007. Both the original and amended originating motions sought judicial review on a number of grounds which are no longer pressed, including grounds arising out of the judge's failure to give reasons. The affidavits filed in this proceeding primarily addressed those grounds.

6. The only ground pressed before me was that the purported delegation of the power to define driver uniforms, and the particulars of the offence of wearing one, to the relevant Secretary was invalid.<sup>[2]</sup> Accordingly, Mr Clarke says that the offence of which he was convicted was not known to law. The police officer accepts that if the relevant part of the 1994 regulations is found to be invalid, that would constitute a jurisdictional error, such that the conviction could not stand.

### The legislative scheme

7. Division 5 of Pt VI of the *Transport Act* 1983 (Vic) ("the *Transport Act*")<sup>[3]</sup> regulates the licensing and operation of commercial passenger vehicles, including taxi-cabs. Section 162 of the *Transport Act* relevantly provides:

- (1) The Governor in Council may make regulations for or with respect to— ...
- (c) prescribing and regulating in respect of vehicles ...
  - (ii) the dress and appearance of drivers ...

8. Importantly for present purposes, s162(2) of the *Transport Act* provides that any regulations made under the section:

- (a) may be of general or of specially limited application;
- (b) may differ according to differences in time, place or circumstance; and
- (c) may prescribe penalties of not more than 20 penalty units for any breach thereof; and
- (d) may confer a power or a discretionary authority on a person or body or a class of people or bodies; ...

9. The relevant part of the 1994 regulations was made under s162 of the *Transport Act*.<sup>[4]</sup> Version No. 13 of the 1994 regulations was in force at the time of the alleged offence.

10. Reg. 25(1) provided:

#### 25. Driver's appearance

- (1) A taxi-cab driver while on duty must wear a uniform approved by the Secretary.
- Penalty: 5 penalty units.

11. The 1994 regulations were revoked on 27 June 2005. The current regulations do not contain a provision in the same form as reg 25.<sup>[5]</sup>

12. According to the definition section of the 1994 regulations, "Secretary" means the Secretary to the Department of Transport.<sup>[6]</sup> However, by virtue of later changes<sup>[7]</sup>, a reference to the "Secretary" in the 1994 regulations should be read as a reference to the "Secretary to the Department of Infrastructure".

13. At the time of the offence, Mr Clarke was licensed to drive a taxi-cab, which was associated with the Black Cabs Combined Limited depot.

14. On 26 March 2003, the Secretary approved different uniforms for each of the six licensed taxi-cab depots. The uniform for the Black Cabs depot relevantly provided:

**Trousers/skirt** Colour: Navy Blue or Black Other detail: Dress trousers (Jeans not acceptable)

15. Mr Clarke's submissions were essentially limited to an attack on the delegation of the power to define uniform standards to the Secretary. There was some suggestion of a sub-delegation by the Secretary to the Victorian Taxi Directorate ("the directorate"). However, Mr Clarke conceded that, in the event the delegation to the Secretary was valid, any sub-delegation was "probably unimpeachable."

16. At the relevant time, the directorate was part of the Department of Infrastructure, and involved in the regulation of the taxi-cab industry. Although Mr Clarke asserted that the Secretary had further delegated the power to set uniform standards to the directorate, there is no evidence before the court as to whether, and, if so, how or when, that happened.

17. On the contrary, such evidence as there was before the court suggests that there was no such sub-delegation. The police officer relied upon a certificate dated 28 June 2005, issued pursuant to s230(4) of the *Transport Act* and signed by an authorised officer. The certificate stated that, according to the directorate's records, the Black Cabs uniform had been approved by the Secretary on 26 March 2003.

### Relevant principles

18. When a discretionary power is conferred by statute on a particular person or body, as a general rule, the power can only be validly exercised by the person or body upon whom it was conferred. Its exercise cannot be delegated to someone else, unless the statute, upon its proper construction, permits such delegation.<sup>[8]</sup>

19. Where, as here, the power has been delegated by regulation, the statute must be "read as a whole with the object of finding in its expressions the intention with which it is made and, in particular, the intended extent of the regulation making-power given to [the delegator]; and an examination of the ambit of the regulations considered in relation to the scope and purpose of the [statute] so ascertained."<sup>[9]</sup>

20. In deciding whether there has been an impermissible delegation, courts often have regard to a number of matters, including the following:

- (a) The nature of the power: whether it can be categorised as legislative, judicial or executive (delegation being more likely to be permitted in the case of executive powers);
- (b) The subject matter of the power;
- (c) The identity of the person to whom the delegation has been made; and
- (d) The form of exercise of the relevant power.

21. Whilst it may be helpful to have regard to some or all of such matters, each case must ultimately depend on the construction of the particular statute in question. So that, for example, the mere fact that the power may be characterised as "legislative" does not preclude it from being validly delegated, although it may make a court more reluctant to conclude that parliament intended that the power could be delegated.

22. Unfortunately, there appears to be no relevant authority and no extrinsic material, such as *Hansard*, which assists the court in construing s162 of the *Transport Act*.

23. Section 162(1) empowers the Governor to make regulations "for or with respect to" a very broad range of matters, including: the design, construction and equipment of commercial passenger vehicles; the alteration, maintenance and repair of vehicles; the inspection of vehicles; the prohibition or regulation of the carriage of goods; the publication of time-tables, fares and rates; licence and permit conditions; the issue and transfer of licences; and the keeping of records. The specific sub-section which is before the court is sub-section (c)(ii) of s162(1), which empowers the making of regulations "for or with respect to ... prescribing and regulating ... the dress and appearance of drivers." These are words of wider import than the legislation in some of the cases which will be discussed shortly.

24. The legislature clearly understood that a breach of the regulations could constitute an offence<sup>[10]</sup>, but nevertheless expressly permitted the Governor to delegate his power and authority, under s162(2)(d). That provision provides that regulations made under s162 "may confer a power or a discretionary authority on a person or body or a class of people or bodies." This is a critical provision in the present case.

25. Mr Clarke referred the court to a number of authorities, which he said support his argument that the delegation to the Secretary was invalid. In fact, they are all distinguishable, for the following reasons.

### Racecourse

26. In *Racecourse Co-Operative Sugar Association v Attorney-General of the State of Queensland*<sup>[11]</sup>, the relevant Act<sup>[12]</sup> provided for the compulsory acquisition by the Queensland government of all sugar processed in Queensland mills. The Act empowered the Governor in Council

to make proclamations to give effect to the Act, including proclamations which “fixed” the prices to be paid for sugar. By proclamation, the Governor in Council delegated to the Sugar Board the power to determine prices, which were to be final and made in the Board’s sole discretion.

27. The High Court held that, in delegating to the Sugar Board the power to determine the price of the sugar without reference to a fixed and objective standard, the Governor in Council had not “fixed” the price, as required by the relevant Act. The power to “fix” a price cannot be validly exercised without naming a sum, or prescribing a standard or certain formula by which the price can be ascertained.<sup>[13]</sup> And no part of the formula may involve an element only determinable by the exercise of discretion by a sub-delegate, even if the application of that formula will produce uniform results, no matter by whom it is applied.<sup>[14]</sup>

28. In so far as Mr Clarke argues that *Racecourse* is authority for the proposition that a delegation will be invalid unless certain or objective standards are set by the delegating party, it is not authority for such a broad proposition. *Racecourse* turned on the fact that the Act required the Governor in Council to “fix” the price, a concept which could not be satisfied by giving a delegate a broad discretion. The Act also contained no provision equivalent to s162(2)(d) of the *Transport Act*.

### **O’Reilly**

29. *O’Reilly v State Bank of Victoria Commissioners*<sup>[15]</sup> considered the power to issue notices under s264 of the *Income Tax Assessment Act 1936* (Cth). Under s8(1) of the *Taxation Administration Act 1953* (Cth), the Commissioner of Taxation delegated his powers to Deputy Commissioners. The Deputy Commissioners authorised Chief Investigation Officers to issue s264 notices and imprint a copy of the Deputy Commissioner’s signature on such notices.

30. There was no dispute as to the validity of the delegation to the Deputy Commissioners, or that the Deputy Commissioners had no power to sub-delegate.<sup>[16]</sup> So, unlike this case, *O’Reilly* was not concerned with the validity of a delegation or sub-delegation.

31. Rather, the question before the High Court was whether the powers conferred by s264 were intended to be exercised only by the Commissioner or his delegate personally, or whether they could be exercised through a properly authorised officer. The case turned on principles of agency discussed in a line of authority which commenced with *Carltona Ltd v Commissioners of Works*<sup>[17]</sup> and was discussed in some detail in *In re Golden Chemical Products Ltd*.<sup>[18]</sup> Those authorities establish that when a Minister is entrusted with administrative functions, he or she may, in general, act through a duly authorized officer of his or her department. That is based partly on constitutional law considerations and partly on the recognition that the functions of Ministers are so multifarious that the business of government could not be carried on if they were required to exercise all powers personally.

32. The majority in *O’Reilly*<sup>[19]</sup> held that the authorised agency principle should also apply to the powers of the Commissioner of Taxation under s264. Having regard to the fact that there were more than 5.6 million individual taxpayers in 1979-80, they said that the administration of the tax laws would be reduced to chaos if the powers conferred by the *Income Tax Assessment Act 1936* (Cth) could only be exercised by the Commissioner or Deputy Commissioners personally.

33. This is not an agency case, and the principles discussed in the *Carltona*, *Golden Chemical* and *O’Reilly* cases are therefore not directly on point.

34. Mr Clarke points out that, unlike the situation in *O’Reilly*, the volume of decisions required to set appropriate dress standards for taxi-cab drivers is not so high as to necessitate what he describes as an “administrative delegation”. However, it should be recalled that s162(1) empowers the making of regulations with respect to an enormous range of subject matters concerning commercial passenger vehicles.<sup>[20]</sup> Driver uniforms is only one of the many and varied matters which may be the subject of such regulations. It would hardly be surprising if the legislature determined to leave the minutiae of such matters to an appropriate authority, rather than expecting the government, acting through the Governor in Council, to make all such decisions.



**Turner**

35. *Turner v Owen*<sup>[21]</sup> concerned a sub-delegation of certain powers conferred on the Governor-General under the *Customs Act* 1901 (Cth). The relevant provisions of the Act<sup>[22]</sup> provided that the Governor-General may, by regulation, prohibit the importation of goods into Australia, unless certain specified conditions or restrictions were complied with. Regulation 4(1) of the *Customs (Prohibited Imports) Regulations* 1956 (Cth) prohibited the importation of the goods specified in the Second Schedule to the regulations, unless the Minister's permission to import had been granted. Item 18 in the Second Schedule was "goods which, in the opinion of the Minister, are of a dangerous character and a menace to the community." Item 30 in the Second Schedule was "rifles of a military type, being rifles the calibre of which is greater than .22 calibre, and parts for those rifles."

36. The majority of the Full Federal Court<sup>[23]</sup> held that reg. 4(1), when read with Item 18, was not a valid exercise of the regulation-making power contained in the Act, because it was an impermissible attempt to delegate to the Minister the power to prohibit, which had been given to the Governor-General. However, there was no suggestion that reg. 4(1), when read with Item 30, was not a valid exercise of power.

37. French J (as he then was) noted that the words in Item 18 "dangerous character and a menace to the community" were not indicative of a factual criterion or class description limited by any intelligible boundary.<sup>[24]</sup> The majority held that the words were legislative in character, and asked the Minister to do what the Governor-General was supposed to do, that is, to prohibit.

38. The decision in *Turner* turned on the wording of the specific sections in the Act and the regulations, which are not in relevantly similar terms to the provisions under consideration in this case. In particular, the Act in *Turner* contained no equivalent to s162(2)(d) of the *Transport Act*, which expressly authorises the delegation by regulation of a discretionary authority.

39. In *Turner*, French J also made some *obiter dicta* remarks about Item 18, describing it as "an extraordinary piece of drafting", because of the absence of any requirement for a formal expression of the ministerial opinion.<sup>[25]</sup> His Honour noted that the opinion could be arrived at informally, "quite literally under the shower", without any announcement of the fact.<sup>[26]</sup>

40. Mr Clarke points out that the Secretary is not required by reg. 25(1) of the 1994 regulations to publish uniform standards in the same way that the Governor would be required to promulgate decisions by Order in Council. Nevertheless, the situation is distinguishable from that in *Turner*, in that reg 25(1) does require the Secretary to have "approved" the uniform worn by a driver. In its ordinary and natural meaning, the concept of approval (unlike the formation of an opinion) appears to require some communication or publication of the decision made<sup>[27]</sup>, even if it is not in any prescribed form.

**Grunt Labour**

41. The decision in *Grunt Labour Services Pty Ltd v Work Health Authority*<sup>[28]</sup> also turned on statutory provisions which are quite different from those under consideration here. In that case, Southwood J held that the *Work Health Act* 1986 (NT) only gave the Administrator power to delegate administrative, not legislative, powers to the Work Health Authority.

42. The sources of the power to delegate administrative power were ss10 and 11 of the Act, which dealt with the functions of the Work Health Authority, and have no relevant equivalent in this case.

43. In holding that there was no power to delegate legislative power, the judge considered s187, which was the regulation-making power. Southwood J specifically noted that "the power granted to the administrator is unaccompanied by any further power to sub-delegate. Section 187 ... does not give any sub-delegation power expressly. Nor does it do so impliedly."<sup>[29]</sup> That may be contrasted with s162(2) of the *Transport Act*, which expressly authorises delegation to other persons or bodies.

**Conclusions**

44. The validity of the delegation to the Secretary must be determined by construing s162 and reg. 25(1).

45. Unlike the position in each of the cases relied upon by Mr Clarke, the *Transport Act* contains a provision which clearly and expressly authorises the Governor in Council to delegate by regulation. The inclusion of the reference to a “discretionary authority” as well as a “power” envisages a delegation in the broadest possible terms.

46. Even though a breach of the regulations could constitute a criminal offence, the legislature has nevertheless expressly permitted the Governor in Council to delegate his power and authority.

47. The Secretary of the department responsible for administering the regulation of the taxi industry is an appropriate person to whom to delegate matters such as the setting of taxi driver uniforms.

48. Driver uniforms is only one of the many and varied matters which may be the subject of regulation under s162. It would hardly be surprising if the legislature determined to leave the minutiae of such matters to an appropriate authority, rather than expecting the government, acting through the Governor in Council, to make all such decisions.

49. The fact that the Secretary is not required to promulgate the uniform standards in a particular manner does not detract from the validity of the delegation.

50. Accepting for present purposes that the setting of driver uniforms is a legislative function, and has possible criminal consequences, I am nevertheless satisfied for the above reasons that the delegation of power to the Secretary under reg 25(1) was a valid delegation.

51. It follows that Mr Clarke’s application for judicial review must fail. I will hear from the parties as to the precise form of orders and as to costs.

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[1] The authenticated copy of the County Court order produced to the court in this proceeding says that the original fine was \$200. However, both parties agree that the original fine was in fact \$100, and that the County Court judge re-imposed the original fine. Accordingly, I assume the reference in the County Court order to \$200 is simply a typographical error.

[2] By consent, I granted leave for a further originating motion to be filed, to reflect the real basis of Mr Clarke’s arguments at trial. The further amended originating motion was duly filed on 16 May 2008.

[3] At the time of the alleged offence, version 103 of the Act was in force (incorporating amendments as at 5 April 2005).

[4] Other (irrelevant) parts of the 1994 regulations were made under s256 of the *Transport Act*, which provides for regulations prescribing fees and forms.

[5] Reg. 31(1) of the *Transport (Taxi-Cabs) Regulations 2005* provides:

(1) While operating a taxi-cab, the driver of the taxi-cab must wear -

(a) if a uniform design has been approved under regulation 32 for the taxi depot with which the taxi-cab is associated, a uniform which conforms to that design; or

(b) if paragraph (a) does not apply, a uniform approved by the licensing authority.

Penalty: 5 penalty units.

[6] Reg. 4.

[7] By virtue of an order of the Governor in Council dated 3 April 1996, and s3(1) of the *Administrative Arrangements Act 1983* (Vic).

[8] *Racecourse Co-operative Sugar Association Ltd v Attorney-General (Qld)* [1979] HCA 50; (1979) 142 CLR 460, at 481; 26 ALR 321; 53 ALJR 758 per Gibbs J.

[9] *Esmonds Motors Pty Ltd v Commonwealth* [1970] HCA 15; (1970) 120 CLR 463 at [4]; [1970] ALR 673; 44 ALJR 211 per Barwick CJ, citing with approval *Morton v Union Steamship Co of New Zealand Ltd* [1951] HCA 42; (1951) 83 CLR 402, at 466; [1951] ALR 655.

[10] See s160 (general penalty provision) and s162(2)(c).

[11] *Op cit.*

[12] *Sugar Acquisition Act of 1915 (Qld)*.

[13] At 480-481 per Gibbs J (with whom Stephen, Mason and Wilson JJ agreed, and with whom Barwick CJ agreed on this point), citing *King Gee Clothing Co Pty Ltd v The Commonwealth* [1945] HCA 23; (1945) 71 CLR 184 per Dixon J at 197; [1945] ALR 397.

[14] At 481, citing *Cann’s Pty Ltd v The Commonwealth* [1946] HCA 5; (1946) 71 CLR 228.

[15] [1983] HCA 47; (1983) 153 CLR 1; (1982) 44 ALR 27; (1983) 57 ALJR 130; (1982) 13 ATR 706; 82 ATC 4,671.

[16] At [4].

[17] (1943) 2 All ER 560

[18] (1976) Ch 300.

[19] Per Gibbs CJ, Mason, Murphy and Wilson JJ.

[20] See para [23] above.

[21] [1990] FCA 358; (1990) 26 FCR 366; (1990) 96 ALR 119; 21 ALD 115.

[22] Sections 50(1) and (2)(c).

[23] Pincus and French JJ, Jenkinson J dissenting.

[24] At 389.

[25] At 389.

[26] At 389-90.

[27] “**Approve** ... **1.** to pronounce or consider good; speak or think favourably of. **2.** to confirm or sanction officially; ratify.” *Macquarie Dictionary* 4th ed.

[28] [2006] NTSC 6; (2006) 197 FLR 422; (2006) 150 IR 182; (2006) 17 NTLR 37.

[29] At [63].

**APPEARANCES:** For the plaintiff Clarke: Mr S Moglia, counsel. Robert Stary & Associates, solicitors. For the first defendant Elias: Mr T Gyorffy, counsel. Victorian Government Solicitor's Office.

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