

Delegations and Authorisations in the APS

Introduction

This paper sets out to touch on the principles of the current law on delegations and authorisations as it applies to the Australian Public Service and provide a resource for people dealing with those issues.¹

Overview

Legislation provides individuals and bodies with powers or functions, however it is not always practicable for an individual or body in whom a power or function is vested to exercise the power or function personally. There are three avenues through which a repository of the power or function is able to divulge themselves (or itself, as the case may be) of their functions or powers:

- (a) legislation may expressly permit the repository of the power to *delegate* or *authorise* the exercise of that power or function to another; and
- (b) where there is an absence of an express power to delegate or authorise, or where there is a prohibition upon delegation, there may be an *implied power to authorise* another person to exercise powers on behalf of the repository of the power. That implied power may be to:
 - i. expressly authorise another person (in writing); or
 - ii. to imply the existence of an authorisation. The implication of the existence of an authorisation is commonly known as the *Carltona* principle.²



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Where a power is authorised, the authorised officer exercises the power for and on behalf of the repository of the power and must execute documents as such.

Delegations

Legislation often includes an express power of delegation. The delegation provision itself will identify the scope of the ability to delegate, including who the power, function or duty³ can be delegated to and how the delegation is to be made (for example in writing, to whom and whether the delegator may give directions to the delegate).

Sections 33, 34AA, 34AB and 34A of the *Acts Interpretation Act 1901* (Cth) provide an important framework for APS officers dealing with delegations. In particular, section 34A codifies a critical feature of a delegation. Under an express power of delegation, the person to whom the power is delegated may exercise the power by applying their own opinion, belief or state of mind in relation to the matter. It follows that the act of exercising a power by a delegate is an act of the delegate in their own capacity, exercising their own discretion.

Generally, the person who delegates the power cannot direct a delegate on the exercise of their discretion. An exception to this is where the power of delegation specifies that a delegation can be made with directions and places a legislative obligation on the delegate to comply with any such direction. **Delegates exercise powers in their own right and sign documents in their own name as a delegate of the delegator.** It is good administrative practice for a delegate to identify the

source of power when making a decision pursuant to a delegation (and in doing so, serves as a reminder to the delegate to ensure that an appropriate delegation exists for the action being taken).

The choice of delegate or ability to delegate may be limited by the relevant legislation both expressly or through implication, for example, some powers may be non-delegable or it is clear that a power is to be exercised personally.⁴ We provide a practical example of this below.

Sub-delegation of powers and authorisation of delegated powers

Generally, if the repository of the power or function has delegated that power or function, the delegate is prohibited from delegating that power or function further (ie a sub-delegation). An exception to this general position is where the legislation in question expressly allows for the sub-delegation of the power or function.⁵

We note that where a power is delegated, it may be technically possible for the delegate to *authorise* the performance of the power or function to another. As a general principle, this should only be done in specific circumstances that require such an arrangement (for example, a one off decision that is required where the delegate is unavailable and it isn't practicable for the delegator to exercise the power personally).

Whether a power may be exercised by a person authorised by a delegate is to be assessed on the same principles as the question on whether a statutory power must be exercised by the repository of the power personally and may not be delegated.⁶ Consideration is to be given to:

- the nature of the power;
- the terms of the instrument of delegation (e.g. any deliberate exclusion in the authorising instrument of persons of lesser seniority than the delegate), whether the instrument of authorisation provides certainty of authority to subordinates (having regard to the knowledge and experience required to hold particular subordinate positions) and the scope of the authorisation (e.g. the authorisation of an administrative act such as affixing a signature);⁷ and
- other considerations such as practical administrative necessity (e.g. department size, the geographic area for which the department is responsible, and how frequently the power is to be exercised) and the consequence that the decision would have on individuals.⁸

Case example: Is the power delegable?

Northern Inland Council v Quall [2019] FCAFC 77

FACTS: This case considered, among other things, whether the certification functions of the Northern Land Council (**NLC**), a representative body for the purposes of section 203BE of the *Native Title Act 1993*, are delegable to the chief executive officer (**CEO**) of the representative body.

Section 203BE of the Native Title Act sets out the certification functions of a representative body to certify applications for registration of Indigenous Land Use Agreements (**ILUA**) relating to areas for which the body is the representative body. Subsection 203BE(5) requires a representative body to hold an opinion that all reasonable efforts have been made to ensure those who may, or do, hold native title in the ILUA area have been identified and that such identified persons agree to the making of the agreement.

In 2017, the NLC and the Northern Territory agreed upon an ILUA for the Cox Peninsula, with the CEO of the NLC, as a delegate of the NLC, subsequently signing a certificate of registration of the ILUA pursuant to s 203BE(1)(b) of the Native Title Act. The decision was appealed on the basis that the function in s 203BE(1)(b) was not capable of being delegated and there was no valid delegation.

The primary judge considered that s 203BK(1) of the Native Title Act vested power in the NLC to delegate the certification functions to its CEO, however agreed that there was no valid delegation. That section provided that the NLC has the *'power to do all things necessary or convenient'* in connection with its functions.

ISSUE: The primary issue before the Court of Appeal was whether or not a statutory function conferred on a particular person or body that involved the formation of a statutory opinion can only be performed by that person or body.

HELD: Their Honours held that the proper discharge of the certification function under section 203BE of the Native Title Act requires the NLC to personally hold and state the requisite opinions. The reasons include, in summary that:⁹

- NLC, as a representative body, has a significant and central representative role under the Native Title Act. The recognition of Land Councils as representative bodies requires that the members of the body have the necessary qualifications and an aptitude to perform their representative roles and functions;
- Representative bodies under the Native Title Act perform important functions (including the certification functions) designed to protect and advance the interests of Aboriginal people who hold, or may hold native title, in the area for which the representative body is responsible;
- The functions under the Native Title Act relate to two important processes: making applications for a determination of native title; and seeking registration of area ILUAs. Administering these processes may lead to outcomes that could have a significant effect on the legal rights and interests of many people, particularly Aboriginals who hold or may hold native title in the area;
- Other elements of the Native Title Act strongly support the premise that representative bodies are to exercise the delegated powers personally, for example the absence of an express power of delegation in the Native Title Act, the text of s 203BK makes clear that the body is permitted to obtain services to *assist* in the performance of its functions, and the nature and significance of the opinion required under s 203BE(5);
- *'The proper discharge of the certification functions under s 203BE(1)(b) requires the NLC itself to hold and state the requisite opinion'* and while the CEO and staff may assist, the NLC cannot 'outsource' the actual performance of its functions;¹⁰ and
- The fact that the NLC consisted of 83 members did not support an argument that the exercise of the power in s 203BE(1)(b) was 'unworkable or improbable' so to conclude that s 203BK(1) extends to an implied delegation of certification. This was because the Minister recognised the NLC as a representative body as a whole as having the capacity to perform the functions conferred, irrespective of the size of the body.¹¹

Authorisations

A repository of a power or function is able to authorise another person or class of persons to exercise the statutory power or function. The source of the power to authorise may be set out expressly in legislation.¹² Where there is an absence of an express power to delegate or authorise, or where there is a prohibition upon delegation, there may be an implied common law right to authorise another person to exercise powers or functions on behalf of the repository of the power.¹³

In contrast to delegations, when a power is authorised by the repository of the power, the authorised officer or agent exercises the power *for and on behalf* of the person in whom the power is legally vested, all the while remaining accountable to the repository of the power and their authorisation - that is, acts are done vicariously by the authority. This means that a decision is taken to be that of the person in whom the power is vested, and not of the authorised person. Consequently, a person acting under authorisation acts in the name of the person who holds the power and must execute documents for and on behalf of that person.

It is important to differentiate between a person authorised to act on behalf of a person and the position of an 'authorised officer' or 'authorised person' authorised or appointed by a person under a legislative power and who may then

independently carry out certain functions and powers under that legislation. In that sense, they are an independent statutory office holder with functions and powers circumscribed by legislation and their appointment does not come within the scope of authorisations that we are discussing.¹⁴

Whether a power to authorise can be implied is a matter of statutory interpretation. The principles surrounding that exercise are discussed further below.

An implied power of authorisation

The general principle that the powers, duties or functions may be carried out by an agent of the person in whom a power is vested is recognised in the following extract from *O'Reilly v Commissioner of State Bank of Victoria* (1983) 153 CLR 1:

Blackburn J, in R v Justices of Kent Law Rep 8 QB 305, 307 : 'No doubt at common law, where a person authorizes another to sign for him, the signature of the person so signing is the signature of the person authorizing it; nevertheless there may be cases in which a statute may require personal signature.' Quain J, then says: 'We ought not to restrict the common law rule, qui facit per alium facit per se, unless the statute makes a personal signature indispensable.' (p 29)

If it is clear from express words, or by implication, that the legislative intention was to permit authorisation, then effect may be given to that interpretation. In considering whether there is an implied power to authorise others it is necessary to consider, by looking at the nature, scope and purpose of the power, whether Parliament intended a power be exercised personally.¹⁵ In *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24 Mason J said at [37] to [38]:

The cases in which the principle has been applied are cases in which the nature, scope and purpose of the function vested in the repository made it unlikely that Parliament intended that it was to be exercised by the repository personally because administrative necessity indicated that it was impracticable for him to act otherwise than through his officers or officers responsible to him.

Other indicia relevant to the application of the principle of agency include the purpose and object of the statute, the character of the power and the '*exigencies of the occasions which may arise with respect to its exercise*', the other circumstances of the case, and whether the exercise of the power could adversely affect the rights of, or have serious consequences for, a person.¹⁶ The statutory construction exercise is the same for an implied power to expressly authorise as it is for an implied authorisation (*Carltona* principle).¹⁷

Machinery of Government or change in Minister or Agency Head

Changes in government and the follow on effects within government departments and agencies can raise concerns about the validity of delegations and authorisations.

Delegations do not automatically cease to have effect merely because there is a change in the identity of the delegator, and a person occupying the position of the delegator is also able to revoke, vary, rescind or amend the delegation of the previous occupant of the position.¹⁸

In respect to authorisations, the Full Federal Court in *Commissioner of Taxation v Mochkin* [2003] FCAFC 15 considered whether a delegate of the Commissioner of Taxation was required to personally authorise the decision-maker of the relevant determination. The Court concluded at [123] that:

Potentially serious problems would be created if fresh authorisations had to be executed every time a Deputy Commissioner, for whatever reason, leaves office. I see no reason for incorporating into the construction of the ITAA concepts derived from a different field of discourse that served no discernible legislative policy.

However, we suggest a cautious approach in respect to the application of *Mochkin* as, in certain circumstances, we consider that some types of authorisations may cease when the person giving the authorisation ceases to hold the relevant office.

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- ¹ This article is provided to clients of HWL Ebsworth Lawyers for general information only. Please contact Lex Holcombe or Kristina Mihalic prior to any action being taken, or decision being made, on the basis of the information in this article.
- ² See *Carltona Ltd v Commissioner of Works* [1943] 2 All ER 560. This principle was accepted in Australia in *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1.
- ³ For example, see s110 of the *Public Governance, Performance and Accountability Act 2013* (Cth) for delegation of duties.
- ⁴ For an example of a provision which limits the delegable powers, see s25 of the *Australian Information Commissioner Act 2010*.
- ⁵ For example, see s78(9) of the *Public Service Act 1999* (Cth).
- ⁶ As observed by Logan J in *Pattenden v Commissioner of Taxation* [2008] FCA 1590 at [42].
- ⁷ For example, see *Deputy Commissioner of Taxation v Armstrong Scalisi Holdings Pty Ltd* [2019] NSWSC 129 at [202].
- ⁸ As observed by Logan J in *Pattenden v Commissioner of Taxation* [2008] FCA 1590 at [42].
- ⁹ *Northern Land Council v Quall* [2019] FCAFC 77 at [129] to [137].
- ¹⁰ *Northern Land Council v Quall* [2019] FCAFC 77 at [137].
- ¹¹ *Northern Land Council v Quall* [2019] FCAFC 77 at [147].
- ¹² For example, s22 of the *Freedom of Information Act 1982* (Cth) or see the *Public Service Act 1999* (Cth).
- ¹³ For example, see Gummow and Hayne JJ in *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at [180].
- ¹⁴ For example, see the definition of 'authorised person' in the *Freedom of Information Act 1982* (Cth) and s77 which provides a power to an authorised person to enter premises.
- ¹⁵ See also *Re Walker; Ex parte Fremantle Islamic Association Inc* [2003] WASC 252 and *Department of Social Security v Alvaro* 50 FCR 213 at 224.
- ¹⁶ See *Re Walker; Ex parte Fremantle Islamic Association Inc* [2003] WASC 252 per Pullin J and *Department of Social Security v Alvaro* 50 FCR 213 per Von Doussa J at p 224 of the decision. The Federal Court in *Ozmanian v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 41 ALF 293 noted the reluctance of the courts to imply a right of authorisation where the exercise of a power has a serious or dramatic consequence on individuals.
- ¹⁷ As an example, see *New South Wales Aboriginal Land Council v Minister Administering Crown Lands Act (Nelson Bay Claim)* (2014) 88 NSWLR 125.
- ¹⁸ Section 34AA of the *Acts Interpretation Act 1901* (Cth) and also *Kelly v Watson* (1985) 10 FCR 305.