

Legal briefing

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Delegations, authorisations and the *Carltona* principle

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Just how well departments and other agencies administer their delegations and authorisations is crucial to how efficiently government operates. This briefing assists clients by outlining the nature of powers of delegation and authorisation and the legal principles relevant to them.¹

When parliament creates a statutory power, it vests that power in some individual or body who is then able to exercise it.² In Commonwealth legislation, this vesting of power is most commonly effected in one of the following 3 ways:

1. Power is vested in a person holding an existing office in the executive government. For example, the Governor-General, a minister or the secretary of a department.
2. Power is vested in an office or body created to exercise particular statutory powers. For example, the *Bankruptcy Act 1966* confers a number of powers and functions on the 'Official Trustee'.
3. Power is vested in a person 'appointed' or 'authorised' by a particular person for the purpose of exercising the power. For example, an 'authorised officer', in relation to a provision of the *Customs Act 1901*, means an officer of Customs authorised in writing by the Comptroller-General of Customs to exercise the powers or perform the functions of an authorised officer under that provision.

It is a fundamental principle of administrative law that when parliament vests power in a person, that person is *prima facie* required to exercise the power personally. The principle is expressed in the maxim *delegatus non potest delegare*; that is, a delegate may not delegate to another person the power which has been delegated to them. The exercise of the power by another person will be invalid if the person in whom the power is vested is held to have abdicated the exercise of the power to that other person.

¹ This briefing updates and replaces AGS *Legal Briefing* No. 24, 24 April 1996 and AGS *Legal Briefing* No. 74, 14 December 2004.

² While this briefing refers primarily to the devolution of *powers*, the principles it sets out apply equally to the devolution of *functions* and *duties*.

However, the maxim is not absolute; it yields to any contrary indicator found in the language, scope or object of the statute.³ There are 3 main ways in which the devolution of authority can be achieved:

1. An express power to delegate

Legislation may expressly provide a statutory procedure for the devolution of a power. This most commonly takes the form of an express power to delegate the power to a person in writing. Such a delegate can then exercise the power in their own right.

Whether a legislative power to delegate needs to be in express terms will depend on the particular statutory context. In *Northern Land Council v Quall*,⁴ a majority of the High Court held that the power in the establishing statute of the Northern Land Council for it to do 'all things necessary or convenient to be done for or in connexion with the performance of its functions' permitted it to delegate a function conferred on it by another Act, provided that the delegation was 'necessary or convenient'.

2. An express power to appoint an authorised officer

Some legislation expressly provides for the appointment of 'authorised officers', or the authorisation of persons, to exercise specified statutory powers.

Usually, an 'authorised officer' is described as a person authorised in writing by a particular person (such as the minister or the secretary).

Legislation may provide that the authorised or appointed officer has a specific title reflecting their statutory role – for example, 'biosecurity officers' authorised under the *Biosecurity Act 2015*; 'monitoring officers' and 'verification officers' authorised under the *Customs Act 1901*. These statutory authorisations operate in a similar way to delegations, and an authorised officer exercises the power in their own right.

3. An implied power to authorise

A person in whom a statutory power is vested may, in some circumstances, be able to rely on an implied power to authorise an official to exercise the statutory power on the person's behalf, whether an express power of delegation is available or not.⁵ Such a power is commonly referred to as an implied power to authorise, the 'alter ego' principle, or the *Carltona* principle.

Express powers of delegation

Most of the common law principles relating to the delegation of power under an express power of delegation have been codified in ss 34AA, 34AB and 34A of the *Acts Interpretation Act 1901* (the Interpretation Act). The application of these provisions is subject to a contrary intention – see s 2(2) of the Interpretation Act.

Delegates must exercise their own discretion

Section 34A of the Interpretation Act provides:

If:

- (a) under an Act, a person's exercise of a power, or a person's performance of a function or duty, is dependent upon the person's opinion, belief or state of mind in relation to a matter; and
 - (b) that power, function or duty has been delegated under that or any other Act;
- the delegate may exercise that power, or may perform that function or duty, upon the delegate's opinion, belief or state of mind in relation to that matter.

³ See, e.g., *Ex parte Forster; Re University of Sydney* [1963] SR (NSW) 723 at 733; *Northern Land Council v Quall* [2020] HCA 33 at [65] per Kiefel CJ, Gageler and Keane JJ.

⁴ [2020] HCA 33.

⁵ This is distinct from a statutory power of delegation of the kind considered in *Northern Land Council v Quall* [2020] HCA 33.

Section 34A expresses the fundamental effect of a delegation of a power made under an express power of delegation. That is, a person to whom a power is delegated under an express power of delegation must exercise the delegated power by applying their own discretion.

As a corollary to that, the exercise by a delegate of a delegated power is, as a matter of law, an act of the delegate. It is not an act of the person who delegated the power to the delegate. A delegate acts in their own name and accordingly signs documents in their own name as a delegate of the delegator.

The fact that a delegate exercises a delegated power by applying their own discretion and, at law, acts in their own capacity, means that the person who delegates the power cannot:

- direct the delegate in the exercise of the delegate's discretion, or
- make the exercise by the delegate of the power conditional on certain events occurring, or on the delegate taking certain action (for example, consulting another person).

This general position is subject to alteration by parliament which can, in particular cases, provide that a delegate is, in the exercise of a delegated power, subject to the directions of, or conditions imposed by, the person who delegates the power.⁶

While a delegate's exercise of a delegated power cannot be subject to direction or conditions imposed by the person who delegates the power without express legislative provision, that person can issue non-binding guidelines which a delegate may have regard to in the exercise of a power. Such guidelines cannot, however, require a decision-maker not to exercise a discretion. Failure to comply with guidelines would not, of itself, invalidate a delegate's exercise of power.

General principles codified in the Interpretation Act

Section 34AB of the Interpretation Act sets out a number of more general principles related to the exercise of an express power of delegation. Section 34AB relevantly provides:

- (1) Where an Act confers power on a person or body (in this section called the **authority**) to delegate a function, duty or power:
 - (a) the delegation may be made either generally or as otherwise provided by the instrument of delegation;
 - (b) the powers that may be delegated do not include that power to delegate;
 - (c) a function, duty or power so delegated, when performed or exercised by the delegate, shall, for the purposes of the Act, be deemed to have been performed or exercised by the authority;
 - (d) a delegation by the authority does not prevent the performance or exercise of a function, duty or power by the authority;

...

A delegation made generally or as otherwise provided

Section 34AB(1)(a) of the Interpretation Act does not alter the fundamental effect of a delegation of power which is expressed above; that is, that delegates must exercise their own discretion and are not subject to direction or conditions imposed by the person who delegates the power (in the absence of express legislative provisions to the contrary). Rather, it is concerned with the extent to which a power may be delegated.

Some statutory powers may be exercised with respect to a number of different matters, or classes of matters, and are capable of division into parts.⁷ Section 34AB(1)(a) recognises that in those cases, a person in whom a power is vested may, under an express power of delegation, delegate part of that power – that is, the power so far as it relates to particular matters or classes of matters. Where such a delegation is made, care must be taken to avoid expressing the delegation as imposing conditions, rather than delegating only part of a power.

⁶ See, e.g., s 78(11) of the *Public Service Act 1999* and s 496(1A) of the *Migration Act 1958*.

⁷ A power will not always be capable of division (see, e.g., *Singh v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 90 ALR 397; *Belmorgan Property Development Pty Ltd v GPT Re Ltd* [2007] NSWCA 171).

The power to delegate cannot be delegated

Section 34AB(1)(b) of the Interpretation Act ensures that if parliament vests power in a particular person, it is for that person to exercise the power or, if there is an express power of delegation, it is for that person to choose which other persons may exercise the power. In other words, the person nominated by parliament to exercise the power will always retain control over the class of persons who are designated to exercise the power. This principle can be modified by an express power of sub-delegation.⁸

The exercise of a power by a delegate is deemed to be the exercise by the delegator

Section 34AB(1)(c) of the Interpretation Act is intended to preclude a recipient of a delegate's decision appealing to the delegator of the power to make a further decision personally. Section 34AB(1)(c) only applies for the purpose of the Act containing the power to delegate. So, for example, a decision made by a delegate is, for the purpose of another Act such as the *Administrative Decisions (Judicial Review) Act 1977*, a decision of the delegate.

The delegator can still exercise a power which has been delegated

Section 34AB(1)(d) of the Interpretation Act recognises that (subject to any contrary indication in the relevant Act) a delegation under an express power of delegation, while enabling a delegate to exercise powers in their own right, does not result in the power being removed from the delegator. The delegator can still exercise the powers as necessary.⁹

Some powers are not delegable

It is important to note that, despite the presence of a seemingly broad delegation provision, some powers may not be delegable. A power may be non-delegable either because there is an express exception to the delegation power or, because as a matter of statutory interpretation, it is evident that the power was intended to be exercised personally.

Where the legislation entrusts a function to a person with specialist skills or qualifications, there may be a strong argument that the function could not be entrusted (by way of delegation or authorisation) to a person without such specialist skills or qualifications. For example, occupational health and safety legislation may provide medical practitioners with certain functions.

Choice of delegate

The choice of delegate is largely a matter to be determined by the person making the delegation. However, the choice of delegate may need to be reasonable. A decision to delegate power is an administrative decision which is subject to the ordinary principles of administrative law. The choice of delegate may also be expressly or impliedly limited by the legislation.¹⁰

Revoking a delegation

Sections in an Act that confer a power to delegate do not ordinarily deal expressly with the revocation or variation of such delegations. However, s 33(3) of the Interpretation Act generally operates so as to allow a delegator to repeal, rescind, revoke, amend or vary any delegation that they make by way of an instrument. This power is exercisable in the like manner and subject to the like conditions as the power to make the delegation by written instrument in the first place.

Delegations do not automatically cease to have effect merely because there is a change in the identity of the person who is the delegator.¹¹ However, it is possible for the new holder of the power to expressly revoke or vary delegations given by the person who previously was the delegator.

⁸ See, e.g., s 78(9) of the *Public Service Act 1999*.

⁹ See *Huth v Clarke* (1890) 25 QBD 391 at 395 per Wills J; see also *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1 at 17 per Mason J.

¹⁰ See, e.g., ss 78(1)–(6) of the *Public Service Act 1999*, which variously permit delegation to 'another Minister', a 'senior official', or an 'APS employee'.

¹¹ *Kelly v Watson* (1985) 10 FCR 305.

Form of instruments of delegation

Legislation which confers an express power of delegation on a person usually requires that power to be exercised in writing, that is, by making a written instrument.¹² An instrument of delegation most commonly specifies classes of position-holders to whom powers are delegated, removing the need to make a separate instrument for each and every person to whom those powers are delegated. It is also possible for delegations to be made to named individuals or the holders of named positions.

‘An instrument of delegation most commonly specifies classes of position-holders to whom powers are delegated ...’

Delegation to classes of offices or positions

Section 34AA of the Interpretation Act provides:

Where an Act confers power to delegate a function, duty or power, then the power of delegation shall not be construed as being limited to delegating the function, duty or power to a specified person but shall be construed as including a power to delegate the function, duty or power to any person from time to time holding, occupying, or performing the duties of, a specified office or position, even if the office or position does not come into existence until after the delegation is given.

The purpose of this provision is to make it clear that an express power of delegation does not have to be exercised in favour of a nominated individual. Rather, it may be exercised by reference to a person or persons from time to time holding, occupying or performing the duties of a specified office or position.¹³

The *Public Service Act 1999* generally does not operate by reference to ‘offices’, at least for APS employees.¹⁴ However, positions can be created by an agency head under the express power in s 77 of that Act or under an agency head’s general employer powers conferred by s 20 of that Act. Provided that the delegate can be identified with sufficient certainty, a delegation can be made to a position in an agency whether that position has been expressly created by an agency head under s 77 or has been identified in the exercise of the agency head’s general employer powers.

A valid delegation may also be made by reference to classifications. For example, a delegation could be given to persons holding positions at the EL1 classification in the ABC Branch of the DEF Division of the GHI Department. Such a delegation would be valid whether or not an agency head had created positions to be occupied by each of the persons holding those classifications in the specified branch of the specified division under s 77.

Delegate must be able to be identified

Section 34AA of the Interpretation Act effectively codifies the common law position about delegation to positions stated in *Owendale Pty Ltd v Anthony*.¹⁵ At common law, a delegation can be made to the holder of a position provided that the delegate can be identified with sufficient certainty.

In *Owendale*, the requirement of specificity was expressed in terms of the need to be able to *identify* the person to whom a power was delegated. The words *specific* and *specify* connote something explicit, definite and precise.¹⁶ Taking into account the common law history of delegations, a delegation will be to a person holding a ‘specified position’ if it is possible to *identify* the position at any given time. Applying the standard accepted by Windeyer J in *Owendale*,¹⁷ the test of whether a particular position will be identified clearly enough is if a person, who is familiar with public service classifications, would be able to identify the relevant position at a particular time.

¹² Also note the definitions of ‘document’ and ‘writing’ in s 2B of the Interpretation Act.

¹³ The references in s 34AA to ‘person’, ‘office’ and ‘position’ include ‘persons’, ‘offices’ and ‘positions’ (see s 23(b) of the Interpretation Act).

¹⁴ Contrast, e.g., the ‘office’ of Secretary of a Department: s 56 of the *Public Service Act 1999*.

¹⁵ (1967) 117 CLR 539.

¹⁶ *Macquarie Dictionary*, online edition.

¹⁷ (1967) 117 CLR 539 at 563.

Delegating to future positions

Section 34AA of the Interpretation Act extends the common law in one important respect. It is not possible at common law to delegate powers to the holder of a position which has not come into existence at the time a delegation is made.¹⁸

Section 34AA, however, provides that a power of delegation can be exercised in favour of a person holding, occupying or performing the duties of a specified office or position, even if the office or position does not come into existence until after the delegation is given. Those words make it clear that, if a delegation is made to persons holding a position in a class of positions, the delegation will operate for positions falling within the relevant class and which are created after the delegation is given.

Change in the person holding the position

Where legislation confers on a person holding a specified position the power to delegate a power vested in them as the holder of that position, a change in the person holding the position will *not* result in an instrument of delegation executed by a person who formerly held the position ceasing to have effect. This issue was considered by the Federal Court of Australia in *Kelly v Watson*,¹⁹ where Neaves J held that there was nothing in the relationship between a delegator and a delegate which required that a delegation cease to have any valid operation upon the delegator ceasing to hold office.²⁰

Reading down an instrument of delegation to ensure its validity

An instrument of delegation made under a provision of an Act requiring the delegation to be in writing is, unless the contrary intention appears, so far as possible to be construed as being within the power of delegation conferred by the Act, even if the instrument is capable of being construed, to some extent, as in excess of the power of delegation.²¹

Statutory authorisations

Some legislation provides for the appointment of ‘authorised officers’, or the authorisation of persons, to exercise specified statutory powers.

For example, s 291(1) of the *Export Control Act 2020* provides:

- (1) The Secretary may, in writing, authorise a person, or each person in a class of persons, to be an authorised officer under this Act if:
 - (a) the person, or each person in the class of persons, is an officer or employee of a Commonwealth body; or
 - (b) the person, or each person in the class of persons, is an officer or employee of a State or Territory body.

The Act confers particular functions and powers on ‘authorised officers’. In such a case the authorised officer exercises the power in their own right. What is said above about delegations applies also to what are termed ‘statutory authorisations’, though the principles generally apply as a matter of common law and not by the operation of the Interpretation Act. Accordingly, the principles relating to delegates exercising their own discretion, the form of instruments of delegation, and the effect of a change of person holding the office of delegator apply equally to statutory authorisations.²²

¹⁸ An instrument of delegation speaks at the time it is made (see, generally, *Australian Chemical Refiners Pty Ltd v Bradwell* unreported NSW Court of Criminal Appeal, 28 February 1986 BC8601215).

¹⁹ (1985) 10 FCR 305.

²⁰ This aspect of the decision in *Kelly v Watson* was affirmed by the Full Court of the Federal Court in *Aban v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 93 at 98–99 and in *Johnson v Veterans’ Review Board* (2002) 71 ALD 16 at 26–27.

²¹ See ss 46(1)(c) and 46(2) of the Interpretation Act.

²² As to the application of the latter two principles to statutory authorisations see *Barton v Croner Trading Pty Ltd* (1984) 54 ALR 541; and *Benwell v Gottwald* (1978) VR 253 cited with approval by Neaves J in *Kelly v Watson* at 319.

However, it should be noted that s 34AA of the Interpretation Act which expressly allows a delegation to be made to a future office or position does not apply to statutory authorisations. The legal position is not settled as to whether a statutory authorisation could operate in relation to offices or positions falling within a relevant class and which are created after the authorisation is given. In the absence of legislative clarification along the lines of s 34AA, a safe legal position to adopt is to proceed on the basis that a statutory authorisation does not operate in relation to a future office or position (unless this is expressly provided for in the relevant legislation).

Implied power to authorise

The general principle

In some circumstances, a person in whom a power is vested can authorise another person to exercise that power *for and on their behalf*. It is essential to note that a person exercising a power for and on behalf of another does so as the ‘alter ego’ of the person in whom the power is vested. That is, the act of the authorised person is, at law, the act of the person in whom the power is vested. This is fundamentally different to the act of a delegate which, at law, is the delegate’s, and not the delegator’s, act.

The case most often relied on as authority for the proposition that a person may authorise another to exercise a power for and on their behalf is the English case of *Carltona Ltd v Commissioners of Works*,²³ which has been expressly approved in Australia.²⁴ In *Carltona*, the English Court of Appeal considered whether a minister had to exercise personally a power to take possession of land, or whether the power could be exercised by one of the minister’s departmental officials for and on behalf of the minister.

The court concluded that the power in question could be exercised by a departmental official for and on behalf of the minister. The court’s reasoning indicates that there are 2 grounds which justify a minister being able to authorise an official to exercise a power vested in the minister:

- the minister is ultimately responsible to the parliament for the decision of an authorised official
- in modern government, ministers have so many functions and powers, administrative necessity dictates that they act through duly authorised officials.²⁵

In Australia, the decision in *Carltona* has been applied to enable senior public servants in whom powers are vested, (for example, departmental secretaries) to authorise more junior employees to exercise those powers for and on their behalf.

In *O’Reilly v State Bank of Victoria Commissioners*²⁶ the High Court was concerned with a purported exercise of power under s 264 of the *Income Tax Assessment Act 1936*. Section 264 conferred on the Commissioner of Taxation the power to issue notices to persons requiring them to furnish information, give evidence, or produce books, documents and other papers in their custody or control.

The Court, by majority, considered that the Commissioner or their delegate did not personally have to exercise the power to issue relevant notices, but could act through a duly authorised officer. Gibbs CJ and Wilson J, representing the majority, based this conclusion on the kinds of administrative necessity arguments referred to in *Carltona*.²⁷

²³ [1943] 2 All ER 560.

²⁴ See, e.g., *Re Reference Under Section 11 of Ombudsman Act 1976* (1979) 2 ALD 86; *O’Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1.

²⁵ [1943] 2 All ER 560 at 563.

²⁶ (1983) 153 CLR 1.

²⁷ (1983) 153 CLR 1 at 12–13 per Gibbs CJ and 31 per Wilson J. This aspect of *O’Reilly* was cited with approval by the High Court in *Minister for Immigration and Border Protection v EFX17* [2021] HCA 9 at [33].

Circumstances in which the general principle applies

Whether the principle expressed in *Carltona* and *O'Reilly* applies so that a power to authorise a person to exercise a power for and on behalf of another can be implied in particular circumstances is a matter of statutory interpretation. A power to authorise cannot be implied where parliament intends a power be

‘A power to authorise cannot be implied where parliament intends a power be exercised personally.’

exercised personally. Whether a power is to be exercised personally is determined by looking at the nature, scope and purpose of the power.²⁸ Many routine administrative powers do not require personal exercise. Indeed, administrative necessity dictates that such decisions are made by persons other than the holder of the relevant statutory power. In contrast, the exercise of a power that may have serious or drastic consequences for an individual may require the personal attention of the holder of the statutory power.²⁹

The courts have also held that a power to authorise cannot be implied where the minister's power is by way of review of a decision of their departmental secretary,³⁰ or where the minister's function under the legislative provision 'is a central feature of the statutory scheme'.³¹

Administrative necessity

Administrative necessity encompasses a number of factors, including the volume of decision making and the orderly management of departmental business.³² In *O'Reilly*, the court considered that it was not possible for the Commissioner or a Deputy Commissioner to deal personally with millions of taxation assessments. To do so would reduce the administration of taxation laws to chaos.³³

In *O'Reilly*, the Commissioner was able to, and had, delegated the relevant power to Deputy Commissioners but the Commissioner had not delegated his powers to other officers of the Australian Taxation Office (ATO). Decisions were then made by ATO employees acting under authorisations given by the Deputy Commissioners. The court found that, in the circumstances, this arrangement was valid.

Where there is an express power of delegation

In *O'Reilly*, the High Court said that the presence in legislation of an express power of delegation does not necessarily mean a power to authorise cannot be implied.³⁴

However, as discussed below, an express power of delegation, particularly in the context of a power that may have serious consequences for an individual, may in some instances indicate that the *Carltona* principle cannot be relied on.

The absence altogether of an express power of delegation does not give rise to any necessary implication that a power to authorise cannot be implied. Indeed, the need to imply a power to authorise may be greatest where there is no express power of delegation.³⁵

28 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 38 per Mason J.

29 In *Pattenden v Federal Commissioner of Taxation* (2008) 175 FCR 1, Logan J noted the description in a previous case of a departure prohibition order (DPO) as a 'severe intrusion into a person's liberty, privacy and freedom of movement' (at [43]). The Commissioner (and any person acting as a delegate of the Commissioner) has power under the *Taxation Administration Act 1953* to make DPOs, which operate to prohibit a relevant taxpayer from leaving Australia. However, Logan J was 'relieved' from considering whether the *Carltona* principle was applicable in relation to the making of a DPO. That was because it was accepted by the taxpayer in that case that the actions of the person who had been authorised by the relevant delegate of the Commissioner to make the DPO were the actions of the delegate.

30 *Sean Investments Pty Ltd v Mackellar* (1981) 38 ALR 363 at 369 per Deane J.

31 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 38 per Mason J.

32 In *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1, Wilson J observed at 32 that the wholesale delegation of the Commissioner's powers would be 'wholly destructive of any semblance of administrative order and efficiency'.

33 (1983) 153 CLR 1 at 12 per Gibbs CJ.

34 (1983) 153 CLR 1 at 12–13 per Gibbs CJ and 32 per Wilson J; see also *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 38 per Mason J.

35 *Re Walker; Ex parte Fremantle Islamic Association Inc* [2003] WASC 252 at [29] per Pullin J.

Nature of the power

The decision in *O'Reilly* indicates that a power to authorise can be implied where it is not administratively practicable to exercise an express power of delegation in respect of every person to whom the power could be delegated, and as a matter of administrative necessity the holder of the power cannot exercise the power personally. In that case, Gibbs CJ accepted that the exercise of the power in question was likely to adversely affect the rights of individuals but, in the circumstances, considered that the power could nevertheless be exercised on the basis of an authorisation.

Since the decision in *O'Reilly*, the Federal Court has, on a number of occasions, taken a relatively strict view of administrative necessity where the power in question had potential to adversely affect the rights of individuals.

In *Dunn v Australian Crime Commissioner*,³⁶ the Federal Court was concerned with ss 59(7) and 59(9) of the *Australian Crime Commission Act 2002*. Those provisions enabled the CEO of the Australian Crime Commission to disclose certain information to law enforcement agencies, Commonwealth departments, and others. Under s 59A of the Act, the CEO could delegate these powers to SES level staff.

Tracey J noted that the power to disclose the information was conditional on the formation of value judgements as to its appropriateness. The significance attached by the legislation to this process was indicated by the fact that the judgement was to be formed by the CEO or an SES-level delegate. Tracey J confirmed, at 77:

There was no evidence to suggest that the occasion for the exercise of power under s 59(7) or s 59(9) was so frequent as to give rise to an assumption that the legislature could not have expected the CEO or a delegate personally to exercise the power. The exercise of the power had no direct effect on the rights of third parties but might, indirectly, have such an affect if the agency to whom the information was provided acted on it to the detriment of the third party.

These considerations disposed Tracey J to hold that it was necessary for the CEO or delegate to have formed the value judgements that the legislation required before the relevant disclosures could take place.

In *Ozmanian v Minister for Immigration, Local Government and Ethnic Affairs*,³⁷ the Federal Court found that the *Carltona* principle is not applicable to decisions made under s 417 of the *Migration Act 1958*. Section 417(1) of that Act confers power on the Minister to do a number of things including, in effect, grant a protection visa to persons previously determined *not* to be refugees if the Minister considers it 'in the public interest' to do so. Section 417(3) provides that the power may only be exercised by the Minister personally. In that case Mr Ozmanian wrote to the Minister asking him to exercise his power under s 417. The request was considered by a departmental official in accordance with detailed guidelines. The official concluded that the matter did not require the Minister's personal attention and drafted a letter rejecting Mr Ozmanian's request for a visa. The letter was signed by the Minister's senior advisor but was not seen by the Minister personally. The court found that the Minister's senior advisor had made the decision that the Minister would not consider whether to exercise his power under s 417.

Merkel J noted that 'traditionally the courts have been reluctant to imply a statutory authorisation to act by others where the exercise of the power may have serious or drastic consequences on an individual'.³⁸ His Honour went on to find that the scope, nature and purpose of the exercise of power by the Minister under s 417, including the power to decide not to consider an application, was such that the *Carltona* principle could not be relied on to enable the Minister to authorise another to act on his behalf in this regard.

³⁶ [2008] FCA 424.

³⁷ (1996) 137 ALR 103. This decision was subsequently overturned by the Full Court in *Minister for Immigration and Multicultural Affairs v Ozmanian* (1996) 71 FCR 1, but the Full Court's reasons in that case did not relate to the application of the *Carltona* principle. Subsequent High Court authority considering relevant provisions of the *Migration Act 1958* may also have implications in relation to other aspects of *Ozmanian*: see the position taken regarding the nature of guidelines issued for the purposes of s 417 in *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636; see also *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 at [72]. However, the reasoning in *Ozmanian* regarding the application of the *Carltona* principle remains valid.

³⁸ (1996) 137 ALR 103 at 121 citing *R v Superintendent of Chiswick Police Station; Ex parte Sacksteder* [1918] 1 KB 578.

In *Din v Minister for Immigration and Multicultural Affairs*,³⁹ the court was concerned with the exercise of the powers of the Minister for Immigration and Multicultural Affairs to approve certain English language tests and the times and places at which those tests were to be administered.

Wilcox J concluded that *Carltona* could not be relied on to enable departmental officers to exercise the relevant powers for and on behalf of the Minister. That conclusion was based on there being no administrative necessity for the Minister to exercise the powers through an authorised officer or officers. In addition, the Minister had an express power to delegate the relevant powers to any relevant departmental officers. Moreover, the nature of the powers involved was such that their exercise had potentially serious consequences for affected individuals.⁴⁰

Dunn, Ozmanian and *Din* demonstrate the need for careful consideration to be given to whether there is an implied power to authorise in each particular case, especially where there is an express power of delegation available. Nevertheless, it is clear from the High Court decisions in *Dooney v Henry*⁴¹ and *Minister for Immigration and Border Protection v EFX17*⁴² that *O'Reilly* is still good law. It is also clear that the existence of a power of delegation is a relevant but not conclusive factor when considering the existence of an implied power to authorise. The single judge in *Dooney*, *Callinan J*, quoted at length from *O'Reilly*, including the passage where Wilson J observed that:

No permanent head of a department in the Public Service is expected to discharge personally all the duties which are performed in his name and for which he is accountable to the responsible Minister.

Likewise, the Full Court of the Federal Court in *Commissioner of Taxation v Mochkin*⁴³ affirmed that where a power is not intended to be exercised only by the Commissioner or delegate personally, it was open for the Commissioner or their delegate to act through an authorised officer.

Form of instruments of authorisation

A *Carltona* authorisation may be express or implied. Whether a written authorisation is required will depend on the nature of the power and the administrative arrangements in place in the particular department. A written instrument of authorisation will provide greater certainty as to who has the authority to exercise a particular power.

However, where it is clear from the policy and administrative practices of a department that certain officials exercise a power, particularly a routine administrative power, for and on behalf of the holder of that power, a written instrument may not be necessary. Having said that, it is generally preferable to execute a written instrument of authorisation.

A person acting on another's behalf under an authorisation acts in the name of the holder of the power. Accordingly, they would execute documents in particular circumstances either by affixing a facsimile signature of the holder of the power or by signing *for* that person. Strictly speaking, it is not necessary for a person acting under such an authorisation to include their own name but it is good administrative practice to do so.⁴⁴

³⁹ (1997) 147 ALR 673.

⁴⁰ (1997) 147 ALR 673 at 682.

⁴¹ (2000) 174 ALR 41.

⁴² [2021] HCA 9 at [33].

⁴³ (2003) 127 FCR 185.

⁴⁴ See, e.g., *Re Walker; Commissioner for Fair Trading; Ex parte Fremantle Islamic Association Inc* [2003] WASC 252 at [31] per Pullin J.

Change in person holding office

As noted above, in *Kelly v Watson*, the Federal Court held that a delegation continued to operate even though there had been a change in the person holding the office under which the delegation was made. In arriving at that conclusion, Neaves J stated that:

There is . . . nothing in the relationship between the person delegating the power and the delegate, as there would be if the relationship was one of principal and agent, which would require that the delegation should cease to have any valid operation upon the delegator ceasing to hold office.⁴⁵
[Emphasis added.]

It would seem to follow from this statement that an authorisation, which effects a principal and agent relationship, ceases to have effect when the person who gives the authorisation ceases to hold office.

However, more recently, the Full Court of the Federal Court in *Mochkin*⁴⁶ took the view that the act of authorising another person to perform specified functions or exercise specified powers in the name of the person giving the authorisation ‘does not import into the “relationship” between the authority and the subordinate the principles governing a principal/agent relationship under the general law’.⁴⁷

In *Mochkin*, the Full Court concluded that, at least in the context of authorisations under the *Income Tax Assessment Act 1936*, a change in the holder of the power did not result in authorisations given by that person ceasing to operate. In other words, authorisations given from one official to another survived even when the person who gave the authorisation leaves their office or position.

It should be noted that in *Mochkin*, neither the court in the first instance⁴⁸ nor the Full Court on appeal, appears to have considered *Kelly v Watson* or the line of authority that follows it on this point.⁴⁹

Authorisations given under some statutory provisions clearly cease to have effect when the person who gives such an authorisation ceases to hold office.⁵⁰ Those authorisations are not ‘statutory authorisations’ in the sense described above. Rather, they are authorisations given under specific legislative provisions to exercise powers for, and on behalf of, the person giving the authorisation.

⁴⁵ (1985) 10 FCR 305 at 318.

⁴⁶ (2003) 127 FCR 185.

⁴⁷ (2003) 127 FCR 185 at 213.

⁴⁸ (2002) 50 ATR 134.

⁴⁹ See in particular *Johnson v Veterans' Review Board* (2002) 71 ALD 16 at 27 and *Aban v Minister for Immigration Local Government and Ethnic Affairs* (1991) 31 FCR 93 at 98–99. See also *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at [68], where the Court noted that ‘[t]he *Carltona* principle has been described [in Aronson, Dyer and Groves, *Judicial Review of Administrative Action*, 4th ed (2009), pp 343–345 [6.45]] as a principle of agency, distinct from a delegation of power, which allows an agent to act in the principal's name and use all of the principal's power. The Commonwealth and the Minister submitted that, while the *Carltona* principle would allow activities of a Minister's Department to be attributed to a Minister, the position is different where (as here) the relevant powers are ones which the statute requires be exercised by the Minister personally.’ The Court went on to state, at [69], that it was not necessary to attempt to identify the limits of the *Carltona* principle.

⁵⁰ See, e.g., s 19(4) of the Interpretation Act.

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