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- Possible exception: a doctrine of estoppel may be applied when the estoppel will not hinder the exercise of the discretion in the public interest and there would be grave injustice to an individual who acted on the representation
 - BUT NOTE: This exception has not been developed in subsequent cases.
- In any event, the exception did not apply in this case. Generally, the judicial branch should be reluctant to be intervene in judicial appointments

Re Minister for Immigration and Multicultural Affairs; Ex parte Lam (2003) 214 CLR 1

- Under the *Migration Act 1958* (Cth), the Minister was empowered to cancel a visa if the Minister reasonably suspected that the visa holder did not pass the “character test”.
- Mr Lam held a visa. He committed some criminal offences.
- The Department of Immigration and Multicultural Affairs wrote to Mr Lam and informed him that the Minister was considering cancelling his visa.
- The Department invited him to make submissions.
- Mr Lam made detailed submissions:
 - He had two children who were Australian citizens whose best interests would be damaged if his visa were cancelled.
 - He annexed a letter from his children’s carer.
- The Department wrote to Mr Lam requesting the contact details of the carer and stating that the Department wished to contact the children’s carer.
- Mr Lam provided the details, but the Department did not contact the children’s carer.
- The Minister cancelled the visa.

Issue: did Mr Lam have a legitimate expectation that the Department would contact his children’s carer?

McHugh and Gummow JJ:

- The doctrine of “legitimate expectation” has little utility in Australia
 - Note: *WZARH* (2015) has subsequently rejected the doctrine of “legitimate expectation”.
- No doctrine of administrative estoppel has emerged in Australia

5. Acting under Dictation

CM&R Textbook Ch 4.3.4

Recognised under both common law and ADJR

Principle: A decision-maker granted a discretionary power under a statute, must exercise that discretion independently rather than submit to the instructions/views/policies of another person or body

Section 5 of the *ADJR Act* relevantly provides:

(1) A person who is aggrieved by a decision to which this Act applies ... may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the decision on any one or more of the following grounds:

...

(e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made ...

(2) The reference in paragraph (1)(e) to an improper exercise of a power shall be construed as including a reference to:

...

(e) an exercise of a personal discretionary power at the direction or behest of another person...

Discretion must not be exercised at the direction or

behest of another person

Bread Manufacturers of NSW v Evans (1981) 180 CLR 404

Section 20 of the *Prices Regulation Act 1948* (NSW) provided:

(1) The Commission may, with respect to any declared goods, from time to time, by order published in the Gazette —

(a) fix and declare the maximum price at which any such goods may be sold generally or in any part of the State or in any proclaimed area; or

...

(1A) Notwithstanding subsection (1), the Commission shall, before causing an order referred to in subsection (1) to be published in the Gazette, serve a copy of the proposed order on the Minister and shall not cause the proposed order to be so published —

(a) unless the Minister has informed the Commission that he does not propose to give it a direction under paragraph (b); or

(b) if the Minister, in the public interest, has directed the Commission not to publish the proposed order.”

Facts

- The appellants manufactured and sold bread and bread products.
- The Prices Commission made an order which increased the price of bread by three cents.
- The appellants alleged:
 - the Prices Commission was considering a four cents increase
 - the Minister had said that he would veto a four cents increase
 - at least one of the members of the Prices Commission had changed his mind about the four cents increase after speaking with the Minister.

Issue: Did the Prices Commission come to its own decision or did it act under the dictation of the Minister who may have indicated that he would veto a four cents increase?

Gibbs CJ:

- “A statutory authority must not, in purported exercise of its discretion, act under the dictation of some other person”
 - “For the Commission to take ministerial policy into account in making a decision of its own is a different thing from automatically following ministerial policy”
- He noted that it would be futile for the Commission to make an order that it knew the Minister would veto

Mason and Wilson JJ:

- There is no universal rule as to whether a decision maker can (or cannot) take into account Minister's views (or the views of the government).
- The following factors determine whether a statutory decision maker can take a Minister's views (or the views of the government) into account
 - the particular statutory function of the decision maker
 - the nature of the question to be decided
 - the character of the decision maker (e.g. a tribunal)
 - the general drift of the statutory provisions regarding the relationship between the decision maker and the responsible Minister
 - the nature of the views expressed on behalf of the Government

Rendell v Release on Licence Board (1987) 10 NSWLR 499

The decision-making process:

- Mr. Rendell murdered his wife. Sentenced to a mandatory life imprisonment. Served 7 years of his sentence. Applied to the Board for release on licence (i.e. parole). Steps in the decision-making process:
 5. The Board would consider an application and then make a recommendation to the Minister.
 6. The Minister would make a recommendation to the Executive Council.
 7. The Executive Council would make a recommendation to the Governor
 8. The Governor would then formally make a decision whether to release the person.
- The Board did not recommend Mr Rendell's release. It said that the period he had served was “*insufficient to comply with guidelines upon which any recommendation of the Board is acceptable to the Executive Council*”

- That policy provided that a person sentenced to mandatory life imprisonment could not be released until serving at least 10 years.
- The Board applied the policy because it felt it had no alternative.
- Challenged the recommendation against his release in the NSWSC.
- Distinguish *Bread*: here only looking at policy, the Minister in *Bread* may have been looking at economic conditions etc
- NSWSC quashed the decision of the Board.
 - No universal rule about applying/not applying policy.
 - The body must not be so influenced by the policy that it fails to perform its own functions (as contemplated in the statute)
 - The extent to which an independent body may reflect established government policy depends upon:
 - the charter of the body (e.g. the statute establishing the body)
 - the nature of the body's functions and
 - the relevance of the policy to the body's charter and functions
 - The *Prisons Act 1952* (NSW) had established the Parole Board as a body independent from the Executive.
 - As such, Board had to have some independence by making its decision with reference to the legislation. Even if executive had no policy, the Board could still make a recommendation.

Statutory directions

Riddell v Secretary, Department of Social Security (1993) 42 FCR 443

- Applicant received social security benefit. Then turned out she was not entitled. In response, started making regular repayments. When it reached around 2k, she asked for it to be waived due to extreme financial hardship.
- Delegate of secretary determined it should not be waived. She made several appeals, including to AAT, then matter ended up in Full Court of the Federal Court for Judicial Review.
- Section 1237 of the *Social Security Act 1991* (Cth):
 - “(1) The Secretary may, on behalf of the Commonwealth, decide to waive the Commonwealth's right to recover from a person the whole or a part of a debt.
 - (2) In exercising the power under subsection (1), the Secretary must act in accordance with directions from time to time in force under subsection (3).
 - (3) The Minister may, by determination in writing:
 - (a) give directions relating to the exercise of the Secretary's power under subsection (1); and
 - (b) revoke or vary those directions ...”
- The direction of 8 July 1991 provided that the Secretary must exercise the waiver power only in particular circumstances, such as “where in the opinion of the Secretary special circumstances apply such that the circumstances are extremely unusual, uncommon or exceptional (as discussed by the Federal Court of Australia in *Beadle v Director-General of Social Security* (1985) 7 ALD 670).”
- **Issue:** Was the direction of 8 July 1991 authorized by s 1237 of the *Social Security Act 1991* (Cth)?
- A direction has to be consistent with the Statute
- The language of s 1237(3) of the *Social Security Act 1991* (Cth), when considered in its context and having regard to its legislative history, is not apt to have authorized the Minister to have made the direction
- Section 1237(3) of the *Social Security Act 1991* (Cth) did not allow the Minister to make directions circumscribing the wide discretion to waive debts. Rather, directions were only allowed to give general guidance to the administrators and had to give the administrator some room to grant departures from the Direction
- In short, the determination was not giving guidance as to how the power was to be exercised. Rather it was denying the existence of the power

6.Unauthorised Delegation

CM&R Textbook Ch 4.3.5

Where there is no express provision to delegate,

Carltona Ltd v Commissioners of Works [1943] 2 All ER 560

- War time.
- Regulation 51(1) of the *Defence (General) Regulations 1939* (UK) provided that a “competent authority” may take possession of any land if it appears to be necessary or expedient so to do in the interests of public safety, defence of the realm or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community.
- “Competent authority” included the Commissioners of Works.
- The Commissioners of Works never met.
- By statute the powers of Commissioners of Works were exercised by the First Commissioner, who at the relevant time was also the Minister of Works and Planning.
- Minister had assistant secretary, who acted for the Minister.
- She issued the notices to requisition of premises of ice cream factory, as the land was needed for defence.
- Challenged the notices on ground that the “Minister” had not issued them.

Issue: Were the notices valid in circumstances where the Minister had not made the relevant decision to issue the notices?

Lord Greene MR

- “*Carltona principle*”: “where a power or function is conferred on a Minister, in circumstances where, given administrative necessity, Parliament cannot have intended the Minister to exercise the power or function personally, an implied power of delegation (or agency) may be inferred”
- According to this principle there is no delegation, the Minister is acting through his/her officers as agents.
- Rationale: Ministers have so many functions that they cannot personally attend to them. Ministers are responsible to Parliament for anything officials have done under their authority.

O’Reilly v Commissioners of State Bank of Victoria (1982) 153 CLR 1

- Mr. Lawson was a taxpayer. He and his Solicitor received notices to give evidence and documents to a Supervisor in the investigations’ section in Department of Taxation.
- Section 264 of the *Income Tax Assessment Act 1936* (Cth) provided that:
 - “The Commissioner may by notice in writing require any person ...
 - (b) to attend and give evidence before him or before any officer authorized by him in that behalf concerning his or any other person’s income or assessment, and may require him to produce all books, documents and other papers whatever in his custody or under his control relating thereto.”
- The Commissioner delegated his power to issue notices under this section to Deputy Commissioners (see s 8(1) of the *Taxation Administration Act 1953* (Cth))
- The notices to Mr Lawson bore a copy of the signature of a Deputy Commissioner. The signature had been stamped on the notice by Mr Holland (the Chief Investigation Officer in the Taxation Department).
- The Deputy Commissioner had no personal knowledge that Mr Holland intended to issue the notices.
- However, the Deputy Commissioner had authorized Chief Investigation Officers to issue notices and stamp a copy of his signature on the notices.
- Argued he could not sub-delegate powers.

Issue: Could the powers conferred on the Commissioner by s 264 of the *Income Tax Assessment Act 1936* (Cth) be exercised by an authorized officer (such as the Chief Investigation Officer)?

Gibbs CJ:

- Acknowledged that the *Carltona* principle could apply to a statutory office holder (such as the Commissioner)
- Whether a statute requires a power to be exercised personally by the person designated depends on the nature of the power and all other circumstances of the case
- In this case:

- In favour of the power being exercised personally by the Commissioner: a decision to issue a notice could have an adverse effect on individuals
- Against the power being exercised personally by the Commissioner: the administration of tax laws could not be carried out just by the Commissioner or Deputy Commissioner given that there were over 5.6 million tax payers
- There was a “practical necessity” for the power to be exercised by authorised agents

Mason J (dissenting):

- The issuing of a notice under s 264 was not the type of decision which could be validly carried out in the absence of a delegation by the Commissioner. That was because:
 - The decision to issue a notice involved a substantial exercise of discretion
 - There was a lack of control exercised by the Deputy Commissioner over the exercise of discretion of the departmental officers
 - The decision would have great impact on the individual
- The *Carltona* principle could not be extended to the Commissioner:
 - The doctrine of ministerial responsibility has no application to the Deputy Commissioner
 - There was no administrative necessity in circumstances where the Commissioner had a comprehensive power to delegate to Deputy Commissioners
 - The Commissioner had power to delegate his functions to anyone and had not done this

Common ground between Gibbs CJ and Mason J (as stated by Basten JA in the *Nelson Bay Claim*):

1. There had to be administrative necessity for there to be an implied power of delegation or agency
2. There might not be an implied power if the exercise of the power will be likely to affect rights of individuals adversely
3. There might not be an implied power if the exercise of the relevant power or function involves the exercise of a discretion or the formation of an opinion

New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (the Nelson Bay Claim) (2014) 88 NSWLR 125

- The NSW Aboriginal Land Council lodged a claim under the *Aboriginal Land Rights Act 1983* (NSW).
- For a claim to be made under the Act, the claim had to be made with respect to “claimable Crown land” (that is, government owned land)
- Section 36(1) defined “claimable Crown lands” to be “lands vested in Her Majesty that, when a claim is made for the lands, the lands:
 - (a) are able to be lawfully sold or leased, or are reserved or dedicated for any purpose, under the *Crown Lands Consolidation Act 1913* or the *Western Lands Act 1901*,
 - (b) are not lawfully used or occupied,
 - (b1) do not comprise lands which, in the **opinion** of a Crown Lands Minister, are needed or are likely to be needed as residential lands,
 - (c) are not needed, nor likely to be needed, for an essential public purpose.”
- The Minister rejected the claim on the basis that the lands “are needed or are likely to be needed as residential lands” (see s 36(1)(b1) of the *Aboriginal Land Rights Act 1983* (NSW)).
- The NSW Aboriginal Land Council sought review in the Land and Environment Court.
- The parties accepted that the Minister did not hold the opinion required by s 36(1)(b1) of the *Aboriginal Land Rights Act 1983* (NSW) at the relevant time.
- The trial judge relied on the *Carltona* principle and dismissed the NSW Aboriginal Land Council’s case.
- The NSW Aboriginal Land Council appealed to the NSWCA.

Issues:

1. Did the Minister need to personally hold the opinion in s 36(1)(b1) of the *Aboriginal Land Rights Act 1983* (NSW) that the land do not comprise lands which are needed or are likely to be needed as residential lands? (Yes)
 2. Did the *Carltona* principle permit s 36(1)(b1) of the *Aboriginal Land Rights Act 1983* (NSW) to be construed as if it were sufficient for such an opinion to be held by a departmental officer? (No)
- There is no presumption that the *Carltona* principle would apply.