

Topic 3: Authorisation to decide (delegation and agency)

Roadmap:

Statutory decision-making power conferred on an officeholder eg Minister, but decision is made by a subordinate

A. Three possibilities: the subordinate acted as –

(1) authorised delegate? (2) authorised agent? (3) without authority

B. Focus of this topic

1. Has there been valid delegation

a. no power to delegate; OR no instrument of delegation; OR delegation doesn't cover the case; OR power hasn't been exercised

b. if not

2. Does the common law imply authority for the repository to exercise this statutory power through agency of others?

a. Principle: Implication can be made if nature, scope and purpose of the power are such that, given administrative necessity, parliament cannot have intended the repository to exercise the power personally.

b. Application: Evaluation, drawing on points of similarity / difference to O'Reilly; Peko-Wallsend; Nelson Bay Land Claim.

Templates

- **Generally**, Administrative decisions must be made by the person who is granted the power under the Act. **Re Ombudsman**. unless there is express statutory delegation or a clear implication from the statute that administrative necessity requires otherwise
- **[Delegation]** requires that repository has validly exercised a statutory power to delegate. Question is does legislation express or implied allow the decision to be delegated ascertained by statutory interpretation. If it's statutorily allowed, it still requires signed instrument by principal appointing delegate. And the delegate should exercise the power under their own name **Re Ombudsman**
- **[Agency]** If not delegation, should consider whether there's agency. Authority for a repository to act through agents will be implied if the nature, scope and purpose of the power are such that, given administrative necessity, parliament cannot have intended the repository to exercise the power personally (eg **O'Reilly; Peko**) If satisfied, the act is to be done in the name of the authority **Re Ombudsman**
- **[personal opinion]** if statutes require the personal judgment of the Minister, the Minister must personally form the opinion, even if relying on departmental advice, but departmental briefings cannot replace the Minister's personal decision-making **Peko- Wallsend**

Step 1: General rule: Direct conferral of statutory power – i.e. as named repository of the power

- i.e. statute empowers an office-holder, the decision is made by such person → perfect
- Administrative decisions must be made by the person who is granted the power under the Act. **Re Ombudsman**.
- Statute attaches power to incumbent of office / position → the power may be exercised or the function or duty must be performed by such persons. **Section 34AAA Acts Interpretation Act 1901 (Cth)**

Step 2: Exceptions

A. Distinction btw delegation and agency: **Re Ombudsman**

- **Delegation:** Where a delegate is exercising the power delegated to him, he may validly exercise that power in his own name.
- **Agent:** Where an authority has not delegated his power but he has authorized another to act in exercise of his power, the act is to be done in the name of the authority.
 - a. The agent is subject to the direction of the principal. Doesn't sign decision, principal signs or signed on principal's behalf, like "ghost writer".

B. Delegation

a. Principles:

i. Requires that repository has validly exercised a statutory power to delegate.

ii. Delegation may be to a person, or the incumbent of named office or position: **s 34AA**.

iii. Delegates cannot sub-delegate: **s 34AB(1)(b)**.

b. Does legislation allow the decision to be delegated? (statutory interpretation) can be express or implied.

i. → if no: cannot delegate

1. But note filtering out process, where seemingly the lower person is not making a final decision

2. Principle: When the statute requires the power be exercised by the Minister personally, the Minister can give instructions about what kinds of cases he wants referred, but cannot give conclusive decision-making power to the Department **Davis**

3. **Ministerial Instructions: only requests involving "unique or exceptional circumstances" be referred → this is enabling the Department to decide on what is or isn't in the public interest, which is required under statute to be personally considered by the minister → declaration that that executive power was exceeded**

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- a. "I want/don't want to be referred cases involving the following characteristics" is fine
- ii. → if yes, has the decision maker been legally authorised to make the decision under that delegation? Have they made the decision under their own name?
 - if yes,
 1. Requires signed instrument by principal appointing delegate.
 2. At common law, delegate exercises the power under their own name. *Re Ombudsman*. (P was allowed to make decision as a delegate as a first assistant D-G, but signed the name under D-G → invalid decision bc P made the decision as an agent by not signing his own name.)
- iii. After validly delegated:
 1. Delegate can exercise a power dependent upon their own opinion, belief or state of mind. *AIA 34A*.
 2. The authority may still perform duty/power/function after delegation. *34AB(1)(d)*.
 3. Delegation not to a specified person, but to any person from time to time holding/ performing duties of a specified office or position, even if the position/office come into existence after the delegation. *34AA*.
 4. If delegated all functions/ duties/ powers + Act amended to give delegators more functions/ duties/ powers+ delegation is in force immediately before the amendment takes effect → delegation is taken to include the additional duties/functions/powers. *34AB(2)*.
 5. If delegated one or more functions/ duties/ powers + Act amended to alter the scope of functions/ duties/ powers+ delegation is in force immediately before the amendment takes effect → delegation is taken to include the duties/ functions/powers as altered. *34AB(3)*.

C. If not delegation, Agency?

a. Step 1: Principle:

- i. Authority for a repository to act through agents will be implied if the nature, scope and purpose of the power are such that, given administrative necessity, parliament cannot have intended the repository to exercise the power personally (eg *O'Reilly; Peko*)
 1. Where an authority has not delegated his power but he has authorized another to act in exercise of his power, the act is to be done in the name of the authority. *Re Ombudsman*

b. Step 2: consider the combination of factors

c. Factors support implied agency

i. Factor: Is the named decision maker a Minister?

1. Where the formal decision-maker is a minister, the conventions of responsible government strengthen the case for implying agency (*Carltona principle*) but agency can be implied for other high-level decision-makers (eg *O'Reilly*).
 - functions given to ministers will normally be exercised through agents.
 - There is no delegation, the Minister is acting through his/her officers as agents.
2. *Carltona*: requisition private land to aid the war effort authorised by statute. Act authorised Minister, signed by assistant secretary → ministers ultimately responsible to the Parliament + practical necessity → yes agent yes valid decision .
 - Rationale: Ministers had multifarious statutory functions and powers → no intention for minister to personally attend to these matters.
3. *O'Reilly* Named decision maker is Tax Commissioner + delegated to deputy commissioner ('DC') + signed by a chief investigation officer using DC's signature → taxation law does not intend personal exercise by Commissioner or DC, yes agency (not sub-delegate) → valid decision

ii. Factor: Practical necessity

1. The implication is favoured if the volume of individual cases requiring exercise of the power make it impractical for the repository to act in all cases (present in *O'Reilly*; absent in *Peko-Wallsend; Nelson Bay*)
 - Eg of typical high-volume decision: social security; visas.
 - millions of tax payers in AU, if the high person has to make all decision, the tax regulation will be in chaos *O'Reilly*
 - thousands of requisitions of private land in war time → support agency *Carltona*
 - CF
 - No practical necessity in decision granting land under Aboriginal Land Rights Act *Peko-Wallsend Mason J*
 - Not Necessary volume in *Nelson Bay* → to be decide by M personally.
2. No agency authorised for official who was an authorised delegate

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- The practical administrative necessity for agency disappears when the authority is empowered to delegate all of his powers and functions to that other. *Re Ombudsman*.
 - if already delegate, no agency
- iii. **Factor: The presence of an express power of delegation** does not necessarily exclude an implied power to act through agents (see eg *O'Reilly*; *Peko-Wallsend*, though *Re Ombudsman*, where held no agency authorised for official who was an authorised delegate).
1. but if only possibility of delegation, still can agent
- d. **Factors against implied agency:**
- i. **Factor: decision affects individual rights**
 1. The implication of agency is less readily drawn if
 - exercise of the power is likely to adversely affect individuals (*O'Reilly*; *Peko-Wallsend*)
 2. Mason J's dissent in *O'Reilly*: potential impact on the individual affected/ likely to adversely affect individuals.
 - ii. **Factor: High public purpose**
 1. The subject matter of the opinion involves giving effect to a high public purpose. *Nelson Bay*
 2. turning land over to residential use requires commitment of public resources. *Nelson Bay*
 3. And assessing uses of Crown land is likely to involve disputes between govt departments which need to be resolved at a ministerial level *Nelson Bay*
 - Subject matter, grants of land rights, decision based on 'essential public purpose' involves 'high government policy' → to be decide by Minister personally. *Nelson Bay*
 - A decision granting land under Aboriginal Land Rights Act has important consequences → against agency *Peko*
 - So basically these two cases have low volume and high importance
 - iii. **Factor: lack of accountability of the agent**
 1. Mason J's dissent in *O'Reilly*: substantial exercise of discretion and there was a lack of control by the Deputy Commissioner.
 2. CF:
 3. **Responsible government ensures ministers will oversee proper departmental organisation and administration** → yes accountability → support agency *Carltona*
 - iv. **Factor: The breadth of the discretion**
 1. Involve a broad discretion or formation of an opinion. *Peko-Wallsend*; *Nelson Bay*.
 - Land assessment is complex. Objects indicated Minister was properly responsible for assessing crown land. Minister likely to be privy to different opinions, including different department opinions, and need to consult cabinet. *Nelson Bay*.
 2. **Precondition (SJF) → Minister's opinion.** *Nelson Bay*. Minister primarily responsible for administering Act
 - Not an objective test/objective jurisdictional fact which a court could assess.
 - v. **Factor: The absence of an express power of delegation**
 1. The absence of an express power of delegation may weigh against the implication if the particular legislative history shows an informed and deliberate choice, suggesting parliament intended the power to be exercised personally. *Nelson Bay*
statute: "in the opinion of Minister...", but the decision is based on the opinion of Officers, not the Minister. Agency to justify? → NO presumption that *Carltona* principle applies, needs to be an implication from legislation that identified decision maker does not need to make the decision.
 2. Andrew: No express power in this act to delegate to someone else. Parliament intended the power to be done not by lower people
 3. History purpose and structure of the Act. *Nelson Bay*.
 - a. Grant of land rights, case law to effect indigenous claimants effectively have a conditional right, unlikely such a right could be overridden by department officers as opposed to Minister.

If no delegation/agency allowed

- When statutes require the personal judgment of the Minister, the Minister must personally form the opinion, even if relying on departmental advice, but departmental briefings cannot replace the Minister's personal decision-making.
 - He cannot delegate this task or allow an officer to act as an implied agent.
- *Peko- Wallsend*:
 - e. Minister had no personal knowledge of letters sent to Department by Peko-Wallsend clarifying the facts, Minister argued he had considered the letters through the agency of his officers.

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- f. The Court found that the Minister's statutory duty required personal consideration — it wasn't enough that officers knew of the material. The Minister failed to consider the contents of the letters, and he could not escape that failure by saying his staff had read them.

Consequence

the signing person is not the one granted the power under the Act, and there is no effective delegation or agency → a ground for judicial review (an error of law; a jurisdictional error & a ground for review under the *ADJR*)

*****Biggest summary**

- Question to ask – Is there a breach of one of the grounds for reviewing administrative decisions made under Acts or regulations, eg (highlighted parts are content of topic 4)
 - Unauthorised delegation or agency
 - Correct understanding of the statute – error of law
 - Probative Basis for finds of facts/no Evidence
 - Consideration grounds
 - Improper Purpose
 - Acting under dictation
 - Unreasonableness
 - Procedural fairness
 - Objective Jurisdictional Fact
 - Inflexible or inappropriate use of policy

Template

[Error of law]

- Error of law is subject to judicial review. It is an ordinarily implied condition of a statutory conferral of decision-making power that the decision-maker must proceed by reference to correct legal principles, correctly applied: *Hossain*
- DM determines the facts (*Azzopardi*) normally wrong finding of fact is not subject to judicial review, but it's the court's role to review interpretation of the meaning of a technical legal term ("special industry" in *Pozzolanic*) or an everyday term when it has a statutory meaning ("injury" in *May v Military*)

[no evidence]

- There is no error of law in making a wrong finding of fact (*ABT v Bond; Enfield*). But "no evidence" is one of the exceptions:
 - 'No evidence' only arises if there is a complete lack of any probative material (i.e., absence of any foundation in fact) for the finding in the material before the decision-maker *Melbourne Stevedoring*
 - At least in some contexts (not a statutory precondition to power), administrative decision-makers can proceed from personal or specialized knowledge or matters commonly known (*Viane*)

[considerations]

- Consideration of a prohibited matter is a ground for review, unless the breach is insignificant: *Padfield*.
- Failure to consider a mandatory matter is a ground for review (i.e., DM is bound to consider a relevant consideration), unless the breach is insignificant: *Peko-Wallsend*
 - Level of engagement
 - Rely on summaries
- Identifying mandatory and prohibited matters is an exercise of statutory interpretation. *Peko-Wallsend*
 - Broad discretion: against prohibited/mandatory
- Insignificant means correcting the breach could not make any difference to the outcome; no material effect. *Peko-Wallsend*

[Purpose]

- A decision made under statutory authority is invalid if it is done for a substantial purpose that is unauthorised. *R v Toohey* The Plaintiff bears the onus of proving that a decision-maker had an unauthorised purpose, and that it was a substantial purpose – *Samrein*
 - Identifying (express/implied) authorised and unauthorised purposes is a matter of statutory interpretation. *R v Toohey* What's the purpose of administrative act/delegated legislation is a question of fact
 - A purpose is substantial if the decision would not have been made but for the purpose *Samrein*

[dictation]

- The presumption is The person (or institution) authorised to make an administrative decision must decide according to their own judgment, rather than do the bidding of someone else. *Bread Manufacturers; Rendell*
 - But merely giving weight to others' views is not dictation. Drawing the line is a contextual exercise: question is

Topic 4: Substantive conditions on administrative decisions

absent of express statute guidance, what is appropriate from the framework of the relationship which the statute has sketched in *Bread Mason and Wilson JJ*

- Directions/Policy: Express statutory direction-giving powers do not necessarily authorise Ministers to direct the result in specific case. (*Riddell*)
- Exceptionally, the statute may expressly or impliedly permit superior officers to control and direct decisions made by the decision-maker: The presumption may be displaced if the statutory context allows control and override officials or other bodies in the exercise of statutory powers in individual cases *CPCF*

[legal unreasonableness]

- The legislature is taken to intend that a discretionary power, statutorily conferred, will be exercised reasonably. (*Li*)
- *Wednesbury* unreasonableness was deemed to be circular and vague in *Li*. The *Li* test is “An inference of unreasonableness can be drawn ‘if the decision, viewed objectively in the particular statutory and factual context, lacks an evident and intelligible justification’.”
 - Under *Li* standard, While it may be unclear what the precise error is, an error can be inferred *Li*
 - The standard of reasonableness must be the standard indicated by the true construction of the statute. *Li*
- Some Types
 - Inconsistency of treatment
 - Oppressive treatment
 - Failure to make inquiries
 - Failure to consider information that is obvious, readily available and centrally relevant (*SZIAI; DUA16*)

Scaffold

➤ **Part 1 – Requirement to apply a correct understanding of governing statute (error of law)**

- What’s error of law
 - Breach of a legal condition on the exercise of statutory power = an error of law, which may be a ground for a remedy in judicial review / an appeal on a question of law
 - When it’s a ground of judicial review
 - ◇ In statute: s5(1)(f) of the ADJR Act - ‘that the decision involved an error of law, whether or not the error appears on the record of the decision’
 - ◇ At common law: an error of law may be a jurisdictional error
- General rule & summary
 - It is an ordinarily implied condition of a statutory conferral of decision-making power that the decision-maker must proceed by reference to correct legal principles, correctly applied: *Hossain*
 - Conclusive interpretation of the governing statute is an exclusively judicial function, and courts do not defer to administrators on the interpretation of statutes. (*Enfield*)
 - Administration’s interpretation of the meaning of a technical legal term is reviewable by court (*Enfield*)
 - The correct statutory interpretation will almost always be the interpretation given by the courts. Exception: administrators are free to adopt any *reasonable* interpretation of statutory terms that carry an ordinary or non-legal technical meaning. (*May v Military*)
 - Administrators can determine the ordinary or non-legal technical meaning of statutory terms, but even so the courts must resolve any constructional choices. (*May v Military*)
- What’s not subject to judicial review
 - Fact finding: DM determines the facts by way of primary findings and inferences (*Azzopardi*)
 - There is no error of law in making a wrong finding of fact: (*ABT v Bond; Enfield*)
- What’s subject to judicial review
 - Exceptions to fact finding: no evidence (topic 4.2); objective jurisdictional facts (6.2); irrationality (6.3)
 - Rule stating: DM directs themselves as to the law (*Azzopardi*)
 - Rule application: DM applies the law to their findings of fact (*Azzopardi*)
 - The effect or construction of a term (ie. how it works within the statute) (*Pozzolanic*)
 - Interpreting the meaning of a technical legal term (*Pozzolanic*)

Topic 4: Substantive conditions on administrative decisions

- i.e., review of statutory interpretation and jurisdictional facts belongs to the courts
- Rationale: It is only the court's role to determine the meaning of statutory provisions relevant to an administrator's decision (**Enfield**; cf US Chevron) (issue: whether the administrator's conclusion that it was not a 'special industry' should be deferred to, or whether the court could independently determine that fact → result: deference principle rejected; court to determine)
- Administrators determining the ordinary or non-legal meaning of statutory terms
 - View 2 (**good law) – statutory interpretation—even of everyday terms like 'injury'—is a question of law (**May v Military**) (definition of 'injury' is a question of law → subject to judicial review)
 - ◇ HC in *Agfa-Gevaert* rejected old view: Analysis was too simple as when considering what may seem at first an ordinary word there is a need to consider the context in which the word is placed
 - ✓ **May v Military** – 'injury' doesn't have merely an 'ordinary meaning'; it has a statutory meaning, which must be arrived by principles of statutory interpretation
 - ◇ HC in **May v Military**: 'Within the well-established parameters of text, context and purpose, recognising the **existence of constructional choices** reflects a recognition that language is plastic and nuanced, leading to a level of legal indeterminacy which **courts must resolve**'

➤ **Part 2 – Requirement of a probative basis for findings of fact (no evidence)**

- ***key of this part
 - Administrator makes a finding of fact without probative material → error of law → subject to judicial review
 - Exception: the finding is made in accordance with the decision-maker's personal or specialized knowledge, or common knowledge
- Principles
 - **What's 'no evidence'**
 - **Starting point:** There is no error of law in making a wrong finding of fact (**ABT v Bond; Enfield**).
 - ◇ How to argue it's just fact finding – 'administrators draw inferences, rely on opinions, draw on policy'
 - ◇ But "no evidence" as one of the exceptions:
 - **Complete lack of any probative material**
 - 'No evidence' only arises if there is a complete lack of any probative material (i.e., absence of any foundation in fact) for the finding in the material before the decision-maker.
 - ◇ Insufficiency of the probative material (i.e., its cogency or persuasive force when weighed against evidence that tends the other way) is not enough to establish the 'no evidence' legal error. (**Melbourne Stevedoring**) (although minor operation failures (i.e., two worker's absence) are not evidence has to be considered under the Act, they're evidence → not 'no evidence')
 - ◇ 'Probative' does bring in *some* qualitative requirement – information is only 'probative' if it is rationally capable of weighing in favour of the finding (**Melbourne Stevedoring**).
 - ◇ even if there is a small amount of evidence then the no-evidence rule will not be established (**Holden**)
 - ◇ 'no evidence' means 'not a skerrick of evidence' (**Viane**)
 - **Personal knowledge /common knowledge → not no evidence**
 - At least in some contexts (not a statutory precondition to power), administrative decision-makers can proceed from personal or specialised knowledge or matters commonly known (**Viane**) (**Min's decision not to revoke visa cancellation involves findings about the speaking of English and services in Samoa → yes personal ... commonly known**)
 - ◇ More from **Viane**
 - ✓ No express requirement to disclose whether a material finding is made from personal, specialized or accumulated knowledge (**Viane**)
 - ✓ Minister can use accumulated knowledge of the Department (**Viane**)

Grounds of review – delegated legislation

- i. Wasn't capricious or oppressive, wasn't a gratuitous interference with rights
→ not unreasonable
 - b. whether there are less restrictive ways of achieving the same ends
 - i. French CJ: may be relevant but exercise caution.
 - ii. Hayne J: only relevant if it goes to whether by-law has a sufficient connection to the parent Act
 - iii. Where act granting a wide legislative power **Austral Fisheries**
 1. Power grant by the act not so wide was to allow the delegated legislation to be "capricious and irrational."
 - a. High threshold for unreasonableness "if no reasonable person could ever have devised it" statistically flawed formula for the calculation of catch history → yes unreasonable
3. **Consequence:** not authorised by the Enabling Act → not valid. But consider severance.

*in green: Key ways regulations may exceed the regulation-making power

Shanahan v Scott (Going outside field of the enabling legislation) VIC Act vested in Egg Marketing Board eggs produced in Victoria. Act empowered making of regulations "necessary or expedient" for administration of the Act. Regulation created an offence for any person to place "any eggs" in any cold storage or preservative treatment → Purpose of the Act is collective marketing of eggs of VIC, so vested VIC eggs in the Board, but "any eggs" included interstate eggs brought into VIC, which was not vested → went beyond the field of operation as the provisions of the Acts → not "necessary or expedient" → DL invalid

Swan Hill ('Prohibiting' where only authorised to 'regulate') Act empower council to make by-laws for the purpose of regulating and restraining the erection and construction of buildings. By-law prohibited erection or construction of buildings unless with council approval → "regulate and restrain" does not extend to prohibition (subject to discretionary licence) → DL invalid

Foley v Padley: (Going outside field of the enabling legislation) an Act empowered the council to make by-laws "regulating, controlling or prohibiting any activity in the Mall or any activity in the vicinity of the Mall that is, in the opinion of the Council, likely to affect the use or enjoyment of the Mall" → by-law prohibited any person from giving out or distributing "anything" in the Mall or adjacent public places to "any bystander or passer-by" without the Council's permission → court read down "giving out or distribute" (Does not apply to pre-existing social or commercial relationships (e.g., mother giving sweets to children)), found by law within power because prohibition was allowed in the Act

Evans (Exceeding implied limits protective of fundamental common law freedoms (where implication not excluded)) Act empowering where necessary or convenient, regulating the use by the public of, and the conduct of the public on WYD venues. Regulation allows authorised persons to direct people to stop conduct that causes annoyance or inconvenience to participants → 'annoyance' limb invalid (subjective), 'inconvenience' limb valid (objective)

Attorney-General (SA) v Corporation of the City of Adelaide (Disproportionality)

- Act granted powers to local governments to make by-laws "for the prevention and suppression of nuisances" and "generally for the good rule and government of the area, and for the convenience, comfort and safety of its inhabitants".
- By-Law 4 – "No person shall without permission on any road ...preach, canvass, harangue, tout for business [excluding ...] ...give out or distribute to any bystander or passer-by any handbill, book, notice, or other printed matter [excluding] → not unreasonable → valid

Austral Fisheries (Unreasonableness) Fisheries Act empowering making of plan including: Allowable fishing capacity. How to measure fishing capacity. Plan adopted of a statistically flawed formula for the calculation → unreasonable → invalid