

Delegations

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INTRODUCTION

Parliament has given, via statute, a broad range of powers and functions to an array of Ministers, chief executives of departments, statutory officers, and statutory entities, including those listed in Schedule 1 of the Crown Entities Act 2004. It is a basic tenant of the law that a power which is conferred by statute on such an authority can only lawfully be exercised by that authority and by no one else. Pursuant to the maxim *delegatus non potest delegare* an authority given such a power or function by statute may prima facie not delegate its exercise to someone else.

However, this rule is subject not only to anything to the contrary in statute, but has also been eroded by other rules developed by the courts in recognition of the needs of modern government. This paper starts with a discussion of some of these common law rules and some of the general exceptions to the rule against sub-delegation now found in statute in New Zealand, before turning to the practicalities of delegation – where it is appropriate, what are the responsibilities of the parties, and what formalities are required or desirable.

TECHNIQUES DEVELOPED BY THE COURTS FOR GETTING AROUND THE RULE AGAINST SUB-DELEGATION

(a) Scope of the rule against sub-delegation

The maxim *delegatus non potest delegare* does not necessarily mean that, absent an express power of delegation, an authority on whom a power has been conferred must carry out all the steps preliminary to the exercise of the power itself. Depending on the nature of the authority, of the power – legislative, judicial or administrative - and the tasks required, these steps may be carried out by someone else on behalf of the authority.¹

This point was illustrated in *Jefferies v NZ Dairy Production Marketing Board*,² where the Privy Council found that the Dairy Board had a duty to act judicially on zoning applications and no power to delegate any of its powers or functions. Despite this, their lordships said that it would have been permissible for the Board in regulating its own procedure to appoint a person or committee to hear evidence and submissions and that in some circumstances it might be sufficient for the Board to have before it and to consider an accurate summary of the relevant evidence and submissions, provided that summary adequately disclosed the evidence and submissions to the Board.

Similarly in *R v Thompson*³ section 13A of the Evidence Act 1908 permitted a certificate “given under the Commissioner [of Police]’s hand” to be filed in court in relation to the identity and record of an undercover police officer. The Court of Appeal held that it was sufficient for the Commissioner to have put in place a system for the preparation of a certificate under section 13A which he in fact signed. Bisson J for the court said:⁴

¹ *Laws of New Zealand*, Administrative Law, para 49, (on www.lexisnexis.com, last accessed 5 February 2006) notes that the decision to uphold a subdelegation of tasks is a contextual one. Relevant factors may include:

- statutory language, objects and policy;
- amplitude of the power;
- importance of the decision and its effect on individuals;
- whether the whole or only part of the power is subdelegated;
- the degree of supervision over the delegate;
- administrative efficiencies obtained; and
- any other circumstances considered to have a bearing.

² [1967] NZLR 1057 (PC)

³ [1990] 2 NZLR 16 (CA)

⁴ *R v Thompson*, above n 3, 21

...this is not a case of the delegated exercise by the Commissioner of a discretion or a power. He is required to certify certain facts. He has done so. How he arrives at those facts is a matter for him to determine in keeping with the responsibility reposed in him by the statute.

...

...he is personally responsible for making any such certificate but that does not in our view require him to personally search official and other records for the required information. That task is surely one he can impose on a responsible subordinate. ... The Commissioner has brought his mind to bear in keeping with the statutory responsibility imposed on him by setting up a system to provide him with the required information.... The point is that the Commissioner himself certifies to the required facts, ... it is not a case in which the senior sergeant who draws up the certificate, has delegated authority to certify anything nor does any authority devolve on him.

This decision was relied on by McGechan J in *McInnes v Minister of Transport*,⁵ where His Honour found that the duty of the Minister to consult before making a land transport rule had been adequately carried out by the Land Transport Safety Authority on his behalf. McGechan J found that there was no delegation of the Minister's consultation function to the LTSA but that the Minister merely engaged the authority to carry out the statutory prerequisites on his behalf. "It was a case of the Minister choosing how to get a job done."⁶

However, it is noted that the Court of Appeal in the same case⁷ did not rely on the same basis as McGechan J for its own finding that the consultation process was properly carried out, focussing instead on whether there was a delegation to the LTSA. This decision is returned to below.

(b) Exception for Ministers? - the *Carltona* principle

In *R v Thompson*⁸ Bisson J differentiated the situation from a delegation or a "devolution of authority". This latter reference stems from the *Carltona* line of cases which, subject to anything in statute, may suggest that the general prohibition on subdelegation of statutory powers at common law is now largely irrelevant to Ministers.

In *Carltona Ltd v Works Comrs*⁹ Lord Greene MR, noted that the functions given to Ministers are "so multifarious that no minister could ever personally attend to them".¹⁰ This meant, Lord Greene said, that –¹¹

The duties imposed upon ministers and the powers given to them are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case.

He said further that:

"Constitutionally, the decision of such official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority... The whole system of departmental organisation and administration is based on the view that ministers being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them."

The *Carltona* principle has since been relied on in a variety of cases including *Oladehinde v Secretary of State*¹² where decisions required to be taken by the Secretary of State in relation to immigration

⁵ H Ct Wellington, CP 240/99, 3 July 2000, McGechan J.

⁶ *McInnes*, above n 5, para 84.

⁷ *McInnes v Minister of Transport* [2001] 3 NZLR 11, 17-18 (CA)

⁸ Above, n 3

⁹ [1943] 2 All ER 560 (CA)

¹⁰ *Carltona*, above n 9, 563

¹¹ *Carltona*, above n 9, p563.

matters, had actually been taken by authorised immigration officers. In the Court of Appeal,¹³ Lord Donaldson commented that the Ministers involved had used language which was not as precise as it might have been, having spoken of 'delegation' of powers, "although it is quite clear that what they were describing was authority to act on behalf of the Secretary of State." He went on to say that "This is something different from delegation. The civil servant concerned acts not as the delegate, but as the alter ego of the Secretary of State. 'Devolution' might be a better word."

In the House of Lords Lord Griffiths again referred to the situation as a "devolution of responsibility" and noted:¹⁴

It is well recognised that when a statute places a duty on a minister it may generally be exercised by a member of his department for whom he accepts responsibility; this is the *Carltona* principle. Parliament can of course limit the minister's power to devolve or delegate the decision and require him to exercise it in person.

The cases suggest that all that is required for a departmental official to exercise a power of a Minister is that the official has the Minister's *authority*. The conferral of such authority may be done informally or, it would seem, merely by implication.

(c) Application of the *Carltona* principle to other authorities

It appears accepted in New Zealand that the *Carltona* principle only applies to administrative, and not legislative or judicial functions.¹⁵ However, Ministers are not of course the only public office holders with multifarious administrative tasks. This has led the courts to consider whether the principle should also extend to other public offices. In *O'Reilly and Ors v The Commissioners of the State Bank of Victoria and Ors*¹⁶ Gibbs CJ opined that *Carltona* and other authorities established that when a Minister is entrusted with administrative functions he may, in general, act through a duly authorised officer of his department, and said further that:¹⁷

This result depended in part on the special position of constitutional responsibility which Ministers occupy... [but also] on the recognition that the functions of a Minister are so multifarious that the business of government could not be carried on if he were required to exercise all his powers personally.

The majority of the court noted this second facet had led to the same principle being applied to those acting under the authority of the Commissioners of Customs and Excise¹⁸ and the Senate of a University,¹⁹ and then proceeded to extend it further in *O'Reilly* to the Commissioner of Taxation.

The extent of the *Carltona* principle was considered in New Zealand by Tompkins J in *Webster v Taiaroa*²⁰ where His Honour considered a statutory notice which was required to be issued by the Director-General of Agriculture and Fisheries but had in fact been signed by an Assistant Director-General under the heading "the Director-General of Agriculture and Fisheries hereby gives the following notice". While the legislation contained a provision permitting *delegation* by the Director-General of his powers and functions, Tompkins J found that there had been no such delegation. Nor did section 25(e) of the Acts Interpretation Act 1924 which extended the powers of a public officer to

¹² [1990] 2 All ER 367

¹³ *Oladehinde*, above n 12, 383

¹⁴ *Oladehinde*, above n 12, 399 and 401.

¹⁵ *Webster v Taiaroa*, H Ct, Dunedin, AP 24/87, 10 August 1987, Tompkins J. Also reported at (1987) 7 NZAR 1.

¹⁶ (1983) 57 ALJR 130 (HCA)

¹⁷ *O'Reilly*, above n 16, 132

¹⁸ *Commissioners of Customs and Excise v Cure & Deeley Ltd* [1962] 1 QB 340.

¹⁹ *Ex parte Forster, re University of Sydney* [1963] SR NSW 723,

²⁰ Above n 15

“his successors in such office, and his or their lawful deputy” extend the powers of the Director-General to the Assistant Director-General.²¹

In considering whether the *Carltona* principle could assist the Assistant Director-General, Tompkins J noted that in some overseas cases, the courts had preferred to find an implied delegation of, or implied power to delegate, an administrative power, rather than extended the principle to officials or other statutory officers.²² However, His Honour did not follow this course but instead summarised the test as to whether the *Carltona* principle applied where the designated person was not a Minister but was a senior official such as a departmental head, as being whether the statute required the power to be exercised personally by the person designated. This, he said, depended on the nature of the power and all the other circumstances of the case.²³

In the particular case at hand, Tompkins J found that there was nothing to show that as a matter of practical administration, the Director-General could not personally exercise the power to give the notice. Further, he could have delegated the power, and the power was not clearly administrative, but was rather legislative in character. His Honour found that the *Carltona* principle did not apply and the issuing of the notice by the Assistant Director-General was invalid.

(d) The *Bounty Oil* case

The opposite result was recently found by McKenzie J in *Bounty Oil & Gas NL v A-G*²⁴ where Bounty argued among other things, that section 39 of the Crown Minerals Act 1991 had not been properly complied with when its permit for petroleum exploration was revoked.

Section 39(1) of the CMA empowered the Minister, “on receipt of a report from the Secretary”, to issue a notice specifying areas in which the Minister believed the permit holder had not complied with the relevant provisions or conditions of the permit and requiring the permit holder to remedy or explain the non-compliance. Following the issue of a section 39(1) notice, a second notice could be issued under s39(2) revoking the permit.

In the case, the relevant s39(1) and s39(2) notices had been issued under delegated powers by a Group Manager in the Ministry of Economic Development, in reliance upon a report from a Mr Player, an employee of the Ministry. Although there was a chain of formal delegation from the Minister to the Secretary (ie. the chief executive), and then from the Secretary to the Deputy Secretary and from the Deputy Secretary to the Group Manager of all the functions and powers exercisable by the chief executive under s39, there had been no delegation from the Group Manager to Mr Player of the Secretary’s function of preparing the report to the Minister under s39. In the circumstances, the Crown argued that –

- Mr Player had authority to prepare the report by virtue of the *Carltona* principle; or
- He had an actual or implied delegation to prepare the recommendation; and
- If he did not have such implied or actual authority, the breach was of such a technical and inconsequential nature that it should not invalidate the s39(1) notice.

McKenzie preferred to base his decision on the *Carltona* principle than the other bases, finding that because any of the delegators of the report function could have exercised that function themselves, they were in a position to authorise Mr Player to prepare the report in terms of the *Carltona* principle.

²¹ *Webster v Tairaoa*, above n 15, 11. His Honour found that in this context a lawful deputy must have lawfully been appointed or deputed to act for the public officer, either under a statute or pursuant to a statutory authority, and the Assistant Director-General did not meet this test..

²² Eg. *Nelms v Roe* [1969] 3 All ER 1379 and *R v Harrison* [1977] 1 SCR 238.

²³ *Webster v Tairaoa*, above n 15, 25-26

²⁴ H Ct, Wgtn, CIV 2005-485-2054, AP 2006-485-15, 27 June 2006

As to whether the presence of express powers of delegation in the State Sector Act 1988 told against the application of that principle, McKenzie J responded:²⁵

I consider that the *Carltona* principle may still be invoked in proper cases, despite the enactment of the specific delegation provisions in the SSA. As I have noted, the *Carltona* principle is not, strictly speaking, concerned with delegation. I do not consider that Parliament is to be taken as having intended, in enacting specific delegation provisions in the SSA, that any existing common law principles governing the ability of departmental officials to act in the name of a Minister of [sic] some other named officials would be impliedly overruled.

In support of the application of *Carltona* in this circumstance His Honour found that the hierarchy, that required the chief executive to report to the Minister who then issued the notice, meant that “the report might be expected to be prepared by someone lower in the hierarchy than the Group Manager” who issued the notice. He said, “That result cannot be achieved by the exercise of the express delegation powers in the CMA and the SSA. The application of the *Carltona* principle in this case assists in achieving the objective that there is separate consideration by two officials within the Ministry before a s39(1) notice is issued.”

McKenzie J found further that it did not matter that the official who had prepared the report had not used any words to indicate that the report was a report of the chief executive under the statutory power.

(e) Judicial discretion

Finally in considering the courts response to the rule against subdelegation, the Court of Appeal's approach in *McInnes v Minister of Transport*²⁶ should be noted. In that case, the court short circuited the various arguments made by counsel as to whether a formal delegation of the Minister's consultation function was necessary and if so, whether the performance agreement between the Minister and the LTSA met the requirement for a delegation in writing, preferring to go straight to the crux of the matter. Blanchard J for the court stated:²⁷

The absence of a written delegation may be fatal when the delegated task is the making of a decision bringing into force a rule or exercising a power (in other words, producing an end result). But when the delegated task is confined to a process of obtaining submissions and of consultation, and that task has been adequately performed by the delegate on the basis of an oral delegation, it would be entirely unreasonable to treat the rule which was ultimately made by the Minister himself (not by the delegate) as invalid because the delegation was not in writing.

STATUTORY EXCEPTIONS TO THE RULE AGAINST SUBDELEGATION

(a) Exercise of powers by other Ministers

Consistent with the maxim *delegatus non potest delegare*, at common law, a Minister can not delegate a statutory power to another Minister. However, this position has now been made irrelevant by section 7 of the Constitution Act 1986, which provides that any member of the Executive Council may exercise any function, duty, or power exercisable by or conferred on any Minister (by whatever designation the Minister is known) “unless the context otherwise requires”. This provision is the basis of the exercise of powers of a portfolio Minister by an Associate Minister. It is not a power to delegate, but a power for any Minister to exercise a portfolio Minister's powers.

In addition, section 9 of the Constitution Act empowers a Parliamentary Under-Secretary holding office as such in respect of any Ministerial office to have and exercise or perform “under the direction

²⁵ *Bounty Oil & Gas*, above note 24, para 27.

²⁶ *McInnes v Minister of Transport*, above n 7

²⁷ *McInnes v Minister of Transport*, above n 7, 17-18

of the Minister concerned, such of the functions, duties, and powers of the Minister of the Crown for the time being holding that office as may from time to time be assigned to the Parliamentary Under-Secretary by that Minister.” Such an “assignment” does not limit the authority of any Minister of the Crown to exercise or perform personally any function, duty, or power and would thus appear to be akin to a delegation at common law.

(b) Delegation by Ministers in accordance with statute

There are many specific provisions in individual Acts which set parameters or prohibitions on the delegation of statutory powers by Ministers.²⁸ However, section 28(1) of the State Sector Act 1988 also contains a general power, for the “appropriate Minister” in relation to a Department to delegate to the chief executive of that Department all or any of the Minister's functions and powers under the State Sector Act or any other Act, including functions or powers delegated to the Minister. This section is to be read subject to any prohibitions, restrictions, or conditions contained in any other Act in relation to the delegation of the Minister's functions or powers.²⁹

The **appropriate Minister**, in relation to a Department is -³⁰

- (a) The Minister responsible for the Department; or
- (b) Where 2 or more Ministers are responsible for different functions of a Department, the Minister responsible for the relevant function of the Department.

A delegation under section 28(1) must be in writing,³¹ and may not include the power to delegate under the section.³²

The State Sector Act 1988 also codifies the law surrounding delegations under section 28(1) by providing that –

- Subject to any general or special directions given or conditions imposed by the appropriate Minister, the chief executive may exercise any functions or powers delegated to the chief executive under section 28(1) in the same manner and with the same effect as if they had been conferred on the chief executive directly and not by delegation (s28(5));
- Where the chief executive purports to act under a delegation under section 28(1), the chief executive is, in the absence of proof to the contrary, to be presumed to be acting in accordance with the terms of the delegation (s28(6));
- A delegation does not affect or prevent the exercise of a function or power by the appropriate Minister (s28(7));
- A delegation does not affect the responsibility of the appropriate Minister for the actions of any person acting under the delegation (s28(7));

²⁸ For example, s22 of the Civil Aviation Act 1990

²⁹ State Sector Act, s28(4). For example, there are limits on (a) Minister of Health in relation to delegation of the issue food standards (see 1981 No 45, s11J), (b) the Minister responsible for the administration of the Land Transport Act 1998 (1998 No 110) in relation to the making of ordinary rules under that Act. See 1998 No 110, s160(8)); and (c) the Minister responsible for the administration of the Health and Disability Services (Safety) Act 2001 (2001 No 93) in relation to the approval or revocation of service standards or amendments of service standards (see 2001 No 93, s15)

³⁰ State Sector Act 1988, s2

³¹ State Sector Act 1988, s28(2)

³² State Sector Act 1988, s28(3). Note, in *Bounty Oil & Gas v A-G*, above n 24, McKenzie J found that the prohibition on delegation of the “power of delegation” in section 6(1)(b) of the Crown Minerals Act 1991, meant no more than that the chain of delegation must commence with the delegation of a specific power from the Minister. It did not prohibit sub-delegation of powers with the Minister's consent.

- A delegation under section 28(1) is revocable in writing at will (s29(1));
- Any such delegation continues in force according to its tenor, until it is revoked, (s29(2)).

Subsections 29(3) and (4) of the Act cover the practicalities associated with changes in the persons holding the offices of Minister or chief executive. They provide:

- “(3) In the event of the appropriate Minister by whom any such delegation has been made ceasing to hold office,—
- “(a) It shall continue to have effect as if made by the person for the time being holding office as the appropriate Minister; and
- “(b) The chief executive shall forthwith advise the then appropriate Minister of the terms of any such delegation.
- “(4) In the event of the chief executive to whom any such delegation has been made ceasing to hold office, it shall continue to have effect as if made to the person for the time being holding office as chief executive or, if there is no chief executive in office or if the chief executive is absent from duty, to the person for the time being directed to act in the place of the chief executive.”

(c) Delegations by Chief Executives under the State Sector Act 1988

The chain of delegation in the State Sector Act 1988 is continued by section 41(1) which provides for delegation, subject to anything to the contrary in any other Act, of the powers and functions of chief executives of Departments, to another chief executive or an employee. This includes a power to sub-delegate any functions or powers delegated to the chief executive by a Minister or the State Services Commissioner, provided the Minister or Commissioner has consented to the sub-delegation in writing.

Under section 41(2), a person who has been delegated powers by a chief executive may with the prior approval in writing of the chief executive, delegate such of those functions or powers as the chief executive approves to an employee “or to the holder for the time being of any specified office in that Department”.

Echoing the provisions relating to delegations by Ministers, the State Sector Act provides further that—

- Subject to any general or special directions given or conditions imposed by the chief executive, the delegatee may exercise any functions or powers so delegated in the same manner and with the same effect as if they had been conferred on that person directly by the State Sector Act and not by delegation (s41(3));
- Where the delegatee purports to act pursuant to any delegation under section 41, that person is, in the absence of proof to the contrary, to be presumed to be acting in accordance with the terms of the delegation (s41(5));
- A delegation does not affect or prevent the exercise of any function or power by the chief executive (s41(7));
- A delegation does not affect the responsibility of the chief executive for the actions of any person acting under the delegation (s41(7));
- A delegation under section 41 is revocable in writing at will (s42(1));
- Any such delegation continues in force according to its tenor until it is revoked, , notwithstanding that the chief executive by whom it was made may have ceased to hold office, in which case it continues to have effect as if made by the successor in office of that chief executive (s42(2)).

Usefully, section 41(6) provides that a delegation under s41(1) may be made to a specified person or to persons of a specified class, or to the holder or holders for the time being of a specified office or specified class of offices.

The position of Ministers is of course dealt with in the Constitution Act, but to avoid any hiatus when the position of chief executive may be vacant, the State Sector Act also provides in section 40 that:

(1) Where—

- (a) there is a vacancy in the position of a chief executive; or
- (b) a chief executive is absent from duty (from whatever cause arising) and that chief executive is unable to delegate his or her responsibilities under this Act to any other person under section 41 of this Act,—

all or any of the functions, powers, and duties of the chief executive or pertaining to the position may be exercised and performed by—

- (c) a chief executive of another Department; or
- (e) an employee,—

for the time being directed by the Commissioner to exercise and perform them, whether the direction has been given before the absence or vacancy occurs or while it continues.

(d) Statutory entities under the Crown Entities Act 2004

A statutory corporation, not being a physical person must in discharging its functions act through an agent. Under the Crown Entities Act 2004, the primary agent of a statutory entity is its board. Section 25 of the Crown Entities Act provides that the board is the governing body of a statutory entity, with the authority, in the entity's name, to exercise the powers and perform the functions of the entity. All decisions relating to the operation of a statutory entity must be made by, or under the authority of, the board.

At common law statutory corporations may not delegate, but must discharge their statutory powers and duties themselves. That is, they too are subject to the maxim *delgatus non potest delegare*. However, in addition to any specific powers of delegation which may occur in individual Crown entity's Acts, section 73 of the Crown Entities Act gives a general power to boards to delegate the functions and powers of the entity (other than powers specified in the entity's Act as being incapable of delegation) or the board to any of the following persons:

- (a) a member or members of the board:
- (b) the chief executive or any other employee or employees, or office holder or holders, of the entity:
- (c) a committee:
- (d) any other person or persons approved by the entity's responsible Minister:
- (e) any class of persons comprised of any of the persons listed in paragraphs (a) to (d):
- (f) a Crown entity subsidiary of the statutory entity.

Boards may not, however, delegate a statutorily independent function to subsidiary.³³ Nor may they delegate the general power of delegation.³⁴

³³ Crown Entities Act 2004, s73(3)

³⁴ Crown Entities Act 2004, s73(4)

A committee to whom a function or power of the entity is delegated must contain at least one member of the board.³⁵

The Crown Entities Act provisions governing delegations resemble but are not identical to those in the State Sector Act. They provide -

- a delegate to whom any functions or powers of a statutory entity or board are delegated—
 - (a) may, unless the delegation provides otherwise, perform the function or exercise the power in the same manner, subject to the same restrictions, and with the same effect as if the delegate were the entity or the board; and
 - (b) may delegate the function or power only—
 - (i) with the prior written consent of the board; and
 - (ii) subject to the same restrictions, and with the same effect, as if the subdelegate were the delegate (s74(1));
- a delegate who purports to perform a function or exercise a power under a delegation is, in the absence of proof to the contrary, presumed to do so in accordance with the terms of that delegation (s74(2)(a));
- a person purporting to perform a function or exercise a power under a delegation must produce evidence of his or her authority to do so, if reasonably requested to do so (s74(2)(b));
- no delegation in accordance with the Crown Entities Act or the entity's Act—
 - (a) affects or prevents the performance of any function or the exercise of any power by the entity or the board; or
 - (b) affects the responsibility of the board for the actions of any delegate acting under the delegation; or
 - (c) is affected by any change in the membership of the board or of any committee or class of persons or by any change in an office holder, chief executive, or employee (s75).

Section 76 provides that –

- (1) A delegation under section 73 may be revoked at will by—
 - (a) resolution of the board and written notice to the delegate; or
 - (b) any other method provided for in the delegation.
- (2) A delegation under section 74(1)(b) may be revoked at will by written notice of the delegate to the subdelegate.

Delegation by a Crown entity company is governed by the Companies Act 1993 and the company's constitution.

THE PRACTICALITIES OF DELEGATION

(a) Responsibilities of delegators

A consistent provision in the statutory provisions outlined above is that a delegation does not affect the responsibility of the delegator/board for the actions of any person acting under the delegation. This may be contrasted with the Companies Act, which provides in section 130(2) that:

³⁵ Crown Entities Act 2004, Schedule 5, cl 14(1)(b)

A board that delegates a power under subsection (1) ... is responsible for the exercise of the power by the delegate as if the power had been exercised by the board, unless the board—

- (a) Believed on reasonable grounds at all times before the exercise of the power that the delegate would exercise the power in conformity with the duties imposed on directors of the company by this Act and the company's constitution; and
- (b) Has monitored, by means of reasonable methods properly used, the exercise of the power by the delegate.

The application of the “responsibility” provisions to Ministers and departmental chief executives is straightforward. Not only will those persons be bound by any decision of a person under delegation, but they are also responsible, that is, accountable to, in the case of Ministers, Parliament, and in the case of chief executives, their Minister, as if they had made the decision themselves.

However, the position of statutory Crown entities is made somewhat more complicated by the role of the board. It goes without saying that the act of a delegatee with proper authority will bind the entity. What does it mean though for the board of such an entity, that it does not have the same protection as the board of a company under section 130(2) of the Companies Act 1993 in relation the exercise of a power by a delegate?

The answer may be that the absence of the Companies Act provision makes little difference. If the board had exercised the power itself, the board would have been accountable in relation to the act to its responsible Minister and the entity in terms of the individual and collective duties in the Crown Entities Act. If a decision taken by the board had not met those duties, board members would have been subject to the sanctions for breach of duty of removal and in some cases personal liability in the Act.³⁶

The board has the same responsibility in relation to decisions made by its delegates as it does for its own decisions. However, even if the act of the delegate did cause the board to breach a collective duty,³⁷ a board member may not be removed for breach of such duty if he or she did not know and could not reasonably be expected to know that the duty was to be or was being breached or if he or she took all reasonable steps in the circumstances to prevent the duty being breached.³⁸

Similarly, to breach an individual duty in respect of the exercise of a power by a delegate, a member would have to contravene or agree to the entity contravening the Crown Entities Act or the entity's Act, not act with honesty and integrity, act in bad faith, act negligently, or disclose confidential information.³⁹ Unless a member is actively involved in the decision of a delegate, it is difficult to see how such a duty could be breached.

The consequences of the Crown Entities Act provisions therefore appear to be that although the Act may on its face appear not to distance board members from delegate's acts in the way provided in the Companies Act, in fact the position may not be dissimilar. A board member who believes on reasonable grounds at all times before the exercise of a power by a delegatee, that the delegatee will exercise the power in conformity with the duties imposed on board members by the Crown Entities

³⁶ Crown Entities Act 2004, ss58 and 59. The question of personal liability is returned to below.

³⁷ These duties are that an entity must act consistently with its objectives, functions, statement of intent, and output agreement (s49), its functions must be performed efficiently, effectively and consistently with a spirit of service to the public (s50); the entity must act in a financially responsible manner (s51) and the board must ensure that the entity complies with the subsidiaries and other associates regime in the Act (s52).

³⁸ Crown Entities Act 2004, s58(3)

³⁹ Crown Entities Act 2004, ss53 to 57

Act and has monitored, by means of reasonable methods properly used, the exercise of the power by the delegatee, is unlikely to have breached a duty him or herself.

As a general rule, to meet their responsibilities, delegators of public powers will need a supply of appropriate information and will need to give diligent attention from time to time to the question whether the system that has been put in place and over which the individuals preside is operating efficiently and whether individuals to whom duties, in accordance with the system, have been delegated are discharging those duties efficiently and thus in turn enabling the delegator to meet his or her own duties.⁴⁰

(b) Responsibilities of delegates

For a statutory power to be exercised validly under a delegation the following points must be met:

1. The delegatee must have jurisdiction, that is, a valid delegation to make the decision;
2. The decision must be authorised by the Act under which it is made;
3. Any procedures or conditions required by law or imposed under the terms of the delegation must be followed; and
4. The delegatee must comply with administrative law principles of fairness etc

In addition, the delegatee as an employee may have duties to his or her employer which will apply when exercising the powers, such as an obligation to act with reasonable care and skill, to act in good faith in performance of the employee's duties, and not to disclose the employer's confidential information.

(c) Liabilities of delegators and delegates

The question of the respective liabilities of delegators and delegates will depend on the facts alleged in any particular case. In some cases, civil proceedings may be brought against both the person acting under the delegation and the delegator. Liabilities may also depend on the immunities or indemnities which protect those persons.

(d) When should delegations be made?

General delegations

As the courts have recognised, it would be impossible for boards of entities to carry out all tasks in an organisation themselves, nor would it be an efficient use of resources. Consequently, most boards of statutory entities will delegate the management of the entity to a chief executive, with a power for that person to sub-delegate further to other employees. Chief executives of departments have management responsibilities under section 32 of the State Sector Act.⁴¹

Most public organisations will also put in place formal financial delegations. For Ministers, these are governed by a Cabinet Office Circular on Financial Delegations And Delegation Limits For Responsible Ministers And Departmental Chief Executives.⁴²

⁴⁰ In *ASIC v Rich No 2* (2004) 22 ACLC 1232, para 88 White J in the Supreme Court of New South Wales noted that in a large business the directors must delegate their powers, but that those who delegate powers have a duty to exercise reasonable care and diligence to ensure that the powers delegated are being efficiently discharged. This dicta would appear to apply equally to boards of Crown entities and other delegators.

⁴¹ That section provides that the chief executive of a department is responsible to the appropriate Minister for (a) The carrying out of the functions and duties of the Department (including those imposed by Act or by the policies of the Government); and

(b) The tendering of advice to the appropriate Minister and other Ministers of the Crown; and

(c) The general conduct of the Department; and

(d) The efficient, effective, and economical management of the activities of the Department.

⁴² CO 99(7), 30 June 1999.

So far as delegations of statutory powers go, this will depend on the size of the organisation and its internal structure, the types of powers that have been conferred on it, or where the powers are conferred on an individual, on him or her, and the statutory scheme. In some cases, the statutory scheme may give alternatives to delegation.⁴³ In each case, before a general power of delegation, for example, in the State Sector Act or the Crown Entities Act, is relied on in relation to delegation of a statutory power, careful consideration should be given to whether there is anything in the statutory provision itself, or the Act in which it appears, which impacts on the ability of the power to be delegated, or limits or extends the persons to whom it may be delegated in a manner contrary to the general delegation provision.

In determining what delegations are appropriate, those responsible for the exercise of the power should consider carefully the appropriateness of decisions being taken at a more junior level and should also anticipate the needs of the department or entity. For example, if a department or entity has a series of branch offices where decisions are taken then the original delegation must anticipate sub-delegation down to that level. In some cases, it may be appropriate to delegate certain types of decisions, and reserve other types for someone higher up the delegation chain.

The State Services Commission's publication for Crown Entities *Board Appointment and Induction Guidelines 2006* states that⁴⁴

Delegations by a board to employees, or to other persons where permitted by the legislation, are an example of decision-making under a board's authority. Some entities give their chief executives day-to-day management responsibilities, such as hiring staff. Other entities give this role to the board, even if it ultimately chooses to delegate the responsibility to its chief executive.

The board's choices on what and to whom it may delegate are often restricted by legislation that prescribes processes and conditions for delegation. Statutory functions and powers should, in general, reside in board members, who are selected for their knowledge, skills and experience. For most entities under the Crown Entities Act, however, the board may delegate to members, employees, office holders and committee members, Crown entity subsidiaries, and other persons or classes of persons approved by the Responsible Minister. The board remains legally responsible for delegated functions and powers (see sections 73-76 of the Crown Entities Act).

Delegations when conflicts occur

In addition to general delegations, public office holders may also consider the desirability of a one off delegation of a function or power when faced with a situation of conflict of interest. The propriety of using the power of delegation to avoid any appearance of bias in the determination of a dispute has been judicially noted.⁴⁵

For statutory Crown entities, the Crown Entities Act's strict conflicts of interest provisions, which disqualify members of Crown entity boards from acting where they are "interested" in a matter involving the entity, could in some circumstances prevent a board from forming a quorum, or in the case of a statutory officer who is a Crown entity, such as the Retirement Commissioner, prevent that person from acting at all. In such case, before any delegation can be made, recourse may be necessary to section 68 of the Crown Entities Act, which permits the chairperson, deputy chairperson, or in the last instance the responsible Minister, to give permission for a board member to act if "satisfied that it is in the public interest to do so".⁴⁶ This provision could if necessary be resorted to

⁴³ For example, under section 16 of the Commerce Act 1986, the chairperson may set up "divisions" of the Commission to consider particular matters..

⁴⁴ State Services Commission *Board Appointment and Induction Guidelines 2006*, on www.ssc.govt.nz

⁴⁵ *Charlesworth v Comptroller of Customs*, H Ct, Ak, M 2350/91. 8 June 1994, Speight J as cited in *Laws of New Zealand*, Customs and Excise, para 22 on www.lexisnexis.com last accessed 5 February 2006

⁴⁶ In addition, for statutory entities, other than corporations sole, clause 10 of Schedule 5 of the Crown Entities Act provides that where aboard has only 1 member available, due, for example, to vacancy or conflicts, the quorum for a meeting is 1, and the available member may enter into certain obligations by him or herself.

to enable a vote to be taken by a Crown entity board to delegate the matter to a permitted delegate (including, a committee) who or which is not tainted by the same interest.

(e) Formalities of delegation

Formal requirements

Not all statutory delegations provisions require delegation to be in writing, but for evidential reasons it is desirable that they be so and be recognisable as delegations.

In *McInnes v Minister of Transport*⁴⁷ it was argued that even if there was no formal delegation in place, the Land Transport Safety Authority's performance agreement with the Minister recognised that it was carrying out the Minister's consultation function under the Land Transport Act 1998 and this met the requirements of a delegation in writing. McGechan J noted that the performance agreement was made for a different purpose, to set targets, no more and opined that "Statutory delegations require, and customarily receive, greater specificity and formality." He held in that case that there was no formal statutory delegation by the Minister at all.

By contrast the Court of Appeal in the same case specifically made no finding on whether the performance agreement was sufficient to meet the statutory requirement for writing but instead exercised its discretion not to invalidate the rule, on the basis that the tasks delegated orally in breach of the requirement for writing were lower level and the ultimate decision, to make the rule had been made by the Minister, not the delegate.⁴⁸

Crown entity boards must delegate by board resolution and notice in writing to the delegatee.

To positions, not individuals

For ease of administration, delegations should where possible be to positions or, where appropriate, classes of persons, rather than named individuals. Nonetheless, even in this case, care will be needed in any restructuring exercises to ensure that any delegations continued to be relied upon remain valid.

Parameters of delegations

A delegation should clearly set out what statutory power or function is delegated and the authority for the delegation. It should also include any consent to sub-delegation deemed appropriate, whether of all or any of the functions and powers delegated.

The delegation should also set out any conditions or restrictions on exercise of the power or function delegated. In this regard, it is normal to require delegated powers to be exercised in accordance with policy and within operational guidelines. However, as with any statutory power, it is important that a discretionary power which is delegated is not fettered by too strict guidelines. The Court of Appeal approved the following statement in *Westhaven Shellfish Ltd v Chief Executive of the Ministry of Fisheries & Anor* -⁴⁹

While the chief executive can state a policy, the decision makers must keep their ears open... They must indicate, or at least reserve, a power to depart from the policy and a willingness to exercise that power. They must bear in mind and conform with the purposes of the legislation under which they are making decisions.

For the reasons set out on page 10, it may be good practice in the case of delegations by Crown Entity boards to include in the delegation a requirement that the delegatee comply with the duties of board members in carrying out their delegated powers.

⁴⁷ H Ct Wellington, CP 240/99, 3 July 2000, McGechan J

⁴⁸ *McInnes v Minister of Transport*, above n 7, 17- 18

⁴⁹ [2001] 1 NZLR 158, 173, para 45

It is good practise also to include in the delegation a requirement for the delegatee to report at intervals on the exercise of the power, so that the delegator can monitor its exercise and ensure his or her own duties in relation to the power are being met.

Transparency

The Public and Administrative Law Reform Committee in its 1984 working paper *Powers of Delegation*⁵⁰ noted the importance of members of the public knowing who in fact made the decision affecting them and the extent of that person's authority. In accordance with this principle, many of those acting under delegated authority cite the authority for their acts when exercising powers delegated to them.⁵¹

While not required by statute, many larger public offices keep a delegations register showing what delegations are in force, and where they are not open-ended, noting the dates at which attention should be given to renewal. If such a register is kept, it should record the authority for the delegation (for example, the primary statute, or the State Sector Act 1988), the statutory power which has been delegated, the office held by the delegate, any conditions on the delegation, and whether consent is given to sub-delegation.

⁵⁰ Public and Administrative Law Reform Committee *Powers of Delegation: Working Paper*, Wellington, New Zealand, November 1984, 1

⁵¹ Nevertheless, the Court of Appeal in *R v Gilchrist*, CA29/06, 18 August 2006, (2006) 22 NZTC 20, 043 recently found that the existence of delegated authority is a question of fact and the absence of a formal statement of delegated authority in a statutory notice was of no consequence.