DELEGATION, AGENCY AND THE ALTER EGO RULE

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I Introduction: The rule against subdelegation

There is a well recognised principle of administrative law, encapsulated in the maxim *delegatus non potest delegare*, which states that "when a power has been confided to a person in circumstances indicating that trust is being placed in his individual judgment and discretion, he must exercise that power personally unless he has been expressly empowered to delegate it to another".[1] The rule is not absolute, however, and, as de Smith points out, it applies more or less strictly according to the circumstances of its exercise. Some writers therefore regard the *delegatus non potest delegare* maxim as not a rule of law, but at most a rule of construction of statutes.[2] Thorp[3] on the other hand describes the principle as a *prima facie* rule, whereby cases of express and implied authority to subdelegate constitute exceptions to the rule—or perhaps rebut the *prima facie* presumption.

Whichever way one looks at the rule against subdelegation, it does not prohibit subdelegation absolutely. If it is clear, either from express words or by implication, that the legislative intention was to permit delegation, then effect will be given to that intention. There are a number of circumstances in which the courts will infer such an intention. Considerations which influence the courts' decision include the nature or the subject matter of the power,[4] and the person or body on whom the power is conferred.[5]

One aspect of the rule against subdelegation which has hitherto enjoyed insufficient judicial attention is the definition of delegation. In seeking to define delegation under the common law, the courts have tended to address the problem piecemeal, limiting themselves to the precise

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[1] J. M. Evans, *S.A. de Smith's Judicial Review of Administrative Action* (4th ed. 1980) p. 298 (hereinafter "de Smith").

[2] John Willis, "Delegatus non potest delegare" (1943) 21 *Can. Bar. Review* 257 at 257 (hereinafter Willis).

[3] P. H. Thorp 'The key to the application of the maxim "*Delegatus Non Potest Delegare*" ' (1972) 2 *Auckland Uni. L.R.* 85 at 86.

[4] For instance disciplinary powers are generally non-delegable. See *General Medical Council* v. *United Kingdom Dental Board* [1936] Ch. 41; *Vine* v. *National Dock Labour Board* [1957] A.C. 488.

[5] In *Ex parte Forster; re University of Sydney* (1963) 63 S.R. (N.S.W.) 723 a power conferred by statute upon the University Senate was held lawfully delegated to a committee consisting of the Chancellor, Deputy Chancellor, Vice-Chancellor, three other members of the Senate, and the Dean of the Faculty concerned.

problem confronting them and failing to provide a wider definition that would forestall future problems.

As a result many subsequent cases rely, at times inappropriately in this writer's view, on the ratio of an early English decision, *Huth* v. *Clarke*,[6] which dealt exclusively with the single problem whether a delegating authority was deprived altogether of power to act unless the delegation were revoked. In England the dearth of authority on the meaning of delegation has permitted development of the view that a government Minister may "act through" an official, who is "not a delegate" and therefore not subject to the maxim *delegatus non potest delegare*.[7] In Australia the High Court recently adopted that questionable doctrine in *O'Reilly* v. *Commissioners of the State Bank of Victoria*.[8] This article attempts to deal with some of the difficulties in defining delegation, and in particular:

(i) to highlight the problems arising from the Australian High Court's ruling in the *O'Reilly* case;
(ii) to challenge the view that a government official acting in the name and on behalf of a government minister or other official required by statute to perform a duty or exercise a power is "not a delegate";
(iii) to offer an alternative interpretation of the famous dictum of Lord Greene, M.R. in *Carltona Ltd.* v. *Commissioners of Works Ltd.*[9] (alternative, that is, to the accepted interpretation); and in view of the above,
(iv) to question the wisdom of the adoption in Australia and elsewhere of the so-called *alter ego* rule.

II O'Reilly's Case[10]

In *O'Reilly* v. *Commissioners of the State Bank of Victoria* the High Court of Australia had to consider whether an official acting in the name and on behalf of the Deputy Commissioner of Taxation was a delegate of the Deputy Commissioner and therefore subject to an express statutory prohibition upon subdelegation of the Deputy Commissioner's delegated powers.

The facts of the case were these:

The financial affairs and dealings of the fourth defendant, Lawson, were being investigated by the Australian Taxation office. In terms of s. 263 of the Income Tax Assessment Act 1936 (Cth), the Commissioner of Taxation or any officer authorized by him in that behalf had at all times full and free access to all buildings, places, books, documents and other

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[6] [1890] 25 Q.B.D. 391.
[7] *Metropolitan Borough and Town Clerk of Lewisham* v. *Roberts* [1949] 2 K.B. 608; *R.* v. *Skinner* [1968] 3 All E.R. 124; [1968] 2 Q.B. 700; *Re Golden Chemical Products Ltd.* [1976] 2 All E.R. 543; [1976] Ch. 300.
[8] (1983) 57 A.L.J.R. 130; (1983) 44 A.L.R. 27. Page references in this article are to the A.L.J.R.
[9] [1943] 2 All E.R. 560.
[10] *Supra* n. 8.

papers for any of the purposes of the Act, and for that purpose might make extracts from or copies of any such books, documents or papers.

Section 264(1) of the Act further provided that the Commissioner could by notice in writing require any person to furnish him with information and to attend and give evidence before him or any officer authorised by him concerning that person's income or assessment. Section 264(2) authorised the Commissioner to require that the information be given on oath and either verbally or in writing, and for that purpose the Commissioner or the officers so authorised by him were empowered to administer an oath.

The Commissioner had delegated his powers and functions under ss. 263 and 264 to the Deputy Commissioner of Taxation, relying on s. 8(1) of the Taxation Administration Act 1953 (Cth), which provides as follows:

> The Commissioner of Taxation may, in relation to a matter or class of matters, or in relation to a State or part of the Commonwealth, by writing under his hand, delegate to a Deputy Commissioner of Taxation or other person all or any of his powers or functions under an Act which is an Act with respect to taxation (except this power of delegation).

The Deputy Commissioner had purported to authorize one Holland, the Chief Investigation Officer in the Australian Taxation office, *inter alia*:

(1) to authorize the issue of notices other than notices requiring the giving of information or evidence upon oath; and
(2) to imprint a facsimile of the Deputy Commissioner's signature upon such notices.

Another officer, Cornell, was also empowered by the same authorization. " . . . to issue notices other than notices requiring attendance to give evidence or to produce books, documents and other papers" and to perform the task of imprinting the facsimile of the Deputy Commissioner's signature upon such notices.

Lawson had received two s. 264 notices, bearing in each case a facsimile signature of the Deputy Commissioner. The decision to issue these notices had been taken by the officers Cornell and Holland together with another officer, Hughes; the Deputy Commissioner had no personal knowledge of the notices served on Lawson.

Lawson objected that the notices served on him were invalid, having been issued by persons not authorized in terms of the Act.

What had to be determined was whether the Deputy Commissioner was authorised to allow another official to perform the functions validly delegated to him (the Deputy Commissioner) in terms of s. 8(1) of the Taxation Administration Act. Since s. 8(1) itself expressly prohibited the Commissioner's delegate from subdelegating the duties and powers delegated to him thereby, the notices issued to Lawson could be held valid only if in fact there had been no subdelegation.

The plaintiff Commissioner contended that no unauthorised sub-

delegation of the Deputy Commissioner's powers had in fact taken place, because the power exercised by the official Holland remained vested in the Deputy Commissioner of Taxation and had been exercised in his name and on his behalf. This argument presupposes a definition of delegation that involves a transfer of power from the named official to another person who exercises the delegated power in his own name and on his own behalf. The argument found favour with two of the three High Court judges who commented separately on the question, Gibbs, C.J. and Wilson, J. Mr Justice Wilson, in particular, drew a distinction between the delegation of a power and the exercise of that power through what he called "servants" or "agents". He held[11] that the action of the officials Holland, Cornell and Hughes, in issuing s. 264 notices in the name of the Deputy Commissioner to the fourth defendant Lawson, was an action of the Deputy Commissioner, notwithstanding that the latter had no personal knowledge of them. Accordingly he found that there had been no unlawful subdelegation and that the impugned notices were valid.

Gibbs, C.J. in the same case held[12] that the power to issue s. 264 notices might be "exercised through a properly authorised officer" and that such an exercise of power did not constitute a delegation of function. He relied for this view upon the line of cases which commenced with *Carltona Ltd.* v. *Commissioners of Works*[13] and which are generally cited as authority for the *alter ego* rule, discussion of which follows later in this article. In addition his Honour put forward as a general proposition that, unless by statute a document is required to be signed personally, 'at common law a person sufficiently "signs" a document if it is signed in his name and with his authority by somebody else'. The learned Chief Justice considered that exactly the same principles applied when the power was given by statute to a designated person to issue a notice. He found nothing in the Taxation Administration Act to require the Deputy Commissioner personally to consider the issue of a notice under s. 264 of the Act. On the contrary he held that:

> . . . there exists, as the Parliament must have known, a practical necessity that the powers conferred on the Commissioner by the Act should be exercised by officers of his Department who were acting as his authorized agents.[14]

Thus his Honour apparently also believed that a person who acts in the name of another is not a delegate, but an "agent".

Mason, J. was in agreement that an official may, apart from any exercise of a power to delegate, appoint "agents" to act on his behalf and in his name.[15] However, he found a different basis for determining whether a named authority had delegated his powers or was exercising

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[11] *Id.* 141.
[12] *Id.* 132-3.
[13] *Supra* n. 9.
[14] *O'Reilly's* case (*supra* n. 8) at 132 G.
[15] *Id.* 135-6.

his own powers through an "agent". In his view it was not sufficient for validity that the "agent" act in the name and on behalf of the higher authority. In cases involving the exercise of a statutory discretion or the formation of an opinion, what was needed for an action by a subordinate to avoid classification as a delegation was the exercise of a "substantial degree of control" by the authority over the actual exercise of the discretion, so that the authority could be said to have directed its own mind to the question. In view of the fact that there was no evidence that the Deputy Commissioner retained any control at all over the decisions of Holland, Hughes and Cornell to issue s. 264 notices against Lawson, Mason, J. held that the Deputy Commissioner had unlawfully subdelegated his power to issue a s. 264 notice.

The reasons of the majority in *O'Reilly's* case, then, suggest a number of general propositions as to the nature of delegation:

1. Where a government minister or other official in a similar situation "acts through" a duly authorised officer of his department, there is no act of delegation.[16]
2. This is so even where the person required by statute to exercise the power has no actual knowledge of the action of his subordinate.[17]
3. An official is in a similar situation to a government minister on the basis of "practical administrative necessity" when his functions are "so multifarious that the business of government could not be carried on if he were required to exercise all his powers personally".[18]
4. The power to "act through" an official does not depend on the nature of the power required to be exercised. Even where the exercise of power will be likely to affect adversely the rights of individuals, the power to "act through" another may arise.[19]
5. A statutory prohibition upon delegation or subdelegation does not interfere with the power to "act through" a subordinate.[20]
6. The existence of a statutory power of delegation does not necessarily preclude a named official from "acting through" a subordinate.[21]

While Mason, J. would have agreed with the first proposition,[22] he would have placed limitations upon the circumstances in which a government minister or similar official may "act through" another. In his view:

> (i) Where the discretionary power to be exercised involves the formation of an opinion, the named official may not appoint someone to act on his behalf "except perhaps on the footing that the [official] retains to himself the substantial exercise of the

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[16] *Per* Gibbs, C.J. at 132G and Wilson, J. at 140G, Murphy, J. concurring with Gibbs, C.J.
[17] *Per* Wilson, J. at 141G.
[18] *Per* Gibbs, C.J. at 132 F-G and Wilson, J. at 144 C-D.
[19] *Per* Gibbs, C.J. at 132B.
[20] *Per* Wilson, J. at 141 generally and Mason, J. at 134F.
[21] *Per* Gibbs, C.J. at 132 E-F and Wilson, J. at 141 generally.
[22] See p. 135B.

discretion or the substantial formation of the opinion, or the exercise of substantial control over the exercise of the discretion or the formulation of the opinion, leaving to the agent (sic) the ministerial act of communicating the decision or issuing a notice".[23]

(ii) Where a wide power of delegation is conferred by statute, it would seem correct in principle that if the [official] desires others to exercise large areas of his powers and functions, he should expressly delegate those powers and functions, and only those powers and functions involving little or no exercise of discretion should be capable of being exercised otherwise.[24]

(iii) The power of government ministers to "act through" subordinate officials depends on the doctrine of ministerial responsibility and has no application to the Deputy Commissioner of Taxation. The factor of administrative necessity underlying the power of ministers to act through officials in their departments is "hardly relevant" where there exists a comprehensive statutory power of delegation.[25]

The crucial point in *O'Reilly's* case is the distinction sought to be drawn between a "delegate" and what the members of the High Court call an "agent" or (in Wilson, J.'s case) a "servant". The use of the word agent is unfortunate, for reasons I shall set out later. However, it is clear that what the learned judges mean by the word is a person "through whom" a government minister or other named official acts.

No express statement is to be found in the case as to when a person is a delegate and when he is a "mere agent" or one "through whom" the superior officer acts. However, from the finding of the majority, and from the remarks of Brennan, J. in *Re Reference Under Ombudsman Act s. 11*[26] on which Wilson, J. in *O'Reilly's* case particularly relies, the inference may be drawn that a delegate is seen to be a transferee of power who acts in his own name and in his own behalf, whereas a person who acts in the name of and on behalf of his superior officer is not a delegate but an "agent" or "servant" of the superior officer. Naturally, one needs to ask how far this interpretation of the word "delegate" is correct.

III The meaning of delegation

Definitions of delegation afforded by dictionaries do not, in this writer's view, support the narrow interpretation sought to be given to the term by the High Court in *O'Reilly's* case (*viz.* that a delegate is a transferee of power who acts in his own name). The O.E.D. defines a delegate as *inter alia* "one entrusted with authority or power to be exercised on behalf

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[23] At 135 B-C.
[24] At 135 F-G.
[25] At 136E.
[26] (1979) 2 *A.L.D.* 86.

of those by whom he is appointed". According to *Webster's Third International Dictionary* delegation means "the act of investing with authority to act for another". The Latin word "*delegare*", from which the word delegation derives, connoted the assigning or entrusting to another a charge or command, especially where the delegator could not attend in person. There is no suggestion that the delegate must be one who acts independently in his own name. In fact in many of the definitions the statement is made that a delegate acts "on behalf of" his superior officer. In *Huth* v. *Clarke* referred to above,[27] Wills, J. made the oft-quoted statement that

> Delegation, as the word is generally used, does not imply a parting with powers by the person who grants the delegation, but points rather to a conferring of an authority to do things which otherwise the person would have to do himself. The best illustration of the use of the word is afforded by the maxim, *delegatus non potest delegare*, as to the meaning of which it is significant that it is dealt with under the law of contracts: it is never used by legal writers, so far as I am aware, as implying that the delegating person parts with his power in such a manner as to denude himself of his rights. If it is correct to use the word in the way in which it is used in the maxim, as generally understood, the word 'delegate' means little more than an agent.[28]

In that case the sole question before the court was whether the executive committee of a county council with power to regulate such matters had validly made a regulation as to the muzzling of dogs, when the power to make such regulations had been delegated to a subcommittee and the delegation had not been revoked. What is important about the case, however, is the rejection by the court of the argument that delegation implies a temporary abdication or denudation of power. The existence of a concurrent power on the part of the delegator was considered to be a natural consequence of the delegation—and the delegation provisions in many contemporary Australian statutes give statutory recognition to that principle in a standard clause which commonly reads: "a delegation under this section is revocable at will and does not prevent the exercise of a power by the [delegator]."[29]

The use by the High Court of the word "agent" to express a relationship to a superior seen as different from that of a "delegate" is particularly unfortunate, since the terms are generally treated as more or less synonymous. In fact the maxim *delegatus non potest delegare* is described by *Broom's Legal Maxims*[30] as a limitation upon the operation of the maxim *qui facit per alium facit per se*, which enunciates the general doctrine governing the rights and liabilities of principal and agent. I have

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[27] *Supra* n. 6.
[28] *Id.* 395.
[29] See, for instance, the Superannuation Act 1922 (Cth) s. 131(3); the Social Services Act 1947 (Cth), s. 12(3); the States Grants (Schools) Act 1973 (Cth), s. 6(6); and the Trade Practices Act 1974 (Cth), s. 25(3).
[30] 10th ed. by R. H. Kersley at 570.

been unable to find any authority, outside of the recent Australian cases referred to, for the view that there is a distinction between delegation and agency.

There is an occasional reference in cases to the word "agent" used to describe a person carrying out a merely mechanical (sometimes called "ministerial") function involving no exercise of discretion,[31] but that is not the sense in which the word "agent" is used by the judges in *O'Reilly's* case. For lack of a satisfactory alternative term, the courts have sometimes referred also to the person who carries out a task on behalf of and under the supervision and control of a superior officer as an "agent".[32] Such a relationship is said *not* to involve delegation because the final decision is in fact the decision of the superior officer and therefore no transfer of function has occurred. It would be more satisfactory were the courts to find a less ambiguous term to describe a relationship which falls short of delegation in the manner described above.

More important than these difficulties with the definition of delegation, however, is the finding by the High Court that there is no delegation where a person acts in the name and on behalf of a high government official, even where there is *in fact* a transfer of function in that the superior officer retains no actual control over the exercise of power by the subordinate. It is not absolutely clear why the majority of the High Court should assert that no delegation has occurred in such a situation.

Some reliance was placed in *O'Reilly's* case upon the analysis of the nature of delegation made by Brennan, J. in *Re Reference Under Ombudsman Act, s. 11.*[33] Let us therefore examine Brennan, J.'s reasoning and some of the cases he uses to support his analysis.

Re Reference Under Ombudsman Act, s. 11

In this case Mr. Justice Brennan, then President of the Administrative Appeals Tribunal, was required to consider *inter alia* whether a particular determination under s. 14 of the Social Services Act was a determination of the Director-General of Social Security himself or of his authorised delegate, a Mr. Prowse. The determination was reflected in a letter, signed in the name of the then Director-General, Mr. L. J. Daniels, by Mr. Prowse, who added his own initials to the handwritten signature "L.J. Daniels". In truth Mr. Daniels had taken no part in dealing with the matter and had not contributed to the decision relating to the applicant's entitlement to unemployment benefits: Mr. Daniel's signature had been affixed by Mr. Prowse, acting on the authority of Mr. Daniels.

The conclusion of the President of the Administrative Appeals Tribunal (as Brennan, J. then was) was that the determination was in fact

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[31] See, for instance, *Shidiack* v. *Union Government* 1912 A.D. (South Africa) 642 at 650.

[32] This appears to be the sense in which Mason, J. in *O'Reilly's* case intends the word when he says (at 135B): "Apart from any exercise of his power of delegation the Commissioner may appoint agents to act on his behalf and in his name . . . ."

[33] *Supra* n. 26.

an exercise of Mr. Prowse's delegated powers and as such ought to have been exercised in his own name. Because *Mr. Prowse's* power was intended to be exercised, but it was exercised in the name of Mr. Daniels, the determination was invalid. The reason given was that: "The attempted exercise by a delegate of his own power miscarries when the very act of exercise purports to deny the power which gives validity to his act."[34]

In general Brennan, J. commented that:

> There is a confusing similarity between the exercise of an authority's power by the authorized acts of another, and the exercise by an authority's delegate of the power delegated to him. In either case the act—whether the act of the authorized person or the act of the delegate—is a valid exercise of power. Nonetheless the sources of validity are different, though it must be said that the term 'delegation' has frequently been used to describe either case without distinguishing between them.[35]

According to his Honour,

> . . . where the relevant power is delegable and has been delegated, the delegate may—without further authorisation—act in effective exercise of the power. His acts are not treated as acts vicariously done by the authority. He is not an agent to exercise the authority's power, he may validly exercise the power vested in him.[36]

Now in the Social Services Act, the provision empowering delegation expressly states that " . . . the delegate may exercise the powers and functions specified in the instrument of delegation".[37]

From this one may reasonably infer that Parliament intended that the delegate should have the capacity to act in his own name. It is not so clear whether it was a *requirement* that the delegate act in his own name. Brennan, J.'s judgment is unsatisfactory on this point for two reasons: *firstly*, because his Honour does not comment on that part of the subsection, and therefore does not explain whether his conclusion is based on those words in the subsection or is intended to be general; *secondly*, because he cites in support of his conclusion the remarks of Scott, L.J. in a judgment strongly criticized by Sykes, Lanham and Tracey[38] as both erroneous and devoid of authority. That judgment is to be found in *Blackpool Corporation* v. *Locker*,[39] a case based on wartime requisitioning powers under reg. 51 of the Defence (General) Regulations 1939.

In *Blackpool Corporation* v. *Locker* Scott, L.J. (Asquith, L.J. concurring) drew a distinction between "a true law-making delegation of

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[34] *Id.* 95.
[35] *Ibid.*
[36] *Ibid.*
[37] S. 12(1).
[38] *General Principles of Administrative Law* (2nd ed.) at para. [805].
[39] [1948] 1 K.B. 349.

powers which otherwise the delegate would have had no legal right to do" and the relationship of principal and agent in which the principal may ratify the action of the agent. But this purported distinction, if it exists, must be seen in context. In the situation before him, his Lordship found that the departmental circulars by which the Minister of Health had delegated to the Blackpool Corporation his requisitioning powers constituted subdelegated legislation. This may account for his Lordship's view that "the corporation had an independent duty under the sub-delegated legislation and was not a mere agent of the Minister", so that the Minister no longer had power to give the town clerk of Blackpool instructions on the matter in question. His Lordship said:

> . . . the circulars contained (together with much explanatory matter) ministerial legislation with statutory force, transferring to the local authorities concerned the Minister's legal power to override the common law rights of individual members of the public, for the purposes defined in the circulars, and limited by their conditions. In any area of local government, where the Minister had by his legislation transferred such powers to the local authority, he, for the time being, divested himself of those powers and . . . retained only those powers which in his subdelegated legislation he had expressly or implied reserved for himself.[40]

His conclusion was that neither the corporation nor its town clerk was acting as "mere agent" for the Minister in the sense that the Minister as principal could ratify the actions of the town clerk.

The use of the term "agent" in *Blackpool Corporation* v. *Locker* is perhaps understandable, since the question was whether the Minister could ratify the decision of the transferee of the requisitioning power and ratification is a power ordinarily associated with the principles of agency. However it is at least questionable whether Scott, L.J. would have been prepared to draw a general distinction between delegates and agents. Rather, it is suggested, he intended to identify two different types of delegation with different consequences. Of these, a transfer of power effected by means of delegated legislation would place the transferee in the position of acting independently and in his/its own name, and ratification of an act done in excess of the powers transferred would therefore, except insofar as the Minister expressly reserved a right of control, not be possible. On the other hand, a delegation effected otherwise than by delegated legislation would have the usual consequences of a relationship of principal and agent, including the possibility of ratification.

With respect, it seems that Brennan, J. has applied the remarks of Scott, L.J. outside of their intended limit, and that Scott, L.J. did not have in view a general rule (such as Brennan, J. suggests there is) that "where a delegate is exercising the power delegated to him, he may validly exercise that power in his own name".[41] This is especially so because

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[40] *Id.* 377-378.

[41] *Re Reference Under Ombudsman Act, S. 11* (*supra* n. 26) at 94.

according to de Smith,[42] "it would generally be held to be *ultra vires* for an authority to invest a delegate with powers exercisable in his own name". (The exception to this general rule occurs in regard to legislative powers which, when delegated by Parliament, or validly subdelegated by Parliament's delegate, are exercised by the delegate or subdelegate in his own name.)

Of course it would not always be *ultra vires* for an authority to invest a delegate with powers exercisable in his own name: the statute could authorise a delegation of that kind, as happens in the Social Services Act, s. 12(1). In *O'Reilly's* case it may well have been the intention of the legislature that the delegate Deputy Commissioner should act in his own name. Subs. (2) of s. 8 of the Taxation Administration Act 1953 provides that:

> *A power or function so delegated may be exercised or performed by the delegate* with respect to the matter or to the matters included in the class of matters, or with respect to the State or part of the Commonwealth, specified in the instrument of delegation.[43]

If one accepts that it was the intention of Parliament in enacting s. 8 of the Taxation Administration Act to allow delegation of the Commissioner's powers to Deputy Commissioners and others who would exercise those powers in their *own* name, then it seems reasonable to apply that Parliamentary definition of delegation to the prohibition upon further delegation contained in s. 8(1). From this it would follow that the statutory prohibition in s. 8(1) applies only to the kind of delegation where the delegate acts in his own name. It would be possible to argue, then, that subdelegation to persons acting in the name of the Deputy Commissioner is permissible under the common law rules, according to which a power to subdelegate is implied where circumstances indicate that Parliament must have intended such a power.

This approach is, I believe, a preferable one. It would affirm the power of the Deputy Commissioner to subdelegate his delegated functions in appropriate cases and it would do no violence to the concept of delegation as generally understood. Unfortunately it is not the approach of the High Court. Instead their Honours have sought to draw a general distinction between delegation of a power and "acting through" officials. Authority for this distinction is drawn not only from Brennan, J.'s judgment in *Re Reference under Ombudsman Act, s. 11*, but also from a line of English cases commencing with *Carltona Ltd. v. Commissioners of Works*[44] and culminating in *Re Golden Chemical Products Ltd.*[45] These cases are said to establish the *alter ego* rule. It is necessary therefore to examine the cases to determine both their authority and the scope of the rule.

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[42] *Op. cit.* at 301.
[43] Italics inserted.
[44] *Supra* n. 9.
[45] *Supra* n. 7.

IV The alter ego rule

Carltona Ltd. v. *Commissioners of Works*

In a *dictum* of Lord Greene, M.R. in this case is said to lie the source of the rule that when, in general, a government minister is entrusted with the administration of a government department he may "act through" duly authorised officers of his department. The Master of the Rolls himself put it this way:

> In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them . . . . The duties imposed upon ministers and the powers given to ministers 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. Constitutionally, the decision of such an 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, and if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament. 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.[46]

What exactly are we to make of these remarks?

The basis of Lord Greene's ruling is essentially political, not legal. In his view government ministers should not be hampered by the *delegatus non potest delegare* rule from authorizing officials to perform most of the functions committed by statute to the ministers themselves. It would seem that there are two special attributes of government ministers which in Lord Greene's view merit their favourable treatment:

(i) the impossibility of their performing personally all the multifarious tasks imposed upon them (the argument of administrative necessity); and
(ii) the doctrine of the constitutional responsibility of ministers.

The *Carltona* case concerned the exercise, by an assistant secretary in the Ministry of Works, of the wartime requisitioning power conferred by regulation on the Minister of Works and Planning (in the capacity of First Commissioner of Works) as a "competent authority". There might

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[46] [1943] 2 All E.R. 560 at 563.

be some argument for confining the operation of the rule as stated to a situation of wartime or national emergency, but Lord Greene gives no indication of such a limitation, and his remarks have been interpreted as having general application to government ministers.

The *Carltona* decision itself presents a major difficulty which this writer believes has not been adequately dealt with in subsequent cases.

In the *Carltona* case the government minister as competent authority had power, under regulation 51(5) of the Defence (General) Regulations 1939, to delegate all or any of his functions under the requisitioning power. No reference was made by the court to the existence of this statutory power of delegation. Why? Could this have been an oversight on the part of the court? If it was an oversight, the *Carltona* decision lacks the authority of a fully considered judgment which takes into account all relevant considerations. If it was not an oversight, then Lord Greene must have had in mind one of two answers to the problem confronting the court: either

(a) the minister's failure to make an express delegation of his requisitioning power did not mean that there had in fact been no act of delegation; the act of delegation was implied in the circumstances by reason of administrative necessity and ministerial responsibility; or
(b) the official Morse was not to be regarded as a delegate and therefore the existence of a power to delegate was irrelevant.

There is nothing objectionable in the first solution. It does not subvert the *delegatus non potest delegare rule*, but allows the court a discretion to decide what circumstances may give rise to an implied act of delegation. In *Nelms* v. *Roe*[47] this solution was adopted to validate a notice which was required by statute to be given by a chief officer of police, but which was in fact given by a police inspector acting on the verbal authority of an intermediate officer, a police superintendent, who had no written authority from the Commissioner either. Lord Parker, C.J. held that, by reason of his position, the superintendent had implied delegated authority to issue the notice from the Commissioner of Police, the relevant chief officer of police, and that delegated authority included a power to sub-delegate.

Of course, delegated authority can be implied only where no particular form is required for the act by which delegation of ministerial power is accomplished. Reg. 51(5) of the Defence (General) Regulations 1939, applicable in the *Carltona* case, laid down no particular form for the act of delegation. Sub-paragraph (5) of regulation 51 reads as follows:

> (5) A competent authority may, to such extent and subject to such restrictions as it thinks proper, delegate all or any of its functions under paragraphs (1) to (3) of this Regulation to any specified persons or class of persons.

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[47] [1970] 1 W.L.R. 4.

So that in the *Carltona* case an implied delegation would seem to be perfectly proper. In this I am in disagreement with Professor Wade, who asserts that delegation requires a "distinct act by which the power is conferred upon some person not previously competent to exercise it."[48] Although a discernible act of delegation might be preferable, it does not follow that delegation can not be implied in an appropriate case—*Nelms* v. *Roe*[49] is an example.

Subsequent interpretations

Subsequent cases in which the very same regulations were under consideration have chosen to treat Lord Greene's ruling in the *Carltona* case as based on solution (b) above, however. In *Metropolitan Borough and Town Clerk of Lewisham* v. *Roberts*[50] the Court of Appeal held that a regional officer of the Ministry of Health, who purported to act on behalf of the Minister of Health, but to whom there had been "no actual delegation of authority" under regulation 51(5) in the sense of a personal instruction to act in matters of the kind before the court, was not subject to the rule *delegatus non potest delegare.* Jenkins, J. attempted to explain the relationship between a minister and the officials in his department thus:

> A minister must perforce, from the necessity of the case, act through his departmental officials, and where . . . functions are expressed to be committed to a minister, those functions must, as a matter of necessary implication, be exercisable by the minister either personally or through his departmental officials; and acts done in exercise of those functions are equally acts of the minister whether they are done by him personally, or through his departmental officials, as in practice, except in matters of the very first importance, they almost invariably would be done. *No question of agency or delegation as between the Minister and Mr. O'Gara seems to me to arise at all.*[51]

In *R.* v. *Skinner*[52] Widgery, L.J. (as his Lordship then was) explicated the *Carltona* rule in a similar way:

> . . . the minister is not expected personally to take every decision entrusted to him by Parliament. If a decision is made on his behalf by one of his officials, then that constitutionally is the Minister's decision. *It is not strictly a matter of delegation; it is that the official acts as the minister himself and the official's decision is the minister's decision.*[53]

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[48] H. W. R. Wade, *Administrative Law* (4th ed.) at 314.
[49] *Supra* n. 47.
[50] *Supra* n. 7.
[51] *Id.* 629. (Italics inserted.)
[52] *Supra* n. 7.
[53] *Id.* 127; 707. (Italics inserted.)

This treatment of an official acting on behalf of a government minister as "not a delegate" is perfectly in accordance with principle if it can be said that the minister exercises "such a substantial degree of control over the actual exercises of discretion so entrusted" that he can be said to direct his own mind to the matters in question.[54]

On the other hand, it has been said that the fact that an authority named in a statute "has and retains a general control over the activities of the person to whom it has entrusted the exercise of its statutory discretion" does not save the act of entrusting to that person the discretion from being "delegation".[55]

There is no doubt that in most government departments the minister retains only a general control over the activities of many of the officials through whom he acts. In *O'Reilly's* case there was no evidence that the Deputy Commissioner had any real control over the decisions of Holland, Cornell and Hughes. It was common ground that the Deputy Commissioner had no knowledge of the notices issued by those officers until some weeks later.[56] For this reason Mason, J. (who it will be recalled was in the minority) considered that there had been an improper "delegation" of the power to issue notices.

The statements of the Court of Appeal in *Lewisham* v. *Roberts*[57] and *R.* v. *Skinner*[58] that when a minister acts through an official "it is not strictly a matter of delegation" seem ill-considered. What is it, if not delegation? If delegation means what Wills, J. in *Huth* v. *Clarke*[59] says it does, *viz.* " . . . the conferring of an authority to do things which otherwise that person would have to do himself", then surely that includes the kind of transfer of function which takes place within a government department (except of course where the Minister or delegating person retains such a substantial degree of control over the exercise of the power that he can be said to apply his own mind to the matter)?

Certainly, the delegation of function by a minister to an official within his government department may have different consequences from a delegation by (say) a municipality to its Town Clerk. But can these differences not be explained on the basis that these are different forms of delegation, rather than by reference to an alleged theoretical distinction between a delegate and an "agent"?[60]

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[54] See Willis *op. cit.* at 258.

[55] *Ibid.*

[56] *O'Reilly's* case (*supra* n. 8) at 135-6.

[57] *Supra* n. 7.

[58] *Supra* n. 7.

[59] *Supra* n. 6.

[60] It is interesting to note that in the South African context two types of delegation of discretionary powers have been identified:

(i) *Deconcentration*, which generally takes place within the hierarchy of a government department. Here the delegator remains responsible and the act is performed in his name. He can withdraw the power of the delegate at any time and act himself, and he can override the decision of the delegate on appeal. The delegator and the delegate are not separate legal entities but, rather, different levels of a single hierarchical structure. (The term "deconcentration" itself is not used by the court, but by Professor Marinus Wiechers). For an example of deconcentration in action, see *Administrator, Cape* v. *Associated Buildings Ltd.* 1957 (2) S.A.L.R. 317 (A).

Commenting on the relationship between the concepts of delegation and agency, de Smith remarks that

> The correct view seems to be that distinctions drawn between delegation and agency are frequently misconceived in so far as they are based on the erroneous assumption that there is never an implied power to delegate, but that some forms of relationship that are properly included within the concept of delegation are substantially different from those which typify the relationship of principal and agent.[61]

In this writer's view the so-called *alter ego* rule, being founded upon a possible misapprehension as to the meaning of Lord Greene, M.R.'s *dictum* in the *Carltona* case, and distorting as it does the common meaning of the word "delegation", ought not to be applied in Australia. However, in the light of cases which assume its applicability in this country, it is necessary to examine the scope of the rule.

Scope of the rule

(i) *To whom does the rule apply?*

As has been said earlier, the favourable treatment accorded to government ministers in the *Carltona* case was based upon two considerations: administrative necessity and the doctrine of the constitutional responsibility of ministers. The question then arises whether both these factors need to be present in order for the rule to apply in a new situation. In *Hinton* v. *Lower*[62] Bray, C.J. of the South Australian Supreme Court held that the doctrine could not apply to the Registrar of Motor Vehicles because he was not responsible to Parliament for the acts of his officials. However, in *O'Reilly's* case necessity alone appeared to justify special treatment. The rationale of that finding is to be found in the words of Gibbs, C.J.[63] where he says that ministers are not alone in having functions "so multifarious that the business of government could not be carried on if [they] were required to exercise all [their] powers personally", and that the Commissioner and Deputy Commissioner of Taxation are in a similar position. Gibbs, C.J. cites two cases in seeking to substantiate his opinion, but the authority of those cases is extremely weak.

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[60] *continued*

(ii) *Decentralization*, where the delegate performs certain functions in his own name and has full responsibility for them. The delegator in this case can not exercise the delegated function unless authorised to do so by statute (and then he does so in the name of the delegate). This was the effect of the particular delegation which took place in *Fouche* v. *Bessant NO and Others* 1952 (2) S.A.L.R. 294 (N) and in *Reddy and Another* v. *Town Council for the Borough of Kloof* 1964 (3) S.A.L.R. 280 (D). Another Natal decision illustrating this class of delegation is *Thompson, Trading as Maharaj & Sons* v. *Chief Constable, Durban* 1965 (2) S.A.L.R. 296 (D).

Clearly in deconcentration and decentralization one encounters very different degrees of control on the part of the delegating authority, yet Wiechers (*Administratiefreg*, 1973 at 52-58) emphasises that both situations qualify as "delegation" for the purposes of the *delegatus* rule.

[61] *Op. cit.* at 301.

[62] [1968] S.A.S.R. 370.

[63] *O'Reilly's* case (*supra* n. 8) at 132.

It is true that in *Commissioners of Customs and Excise* v. *Cure and Deeley Ltd*[64] Sachs, J. remarked that the commissioners of customs and excise were in a position parallel to that of the ministers referred to in the judgment of Lord Greene in the *Carltona* case in that

> their functions are so multifarious that they could never personally attend to them all, and the powers given to them are normally exercised under their authority by responsible officials of the department.[65]

However, the remarks were part of an *obiter dictum* and did not determine the result of the case. Gibbs, C.J. also pointed to *Ex parte Forster; Re University of Sydney*[66] as supplying a situation in which a University Senate was treated by the court as equivalent to a government minister able to "act through" an *alter ego*. With respect, a careful reading of the case suggests otherwise. The court in *Forster's* case in fact used the word "delegation" to refer to the relationship between the Senate and its committee. It was said expressly that:

> . . . the degree of control maintained by the Senate over its committee was not close enough for the decision to be regarded as the Senate's own decision, and in truth the Senate had *delegated* its power to its committee . . . .[67]

The action of the committee was held valid because the court recognised that "Without the most ample facility for *delegation* the affairs of a University could not be carried out at all".[68] and that

> . . . the affairs of a University are for the most part carried on, under authority *delegated* from its governing body, by its officers, both executive and academic, and by a multitude of subordinate bodies.[69]

These comments are more consistent with the existence of an implied power of delegation than with the application of the *alter ego* rule. In the final analysis the court in *Forster's* case avoided the question whether there had been an invalid delegation, or a delegation at all, holding instead:

> At all events we are not prepared to say that there has been an invalid delegation – whether in the sense of delegation at all or *qua* the body to which the delegation was made – when the task of deciding as a matter of urgency before the commencement of the academic year (and in the interval before the next meeting of the Senate) upon numerous cases of the re-enrolment of students in courses in which they have failed twice (with liberty reserved to the excluded student

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[64] [1962] 1 Q.B. 340.
[65] *Id.* 371.
[66] *Supra* n. 5.
[67] *Id.* 733. (Italics inserted.)
[68] *Ibid.* (Italics inserted.)
[69] *Ibid.* (Italics inserted.)

> in any event to re-apply after two years) is delegated to a committee consisting of the Chancellor, the Deputy Chancellor, the Vice-Chancellor, three other members of the Senate, and the Dean of the Faculty concerned.[70]

Neither Gibbs, C.J. nor Wilson, J. adverts to the important decision in *Nelms* v. *Roe*[71] in which Lord Parker, C.J. refused to apply the *alter ego* principle to the Commissioner of Metropolitan Police, holding that:

> It is not . . . sufficient to say that it is a principle which is applicable whenever it is difficult or inpracticable for a person to act himself, in other words that whenever he has to act through others the principle applies.[72]

If the majority of the High Court hold to the view that an *alter ego* is not a delegate on the purported authority of the *Carltona* case and decisions which rely on that case, then it is hard to justify their willingness to overlook the requirement of ministerial responsibility to Parliament which so clearly was integral to the decision in *Carltona.*

Add to the fact that ministerial responsibility is apparently no longer necessary for an official to act through an *alter ego* the further fact that in *R.* v. *Skinner*[73] the requirement of administrative necessity was overlooked, and it is evident that we have come a very long way from Lord Greene's ruling in the *Carltona* case.

(ii) *To what sort of decisions does the rule apply?*

The *Carltona* case involved a discretionary power to requisition premises under the Defence (General) Regulations 1939, and most of the subsequent cases involve the same wartime requisitioning power. However, more recently the *alter ego* rule has been applied to the power to approve a breath-testing device[74] and to a decision under section 35a of the Companies Act 1967 (U.K.) to present a petition for winding up a company as expedient in the public interest.[75] In the case involving the latter situation, *Re Golden Chemical Products Ltd*, the Court of Appeal found that there was no requirement that the decision had to be made by the Secretary of State for Trade personally; the decision could properly be made by the Secretary of State acting through one of his officers, an Inspector of Companies named Gill. Brightman, J. commented that:

> Mr Gill exercises the powers given to the Secretary of State by s. 35 because that is the departmental practice and not because they have been delegated to him by the Secretary of State or by any other superior.[76]

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[70] *Id.* 734.
[71] *Supra* n. 47.
[72] *Id.* 8.
[73] *Supra* n. 7.
[74] *Ibid.*
[75] *Re Golden Chemical Products Limited, supra* n. 9.
[76] *Id.* 547; 305H.

Later he remarked "The *Carltona* case is authority that such a devolution of power—delegation is the wrong word—is lawful."[77]

Brightman, J. emphatically repudiated the argument of counsel for the company that, because the power given to the Secretary of State by section 35 was of a "formidable nature" which might cause serious damage to the reputation and financial stability of the company, the Secretary of State was required to exercise it personally.

The learned judge stated that he could find no warrant in the authorities for a legal distinction between powers which the minister had to exercise personally and those which could be exercised by an officer of his department. In his view the distinction sought to be drawn between a case which involved a serious invasion of the freedom or property rights of a subject and a case which involved a similar invasion that was not serious was "impossibly vague" and would, if it were maintained, have the court "groping in a perpetual twilight, except at the extremes of midnight and midday".[78]

According to Denning, L.J. in *Woollett* v. *Minister of Agriculture and Fisheries*,[79] what distinguishes a valid exercise of power by an official acting for a Minister from an invalid action is simply the use of the magic words: 'I am "directed by the Minister" to do it'.[80]

In the light of these remarks, the optimistic conclusion expressed by one writer that:

> There should be no fear that a wider application of the *alter ego* principle would encourage undesirable exercises of discretion by authorities through agents which would be beyond the review of the courts[81]

is not shared by this writer.

Although Mason, J. in *O'Reilly's* case would apparently exclude the operation of the *alter ego* principle in all cases requiring the exercise of a "statutory discretion which involves the formation of an opinion", he is not supported in that view by other members of the High Court. Gibbs, C.J. pays some regard to the idea that the nature of the power may play a role in deciding when the *alter ego* rule should apply, for he says

> Section 264 confers on the Commissioner a power whose exercise will be likely adversely to affect rights of individuals. This is a reason for inclining in favour of the view that it must be exercised personally.[82]

But in the final analysis he considers that the dictates of "practical necessity" must prevail.

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[77] *Id.* 548; 307C-D.
[78] *Id.* 550-551; 310F.
[79] [1955] 1 Q.B. 103.
[80] *Id.* 120.
[81] Andrew Christie, Case Note in (1983) 14 *Melbourne Uni. L.R.* 125 at 132.
[82] *O'Reilly's* case, *supra* n. 8 at 132B.

In *Deputy Commissioner of Taxation (SA)* v. *Saddler*,[83] handed down almost contemporaneously with the decision of the High Court in *O'Reilly's* case, Cox, J. of the Supreme Court of South Australia refused to apply the *alter ego* doctrine to the delegated function of the Deputy Commissioner of Taxation under s. 221YDA(4) of the Income Tax Assessment Act, holding that in his opinion

> . . . the *Carltona* principle, though no doubt applicable to a great number of administrative decisions and actions made every day on behalf of the Commissioner of Taxation, cannot be applied simply as a matter of course to a power such as that conferred by s. 221YDA(4) of the Income Tax Assessment Act. It all depends on more particular considerations of the precise nature of the power, of the conditions of its exercise, the object of the legislation, and so on . . . .[84]

but the authority of that decision is not particularly strong, it being the judgment of a single judge in a State Supreme Court.

It would seem, therefore, that the *alter ego* rule is applicable without regard to the nature of the power to be exercised, and that only where something *else* in the statute indicates that the power is to be exercised personally will the *alter ego* doctrine be held inapplicable.

The reluctance of the courts, demonstrated above, to distinguish between functions which may properly be performed through an *alter ego* and those which must be performed personally by the minister is rather curious when one considers that the courts are clearly willing to make that distinction in relation to delegated functions. When required to consider, in the absence of an express power to delegate, whether an implied power to delegate exists in particular circumstances, the courts have shown themselves astute to protect the rights of individual citizens by ensuring that important decisions affecting them are personally considered by the administrative authorities on whom Parliament has conferred the decision-making power.[85] It is ironic that in vast government departments, where the danger of maladministration by minor officials must surely be greatest, no such protection in matters of great moment exists. Not even the existence of the remedies of Parliamentary questions or litigation in the courts can, under the present approach of the High Court, ensure that a high government official will give personal attention to a matter for which in name he is responsible. As long as the minister's subordinate acts in the minister's name, it does not matter how important the decision is which has been taken by the subordinate. By this means the High Court has—perhaps unwittingly—set the stage for an extraordinary development, whereby the common law rule against subdelegation or even a statutory prohibition upon delegation is rendered almost meaningless—even outside

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[83] (1983) 13 A.T.R. 662.

[84] *Id.* 669-19 ff.

[85] See, for instance, *Allingham* v. *Minister of Agriculture and Fisheries* [1948] 1 All E.R. 780; *Vine* v. *National Dock Labour Board, supra* n. 4.

government departments—because no subdelegation is held to occur if the subordinate acts in the name of his/its superior authority.

I cannot agree with Professor Lanham, who comments in a recent article that there is no harm in the *alter ego* fiction "provided that the fiction is not carried too far".[86] Lanham regards the *alter ego* principle as a species of qualification upon the rule against subdelegation, and he does not deal with the fundamental difficulty that, where an official acts through an *alter ego* (it is said) "there is no question of delegation".[87]

V Adoption of the alter ego rule in Australia

It is quite clear that the *alter ego* rule is a creation of the English Courts and that it grew out of a number of cases dealing with the exercise of wartime requisitioning powers under the Defence (General) Regulations 1939. The doctrine certainly had no application in Australia prior to *Carltona Ltd.* v. *Commissioners of Works.* A small number of Australian decisions may make passing reference to the *Carltona* principle as if it applied in this country,[88] but before *O'Reilly's* case there was no express adoption of the rule by the High Court. It is questionable whether even that case represents an authoritative adoption of the rule for Australia, in view of the fact that only one judgment (that of Wilson, J.) relies substantially upon it for the finding and there is no unanimity on the scope of the rule or its applicability to persons who are not ministers of the Crown.

VI Excursus: Ministers as servants of the Crown

One final possible reason—not hitherto mentioned—for treating government officials as something other than delegates of their minister, it may be suggested, is that they and the minister are all servants of the Crown, and that it is the *Crown* which acts whenever the minister acts. This could mean that, in the performance of a duty owed or exercise of a power held by the Crown, any servant—whether minister or subordinate—might carry out the function. Such a justification of the *alter ego* rule would explain why the rule can not apply outside of government departments headed by cabinet ministers. However, as is pointed out by Hogg,[89] when a minister is named in a statute to perform a particular duty (or exercise a power), it is a question of statutory construction whether the function is to be performed by the Crown or by the minister as a designated person. According to Wade,[90] when an Act states that "the minister may make regulations" or "the minister may appoint" or "the minister may approve", the powers and duties under the Act belong to the minister alone. It is only where the Act confers the powers upon the

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[86] "Delegation and the Alter Ego Principle" in [1984] 100 *L.Q.R.* 587.

[87] See *Metropolitan Borough & Town Clerk of Lewisham* v. *Roberts* (*supra* n. 7); *R.* v. *Skinner* (*supra* n. 7).

[88] One such case is *Hinton* v. *Lower, supra* n. 62.

[89] P. W. Hogg *Liability of the Crown in Australia, New Zealand & the United Kingdom* (1971) at 13.

[90] H. W. R. Wade, *Administrative Law* (4th ed.) at 49-50.

Crown itself, as by saying "Her Majesty may (etc.) . . . .", that the minister would in law be merely a servant of the sovereign.

There has been no hint in any of the cases applying the so-called *alter ego* rule that the nature of the minister's relationship to the Crown is at the heart of the rule.

VII Summary and Conclusions:

From the discussion above, the writer suggests the following conclusions:

1. The courts recognise that powers and functions conferred by Parliament upon government ministers and other named officials should in many cases be exercised by subordinates, even in the absence of an express power of delegation.
2. In the absence of an express power of delegation, the exercise of delegated powers may be justified by discovering an implied power to [sub]delegate. Such a power may be implied in a variety of circumstances, including administrative necessity and the existence of ministerial responsibility to Parliament, but will not generally be implied where the decision is one requiring the personal attention of the minister on account of its importance.
3. Where there is a power to delegate, whether express or implied, and no particular form is laid down for the act of delegation, then the act of delegation itself may be implied by the circumstances. In large government departments where the practice is for officials to perform the functions assigned by statute to a minister, an informal act of delegation could generally be inferred from the appointment of the official to perform the task.
4. There is no true distinction between an "agent" and a "delegate" and the rules applicable to delegates are equally applicable to "agents", except insofar as the term agent is used to describe an exercise of discretion over which the "principal" or delegating authority retains a substantial degree of control. In this latter case it is possible to say no transfer of power has taken place and there has been no delegation.
5. The notion that a ministerial *alter ego* is by definition not a delegate is misconceived and may promote circumvention of statutory prohibitions upon delegation of discretionary functions, thereby defeating the intention of Parliament.
6. The meaning of the word delegate as generally used does not connote a person who acts in his own name, although the precise scope of a delegate's power may be varied by statute. For example, s. 8(2) of the Taxation Administration Act (Cth), suggests that a delegate of the Commissioner may be intended to act in his own name.

With so much uncertainty about what constitutes an act of delegation and about when the power to subdelegate is to be implied it is highly desirable that the High Court should at the next opportunity re-examine and state more fully its position on at least some of these points.