# Delegations and Sub-Delegations
# Making Decisions without Authority

**A paper delivered by Mark Robinson SC to a LegalWise Conference**
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I am asked to speak to you today to update matters concerning delegations, which is a component of administrative law within the broader field of public law.

On some levels, the subject can seem quite boring, overly technical and it can be seen as irrelevant to day-to-day legal practice. Like constitutional law, it does not often rear its head. In my experience, that is because, very often, the lawyer is not looking for it or has forgotten the principles that in fact apply. Regrettably, as you will see later in the paper, a failure to look for the issue or to forget the principles which apply might constitute professional negligence in the practise of public law matters. The same applies in failing to look for, or to recognise, a constitutional point in a matter you are dealing with (or to fail to interpret a statute properly).

The toolkit you need in order to brush up on delegations is the following:

- some Latin;
- some common law precepts;
- the various interpretation acts; and
- the subject act or enabling act that you are primarily dealing with.

In this paper, I will be dealing with the exercise of statutory power only. There are other forms of power, such as the power of government to act using its prerogative power or as juristic entity or as a natural person. The Crown can delegate prerogative power as it likes - *Council of Civil Service Unions v Minister for the Civil Service* [1984] AC 374 at 382C, 384G, 385A, 389C, 392E, 397H, and 417.G (the GCHQ Case). The House of Lords held there that the exercise of prerogative power was amenable to judicial review in the same way the exercise of statutory power was (but not so much when national security was engaged). The source of the power was not as important as the lawful exercise of that power (its subject matter) *ibid* at 407F. The House of Lords agreed that the immunity of prerogative power

from judicial review was a legal fiction, as was stated by Mason J in *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 220.5.

The Latin maxim that is often considered the starting point in consideration of delegations is *delegatus non potest delegare*, which means, a person invested with a statutory power must exercise it personally, rather than delegate its exercise to others.

It also means that a person who is exercising delegated power cannot further delegate or sub-delegate to another.

This Latin maxim is only that. It is a principle of the construction of statutes and regulations. It is not a substantive law of itself but it guides the courts. It is a prima facie rule which has very little content in and of itself, except to act as a starting point and to reflect "*important public law values*" (see also M Aronson and M Groves, *Judicial Review of Administrative Action* (7th ed, Thomson Lawbook Co, 2021)("**Aronson**") at [7.20].

Since the maxim is only a rule of construction, the presumption gives way to a contrary intent in legislation or delegated legislation. This can be express or implied in the statute (see the authorities at Aronson at [7.40]).

The nature of the power that is to be delegated is an important consideration. For example, the courts generally do not favour delegating judicial power or quasi-judicial power. There is a very strong presumption against it. As Aronson says [at 7.50]:

> "An examination of the cases shows this strong presumption to exist only where the primary repository of power is a court, or a disciplinary body distinct from a department or other large institution. It is trite law that a large degree of devolution of functions is permitted to institutional and departmental decision-makers, even though they are bound by the rules of natural justice." (footnotes omitted)

There is also a strong presumption against delegation of legislative functions – See Aronson, *ibid* and DC Pearce and S Argument, *Delegated Legislation in Australia* (4th ed, LexisNexis, 2012) at [2.31] *et seq*.

At the level of administrative decisions made by members of the executive, particularly in the exercise of purely routine and non-discretionary functions and powers, the presumption against delegation is at its weakest and, indeed, there is a positive presumption in favour of allowing such routine decisions to be delegated to servants or agents (see, *O'Reilly v State Bank of Victoria* (1983) 153 CLR 1 at 11 and 18; and *DPP v His Honour Judge Fricke* [1993] 1 VR 361).

**The Interpretation Acts**

There are provisions in the *Acts Interpretation Act 1901* (Cth) and the *Interpretation Act 1987* (NSW) relating to delegation.

These two statutes must never be further than one metre from your desk in private practice. They are amended from time to time, so you *cannot* consult them just once. The Commonwealth Act in particular is amended often (and has been amended substantially very recently).

**The *Acts Interpretation Act 1901* (Cth)**

Section 34AA of the Act provides for delegations. It provides:

> "**34AA Delegation to persons holding, occupying or performing the duties of an office or position**
>
> Where an Act confers power to delegate a function, duty or power, then the power of delegation shall not be construed as being limited to delegating the function, duty or power to a specified person but shall be construed as ***including*** a power to delegate the function, duty or power ***to any person*** from time to time holding, occupying, or performing the duties of, a ***specified office or position***, even if the office or position does not come into existence until after the delegation is given." (my emphasis)

Section 34AB (the effect of delegation) provides that:

- A delegation may be made either generally or as otherwise provided by the

***instrument of delegation***;

- The powers that may be delegated do not include the power to delegate;
- A delegated function or power performed or exercised by the delegate, is deemed to have been performed or exercised by the authority that delegated it;
- A delegation by a person or authority does not prevent the performance or exercise of a function or power by the person or authority;
- If the Act containing the delegation power is later amended to give a delegator one or more additional functions, duties or powers (or it alters them) and a delegation is in force immediately before the amendment takes effect, then, on and after the amendment taking effect, the delegation is taken to include the additional or altered functions, duties or powers (s 34AB(2)&(3)) (my emphasis).

Section 34A (exercise of certain powers and functions by a delegate) provides that where the exercise of a power or function by a person is dependent upon the opinion, belief or state of mind of that person in relation to a matter, the delegate may exercise that power or function upon the opinion, belief or state of mind of the delegate in relation to that matter.

Section 34AAB provides:

"**34AAB Minister may authorise others to perform functions or duties or exercise powers on his or her behalf**

(1) A Minister (the authorising Minister) who administers (whether alone or jointly with one or more other Ministers) an Act or a provision of an Act may authorise:

(a) a Minister who does not administer the Act or provision; or

(b) a member of the Executive Council who is ***not*** a Minister;

***to act on behalf of the authorising Minister*** in the performance of functions or duties, or the exercise of powers, that the authorising Minister may perform or exercise under the Act or provision." (my emphasis)

There are other such powers in the Act. There are also powers that are related to the exercise

of statutory power, such as section 33(1), which provides that a power or duty conferred or imposed by an Act may be exercised "*from time to time as occasion requires*". This provision reversed an "inconvenient common law doctrine of somewhat uncertain extent to the effect that a power conferred by statute was exhausted by its first exercise" - *Minister for Indigenous Affairs v MJD Foundation Ltd* (2017) 250 FCR 31 at [29]–[31] (Perram J).

Section 33(1) sometimes clashes with the functus officio doctrine. Section 2(2) of the Act says its provisions are subject to a "contrary intention". The High Court found there was a contrary intention in the *Migration Act 1958* (Cth) when the Minister tried to overturn an AAD visa decision made without any changed circumstances - *Minister for Immigration and Border Protection v Makasa* (2021) 270 CLR 430.

You will find some surprising things in the Commonwealth Act.

Section 33AB of the *Acts Interpretation Act 1901* (Cth) provides:

> **"33AB Validity of things done under appointments under Acts**
>
> Anything done by or in relation to a person purporting to act under an appointment (including an acting appointment) under an Act is not invalid merely because:
>
> (a) for any appointment—the occasion for the appointment had not arisen; or
>
> (b) for any appointment—there was a defect or irregularity in connection with the appointment; or
>
> (c) for any appointment—the appointment had ceased to have effect; or
>
> (d) for an acting appointment—the occasion to act had not arisen or had ceased."

This is an attempted codification of the "*de facto officers doctrine*" of common law origin. The common-law doctrine was considered and rejected as being not applicable in the case of appointments made to a Medicare disciplinary quasi-judicial disciplinary panel in circumstances where the Act required the Minister to first consult before making any appointments - *Kutlu v Director of Professional Services Review* (2011) 197 FCR 177.

It came into effect on 27 December 2011, along with many other substantial amendments by operation of the *Acts Interpretation Amendment Act 2011*(Cth) No 46 (assented on 27 June 2011)

**The Interpretation Act 1987 (NSW)**

Similar provisions are found in this Act at Part 7 - Exercise of statutory functions.

Section 48 (exercise of statutory functions) provides that if an Act or instrument confers or imposes a function on any person or body, the function may be exercised (or, in the case of a duty, shall be performed) from time to time as occasion requires;

Section 49 (delegation of functions) provides that delegations may be made to a person or body by name or to a particular officer or the holder of a particular office by reference to the title of the office concerned. It also provides that:

- A delegation may be general or limited, and must be evidenced by writing signed by the person or in the case of a body, on its behalf by a person authorised for that purpose;
- A delegation may be revoked, wholly or partly, by the delegator;
- A delegated function must be exercised in accordance with any conditions to which it is subject;
- A delegate may exercise any function that is incidental to the delegated function;
- A function that purports to have been exercised pursuant to a delegation is taken to have been duly exercised by the delegate, until the contrary is proved;
- A function that is duly exercised by a delegate shall be taken to have been exercised by the delegator.
- If a person or body exercises a delegated function that is dependent on the delegator's opinion, belief or state of mind on any matter, the function may be exercised by the delegate on the delegate's opinion, belief or state of mind on such matter.
- A function delegated to a particular officer or the holder of a particular office, does not cease to have effect merely because the person who was the particular officer or

the holder of the particular office when the function was delegated ceases to be that officer or the holder of that office, and the function may be exercised (or the duty shall be performed) by the person for the time being occupying or acting in the office concerned.

- A function that has been delegated may, notwithstanding the delegation, be exercised by the delegator;
- These provisions apply to a sub-delegation of a function in the same way as they apply to a delegation of a function, <u>to the extent that</u> the Act or instrument authorises the sub-delegation of the function.

**The *Carltona* Principle – Who Needs Delegation, When You Can Have an Alter-Ego or an Agent?**

There is a line of cases in Australia starting from *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 to the effect that Ministers are normally too busy to exercise the many and varied statutory powers and duties placed on them personally and that, of necessity, they must either delegate or act through an agent. The theory goes that since the Minister is responsible for the entire Department, he or she does not lose any relevant connection to the decision. This has been applied to a statutory officeholder as well (a Deputy Commissioner of Taxation) in *O'Reilly v The Commissioners of the State Bank of Victoria* (1983) 153 CLR 1 (note that Justice Wilcox said in *Din v Minister for Immigration and Multicultural Affairs* (1997) 147 ALR 673 at 682 that *O'Reilly* "*was a very special case*"). It has also been applied to others, including commissioners (*Commissioners of Customs and Excise v Cure & Deeley Ltd* [1962] 1 QB 340 at 371) and a university senate (Ex parte Forster; Re University of Sydney (1963) 63 SR (NSW) 723 at 733).

The *Carltona* principle (also called the alter ego principle) was discussed by Mason J in the High Court in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 37-38 in the following terms:

> "The cases in which the principle has been applied are cases in which the nature, scope and purpose of the function vested in the repository made it unlikely that Parliament intended that it was to be exercised by the repository personally because

> administrative necessity indicated that it was impractical for him to act otherwise than through his officers or officers responsible to him."

Also, in *In Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at [180], Gummow and Hayne JJ said:

> "The presence of an express, and limited, statutory power of delegation does not necessarily exclude the existence of an implied power of a Minister to act through the agency of others."

In *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 318 the High Court determined that judicial review was available in relation to the assessment and review of asylum-seeker applicants on Christmas Island. The *Carltona* principle was argued but the Court decided the matter without relying on the principle. The Court said (at [68]):

> "68 It is convenient at this point to deal with how resolution of the issue that is now under consideration fits in with what is usually called the "*Carltona* principle". The *Carltona* principle has been described as a principle of agency, distinct from a delegation of power, which allows an agent to act in the principal's name and use all of the principal's power. The Commonwealth and the Minister submitted that, while the *Carltona* principle would allow activities of a Minister's Department to be attributed to a Minister, the position is different where (as here) the relevant powers are ones which the statute requires be exercised by the Minister personally. …
>
> 69 It is not necessary to decide whether the analogy which the Commonwealth and the Minister sought to draw is apt. Nor is it necessary to attempt to identify the limits of the *Carltona* principle. What is presently important is that what the Department did, in conducting assessments and obtaining reviews, was done in consequence of a ministerial decision that those steps be taken. In requiring those steps to be taken, the Minister did not seek to (and did not) delegate any power. But the fact that the steps were taken in consequence of a ministerial decision is important."

In *Minister for Immigration and Border Protection v EFX17* (2021) 95 ALJR 342 at [33] the High Court said:

> "The duties upon the Minister [for Immigration] in s 501CA(3) [of the *Migration Act 1958* (Cth)] to give a written notice and particulars and to invite representations are not duties personally to do these acts but duties to ensure that the acts are done. They are matters that fall within the usual principle, based in part on administrative necessity, that "when a Minister is entrusted with administrative functions he may, in general, act through a duly authorized officer of his department. (footnote: *O'Reilly v State Bank of Victoria Commissioners* (1982) 153 CLR 1 at 11; 57 ALJR 130, discussing *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 at 563. See also at 19-20, 31.34)"

In *Centro Properties Limited v Hurstville City Council* (2004) 135 LGERA 257 at [45]-[56], McClellan CJ held that (at [55]) the *Carltona* principle did not extend to local government authorities. The Court held that the principle is confined to the circumstances where an officer exercises the decision-making power of the person or body given the responsibility for making the decision. In the absence of a delegation, the corporate body must consider for itself the relevant issues (regarding development applications).

The important practical point to take from *Carltona* is the distinction between notions of administrative agency (ie the *Carltona* principle) where an officer/decision-maker does things for and on behalf of the repository of the power (eg the Minister) and the notion of delegation where the power is exercised by the repository of the power through the actions of the officer. The officer is NOT a delegate. He/she does not take the action in question as the repository of the power. In contrast, a delegate does exercise the power as the repository of the power – See also "The Carltona doctrine" (2007) 18 PLR 251, Mark Campbell.

The NSW Court of Appeal gave the Carltona principle short shrift and held it did not apply in *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2014) 88 NSWLR 125 where it held that the *Aboriginal Land Rights Act 1983* (NSW) gave the Minister statutory power to form an opinion as to whether crown lands were needed. Basten JA said (at [11]):

> Both the scope and status of the principle are uncertain. The principle is usually treated as one of statutory interpretation, although it may apply to prerogative powers. On the other hand, many standard texts on statutory interpretation do not mention it. Some statements of the principle in English law seem to assume its application as a matter of presumption in the absence of indications to the contrary.

**Practical Applications**

Questions on the lawfulness of delegations in an agency are important since they go to the legal validity of decisions in many cases. Properly put to a court, they established that the decision maker was acting without power and therefore the decision is not supported in law and is therefore *ultra vires*.

In day-to-day practice, one must be vigilant to seek answers to the following questions:

- Who made the decision?
- By what authority?
- Is there an instrument of delegation?
- Have you sighted a copy of it?

It is simply not enough to assume that the person who made the decision was the person empowered to make the decision. In many cases, it is simply not enough to assume that when a person signs a statutory decision using the words "as delegate of XXXX” that the person is actually a delegate of the statutory decision maker and that he or she holds an instrument of delegation in the correct terms and with the sufficient power identified (and that is not out of date).

The importance of identifying an actual or intended delegation of a power in a written instrument in order to enliven the relevant provisions of the *Acts Interpretation Act* was emphasised in *Echin v Southern Tablelands Gliding Club Incorporated and Civil Aviation Safety Authority* [2012] NSWSC 966 at [12]-[13] where McCallum J said:

> “First, s 34AB of the *Acts Interpretation Act* clearly contemplates that delegation must be made by an instrument in writing. So much emerges from section 34AB(1)(a), which provides that, where an Act confers power on a person or body to delegate a function or duty or power, the delegation may be made:
>
> > ‘either generally or as otherwise provided in the instrument of delegation.’
>
> Plainly that provision contemplates the existence of a written instrument to give effect to the delegation”.

Accordingly, there is no substitute for an examination of the actual instrument of delegation in every case (where it matters, obviously).

If you commence judicial review proceedings for your client and you do not ask for the instrument of delegation at an early stage, you may not be permitted to ask for it later on, or, if you do find an error you might not be able to argue the point.

For example, in *Reece v Webber* (2011) 192 FCR 254, the Full Federal Court considered an

appeal concerning a Medicare discipline matter. A Professional Services Review Committee was set up to consider whether the appellant medical practitioner had engaged in "*inappropriate practice*" contrary to s 82 of the *Health Insurance Act 1973* (Cth). It found he had. The medical practitioner appealed to the Federal Court in judicial review and failed. On his appeal to the Full Court, and following his discovery of new information that concerned the validity of the appointment of the members of the Committee that conducted his hearing, he sought to add a new ground on the appeal and to seek to adduce new documents relating to that new ground concerning the instruments of appointment.

The Federal Court refused to entertain the new ground or to permit the doctor to tender any documents concerning the appointment of the Committee members. It was all said to be too late. The appellant's application to adduce additional evidence on the appeal was made pursuant to s 27 of the *Federal Court of Australia Act 1976* (Cth) (the FCA Act). In this regard, the Court noted the common law principles that a new argument was only to be raised on appeal in exceptional circumstances, and where it was expedient in the interests of justice to do so (see, for example, *Coulton v Holcombe* (1986) 162 CLR 1). It was held (at [15]) that although the exercise of the discretion conferred by s 27 of the FCA Act was not constrained by common law principles, it may be informed by those principles - *NASB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 24 and *Sobey v Nicol* (2007) 245 ALR 389.

Importantly, in *Reece v Webber*, it was held (at [20], [24], [25]) that as the evidence sought to be adduced on the appeal was available to the appellant at the time of the primary hearing, leave to amend should be refused in the interest of finality of litigation.

Ultimately, some months later, the invalidity of the appointment of (different) members of related Committees in that matter was established in *Kutlu v Director of Professional Services Review* (2011) 197 FCR 177.

In other words, the appellant Doctor Reece was not permitted by the Federal Court to argue what turned out to be a winning point.

The lesson for legal practitioners is plain. Call for the relevant documents as soon as possible

and as early as it is possible.

Note also Rule 59 of the *Uniform Civil Procedure Rules2004* (NSW). It applies to all judicial review cases in NSW.

Rule 59.7(4) provides that:

> "(4) A party may not, without the leave of the court, seek discovery from, or interrogate, another party to the proceedings. An application for leave is to include a draft list of categories of documents to be discovered or draft interrogatories."

This might make it a little more difficult to obtain such documents in future.

**Other Lessons**

In *NRMA v Falco* (2012) 60 MVR 175 (Hislop J) a woman was injured in a motor vehicle accident in New South Wales and made a claim against the insurer for personal injury damages under the non-curial assessment system set up under the *Motor Accidents Compensation Act 1999* (NSW). A medical assessment was made of her physical impairment and she was not happy with the result. She applied to a "*proper officer*" of the Motor Accidents Authority pursuant to section 62 of the Act and sought a further assessment. She was permitted that further assessment, but the insurer challenged the proper officer's statutory decision in judicial review proceedings in the Supreme Court. Reasons were required to be provided under the relevant delegated legislation and they were provided and signed not by the proper officer, but by a "*case manager*". This case manager did not purport to be a delegate or an agent of the proper officer.

As to the issue of proper officers' statutory decisions being delivered by other persons, the Court said (at [27]):

> "[P]rovided it is clear that the reasons for decision are those of the Proper Officer (perhaps best achieved by the Proper Officer signing the statement of reasons), the agent of the Proper Officer may perform the non-discretionary clerical tasks of reducing the reasons to writing and furnishing or supplying those reasons to the parties. There is ample authority that use of an agent to perform non-discretionary

> clerical tasks is unobjectionable - see *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1 per Mason J."

However, in the *Falco* case, the case manager stated in the reasons at one point:

> "I refer to *Glover-Chambers v Rey and MAA* [2010] NSWSC 17, where McCallum J stated:
>
> > 'Provided that the relevant threshold is met, the final assessment of the additional information is a matter for a medical assessor.'"

The Court held (at [33]) that:

> "Prima facie, this comment is to be attributed to the case manager. It involves part of the determinative process related to the application. As such, it exceeds the power of the case manager and evidences an error of law."

The statutory decision was quashed for error of law on the face of the record and was remitted to the MAA to be determined in accordance with law.

In *Allianz Australia Insurance Limited v Mackenzie* (2012) 62 MVR 305 (Johnson J), the Court considered the legal validity of a similar proper officer decision (written and signed by a case manager) and held [at 53], [125] and [131] that the case manager there did <u>not</u> purport to express his own views in the document and was merely passing on the comments of the proper officer. He was merely acting as a go-between, and the decision was accordingly held to be valid.

In conclusion, when considering issues of delegation, it is much better to start with the statute and any delegated legislation and then the relevant principles of statutory construction and other relevant principles derived from the common law thereafter. Latin maxims have their use, but they can be a distraction sometimes.

As to the Latin maxim noted at the beginning of this paper, note that the High Court has said in *Dainford Ltd v Smith* (1985) 155 CLR 342 at 349 per Gibbs CJ:

> "I am not convinced that recourse to the maxim *delegatus non potest delegare* is of much assistance in deciding upon the validity of an exercise of statutory powers. It is

> simpler to ask directly whether the power has been exercised by the person upon whom it has been conferred and whether it has been exercised in the manner and within the limits laid down by the statute conferring the power."

In *Minister for Local Government v South Sydney City Council* (2002) 55 NSWLR 381 at 424, Mason P said:

> "It is inappropriate to start with some overarching theory about the impropriety of delegation."

I wish to now consider two common law doctrines of ancient origin that impact upon the power that rests in a delegate or delegatee's hands – the *de facto officers* doctrine, and the presumption of regularity. They can be powerful presumptions even if there is error or irregularity in a delegation or in the exercise of statutory power or delegated power.

**The *De Facto Officers* Doctrine**

As mentioned earlier, this doctrine was the subject of a decision of the Full Federal Court of Australia in *Kutlu v Director of Professional Services Review* (2011) 197 FCR 177 ("**the *Kutlu Case***").

It concerned an epic fight between the Commonwealth of Australia, Nicola Roxon MP (then Minister for Health, and former Commonwealth Attorney General) (for decisions made in November 2009), five Professional Services Review Committees established pursuant to section 93 of the *Health Insurance Act 1973* (Cth) ("**the Act**") each containing three medical professionals appointed to a Panel, the Professional Services Review Panel pursuant to section 84 of the Act. Each Committee is a quasi-judicial body that conducts hearings into Medicare disciplinary matters.

One of the Panel members must also be appointed as Deputy Director of Professional Services Review pursuant to section 85 of the Act. That Deputy Director would, when allocated to a particular Committee, act as Chairperson of that Committee. There was also the Chief Executive Officer of Medicare Australia, the Director of Professional Services Review and the Determining Authority constituted by section 106Q of the Act. The Authority was

made up of mostly medical practitioners including a dentist, an optometrist, a midwife, a nurse practitioner, a chiropractor, a physiotherapist, a podiatrist, and an osteopath. The Determining Authority has power to make a determination that (pursuant to 106U of the Act) a medical practitioner be fully or partially disqualified from receiving Medicare payments for up to 3 years. They can also be required to "*repay*" the whole or part of the Medicare payment made to their patients for a period of up to two years (during the "*referral period*").

All of these players were the respondents in the *Kutlu Case*. A further respondent was the Minister for Health, Tony Abbott (for a decision as to deputy directors made in January 2005).

They were all sued by four busy bulk-billing general practitioners.

Medicare is big business in Australia. The Commonwealth currently spends nearly $18 billion on Medicare services and $10 billion on pharmaceutical benefits per annum (Hansard, 9 May 2012 Commonwealth House of Representatives, page 120).

The nub of the case was that section 84(3) of the Act provided that:

> "(3) Before appointing a medical practitioner to be a Panel member, the Minister must consult the AMA."

In the case, for all four doctors, the Commonwealth admitted as a fact that it did not consult the AMA. The reason they did not consult in respect of Panel appointments made in November 2009 was that that had already consulted in late 2004 and did not need to again.

The Commonwealth contended that the failure to consult did not sound in invalidity of the appointment because of *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 or, alternatively, because of the *de facto officers* doctrine.

The Full Court held that:

- the process of panel member appointment was intended by the Parliament to be one for which the persons carrying out the review had been selected only after the Minister had received advice from the AMA and, through it, any other relevant

professional organisation or association about a proposed appointee. It follows that the provisions of ss 84(3) and 85(3) provide indicia of a legislative intention that prior consultation by the Minister is an essential pre-requisite to the validity of an appointment of officeholders under those sections (*Kutlu* at [20]).

- As to ss 84(3) and 85(3) they have a rule-like quality which can be easily identified and applied. Parliament used the words "*must consult*" and "*before advising*" to achieve the Acts purposes (*Kutlu* at [28]).

- The public inconvenience resulting from a finding of invalidity of the various impugned appointments is likely to be significant. However, the scale of both Ministers' failures to obey simple legislative commands to consult the AMA before making the appointments is not likely to have been a matter that the Parliament anticipated (*Kutlu* at [32]).

- The magnitude of the consequences of the Court finding invalidity here was simply the product of the scale of the breaches of both Ministers' statutory obligations over a considerable period (*Kutlu* at [25]).

The Commonwealth contended (*Kutlu* at [40]) that the *de facto officers* doctrine prevented a challenge to the validity of past acts of a person purporting to occupy an office in apparent execution of that office.

It said that <u>three</u> conditions had to be fulfilled in order for the principles to operate. These were:

1. a *de jure* office had to exist,

2. the power exercised by the de facto officer must be within the scope of that *de jure* office's authority and,

3. the *de facto* officer must have the "*colour of authority*" in exercising the office's power.

The four doctors argued the Court should not seek to expand the operation of the common law doctrine, which exists only for a very limited purpose in highly unusual or extraordinary situations and which does not operate at all where its application would defeat a clear statutory policy (see Enid Campbell, "*De Facto Officers*" (1994) 2 A J Admin L 5 at 6.2, 13.5 and the

cases cited there, and 21.3; and *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 155.8 [148]).

Before the *Kutlu* case, the clearest judicial statement on the *de facto officer* doctrine had come from a bench of five judges of the New South Wales Court of Criminal Appeal in *R v Janceski* (2005) 64 NSWLR 10, in which that Court held unanimously that, while the *de facto officer* doctrine might be applicable in some instances in Australia, it cannot be used to overcome the interpretation of a statute reached by the application of the principles contained in *Project Blue Sky* (*R v Janceski* (2005) 64 NSWLR 10, 34.6 [132] per Spigelman CJ, 40.9-41.1 [208] per Wood CJ at CL, concurring with Spigelman CJ, 57.1 [284] per Howie J, concurring with Spigelman CJ, and with whom Hunt AJA concurred generally, 57.3 [284] per Johnson J). This was entirely in keeping with the comments made by Kirby P and Hope JA in *G J Coles & Co Ltd v Retail Trade Industrial Tribunal* (1986) 7 NSWLR 503, 519F-G.

The *de facto officer* doctrine is founded in public policy, being the protection of the public and the maintenance of public confidence in the system (*Balmain Association Inc v Planning Administrator for the Leichhardt Council* (1991) 25 NSWLR 615, 639D-E per Kirby P, Priestley and Handley JJA). The protective nature of the doctrine is such that it must apply to prevent the Commonwealth or the Minister "*rely[ing] upon [the Minister's or her predecessor's] own unauthorised appointment of the [Panel members and Deputy Directors] to support or justify any further action under the Act*" (*Balmain Association Inc v Planning Administrator for the Leichhardt Council* (1991) 25 NSWLR 615, 639G per Kirby P, Priestley and Handley JJA; see also Enid Campbell, "*De Facto Officers*" (1994) 2 A J Admin L 5).

In any event, public policy considerations already formed part of the *Project Blue Sky* test, and so they were and should be counted in the balancing exercise undertaken in construing the legislation in the first place. For this reason, even if the *de facto officers* doctrine was to have some never-before-seen wider operation than in this case, in order to support an argument permitting <u>the Commonwealth</u> to rely on acts done by officers who have not lawfully been appointed, it cannot automatically trump the other considerations which form part of an application of *Project Blue Sky*.

The Full Court held that the Committee decisions in the *Kutlu* case, were "*no decisions at all*" because a breach of the legislative provisions under the Act (*Kutlu* at [44])

It was held that the *de facto officers* doctrine is a principle of common law and that it could be overridden by statute.

It was held that it was overridden in the present case (*Kutlu* at [47]-[48]).

It was held that Parliament did not authorise persons to exercise offices where they were, unknowingly, usurping the public offices in which they purported to act (*Kutlu* at [47]).

It was held that the *de facto officers* doctrine had no application at all to the invalid appointments (*ibid*, [48]).

Justice Flick, in his separate judgment described the *de facto officers* doctrine as the Commonwealth's "*fall-back*" position (*ibid*, [108]). He said (*ibid*, [110]):

> "Whatever its precise origins, the chains of this ancient ghost continue to be jangled whenever it seems convenient to do so."

His Honour noted the rationale for the doctrine which was said to be founded in the public interest and in protecting the public and the individual whose interests was affected (*Kutlu* at [113]).

His Honour analysed the doctrine in considerable detail and considered the authorities in Australia. He ultimately concluded that there was much to be said for confining the doctrine within the "*narrow limits*" (*Kutlu* at [117]) and that times had changed since the origin of the doctrine and that an express legislative provision must operate to the exclusion of the doctrine (*Kutlu* at [119]).

His Honour also contended that the Act may simply leave no room for the operation of the *de facto officers* doctrine (*Kutlu* at [121]).

**De facto officer doctrine – state of the authorities**

The Commonwealth relied on many authorities on the doctrine.

In none of the authorities of the High Court to which the Commonwealth referred (*Bond v The Queen* (2000) 201 CLR 213, *Cassell v The Queen* (2000) 201 CLR 189 and *Haskins v Commonwealth* (2011) 279 ALR 434) was the Court required to consider the application of the *de facto officers* doctrine.

Further, in *Bond*, the Court did say "*the question of the powers of [a] particular officer of the Commonwealth*" was one "*arising under the Constitution*" which "*cannot be resolved by ignoring the alleged want of power"*: *Bond v The Queen* (2000) 201 CLR 213, 225.5 [34] (emphasis added).

The Court reiterated this proposition in *Haskins*, where the majority explicitly acknowledged the possibility for a "*limitation on [the* de facto officers*] doctrine where the want of authority is the consequence of the operation of the Constitution*": *Haskins v Commonwealth* (2011) 279 ALR 434, 446 lines 36-37 [46] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

In addition, it was submitted by the doctors, it was far from clear that there was a single and consistent international *de facto officers* doctrine. In particular, there were signs that the doctrine was falling out of favour in both the United Kingdom and the United States of America.

In the United Kingdom, the doctrine has been described as "*sail[ing] close to the wind*" in light of the United Kingdom's European commitments: *Sumukan Ltd v Commonwealth Secretariat (No 2)* [2008] Bus LR 858, 875 [51] per Sedley LJ.

In the United States, cases such as *Nguyen v United States* 539 US 69 (2003) and *Ryder v United States* 515 US 177 (1995) suggest the Supreme Court of the United States has been championing a contraction of the doctrine. In *Ryder*, the Court declined to "*extend*" the application of the doctrine beyond the facts of previous authorities: *Ryder v United States* 515 US 177 (1995) 184.1. Further, it was relevant that the claim in that case had a constitutional aspect: *Ryder v United States* 515 US 177 (1995) 180.4, 182.4, 182.9. Similarly, in *Nguyen*, it was relevant that the issues for resolution involved "*weighty*

*congressional policy concerning the proper organization of the federal courts*": *Nguyen v United States* 539 US 69 (2003) 79.8.

Finally, even in Canada, where the doctrine appears to have the broadest application, it has been held to apply within the principles of statutory interpretation: *Fahrenbruch v British Columbia (Family Maintenance Enforcement Program)*, 2009 BCSC 1128 [54]-[60].

**The Presumption of Regularity**

The presumption of regularity in public law centres on the principle that where an act is done which can only be done legally after the performance of some prior act, proof of the later act carries with it a presumption of the due performance of the prior act: see *Johnson v Director of Consumer affairs Victoria* (2011) VSC 595 (Kyrou J).

In another case concerning Dr Lee against the Professional Services Review Committee, Dr Lee challenged the validity of the Minister for Health's appointment of three panel members who were general practitioners (GPs). There were 28 other GPs appointed at the same time by the same process. In *Lee v Napier* (2013) 216 FCR 562 (Katzmann J), the court considered the meaning of the word "*consult*" in section 84(3) of the *Health Insurance Act 1973* (Cth).

This time, the Commonwealth did not admit it had failed to consult (as it did in *Kutlu*). It put the doctor to strict proof.

The Commonwealth had sent a letter to the AMA, seeking "the advice of the AMA" on proposed panel appointments. The AMA did not reply as to the GPs until after the Minister had made his decision to appoint the GPs to the panel.

The Court held that there was a failure to consult under the Act. Among other arguments, the Commonwealth relied on the presumption of regularity.

The Court noted (at [69]) that the doctrine was best described in *Minister for Natural Resources v Aboriginal Land Council* (1987) 9 NSWLR 154 at 164 where McHugh JA explained the presumption of regularity in a case of this kind in the following way:

> "Where a public official or authority purports to exercise a power or to do an act in the course of his or its duties, a presumption arises that all conditions necessary to the exercise of that power or the doing of that act have been fulfilled. Thus a person who acts in a public office is presumed to have been validly appointed to that office."

The Court held (at [70]) that it "is doubtful whether there is any room for the operation of the presumption. In the alternative, I am satisfied that the presumption has been rebutted."

The Court noted (at [71]) that in *Carpenter v Carpenter Grazing Co. Pty Ltd* (1987) 5 ACLC 506 ("**Carpenter**") at 514 Hope JA, with whom Samuels and Priestley JJA agreed, said:

> "the true rule is that the presumption may reasonably be drawn where an intention to do some formal act is established, when the evidence is consistent with that intention having been carried into effect in a proper way, the observance of the formality has not been proved or disproved and its actual observance can only be inferred as a matter of probability: *Harris v Knight* (1890) 15 PD 170 at 179-180; *In the Estate of Bercovitz* [1962] 1 WLR 321 at 327."

However, *Lee v Napier* was not like *Carpenter* in that (at [72]) "there is no evidence about the observance of the formality" and "Here, there is evidence that the advice was given after the appointments were made and that before the advice was given the Director informed the Minister that advice was unnecessary. In the present case the observance of the formality has been disproved."

The Court accepted (at [74]) that the <u>effect</u> of the presumption was that the onus was on Dr Lee to prove there was no response from the AMA before the appointments were made. It was also accepted that the presumption carried some weight. "*But the weight can vary according to the circumstances* (*Hill v Woollahra Municipal Council* (2003) 127 LGERA 7 at [52] per Hodgson J)."

In circumstances where the applicant had put on some positive evidence on the point, the

Court held (at [74]) that:

> "… the Commonwealth has an evidential (or tactical) burden of showing otherwise: *Apollo Shower Screens Ply Ltd v Building and Construction Industry Long Service Payments Corp* (1985) 1 NSWLR 561 at 565, citing *Purkess v Crittenden* (1965) 114 CLR 164 at 167-168, 171. As the learned author of the most recent Australian edition of Cross on Evidence puts it:
>
> > Where one party bears the burden of proving a negative but the other has greater means to produce evidence to contradict the negative proposition, then provided the party bearing the burden of proof has tendered some evidence from which the negative proposition may be inferred, the other party carries a tactical burden to advance in evidence any matters with which (if relevant) the first party would have to deal in the discharge of its legal burden of proof.
>
> See JD Heydon, *Cross on Evidence* (9th Australian edition, 2013) at [7165]."

In the United States there is a strong presumption against general discovery in administrative proceedings said to be born "out of the objective of preserving the integrity and independence of the administrative process." - *NVE v. Department of Health and Human Services* 436 F.3d 182, 195 (3d Cir. 2006). A party must provide good reason to believe that discovery will uncover evidence relevant to the Court's decision to look beyond the record. (See, *Tafas v. Dudas*, 530 F. Supp. 2d 786, 795 (E.D.Va. 2008). It remains to be seen whether the courts of this State will apply any presumption against discovery in the same way as in the US.

Thank you