OSTENSIBLE AUTHORITY IN PUBLIC LAW

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INTRODUCTION

In public administration many decisions made in purported exercise of statutory powers are, as a matter of practical necessity, made not by the officer or body in whom the power has been reposed by statute but by persons purporting to act as delegates or agents of the repository of the power. Nowadays the empowering statute will often contain a provision which expressly authorises delegations of power or the appointment of authorised officers who, by virtue of their appointment, will be invested with specified powers. The statute may limit the powers which may be delegated. It may restrict the classes of persons who may be selected to act as delegates. It may stipulate that delegations be effected by instruments in writing or by some other procedure.

Even if a statute does not expressly authorise delegations of power, authority to delegate, or to act through the agency of others,[1] may be implied. Whether such authority is implied depends on a range of considerations, among them the nature and purpose of the power, the occasions on which the power is to be exercised and matters to be taken into account in exercise of the power, and the status of the repository of the power.[2] In determining whether the repository of a statutory power is obliged to exercise the power personally or is impliedly authorised to act through the agency of others, the courts have been attentive to the requirements of effective and efficient administration. They have recognised that the functions reposed in some public bodies and officers are so multifarious that the business of government could not be carried on if those bodies and officers were required to exercise all of their powers personally.[3]

Members of the public who have dealings with administrative agencies of government, whether as applicants for benefits or permits or in some other capacity, will normally assume that the officials with whom they deal, and who make determinations in their cases, have the requisite authority to act. Certainly few members of the public are likely to consult the legislation under which the governmental agency operates to ascertain who has authority to make decisions, or

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1 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 138-139 per Mason J.

2 M Aronson and B Dyer, *Judicial Review of Administrative Action* (1996) at 333-347; E I Sykes, D J Lanham, R R S Tracey and K W Esser, *General Principles of Administrative Law* (4th ed 1997) ch 3.

3 *O'Reilly v Commissioners of the State Bank of Victoria* (1982) 153 CLR 1 and cases cited therein.

who may be authorised to make decisions. Even if a person does take the trouble to consult relevant legislative instruments, and discovers that power has been vested in a minister but can be delegated by the minister, it may be very difficult to discover whether power has in fact been delegated and, if so, to whom.[4]

Persons who have dealt with officials on the assumption that the latter have the requisite authority to act are likely to be aggrieved if, having been notified that a certain determination has been made in their favour, they are then told that they should disregard the determination because the person who made it had no authority in the matter. The person who has received such a communication is likely to be most aggrieved if he or she has acted in reliance on the prior communication and would suffer some detriment if it is not honoured.

The reason, if any, offered for repudiation of the apparent determination could be any one of the following:

- The person who made the decision purported to exercise a power which, by law, could only be exercised by X, say the Minister;
- The person who made the decision could have made it only if he or she had been a duly appointed delegate, and he or she was not possessed of the requisite delegated authority at the relevant time;
- The person who made the decision exceeded the authority actually delegated to him or her; or
- The decision is *ultra vires* in the sense that it was not even one the statutory repository of the power could have made.

The object of this article is to explore the ways in which courts have attempted to resolve problems of the kinds described above by principles of ostensible authority and closely related principles of estoppel *in pais*, that is, principles regarding estoppels generated by representations about past or present states of affairs.[5] The article also considers the applicability of the so-called "indoor management" rule to the operations of governmental agencies and the presumption of regularity.

AGENCY AND DELEGATION

Principles of agency have been developed by the courts principally in relation to transactions governed by private law. Principles about delegation and sub-delegation of governmental powers and functions are, in contrast, largely principles of public law. They have been developed by courts in the light of fundamental principles of constitutional law. Questions about the delegability of governmental powers and about the validity of acts of those who have purported to act as delegates usually arise in a particular statutory context. How these questions are resolved will often turn on points of statutory construction.

Where, for example, a statute has invested a minister with a panoply of powers and has expressly authorised the minister to delegate some of those powers, it would normally be presumed that the minister has not been authorised to delegate the

4 Documents recording delegations will, however, normally be accessible to members of the public under freedom of information legislation.

5 Principles of estoppel by representation are dealt with in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 and *Commonwealth v Verwayen* (1990) 170 CLR 394.

powers which had not been declared to be delegable and is obliged to exercise those powers personally.[6] Likewise if a statute specifies the classes of persons to whom a power may be delegated,[7] it would be presumed that persons not within the specified classes cannot be appointed as delegates. It could be argued that when a statute reposes powers in a minister, or the secretary of a government department, or an officer designated as a commissioner, and it authorises the repository of the powers to delegate powers to officers of the organisation, and to do so by written instrument, Parliament intends that no officer of the organisation shall have authority to exercise the powers unless he or she has been formally appointed as a delegate. But in *O'Reilly v Commissioners of the State Bank of Victoria*[8] the High Court of Australia rejected this argument.

In that case a majority of the Justices[9] held that the express power of delegation given to the Commissioner of Taxation by s 8 of the Taxation Administration Act 1953 (Cth) did not prevent the Commissioner, or a Deputy Commissioner formally appointed as a delegate, from acting through authorised agents. Notices which had been issued under s 264 of the Income Tax Assessment Act 1936 (Cth) by officers of the Taxation Office, under the facsimile signature of a Deputy Commissioner, and with the written authority of that Deputy Commissioner, were held to be valid notices. The officers who had issued the notices were not regarded as delegates of the Deputy Commissioner. They were merely authorised agents of the Deputy Commissioner, acting on his behalf and in his name. The prohibition in s 8 of the Taxation Administration Act 1953 on sub-delegation by delegates of the Commissioner was not therefore infringed.

Mason J dissented. He recognised that there is a distinction between acting as a delegate and acting as a mere agent. But in his opinion the only statutory powers and functions which can validly be exercised by agents are ones which do not involve the exercise of discretion or formation of an opinion. The power which in this case had been assigned by the Deputy Commissioner involved "a substantial exercise of discretion". It was a power which the Commissioner could have assigned by delegation, but had not. However, it was not a power which a delegate of the Commissioner could either sub-delegate or exercise through an agent.[10]

The decision of the majority in *O'Reilly* is not entirely satisfactory.[11] It was much influenced by considerations of administrative convenience, indeed necessity. But it offers little guidance on what kinds of statutory powers may be exercised through agents and what kinds of such powers may be exercised only by the original repository of power and his or her lawfully appointed delegates. None of the Justices of the Court examined the question before them in terms of the general law of agency. Neither did they consider when a person could be regarded as a duly authorised agent of a

6 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 38-39 per Mason J.

7 For example, officers of a particular department or persons holding a designated office.

8 (1982) 153 CLR 1.

9 Gibbs CJ, Murphy and Wilson JJ.

10 (1982) 153 CLR 1 at 16-21.

11 The decision was followed by a Full Court of the Supreme Court of South Australia in *Deputy Commissioner of Taxation v Saddler* (1982) 34 SASR 254. Sangster J (at 263) said he had difficulty in extracting a *ratio decidendi*. For a critical analysis of the case see M L Dixon, "Delegation, Agency and the Alter Ego Rule" (1987) 11 *Syd LR* 326. See also P Bayne, "Delegation, agency and just assisting" (1988) 62 *ALJ* 721.

repository of a statutory power or what the essential differences between agency and delegation might be. All Justices, however, seem to have accepted that a person acts as an agent only if he or she acts in the name of the principal, and expressly on behalf of the principal.

Statutes which expressly authorise delegation of power, and which require delegations to be by some formal instrument, are obviously designed to ensure that at any point of time it is possible to ascertain precisely who possesses authority to act, and subject to what limitations, if any.

Judicial case law on the exercise of delegated powers emphasises that delegates are expected to exercise the powers which have been delegated to them in their own name,[12] and also independently of the wishes or dictates of the person or body which has delegated power.[13] By delegation the delegator does not denude itself of authority to exercise the power,[14] but in the absence of clear statutory authority, it has no power to countermand a valid decision made by the delegate.[15] Legally, such a decision by a delegate has the same effect as a decision of the primary repository of power. These principles serve to render identifiable delegates accountable and responsible for acts done in exercise of the powers which have been assigned to them. They are in no way inconsistent with constitutional principles according to which some minister is ultimately answerable to the relevant parliament for the manner in which a statutory power has been exercised. They may even assist in the administration of constitutional conventions about when it is, and when it is not, proper for a minister to be attributed with personal fault which requires him or her to resign from ministerial office or accept dismissal from office on the advice of the chief minister.

Principles of agency are, in contrast, ones which are not designed to enforce conceptions about who among the functionaries of government should take responsibility for exercise of powers which are peculiarly governmental in character. Those principles are rather directed to when it is, and when it is not, appropriate to fix civil liabilities on principals for actions they themselves might have taken.

Another difference between agency and delegation seems to be that, under the law of agency, a principal is accorded greater scope for ratification of acts of unauthorised agents (or unauthorised acts of agents) than is accorded to those who, by statute, are empowered to delegate authority. When an agent has entered into a transaction which is beyond the agent's actual or ostensible authority, the principal can subsequently, by ratification, adopt "the relationship of agency assumed by the professing agent in the transaction." That adoption may relate back "to the origination of the transaction"[16]

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12 *Woollett v Minister of Agriculture and Fisheries* [1955] 1 QB 103 at 120, 132, 134; *Re Reference under s 11 of the Ombudsman Act for an Advisory Opinion* (1979) 2 ALD 86 at 94 per Brennan J (AAT); *O'Reilly v Commissioners of the State Bank of Victoria* (1982) 153 CLR 1 at 18 per Mason J; cf SA deSmith, Lord Woolf and J Jowell, *Judicial Review of Administrative Action* (5th ed 1995) 362.

13 *Nashua Australia Pty Ltd v Channon* (1981) 36 ALR 215; *Broadbridge v Stammers* (1987) 76 ALR 339.

14 *Huth v Clarke* (1890) 25 QBD 391; *Manton v Brighton Corporation* [1951] 2 KB 391. This rule is sometimes given statutory expression: eg, Acts Interpretation Act 1901 (Cth), s 34AB(d).

15 E Campbell, "Revocation and Variation of Administrative Decisions" (1996) 22 *Mon LR* 30 at 64-67.

16 *Davison v Vickery's Motors Pty Ltd* (1925) 37 CLR 1 at 21 per Isaacs J; *Hughes v NM Superannuation Pty Ltd* (1993) 29 NSWLR 653 at 665 per Sheller JA.

and make the principal bound by it. The adoption must, however, occur within a reasonable time of the unauthorised act of the professed agent.[17]

Courts have allowed little room for the application of the doctrine of ratification to the acts of unauthorised delegates.[18] If the statutory power which the repository of the power has actually delegated is a power it cannot delegate at all, or cannot delegate to the person it has chosen as the delegate, it cannot, by ratification, validate the acts of the unauthorised delegate.[19] This is so even when what the unauthorised delegate has done is something the repository of the power could itself do. If in such a case the repository of the power wishes to validate what has been done, it must redecide the matter itself. Even then it may be prevented from giving its decision retroactive effect. There is also authority for the view that even if the power exercised by the unauthorised delegate could, legally, have been conferred on him or her, the statutory repository of the power cannot, by ratification, validate the acts of the unauthorised delegate retroactively if to do so would be prejudicial to a third party.[20]

OSTENSIBLE AUTHORITY

Under the law of agency a principal may be bound by the acts of a person who ostensibly, though not actually, has the principal's authority to do those acts on behalf of the principal. The principal may be a natural person or a corporation. Whether or not someone has ostensible authority to act on behalf of a principal depends not on the conduct of the person who has purported to act on behalf of the principal, but rather on the conduct of the person or body which is alleged to be the principal, and therefore the person or body upon which a liability may be fixed, for example, a liability for breach of contract.

For a corporation to be bound by acts of persons having ostensible authority to act on its behalf, several common law requirements must be satisfied.[21] First there must have been a representation, by words or conduct, that the person purporting to act on behalf of the corporation did have authority to do what was done. Standing by and allowing a person to act on behalf of the corporation may be enough.[22] Secondly, the representation or conduct must emanate from someone having the actual, relevant authority of the corporation, that is actual authority to make the representation, or to manage the business generally. The actual authority may be found in the constitution of the corporation or some act taken pursuant to the constitution.[23] Thirdly, the person

17 *Hughes v NM Superannuation Pty Ltd* (1993) 29 NSWLR 653 at 665 per Sheller JA.

18 M Aronson and B Dyer, above n 2 at 344-345; E I Sykes, D J Lanham, R R S Tracey and K W Esser, above n 2 at paras 354-357.

19 M Aronson and B Dyer, above n 2 at 345.

20 E I Sykes, D J Lanham, R R S Tracey and K W Esser, above n 2 at para 355.

21 The classic statement of principles by Diplock LJ in *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] QB 480 at 503 was endorsed by the High Court of Australia in *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising and Addressing Co Ltd* (1975) 133 CLR 72 and *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146. The common law principles have been modified by the Corporations Law (Cth), ss 128-129 as amended by the Company Law Review Act 1998 (Cth).

22 *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 at 159 per Mason CJ, at 177-178 per Brennan J and at 198-199 per Dawson J.

23 Ibid at 173-174 per Brennan J.

making the representation must have intended it to be relied upon and it must be shown that the representation has in fact been relied upon.[24] Fourthly, it must be shown that what has been done is *intra vires* and something the corporation could have authorised to be done by an agent. For the purposes of this fourth requirement, third parties are deemed to have constructive notice of the public documents which form the constitution of the corporation.[25]

For a corporation to be bound by the acts of a person claimed to have ostensible authority to act on its behalf, it does not have to be shown that this person was actually aware of the representation or conduct which has been relied upon by the other party. But the corporation will not be bound by the acts of this person if he or she has purported to have acted as principal rather than as an agent.[26]

When it is claimed that a corporation is bound by the acts of someone having ostensible authority, that claim may be rejected on the ground that the circumstances of the case were such as to put the party who makes the claim on inquiry to ascertain the actual state of affairs. Those circumstances may be the nature of the transaction or facts of which the claimant was aware.[27]

It is now accepted that the doctrine of ostensible authority is but a particular example of the operation of the doctrine of estoppel *in pais*, that is estoppel by representations which induce assumptions about a present or past state of affairs, including about a legal relationship between parties.[28] If this is so, there can be no reason for restricting the application of the doctrine of ostensible authority to transactions governed solely or primarily by private law. Agencies of government enjoy no general immunity from the operation of principles of estoppel, though they cannot be estopped by representation from taking action which they are required to take in order to fulfil their public duties. Nor can public bodies be estopped from resiling from representations which, if fulfilled, would involve *ultra vires* action on their part.[29]

There are obvious analogies between corporations formed within the private sector and many governmental institutions. Some governmental institutions are, by statute, endowed with corporate status. Some such institutions do not possess corporate status but are multi-member bodies created by statute which are meant to operate as a group, albeit with powers of delegation. There are other governmental institutions which operate under statutory regimes which repose powers in individual officers (like ministers, secretaries of departments, and commissioners) but which also contemplate delegations of power to others.

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24 Ibid at 172 per Brennan J.

25 Ibid at 159-160 per Mason CJ, at 174-175 per Brennan J and at 192 per Dawson J. This requirement has been abolished by the Corporations Law (Cth), s 125 as amended by the Company Law Review Act 1998 (Cth), in relation to companies as defined in s 9.

26 Ibid at 172 per Brennan J.

27 Ibid at 154 and 164 per Mason CJ, at 178 and 181 per Brennan J and at 212 per Gaudron J.

28 Ibid at 172 per Brennan J and at 212 per Gaudron J.

29 The law is reviewed by Gummow J in *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 92 ALR 93. See also *Minister for Immigration and Ethnic Affairs v Polat* (1995) 37 ALD 394 (Full FC) and J Thomson, "Estoppel by Representation in Public Law" (1998) 26 *FL Rev* 83.

Before the operation of the doctrine of ostensible authority within the domain of public law is examined more closely, it is appropriate to say something about an associated doctrine—which has come to be known as the "indoor management" rule—and the presumption of regularity.

THE INDOOR MANAGEMENT RULE AND THE PRESUMPTION OF REGULARITY

The expression the "indoor management" rule has been ascribed to Lord Hatherley. He used it in *Mahoney v East Holyford Mining Co*[30] in 1875 as a short title for the general rule which had been enunciated in 1856 in *The Royal British Bank v Turquand*.[31] It was a rule for the protection of persons having dealings with corporations operating under memoranda and articles of association which delimited their powers and functions and which were public documents, but whose records of acts done in the management of the internal affairs of the corporation were not readily accessible to members of the public.[32]

The rule, summarily stated, is that "persons dealing with a company in good faith may assume that acts within its constitution and powers have been duly performed and are not bound to inquire whether acts of internal management have been regular...".[33] Application of the rule does, of course, require identification of those acts which are to be regarded as ones of "internal management". Courts have held those acts to include the making of appointments of agents to exercise the powers of a corporation and determination of the scope of their authority, and the conduct of meetings and the passing of resolutions.[34]

Judges have not agreed on how and where the so-called "indoor management" rule fits into more general legal doctrine. In *Northside Developments Pty Ltd v Registrar-General*[35] Gaudron J referred to debate about whether the rule was a special rule of company law or a more general principle under the law of agency. She suggested that the rule should "now be seen as grounded in notions akin to those which underpin the law of estoppel".[36] Other judges in the same case considered that the "internal management" rule is one which can operate only when it has first been established that the alleged agents of the corporation had its actual or ostensible authority to act on its behalf.[37]

Brennan J described the rule as "really a presumption of regularity",[38] expressed in the Latin maxim: *omnia praesumuntur rite esse acta*.[39] That presumption, he said, "is no more than a presumption of fact" and therefore one which "is displaced when the

30 (1875) LR 7 HL 869 at 894.
31 (1856) 6 EI & Bl 377; 119 ER 886.
32 *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 at 155 per Mason CJ and at 176 per Brennan J.
33 Ibid at 154-155 per Mason CJ.
34 Ibid at 178-179 per Brennan J and at 207 per Toohey J.
35 (1990) 170 CLR 146 at 210-211.
36 Ibid at 213.
37 Ibid at 198 per Dawson J and at 207 per Toohey J.
38 Ibid at 176.
39 Meaning "all that is done is presumed to be done lawfully".

circumstances put on inquiry the party seeking to rely on the rule".[40] The presumption of regularity, his Honour suggested,

> arises from the likelihood that a company has given to its officers and agents the authority needed to carry on its business and to act for its benefit within the limits of the authority which officers and agents within their respective positions would ordinarily possess.[41]

His Honour went on to say that:

> The presumption might reasonably be made when the officers or agents of a company engage in a transaction for the purpose of a company's business or otherwise for the benefit of the company and the transaction is one that officers and agents in their respective positions would ordinarily be expected to have the company's authority to undertake. In that situation, a party dealing with the company in good faith is entitled to presume that the officers and agents had that authority...[42]

The presumption of regularity is essentially a rule of evidence and it is one which applies in the domains of both private and public law. Indeed it has been said that: "The natural home of the maxim [*omnia praesumuntur rite esse acta*] is public law".[43] The maxim has frequently been applied in cases in which a person has acted in a public office or as a delegate of the repository of a statutory power. When a person so acts, it is presumed that he or she has been validly appointed to the office or as a delegate.[44] The presumption may, of course, be rebutted.

In the Victorian case of *Paterson v Director-General of Community Welfare Services*[45] a question arose as to whether the Director-General had validly delegated a power to one of his officers. The governing statute had authorised delegation but any delegation had to be in writing and also be approved by the Minister. There was evidence that the Director-General had made a written delegation but the document had not been signed by the Minister. Lush J held that it could not be presumed that there had been a valid delegation because the Director-General could have issued his instrument of delegation before the Minister's approval was sought and obtained.[46]

THE OSTENSIBLE AUTHORITY OF PUBLIC OFFICIALS

In determining the legal effect of the acts of persons who are held out to be, or profess to be, agents or delegates of bodies invested with statutory powers, courts have, from time to time, drawn on principles of estoppel and ostensible authority and also on the "indoor management" rule. Some judges have perceived connections between these several strands of legal doctrine. But, by and large, the courts have not, to date, produced a coherent body of legal doctrine which is attentive to the special problems which arise under statutory regimes which are to be administered by agencies of government.

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40 (1990) 170 CLR 146 at 177.
41 Ibid at 176.
42 Ibid at 176-177.
43 *Minister for Natural Resources v New South Wales Aboriginal Land Council* (1987) 9 NSWLR 154 at 164 per McHugh JA.
44 *Pertl v Kahl* (1976) 13 SASR 433 and cases therein cited and *Minister for Natural Resources v New South Wales Aboriginal Land Council* (1987) 9 NSWLR 154.
45 [1982] VR 883.
46 Lush J did not refer to the possible application of principles of estoppel.

Some such statutory regimes may be ones which confer powers and impose duties on agencies of government of kinds which are distinctively governmental in character.[47] Some, however, may confer powers to enter into transactions of kinds which, in their fundamentals, are governed by the rules of private law, for example, contracts and disposition of proprietary interests. Contracting and like powers accorded by statute to public officers and bodies may be constrained and delimited by statute. For example, the power of a statutory corporation to enter into certain kinds of contracts may be constrained by a requirement that ministerial approval for entry into a contract be sought and obtained, or by a requirement that contracts not be concluded except after a process of competitive tendering.[48] In Australia there are also long established statutory regimes which control dispositions of proprietary interests in lands of the Crown in right of the several States of the federation.

When disputes arise between agencies of government and private parties and those disputes are primarily ones about governmental liability according to principles of private law—like a liability for breach of contract—judicial resolution of the dispute will start from a consideration of relevant principles of private law.[49] Principles of public law may be brought into play when the court has to consider whether, by statute or otherwise, the relevant principles of private law are not applicable at all, or applicable subject to important qualifications.

What legal principles a court brings into play in resolving disputes between governmental agencies and private parties can also be much affected by the form of the particular curial proceedings, the curial jurisdiction which is being invoked by the initiator of the proceedings, and by the nature of the remedy sought. When the proceedings are by way of an ordinary civil action, principles of private law are likely to be the primary ones according to which the claim to remedy is sought to be established. When the proceedings are brought before a superior court exercising a supervisory jurisdiction, the substantive and remedial laws according to which the case will be decided will, normally, be primarily ones of public law. Elements of public law can, however, enter into proceedings in which a governmental body is sued for breach of some civil wrong. *Attorney-General for Ceylon v AD Silva*[50] is a good example.

In this case the Crown was sued for breach of a contract to sell unclaimed goods. The contract had been entered into by the Principal Collector of Customs in Ceylon. He had no actual authority to enter into the contract as an agent of the Crown, but it was claimed that he had ostensible authority. The Judicial Committee of the Privy Council, before whom the case eventually came, did not deny that the Crown could be bound by the acts of agents having its ostensible authority. But the Collector of Customs had no such authority. No one with the actual authority of the Crown had held him out to be an agent of the Crown.[51] More importantly the powers given to the Collector under

47 For example, the power to issue licences to engage in activities which have been prohibited by statute except under licence.

48 N Seddon, *Government Contracts: Federal, State and Local* (1995) ch 6.

49 Crown proceedings legislation ensures that Crown liability for breach of contract will normally be determined with reference to private law: eg, Judiciary Act 1903 (Cth), s 64.

50 [1953] AC 461.

51 The Judicial Committee stated (ibid at 479) as "a simple and clear proposition that a public officer has not by reason of the fact that he is in the service of the Crown the right to act for and on behalf of the Crown in all matters which concern the Crown. The right to act for the Crown must be established by statute or otherwise".

the Customs Ordinance to sell Crown property did not authorise him to sell the goods he had in this instance purported to sell. "It may be said", the Judicial Committee observed,

> that it causes hardship to a purchaser at a sale under the Customs Ordinance if the burden of ascertaining whether or not the Principal Collector has authority to enter into the sale is placed upon him. This undoubtedly is true. But where, as in the case of the Customs Ordinance, the Ordinance does not dispense with that necessity, to hold otherwise would be to hold that public officers had dispensing powers because they could by unauthorized acts nullify or extend the provisions of the Ordinance. Of the two evils this would be the greater one.[52]

In deciding as it did the Judicial Committee was simply applying the principles of ostensible authority which apply to corporations whose powers are restricted by their constituent instruments.

In *Lever Finance Ltd v Westminster (City) London Borough Council*[53] the English Court of Appeal invoked the principle of ostensible authority to hold a public body bound by a representation by one of its officers in relation to a matter squarely within the domain of public law. The decision has proved controversial, and its authority has been diminished by subsequent decisions of the Court. The case nonetheless merits attention because of the problems it reveals in application of the principle of ostensible authority to public bodies.

The circumstances of the case were these. In March 1969 Lever Finance Ltd had obtained the Council's approval under planning legislation to develop a site for residential purposes, in accordance with a detailed site plan prepared by the company's architect. Later the architect found it necessary to vary the plan. A copy of the variations was sent to the Council's planning officer. He advised that as the variations were minor, no formal permit in respect of them was required. Acting on that advice, the company proceeded with its development in accordance with the plans as varied. Before the work was completed, some neighbours objected to the Council about the changes, whereupon the Council told the company that it should apply for approval of those changes. The company duly applied for that approval, but the Council's planning committee refused the application. In its view the changes in the plans were of a material kind. The Council thereupon served an enforcement notice on the company requiring it to comply with the plans approved in March 1969. The company sought a declaration, and also an injunction to restrain the carrying out of the enforcement notice, on the ground that the advice given by the Council's planning officer constituted a decision by the Council to approve the variations in the plan.

The Court of Appeal conceded that the Council could not dispense with the statutory requirement that the company had to obtain its approval for the alterations in the planned development. The Court nonetheless went on to hold that the Council could not resile from the assurance of its planning officer that the variations in the plans were immaterial and that no formal approval was needed in respect of them. In coming to that conclusion the Court attached significance to the fact that it was regular practice for developers to seek rulings from planning officers about the need to obtain formal approval of variations of their plans. Lord Denning MR, with whom Megaw LJ agreed, thought that because of this practice the planning officer who had advised the

52 Ibid at 480-481.
53 [1971] 1 QB 222.

company had ostensible authority to decide whether a change in approved plans was a material change, and thus one which needed to be authorised by a further permit.

Lord Denning also supported his conclusion that the Council was bound by its officer's assurance by reference to a provision in the governing planning legislation which expressly authorised planning authorities to delegate their powers to planning officers.[54] This provision required that delegations be to officers specified by name. It also required that determinations by those delegates be notified to applicants in writing. In the present case, neither of these requirements had been fulfilled. That they had not, Lord Denning thought, were mere irregularities which should be overlooked. As to the fact that there had been no formal delegation to the planning officer, his Lordship observed:

> An applicant cannot himself know ... whether such a delegation has taken place. That is a matter for the "indoor management" of the planning authority. It depends upon the internal resolutions which they have made. Any person dealing with them is entitled to assume that all necessary resolutions have been passed. Just as he can in the case of a company...[55]

Sachs LJ held in favour of the company on the ground that there had been an effective delegation of power to the planning officer.[56]

The Court of Appeal's decision in *Lever Finance* has been criticised on a number of grounds. Craig has argued that the decision was wrong because, at the time, the power to decide applications for planning permits was not legally capable of being delegated to planning officers.[57] None of them could therefore have ostensible authority to decide such applications. Wade has described the decision as one "in apparent defiance of the rules against both delegation and estoppel". Its unfortunate features, he has suggested, were that "it sacrificed the interests of the neighbouring house-owners who were forced to accept houses overlooking them much more closely than the planning authority would have permitted". It also "sacrificed the public interest, since the court deprived the responsible public authority of the powers of control which the Act assigned to them and to them only".[58]

Some dissatisfaction with *Lever Finance* was expressed by Widgery CJ in *Brooks & Burton Ltd v Secretary of State for the Environment*[59] and in 1978, in *Western Fish Products Ltd v Penwith District Council*,[60] a differently constituted Court of Appeal qualified some of the propositions expressed in it. It did so out of a concern to ensure that principles of ostensible authority and estoppel were not extended to erode the supremacy of statute law and to diminish the capacity of public bodies to perform their statutory duties or exercise their statutory discretions according to law.

Megaw LJ who, on this occasion, delivered the Court's reasons for judgment, dismissed one of Lord Denning's statements in *Lever Finance* as *obiter dictum* and as expressing the law too widely.[61] This was Lord Denning's statement that "Any person

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54 Town and Country Planning Act 1964 (UK), s 64.
55 [1971] 1 QB 222 at 231. Denning MR invoked the "indoor management" rule.
56 Ibid at 233-234.
57 P P Craig, *Administrative Law* (3rd ed 1994) at 338 and 656.
58 H W R Wade and C Forsyth, *Administrative Law* (7th ed 1994) at 373-374.
59 (1976) 75 LGR 285.
60 [1981] 2 All ER 2024. The Court's judgment was delivered in May 1978.
61 [1981] 2 All ER 204 at 221.

dealing with... [officers of a planning authority] is entitled to assume that all the necessary resolutions [for empowering those officers to exercise the powers of the authority] have been made".[62] For an estoppel to be created against the planning authority by reason of a representation by one of its officers having ostensible authority, "there must", Megaw LJ said, "be some evidence justifying the person dealing with the planning officer for thinking that what the officer said would bind the planning authority".[63] Holding the office of planning officer was not enough. A critical factor in *Lever Finance* had been the evidence of "a widespread practice amongst planning authorities of allowing their planning officers to make immaterial modifications to the plans produced when planning permission was given".[64] But then Megaw LJ went on to suggest that proof of such a practice would have been of no avail to Lever Finance had its architect produced to the planning officer "plans showing material and substantial modifications to the planning permission for a large development in Piccadilly Circus already granted", for in that circumstance the architects, as the company's agent, "could not have sensibly assumed that the planning officer with whom he was dealing had authority to approve the proposed modifications without putting them before planning authority".[65]

Later in the Court's reasons for judgment Megaw LJ acknowledged the force of the objections to the extension of the operation of estoppel doctrine which had been manifested in *Lever Finance*. He was prepared to assume that the Court in *Lever Finance* had been right in concluding that the variations in the company's plans were material and that the Court had jurisdiction to decide whether those variations were or were not material. In other words he was prepared to assume that the question of whether the revised plans did or did not necessitate a formal grant of approval of them entailed a question of law and, moreover, a question resolvable by a court exercising a supervisory jurisdiction.[66] Megaw LJ went on to say that:

> To permit the estoppel no doubt avoided the injustice to the plaintiffs [Lever Finance]. But it may fairly be regarded as having caused an injustice to one or more members of the public, the owners of the adjacent houses who would be adversely affected by this wrong and careless decision of the planning officer that the modifications were not material. How, in their absence, could the court balance the respective injustices according as the court did or did not hold that there was an estoppel in favour of the plaintiffs? What "equity" is there in holding, if such be the effect of the decision, that the potential injustice to a third party of the granting of the estoppel is irrelevant? At least it can be said that the less frequently this situation arises the better for justice.[67]

The ultimate conclusion in the *Western Fish Products* case was that the planning authority was not bound by a representation made by one of its officers that a proposed use of land was covered by an "existing use" right and did not therefore need to be authorised by a formal planning permit. The planning authority was thus not prevented from refusing a formal application for permission to use the land in the way the applicant company had indicated it proposed to use the land when it sought advice from the planning authority. Equally it was not estopped from exercising its statutory

62 [1971] 1 QB 222 at 231.
63 [1981] 2 All ER 204 at 220.
64 Ibid.
65 Ibid.
66 Ibid at 221.
67 Ibid.

powers to enforce a statutory prohibition of a use of land which had not been approved by it. The Court of Appeal, this time, attached overriding significance to the statutory regime which, in its view, made it clear that the power to authorise use of land in the circumstances of the particular case rested solely with the planning authority and was incapable of being delegated to officers of that body.

In *Jurkovic v Port Adelaide Corporation*,[68] Wells J stated a series of principles which he believed had been established by the authorities, among them *Lever Finance* and *Western Fish Products*.

1 The first principle was "that a public authority charged, by statute, with the performance of a public duty, or with the exercise of a discretion with respect to matters of public concern, cannot be estopped from performing that duty or exercising the discretion according to law, whatever representations or communications may have been made by the Authority's officers".[69]

2 Where a proper application for consent, permission, or approval, or for some other decision, is made to a Council, or other public authority, upon a matter of public concern governed by public law, the Authority may be estopped from denying a representation or statement as to what the decision is or was, made by one of its officers to the applicant where:

   (a) the Authority has previously established a practice of lawfully delegating to the officer concerned, or to officers of the same status and responsibility, the power to make decisions with respect to the subject matter of the applications, and to communicate those decisions to persons concerned, and the officer in question acted—though mistakenly—in the course, and within the scope, of his ostensible authority; or

   (b) an officer or officers of the authority in arriving at the decision, or in making a representation or statement as to what the decision is or was, acted in breach of the Authority's domestic or internal procedures, but in what the officer or officers conveyed to the applicant, there was nothing to suggest that there had been an infringement of those procedures, and the officer or officers, in making the representation or statement, was or were acting—though irregularly—in the course, and within the scope, of his or their ostensible authority.

3 The question whether, for the purposes of Rule 2 above, there has been a proper application, whether there has been a sufficiently well established practice of delegation, and whether the procedures allegedly infringed, were domestic or internal, are questions of fact to be decided having regard to all the circumstances of the case.

4 The above stated rules must yield to any contrary intention expressed or necessarily implied in the legislation governing the case under consideration.[70]

In the particular case Wells J concluded that the Council was not estopped from refusing its consent to an application for a planning permit by a representation of one of its officers, which, the applicant alleged, led him to believe that the consent was merely a formality. He so held for several reasons. There was no evidence that the Council had delegated its powers to deal with applications for planning permits to any

68 (1979) 23 SASR 434.
69 Ibid at 440.
70 Ibid at 440-441.

of its officers. Even if the officer who had spoken with the applicant had purported to commit the Council, which, on the facts, he had not done, "the Council could not be divested of its duty and power to decide upon the merits of the application for consent, if and when such application was made".[71] His Honour doubted whether public authorities could even be estopped by promises.[72] And finally, under the governing legislation, the application which had been made could not have been granted by the Council.[73]

In *Lever Finance*, *Western Fish Products* and *Jurkovic* the relevant statutory powers had been invested in statutory corporations which acted primarily through elected councils. The analogy between these statutory corporations and privately formed corporations is fairly close and the common law principles of ostensible authority which have been developed in relation to the private corporations, and likewise the "indoor management" rule, can be applied to the statutory corporations without any significant violation of fundamental principles of public law. Even in the domain of private law the operation of these principles is, under the common law, constrained by the over-arching *ultra vires* doctrine, and the associated principle that third parties are deemed to have constructive notice of the constituent instruments of the corporation. The common law in this regard may be altered by statute and has been altered by s 125 of the federal Corporations Law (as amended by the Company Law Review Act 1998). This provision abolishes the *ultra vires* doctrine so far as it relates to companies. It does not, however, apply to statutory corporations.

It remains to consider the special problems which can arise when decisions or representations are made by officials of central government departments. In Australia these departments are seldom established by legislation and they are seldom identified in the legislation they administer. The legislation they administer often does no more than repose functions in a minister (unspecified) and in designated office holders, often with express provision for delegation of authority or appointment of persons as officers to exercise particular powers. Such arrangements are adopted to facilitate the reallocation of responsibilities for administration of particular pieces of legislation between ministers and departments.[74] While changes in the legislative portfolios of ministers and their departments are usually notified in government gazettes, they are made with sufficient frequency that honest mistakes can be made by officials as to the current responsibilities of their department. An official may therefore make representations in relation to the exercise of a statutory power, or actually make a decision, unaware of the fact that responsibility for administering the statute has recently been transferred to another department. In those circumstances can the representation give rise to an estoppel against the Crown on the basis of the ostensible authority of the agent who made the representation?

It was a question of this nature which arose for consideration in *Robertson v Minister of Pensions*.[75] The representation in issue in that case was one emanating from the War

71 Ibid at 443.
72 Ibid.
73 Ibid at 443-453.
74 Provisions in statutes on interpretation of legislation may contain provisions which specify who is vested with statutory power at a particular time: eg, Acts Interpretation Act 1901 (Cth), ss 34A, 34AA and 34AB.
75 [1949] 1 KB 227.

Office advising Robertson that, for pension purposes, a disability from which he suffered as a result of an injury sustained in 1940 had been accepted as attributable to war service. Unknown to him, at the time this advice was given, responsibility for administering that part of the pensions scheme which dealt with disablement claims in respect of war service after 2 September 1939 had been transferred, by royal warrant, from the War Office to the Ministry of Pensions. Relying on the advice, Robertson did not take steps to obtain an independent medical opinion. Later the Ministry of Pensions decided that Robertson's injury was not attributable to war service. By that time X-ray plates relevant to the case had been lost or destroyed.

Denning J held the Minister of Pensions bound by the representation of the War Office. The case, he said, fell "within the principle that if a man gives a promise or assurance which he intends to be binding on him, and to be acted on by the person to whom it is given, once it is acted upon, he is bound by it".[76] On the question of whether the Minister of Pensions was bound by the War Office's ruling, Denning J reasoned as follows:

> In my opinion if a government department in its dealings with a subject takes it upon itself to assume authority upon a matter with which he is concerned, he is entitled to rely upon it having the authority which it assumes. He does not know, and cannot be expected to know, the limits of its authority. The department itself is clearly bound, and as it is but an agent of the Crown, it binds the Crown also; and as the Crown is bound, so are the other departments, for they are also but agents of the Crown. The War Office letter therefore binds the Crown, and through the Crown, it binds the Minister of Pensions.[77]

In *Howell v Falmouth Boat Construction Co*[78] the House of Lords disapproved the statement of principle in the first sentence of the passage from Denning J's judgment quoted above since, literally construed, it would allow public bodies to evade statutory limitations on their powers. The House of Lords did not, however, express a view on whether *Robertson's* case had been correctly decided.

It can be argued that when public powers are invested in the Crown, and there are no clear statutory limitations on who may exercise those powers on the Crown's behalf, the Crown can be bound by representations of persons having ostensible authority to act as its agents, providing, of course, that the representation would be binding on the Crown if made by an agent with actual authority.[79] There is a difficulty in applying the principle of ostensible authority in cases like *Robertson*, for the "holding out" of authority will frequently be by the person assuming authority rather than by someone who can clearly be identified as a competent principal, that is, an agent of the Crown having actual authority.

Arguably the principles of ostensible authority need to be modified to take account of the special problems which arise when the only true principal is the Crown and the legislation from which the Crown derives its powers permits the executive branch of government considerable latitude in choice of departments and officers to administer

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76 Ibid at 231.
77 Ibid at 232.
78 [1951] AC 837 at 845 and 849.
79 *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 92 ALR 93 at 114-115 per Gummow J.

the legislation, and does not expressly require the choices made to be made by particular officers or in any particular manner, or to be publicly notified.

THE DE FACTO OFFICER DOCTRINE

The doctrine of ostensible authority resembles what is known as the de facto officer doctrine but it differs from it in some respects.[80] When applicable, the de facto officer doctrine operates to validate the acts of persons who had no legal authority to do what they did because they were not validly appointed or elected to the relevant public office, or because at the relevant time they were no longer in lawful occupation of the office. To be recognised as a de facto officer a person must have presumed to act in a public office which exists de jure and the person's lack of entitlement to occupy that office must not be readily discoverable by members of the public. Or else the circumstances must be such that the person has the reputation of being the lawful occupant of that office. The only acts which can be validated by operation of the de facto officer doctrine are those which would be valid had they been taken by a de jure officer.

The de facto officer doctrine can apply in cases where there has been, in some sense, a holding-out by the appointing authority that someone has been validly appointed to a particular office whereas in fact there has been no valid appointment. A case in this category might be one in which there has been a formal notification (say in a government gazette) that X has been appointed to a statutory office, but in truth no valid appointment has been made because the appointing authority failed to comply with mandatory procedural requirements, or because X did not possess the prescribed qualifications for appointment, or because X had failed to comply with a condition for assumption of the office—such as swearing the required oath of office.

The de facto officer doctrine might also be invoked in cases where, although there has been no positive representation by the appointing authority that X has been validly appointed to an office, conduct on the part of that authority has signified its acquiescence in X's exercise of powers or functions attached to the particular office. A case in this category might be one in which X had been validly appointed to the particular office for a term of three years, but continued to exercise the powers attached to the office after the expiration of the term, without protest by the appointing authority, or perhaps even on the strength of an assurance that steps necessary to secure re-appointment had been or would be taken.

To date, the de facto officer doctrine has not been applied in cases where the actor has purported to act as the agent or delegate of another. It has been applied only in cases in which the actor has purported to act as the original repository of power, and then only in exercise of powers and functions attached to the particular office. Situations could, however, arise in which the relationship between the de facto officer doctrine, the doctrine of ostensible authority, and principles of delegation may need to be examined. One such situation is where the de facto officer, X, has taken action, in exercise of the powers invested in lawfully appointed occupants of the office, to appoint agents or delegates, and where what is in dispute is the legality or validity of acts of such agent or delegate X has appointed or has held out to be his or her agent or delegate.

80 E Campbell, "De Facto Officers" (1994) 2 *AJ Admin L* 5.

CONCLUSIONS

In *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic*[81] Gummow J wrote at some length on the subject of estoppel in administrative law. In the course of his analysis he referred to the doctrine of ostensible authority and the "indoor management" rule. He noted "the significant element of notions of estoppel in the doctrine of ostensible authority".[82] But, in his opinion

> It remains to be seen whether there develops in this country any exception or qualification to the *ultra vires* doctrine which relies upon principles of ostensible authority and presumptions of regularity drawn from the law of agency in private law and from company law.[83]

What his Honour omitted to mention was that in their application to companies the doctrine of ostensible authority and the presumption of regularity which is reflected in the "indoor management" rule already accommodate the *ultra vires* doctrine. If, for the purposes of the doctrine of ostensible authority and the "indoor management" rule, public bodies are treated as analogous to companies, the *ultra vires* doctrine is in no way compromised.

In the cases of *Lever Finance*, *Western Fish Products* and *Jurkovic* it was assumed that the doctrine of ostensible authority applied to statutory corporations which held out persons as their delegates. In *Lever Finance* and *Jurkovic* also it was held that the "indoor management" rule applied to such corporations. There seems to be little doubt that the presumption of regularity may be invoked when there is dispute about whether someone has been duly appointed as a delegate. While the doctrine of ostensible authority has been developed primarily in the context of the general law of agency, there is no good reason why it cannot be applied in cases where someone has been held out as having delegated authority to exercise a statutory power. Application of the doctrine in those cases cannot, however, validate acts which are *ultra vires* or acts in exercise of powers which are not capable of being delegated.

81 (1990) 92 ALR 93.
82 Ibid at 113.
83 Ibid at 114.