

ADMINISTRATIVE INSTRUCTION NO. 11

(The previous Administrative Instruction No. 11 dated 18 July 1989 is hereby revoked).

**SIGNING OF DEPARTMENTAL CORRESPONDENCE
AND DOCUMENTS**

1. OBJECTIVE

To provide guidance to staff with respect to the signing of Departmental correspondence and documents.

2. LEGISLATIVE BASE

Section 133(2) of the CALM Act.

Carltona Ltd v Commission of Works [1943]2 A11 ER560

Legal Advice – Crown Solicitors Office Ref CSO 00/3544 dated 24 August 2000 (see attachment 1)

3. INSTRUCTION

3.1 External Written Communications

3.1.1 Standard or Approved Letterhead to be Used

All external written communications shall be on standard Departmental letterhead unless approval has been given by the Executive Director for use of an alternative letterhead.

3.1.2 Matters to be included on Correspondence

All external written communications shall include reference to the name of the author, the telephone and fax number of the author, the email address of the author, and a file reference where applicable.

3.1.3 Correspondence to be Signed by the Author

Where correspondence does not have a content that is either political (i.e. relates to a matter of significant current public interest, responds to members of the State or Commonwealth Parliament, or comments on sensitive Government policy issues); strategic (i.e. has the potential to convey a position with significant short or long term implications to CALM); or financial (i.e. commits the Department to a future financial obligation or revenue position) the correspondence should be signed by the author.

3.1.4 Correspondence to be Signed by Executive Director

Unless the Executive Director separately advises, correspondence that is political, strategic or financial in nature, as defined in 3.1.3 is to be signed by the Executive Director.

3.1.5 Other Divisional/Branch Policies or Instructions

Directors and Managers may determine under divisional or branch policies or instructions (which shall be consistent with this instruction) those officers who may or may not sign correspondence, and the categories of correspondence that may be signed. In the absence of any separate divisional/branch instruction staff are to be guided by this instruction.

3.1.6 Signing Style

Officers who sign external correspondence shall use the following signing block:-

First Name (or initials) Surname	eg	Dr John Byrne
TITLE		DIRECTOR OF CORPORATE SERVICES
for the Executive Director		for the Executive Director

3.1.7 Email

Where email is used as a mode of formal communication to convey departmental information the requirements of 3.1.2-3.1.6 shall be applied to the extent that they are relevant to email.

3.2 Other Departmental Documents

Documents that do not fall within the criteria set out in 3.1.3 (i.e. political, strategic or financial) may be delegated by the Executive Director to Directors or other staff. A formal instrument of delegation must be prepared and the delegation must be recorded in the Delegations Register administered by the Office of the Executive Director. The Executive Director may also separately, under other Departmental policies or administrative instructions delegate approval and execution of other documents or contracts to specific officers.

4. CUSTODIAN

Manager Office of the Executive Director.



Dr Wally Cox
EXECUTIVE DIRECTOR

9 October 2000



CROWN SOLICITOR'S OFFICE

Your Ref : MB:SE
 Our Ref : CSO 00/3544
 Enquiries : MR J HASSETT
 Telephone No : 9264 1871

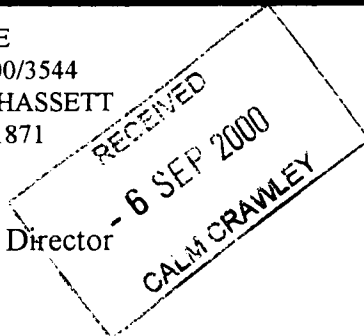
Manager
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ATTENTION: MARK BRABAZON

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21 AUG 2000

SIGNING OF CORRESPONDENCE

I refer to your request for advice dated 8 August 2000 concerning the signing of departmental correspondence and documents.

You have indicated that it is the Executive Director's preference that the signing of documents that do not have strategic, financial or political implications or those that have already been the subject of decisions at Executive Director or Ministerial level, should be delegated if possible.

In particular, you seek advice as to the following:

- (a) Can routine correspondence be signed by any officer of an agency?
- (b) If so, should the officer sign such correspondence in his own name or the title/name of the Executive Director?
- (c) Can documents arising from property dealings or agreements with other agencies be signed by delegates of the Executive Director?

Each of these issues is considered below. However, as a preliminary matter it is useful to set out the general principles relating to delegation of functions with a view to determining how those principles apply to the functions of the Executive Director under the *Conservation and Land Management Act 1984* ("the CALM Act"). These principles have been considered under three headings:

- 1 Delegation and the alter ego principle.
- 2 Relevance of distinction between delegation and the alter ego principle.
- 3 Does the alter ego principle apply to the CALM Act?

1. **Delegation and the alter ego principle**

It is a general principle of administrative law that an official entrusted with a function is generally required to perform that function himself. However, power reposed in an official may be exercised by another person in two cases.

The first is by means of a delegation proper, a process available only with legislative sanction (as is the case with section 133(2) of the CALM Act). A person to whom a power or duty has been delegated in such circumstances exercises the power or performs the duty in his or her own right, albeit as a delegate.

The second process is not a delegation proper but the application of what is often described as the "alter ego" principle or, following the decision in *Carltona Ltd v Commissioner of Works* [1943] 2 All ER 560 in which the English Court of Appeal held that a Minister's power to requisition property could be exercised in the Minister's name by an Assistant Secretary, the "Carltona" principle. The alter ego principle is not, strictly speaking, a delegation at all, because the official to whom powers are given acts as the person in whom the power is statutorily vested and his decision is in law the decision of the latter.

Whether, absent a formal power of delegation, duties or powers vested in a designated person must be carried out or exercised by that person or may under the *alter ego* principle be performed by some other officer, is a question of construction of the applicable statute having regard to the statutory scheme and to the nature of the duty or power and of the person exercising that duty or power. In the ordinary course, day-to-day administrative responsibilities vested statutorily in a Department or organisation head may be carried out by duly authorised officers of the Department or organisation for which he or she is responsible. As was observed by the High Court in *O'Reilly v. State Bank of Victoria Commissioners* (1983) 153 CLR 1, at 11 per Gibbs CJ as regards delegation by Ministers¹, this principle

"rest[s] on the recognition that the functions of a Minister are so multifarious that the business of government could not be carried on if he were required to exercise all his powers personally".

The Court in *O'Reilly* referred with approval to the discussion of the relevant principles, and in particular the discussion of the distinction to be drawn between a delegation of a power and the exercise of that power through employees or agents, in *Re Reference under Ombudsman Act s.11* (1979) 2 ALD 86. I set out below some material extracts from those observations:

"An act done in purported exercise of a statutory power is valid if the act falls within the statutory provision which confers the power. Prima facie an act will not fall within the statute unless it be done by the person in whom the statute reposes the power (whom I shall call "the authority"). Validity is thus dependent upon the identity of the authority and the doer of the act.

¹ The doctrine applies also to officers of Departments or organisations in whom powers are reposed.

Where the power is not delegable, but the authority could not have been expected by the Parliament to have exercised it personally in the multitude of instances when its exercise would be required, it has been held that some classes of acts done by others for and on behalf of the authority should be treated as though they were the acts of the authority. In *Carltona Ltd v. Commissioners of Works* [1943] All ER 560, Lord Greene MR said (at 563): "It cannot be supposed that this regulation meant that, in each case, the Minister in person should direct his mind to the matter. The duties imposed upon Ministers and the powers given to Ministers are normally exercised under the authority of the Ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the Minister. The Minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the Minister would have to answer for that in Parliament. The whole system of departmental organisation and administration is based on the view that Ministers, being responsible to Parliament, will see that important duties are committed to experienced officials."

The extent to which an authority may commit to other officials the performance of duties is primarily dependent upon the nature of the power to be exercised. In *Ex parte Forster: Re University of Sydney* [1963] SR (NSW) 723, the court (Sugerman, Else-Mitchell and Moffitt JJ) at 733 said in reference to the maxim *delegatus non potest delegare* (a delegate cannot delegate):

"As a matter of the construction of the statute conferring the power, the application of the maxim, and its extent, must be considered with due regard to the purpose and objects of the statute, the character of the power which is conferred, the exigencies of the occasions which may arise with respect to its exercise, and other relevant considerations."

Where acts are clothed with the character of acts done by the authority, they have the legal effect of acts done personally by that authority. In *R v. Skinner* [1968] 2 QB 700, Widgery LJ (as he then was) said at 707: "*It is not strictly a matter of delegation; it is that the official acts as the Minister himself and the official's decision is the Minister's decision.*"

It is often difficult to ascertain whether a given act is one which the authority may authorise another to perform on his behalf (see de Smith, *Judicial Review of Administrative Action*, 3rd ed, pp.268-72), and if an act is not one which may be so authorised, it cannot be effective to exercise the statutory power: *Jefferies v. New Zealand Dairy Production and Marketing Board* [1967] 1 AC 551.

2. Relevance of distinction between delegation and alter ego principle

There is a confusing similarity between the exercise of an authority's power by the authorised acts of another, and the exercise by an authority's delegate of the power delegated to him. In either case the act - whether the act of the authorised person or the act of the delegate - is a valid exercise of power. Nonetheless, the sources of validity are different, though it must be said that the term "delegation" has frequently been used to describe either case without distinguishing between them. For some purposes, a distinction must be made.

Where the relevant power is not delegable, the only acts by which the power can be exercised are the acts of the authority and acts which, having regard to the nature of the power, the authority may authorise another to perform on his behalf and which have been so authorised. But where the relevant power is delegable and has been delegated, the delegate may - without further authorisation - act in effective exercise of the power. His acts are not treated as acts vicariously done by the authority. He is not an agent to exercise the authority's power; he may validly exercise the power vested in him.

Where an authority has not delegated his power but he has authorised another to act in exercise of his power, the act is to be done in the name of the authority: *London County Council v. Agricultural Food Products Ltd* [1955] 2 QB 218 per Romer LJ at 224. But where a delegate is exercising the power delegated to him, he may validly exercise that power in his own name: *Owendale Pty Ltd v. Anthony* (1967) 117 CLR 539 at 562, 611 (at 93-94).

3. Does the alter ego principle apply to the CALM Act?

Whether an alter ego may exercise a statutory power is determined by the language, scope and purpose of the legislation. A number of matters have tended to influence courts in determining the existence of an implied power of delegation. Some of these matters are:

- (i) the practicability of the requirement to have the decision-maker actually exercise the power personally;
- (ii) the scope of the discretion involved (ie. the greater the power involves a discretion, the less likely a court will make the inference to permit delegation); and
- (iii) the importance of the decision and interests reflected.

The CALM Act contains a specific power of delegation. Section 133(2) provides that:

"The Executive Director may, either generally or as otherwise provided by the instrument of delegation, by writing signed by him, delegate to a person employed in the Department any of his functions under this Act or the *Wildlife Conservation Act 1950*, other than this power of delegation or a function delegated to him under subsection (1)."

The subsection (1) power of delegation referred to is the power of the Minister to delegate to the Executive Director any of the Minister's functions under the Act or the *Wildlife Conservation Act 1950* other than this power of delegation or the power to make any instrument having legislative effect. Any function of the Executive Director performed by a duly authorised delegate is deemed to be performed by the Executive Director (s.59(3) *Interpretation Act 1984*).

The existence of the broad delegation power in section 133(2) serves, as a matter of construction of the CALM Act, to limit the range of functions which the Executive Director may legitimately leave to others to perform on his behalf. However, I do not read the presence of section 133(2) as meaning that the Executive Director must perform all duties

and exercise all powers which have been vested in him by the CALM Act unless those duties or powers have been specifically delegated under section 133(2). The issue in each case will be whether the nature of the duty or power is such that it was intended by the CALM Act, having regard to factors such as but not only the Executive Director's ability to delegate that, absent delegation, the particular duty or power would be exercised personally by the Executive Director.

It should be appreciated that even where the Executive Director delegates the exercise of a power or the performance of a duty, he is not precluded from exercising or performing the power or duty himself at any time (s.59(1) of the *Interpretation Act 1984*).

Specific questions answered

(a) *Can routine correspondence be signed by any officer of an agency?*

Pursuant to the "alter ego" principle, routine correspondence can be signed by any officer of an agency without a formal instrument of delegation of powers by the Executive Director.

(b) *If so, should the officer sign such correspondence in his own name or the title/name of the Executive Director?*

A signature by a departmental official with his or her own name with the additional words "for the Executive Director" would be satisfactory in the case of routine departmental correspondence. This style accurately reflects the process by which the document emanates from the Department. Such a document would not, however, be "signed by the Executive Director" and in respect of those documents (if any) which must be "signed by the Executive Director" the particular style would be deficient.

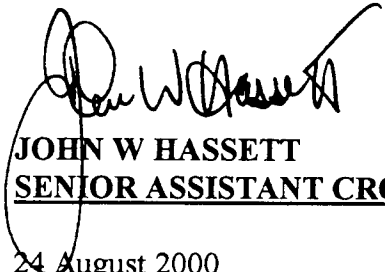
(c) *Can documents arising from property dealings or agreements with other agencies be signed by delegates of the Executive Director?*

Under the CALM Act the Executive Director has a number of specific powers to enter into agreements with private land owners and other agencies (see, for example, ss.16, 34, 34A(g), 34B(1), (2) & (6a)). Some of those powers expressly contemplate that an agent of the Executive Director may enter into an agreement on the Executive Director's behalf. Thus section 34B(2)(a) states that under a timber sharefarming agreement the right to establish, maintain and harvest a crop of trees on land may be acquired by either:

- "(i) the Executive Director;
- (ii) another person through the Executive Director acting as an agent; or
- (iii) the Executive Director and by another person through the Executive Director acting as an agent ." (underlining mine).

By implication, it may be inferred that where the CALM Act does not expressly provide for an agent of the Executive Director to contract on his behalf, the "alter ego" principle should not apply to authorise agents of the Executive Director to enter into agreements on his behalf. However, the Executive Director may formally delegate any of these powers to departmental officers pursuant to the express power of delegation in section 133(2) of the CALM Act. A departmental officer in whom such a delegated power is reposed may enter into agreements (to the extent authorised by the instrument of delegation) in his or her own name.

Should you wish to discuss this matter, please contact the writer.



JOHN W HASSETT
SENIOR ASSISTANT CROWN SOLICITOR

24 August 2000

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1. ^{dx} copy to Exec Director + Directors
2. Return to MB to draft Admin Instructions

56/9