

public may be invited to participate. So wide is the definition of 'interest' that it could comprehend such diverse items as fractions of the beneficial interest under a trust (such as a unit trust, property trust or cash management trust), schemes to raise produce of various kinds (such as forestry and nut schemes), shares in the financing of theatrical ventures, shares in the ownership and management of competing animals (such as racehorses), certain franchising schemes, holiday resort time-sharing arrangements and even contracts of employment which carry a right to share in profits by way of bonuses. If some of these do not involve a mischief calling for regulation under the companies legislation or the securities industry legislation it is open to the executive to use its power to make regulations to grant exemption,<sup>15</sup> or for the National Companies and Securities Commission to grant exemption.<sup>16</sup> It would, perhaps, be an improvement in the legislation if there were inserted more explicit reference to the machinery for obtaining a clearance and some statement of the criteria<sup>17</sup> to be applied by the executive or the National Companies and Securities Commission in determining whether a clearance should be given.

HAROLD FORD\*

## O'REILLY v. COMMISSIONER OF STATE BANK OF VICTORIA<sup>1</sup>

*Administrative Law — Existence of power — Validity of exercise of discretion — Distinction between delegation of power and exercising power through agents — Alter ego principle.*

### INTRODUCTION

Where one person objects to the performance of a function by another, one obvious way in which the former could seek to impugn the action would be to challenge the existence of the latter's power to so act. To resolve a dispute as to the validity of the performer's action, the court will have resort in the first place to the source<sup>2</sup> from which it is alleged that the power of performance is derived. The role of the court is to then decide to whom it is that the source gives the power to act.

Where a statute expressly confers the power of performance of a function to A, and it is not A but B who ostensibly has performed the function, then a complaint that the power has not been validly exercised<sup>3</sup> would *prima facie* be well founded.<sup>4</sup>

<sup>15</sup> Companies Act 1981 (Cth), s. 5(1) and State Companies Codes, s. 5(1). *E.g.* in Victoria on 5 May 1981 regulations were made under the Companies Act 1961. They have the title Companies (Lake Eildon) Regulations 1981 and have the effect of exempting a particular holiday resort time-sharing scheme.

<sup>16</sup> Companies Act 1981 (Cth), s. 176 and State Companies Codes, s. 176.

<sup>17</sup> Compare the legislative statement of criteria to be considered by the National Companies and Securities Commission when deciding whether to exempt a person from compliance with the take-overs legislation or whether to modify the application of that legislation: see Companies (Acquisition of Shares) Act 1980 (Cth), s. 59 and State Companies (Acquisition of Shares) Codes, s. 59.

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<sup>1</sup> (1982) 44 A.L.R. 27.

<sup>2</sup> In the field of administrative law, the source of the power will almost invariably be an enactment — either an Act of Parliament or delegated legislation.

<sup>3</sup> Another way of expressing this complaint is to say that B had no power to act.

<sup>4</sup> *Re Reference under Section 11 of the Ombudsman Act 1976 for an Advisory Opinion* (1979) 2 A.L.J. 86, 93 per Brennan J.

However, it could be argued that B had power to perform the function if he was acting as A's delegate. The court must then decide if the statute allows A to so delegate his power. In the case of minor ministerial functions which involve little in the way of discretion, a delegation of the power of performance of the function is allowed.<sup>5</sup> But with respect to discretionary powers, there may be no delegation unless the statute upon its proper construction permits such a delegation.<sup>6</sup> This canon of construction is often referred to as the maxim *delegatus non potest delegare*.<sup>7</sup>

The existence of the *delegatus* maxim necessitates the consideration of what constitutes a 'delegation'. Professor Willis seems to be of the opinion that where a discretion conferred on authority A is exercised by another B, this in general shows a purported delegation of A's power to B.<sup>8</sup> It is only if

the authority exercises such a substantial degree of control over the actual exercises of the discretion so entrusted [to B] that it can be said to direct its own mind to it, [will there be] in law no 'delegation'.

. . .

The fact that the authority named in the statute has and retains a general control over the activities of the person to whom it has entrusted the exercise of its statutory discretion does not, therefore, save its act of so entrusting to him the discretion from being 'delegation'. . .<sup>9</sup>

From this statement it can be seen that Willis distinguishes between the situation where B acts as a delegate of A, and where B acts for A under A's control. This distinction provides an alternative basis upon which B's exercise of A's power could be considered as valid by the court — namely that B acted not in his own right, but for A in A's name. In this situation the *delegatus* maxim can have no application; and the validity of B's exercise of the power will, according to Willis, be determined solely by reference to the degree of control A exercised over B.

It is possible that there exists a further, distinct, basis upon which the court might consider B's exercise of A's power of discretion as valid where there has been no delegation. A series of cases<sup>10</sup> has established that a public servant may validly exercise a discretionary power<sup>11</sup> entrusted to a minister of the Crown even though the public servant is not considered a delegate of the minister. It is clear from the judgment of Lord Greene M.R. in the leading case<sup>12</sup> that this principle — sometimes referred to as the *alter ego* principle<sup>13</sup> — is not merely an example of the non-delegation situation as defined by Willis. For Lord Greene M.R. was of the opinion that this principle applied *because* the minister could not be expected to 'direct his mind to the matter' requiring the exercise of a discretion.<sup>14</sup> It can be seen that Lord Greene M.R. was of

<sup>5</sup> *Hunt v. Allied Bakeries Ltd (No. 2)* [1959] 1 W.L.R. 50. See Sykes E., Lanham D. and Tracey R., *General Principles of Administrative Law* (1979) 27-8.

<sup>6</sup> *Racecourse Co-operative Sugar Association Ltd v. Attorney-General (Q.)* (1979) 142 C.L.R. 460, 481 *per* Gibbs J.

<sup>7</sup> 'A delegate may not re-delegate.' Note that Gibbs J. in the *Racecourse* case, *supra*, distinguishes this maxim from the proposition that a statute which on its proper construction confers a power on A does not permit the power to be exercised by B.

<sup>8</sup> Willis J., 'Delegatus Non Potest Delegare' (1943) 21 *Canadian Bar Review* 257-8.

<sup>9</sup> *Ibid.* 258.

<sup>10</sup> *Carltona Ltd v. Commissioners of Works* [1943] 2 All E.R. 560; *Metropolitan Borough and Town Clerk of Lewisham v. Roberts* [1949] 2 K.B. 608; *R. v. Skinner* [1968] 2 Q.B. 700; *Re Golden Chemical Products Ltd* [1976] Ch. 300.

<sup>11</sup> This includes administrative (*R. v. Skinner, supra*), quasi-judicial (*Local Government Board v. Arlidge* [1915] A.C. 120), and at least some kind of legislative function: *Lewisham v. Roberts* case, *supra*.

<sup>12</sup> *Carltona* case, *supra*.

<sup>13</sup> See *De Smith's Judicial Review of Administrative Action* (4th ed. 1980) 307; Sykes E., Lanham D. and Tracey R., *op. cit.* 28.

<sup>14</sup> *Carltona* case, *supra* 563.

the opinion that the principle was required due to the practical administrative necessities of the situation; and that it could be justified by the fact that the minister was constitutionally responsible to Parliament, and thus '[i]t is he who must answer before Parliament for anything that his officials have done under his authority . . .'.<sup>15</sup> Later English authorities have extended the *alter ego* principle by applying it to situations where there would appear to be no administrative necessity;<sup>16</sup> but seem unwilling to apply the principle to situations involving an authority not constitutionally responsible to Parliament.<sup>17</sup>

It may in fact be that the *alter ego* principle is really a special case of the non-delegation situation as defined by Willis. For although the minister need not *actually* 'direct his mind to the matter',<sup>18</sup> it is arguable that since 'the official is . . . subject to the fullest control by his superior [the minister] . . .'<sup>19</sup> this is sufficient to satisfy Willis' control test.<sup>20</sup> However, the courts which have applied the *alter ego* principle have not made clear what is the actual *status* of the servant B who may validly exercise authority A's power. It is possible that in situations where the *alter ego* principle is applicable, the courts regard B as being an 'agent' of A.<sup>21</sup> On the other hand, it may be that under the *alter ego* principle B is neither a 'delegate' of A nor an 'agent' of A — and that B's status is *sui generis*.

The *alter ego* principle as laid down in the English cases has been judicially recognised in Australia.<sup>22</sup> However, the general question of the status of B under the *alter ego* principle — and the more specific question of the extent of application of the *alter ego* principle outside situations involving ministers responsible to Parliament — had hitherto not been canvassed by an Australian court. But it was just these very questions which came up for consideration by the High Court in the instant case *O'Reilly v. Commissioner of State Bank of Victoria*.<sup>23</sup>

## THE FACTS

Section 264(1)(b) of the Income Tax Assessment Act 1936 (Cth), (the 'Assessment Act'), states, *inter alia*, that the Commissioner of Taxation (the 'Commissioner') may by notice in writing require any person to attend and give evidence and produce documents before him or any officer authorized by him. Section 8(1) of the Taxation Administration Act 1953 (Cth), (the 'Administration Act'), states that the Commissioner may in relation to any matter delegate to a Deputy Commissioner of Taxation (the 'Deputy Commissioner') or other person all or any of his powers, except this power of delegation. The powers of the Commissioner under section 264(1)(b) of the Assessment Act were delegated by the Commissioner to the Deputy Commissioner in 1979 pursuant to section 8(1) of the Administration Act. In 1980 the Deputy Commissioner purported to authorize Chief Investigation Officers to issue notices under section 264(1)(b) and imprint upon them a facsimile of the Deputy Commissioner's signature.

In 1981 a Chief Investigation Officer, H, issued to the defendants a notice in

<sup>15</sup> *Ibid.*

<sup>16</sup> *R. v. Skinner* [1968] 2 Q.B. 700.

<sup>17</sup> *Nelms v. Roe* [1970] 1 W.L.R. 4. But compare with *Commissioners of Customs and Excise v. Cure and Deeley Ltd* [1962] 1 Q.B. 340, 371.

<sup>18</sup> *Carltona* case, *supra* 563 per Lord Greene M.R.

<sup>19</sup> *De Smith, loc. cit.*

<sup>20</sup> Willis, *op. cit.* 258.

<sup>21</sup> This seems to be the view expressed by Brennan J. in *Re Reference under Ombudsman Act s. 11* case (1979) 2 A.L.J. 86, 93-4. His Honour does not expressly use the term 'agent', but describes the legal status of B in terms consistent with B being an agent of A.

<sup>22</sup> *Racecourse* case (1979) 142 C.L.R. 460, 481 per Gibbs J.; *Re Reference under Ombudsman Act s. 11* case (1979) 2 A.L.J. 86, 93 per Brennan J.

<sup>23</sup> (1982) 44 A.L.J. 27.

purported pursuance of section 264(1)(b) of the Assessment Act, stamped with a facsimile of the Deputy Commissioner's signature. The Deputy Commissioner had no knowledge that H had issued such a notice. The defendants failed to comply with the notice, and contested its validity. They argued that the Deputy Commissioner's purported authorization given to the Chief Investigation Officer in 1980 was an invalid sub-delegation; or, alternatively, that the Deputy Commissioner had no power to authorize anyone else to exercise the section 264 power on his behalf.<sup>24</sup> The plaintiff, the Commissioner, did not dispute that the Deputy Commissioner had no power of sub-delegation.<sup>25</sup> A case was stated to the High Court pursuant to section 18 of the Judiciary Act 1903 (Cth) seeking, *inter alia*, the Court's opinion on the validity of the notice issued by H.

### THE DECISION

The High Court<sup>26</sup> held by a majority (Mason J. dissenting), that the notice issued by H under section 264(1)(b) of the Assessment Act was valid. It was not disputed that the Commissioner had validly delegated his power under section 264 to the Deputy Commissioner; nor was it disputed that the Deputy Commissioner could not further delegate this power to anyone else. Thus, the question that the Court had to decide was whether, apart from any exercise under delegation, the power of issuing a notice under section 264 was one which was only exercisable by the Commissioner personally, or whether it was also exercisable by the Chief Investigation Officer H.

Mason J. approached this question on the assumption that there were two bases upon which it might be possible for H to exercise the Commissioner's power. Firstly, the court may be justified in 'implying an authority in officers of the Department to exercise powers and functions of the Commissioner . . .'.<sup>27</sup> Secondly, 'the Commissioner [might] appoint agents to act on his behalf and in his name'.<sup>28</sup> With respect to this first possibility, Mason J. considered the power of the Commissioner to delegate under section 8(1) of the Administration Act, and noted that it enabled the Commissioner to delegate to any person or persons and not just to a restricted class.<sup>29</sup> Given the width of this provision for delegation, his Honour concluded that

there is neither a need nor a basis for implying an authority in officers of the Department to exercise powers and functions of the Commissioner, at least when the exercise of the relevant power or function involves the exercise of a discretion or the formation of an opinion.<sup>30</sup>

In considering whether the Commissioner could in this case appoint agents to act in his name, Mason J. expressly endorsed Willis' 'degree of retained control test'<sup>31</sup> as the appropriate criterion. His Honour said

[I] do not think that the Commissioner can appoint an agent to act on his behalf in exercising a statutory discretion or a statutory power which involves the formation of an opinion, except perhaps on the footing that the Commissioner retains to himself the substantial exercise of the discretion or the substantial formation of the opinion, or the exercise of substantial control over the exercise of the discretion or

<sup>24</sup> *Ibid.* 29 *per* Gibbs C.J.

<sup>25</sup> Presumably because the final words of s. 8(1) of the Administration Act, stating that the Commissioner could not delegate his power of delegation, indicated on the true construction of the statute that the Deputy Commissioner had no power to sub-delegate.

<sup>26</sup> The Court consisted of Gibbs C.J., Mason, Murphy, Aickin and Wilson JJ. Aickin J. died before judgment was delivered.

<sup>27</sup> (1982) 44 A.L.R. 27, 35.

<sup>28</sup> *Ibid.* 36.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.* 35.

<sup>31</sup> See n. 9 *supra*.

the formation of the opinion, leaving to the agent the ministerial act of communicating the decision or issuing the notice.<sup>32</sup>

Mason J. noted that the power to issue a section 264 notice may have a great impact on the affairs of individual persons, and that its exercise involved a substantial area of discretion. In the present case the Deputy Commissioner was not aware that H had issued the notice. This showed that there was insufficient control by the Deputy Commissioner, such that it could not be said that he directed his own mind to the question. Therefore H could not be regarded as having acted as an agent for the Deputy Commissioner.<sup>33</sup> His Honour considered that the *alter ego* principle could have no application to this case. Firstly, the 'dominant factor' underlying this principle — the doctrine of ministerial responsibility — had no application to the Deputy Commissioner. Secondly, the other factor underlying the principle — the notion of administrative necessity — could not in this case be a relevant factor given the Commissioner's comprehensive power of delegation.<sup>34</sup> Thus, since H was not a delegate of the Deputy Commissioner, and since H could not be regarded as the Deputy Commissioner's agent, H had no power to issue the notice and it was therefore invalid.

Unlike Mason J., the judges in the majority — Gibbs C.J., Murphy J. (who expressly agreed with Gibbs C.J. on the whole issue in question), and Wilson J. — did not advert to the possibility that the court might be able to 'imply an authority' in H to exercise the Commissioner's powers. In the opinion of Gibbs C.J., the question whether H could exercise the power of the Commissioner was to be decided by determining who had to sign the notice. As to this, his Honour said

The question whether s264 requires that the Commissioner (or his delegate) should personally sign the notice in writing is simply one of construction.

. . .

There can be no doubt that as a general proposition at common law a person sufficiently 'signs' a document if it is signed in his name and with his authority by somebody else, but if by statute a document has to be personally signed the duty of signing cannot be delegated to a third person. . . . Exactly the same principles apply when the power is given by statute to a designated person to issue a notice. The notice may be given by the authorised agent of the designated person, whose act will be the act of the principal, unless the statute on its proper construction requires the notice to be issued only by the person who is designated.

. . .

The answer to the question whether the statute requires the power to be exercised personally by the person designated depends on the nature of the power and all the other circumstances of the case. . . .<sup>35</sup>

This long extract shows clearly the approach that Gibbs C.J. regards as appropriate for determining whether a power entrusted to A can be validly exercised by B in the absence of any delegation. *Prima facie*, B can exercise the power as A's agent, unless the statute on its construction requires otherwise.<sup>36</sup>

One factor which Gibbs C.J. felt would incline a court to the view that the power should be exercised personally was that section 264 conferred on the Commissioner

<sup>32</sup> (1982) 44 A.L.R. 27, 36.

<sup>33</sup> Presumably the Deputy Commissioner was able to appoint agents to act on his behalf, in the same way that the Commissioner could appoint agents to act on the Commissioner's behalf.

<sup>34</sup> (1982) 44 A.L.R. 27, 37.

<sup>35</sup> *Ibid.* 29-30.

<sup>36</sup> Compare this with the view Gibbs C.J. expressed in the *Racecourse* case *supra* regarding an authority's ability to *delegate* its power. There his Honour was of the opinion that *prima facie* there could be no delegation unless the statute on its proper construction so permits: (1979) 142 C.L.R. 460, 481.

a power whose exercise would be likely to adversely affect the rights of individuals.<sup>37</sup> Against this, however, was the factor of administrative necessity. His Honour noted that although the *alter ego* principle had been partly based on the constitutional responsibility of ministers, it was also based 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 his powers personally. Ministers are not alone in that position.<sup>38</sup>

Gibbs C.J. found judicial recognition of this fact in *Commissioners of Customs and Excise v. Cure and Deeley Ltd*,<sup>39</sup> and *Ex parte Forster; Re University of Sydney*.<sup>40</sup> In the present situation, the 'myriads of cases' to which section 264 could be applied meant that there would be 'chaos' if this power could be exercised only by the Commissioner or Deputy Commissioner personally.<sup>41</sup> Although the Commissioner had a wide power of delegation under section 8(1) of the Administration Act, his Honour felt that

it would hardly be practicable to make a delegation of that kind, and it seems to me that there exists, as the Parliament must have known, a practical necessity that the powers conferred on the Commissioner by the Act should be exercised by the officers of his Department who are acting as his authorized agents.<sup>42</sup>

In the view of Gibbs C.J., H had been such an authorized agent, and thus his issuing of the notice was valid.

Wilson J. approached the resolution of the issue in question in the following way. There is a clear distinction to be drawn between the delegation of a power and the exercise of that power through servants or agents. There exists a 'necessity in modern government for the shared performance of duties short of delegation'.<sup>43</sup> The question is simply whether the *alter ego* principle applies in *this* particular case. In determining whether the *alter ego* principle was applicable to this situation, his Honour had to consider the two submissions made by the defendants. The first submission was that the *alter ego* principle was limited to the relationships between ministers of the Crown and their departments, which was not the case here. The second submission was that the existence of the wide power of delegation given to the Commissioner by section 8(1) of the Administration Act meant that in this case there was no need to invoke the principle because there was no 'administrative necessity'.

With respect to the first of these submissions, Wilson J. said

They [the defendants] would dismiss the English authorities to which I have referred as dealing with the relationship of Ministers of the Crown to their departments. It is true that the emphasis in the cases is primarily expressed in that way. Yet I find the logic of the principle equally persuasive in its application to the head of any large government department, and, *a fortiori*, to a Deputy Commissioner of Taxation responsible within a State for the implementation of the Commonwealth's laws with respect to taxation. No permanent head of a department in the Public Service is expected to discharge personally all the duties which are performed in his name and for which he is accountable to the responsible Minister.<sup>44</sup>

<sup>37</sup> (1982) 44 A.L.R. 27, 30. His Honour also drew a distinction between a 'power' and a 'right'; and said that 'one may conclude that a power may be exercised through an agent more readily than that a right is conferred upon an agent': *ibid.* 31. In this case s. 264 was concerned with powers.

<sup>38</sup> *Ibid.* 30.

<sup>39</sup> [1962] 1 Q.B. 340, 371.

<sup>40</sup> (1963) 63 S.R. (N.S.W.) 723, 733.

<sup>41</sup> (1982) 44 A.L.R. 27, 30.

<sup>42</sup> *Ibid.* 31. This seems to indicate that Gibbs C.J. regards the person who exercises the authority's power under the *alter ego* principle does so as an 'agent' of the authority.

<sup>43</sup> *Ibid.* 46.

<sup>44</sup> *Ibid.* 46-7.

As to the defendant's second contention, his Honour stated that

The question is whether the existence of the power of delegation requires that the Commissioner or his delegate must direct his mind personally to the exercise of every power or function vested in him. Stated in that way, in my opinion, the question admits only of one answer. The practical administrative necessity to allow a Deputy Commissioner to exercise the powers delegated to him by the actions of officers authorized by him is evident. The opposing argument would oblige the Commissioner himself to delegate his powers, not only to the Deputy Commissioners, but to a host of departmental officers throughout Australia, rendering each of them a Commissioner in his own right. It would be wholly destructive of any semblance of administrative order and efficiency.<sup>45</sup>

Thus, in Wilson J.'s opinion, the *alter ego* principle was applicable to this case, and therefore the Deputy Commissioner could act through an agent without having to consider the matter personally. Since H had been duly authorized by the Deputy Commissioner, the issue by H of the notice under section 264 to the defendants was an action of the Deputy Commissioner, and thus valid.<sup>46</sup>

#### COMMENT

In the instant case just noted, the High Court of Australia considered, for the first time in detail, the possibility of holding as valid the exercise of a discretionary power by one to whom it had not originally been entrusted, and to whom there had been no delegation of that power. The Court made it clear that such an exercise of the power would be valid if the exerciser of the power could be regarded as an authorized agent of the authority to whom the power was entrusted. What is important is the Court's attitude as to when the exerciser of the power will be regarded as such an agent.

The dissentient, Mason J., adopted the approach that the authority can only exercise the power through an agent when it retains such a degree of control over the exercise of the power that it can be said that the authority had directed its own mind to the exercise of the power. Situations in which the authority could act through an agent without considering the matter personally were limited to those relationships between a minister of the Crown and his department involving the concept of administrative necessity.

However, according to the majority judges, the *alter ego* principle will be *prima facie* applicable to the exercise of a discretionary power by one whom is neither the authority nor the authority's delegate. The status of one who exercises the power under the *alter ego* principle is considered to be that of an 'agent'.<sup>47</sup> Thus, in general the authority can act through an agent regardless of the degree of control it retains over the agent. The relevant factor is the degree of 'administrative necessity' for acting through the agent. There is no need for the authority to be constitutionally responsible to Parliament.

It can be seen that an important aspect of the majority's decision is their interpretation of what constitutes this 'administrative necessity'. Mason J. considered that the existence in the authority of a broad power to delegate negates the argument that

<sup>45</sup> *Ibid.* 47.

<sup>46</sup> *Ibid.* 48. It is quite clear that Wilson J. considers that the person who exercises the authority's power under the *alter ego* principle has the status of 'agent'.

<sup>47</sup> It is a moot point the extent to which the majority equate this status of 'agent' under the *alter ego* principle with the status of an agent as defined by the civil law of agency. It is clear that their Honours consider it is 'administrative necessity' which justifies any application of the *alter ego* principle. Yet there is no requirement in the civil law of agency that there be any 'necessity' before one can act through an agent. Thus it would appear that the majority's concept of 'agent' under the *alter ego* principle may not be identical to the civil law of agency concept of 'agent'. If this is the case, then it is submitted that the court should refer to the exerciser of the power by a different term — perhaps 'servant', or more simply '*alter ego*'.

there is an administrative necessity to act through an agent. However, the majority take a much broader view of the concept of administrative necessity. In their opinion, the court must consider the *practicalities* of using the power of delegation. The mere fact that a power of delegation exists is not sufficient to show that the *alter ego* principle has no application.

It is arguable that the decision of the majority to allow the Deputy Commissioner to exercise his power through an agent (H), must be considered in the light of the fact that the Commissioner could have delegated the power to H if he had so desired. The question that naturally arises is, would the majority have held H's exercise of the Commissioner's power valid if there had been no possibility of the Commissioner delegating his power to H (for example if the Administration Act expressly forbade any delegation)? In the writer's opinion, the majority would have come to the same conclusion — for two reasons. Firstly, the majority clearly distinguished between a person acting as a delegate, and a person acting as an agent.<sup>48</sup> Because of this distinction, it could not necessarily be said that because no delegation is allowed, there can be no acting through an agent. Secondly, and in addition to this, where no possibility whatsoever of a delegation exists, the 'administrative necessity' which warrants the use of agents will be even greater.

It is also arguable that, since the case concerned the exercise of a discretionary power that was of an 'administrative' character, then any future application of the *alter ego* principle as interpreted by the majority must be confined to situations involving 'administrative' functions. However, earlier authorities have shown that the principle applied to quasi-judicial functions and also to some kinds of legislative functions.<sup>49</sup> There seems no reason in principle why any factor of ministerial responsibility should be more relevant with respect to these functions than it should be with respect to administrative functions. Thus, as long as the concept of 'administrative necessity' as interpreted by the majority is present, the *alter ego* principle seems applicable to at least those situations in which it was previously applied to when ministerial responsibility was considered the dominant requirement.

Since the majority of the High Court are clearly of the view that the *alter ego* principle can apply outside the situation of ministers responsible to Parliament, it is necessary to consider how far the courts will extend its application. It might be thought that the reference of Gibbs C.J. to what 'Parliament must have known' were the administrative practicalities of the situation,<sup>50</sup> and the reference of Wilson J. to a permanent head of a Public Service department being 'accountable to the responsible Minister',<sup>51</sup> indicates that the majority would confine the application of the *alter ego* principle to the central government sphere. However, in the writer's opinion, there would be no good reason for doing so. It is clear from the majority's judgments that the notion of 'retained control' is not the relevant factor in allowing authorities to act through agents. Thus, to confine the *alter ego* principle to government departments, where the degree of 'control' by Parliament is at best somewhat fictional, would be contrary to the logic of the majority's decision. There should be no fear that a wider application of the *alter ego* principle would encourage undesirable exercises of discretions by authorities through agents which would be beyond the review of the courts. For it will still be discretionary in the court itself to decide if such a perform-

<sup>48</sup> In fact even the dissident, Mason J., was willing to draw this distinction: (1982) 44 A.L.R. 27, 36. See also Brennan J. in *Re Reference under Ombudsman Act s. 11* case (1979) 2 A.L.D. 86, 94. Compare with the view of *De Smith, op. cit.* 301-3.

<sup>49</sup> See n. 12 *supra*.

<sup>50</sup> (1982) 44 A.L.R. 27, 31. Brennan J. in *Re Reference under Ombudsman Act s. 11* case also makes a reference to what is 'expected by the Parliament': (1979) 2 A.L.D. 86, 93.

<sup>51</sup> (1982) 44 A.L.R. 27, 47.

ance through an agent is possible; and there should be no reason why the court could not imply into the ability of the authority to employ an agent, a limitation that the use, and choice, of any agent be a reasonable action.

The courts in the past have often assumed that the maxim *delegatus non potest delegare* lays down a rule of rigid application. The High Court, in recognising a distinction between the delegation of a power and the exercise of that power through servants or agents, has provided a mechanism for avoiding the undesirable consequences such a rigid application might lead to. Legal maxims often owe their existence more to theoretical niceties than to the realities of life. Fortunately, the High Court's interpretation and application of the *alter ego* principle has not suffered a similar fate.

ANDREW CHRISTIE\*

### CLELAND v. THE QUEEN<sup>1</sup>

*Criminal Law — Evidence — Confession — Confession made by accused while unlawfully detained by police officers — Crimes Act 1958 (Vic.) s.460 — Judicial discretion to exclude voluntary confession — Voluntary and not unfair to admit — Application of Bunning v. Cross — Whether a judicial discretion to exclude the confession on grounds of public policy is attracted.*

#### *The facts*

The applicant had been convicted in the Supreme Court of South Australia of shopbreaking, larceny, and armed robbery. The evidence against him was based upon an oral confession allegedly given to police in Melbourne. The applicant and another were arrested in Melbourne shortly after 1.00 p.m. on 9 April 1981, and both were taken to Russell Street Police Station. The applicant reached Russell Street at 2.00 p.m., and remained there until midnight. At about 8.35 p.m. the police began to question the applicant and the procedure continued for most of the evening. It was during this time that the alleged confession took place.

Shortly before midnight both men were charged, but the applicant was not brought before a justice or a magistrate until the next day. By reason of section 460 of the Crimes Act 1958, the applicant's detention after 5.30 p.m. was unlawful, and it was during this detention that the confession was made.

#### *The issue*

The applicant sought special leave to appeal to the High Court on three grounds. It was the first of these grounds which provides the focal point of this discussion.

The submission made on behalf of the applicant with respect to the first ground was that the learned trial judge, in exercising his discretion to exclude a confession voluntarily made, failed to take into account the discretionary principle in *R. v. Lee*,<sup>2</sup> and regarded the relevant principles as being those stated in *R. v. Ireland*<sup>3</sup> and *Bunning v. Cross*.<sup>4</sup> In support of the application for special leave to appeal, it was submitted that there had been a difference of opinion among judges of the Supreme Court of South Australia as to whether the principles of *Bunning v. Cross* had any

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<sup>1</sup> (1982) 43 A.L.R. 619.

<sup>2</sup> (1950) 82 C.L.R. 133.

<sup>3</sup> (1970) 126 C.L.R. 321.

<sup>4</sup> (1978) 141 C.L.R. 54.