

Delegations v Authorisations

There are significant differences in the powers bestowed by a delegation or an authorisation on a decision maker

What is a delegation?

Delegations are a type of formal authority to exercise a power. A person derives the power to delegate from an Act. The powers to be delegated are contingent on the specific powers of the Act to delegate.

Dependent on the delegation power, a person may delegate a power or a duty to an individual, or class of persons. The delegation can be for a specified period of time or until it is revoked, amended or varied. A delegation may also be made subject to conditions or limitations.

A delegation does not automatically cease to have effect if the delegator stops holding office, but the new office holder may expressly revoke or vary delegations made by their predecessor.¹

The delegation and a revocation are formal written instruments that are dated and signed, and identify the source of the relevant power of delegation.

The delegator can still exercise powers that they have delegated as necessary.

The delegate cannot delegate their power of delegation, unless they are specifically permitted to do so.² This means the delegate always retains control over delegation decisions about their powers.

Some other powers are not delegable. There may be an express exception to the delegation power, or as a matter of statutory interpretation, it is evident that the power was intended to be exercised personally. For example, if a function is entrusted to a person with specialist skills or qualifications, then only a person with those skills

or qualifications can be delegated or authorised to perform that function.

What is an authorisation?

Power is vested in a person 'appointed' or 'authorised' by a particular person for the purpose of exercising the power. The power may be either express or implied.

An authorisation generally ceases to have effect when the authoriser ceases to hold office. However, in the case of Mochkin's case,ⁱⁱ the Full Federal Court concluded that, in relation to a statutory authorisation under the *Income Tax Assessment Act 1936* (Cth), authorisations given by one officer to another survived.

An express power of authorisation provides for the appointment of 'authorised officers', or the authorisation of persons, to exercise specified statutory powers. An authorised officer exercises the express power in their own right.

An implied power may be exercised by a person with a statutory power to authorise another person to exercise the statutory power on their behalf.

An implied power can be used whether or not an express power of delegation is available. However, it cannot be implied where parliament intends a power to be exercised personally, and this can be determined by looking at the nature, scope and purpose of the power. For example, a routine administrative power may not require personal exercise, and administrative necessity (volume of decision making and orderly management of departmental business) dictates that such decisions may be made by an authorised person.

Although it is not necessary for the authoriser to execute a written instrument of authorisation, it is good practice to do so, since it identifies to whom the authorisation has been given and the nature and extent of the powers that the authorised person can exercise.

What can a delegate do?

A delegate makes the decision themselves, exercising the delegated power and acting on behalf of the person named in the statute, but is able to consult with others and inform themselves before making a decision.

The delegate's decision must be an exercise of the power delegated to them. The delegate cannot be directed in the exercise of that power by the person who has delegated them the power. Nor can the exercise of the delegation be conditional on certain events occurring or certain actions of the delegate.

The exercise of a delegated power by a delegate is the act of the delegate, but the decision is then taken to be that of the person named in the statute.

What can an authorised person do?

The act of the authorised person is, at law, the act of the person in whom the power is vested.

Any documents they execute under their authorisation should be in the name of the authoriser and signed on their behalf.

Effect on a decision if a person is not authorised or delegated correctly

If a person is not delegated properly to exercise a power, then the exercise of that power will be ineffective. For example, in *R v Ashby*,ⁱⁱⁱ Osborne J found that the delegation was ineffective at law and that as a result an oath was not administered in accordance with legislative requirements under section 51 of the Evidence Act 1958, and nor did the purported delegate have any power to examine a witness on oath.

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i Federal Court of Australia in *Kelly v Watson* (1985) 10 FCR 305, where Neaves J held that there was nothing in the relationship between a delegator and a delegate which required that a delegation cease to have any valid operation upon the delegator ceasing to hold office.

ii S 42A of *Interpretation of Legislation Act 1984 (Vic)* and s 34AB of *Acts Interpretation Act 1901 (Cth)*. (2003) 127 FCR 185.

iii [2010] VSC 14.