



**UNDERSTANDING THE LAW :
ROLE AND RESPONSIBILITIES OF THE GOVERNMENT**

EXERCISING THE LAW





SOURCE OF AUTHORITY

Decisions made without proper legal authority can put your organisation at legal risk.



SOURCE OF AUTHORITY

- Know the scope of your powers :
The source of your power, and the legislation that confers the power.
- Know who can exercise your powers (extended definition? power to delegate? Carltona principle?)



SOURCE OF AUTHORITY

An organisation
(the Ministries and departments
AND statutory corporations)
must act within the boundaries of its law.



POWERS WITHIN ENABLING LAW

- Check whether the relevant legislation under which you are making your decision prescribes a **procedure** to be followed before a decision may be made.
- Even where the relevant legislation does not prescribe any procedure to be followed, **be mindful** of the need to give the affected person adequate **notice** of the case he has to meet and the **opportunity to make representations** before the decision is taken. During the decision-making process, ensure that you do **not conduct** yourself in any way that may give rise to an allegation that you are **biased** against one party or in favour of the other.
- After you have reached a decision, **communicate your decision** to the affected person. You would need to include **reasons** for your decision if there is an express statutory provision requiring you to do so or where there is a right of appeal against your decision. In any event, as a matter of transparency and good administration, you should give reasons for your decision where possible. This may **avoid any misunderstanding** that your decision is irrational.



EXERCISING THE LAW

- Discretion
- Delegation of power
- Carltona principle
- Agency



EXERCISE OF DISCRETION

- Discretion exists when the decision-maker has the power to make a choice about whether to act or not act, to approve or not approve, or to approve with conditions.
- The role of the decision-maker is to make a judgment taking into account all relevant information.



EXERCISE OF DISCRETION

LAWS OF BRUNEI

Public Entertainment

CAP. 181

7

Refusal of licence.

13. (1) The Licensing Officer may in his discretion refuse any application for a licence.

(2) The Licensing Officer shall, if so required by the applicant, furnish him within 14 days of being so required with the grounds of such refusal in writing.

(3) Any applicant aggrieved by the refusal of his application by the Licensing Officer may, within 14 days of the furnishing to him of the grounds of the refusal, appeal in writing to the Minister whose decision shall be final. Where the Minister decides to grant an application for a licence, he may impose such conditions as he thinks fit.



DELEGATION

The entrusting to another person with the authority to act and making legally binding decisions on his behalf.





DELEGATION

General Rule :

One to whom power is delegated cannot himself further delegate that power. In other words, a delegation cannot be sub-delegated.



DELEGATED LEGISLATION

POWER TO MAKE SUBSIDIARY LEGISLATION

Legislative power of legislature delegated to designated authority –
Ministers, statutory authorities and public officers



CONSTITUTION OF BRUNEI DARUSSALAM
(Order under Article 83(3))

DISASTER MANAGEMENT ORDER, 2006

Minister

Regulations.

47. (1) The Minister may, with the approval of His Majesty the Sultan and Yang Di-Pertuan, make regulations which are necessary or expedient for giving effect to and carrying out the provisions of this Order, including the prescription of fees and of any other thing required to be prescribed under this Order, and for the due administration thereof.

(2) Such regulations may include such incidental, consequential and supplementary provisions as the Minister considers necessary or expedient.



Autoriti Monetari Brunei Darussalam

16th. DECEMBER, 2010

CONSTITUTION OF BRUNEI DARUSSALAM (Order made under Article 83(3))

AUTORITI MONETARI BRUNEI DARUSSALAM ORDER, 2010

Regulations.

77. (1) The Authority may, with the approval of His Majesty the Sultan and Yang Di-Pertuan, make such regulations as he considers necessary or expedient for giving effect to and carrying out the provisions of this Order, including the prescription of any fees or other thing required to be or which may be prescribed under this Order, and for the due administration thereof.

(2) Such regulations may include such incidental, consequential and supplementary provisions as the Minister considers necessary or expedient.



Attorney General

Power to extend Act to foreign countries giving reciprocal treatment.

3. (1) The Attorney General, if he is satisfied that substantial reciprocity of treatment will be assured as respects the enforcement in a foreign country of judgment given in the High Court of Brunei Darussalam, may by order published in the *Gazette* direct —

(a) that this Act shall extend to that foreign country; and

(b) that such courts of that foreign country as are specified in the Act shall be deemed superior courts of that country for the purposes of this Act.

(2) Any judgment of a superior court of a foreign country to which this Act extends, other than a judgment of such a court given on appeal from a court which is not a superior court, shall be a judgment to which this Act applies, if —

(a) it is final and conclusive as between the parties thereto; and

(b) there is payable thereunder a sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty; and

(c) it is given after the coming into operation of the order directing that this Act shall extend to that foreign country.

(3) For the purposes of this section, a judgment shall be deemed to be final and conclusive notwithstanding that an appeal may be pending against it, or that it may still be subject to appeal, in the courts of the country of the original court.

(4) The Attorney General may by a subsequent order published in the *Gazette* vary or revoke any order previously made under this section.



SUB-DELEGATION PROHIBITED BY LAW

Interpretation and General Clauses Act (Chapter 4)

- Cannot delegate power to make subsidiary legislation:
Proviso to section 31A(1) and section 32.
- Cannot delegate if there is a provision of law to the contrary (e.g. quasi-judicial power such as the power to consider and determine appeals):
Section 32.



No. S 61

CONSTITUTION OF BRUNEI DARUSSALAM
(Order made under Article 83(3))

TOWN AND COUNTRY PLANNING ORDER, 2015

Appeal to Minister against enforcement notice

37. (1) Any person aggrieved by any requirement of an enforcement notice may, at any time before the notice takes effect, appeal to the Minister in such form and manner as the Planning Authority may determine.

(2) Where an appeal is made under this section, the Minister may —

(a) correct any defect, error or misdescription in the enforcement notice or vary its requirements;

(b) extend, subject to such conditions as he thinks fit, the period specified in the enforcement notice within which any requirement therein is to be complied;

(c) dismiss the appeal;

(d) allow the appeal unconditionally; or

(e) allow the appeal in whole or in part, and subject to such conditions as he thinks fit,



and the Minister may give such directions as he thinks fit to give effect to his decision on the appeal.

{3} Without prejudice to the general power of the Minister to impose conditions or give directions under subsection {2}, the Minister may require that such security as he may think necessary be furnished to the Planning Authority and specify the circumstances in which the security may be forfeited by the Planning Authority.

{4} The decision of the Minister under subsections {2} and {3} shall be final.

{5} When an appeal is made to the Minister under this section, the enforcement notice shall, unless the Minister at any time otherwise directs, be of no effect pending the determination or withdrawal of the appeal.

{6} Except where the Minister decides to allow an appeal unconditionally, the enforcement notice shall take effect from the date the appellant is given notice of the decision of the Minister.

{7} Any forfeiture by the Planning Authority of any security furnished under this section shall not prejudice the institution of proceedings against any person for any offence under this Order.



DEPARTURE FROM SUB-DELEGATION RULE

A delegate under a statutory delegation of authority can **ONLY** further delegate that power by an **express statutory power to delegate**.

Power of delegation is **NOT** conferred by inference
but by **specific** power of delegation



HOW IS AUTHORITY DELEGATED?

Delegation is :

- given from a legal provision as the source of power;
- to an individual or body by the source of power;
- to make enforceable decisions that commit or incur liabilities; and
- for which the specific individual or body will be held accountable.



EXPRESSLY PROVIDED BY LEGISLATION

Delegation of power of Minister

“31A. (1) Where in any written law a Minister is empowered to exercise any power or perform any duty, he may, in the absence of any provision of law to the contrary, with the approval of His Majesty the Sultan and Yang Di-Pertuan and by notification published in the Gazette, depute any person by name or the person for the time being discharging the duties of an office designated by him to exercise such powers or perform such duties on behalf of the Minister subject to such conditions, exceptions and qualifications as His Majesty the Sultan and Yang Di-Pertuan may determine, and thereupon or from the date specified by His Majesty the Sultan and Yang Di-Pertuan, the person so deputed shall have and exercise such powers and perform such duties: ”

Interpretation and General Clauses Act (Chapter 4)



EXPRESSLY PROVIDED BY LEGISLATION

The requirement of s 31A (1):

- must specify to whom and what powers to be delegated
- His Majesty the Sultan and Yang Di-Pertuan's approval
- *Gazette* notification



EXPRESSLY PROVIDED BY LEGISLATION

PROVIDING SAME POWERS CONFERRED ON ASSISTANTS/DEPUTIES

Section 3(6) of the Customs Order, 2006 :

“Deputy Controllers, Assistant Controllers, Senior Superintendents, Superintendents, Deputy Superintendents, and Assistant Superintendents of Customs and Excise shall be subject to the general direction and supervision of the Controller and, subject thereto, **shall have and exercise all or any of the powers conferred on the Controller** by or under this Order, other than those conferred by subsection (5) of section 11 and by section 23.”



EXPRESSLY PROVIDED BY LEGISLATION

SPECIFIC POWER TO DELEGATE IN THE LEGISLATION

Section 3(3) of Fisheries Order, 2009:

“The **Director may delegate** the exercise of any power or the performance of any duty conferred or imposed on him by this Order **to the Deputy Director** of Fisheries or to such other person as he may think fit.”



CONSTITUTION OF BRUNEI DARUSSALAM

{Order under Article 83(3)}

DISASTER MANAGEMENT ORDER, 2006

National Disaster Management Centre.

EXPRESSLY PROVIDED BY LEGISLATION

16. (1) There is hereby established a Centre known as the National Disaster Management Centre to exercise or perform the following functions —

(a) to help the Council exercise or perform its functions;

(b) to advise and make recommendations to the Council about matters relating to disaster management referred by the Council to the Centre;

(c) to exercise or perform such other functions as the Council may determine, being incidental to a function mentioned in paragraph (a) or (b).

{2} The Centre shall consist of a Director and such number of Deputy Directors and such other persons to be appointed by the Minister, with the approval of His Majesty the Sultan and Yang Di-Pertuan, notice of whose appointment shall be published in the *Gazette*.

{3} The Director may delegate the exercise of any power or the performance of any duty conferred or imposed on him by this Order to a Deputy Director of the Centre or to such other members of the Centre, appointed under subsection {2}, as he may think fit.

{4} A delegation under subsection {3} may be made subject to such conditions as may be determined by the Director in the instrument of delegation.

{5} The power of delegation under subsection {3} shall only be exercised by the Director personally.



EXPRESSLY PROVIDED BY LEGISLATION

A delegation under this section may authorise the delegate to subdelegate all or any of the powers or duties delegated to him.



EXPRESSLY PROVIDED BY LEGISLATION

SPECIFIC POWER TO CONFER A DISCRETION

Section 81 (4) Maritime and Ports Authority of
Brunei Darussalam Order, 2017



CONSTITUTION OF BRUNEI DARUSSALAM
{Order made under Article 83(3)}

PART 12

LICENSING OF MARINE AND PORT SERVICES AND FACILITIES

Public licences authorising provision of marine or port services and facilities

81. (4) Without prejudice to the generality of subsection [3], a public licence may be granted either to any person, class of persons or a particular person, and may include conditions requiring the public licensee —

(a) to enter into agreements or arrangements with any other person, class of persons or another public licensee for —

(i) the interconnection with, access to and use of any installation of the licensee (wherever situated and whether or not used for the purpose of carrying on the activities authorised by the licence); and

(ii) such other purpose as may be specified in the licence,

and on such conditions as may be agreed to by the licensee and such other persons or, in default of agreement, as may be determined by the Authority;

(b) to prepare itself to deal with any public emergency;

(c) to pay to the Authority a fee on the grant of the licence or pay to the Authority periodic fees during the currency of the licence or both, of such amount as may be determined by or under the licence;

(d) to comply with any direction given by the Authority as to such matters as are specified in the licence or are of a description so specified; and

(e) to do or not to do such things as are specified in the licence or are of a description so specified.



EXPRESSLY PROVIDED BY LEGISLATION

Signing of documents

17B. Where in any written law any document is required to be under the hand of or countersigned by a Minister in exercise of any powers conferred thereby, it shall be sufficient for such document to be under the hand of or signed or countersigned by the Permanent Secretary to the Ministry for which the Minister is responsible or by any public officer duly authorised in writing by the Minister.



AGENCY : CARLTONA PRINCIPLE (AUTHORISATION)

The ability to act through an agent to perform functions conferred under statutory authority.



It provides practical flexibility while the ultimate accountability stays with the person conferred with legal authority.





AGENCY : CARLTONA PRINCIPLE (AUTHORISATION)

- The courts have recognised a Minister or head of department or Authority **on whom a statutory power or duty has been vested** cannot reasonably be expected to act personally.
- So the courts have developed a legal mechanism to allow the person conferred with statutory functions to **confer a right** on a **subordinate** to exercise **specific powers** under the enabling law.



AGENCY : CARLTONA PRINCIPLE (AUTHORISATION)

Lord Greene in the *Carltona* case said :

“The duties imposed upon ministers and the powers given to ministers are normally exercised upon 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.”



AGENCY : CARLTONA PRINCIPLE (AUTHORISATION)

- **Alter ego principle, NOT a delegation**
- Power exercised by subordinate officers in the name of and under the authority of the principal as his agent and remains and subject to his fullest control.
- Minister remains responsible for the decision. The act of the public officers is in law that of the authority for whom he (as agent) is acting.



AGENCY : CARLTONA PRINCIPLE (AUTHORISATION)

Power to disconnect supply of electrical energy

5. (1) Where the Director is of the opinion that immediate action is necessary on the occurrence of any emergency, in the interests of public safety ..., the Director may forthwith discontinue the supply of electrical energy to any person.

Section 5 of the Electricity Act (Chapter 71)



2nd. JUNE, 2009

No. S 25

CONSTITUTION OF BRUNEI DARUSSALAM
{Order made under Article 83(3)}

FISHERIES ORDER, 2009

PART III

GENERAL PROVISIONS IN RESPECT OF LICENCES

Applications for and renewal of licence.

6. {3} The Director shall, on being satisfied that the applicant has fulfilled with the requirements referred to in subsection (1) and has paid the prescribed fee and any deposit that the Director may require, grant the application and cause the licence to be issued to the applicant.



Traffic signs.

38. (1) The Director or any person authorised by him may cause or permit traffic signs to be placed on or near any road.

[S 16/88]

(2) Traffic signs shall be of such size, colour and type as may be prescribed, and after such signs have been prescribed no traffic sign shall be placed on or near any road except under and in accordance with the provisions of this section:

Provided that any traffic sign erected or displayed before such signs had been prescribed shall, if approved (whether before or after the first day of December 1957) by the Director or any person authorised by him, be deemed for the purposes of section 39(1) to be of the prescribed size, colour and type and to have been lawfully placed on or near any road:

[S 16/88]

Provided further that any traffic sign so erected or displayed shall be deemed to have been approved by the Director or some person authorised by him unless the contrary is proved.

[S 16/88]



AGENCY : CARLTONA PRINCIPLE (AUTHORISATION)

The application of the Carltona principle can be applied by a **provision in the written law** to the effect that a **statutory function may be performed by a member of the staff of the person on whom the function is conferred** who is **authorised** either generally or specially by him.

GC Thornton



AGENCY : CARLTONA PRINCIPLE (AUTHORISATION)

Anything authorised or required by or under this Act or any other enactment to be done by the Director, other than the making of a statutory instrument, may be done by any member of the staff of the Director who is authorised generally or specially in that behalf in writing by the Director.

Fair Trading Act 1973 [UK] Schedule 1, paragraph 7



AGENCY : CARLTONA PRINCIPLE (AUTHORISATION)

Composition of offences

91. (1) The Commissioner of Police or any police officer authorised by him in writing in that behalf, or the Director or any person authorised by him in writing in that behalf, may in his discretion, compound any such offences against the Act or against any rules or regulations made thereunder ...

Road Traffic Act , Chapter 68



5th. SEPTEMBER, 2009

No. S 37

CONSTITUTION OF BRUNEI DARUSSALAM

{Order made under Article 83(3)}

EMPLOYMENT ORDER, 2009

Interpretation.

2. In this Order, unless the context otherwise require —

"apprentice" means any person who has contracted to serve an employer and to learn and to be taught any business, trade, manufacture, undertaking, calling or employment in which employees are employed;

"Assistant Commissioner" means an Assistant Commissioner of Labour appointed under section 3(1);

"authorised officer" means any person appointed as such under section 5;



Appointment of authorised officers.

5. The Minister may, with the approval of His Majesty the Sultan and Yang Di-Pertuan, appoint such number of authorised officers to carry into effect any specific provisions of this Order or of any regulations made thereunder.



PART XV

INSPECTION

Powers of entry, inspection and enquiry.

118. The Commissioner and any authorised officer may —

(a) enter and inspect, without previous notice at any hour of the day or night —

(i) any place where he has reasonable cause to believe that any employee resides or is employed; or

(ii) any building occupied or used for any purpose connected with that employment; and

(b) make any enquiry which he considers necessary in relation to any matter within the provisions of this Order.



AGENCY : CARLTONA PRINCIPLE (AUTHORISATION)

LIMITS :

- Enabling legislation expressly or impliedly requires him to act personally.
- An authorisation should not be made where –
 - significant rights of an individual would be affected; or
 - the instrument of authorisation clearly anticipates a personal decision from the delegate.



EVIDENCE OF DELEGATION AND AUTHORISATION

It is advisable for reasons of certainty and to provide information of the delegation and authorisation that the delegation and authorisation be **in writing** or even published in the **Gazette**.



AGENCY : APPOINTMENT BY LAW

Agent is a third party (not part of Government) but acts for the Government in certain matters.

Statutory boards can be vested with statutory function of acting as the Government's agent for certain purposes.



DELEGATION VS AGENCY

Delegation	Agency
B exercises power in B's own name as if B had that power	B acts on A's behalf
B is directly responsible for his own acts	A is directly responsible for B's acts
Within Government	Third party (not part of Government)



THANK YOU