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Department of Local Government,
Sport and Cultural Industries

Dear Sirs,

Department of Local Government Review

I wish to focus on a set of provisions within the *Local Government Act 1995* (**'Local Government Act'**) that possibly no other person will make submissions in respect of.

As a Litigator with significant experience in prosecuting matters for the Local Government I am concerned that the Local Government Act itself is not out of step with other legislation.

Firstly, the Local Government Act 1995 was the significant advance in the *Local Government (Miscellaneous Provisions) Act 1960* (**'1960 Act'**) in providing for Governance arrangements to be vastly improved.

However, it possibly could be best described as a half-way house for which modern Government is no longer reflected.

In essence, the 1960 Act provided that all management of the Local Government needed to be through (**'the Council'**). The 1995 legislation provides that the role of the Council is to govern however, the process by which the officers of the Local Government are to carry out their management function depends on the delegations.

Whereas, on the one hand this appears to be an effective management tool and the Council is able to call in any power that it has delegated, to be able to carry out that power, on the other hand, at least in prosecution matters, it proves to be a very cumbersome approach to govern, and places an unnecessary burden on Local Government.

Part 9 of the Local Government Act was intended to provide a streamlined and clearer approach to demonstrate the requirements for the various delegations. In my view, the requirement for express delegations is redundant and no longer something that ought to be expressly required, or required to be proven.

The provisions of the Local Government Act give rise to an unwieldy process of delegations which require proof in the court to demonstrate that a particular person is authorised for and on behalf of a Local Government to issue various notices.

Firstly, authorisations and delegations can be cumbersome and require the person who has been delegated to prove that they have been relevantly appointed pursuant to the Section 9.10 of the Local Government Act.

It ought simply to be that the person employed within a particular capacity thereby has the authority from the Local Government by virtue of that position.

In the case of *Columbia Holdings Pty Ltd v City of Armadale* [2012] WASC 422 it was argued that a Bushfire Notice needed to be signed by the Chief Executive Officer. Sensibly the learned Judge, Justice Pritchard, found that this was not required under the express terms of the *Bushfires Act 1954* itself. She found that for pragmatic reasons it would not be reasonable to assume that a Chief Executive Officer would busy themselves with satisfying themselves that a Bushfires Act Notice needed to be issued.

The problem is that this area is unclear and therefore leaves the question of delegation and authority open to challenge. It is for that reason that I would recommend that there are provisions within the Local Government Act that make it clear that a person who is acting within their employment as an officer of the Local Government is sufficiently delegated and authorised by virtue of that position to issue notices, letters and documents for and on behalf of the Local Government. This will overcome the somewhat absurd position where proof of the delegation is required. Similar to what is included in the Corporations Act, that is that persons with extensible authority are able to bind the Corporation.

For that reason, Section 9.10 of the Local Government Act is entirely redundant and ought to be replaced by a more pragmatic provision that simply sets out that a person employed by a Local Government is thereby authorised to issue notices for and on behalf of a Local Government.

Section 9.11 needs to be considered in light of the *Criminal Investigation Act 2006* in respect of the demand for names and addresses and ought to be amended so that Local Government officers have the certainty of protection under the *Surveillances Devices Act 2004* by being a relevant law enforcement officer for the purposes of that Act.

Section 9.24 of the Local Government Act is not required as Section 20 of the Criminal Procedure Act now provides who can command prosecutions. Therefore a provision such as 9.24 is no longer required.

Section 9.29 is a provision which expressly provides that a CEO or an employee of the Local Government may act for the Local Government in legal proceedings. This is at odds with the way that other corporations are required to be represented through solicitors.

The *Corporations Act 2001* (Cth) and *Supreme Court Rules 1971* (WA) expressly provide that a corporation such as a company need to be represented through solicitors. This makes good sense to avoid any conflict of interest in circumstances and ensure that the corporation is properly represented.

Part 9, Subdivision 2, Subdivision 4 has been largely replaced or entirely replaced by Section 79C of the *Evidence Act 1906*. Section 79C enables documents to be tendered in proof without the requirement proving the original if it is a business record.

The Local Government Act provides a cumbersome method by which documentary evidence needs to be proven including signature of a person authorised to sign that it is a document of the Local Government. Whereas, in 1995 this may have been an advance on the Evidence Act as it then stood since 1995 Section 79C of the Evidence Act has a provision relevant to Business Records.

For that reason, it is my view that the method of proving documents, including matters such as Local Laws and records of the Local Government, ought to simply rely on Section 79C of the Evidence Act. This will overcome problems such as trying to prove Local Laws or tendering the Government Gazette matters which are expressly provided for within the *Interpretation Act 1964* or handing up minutes of a meeting which might not be certified as required by Section 9.371.

Section 9.38 requires that documentary evidence is to be proven by either being signed by the Mayor, Chief Officer or person authorised to sign such documents.

Section 9.47 appears to me to be entirely redundant as in any event the onus is always on the party endeavoring to prove a defence of the nature that might be suggested within that provision.

I am happy to discuss these redundant and cumbersome provisions in more detail if required.

Yours sincerely,

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[2012] WASC 422

JURISDICTION	:	SUPREME COURT OF WESTERN AUSTRALIA IN CRIMINAL
CITATION	:	COLUMBIA HOLDINGS PTY LTD -v- CITY OF ARMADALE [2012] WASC 422
CORAM	:	PRITCHARD J
HEARD	:	1 AUGUST 2012
DELIVERED	:	19 NOVEMBER 2012
FILE NO/S	:	SJA 1100 of 2011
BETWEEN	:	COLUMBIA HOLDINGS PTY LTD Appellant AND CITY OF ARMADALE Respondent

ON APPEAL FROM:

Jurisdiction	:	MAGISTRATES COURT OF WESTERN AUSTRALIA
Coram	:	MAGISTRATE G MIGNACCA-RANDAZZO
File No	:	AR 5132 of 2010, AR 5133 of 2010, AR 5134 of 2010

Catchwords:

Criminal law - Appeal against conviction - *Bushfires Act 1954* (WA), s 33(1) - Whether magistrate erred in holding that a person other than the council of a local government could issue a notice under s 33(1)

Statutory construction - Proper construction of *Bushfires Act 1954* (WA), s 33

Agency - Public law concept of agency - Application to statutory corporations

Local government - Whether the principle in ***Carltona Ltd v Commissioners of Works*** applies to local governments

Legislation:

Bushfires Act 1954 (WA)
Fire and Emergency Services Legislation Amendment Act 2001 (WA)
Interpretation Act 1984 (WA)
Local Government Act 1960 (WA)
Local Government Act 1995 (WA)
Local Government (Consequential Amendments) Act 1996 (WA)
Municipal Corporations Act 1906 (WA)
Planning and Development Act 2005 (WA)
Road Districts Act 1919 (WA)

Result:

Appeal dismissed

Category: B

Representation:

Counsel:

Appellant	:	Mr P J Urquhart
Respondent	:	Mr P G McGowan & Mr T Houweling

Solicitors:

Appellant	:	Hotchkin Hanly
Respondent	:	Cornerstone Legal

Case(s) referred to in judgment(s):

AB v Western Australia [2011] HCA 42
Anthony Horden and Sons Ltd v The Amalgamated Clothing and Allied Trades Union of Australia (1932) 47 CLR 1

Carltona Ltd v Commissioners of Works [1943] 2 All ER 560
Centro Properties Limited v Hurstville City Council [2004] NSWLEC 401
CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384
Commissioner for Railways (NSW) v Agalianos (1955) 92 CLR 390
Gee v Council of the City of Sydney and Ors [2004] NSWLEC 581
Gunning Sustainable Development Association Inc v Upper Lachlan Council and Another [2005] NSWLEC 23
Hill v Woollahra Municipal Council [2003] NSWCA 106
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24
O'Reilly v Commissioner of State Bank of Victoria (1982) 44 ALR 27
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355
Refrigerated Express Lines (Australasia) Pty Ltd v Australian Meat and Live-stock Corp (1980) 29 ALR 333
Salia Property Pty Ltd v Commissioner of Highways (2012) 112 SASR 384
Samuels v Western Australia (2005) 30 WAR 473
Saraswati v The Queen (1991) 172 CLR 1

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PRITCHARD J:

Introduction

1 Columbia Holdings Pty Ltd (Columbia) was convicted in the Magistrates Court at Armadale of three offences under s 33(3) of the *Bushfires Act 1954* (WA) (the BF Act). Each charge alleged that Columbia was the owner or occupier of land situated within the City of Armadale (the City) and failed to comply with the requirements of a notice issued to it in accordance with s 33(1) of the BF Act (the Notices).

2 Subsection 33(1) of the BF Act (the terms of which are reproduced in full below) permits a local government to issue a notice to the owner or occupier of land requiring that person to act with respect to anything on that land which is likely to be conducive to the outbreak or spread of a bushfire. Failure to comply with the requirements of a notice in the specified time constitutes an offence.[1]

3 Columbia was sentenced to a global penalty of $10,000 for the three offences and was ordered to pay compensation and costs.

4 Columbia now appeals against its conviction for each of the offences. Its application for leave to appeal was referred for hearing in conjunction with the appeal itself.

5 The sole ground of appeal relied on in respect of each of the convictions concerns whether the Notices were issued in compliance with the BF Act. It was not in contention, and the learned magistrate accepted, that the City was a local government for the purposes of s 33(1) of the BF Act. However, Columbia contends that

> The learned magistrate erred in law in finding that:
>
> (a) the Notices were notices given by a local government for the purposes of section 33 of the BF Act;
>
> (b) the issuing of the Notices to Columbia was, for the purposes of section 33 of the Act, a function capable of being performed by Mr N.J. Hall (the person who signed the Notices); and
>
> (c) Mr Hall was authorised by section 48(4) of the Act to send the Notices to Columbia.

[1] Section 33(3) of the BF Act.

6 The essence of the ground of appeal was that only the council of the City (the Council) was permitted to exercise the functions of the City under s 33(1)(b) of the *Local Government Act 1995* (WA) (the LG Act).

7 These reasons for decision deal with the following matters:

(1) The background facts.

(2) The learned magistrate's findings in respect of the Notices.

(3) The proper construction of s 33(1) of the BF Act.

(4) An alternative argument advanced on behalf of the City.

1. The background facts

8 Columbia admitted that at 16 November 2009 it was the owner of each lot of land (the Lots) referred to in the charges, and that each lot of land was within the district of the City. Columbia also admitted that it had received a notice in respect of each of the Lots.

9 The evidence was that the Notices came to be issued following an inspection of the Lots conducted by a Mr Hall, whom the learned magistrate accepted was an employee of the City working as a ranger. Mr Hall was also a bushfire control officer (BCO) for the City pursuant to s 38 of the BF Act and an experienced volunteer firefighter. The learned magistrate described as uncontentious the fact that at the relevant time Mr Hall was, by virtue of his duties, within the class of persons apt to be described as a 'duly authorised officer' of the City.

10 As part of his duties, Mr Hall inspected the Lots in August 2009 for the purpose of assessing the Lots for fire risk. Taking into account the nature and extent of the vegetation present, the topography and the surrounds, Mr Hall's opinion was that the presence of vegetation on the Lots gave rise to an extreme fire risk in uncleared areas, and that the nature and density of the vegetation would increase the rate of spread of a bushfire and make it more difficult to fight and control. The learned magistrate accepted Mr Hall's opinion evidence that the vegetation posed a real potential fire risk that could endanger property and persons in the event of fire.

11 Having formed that opinion, Mr Hall then issued the Notices to Columbia. He had not been instructed to do so by the Council, or by the Chief Executive Officer (CEO) for the City. The learned magistrate found that Mr Hall prepared and signed the Notices, and that he sent or

caused them to be sent to Columbia. The learned magistrate found that the Council had not made any decision to give Columbia the Notices, whether with or without any advice from Mr Hall.

12 Each of the Notices was dated 29 October 2009. They were in identical terms (other than in respect of the land to which they pertained) and required Columbia to carry out certain works before 15 November 2009, namely the reduction of the bushfire fuel loading on each of the Lots to an amount of two tonnes per hectare or less, by the removal of parrot bush and other small shrubbery.

13 No specific issue appears to have been taken at the trial, and none was taken at the hearing of the appeal, with the form of the Notices. I note that although the Notices were printed on letterhead of the City, they were signed by 'NJ Hall, Fire Control Officer' (rather than by Mr Hall for and on behalf of the City). Each of the Notices was sent to Columbia under cover of a letter dated 29 October 2009, also on letterhead of the City, which was signed by Mr Brian L Watkins, Manager Ranger and Emergency Services.

14 The Notices themselves do not make reference to s 33 of the BF Act at all. The covering letter which accompanied each of the Notices, however, made clear that it was s 33 of the BF Act which permitted notice of a requirement for remedial action to be given to an owner of property. (Curiously, however, the covering letter referred to s 33 of the BF Act as allowing the Council (rather than the City) to serve notice of the remedial action.)

15 On 16 November 2009, Mr Hall inspected the Lots and his evidence was that no work had been done to remove the vegetation from the Lots in accordance with the Notices. A contractor was subsequently engaged by the City to carry out the work specified in the Notices.

16 The learned magistrate found that it had been proved beyond reasonable doubt that Columbia failed to comply with the Notices in that the bushfire fuel loading on the Lots was not reduced and the parrot bush and shrubbery was not removed by 15 November 2009 as the Notices required.

17 The learned magistrate therefore found each of the charges proved beyond reasonable doubt.

2. The learned magistrate's findings in respect of the Notices

18 It is convenient at this point to note the terms of s 33(1) and s 48 of the BF Act, which were the focus of submissions at the trial and on the appeal.

19 Section 33 of the BF Act provides:

> (1) Subject to subsection (2) a local government at any time, and from time to time, may, and if so required by the Minister shall, as a measure for preventing the outbreak of a bushfire, or for preventing the spread or extension of a bushfire which may occur, give notice in writing to an owner or occupier of land situate within the district of the local government or shall give notice to all owners or occupiers of land in its district by publishing a notice in the *Government Gazette* and in a newspaper circulating in the area requiring him or them as the case may be within a time specified in the notice to do or to commence to do at a time so specified all or any of the following things -
>
> (a) to plough, cultivate, scarify, burn or otherwise clear upon the land fire-breaks in such manner, at such places, of such dimensions, and to such number, and whether in parallel or otherwise, as the local government may and is hereby empowered to determine and as are specified in the notice, and thereafter to maintain the fire-breaks clear of inflammable matter;
>
> (b) to act as and when specified in the notice with respect to anything which is upon the land, and which in the opinion of the local government or its duly authorised officer, is or is likely to be conducive to the outbreak of a bushfire or the spread or extension of a bushfire,
>
> and the notice may require the owner or occupier to do so -
>
> (c) as a separate operation, or in co-ordination with any other person, carrying out a similar operation on adjoining or neighbouring land; and
>
> (d) in any event, to the satisfaction of either the local government or its duly authorised officer, according to which of them is specified in the notice.

20 A failure by an owner or occupier to comply with a notice constitutes an offence which is subject to a penalty of $5000.

21 Section 48 of the BF Act provides:

> (1) A local government may, in writing, delegate to its chief executive officer the performance of any of its functions under this Act.
>
> (2) Performance by the chief executive officer of a local government of a function delegated under subsection (1) -
>
> (a) is taken to be in accordance with the terms of a delegation under this section, unless the contrary is shown; and
>
> (b) is to be treated as performance by the local government.
>
> (3) A delegation under this section does not include the power to subdelegate.
>
> (4) Nothing in this section is to be read as limiting the ability of a local government to act through its council, members of staff or agents in the normal course of business.

22 The primary argument advanced at the trial in defence of the charges was that s 33(1) of the BF Act required that the Notices be issued by the Council, and not by Mr Hall, because it was the Council which was responsible for the performance of the local government's functions. It was also submitted that it was possible for the City to delegate functions to the Chief Executive Officer pursuant to s 48(1) of the BF Act, but that there was no evidence that that had occurred in this case, as the learned magistrate so found. At the trial, the prosecutor submitted that the City gave the Notices to Columbia in that it acted through Mr Hall who gave the Notices to Columbia in the ordinary course of business. The prosecutor also relied on s 48(4) of the BF Act, as not limiting the ability of a local government to act through members of staff or agents in the normal course of its business.

23 The learned magistrate held that:[2]

> ... having regard to the [sic] s 48 of the [BF Act] I accept that a local government can act through its staff and agents in the normal course of business. I accept that Mr Hall in preparing and sending the notices to the accused was discharging a function of the City of Armadale in the normal course of business. Those facts are proved to my satisfaction beyond reasonable doubt and as a matter of law [the Notices] were given validly. There was no delegation and none necessary. That is not to say that the council of the City of Armadale could not have determined themselves upon appropriate advice and opinion (whether the councillors formed the opinion themselves or one was provided to them by a duly authorised officer in terms of subsection 33(1)(b) of the [BF Act]) to cause the issue

[2] ***City of Armadale v Columbia Holdings Pty Ltd***, Magistrates Court, 16 August 2011 [83] (Magistrate Mignacca-Randazzo).

> and giving of notices through staff but it was not exclusively their domain (or by the chief executive officer under delegation). Parliament allows a local government to act through it [sic] staff or agents. The possibility of councillors determining to give notices may also explain why there is reference to both 'local government' and 'duly authorised officer' in subsection 33(1)(b) of the [BF Act]. The prosecution's construction and the one I have accepted, means 'local government' is consistently construed in subsection 33(1)(b) of the [BF Act], avoids any impracticably [sic] that the accused's construction would suggest and promotes the effective purpose of the subsection. I also note in this case that an experienced ranger who had fire control duties gave the notices. Whether any person being a member of staff could do likewise would depend on whether the giving of notices by such a staff member was within his or her scope of duties and whether it could be said to be in the normal course of business. In this case it was. Mr Hall did not exercise just any statutory function but one that the City of Armadale as a local government could through him in the normal course of business.

3. The proper construction of s 33(1) of the BF Act

24 Counsel for Columbia submitted that the conclusion reached by the learned magistrate was inconsistent with the legislative history of the BF Act and with a proper construction of s 33 and s 48 of the BF Act. Further, counsel submitted that the conclusion reached by the learned magistrate was inconsistent with the statutory framework established by the LG Act and the BF Act for the manner in which a local government performs its statutory functions and the manner in which those functions can be delegated, rendered s 48(1) of the BF Act redundant, and had the effect of impermissibly allowing Mr Hall to perform a function that was ascribed to the City under the BF Act.

25 The resolution of the question posed by the appeal is not without difficulty. For the reasons set out below, however, I have come to the conclusion that the submissions advanced by counsel for Columbia should not be accepted. In my view, there was no error by the learned magistrate in his approach to the construction of s 33 of the BF Act, understood within its context. I will deal with each of the arguments relied upon by counsel for Columbia in turn.

(a) The proper construction of s 33 of the BF Act, within the context of the BF Act as a whole, including s 48 of the BF Act

(i) The statutory definition of 'local government'

26 Counsel for Columbia submitted that on the proper construction of s 33(1) of the BF Act, only the City through the Council, or the CEO (if

appointed the delegate of the City pursuant to s 48 of the BF Act), could perform the function of giving a notice pursuant to s 33(1) of the BF Act.

27 There is no authority dealing with the meaning of s 33(1) of the BF Act. There was also no authority drawn to my attention in relation to the wider question of the legal means by which statutory bodies corporate carry out their functions – particularly in relation to the application of public law concepts of agency to statutory corporations.[3] The meaning of the subsection therefore falls to be determined by the application of ordinary principles of statutory construction. The starting point in the construction of any statutory provision is to consider the ordinary meaning of the words used, within their context, which includes matters such as the existing state of the law and the purpose to which the statute was directed.[4]

28 The term 'local government' is not defined in the BF Act, but it is defined in the *Interpretation Act 1984* (WA) to mean a local government under the LG Act.[5]

29 It is necessary to bear in mind some of the features of a local government established under the LG Act. The general function of a local government is to provide for the good government of persons in its district,[6] and its functions are of a legislative and executive nature.[7] The legislative functions of a local government include making local laws,[8] while the executive functions of a local government comprise administering local laws and doing all other things necessary or convenient to be done for or in connection with performing its functions under the LG Act.[9]

30 Each local government established under the LG Act is a body corporate with perpetual succession and with the legal capacity of a natural person.[10] As a corporate body, a local government must

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[3] For a general discussion of the public law concept of agency see P. Bayne, Delegation, Agency and Just Assisting, (1988) 62 *ALJ* 721; P. O'Connor, Decisions Made in the Absence of Formal Delegation of Power, (1997) 2 *LGLJ* 225; E. Campbell, Ostensible Authority in Public Law, (1999) 27 *FLR* 1

[4] ***CIC Insurance Ltd v Bankstown Football Club Ltd*** (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey & Gummow JJ); see also ***Project Blue Sky Inc v Australian Broadcasting Authority*** (1998) 194 CLR 355, 381 (McHugh, Gummow, Kirby & Hayne JJ); ***Commissioner for Railways (NSW) v Agalianos*** (1955) 92 CLR 390 397 (Dixon CJ); ***AB v Western Australia*** [2011] HCA 42 [10], [23] - [24], [36], [38] (French CJ, Gummow, Hayne, Kiefel & Bell JJ).

[5] See s 5 *Interpretation Act 1984* (WA) and s 1.4 of the LG Act.

[6] Section 3.1(1) of the LG Act.

[7] Section 3.4 of the LG Act.

[8] Section 3.5(1) of the LG Act.

[9] Section 3.18(1) of the LG Act.

[10] Sections 2.5(2) and (3) of the LG Act.

necessarily act through its officers, employees and agents. Each local government has an elected council as its governing body comprising (in the case of a city) a mayor, deputy mayor and councillors.[11] The council of a local government governs the local government's affairs and is responsible for the performance of a local government's functions.[12]

31 The LG Act clearly contemplates that the employees of a local government carry out its functions. Local governments are required to employ a CEO and such other persons as the council believes are 'necessary to enable the functions of the local government and of the council to be performed'.[13] A person is not to be employed in a position unless the CEO believes the person is suitably qualified for the position.[14] I note that under the LG Act a local government does not have a general power of delegation of its functions to employees of the local government. The power of delegation under the LG Act is limited to the delegation to the CEO of certain of the local government's functions under the LG Act and the *Planning and Development Act 2005* (WA).[15] Some of those functions may in turn be the subject of a sub-delegation by the CEO to employees of the local government.[16] However, the LG Act also contemplates that a local government will perform its functions by acting through persons other than the CEO.[17]

32 Accordingly, in seeking to understand what the Parliament meant when it referred to a 'local government' in s 33 of the BF Act, the starting point is that a local government is a body corporate whose functions are able to be performed by the council of the local government, and by the officers and employees of the local government. The meaning of the term 'local government' which has been prescribed by the Parliament in the *Interpretation Act 1984* (WA) thus does not refer only to the council of the local government in question.

(ii) Contextual considerations – use of the term 'local government' within s 33 as a whole

33 A consideration of the context in which the term 'local government' is used in s 33 of the BF Act does not support the conclusion that the term

[11] Sections 2.6(1) and (2) of the LG Act.
[12] Section 2.7(1) of the LG Act.
[13] Section 5.35 of the LG Act.
[14] Section 5.36(3)(a) of the LG Act.
[15] Section 5.42 of the LG Act.
[16] Section 5.44 of the LG Act.
[17] Section 5.45(a) of the LG Act.

should be understood as referring only to the council of a local government.

34 Commencing with s 33(1)(b) itself, I note that there are a number of different steps involved in issuing a notice under that provision. First, an opinion needs to be formed that something which is on land is or is likely to be conducive to the outbreak of a bushfire or the spread or extension of a bushfire. That opinion must be formed by the local government or its duly authorised officer. A decision then needs to be made by the local government that some action should be taken by the owner or occupier of the land in question (with respect to that thing upon the land which has been identified as being conducive to the outbreak or spread of a bushfire) within a particular time frame. The purpose of the action which the owner or occupier will be required to take will therefore be aimed at preventing the outbreak of a bushfire or the spread or extension of a bushfire. Additional decisions which must be made are whether the owner or occupier must take the action in co-ordination with any other person on adjoining or neighbouring land and whether the owner or occupier will be required to take the action to the satisfaction of the local government or its duly authorised officer.

35 The next step is for the preparation of a notice in accordance with the requirements of s 33(1)(b) and, finally, that notice must be given to the owner or occupier.[18]

36 Turning to s 33 as a whole, a range of other decisions and actions are contemplated by that section. Section 33 contemplates that a local government may make local laws requiring owners and occupiers to clear and maintain firebreaks,[19] and that a local government may publish a notice requiring all owners or occupiers of land in its district to take action specified in the notice within a certain time.[20] Further, if action is not taken by an owner or occupier as required in a notice, or pursuant to a local law, then a decision will need to be made as to whether there has been a breach of a requirement on the owner or occupier, what action (if any) the local government may need to take to carry out that action itself, and what legal action may be taken against an owner or occupier of land.[21]

[18] Sections 33(2) and (2a) of the BF Act.
[19] Section 33(5a) of the BF Act.
[20] Section 33(1) of the BF Act.
[21] Sections 33(4) and (5) of the BF Act.

37 It can thus be seen that a variety of different kinds of decision-making and conduct by a 'local government' are contemplated in s 33, ranging from decisions affecting all owners and occupiers in a district, to decisions particular to an individual owner or occupier in particular circumstances, to the enactment of local laws, to simple administrative action (such as the publication or service of a notice). There are occasions within the section where the legislature has expressly contemplated that certain persons may do certain things (eg form an opinion,[22] or take remedial action when an owner or occupier fails to do so[23]), but generally speaking the decisions and actions required under s 33 are simply required to be made or undertaken by the 'local government'.

38 At one end of the spectrum of decisions and actions contemplated by s 33, there are some decisions or actions that a council of a local government will itself need to undertake (for example, the making of local laws[24]). At the other end of that spectrum are decisions or actions where it would be absurd for the council of a local government itself to undertake that decision or action (such as the administrative task of arranging for the service of a notice on an owner or occupier[25]). Between these ends of the spectrum, the other decisions and actions contemplated by s 33 of the BF Act are those of a kind where, depending upon the circumstances, it may be appropriate or desirable for the council of a local government to have a role, and where in other circumstances, it will be impracticable or inappropriate for the council to be involved, and where the involvement of officers and employees of the local government will be necessary. One of the key weaknesses in the case advanced by Columbia was that no rationale was offered for why 'local government' in s 33(1) (at least in relation to the decision to issue a notice) should be understood as meaning the council of a local government, when difficulties would arise were the council itself required to act in some of the other contexts in which the term 'local government' is used in s 33 of the BF Act.

39 Counsel for Columbia submitted that the decision to issue a notice was a significant step, particularly in view of the fact that a failure to comply with a notice could lead to a prosecution, and that the Parliament would have intended that such a serious step would only be taken following the consideration of a council of a local government. However,

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[22] Section 33(1)(b) - the opinion may be formed by the local government or by its duly authorised officer.
[23] Sections 33(4)(a) and (b) - the local government may direct its bushfire control officer or any other officer of the local government to enter upon the land and to carry out remedial work which has not been complied with by the owner or occupier.
[24] See s 3.12 of the LG Act.
[25] Section 22(3) of the BF Act.

that rationale was not an entirely persuasive one, for three reasons. First, it is not at all unusual to see legislation which enables governmental officers making decisions which may involve, or lead to, the prosecution of members of the community.[26] To the extent then, that an officer or employee of a local government might be permitted to make the decision to issue a notice (which if not complied with might result in the prosecution of the recipient of the notice) that would not necessarily be a surprising result. Secondly, the functions of the local government can clearly be delegated to the CEO of the local government.[27] Accordingly, it cannot be said that even in relation to prosecutions, the Parliament must have intended that only the council of a local government would make such a significant decision. Thirdly, at the heart of the submission appears to have been a concern about accountability – that is, ensuring that the council of a local government is responsible for making significant decisions on behalf of the local government. However, even if a decision is made by an employee or officer of the local government, on behalf of the local government, that decision is necessarily made by the local government itself, and the council of the local government retains responsibility for that decision.[28]

40 In my view, save where there is a clear contrary indication in the section itself,[29] the uses of the term 'local government' in s 33 encompass the local government acting either through its council, or through its officers and employees. In my view, there is nothing in s 33(1)(b) of the BF Act, or s 33 of that Act as a whole, which suggests that the term 'local government' in s 33(1)(b) should be construed as referring to the local government acting solely through its council.

(iii) Contextual considerations – legislative objects

41 I turn next to consider the objects of the BF Act, and of s 33 in particular. The objects of the BF Act, which may be discerned from its long title, are to make better provision for diminishing the dangers resulting from bushfires and for the prevention, control and extinguishment of bushfires. The terms of s 33 itself indicate that the objective behind the section is clearly to prevent the outbreak of bushfires, but also to prevent the spread of bushfires once they have started.

42 Some of the measures contemplated by s 33 of the BF Act (such as the making of by-laws or the publication of a notice to all owners or

[26] See, for example, s 9.11 of the LG Act.
[27] See s 48(1) of the BF Act.
[28] See s 2.7(1) of the LG Act.
[29] For example, in s 33(5a) where only the local government acting through its council may make local laws.

occupiers of land in a district about remedial action which must be taken) constitute longer term strategies to prevent bushfires. At the same time, it is also apparent from the terms of s 33 that that provision may be relied upon in situations where immediate or urgent action may be required to prevent the spread of a bushfire.

43 The decision-making process for councils of local governments which is mandated by the LG Act is unlikely to be compatible with the sorts of urgent decisions which are likely to be required to prevent the spread of a bushfire which has broken out. Ordinary council meetings, for example, require 72 hours' notice, need a specified quorum of council members, and certain procedural requirements must also be observed.[30]

44 In this context, a construction of the term 'local government' in s 33(1)(b) as referring only to the local government acting through its council would not promote the object of the BF Act, and of s 33 in particular, insofar as that object is to prevent the spread of bushfires. The preferable construction[31] is that the term 'local government' in s 33(1)(b) refers to the local government acting through either its council, or through its officers or employees.

(iv) Contextual considerations – the power of delegation in s 48

45 A further contextual consideration is to be found in s 48(4) of the BF Act. That subsection provides a clear indication that the Parliament contemplated that a local government would act through its council, members of staff or agents in the normal course of its business. Section 48(4) serves to confirm that the term 'local government' in s 33 of the BF Act should be understood as referring to the local government acting either through its council or through its officers or employees (subject to any contrary indication in the section). I note that a provision similar to s 48(4) of the BF Act can be found in s 5.45 of the LG Act which provides that nothing in 'Division 4 of Part 5 of the BF Act' (which deals in part with the delegation of functions by a local government to its CEO) 'is to be read as preventing a local government from performing any of its functions by acting through a person other than the CEO'.

46 Counsel for Columbia submitted that the learned magistrate had erred in that he had treated s 48(4) of the BF Act as an empowering provision, when that section did 'not confer a power on staff or on unspecified 'agents' of the local government to perform a function that had

[30] See Div 2 of Pt 5 of the LG Act, especially s 5.5(1) and s 5.19

[31] Section 18 of the *Interpretation Act 1984* (WA).

not previously been capable of being exercised by them'.[32] Subsection 48(4) does not contain a grant of power, and the learned magistrate did not view the subsection in that way. The learned magistrate correctly viewed s 48(4) of the BF Act as confirming what would otherwise be able to be discerned through the provisions of the BF Act, namely that a local government may act through its council or through its officers and employees.[33]

47 Further, counsel for Columbia submitted that some of the practical problems which might arise if the term 'local government' in s 33(1)(b) was construed to mean the council of the local government could be alleviated or avoided by recourse to the power of delegation to the CEO of a local government under s 48(1) of the BF Act. I am unable to agree. The functions of a CEO under the LG Act are quite extensive.[34] There is also no power of sub-delegation from the CEO to other employees of the local government.[35] (In this respect the position with respect to delegations under the BF Act may be contrasted with the position under the LG Act.[36]) Although there was no evidence before the Court in relation to these matters, it is not difficult to envisage that the possibility of a delegation of the local government's power to the CEO may not be a satisfactory alternative in situations where urgent steps to prevent the spread of a bushfire were required, particularly in view of the fact that a power of sub-delegation by the CEO is expressly excluded.

48 Counsel for Columbia also submitted that the learned magistrate erred in failing to consider the purpose of s 48(1), insofar as it confined the delegation of the City's functions under the BF Act to the CEO of the City. I understood this to be a submission that s 48 of the BF Act manifested an intention that if a local government was to act other than through its council when exercising its powers under the BF Act, it should delegate those powers to its CEO. Having regard to the matters I have already addressed, I do not accept this submission. In any event, the existence of a power of delegation does not preclude a body acting through its officers and employees.[37]

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[32] Appellant's Written Submissions dated 26 July 2012 [31].
[33] Decision [83].
[34] Section 5.41 of the LG Act.
[35] See s 48(3) of the BF Act.
[36] See s 5.44 of the LG Act which permits a CEO of a local government to delegate to any employee of the local government the exercise of any of the CEO's duties under the LG Act, other than the power of delegation.
[37] ***O'Reilly v Commissioner of State Bank of Victoria*** (1982) 44 ALR 27, 31 (Gibbs CJ); ***Minister for Aboriginal Affairs v Peko-Wallsend Ltd*** (1986) 162 CLR 24, 37 - 38 (Mason J); ***Salia Property Pty Ltd v Commissioner of Highways*** (2012) 112 SASR 384, 390 - 391 [27] - [31] (Doyle CJ, Anderson & Stanley JJ agreeing) (special leave to appeal to the High Court refused: [2012] ***HCATrans*** 211).

49 Counsel for Columbia also relied on two principles of statutory construction to assist in the interpretation of s 33, when read in the context of s 48 of the BF Act: first, that a specific provision in a statute will prevail over a more general provision dealing with the same subject matter, to the extent of any inconsistency between them[38] and, secondly, that if, in a specific provision, the Parliament describes the mode in which a power shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general provisions in the same Act which might otherwise have been relied upon for the same power.[39] In my view, neither of these principles is applicable in this case. It is not apt to describe s 48 as dealing specifically with the manner in which a more general power granted in s 33 may be exercised. The two provisions deal with different things, although clearly they may intersect if a local government decides to delegate some of its functions under s 33 to its CEO.

50 Counsel for Columbia submitted that s 48(1) supported the conclusion that the functions of a local government in s 48(4) must be construed as different from the powers of a local government which might be the subject of a delegation under s 48(1) of the BF Act. This submission was premised on the assumption, which I have already rejected, that the powers of a local government under s 33 of the BF Act must be exercised by a council of a local government unless delegated by the local government to the CEO under s 48(1).

51 Counsel for Columbia submitted that the only activities of a local government which could be exercised by its officers or employees were those referred to in s 48(4), namely those in the 'normal course of business' and that these tasks would be routine activities, of a day-to-day nature.[40] He submitted that the functions given to the City under the BF Act, including those set out in s 33(1) of the BF Act, could not be understood to be activities regularly or routinely performed by the City.

52 This submission was premised on the assumption that s 48(4) sought to comprehensively define what activities of a local government could be exercised by its officers, employees and agents. The better view is that s 48(4) represents a shorthand way of confirming that the power of delegation to the CEO in s 48(1) was not intended to affect the ordinary

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[38] ***Refrigerated Express Lines (Australasia) Pty Ltd v Australian Meat and Live-stock Corp*** (1980) 29 ALR 333, 347 (Deane J).

[39] ***Anthony Horden and Sons Ltd v The Amalgamated Clothing and Allied Trades Union of Australia*** (1932) 47 CLR 1, 7 (Gavan Duffy CJ & Dixon J).

[40] Appellant's Written Submissions dated 26 July 2012 [36].

operation of a local government through its officers, employees and agents. That much necessarily follows from the provisions of the LG Act to which I have referred.

(vi) Contextual considerations – references in s 33 to 'duly authorised officers', 'bushfire control officers' and 'other officers of the local government'

53 One of the more attractive arguments advanced by counsel for Columbia sought to rely on the distinction between use of the terms 'local government' and 'duly authorised officer' in s 33(1)(b) of the BF Act. He submitted that the reference to a 'duly authorised officer' provided an indication of the circumstances in which an individual officer of the local government would exercise a power, with the result that use of the term 'local government' elsewhere in s 33(1)(b) should be construed as referring only to the council of the local government. Counsel for Columbia also submitted that the distinction drawn in s 33(1) between a 'local government' and a 'duly authorised officer' would be rendered otiose if the functions given to a local government under the BF Act could be exercised by its officers or agents rather than by its council.

54 The term 'duly authorised officer' is not defined in the BF Act, and there is only one other reference to that term in the BF Act, which does not provide any greater indication of the intended meaning of that term.[41] One possibility is that what was in contemplation was the appointment of an authorised officer in the manner contemplated in the LG Act. (I note that under the LG Act, a local government may appoint a person or class of persons to be authorised for the purpose of performing particular functions.[42]) Counsel for the City submitted that the explanation for the reference to 'duly authorised officer' in s 33 lay in the possibility that a local government might engage persons on a short-term basis, for example during peak bushfire periods and in order to be able to act on behalf of the local government those persons would need to be authorised to do so. That might also be an explanation for the reference to a 'duly authorised officer' in s 33(1)(b).

55 However, it is unnecessary to resolve this question because in this case the learned magistrate found that there was no dispute that at the relevant time Mr Hall was, by virtue of his duties, within the class of persons apt to be described as a 'duly authorised officer' of the City. This

[41] Section 24 of the BF Act.

[42] Section 9.10(1) of the LG Act. Under the LG Act, the local government is required to issue to a person so authorised a certificate stating that the person is so authorised: see s 9.10(2) of the LG Act.

finding was apparently based on a concession made by Columbia in its written submissions at the trial that, by virtue of his role, Mr Hall fell within the category of a duly authorised officer under s 33 of the BF Act.[43]

56 The reference to a 'duly authorised officer' in s 33(1)(b) does not, in my view, support the conclusion that the term 'local government' in that subsection should be construed as referring only to the council of a local government. The reference to the duly authorised officer appears in the context of the requirement that an opinion must be held - either by the local government or by its duly authorised officer - that a thing upon land is likely to be conducive to the outbreak or spread of a bushfire. In addition, a notice may specify that the remedial work is required to be done to the satisfaction of the local government or of the duly authorised officer.[44] The reference to the formation of that opinion or degree of satisfaction by either a duly authorised officer, or by a local government, seems to me to leave open the possibility that in some cases the relevant opinion or degree of satisfaction might be formed by one person, particularly a person with expertise in relation to bushfires (whether an employee or agent of a local government specifically authorised to carry out that function, or an employee of a local government), but the decision to issue the notice and other related action, such as effecting the service of the notice, will be undertaken by another person or persons acting on behalf of the local government.

57 Equally, however, I do not see anything in the reference to a 'duly authorised officer' in s 33(1) which would prevent that officer being the one to form the requisite opinion, and then, on behalf of the local government, to make the decision to issue the notice and to arrange for its service on the owner or occupier, as occurred in this case.

58 For completeness, I note that s 33(4) makes reference to a local government directing a 'bushfire control officer or any other officer of the local government' to enter upon the land in the event that the owner or occupier fails to carry out remedial work specified in a notice, and to undertake that work. A local government is empowered to appoint 'such persons as it thinks necessary' to be bushfire control officers under the BF Act.[45] Those officers have particular powers under the BF Act.[46] It does not appear to be a requirement that those persons appointed be

[43] Defendant's Closing Submissions dated 29 June 2011 [1(a)].
[44] Section 33(1)(d) of the BF Act.
[45] Section 38(1) of the BF Act.
[46] See, for example, s 39 of the BF Act.

employees of the local government, although they may be (as Mr Hall was).

59 In my view, the reference in s 33(4) to bushfire control officers and other officers of the local government, in contradistinction to the local government itself, does not require that the term 'local government' be construed as referring only to the council of a local government. Rather, in my view, the subsection contemplates the situation where either the council, or an officer or employee of the local government, will direct other persons (no doubt those with the skills or expertise or equipment necessary to do so) to carry out the remedial work on the land.

(b) Legislative history of the BF Act

60 The legislative context also includes the history and purpose of the legislation and it is appropriate to take that legislative history into account in the construction of a provision.[47]

61 Counsel for Columbia submitted that the history of s 33 of the BF Act indicated that 'the intention of the Parliament since the [BF] Act was enacted has been that a local government (and 'local authority' before it) has been, and continues to be required to act through its council in performing its functions under the Act'.[48]

62 Prior to 1996, s 33(1) of the BF Act referred to a 'local authority' instead of a 'local government'. Under the BF Act as originally enacted, 'local authority' was defined to mean 'municipal council or road board constituted under the provisions of the *Municipal Corporations Act 1906 - 1953* or the *Road Districts Act 1919 - 1951*'.[49] The definition of 'local authority' was subsequently amended to mean 'a council of a municipality constituted under the *Local Government Act 1960*'.

63 By the *Local Government (Consequential Amendments) Act 1996* (the LG Amendment Act) all references to 'local authority' in the BF Act were deleted and replaced with the term 'local government'.

64 Counsel for Columbia submitted that 'if it was the intention of Parliament to fundamentally alter the manner in which a 'local government' was required to act (ie by removing the requirement that it act through its council) then it is reasonable to assume that the Parliament would have, contemporaneously with the changes brought about by the

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[47] ***Saraswati v The Queen*** (1991) 172 CLR 1, 21 (McHugh J).
[48] Appellant's Written Submissions dated 26 July 2012 [23].
[49] Section 7 of the BF Act at the time of its enactment in 1954.

[LG Amendment Act] deleted the words 'or its duly authorised officer' from s 33(1) of the BF Act because those words would have been redundant'.[50] I do not accept this submission for the reasons discussed above in relation to the references to 'duly authorised officer'. In addition, it can equally be said that had the Parliament intended to refer only to the council of the local government, it could very easily have made that clear by referring expressly to the council, in the same way that it had previously referred to the council of a local authority in the BF Act.

65 At the time of the second reading of the LG Amendment Bill, the then Minister for Local Government observed that the amendments made by that Act 'in most cases [did] no more than incorporate the new local government terminology'.[51] However, there was no specific reference to s 33 of the BF Act in that speech, and one must be cautious about attaching too much weight to the very general observations about the operation of the LG Amendment Bill in construing the reference to 'local government' in s 33(1)(b) of the BF Act.

66 Nevertheless, the fact that s 33 of the BF Act previously referred to the council of the local authority as the decision-maker for the purposes of that section, and to the fact that, at least generally speaking, the LG Amendment Act does not appear to have been intended to change more than terminology, amount to the strongest argument for the construction of s 33 for which counsel for Columbia contends. Ultimately, however, I am not persuaded that this is the proper construction of the various references to 'local government' in s 33, having regard to the purpose of the legislation (as discussed above) and in particular to the potential operation of s 33 in times when a bushfire has started and measures are required to prevent its spread, and having regard to the existence of s 48(4) of the BF Act which as I have already explained, serves to confirm that the Parliament contemplated that the functions and powers of a 'local government' in the BF Act (including s 33) would not be exercised solely by a council of a local government.

67 Counsel for Columbia also referred to the amendment to s 48 of the BF Act which was effected by the *Fire and Emergency Services Legislation Amendments Act 2002* (WA). By that amendment an entirely new provision was inserted into the BF Act as s 48. The explanatory memorandum for that provision provides some indication of the purpose behind the section:

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[50] Appellant's Written Submissions dated 26 July 2012 [24].

[51] Parliament of Western Australia, *Hansard, Local Government (Consequential Amendments) Bill* 1996 Second Reading Speech, Hon Mr P Omodei, Minister for Local Government, 1014.

> As an entirely separate matter, the replacement section 48 empowers Local Governments to delegate to their chief executive officers the performance of functions under the Act. It provides a legislative basis for any formal delegation process which a Local Government may wish to establish. (This amendment was requested by Local Governments, to assist in clarifying the extent to which matters needed to be dealt with by their councils, or could be handled at other levels.)
>
> Section 48 also stipulates that such provisions do not limit the ability of Local Governments to act through their councils, members of staff or agents in the normal course of business.

68 Three things can be drawn from these observations. First, s 48 in its current terms was inserted because there was some confusion or uncertainty about precisely the extent to which councils were required to exercise the functions of local governments under the BF Act. Secondly, the addition of s 48 in its current terms was designed to provide a means for the formal delegation of the functions of local governments under the BF Act. That does not mean that other means by which the functions of local governments could be exercised were excluded. Thirdly, and most importantly for present purposes, the inclusion of what is now s 48(4) of the BF Act provides an indication that it was clearly recognised by the Parliament that it was possible under the BF Act for local governments to act through either their councils or their officers or employees in the normal course of business, and that the inclusion of the power of delegation in s 48(1) was not intended to change that situation.

69 In my view, the existence of s 48(4) provides a strong confirmation that it was the Parliament's intention that the functions and powers given to local governments under other provisions of the BF Act would be exercisable by local governments acting through their councils or officers or employees, or by the chief executive officers of those local governments acting pursuant to a delegation under s 48(1) of the BF Act.

(c) The statutory framework for the performance by a local government of its functions under the LG Act and the BF Act

70 Counsel for Columbia submitted that the learned magistrate's construction of s 33 and s 48 of the BF Act was inconsistent with the framework established by the LG Act for the exercise of similar powers by local governments. Counsel pointed to s 3.25(1) of the LG Act which empowers a 'local government' to give a person who is the owner or occupier of land a notice in writing requiring the person to do anything specified in the notice, and to s 3.24 of the LG Act which makes clear that the powers given to local governments in s 3.25 (amongst others) can only

be exercised on behalf of the local government by a person expressly authorised by it to exercise those powers.

71 I note that s 3.24 does not require that a local government act only through its council, or that it otherwise appoint a delegate, but rather contemplates that the powers of a local government may be exercised by a person acting on behalf of the local government. In any event, however, recourse to s 3.24 and s 3.25 of the LG Act do not assist in the construction of s 33 of the BF because the LG Act provisions apply only to powers given to a local government under the provisions of the LG Act referred to in s 3.24.

72 Insofar as s 3.24 requires those powers to be exercised by a person expressly authorised by the local government to do so, there is an important difference between this part of Pt 3 of the LG Act and s 33 of the BF Act. It does not appear that the Parliament contemplated that the powers referred to in s 3.25 would be exercised in situations involving urgency. That much is clear from the nature of the powers concerned[52] and from the fact that an owner or occupier to whom a notice is issued under s 3.25(1) of the LG Act may apply for a review of the decision to issue the notice.[53]

73 In contrast, s 33 of the BF Act may operate in a range of situations. As I have already observed, the section may be relied upon to implement longer term strategies for the prevention of bushfires across a district, in which case it is not difficult to envisage that councils might be involved in some decisions, particularly those requiring action by all landowners or occupiers in a district or part thereof. Section 33 may also be relied upon in the implementation of individual cases where preventive steps are required, for example, to ensure situations have not arisen which might increase the risk of a bushfire in certain conditions. In those cases, it may be practicable or desirable for persons who are duly authorised officers to be involved in some or all of the decisions or actions contemplated in s 33. Finally, s 33 may be applied in situations involving some urgency where measures are required to be taken at very short notice to prevent the spread of a bushfire which has started. In those situations, it can be envisaged that it may not be practicable to expect a council to act, or even to expect that a duly authorised officer may be involved in all of the decisions and courses of action contemplated by s 33, and it may be necessary for the local government to act through its officers, employees or agents.

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[52] See Sch 3.1 to the LG Act.

[53] See s 3.25(5) of the LG Act.

(d) Whether the construction of s 33 of the BF Act adopted by the learned magistrate rendered s 48(1) of the BF Act redundant

74 Counsel for Columbia submitted that the construction of s 33(1) adopted by the learned magistrate would render the delegation provision in s 48(1) redundant because the functions of a local government could be performed by its servants or agents, quite apart from a delegation to its CEO. I am unable to agree. A delegation of power involves a transfer of the decision making role to the delegate. In contrast, when an employee or officer of a local government makes a decision or takes action on behalf of the local government, the decision or action is that of the local government itself.

75 Furthermore, even if it chooses to delegate a function to its chief executive officer, a local government nevertheless remains entitled to exercise that function itself at any time.[54] Furthermore, s 48(4) of the BF Act expressly recognises that the power of delegation in s 48 may operate concurrently with the exercise of powers or functions by a local government through its officers, employees or agents.

4. An alternative argument advanced on behalf of the City.

76 It is appropriate to mention an argument advanced on behalf of the City, in the alternative to its primary submission that the learned magistrate did not err in his construction of s 33(1) of the BF Act. That alternative argument was that the Court should find that Mr Hall was acting with an 'implied delegation or as agent' of the City when he issued the Notice. This was intended to be a reference to the principle established in ***Carltona Ltd v Commissioners of Works***,[55] sometimes referred to as the 'alter ego' principle, notwithstanding that that case was not a case concerning delegation. The submission was not fully elaborated, but it appeared that it was intended to advance a different basis by which a local government might act through its officers or employees. Two points may be made in respect of that submission. The first is that there is room for debate about the extent to which the ***Carltona*** principle and the concept of agency which I have discerned in the references to

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[54] Section 59(1) of the *Interpretation Act 1984*. In the not dissimilar context of the operation of the ***Carltona*** principle, it has been held that the power of delegation does not preclude the exercise of a power or function given to a decision-maker through officers, employees or agents acting on behalf of that decision-maker: see ***O'Reilly v Commissioner of State Bank of Victoria*** (1982) 44 ALR 27, 31 (Gibbs CJ); ***Minister for Aboriginal Affairs v Peko-Wallsend Ltd*** (1986) 162 CLR 24, 37 - 38 (Mason J); ***Salia Property Pty Ltd v Commissioner of Highways*** (2012) 112 SASR 384, 390 - 391 [27] - [31] (Doyle CJ, Anderson & Stanley JJ agreeing) (special leave to appeal to the High Court refused: [2012] ***HCATrans*** 211).

[55] [1943] 2 All ER 560, 563.

'local government' in the BF Act in this case are discrete principles. It is not necessary to resolve that issue for present purposes.

77 Secondly, the extent to which the ***Carltona*** principle is applicable to local governments is not entirely settled, at least in so far as that principle embodies the concept of the knowledge of the decision maker's alter ego being imputed to the decision maker.[56]

78 I have preferred to approach the present case on the basis that at least insofar as the exercise of functions or decision-making powers under a statute is concerned, the question in every case must be one of statutory construction to determine whether the Parliament intended that a power given to a local government might be exercised by another individual or body on behalf of that local government. Given my conclusions in relation to the construction of s 33 of the BF Act, it is unnecessary to consider the question whether the ***Carltona*** principle is capable of application in relation to the exercise by 'local governments' of their functions under the BF Act.

Conclusion

79 Given the terms of the BF Act, the absence of any authority in relation to the construction of s 33, and the legislative history, I am satisfied that the ground of appeal had a reasonable prospect of succeeding.[57] There should therefore be a grant of leave to appeal.[58] However, for the reasons I have given the term 'local government' in s 33(1)(b) should not be understood as referring solely to the council of a local government. The decisions and actions contemplated in s 33(1)(b) may also be undertaken by an officer or employee of the local government acting on behalf of the local government. Accordingly, the appeal should be dismissed.

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[56] The issue has been considered in relation to a different aspect of the ***Carltona*** principle, namely in relation to the question whether knowledge of a local government officer can be imputed to a council which is required by a statute to make a decision when the council itself (and not the officer on behalf of the council) proceeds to make the decision: see ***Centro Properties Limited v Hurstville City Council*** [2004] NSWLEC 401 [55] (McClellan CJ); cf ***Hill v Woollahra Municipal Council*** [2003] NSWCA 106 [59] (Hodgson JA), where the ***Carltona*** principle was referred to but its application in the context of local government was not decided; see also ***Gee v Council of the City of Sydney and Ors*** [2004] NSWLEC 581 [16] - [17] (Pain J) and ***Gunning Sustainable Development Association Inc v Upper Lachlan Council and Another*** [2005] NSWLEC 23 [75] (Talbot J).

[57] ***Samuels v Western Australia*** (2005) 30 WAR 473, 487 [55] - [56] (the Court).

[58] Section 9 of the *Criminal Appeals Act 2004* (WA).