

Table 1

SECTION	SECTION TITLE	POWERS CONFERED	DELEGATED PERSONS
12	Failure to Control Noxious Weeds	The power to initiate prosecutions	Kerry Yates, Paul Wise and Michael Achelles
18a	Prior Notice of Weed Control Notice	The power to issue prior notice of a proposed weed control notice	Kerry Yates, Paul Marynissen and Darren Williams
18	Weed Control Notices	The power to issue weed control notices	Paul Wise and Paul Marynissen
19	Failure to Comply with a Weeds Notice	The power to initiate prosecutions	Kerry Yates, Paul Wise and Michael Achelles
20	Noxious Weed Control by Local Control Authority after Weed Control Notice not complied with	Subsection (1) The power to authorise such work	Kerry Yates, Paul Wise, Michael Achelles, Paul Marynissen and Darren Williams
		Subsection (2) Authority to carry out such work	Paul Marynissen, Darren Williams and contractors working on behalf of Council
		Subsection (3) Power to issue notices to occupiers prior to taking action under this section	Kerry Yates, Paul Wise, Paul Marynissen and Darren Williams
28	Sale or Removal from land Infested With Notifiable Weed Material	The power to initiate prosecutions under this section	Kerry Yates, Paul Wise and Michael Achelles
29	Sale of Turf etc. From Land Infested With Notifiable Weeds	The power to initiate prosecutions under this section	Kerry Yates, Paul Wise and Michael Achelles
30	Scattering of Notifiable Weed Material	The power to initiate prosecutions under this section	Kerry Yates, Paul Wise and Michael Achelles
32	Use of Agricultural Machines that are Carrying Notifiable Weeds	The power to initiate prosecutions under this section	Kerry Yates, Paul Wise and Michael Achelles
36a	Temporary Restrictions During Weed Control	The power to impose temporary restrictions	Kerry Yates and Paul Wise and Paul Marynissen
41	Appointment of Inspectors	Power to appoint inspectors under the Noxious Weeds Act 1993 for the Local Control Authority	Kerry Yates, Paul Wise and Michael Achelles
45	Notice of Entry	The power to give occupiers notice prior to entry	Kerry Yates, Paul Wise, Paul Marynissen and Darren Williams
46	Use of Force	The power to authorise use of force to gain entry to premises	Kerry Yates, Paul Wise and Michael Achelles
47	Notification of Use of Force	The power to notify an occupier of the use of force	Kerry Yates, Paul Wise and Michael Achelles
50	Certificates of Authority	The power to issue Certificates of Authority for Inspectors	Kerry Yates and Paul Wise, these Certificates must be signed by same
54	Offence: Obstructing an Inspector etc	The power to initiate prosecutions	Kerry Yates, Paul Wise and Michael Achelles
55	Offence: Impersonation of an Inspector	The power to initiate prosecutions	Kerry Yates, Paul Wise and Michael Achelles
64	Certificates as to Weed Control Notices etc	Power to issue such certificates	Darren Williams and Paul Marynissen



DELEGATIONS BY LOCAL CONTROL AUTHORITIES UNDER THE NOXIOUS WEEDS ACT

The Noxious Weeds Act (1993) grants a range of powers, duties and functions to local control authorities. Section 68 of the act permits a local control authority to delegate any of these functions, except the power of delegation, to a person. It is often desirable that these functions be delegated to staff to facilitate the efficient implementation of the Act and to create a separation of powers between the councillors who make policy and the staff who implement council policy. Therefore, it is recommended that local control authorities delegate by resolution, the following powers, functions and responsibilities to the named occupants of the listed staff positions or equivalent positions.

Note that Section 68 requires that delegations be made to a person, not to a position. This means that any delegation made by a Council must be to a named person, not merely to the position in the council that will carry out the delegated function.

It is **not** sound practice for the local control authority to delegate its functions to the general manager and the general manager to make sub-delegations to other staff. Delegations made by the local control authority should be made to the person who will carry out the delegated function.

Section 12 Failure to Control Noxious Weeds.

Delegate authority to initiate prosecutions under this section to the General Manager.

Section 18 Weed Control Notices.

Power to issue weed control notices should be delegated to either:

- i. the Chief Weeds Officer, or
- ii. the Director who administers the Weeds Unit, or
- iii. the General Manager.

Section 19 Failure to Comply with a Weed Control Notice.

Delegate authority to initiate prosecutions under this section to the General Manager.

Section 20 Noxious Weed Control by LCA after Weed Control Notice not complied with.

Subsection (1) - Delegate power to authorise such work to the General Manager.

Subsection (2) - Delegate authority to carry out such work to Inspectors and LCA Spray Operators.

Subsection (3) - Delegate responsibility to issue notices to occupiers, prior to action under this section to the General Manager.

Section 28 Sale or Removal from Land, of Notifiable Weed Material.

Delegate authority to initiate prosecutions under this section to the General Manager.

Section 29 Sale of Turf etc. From Land Infested With Notifiable Weeds.

Delegate authority to initiate prosecutions under this section to the General Manager.

Section 30 Scattering of Notifiable Weed Material.

Delegate authority to initiate prosecutions under this section to the General Manager.

Section 32 Use of Agricultural Machines that are Carrying Notifiable Weeds.

Delegate authority to initiate prosecutions under this section to the General Manager.

Section 36A Temporary Restrictions During Weed Control.

Delegate authority to impose temporary restrictions to the Chief Weeds Officer.

Section 41 Appointment of Inspectors.

Delegate the power to appoint inspectors under the Noxious Weeds Act for the local control authority to the General Manager.

Section 45 Notice of Entry.

Delegate the responsibility to give occupiers notice prior to entry to **all** Inspectors.

Section 46 Use of Force.

Delegate power to authorise use of force to gain entry to premises to the General Manager.

Section 47 Notification of Use of Force.

Delegate responsibility to notify an occupier of the use of force to the General Manager.

Section 50 Certificates of Authority.

Delegate power to issue Certificates of Authority for Inspectors under this act to the General Manager.

*** Note that under this section, (S.50 (2) (f)), the Noxious Weed Regulation (Clause 3) requires that the General Manager must also sign the Certificate of Authority.**

Section 54 Offences: Obstructing an Inspector etc.

Delegate authority to initiate prosecutions under this section to the General Manager.

Section 55 Offence: Impersonation of an Inspector.

Delegate authority to initiate prosecutions under this section to the General Manager.

Section 64 Certificates as to Weed Control Notices etc. on land.

Subsection (3) - Delegate power to issue such certificates to the General Manager.

Council Resolutions Regarding Delegations

Council resolutions should take the form:

(A) " That this Council resolve to appoint (Joe Bloggs) as an inspector under Section 41 of the Noxious Weeds Act 1993", and

(B) "It was resolved by this Council that (Joe Bloggs, the General Manager / Chief Weeds Officer / Weeds Officer) be delegated with Council's powers duties and responsibilities under the following section/s of the Noxious Weeds Act 1993 -

1. Section X - the power to.....
2. Section Y - the power to...."

Should you require any further information on this matter, please contact Philip Blackmore at Armidale by telephone on 02 6738 8504 or by e-mail at philip.blackmore@dpi.nsw.gov.au



CROWN SOLICITOR
NEW SOUTH WALES

Advice

Appointment of Inspectors and Delegations under Noxious Weeds Act 1993

Contents

1. Summary of advice	2
2. Introduction and matter for advice	2
3. Advice	5
As to question 1	5
As to question 2	8
As to question 3	9
As to question 4	15
As to question 5	15
4. Conclusion	15

Prepared for: NSW Department of Primary Industries

Date: 4 May 2006

Client ref: Ms Gabby Price

CSO ref: PRY72100004 T1 Dr David Galbraith

1. Summary of advice

- 1.1 This summary is intended to be read in conjunction with, and not in isolation from, the advice that follows.
- 1.2 In my view s. 68 of the *Noxious Weeds Act 1993* would permit a local control authority that is also a council within the meaning of the *Local Government Act 1993* to delegate to its general manager the power conferred upon it by s. 41(1) of the *Noxious Weeds Act* to appoint inspectors for the purposes of that statute.
- 1.3 I do not think that it is possible to advise in the abstract as to the steps that a local control authority (be it a council or a county council) must follow in order to ensure the valid appointment of an inspector under s. 41(1) of the *Noxious Weeds Act*. That having been said, where such an appointment is made directly by a council or county council, attention should be paid to the matters referred to in para. 3.6 below. Where the power is to be exercised by a delegate of a council or county council as the case may be, care will need to be taken in the drafting of the relevant resolution delegating the council's power, and the donee will have to comply with the terms of the resolution delegating the power. In this context attention is drawn to paras. 3.8 and 3.9 below.
- 1.4 While the matter is not free from doubt, I think that the better view is that councils ought to use and rely upon s. 68 of the *Noxious Weeds Act* in delegating their power to appoint inspectors under s. 41(1) of the *Noxious Weeds Act*, and that they should not rely upon the general delegation power contained in s. 377(1) of the *Local Government Act*.

2. Introduction and matter for advice

- 2.1 The questions raised by your letter of instructions concern practical matters relating to the operation of the *Noxious Weeds Act* and the *Local Government Act*. In order to put the questions raised by your letter of instructions into context, it will be necessary to refer briefly to certain provisions of both of these statutes. Other relevant statutory provisions will be considered as the questions raised by your letter of instructions are addressed.
- 2.2 Under Pt 4 (ss. 33-40) of the *Noxious Weeds Act*, various functions and powers are conferred upon the Minister and local control authorities. Division 2 (ss. 35-40) of Pt. 4 of the *Noxious Weeds Act* deals with local control authorities. So far as it is relevant for present purposes, s. 35(1) provides that the local control authority for land within a local government area is the Council of the local government area, and, if noxious weed control functions for that area has been conferred upon a county council under any other statute, the county council exercising those functions. The

effect of the opening lines of s 36 of the *Noxious Weeds Act* is that the area within a local government area for which a local authority has responsibility is a local area, and paras. (a)-(h) set out various functions with respect to noxious weed control that are to be exercised by a local control authority within its local area. Sections 36A(6), 39 and 40 refer to functions and powers exercisable by inspectors.

- 23 Part 5 of the *Noxious Weeds Act* is headed "Noxious weed control officers and advisory committees", and Div. 1 (ss. 41-55) is headed "Inspectors". Section 41(1) provides that a local control authority may appoint inspectors for the purposes of the *Noxious Weeds Act*, and subs. (2) provides that an inspector has functions conferred or imposed upon inspectors by or under the *Noxious Weeds Act*. Section 41(3) provides that an inspector appointed by a local control authority may not exercise any functions under the *Noxious Weeds Act* outside the local area of the relevant local control authority. Section 42(1) provides that the Director-General may authorise in writing any person to exercise some or all of the functions of an inspector under the *Noxious Weeds Act* in relation to the whole or any part of the State.
- 24 Section 43(1) provides that, for the purposes of the *Noxious Weeds Act*, an inspector, authorised officer or other person authorised by a local authority to control noxious weeds on land may enter any premises. Sections 45, 46 and 47 contain more detailed provisions relating to the exercise of the power of entry conferred by s. 43(1) of the *Noxious Weeds Act*. Sections 44 and 47A refer to other powers that are exercisable by inspectors or authorised officers. For present purposes I do not think that this is necessary to refer to any of the other provisions contained in Div. 1 of Pt. 5 of the *Noxious Weeds Act*.
- 25 Sections 66 and 67 of the *Noxious Weeds Act* deal with the delegation by the Minister and the Director-General of certain of their functions under the *Noxious Weeds Act*. However, for the purposes of this advice we are concerned with the delegation of functions by local control authorities, and, in this context, reference should be made to ss. 68 and 69 of the *Noxious Weeds Act*. Those provisions are in the following terms:

68 Delegation by local control authorities

A local control authority may delegate to a person any of the local control authority's functions under this Act other than this power of delegation.

69 Arrangements by local control authorities

A local control authority may enter into agreements or other arrangements with another person or body to exercise all or any, or to assist in the exercise of all or any, of the authority's functions under this Act or the regulations."

- 2.6 Section 204(1) of the *Local Government Act* empowers the Governor, by proclamation, to constitute any part of the State as an area, and s. 219 of the same statute provides that a council is constituted by the *Local Government Act* for each area. Section 220 of the *Local Government Act* provides that a council is a body corporate, and s. 222 provides that the elected representatives (councillors) comprise the governing body of a council. Section 223 provides that the role of the governing body is to direct and control the affairs of a council in accordance with the *Local Government Act*. Section 334(1) provides that a council "must" appoint a person to be its general manager, and that the person so appointed "must not" be a body corporate. Section 335(1) provides that the general manager is generally responsible for the efficient and effective operation of a council's organisation and for ensuring the implementation, without undue delay, of a council's decisions. Section 335(2) provides that a general manager shall have certain particular functions, which include the day-to-day management of the council, and the exercise of such functions of a council as are delegated to him by the council.
- 2.7 Section 21 of the *Local Government Act* provides that a council has the functions conferred or imposed upon it by that statute, and s. 22 provides that a council has the functions conferred or imposed upon it under any other Act or law.
- 2.8 Chapter 12 of the *Local Government Act* is headed "How do councils operate?" So far as it is relevant for present purposes, s. 355 of the *Local Government Act* provides:
- "355 How does a council exercise its functions?**
A function of a council may, subject to this Chapter, be exercised:
- (a) by the council by means of the councillors or employees, by its agents or contractors, or
 - ...
 - (c) partly or jointly by the council and another person or persons, or
 - ...
 - (e) by a delegate of the council (which may, for example, be a Voluntary Regional Organisation of Councils of which the council is a member)."
- 2.9 Section 357 of the *Local Government Act* provides while generally a council may exercise its functions within or outside its area, but it may exercise its regulatory functions under Chapter 7 only within its area.
- 2.10 So far as it is relevant for present purposes, s. 377(1) of the *Local Government Act* provides that a council may, by resolution, delegate to its general manager or any other person or body (not being another employee of the council) any of the functions of the council other than those enumerated in 20 dot-points.

- 2.11 In the light of the provisions of the *Noxious Weeds Act* and the *Local Government Act* that have been referred to above, you seek my advice on the following questions:
- 1 Does s. 68 of the *Noxious Weeds Act* allow a local control authority that is also a council to delegate to its general manager the power conferred upon it by s. 41(1) of the *Noxious Weeds Act*?
 - 2 If my answer to question 1 is in the affirmative, what are the steps that a local control authority, whether a council or not, must take if it wishes to ensure that it validly appoints a person in its employ as an inspector for the purposes of the *Noxious Weeds Act*?
 - 3 Does s. 377(1) of the *Local Government Act* allow a council that is also a local control authority to delegate to its general manager the power conferred on it by s. 41(1) of the *Noxious Weeds Act*?
 - 4 If my answer to question 3 is in the affirmative, what are the steps that a local control authority, whether a council or not, must take if it wishes to ensure that it validly appoints a person in its employ as a *Noxious Weeds Act* inspector?
 - 5 If the answer to both questions 1 and 3 above is in the affirmative, is a council entitled to choose whether it relies upon the [*Noxious Weeds Act*] or the [*Local Government Act*] has regards the limits of its power to delegate the appointment function?

3. Advice

As to question 1

- 3.1 As has been noted in para. 2.3 above, s. 41(1) of the *Noxious Weeds Act* provides that a local control authority may appoint inspectors for the purposes of that statute. Again, as has been noted in para. 2.5 above, s. 68 of the *Noxious Weeds Act* provides that a local authority may delegate to a person any of that local authority's functions under the *Noxious Weeds Act* other than the power of delegation.
- 3.2 In my view the entitlement conferred by s. 41(1) of the *Noxious Weeds Act* upon local control authorities to appoint inspectors ought to be regarded as a function of a local control authority within the meaning of that phrase as it is used in s. 68 of the *Noxious Weeds Act*. Consequently, and in so far as we are concerned with local councils that are also local control authorities, I am of the opinion that the natural and ordinary meaning of s. 68 is that such councils may delegate to their general managers their s. 41(1) function of appointing persons to be inspectors. I should add that I cannot see any good reason for not giving the words used in s. 68 their natural and ordinary meaning. Accordingly, for these reasons, I think that this question should be answered in the affirmative.

As to question 2

- 3.3 Whereas question 1 was concerned only with local control authorities that are also local councils within the meaning of the *Local Government Act*, this question is also concerned with local control authorities that are not local councils within the meaning of the *Local Government Act*. As appears from para. 2.2 above, a local control authority may be either a local council or a county council constituted under another statute, provided that noxious weed control functions have been conferred upon such a county council. Consequently, as I read s. 35(1) of the *Noxious Weeds Act*, a local control authority can only be one of two things, a local council or a county council. In answering this question I shall consider each separately.
- 3.4 While, in so far as it relates to local councils, this question assumes an affirmative answer to question 1, viz., that s. 68 of the *Noxious Weeds Act* allows a local council to delegate to its general manager the power to appoint persons to be inspectors under s. 41(1), this question is not posited on the existence of any such delegation. Rather, it seeks advice as to the steps that a local council must take if it wishes to ensure that any appointment of one of its employees as a s. 41(1) inspector has been validly made.
- 3.5 So far as the remarks made in the preceding question are concerned, two points arise. In the first place, assuming that, under s. 68 of the *Noxious Weeds Act*, a local council were to delegate to its general manager the power to appoint inspectors under s. 41(1) of that statute, would it, by such delegation deprive itself of the power directly to make such an appointment? Notwithstanding a decision of the English Court of Appeal to the contrary (*Blackpool Corporation v Lockor* [1948] 1 QB 349 at 377-78 (Scott & Asquith LJ)), the view of authoritative English and Australian texts is that, in such circumstances, a local council would retain the power to make such appointments directly: de Smith, Woolf & Jowell *Judicial Review of Administrative Action* (5th Edition - 1995) at 362-363, Wade & Forsyth *Administrative Law* (9th Edition - 2004) at 318-319, Aronson, Dyer & Groves *Judicial Review of Administrative Action* (3rd Edition - 2004) at 310 and Sykes, Lanham, Tracey & Esser *General Principles of Administrative Law* (4th Edition - 1997) at [805]. Secondly, assuming the existence of a delegation, the act of the delegate (in this case the general manager) is nevertheless regarded as the act of the council.
- 3.6 The consequence of what has been said in the preceding paragraph is that the appointment of persons as s. 41(1) inspectors may be made in any of the following ways. In the first place, they may be made by a local control authority, being also a local council, in circumstances where there has been no exercise of the s. 68 power to delegate the function. In such cases local councils would be required to comply with their own procedures, and, I assume, any applicable industrial laws in the making of any such appointment. In the second place, assuming that there had been an exercise of the s. 68 power of delegation to confer such function on a local council's

general manager, appointments could be made either by the local council, or by the general manager as its delegate. I shall take these alternatives in reverse order.

- 3.7 From the third paragraph of your letter of instructions it is apparent that an inspector appointed under s. 41(1) of the *Noxious Weeds Act* may be, but need not be, an employee of the relevant local council. However, the present question assumes that any delegation under s. 68 of the *Noxious Weeds Act* would confine the general manager, as delegate of the relevant council, to appointing a person who is already an employee of the relevant council. That is to say, the general manager would have no power to appoint a non-council employee as an inspector. To put it another way, relevantly this question assumes that a local council may exercise its power of delegation under s. 68 of the *Noxious Weeds Act* to delegate a segment only of its power to make appointments under s. 41(1), without delegating the other segment of that power, viz., although it would delegate the power to appoint one of its employees as an inspector, it would not delegate the power to appoint non-employees. I raise this because, in such circumstances, a question can arise as to whether the delegation of part only of the delegator's functions constitutes a valid exercise of the delegating power. In broad terms the test for determining this question depends upon the degree of control to be maintained by the delegating authority: *de Smith* at 362 and 365. While it is difficult to answer such questions in the abstract, I am inclined to think that the delegation of so much of a local council's power as allowed the delegate to appoint members of the council's staff as inspectors would be a valid exercise of that power.
- 3.8 Returning to consider the appointment of a council employee by a council's general manager as delegate of the council concerned, it seems to me that there would be two principal matters that would have to be addressed. In broad terms, the first concerns the validity of the delegation. The *Noxious Weeds Act* does not contain any provisions specifying what steps must be taken for the valid exercise of the delegating power contained in s. 68 of the *Noxious Weeds Act*. While it would be a matter for those advising a local council to draw its attention to how the s. 68 power of delegation should be exercised, I make the following comments. In the first place, it seems to me that such delegation should be made by a resolution of the relevant council. Secondly, it seems to me that the resolution should make it clear that the delegation is being made pursuant to the power conferred upon the council by s. 68 of the *Noxious Weeds Act*. Thirdly, care should be taken in the identification of the donee of the delegation. That is to say, it could include the name of the person who was general manager of the council at the time the delegation was made, or it could be expressed in more general terms to be a delegation to the general manager for the time being. The latter might be thought to be more serviceable. Further, it seems to me that such resolution should indicate whether the delegation is for a limited period of time, and, if appropriate, should specify how it may be revoked. Finally, as appears from the preceding paragraph, it should carefully stipulate that the power is

limited to the appointment of council employees, and that it does not extend to the appointment of individuals who are not employees. It should also specify any other limitations that are to govern the general manager's exercise of the power of appointment under s. 41(1), such as compliance with applicable council protocols and applicable industrial laws.

- 3.9 The second element referred to in para 3.8 above is that the general manager, as delegate of the relevant local council, exercises the power of appointment of inspectors under s. 41(1) of the *Noxious Weeds Act* in accordance with the terms of the relevant delegation. In this context it needs to be remembered that as the local council has delegated its functions to appoint inspectors to its general manager, it is not for the local council as it were to "stand over" and direct the general manager as to how he shall exercise the function that has been delegated to him.
- 3.10 Assuming that a local council has, under s. 68 of the *Noxious Weeds Act*, delegated to its general manager its powers under s. 41(1) of that statute, it seems to me that the validity of its exercise of its residual function to make such an appointment would be determined by considerations such as those referred to in para. 3.6 above.
- 3.11 It seems to me that it is not possible to answer this question otherwise than in fairly general terms. I say this because, as it seems to me, determination of the validity of the exercise of the power conferred by s. 41(1) of the *Noxious Weeds Act* either by a local council or by a local council's general manager as delegate of the council itself will depend upon the circumstances of particular cases.
- 3.12 From what has been said in para 2.2 above it will be appreciated that not all county councils are local control authorities for the purposes of the *Noxious Weeds Act*. Rather, only those county councils that have had noxious weed control functions conferred upon them will be local control authorities for the purposes of the *Noxious Weeds Act*, and in this context it is noted that the Dictionary to that statute does not define the expression "noxious weed control functions".
- 3.13 For the purposes of this advice, I shall assume that a county council will have an officer who has powers similar to those referred to in s. 335(1) of the *Local Government Act*. For the sake of simplicity, in what follows, I shall refer to such person as the general manager of a county council.
- 3.14 Assuming that a county council is a local control authority, then, among other things, it would have the power to make appointments under s. 41(1) of the *Noxious Weeds Act*, and it will be also entitled to exercise the power of delegation conferred upon local control authorities by s. 68 of that statute. In such circumstances I think that, *mutatis mutandis*, the validity of the exercise of the delegating function in s. 68 of the *Noxious Weeds Act* and the validity of appointments of inspectors to local councils

would fall to be determined along the same lines as those that have been discussed in paras. 3.8-3.11 above.

As to question 3

- 3.15 From those provisions of the *Local Government Act* that have been referred to in paras. 2.6-2.10 above, I think that the following propositions emerge. First, by s. 22, a council has the functions conferred or imposed upon it by or under any statute other than the *Local Government Act*. While I appreciate that it does not form part of s. 22, the Note to that section lists various statutes that confer functions upon councils. In some instances, such as the *Companion Animals Act 1998*, functions are, in terms, conferred upon councils. In other cases, such as the *Food Act 2003*, functions are not, in terms, conferred upon councils. In the case of the *Food Act*, the relevant powers are conferred upon enforcement agencies, and cl. 170 of the *Food Regulation 2004* provides that, for the purposes of the *Food Act*, local councils are enforcement agencies. Although I have not examined all of the statutes referred to in the Note to s. 22 of the *Local Government Act*, those that I have examined do not contain a provision allowing the council upon whom functions are conferred (whether referred to as a council or not) to delegate the relevant power. Secondly, s. 355(c) provides that, in broad terms, a council may exercise its functions by a delegate. Thirdly, s. 377(1) of the *Local Government Act* provides that a council may, by resolution, delegate to its general manager any of its functions.
- 3.16 If one examines the matter purely from the point of view language referred to in relevant provisions of the *Local Government Act* that have been referred to in the preceding paragraph, it seems to me that the result is that, as the result of the combined effect of ss. 22 and 377(1), a council could delegate to its general manager its power to appoint inspectors under s. 41(1) of the *Noxious Weeds Act*. The consequence of this is that if both these provisions and ss. 35, 41(1) and 68 of the *Noxious Weeds Act* are to have effect according to their language, there would exist two parallel mechanisms by which councils could delegate to general managers their power to appoint inspectors under s. 41(1) of the *Noxious Weeds Act*. What I find to be a more difficult question is whether the legislature's intention was that there should be concurrent mechanisms for making a council's general manager its delegate for the purposes of appointing inspectors under s. 41(1) of the *Local Government Act*, or whether general managers are to be appointed as delegates under s. 68 of the *Noxious Weeds Act* and not otherwise.
- 3.17 In order to consider the question referred to in the preceding paragraph, it is necessary that certain dates be borne in mind. The *Noxious Weeds Act* received the Royal Assent on 4 May 1993, and commenced on 1 July 1993. The *Local Government Act* received the Royal Assent on 8 June 1993, and commenced on 1 July 1993. That is to say, while these statutes received the Royal Assent on different days, they both commenced on the same day.

- 3.18 In the context of statutory interpretation there are two maxims that are sometimes relied upon to resolve inconsistencies (not using that word as a term of art for present purposes) between earlier and later statutes dealing with the same subject matter. The first approach is reflected in the Latin maxim *leges posteriores priores contrarias abrogant*, and the second is reflected in the Latin phrase *generalia specialibus non derogant*. These phrases are respectively rendered into English as: later acts repeal earlier inconsistent acts and a general provision does not impliedly repeal a specific provision. The *generalia specialibus* maxim is only available where the general act is later in time than the earlier act: Pearce & Geddes *Statutory Interpretation in Australia* (5th Edition – 2001) at [7.20].
- 3.19 Fundamental to the operation of the two maxims that have been referred to in the preceding paragraph is that there exists an earlier statute and a later statute. In the light of what has been said in para 3.17 above, it will be appreciated that these maxims could only have application if the existence of earlier and later statutes was to be determined by reference to the dates when they received the Royal Assent and not when they commenced.
- 3.20 Although my researches have not disclosed any reported authority that has considered the point, it seems to me that this is a question that ought to be determined by reference to the date when statutes commence rather than the date upon which they receive the Royal Assent if that is not the day when they commence. I say this for the following reasons. In the first place if the date of Royal Assent were to be taken to be the relevant date, we would be in the realm of the theoretical rather than the real world. That is to say, we could become involved debates as to whether one statute that had not commenced had impliedly repealed another statute that had not commenced, or whether a later statute that had not commenced had impliedly repealed a statute that had commenced was in force, and was governing the conduct of individuals. In the second place, on occasion there may be a considerable time between the date when a statute receives the Royal Assent and the date upon which it commences. Within that period it is quite possible that a legislature could amend un-commenced provisions in a statute. Again, there would be an air of unreality about determining whether an un-commenced provision in a statute that was liable to subsequent amendment before it commenced impliedly repealed a provision that was already in effect. Thirdly, at the core of the two maxims referred to in para 3.18 above is the notion of implied repeal of an earlier statutory provision by a later statutory provision. It seems to me that repeal (be it express or implied) is essentially a practical concept, and requires that both the repealed and the repealing legislation be in effect. If this were not so, there could be no repeal either express or implied.
- 3.21 The conclusion that the maxims referred to in para 3.18 above are not available to resolve the question referred to in para 3.16 above does not mean that the question is not capable of being addressed. Statutory construction involves both giving effect

to what is divined to be the legislative intention, and giving effect to the purpose intended to be achieved by relevant legislation. It seems to be that if these two notions are applied to the question referred to in para. 3.16 above, the result is that, while the matter is not free from doubt, I think the better view is that delegations to a council's general manager to appoint inspectors under s. 41(1) of the *Noxious Weeds Act* ought to be made under s. 68 of that statute and not under s. 377(1) of the *Local Government Act*. I say this for the following reasons.

3.22 While the *Noxious Weeds Bill 1993* and the *Local Government Bill 1993* were not cognate Bills, it seems to me that they were nevertheless part of a legislative package. In part this observation derives from the contemporaneity with which they were debated, and in part it derives from the common commencement date of the *Noxious Weeds Act* and the *Local Government Act*. However, of more significance is the fact that prior to the passing of the *Noxious Weeds Act*, the control of noxious weeds in New South Wales was dealt with by the *Local Government Act 1919* (the 1919 Act): *Hansard* Vol. 235 at 181.

3.23 Further, in the Minister's second reading speech that has been referred to in the preceding paragraph, there appears the following (at 181-82):

"Following agreement between the Minister for Local Government and the Minister for Agriculture and Rural Affairs to transfer responsibility for noxious weed control to the Minister for Agricultural and Rural Affairs, a working party was set up to report to the two Ministers on new legislation for noxious weeds legislation in New South Wales ...

The bill draws heavily on the noxious plant provisions of the *Local Government Act [1919]* which have operated for many years but the opportunity has been taken to streamline the administration of noxious plant control and to recognise the practical problems facing local government councils and the land holder. The major changes proposed from the previous legislation are: the administration of noxious weeds control will be under one Minister, the Minister for Agricultural and Rural Affairs. This will insure that one Minister has control over all activities in the state concerned with noxious weeds, rather than the division of responsibility between two ministers are previously existed ..."

3.24 The policy of removing responsibility for noxious weed control from Local Government continues, with responsibility now resting with the Minister for Primary Industries.

3.25 While I acknowledge that there is a distinction to be drawn between the general policy question of whether responsibility for noxious weed control should be shared between two ministers, and, if not, which particular minister should have responsibility for it and the more operational matter of delegating to a person the power to appoint inspectors under s 41(1) of the *Noxious Weeds Act*, I think that there is nevertheless the indication of a legislative intention that the administration of noxious weed control was to be taken out of the realm of local government.

- 3.26 Further, I think that some of the discussion in para. 3.15 above is also relevant in this context. There it was mentioned that a number of the statutes referred to in the Note to s. 22 of the *Local Government Act* do not contain specific provisions allowing councils to delegate functions conferred upon them under those statutes. Rather, in the absence of express powers of delegation in those statutes, councils must rely upon the combined effect of ss. 22 and 377(1) of the *Local Government Act*. In such a situation, it seems to me that the inclusion of a specific power of delegation in s. 68 of the *Noxious Weeds Act* should not be seen as peradventure. Finally, it seems to me that another reason pointing to an intention on the part of the legislature that the administration of noxious weeds management ought to be governed entirely by the *Noxious Weeds Act* and not partly by that statute and partly by the *Local Government Act* has its origins in s. 357 of the *Local Government Act*, which has been referred to in para. 2.9 above. While under the *Local Government Act* it is generally the case that councils may exercise their functions within or outside their particular geographical areas, the *Noxious Weeds Act* embodies an entirely different policy. In the first place, as appears from para. 2.2 above, local control authorities may only exercise their functions enumerated in that section within their particular geographical areas. This policy is repeated in s. 37(1), which provides that a local control authority must monitor the presence of noxious weeds within its own area and keep records of the matters enumerated in that subsection. When it comes to inspectors, as has been noted in para. 2.3 above, s. 41(3) provides that they may not exercise any functions under the *Noxious Weeds Act* outside the local area of the relevant local control authority. So far as inspectors are concerned, it seems to me that this policy consideration is under-scored by s. 36A(6) and s. 39.
- 3.27 The question referred to in para. 3.16 above may also be considered in the light of maxims of statutory interpretation other than those referred to in para. 3.18 above. The first of these other maxims is embodied in the Latin phrase *expressio unius personae vel rei, est exclusio alterius* (the express mention of one person or thing is the exclusion of another), and the other is embodied in the Latin phrase *expressum facit cessare tacitum* (when there is express mention of certain things, then anything not mentioned is excluded). In some instances these maxims have been equated: Pearce & Geddes at [4.28].
- 3.28 If one were to apply one or other of these maxims to the circumstances presently under consideration, the reasoning would be to the effect that as the *Noxious Weeds Act* contains provisions dealing specifically with noxious weeds and the appointment of inspectors, including the delegation of the power to appoint inspectors, provisions dealing more generally with the delegation of a council's functions ought to be regarded as having no application.

- 3 29 Assuming for the moment that the two maxims are distinct, Pearce & Geddes make it plain that either of them will only be applied with considerable caution [4 26], [4 27] and [4 28].
- 3 30 That having been said, it seems to me that if one were to adopt by analogy the reasoning in *David Grant and Co Pty Limited (Receiver Appointed) v. Westpac Banking Corporation* (1995) 184 CLR 265, it may be that one or other of those maxims could apply in the circumstances presently under consideration. That case arose out of statutory demands served by a creditor upon three companies in the same group. Section 459E(2)(c) of the *Corporations Law* (Vic) required that such demands be complied with within 21 days of service, and s. 459G of the same statute provided that applications to set aside such demands "may only be made within 21 days" after service of the demand. Applications to set aside the demands were made outside the 21 day period, and in them the applicant relied upon s. 1322(4)(d) of the *Corporations Law* to seek an extension of the time to make the relevant application. Relevantly, s. 1322(4) provided that a court could, on application, make an order extending the period for doing any act, matter or thing under the *Corporations Law*, including an order extending a period where the period in question had ended before the application was made for the order.
- 3 31 Accordingly, the question that the High Court had to resolve was whether, notwithstanding the precise terms of s. 459G, the more general provision in s. 1322(4)(d) was available to extend the time for the filing of applications to set the demands aside. In his judgment (with which Brennan CJ and Dawson, Gaudron and McHugh JJ agreed), Gummow J noted that Part 5.4 of Chapter 5 of the *Corporations Law* (which contained both s. 459E and s. 459G) was inserted into the *Corporations Law* by an amending statute of 1992. Section 1322 was in the *Corporations Law* at the time that Part 5.4 was inserted. He also noted (at 270) that the provisions of the new Part 5.4 constituted a legislative scheme for the quick resolution of disputes as to solvency and the determination of whether a company should be wound up without the interposition of disputes about debts, unless they were raised promptly.
- 3 32 Then, after referring to relevant provisions in the *Corporations Law* and differences of opinion as to their operation between the Appeal Division of the Supreme Court of Victoria and the Full Court of the Supreme Court of Queensland, Gummow J cited with approval the following passage from the joint judgment of Gavan Duffy CJ and Dixon J (as he then was) in *Anthony Hardorn & Sons Limited v. Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7:

"When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it should be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power."

- 3 33 After quoting this passage, Gummow J noted that in the same case McTiernan J had spoken to the like effect, and that the reasoning in the passage quoted above had been applied in subsequent decisions of the High Court between 1949 and 1991. Applying that principle, his Honour held that s 459G applied to the exclusion of s 1322(4)(d). If one were to attempt to apply the reasoning in *David Grant* to the circumstances presently under consideration, the first point to observe is that just as Part 5.4 of the *Corporations Law* was intended to constitute a legislative scheme for dealing with a specific matter, so too is the *Noxious Weeds Act* intended to constitute a legislative scheme dealing with a specific matter. So much seems to me to follow from that passage from Hansard that has been referred to in para 3 23 above. Secondly, in the passage from *Anthony Hordern* that has been quoted in para. 3.32 above, Gavan Duffy CJ and Dixon J expressed the view that particular provisions prescribing a mode in which a power should be exercised excluded the operation of more general provisions that might otherwise have been relied upon for the same power.
- 3 34 So much having been said, it must be acknowledged that in that passage from their joint judgment their Honours referred to specific and general provisions "in the same instrument". However, in the circumstances presently under consideration, we do not have the two provisions in the same instrument, but we have them appearing in separate instruments. The question that arises is whether this distinction is fatal to an application, by analogy, of the reasoning in *David Grant* to the circumstances presently under consideration. While, subject to what follows, my researches have not disclosed any reported authority that has considered the question, it seems to me that it is at least arguable that the general principle stated, Gavan Duffy CJ and Dixon J in *Anthony Hordern* ought to be applicable in the circumstances presently under consideration. I say this because, as has been noted above, the *Noxious Weeds Act* and the *Local Government Act* were part of a legislative package and both commenced on the same day. Further, it seems to me that in this connection, the considerations referred to in paras. 3.17 and 3 23 above are also relevant.
- 3 35 While, as has been noted above, there is no direct authority for the proposition that the statement of principle quoted in para. 3.34 above may be applicable in the context of different instruments, in *Re Wilcox; Ex parte Venture Industries Pty Ltd* (1996) 66 FCR 551 there is in the joint judgment of Black CJ, Cooper and Merkel JJ (at 531) what might be described as a slight dictum to the effect that the principle will apply in circumstances where the powers under consideration appear in different instruments.
- 3 36 While I acknowledge that the matter is not free from doubt, I think that the answer to the question referred to in para 3.16 above ought to be that, for the reasons set out in paras 3.17 – 3 35 above, the better view is that any delegation of a local control authority's power to appoint an inspector under s 41(1) of the *Noxious Weeds Act* is

to be exercised under s 68 of the statute and not under s. 377(1) of the *Local Government Act*.

3.37 Consequently, and again acknowledging that the matter is not free from doubt, I think that the better view is that this question should be answered in the negative.

As to question 4

3.38 In view of my answer to question 3 above, this question does not arise

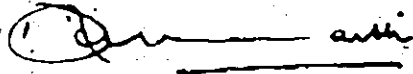
As to question 5

3.39 As I have answered question 3 above in the negative, I do not think that this question arises.

4. Conclusion

4.1 See summary of advice.

Signed:



Dr David Galbraith
Senior Solicitor
for Crown Solicitor

[Status Information](#) [Whole Instrument](#) [List Reqs etc](#) [Historical Versions](#)[Historical notes](#) [Search Title](#)[Previous Page](#) [Next Page](#)

Part 7 >> Section 68

Noxious Weeds Act 1993 No 11

68 Delegation by local control authorities

A local control authority may delegate to a person any of the local control authority's functions under this Act other than this power of delegation.

[Top of page](#)

[Status Information](#) [Whole Instrument](#) [List Regs etc](#) [Historical Versions](#)[Historical notes](#) [Search Title](#)[Previous Page](#) [Next Page](#)

Part 4 >> Division 2 >> Section 35

Noxious Weeds Act 1993 No 11

35 What are the local control authorities?

- (1) The local control authority for land within a local government area is the council of the local government area or, if noxious weed control functions for that area have been conferred on a county council under any other Act, the county council having those functions.
- (2) The local control authority for land within the Western Division that is not within a local government area is the Western Lands Commissioner.
- (3) The local control authority for land within Lord Howe Island is the Lord Howe Island Board.

[Top of page](#)

[Status Information](#) [Whole Instrument](#) [List Regs etc](#) [Historical Versions](#)[Historical notes](#) [Search Title](#)[Previous Page](#) [Next Page](#)

Part 5 >> Division 1 >> Section 41

Noxious Weeds Act 1993 No 11

41 Inspectors

- (1) A local control authority may appoint inspectors for the purposes of this Act.
- (2) An inspector has the functions conferred or imposed on inspectors by or under this Act.
- (3) An inspector appointed by a local control authority may not exercise any functions under this Act outside the local area of the authority.

Note. The noxious weed control functions of inspectors are set out in sections 39 and 40.

[Top of page](#)