Submission No 6

INQUIRY INTO MAKING OF DELEGATED LEGISLATION IN NEW SOUTH WALES

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Dear Chair

RE: Inquiry into the making of delegated legislation in New South Wales

Thank you for the opportunity to make a submission to the Regulations Committee in its 'Inquiry into the making of delegated legislation in New South Wales'. I consent to this submission being published on the Committee's website and I would be happy to speak with the Committee further regarding any aspect of it.

The Regulation Committee has asked about the extent to which the New South Wales Parliament has delegated legislative power, and particularly the practice of using 'shell' legislation, 'Henry VIII' clauses and other forms of executive government overreach. In this submission, I have endeavoured to draw the Committee's attention to the constitutional principles at stake in relation to the practice of such delegations, using a number of New South Wales examples to illustrate my points. I have not been able to provide a comprehensive overview of New South Wales practice in relation to these issues. However, the examples that I do draw the Committee's attention to demonstrate the wider concerns that I highlight in the submission.

The submission is divided into three parts. The first part explains the practice of shell legislation, Henry VII clauses and quasi-legislation as three concerning examples of legislative over-delegation and concomitant executive overreach. The second part looks at the constitutional position of delegation. The third part, informed by the practice and constitutional position, makes a number of recommendations as to best practice in delegations in New South Wales, with particular reference to the work of the Regulations Committee.

Part I – The practice of shell legislation, Henry VIII clauses and quasi-legislation

Shell, or skeleton, legislation refers to primary legislation in which significant policy decisions in the legislative scheme are delegated. It is closely associated with, and poses similar challenges to constitutional principles, as broadly framed delegated legislative powers. A key indicator of a piece of shell or skeleton legislation is that the delegations are of

such a breadth that major, conflicting policy choices could be taken under them. A recent report by the House of Lords Secondary Legislation Scrutiny Committee explained that these delegations present accountability challenges because 'the fact that although the government which originally sought such wide powers might offer assurances as to their exercise, such assurances will not bind the actions of future governments.'[1]

A concerning example of the use of overly broad delegations in New South Wales is the *Biodiversity Conservation Act 2016*. While the Act puts in place some of the regulatory scheme in relation to land clearing in the State, it leaves fundamental policy decisions to delegated legislation; these are decisions that might change the entire policy orientation of that scheme. Part 2, Division 1 creates a series of offences, including for harming animals, picking plants, damaging (including clearing) declared areas of outstanding biodiversity value and habitat of threatened species or ecological communities. Division 2 creates defences to a prosecution for an offence in Division 1, and includes defences created through regulations and codes of practice in s 2.9:

> ***2.9 Acts authorised by regulations (including codes of practice)***
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> *(1) The regulations may make provision for additional defences to a prosecution for an offence under Division 1, including by reference to acts done in accordance with codes of practice made or adopted under subsection (2).*
> *(2) The regulations may provide for the making and publication by the Minister of codes of practice relating to animals or plants or for the adoption of other codes of practice relating to animals or plants.*

This example also incorporates a further delegation through a quasi-legislative instrument, the 'codes of practice', which I refer to below.

Henry VIII clauses refer to delegated legislative powers that authorise the executive to make delegated instruments that override (amend or repeal) the provisions of the primary Act, or another piece of primary legislation. In the 2014 High Court case *ADCO Constructions Pty Ltd v Goudappel*, French CJ, Crennan, Kiefel and Keane JJ observed that Henry VIII clauses 'have frequently been criticised for good reason',[2] but Gageler J argued against any cautionary approach to the construction of these clauses. He said '[P]arliamentary oversight, together with the scope of judicial review of the exercise of regulation-making power, diminishes the utility of the pejorative labeling of the empowering provisions as "Henry VIII clauses"'. In the context of a Henry VIII clause used to achieve a legislative transition, he said such clauses strike a balance between flexibility and accountability.[3]

The New South Wales Parliament appears to rely heavily on Henry VIII clauses. A brief review of the work of the Legislation Review Committee reveals this. In its most recent *Legislation Review Digest* (No 10/57, 24 February 2020), three Henry VIII clauses were

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1 House of Lords, Secondary Legislation Scrutiny Committee, *Response to the Strathclyde Review: Effective parliamentary scrutiny of secondary legislation*, April 2016, HL Paper 128, available at http://www.publications.parliament.uk/pa/ld201516/ldselect/ldsecleg/128/128.pdf at [78].

2 [2014] HCA 18 [31].

3 Ibid [61].

identified.[4] Only one of these related to a transitionary provision of the type Gageler J was referring to. One, the *Natural Resources Access Regulator Amendment Regulation 2019*, amended the *Natural Resources Access Regulator Act 2017* to list additional functions for the Regulator. The Committee was so concerned about this particular Henry VIII clause, changing the role of the Regulator, that it referred the matter to Parliament for further consideration.

In addition to the use of shell legislation and Henry VIII clauses, the use of **'quasi-legislation'** has also been identified as a serious threat to parliamentary oversight of delegated legislation, as well as public transparency as to the content of the law.[5] Quasi-legislation refers to the incorporation into legislation of non-legislative instruments (guidelines, codes of practice, international standards), and is particularly worrying where those instruments might change over time, affecting legislative change without any parliamentary oversight, or even knowledge. There is a general power for the executive to incorporate such instruments under any delegation in s 42(1) of the *Interpretation Act 1987* (NSW):

> ***42 Matters for which Statutory Rules may make Provision***
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> *(1) If an Act authorises or requires provision to be made for or with respect to any matter by a statutory rule, such a rule may make provision for or with respect to that matter by applying, adopting or incorporating, with or without modification, the provisions of any Act or statutory rule or of any other publication, whether of the same or of a different kind.*

The *Acts Interpretation Act* provides a general 'date stamping' rule that would assist in identifying these documents. It provides in s 69:

> ***69 References to Publications other than Acts or Instruments***
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> *(1) In any Act or instrument, a reference to a publication other than an Act or instrument is a reference to the publication:*
>
> *(a) if a particular day is specified for that purpose in the Act or instrument--as in force or current on that particular day, or*
>
> *(b) in any other case--as in force or current on the day on which the provision containing the reference took effect.*

However, the provisions of the Act may override this presumption (s 69(2)). One example of this position being overridden is s 138 of the *Marine Safety Act 1998*, which provides:

> *(1) The regulations may incorporate by reference, wholly or in part and with or without modification, any standards, rules, codes, specifications or methods, as in*

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4 Available at: https://www.parliament.nsw.gov.au/ladocs/digests/642/Digest%20No.%2010%20-%2025%20February%202020.pdf

5 See further discussion in Scott Hickie, 'Diminishing the efficacy of disallowance motions: Quasi-legislation in State Jurisdictions' (2012) 27 *Australian Parliamentary Review* 91; and Chris Angus, 'Delegated Legislation: Flexibility at the cost of scrutiny?' *New South Wales Parliamentary Research Service e-brief* (July 2019) available at https://www.parliament.nsw.gov.au/researchpapers/Documents/Delegated%20legislation%20e-brief.pdf

> *force at a particular time or as in force from time to time, prescribed or published by whatever means by an authority or body (whether or not it is a New South Wales authority or body).*

This provision, is, in effect, giving non-accountable bodies legislative power, because, if incorporated, their instruments are given the force of law. It also creates a challenge for the intelligibility of the statute book, as many of these instruments would be substantive documents that change regularly.

Section 2.9 of the *Biodiversity Conservation Act*, set out above, is another illustrative example of the dangers of quasi-legislation. While the Minister's code of practice is made by an executive officer, its incorporation by regulations would allow amendment to be made to the defences, without any amendment to the regulation itself. This would avoid triggering the tabling and disallowance requirements that attach to regulations under s 40 of the *Interpretation Act*.[6]

Part II – The constitutional position of delegated legislation

Each of these practices seriously undermines the constitutional responsibilities of the Parliament to oversee exercises of delegated legislation. It has long been accepted that there is no constitutional prohibition, even at the federal level, on the delegation of legislative power from the Parliament to the executive. This was most famously established in 1931 in *Dignan*,[7] which considered the constitutionality of an extreme example of shell legislation that also incorporated a Henry VIII clause. Section 3 of the *Transport Workers Act 1928* provided:

> The Governor-General may make regulations not inconsistent with this Act, which, notwithstanding anything in any other Act … shall have the force of law, with respect to the employment of transport workers …

Dixon J later explained that the judgments in this case were driven at least in part by the practical exigencies of governance requiring delegation.[8] The Court upheld the delegation as constitutional, but some limitations on this position were mooted. Dixon J indicated that the delegated legislation must be characterised under a constitutional head of power (which is a requirement for federal but not state legislative power). He also said, rather delphicly, that the distribution of powers (separation of powers) may supply 'considerations of weight' affecting the validity of an Act creating a legislative authority.[9] He took that limit no further. The judgment of Evatt J made remarks about the necessity of ensuring some minimum level of contact between the power and Parliament. These were described by Geoffrey Sawer as 'practical tests' dictating a minimum level of parliamentary supervision.[10] These included the nature of the delegate ('The further removed the law-making authority is from continuous contact with Parliament, the less likely is it that the law will be a law with respect to [the Commonwealth Parliament's powers]'.) and the 'restrictions placed by Parliament upon the

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6 The importance of the codes is demonstrated by the requirement for public consultation in s 9.1 of the Act. There is, however, no requirement to table the Codes in Parliament.

7 *Victorian Stevedoring and General Contracting Company Pty Ltd v Dignan* (1931) 46 CLR 73.

8 Owen Dixon, 'The Law and the Constitution' (1935) 51 Law Quarterly Review 590, 606

9 *Dignan* (1931) 46 CLR 73, 101.

10 Geoffrey Sawer, 'The Separation of Powers in Australian Federalism' (1961) 35 *Australian Law Journal* 177, 187.

exercise of power by the subordinate law-making authority'.[11] He also saw the circumstance in which delegations were made as relevant to their validity, for example delegations during war may be wider than otherwise justified by the Commonwealth's powers.[12]

These limitations that draw on the fundamental responsibility of Parliament to supervise delegated exercises of legislative power have not been taken further at the Commonwealth level, and it is not suggested that these are limitations drawn from principles of separation of powers and democratic government that operate at the State level.[13] They do, however, highlight the constitutional principles at stake in relation to delegation of legislative power, particularly when it comes to shell legislation, the use of Henry VIII clauses and the use of quasi-legislation.

Summary of Constitutional Principle:

The constitutional principle can be summarised thus. Within the New South Wales constitutional system, Parliament is the institution responsible for making the law. It fills this position because of its broad representative *nature*, with the widest and most diverse range of constituents represented in it, as well as its *practice* of conducting its activities in public, and subjecting them to challenge, debate and ultimately, an open vote for which its members will ultimately be accountable back to the people. While delegation of legislative power is permitted within this system, to respect the status of Parliament, delegation should only be done where the Parliament retains oversight of that power and retains responsibility for significant policy decisions that are made under it. In addition to the nature and practice of Parliament, delegations should be limited because of the rule of law principle that strives for certainty: use of overly broad delegations in shell legislation, Henry VIII clauses and quasi-legislative instruments undermines the intelligibility of the statute book. None of this *prevents* the delegation of law-making power, and indeed there are generally accepted reasons for, and instances in which delegation is considered appropriate. However, it reinforces the need to limit these practices in delegation.

Part III –Best Practice in relation to Delegations

From the brief consideration of New South Wales practice contained in this submission, it is clear that there are practices of broad delegations, Henry VIII clauses and use of quasi-legislation. These each present challenges to foundational constitutional principles of democratic oversight of the legislative function.

There are already a number of processes that the New South Wales Parliament has put in place to try to ensure oversight of executive power in these instances. These include the terms of reference of the Legislation Review Committee, which must under s 8A of the *Legislation Review Act 1987*, report to Parliament Bills that 'inappropriately delegate legislative power" and "do not sufficiently allow the Parliament to scrutinise legislative power." However, while the Committee has flagged these issues in its reports, we are nonetheless seeing these provisions in the New South Wales statute book. The establishment of the Regulations Committee is a further step that the Legislative Council has recently taken to ensure oversight

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11 *Dignan* (1931) 46 CLR 73, 120.

12 Ibid 120-121.

13 Although note that Twomey has pointed out the Parliament cannot, in the extreme circumstance, abdicate its legislative power to the executive: Anne Twomey, *The Constitution of New South Wales*, (Federation Press, 2004) 211-212.

of these types of delegations. Its terms of reference extend beyond those traditionally undertaken by delegated legislative committees, to examination of the policy or substantive content of a regulation, which is particularly important where there are broader delegations, or use of Henry VIII clauses and quasi-legislation. As the review of the Committee concluded, this has provided greater oversight for the Parliament with respect to these regulations.[14]

Nonetheless, there are further improvements and strengthening of oversight that might be achieved in this area, and the Regulation Committee is in a unique position to drive any reform.

Some of these responses should be undertaken through amendments to the *Legislation Review Act* and the *Interpretation Act*. These might include, for instance:

1. Expanding the application of Part 6 of the *Interpretation Act* and the scope of the *Legislation Review Act* to include all instruments of a legislative character, including quasi-legislative instruments. This would expand the tabling and disallowance requirements, as well as the jurisdiction of the Legislation Review Committee. This would be consistent with best practice in this area, as is now seen in the Commonwealth scheme and the application of its scrutiny framework to instruments of a legislative character and the scope of the Senate Committee Standing Committee for the review of Delegated Legislation.[15]
2. Removing the exception to the date-stamping requirement for quasi-legislative instruments in s 69(2) of the *Interpretation Act*.

Other responses are more directly relevant to the Regulations Committee and its terms of reference. In this respect, I offer the following recommendations for the consideration of the Committee:

1. The jurisdiction of the Regulations Committee be clearly stated to include review of all forms of delegated legislative instrument, not limiting its remit to regulations. While this appears to have been the practice of the Legislative Council and Committee to date (for instance, it has undertaken review of the *Environmental Planning and Assessment Amendment (Snowy 2.0 and Transmission Project) Order 2018*), to avoid future doubt, I recommend that the jurisdiction of the Committee be extended to all instruments of a legislative nature, regardless of their form.[16] This will ensure it has policy and substantive oversight of all delegated instruments, including quasi-legislative instruments, particularly important when there are broad delegations or Henry VIII clauses used.

2. The Regulations Committee, with greater resources and time to review delegated instruments, should take the opportunity to develop a **set of guidelines** against which

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14 Regulation Committee, *Evaluation of the Regulation Committee Trial* (November 2018), available at https://www.parliament.nsw.gov.au/lcdocs/committees/252/Evaluation%20of%20the%20Regulation%20Committee%20trial%20-%20%20final%20report%20-%209%20November%202018.pdf.

15 See further the definition of legislative instrument in the *Legislation Act 2003* s 8, and see also discussion of the Senate Committee's jurisdiction in Senate Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of Delegated Legislation* (2019)

16 See the experience of the Subordinate Legislation Committee in Tasmania during the COVID-19 crisis, Brendan Gogarty and Gabrielle Appleby, 'The Role of the Tasmanian Subordinate Legislation Committee During the COVID-19 Emergency' (2020) *Alternative Law Journal* (forthcoming), available at SSRN: https://ssrn.com/abstract=3587177

breadth of delegations are assessed, and set out the limited circumstances in which it is deemed appropriate to rely upon Henry VIII clauses and quasi-legislation. I would suggest that these guidelines incorporate the following principles:

(a) Broadly framed delegations should be avoided, or where they are included, should be subject to affirmative resolution procedures, or at the least are in the form of regulations to ensure appropriate drafting assistance and maximum parliamentary scrutiny.
(b) Delegated instruments made under Henry VIII clauses are used only for transitionary provisions, or are otherwise time-limited by being subject to sunset provisions. Using sunset clauses means that if instruments under a Henry VIII are remade after their expiry, this would trigger further parliamentary review and oversight.
(c) The use of quasi-legislation is restricted by **requiring** the instrument to be 'date stamped', that is, the legislative reference **must be** to a *particular* instrument at a *particular* time. This would strengthen the principle currently contained as a presumption in s 69(1) of the *Acts Interpretation Act 1987*.

3. The Regulations Committee work with the government and the Office of Parliamentary Counsel to develop a set of guidelines and educational tools for those in government instructing parliamentary counsel on the drafting of legislation. These would largely reflect the scrutiny guidelines of the Committee (see suggestions at (2)).

Yours sincerely

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