

**INQUIRY INTO MAKING OF DELEGATED LEGISLATION  
IN NEW SOUTH WALES**

**Organisation:** NSW Parliamentary Counsel's Office

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Parliamentary  
Counsel's Office

Submission of the NSW Parliamentary Counsel's Office to the  
Inquiry into the making of delegated legislation in New South Wales  
of the NSW Legislative Council's Regulation Committee

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## Contents

A.	Introduction, Executive Summary and Recommendations	1
1.	Parliamentary Counsel's Office	1
2.	Defining 'Henry VIII clauses' and 'shell legislation'	1
3.	Executive summary and recommendations	3
B.	Discussion	5
4.	Statutory framework for the delegation of power	5
5.	Procedural differences in the making of primary and delegated legislation	5
6.	Issues posed by the terms of reference	6
C.	Select case studies—NSW	9
7.	COVID-19 emergency measures—use of Henry VIII clauses to allow executive management during parliamentary hiatus of 'lockdown'	9
8.	Protection of the Environment Operations—regulations amending defined terms in Act that affect its scope beyond the scope of the Henry VIII clause power	9
9.	Liquor regulatory scheme—broad delegated exception-making power	10
10.	Workers compensation—savings and transitional provisions	10
11.	Occupational Licensing (Adoption of National Law) Act 2010	10
D.	Other jurisdictions	12
12.	Commonwealth	12
13.	Queensland	13
14.	Western Australia	15
15.	Northern Territory	16
16.	Australian Capital Territory	17

## A. Introduction, Executive Summary and Recommendations

### 1. Parliamentary Counsel's Office

- 1.1. The New South Wales Parliamentary Counsel's Office (PCO) is responsible for drafting and providing access to most New South Wales legislation. PCO drafts all Bills for Acts required for introduction into Parliament. PCO also drafts a wide range of delegated legislation, including regulations, rules, proclamations, orders and environmental planning instruments.
- 1.2. The Office has experience with 'Henry VIII clauses' and 'shell legislation'—the drafting of the clauses or legislation, the difficulties that the clauses or legislation may pose and the consequences the clauses or legislation may cause.
- 1.3. This submission is public.

### 2. Defining 'Henry VIII clauses' and 'shell legislation'

- 2.1. The term 'Henry VIII clause' is generally used to describe a clause in a principal Act of Parliament that allows for the making of subordinate, or delegated, legislation, and confers the ability for the delegated legislation to amend the principal Act of Parliament. The term is usually used pejoratively and recalls the Proclamation by the Crown Act 1539<sup>1</sup>, which gave the named monarch's proclamations force 'as though they were made by act of parliament'. Despite containing the caveat that the proclamations 'shall not be prejudicial to any person's inheritance, offices, liberties, goods, chattels or life', the delegation was sufficiently wide-ranging that it is understood as representing the height of executive power unchecked by, indeed enabled by, the legislature.
- 2.2. However, almost all modern legislation involves delegations to the executive of power to make delegated legislation. A standard regulation-making power is included in most Acts, in the following terms—

The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- 2.3. This is necessary for the efficient functioning of government in complex societies, and avoids precious parliamentary time being absorbed with trifling matters. In a sense, all delegated power confers the ability to amend legislation, even if it be only to change a time period by which an event must occur, or update penalty amounts for infringements imposed by the primary legislation. Under a broad definition, all delegated power could be viewed as a Henry VIII clause, and the term is unhelpful. However, this is not what is generally meant by the term.
- 2.4. A recent example of a Henry VIII clause is in the COVID-19 emergency legislation, enacted in March 2020 in response to the global pandemic. The *COVID-19 Legislation Amendment (Emergency Measures) Act 2020 (Emergency Measures Act)*, amended the *Criminal Procedure Act 1986* to modify some of the usual processes applicable to criminal trials. The Emergency Measures Act also introduced into the *Criminal Procedure Act* a broad regulation making

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<sup>1</sup> 'The King for the time being, with the advice of his council, or the more part of them, may set forth proclamations under such penalties and pains as to him and them shall seem necessary, which shall be observed as though they were made by act of parliament; but this shall not be prejudicial to any person's inheritance, offices, liberties, goods, chattels or life; and whosoever shall willingly offend any article contained in the said proclamations, shall pay such forfeitures, or be so long imprisoned, as shall be expressed in the said proclamations; and if any offending will depart the realm, to the intent he will not answer his said offence, he shall be adjudged a traitor.' 1539: 31 Henry 8 c.8: *Proclamation by the Crown*

power (s 366) for the purposes of responding to the public health emergency. Regulations made under the section—

- (a) are not limited by the regulation-making power in a relevant Act, and
- (b) may override the provisions of any Act or other law

- 2.5. The delegated law-making power in this type of clause is far more extensive than in the ‘standard’ regulation-making power. It is this type of delegation which is usually meant by the term ‘Henry VIII clause’. The Emergency Measures Act is discussed further in the case studies below.
- 2.6. Analysis based on whether the delegated legislation varies the primary Act by amending the text of the Act or by otherwise changing its application or operation are also artificial distinctions. The issue is whether the power exercised in the delegated legislation is properly executive or legislative in nature, and whether it should receive the enhanced scrutiny and debate that characterises legislative enactments.
- 2.7. Shell legislation, while not the same as Henry VIII legislation, is not dissimilar in that it moves the power to legislate from the legislature to the executive. Shell legislation is commonly referred to as ‘skeletal legislation’ as it is a descriptive term that gives a flavour of what is meant. That is, the primary legislation provides only the ‘bare bones’ of the legislative scheme with the detail to be set out in delegated legislation.
- 2.8. While it is accurate to say that most primary legislation will provide power for some details to be set out in delegated legislation, and that therefore what constitutes shell or skeletal legislation is a matter of opinion, there are clear examples of instances where so little of the scheme is contained in the primary legislation and so much detail is left to delegated legislation that it is difficult for Parliament to appropriately scrutinise the scheme.
- 2.9. Although the separation of powers is a foundational concept in Australian government, the separation between legislative and executive power is not crisp and is complicated by the Westminster system of ministerial responsibility. Henry VIII clauses and shell legislation fall into the overlap of legislative and executive power created by those foundational concepts.
- 2.10. Usefully analysing why and when delegated legislation is problematic therefore requires more complex analysis. The touchstone of the analysis is always, however, whether the power is properly executive or legislative in nature—whether the scope of the delegation is so large that it enables the executive to govern by decree or to overcome the intent of the primary legislation, rather than being subordinate to it.
- 2.11. For the purposes of the discussion in this submission—
  - ‘Henry VIII clause’ will be defined as a ‘provision of an Act that gives considerable amending power to delegated legislation’ and allows the delegated legislation to amend the Act under which it is made or other Acts; and
  - ‘Shell legislation’ will be defined as ‘primary legislation that only sets out the ‘bare bones’ of a legislative scheme, with the detail to be set out later in delegated legislation’.<sup>2</sup>

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<sup>2</sup> See ‘Delegated legislation: Flexibility at the cost of scrutiny?’ by Chris Ashton, NSW Parliamentary Research Service, July 2019 and ‘Bones without flesh – the issues with skeletal legislation’, a paper presented by Hon Adele Farina MLC, Chairman of the Uniform Legislation and Statutes Review Committee, Western Australian Legislative Council presented at the Australia – New Zealand Scrutiny of Legislation Conference, 26 – 28 July 2011, Brisbane.

### 3. Executive summary and recommendations

- 3.1. This submission considers both issues raised in the terms of reference together. It focuses on the drafting process and scrutiny safeguards applicable to primary and delegated legislation.
- 3.2. The submission lists some broad concerns with Henry VIII clauses and shell legislation which are well known in debates as to the appropriate matter for legislative delegation across jurisdictions, as well as some specific issues that have arisen in NSW, without reference to specific legislation.
- 3.3. Select case studies briefly profile different types of delegations of law-making power by reference to named legislation.
- 3.4. Finally, a brief interjurisdictional survey notes the approach of the Commonwealth and some other States and Territories.
- 3.5. PCO **notes** the following—
  - The separation of powers between the legislature and the executive is a cornerstone of our democracy.
  - The practical reality is that in a modern democracy delegated legislation is a matter of necessity to ensure that—
    - Appropriate administrative or highly technical detail can be ‘filled in’ by the executive rather than overloading parliament; and
    - There is a degree of flexibility to cater for changing circumstances.
  - However, this should not be at the expense of—
    - Sufficient time for the policy-making process, including appropriate consultation with Members of Parliament and the community, to ensure that legislative schemes are fully developed before primary legislation is brought before Parliament rather than being delegated to the executive and that policy conflicts are resolved before or during parliamentary debate rather than being left for a later time; and
    - The need for appropriate respect for the institution of Parliament, including that enough time is allowed for Parliament to scrutinise schemes.
  - Therefore, the use of delegated legislation is a balance between needing legislative flexibility and needing comprehensive and effective scrutiny of legislation.
  - The over-reliance on the use of Henry VIII clauses and shell legislation indicates a lack of respect for the institution of Parliament and puts at risk our fundamental democratic values and the legitimacy of the law.
- 3.6. PCO **recommends** the following—
  - That it be **noted** that—
    - to ensure legislation is of the highest standard and has appropriate regard to the fundamental legislative principles that underlie a parliamentary democracy, sufficient time is needed for the development of the legislative scheme and for parliamentary scrutiny of the legislation; and
    - in a modern democracy the complexity of Government, the need for flexibility to meet changing circumstances and the volume of legislation render it a practical reality that legislative power be delegated to the executive;

- That **consideration** be given to whether the balance between the need for legislative flexibility and the need for respect for the institution of Parliament, including comprehensive and effective scrutiny of legislation, is being appropriately maintained in New South Wales, noting that it is ultimately a matter for the Parliament;
- That **consideration** be given to introducing a mechanism to provide guidance to the executive, including the PCO, about the appropriate use of Henry VIII clauses and shell legislation. Having regard to the experience of other jurisdictions there are differing mechanisms that could be used, ranging from guidelines to legislation setting out matters about legislative standards;
- That **consideration** be given to more transparency about the use of Henry VIII clauses or shell legislation by introducing a mechanism (for example, by a statement in the explanatory notes accompanying the bill) to ensure the use of such clauses or legislation is more openly brought to the attention of Parliament;
- That **consideration** be given to the need for guidance about other matters the Committee, and the Parliament, consider appropriate and relevant matters to which regard must be had in the preparation of New South Wales legislation to ensure it is of the highest standard and has sufficient regard to democratic principles.

## B. Discussion

### 4. Statutory framework for the delegation of power

4.1. Parliament routinely delegates power to the executive to make delegated legislation. The *Subordinate Legislation Act 1989* establishes a scheme of requirements regarding the making of statutory rules. A statutory rule is any—

regulation, by-law, rule or ordinance—

- (a) that is made by the Governor, or
- (b) that is made by a person or body other than the Governor, but is required by law to be approved or confirmed by the Governor<sup>3</sup>,

However, a statutory rule does not include instruments excluded by Schedule 4 of the *Subordinate Legislation Act 1989*. Currently 31 instruments are excluded, including regulations, by-laws, ordinances and rules under various Acts, and the rules of courts and the houses of parliament.

4.2. That Act's legislative framework, comprised of the Guidelines, Regulatory Impact Statements and Staged Repeal mechanisms reflect Parliament's proper intention to place safeguards around the delegated legislation-making power that it delegates to the executive. These provisions in the Subordinate Legislation Act are supplemented by the tabling and disallowance mechanisms in Part 6 of the Interpretation Act 1987, which support that intention.

### 5. Procedural differences in the making of primary and delegated legislation

5.1. This statutory framework illustrates the difference in the processes that are applied to primary and delegated legislation.

5.2. Primary legislation is generally the subject of extensive policy development within the responsible department, under the responsible Minister.

- This will often involve consultation with targeted stakeholders or the general public.
- Prior to being introduced to Parliament, the legislation will be taken to one or more meetings of Cabinet, and other Ministers and departments will be given the opportunity to comment on proposals and drafts of legislation.
- Within PCO, a more senior drafter would be allocated to the project and, generally, the preparation of the bill would be allocated more resources in terms of drafting and review time (although of course, some regulations are more substantial and time-consuming than some bills).
- Once introduced to Parliament, the process of first, second and third readings and debate in both houses of parliament and, in some cases, committee processes, allow substantial opportunity for primary legislation to be fully explored, the issues ventilated and the drafts amended. These formal parliamentary processes are supplemented by backbench and crossbench briefings, allowing further opportunities for members of Parliament to interrogate the draft legislation.

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<sup>3</sup> *Subordinate Legislation Act 1989* s 3.



- 5.3. Subordinate legislation does not usually receive this degree of whole-of-government scrutiny and development.
- Depending on the nature of the delegated legislation, it may still involve a thorough policy development process and receive the attention of the responsible Minister, though it is likely that both will be less extensive.
  - Stakeholders may be consulted, again, depending on the nature of the delegated legislation being made. Sometimes this depends on the nature of the delegated law-making power. The ‘better regulation principles’ (*NSW Guide to Better Regulation*, 2016) require consultation with business and the community to inform regulatory development.
  - In rare cases, Cabinet may apply some scrutiny to regulations or regulation amendments, but generally, delegated legislation is drafted and tabled on the approval of the relevant Minister, without further Cabinet scrutiny.
  - Generally speaking, PCO’s priority is the Government Bill program and this leaves fewer resources to devote to delegated legislation, particularly at a more senior and experienced level.
  - Statutory rules the subject of Part 6 of the *Interpretation Act 1987* are published on the NSW legislation website maintained by PCO and written notice of their making must be laid before each House of Parliament within 14 sitting days of that publication (s 40) (though failure to do so does not invalidate the instrument—s40(4)). Either House may pass a resolution disallowing a statutory rule from its publication on the legislation website until 15 sitting days after the written notice was laid. The effect of such a resolution is to repeal the rule (and its effect on any other Act or statutory rule—s 41(4)).
- 5.4. The disallowance mechanism is both blunt and severe in contrast to the power to debate and amend primary legislation. Perhaps as a consequence, it is rarely successfully used. For example, in the 55th Parliament (2011–2014), 13 disallowance motions were moved in the Legislative Council, of which 3 were passed. In the 56th Parliament (2015–2018), 28 motions were moved, and none passed.
- 5.5. The more rigorous process applied to primary legislation suggests that substantive law-making should be confined to primary legislation to the greatest extent practical.

## 6. Issues posed by the terms of reference

- 6.1. The first issue raised in the terms of reference addresses Parliament’s enactments which delegate power to the executive to make delegated legislation. The second addresses the use of the power so delegated by the executive in making it. The structure reflects the fact that both stages—the enactment of the Henry VIII clause in the primary legislation and the making of delegated legislation under it—and the steps taken by both arms of government, legislative and executive, are relevant to the appropriate allocation and use of power.
- 6.2. However, controversies that arise with Henry VIII clauses often occur because of both the clause in the primary enactment allowing too broad a delegation, and the subordinate instrument enacting provisions that are perceived as too extensive in their effect on the primary legislation. Because of this interaction between the two stages, this submission will consider considers the two issues raised in the terms of reference together.
- 6.3. Some of the **broad issues** that arise in relation to Henry VIII clauses, which are well known, are as follows.

- 6.4. When primary legislation is amended, either textually or impliedly, by delegated legislation, this creates complexity in statutory interpretation.
- 6.5. Consequently, Henry VIII clauses undermine the principles of plain language drafting and the closely related concern of making the law more accessible. Further information on PCO's plain language drafting policy is available on the legislation website—[https://www.legislation.nsw.gov.au/dp2-pco\\_plain\\_language\\_policy.pdf](https://www.legislation.nsw.gov.au/dp2-pco_plain_language_policy.pdf).
- 6.6. The clauses result in substantially less scrutiny being given to the content of laws passed by way of delegated legislation, compared to primary Acts, and the disallowance mechanism for delegated legislation is blunt compared to the ability to debate and amend Acts, and is little used.
- 6.7. Aside from parliamentary scrutiny, delegated legislation also will generally attract lower levels of community consultation and public attention than primary Acts, even while it may have the effect of amending primary legislation.
- 6.8. All these factors can tend to re-weight the proper balance of power in the Australian system as between legislature and executive. The legitimacy of the laws made by subordinate instruments may be adversely affected if the public perception is that this has become unbalanced.
- 6.9. Judicial review of directly challenged legislation, or judicial interpretation of legislation involving Henry VIII clauses and the subordinate instruments made under them, may 'read down' delegations of power that are perceived as 'too broad'. In drafting Henry VIII clauses, it is often challenging to strike the appropriate balance between specifically confining the scope of the delegation, to provide greater certainty that the legislation would be upheld on the one hand, and breadth in the delegation, to allow the flexibility, on the other.
- 6.10. Where legislation is being prepared or enacted on a short timetable, there is a temptation to leave the detail to delegated legislation. This can result in broader Henry VIII delegations than would otherwise be the case, and content that is more properly the subject of primary legislation ultimately residing in subordinate instruments. An alternative approach would be to address these matters by subsequent amendment of the primary Act in an amending Act.
- 6.11. Some of the **specific questions** that have arisen for PCO in the course of drafting various instruments over an extended period are, in general terms, as follows.
- 6.12. Where a Henry VIII clause delegates power to amend any sections of a primary Act, whether there are any limits on the provisions of the primary Act which the delegated legislation made under the Henry VIII clause can any amend. For example—
  - Can the delegated legislation disapply fundamental sections of an Act, such as the principles, objects, purposes or priorities within the Act?
  - If so, can the delegated legislation do this impliedly by establishing alternative principles, objects, purposes or priorities, or must it refer explicitly to the relevant provisions in the Act?
- 6.13. Are there any common law limitations on the ability of delegated legislation to amend provisions of the primary legislation?
  - For example, where provisions within the primary legislation embody fundamental administrative law principles, such as limits on Ministerial discretion or judicial review of administrative action, can the delegated legislation displace or amend these?
- 6.14. Where a Henry VIII clause allows further exemptions to be made to a general regulatory scheme established by primary legislation, are there any implied limits on the scope of these

further exemptions? How far can the exemptions go in departing from the regulatory scheme before the regulations depart so significantly from the primary Act's scheme that they are no longer able to be considered within the spirit of the Act?

- 6.15. Where a Henry VIII clause allows regulations to declare the date on which a primary Act, or part thereof, commences, is there any limit on the ability of the regulations to repeatedly or indefinitely delay the commencement of the primary legislation?
- 6.16. Where a Henry VIII clause is designed to allow for regulations to be made responsive to particular emergencies, what safeguards should be embodied in the primary legislation? For example—
  - sunset clauses,
  - procedural protections, such as additional review rights,
  - spreading of responsibility, such as additional Ministers, or relevant non-Ministerial public officials, dual-authorising regulations, and
  - limiting the regulation-making power by tying it closely to the emergency
- 6.17. Are there any implied limitations on the scope of savings and transitional provisions that may be made by regulation under a Henry VIII clause? For example, can these regulations effectively reverse substantive rights and liabilities created under the primary legislation?
- 6.18. Can a Henry VIII clause delegation of the power to make subordinate instruments that amend the primary Act also impliedly authorise those subordinate instruments to amend other Acts and instruments made under those other Acts? This can arise, for example, where instruments made under one Act are conditional upon, or incorporate the terms of, instruments made under other Acts.
- 6.19. Some of the issues that arise in relation to the drafting of shell legislation are as follows.
- 6.20. Is the bill drafted in a sufficiently unambiguous way and is it sufficiently clear and precise? Does the bill include so little detail of the scheme that it is not possible for Parliament to know the intended result of the scheme? Is the scheme so 'bare bones' that to give it any meaning, substance and effect it relies entirely on the delegated legislation?
- 6.21. Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?
- 6.22. Does the bill sufficiently subject the exercise of a delegated legislative power to the scrutiny of the Parliament?
- 6.23. Will any delegated legislation made under the bill be within power and be consistent with the policy objectives of the bill or is the power to make delegated instruments under the bill so broad and ill-defined that the policy objectives are unclear? Will any delegated legislation contain matter that is inappropriate for subordinate legislation? For example, will it impact on the rights and liberties of individuals in inappropriate ways?
- 6.24. Will the use of shell legislation make it difficult for there to be an adequate basis for judicial review of the powers delegated to the executive as the powers are so broad they cover almost all actions?

## C. Select case studies—NSW

### 7. COVID-19 emergency measures—use of Henry VIII clauses to allow executive management during parliamentary hiatus of ‘lockdown’

7.1. The recent COVID-19 pandemic and emergency response provide an example of unusual circumstances where extensive power to amend certain legislation (eight named Acts and any ‘other Act administered by the Attorney General’<sup>4</sup>) was given to the executive. In the *COVID-19 Legislation Amendment (Emergency Measures) Act 2020 (Emergency Measures Act)*, the *Criminal Procedure Act 1986* was amended to modify some of the usual processes applicable to criminal trials. The Emergency Measures Act also introduced into the *Criminal Procedure Act* a broad regulation making power (s 366) for the purposes of responding to the public health emergency Regulations made under the section—

- (a) are not limited by the regulation-making power in a relevant Act, and
- (b) may override the provisions of any Act or other law

7.2. This extreme example of a Henry VIII clause was qualified by several constraints on the power delegated, relevant to the pandemic circumstances.

- Regulations are sunsetted after 6 months or earlier if so resolved by Parliament (s 366(5))
- Regulations can only be made if parliament was not likely to sit within two weeks (s 366(2)(a))
- Arrangements made by the regulations must be in accordance with relevant health advice and reasonable to protect the health, safety and welfare of persons in relation to the administration of justice (s 366(2)(b))
- In relation to certain identified court matters, the consent of the Chief Justice or the head of a particular jurisdiction, as relevant, is required.

7.3. Despite these qualifications, the power delegated is broad and essentially legislative. Whether the Henry VIII clause is ultimately considered justified by the extreme circumstances or not may depend on what use is made of the regulation-making power. This case study illustrates that the Henry VIII clause, at drafting stage, may well be both justified by compelling public policy motives and hedged with protections that limit the extent of the qualification, and yet remain problematic from the perspective of a proper allocation of power.

### 8. Protection of the Environment Operations—regulations amending defined terms in Act that affect its scope beyond the scope of the Henry VIII clause power

8.1. The *Protection of the Environment Operations Act 1997* has a range of objectives related to environmental protection, pollution management and public involvement with waste and environmental issues (s 3). The Act creates a list of ‘scheduled activities’, specified in Schedule 1, which require a licence under the Act. The Henry VIII clause, in s 5(3), delegates to regulations the power to amend or replace Schedule 1, effectively allowing regulations to determine the scope of the Act’s application. These regulations can have a very significant impact in, for example, enlarging the scheme and imposing licence requirements in new areas that may not have been contemplated when Parliament first enacted the enabling legislation.

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<sup>4</sup> *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* s 366(6)(i)

- 8.2. Schedule 1 also contains a number of defined terms. Some of these defined terms are used in the Dictionary to the primary Act. While the regulations may amend Schedule 1 (and therefore the defined terms contained within it), the regulations may not amend the Act's Dictionary. Accordingly, where an amendment to a definition in Schedule 1 would have the consequence of changing a definition in the Dictionary, this was most appropriately achieved via an amendment of the Act, rather than via regulation (see Protection of the Environment Operations Legislation Amendment (Scheduled Activities) Regulation 2019, item [11]).

## 9. Liquor regulatory scheme—broad delegated exception-making power

- 9.1. The *Liquor Act 2007* establishes the regulatory regime for the sale of liquor in this State and includes a lengthy list of exemptions enumerated in the primary Act (s 6). Regulations can supplement these exceptions, and do so (Liquor Regulation 2018, Part 9). It is an example of a regulatory scheme that relies heavily on delegated law-making.

## 10. Workers compensation—savings and transitional provisions

- 10.1. In the leading Australian case on Henry VIII clauses, the High Court has upheld a regulation made under such a clause, which delegated the power to make savings and transitional regulations under the *Workers Compensation Legislation Amendment Act 2012*<sup>5</sup>. The amending Act relevantly removed compensation entitlements under the *Workers Compensation Act 1987* for workers who sustained an injury assessed at less than ten per cent. The amending Act included savings and transitional provisions, which protected entitlements under the ten per cent threshold for a period that covered the relevant application for workers' compensation; and it also delegated power to make savings and transitional regulations, via a Henry VIII clause.
- 10.2. That power was expressed as 'if the regulations so provide, [taking] effect as from a date that is earlier than the date of assent to the 2012 amending Act' (cl 5(1) of Part 19H of Schedule 6 to the *Workers Compensation Act*), as having 'effect, if the regulations so provide, despite any other provision of this Part' (cl 5(3)) and as extending 'to authorise the making of regulations whereby the provisions of the Workers Compensation Acts are deemed to be amended in the manner specified in the regulations' (cl 5(4)).
- 10.3. Clause 5(2) specified that 'Clause 1(3) of Part 20 does not limit the operation of this clause.'. Clause 1(3) of Part 20 provided that, where regulations take effect as from the date of assent to the Act, the regulations do not prejudicially affect rights of a person existing before its gazettal. The High Court held that cl 5(2) of Pt 19H, by displacing the protection afforded by cl 1(3) of Pt 20, disclosed a statutory purpose that overcame s 30(1)(c) of the *Interpretation Act*, which would otherwise prevent the amendment from affecting accrued rights under the Act. Accordingly, the regulations made under the Henry VIII clause were upheld, notwithstanding their reversal of substantive rights and liabilities under the primary Act.

## 11. Occupational Licensing (Adoption of National Law) Act 2010

- 11.1. One of the most extreme examples of the use of shell legislation in New South Wales (and other States and Territories) in recent times was the adoption of the Occupational Licensing National Law by the now repealed *Occupational Licensing (Adoption of National Law) Act 2010* (the **Adoption Act**). This Act arose out of a COAG agreement, the *Intergovernmental Agreement for a National Licensing System for Specified Occupations*. Victoria was the host for the legislation with the *Occupational Licensing National Law* (the *National Law*) set out in the

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<sup>5</sup> *ADCO Constructions Pty Ltd v Goudappel* [2014] HCA 18.

Schedule to its Act subsequently being adopted by other States and Territories, including New South Wales by enactment of the Adoption Act. While the intent of the National Law was to improve economic and business efficiency, and to cut red tape, by allowing for a national licensing system for certain occupations, the skeletal nature of the National Law adopted by New South Wales and other States and Territories reflected a lack of agreement amongst jurisdictions about the detail of the scheme and that, at the time the primary legislation was enacted, insufficient policy work had been undertaken to allow the detail of the scheme to be included in the primary legislation and thus to be provided to relevant parliaments.

- 11.2. This detail and lack of agreement was left to be resolved in the development of delegated legislation under the National Law. For example, the occupations to which the scheme was to apply, the type of work to be covered, who could apply for and hold a licence, the qualifications, experience, skills, knowledge and probity requirements necessary for licensees, all matters that were fundamental to the scheme, were left to be dealt with by delegated legislation.
- 11.3. It is perhaps not surprising that, in many jurisdictions, parliamentary scrutiny committees criticised the primary legislation adopting the National Law as being an abrogation of parliamentary sovereignty in that too much of the scheme was left to be dealt with by delegated legislation, leaving parliaments with only a limited opportunity to scrutinise and influence the scheme. The Acts adopting the National Law were subsequently repealed in many jurisdictions, including New South Wales.

## D. Other jurisdictions

Compared to other Australian jurisdictions, there is a perception that legislation passed by the New South Wales parliament may rely more heavily on the use of delegated legislation, including Henry VIII clauses.

### 12. Commonwealth

- 12.1. The Commonwealth Government's Senate Standing Committee for the Scrutiny of Bills is the primary body tasked with identifying and managing Henry VIII clauses. It regularly notes Henry VIII clauses as an example of an inappropriate delegation of legislative power, both in its reports scrutinising particular Bills and in its annual reports and reports on the work of the committee during a given Parliament<sup>6</sup>.
- 12.2. The Commonwealth's *Legislation Handbook*<sup>7</sup> provides guidance on appropriate matters for delegated legislation. While not definitive, it suggests 12 matters which should be included in primary legislation, not delegated legislation<sup>8</sup>.
- 12.3. The terms of reference for the Senate Standing Committee for the Scrutiny of Bills include whether the Bill inappropriately delegate[s] legislative powers, and the *Legislation Handbook* requires officers who prepare explanatory memoranda must, among other things, explain 'any unusual arrangements, such as using regulations for important measures that would normally be included in primary legislation or a 'Henry VIII' clause'<sup>9</sup>.
- 12.4. Henry VIII clauses do receive considerable attention from Senate Committees in reviewing legislation—not only the Senate Committees for the Scrutiny of Bills and of Delegated Legislation, but also, for example, the Standing Committee on Foreign Affairs Defence and Trade<sup>10</sup> and the Legal and Constitutional Affairs Committee<sup>11</sup>.
- 12.5. For example, commenting on the *Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011*, the Senate Standing Committee on Legal and Constitutional Affairs Committee gave eight pages of consideration to the Henry VIII clauses involved in that Bill, including by reference to the evidence of several constitutional scholars and taking note of the Queensland Parliament's conclusions as to justifiable uses of such clauses<sup>12</sup> (see below). It concluded—

The committee agrees that Henry VIII clauses are, in general, undesirable in legislation and should only be used in limited circumstances. However, in the view of the committee, the Henry VIII clause in the TM Bill falls within the set of limited circumstances where such a clause may be justifiably used. The committee holds this position for a number of reasons, including that the TM Bill amendments will facilitate immediate Australian Government action to protect trade mark owners affected by the plain packaging scheme, and will maintain Australia's

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<sup>6</sup> For example, see Senate Standing Committee for the Scrutiny of Bills, *Annual Report 2018*, February 2019 at pp33-34; and *The work of the committee during the 43<sup>rd</sup> Parliament, September 2010-June 2013*, March 2014, at 27 ff.

<sup>7</sup> Department of the Prime Minister and Cabinet (Cth), *Legislation Handbook*, February 2017, <https://www.pmc.gov.au/sites/default/files/publications/legislation-handbook-2017.pdf>

<sup>8</sup> Department of the Prime Minister and Cabinet (Cth), *Legislation Handbook*, February 2017, p 2 at [1.10].

<sup>9</sup> Department of the Prime Minister and Cabinet (Cth), *Legislation Handbook*, February 2017, p 43 at [7.29(f)].

<sup>10</sup> For example, see Senate Foreign Affairs, Defence and Trade Legislation Committee, Report on the Safety, Rehabilitation and Compensation Legislation Amendment (Defence Force) Bill 2016, March 2017 at [3.22] ff.

<sup>11</sup> For example, see at [3.6] ff.

<sup>12</sup> Senate Standing Committee on Legal and Constitutional Affairs, *Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011 [Provisions]*, September 2011, pp 10-18, see especially at [3.30] [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed\\_inquiries/2010-13/trademarksamendment/report/c03](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/trademarksamendment/report/c03)

international obligations under the Madrid Protocol. Reflecting the categories of justifiable use identified by the Queensland Parliament's Scrutiny of Legislation Committee, the committee considers that the Henry VIII clause in the TM Bill facilitates 'the effective application of innovative legislation' and the 'transition arrangements' of the implementation of this new legislative scheme.

The committee acknowledges that legitimate concerns were raised regarding the level of parliamentary scrutiny for amendments to legislation enabled by a Henry VIII clause. Significant proposed amendments to law should, in most cases, be introduced to the Parliament as primary legislation in order to maximise appropriate parliamentary scrutiny. However, the committee also notes that scrutiny of regulations and legislative instruments is regularly undertaken by the Parliament, in particular by the Senate Standing Committee on Regulations and Ordinances (R&O Committee).<sup>13</sup>

- 12.6. The Australian Law Reform Commission also considered delegated legislation in a 2015 report on encroachment by Commonwealth laws on traditional rights and freedoms<sup>14</sup>. It concluded—

Given the quantity of delegated law in Australia, careful and ongoing scrutiny—built into the law making process—may be the most suitable way to limit inappropriate delegations of legislative power.<sup>15</sup>

- 12.7. In relation to Henry VIII clauses, the ALRC noted that they are 'considered inappropriate'. It further noted that—

The Scrutiny of Bills Committee often comments on such provisions. In 2009, for example, the Committee noted the large number of Henry VIII clauses in the National Consumer Credit Protection Bill 2009—so many in fact that it was 'not possible to provide commentary in relation to all of them'. The relevant Minister defended the arrangement, telling the Committee that the Government needed to ensure that there was 'adequate flexibility in the new arrangements to ensure the smooth transition to a national credit regime'. Section 35A of the *Fair Work Act 2009* (Cth), which relates to the geographical application of the Act, is another example.<sup>16</sup> [footnotes omitted]

- 12.8. Other examples of Henry VIII clauses in prominent Commonwealth legislation include s 926B of the *Corporations Act 2001* (Cth)—which allows regulations to make exemptions from financial services regulation provisions of that Act—and s 100(c) of the *National Consumer Credit Protection Act 2009*—which similarly allows regulations to make exemptions from the licensing provisions of that Act.

### 13. Queensland

- 13.1. In Queensland, the Legislative Standards Act 1992 is an Act 'relating to the standards of legislation, the drafting of legislation and for other purposes related to legislation'. Under section 7 of that Act, a function of the Office of the Queensland Parliamentary Counsel includes advising on the application of fundamental legislative principles to proposed legislation. 'Fundamental legislative principles' are defined in section 4 of the Act as 'the principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. The principles include requiring that legislation has sufficient regard to the institution of Parliament (s 4(2)(b)). Whether a Bill has sufficient regard to the institution of Parliament

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<sup>13</sup> Senate Standing Committee on Legal and Constitutional Affairs, Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011 [Provisions], September 2011, pp 23-24 at [3.47-3.48].

<sup>14</sup> Australian Law Reform Commission, ALRC Report 129, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, December 2015, Chapter 17, 'Delegating Legislative Power'.

<sup>15</sup> Australian Law Reform Commission, ALRC Report 129, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, December 2015, Chapter 17, 'Delegating Legislative Power', p 448 at [17.5].

<sup>16</sup> Australian Law Reform Commission, ALRC Report 129, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, December 2015, Chapter 17, 'Delegating Legislative Power', p 455 at [17.40].



depends on whether, for example, the bill ‘allows the delegation of legislative power only in appropriate cases’ (s 4(4)(a)) and ‘authorises the amendment of an Act only by another Act’ (s 4(4)(c)).

- 13.2. Section 23 of the *Legislative Standards Act 1992* provides that the explanatory note for a Bill must include ‘a brief assessment of the consistency of the Bill with fundamental legislative principles and, if it is inconsistent with fundamental legislative principles, the reasons for the inconsistency’. This ensures that the inclusion of Henry VIII provisions in a Queensland bill must be specifically highlighted and justified in the explanatory note accompanying the bill.
- 13.3. In addition, section 93 of the *Parliament of Queensland Act 2001* provides that a parliamentary portfolio committee is responsible for examining each bill in its portfolio area to consider ‘the application of fundamental legislative principles to the legislation’. The combined operation of the relevant provisions of the *Legislative Standards Act 1992* and the *Parliament of Queensland Act 2001* ensures there is greater transparency around the use of Henry VIII provisions in Queensland legislation and facilitates greater scrutiny of such provisions.
- 13.4. In 1997, Queensland’s former Scrutiny of Legislation Committee published a report, *The Use of “Henry VIII clauses” in Queensland Legislation*<sup>17</sup>. That report referred to the Queensland Law Reform Commission’s 1990 report on Henry VIII clauses and defined four categories of Henry VIII clauses, in summary—
  - a. **Generally objectionable**—clauses which allow the Act or even a range of Acts or all Acts to be amended by delegated legislation
  - b. **Not objectionable**, or not properly considered ‘Henry VIII clauses’, including—
    - Facilitating the consolidation and rationalisation of acts in a reprinting
    - Commencing an Act
    - Providing for the expiry of a provision of an Act
    - Clarifying the terms of a definition
  - c. **Avoidable** use of Henry VIII clauses, including—
    - Allowing lists of Schedules to Acts to be flexibly amended
    - Giving force of law to agreements to which the State is a party
    - Amending rules of the Supreme Court
  - d. **Justifiable** uses of Henry VIII clauses, such as for—
    - Urgent Executive action
    - Innovative legislation
    - Consequential amendments
    - Transitional arrangements.
- 13.5. As noted above, this categorisation has also been referred to by Commonwealth Senate Committees.
- 13.6. Following the review, the Queensland Parliament’s *Legislation Handbook* determined that ‘Henry VIII clauses should not be used’. Referring to the work of the former Scrutiny of Legislation Committee, the *Legislation Handbook* further notes that—

in the context of urgent Bills, a transitional regulation-making power may have sufficient regard

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<sup>17</sup> <https://www.parliament.qld.gov.au/documents/committees/SLC/1997/Report003.pdf>

to the institution of Parliament [and thus be acceptable] if it is subject to—

- a twelve-month sunset clause
- a further sunset clause on all transitional regulations made pursuant to the transitional regulation-making power.<sup>18</sup>

13.7. The Handbook also notes the view of the former Scrutiny Committee, apparently with approval, that the subjects about which transitional regulations may be made should be stated in the relevant Bill; and that delegations of the power to create exemptions from the Act are potential Henry VIII clauses. The power to create such exemptions should be linked to a specific purpose, stated in the Act, and the power to exempt should be limited to—

circumstances so specific that the Parliament may be assured an exemption will be appropriate. A power to exempt should not be included in an Act if an ordinary licensing scheme could achieve the same purpose.<sup>19</sup>

13.8. The Queensland Scrutiny of Legislation Committee is no longer constituted; its work is undertaken by portfolio committees, which review both primary and delegated legislation. If those committees object to a provision in delegated legislation, they may ask the Queensland Legislative Assembly to support a motion to disallow the provision<sup>20</sup>.

## 14. Western Australia

14.1. Western Australia generally takes an adverse view of Henry VIII clauses. Its Standing Committee on Legislation reports on Henry VIII clauses in reviewing legislation. For example, in reviewing the Animal Welfare Amendment Bill 2017, it commented—

The Committee is firmly of the view that the use of Henry VIII clauses, and clauses akin to them, should be avoided in the absence of compelling reasons for them being required.<sup>21</sup>

14.2. In scrutinising the Henry VIII clause—which allowed the making of regulations to provide that a defence under the Act to a charge of animal cruelty is inapplicable if one of the specified acts of animal cruelty was committed in a prescribed manner or in prescribed circumstances—the Committee noted that—

This is a Henry VIII clause, in that it would make provision for regulations to be made which would have the effect of amending primary legislation. This has a direct effect on Parliamentary sovereignty, as it would take away the right of Parliament to debate such legislative provisions. Whilst regulations might be the subject of a motion for disallowance, and in fact may be disallowed, they take effect for the period from the commencement date until the date of disallowance (which is commonly some months).<sup>22</sup>

and subsequently,

The Department should be able to clearly foresee and enunciate what it wishes to see legislatively when it brings proposals to Parliament. At this point in time, the Department appears to be unable to do so in terms of statutory defences. It is certainly not the job of Parliament to give carte blanche to the Department to make whatever law it likes if an unforeseeable matter arises — that is precisely the job of Parliament. The Department has itself admitted that, with more forethought, it could achieve its desired outcomes without the

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<sup>18</sup> *Queensland Legislation Handbook Governing Queensland*, Chapter 7.3.3 (First published 2000, Sixth edition November 2019), <https://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/legislation-handbook/introduction.aspx>

<sup>19</sup> *Queensland Legislation Handbook*, Chapter 7.3.3

<sup>20</sup> *Statutory Instruments Act 1992*, s 50.

<sup>21</sup> Western Australia Legislative Council Standing Committee on Legislation, Report 36, Animal Welfare Amendment Bill 2017, June 2018, p 30 at [6.53].

<sup>22</sup> Western Australia, Legislative Council Standing Committee on Legislation, Report 36, Animal Welfare Amendment Bill 2017, June 2018, pp 10-11 at [4.22].

Henry VIII clause.<sup>23</sup>

14.3. The Committee concluded—

the Minister should be invited to give full and detailed explanations about what precisely is envisaged to be in the proposed regulations with respect to the creation of new cruelty offences as well as—

why these clauses cannot be replaced with direct references to standards and guidelines so that the distinction between animal husbandry practices and animal cruelty offences is maintained; and

ii. why the desired outcomes cannot be attained without the creation of a Henry VIII clause<sup>24</sup>

and subsequently,

The skeletal nature of some of those provisions, together with the deployment of a Henry VIII clause, reflected not a desire to provide flexibility in law-making in the future but a lack of consideration of what legislation is really required.<sup>25</sup>

14.4. There are many examples of reports documenting the Western Australian view on Henry VIII clauses.<sup>26</sup>

## 15. Northern Territory

15.1. In the Northern Territory, the recently constituted Legislation Scrutiny Committee's terms of reference include examining a Bill referred to it for whether the bill 'allows the delegation of administrative power only in appropriate cases and to appropriate persons'<sup>27</sup>.

15.2. Previously, some of this work was done by the Subordinate Legislation and Publications Committee examines delegated legislation. Its terms of reference include considering 'whether the instrument contains matter which in the opinion of the committee should properly be dealt with in an Act'<sup>28</sup>.

15.3. Henry VIII clauses have also been identified as problematic. For example, in commenting on the Ports Management Regulations, the Northern Territory's Legislative Assembly Legal and Constitutional Affairs Committee, performing the functions of the subordinate Legislation and Publications Committee, annexed independent legal advice from Professor Ned Aughterson who identified s 156(1) of the *Ports Management Act 2015* (NT), which stated 'The Administrator may make a regulation that amends this Act (other than this section) in relation to any matter.'

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<sup>23</sup> Western Australia, Legislative Council Standing Committee on Legislation, Report 36, Animal Welfare Amendment Bill 2017, June 2018, p 31 at [6.57].

<sup>24</sup> Western Australia, Legislative Council Standing Committee on Legislation, Report 36, Animal Welfare Amendment Bill 2017, June 2018, p 34 at [6.71].

<sup>25</sup> Western Australia, Legislative Council Standing Committee on Legislation, Report 36, Animal Welfare Amendment Bill 2017, June 2018, p 51 at [8.2].

<sup>26</sup> See Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 70, Business Names (Commonwealth Powers) Bill 2011, March 2012, p 7 and Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 91, Rail Safety National Law (WA) Bill 2014, March 2015, pp 19–20. A detailed review of Henry VIII clauses is also contained in Western Australia, Legislative Council, Standing Committee on Legislation, Report 19, Revenue Laws Amendment Bill 2012, September 2012.

<sup>27</sup> Terms of Reference, Legislation Scrutiny Committee, Legislative Assembly of the Northern Territory, Sessional Order 13, para (4)(c)(iii)(C), adopted 27 November 2019.

<sup>28</sup> Terms of Reference, Legislation Scrutiny Committee, Legislative Assembly of the Northern Territory, Standing Order 176, para (3)(d), last updated 18 July 2018.

## 16. Australian Capital Territory

- 16.1. As in many other Australian jurisdictions, in the ACT, delegated legislation generally operates from the day after it is tabled, but disallowance by the Legislative Assembly must occur within six sitting days of the tabling<sup>29</sup>. Unusually, the ACT legislature also has power to amend the delegated legislation within that period<sup>30</sup>.
- 16.2. The ACT Legislative Assembly Standing Committee on Justice and Community Safety undertakes the legislative scrutiny role for the capital territory. As in many other jurisdictions, its roles include reviewing Bills to determine whether (among other things) they inappropriately delegate legislative powers.
- 16.3. The Committee produced a ‘Henry VIII clauses Fact sheet’<sup>31</sup>, published in November 2011, which remains current. The fact sheet records the standard issues associated with Henry VIII clauses, including that they fundamentally undermine the separation of powers, the existence of the disallowance mechanism and its limitations and the loss of scrutiny and public accountability associated with extensive delegated legislation.
- 16.4. The fact sheet gives the example of the liquor regulation regime in the ACT, in which the *Liquor Act 2010* (ACT) may be modified by its regulations, using a transitional regulation power in s 258. That section has since expired, with the expiry of Part 20 – Transitional, three years after enactment. A regulation-making power remains in the Act at s 229, but in more circumscribed terms.
- 16.5. The fact sheet notes that the transitional Henry VIII clause was used by the executive to twice amend the primary Act to delay the commencement of certain parts of the Act. The purpose of this was noted in an Explanatory Statement to one of those regulations as ‘to give the liquor industry additional time to undertake RSA courses taught by an ACT approved Registered Training Organisation’<sup>32</sup>. The fact sheet records the comments of the Committee in its *Scrutiny Report No 42 of the 7<sup>th</sup> Assembly* as accepting the plausibility of the need for transitional arrangements for the stated purpose, but noting that—

[i]t would be preferable, of course, if these sorts of timing issues were properly taken into account in the development and enactment of the relevant legislation, with the result that recourse to such transitional regulations (relying, as they do, on ‘Henry VIII’ clauses) would not be required.<sup>33</sup>

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<sup>29</sup> *Legislation Act 2001* (ACT), s 65.

<sup>30</sup> *Legislation Act 2001* (ACT), s 68.

<sup>31</sup> Legislative Assembly for the ACT, Standing Committee on Justice and Community Safety (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee), *Henry VIII clauses Fact sheet*, November 2011, available at [https://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0005/434345/HenryVIII-Fact-Sheet.pdf](https://www.parliament.act.gov.au/_data/assets/pdf_file/0005/434345/HenryVIII-Fact-Sheet.pdf).

<sup>32</sup> Explanatory Statement to the Liquor Amendment Regulation 2011 (No 1) (SL2011-23) (ACT), quoted in *Henry VIII clauses Fact sheet*, p 4.

<sup>33</sup> Standing Committee on Justice and Community Safety (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee), *Scrutiny Report No 42 of the 7<sup>th</sup> Assembly*, quoted in *Henry VIII clauses Fact sheet*, p 4.