The use of “Henry VIII Clauses” in Queensland Legislation

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LEGISLATIVE ASSEMBLY OF QUEENSLAND

THE SCRUTINY OF LEGISLATION COMMITTEE

THE USE OF “HENRY VIII CLAUSES” IN QUEENSLAND LEGISLATION

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Scrutiny of Legislation Committee
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1 Mr Paul Lucas MLA, Member for Lytton, replaced the Hon Dean Wells MLA, as a Member of the committee on 4 December 1996
Chairman’s Foreword

For the past twenty-one years this Committee and its predecessor, the Subordinate Legislation Committee, have been making adverse reports to Parliament on provisions in legislation regarded as “Henry VIII clauses”. A “Henry VIII clause” is one which permits an Act of Parliament to be amended by subordinate legislation. However, no Parliamentary Committee in Queensland has, to date, conducted a detailed analysis of the use of such clauses.

The Subordinate Legislation Committee resolved in 1995 to undertake such an examination. As the successor to that Committee, the Scrutiny of Legislation Committee, took over that task.

In the course of this Report to Parliament analysing the use of “Henry VIII clauses” in Queensland, the Committee looks briefly at the problem posed to the institution of Parliament by such clauses. It also reviews the attitude of other scrutiny committees, members of the Executive and legislative drafters to “Henry VIII clauses”.

The definition of a “Henry VIII clause” is considered and reformulated in the course of the Report. Its use in various different situations is then analysed with the Committee concluding that such provisions could be avoided most of the time. The Committee, however, also concluded that there were limited circumstances in which the use of “Henry VIII clauses” could be accepted if fully justified. This constitutes a significant shift in policy for the Committee and its predecessor which had adopted the view that no “Henry VIII clause” was justifiable.

I hope that this Report will clarify the Committee’s approach to the use of “Henry VIII clauses”. I also hope that it will assist Members to differentiate between those clauses which should not be permitted in legislation because they fail to have sufficient regard for the institution of Parliament and those which may have sufficient regard because they could be considered to be justified under the circumstances.

I want to take this opportunity to thank the Premier and the Ministers for their assistance during the course of this review of “Henry VIII clauses”. All Ministers provided information to the Committee on the use of these clauses within their portfolios and many expressed support for the Committee’s work on this subject.

In addition, I would like to point out that while several Ministers have been actively removing “Henry VIII clauses” from legislation for which they have responsibility, others have been taking positive steps to avoid the use of such clauses.

The Committee has been encouraged by the views expressed by many Ministers opposing the use of “Henry VIII clauses” within their portfolios. It urges Ministers to be vigilant and to maintain a firm stance against the use of “Henry VIII clauses” in Queensland legislation.
Departmental officers providing instructions for the drafting of legislation and officers in the Office of Parliamentary Counsel are also urged to take an active role in ensuring that legislation has sufficient regard for the institution of Parliament by, for example, not incorporating objectionable “Henry VIII clauses” in principal legislation and not making subordinate legislation pursuant to existing objectionable “Henry VIII clauses”. Although the Committee has accepted that there may be a legitimate role for “Henry VIII clauses”, this would only apply to very limited circumstances in which such use is fully justified. In all other circumstances the Committee will continue to oppose the inclusion of “Henry VIII clauses” in principal legislation and, where necessary, will move for the disallowance of subordinate legislation made pursuant to objectionable “Henry VIII clauses”.

I would like to thank my fellow Committee Members for their commitment to the demanding work of this Committee. The role played by the Honourable Dean Wells, MLA, a former Member of this Committee, in the development of this Report is also acknowledged with thanks.

Finally, I would like to thank the Committee staff for working on this Report in between meeting the regular reporting commitments of the Committee. The work of the Research Director, Ms Louisa Pink, in researching and drafting the report is particularly recognised, together with the word processing skills (and patience) of the Committee’s former Executive Assistant Mrs Lisa Shuttleworth and its current Executive Assistant, Ms Cassandra Adams.

I commend this Report to Parliament.

Tony Elliott
Chairman
A FAIRY STORY

“Gather around, friends, and listen to this Grimm fairytale:

Once upon a time, a very long time ago, there lived a very wicked king - and he was a king with a capital “K”. The name of this king was King Henry VIII. He was a very large man,... we also had it on good authority that he ate very large meals,... he certainly had a large number of wives, admittedly most of them only for a short period of time. He also decided to have very large powers to make laws, and so it came to pass that this large King ensured that there was an Act. And if this very large King hadn’t got his Act, probably someone would have got an axe. This Act was called the Statute of Sewers. That is not sewers as in Suez Canal, because this was long ago in 1531. The Statute of Sewers really was a stinker. As the Donoughmore Committee said, “The Statute delegates legislative powers, taxing powers and judicial powers.”

Ever since then, those good fairy godmothers, Parliament and scrutiny committees, have been trying to undo that kind of excessive grant of power. And but for those Parliamentary scrutiny committees and the courts, we would have all lived very unhappily ever after. Even today there are still some “Henry VIII clauses”, so we all remain relatively miserable.”

Professor Douglas Whalan
Third Commonwealth Conference of Delegated Legislation Committees
Westminster
1989
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1. “HENRY VIII CLAUSES” - BACKGROUND

Background

1.1 Since the formation of the Subordinate Legislation Committee in 1975, that Committee (and now the Scrutiny of Legislation Committee) has, as part of its functions, been responsible for guarding against the unnecessary use of “Henry VIII clauses”.

1.2 This somewhat colourful and dramatic term has a simple definition:

   A “Henry VIII clause” is a clause in an Act of Parliament which enables the Act to be amended by subordinate or delegated legislation.\(^2\)

1.3 Barely two years after the Subordinate Legislation Committee’s formation, it reached the following conclusion on “Henry VIII clauses”:

   It is the Committee’s view that as a matter of principle, statutes should not provide for their own amendment by subordinate legislation.\(^3\)

1.4 Since that time the Committee has repeatedly reported adversely on clauses, which in its view, were “Henry VIII clauses”. This view has not gone unchallenged by some Members of the Executive who have argued that the Committee’s approach to the classification of these clauses has been too broad. Since the formation of the Scrutiny of Legislation Committee in September 1995, “Henry VIII clauses” have continued to be a contentious issue.

1.5 The Subordinate Legislation Committee was somewhat powerless in its efforts to oppose the use of “Henry VIII clauses” which appear in principal legislation, and are merely carried out in subordinate legislation. With the formation of Scrutiny of Legislation Committee, however, which is responsible for scrutinising primary as well as subordinate legislation, it has now become possible for this Committee to consider “Henry VIII clauses” at their genesis - in primary legislation.

1.6 Motivated in part by the differing views on the definition of a “Henry VIII clause” and partly by a perceived increase in the use of such clauses, the outgoing Subordinate Legislation Committee recommended that the use of “Henry VIII clauses” be fully researched and that a report be prepared to Parliament in relation thereto. The Scrutiny of Legislation Committee has


taken over this task⁴ and, due to the time committed to its ongoing function of reporting to Parliament on the results of its scrutiny of Bills, is now taking its first opportunity to table a report on this issue.

1.7 Four major issues arose for this Committee’s consideration:
• the interpretation of the definition of a “Henry VIII clause”;
• the varieties of “Henry VIII clauses”;
• the reason and justification (if any) for their use; and
• alternatives to their use.

1.8 This report explores these issues and, for the first time in 21 years of “Henry VIII clauses” being considered by a Parliamentary Committee in Queensland, endeavours to provide well reasoned guidance on the Committee’s approach to these clauses.

Historical Reasons For The Term “Henry VIII Clauses”

1.9 “Henry VIII clauses” appear to be so named because that King is regarded popularly as the impersonation of executive autocracy and because of its actual use by that monarch⁵.

1.10 One of the first instances in which Parliament delegated power to legislate in general, and effectively unlimited terms, was in an enactment concerning the Staple in 1385. The next three examples occurred during the reign of King Henry VIII: the Statute of Sewers in 1531; the Statute of Proclamations in 1539 and the Statute of Wales in 1542-3.

1.11 To demonstrate the effect of these enactments:

*The Statute of Sewers gives to the Commissioners of Sewers not only legislative powers, but also powers to rate landowners, and to distrain and to impose penalties for non-payment of rates.*⁶

1.12 Henry VIII’s Statute of Proclamations allowed the King to issue proclamations which had the force of an Act of Parliament.

1.13 In the 17th century, the Stuart kings sought to extend their powers but, as Scots, they lacked the legitimacy of Tudors like Henry. When they sought to legislate by proclamations the courts refused to acknowledge them (Case of Proclamations). In the ensuing battle between Crown and Parliament the Parliament won and the separation of legislative and Executive power became

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⁴ Pursuant to s.40 of the Parliamentary Committees Act 1995.
⁵ Report by the Committee on Ministers’ Powers (the Donoughmore Committee), His Majesty’s Stationary Office, London, 1932, p.36.
⁶ ibid., p.13.
one of the cornerstones of the British Constitution. It was celebrated by Montesquieu and enshrined by the drafters of the American Constitution.

1.14 Ironically, even while the American Constitution was being conceived and drafted, the rise of responsible government in the United Kingdom meant that the effective head of the executive gained control over the legislature. Nonetheless, the power to legislate remained formally within the power of the Parliament and was jealously guarded.

1.15 In Europe the battle between Crown and Parliament was won by the Crown. Legislation by decree remained a feature of continental constitutions and many modern presidents have had some such power.

1.16 In England the Committee chaired by the Right Honourable the Earl of Donoughmore (the Donoughmore Committee) considered “Henry VIII clauses” in its inquiry on Minister’s powers. It subsequently reported to Parliament in London in 1932. The Donoughmore Committee Report described the comparison between the Statute of Proclamations and modern “Henry VIII clauses” as “certainly far-fetched”. Despite this divergence between the original Henry VIII proclamations and what are considered to be “Henry VIII clauses” today, the term continues in usage.

**Incidence Of “Henry VIII Clauses”**

**In Great Britain**

1.17 Based on the information available on “Henry VIII clauses”, it would appear that they were not frequently utilised until early this century. The Donoughmore Committee reported that such clauses had been implemented in England in nine modern Acts passed between 1888 and 1929. Commentators on the situation in the 1960s reported that the use of “Henry VIII clauses” in public Acts in the United Kingdom had ceased following the Donoughmore Committee Report.

1.18 This may have given the impression that Westminster has managed to forge ahead in the (1990’s) modern legislative setting without having to resort to using “Henry VIII clauses”. By 1989, however, its seems that nothing could have been further from the truth.

1.19 At the Third Commonwealth Conference of Delegated Legislation Committees in London in 1989, Lord Rippon of Hexham informed the conference that “Henry VIII clauses” were in such frequent use that:

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7 ibid.,
Ministers, at any rate in this country, take power to amend or repeal primary legislation by order, almost as a matter of common form.⁹

1.20 Although Lord Rippon reported that there were some signs in the House of Lords of an awareness of the increasing danger of such arbitrary powers,¹⁰ he believed that:

...what is happening today is - in the words of Lord Simon - “a constitutional outrage”. I hope that this precedent is not being followed by other members of the Commonwealth.¹¹

In Queensland

1.21 In Queensland, it appears that “Henry VIII clauses” were already in use at the beginning of this century. A writer commenting on the situation in Queensland in the 1930s, after the Donoughmore Committee Report, reported as follows:

The practice in the States and Commonwealth of Australia is to delegate such a power almost never, and then only for a special purpose and for a limited period, except in Queensland, where the annual volume of Statutes in many a recent year has contained almost as many instances as have occurred in all Great Britain’s modern history.¹²

1.22 With the formation of the Subordinate Legislation Committee in 1975, the Queensland Parliament for the first time enabled a systematic check to be carried out on the use of “Henry VIII clauses”. One of the Terms of Reference of the Subordinate Legislation Committee was to consider whether:

The regulations contain matter which in the opinion of the Committee should properly be dealt with in an Act of Parliament.

1.23 The Subordinate Legislation Committee, although only seeing the results of the use of “Henry VIII clauses” in subordinate legislation, frequently reported its opposition to such clauses to Parliament. The Subordinate Legislation Committee consistently maintained that:

The solution to this problem lies in Parliament’s own hands, for as long as Parliament permits the inclusion in Bills of Clauses which allow the amendments of Acts by Orders in Council, it will continue to place the scrutiny and control of its Legislation outside its own power.

¹⁰ ibid.
¹¹ ibid.
The Committee urges the Parliament to exercise continuing vigilance regarding such measures in future legislation.\(^\text{13}\)

1.24 Despite this clear advice to Parliament, in the years leading up to 1980 the statute book remained fundamentally unchanged. The Subordinate Legislation Committee had its first success in achieving some change in late 1981 to mid 1982 when it began to report that various Ministers were providing undertakings to amend Acts in accordance with the Committee’s suggestions. These amendments, on the whole, involved amending schedules to Acts and relocating materials to subordinate legislation.

1.25 In 1982 the Subordinate Legislation Committee also first reported encountering difficulties with what is now called national scheme or uniform legislation. This concern was echoed by scrutiny committees throughout Australia. Despite this early concern, the usage of “Henry VIII clauses” in national schemes of legislation continues.\(^\text{14}\)

1.26 During the 1980s, the Subordinate Legislation Committee’s opposition to “Henry VIII clauses” had not subsided. It continued to offer the following solution to Parliament:

\[\text{It is the Committee’s firm belief that if a matter is sufficiently important to be incorporated in an Act, it ought to be amended only by an Act. If the matter is of such lesser importance that it can be amended by subordinate legislation, then it ought to be written as subordinate legislation in the first instance.}\(^\text{15}\)

1.27 In 1988 the Subordinate Legislation Committee changed its tack by seeking the adoption of a recently introduced procedure in New South Wales where minor and technical changes were introduced into legislation through Bills entitled “Statute Law (Miscellaneous Provisions) Bills”. The Committee advised that these Bills provided an effective vehicle for amendments that did not warrant the preparation of separate amending Bills. Cabinet accepted this recommendation and gave approval for the preparation of such Bills from time to time, as required. In response, the Committee reported as follows:

\[\text{Once the legislation is in place, the Committee believes that the practice of amending Acts of Parliament by subordinate legislation can be discontinued and urges Ministers to avail themselves of the new legislation in preference to amending by subordinate instrument.}\(^\text{16}\)

1.28 In 1990 the then Attorney-General, the Hon. Dean Wells MLA, referred the matter of “Henry VIII clauses” to the Queensland Law Reform Commission

\(^{13}\) Committee of Subordinate Legislation, Sixth Report of the Committee of Subordinate Legislation, Government Printer, Brisbane, 1979, p.3.

\(^{14}\) Refer to pages 48-50 for further discussion on national schemes of legislation and “Henry VIII clauses”.


(QLRC). That Commission produced a discussion paper, a subsequent report and a draft Bill in 1990.\textsuperscript{17} The QLRC referred to the work of the Subordinate Legislation Committee, identified many “Henry VIII clauses” on the statute book, and having concluded that some such clauses were legitimately used, identified 29 “objectionable” “Henry VIII clauses” occurring in 23 statutes which it recommended should be omitted. Of these 29 clauses, 27 have now been repealed, and only two remain.\textsuperscript{18} Since 1990, however, some new “Henry VIII clauses” have also been added to the statute book.

1.29 The purpose of this Report of the Scrutiny of Legislation Committee is to:

\begin{itemize}
\item consider the definition of “Henry VIII clauses” set out by the Law Reform Commission in 1990;
\item develop its view on the application of that definition; and
\item identify some of the “Henry VIII clauses” which fall within that definition and continue on the Queensland statute book.
\end{itemize}


\textsuperscript{18} Primary Producers’ Organisation and Marketing Act 1926 s.9(1D), (1G); State Housing Act 1945 s.15. See Appendix C for an example of these remaining “Henry VIII clauses”.
2. THE PROBLEM POSED TO PARLIAMENTS
BY “HENRY VIII CLAUSES”

Background

2.1 Professor Pearce, in his book entitled “Delegated Legislation”\(^{19}\), described a “Henry VIII clause” as:

... the inclusion in an Act of power to amend either that Act or other Acts by regulation.

2.2 It is the power of the Executive by means of subordinate legislation to override the intention of Parliament as expressed in an Act that causes consternation over “Henry VIII clauses”. These clauses are sometimes regarded as having insufficient regard for the doctrine of separation of powers and ultimately, for the institution of Parliament. Each of these propositions will now be discussed in turn.

Sufficient regard for the doctrine of separation of powers

2.3 In his Manual of Australian Constitutional Law, Professor Lane refers directly to the words of the constitution and provides the following simple statement of the separation of powers doctrine:

In theory there is to be a separation of powers in the sense that the legislature has the power to make law, the judiciary the power to declare the (already made) law, the Executive the power to carry out the (already made and, if necessary, declared) law. Neither the judiciary nor the Executive makes the law of the land; the legislature does. Neither the legislature nor the Executive declares innocence or guilt under the law of the land; the judiciary does. Neither the legislature nor the judiciary executes and maintains the law of the land; the Executive does. In practice, however, the separation of powers doctrine as between the legislature and the Executive breaks down to the extent that the Executive does engage in a kind of law-making.\(^{20}\)

2.4 This practical view of the separation of powers doctrine was reflected by the Donoughmore Committee in 1932 when it reported:


In the British Constitution there is no such thing as the absolute separation of legislative, executive, and judicial powers; in practice it is inevitable that they should overlap. ... One of the main problems of a modern democratic state is how to preserve the distinction, whilst avoiding too rigid an insistence on it, in the wide borderland where it is convenient to entrust minor legislative and judicial functions to executive authorities.

It is customary to-day for Parliament to delegate minor legislative powers to subordinate authorities and bodies. ... Some people hold the view that this practice of delegating legislative powers is unwise... We do not agree with those critics... We see in it definite advantages, provided that the statutory powers are exercised and the statutory functions performed in the right way. But risks of abuse are incidental to it, and we believe that safeguards are required, if the country is to continue to enjoy the advantages of the practice without suffering from its inherent dangers.\(^{21}\)

2.5 The issue of “Henry VIII clauses” highlights the need for such safeguards in the system because, not only can the Executive make delegated legislation, but in using “Henry VIII clauses”, Parliament empowers it to impose its own intent over that of the Parliament as expressed in principal legislation. This is the real cause for concern:

... it cannot but be regarded as inconsistent with the principles of Parliamentary government that the subordinate law-making authority should be given by the superior law-making authority power to amend a statute which has been passed by the superior authority.\(^{22}\)

2.6 The Committee accepts the practical necessity of subordinate legislation.

2.7 However, it does not see subordinate legislation as a necessary evil or as an unfortunately inevitable breach of an ideal and perfect separation of powers.

2.8 Subordinate legislation can be justified on the basis that Parliament’s role is to debate matters of principle and that Acts should concentrate on such matters of broad principle. The details are often best left to subordinate legislation or case by case development by the courts. We have seen too many examples of attempts to provide every possible detail in legislation and this has led, for example, to criticism of the drafting of the federal income tax laws and corporate legislation.

2.9 Although this view acknowledges an important and positive role for subordinate legislation, the importance of retaining a clear supremacy for Parliament is undiminished. Although subordinate legislation may legitimately concentrate on principle rather than detail, detail must never be allowed to

\(^{21}\) Report by the Committee on Ministers’ Powers (the Donoughmore Committee), op. cit., pp.4-5.

\(^{22}\) ibid., p.59.
2.10 The Committee regards legislative scrutiny by a Parliamentary Committee and the requirement that legislation have regard to the institution of Parliament as two of the safeguards operating in our system in Queensland to protect against the inherent dangers of delegating legislative power to the Executive. The Committee therefore takes this role as a check on the exercise of law-making power by the Executive very seriously and that is one of the reasons for this Report.

Sufficient regard for the institution of Parliament - A fundamental legislative principle

2.11 A long recognised principle of Parliamentary law making is that an Act should only be amended by another Act of Parliament. This became a legislated “fundamental legislative principle” in s.4 of the Legislative Standards Act 1992 which provides:

4.(1) For the purposes of this Act, “fundamental legislative principles” are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.

(2) The principles include requiring that legislation has sufficient regard to-

(a) rights and liberties of individuals; and

(b) the institution of Parliament ...

(4) Whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, the Bill-

...

(c) authorises the amendment of an Act only by another Act.

(5) Whether subordinate legislation has sufficient regard to the institution of Parliament depends on whether, for example, the subordinate legislation-

(d) amends statutory instruments only; ...

2.12 These extracts from the Legislative Standards Act clearly indicate that “Henry VIII clauses” (by allowing amendment of an Act by means other than another
Act, and amendment by subordinate legislation of instruments other than subordinate legislation) may be regarded as having insufficient regard to the institution of Parliament.

2.13 However, these provisions may be seen as merely an important subset of the first principle outlined in the Legislative Standards Act, s. 4(4):

(4) Whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, the Bill

(a) allows the delegation of legislative power only in appropriate cases and to appropriate persons; ...

2.14 A “Henry VIII clause” is merely one of the most objectionable and least appropriate cases.

Protectors of fundamental legislative principles:

The Office of Parliamentary Counsel

2.15 Section 7(g) and (h) of the Legislative Standards Act provides that one of the functions of the Office of Parliamentary Counsel (OPC) is to provide advice to Ministers, units of the public sector and Members on the application of fundamental legislative principles when drafting legislation.

2.16 The OPC is therefore obliged to draft legislation that has sufficient regard to the institution of Parliament and to advise their clients in that respect.

2.17 However, the obligation to pay sufficient regard to fundamental legislative principles is not confined to Parliamentary Counsel. The Committee sees the passage of high standard legislation as requiring the best efforts of the instructing officers, the OPC, this Committee and the Parliament. The process will work best if the drafters of legislation attempt to ensure that their legislation conforms to the fundamental legislative principles. The aim of all should be to establish a dialogue on fundamental legislative principles so that the legislation improves at each stage of the process of drafting and deliberation.

The Scrutiny of Legislation Committee

2.18 The Scrutiny of Legislation Committee is also granted a specific role with respect to fundamental legislative principles by Parliament in the Parliamentary Committees Act 1995:

22.(1) The Scrutiny of Legislation Committee’s area of responsibility is to consider—

(a) the application of fundamental legislative principles to particular Bills and subordinate legislation; ...
by examining all Bills and subordinate legislation.

(2) The committee’s area of responsibility includes monitoring generally the operation of—

(a) the following provisions of the Legislative Standards Act 1992.

- section 4 (Meaning of “fundamental legislative principles”)...

2.19 It is because of the Committee’s specific role regarding respect for the institution of Parliament that this particular inquiry has been commenced, culminating in this Report.

“Henry VIII Clauses” - A Matter Of Necessity Or Convenience?

2.20 During the course of its research for this Report, it became apparent to the Committee that “Henry VIII clauses” were often inserted as a fall back position just in case such powers were needed. “Henry VIII clauses” were used in these circumstances as insurance against unforeseen consequences rather than as tools to achieve a specified or special purpose.

2.21 The Committee was concerned by the possibility that these clauses were merely being used to provide leeway for the Executive arm of Government, just in case an Act of Parliament had to be amended. The Committee therefore wrote to all Ministers in July 1996 seeking information on whether the use of certain “Henry VIII clauses” were genuinely necessary, and therefore justified, or whether they were only being used as a matter of convenience.

2.22 In their responses to the Committee it was evident that many Ministers supported the Committee in its work on “Henry VIII clauses”. The Honourable Vaughan Johnson MLA, Minister for Transport and Main Roads, for example, said:

I share your concern as to the potential for such clauses to be used as a convenience without giving due regard to the institution of Parliament.24

2.23 The Honourable Bob Quinn MLA, Minister for Education, gave examples of repealed and soon to be repealed Henry VIII provisions that were not necessary25:

25 Queensland University of Technology and Brisbane College of Advanced Education Amalgamation Act 1990 (repealed), s. 25; University of Queensland and Queensland Agricultural College Amalgamation Act 1989 (repealed), s. 19; University of Queensland Act 1965 (repealed), s. 22.
In these three instances, I consider Henry VIII clauses were used as a matter of convenience rather than to facilitate urgent executive action, innovative legislation, consequential amendments or transitional arrangements.

The current practice in the education portfolio is to avoid the use of Henry VIII clauses and it is highly unlikely that any necessity for the use of such clauses will arise in the future.26

2.24 In addition, the Committee is of the view that there are other “Henry VIII clauses” which remain on the statute book to provide a means of convenient amendment. By way of example, ss. 17(2) and 20 of the Residential Tenancies Act 1994, provide:

**Application of Property Law Act to agreements**


(2) However, a regulation may declare that the Property Law Act 1974, or a provision of that Act, applies, or applies with prescribed changes, to residential tenancy agreements or a particular type of residential tenancy agreement.

**Changes to Act’s application**

20. A regulation may declare that this Act, or a provision of this Act, does not apply to, or applies with prescribed changes to, any of the following—

(a) residential tenancy agreements;

(b) residential premises;

(c) entities.

2.25 These sections are not stated to be transitional in nature and if they were inserted to allow a smooth transition for the 1994 Act they should, in the Committee’s view, have been subject to sunset clauses. The legislation has been in place for some 18 months and any amendments required for a smooth transition should already have been made by now.

2.26 An amendment was recently made to the Residential Tenancies Act 1994 by subordinate legislation pursuant to s. 2027. The amendment specifically provided for the Act to apply to certain residential tenancy agreements for holiday purposes despite the fact that the Act specifically provides that it does not so apply.

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27 Residential Tenancies Amendment Regulation (No.1) 1996
2.27 The Committee strongly objected to this Regulation on the basis that it was either questionable whether it was within power (because of s. 17(1) of the Act) and if it was to be regarded as being within power it was only due to reliance on a particularly objectionable “Henry VIII clause” (s. 20 of the Act). An amendment to the Residential Tenancies Act has since been introduced in the form of principal legislation to replace the objectionable Regulation.

2.28 This provides a good example of a subordinate instrument overriding the express will of Parliament. The reason for this method of amendment appears to be that it is convenient.

2.29 The present Government’s view on the issue of utilising “Henry VIII clauses” for convenience in the drafting of future legislation was addressed by the Premier in response to the Committee’s request for information:

I am concerned that the Committee would consider that the use of these clauses may be dictated by “convenience” rather than necessity. If this implies that the Parliamentary Committee considers that the Executive Government holds the Parliament in low esteem, then I can assure the Committee that this is not the case. My Government takes the drafting of legislation very seriously, and clauses inserted in Bills are designed to achieve specific policy ends after weighing up carefully the various policy objectives. Mere “convenience” is not a factor in this regard.28

2.30 In Chapter 4 of this report, the Committee does consider one category of clauses which may be regarded as “Henry VIII clauses” and which are used to facilitate the legislative process but which are not regarded as objectionable. This category includes clauses which commence Acts (and provisions in Acts) or bring about the repeal of provisions in Acts.

Does The Power Of Disallowance Redeem And Justify The Use Of “Henry VIII Clauses”?

2.31 The concept of the sovereignty of Parliament was developed by the noted constitutional theorist A.V. Dicey in the late nineteenth century and has been described as follows:

The sovereignty of Parliament is, from a legal point of view, the dominant characteristic of our political institutions. … The principle, therefore, of parliamentary sovereignty means neither more nor less than this, namely that “Parliament” has “the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament,” …

2.32 Some persons involved in the debate on “Henry VIII clauses” have contended that any objections to such clauses are overcome by the fact that Parliament

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remains the supreme law-maker and can amend Acts to omit “Henry VIII clauses” or disallow subordinate legislation made under such clauses.

2.33 This view is reflected in correspondence to the Committee on “Henry VIII clauses” from several Ministers, for example:

*I consider this to be a critical point which needs to be taken into account when examining the use of Henry VIII clauses. While it is acknowledged that any action authorised by such clauses may potentially override or negate or change the effect of the Parliament’s legislation, any concerns in this regard can, to some extent, be allayed if there is an opportunity for the Parliament to review and strike down such actions.*

*However, when a clause authorises executive action in such a way that the action is not subject to review and disallowance by the Legislative Assembly, then there clearly exists reasonable grounds for concern.*

2.34 Another Department provided a similar view:

*I am satisfied that there are sufficient checks in place to ensure such clauses are relied upon only in appropriate cases and the “tabling” requirements in the Legislative Assembly and disallowance procedures for subordinate legislation as provided in the Statutory Instruments Act 1992 provide an example.*

2.35 The Committee does not share this view. Subordinate legislation merely contains the amendment pursuant to the objectionable “Henry VIII clauses”, which is located in the principal Act. The Committee believes that it is preferable to take action against the “Henry VIII clause” itself rather than the individual subordinate instruments implementing the power to amend.

2.36 A further weakness in the view that the power of disallowance redeems “Henry VIII clauses” was identified by a Victorian Member of Parliament who informed a conference of delegated legislation committees that disallowance, although a powerful tool in the hands of Parliament, does not provide the final solution to an objectionable issue - the Victorian Parliament had recently disallowed a regulation which was immediately reintroduced that same night:

*We are just going to disallow it again the moment the Government lays it on the Table of the House. I do not know how long that procedure can keep going. So it does have faults in saying that the Parliament has the power to disallow.*

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30 Letter dated 22 August 1996 from T D Fenwick, Director-General, Department of Natural Resources, p.1.

2.37 Despite the fact that legal theory suggests that Parliament is supreme and can omit a “Henry VIII clause” at any time or disallow the product of a “Henry VIII clause” in delegated legislation, the effect of such a clause on an Act or Acts of Parliament is substantial. A noted academic has commented on the fact that in expounding his theories on the omnipotence of Parliament, Dicey would never have foreseen the Executive as a rival to the law making role of Parliament:

\[\text{Dicey observed it was the law that no person or body may override or set aside the legislation of Parliament.} \text{ Yet Parliament may abdicate to the political executive through “Henry VIII clauses”, according primacy to subordinate legislation over Acts of Parliament.} \]

\[\text{Such clauses could not have been farthest from Dicey’s mind when he pronounced the absence of a rival law-making power.} \]

2.38 There seems to be a consensus amongst Parliamentarians that the power of disallowance does not make “Henry VIII clauses” more palatable because they are still not subject to sufficient or effective Parliamentary control. The Committee supports this view.

2.39 Even if the Committee did not hold this view, the Legislative Standards Act is quite explicit. One of the factors to which the Parliament (and the Committee) must have sufficient regard is whether an Act can be amended by something other than an Act. If the availability of disallowance were sufficient, then there would be no point in providing for scrutiny of this ground.

2.40 For those occasions where “Henry VIII clauses” were permitted, Parliament could assert control over significant subordinate instruments by introducing, for example, a process of positive affirmation into Parliamentary practice. Under this reform, Parliament would have to actively consider the subordinate instrument/s in question and pass a positive (or affirmative) resolution adopting or confirming it rather than the current default process which allows Parliament the power to disallow if the instrument is sufficiently objectionable.

2.41 Another method of reasserting the control of Parliament with respect to these clauses would be for the House to exercise its power at the Bills phase to prevent the issue arising at all. If this was carried out effectively the question of sufficiency of control via the disallowance process becomes irrelevant.

View Of Members Of The Executive On “Henry VIII Clauses”

2.42 Generally, the Committee has been very encouraged by the positive responses it has received from Ministers indicating opposition to the use of “Henry VIII clauses”. By way of example, the Minister for Mines and Energy, the Honourable T Gilmore MLA, commented as follows:

I must state that I am strongly opposed to any such provision within legislation pertaining to this portfolio.

Any matter which is to be dealt with by law must be sufficiently important to be subject to the full democratic process of scrutiny by the Parliament. Any amendment to such law must also be able to withstand rigorous scrutiny.

Amendment of Acts by subordinate legislation can be subject to arbitrary and subjective decision making outside the power of the Parliament and is not in the interests of good government.34

2.43 This view was also expressed by the Minister for Tourism, Small Business and Industry, the Honourable B Davidson MLA:

As a matter of principle, my Department considers that statutes should not provide for their own amendment by subordinate legislation. Such provisions breach fundamental legislative principles because they undermine the institution of Parliament. If a matter is sufficiently important to be incorporated in an Act, it ought to be amended only by an Act. If the matter is of such lesser importance that it can be amended by subordinate legislation, then it ought to be written as subordinate legislation in the first instance.35

2.44 These comments indicate an acute awareness of the problems posed to Parliament by “Henry VIII clauses”. The Committee is hopeful that such views will lead to a decrease in the future usage of “Henry VIII clauses” and a removal of some such clauses from the statute book.

3. "HENRY VIII CLAUSES" - RESTRICTED AND EXPANDED DEFINITIONS

Background

3.1 Subsequent chapters will consider situations in which “Henry VIII clauses” have been applied and whether there is a legitimate role for “Henry VIII clauses”. Before those issues can be explored, however, there is a need to further examine the interpretation of the definition of “Henry VIII clauses” set out by the Law Reform Commission and referred to by the Committee in its first chapter. The principal issue arising is whether the definition should be interpreted by the Committee as having a narrow or a broad application.

3.2 The need for the Committee to carefully consider the application of the definition is reflected in several letters from Ministers commenting on “Henry VIII clauses”, for example, the Attorney-General the Honourable D E Beanland MLA addressed the issue as follows:

*Further, as I understand it, there is a narrow and a wide definition of the term.*

*The expression, when used in its narrow connotation, adverts to a provision which expressly empowers an Act to be amended by an Executive instrument including subordinate legislation.*

*The wide understanding of the term would include within its ambit arrangements whereby the coverage of the provisions of an Act are extended or narrowed, as the case may be, without what appears to be and explicit amendment to that Act, for example, s. 8(1) of the Jury Act 1929 which allows the categories of persons exempt from jury service to be extended by Governor in Council.*

*From time to time, I believe there have been disputes as to whether a particular provision in proposed legislation could be described as a Henry VIII clause because of these sorts of considerations.*

3.3 The Honourable T Perrett MLA, Minister for Primary Industries, approached the issue of defining a “Henry VIII clause” from another perspective:

*The fundamental difficulty with the so-called “Henry VIII” clause is defining what it is. As with other technical law, for almost every example, there is an arguable case either way.*

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No-one can argue that executive government should have power to usurp the authority and supremacy of the Parliament. However, no-one in Queensland has yet tackled comprehensively the task of identifying the bounds of what make a statutory provision offensive on this ground.37

3.4 This chapter therefore deals with the question of interpretation of “Henry VIII clauses”. In so doing, it explores the approach adopted by Parliamentary Scrutiny Committees and other approaches advocated, for example, by the drafters of legislation.

A Broad Or A Narrow Interpretation?

3.5 Since the Committee’s formation as a scrutiny of subordinate legislation committee in 1975, the Committee has identified many provisions which it has regarded as falling within the definition of a “Henry VIII clause”. Amongst others, the Committee has taken issue with clauses which allow:

- an agreement in a schedule to an Act of Parliament to be amended by subordinate legislation;
- lists contained in schedules to an Act of Parliament to be amended by subordinate legislation;
- provisions allowing subordinate legislation to be made pursuant to transitional arrangements which may have effect despite any provisions of the principal Act; and
- provisions in an Act of Parliament which allow subordinate legislation to set their staged expiry.

3.6 Over the years the Committee has succeeded in discouraging the use of several of these provisions, for example, many lists that were previously contained in schedules to Acts have now been relocated to subordinate legislation. In other cases, however, Ministers, on replying to queries raised by the Committee with respect to “Henry VIII clauses”, have challenged the Committee’s definition of a “Henry VIII clause”. On some occasions it would appear that Ministers have introduced provisions into Parliament fully believing them to be entirely proper, only to have the Committee raise a question with respect to a “Henry VIII clause”. This last point is illustrated in the following comment from the Honourable Trevor Perrett MLA, Minister for Primary Industries:

I would like to congratulate you on taking an initiative with this issue, and encourage you in taking the Committee away from (its previous) reactive approach ... to a more proactive approach. It is clearly preferable, and clearly more sophisticated, to provide guidance to Ministers, Parliamentary Counsel and departmental officials before the

event, than to report adversely to Parliament on matters that all parties considered, on reasonable grounds, to be acceptable drafting right up to the point of your Committee’s publishing its periodic “alert digests”.38

3.7 This comment clearly highlights the need for this Report.

Proponents of a broad definition

3.8 These differences in view have largely resulted from the fact that the Committee has, to date, taken a broad view in interpreting the definition of a “Henry VIII clause”. That view includes altering the effect of an Act within the concept of “amendment”. The most extreme interpretation of that view is that any alteration of the effect of an Act is an amendment. This is consistent with the practice followed by scrutiny committees in other jurisdictions.

3.9 The adoption of a broad interpretation of the definition of a “Henry VIII clause” by the Senate Scrutiny of Bills Committee was discussed by then Senator Amanda Vanstone (at the time Deputy Chair, Scrutiny of Bills Committee):39

A typical example occurred recently in the Hearing Services Bill 1991. In that Bill, subclause 4(1), defines ‘hearing products’. They are defined as:

(a) hearing aids; and

(b) alternate listening devices; and

(c) listening systems; and

(d) tests, procedures, documents and computer software associated with the provision of hearing services; and -

just to catch the lot of them -

(e) such other products as the Minister determines to be hearing products within the meaning of this Act …

We think that is probably a ‘Henry VIII’ clause.

The Committee suggested that that was exactly what it was, because it would allow the Minister to alter the definition of a hearing product contained in the primary legislation by simply issuing a determination.40 I understand the argument that he was not altering

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38 ibid.,
40 See Alert Digest No.16 of 1991.
the definition, because the definition says that anything he says is a hearing product is a hearing product. But it does alter the definition in so far as members of the public who buy the legislation can be expected to understand what a hearing product is.

**Parliamentary opposition to “Henry VIII clauses”**

3.10 In addition to taking a generally broad interpretation of the definition of a “Henry VIII clause”, various Members of Parliament (and particularly Parliamentary scrutiny committees) have expressed firm opposition to the use of “Henry VIII clauses”. At a 1991 conference of Australian delegated legislation committees, then Senator Bronwyn Bishop made the following comments on the process of deciding whether or not to allow a “Henry VIII clause”:

*I personally would like to err on the side...of saying that “Henry VIII clauses” are intrinsically bad and ought to be avoided at every possible instance. ... I think if we tend to use “Henry VIII clauses” in any way as having a legitimate general function, we would do ourselves a great disservice.*

3.11 This sentiment was echoed by several other Parliamentarians at that conference. Senator Mal Colston expressed the following view:

*I can see that it would be very easy for counsel and perhaps bureaucrats to think that it would be good to have “Henry VIII clauses” so that when particular issues come up they can just add parts to Acts or change Acts in a certain way. But one of the things that people are forgetting is that under our system of democracy it is Parliament which makes the law; it is not the bureaucracy; it is not the Executive; it is Parliament.*

3.12 Mr Ken Jasper, MP supported this approach:

*I join with those who have expressed their opposition to anything which may seek to retain the “Henry VIII clauses” as they have been suggested. I think that this goes to the heart of what we are here about ... to try to ensure that we have Governments operating correctly within the Acts of Parliament ... and being accountable ... back to the Parliament and subsequently to the people.*

3.13 Ultimately the following strongly worded resolution was passed unanimously and without amendment at the third Conference of Australian Delegated Legislation Committees in 1991:

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42 ibid., p.62 per Senator Mal Colston.

43 ibid., pp.63-64 per Mr Ken Jasper, Chairman, Victorian Subordinate Legislation Sub-Committee of the Scrutiny of Acts and Regulations Committee.
While noting that there may be a rare, justifiable use of a Henry VIII clause where such use would be subject to tabling and disallowance, this conference believes that “Henry VIII clauses” have no legitimate general application in the legislative process.\textsuperscript{44}

Proponents of a narrow definition

3.14 As previously referred to, however, the view adopted by Parliamentary scrutiny committees is not necessarily shared by others involved in the legislative process. An example of a difference of opinion can be found in the response of Mr Ian Turnbull QC, first Parliamentary Counsel to the comments of Senator Vanstone quoted above:

\textit{The Scrutiny of Bills Committee defines a “Henry VIII” clause as any clause that enables regulations to alter the effect of an Act, even if they do not amend it, and you heard the example given of the Hearing Services Bill. ... What this is doing is not amending the Act, or any other Act. It is not autocratic; it merely extends a definition. ... If regulations are made under this definition, more products will get benefits under the Act.}

\textit{There are a vast number of ways in which regulations can alter the effect of an Act, ranging from changing a date or an amount of money to really substantial law-making, and I cannot believe, personally, that they are all bad.}\textsuperscript{45}

3.15 In Queensland, the Office of Parliamentary Counsel has also taken issue with the question of whether a clause which provides for the effect of an Act to be altered is a “Henry VIII clause”:

\textit{The office is, therefore, concerned that FLPs [fundamental legislative principles] are not debased to the level of meaningless pious incantations.}

\textit{For example, the office sees much of the debate about ‘Henry VIII clauses’ as potentially misinformed. A ‘Henry VIII clause’ is a provision of an Act that enables the Act (or another Act) to be amended by subordinate legislation.' It is objectionable to the institution of Parliament because it allows a provision of a law made by Parliament to be amended by a law made by a subordinate law-making authority, usually the Executive Government.}

\textit{There have been attempts in other jurisdictions to extend the meaning of a ‘Henry VIII clause’ to any provision that enables the effect of an Act to be altered by a statutory instrument.' Such an approach is patently absurd since every statutory instrument made under an Act

\textsuperscript{44} ibid., p.41.
(for example, the approval of a form for use under an Act) could be regarded as having the effect of altering the effect of the Act.

Attempts to extend the meaning of ‘Henry VIII clauses’ in such a simplistic way have nothing to do with ensuring that legislation has sufficient regard to the institution of the Parliament.46

The Amending Instrument

3.16 Before moving on from its consideration of the interpretation of the definition of a “Henry VIII clause” provided by the QLRC,47 the Committee wishes to clarify one further issue raised by the Honourable Denver Beanland MLA, Attorney-General and Minister for Justice:

I would contend that the ambit of the definition could be extended to include amendment of primary legislation by any Executive instrument, even those which are not necessarily legislative in character. For example, a provision in an Act may allow for primary legislation to be modified or overridden by an inter-governmental agreement.

One instance of this is to be found in s.8(1) of the Tweed River Entrance Land Bypassing Act 1995 (NSW) (TRESB Act) which provides that the “deed of agreement and each further agreement may be carried into effect despite the provisions of any other Act or law”. The agreement in question relates to arrangements between the Queensland and New South Wales governments to regulate a joint project dealing with the subject matter of the legislation. While I understand complementary Queensland legislation has yet to be introduced and when it is so introduced it will not be part of my portfolio, I have adverted to the New South Wales statutory provision to illustrate the definitional problem. Also, I realise that the provision refers to the “provisions of any other Act or law” and not the TRESB Act itself. Nevertheless, it is an example whereby an Executive instrument has the effect of qualifying primary legislation.48

3.17 The Committee fully supports the Attorney-General’s contention on this point. If a clause in an Act allows Executive action to amend an Act of Parliament (as clarified in the above section) the Committee may regard it as a “Henry VIII clause”.

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48 Senate Standing Committee for the Scrutiny of Bills, Proceedings of Ten Years of Scrutiny: A Seminar to Mark the Tenth Anniversary of the Senate Standing Committee for the Scrutiny of Bills, op. cit., p.66 per I Turnbull QC.
49 “A ‘Henry VIII clause’ is a clause in an Act of Parliament which enables the Act to be amended by subordinate or delegated legislation.”
3.18 The amendment of an Act of Parliament by instruments other than subordinate legislation is even more objectionable than amendment by regulation. The Committee has objected to such provisions in the past.

3.19 The reason for the apparent failure to include such action within traditional definitions of “Henry VIII clauses” is due to two different meanings of “subordinate legislation”. The amendment of legislation is itself legislative. If an Act authorises another person to legislate, this can be characterised as “subordinate legislation”. However, it will not necessarily be “subordinate legislation” as defined by the Statutory Instruments Act 1992.

3.20 To avoid confusion, the Committee therefore proposes to adopt the following amended definition to make it clear that any instrument which enables an Act to be amended is a “Henry VIII clause” and that s. 4(4)(c) of the Legislative Standards Act should not be interpreted restrictively:

A “Henry VIII clause” is a clause in an Act of Parliament which enables the Act to be expressly or impliedly amended by subordinate legislation or Executive Action.

Committee’s Views On Scope Of Definition

3.21 Having regard to the above arguments and the Committee’s experience in scrutinising legislation, the Committee has reached a view on the scope of definition of “Henry VIII clauses”.

3.22 With respect, the broadest definitions of “Henry VIII clauses” appear to be misconceived. All subordinate legislation alters the effect of the principal Act. If there was no difference in the effect of an Act after the passage of regulations, then, by definition, the regulations would have had no effect. Such a definition would dub subordinate instruments proclaiming the commencement of an Act “Henry VIII clauses”.

3.23 It is appropriate that Parliament consider general principle and that matters of detail may be left to subordinate legislation.

3.24 However, an extremely narrow definition in which “Henry VIII clauses” are confined to those which formally amend the principal Act would fail to deal with the mischief. A common “Henry VIII clause” provides that ‘regulations shall take effect irrespective of the provisions of this Act [or even any Act]’. The Committee does not intend to encourage such avoidance of the Legislative Standards Act by departmental officers.

3.25 The crux of the issue is that the detail should not conflict with the principles that Parliament has supported and the provisions of the Act by which it has sought to give the force of primary legislation.
Conclusion On Scope Of Definition

3.26 As already referred to, the definition of “Henry VIII clauses” adopted by the Committee is:

A Henry VIII clause is a clause of an Act of Parliament which enables the Act to be expressly or impliedly amended by subordinate legislation or Executive action.

3.27 The point is that, as a result of a “Henry VIII clause”, a subordinate instrument has the same effect on an Act as an amendment to that Act (in that the relevant section of the Act would have to be read as if it contained different words).

3.28 This approach may differ slightly from that taken by other scrutiny committees.

3.29 However, the mere fact that a Bill does not offend in this way does not mean that it pays sufficient regard to Parliament. It should always be borne in mind that the relevant fundamental legislative principle is that Bills must have sufficient regard for the institution of Parliament. Section 4(4)(c) of the Legislative Standards Act, which covers “Henry VIII clauses” is but one of three specific examples of this fundamental legislative principle.

3.30 Some of the clauses which are dubbed “Henry VIII clauses” fall foul of other parts of s. 4(4). Broad delegations which allow regulations to significantly alter the effect of legislation may be seen as involving inappropriate delegations of legislative power. As such they will fall foul of s. 4(4)(a) of the Legislative Standards Act.

3.31 Accordingly, this reconsideration of the definition of “Henry VIII clauses” is less likely to alter the conclusions of the Committee than the category under which those conclusions are reached.

3.32 Nothing is achieved by strictly policing the boundary between “Henry VIII clauses” and other objectionable clauses where clauses on both sides of the boundary fail to pay sufficient regard to the institution of Parliament. That should always be the test applied by drafters and the Committee will in each case determine whether the relevant clauses have sufficient regard to the institution of Parliament.

3.33 However, it is hoped that the comments above and the discussion of various types of “Henry VIII clauses” in the next section will assist drafters and instructing officers in their consideration of this fundamental legislative principle.
4. IS THERE A LEGITIMATE ROLE FOR “HENRY VIII CLAUSES”?

Background

4.1 During the course of this chapter, the Committee will express views on the desirability of using various categories of what are called “Henry VIII clauses”. Where, in the Committee’s view, such clauses should be avoided, suggestions have been made as to how this can be accomplished. Where possible, issues under discussion are illustrated by examples drawn from the Queensland statute book. At the end of this chapter the Committee considers the question of whether there is a legitimate role for “Henry VIII clauses”.

Defining Categories Of Usage

4.2 In 1932 the Donoughmore Committee reported that:

*The sole purpose of Parliament on the nine occasions (when “Henry VIII clauses” were used between 1888 and 1929) ... was to enable minor adjustments of its own handiwork to be made for the purpose of fitting its principles into the fabric of existing legislation, general or local, and of meeting cases of hardship to Local Authorities.*

4.3 In Queensland, the Law Reform Commission undertook a review of the statute book and, in its 1990 Report on “Henry VIII clauses”, concluded that:

*... with certain exceptions, “Henry VIII clauses” should be generally removed from the statute book. ... The Commission has prepared a draft Law Reform (Statutes) Act which ... will remove various objectionable “Henry VIII clauses” from the present statute book.*

4.4 In coming to this conclusion, the Law Reform Commission distinguished instances of “Henry VIII clauses” which, in its opinion should be retained, from objectionable “Henry VIII clauses”. The following sections consider the various types of “Henry VIII clauses”, including those categorised by the Queensland Law Reform Commission (QLRC).

4.5 In its consideration of the categories of usage of “Henry VIII clauses” in the rest of this chapter the Committee has broadly grouped provisions into four classes:

- generally objectionable “Henry VIII clauses”;

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49 Report by the Committee on Ministers’ Powers (the Donoughmore Committee), op. cit., p.36.
those types of provision which the Committee does not regard as coming within its more restrictive interpretation of a “Henry VIII clause” or which, although they may come within that definition, are not generally objected to;

those situations in which the Committee has formed the view that the use of “Henry VIII clauses” could be avoided by more appropriately locating the subject material in subordinate legislation, or, by maintaining it in the principal Act and amending by a further Act of Parliament; and

those situations in which the Committee recognises that a valid need for the use of a “Henry VIII clause” may arise but would need to be adequately justified in every case.

4.6 It should be noted that there is another category of provisions which is closely related to the above categories: those types of provision which, though not “Henry VIII clauses”, are often objectionable for failing to have sufficient regard to the institution of Parliament for other reasons.

4.7 Each of the four categories identified above will now be considered in turn.

A. Generally Objectionable “Henry VIII Clauses”

4.8 Clauses which allow for the amendment of the relevant Act by subordinate legislation are generally objectionable, for example:

**Changes to Act’s application**

20. A regulation may declare that this Act, or a provision of this Act, does not apply to, or applies with prescribed changes, to any of the following—

(a) residential tenancy agreements;

(b) residential premises;

(c) entities.\[^{51}\]

4.9 Some clauses go even further to allow the amendment of a range of Acts, or even all Acts, for example:

**Agreement has effect as enactment**

5(1). The casino agreement has effect as if it were an enactment of this Act.

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\[^{51}\] *Residential Tenancies Act 1994 s. 20*
(2) If a provision of the casino agreement is inconsistent with an Act, the provision prevails and the Act is not effective to the extent of the inconsistency.\textsuperscript{52} (Emphasis added)

B. Categories Of Provision Which Are Not “Henry VIII Clauses” Or Which, Although “Henry VIII Clauses”, Are Not Objected To

To facilitate the Consolidation and Rationalisation of Acts in a Reprinting Process

4.10 One example of such a clause was contained in the Acts Interpretation Act 1975 of South Australia. The convoluted s. 52(1) essentially provided what has been described as a most startling power to the Executive to make regulations amending Acts.\textsuperscript{53} This clause was introduced because it was anticipated that various Acts would be inconsistent with one another and, to avoid amending each Act, the “Henry VIII clause” in the Acts Interpretation Act allowed these changes to be made by regulation. Whilst there was some opposition to this clause in the Legislative Assembly, the Bill was not opposed, however, the Legislative Council added a sunset clause providing that the power to make regulations expired on 31 December 1977.

4.11 “Henry VIII clauses” have, at times, been utilised to avoid the necessity for amendments of many Acts during a reprinting process.

4.12 The case for the advantages of “Henry VIII” provisions in a Reprints Act were persuasively put by a representative from the New South Wales Parliamentary Counsel’s Office at a conference of delegated legislation Committees:

\begin{quote}
In New South Wales we have a Reprints Act, which enables some Acts to be amended by an administrative order. That is necessary because a statutory corporation has been abolished; another corporation has come to take its place; the Act constituting the new corporation might say that a reference in any Act to the old corporation is to be read and construed as a reference to the new corporation. In those circumstances it is desirable that the law be brought up to date, on the face of it, as quickly as possible. No one could object, in those circumstances, to the tidying up of the Statute Book by means of a piece of subordinate legislation. There is no issue of principle. … I think there is an area where it is entirely appropriate for a statute to be amended by a piece of subordinate legislation, and it would be a pity, I think, to say that there would be no recognition of any circumstances at all where that might be a proper procedure.\textsuperscript{54}
\end{quote}

4.13 Commenting on the use of “Henry VIII clauses” to facilitate reprinting processes, Professor Pearce said that although they may be seen to be justified

\textsuperscript{52} Section 5, \textit{Brisbane Casino Agreement Act 1992}
\textsuperscript{53} Pearce, op. cit., p.7.
\textsuperscript{54} Report of the Third Conference of Australian Delegated Legislation Committees, op. cit., p.61 per Michael Orpwood, Parliamentary Counsel’s Office, New South Wales.
when dealing with special circumstances where the passage of amending Acts is not practicable, these clauses are not the ultimate solution. Professor Pearce continued:

But it is very tempting for governments to find reasons why such a situation exists and to make out an argument for the parliament to be by-passed. This is an approach to legislating that should be resisted. Parliamentarians at present pay too little heed to the regulation making sections of Acts. If “Henry VIII” clauses are allowed to pass by default, the parliamentary institution is placed in jeopardy.\(^55\)

4.14 The Committee agrees with Professor Pearce. Well drafted legislation would ordinarily include within the Act provisions that anticipate changes. It is relatively easy to cover the required changes to the text of the primary legislation through Statute Law Miscellaneous Provisions Bills.

4.15 In considering the restrictive nature of the Queensland Reprints Act 1992, however, the Committee does not object to the proposed changes within the ambit of that legislation.

**To Commence an Act of Parliament**

4.16 Some jurisdictions have regarded the commencement of an Act of Parliament by a subordinate instrument to be a “Henry VIII clause”. For example, the Donoughmore Committee reported in 1932 that:

*The “Henry VIII clause” should:*

(a) *never be used except for the sole purpose of bringing an Act into operation;*

(b) *be subject to a time limit of one year from the passing of the Act.*

4.17 A typical example of a clause in a Queensland Act of Parliament which delays the commencement of the Act is:

*This Act commences on a day to be fixed by proclamation.*

4.18 A proclamation (subordinate instrument) would then subsequently fix the relevant day.

4.19 In some jurisdictions this type of commencement clause is still treated with caution, as the commencement of Acts is thereby placed entirely within the Minister’s control. On the rare occasion this has meant that Bills have never been commenced or have had a considerable delay prior to commencement.

4.20 In Queensland, concerns about long delays in commencement (or failure to commence) have been overcome by the introduction of s. 15DA of the Acts Interpretation Act 1954 which provides for the automatic commencement of

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55 Pearce, op.cit., p. 8
postponed law. That section provides that “postponed law” are Acts (or provisions of Acts) that do not commence on the assent day because their commencement is postponed until a date be fixed under an instrument. Sections 15DA(2) and (3) provide:

(2) If a postponed law has not commenced within 1 year of the assent day, it automatically commences on the next day.

(3) However, within 1 year of the assent day, a regulation may extend the period before commencement under subsection (2) to not more than 2 years of the assent day.

4.21 The Committee does not regard these commencement provisions as “Henry VIII clauses” although the ability to delay the commencement of an Act indefinitely may be seen as an inappropriate delegation under s. 4(4)(a) of the Legislative Standards Act that fails to have sufficient regard for the institution of Parliament. However, due to the automatic commencement provisions in the Acts Interpretation Act, the Committee is not concerned about commencement of Acts of Parliament being inordinately delayed.

4.22 The Committee does, however, note that s. 15DA of the Acts Interpretation Act only applies to postponed law enacted after 31 December 1994. Laws made before that date and not commenced within two years may become of concern to the Committee just as long delays in commencement are of concern in other jurisdictions. The Committee therefore urges Ministers not to unduly delay the commencement of postponed law not subject to s. 15DA.

To Provide for the Expiry of a Provision of an Act

4.23 The Queensland Subordinate Legislation Committee has, in the past, queried whether provisions which allow their own expiry to be set by subordinate instruments are “Henry VIII clauses” and if so, whether they are objectionable “Henry VIII clauses”.

4.24 Some examples of these types of clauses in Acts are:

This section expires 2 years after it commences or, if an earlier date is prescribed by regulation, on that date.\(^{57}\)

OR

This section expires on a date to be fixed by regulation.\(^{58}\)

4.25 The then Minister for Transport, the Honourable Jim Elder MLA’s response to the Committee’s query, incorporated the following advice from the OPC:

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\(^{56}\) Acts Interpretation Act 1954, s.15DA(5).

\(^{57}\) Transport Infrastructure Act 1994, s.131(2) (Reprint No. 3).

\(^{58}\) Transport Infrastructure Act 1994, s.135(3) (Reprint No. 3).
There is no provision of the chapter that allows subordinate instruments to amend the text of the Act. The provisions that expire sections of the chapter all seem to be as harmless as other very common provisions in many other Acts that allow the staged commencement of provisions of Acts. Generally speaking, the chapter’s arrangements appear to be reasonably directed to the staged transition from the operation of repealed laws to laws that will operate when the chapter is exhausted.

There is nothing essentially wrong with the operation of an Act being linked with the operation of a regulation. This is often the normal way in which the Parliament delegates its authority to ensure effective and efficient legislation. 59

4.26 The Committee evaluated the information provided by the Minister at the time and indicated that although the matter would be fully dealt with in this Report, sections which provide for their staged expiry by subordinate legislation may be considered to be acceptable.

4.27 The Committee confirms that view. As with the provisions providing for delayed commencement, these provisions are regarded as being useful and will not generally be objected to by the Committee.

4.28 However, as with provisions for commencement, long delays may be unacceptable. It is one thing for Parliament to determine that a section should expire and that the time for expiry may be set by the Executive based on a number of practical and contextual considerations. It is entirely another thing for the Parliament to give to the Executive a discretion to repeal a section or sections of an Act should it wish to do so. Such clauses would not seem to have sufficient regard for the institution of Parliament and would have to be clearly justified. In the absence of such justification, the Committee is likely to make adverse findings against such clauses. Expiry should generally be treated similarly to commencement. The Committee has a strong preference for the first of the two kinds of formulations outlined in paragraph 4.24.

To further clarify the terms of a definition

4.29 Where definitions have been provided in an Act and a clause in the Act has allowed the definition to be further expanded by subordinate legislation, the Committee has, in the past, regarded these as “Henry VIII clauses”. The fact that the Senate Scrutiny of Bills Committee took a similar view is illustrated in the extract of (then) Senator Vanstone’s comments on hearing aids quoted at paragraph 3.7 on page 19.

4.30 Following the reformulation of its approach as outlined in this Report, these clauses will no longer be regarded as “Henry VIII clauses” because they do not

amend the subject section of the Act. The section is still read in the same way, but the details of the definition are expanded in subordinate legislation.

C. Categories Of Provisions In Which The Use Of “Henry VIII Clauses” May Be Avoided

To Allow Lists of Schedules to Acts to be Amended Flexibly

4.31 A common drafting practice in years gone by was to allow matters listed in schedules to Acts to be amended by subordinate legislation. Two examples of such provisions, which are no longer on the statute book, are:

**Power to amend Schedule 2**

8. The Governor-in-Council may from time to time by Order-in-Council amend Schedule 2 by altering the description or deleting any of the species of timber …

8. Amendment of Standard Building By-laws. (1) The Governor in Council may, by Order in Council, amend the Standard Building By-laws in such manner as he thinks fit and every amendment so made shall have force and effect (unless it is disallowed according to law) as if it had been made by Parliament and shall become and be part of the schedule.

4.32 These provisions are regarded to be “Henry VIII clauses” because s. 14(4) of the Acts Interpretation Act 1954 provides:

(4) A schedule or appendix of an Act is part of the Act.

4.33 Any amendments to provisions allowing the amendment of a schedule to an Act is therefore regarded to be a “Henry VIII clause”. This includes amendments by subordinate legislation to agreements contained in schedules which will be discussed in the following section.

4.34 The reasoning for allowing “Henry VIII clauses” which permit amendment of lists or schedules in Acts to be amended by subordinate legislation has been put as follows:

*It may be that there is an Act which deals with matters of principle, and applies those matters of principle to a specified class. It may be that the class is a list of statutory officers. It may be that those statutory officers can be changed by an administrative changes order. It is desirable in a case like that, that the Act be brought up to date quickly and simply. It would be possible to do it by means of a statute law revision Bill, but it would be just as convenient and without anyone’s*

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60 Timber Utilization and Marketing Act 1987, s.8 (omitted by 1992 Act No. 15, s.13, sch.).
61 Building Act 1975, s.8 (omitted by 1992 Act No. 76, s.3, sch.1)
rights being adversely affected, to do it by means of amendment
effected by subordinate legislation.\textsuperscript{62}

4.35 The updating of lists contained in Acts by subordinate legislation is something
which, it appears, the Senate Scrutiny of Bills Committee accepts as being
justified on occasion. In its consideration of the use of “Henry VIII clauses”,
the House of Lords Select Committee on the Scrutiny of Delegated Powers
concluded that it recognised the case for using “Henry VIII clauses” for
updating lists, updating for inflation and for making consequential and
transitional provisions. The last-mentioned Committee, however, also stated
that the Government would be expected to justify the use of such clauses as
being necessary and not merely convenient.

4.36 The Scrutiny of Legislation Committee has, however, formed the view that the
use of “Henry VIII clauses” to amend schedules to Acts can be avoided by
either:
- relocating the subject matter to subordinate legislation (if it is appropriate
to subordinate legislation) and subsequently amending by subordinate
legislation; OR
- amending the schedule only by a further Act of Parliament (if, for
example, the subject matter is not appropriate to subordinate legislation
and amendments are infrequent).

4.37 The Committee’s approach on this issue is supported by the many instances in
which the use of “Henry VIII clauses” have been obviated by taking such
action.\textsuperscript{63}

4.38 The following extract from the Honourable T J Perrett’s correspondence to the
Committee on “Henry VIII clauses” provides a further example of the practical
implementation of the Committee’s approach and clearly indicates a
commitment to continue implementing this approach:

\textit{Past drafting practices made extensive use of provisions that had the
effect of amending the words of an Act. Often the Act would contain a
Schedule, intended to be the initial list of matters regulated under the
Act, and provide that a regulation or Order in Council might add to, or
remove matters from the list. This was especially prevalent in
Queensland’s primary industries statutes from the early parts of this
century. Recently these devices have been removed progressively from
the Acts I now administer, and other devices implemented to provide
the relevant framework. However, I am advised some of these

\textsuperscript{62} Report of the Third Conference of Australian Delegated Legislation Committees, op. cit., p.61 per Michael
Orpwood, Parliamentary Counsel’s Office, New South Wales.

\textsuperscript{63} For example, despite the availability of a “Henry VIII clause”, the Central Queensland Coal Associates
Agreement Variation Bill 1996 recently provided for the amendment of the Central Queensland Coal
Agreement which is contained in a schedule to the \textit{Central Queensland Coal Associates Agreement Act} 1968.
A second example is the recent relocation of schedules 1-6 of the \textit{Drugs Misuse Act} 1986 to the \textit{Drugs Misuse
Regulation 1987} thereby avoiding the use of a “Henry VIII clause” to amend the schedules
provisions may still be within my portfolio of Acts. I can assure the Committee that the orderly review of primary industries statutes underway will include identification of these remaining provisions, and ensure more acceptable legal policy is put in place.\textsuperscript{64}

4.39 Part of the problem with “Henry VIII clauses” is that the material included within the Act is of a detailed nature that could just as easily be included within regulations. However, there is an entirely justifiable tendency for Parliament to want to see what the legislation will look like when fleshed out with the intended regulations.

4.40 The answer may be for the subordinate legislation to be proclaimed at the same time as the legislation. A novel alternative would be for the Parliament to pass the regulations itself. There is nothing wrong with a delegator exercising the powers of a delegate. Should it do so, the Parliament should not give the regulations the same force as primary legislation.

\textbf{To Give the Force of Law to Agreements with the State}

4.41 The Queensland statute book contains many Acts which incorporate agreements with either commercial organisations or other jurisdictions, for example:\textsuperscript{65}

- \textit{Ampol Refineries Limited Agreement Act 1964}
- \textit{Breakwater Island Casino Agreement Act 1984}
- \textit{Commonwealth and State Housing Agreement Act 1990}
- \textit{Gladstone Power Station Agreement Act 1993}

4.42 Typically, these “agreements Acts” are structured to contain the following elements:

(i) a two to four page Act referring to the agreement incorporated in a schedule to the Act;

(ii) a provision giving the agreement the force of law or stating that it is effective as if it were an enactment;

(iii) a provision allowing the agreement to be varied by further agreement, approved by regulation;

(iv) the statement that if a provision of the agreement is inconsistent with the principal Act (or in some circumstances any other Act or law), the agreement prevails to the extent of the inconsistency.

\textsuperscript{64} Letter dated 7 August 1996 from the Honourable T Perrett MLA, Minister for Primary Industries, p.1.
\textsuperscript{65} A list of “agreements Acts” including “Henry VIII clauses” (of which the Committee is currently aware) is set out in Appendix A.
4.43 These agreement Acts therefore provide for the agreement to be flexibly amended by subordinate legislation, whilst still continuing to have the force of principal legislation.

4.44 This Committee, and the Committee of Subordinate Legislation, have consistently maintained the view that these agreement Acts are amended by means of “Henry VIII clauses”. One of the reasons for this view has been that these agreements and further agreements by subordinate legislation can often override other legislation. By way of example, it may be considered desirable for an agreement concerning a casino to override some aspects of the Liquor Act. The Committee does not object to an Act of Parliament amending another Act of Parliament but in the circumstances created by agreement Acts such amendment is not only carried out by subordinate legislation but also by stealth. Legislation being overridden is not specifically identified but impliedly overridden by the inconsistent agreement.

4.45 The Committee’s view of agreement Acts as incorporating “Henry VIII clauses” has not been shared by Members of the Executive. The Honourable Tom Gilmore MLA, Minister for Mines and Energy, expressed the following view on point:

*On this particular issue I would like the Committee to note that agreement Acts are essentially political sanctioning of private agreements while providing a mechanism for the agreement to be changed at the request of the parties to the agreement.*

*Essentially, changes to the agreement do not change the effect of the Act, they simply reflect changing commercial realities.*

*I am not convinced that amendment to an agreement can be construed as an amendment to the Act.*

4.46 Addressing the need to maintain flexibility in amendment of agreement Acts, the Honourable Bruce Davidson MLA, Minister for Tourism, Small Business and Industry, provided the following reasoning:

*These Acts which ratify agreements entered into by the State contain Henry VIII provisions allowing the agreements to be amended by Regulation or Order in Council. It is necessary to maintain these provisions in these Acts as the agreements may have to be amended at a time when the Legislative Assembly is not sitting.*

4.47 The Committee has considered these views together with the arguments advanced by the Office of Parliamentary Counsel asserting that agreement Acts do not contain “Henry VIII clauses” because two elements of the definition of a “Henry VIII clause” are not fulfilled. A copy of the Office of Parliamentary Counsel’s reasoning is contained in Appendix B of this Report.

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4.48 The Committee does not accept the reasoning provided by the Office of Parliamentary Counsel and has formed the following view on the points discussed:

- When an agreement is contained in the schedule to an Act, it is part of the Act, pursuant to s. 14(4) of the *Acts Interpretation Act 1954*. The reasoning that this subsection is displaced by the contrary intention (reflected in the statement in some Acts that the agreement has the force of law as if it were an enactment of the Act) is also not accepted. In the Committee’s view, an express (or compelling implied) intention would be required to override the effect of s. 14(4) of the *Acts Interpretation Act 1954*. In addition, some Acts incorporating agreements do not contain the subject words granting the agreement the force of law as if it were an enactment.\(^68\)

- Amendments to the agreement are usually allowed by further agreement but ONLY if approved by regulation. Such approval therefore gives effect to the further agreement which, in turn, amends the agreement in the schedule to an Act. In the Committee’s view, and despite the contrary opinion expressed by the former Parliamentary Counsel on this point, this constitutes a “Henry VIII clause”.

4.49 Having maintained the view that the provisions typically contained in agreement Acts do constitute “Henry VIII clauses”, the Committee is further of the view that the use of such clauses can be avoided.

4.50 Where the Government enters into a significant agreement, dealing with matters that should be contained in principal legislation, the Committee is of the view that such an agreement can be contained in a schedule to an Act. Any amendments to such an agreement should, however, be carried out by further Act of Parliament. This option would be suitable where the agreement is not frequently amended and amendments are not likely to be urgent. This option would also suit those situations where the Act and agreement are desired to override inconsistent legislation.\(^69\)

4.51 As previously mentioned, the *Central Queensland Coal Associates Agreement Act 1968* was most recently amended by the Central Queensland Coal Associates Agreement Variation Bill 1996 rather than by subordinate legislation, which is possible under s. 4(1) of that Act.

4.52 Where an agreement deals with matter appropriate to subordinate legislation, however, the Committee is of the view that the agreement can be located in a regulation rather than in a schedule to an Act. The agreement can then be amended by further regulations. This opinion would be suitable to agreements

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\(^{68}\) For example, *Commonwealth and State Statistical Agreement Act 1958; Local Government (Robina Central Planning Agreement) Act 1992.*

\(^{69}\) For example, *Hay Point Harbour (Ratification of Agreements) Act 1987; Mount Isa Mines Limited Agreement Act 1985.*
continuing matter appropriate to subordinate legislation which need to be amended more frequently and/or urgently.

4.53 By way of example, the agreement the subject of the Brisbane Casino Agreement Act 1992 is located in the Brisbane Casino Agreement Regulation 1993. Section 5 of this Act, however, contains a very clear example of a Henry VIII clause:

**Agreement has effect as enactment**

5.(1) The casino agreement has effect as if it were an enactment of this Act.

(2) If a provision of the casino agreement is inconsistent with an Act, the provision prevails and the Act is not effective to the extent of the inconsistency. (emphasis added)

4.54 Section 5 therefore allows subordinate legislation to prevail over inconsistent Acts to the extent of the inconsistency.

4.55 If agreements are to be located in regulations, the Committee is also of the view that they should, where possible, be tabled in Parliament when their principal Act is first introduced. This will ensure that Parliament is fully informed as to the effect of the agreement when passing the agreement Act.

**To Amend Rules of the Supreme Court**

4.56 Rules of the Supreme Court are now made under section 117 of the Supreme Court of Queensland Act of 1991, which replaces s.11 of the Supreme Court Act 1921. Section 11 was described by the Law Reform Commission as a section which had:

... long been considered to be a grant of ample power to modify the operation of existing legislation. However, the Rules of Court may only modify a provision in an Act of Parliament that relates to “the practice or procedure of the Court”. The rule making power is therefore narrow in scope and confined to a proper object.\(^{70}\)

4.57 The Supreme Court Rules are subordinate legislation and therefore subject to Part 6 of the Statutory Instruments Act 1992 which stipulates procedures to be followed after the making of subordinate legislation. Section 50 specifically provides that the Legislative Assembly may pass a resolution disallowing subordinate legislation.

4.58 In its Report, the QLRC commented as follows on this aspect:

This is also a sensitive matter as the power of the Supreme Court to manage its own affairs and regulate practice and procedure should be

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preserved. ... The Commission considers that it would be appropriate to delete the necessity for approval by the Executive Government of Rules of Court to have regard to the doctrine of the Separation of Powers.\(^71\)

4.59 The Committee has taken note of the view expressed in the above extract from the QLRC and particularly of the need to have regard to the doctrine of Separation of Powers. The Committee however, considers that there are alternative means of achieving this end.

4.60 Rather than allowing the current practice of amendment to principal legislation by subordinate legislation to continue, the Committee considers that the position of the Court can be enhanced while also removing the need for the use of a “Henry VIII clause”. The Committee believes that consideration could be given to amending the relevant legislation and transferring subject matter with respect to which the Courts make rules into subordinate legislation.

4.61 This would necessarily involve the shifting of detail into subordinate legislation. Given the respect due to the institution of the courts, a broader delegation is appropriate than to some other institutions. Some might even consider that Parliamentary scrutiny of the Rules of Court does not pay sufficient regard to the independence of the judiciary. On the other hand, others believe, the need for checks and balances and the fact that the Rules of Court are essentially legislative (and partly Executive) functions incidental to their operation as courts justifies such review. Ensuring that the rules of court amend subordinate rather than principal legislation preserves regard for the institution of Parliament. The Committee adopts this latter view.

4.62 This same principle could be applied to the rule-making function with respect to all Courts, for example, Supreme, District and Magistrates Courts. In each case the Parliament could make the rule-making power as broad or as narrow as it deems necessary.

4.63 Having made these observations, the Committee notes that, following consolidation, the Supreme Court Act appears no longer to contain a clear “Henry VIII clause”. Section 11(3) of the \textit{Supreme Court Act 1921}, which was a particularly objectionable “Henry VIII clause”, has now been removed.

4.64 The broad regulation making power now granted in s.117 in the \textit{Supreme Court of Queensland Act 1991} is not, on the face of it, a “Henry VIII clause”. Section 117 would only constitute a “Henry VIII clause” if matters covered by it were already included in State Acts. This is improbable and may be read down by a court.

4.65 The Committee’s view is that it is appropriate for the \textit{Supreme Court Act} not to have a “Henry VIII clause”. As explored above, the solution lies in ensuring that the Acts do not cover matters that are appropriate to Supreme Court Rules (beyond authorising the making of the Rules).

\(^{71}\) ibid.
D. Recognising That The Use Of “Henry VIII Clauses”, In Certain Circumstances, May Be Justified

4.66 During its process of assessing the use of “Henry VIII clauses”, the Committee sought information from each Minister on circumstances in which “Henry VIII clauses” were used to facilitate:

- urgent Executive action;
- innovative legislation;
- consequential amendments; and
- transitional arrangements.

4.67 These are the categories in which the Committee considered that the use of “Henry VIII clauses” would be most likely to be justified. The Committee also requested Ministers to provide specific examples of use of “Henry VIII clauses” in those particular circumstances and information on actual situations in which their use would be necessary.

4.68 Several Ministers expressed general opposition to the use of “Henry VIII clauses” but expressed the view that such use, in certain circumstances, may be necessary and justified. The Minister for Primary Industries, the Honourable T Perrett MLA, commented as follows:

> In my view, “Henry VIII” clauses are to be avoided where other legislative or administrative mechanisms are open to achieve the objectives of legislation. However, ... it is possible that in some circumstances, Executive Government action adjusting the effect of an Act may be reasonable.\(^{72}\)

4.69 The Minister for Health, the Honourable M Horan MLA, supported this stance:

> As a general principle, I am opposed to Henry VIII clauses in health legislation and would suggest that the frequently cited rationale for these clauses could be otherwise adequately addressed through appropriate subordinate legislation making powers and access to a timely and efficient legislative amendment processes. However, I recognise that there may be unforeseen and extraordinary circumstances which occasionally warrant a provision of this kind, although I am unable to provide you with any concrete examples of such circumstances as none have arisen within my portfolio.\(^{73}\)

4.70 The Committee accepts the point made by the Ministers and recognises that there are circumstances in which the use of “Henry VIII clauses” may be justified. The requirement that legislation pay “sufficient regard” to various

\(^{72}\) Letter dated 7 August 1996 from the Honourable T J Perrett MLA, Minister for Primary Industries, p.2.

\(^{73}\) Letter dated 29 July 1996 from the Honourable M Horan MLA, Minister for Health, p.1.
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rights liberties and institutions does not involve a blanket ban. In this section
the Committee has set out some types of “Henry VIII clauses” which, in its
view, fall within this category and cites particular examples only to illustrate
points.

In Circumstances Warranting Immediate Executive Action

4.71 The Committee recognises that there may be circumstances in which the
provisions of an Act may have to be amended urgently.

4.72 In its 1990 Report, the Queensland Law Reform Commission also considered
that “Henry VIII clauses” may be warranted in circumstances which may
require immediate Executive action. At pages 13 - 14 of its Report the QLRC
identified three instances in which “Henry VIII clauses” may be required in
emergencies and should therefore be retained in that legislation. The examples
were regarding:

- departments of State;
- trustee companies; and
- heritage protection.

4.73 In each of these cases the need to use a “Henry VIII clause” has now been
obviated. The departments of State of the Government of Queensland were set
out in a schedule to the Act and could be amended by immediate Executive
action by subordinate legislation. The list of departments has now, however,
been transferred to subordinate legislation where it was more appropriately
located.

4.74 The Trustee Companies Act 1968 allowed the Governor-in-Council to amend
the second schedule of the Act to omit the name of a trustee company (s.
72(1)). This section has now been omitted and the schedule can now only be
amended by a further Act of Parliament.

4.75 With respect to the third instance relating to Heritage protection, the QLRC
considered that protected historic buildings may need to be enumerated in a
schedule to an Act and may need to be urgently amended by subordinate
legislation. Ultimately, however, the Queensland Heritage Act 1992 did not
contain a heritage register in the Act or its schedules and the use of a “Henry
VIII clause” was avoided.

4.76 Of the three instances identified by the QLRC as justified use of “Henry VIII
clauses”, therefore, all were obviated by more appropriate location of the
subject matter or more appropriate means of amendment.

4.77 In the responses from the Ministers to the Committee’s request for actual
examples of past or future use of Henry VIII clauses to implement urgent
Executive action, only a few were provided:

- Legal Practitioners Act 1995 - s. 51;
Is There a Legitimate Role For “Henry VIII Clauses”

• *Primary Producers’ Organisation and Marketing Act 1926* - s. 9(1);

• *Corrective Services Act 1988* - ss. 59 and 67(1);

• *Building Act 1975* - s. 6.

4.78 With respect to these identified “Henry VIII clauses”, the Committee is of the view that the need to utilise such a clause can again be removed by more appropriately locating the subject matter or by providing for a more appropriate means of amendment. By way of example, the Committee will address two of these cases.

• *Legal Practitioners Act 1995*

4.79 The Honourable the Attorney-General and Minister for Justice provided the following information on this “Henry VIII clause”:

> Section 51(9) (previously s. 10 of the Legal Assistance Act 1965) requires interest earned from time to time on the statutory deposit component of solicitors’ trust accounts to be paid, first to the Queensland Law Society for the cost of administration, and then to the Legal Aid Fund and to the Fidelity Guarantee Fund.

The Legal Aid Fund receives the “prescribed percentage”, the Guarantee Fund receives the remainder or so much as is needed to raise and keep the Fund at its prescribed amount of $5 million, and any remaining is paid to Legal Aid.

Section 51(10) provides that the “prescribed percentage” is 50%, or another percentage prescribed under a regulation.

The ability to alter the prescribed percentage by regulation enables swift action to be taken if it is considered that circumstances require either the Legal Aid Fund or the Guarantee Fund to receive a larger portion of the interest. A requirement for the percentage to be altered only by amendment to the Act would mean a delay of some months. However, the discretion to alter the percentages is not open-ended and remains effectively circumscribed by s. 51(9) in that the amount actually paid to the Guarantee Fund can never exceed the amount needed to top up the fund to its limit of $5 million.

4.80 The Committee is of the view that, if the Act prescribed limits within which the prescribed percentage was to be altered and maintained the limit imposed by s. 51(9), amendments to the prescribed percentage could be carried out by regulation. This would provide the relevant flexibility and would be an appropriate relocation of material to subordinate legislation and overcome the need for a “Henry VIII clause”.
4.81 The Honourable the Attorney-General and Minister for Justice provided the following information on this “Henry VIII clause”:

Section 9(1) enables the Governor in Council, after certain conditions are fulfilled, to declare by regulation any grain, cereal, fruit, vegetable etc to be a “commodity” subject to the Act.

Section 9(1) of the Act states as follows:

**Power to declare commodity and extend Act and constitute board for same**

9.(1) The Governor in Council may from time to time, if requested so to do by a petition signed by 50 growers of any particular commodity (or such other number of growers as may be approved) by regulation declare that any grain, cereal, fruit, vegetable, or other product of the soil in Queensland, or arrowroot or any dairy produce (including butter and cheese) or eggs or any article of commerce prepared other than by any process of manufacture from the produce of agricultural or other rural occupations in Queensland, is and shall be a commodity under and for the purposes of this Act.74

It may be argued that s. 9(1) be preserved for the following reasons:

1. To give effect to the underlying policy in the Act (that is, relating to the marketing of rural commodities), it is necessary that immediate Executive action be permitted to enable another grain, cereal, fruit, vegetable or other commodity to be covered by the Act.

2. It is impossible to draft a legislative provision which would cover all of the food commodities which require orderly and significant marketing procedures because new food commodities are being created all the time through genetic and technological change and the fact that the marketplace determines their demand and popularity. As is well known, marketplace forces can take effect quite suddenly.

4.82 The Committee notes the Attorney-General’s view that immediate action may be required to enable the inclusion of a further “commodity” within the Act and that such a need will be dictated by sudden marketplace forces.

4.83 This is an interesting example. This section could be seen, especially with some slightly different drafting, as being about detail. The principal legislation sets out a general approach to marketing of commodities in need of what would

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74 Note: this section is also discussed at paragraph 4.29 where the Committee reaches the conclusion that the fact that a “commodity” may be further defined by regulation does not, in itself, make it a “Henry VIII clause”.
once have been called “orderly marketing”. The detail is over the commodities to be included. This would mean that the clause is not, in fact, a “Henry VIII”. However, the significance of the inclusion of such a key matter in subordinate legislation raises questions about whether the matter is appropriate to subordinate legislation (s. 4(4)(a)). It could well be seen as inappropriate. If that is the conclusion, then it should be fully within the legislation with new commodities being introduced in Statute Law (Miscellaneous Provisions) Bills. Given the relative rarity of additions to the list of commodities, this may not be too high a price to pay. Given the time taken to set up marketing schemes, the delay may be perfectly acceptable - provided that regulation making powers enable activities in anticipation of the amendment.

4.84 A recent illustration of the Committee’s view on material requiring urgent executive action being more appropriately located (in subordinate legislation in this instance) was provided by the Drugs Misuse Amendment Act 1996. This amending legislation became necessary when it became apparent to the Minister for Police and Corrective Services and Minister for Racing, the Honourable T R Cooper, MLA that a drug known colloquially as “fantasy” or “GBH” had caused the hospitalisation of a number of people and yet was not (at the time) listed as a dangerous drug.

4.85 Dangerous drugs were at that time listed in the schedules to the Drugs Misuse Act 1986 which meant that urgent changes by amending legislation was not always possible. The Minister therefore transferred the schedules into the Drugs Misuse Regulation 1987 where they can be conveniently and urgently amended to list future dangerous drugs.

4.86 In summary, it is clear that circumstances may justify the use of “Henry VIII clauses” to facilitate immediate Executive action on some occasions. However, the frequency with which alternative arrangements are possible indicates to the Committee that such alternatives should be fully canvassed and frankly discussed by instructing officers, the Office of Parliamentary Counsel, the Committee and Parliament itself.

4.87 In any case, where a “Henry VIII clause” is used to implement urgent Executive action, the Committee is of the view that such use must be justified. Elements to be considered in assessing whether such an infringement of fundamental legislative principles is justified include consideration of:

- whether the subject matter can be more appropriately located in subordinate legislation;
- whether the method of amendment should be by further Act of Parliament;
- whether the “Henry VIII clause” is subject to a suitable sunset clause;
- whether any regulations made pursuant to the “Henry VIII clause” are subject to a suitable sunset clause; and
• whether considering all the circumstances such an amendment has sufficient regard for the institution of Parliament.

To Facilitate The Effective Application Of Innovative Legislation

4.88 The use of “Henry VIII clauses” to facilitate innovative or reforming legislation appears to be a widely adopted practice.

4.89 The usefulness of “Henry VIII clauses” as legislative tools in these circumstances was illustrated by a delegate from a legislative drafting unit at the 1991 Perth conference of scrutiny committees:

There is one example of a Henry VIII clause which comes to my mind fairly readily. It was in the power given by the 1976 Commonwealth Superannuation Act to modify the application of the Act in relation to various groups of people. ... In this instance I think it was probably a reasonable Henry VIII power, because at the time the 1976 Superannuation Act was passed I do not think anybody could have known all the circumstances in which various groups of people were to come into or move out of that Act. It would have made the Act almost impossible and of extraordinarily great length. The regulations that we have made under that power, as far as I can recall, all relate to specific groups. ... In those circumstances it has been a useful administrative tool - or legislative tool.75

4.90 Some of the negative aspects of using “Henry VIII clauses” to tidy up innovative legislation are evident in comments made by another legislative drafter at the same conference:

In my experience, quite often what ultimately ends up in an Act are things the department has not looked at - has not had time to look at in detail because of the timetable - and it says, “Just do what you’ve got to do and we will fix that up later.”76

4.91 The dangers associated with “Henry VIII clauses” used to cure difficulties associated with innovative or reforming legislation have also been explored. The New Zealand Regulations Review Committee provided a report to the Darwin Conference of scrutiny committees entitled: “Scrutinising empowering provisions in Bills - The use of “Henry VIII clauses” in Transitional Provisions”. The Report dealt with a major reform of resource management and planning law in New Zealand which took place in 1991. Some fifty Acts were repealed and relaced by the Resource Management Act 1991 which effectively introduced a regime in which anything was permitted unless expressly prohibited, to replace the previously prohibitive regime. The Act contained a very broad “Henry VIII” empowering provision which the New Zealand committee described as follows:

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76 Ibid., p. 59 it should be noted that the drafter being quoted informed the Scrutiny of Legislation Committee office that this view no longer reflects the drafting practices currently adopted.
In short the executive were given a broad power to suspend provisions of the Act and substitute new provisions, a power so broad on the face of it that it has the potential for being used not only to correct technical mistakes and anomalies, but to alter the substance of the legislation enacted by Parliament.\textsuperscript{77}

4.92 The Committee then reported that the clause was used not only to correct the original Act but to override a subsequent statutory amendment, and that such action was not what Parliament intended when it conferred the power.\textsuperscript{78} The Committee further reported that at the time of its inquiry, the power had been used seven times to promulgate regulations overriding the transitional provisions of the Act.\textsuperscript{79} During the course of the inquiry it emerged that changes to the regulations may have been undertaken too readily, without sufficient consultation and planning because the process of amending the Act was so simple. In addition, the Committee reported that some of the changes undertaken by regulation were matters worthy of legislative debate and the attention which ought to accompany amendment by statute.\textsuperscript{80}

4.93 In Queensland in 1990 the Queensland Law Reform Commission concluded that it may, in some circumstances, be necessary for innovative legislation to be amended urgently.\textsuperscript{81} However, when the Commission considered such an example of a “Henry VIII clause” in s. 14 of the Registration of Plans (S.S.P. (Nominees) Pty Limited) Enabling Act 1980 it concluded

\textit{In the circumstances the Commission has proposed the deletion of this particular provision. Parliamentary approval should be necessary in such a situation where extraordinary privileges are given to a corporation.}\textsuperscript{82}

4.94 This section was subsequently omitted in 1994.

4.95 During its process of reviewing “Henry VIII clauses”, the Committee sought information from Ministers on the use of such clauses to implement innovative legislation and make transitional arrangements. Two examples provided by Ministers which may be regarded as coming within this category are:

- \textit{Local Government Act 1993} - s. 137ZZG; and

- Sugar Industry Amendment Bill 1996 - s. 245(3).

\textsuperscript{78} ibid.
\textsuperscript{79} ibid.
\textsuperscript{80} ibid., p.3.
\textsuperscript{81} Queensland Law Reform Commission, Report No. 39, \textit{“Henry VIII Clauses”}, op. cit., p.16.
\textsuperscript{82} ibid.
4.96 In relation to s. 137ZZG of the Local Government Act 1993, the Honourable Di McCauley MLA, Minister for Local Government and Planning, provided the following information (in part):

**Local Government Act 1993 - Section 137ZZG**

This section provides an additional regulation making power to the Governor in Council in relation to the arrangements for a referendum for the de-amalgamation of certain local government areas. This section was introduced into the Act via the Local Government Amendment Act 1996 …

… this legislation was unique and time limited in nature. It was designed to enhance the rights of individuals by democratically giving them the opportunity to influence the direction of their local communities and for their views to be responded to as quickly and efficiently as possible by the Government.

The regulation making power in section 137ZZG was designed to cope with any unforeseen difficulties which may have arose (sic) in meeting the objectives of the legislation. The section allowed further electoral provisions of the Local Government Act 1993 to be applied to the conduct of a referendum. As the Committee would appreciate, the holding of elections and referendums is a complex administrative process which requires legislative controls of a precise nature.

The regulation making power did not provide for changes to the principles or policies outlined in the legislation, but enabled the intended outcomes to be successfully met. It would have been undesirable for the objectives of this time limited legislation not to be met as a result of a minor anomaly in applying procedural provisions of an administrative nature.83

4.97 In addition, the Minister had previously provided examples of the use of similar regulation making powers (including “Henry VIII clauses”) in the Local Government Act 1993:

These powers were used to facilitate the holding of the 1994 triennial elections. For example, clarifying the meaning of the term “polling booth” for the purpose of enabling an elector to cast a pre-poll vote. In this respect, a transitional regulation enabled a returning officer to declare the local government public office, another office used by the local government to receive rate payments and other convenient place in the local government area, to be polling booths for pre-poll voting.84

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4.98 In her letter to the Committee of 26 August 1996, the Minister expressed the following general view on such clauses:

... I believe there needs to be some acknowledgment that circumstances arise from time to time ... when clauses which are arguably of this type, need to be utilised in legislation.\(^{85}\)

4.99 In the circumstances of a “Henry VIII clause” such as that in s. 137ZZG, the Committee accepts this view. The Committee is, however, of the view that any shortcomings in the relevant Act which are corrected by the use of such clauses should be addressed at the earliest opportunity, and that amendments made pursuant to such provisions should be subject to a sunset clause of a maximum of 12 months.

4.100 When the Sugar Industry Amendment Bill 1996 was introduced into Parliament, it contained a “Henry VIII clause” in s. 245(3). Section 245 was a provision granting power to make transitional regulations and subsection (3) provided that a regulation dealing with transitional matters:

... may have effect despite any provision of this Act other than this section.

4.101 The Committee expressed concern in relation to several aspects of s. 245, including the fact that it incorporated a “Henry VIII clause”. The Committee was not convinced that the legislation in question was so innovative that it could not be reasonably adequately addressed either in the Bill or in subsequent amendments to the Bill once passed. The Minister took cognisance of these concerns and, addressed them as follows:

The justification for the proposed section was the unexplored circumstance of expanding the number of sugar mills in the State. Over recent years, 2 mills have closed, and the resulting distribution of cane assignments was very complex indeed, each time requiring Parliamentary intervention. However, no new mills have been established for more than 70 years. At the time of developing the legislation, it was considered that a supplementary regulation making power would enable flexible and timely responses to emerging circumstances to the extent they were not accommodated by the Act.

After your Committee raised its concerns, I decided to omit that provision, not because the need for flexible and timely response had lessened, but because your Committee’s concerns were indeed real ones. It was a responsible approach for me to move the proposed provision be omitted, even if the advice received in preparing the Bill was that the provision was acceptable. The need to respond may yet express itself in an amending Bill, and I remain concerned that the

time it takes to develop a Bill and sponsor it through Parliament could impact negatively on this important new sugar mill.\textsuperscript{86}

4.102 The Committee was appreciative of the fact that the Minister removed this particular subsection despite his reservations.

4.103 With respect to “Henry VIII clauses” to implement innovative legislation, the Committee has already indicated that use of such clauses may be justified. The question of justification is one which will be considered in each individual case, however, and the Committee is of the view that:

- “Henry VIII clauses” in innovative legislation should not be a substitute for careful drafting nor should they be the result of a restrictive timetable for drafting the legislation.

- Innovative legislation is only “innovative” for a limited period of time after which the operation and effect of the legislation should become clear and predictable. The need to compensate for the unpredictability of novel legislation will pass and therefore “Henry VIII clauses” in such legislation should sunset within a maximum period of two years and generally less.

- Regulations made pursuant to a “Henry VIII clause” should also sunset together with the power to make such regulations.

- Drafting legislation for a particular matter not previously the subject of legislation does not necessarily mean that the legislation is “innovative”. The Committee regards this category as generally applying to situations where an entire area of complex law making is being introduced or radically altered.

To Facilitate Transitional Arrangements

4.104 “Henry VIII clauses” are frequently used either to overcome anomalies consequential to a change in legislative regime or to facilitate the transition from one regime to another.

4.105 An example of the usefulness of “Henry VIII clauses” in these situations was given at the Perth Conference by a delegate from the Australian Capital Territory (ACT) who referred to the ACT Motor Traffic, Alcohol and Drugs Ordinance:

\begin{quote}
That ordinance came in 1973 and up until 1983 was plagued over a 10 year period with great difficulties - technical difficulties - mainly pointed out and initiated by one of our current Supreme Court judges ... (who) made his name in pointing out deficiencies in the legislation. A number of quite serious deficiencies - they were technical points but they were quite serious in that they completely destroyed the operation
\end{quote}

\textsuperscript{86} Letter dated 7 August 1996 from the Honourable T Perrett MLA, Minister for Primary Industries, p.2.
of the law - were resolved very quickly as a result of a Henry VIII provision.\textsuperscript{87}

4.106 The contrary view was expressed at the same conference where the Chairman of the Victorian Parliamentary scrutiny committee argued strongly against the idea of introducing legislation that could be corrected by an amendment later. He suggested:

... we should be trying to get legislation right in the first place. Enough legislation goes through for which we must have amendments later, without deliberately allowing that legislation to go through and correcting it later. ... Surely that is where it should be withdrawn, redrafted and brought back in the correct form ...\textsuperscript{88}

4.107 As mentioned above, Henry VIII provisions are also commonly used to provide for a smooth transition from one legislative regime to another particularly complex regime.

4.108 An example of such major reform legislation was in the area of resource management and planning law in New Zealand already referred to. Some fifty Acts had previously provided the basis of the law on the area and were repealed and replaced by the \textit{Resource Management Act 1991}. That Act contained a very broad “Henry VIII” empowering provision allowing the Governor in Council to make regulations prescribing transitional and savings provisions which could be in addition to, or in substitution of, any of the provisions in the same part of the Act; provided that specified provisions of the Act could be suspended; or provisions of repealed or amended Acts could be reinvoked during the transitional period. Regulations made under this provision were required to have a sunset clause to expire within five years of commencement of the Act.

4.109 Transitional sections in Acts containing “Henry VIII clauses” are commonplace in Queensland. An example of such a section was recently considered by the Committee in s. 48P(3) of the \textit{Suncorp Insurance Finance Amendment Act 1996}. Section 48P of that Act provides:

\textbf{Transitional regulations}

\textbf{48P.(1)} A regulation may make provision about any matter for which—

(a) it is necessary or convenient to make provision to assist the transition from the operation of this Act before its amendment by the Suncorp Insurance and Finance Amendment Act 1996 (the “amending Act”) to its operation

\textsuperscript{87} Report of the Third Conference of Australian Delegated Legislation Committees, op. cit., p.59 per an ACT Delegate.

\textsuperscript{88} Report of the Third Conference of Australian Delegated Legislation Committees, op. cit., p.64 per Mr Ken Jasper, Chairman, Victorian Subordinate Legislation Sub-Committee of the Scrutiny of Acts and Regulations Committee.
after amendment by all or any of the provisions of the amending Act; and

(b) this Act does not make provision or sufficient provision.

(2) A regulation under this section may have retrospective operation to a date not earlier than the commencement of the amending Act, section 1.

(3) A regulation under this section may have effect despite any provision of this Act other than this section.

4.110 The Committee expressed concern on three issues arising with respect to this transitional regulation making power. Questions arose as to whether there had been an inappropriate delegation of legislative power, whether subsequent regulations should have retrospective effect and whether the “Henry VIII clause” in s. 48P(3) was justified. Ultimately, the Committee recommended the removal of s. 48P(1)(b), (2) and (3).

4.111 The Honourable Joan Sheldon MLA, Deputy Premier, Treasurer and Minister for the Arts, responded to the Committee’s comments as follows:

It is my view that such amendments are unnecessary, and have the potential to frustrate the primary intent of the legislation, namely the restructuring of Suncorp. The power to make regulations to deal with the matters to which these sections refer are essential to ensure that the restructuring can take effect within the necessary timeframe. Specifically, this must occur by 1 July 1996. In the unlikely event that a matter has been overlooked in the Bill, or a matter arises subsequent to its passage which impacts on the capacity of Suncorp to achieve its restructure, a requirement for any necessary amendment to be by way of statute would effectively prevent the restructure taking place.

It is my view that there is sufficient opportunity for review of such regulations by the Parliament under the process established through sections 49 and 50 of the Statutory Instruments Act 1992. To the extent that such regulations impact retrospectively on rights and liberties of citizens, this would be appropriate grounds for the Parliament to disallow the regulations.89

4.112 A similar transitional regulation making provision appeared in s. 251 of the Environmental Protection Amendment Act 1996. Subsequent to a change in Government a moratorium was placed on the licensing requirements of specified environmental protection legislation. The Honourable Brian Littleproud MLA, Minister for the Environment, commented as follows on the need for the relevant provisions and their justification:

Section 251 provides only for regulations to be made to allow for the expeditious and equitable implementation of the moratorium. As the Committee correctly identified in Alert Digest Number Three of 1996 the clause in question will expire on 1 March 1997, a period of 12 months from the commencement of the moratorium, and a period in which any unintended consequences of the moratorium would have become evident.

Further, it should be noted that the term “amending regulation”, as used in the section, is defined in section 242 to be only the Environmental Protection (Interim) Amendment Regulation No. 2 of 1996 or Environmental Protection (Interim) Amendment Regulation No. 3 of 1996. These two regulations do nothing more than establish and fine tune the Government’s four month moratorium on licensing requirements under the Act which ran from 1 March to 30 June 1996.

In general I support the Committees concern regarding the use of Henry VIII clauses. However in circumstances such as those discussed above, the use of such clauses may be necessary for the good rule and government of the State.\(^{90}\)

4.113 The Committee also raised similar concerns with respect to substantially identical provisions in subsequent Bills. In other Bills with transitional regulation making power, however, the subsections allowing retrospective operation and incorporating “Henry VIII clauses” were not included.

4.114 The Committee again recognises that the justifiable need for transitional regulation making powers incorporating a “Henry VIII clause” may arise. In these circumstances, however, the Committee is of the view that:

- there must be a genuine need for such provisions as evidenced by, for example:
  - Generally objectionable “Henry VIII clauses” which would be opposed for allowing the amendment of an Act by subordinate legislation; and
  - circumstances in which the use of “Henry VIII clauses” could be avoided by either amending an Act by a further Act of Parliament or more appropriately locating the subject matter.

- “Henry VIII clauses” should not be inserted into hastily drafted legislation to be introduced in a restrictive timetable as a substitute for careful, well developed drafting;

- the transitional phase for legislation should be limited to a maximum of 2 years and therefore transitional regulation making powers should be subject to a sunset clause;

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\(^{90}\) Letter dated 6 August 1996 from the Honourable B Littleproud MLA, Minister for the Environment, p.2.
all regulations made pursuant to transitional regulation making powers should be subject to sunset clauses which bring about their expiry at the same time as the head of power expires; and

any shortcomings in the principal legislation overcome by a “Henry VIII clause” should, where necessary, be addressed by amendments to the Act at the earliest opportunity.

To Facilitate the Application of National Schemes of Legislation

4.115 As early as 1979 the Subordinate Legislation Committee in Queensland reported that “Henry VIII clauses” were being used to facilitate the implementation of national schemes of legislation. “Henry VIII clauses” are a useful tool to drafters wishing to ensure that amendments adopted in the principal legislation of one jurisdiction flow through to all other participating jurisdictions.

4.116 The utility of “Henry VIII clauses” to drafters, however, does not necessarily win support for them from Parliamentary scrutiny committees who have made formal objections to this practice at a national level. The frustration of scrutiny committees arises from the fact that, unlike objections raised to “domestic” legislation within a jurisdiction which may be overcome by amendment, similar amendment to national schemes of legislation is resisted because of its national application. Despite the fact that scrutiny committees can scrutinise national scheme legislation and may identify problems in it, amendment is resisted on the basis of its application to other jurisdictions. By way of example, the Queensland Scrutiny of Legislation Committee recently received this response (in part) to a challenge to such legislation:

In addition in this instance, the legislation is a component part of similar legislation in four other Parliaments which together establish the Agreement. It would not be proper for Queensland to vary unilaterally those arrangements.

4.117 Parliamentary committees scrutinising primary and secondary legislation in all jurisdictions throughout Australia have therefore been involved in an initiative to reassert the role of Parliament as lawmaker with respect to national schemes of legislation.

Note: the phrases “national schemes of legislation” and “uniform legislation” referred to in this report are used to describe:

any and all methods of developing legislation, which is
- uniform or substantially uniform in application
- in more than one jurisdiction, several jurisdictions, or nationally.

Undated letter received on 10 July 1996 from the Honourable H Hobbs MLA, Minister for Natural Resources. A discussion Paper entitled The Scrutiny of National Scheme Legislation and the Desirability of Uniform Scrutiny Principles was formally released by all Parliamentary Scrutiny Committees in July 1995. A Position Paper has now been developed formally setting out the position of scrutiny committees on this subject. This Paper was tabled and published in all jurisdictions in late 1996. Copies of the Discussion Paper and the Position Paper are available from the Queensland Scrutiny of Legislation Committee on (07) 3406 7671.
4.118 An example of a “Henry VIII clause” in national schemes of legislation and the problems created for Parliament by such clauses was reported upon by the Queensland Subordinate Legislation Committee in its 1993-1994 Annual Report, the relevant section of which is extracted below:

The Mutual Recognition (Queensland) Act 1992 has the stated purpose of enabling:

“… the enactment of uniform legislation relating to the recognition of regulatory standards adopted in Australia regarding goods and occupations.”

The Act refers power on stipulated matters to the Parliament of the Commonwealth for a minimum period of 5 years and mainly consists of schedules which incorporate the Commonwealth Mutual Recognition Bill 1992 and the Schedules thereto. Section 6 of the Act allows the Governor, by proclamation, to approve the terms of amendments to the Commonwealth Act. Section 47 of the Commonwealth Bill in the Schedule allows the Governor-General to make regulations amending the Schedules with the proviso that:

“(2) No such regulation may be made unless the designated person for each of the then participating jurisdictions has published a notice in the official gazette of the jurisdiction setting out the terms of the proposed regulation and requesting that it be made.”

Under the existing procedure outlined above, a notice by the Governor in the Government Gazette requesting an amendment does not appear to fall within the category of subordinate legislation as defined in s. 9(1) of the Statutory Instruments Act 1992. Consequently, there is no requirement for the notice (which effectively brings about an amendment to a principal Act in Queensland) to be brought to the attention of, and be scrutinised by, the Legislative Assembly by means of tabling and disallowance requirements.

The fact that a principal Act can be amended without the Parliament of Queensland being consulted or having a scrutiny role, is of particular concern to the Committee. In the case of amendments to the Schedules to the Mutual Recognition (Queensland) Act 1992, the Commonwealth Parliament would scrutinise the proposed amendments, however, there would be no scrutiny according to the terms established and applicable in Queensland and no examination of issues as they affect Queenslanders.

The Committee is concerned that section 47(2) of the Commonwealth Mutual Recognition Act permits the amendment of the Schedule to an act by a regulation (a “Henry VIII clause”). This appears to be in
4.119 The Scrutiny of Legislation Committee has reviewed the use of “Henry VIII clauses” in national schemes of legislation. Whilst the Committee recognises that the use of such clauses play an important role in maintaining consistency of legislative change across jurisdictions, it also urges Ministers to ensure that the use of such clauses in this type of legislation is justified and has sufficient regard to the institution of Parliament.

4.120 The Discussion Paper referred to by the Subordinate Legislation Committee in the extract above has now resulted in a Position Paper entitled Scrutiny of National Schemes of Legislation, compiled and endorsed by the Chairs of scrutiny committees in all jurisdictions in Australia. This Paper proposes that all national schemes of legislation be subject to agreed minimum scrutiny principles supported by all jurisdictions. One of those principles is:

*Whether the Bill inappropriately delegates legislative powers.*

4.121 In future it may therefore be possible to ensure, at a national level across all jurisdictions, that “Henry VIII clauses” employed within national schemes of legislation are justified.

**Is there a legitimate role for “Henry VIII clauses”? - The Committee’s view in summary**

4.122 In the course of this chapter the possibility of a legitimate role for “Henry VIII clauses”, in certain circumstances, has been reviewed. Four categories of “Henry VIII clause” were identified to facilitate discussion on this point:

- First, generally objectionable “Henry VIII clauses” which would be opposed for allowing the amendment of an Act by subordinate legislation;
- secondly, those provisions which are considered not to be objectionable “Henry VIII clauses”;
- thirdly, circumstances in which the use of “Henry VIII clauses” could be avoided by either amending an Act by a further Act of Parliament or more appropriately locating the subject matter; and
- finally, those circumstances in which the use of “Henry VIII clauses” may be acceptable, if sufficiently justified.

4.123 This is a significant departure from the view previously adopted by the Committee and its precursor, the Subordinate Legislation Committee - which

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95 The intention is for the Position Paper to be forwarded to the Council of Australian Governments (COAG) and the Standing Committee of Attorneys-General (SCAG) for consideration and comment. Copies of the Position Paper may be obtained from the Queensland Scrutiny of Legislation Committee on tel: (07) 3406 7671 or fax: (07) 3406 7500.
was to oppose provisions which appeared to be “Henry VIII clauses” in all circumstances.
5. “HENRY VIII CLAUSES” - CONCLUSION

Background

5.1 The need for this Report came about as a result of a perception by the Subordinate legislation Committee that the use of “Henry VIII clauses” in Queensland legislation was continuing, if not increasing, despite the sustained efforts of that Committee to discourage such use. In addition, the Committee’s interpretation of the definition of a “Henry VIII clause” had been challenged, making it clear that a thorough review and evaluation was necessary.

5.2 It may now be useful, in conclusion, to draw together the issues in relation to which the Committee has formed clear views and which will form the basis of its approach to scrutinising “Henry VIII clauses” in the future.

Does the power of disallowance redeem or justify the use of “Henry VIII clauses”?

5.3 The Committee is firmly of the view that Parliament’s power to disallow a subordinate instrument does not redeem or justify the use of a “Henry VIII clause”.

5.4 The statutory requirement for subordinate legislation to be tabled and subject to disallowance was introduced in the same year as the statutory expression of fundamental legislative principles which requires legislation to have sufficient regard to the institution of Parliament. Several examples cited in s. 4 of the Legislative Standards Act dealing with fundamental legislative principles make it clear that “Henry VIII clauses” may not have the requisite regard for the institution of Parliament.

Definition of a “Henry VIII clause”

5.5 The Committee started its examination of these provisions by referring to the definition of a “Henry VIII clause” adopted by the Queensland Law Reform Commission:

A “Henry VIII clause” is a clause in an Act of Parliament which enables the Act to be amended by subordinate or delegated legislation.96

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5.6 As it explored the issues, however, the Committee found that there were different approaches to two aspects of this definition:

- the word “amended” was being interpreted in both a literal and liberal sense, creating confusion; and

- the reference to “subordinate or delegated legislation” may be too restrictive to incorporate amendment by Executive action.

5.7 An adaptation of the definition was then considered to clarify the fact that, in the Committee’s view, “amended” referred not only to formal amendment but also to an amendment which has the same effect on an Act as a formal amendment of the Act (so that the Act is to be read as if it contained different words). The definition was also extended to include an amendment of an Act by Executive action. The Committee therefore agreed on the following definition:

*A Henry VIII clause is a clause of an Act of Parliament which enables the Act to be expressly or impliedly amended by subordinate legislation or Executive action.*

**Is there a legitimate role for “Henry VIII clauses”?**

5.8 The question of whether there may be a legitimate role for “Henry VIII clauses” in Queensland legislation is a fundamental issue to this Report. To date the Committee’s view has been that all “Henry VIII clauses” are undesirable and that the statute book should be cleansed of them.

5.9 The Committee’s view on this issue has, however, shifted to an acceptance that in specified circumstances and where justified, “Henry VIII clauses” may be acceptable. The possibly justifiable uses of “Henry VIII clauses” are, however, considered to be limited to circumstances like the following:

- to facilitate immediate Executive action;

- to facilitate the effective application of innovative legislation;

- to facilitate transitional arrangements; and

- to facilitate the application of national schemes of legislation.

5.10 The Committee reviewed the use of “Henry VIII clauses” in the other specified circumstances and concluded that such use could be avoided by either amending the Act by a further Act of Parliament or by relocating the subject matter to subordinate legislation. These circumstances are:

- to allow lists of schedules to Acts to be amended flexibly;

- to give the force of law to agreements with the state; and

- to amend Rules of the Supreme Court.
5.11 Clauses used to commence an Act of Parliament or to expire provisions of an Act are not regarded as objectionable “Henry VIII clauses”.

Summary

5.12 The Committee’s view on “Henry VIII clauses” has therefore shifted in two significant respects:

- On the definition of “Henry VIII clauses” - an amendment which formally amends the words of an Act or has the effect of amending the words of an Act is regarded as a “Henry VIII clause”. An amendment which changes the effect of an Act is therefore not necessarily a “Henry VIII clause”.

- On the legitimacy of “Henry VIII clauses” - the Committee accepts that in limited circumstances, when amendment of an Act by another Act or relocation of the subject matter to subordinate legislation is not appropriate, “Henry VIII clauses” may be used if sufficiently justified.

5.13 In the course of carrying out its responsibilities to Parliament, however, the Committee will continue its practice of closely scrutinising all “Henry VIII clauses” on their merits.

5.14 The Committee has been encouraged by the support it has received in its opposition to “Henry VIII clauses” from Members of the Executive. Even more significant is the recent move by several Departments to remove “Henry VIII clauses” from the statute book and to avoid the option of using them in other circumstances.

5.15 This Report has, however, come about because there are still many objectionable “Henry VIII clauses” on the statute book. The Committee recently came to the verge of giving notice to disallow a regulation containing a particularly objectionable “Henry VIII clause”. The notice of a motion to disallow was ultimately averted at the eleventh hour when a suitable amendment to the Act in question by a further Act of Parliament was introduced. Disallowance motions by the Committee are rare and notice of such motions have only been given on three occasions in the Committee’s 21 year history.

5.16 The Committee therefore urges Parliament to firmly oppose the introduction of “Henry VIII clauses” into legislation unless they occur in limited circumstances and are justified. The Committee also appeals to Departments to review their legislation and to remove objectionable “Henry VIII clauses” from their statutes.

5.17 In future, where an Act is purported to be amended by a subordinate instrument in circumstances that are not justified, the Committee will voice its opposition by requesting Parliament to disallow that part of the instrument which breaches
the fundamental legislative principle requiring legislation to have sufficient regard for the institution of Parliament.