



Legislative Assembly for the ACT

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY
(performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee)

Henry VIII clauses Fact sheet

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First, a fairy story ...

“Gather around, children, 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, paper presented to the Third Commonwealth Conference of Delegated Legislation Committees, Westminster, 1989¹

“Henry VIII” clauses—some standard definitions

Wikipedia states:

Some statutory instruments are made under provisions of Acts which allow the instrument to change the parent Act itself, or to change other primary legislation. These provisions, allowing primary legislation to be amended by secondary legislation, are known as “Henry VIII” clauses, because an early example of such a power was conferred on King Henry VIII by the *Statute of Proclamations 1539*. The Delegated Powers and Regulatory Reform Select Committee of the House of Lords issued a report concerning the use and drafting of such clauses, an issue its chairman remarked "goes right to the heart of the key constitutional question of the limits of executive power". Such clauses have often proved highly controversial – for instance, that in the *Nationality, Immigration and Asylum Act 2002* which prompted the aforementioned report, and the *Legislative and Regulatory Reform Act 2006*.

In 1997, the (recently-abolished) Scrutiny of Legislation Committee of the Queensland Parliament published a report entitled *The use of "Henry VIII Clauses" in Queensland Legislation*. That report contained the following definition of “Henry VIII” clauses:

¹ Professor Whalan was the Committee’s first Legal Adviser, serving the Committee between 1990 and 1997.

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.²

Why are ‘Henry VIII’ clauses “a bad thing”?

The Queensland *Legislation Handbook* states:

Henry VIII clauses should not be used.³

It does not explain why.

The logical reasons why “Henry VIII” clauses are “a bad thing” are as follows.

Primary legislation (ie Acts) is made by the Legislative Assembly. It is generally subject to close consideration and debate and it generally does not operate until after the Legislative Assembly has approved it. Importantly, the Legislative Assembly has the opportunity to amend primary legislation and, therefore, to have a real control over its final form.

Subordinate legislation (ie regulations and disallowable instruments) is made by the Executive. It generally operates from the day after the day that it is notified on the ACT Legislation Register. It also operates until such time as it is disallowed by the Legislative Assembly.

The only way that the Legislative Assembly has control over subordinate legislation is through the requirement in section 64 of the *Legislation Act 2001* that subordinate legislation be tabled in the Legislative Assembly within 6 sitting days of the subordinate legislation being notified. The Legislative Assembly then has the capacity to disallow the subordinate legislation. While (unlike almost every other Australian jurisdiction) the Legislative Assembly has a limited capacity to *amend* subordinate legislation, the fact remains that the Legislative Assembly’s powers in relation to subordinate legislation are substantially limited.

How does this explain why “Henry VIII” clauses are “a bad thing”?

As explained above, primary legislation is made by the Legislative Assembly. The Legislative Assembly has direct control over the form of primary legislation. The Legislative Assembly also has direct control over when primary legislation takes effect. “Henry VIII” clauses allow for the amendment of primary legislation by subordinate legislation. Subordinate legislation is made by the Executive. The form and the date when subordinate legislation takes effect are entirely within the power of the Executive. The Legislative Assembly has no control over the form of subordinate legislation or when it takes effect. The Legislative Assembly’s principal power in relation to subordinate legislation is the capacity to disallow it. If disallowance occurs, it occurs only after the subordinate legislation will have been in force for (probably) several months.

² At para 7.3.3 (available at <http://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/legislation-handbook/fund-principles/parliament.aspx>).

³ Ibid.

In short, “Henry VIII” clauses detract from the legislative power of the Legislative Assembly. As a paper delivered to the 2011 Australia-New Zealand Scrutiny of Legislation Conference stated:

Henry VIII powers provide the executive with a power to override primary legislation by way of delegated legislation. The practical significance of Henry VIII clauses lies in the loss of the public scrutiny and accountability for policy decisions that would usually occur when primary legislation is made by Parliament. In other words, matters of policy can be determined by the executive without the effective scrutiny of Parliament.⁴

A typical “Henry VIII” clause (in the ACT)

In its *Scrutiny Report No 42 of the 7th Assembly*, the Committee considered the *Liquor Amendment Regulation 2011 (No. 1)* (SL2011-23), made using the power given by section 258 of the *Liquor Act 2010*, which provides:

258 Transitional regulations

- (1) A regulation may prescribe transitional matters necessary or convenient to be prescribed because of the enactment of this Act.
- (2) A regulation may modify this part (including in relation to another territory law) to make provision in relation to anything that, in the Executive’s opinion, is not, or is not adequately or appropriately, dealt with in this part.
- (3) A regulation under subsection (2) has effect despite anything elsewhere in this Act.

In 2010, the Liquor Regulation was amended by the *Liquor Amendment Regulation 2010 (No 1)* (SL2010-48). Sections 4 and 5 of the Amendment Regulation operated to amend the Liquor Regulation (as originally made), so as to (it turn) modify the Liquor Act, so that it read as if a new section 250A had been inserted. The new section 250A delayed the commencement of various provisions of the Liquor Act.

In 2011, the *Liquor Amendment Regulation 2011 (No 1)* (SL2011-23) further amended the Liquor Regulation, replacing the provision relating to subsection 250A (1) of the Liquor Act with a new provision. The effect of the amendment was to further modify the Liquor Act, to further delay the commencement of certain provisions of the Liquor Act.

The Explanatory Statement for the 2011 subordinate law stated:

Section 4 Schedule 4, modification 4.1, section 250A (1)

⁴ Paper delivered by Tim Macindoe MP and the Hon Lianne Dalziel MP, entitled “New Zealand’s response to the Canterbury earthquakes” (available at http://www.parliament.qld.gov.au/work-of-committees/former-committees/SLC/inquiries/current-inquiries/SLC_Conference), at page 5.

This section replaces section 250A(1) of Schedule 4 at section 4.1 of the *Liquor Regulation 2010* and delays commencement of the offences dealing with the responsible service of alcohol (RSA) in Division 8.1 of the *Liquor Act 2010* until 1 June 2012. This will give the liquor industry additional time to undertake RSA courses taught by an ACT approved Registered Training Organisation.

In its *Scrutiny Report* No 42 of the 7th Assembly, the Committee stated:

The Committee notes that what is provided for in this subordinate law, while relying on a “Henry VIII” clause, is expressly provided for by section 258 of the Liquor Act. It seems entirely plausible that the need to allow the liquor industry “additional time to undertake RSA courses taught by an ACT approved Registered Training Organisation” is a “transitional matter” that is “necessary or convenient to be prescribed because of the enactment of [the] Act”. It would be preferable, of course, if these sorts of timing issues were properly taken into account in the development and enactment of the relevant legislation, with the result that recourse to such transitional regulations (relying, as they do, on “Henry VIII” clauses) would not be required.

Recent use of “Henry VIII” clauses in the United Kingdom

In recent years, there has been some controversy about the use of “Henry VIII” clauses in United Kingdom legislation. On 13 July 2010, Lord Judge, the Lord Chief Justice of England and Wales, told the Lord Mayor’s Dinner for the Judiciary:

... my deepest concern at the moment is directed to the increased use of what are described as Henry VIII clauses. Last year, Lord Mayor, I said that I hoped to use this occasion to draw attention to matters of concern, and I propose to say something more on this topic.

Henry VIII was a dangerous tyrant. The Reformation Parliament made him Supreme Head of the Church, the representative of the Almighty on earth – which is as we know hardly an encouragement to modesty and humility: that Parliament altered the succession at his will: it changed the religion backwards and forwards at his will depending on which religious book he had read most recently: they were a malleable manageable lot. And there is a public belief that the Statute of Proclamations of 1539 was the ultimate in Parliamentary supineness. The Act itself was repealed within less than 10 years, immediately on his death in 1547. But it had allowed the King’s proclamations to have the same force as Acts of Parliament. That is a Henry VIII clause. It is perhaps worth emphasising that this famous Act, and this supine Reformation Parliament refused to, or was not persuaded to, agree that proclamations alone could prejudice any inheritance, office, liberty, goods, chattels or life. It was subject to those limitations.

Do you remember the Legislative and Regulatory Reform Bill of 2006 which, is going to reduce the red tape, sought to give ministers power to amend, repeal or replace any act of Parliament simply by making an Order? It was eventually withdrawn when the House of Lords Constitution Committee alerted itself or was alerted to the implications of this provision. That’s that, then. But it is not.

Consider the *Banking (Special Provisions) Act 2008*, enacted in the hurricane of the banking crisis. It granted the Treasury, presumably the Prime Minister and First Lord of the Treasury, this power to make:

- “(a) such supplementary, incidental or consequential provision, or
- (b) such transitory, transitional or saving provision, as they consider appropriate for the general purposes, or any particular purposes, of this Act ...”

But listen to this. It expressly provided that an order may

“disapply (to such extent as is specified) any specified statutory provision or rule of law;”

So, my Lord Mayor, we have an Act of Parliament which expressly grants to the Treasury power to disapply any other relevant statute bearing on the provisions of the 2008 Act or indeed any rule of law.

You can see the same process is at work with section 51 of the *Constitutional Reform and Governance Act 2010*. This enables any Minister of the Crown, by order to make such provision as he or she considers appropriate in relation to any provision of the Act. This is the Act which deals with our constitution. The order may:

- “(a) amend, repeal or revoke any existing statutory provision,
- (b) include supplementary, incidental, transitional, transitory or saving provision.”

So the new constitutional arrangements, and the old, can be revisited by ministerial order, directed not merely to amendment repeal or revocation of any provisions in the Act, but directed at any of our existing provisions which bore on our Constitutional Affairs.

My Lord Mayor this is a matter of great seriousness.⁵

Lord Judge went on to say:

You can be sure that when these Henry VIII clauses are introduced they will always be said to be necessary. William Pitt warned us how to treat such a plea with disdain. Necessity is the justification for every infringement of human liberty: it is the argument of tyrants, the creed of slaves. But why are we allowing ourselves to get into the habit of Henry VIII clauses? Why should we? By allowing them to become a habit, we are already in great danger of becoming indifferent to them, and to the fact that they are being enacted on our behalf.

⁵ At pages 4 to 5 (available at http://www.judiciary.gov.uk/media/speeches/2010/lcj-speech-lord-mayor-dinner-mansion-house-2010.htm?wbc_purpose=Basic&WBCMODE=PresentationUnpublished%2cPresentationUnpublished.rss).

I do not regard the need for resolutions, affirmative or negative, as a sufficient protection against the increasing, apparent indifference with which this legislation comes into force. To the argument that a resolution is needed, my response is, wait until the need arises, and go to Parliament and get the legislation through, if you can. I continue to find the possibility, even the remote possibility, that the Treasury may by order disapply any rule of law to be extraordinary, or that a Minister may change our constitutional arrangements, to be deeply problematic. Of course I am not suggesting that any of the Ministers with whom we were dealing before June, or for that matter any of the Ministers we are dealing with now are intent on subverting the constitution. I know that. You know that. But, and it is, a very important but, what's to come is always unsure and history is long as well as short. We should not just be thinking about 2015, but about 2025 and 2035.⁶

Lord Judge concluded this discussion by saying:

When the Great Repeal Act is under consideration, I do urge that somehow, somewhere, Henry VIII clauses and indeed, the modern clause which is Henry VIII Plus clauses, should be excluded from the lexicon, unless the Minister coming to the House says in express and unequivocal language that he or she is seeking the consent of the House to such a clause, so that, quite apart from the members of Parliament, the wider public may be informed of what it is proposed on its behalf.⁷

Recent use of “Henry VIII” clauses in New Zealand—the legislative response to the Canterbury earthquakes

There has recently been a significant increase in the use of “Henry VIII” clauses in New Zealand, in the context of the earthquakes that struck Canterbury in 2010 and 2011. As noted in a paper delivered to the 2011 Australia-New Zealand Scrutiny of Legislation Conference by Tim Macindoe MP and the Hon Lianne Dalziel MP,⁸ section 71 of the *Canterbury Earthquake Recovery Act 2011 (CER Act)* provides:

Governor-General may make Orders in Council for purpose of Act

- 71 (1) The Governor-General may from time to time, by Order in Council made on the recommendation of the relevant Minister, make any provision that is reasonably necessary or expedient for all or any of the purposes stated in section 3(a) to (g).
- (2) An Order in Council made under subsection (1) may grant exemptions from, modify, or extend any provisions of any enactment for all or any of the purposes stated in section 3(a) to (g).
- (3) The enactments that may be the subject of an Order in Council that does anything referred to in subsection (2) include (without limitation) the following:

⁶ Lord Judge (note 5), at page 6.

⁷ Lord Judge (note 5) at page 6.

⁸ Macindoe and Dalziel (note 4).

- (a) the *Building Act 2004*;
 - (b) the *Cadastral Survey Act 2002*;
 - (c) the *Civil Defence Emergency Management Act 2002*;
 - (d) the *Commerce Act 1986*;
 - (e) the *Earthquake Commission Act 1993*;
 - (f) the *Health Act 1956*;
 - (g) the *Health and Disability Services (Safety) Act 2001*;
 - (h) the *Historic Places Act 1993*;
 - (i) the *Land Transport Act 1998*;
 - (j) the *Land Transport Management Act 2003*;
 - (k) the *Local Government Act 1974*;
 - (l) the *Local Government Act 2002*;
 - (m) the *Local Government Official Information and Meetings Act 1987*;
 - (n) the *Local Government (Rating) Act 2002*;
 - (o) the *Public Works Act 1981*;
 - (p) the *Rating Valuations Act 1998*;
 - (q) the *Reserves Act 1977*;
 - (r) the *Resource Management Act 1991*;
 - (s) the *Road User Charges Act 1977*;
 - (t) the *Social Security Act 1964*;
 - (u) the *Soil Conservation and Rivers Control Act 1941*;
 - (v) the *Transport Act 1962*;
 - (w) the *Waste Minimisation Act 2008*.
- (4) An exemption from, modification of, or extension of a provision may be—
- (a) absolute or subject to conditions; and
 - (b) made by—
 - (i) stating alternative means of complying with the provision; or

- (ii) substituting a discretionary power for the provision.
- (5) To avoid doubt, an exemption from, modification of, or extension of a provision may be for the purposes of enabling the relaxation or suspension of provisions in enactments that—
- (a) may divert resources away from the effort to—
 - (i) efficiently respond to the damage caused by the Canterbury earthquakes;
 - (ii) minimise further damage; or
 - (b) may not be reasonably capable of being complied with, or complied with fully, owing to the circumstances resulting from the Canterbury earthquakes.
- (6) Despite subsections (2) to (5), an Order in Council made under this section may not—
- (a) grant an exemption from or modify a requirement to—
 - (i) release a person from custody or detention; or
 - (ii) have any person's detention reviewed by a court, Judge, or Registrar; or
 - (b) grant an exemption from or modify a restriction on keeping a person in custody or detention; or
 - (c) grant an exemption from or modify a requirement or restriction imposed by the *Bill of Rights 1688*, the *Constitution Act 1986*, the *Electoral Act 1993*, the *Judicature Amendment Act 1972*, or the *New Zealand Bill of Rights Act 1990*; or
 - (d) contain any provision having the effect of amending this section or section 3, 6, 72 to 76, or 93.
- (7) Subsections (2) to (5) do not limit subsection (1).

Clearly, section 71 includes sweeping “Henry VIII”-type powers. As Mr Macindoe and Ms Dalziel noted, the CER Act built on a similar, 2010 Act – the *Canterbury Earthquake Response and Recovery Act 2010* – that had been enacted to address issues arising from the 2010 earthquake. In relation to the subpart in which section 71 appears, the explanatory notes to the CER Act state:

This subpart (*clauses 70 to 75*) largely carries over the provisions in the *Canterbury Earthquake Response and Recovery Act 2010* relating to the making of Orders in Council. A new feature (in *clauses 71 and 72*) is the creation of a Canterbury Earthquake Recovery Review Panel of 4 persons to review draft Orders in Council before the relevant Ministers can recommend them to Cabinet and the Executive Council. The *Regulations (Disallowance) Act 1989* will apply to Orders in Council made under this Bill.⁹

The paper by Mr Macindoe and Ms Dalziel states:

The explanatory note to the 2010 bill summarised the purpose of the legislation as being to ensure that the Government has adequate statutory power to assist with the response to the Canterbury earthquake. The explanatory note to the 2011 bill describes the bill as setting out appropriate measures to enable the Minister for Canterbury Earthquake Recovery and/or the Canterbury Earthquake Recovery Authority to facilitate and direct, if necessary, greater Christchurch and its communities to respond to, and recover from, the impacts of the Canterbury earthquakes.

The explanatory note to the 2011 bill goes on to say that it is necessary to put in place stronger governance and leadership arrangements for the rebuilding and recovery of greater Christchurch from the cumulative effects of the 4 September 2010 and 22 February 2011 earthquakes. Factors taken into account include the scale of the post-earthquake rebuilding effort, recognising that the 22 February earthquake represents an incomparable natural disaster in New Zealand's history;

and the need for timely and effective decision-making powers.

Under section 71(6) some express **limits** apply to the making of the orders. These limits include that orders cannot relate to the release of a person from custody or detention, or to the review of a person's detention by the courts, or to a restriction on keeping a person in custody or detention.

Nor can the orders relate to specified legislation of constitutional significance. Nor can the orders amend certain provisions in the 2011 Act. These are:

- section 3 containing the **purposes** of the Act
- section 6 relating to the **community forum** for input into decision making under the Act
- sections 71 to 76 relating to the making of **Orders in Council**
- section 93 relating to the **expiry of the Act** – 5 years after its commencement – and the **revocation of Orders in Council** made under the Act in force immediately before the date the Act expires.

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Available at http://www.legislation.govt.nz/act/public/2011/0012/latest/whole.html?search=ts_act_canterbury_rese&p=1#d1m3653522.

A new feature which was not contained in the 2010 Act is the establishment of the **Canterbury Earthquake Recovery Review Panel** which will provide advice to Ministers and review all draft Orders in Council. The members of the Panel are: retired High Court Judge, Justice Hansen, former Prime Minister Rt Hon Jenny Shipley, Anake Goodall, a former chief executive of Te Rūnanga O Ngāi Tahu, and Murray Sherwin, the former chair of the Canterbury Earthquake Recovery Commission.

Ministers must take into account the purposes of the Act, and have regard to the recommendations of the Panel, when making a recommendation for an Order in Council under the 2011 Act.

In summary, the 2011 Act provides the executive with wide Henry VIII powers to make rules for the recovery of Canterbury which differ from rules in existing primary legislation. The purposes of the Act are drafted in broad terms and these together with the specified exceptions provide the only express limits on the powers. The 2011 Act also provides for review of draft orders by the Canterbury Earthquake Recovery Review Panel and the Regulations Review Committee retains a role to examine these Orders in Council following their presentation to Parliament.¹⁰ (emphasis in original, footnotes omitted)

The paper by Mr Macindoe and Ms Dalziel refers to some of the issues raised by the “Henry VIII”-type clauses in the CER Act, including issues raised by law societies and the public and also including alternative approaches that had been suggested. The paper then concludes by saying:

Both the 2010 and 2011 Acts provided the executive with wide Henry VIII regulation-making powers allowing it to make rules for the recovery of Canterbury which differ from rules in existing primary legislation. The current 2011 Act expires after five years and during the period until then these wide powers can be exercised in relation to any enactment, with a few express exceptions.

Some of the orders themselves are now being made with expiry dates of 19 April 2016. One constraint on the exercise of executive power is review of all draft orders by the Canterbury Earthquake Recovery Review Panel.

However, the usual parliamentary scrutiny of policy-making by the executive, including in areas of significant public interest, has been suspended for five years in relation to the rebuilding of Canterbury. Moreover, review by the courts and scrutiny by the Regulations Review Committee, of the Orders in Council, have been limited by the breadth of the purpose provisions now in the 2011 Act.

The justification for the 2011 Act, including the wide regulation-making powers, is said to be the need to take appropriate measures to facilitate, and if necessary direct, greater Christchurch and its communities to respond to, and recover from, the impacts of the Canterbury earthquakes. The scale of the rebuilding effort is a key factor said to underlie this imperative.

¹⁰ Macindoe and Dalziel (note 4), at pages 3 to 4.

Another view is that a distinction needs to be made between legislation dealing with an emergency situation and legislation needed for rebuilding. A key factor underlying this view is the need to preserve parliamentary scrutiny of amendment to primary legislation in non-urgent situations.

These two views will need to be given further consideration in a more deliberative parliamentary process in coming years to see whether there is a better way of reconciling the practicalities of rebuilding with established principle.¹¹

Frequency of use of “Henry VIII” clauses

While the New Zealand examples discussed above are, indeed, sweeping, the Committee notes that the fact that they relate to a natural disaster of terrible proportions brings this use of “Henry VIII” clauses clearly within the exceptional circumstances / emergency justification that has previously been given for the use of such clauses. Similar considerations were discussed in a paper given to the 2011 Australia-New Zealand Scrutiny of Legislation Conference by the former chair of the (former) Scrutiny of Legislation Committee of the Queensland Parliament, Jo-Ann Miller MP, in the context of consideration of legislative scrutiny issues arising from the Queensland Reconstruction Authority Bill 2011, the Queensland Government’s legislative response to the disastrous floods in Queensland, in 2011.¹²

In this context, an interesting issue regarding “Henry VIII” clauses is the frequency of their use. In the speech discussed above, Lord Judge went on to say:

I have tried to pursue this question and recently read two letters from the Ministry of Justice on this topic. For me, it made alarming reading. First, it is clear that there is no routine method for collecting information about Henry VIII clauses. Doing the best the Ministry could, and this is not a criticism, during the parliamentary session up to 10 November 2009 there were I quote “around 70 such powers contained within the legislation enacted so far”. It is pointed out that at least 10 of them were not new, but were re-enactments, and 15 of them contained provisions allowing consequential amendments. But that was not the end of the session. Between 10 November and the end of the parliamentary session for 2008-09 there were some 53 additional such clauses, of which 10 were provisions allowing for consequential amendments, and 5 enabled the proper functioning of pilot schemes. So we are talking, in one parliamentary session, over 120 Henry VIII clauses. It astonishes me.

It is said in the letters that they are only used when there is a substantial call for them, no practical alternative for dealing with the issue in the original legislation, and that such powers are rarely used. Well, the two Acts of Parliament to which I have referred seem to be the opposite of narrow-ranging.¹³

¹¹ Macindoe and Dalziel (note 4), at pages 8 to 9.

¹² Available at http://www.parliament.qld.gov.au/work-of-committees/former-committees/SLC/inquiries/current-inquiries/SLC_Conference. See pages 8 to 10.

¹³ Lord Judge (note 5), at page 5.

In his 1977 text, *Delegated Legislation in Australia and New Zealand*, Professor Dennis Pearce stated:

Use of “Henry VIII” clauses in Australia and New Zealand has not been common except in wartime.¹⁴

In the 2nd edition of Professor Pearce’s text, published in 1999, expressed a different view:

... contrary to what was observed in the earlier version of this work ... the use of Henry VIII clauses in the Australian jurisdictions has become more, rather than less, common.¹⁵

In the 3rd edition of the text, published in 2005, the following statement appears:

Regrettably, the use of Henry VIII clauses in the Australian jurisdictions has become more common.¹⁶

This is certainly the Committee’s observation of the use of “Henry VIII” clauses.

¹⁴ 1977, Butterworths, Sydney, at [13].

¹⁵ Pearce, DC and Argument, S, *Delegated Legislation in Australia* (1999, Butterworths, Sydney), at [1.19].

¹⁶ Pearce, DC and Argument, S, *Delegated Legislation in Australia* (2005, LexisNexis Butterworths, Australia), at [1.20.]