

A Proposed Statutory Remedial Power for the Commissioner of Taxation – A Henry VIII Clause to benefit taxpayers?

'Now the legislature would be an ineffective instrument for making laws if it only dealt with the circumstances existing at the date of the measure. The aim of all legislatures is to project their minds as far as possible into the future, and to provide in terms as general as possible for all contingencies likely to arise in the application of the law. But it is not possible to provide specifically for all cases, and, therefore, legislation from the very earliest times, and particularly in more modern times, has taken the form of conditional legislation, leaving it to some specified authority to determine the circumstances in which the law shall be applied, or to what its operation shall be extended, or the particular class of persons or goods to which it shall be applied.' *Baxter v Ah-Way*¹

I Introduction

On 1 May 2015, the former Assistant-Treasurer proposed to incorporate a statutory remedial power into Commonwealth revenue legislation.² This proposal was included in the 2015/16 Federal Budget.³ Under the proposal, a statutory remedial power will vest in the Commissioner of Taxation a quasi-legislative power to modify revenue and superannuation laws⁴ to remedy 'unforeseen or unintended outcomes' where it is beneficial to the taxpayer.⁵ Further, a statutory remedial power would only be exercisable where the modification has a negligible revenue impact.⁶ The stated goal of enacting such a measure is to provide a timelier resolution of these issues.⁷ On 4 December 2015, the Treasury released an Exposure Draft with associated Explanatory

¹ *Baxter v Ah Way* (1909) 8 CLR 626, 637.

² The Hon Josh Frydenberg MP, (the former) Assistant Treasurer, "Providing More Certainty and Better Outcomes for Taxpayers" (Media Release, 1 May 2015) <<http://jaf.ministers.treasury.gov.au/media-release/021-2015>>.

³ Budget 2015/2016, *Commonwealth Budget*, Budget Paper No 2: Part 1 http://budget.gov.au/2015-2016/content/bp2/html/bp2_revenue_07.htm

⁴ Explanatory Material to the Exposure Draft for *Tax Laws Amendment (2016 Measures No 1) Bill 2016: Commissioner's remedial power* 1.24 ("Explanatory Material").

⁵ *Ibid.*

⁶ *Ibid.* Whether a benefit is negligible is determined by the Treasury or Department of Finance who will notify the Commissioner.

⁷ Budget, above n 3; Explanatory Material, above n 4, (Paragraph 1.1-1.2), 3.

Materials for public comment, detailing the suggested form of the statutory remedial power.⁸

An effectively drafted and administered measure could provide significant benefits for taxpayers; however, this measure presents challenges to the rule of law and it could be argued takes the form of a Henry VIII Clause.

This paper will provide the background and context to the proposed statutory remedial power. It will further consider whether a statutory remedial power could be categorised as a Henry VIII Clause and why such clauses are considered undesirable. The paper will conclude by postulating if the benefits arising from a properly administered statutory remedial power are sufficient to justify this delegation of power to the Commissioner of Taxation.

The structure of this paper is as follows. Part two outlines the background to the proposal for the incorporation of a statutory remedial power into Commonwealth revenue legislation. Part three discusses the definition of a Henry VIII Clause and it is argued that if the broad definition is adopted, a statutory remedial power could be categorised as a Henry VIII Clause. Part four considers the disadvantages and advantages associated with delegated legislation and Henry VIII Clauses. Finally, the paper considers whether the potential benefits of a statutory remedial power justify

⁸ Exposure Draft for *Tax Laws Amendment (2016 Measures No 1) Bill 2016: Commissioner's remedial power* ("Exposure Draft").

the use of a provision adopting such a form. In other words, do the ends justify the means?

II Proposal for a Statutory Remedial Power

On 1 May 2015, the former Assistant Treasurer announced that the Government would provide the Commissioner of Taxation with a statutory remedial power in the form of a disallowable legislative instrument. This proposal was included in the 2015/16 Federal Budget.⁹

The statutory remedial power is a discretionary power that would enable the Commissioner to modify the application of the primary legislation, encompassing taxation and superannuation laws, to further achieve the purpose or object of the legislation but only for the benefit of the taxpayer.¹⁰ This type of power was previously named an extra-statutory concession power.¹¹

The suggestion for the introduction of a statutory remedial power was first raised in the Tax Design Review Panel paper, *Better Tax Design and Implementation*.¹² The incorporation of a statutory power to amend the law was considered in further detail

⁹ Budget, above n 3,3

¹⁰ The Hon Josh Frydenberg MP, above n 2.

¹¹ Treasury, *An “Extra Statutory Concession” Power for the Commissioner of Taxation – Discussion Paper* (17 July 2009); Commonwealth Ombudsman, *Mistakes and unintended consequences – a safety net approach* (November 2009).

¹² Tax Design Review Panel, *Better Tax Design and Implementation* (2008). Recommendation 24 of this Report suggested investigating whether the Commissioner of Taxation should be granted a power to amend the revenue legislation to relieve taxpayers in certain appropriate scenarios. In making this recommendation the Panel noted that taxpayers commonly experienced difficulties in satisfying their taxation obligations because of minor anomalies and unintended outcomes arising from the legislation.

in the Discussion Paper, *An “Extra Statutory Concession” Power for the Commissioner of Taxation*.¹³ These investigations ultimately led to the 2015 government announcement that such a power would be introduced. The power was renamed a statutory remedial power.¹⁴ Consultation was undertaken with representatives from the ATO, Treasury, the Australian Government Solicitor and key stakeholders¹⁵ and on 4 December 2015, an Exposure Draft with associated Explanatory Materials was released for comment. It is proposed that the power be inserted into the *Taxation Administration Act 1953* and it has been renamed the Commissioner’s remedial power.¹⁶ However, for the purposes of this paper the term statutory remedial power continues to be used.

The statutory remedial power is a discretionary power to modify the law in two main circumstances. Firstly, where the law produces outcomes that are ‘inconsistent with the reasonably ascertainable policy intent of the law.’ This would include scenarios that were not contemplated by the drafters at the time of developing the law.¹⁷ Secondly where the law results in ‘unnecessary or disproportionate’ compliance costs.

¹³ Treasury above n 11. It was also considered by the Inspector General of Taxation, *Review into Improving the Self Assessment System* (August 2012) <http://igt.gov.au/files/2014/12/improving-self-assessment-system.pdf> this was referred to at page 131 as a positive discretion to act in taxpayers favour.

¹⁴ Budget, above n 3.

¹⁵ Explanatory Material, above n 4, 4 (Paragraph 1.5).

¹⁶ Exposure Draft, above n 8.

¹⁷ Explanatory Material, above n 4.

In addition to these two requirements, the revenue impact associated with the amendment must be negligible as advised by the Treasury or Department of Finance, pursuant to ordinary processes and budget rules.¹⁸

The power is discretionary and applies in those circumstances where the Commissioner considers the modification is ‘reasonable’ by having regard to the purpose and object of the provision and compliance costs.¹⁹

By applying to scenarios that were not contemplated by the drafters at the time of developing the law and acting as a provision of last resort, it could be argued that a statutory remedial power has similarities to a general anti-avoidance rule. A notable feature of a general anti-avoidance rule is that it applies to circumstances that were not foreseen by parliamentary drafters at the time the legislation was enacted.²⁰

Cooper states:

It is a strange admission by legislators to introduce a law which says, in effect: Parliament is enacting a rule to reverse something which it does not otherwise prohibit and cannot foresee, and so must either prevent by deterring ex ante or else cure by ex post reversal.²¹

Similarly, a statutory remedial power is designed to apply to unforeseen circumstances but only to *benefit* the taxpayer and is utilised as a provision of last

¹⁸Explanatory Material, above n 4, 4-5 (Paragraph 1.7). Proposed section 370-1 and 370-5 of the *Taxation Administration Act 1953* from Exposure Draft, above n 8.

Mills, Andrew (Second Commissioner), ‘It’s time for tax (administration) reform’ (Speech delivered at Australasian Tax Teachers Association 27th Annual Conference, 20 January 2015) 11.

¹⁹Explanatory Material, above n 4, 3 (Paragraph 1.2).

²⁰ Graeme Cooper, ‘International Experience with General Anti-Avoidance Rules’ (2001) 54 *SMU Law Review* 83, 86.

²¹ *Ibid.*

resort. However, the potential application of a statutory remedial power is significantly more limited than the GAAR, being confined to amendments that have a negligible budgetary impact.

Whilst the policy goals of a statutory remedial power are to benefit taxpayers and enhance efficiency and certainty by aligning the application of the law with its intent, the form it adopts is controversial. The power allows the Commissioner of Taxation to alter the law and it could be argued constitutes a Henry VIII Clause. This represents a derogation from the separation of powers doctrine and other tenets embodied in the rule of law such as certainty. The fact that this power takes the form of a Henry VIII Clause is controversial. Accordingly, the following section discusses this characterisation.

III Definition and features of a Henry VIII Clause

A. Definition of a Henry VIII Clause

Whilst Henry VIII Clauses are widely condemned, there are different definitions of what constitutes a Henry VIII Clause, ranging from a narrow to a broad formulation.

Pearce and Argument refer to a Henry VIII Clause as ‘inclusion in an Act of a power to amend either that Act or other Acts by regulation.’²²

²² Pearce and Argument, *Delegated Legislation in Australia* (Lexis Nexis, 4th ed, 2012) 22.

Other formulations of a Henry VIII Clause are broader. For example, the Rule of Law Institute state that a Henry VIII clause is a provision in the core or primary legislation that delegates the ‘power for secondary legislation (regulations) to include provisions which amend, repeal or *are inconsistent* with the primary legislation.’²³ The Queensland Legislation Handbook adopts a broader approach by including that a Henry VIII Clause can allow subsidiary legislation to amend expressly or *by implication* the primary legislation.²⁴ A similarly broad definition is also adopted by Ng who argues that a Henry VIII Clause allows the ‘promulgation of subordinate legislation that either amends *or is inconsistent* with the relevant principal statute.’²⁵ A further definition in the Encyclopaedic Australian Legal Dictionary characterises a Henry VIII Clause as a ‘chop off the head’ clause:

a provision in a statute that if delegated legislation made under it is inconsistent with the statute or earlier statutes, the delegated legislation prevails. Also known as ‘chop off the head’ clause.²⁶

A recent legal briefing by the Australian Government Solicitor defined a Henry VIII Clause as a

²³ [Rule of Law Institute of Australia, *Henry VIII Clauses & Rule of Law*, <http://www.ruleoflaw.org.au/wp-content/uploads/2012/08/Reports-and-Pres-4-11-Henry-VIII-Clauses-the-rule-of-law1.pdf>](http://www.ruleoflaw.org.au/wp-content/uploads/2012/08/Reports-and-Pres-4-11-Henry-VIII-Clauses-the-rule-of-law1.pdf)

²⁴ Department of the Premier and Cabinet, *Queensland Legislation Handbook Governing Queensland* (January 2014, 4th edition) <http://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/legislation-handbook/assets/legislation-handbook.pdf>36

²⁵ Gerald Ng, ‘Slaying the Ghost of Henry VIII: A Reconsideration of the Limits Upon the Delegation of Commonwealth Legislative Power.’ (2010) 38 *Federal Law Review* 205.

²⁶ Lexis Nexis Online, *Encyclopaedic Australian Legal Dictionary - online*

common name given to a provision in an Act that confers on the rule-maker a power to override or *modify the effect* of the enabling Act or some other primary legislation, usually by making a regulation.²⁷

A common element of these definitions is that the effect of a Henry VIII Clause is to promote ‘primacy’ of the subordinate over the primary legislation.²⁸ However, the narrower definition sees only a textual amendment to the primary legislation as constituting a Henry VIII Clause. Whereas the broader definition contemplates that a clause may be a Henry VIII Clause where the clause alters the *effect* of the legislation or amends it by *implication*.

Bottomly discusses the definition of a Henry VIII Clause in the context of the ASIC modification powers. He states:

There is a considerable body of literature that is critical of or, at least, cautious about the use of such provisions, although there is some variation in the exact focus of concern. At its narrowest the term “Henry VIII” Clause refers to a statutory provision which authorises delegated legislation that makes an actual amendment to the parent statute. At its widest, the term has been used to refer to statutory provisions which authorise delegated legislation that alters the effect of the parent statute, even though the text of statute remains unaltered.²⁹

Bottomly further contemplates a third category of provisions where the legislation permits an administrator to modify the primary legislation, generally or for a specific

²⁷ AGS Legal Briefing, Legislative instruments: Issues in Design (26 February 2014) <http://www.ags.gov.au/publications/legal-briefing/br102.pdf>

²⁸ Philip Joseph, ‘Delegated Legislation in New Zealand’ (1997) 18(2) *Statute Law Review* 85,86.

²⁹ Stephen Bottomley, ‘The Notional Legislator: The Australian Securities and Investment Commission’s Role as a Law Maker’ (2011) 2 *Federal Law Review* 1, 23.

class but does not actually amend the text of the legislation. This therefore creates a “shadow” or “notional” provisions that have the force of law. These “notional” provisions may or may not subsequently be translated into a textual amendment of the primary legislation.³⁰ He acknowledges that changes made by this mechanism don’t appear to be substantially different to amendments effected by a Henry VIII Clause.

Both involve legislative instruments that modify the primary legislation and are subject to parliamentary scrutiny and disallowance. However, he suggests that there are some significant differences. For example, Henry VIII Clauses allow explicit changes to the primary legislation for **all** those to which the statute applies. Furthermore, over time the amendment will be effected into a textual amendment of the legislation.³¹

Determinations made pursuant to a Henry VIII Clause are a form of delegated legislation. The term delegated legislation has two elements. Firstly, delegated legislation is a legislative instrument made under a form of delegation. Secondly, it is an instrument having a legislative rather than administrative impact.³² Thus, in determining if something is a form of delegated legislation one must draw a distinction between legislative and executive action. The Court in *Commonwealth v Grunseit* stated:

³⁰ Ibid, 24.

³¹ Ibid

³² Pearce and Argument, above n 22, 1.

The general distinction between legislation and the execution of legislation is that legislation determines the content of the law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular cases.³³

These elements are applied below to establish that, where the broad definition is adopted, a statutory remedial power could be categorised as a Henry VIII Clause.

B. History of Henry VIII Clauses

The reason why clauses that allow subsidiary legislation to amend primary legislation are coined Henry VIII clauses is that they were developed and proliferated during the reign of notorious King Henry VIII (1509-1547) who had a 'penchant' to provide himself with the power to amend statutes passed by Parliament.³⁴ Lord Hexham states these clauses were labelled 'in disrespectful commemoration of that monarch's tendency to absolutism.'³⁵

It is suggested that the earliest example of delegated legislation was the 1385 *Statute of Staple*³⁶ providing the King with the power to determine the places where staple³⁷ could be stored, the commencement and form and method of execution.

During the reign of King Henry VIII there were two particularly controversial examples of Henry VIII Clauses the *Statute of Sewers 1531* and *Statute of*

³³ (1943) 67 CLR 58, 82. Similar definitions are suggested in *Minister for Industry and Commerce v Tooheys Ltd* (1982) 60 FLR 385. Pearce and Argument, above n 22, 1; Duncan Berry, 'When does an instrument made under primary legislation have "legislative effect"?' (March 1997) *The Loophole*, 14.

³⁴ Dennis Morris, 'Henry VIII Clauses: Their birth, a late 20th century renaissance and a possible 21st century metamorphosis' (March 2007) *The Loophole* 14.

³⁵ Lord Rippon of Hexham 'Henry VIII Clauses' (1989) 10(3) *Statute Law Review* 205.

³⁶ Stephen Bourke "Subordinate Rule Making – An Historical Perspective" [1991] *Admin Review* 8 ; Donoughmore Committee, *Committee on Ministers' Powers* (1932).

³⁷ Bourke, above n 36 provided that staple consisted of four products wool, leather, tin and lead.

Proclamations 1539. The *Statute of Sewers 1531* provided the Commissioner of the Sewers with the power to impose tax rates and penalties. Professor Whalan provided a colourful description of this statute:

Once upon a time, a very long time ago, there lived a very wicked king – and he was 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 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 Sewer really was a stinker. As the Donoughmore Committee said:

“The Statute delegates legislative powers, taxing powers and judicial powers.”³⁸

The *Statute of Proclamations 1539* allowed the King to issue proclamations that had equal force to an Act of the Parliament.³⁹ Hamer states this Statute provided:

The King for the Time being, with the Advice of his Council, or more than part of them, may set forth Proclamations under such Penalties and Pains as to him and then shall seem necessary while shall be observed as though they were made by Acts of Parliament.⁴⁰

This Act was repealed in 1547 and in the words of Professor Whalan had ‘almost as short a life as the married life of some of Henry’s wives.’⁴¹

A further Act from that period was the *Statute of Wales 1542* which allowed the King

³⁸ Professor DJ Whalan Third Commonwealth Conference of Delegated Legislation Committees Westminster 1989. Also cited in Stephen Argument, *Henry VIII Clauses Fact Sheet Prepared for the Legislative Assembly ACT* (November 2011) <http://www.parliament.act.gov.au/__data/assets/pdf_file/0005/434345/HenryVIII-Fact-Sheet.pdf>; Professor DJ Whalan, ‘Scrutiny of Delegated Legislation by the Australian Senate’ (1991) 12 *Statute Law Review* 87.8

³⁹ Joseph, above n 28, 86.

⁴⁰ David Hamer, ‘Can Responsible Government Survive in Australia’ (Department of the Senate, 2001) <<http://www.aph.gov.au/binaries/senate/pubs/hamer/book.pdf>>

⁴¹ Professor DJ Whalan, *Scrutiny of Delegated Legislation*, above n 38, 89.

to alter the laws of Wales, such alterations were to be of as good strength, authority and effect as if made by Parliament.

These Acts provide very extreme illustrations of the transfer of power that can be associated with the use of Henry VIII Clauses.

C. *Examples of Henry VIII Clauses in Australia*

However, Henry VIII Clauses have not been only prevalent in the times of Henry VIII. In fact, Pearce and Argument state that ‘regrettably, the use of Henry VIII clauses in Australia has become more common.’⁴²

Depending on the definition one adopts of a Henry VIII Clause, examples can be found in diverse areas of law. A few examples are discussed below.

The *Fair Work Act 2009* (Cth) contains some very stark illustrations of Henry VIII Clauses including in sections 28, 123 and 35A. For example, section 35A provides that the regulations ‘may exclude the application of the whole of this Act’ and the Act will then have effect as if it did not apply in that area.

In the superannuation context, section 326 of the *Superannuation Industry*

⁴² Pearce and Argument, above n 22, 22. Interestingly, it appears Australia is not alone in relation to the use of Henry VIII Clauses. In New Zealand, there has also been an increase in the use of Henry VIII Clauses. Joseph above n 28 states:

A number of laws have been passed in New Zealand which have been described as a blank cheque, written by Parliament for ratifying in advance whatever the Government should choose to do by regulation

Likewise, in the UK context, Ganz stated in 1987: ‘there has been an exponential growth of statutory and extra-statutory rules in a plethora of forms.’

(Supervision) Act 1993 (Cth) states that the Regulator (APRA and ASIC) can grant exemption from and make modifications to certain provisions of the Act (as listed in section 327) and the regulations. This is generally by way of legislative instrument where it impacts a group of persons but can also apply to a particular person or group (section 328).

The *Corporations Act 2001* (Cth) has a number of modification powers including sections 655A, 741, 926A and 992B. Section 655A allows ASIC to exempt a person from a particular Chapter of the Act or declare that it applies as if particular provisions were omitted, varied or applied in a modified way. Interestingly, as discussed above, Bottomly argues that rather than Henry VIII Clauses these class orders are ‘hybrids and not pure Henry VIII Clauses’ he says:

In short modifications made by Class Orders appear to be a hybrid. They are not primary legislation, although they are expressed to operate as if they were, but unlike ‘ordinary’ agency rules they do more than simply affect the operation of the Act, they modify the Act itself as it applies to a specified class of persons. For those in the defined class, the Corporations Act says what ASIC declares that to say.⁴³

Whereas other commentators categorise these powers as clear examples of Henry VIII Clauses.⁴⁴

Section 163 of the *National Consumer Credit Protection Act 2009* (Cth) states ASIC may exempt a person or class of persons from compliance with specified provisions

⁴³ Stephen Bottomley, ‘The Notional Legislator: The Australian Securities and Investment Commission’s Role as a Law Maker’ (2011) 2 *Federal Law Review* 1, 23. This view is also acknowledged and adopted by the Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (December 2015) 450 where it is stated these powers are ‘are not strictly speaking Henry VIII clauses’ but they do allow ASIC to essentially re-write parts of the Act.

⁴⁴ Gerald Ng, ‘Slaying the Ghost of Henry VIII: A Reconsideration of the Limits Upon the Delegation of Commonwealth Legislative Power.’ (2010) 38 *Federal Law Review* 205.

of the Act. Likewise, section 164 provides any exemption or modifications to particular parts can be undertaken by the regulations.

In the revenue context section 29-25 of *A New Tax System (Goods and Services Tax) Act 1999* (Cth) specifically allows the Commissioner of Taxation to amend or override the general attribution rules where they may otherwise be inappropriate.

D. Why a Statutory Remedial Power could be categorised as a Henry VIII Clause

If the broad definition of a Henry VIII Clause discussed above is adopted a statutory remedial power would constitute a Henry VIII Clause. That is where the clause allows amendment of the primary legislation by implication or by effect. The purpose of the remedial power is to allow a departure from the black letter of the law to remedy unforeseen or unintended consequences. Arguably the amendments made are legislative in nature (otherwise such determinations could be made under the general administration power or by using a purposive interpretation of the law). The power is designed to be exercised in circumstances where an alteration could otherwise only be implemented by a legislative amendment.⁴⁵

By enabling a legislative modification, a statutory remedial power differs from the power of general administration⁴⁶ granted to the Commissioner of Taxation. The general administration power is narrower and can only involve administrative

⁴⁵ Wilson-Rogers, Nicole, 'Building flexibility into Commonwealth tax legislation: A case for the use of an extra statutory concession power.' (2013) 42 *Australian Tax Review* 53.

⁴⁶ Section 8 of the *Income Tax Assessment Act 1936*, section 3A and 356-5 of the *Taxation Administration Act 1953*(Cth)

decisions not a modification or amendment of the law.⁴⁷ Likewise, it goes beyond the Commissioner's power to make rulings, which is designed to clarify how the law is applied and not to modify the law. Furthermore, it is clear that the statutory remedial power would only be exercised where a purposive approach could not remedy the scenario or issue. The Explanatory Materials to the Exposure Draft states:

Consistent with section 15AA of the *Acts Interpretation Act 1901* the Commissioner applies purposive principles to the interpretation of the taxation laws to give effect to the purpose or object of the law. However, sometimes this approach is unable to remedy unintended consequences in the application of the taxation laws. For example, this can occur when dealing with new scenarios which were not known or contemplated when the provisions were drafted.⁴⁸

In this regard, the remedial power is to be used as a last resort where the general administration power or a purposive approach could not remedy the issue.⁴⁹ An example of the application of the statutory remedial power can be found in the Explanatory Materials. The example concerns the application of Subdivision 124 of the *Income Tax Assessment Act 1997* (Cth) which allows the deferral of a capital gain or loss from one CGT asset ending and the acquisition of another one. Whilst this would normally apply in the case of a natural disaster, an example is provided where the deferral provision would not apply where it is likely it was intended to apply. Following the Queensland Floods the Lockyer Valley Regional Council allowed residents to move to higher ground as part of a land swap initiative. Because the land was not compulsorily acquired, lost or destroyed, the replacement land would not

⁴⁷ Bruce Quigley, 'The Commissioner's power of General Administration: How Far Can He Go' (Speech delivered at 24th Tax Institute National Convention – Bright Lights Big City, Sydney, 12 March 2009).

⁴⁸ Explanatory Material, above 4, Paragraph 1.7 page 4 and paragraph 1.20 page 7.

⁴⁹ Treasury, *Consultation Draft – Information Paper on Commissioner's Remedial Power and Related Issues* 7.

<http://treasury.gov.au/~media/Treasury/Consultations%20and%20Reviews/Consultations/2015/Commissioners%20remedial%20power/Key%20Documents/PDF/Information%20Paper.aspx>

satisfy the conditions for deferral in Subdivision 124-B. Therefore, under the proposed statutory remedial power a modification could be made to ensure that Subdivision 124-B would apply to this scenario.⁵⁰

The statutory remedial power could also allow an exemption from the operation of the legislation. In this regard, the Queensland Legislation Handbook provides that the power to exempt a person or thing from the operation of the Act can also constitute a Henry VIII Clause:

The former Scrutiny Committee also identified clauses that delegate power to exempt a person or thing from the operation of an Act as potential Henry VIII clauses. This is because, under the delegation, there may be, effectively, a power to substantially change the Act in its application to a person or thing without reference to the Parliament.

This is particularly so if the clause allows a person or thing to be exempted from all or any provisions of an Act, without further limitation.⁵¹

To the extent that a statutory remedial power exempts certain activities from the operation of the legislation or from incurring certain compliance costs it could be characterised as a Henry VIII Clause.

The Information Paper on the Consultation Draft states the following:

The Remedial Power will not allow the Commissioner to directly amend the text of primary legislation or to alter or extend the purpose or object of the law. Rather it will allow the Commissioner to modify the operation of a provision of a tax law where that modification is not inconsistent with the purpose or object of the provision and any

⁵⁰ Explanatory Materials, above n 4.

⁵¹ Queensland Legislation Handbook, above n 24.

budget impact from the modification is negligible.⁵²

This statement appears to address the argument that a statutory remedial power does not satisfy the narrow definition of a Henry VIII Clause, because it does not allow a direct amendment of the text of the primary legislation.

However, whilst there may be no direct amendment to the primary legislation the impact of the legislative instrument will be to allow a position that is inconsistent with the primary legislation. Therefore, by implication it will amend the primary legislation for the group of taxpayers involved. Arguably the effect of this is to amend the legislation even if it is by means of a 'shadow' set of provisions.

This raises the question of whether a modification differs to an amendment and therefore precludes the finding that a statutory remedial power is a Henry VIII Clause. One potential view is that unlike an amendment, which is permanent, a 'modification' is temporary. This is reflected in the fact that a legislative instrument made pursuant to the statutory remedial power will sunset after five years. (This is in contrast to the ten year period prescribed in the *Legislative Instruments Act 2003* (Cth) (section 50 and 51).)

However, despite the fact that the primary legislation is not 'textually' amended this is still an amendment in the circumstances to which it applies. The effect upon the taxpayers covered by a modification made under the statutory remedial power would

⁵²Explanatory Material, above n 4, 7 (Paragraph 1.16); Treasury, *Consultation Draft – Information Paper on Commissioner's Remedial Power and Related Issues* 1. <http://treasury.gov.au/~media/Treasury/Consultations%20and%20Reviews/Consultations/2015/Commissioners%20remedial%20power/Key%20Documents/PDF/Information%20Paper.aspx>

be permanent and not temporary or reversible.

Another element of the statutory remedial power is that it cannot be ‘inconsistent with the purpose or object’ of the provision and as noted above a Henry VIII Clause is something that is inconsistent with the primary legislation. However, just because the modification may *not be inconsistent* with the purpose or object of the primary legislation, this *does not mean it is consistent* with it or even contemplated by the text of the provision and does not diminish the argument that it could be categorised as a Henry VIII Clause.

A further point to consider in characterising a statutory remedial power is the disallowable nature of a legislative instrument made pursuant to this delegation.⁵³

Whilst the disallowable nature of a statutory remedial power means that it contains safeguards in the form of Parliamentary oversight, again this does not detract from the conclusion that it is a Henry VIII Clause. Although such safeguards may mean the disadvantages associated with a Henry VIII Clause are significantly diminished in the case of a statutory remedial power.

IV The Disadvantages and Advantages of a Statutory Remedial Power adopting the form of a Henry VIII Clause

On the basis that a statutory remedial power could be categorised as a Henry VIII Clause this part considers the literature exploring the advantages and disadvantages of

⁵³ Explanatory Material, above n 4, 1.8

delegated legislation and in particular Henry VIII Clauses.⁵⁴ These perceived disadvantages and advantages will be applied to a statutory remedial power.

Whilst such clauses are clearly contrary to the rule of law and the separation of powers doctrine, they are constitutionally valid.⁵⁵

A. *Disadvantages*

(i) *Derogation from the Rule of Law and the Separation of Powers*

Many of the objections to Henry VIII Clauses in general, are based on the derogation such a measure takes from fundamental tenets underlying the rule of law such as the separation of powers doctrine and certainty.⁵⁶

Whilst it is beyond the scope of this paper to consider the definition of the rule of law (which is itself a matter of debate), some of the following general observations can be made. The rule of law focuses on the importance or primacy of the law. Broad discretions represent the antithesis of the rule of law. For example, Dicey refers to the principles underlying the rule of law that include:

...the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government.⁵⁷

⁵⁴ Hon Justice VCRAC Crabbe, 'Shorter parliamentary enactments and longer regulations' (1986) 7(1) *Statute Law Review* 4; Bates, John, 'Parliament, Policy & Delegated Power' (1986) 7(2) *Statute Law Review* 114.

⁵⁵ *Capital Duplicators Pty Ltd v Australian Capital Territory (No 1)* (1992) 177 CLR 248; (1992) 66 ALJR 794. The High Court in *Victorian Stevedoring & General Contracting Co Pty Ltd & Meakes v Dignan* (1931) 46 CLR 73 held that the Parliament could validly delegate its legislative power and that the Parliament retained control by its ability to repeal the enabling statute.

⁵⁶ Gerard Carney, *Separation of Powers in the Westminster System* (Paper Presented at Bond University to ASPG Queensland Chapter on Monday 13 September 1993)

⁵⁷ A Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan, 1948) 202.

However, there have been many acknowledgements that the ideals underpinning the rule of law has limitations in the revenue context. For example, Former

Commissioner D'Ascenzo stated:

The rule of law provides an anchor for legislative regimes such as taxation and superannuation operating as they do in this choppy sea of change. Whilst this constancy safeguards rights and obligations, its ambulatory restrictions, the inherent vagaries of words, and the infinite variety of personal circumstances impose daunting difficulties on policy makers, legislators and administrators. Where the law blurs into 'indeterminacy' there are difficulties also for taxpayers and their advisers, and the potential for disputation increases.⁵⁸

Similarly, De Cogan stated that the rule of law 'could impose deep limitations on the exercise of delegated power.' However, he acknowledges the values of the rule of law 'do not express every characteristic desirable in a tax system.'⁵⁹ Dourado stated the rule of law does not guarantee that a tax system observes other principles like equity or ability to pay, efficiency or practicability.⁶⁰ Likewise Cooper question the importance of the rule of law and suggests that the concept may need to be modified in the context of revenue law:

The rule of law might be a value that should be given absolute primacy in cases where the curtailment of personal freedoms or the expropriation of property without some attempts at lawful justification is threatened. But might it be appropriate to modify or circumscribe its

⁵⁸ Michael D'Ascenzo 'The rule of law a corporate value' (Speech delivered at Law Council of Australia, Rule of law conference, Brisbane, 1 September 2007).

⁵⁹ Dominic De Cogan, 'Tax Discretion and the Rule of Law' in Chris Evans, Judith Freedman and Richard Krever (eds), *The Delicate Balance: Tax Discretion and the Rule of Law* (IBFD, 2011), 1.

⁶⁰ Ana Dourado, 'The Delicate Balance: Revenue Authority Discretions and the Rule of Law – Some Thoughts in a Legal Theory and Comparative Perspective' in Chris Evans, Judith Freedman and Richard Krever (eds), *The Delicate Balance: Tax Discretion and the Rule of Law* (IBFD, 2011), 15.

application in a taxation context, especially one characterised by say a high degree of artificiality and a motive which taints the taxpayer's position?⁶¹

However, if the importance of the rule of law in the revenue context is accepted, by transferring legislative power to the executive, Henry VIII Clauses (including the statutory remedial power) derogate from this principle. Meyerson states:

if we allow the unlimited transfer of legislative power to the executive we run the risk of subverting the rule of law ideal, fundamental to the control of government, that those who carry out the law should be restrained by those who make it.⁶²

Perhaps the most famous and vigorous criticisms of delegated legislation was contained in the seminal works of Chief Justice Lord Hewart of Bury in his book written in 1929 *The New Despotism*.⁶³ Hewart thought that the process of delegated legislation had the impact of wresting power from the Parliament and vesting in the bureaucrats. He stated:

The new despotism, which is not yet defeated, gives Parliament an anaesthetic. The strategy is different, but the goal is the same. It is to subordinate Parliament, to evade the Courts, and to render the will or the caprice, of the Executive unfettered and supreme.⁶⁴

⁶¹ Graeme Cooper, 'Conflicts, Challenges and Choices – The Rule of Law and Anti-Avoidance Rules' in Graeme Cooper (ed), *Tax Avoidance and The Rule of Law* (IBDF, 1997), 17.

⁶² Denise Meyerson 'Rethinking the Constitutionality of Delegated Legislation' (2003) 11 *Australian Journal of Administrative Law* 45, 52. Relevantly, Suri Ratnapala, Thomas John, Vanitha Karean and Cornelia Koch, *Australian Constitutional Law: Commentary and Cases* (Oxford University Press, 2007)43 provide a similar observation:

Excessive delegation of legislative power to the executive defeats the purpose of the separation of powers doctrine and may threaten the rule of law by allowing the executive branch to subject the law to its capricious will.

⁶³ G Hewart, *The New Despotism* (R & R Clarke Limited, 1929) 17.

⁶⁴ *Ibid.*

He argued that delegations to the executive produced a ‘despotic power’, which placed governmental departments above the ‘sovereignty of Parliament’.⁶⁵ He was particularly scathing of Henry VIII Clauses.⁶⁶

Perhaps the most material disadvantage associated with a Henry VIII Clause is the transfer of power that such clauses represent from the legislature to the administrator. In particular, as noted above, commentators fear ‘unfettered’ transfers of such power.

However, this disadvantage is significantly mitigated by the proposed form of a statutory remedial power which is far from ‘unfettered’.

There are several strict conditions surrounding the exercise of the statutory remedial power and in this regard it does not constitute an unfettered delegation of power to the Commissioner.

Firstly, the statutory remedial power can only be exercised where the law produces outcomes that are ‘inconsistent with the reasonably ascertainable policy intent of the law,’ including scenarios not contemplated by the drafters at the time of developing the law. Alternatively, where the application of the law results in compliance costs that are ‘unnecessary or disproportionate’. Finally, the revenue impact must be

⁶⁵ Hewart, above n 63, 14

⁶⁶ Hewart, above n 63, 14

negligible as advised by the Treasury or Department of Finance pursuant to ordinary processes and budget rules.⁶⁷

The power is discretionary being limited to those circumstances where the Commissioner considers the modification is ‘reasonable’ by having regard to the purpose and object of the provision and compliance costs.⁶⁸ However, whilst the legislation does not prescribe the circumstances to be taken into account in exercising this discretion the Explanatory Materials suggest that the following factors would be relevant:

- the extent to which a modification is favourable to certain entities, including the number of entities impacted;
- the adverse impacts on third parties. For example, if the modification could lead to ‘asymmetric outcomes’ it may not be reasonable.⁶⁹
- the current judicial interpretation of the law in that area; and
- any other relevant matters.⁷⁰

Likewise, the power can only be exercised where the modification is ‘not inconsistent with the purpose or object of the provision.’⁷¹ This is contemplated to be an objective test and broader than the expression ‘consistent with the purpose or object’ so that the power can be exercised when the circumstances were not contemplated.

⁶⁷Explanatory Material, above n 3, 4-5 (Paragraph 1.7). Proposed section 370-1 and 370-5 of the *Taxation Administration Act 1953* from the Exposure Draft for *Tax Laws Amendment (2016 Measures No 1) Bill 2016*. Mills, above n 18.

⁶⁸Explanatory Material, above n 3, 1.2 page 3

⁶⁹Explanatory Material, above n 3, 13 (Paragraph 1.40).

⁷⁰Explanatory Material, above n 3, 12 (Paragraph 1.38).

⁷¹Explanatory Material, above n 3, 13 (Paragraph 1.42).

An important constraint on the statutory remedial power is that it is limited to benefiting a taxpayer. The proposed legislation states:

The power is limited in its application and an entity (the first entity) must treat a modification made under the power as not applying to it and any other entity if the modification would produce a less favourable result for the first entity.⁷²

This has been framed in this manner to ensure that the statutory remedial power results in neutral outcomes and that where a modification is less favourable to one or more entities it may still apply to those entities that do not have a less favourable outcome.⁷³ Whilst this would ensure only taxpayers who benefited would be impacted by the statutory remedial power it has interesting implications in terms of equity or like treatment of taxpayers in similar circumstances.

Having regard to these preconditions, it is unlikely the statutory remedial power will be broadly utilised. In practice, the difficulty in applying the statutory remedial power may be in demonstrating where there is inconsistency between the policy underlying the law and the way it is being applied.⁷⁴ Ascertaining the policy or the intention underpinning the legislation is notoriously problematic.⁷⁵ In *Mills v Meeking* Justice Dawson observed that the notion of the intention of Parliament is a fiction:

⁷² Explanatory Material, above n 3, (Paragraph 1.11).

⁷³ Explanatory Material, above n 3 (Paragraph 1.56).

⁷⁴ Ross Parsons, 'Income Taxation – An Institution in Decay' (1986) 3 *Australian Tax Forum* 233, 234 states 'But if reason is not written into the analytical fabric of the tax, we are ruled by the reason of the administrators and not by the law.'

⁷⁵ Justice Susan Crennan, 'Statutes and the Contemporary Search for Meaning' (Speech delivered at Statute Law Society London, 1 February 2010); Jim South, 'Are Legislative Intentions Real' (2014)40 (3) *Monash University Law Review* 853.

The difficulty has been in ascertaining the intention of Parliament rather than giving effect to it when it is known. Indeed, as everyone knows, the intention of Parliament is somewhat a fiction. Individual members of Parliament, or even the government, do not necessarily mean the same thing by voting on a Bill or, in some cases anything at all. The collective will of the legislature must therefore be taken to have been expressed in the language of the enactment itself, even though that language has been selected by the draftsman, who is not a member of Parliament.⁷⁶

More recently in *Queensland v Congoo*⁷⁷ the High Court affirmed that

The "clear and plain intention", demonstrated by the inconsistency of statutory rights and powers and native title rights and interests, and necessary to a finding of extinguishment, is not the subjective intention of the relevant legislature, nor is it that of the executive authority making a grant. Nor is it an intention, the presence or absence of which is to be determined by reference to the awareness or otherwise of the existence of native title rights and interests when the statute was enacted or the grant made. That approach is consistent with the approach of this Court to the place of legislative intention in statutory interpretation in *Project Blue Sky Inc v Australian Broadcasting Authority*, *Zheng v Cai* and *Lacey v Attorney-General (Qld)*. Attributed legislative intention is a conclusion arising from the application of accepted rules of construction, both common law and statutory.⁷⁸

The Explanatory Materials to the Exposure Draft suggest that it may be 'reasonably ascertained that, had the circumstances, arrangement or transaction been considered at the time the law was drafted, applying the law in a modified way would not be inconsistent with the purpose or object of the law.'⁷⁹ In order to do this it is suggested that to ascertain purpose or object reference should be made to the extrinsic materials pursuant to section 15AB of the *Acts Interpretation Act 1901*. This would include the

⁷⁶ (1990) 169 CLR 214, 234. Richard Ekins and Jeffrey Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (2014) 36 *Sydney Law Review* 39.

⁷⁷ [2015] HCA 17.

⁷⁸ [2015] HCA 17, [36].

⁷⁹ Explanatory Material, above n 3, 70 (Paragraph 1.29 and 1.30).

Explanatory Materials, Second Reading Speech, Government announcements and could include an examination of the legislative history of a provision.⁸⁰

In practice, ascertaining the intention or policy of a provision may not be straightforward. Indeed, even the Courts sometimes have difficulties with such a task. It becomes even more difficult where the ‘accepted rules of construction’ still lead to a result where the provision appears to be inconsistent with the intention or if the application of the provision was unforeseen at the time of drafting it is difficult to see how there could be any intention at all.

⁸⁰ Explanatory Material, above n 3, 70 (Paragraph 1.31 and 1.34).

(ii) *Findings of the Donoughmore Committee*

In response to the attack by Lord Hewart, the British Government appointed the Donoughmore Committee on Ministers power,⁸¹ to look at delegated legislation made by Ministers (or persons or bodies appointed to exercise the power). The Donoughmore Committee stated that the main issues with delegated legislation included the fact that it could lead to ‘skeletal legislation’,⁸² broadly defined delegations, diluting Parliamentary power, inadequate scrutiny, publicity and consultation.⁸³ However, they felt delegations should not be disregarded as they had several material benefits.⁸⁴

Again many of the perceived disadvantages addressed by the Donoughmore Committee do not apply in the context of a statutory remedial power. In relation to safeguards against abuse of delegated legislation, Pearce and Argument suggest four matters⁸⁵:

1. Careful selection of the delegate;
2. Ensuring the delegation does not authorise making: ‘whatever legislation on a matter seems appropriate to the delegate.’
3. Facilitating adequate publication and access to the delegated legislation.

⁸¹Donoughmore Committee, above n 36 ; DGT Williams, ‘The Donoughmore Report in Retrospect’ (1982) 60(3) *Public Administration* 273

⁸² Donoughmore Committee, above n 36, 53. Adele Farina, ‘Bones without flesh – the issues with skeletal legislation’ (Speech delivered at the Australia-New Zealand Scrutiny of Legislation, Brisbane 26-28 July 2011).

⁸³ Donoughmore Committee, above n 36, 53 and 54.

⁸⁴Donoughmore Committee, above n 36, 51.

⁸⁵ Pearce and Argument, above n 22, 24

4. Ensuring appropriate parliamentary review mechanisms⁸⁶

Each of these elements appear to have been addressed in relation to the form adopted for the statutory remedial power. For example, it appears appropriate to delegate the power to the Commissioner of Taxation who is in a unique position to perform such a function. As Mills stated when discussing the statutory remedial power:

As administrator of our tax system, the ATO experiences and observes firsthand the operation of our tax laws in actual practice. With the knowledge and insight gained by these experiences and observations, we provide advice and input to Treasury on how aspects of the law can be improved –which laws work in practice and which ones don't. In a sense, among the roles, we perform an advocacy function on behalf of the taxpayer.⁸⁷

There are several preconditions to the power being exercised and it does not constitute an unfettered right to delegate on any matter. Likewise, the statutory remedial power will be subject to parliamentary scrutiny and disallowance and will not take effect until the disallowance period is over. This will ensure that the Parliament has a 'full opportunity to scrutinise the instrument.'⁸⁸ Thus, whilst the power is delegated it is not unsupervised, these safeguards are discussed further below.

However, it is contemplated that a legislative instrument under the statutory remedial power may be retrospective.⁸⁹ Where an instrument was retrospective this would constitute a further derogation from the rule of law.⁹⁰ However, because the

⁸⁶ Pearce and Argument, above n 22, 24

⁸⁷ Mills, above n 18, 11.

⁸⁸ Explanatory Material, above n 4, (Paragraph 1.63).

⁸⁹ Proposed section 370-55 of the Draft for *Tax Laws Amendment (2016 Measures No 1) Bill 2016*.

⁹⁰ Explanatory Material, above n 4, (Paragraph 1.45).

retrospectivity could only advantage and not prejudice the taxpayer, perhaps this derogation may be seen as acceptable and in fact desirable.

Likewise, an exercise of the power will be subject to public consultation, which will provide further scrutiny and transparency.

The argument that a Henry VIII Clause may lead to skeletal legislation would also not apply in the context of a statutory remedial power. The power would apply to existing revenue legislation that is not in any way ‘skeletal’ in nature and the power may in fact enhance the operation of provisions which have been drafted in a principles based manner, thereby encouraging brevity.

(iii) Potential for Abuse

Despite recognising the utility of delegated legislation, the Donoughmore Committee recommended abandoning Henry VIII Clauses in all but exceptional cases because such provisions vested such enormous power in the executive and were capable of abuse (although no evidence of abuse was found):⁹¹ They felt the only justification for such a clause was ‘housekeeping’ and stressed the importance of ensuring that such a clause be linked to a sunset provision limiting the operation in time.⁹² The

⁹¹ Donoughmore Committee, above n 36, 59

⁹² Donoughmore Committee, above n 36 59

Queensland *Legislation Handbook* states definitively ‘Henry VIII clauses should not be used.’⁹³

Hamer states that an ‘ideal legislature’ would ensure that Henry VIII Clauses are ‘extremely rare’ are only used when essential and come into effect only after ‘affirmative resolutions’ of both Houses of Parliament.⁹⁴

(iv) Uncertainty and eroding the cohesiveness of the statutory framework

Practically, Henry VIII clauses have the potential to create additional uncertainty as the law is not contained in a single enabling statute but spans several different statutory instruments. Likewise, where they amend or modify the primary legislation it will be difficult to ascertain what the status of the law is. Indeed, the use of delegated legislation and in particular a Henry VIII Clause can erode the cohesiveness of a statutory framework by allowing departure from the core conditions prescribed by the legislation.⁹⁵

Certainly a statutory remedial power could create difficulties for taxpayers or their representatives ascertaining the state of the law. Therefore, given delegations made under the statutory remedial power will alter the law it will be key that any changes are well publicised and easy to locate to ensure that all taxpayers impacted by the changes are able to take advantage of the amendment. Megarry states that one of the main objections to quasi-legislation is its ‘haphazard mode of promulgation.’⁹⁶ Whilst

⁹³ Queensland Legislation Handbook, above n 24.

⁹⁴ Hamer, above n 40, 305.

⁹⁵ Commonwealth Ombudsman, *Mistakes and unintended consequences – a safety net approach*

⁹⁶ RE Megarry, ‘Administrative quasi-legislation’ (1944) 60 *Law Quarterly Review* 125, 127.

a statutory remedial power would take the form of a legislative instrument, it would still suffer from this disadvantage making it more difficult for practitioners to ascertain the state of the revenue law. However, the Explanatory Materials to the Exposure Draft suggest that any modifications made pursuant to this power will be kept in a central repository, in addition to being registered on the Federal Register of Legislative Instruments.⁹⁷ Depending on how this is implemented it could substantially assist with promoting transparency and certainty.

As an administrative matter it will be important for the Commissioner to ensure that the details of any amendments made via a statutory remedial power are visible to taxpayers. Whilst any instrument will need to be registered on the Federal Register of Legislative Instruments, it would be advisable that a separate part of the ATO website also makes reference to these amendments. Likewise, attempts should be made to communicate such amendments to tax agents and affected taxpayers. Indeed, the Information Paper contemplates a single consolidation of issues.⁹⁸

B. Advantages

As noted above, whilst there are several disadvantages associated with delegated legislation and in particular Henry VIII Clauses, there are compelling reasons for utilising delegations. Thus, despite potentially being categorised as a Henry VIII

⁹⁷ Explanatory Material, above n 3, X.

⁹⁸ Treasury, *Consultation Draft – Information Paper on Commissioner’s Remedial Power and Related Issues*’1 7.
<http://treasury.gov.au/~media/Treasury/Consultations%20and%20Reviews/Consultations/2015/Commissioners%20remedial%20power/Key%20Documents/PDF/Information%20Paper.aspx>

Clause, an effectively drafted statutory remedial power would have three primary benefits:

- embedding flexibility to deal with legislative problems in a timelier manner than legislative amendment;
- promote simplicity in the legislation and therefore assist in reducing regulatory burdens;⁹⁹ and
- by the taking the form of a legislative instrument it will be subject to several important safeguards.’

These benefits are discussed in further detail below.

(i) *Flexibility*

Delegated legislation or in particular Henry VIII clauses can create substantial statutory flexibility and allow minor or anomalous outcomes to be fixed expeditiously. In fact, embedding flexibility into primary legislation by way of a delegation of power to deal with unforeseen circumstances or contingencies is not without precedent. As noted above Henry VIII Clauses of this type exist in various areas of the law, including existing powers in the revenue law. Justice O’Connor stated in *Baxter v Ah Way*:

Now the legislature would be an ineffective instrument for making laws if it only dealt with the circumstances existing at the date of the measure. The aim of all legislatures is to project their minds as far as possible into the future, and to provide in terms as general as possible for all contingencies likely to arise in the application of the law. But it is not possible to provide

⁹⁹ Australian Taxation Office, *Statutory Remedial Power*, ATO Website, 21 May 2015 <<https://www.ato.gov.au/General/New-legislation/In-detail/Other-topics/Statutory-Remedial-Power>>. Also see the 2015/2016 Commonwealth Budget, Budget Paper No 2: Part 1 <http://budget.gov.au/2015-16/content/bp2/html/bp2_revenue-07.htm>.

specifically for the all cases, and, therefore, legislation from the very earliest times, and particularly in more modern times, has taken the form of conditional legislation, leaving it to some specified authority to determine the circumstances in which the law shall be applied, or to what its operation shall be extended, or the particular class of persons or goods to which it shall be applied.¹⁰⁰

In looking at some of the advantages of delegated legislation, the Donoughmore Committee pointed to the ability to use such clauses to allow unforeseen circumstances and contingencies to be dealt with thereby embedding flexibility in the legislation¹⁰¹:

If large and complex schemes of reform are to be given technical shape, it is difficult to work out the administrative machinery in time to insert in the Bill all the provisions required; it is impossible to foresee all the contingencies and local conditions for which provision must eventually be made.¹⁰²

Following on from this point, the Donoughmore Committee noted the advantages of delegating matters of a very technical matter:

The subject matter of modern legislation is very often of a technical nature. Apart from the broad principles involved, technical matters are difficult to include in a Bill, since they cannot be effectively discussed in Parliament.¹⁰³

A statutory remedial power would embed flexibility or 'elasticity' by providing a 'power of constant adaptation' to deal with unintended outcomes or legislative anomalies, without the need for legislative amendment.¹⁰⁴ This could provide a

¹⁰⁰ *Baxter v Ah Way* (1909) 8 CLR 626, 637.

¹⁰¹ Donoughmore Committee, above n 36, 51 and Pearce and Argument above n 22, 7

¹⁰² Donoughmore Committee, above n 36,51

¹⁰³ Donoughmore Committee, above n 36, 51.

¹⁰⁴ Donoughmore Committee, above n 36, 51 states that a delegation of power can be valuable because: It provides for a power of constant adaptation to unknown future conditions without the necessity of amending legislation. Flexibility is essential. The method of delegated legislation permits of the rapid utilisation of experience,

timelier and more effective mechanism for remedying unintended outcomes or legislative anomalies in favour of the taxpayer than seeking to remedy such outcomes via seeking legislative amendments.¹⁰⁵ Parallels could be drawn to the ASIC modification powers referred to above. The Australian Law Reform Commission notes that submissions by ASIC highlighted the need for delegated legislation because the sector regulated is ‘is complex and subject to constant innovation’ and therefore without delegations the legislation would not be able to ‘anticipate and respond’ in a timely manner.¹⁰⁶ The same observations would apply in the revenue law context which is characterised by constant innovation and complexity.

(ii) *Reduce pressure on parliamentary time*

Effective delegation can also free up parliamentary time from investigating the details of the legislation¹⁰⁷ and better accommodate some of the highly technical subject matter of modern legislation.¹⁰⁸ Jaffe states:

Power can be delegated where there is agreement that a task must be performed and it cannot be effectively performed by the legislative without the assistance of a delegate or without an expenditure of time so great as to lead to the neglect of equally important business.¹⁰⁹

and enables the results of consultation with interests affected by the operation of new Acts to be translated into practice.

¹⁰⁵ Kenneth Davis, *A Preliminary Inquiry into Discretionary Justice* (Louisiana State University Press, 1969) 49 states ‘rules alone, untempered by discretion, cannot cope with the complexities of modern government and of modern justice. Discretion is our principal source of creativeness in governments and in law.’

¹⁰⁶ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (December 2015) 450.

¹⁰⁷ Donoughmore Committee, above n 36, 51 in stating the reasons for the necessity of delegation states that:

Pressure upon Parliamentary time is great. The more procedure and subordinate matters can be withdrawn from detailed Parliamentary discussion, the greater the time which Parliament can devote to the consideration of essential principles in legislation.

¹⁰⁸ Donoughmore Committee, above n 36, 51.

¹⁰⁹ Louis Jaffe ‘An Essay on Delegation of Legislative Power’ (1947) 47 *Columbia Law Review* 359.

Pearce and Argument note however that this advantage should not be accepted without question. Australian parliaments have routinely considered complex and technical legislation and find the time to do so:¹¹⁰

In particular, ‘similar arrangements can be made in relation to the primary legislation relating to corporations, superannuation and taxation. In the case of each of those examples, the primary legislation is bursting at the seams with technical detail. The Commonwealth Parliament seems also to be able to deal with technical detail in amendments to the primary legislation example however all of the areas of regulated activity mentioned also involve voluminous (and complex) subordinate legislation...So that should not be taken as a given that complexity and the need for regular amendment necessarily justify the implementation of legislative proposals by delegated legislation, rather than by primary legislation.’¹¹¹

Furthermore, there is the ability to deal with technical and smaller amendments through a Miscellaneous Amendments Bill, which could be relatively timely. In fact, Australia has a system of enacting these amendments as part of a commitment to ‘care and maintenance’ of the taxation system.¹¹²

(iii) *Promote Brevity*

Delegations of power could keep unnecessary details out of the legislation and enhance the simplicity and comprehensibility of the legislation. Holland and McGown argue that a Henry VIII Clause can operate to give particularity to a more general

¹¹⁰ Pearce and Argument, above n 22, 7

¹¹¹ Pearce and Argument, above n 22, 9.

¹¹² Miscellaneous amendments to taxation and superannuation laws

<http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2016/Miscellaneous-amendments-to-taxation-and-superannuation-laws-2016>

primary legislation.¹¹³The recent report by the Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*:

Practical necessity is perhaps the overriding justification for delegated legislation. The “modern state depends on reams of delegate legislation” and therefore the ability of a legislature to empower others to make legislation has been described as “an essential adjunct to the practice of government”. The Public Interest Advocacy Centre (PIAC) submitted that, given “the breadth and depth of areas now regulated by government, the ability to flesh out primary legislation in subordinate legislation is a necessary and expedient tool of government.”¹¹⁴

A statutory remedial power could avoid cluttering already complicated revenue legislation with further unnecessary detail to cover anomalous and marginal activities. This could help to maintain simplicity in the legislation by allowing more considered legislative responses, rather than reactive and piecemeal amendments.¹¹⁵ Likewise, this could enhance and preserve the benefits associated with principles-based drafting, by allowing the detail to be implemented or unfolded through the use of a statutory remedial power.¹¹⁶ In this regard the Australian Law Reform Commission sights the work of Sir Standley de Smith where he notes a reason to delegate legislation:

“Tortuous and cumbersome legislation, bulging with minutiae, disfigures the statute book and tends to detract from the prestige of Parliament.”¹¹⁷

¹¹³ Denys Holland and John McGown, *Delegated Legislation in Canada* (Carswell, 1989).

¹¹⁴ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (December 2015) 450.

¹¹⁵ The *Rethink* Discussion Paper (March 2015), 107 states that there have been ‘an average of 77 tax measures introduced into Parliament each financial year since 02-03.’

¹¹⁶ Wilson-Rogers, above n 4559. ESCP Discussion Paper above n 13, 9.

¹¹⁷ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (December 2015), 450.

(iv) *Create greater co-operation between the administration and the taxpayer.*

Where administered appropriately, a statutory remedial power could create greater co-operation between the tax administrator and taxpayer by reducing the regulatory burden for taxpayers by enhancing certainty in the application of the law.¹¹⁸ This would appear to fit firmly within the ATO's new reinvention agenda¹¹⁹ and could positively enhance the relationship between taxpayers and administrator.¹²⁰

(iv) *More Certainty than Quasi-legislation*

A further advantage of delegated legislation is that it is more certain and regulated than quasi legislation, which can embody rulings, practice notes and extra statutory concessions.¹²¹ Former Commissioner D'Ascenzo stated the following when considering a suggestion by the National Tax Liaison Group that the ATO adopt an administrative approach similar to the prior system of granting extra statutory concessions in the UK:

A ubiquitous creation of a tax 'lore' through administrative practices that ends up usurping the tax law, is likely to deliver less certainty for taxpayers in the long run. No matter how 'well

¹¹⁸ Budget, above n 3

¹¹⁹ ATO, *Reinventing the ATO*, <reinventing.ato.gov.au>

¹²⁰ Kristina Murphy, 'Procedural justice and tax compliance' (2003) 38(3) *Australian Journal of Social Issues* 379, 381. Murphy states

One's judgment about whether or not an authority is motivated to treat them in a fair way, to be concerned about their needs, and to consider their arguments (i.e. their trustworthiness) has been shown to be the primary factor that people consider when evaluating authorities. If people believe that an authority is "trying" to be fair and to deal fairly with them, they trust the motives of that authority and develop a long-term commitment to accepting its decisions...

Murphy further states at 380 'people who feel they have been treated fairly by an organisation will be more likely to trust the organisation and be included to accept its decision and follow its directions.'

¹²¹ Stephen Argument, 'Quasi legislation, Greasy Pig, Trojan Horse or Unruly Child?' (1994) 1 *Australian Journal of Administrative Law* 144. In exploring the meaning of quasi-legislation Argument provides that it is 'not a term of art'. However, it can be regarded 'as something resembling a law or which is *seemingly* a law.'

intentioned' the actions of the administrator be innovative taxpayer approaches that seek to extend administrative guidance to circumstances never intended, ultimately come unstuck.¹²²

Argument considered whether quasi legislation was a greasy pig, Trojan Horse or unruly child, concluding it is a combination of all three for the following reasons:

It is like a greasy pig because, once a Parliament lets it slip through its fingers, it is very difficult to recapture. It is like a Trojan Horse because often its dangers are hidden or (at best) not easily identified. It is like an unruly child because it is in dire need of some firm discipline.¹²³

Megarry also referred to the advantages and disadvantages of quasi-legislation and stated it was a 'curate's egg', arguing that lawyers would not view positively a process by which 'the unrepealed words of the statute book may be emasculated, not by the Legislature or the judiciary but by mere administrative process.'¹²⁴

Unlike delegated legislation, quasi legislation is less visible and not subject to the scrutiny of the Parliament. In this regard, a statutory remedial power provides greater transparency and has the additional safeguard of Parliamentary scrutiny than a strained interpretation of the law undertaken through the rulings or general administration power.

¹²² Michael D'Ascenzo, 'Making Choices: Risk Management in Action' (2004) 19 *Australian Tax Forum* 525.

¹²³ Argument, above n 121.

¹²⁴ Megarry, above n 96, 127.

(v) Parliamentary Scrutiny

A material benefit of a statutory remedial power taking the form of a disallowable legislative instrument is that it would be subject to parliamentary scrutiny and disallowance and therefore the decision maker retains ‘... a Parliamentary hand on his shoulder.’¹²⁵

Pursuant to section 15H of the *Legislative Instruments Act 2003*¹²⁶ there is an obligation to register the legislative instrument in the Federal Register of Legislative Instruments and this will take effect on a specified date or the day after registration. Section 38(1) of the *Legislative Instruments Act 2003* requires that a legislative instrument is tabled in each House of the Parliament within six days of the instruments registration. If this does not occur the instrument will cease to have effect. Both houses have 15 sitting days to disallow the legislative instrument.¹²⁷

Legislative instruments made pursuant to this power will be subject to the scrutiny of the Committee for the Scrutiny of Bills and the Senate Standing Committee on Regulations and Ordinances.

However, commentators such as Williams, Brennan and Lynch question the comprehensiveness of such scrutiny stating:

¹²⁵ *Cobb & Co Pty Ltd v Kropp* [1965] Qd R 285, 290. Pearce and Argument above n 22, 12.

¹²⁶ This will be renamed the *Legislation Act 2003* from March 2016.

¹²⁷ Section 42 of the *Legislative Instruments Act 2003*.

in practice however the volume of delegated legislation is so vast that the effectiveness of parliamentary scrutiny has fluctuated considerably, and depends on a vigilant and efficient system of parliamentary committees.¹²⁸

Whereas other commentators note the strength of the review undertaken by the legislative scrutiny committees. Pearce and Argument state:

The Donoughmore Committee Report states that one of the problems with delegated legislation is that [t]he facilities afforded to Parliament to scrutinise and control the exercise of powers delegated to Ministers are inadequate. There is a danger that the servant may be transformed into the master. One of the strengths of the management of delegated legislation in Australia is that, arguably, parliaments do have through their various legislative scrutiny committees adequate facilities to scrutinise delegated legislation. This relies on experience and expertise developed over 80 years.¹²⁹

Whalan refers to this as a 'protective chain of scrutiny of legislation' that assesses delegated legislation and protects against invalid or unjust subordinate laws.¹³⁰ Pearce and Argument state these Committees are the 'most important bulwark':

However, the various parliamentary review committees do much to maintain these safeguards. Though they do not perform the task without criticism, not to the satisfaction of all concerned, parliamentary review committees generally exist as the most important bulwark against the abuse of executive power through delegated legislation.¹³¹

¹²⁸ George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law & Theory* (The Federation Press, 6th Edition, 2014), 1010. Likewise Michael Asimow, 'Delegated legislation: United States and United Kingdom' (1983) 2 *Oxford Journal of Legal Studies* 253, 266 states 'critics have pointed out, parliamentary control over rulemaking can be quite ineffective as a check against ill-considered rules.' He states that 'members are generally uninterested and poorly informed about the substance of rules, while administrators are ill-disposed toward making changes in already completed instruments.'

¹²⁹ Pearce and Argument, above n 22,59

¹³⁰ Professor DJ Whalan, 'Scrutiny of Delegated Legislation by the Australian Senate' (1991) 12 *Statute Law Review* 87, 92.

¹³¹ Pearce and Argument, above n 22, 25.

The Committee for the Scrutiny of Bills scrutinises Bills to look at inappropriately delegated legislative powers or where rights, liberties or obligations are dependent upon ‘insufficiently defined administrative powers’ or insufficient parliamentary scrutiny. This provides the Committee with an important early opportunity to ‘exercise influence over the shape, content and effectiveness of delegated legislation,’
Allowing the Committee to ensure ‘purity at source.’¹³²

Pursuant to Standing Order 23(2) the Senate Committee of Regulation and Ordinances scrutinises each instrument to ensure it is in accordance with the principal act and does not infringe on rights and liberties. It also considers if the instrument deals with a matter more appropriate for parliamentary enactment. The Committee has an independent legal adviser that examines the regulations and notes any infringement of these principles. Whilst the Committee cannot directly disallow an instrument its recommendations are seen as persuasive and can have a ‘deterrent effect’ because Henry VIII Clauses are likely to attract comment they are too broad or unstructured.¹³³

Interestingly the statutory remedial power can implement multiple modifications in one instrument.¹³⁴ This may make scrutiny of the instrument more problematic.

(vi) *Judicial Review*

¹³² Professor DJ Whalan, ‘Scrutiny of Delegated Legislation by the Australian Senate’ (1991) 12 *Statute Law Review* 87.

¹³³ Pearce and Argument, above n 22, 23.

¹³⁴ Explanatory Material, above n 4, 1.15 page 7

Another safeguard is the right for the Court to review the validity of legislative instruments made under this power. Furthermore, each legislative instrument enacted under the statutory remedial power will also be subject to scrutiny as to its constitutional validity.¹³⁵

The Court maintains some judicial control over delegated legislation, although it is broadly limited to whether the delegation is within the power provided by the primary legislation rather than a merits review of the decision.¹³⁶ For example, this would include considering if the formal requirements had been complied with and whether the instrument is within the delegated power (*ultra vires*). This would not include looking at whether a decision had regard to relevant or irrelevant considerations.¹³⁷

A condition of the statutory remedial power is that the modification must be consistent with the purpose or object of the modifiable provision. Therefore, if the Court found a legislative instrument was outside of the policy of the provision the modification would be invalid.¹³⁸

Furthermore, the *Administrative Decisions (Judicial Review) Act 1977 (Cth)* that requires giving reasons for a decision is not applicable to a legislative instrument.

¹³⁵ Pearce and Argument, above n 22, 288.

¹³⁶ Pearce and Argument, above n 22, 174:

The courts have expressly indicated that they are not prepared to interfere too readily with legislative instruments. In *Austral Fisheries Pty Ltd v minister for Primary Industries and Energies...and Donohue v Australian Fisheries Management Authority*

DJ Whalan, 'Scrutiny of Delegated Legislation by the Australian Senate' (1991) 12 *Statute Law Review* 87, 92

¹³⁷ Pearce and Argument, above n 22, 174.

¹³⁸ Explanatory Materials, above n 4, 9 (Paragraph 1.27). This is an objective test to be considered by the Court but seen through the prism of 'sympathetic and imaginative discovery.' See *Thiess v Collector of Customs* [2014] HCA 12, [23].

(viii) *Consultation*

Another safeguard embedded in the statutory remedial power is the requirement to consult on the form of the legislative instrument. Asimow points to the fact that consultation promotes ‘public engagement’ in the process, thereby operating to protect the public interest.¹³⁹

Part 3 of the *Legislative Instruments Act 2003* states that ‘appropriate consultation’ must be undertaken before making the instrument.¹⁴⁰ The Explanatory Materials state that the Commissioner must be satisfied that any appropriate and reasonably practicable consultation has been undertaken. Whilst there are no exact details of the extent of consultation the Explanatory Memorandum states that the Commissioner will establish appropriate consultation and governance arrangements.¹⁴¹ It is further stated that where the Commissioner shares the power of administration with another agency there will be consultation with them in relation to the exercise of this power.¹⁴² In addition to formal consultation, at an early stage in considering whether and how to exercise the statutory remedial power on a certain issue the Commissioner will consult with a ‘technical advisory group’ that will consist of private sector experts as well as Treasury.¹⁴³

¹³⁹ Asimow above n 128.

¹⁴⁰ Section 17(2) provides rule-makers with guidance in determining any consultation was appropriate. Section 17(3) looks at forms of consultation.

¹⁴¹ Explanatory Material, above n 3, 7 (Paragraph 1.18).

¹⁴² Explanatory Material, above n 3, (Paragraph 1.25).

¹⁴³ Treasury, *Consultation Draft – Information Paper on Commissioner’s Remedial Power and Related Issues*’1
7.
<http://treasury.gov.au/~media/Treasury/Consultations%20and%20Reviews/Consultations/2015/Commissioners%20remedial%20power/Key%20Documents/PDF/Information%20Paper.aspx>

V Do the ends justify the means?

A common critique of Australian revenue legislation is that it is complex, uncertain and sometimes even indeterminate.¹⁴⁴ In fact, given the breadth of taxpayers and scenarios taxation legislation seeks to regulate,¹⁴⁵ it would be impossible for the drafters to contemplate all the circumstances to which the legislation will need to apply.¹⁴⁶

Inevitably circumstances will arise where the revenue legislation does not extend a benefit to taxpayers in circumstances where it was *intended* that they should be covered and there will be outcomes that are unintended or anomalous.¹⁴⁷ Likewise, circumstances may arise that were not contemplated at the time of drafting the

¹⁴⁴ John Miller, 'Indeterminacy, Complexity and Fairness: Justifying Rule Simplification in the Law of Taxation' (1993) 68(1) *Washington Law Review* 1,6 states 'tax complexity is a necessary byproduct of fairly addressing the full sweep of tax questions arising in today's complex world.'

In relation to uncertainty the Australian Government, *Rethink* Discussion Paper (March 2015), 13 provides:

Complexity and compliance costs have many drivers and are a growing problem in the tax system. Tax compliance costs are in the order of \$40 billion per year. Approaches to tax design and governance practices will need to change if complexity in the tax system is to be reduced.

Hon Justice Gaetano Pagone, 'Tax Uncertainty' (2009) 33 *Melbourne University Law Review* 886, 888 notes that despite numerous attempts to reform the Australian taxation legislation 'stubborn uncertainty stubbornly remains' and notes 'uncertainty may in part be an inevitable feature of language.'

¹⁴⁵ Victor Thuronyi, 'Drafting Tax Legislation' in Victor Thuronyi (ed) *Taxation Law Design and Drafting – Volume I* (International Monetary Fund, 1996) 84 states 'unnecessary ambiguity should be eliminated, although given that language is inherently ambiguous, it is impossible to eliminate all ambiguity.' Dominic De Cogan, 'A Changing Role for the Administrative Law of Taxation' (2015) 24(2) *Social and Legal Studies* 251, 255 states 'this leaves us in something of a quandary, as rules must be applied determinately to real taxpayers even in circumstances where their meaning is in principle indeterminate' Likewise, Morse Edward Morse, 'Reflections on the Rule of Law and "Clear Reflection of Income": What Constitutes Discretion?' (1999) 8 (3) *Cornell Journal of Law and Public Policy* 445 considers the need for discretion in revenue legislation due to 'linguistic indeterminacy' and the inability of the law to address every situation to which it applies

¹⁴⁶ Michael Carmody (former Commissioner of Taxation), 'The Art of Tax Administration – Two Years On' (Speech delivered at the 6th International Conference on Tax Administration, Sydney, 15 April 2004) stated:

In a dynamic business environment it is difficult for any law, let alone one as expansive as tax law, to contemplate fully the practicality of administration for all types of taxpayers from large international corporations to small home-based businesses.

¹⁴⁷ This was discussed by the Tax Design Review Panel, *Better Tax Design and Implementation* (2008), 35 and 40-41.

legislation or where complying with the revenue legislation inadvertently creates disproportionate compliance costs.¹⁴⁸

In this regard, the Explanatory Materials to the Exposure Draft and the objects clause to the proposed legislation states:

The Australian taxation laws are complex and operate in the context of rapidly changing business practices as a result of the dynamic and transforming economy. This increasingly leads to unintended or unforeseen outcomes in the application of the taxation laws. These outcomes can create significant uncertainty and compliance cost impacts for entities¹⁴⁹.

Without a statutory remedial power, the only recourse would be legislative amendment, which can be difficult and time-consuming.¹⁵⁰ Furthermore, where an amendment rectifies an existing anomaly or unintended outcome in the law, it will necessarily be retrospective.¹⁵¹

A statutory remedial power will assist with rectifying these issues,¹⁵² allowing the Commissioner to extend a tax benefit or alleviate compliance costs in these circumstances by way of a disallowable legislative instrument that will modify the primary legislation. The Information Paper states this will ‘realign’ the legislation

¹⁴⁸ Mills, above n 18 states that a second scenario where a statutory remedial power would apply includes where the law:

results in compliance costs on taxpayers that are unnecessary or disproportionate to achieve the reasonably ascertainable broad policy intent of the law and those costs can be relieved in a way that is consistent with that intent.

¹⁴⁹ Explanatory Material, above n 4, 4,(paragraph 1.6) and proposed section 370-1.

¹⁵⁰ Australian Treasury, above n 13, 8 states:

Currently a defect the Government priorities as important enough to correct as soon as practicable can usually be corrected by legislative amendment within six months. While it cannot reasonably be assumed that the time taken to issue a ruling equates to the time it would take the Commissioner to implement a variation to the law, these figures at least suggest that the Commissioner may be able to vary the law somewhat faster than the Parliament would be able to amend it.

¹⁵¹ Australian Treasury, *Review of Aspects of Income Self Assessment* Discussion Paper (March 2004) discusses the issues with the use of retrospective revenue legislation at page 69- 70.

¹⁵² Frydenberg, above n 2.

with the purpose or object of the provision.¹⁵³

Whilst the flexibility and speed of a statutory remedial power are evident, it does represent a compromise between often-conflicting canons of certainty and flexibility in the revenue legislation. On one hand, revenue legislation needs sufficient flexibility to accommodate the diversity of circumstances exhibited by taxpayers. On the other hand, it must be sufficiently certain so that it can be understood by taxpayers within a system that is based on the rule of law.¹⁵⁴

The proposed design of a statutory remedial power attempts to strike a compromise between these competing objectives. Like any compromise, it is not perfect, representing derogation from some of the attributes associated with the rule of law.

As Joseph states when looking at the validity of delegated legislation:

Nothing is perfect so the truism holds. In one breath we proclaim the constitutional imperative of parliamentary legislation, in the next breath we concede the necessity and justification of delegated legislation. Delegated legislation is essentially a compromise.¹⁵⁵

A statutory remedial power has the potential to create uncertainty as it may not be clear what the status of a particular provision is and therefore it may erode the

¹⁵³ Treasury, *Consultation Draft – Information Paper on Commissioner’s Remedial Power and Related Issues*’1 7.
<http://treasury.gov.au/~media/Treasury/Consultations%20and%20Reviews/Consultations/2015/Commissioners%20remedial%20power/Key%20Documents/PDF/Information%20Paper.aspx>

¹⁵⁴ Sir James Mirrlees, *Tax by Design: The Mirrlees Review* (Oxford University Press, 2011) states:

A tax system is more likely to command respect, and so be widely accepted, if the process that determines tax levels and structures is seen to be fair. This is what we mean by fairness of procedure. The process and institutional context for tax policy matter, not just because they are likely to determine the outcome, but also because they affect how that outcome is perceived and even how well it is complied with.

¹⁵⁵ Joseph above n 28.

statutory framework of the Act. However, are the benefits of such a power sufficient to overcome the issues associated with a delegation of power?

Where administered correctly such a power will ensure taxpayers receive tax benefits intended for them or do not suffer from disproportionate compliance costs. Arguably, the ends justify the means. A statutory remedial power is simply attempting to clarify the application of the revenue legislation, which arguably the Parliament would have done had it directed its 'mind' to the 'precise circumstances'.¹⁵⁶

The shortcomings of delegated legislation must be balanced against the role that such a delegation can play in enhancing effective administration.¹⁵⁷ As Jaffe states 'we should recognize that legislation and administration are complementary rather than opposed processes; and that delegation is the formal term and method for their interplay.'¹⁵⁸

A statutory remedial power could be characterised as a Henry VIII Clause representing a delegation to the Commissioner of Taxation to amend or alter the effect of the primary legislation. However, perhaps in the words of Aaronson it is only a Henry VIII Clause 'in miniature' applying in narrowly prescribed circumstances.¹⁵⁹

Despite arguably being clothed in the controversial cloak of a Henry VIII Clause the ends achieved by the statutory remedial power do justify the means. A properly

¹⁵⁶ Professor Bailey in Evidence to the Senate Select Committee on the Standing Committee System PP S1/19-20-31 cited in *Odgers' Australian Senate Practice (Thirteenth Edition)* 325

¹⁵⁷ Dourado, above n 60.

¹⁵⁸ Jaffe, above n 109.

¹⁵⁹ Mark Aaronson, 'The Great Depression, this depression and administrative law' (2009) 37 *Federal Law Review* 165, 174.

administered statutory remedial power could provide taxpayers with a quicker remedy and greater certainty for rectifying unintended outcomes or anomalies than legislative amendment and could assist in alleviating disproportionate compliance costs.