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HENRY VIII CLAUSES: THEIR PLACE IN MODERN NEW ZEALAND

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Table of Contents

I	Introduction.....	1
II	What is a Henry VIII Clause?.....	3
A	The Orthodox Definition	3
B	The Benefits of Henry VIII Clauses	6
C	A Brief History of Administrative Power and Henry VIII Clauses in the United Kingdom	7
D	Conclusion	15
III	Why are Henry VIII Clauses Concerning?	15
A	Infringing Parliamentary Sovereignty and the Separation of Powers	16
B	A Lack of Checks and Balances	20
C	Normalising Henry VIII Clauses and the Snowball Effect	26
D	Loss of Debate and Public Scrutiny on Policy	28
E	New Zealand’s Experience of Unbridled Power: Robert Muldoon.....	29
F	Synthesis and Analysis	33
IV	The use Henry VIII Clauses in New Zealand.....	34
A	The Trans-Pacific Partnership Agreement Amendment Bill.....	34
B	The Canterbury Earthquake Recovery Act 2011	38
C	The Financial Markets Conduct Act 2013.....	40
D	The Home and Community Support (Payment for Travel Between Clients) Settlement Act 2016	44
E	The Shop Trading Hours Amendment Bill.....	46
F	Why use a Henry VIII Clause at all?	49
V	Conclusion	52
VI	Bibliography	55

Abstract

New Zealand's statutory and regulatory environment is becoming ever more complex in order to respond to the demands of an increasingly technologically and socially diverse world. For law makers, this provides significant challenges, particularly in the way that the relevant regulatory regimes are drafted. One of the responses made by the United Kingdom Parliament is the proliferation of the controversial so-called "Henry VIII clause". These enable the executive branch of government to amend, suspend or override Acts of Parliament. These clause come with various expedience benefits, but also have some significant drawbacks, particularly in respect of their constitutional implications. This paper seeks to assess why these clauses are used and what about these clauses really is of concern. This paper concludes that New Zealand's concerns, while shared with the United Kingdom's to some degree, are really focused on the issue of policy production, and that if that is the understanding to be taken of these clauses, our use of the term "Henry VIII clause" may take on a different meaning.

Keywords

Henry VIII clause; regulations; parliamentary sovereignty; public law.

I Introduction

New Zealand's regulatory and statutory environment is becoming ever increasingly complex as the needs of a modern New Zealand are rapidly changing in response to developing technology, globalisation and social views. Consequently, both Parliament and the government are in a perpetual state of catch up as to the legal frameworks for managing these changes. Not only must law makers navigate the technical difficulties of any particular area of reform, technological or otherwise, but they also face a plethora of design options for achieving those ends. Through statute? Through regulation? More often the answer is "both".

A hybrid design whereby the core legal framework is set out in statute and implemented or adjusted by way of delegated legislation, or regulation, can offer an effective and flexible approach to law making. However, even this drafting solution can take various forms, particularly as to how the regulation-making power is drafted. One permutation of regulation-making power which has rapidly expanded in the United Kingdom and attracted a great deal of criticism, is known as the "Henry VIII clause". It is this species of controversial empowering provision which is the subject of this paper.

Broadly speaking these are clauses in Bills, or sections in Acts, which enable primary legislation to be amended, repealed or overridden by subordinate legislation. They have traditionally been considered problematic for several reasons. In the first instance they at least appear to infringe classical conceptions of parliamentary sovereignty and the separation of powers, two of New Zealand's most significant constitutional principles. Secondly, a lack of constitutional protections on the use of those powers only serves to amplify constitutional concerns. Thirdly, the repeated use of a Henry VIII power has the potential, as it has in the United Kingdom, to serve as a dangerous precedent for subsequent law makers whereby Henry VIII clauses become the norm rather than the exception.

While these are all very real issues, the way we currently talk about Henry VIII clauses takes a very 'broad brush' approach without adequately responding to what our fears actually are in respect of them. Certainly, delegated legislation with the effect of altering or overriding an Act in some way is *constitutionally significant*, but that does inevitably lead to the conclusion it is also *constitutionally unacceptable*. This paper argues our current understanding of what a Henry VIII clause is should be properly adapted to a

New Zealand context in order to properly reflect our concerns about them. To this end, three key conclusions are drawn. First, our current usage of the term “Henry VIII clause” reflects pathologies more closely associated with the United Kingdom’s constitutional structure which, in respect of Henry VIII clauses, is quite different in a number of important respects. New Zealand shares several concerns with the United Kingdom, but our history with these clauses and means of controlling their use differs. Consequently, the wholesale importation we have made of the concept needs some adaptation.

The second key conclusion is that each of the concerns expressed above can properly be traced to the more fundamental anxiety that there is a potential for an empowering provision to unjustifiably enable the production of ‘new’ policy that goes further than, or in a different direction to, the central policy of the Act or Acts affected by the power. While there are other constitutional issues with Henry VIII clauses, these are not generally problematic unless they affect a matter of policy. Merely because a clause empowers an amendment to be made to a schedule to an Act, or to make a mechanical update in text which involves no new policy direction it is not constitutionally inappropriate. It has recently been noted that, at least in New Zealand and Australia:¹

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.

A conceptualisation of the Henry VIII clause which focuses on this ‘policy production fear’ would therefore, perhaps significantly, expand the class of powers we would currently refer to as Henry VIII clauses. As a result of this second conclusion, the third conclusion is that where policy production is really the key issue, thus excluding those clauses which enable mechanical changes such as updating lists or figures,² then many

¹ Tim Macindoe and Lianne Dalziel “New Zealand’s response to the Canterbury earthquakes” (paper presented to the Australia-New Zealand Scrutiny of Legislation Conference, 2011) (emphasis added).

² See, for example, those Acts and Bills discussed below at Part IV(D).

of the clauses currently considered to be Henry VIII clauses ought not to be considered *constitutionally inappropriate*, although they remain *constitutionally significant*.

This paper is broadly split into three parts. The first part will review what a Henry VIII clause is along with a history of those powers in the United Kingdom. The second part will assess what concerns Henry VIII clauses pose in New Zealand, and how they are similar to or distinct from those fears expressed in the United Kingdom. The third part will review those concerns and differences through five examples demonstrating various categorisations of clauses which, it is argued, should be of varying degrees of concern in New Zealand. In this respect, the paper concludes that while we can be less worried about Henry VIII clauses in New Zealand than the United Kingdom, we ought to be live to preventing their use escalating to levels comparable to the United Kingdom.

II What is a Henry VIII Clause?

A The Orthodox Definition

The expression “Henry VIII clause” typically refers to a provision in a Bill (or section in an Act) which enables primary legislation, whether the parent Act or not, to be amended, repealed or overridden by subordinate legislation. The name is a term in “disrespectful commemoration”³ of King Henry VIII’s despotic tendencies. In particular, in 1539 King Henry VIII pressured a supine English Parliament into enacting the Proclamation by the Crown Act 1539.⁴ The Act permitted the King to amend statutes passed by Parliament by way of decree.

Various definitions for what a Henry VIII clause now is have been articulated, although they are largely of the same pedigree. However, one key difference in the various definitions is to what degree a Henry VIII clause can achieve that purpose by way of implication. Put another way, the question is to what extent can an empowering clause enable regulations to be made notwithstanding an Act of Parliament (or by way of implication) despite not enabling changes to be made to the text of the Act? It is this category of clause which have caused further issues, particularly in the preliminary task

³ Lord Rippon “Henry VIII Clauses” (1989) 10 Stat L Rev 205 at 205. Commonly referred to as the Statute of Proclamations.

⁴ Proclamations by the Crown Act 1539, 31 Hen 8 c 8.

of identifying whether a particular clause is a Henry VIII clause or not. Some issues with identification of Henry VIII clauses will be briefly addressed in this paper.⁵

The Legislation Design and Advisory Committee (LAC)⁶ Guidelines on Process and Content of Legislation define, although not expressly,⁷ such clauses as empowering provisions that authorise delegated legislation to “override, suspend or amend primary legislation”.⁸ Importantly, the definition includes the power for delegated legislation to “override” an Act and is not limited to a regulation-making power containing the words “amend” or “repeal”.

The New Zealand Regulations Review Committee (RRC) similarly defines the Henry VIII clause with the addition that the RRC’s approach to what amounts to a “Henry VIII clause” is broad. The RRC’s defines a “Henry VIII clause” as:⁹

a type of regulation-making power that enables primary legislation (ie, a statute) to be amended, suspended or overridden by regulation. The [RRC] has considered that a power to alter the effect or scope of legislation constitutes a Henry VIII clause, even if the power does not allow changes to the text of primary legislation.

Similar definitions are generally accepted in the United Kingdom as articulated by the United Kingdom House of Lords Delegated Power and Scrutiny Committee,¹⁰ and a helpful definition in the Australian context (again along the same lines) has been adopted by the Scrutiny of Legislation Committee of the Queensland Parliament.¹¹ The key

⁵ At Part IV(E).

⁶ The Legislation Design and Advisory Committee is responsible for the Guidelines discussed here, advising on the initial stages of developing legislation, and examining government Bills, among other things.

⁷ This is presumably to avoid using the term “Henry VIII” which can sometimes obscure people’s real concerns in respect of these clauses.

⁸ Legislation Design and Advisory Committee “Guidelines on Process and Content of Legislation: 2014 Edition” at [13.5].

⁹ Dean R Knight and Edward Clark *Regulations Review Committee Digest* (6th ed, New Zealand Centre for Public Law, 2016) at 106, citing Regulations Review Committee “Activities of the Regulations Review Committee in 2012” (19 March 2014) at 18.

¹⁰ House of Lords Delegated Powers Scrutiny Committee (HL 57 1992–1993) at [10].

¹¹ Department of the Premier and Cabinet *The Queensland Legislation Handbook: Governing Queensland* (4th ed, Queensland, 2014) at [7.3.3].

features between each of these definitions are held in common, including that a clause may have a ‘Henry VIII’ effect by way of implication.

These powers are typically exercised by way of a regulation-making power, which naturally leads to the question: what is a “regulation” and what does it mean to “regulate”? Regulation refers more generally to the implementation of rules in order to control or direct certain human behaviour and would include, for example, statutes. In a more specific sense the term “regulation” is variously defined in the Standing Orders of the House of Representatives,¹² the Legislation Act 2012,¹³ the Interpretation Act 1999,¹⁴ and the Regulations (Disallowance) Act 1989.¹⁵ These are more formal definitions of “regulation”,¹⁶ and typically involve the promulgation of an Order in Council by the Governor-General on the advice of a Minister and broadly includes the synonymous instruments titles “delegated legislation”, “secondary legislation” and “disallowable instruments”.¹⁷

In this paper the term “regulation” will be used to refer to the way in which a delegated power can be exercised under an Act whether by an Order in Council, or some other form of action. Given Henry VIII clauses are a subclass of regulatory instruments this paper will focus on those powers the exercise of which *in substance rather than form* amounts to an amendment, suspension or override of an Act of Parliament.¹⁸ Again, while this typically occurs by way of an Order in Council,¹⁹ a delegated power may be applied using what the Parliamentary Counsel Office describe as “other instruments”²⁰

¹² Standing Orders of the House of Representatives 2014, SO 3.

¹³ Section 38 defines “disallowable instruments” which includes “Order in Council, an instrument made by a Minister of the Crown, an “instrument that an Act requires to be published under this Act”, and “various resolutions of the House of Representatives. Section 39 of that Act also defines instruments that have “significant legislative effect”, which are to be treated as “disallowable instruments”.

¹⁴ Section 29.

¹⁵ Section 2.

¹⁶ For an excellent summary of these definitions, and their interrelationship, see Knight and Clark, above n 9, at 2—10. These definitions are particularly important for determining the ambit of the Regulations Review Committee’s ability to challenge delegated legislation.

¹⁷ This name is particularly from the perspective of the Regulations Review Committee as to what instruments it can seek to place before Parliament for criticism, a topic that is covered in greater depth below.

¹⁸ For the sake of clarity, “statute”, “Act”, and “primary legislation” will all be used synonymously. Similarly, “parent Act” refers to the Act that contains the relevant power.

¹⁹ See Phillip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at [26] and R Carter, J McHerron and R Malone *Subordinate Legislation in New Zealand* (LexisNexis, Wellington, 2013).

²⁰ These sorts of ‘codes’ and ‘rules’ vary in their legal effect. For example, many forms or ‘rules’ promulgated by the government are better thought of as ‘best practice’ or ‘soft law’ as they are either not legally enforceable, or do not have the same legal status as a regulation made under

which include land transport rules, civil aviation rules and other codes.²¹ Each of these types of instrument comes with its own particular advantages. The use of Henry VIII clauses and regulations more generally also offer significant benefits for law makers.

B The Benefits of Henry VIII Clauses

Many of the advantages of Henry VIII clauses are held in common with the general benefits of delegated legislation and it is important to review these first in order to understand the conceptually distinct benefits Henry VIII clauses. Turning to delegated legislation, these instruments have an array of benefits.²² First, they help to relieve the significant time pressures on Parliament which determines the key core legal framework and, importantly, the policy of a particular statute. Delegated legislation can then enable the government to fill in the gaps as to how that policy will be implemented.²³ Secondly, Parliament is discharged from dealing with technical aspects of a particular subject area. Parliament can free its time by enabling subject experts to implement the broader policy matters.²⁴

Thirdly, and more particularly in respect of Henry VIII clauses, large and complex reforms may give rise to unforeseen implementation issues. This may simply involve consequential adjustments to the language of statutes where the sheer number of Acts prohibits any real prospect of locating all changes in advance,²⁵ or in respect of future Acts where there may be an inconsistency.²⁶ A Henry VIII power that enables these sorts of amendments is relatively uncontroversial and often linked to a “sunset clause”

statute. See for example the Financial Markets Authority “Corporate Governance in New Zealand Principles and Guidelines: A handbook for directors, executives and advisers” (2014).
²¹ A list of these instruments can be found at Parliamentary Counsel Office “Other Instruments” <www.pco.parliament.govt.nz/other-instruments>.

²² Report of the Committee on Ministers’ Powers 1932, Cmnd 4060 [*The Donoughmore Report*]; adopted in Report of the Delegated Legislation Committee [1962] AJHR I18 [*Algie Committee*]. See also Phillip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at [26.3.3].

²³ See Phillip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at [26.3]. As an example, the Financial Markets Conduct Act 2013 is 384 pages, and the companion Financial Markets Conduct Regulations 2014 run to 547 pages. The Regulations contain a significant quantity of highly detailed and prescriptive matters necessary to the proper operation of the Act.

²⁴ *Algie Committee*, above n 22, at 6.

²⁵ David McGee *Parliamentary Practice in New Zealand* (Dunmore Publishing, Wellington, 2005) at 402.

²⁶ Richard Gordon “Why Henry VIII Clauses should be Consigned to the Dustbin of History” (Public Law Project, Conference Papers, November 2015), at [8]. See also Regulations Review Committee “Inquiry into the Resource Management (Transitional) Regulations 1994 and the Principles that Should Apply to the Use of Empowering Provisions Allowing Regulations to Override Primary Legislation During a Transitional Period” [1995] AJHR I 16C at 15.

where the power self-terminates typically on a set date or a fixed period of time after the Bill receives royal assent.²⁷ Accordingly, those matters may appropriately be updated or amended through subordinate instruments,²⁸ leaving Parliament to address central matters of policy.

Henry VIII clauses can be highly effective at achieving other relatively mechanical amendments, for example where they are used to “confer power to alter financial limits, to bring lists up to date, to make exceptions to the operation of a statute, or to make alterations of detail within a narrowly defined field.”²⁹ Delegated legislation may be used where there is a need for flexibility in the scheme (particularly for developing or experimental areas),³⁰ and in emergency circumstances where Parliament cannot be expected to provide sufficiently expedient law making.³¹ Henry VIII clauses can be particularly effective in both of these circumstances, although their use in this way is a relatively modern development.

C A Brief History of Administrative Power and Henry VIII Clauses in the United Kingdom

It is important to set out at this stage the background of Henry VIII clauses in the United Kingdom, the source of the modern Henry VIII clause in New Zealand. In the United Kingdom leaving aside Henry VIII himself,³² this focused around three key events: first, the passing of the Local Government Act 1888; secondly the publication of Lord Hewart’s book *The New Despotism*;³³ and, thirdly, the publication of the Donoughmore Report.³⁴ This period was marked with an expansion in administrative power which caused unrest due to Dicey’s conceptions of parliamentary sovereignty and rule of law being particularly influential at the time.

²⁷ Joseph, above n 19, at [15.4.3].

²⁸ Select Committee on Delegated Powers and Regulatory Reform “Henry VIII Powers to make Incidental, Consequential and Similar Provision” (11 December 2002, United Kingdom).

²⁹ CJ Boulton *Erskin May’s Treaties on the Law, Privileges, Proceedings and Usage of Parliament* (21st ed, Butterworth-Heinemann, United Kingdom, 1989) at 539.

³⁰ See below at Part IV(C).

³¹ For example, see the Canterbury Earthquake Recovery Act 2011, discussed below at Part IV(B).

³² In fact the Donoughmore Report actually cited the Statute of the Staple 1385 (Eng) as the earliest enactment delegating broad legislative powers of a general nature, well before King Henry VIII was born. However, at that time there was little distinction between statutes and ordinances.

³³ Gordon Hewart *The New Despotism* (Ernest Benn, United Kingdom, 1929).

³⁴ The Donoughmore Report, above n 22.

It should also be noted that this account of administrative power affecting individuals' rights in the United Kingdom follows one particular conception of the nature and history of executive power focused on a 'traditional' approach articulated largely by Dicey³⁵ and Montesquieu.³⁶ However, there are other philosophical approaches to this area, particularly prevalent in North America, influenced by John Rawls and John Stuart Mill.³⁷ This is particularly reflected in the sea change in administrative power that occurred there following the 1929 stock market crash.³⁸ The approach reflected in the North American jurisprudence shows a different path taken as to the nature and concerns of that power.

Turning to the first of the key United Kingdom events, the passing of the Local Government Act was significant for two key reasons. First, it constituted a major reform of the organisation and powers of local government. The Act established county councils and county borough councils – rather than municipal boroughs – with significant powers,³⁹ including powers once held by the quarter sessions of a regulatory nature.⁴⁰ This constituted a devolution towards local authorities and an expansion of administrative powers.⁴¹

The second reason the Act is significant is it contains the first 'modern' Henry VIII clause.⁴² Section 108(3) empowered the relevant ministers to:⁴³

³⁵ AV Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, Macmillan & Co, London, 1959).

³⁶ CL Montesquieu *De L'Esprit des Lois* (1748) Book 11 reproduced in SM Cahn (ed) *Classics of Modern Theory: Machiavelli to Mill* (Oxford University Press, New York, 1997).

³⁷ See John Rawls *The Law of Peoples with "The Idea of Public Reason Revisited"* (Harvard University Press, Cambridge, Massachusetts, 2001); and Dennis Thompson *John Stuart Mill and Representative Government* (Princeton University Press, New Jersey, 1976). See also Christopher Edley *Administrative Law: Rethinking Judicial Control of Bureaucracy* (Yale University Press, New Haven, 1990) at [1.1]–[2.4]; M Vile *Constitutionalism and the Separation of Powers* (2nd ed, Liberty Fund, Indianapolis, 1998); William Gwynn *The Meaning of Separation of Powers* (Tulane University, New Orleans, 1965); and David Espstein *The Political Theory of the Federalist* (University of Chicago Press, Chicago, 1984) for a North American approach.

³⁸ Keith Werhan *Principles of Administrative Law* (Thompson West, Saint Paul, Minnesota, 2008) at [1.5(c)].

³⁹ Encyclopædia Britannica "Borough: Legislative Area" <www.britannica.com/topic/borough>.

⁴⁰ Section 3 of the Act enumerates, for example, the making and levying of rates, borrowing money, various licensing powers, the division of the county into polling districts, with the catch-all of "[a]ny other business transferred by this Act" (s 3(xvi)).

⁴¹ See generally John Stanton *Democratic Sustainability in a New Era of Localism* (Routledge, Abingdon, 2014) at 63–73.

⁴² Dennis Morris "Henry VIII Clauses: Their birth, a late 20th century renaissance and a possible 21st century Metamorphosis" (The Loophole, March 2007) at 14.

⁴³ Local Government Act 1888 (UK), s 108(3).

... make such orders as appear to them necessary for bringing this Act into full operation as respects the council so applying, and such orders may modify any enactment in this or any other Act, whether general or local and personal, so far as may appear to the Board necessary for the said purpose.

The provision was passed with little or no debate. Despite clearly being a Henry VIII clause, given the significance and complexity of the reform it was deemed necessary to remedy inevitable defects.

The second key event was the publication of Lord Hewart's *The New Despotism*, in which the incumbent Chief Justice wrote a scathing attack on the significant proliferation in delegated instruments transferring significant powers to the executive.⁴⁴ Lord Hewart opined this was largely motivated by civil servants seeking extensive and arbitrary power for themselves, exercised through the relevant Ministers. The book proved influential and highlighted growing concerns at the ingress executive authority was making over powers typically reserved to Parliament.

Lord Hewart's book led to the third key event, the appointment of the Committee on Ministers' Powers which produced the celebrated Donoughmore Report in 1932.⁴⁵ At this stage there were "nine modern" instances of Henry VIII clauses in public Acts.⁴⁶ The Report, too, was critical of the way delegated powers had developed stating:⁴⁷

... the system of delegated legislation had been built up haphazard without plan or logic, and the extent and limits of legislation had been determined by accident and expediency and not upon any system.

⁴⁴ Hewart, above n 33, at 29.

⁴⁵ Named after the Committee's Chairman, the Earl of Donoughmore, although he retired from the position due to health reasons in 1931.

⁴⁶ CK Allen *Law in the Making* (7th ed, Oxford University Press, Oxford, 1964) at 589; and William Craies and Samuel Edgar *Craies on Statute Law* (6th ed, Sweet & Maxwell, London, 1963) at 293.

⁴⁷ At 30.

The report noted, however, that delegated legislation was inevitable in order to fill in the details of extensive and complex statutory regimes, and distanced itself from Lord Hewart's overheated rhetoric.⁴⁸ Many forms of delegated legislation were not considered to be objectionable, but Henry VIII clauses made the Committee anxious, a concern firmly placed in the separation of powers.⁴⁹

The timing of both Lord Hewart's book and the Donoughmore Report are important, even from a modern perspective. They came at a time when Dicey's views on, in particular, the separation of powers were particularly influential,⁵⁰ and the period immediately before, during and after the First World War which saw a significant surge in governmental activity including far greater quantities of regulatory instruments.⁵¹

As early as 1915 suspicion as to expanding administrative power was already being seen in the courts, notably in the decision of *Local Government Board v Arlidge*,⁵² albeit in the context of quasi-judicial powers. In that case, Mr Aldridge roundly failed in his appeal to the House of Lords in seeking vindication of natural rights. For many the decision was a "judicial withdrawal from effective control of departmental powers affecting individuals."⁵³ The decision was criticised in Lord Hewart's book,⁵⁴ and considered an "illustration of how the Rule of Law was endangered by the growth of administrative jurisdiction".⁵⁵ The case did not address a Henry VIII provision but illustrates the widely shared concerns of expanding administrative powers and judicial failure to meaningfully control it.

⁴⁸ At 4—7.

⁴⁹ The other "exceptional" instruments were those "instance of power to legislate on matters of principle", impose taxes, grant extensive powers to Ministers, and where Parliament in effect removes the ability for the courts to control the law.

⁵⁰ Despite Dicey having expressed his views nearly a half-century earlier.

⁵¹ DGT Williams "The Donoughmore Report in Retrospect" (1982) 60 Public Administration 273 at 274.

⁵² *Local Government Board v Arlidge* [1915] AC 120.

⁵³ Williams, above n 51, at 276. The decision is more thoroughly addressed in the seminal Report of the Committee on Administrative Tribunals and Enquiries (Cmnd 218, 1957). That report focused more on the executive's appropriation of quasi-judicial powers, while the focus of this paper is on delegated legislation giving quasi-legislative power (see Geoffrey Marshall "The Franks Report on Administrative Tribunals and Enquiries" (2007) 35(4) Public Administration 347).

⁵⁴ At 167. The decision was also criticised over 35 years later, when the position of the House of Lords was still ossified in William Robson *Justice and Administrative Law: A study of the British Constitution* (Stevens & Sons, London, 1951) at 538: "rules of natural justice were evolved in the nineteenth century, and they have been almost static since the *Arlidge Case*".

⁵⁵ Williams, above n 51, at 276.

In other respects, however, the English courts expressed greater willingness to challenge the ever increasing powers given to local authorities, which is possibly the result of the sheer frequency with which byelaws leading up to the First World War were scrutinised by the courts.⁵⁶ Fewer of these byelaws were challenged after the First World War at least in part because some of the more controversial matters were included in primary legislation.⁵⁷

While the powers of local authorities were historically an issue, scrutiny of the exercise of powers by central departments has not been nearly as frequently nor successfully challenged in the courts. It has been suggested the English courts were more reluctant to conclude statutory orders were ultra vires than to byelaws as an apparently “self-imposed limitation”.⁵⁸ This is important as Henry VIII empowered central government rather than local authorities. This was particularly clear where the empowering statute expressed that a regulation made under it ‘should have the effect as if enacted in this Act’. This phrase was held to be effective,⁵⁹ despite its obvious circularity.⁶⁰ New Zealand statutes historically also suffered from this oddity.⁶¹

Cecil Carr in 1921 commented that delegated legislation exceeded parliamentary legislation in volume, a factor which excluded realistic control by the courts of delegated legislation,⁶² partly due to the necessity of fast and easy law making during the First World War. While little was said in response to the Donoughmore Report it is highly

⁵⁶ Notably *Kruse v Johnson* (1898) 2 QB 91. See also the following cases where particularly controversial matters gave rise to the claims: *Stiles v Galinski* (1904) 1 KB 615; *Nokes v Corporation of Islington* (1904) 1 KB 610; *Repton School Governors v Repton RDC* (1918) 2 KB 133; and *Attorney-General v Denby* (1925) Ch 596.

⁵⁷ Williams, above n 51, at 277.

⁵⁸ At 278.

⁵⁹ *Institute of Patent Agents v Lockwood* (1894) AC 347.

⁶⁰ This ossification was somewhat undone, finally, in 1975 in *Hoffman – La Roche & Co v Secretary of State for Trade and Industry* (1975) AC 295 by Lord Diplock.

⁶¹ Dennis Charles Pearce *Delegated Legislation in Australia and New Zealand* (Butterworths, Sydney, 1977) at [657]. This was so particularly where the power contained other safeguards: Williams, above n 51, at 283; and Cecil Carr *Delegated Legislation: three lectures* (Cambridge University Press, Cambridge, 1921) at 2.

⁶² Cecil Carr *Delegated Legislation: three lectures* (Cambridge University Press, Cambridge, 1921) at 2.

likely it did influence officials' conduct.⁶³ Nevertheless, from the Second World War until 1971 Henry VIII clauses very infrequently arose.⁶⁴

Their use then saw a massive resurgence during the Thatcher era, from 1979 to 1990, perhaps ironically given her rhetoric on “getting government of peoples’ backs” and “rolling back” the state.⁶⁵ This has been attributed not to the Prime Minister herself but “the influence of civil servants, who found it convenient to circumvent the need to obtain Parliamentary approval for subsequent amendments to the statutes concerned”,⁶⁶ redolent of a similar pathology identified by Lord Hewart.

Another possible reason for the resurgence was the European Communities Act 1972, the instrument by which the United Kingdom joined the European Union, and has been one of the most prolific sources of Henry VIII clauses in the United Kingdom. Section 2 relevantly provides:⁶⁷

2 General implementation of Treaties.

...

- (2) Subject to Schedule 2 to this Act, at any time after its passing Her Majesty may by Order in Council, and any designated Minister or department may by order, rules, regulations or scheme, make provision—
- (a) for the purpose of implementing any EU obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or

⁶³ Williams, above n 51, at 282. See also Carleton Kemp Allen *Law and orders, an inquiry into the nature and scope of delegated legislation and executive powers in England* (Stevens & Sons, London, 1945) at 43.

⁶⁴ Interestingly, during World War Two the Emergency Powers (Defence) Act 1939 did not contain a Henry VIII clause, nor did the Defence of the Realm Acts 1914 during the First World War.

⁶⁵ John Campbell *The Iron Lady Margaret Thatcher: From Grocer's Daughter to Iron Lady* (Vintage, London, 2012) at 47.

⁶⁶ Morris, above n 42, at 14.

⁶⁷ Emphasis added.

- (b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force ... ;

and in the exercise of any statutory power or duty, including any power to give directions *or to legislate by means of orders, rules, regulations or other subordinate instrument*, the person entrusted with the power or duty *may* have regard to the objects of the EU ...

...

This enables Acts to be amended or repealed, even though neither of those words are expressly used, and indeed that is typically how it is exercised. It constitutes quite an incredible power. Under subsection (2) the person “entrusted” with the relevant power “may” rather than “must” have regard to the objects of the European Union. This would render a challenge under judicial review particularly difficult. The Irish equivalent provides a similar power, although it is more explicit in this regard.⁶⁸

The “Brexit” vote naturally leaves the future of the Act in doubt. Nevertheless, the frequent use of the Act has influenced the regulatory landscape there. One survey suggests 61 statutes between 1989 and 1994 contained provisions enabling amendment or repeal of statute by regulation.⁶⁹ Only 18 of those were limited to the less concerning variation of particular sums or percentages. The strength of the whip in the United Kingdom has also been suggested as a possible reason why Henry VIII clauses are passed with relative ease,⁷⁰ an issue more pronounced under a first past the post system.⁷¹

It is relatively clear Henry VIII clauses are part of the common vernacular of legislators in the United Kingdom. There are several modern examples demonstrating their

⁶⁸ European Communities Act 1972 (Ireland). This perhaps difficult to reconcile this with the approach taken by the Supreme Court in Ireland in *Mulcreavy v The Minister for Environment* [2004] 1 IR 72. See below at footnote 101.

⁶⁹ Morris, above n 42, at 23.

⁷⁰ At 20—23.

⁷¹ Joseph, above n 19, at [8.4.1(2)].

significance.⁷² Perhaps the most substantial of these in recent times is the Legislative and Regulatory Reform Act 2006. Section 1 states:

1 Power to remove or reduce burdens

- (1) A Minister of the Crown may by order under this section make any provision which he considers would serve the purpose in subsection (2).
- (2) That purpose is removing or reducing any burden, or the overall burdens, resulting directly or indirectly for any person from any legislation.
- (3) In this section “burden” means any of the following—
 - (a) a financial cost;
 - (b) an administrative inconvenience;
 - (c) an obstacle to efficiency, productivity or profitability; or
 - (d) a sanction, criminal or otherwise, which affects the carrying on of any lawful activity.

...

While it is subject to several, complex,⁷³ constrains⁷⁴ it provoked widespread criticism and is truly of extraordinary breadth.⁷⁵ The Act was justified on the basis it would reduce time pressures on Parliament.⁷⁶ This rationalisation is ironic in the light of the fact it is Parliament’s purpose to *occupy its time with these sorts of questions*. It enables the override of other Acts of Parliament and it takes little imagination to see how it may

⁷² Other significant examples can be found in s 108(9) of the Children Act 1989, the Child Support Act 1991, and paragraph 3 of Schedule 11 to the Railways Act 1993. The Children Act example is particularly worrying as its application is not limited to the purpose (and therefore policy) of the Act, but rather, any “consequence of any provision” of the Act. For other examples see also the Water Act 1989, s 191; the Environmental Protection Act 1990, s 162(4); the Water Companies Act 1991, s 14; the Museums and Galleries Act 1992, s 6(6); and the Local Government Finance Act 1992, s 3(6).

⁷³ Morris, above n 42, at 58.

⁷⁴ Legislative and Regulatory Reform Act 2006, ss 3—19.

⁷⁵ JR Spencer, Sir John Baker QC, David Feldman, Christopher Forsyth, David Ibbeston and Sir David Williams QC to *The Times* (16 February 2006).

⁷⁶ Morris, above n 42, at 59.

affect a new policy direction in any given Act prescribing a “burden”. It is difficult to see how this sort of a clause would ever be justifiable in the absence of a specific issue or event in mind, for example as an emergency response mechanism.

D Conclusion

Henry VIII clauses have been subject to significant criticism in the United Kingdom and in many of the more notorious examples rightly so. This criticism has come from highly influential figures, too, notably Richard Gordon QC,⁷⁷ Lord Rippon,⁷⁸ and frequently by members of the House of Lords in debate.⁷⁹ The use of such clauses in the United Kingdom has exploded in recent years, reaching a height during the passage of the Deregulation and Contracting Out Act 1994 and “[m]ore recently, as many as several hundred such clauses have been passed in a single Parliamentary session.”⁸⁰ The next section will look at the degree to which these concerns are held in common with New Zealand.

III Why are Henry VIII Clauses Concerning?

Some of the concerns we have in respect of Henry VIII clauses have already been briefly explored above. The historical narrative reveals several key, interrelated, dangers of using these clauses. The first is they challenge classical, Dicean, conceptions of parliamentary sovereignty and notions of the separation of powers.⁸¹ The second concern, which exacerbates the first, is that by virtue of the nature of the United Kingdom’s parliamentary procedures, regulations are not easily challengeable in Parliament. Consequently, there is a distinct lack of oversight of the exercise of these powers.⁸²

Thirdly, repeated use of Henry VIII clauses may set a dangerous precedent whereby they become the rule rather than the exception, thereby exacerbating the first two concerns.

⁷⁷ Gordon, above n 26.

⁷⁸ Rippon, above n 3.

⁷⁹ See, for example, Lord Simon and, in particular, Earl Russell in the debate on the Child Support Act 1991 discussed below and at 351 HL Debates, Columns 581—583, 22 July 1991.

⁸⁰ Gordon, above n 26, at [6].

⁸¹ Separation of powers gained particular sway following the writings of Montesquieu. See particularly Montesquieu, above n 26. As to its modern significance, compare with WA Robson *Justice and Administrative Law* (3rd ed, Stevens & Sons, London, 1951) at 16; and G Marshall *Constitutional Theory* (Clarendon Press, Oxford, 1971) at 124.

⁸² For example, in respect of the Child Support Act 1991 provision which in fact prevents Parliament from reviewing orders made under it.

The fourth concern is the most fundamental and goes to the heart of the first two. Some Henry VIII clauses have the ability to enable the production of new policy without Parliament's scrutiny.⁸³ The extensive procedures for passing primary legislation are importantly put in place to ensure there is ample opportunity for public and political criticism.⁸⁴

New Zealand and the United Kingdom are not alone in having to deal with Henry VIII clauses,⁸⁵ so what is it about their use in New Zealand which is so troubling? This section discusses the concerns raised in the United Kingdom context and assess whether they are applicable or comparable to New Zealand's constitutional arrangements. The final part of this section assess New Zealand's interaction with and suspicion of executive power and how that has perhaps influenced the way we think about Henry VIII clauses and fed into our fears on a more local level. This section concludes that the unifying concept in our fears as to Henry VIII clauses and executive power more generally is the promulgation of policy without the necessary scrutiny it should receive, but despite this the endemic use of Henry VIII clauses in the United Kingdom is not reflected in New Zealand.

A Infringing Parliamentary Sovereignty and the Separation of Powers

Early uses of Henry VIII clauses arose at a time when Diceyan views on Parliamentary sovereignty were still highly influential,⁸⁶ as they are now. Under a system of Parliamentary sovereignty:⁸⁷

Parliament enjoys unlimited and illimitable powers of legislation. Parliament's word can be neither judicially invalidated nor controlled by earlier enactment. Parliament's collective will, duly expressed, *is* law.

⁸³ Macindoe and Dalziel, above n 1.

⁸⁴ Joseph, above n 19, at [11.6.2].

⁸⁵ A fully comparative analysis with these jurisdictions is beyond the scope of this paper. See for example, in British Columbia, the Hydro and Power Authority Act 1996, s 52; in Australia, the Administrative Arrangements Act 1987 (empowering Governor-General to make amendments to any Act by regulation if necessary or convenient as a result of specified new administrative arrangements); in Guernsey, the Control of Intoxicating Liquor (Enabling Provisions) (Guernsey) Law 2006, s 3(3).

⁸⁶ Williams, above n 51, at 274.

⁸⁷ Joseph, above n 19, at [15.1] (emphasis in original).

Following the significant turmoil and civil war in the 17th century which secured a sovereign Parliament,⁸⁸ the powers of the English Parliament were jealously guarded and have been since. Despite Dicey's views⁸⁹ having been somewhat diluted,⁹⁰ parliamentary sovereignty is still a key feature of our constitutional landscape. Consequently, delegating the power to override or amend statutes, the highest form of law,⁹¹ may appear contrary to the doctrine of parliamentary sovereignty. This is also informed by the separation of powers in which various powers of 'government' are separated into legislative, judicial and executive powers in order to avoid any one branch being too powerful.⁹²

A general objection that these clauses on the basis of parliamentary sovereignty was rejected by the Queen's Bench in *Thoburn v Sutherland City Council Hunt* where Laws LJ, while accepting Parliament cannot bind its successors, stated:⁹³

A future Parliament may legislate as it chooses in face of the clause. It may pass an Act which stipulates that its terms are not to be touched by the Henry VIII power. Such a provision would be perfectly valid.

The New Zealand courts have not grappled with these clauses to the same degree but have had some cause to discuss them. In *Accident Compensation Corporation v Donaldson* the Court of Appeal noted s 159(2) of the Accident Rehabilitation and Compensation Insurance Act 1992, which enabled the Minister to give the Corporation directions for the purpose of ensuring compliance with government policy, was "similar

⁸⁸ Joseph, above n 19, at [15.2.2].

⁸⁹ AV Dicey, above n 35.

⁹⁰ See for example Joseph, above n 19, at [15.5]. For an earlier example of what might be considered a chipping away of Parliamentary sovereignty, see *Bonham's Case* (1610) 8 Co Rep 113b, 77 ER 646, n C and Sir William Blackstone *Commentaries on the Laws of England* (16th ed, Cadell & Butterworth, London, 1825) vol 1.

⁹¹ Joseph, above n 19, at [8.2.1(1)].

⁹² At [8.1].

⁹³ *Thoburn v Sunderland City Council Hunt* [2003] QB 151 at [51].

in effect to a Henry VIII clause”.⁹⁴ The Court then stated “[a]lthough such clauses are sometimes used in exceptional circumstances, they are, in principle, undesirable”.⁹⁵

Similar comments were made in *North Shore City Council v Local Government Commission*, although it was not the focus of the case, that:⁹⁶

Such a provision cannot permit the modification of a statutory provision without very clear enabling words. Cases such as *McKiernon v Secretary for State and Social Security*⁹⁷ ... and *R v Secretary of State for Social Security, Ex Parte Britnell*⁹⁸ ... indicate that, whilst the duty of the Courts is to give effect to the will of Parliament, a delegation to the Executive of power to modify primary legislation must be seen as an exceptional course; if there is any doubt about the scope of such a power or whether it has been exercised, it should be resolved by a restrictive approach.

The New Zealand Courts are, therefore, likely to take an understandably strict approach to the use of Henry VIII powers to avoid giving a “blank cheque” for approving executive action in advance.⁹⁹ However, “Parliament *may* delegate the power to amend or even repeal primary legislation by regulation”,¹⁰⁰ despite the lingering constitutional concerns. This is unlike the approach taken in Ireland where Henry VIII clauses are constitutionally repugnant in the light of the Constitution of Ireland.¹⁰¹

⁹⁴ *Accident Compensation Corporation v Donaldson* [2009] NZCA 167, [2009] BCL 424 at [26].

⁹⁵ At [26], referring the Legislation Advisory Committee *Guidelines on Process and Content of Legislation*, above n 8.

⁹⁶ *North Shore City Council v Local Government Commission* HC Auckland M 1197-96, April 28 1993 at 11 (footnotes added).

⁹⁷ *McKiernon v Secretary for State and Social Security* (1990) Admin LR 133.

⁹⁸ *R v Secretary of State for Social Security, Ex Parte Britnell* (1991) 1 WLR 198, 204.

⁹⁹ *Reade v Smith* [1959] NZLR 996 (CA) at 1003.

¹⁰⁰ McGee, above n 25, at 402 (emphasis added).

¹⁰¹ In *Mulcreavy v The Minister for Environment* [2004] 1 IR 72 Keane CJ after citing art 15.2.10 of the Constitution of Ireland stated at 82 “It is well established that the executive role assigned to the Oireachtas [the Legislature of Ireland] in the making of laws by this Article does not preclude the Oireachtas from empowering Ministers or other bodies to make regulations for the purpose of carrying into effect the principles and policies of the parent legislation. ... But it is also clear that such delegated legislation cannot make, repeal or amend any law and that, to the extent that the parent Act purports to confer such a power, *it will be invalid having regard to the provisions of the Constitution*” (emphasis added). See also *Cooke v Walshe* [1984] IR 710; *Harvey v The Minister for Social Welfare* [1990] 2 IR 232; and *Cityview Press Ltd v An Chomairle Oliúna* [1908] IR 381.

New Zealand’s LAC Guidelines acknowledge there may be “*rare* cases where power of this kind is needed”,¹⁰² although it does not indicate what these circumstances might be. Certainly, the executive should not be permitted free reign over any statute as it sees fit.¹⁰³ Nevertheless there are some circumstances where such clauses are desirable as has already been explored.

The RRC has expressed its concern regarding Henry VIII clauses in no small part due to an infringement of Parliamentary sovereignty:¹⁰⁴

As a matter of principle, [Henry VIII clauses] are undesirable because they give the government of the day the power to override the will of Parliament
...

In circumstances where Parliament has expressed a clear view that it is its “will” the executive in fact be permitted to do a particular thing (including the amendment of primary legislation) it would be counterintuitive to label an exercise of that power as contrary to the “will of Parliament”. However, the question may be more difficult with respect to powers enabling modification of Acts passed after the empowering.¹⁰⁵

While a Henry VIII should always be regarded as constitutionally significant, where the power engages mechanical or consequential amendments it is difficult to identify just how Parliament’s sovereignty is really being infringed. This is particularly so where Parliament has expressly delegated the ability to make that change, and where Parliament continues to be free to legislate in the face of that power, or remove it altogether¹⁰⁶ along with any regulations produced under it.¹⁰⁷ What ought to be assessed in any given situation is whether, in substance rather than form, the power truly takes something away from Parliament.

¹⁰² Legislation Design and Advisory Committee, above n 8, at [13.5] (emphasis added).

¹⁰³ Issues of construction will be dealt with in greater depth in a longer follow-up paper.

¹⁰⁴ Regulations Review Committee Investigation into the Road User Charges (Transitional Matters) Regulations 2012 (13 November 2012) at 3, cited in Knight and Clark, above n 9, at 30.

¹⁰⁵ On the doctrine of implied repeal see Joseph, above n 19, at [15.4.6].

¹⁰⁶ As noted in *Thoburn v Sunderland City Council* [2003] QB 151 at [50] and [51].

¹⁰⁷ On parliamentary procedures for annulling or amending regulations see below at Part III(B).

B A Lack of Checks and Balances

One of Lord Hewart's principal criticisms of the growth of delegated legislation was that constitutional checks were becoming inadequate to control the use and expansion of delegated powers.¹⁰⁸ Many of the modern criticisms in the United Kingdom as to Henry VIII clauses share these concerns. This section argues these concerns should not be equally present in New Zealand due to stronger procedural protections.

In the United Kingdom, whether an Act will be subject to any parliamentary procedure is set out in the parent Act. Many statutory instruments are not subject to any parliamentary procedures. Where the parent Act prescribes that statutory instruments be laid before the House of Commons,¹⁰⁹ the instrument will typically be subject to one of two procedures. The first is a "negative procedure" where the instrument will come into effect on the date stated in the instrument *unless* annulled by either House passing a motion calling for the annulment within a particular time.¹¹⁰ The House of Lords most recently successfully motioned to annul the Greater London Authority Elections Rules in 2000.¹¹¹ The House of Commons, however, last annulled a statutory instrument on 24 October 1979.¹¹² This procedure rarely results in annulment.

Less commonly used is the "affirmative procedure",¹¹³ and requires the instrument receive Parliament's approval *before* it can come into force. The last time an instrument failed to receive affirmative approval by Resolution of the House of Commons was in November 1969.¹¹⁴ It is not necessarily problematic that the procedures rarely result in regulations not coming into force provided Parliament has had the opportunity to scrutinise the instrument. However, other than in "extremely rare instances"¹¹⁵ where the relevant parent Act provides for it, instruments may not be amended by either house.

¹⁰⁸ Williams, above n 51, at 278.

¹⁰⁹ Under House of Commons SO 159.

¹¹⁰ Usually 40 days. This is often referred to as "prayer".

¹¹¹ Greater London Authority Elections Rules (SI 2000/208).

¹¹² Annuling the Paraffin (Maximum Retail Prices) (Revocation) Order 1979, SI 1979/797.

¹¹³ Constituting approximately 10% of instruments subject to Parliamentary procedures: House of Commons "Statutory Instruments: House of Commons Information Office Fact Sheet" (May 2008) at 5.

¹¹⁴ The House of Commons agreed to motions that the draft Parliamentary Constituencies (England) Order 1969, the draft Parliamentary Constituencies (Wales) Order 1969, the Parliamentary Constituencies (Scotland) Order 1969, and the draft Parliamentary Constituencies (Northern Ireland) Order 1969 be "not approved".

¹¹⁵ House of Commons "Statutory Instruments: House of Commons Information Office Fact Sheet" (May 2008) at 5.

In respect of Henry VIII clauses The Delegated Powers and Regulatory Reform Committee recently stated there need not necessarily be an affirmative procedure, and any alternative procedure merely requires a “full explanation giving reasons for choosing that procedure”.¹¹⁶

This is in distinction to the New Zealand Parliament which has comparably significant powers including affirmative procedures, to disallow and, importantly, amend regulations.¹¹⁷ The South Australian¹¹⁸ and Hong Kong¹¹⁹ legislatures also have the power to amend statutory instruments. In New Zealand, the RRC plays a particularly important role in overseeing Parliament in this respect.¹²⁰ The RRC was established in 1985 and is a bipartisan entity which,¹²¹ by convention, is chaired by a member of the opposition.¹²² The Committee may bring regulations to the attention of the House on any of nine grounds.¹²³ The Committee has also on several occasions written to select committees raising concerns a proposed provision in a Bill amounts to an impermissible Henry VIII clause.¹²⁴

The RRC may give notice of a motion to disallow any regulation. If Parliament fails to dispose of the motion within 21 sitting days the regulation is deemed to have been

¹¹⁶ House of Lords Delegated Powers and Regulatory Reform Committee “Guidance for Departments on the role and requirements of the Committee” (July 2014) at [35]. See also House of Lords Select Committee on Delegated Powers and Regulatory Reform “Special Report on Henry VIII Powers to make Incidental, Consequential and Similar Provision” (3rd Report, Session 2002—2003, HL Paper 21); and Joint Committee on Conventions “Conventions on the relationship between the two Houses of Parliament” (HC1212/HL, October 2006) at 2005—2006.

¹¹⁷ Formerly s 5 of the Regulations (Disallowance) Act 1989.

¹¹⁸ See House of Representatives Practice “10 – Legislation” (6th ed, online edition) <www.aph.gov.au/About_Parliament>. See also DC Pearce and S Argument *Delegated Legislation in Australia* (3rd ed, Butterworths, Sydney, 2005) at 14—15. Australia, like Ireland, is a less helpful comparator on the basis that it operates under a written constitution and primary and secondary legislation is contestable on quite different bases. However, the High Court addressed a Henry VIII clause in *Adco Constructions Pty Ltd v Goudappel* [2014] HCA 18.

¹¹⁹ Interpretation and General Clauses Ordinance 1966. For a very helpful summary of these powers, and a comparison with those of the United Kingdom, see the Subcommittee to Study Issues Relating to the Power of the Legislative Council to Amend Subsidiary Legislation “Power of Legislature to Amend Subsidiary Legislation – Differences between the Parliament of the United Kingdom and the Hong Kong Legislature” (LC Paper No CB(2) 1974/10-11(02)).

¹²⁰ See generally Joseph, above n 19, at [11.7.5(3)].

¹²¹ Constituted under the Standing Orders of the House of Representatives 2011, SO 181(1)(b).

¹²² Although it’s current membership has a National Party majority (David Cunliffe, Chairperson (Labour Party), Andrew Bayly, Deputy-Chairperson (National Party), Chris Bishop (National Party), Chester Burrows (National Party), and David Parker (Labour Party).

¹²³ Set out in the Standing Orders of the House of Representative 2011, SO 314.

¹²⁴ For an extensive list, see Dean R Knight and Edward Clark *Regulations Review Committee Digest* (6th ed, New Zealand Centre for Public Law, 2016) at 29—31.

disallowed.¹²⁵ Additionally, the House may by resolution disallow any regulations (or provisions of regulations),¹²⁶ or by resolution *amend* or revoke any regulations and substitute it with other regulations.¹²⁷

The Standing Orders place some limitations on these procedures. For example, a motion to disallow regulations under s 42 of the Legislation Act 2012 is a negative procedure, not unlike that in the United Kingdom, and which if not disposed of by the House within the allocated time will have no effect.¹²⁸ The Regulation Review Committee's 21-day disallowance mechanism is a particularly pertinent one, but prior to 2013 had been invoked only six times. The RRC argues that, like the court's ability to declare a regulation *ultra vires*, its power lies in the threat of exercise and "ensures that a Committee's views are taken seriously".¹²⁹ Since 2013 the disallowance mechanism has resulted in the disallowance of three regulations.¹³⁰

The United Kingdom Parliament has a plethora of committees which review delegated instruments, and in some instances has the ability to draw regulations to the special attention of either or both Houses of Parliament. Their powers are narrow, though, than those of the RRC.¹³¹ Perhaps most interesting is the Secondary Legislation Scrutiny Committee¹³² which is not restricted to reviewing technical drafting aspects of statutory instruments. It is able to draw either House's attention to any instrument on the basis that "it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House".¹³³ From the period of 2003 to 2015 the Committee

¹²⁵ Legislation Act 2012, s 43, formerly the Regulations (Disallowance) Act 1989, s 6.

¹²⁶ Legislation Act 2012, s 42, formerly the Regulations (Disallowance) Act 1989, s 5.

¹²⁷ Legislation Act 2012, s 46, formerly the Regulations (Disallowance) Act 1989, s 9(1).

¹²⁸ Standing Orders of the House of Representatives 2014, SO 323.

¹²⁹ Regulations Review Committee "Proposals for a Regulations Bill" [1987] AJHR I 16B, at 36.

¹³⁰ Contained in the Road User Charges (Transitional Matters) Regulations 2012. The mechanism operated by way of a lapse of the 21 sitting day threshold. It was not clear why this was so at the time, but a latter Committee report suggested the relevant minister had been given advice, but no House time had been set aside to debate the motion (Regulations Review Committee Investigation into the Road User Charges (Transitional Exemption for Certain Farmers' Vehicles) Regulations 2013 (12 August 2013) at 9—11. See also Dean R Knight and Edward Clark *Regulations Review Committee Digest* (6th ed, New Zealand Centre for Public Law, 2016) at 17—19.

¹³¹ The Joint Committee on Statutory Instruments (Standing Orders of the House of Commons, SO 151, appearing also in the Standing Orders of the House of Lords, SO 74), the Select Committee on Statutory Instruments (House of Commons), the Delegated Powers and Regulatory Reform Select Committee (House of Lords), and the Secondary Legislation Scrutiny Committee

¹³² Formerly known as the Merits of Statutory Instruments Committee.

¹³³ Secondary Legislation Scrutiny Committee "Guidance for Departments on Statutory Instruments" at 2. For the entire remit of the Committee see Parliament.UK "Lords Select Committee: Terms of Reference" <<http://www.parliament.uk/business/committees/committees-a-z/lords-select>>.

scrutinised 11,603 instruments and brought 718 to the attention of the House.¹³⁴ This Committee does not have the RRC’s disallowance procedure, though. Furthermore, in New Zealand, the subject select committees are able to initiate “inquiries”¹³⁵ into matters related to their respective areas.¹³⁶

By way of example as to the differences between the United Kingdom and New Zealand parliamentary controls, the Child Support Act 1991 (UK) contained a particularly troubling clause. Sections 56(2) and (4) empower the Secretary of State to, first, set the date on which the Act is to come into force by way of Order, and secondly, in making that Order to make “such adaptations or modifications” to “any provision in this Act” and “any provision of any other enactment ... as appear to him to be necessary or expedient”.

When the Bill returned to the House of Lords, Earl Russell, supported by Lord Simon, moved a motion that the amendment be removed and stated:¹³⁷

When I read it, it caused me a good deal of surprise. The parentage appears to me to be by Henry VIII out of Humpty Dumpty. Even in these permissive days, I have some doubt whether that is a legitimate parentage. I have no objection to the stated purpose of the clause as it is set out in the Notes on Commons Amendments. ...

I have no problem with that. I want to know why another place [the House of Commons] has found it necessary to use such sweeping and arbitrary words to bring that provision into effect.

In dealing with the Executive, there are two duties which rest on Parliament. There is a duty of scrutiny, and there is a duty of control. Until I hear the reply, I am engaged simply on the duty of scrutiny. I want to know why these powers need to be so sweeping. ...

...

¹³⁴ Secondary Legislation Scrutiny Committee “Secondary Legislation Scrutiny Committee of the House of Lords: Historical Note” (May 2015).

¹³⁵ A more formal process than a “briefing”: [2002-2005] AJHR 1.18B at 28.

¹³⁶ Standing Orders of the House of Representatives 2014, SO 190(2). See also McGee, above n 25, at 238—239.

¹³⁷ 351 HL Debates, Column 581, 22 July 1991.

The s 58 power is clearly a Henry VIII clause but is not even subject to even the affirmative resolution procedure which, importantly, would have necessitated debate on an exercise of the power. Lord Mackay was of the opinion no affirmative resolution procedure was necessary on the basis s 58 caters for “supplementary arrangements in a commencement order”,¹³⁸ and was of the opinion “the negative procedure is appropriate in the circumstances”. However, s 52(3) provides that orders made under s 58 are not subject to annulment either, and so is not even subject to the negative procedure.

While these provisions may be necessary, proper balancing between protecting parliamentary sovereignty with executive efficiency is necessary.¹³⁹ Had the same provision arisen in a New Zealand bill, first, the RRC would almost certainly have brought the clause to the attention of the relevant select committee, and it is likely the Chair Person would also have raised the matter during debate in the House. Additionally, any exercise of that power would be comparatively easily brought to the House’s attention, either by a Member of Parliament or the RRC, with the option of changing the text of the regulation, or removing it altogether.

The other key factor that may go a long way to ensuring there are sufficient protections around a *particular* Henry VIII power is the extent of the safeguards included in the provision itself. This rightly varies depending on the nature of the power. For example, the safeguards in the very broad Henry VIII power in the Canterbury Earthquake Recovery Act 2011¹⁴⁰ contained extensive measures including the establishment of a panel for reviewing draft Orders under the Act,¹⁴¹ The Panel handed down 33 decisions on proposed Orders.¹⁴² Whether the safeguards go far enough in any particular case will depend on the nature of the power in the circumstances.

Two further aspects of New Zealand’s constitutional framework may, in theory, indicate a greater degree of constitutional protection than that offered in the United Kingdom.

¹³⁸ 531 HL Debates, Column 585, 22 July 1991.

¹³⁹ In New Zealand see Legislation Design and Advisory Committee, above n 8, at [13.5].

¹⁴⁰ Canterbury Earthquake Recovery Act 2011, s 71, based on the Canterbury Earthquake Response and Recovery Act 2010, s 6.

¹⁴¹ Sections 72 and 73. The Convenor of the Panel was Sir John Hasnen, former High Court judge, and the panel included several other distinguished individuals including Ms Sarah Dawson, Lester Chisholm (former High Court Judge) and John Hassan (Environment Court Judge).

¹⁴² Canterbury Earthquake Recovery Review Panel “All Decisions of the Canterbury Earthquake Recovery Review Panel”.

The first is the House of Commons is still elected by first past the post, while New Zealand uses the mixed-member proportional voting.¹⁴³ This should, in theory, result in a greater mix of political parties and that government will usually be formed by way of a coalition agreement,¹⁴⁴ resulting not only in a greater degree of ministerial scrutiny but also a softening of the Whip dynamic.¹⁴⁵ Under MMP, “[a]ll legislative policy is contestable”.¹⁴⁶ These theoretical ends may not necessarily have been achieved as, for example, the National/New Zealand First coalition¹⁴⁷ operated a one seat majority and pushed through its shared legislative agenda with little opposition resistance.¹⁴⁸

The second factor is New Zealand’s unicameral Parliamentary structure. This has a mixed impact on constitutional protections. On the one hand, a unicameral parliament generally enables easier passage of Bills than a bicameral Parliament. This may in fact enable a Henry VIII clause to be more easily enacted. However, on the other hand, the ease with which laws can be amended may mean there is less of a need to include a Henry VIII clause at all. If it is correct that civil servants in the United Kingdom were the protagonists for the expansive use of Henry VIII clauses in the Thatcher era,¹⁴⁹ those difficulties are far less pronounced under New Zealand’s unicameral Parliament.

Consequently, in New Zealand, we can be less worried than the United Kingdom about an absence of constitutional checks and balances. Not only can any Member of Parliament bring a motion to disallow a regulation, but the Regulation Review Committee’s power is a negative one meaning it need not even be addressed in order for a regulation to lapse. Comments made in the United Kingdom that Henry VIII clauses

¹⁴³ Joseph, above n 19, at [11.9].

¹⁴⁴ See further A McRobie “The electoral system” in PA Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995).

¹⁴⁵ Report of the Royal Commission on the Electoral System *Towards a Better Democracy* (Government Printer, 1986) at 26. See also K Jackson and A McRobie *New Zealand Adopts Proportional Representation* (Ashgate, 1998); and EP Aimer *The Future of Party System* in R Miller (ed) *New Zealand Politics in Transition* (Oxford University Press, Auckland, 1997) 186.

¹⁴⁶ Joseph, above n 19, at [8.4.1(2)].

¹⁴⁷ Lasting from 1996—1998.

¹⁴⁸ Andrew P Stockley “What difference does proportional representation make?” (2004) 15 PLR 121 at 130. See also B Grofman and A Lijphart (eds) *Electoral Laws and their Consequences* (Agathon Press, New York, 1986) at 121; Mai Chen “The introduction of mixed-member proportional representation in New Zealand – implications for lawyers” (1994) 5 PLR 104 at 104; and Fiona Barker and Elizabeth McLeay “How Much Change? An Analysis of the Initial Impact of Proportional Representation on the New Zealand Parliamentary Party System” (2000) 6(2) *Party Politics* 131.

¹⁴⁹ As suggested in Hewart, above n 33; and in Morris, above n 42, at 14.

are counter-democratic, and function to “unduly fetter parliamentary scrutiny”¹⁵⁰ are therefore less applicable in New Zealand.

C Normalising Henry VIII Clauses and the Snowball Effect

A further concern we may have is to avoid the risk that Henry VIII clauses become a generally accepted design option as opposed to an exception. This was painfully clear in the debate on the United Kingdom Companies Act 2006 which contains significant Henry VIII powers. In debate, Lord Young stated:¹⁵¹

Similar order making powers are contained in section 449(1B) of the Companies Act 1985, section 180(3) of the Financial Services Act 1986, and section 84(2) of the Banking Act 1987. These order making powers are not novel, *they are part of the accepted form.*

Otherwise narrow powers may act as a sort of ‘gateway drug’ for overzealous or, more likely, misguided politicians acting in good faith transforming their role over time from executive administrators to legislators through the augmentation of Henry VIII clauses. The change to mixed-member proportional representation will do some work to ameliorate that risk given the need for cross-party support, but it is certainly not absent.

Australia has also seen a gradual increase in these powers, with Queensland’s Henry VIII clauses outnumbering the United Kingdom’s in the 1930s.¹⁵² This is illustrated by a sample of three editions of *Delegated Legislation in Australian and New Zealand* where, in the first edition, Dennis Pearce stated in 1977:¹⁵³

¹⁵⁰ Gordon, above n 26, at [10].

¹⁵¹ Quoted in Rippon, above n 3, at 206 (emphasis added).

¹⁵² TP Fry *Australian Disregard of the Doctrine of the Separation of Powers* (1933) 5(4) Rocky Mountain Law Review 221 at 227.

¹⁵³ These three quotes were set out in Standing Committee on Justice and Community Safety “Henry VIII clauses Fact sheet” (Parliament of Australia, November 2011) at 12, citing Dennis Pearce *Delegated Legislation in Australia and New Zealand* (1st ed, Butterworths, Sydney, 1977) at [13].

[u]se of “Henry VIII” clauses in Australia and New Zealand has not been common except in wartime.

The second edition in 1999 then stated:¹⁵⁴

... 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.

Finally in 2005 the third edition comments:¹⁵⁵

[r]egrettably, the use of Henry VIII clauses in the Australian jurisdictions has become more common.

The United Kingdom’s experience using these clauses indicates their use is far more prolific there than here. We should nevertheless be cautious about extending the use of Henry VIII clauses in order to avoid such significant expansions in powers. Earl Russell, in concluding his motion to remove s 58 of the Child Support Act, colourfully stated:¹⁵⁶

[l]ike alcohol Henry VIII clauses are addictive and prohibition is the only answer. The only way to bring them under control is to have it known that whenever they are put in Bills this House will divide against them. I urge this House to disagree with the Commons ...

¹⁵⁴ Dennis Pearce and S Argument *Delegated Legislation in Australia and New Zealand* (2nd ed, Butterworths, Sydney, 1999) at [1.19].

¹⁵⁵ Pearce and Argument, above n 118, at [1.20].

¹⁵⁶ 531 HL Debates, Column 583, 22 July 1991. For more on this particularly debate, along with commentary on Lord Mackay’s motion in opposition see Morris, above n 42, at 24—28.

This paper does not agree that prohibition is the only answer, but there is a degree of truth to the addictive aspects of Henry VIII. We ought to be live to maintaining standards making clear Henry VIII clauses are the exception, not the norm. The LAC Guidelines on Process and Content of Legislation,¹⁵⁷ which have been endorsed by Cabinet,¹⁵⁸ go a significant way towards this.¹⁵⁹ Additionally, the RRC serves an important function in this respect and offers a degree of scrutiny arguably lacking in the United Kingdom.

D Loss of Debate and Public Scrutiny on Policy

What is really at the heart of our concerns about Henry VIII clauses, though, is their ability to enable production of policy beyond the principles and purpose of the parent Act. The extensive procedures involved in enacting a statute ensure a high degree of scrutiny.¹⁶⁰ These procedures “facilitate discussion and debate on substantive issues”.¹⁶¹ These substantive issues, or policies, are core to Parliament’s function. The executive government, while it plays a crucial role in formulating policy and Bills, must still secure a parliamentary majority.¹⁶² This has been discussed above in the context of the United Kingdom,¹⁶³ and is also a significant and live issue in New Zealand.

Regulations promulgated under an empowering provision may be subject to no scrutiny at all depending on how the empowering provision is drafted. While executive action may be challenged in the courts for various defects,¹⁶⁴ that will not allow a merits assessment of the exercise (or even the decision to exercise) that power. Furthermore, the avenue of judicial review is an expensive, time consuming and inherently risky option for aggrieved parties.¹⁶⁵ Furthermore, while Ministers remain accountable to Parliament as a fundamental incident of the Westminster parliamentary democracy,¹⁶⁶

¹⁵⁷ Legislation Design and Advisory Committee, above n 8, at [13.5] in particular.

¹⁵⁸ Cabinet Office Circular “Revised Legislation Advisory Committee Guidelines: Cabinet Requirements” (22 May 2015) CO(15) 3.

¹⁵⁹ The Legislation Advisory Committee and the Legislation Design Committee are also referred to in the Cabinet Manual (Cabinet Office *Cabinet Manual 2008* at [7.34]—[7.38]. The two entities are now merged: Parliamentary Counsel Office “Strategic Intentions for the period 1 July 2015 to 30 June 2019” (November 2015) A9 SI 2015 at 3.

¹⁶⁰ Joseph, above n 19, at [11.6.2].

¹⁶¹ At [8.2.1(1)].

¹⁶² At [8.2.2].

¹⁶³ See above at Part II(C).

¹⁶⁴ Joseph, above n 19, at [22].

¹⁶⁵ May Chen *Public Law Toolbox: Solving Problems with Government* (LexisNexis, Wellington, 2012) Chapter 26.

¹⁶⁶ Joseph, above n 19, at [11.7].

an exercise of a Henry VIII power may never be brought to the attention of the House of Representatives.

Where the executive crosses the line by producing policy through these instruments, and that exercise is not within the bounds of the Act's principles and purposes, this constitutes a significant infringement on the role importantly set aside for Parliament. This issue is naturally problematic in New Zealand, as it is in the United Kingdom. However, New Zealand is less afflicted by this than the United Kingdom by reason of the additional safeguards discussed above.¹⁶⁷

E New Zealand's Experience of Unbridled Power: Robert Muldoon

New Zealand has, at times, had an uneasy relationship with administrative power. The most notable modern example occurred during Robert Muldoon's Prime Ministership whose National Government¹⁶⁸ "expressed an unhealthy interest in Henry VIII clauses".¹⁶⁹ Interestingly, Muldoon's tenure as Prime Minister overlapped significantly with the first half of Margaret Thatcher's time in office, a period which saw an explosive increase in the use of Henry VIII clauses in the United Kingdom.¹⁷⁰ Three public administration Acts containing Henry VIII clauses were passed in 1979 alone.¹⁷¹

Muldoon also stands out as a concerning symbol of executive power in New Zealand on the basis of his personality. He was "opinionated and aggressive ... [h]is glare intimidated"¹⁷² and "to critics he was a dictatorial bully".¹⁷³ He also made several highly controversial decisions including using Security Intelligence Service information to publicly identify trade unionists he considered communist; he attacked George Gair, a colleague, for promoting liberalisation of abortion; encouraged visits from United States nuclear powered vessels; and refused to stop the Springbok rugby tour to New Zealand

¹⁶⁷ At Part II(B).

¹⁶⁸ 1975—1984.

¹⁶⁹ See Joseph, above n 19, at [15.4.3].

¹⁷⁰ See above at Part II(C).

¹⁷¹ The Remuneration Act 1979, the National Development Act 1979, and the Commerce Amendment Act 1979. For a more thorough discussion of these statutes along with several others passed during the 1900s in New Zealand see Phillip A Joseph *Constitutional and Administrative Law in New Zealand* (2nd ed, Brookers, Wellington, 2001) at [14.4.3].

¹⁷² Gavin McLean "Robert Muldoon: Biography" (15 June 2015) <<http://www.nzhistory.net.nz/people/robert-muldoon>>.

¹⁷³ Gavin McLean "Robert Muldoon: Biography" (15 June 2015) <<http://www.nzhistory.net.nz/people/robert-muldoon>>.

which led to significant civil disorder in 1981.¹⁷⁴ His volatile personality renders him an unsettling figure in New Zealand's political history.

Muldoon was one of the most controversial personalities to occupy New Zealand's Prime Ministership. Generally, we like our political leaders to be measured and careful particularly as they exercise significant powers. We do trust the executive with a great deal of power, and we trust it will not be abused, or if it is that person will be responsible to the House of Representatives. Muldoon's stubbornness, however, came to ahead when he was defeated by the Labour Party in the 1984 snap election.¹⁷⁵

Perhaps Muldoon's most notorious exercise of administrative power was the 1982 price freeze. In response to increasing inflation and the stagnation of New Zealand's economy, Muldoon announced a 12 month price and wage freeze contrary to the advice of both the Reserve Bank and Treasury.¹⁷⁶ This freeze was extended for another year and was ended by the incoming Labour government in 1984. Other governments had certainly the power to exercise the same sorts of monetary policies, but this action combined with Muldoon's volatile personality make the entire narrative a uniquely unsettling one.

This freeze, an extraordinary measure by any metric, was achieved by way of regulation. The Court of Appeal in *Combined State Unions v State Services Coordinating Committee* held that regulations purporting to suspend the wage-fixing provisions of the State Services Conditions of Employment Act 1977 were invalid.¹⁷⁷ In response, Muldoon's government through a strong Whip included a Henry VIII clause in the Economic Stabilisation Act 1948 in order to override the Court of Appeal's decision. This significantly expanded the ambit of that Act's regulation-making powers and ensured regulations would apply notwithstanding several other Acts.

¹⁷⁴ Barry Gustafson "Muldoon, Robert David" (26 May 2011) Te Ara – the Encyclopaedia of New Zealand < <http://archives.govt.nz/has/politicians-papers>>.

¹⁷⁵ Barry Gustafson "Muldoon, Robert David" (26 May 2011) Te Ara – the Encyclopaedia of New Zealand < <http://archives.govt.nz/has/politicians-papers>>.

¹⁷⁶ John Singleton, "Reserve Bank – Reserve Bank, 1936 to 1984" Te Ara – The Encyclopaedia of New Zealand <www.teara.govt.nz/en/video/33455/> (accessed 5 September 2016).

¹⁷⁷ *Combined State Unions v State Services Coordinating Committee* [1982] 1 NZLR 742 (CA).

The Economic Stabilization Act 1948 gave effect to policy introduced in war based regulations.¹⁷⁸ The 1982 amendment empowered the Minister of Industries and Commerce to:¹⁷⁹

[do] all things that he deems necessary or expedient for the general purpose of this Act, and in particular for the stabilization, control, and adjustment of prices of goods and services, rents, other costs, and rates of wages, salaries, and other incomes.

That purpose is to promote the economic stability of New Zealand.¹⁸⁰ To this end, the Minister was empowered under s 11 to make regulations in the following terms:

...

(2) Without limiting the general power hereinbefore conferred, it is hereby declared that regulations may be made under this section for enabling the Minister to exercise his functions under this Act, and, in particular, for all or any of the following purposes:—

(a) Regulating the marketing of any goods or classes of goods for the general purpose of this Act:

...

(c) The recovery of subsidies paid out of public moneys in respect of any goods or classes of goods:

(d) Providing for the appointment of officers and committees and other bodies, and defining their functions and powers.

...

¹⁷⁸ Itself, made under the Emergency Regulations Act 1939. See also HDC Adams “New Zealand” 32 (1950) *Journal of Comparative Legislation and International Law* 106 at 110.

¹⁷⁹ Section 4(2). Other more specific powers to control rent and prices were contained in the Tenancy Act 1948 and the Control of Prices Act 1947.

¹⁸⁰ Section 3.

This section undoubtedly enabled the exercise of policy decisions to be made. Furthermore, while exercise of the power must have given effect to the “general purpose” of the Act under s 4, those purposes were very general. Consequently, an exercise of that power, consistently with those purposes, could apply notwithstanding other enactments. The section should therefore be regarded as a Henry VIII power. Furthermore, s 11(3) enables that delegated power to be further delegated to a body empowered to exercise the regulation-making power, itself established by regulation.

It was the exercise of this regulation-making power which enabled the government to put in place the price freeze, an undoubtedly political decision with incredibly wide reaching effects on individuals and businesses.¹⁸¹ Due to the sheer significance of the impacts of the regulations many claimed only Parliament should have had the power to make such a change.¹⁸² There is little to suggest the measures were so urgent they could not be taken to Parliament. In this sense, one of New Zealand’s most constitutionally volatile periods began in no small part with the exercise of a regulation-making power. The change from first past the post to a mixed member proportional composition of Parliament goes some way to reinforcing the distinction between the executive and the legislature,¹⁸³ but may still result in a single political party forming government.¹⁸⁴

Inevitably bound up with the price freeze is the larger constitutional crisis caused during Muldoon’s exit from government.¹⁸⁵ Muldoon’s failure to devalue the dollar in response to the demands of the incoming Labour government was broken only when members of Muldoon’s own Cabinet threatened to resign, leading to the so-called “caretaker government” convention.¹⁸⁶ This was a time of significant unrest and New Zealand were understandably cautious of concentrated executive government. Many of these concerns were expressed in no uncertain terms by Sir Geoffrey Palmer.¹⁸⁷

¹⁸¹ Knight and Clark, above n 9, at 4.

¹⁸² Doug Kidd *Legislature v Executive: The Struggle Continues* (New Zealand Centre for Public Law, Victoria University of Wellington, Occasional Paper No 3, 2001) at 2—3. See Knight and, above n 9, at 4.

¹⁸³ Geoffrey Palmer and Matthew Palmer *Bridled Power* (3rd ed, Oxford University Press, Auckland, 1997) at 11.

¹⁸⁴ At 12—13.

¹⁸⁵ At 33—37.

¹⁸⁶ See Joseph, above n 19, at [9.5.1(6)]—[9.5.1(7)].

¹⁸⁷ Geoffrey Palmer *Unbridled Power? An interpretation of New Zealand’s Constitution* (2nd ed, Oxford University Press, Wellington, 1987), the second edition was significantly changed, but

Understandably, we may be fearful of protecting the democratic mandate of our legislature, and avoiding a repetition of the Muldoon saga, nor is such a fear new. The opening sentence of Sir Geoffrey's Palmer's *New Zealand Constitution in Crisis* reads: "The central feature of the New Zealand government is a concentration of power in the central government".¹⁸⁸ These were certainly the sorts of fears expounded in the Donoughmore Report, as spurred by similar rhetoric in Lord Hewart's book.¹⁸⁹ However, whether a particular empowering provision really enables a challenge to parliamentary sovereignty probably depends on its circumstances, hence the need to differentiate between Henry VIII clauses which really do something we are afraid of, and those which do not, at least in a New Zealand context.

New Zealand is *not* unique in being fearful of the abuse of administrative power. There is no true solution to being fearful of expansive administrative power, indeed a cautious unease is healthy in any democracy. Whether there are sufficient constitutional safeguards against administrative power, generally, is beyond the scope of this paper. Nevertheless, one key difference between the Muldoon era and today is the change to mixed-member proportional which should help to mitigate the executive's dominance in the legislature.

F Synthesis and Analysis

Our key fears, therefore, in respect of these clauses are well-founded but in some respects different from that in the United Kingdom from which our conception of the Henry VIII clause has understandably been derived. In particular, while we can certainly be cautious about clauses challenging Parliamentary sovereignty, some other concerning aspects of those powers in the United Kingdom are not as prominent in New Zealand. But, again, the ability to produce policy, at least at a higher level, and therefore essentially new law is our key fear as it goes beyond what we expect the executive to do as it lacks the benefit of public and parliamentary scrutiny.

the first is still an interesting source of opinion from the late 1970s: Geoffrey Palmer *Unbridled Power? An interpretation of New Zealand's constitution and government* (Oxford University Press, Wellington, 1979).

¹⁸⁸ Geoffrey Palmer *New Zealand's Constitution in Crisis* (McIndoe, Dunedin, New Zealand, 1992) at 1.

¹⁸⁹ Hewart, above n 33.

If this fear, in particular, is brought into our understanding of what a Henry VIII clause is, rather than just those clauses that fall into the orthodox meaning (empowering the amendment, suspension or override of an Act) then two conclusions at once follow. The first is more powers would fall into what we would typically call a “Henry VIII” clause on the basis that many Acts enable some sort of exercise of policy.¹⁹⁰ At the same time, if the exercise of policy is really our concern, as compared with mechanical changes to statutes or the updating of lists in schedules, several examples of what we currently consider to be Henry VIII clauses would not be constitutionally inappropriate although they remain constitutionally significant.

In many instances it will be difficult to determine whether the exercise of a power to create or change policy amounts to an *inappropriate* power to delegate.¹⁹¹ In making this assessment regard should be had to broad considerations of whether the decision was really one Parliament should only be entitled to make (the prize freeze is perhaps the most notable example of this), whether the exercise of the power is expressly restricted to the policy of the Act,¹⁹² and whether the power enables policy decisions or the operational implementation of those policies.¹⁹³

I have selected 5 examples of clauses in Bills, or sections in Statutes, in particular which it is hoped will help delineate those clauses which, in a modern New Zealand *should* make us worried, those which *should not* worry us, and those which may fall in between. They are intended to exemplify differing *categories* of clauses which ought to attract differing degrees of scrutiny. The particular examples are paradigmatic of those categories of clauses and are thus illustrative examples of more general types of powers. Broadly, these are ordered from, first, most concerning to, fifthly, least concerning.

IV The use Henry VIII Clauses in New Zealand

A The Trans-Pacific Partnership Agreement Amendment Bill

The Trans-Pacific Partnership Agreement Amendment Bill (the TPPA Amendment Bill) was introduced as a further step in the implementation of the Trans-Pacific Partnership

¹⁹⁰ See, in particular, Part IV(C) below.

¹⁹¹ The LDAC Guidelines offer a helpful list of matters that are not generally appropriately delegated: Legislation Design and Advisory Committee, above n 8, at [13.1].

¹⁹² See, for example, the Financial Markets Conduct Act 2013 examples below at part IV(C) where the relevant powers must be exercised in accordance with the purposes of the Act.

¹⁹³ That is to say, implementing a high level policy set out by the legislature.

Agreement and covers a range of topics. Of particular concern are the regulation-making powers suggested in respect of intellectual property. The Bill seeks to introduce a prohibition against circumvention of so-called “access control technological protection measures” (TPMs).¹⁹⁴ As the name suggests, these are measures which restrict access to or control (such as the copy) of intellectual property.

Clause 44 seeks to amend the Copyright Act 1994, significantly widening the applicability of the current regulation-making power under s 234 of the Act. It would enable regulations to be made that could add to, modify, or narrow various exceptions to the TPM prohibitions. The reason this is problematic is the Bill also provides a prohibition against circumvention of access control TPMs.¹⁹⁵ An offence may attract a conviction involving a fine not exceeding \$150,000 or up to 5 years’ imprisonment or both.¹⁹⁶ Additionally, regulations may be produced providing that the exceptions do not apply,¹⁹⁷ apply with modifications or additions,¹⁹⁷ and can even create new exemptions.¹⁹⁸

The LDAC submissions to the Foreign Affairs, Defence and Trade Committee stated one of the effects of the new regulation-making scheme is that:¹⁹⁹

[t]his provision essentially allows the Minister to criminalise conduct in regulations that would not otherwise be an offence under the Copyright Act. Further, it means that the offence provisions in section 226C do not operate in relation to non-infringing [Acts] until they are triggered by regulations.

...

We are inclined to the view that the creation of such offences is a matter that should only rarely, if ever, be a matter for delegated legislation ... [I]t strikes

¹⁹⁴ Trans-Pacific Partnership Agreement Amendment Bill, cl 40.

¹⁹⁵ Clause 40, new sections 226A—226AC.

¹⁹⁶ Clause 42, new section 226C.

¹⁹⁷ An extraordinarily confusing series of exceptions with exceptions to exceptions and so forth is also a significant concern, which the Legislation Design and Advisory Committee have expressed concern in respect of in their submission to the Select Committee: Legislation Design and Advisory Committee “Transpacific Partnership Agreement Amendment Bill” at [9].

¹⁹⁸ Clause 42, new sections 226D—226K.

¹⁹⁹ Legislation Design and Advisory Committee have expressed concern in respect of in their submission to the Select Committee: Legislation Design and Advisory Committee “Transpacific Partnership Agreement Amendment Bill” at [7], [8].

us as odd that the power to determine what is and is not a significant criminal offence under the Act is delegated to the executive.

This must be correct. Given that a very real fear we hold in respect of Henry VIII clauses is the production of policy, the power to effectively create and determine the boundaries of a significant criminal offence is not appropriate for the executive.²⁰⁰ While technology, and measures that can circumvent TPMs are likely to develop quickly, this is a matter best left to Parliament, or, as the LDAC suggest, should perhaps be subject to confirmation by a resolution of the House of Representatives, similar to the affirmative procedure in the United Kingdom.

The second reason the proposed power is inappropriate is that the prohibition against circumventing access control TPMs is a question that ought to be left for parliament as a matter of policy. In submission made by Professor Graeme Austin this view was expressed in the following way:²⁰¹

[It] would only be through the passage of regulations “prescribe[ing] circumstances” in which the defence in the proposed new s 226D(1)(a) would not apply that meaningful prohibitions against circumventing access control TPMs would come into effect. Were that to occur, there would be a significant change to New Zealand’s copyright law. This change would occur without the benefit of the Parliamentary process.

...

If regulations are passed under s 226D(2), thereby triggering the prohibition, this would set a new policy direction: they would not be merely giving effect to policies that are made clear on the face of the Bill (or the Copyright Act 1994 itself). The new form of *personal* liability imposed on the *individuals* engaged in acts of circumvention would be entirely new.

²⁰⁰ The Court of Appeal in *R v Harrison; R v Turner* [2016] NZCA 381 stated, albeit in the context the so-called three-strikes rule under the Sentencing Act 2002, that “[t]he starting point is that the choice of what conduct should be criminalised and what maximum sentence should apply to it is Parliament’s to make” (at [78]).

²⁰¹ Graeme Austin “Submission on the Trans-Pacific Partnership Agreement Amendment Bill” at [24], [30] and [31] (emphasis in original).

...

Given the novelty, and potential significance, of this policy change, it should be a matter for Parliament to bring this change into effect. It should not be done through subordinate legislation

The Regulatory Impact Statement for the Bill drew little attention to the concerns expressed by contributors prior to the select committee process, stating:²⁰²

Many submitters were confused regarding the purpose of the regulation making power and expressed concern that it may be misused. We expect that these submissions are likely to be addressed by the framing of the power in the TPP Implementation Bill ...

It would be troubling if the regulation-making power were to enter into force without significant amendment. The Law Society's submissions expressly identified this as a Henry VIII power.²⁰³ The regulation-making power contains matters of significant policy for which no proper justification has been given. It is also particularly concerning that the use of the power is to be guided by "the purposes of [the Copyright Act]",²⁰⁴ as there are no express purposes in that Act.²⁰⁵

For these reasons the TPPA Amendment Bill is of a class of clauses which ought to be considered as the most troubling. It contains a policy making provision with the ability to criminalise conduct and there is no indication as to why this must be achieved by way

²⁰² Ministry of Business, Innovation and Employment *Regulatory Impact Statement: Analysis of Options Relating to Implementation of Certain Intellectual Property Obligations under the Trans-Pacific Partnership Agreement* (8 April 2016) at [221]. Several submitters, in response to the targeted consultation document (Ministry of Business, Innovation and Employment "Targeted Consultation Document: Implementation of the Trans-Pacific Partnership Intellectual Property Chapter" (9 March 2016) indicated views that were quite contrary to the power included in the Bill: see for example Chris Moore (President of the New Zealand Law Society) to Ministry of Business, Innovation & Employment regarding Implementation of the Trans-Pacific Partnership Intellectual Property Chapter (30 March 2016) at [2.2.23]; and Library and Information Association of New Zealand "Submission on consultation document: Implementation of the Trans-Pacific Partnership Intellectual Property Chapter" at 5—6.

²⁰³ New Zealand Law Society "Trans-Pacific Partnership Agreement Amendment Bill" at [3.57].

²⁰⁴ In the proposed new s 234(2)(c).

²⁰⁵ Unlike the examples given below in Part IV(C) as to the Financial Markets Conduct Act 2013, and the Financial Markets Authority Act 2011.

of regulation as opposed to ordinary parliamentary processes. This may have been different if, for example, the power were to be applied consistently with specific purposes or principles under the Copyright Act, and if sufficient explanation provided as to *why* it must be achieved in this way. As the clause is currently drafted, though, the power cannot justifiably be enacted and therefore counts among the most distressing form of Henry VIII clause.

B The Canterbury Earthquake Recovery Act 2011

The provisions of the Canterbury Earthquake Recovery Act 2011, and its predecessor, the Canterbury Earthquake Response and Recovery 2010 Act, contained a Henry VIII clause “of spectacular reach”.²⁰⁶ Section 71(2) of the 2011 Act states:

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).

Subsection (3) then lists 23 specific pieces of legislation such an Order in Council may affect, but also that that list is “without limitation”. Any statute might be subject to an order made under the Act despite not appearing on the list of Acts provided. The 2010 Act was passed following the first Canterbury earthquake on 4 September 2010 and contained a similar regulation-making power.²⁰⁷ Academic criticism quickly followed the making of this power.²⁰⁸

The interesting feature introduced in the 2011 Act, not present in its 2010 counterpart, was the establishment of the Canterbury Earthquake Recovery Review Panel,²⁰⁹ which provides advice to Ministers and reviews all draft Orders before they are recommended under s 71.²¹⁰ The Panel has only three days to report, subject to a ministerial

²⁰⁶ Joseph, above n 19, at [15.4.3]. See also Macindoe and Dalziel above n 1; and Standing Committee on Justice and Community Safety “Henry VIII clauses Fact sheet” (Parliament of Australia, November 2011).

²⁰⁷ Canterbury Earthquake Response and Recovery Act 2010, s 6.

²⁰⁸ “Academics call for rethink over earthquake law” *The Press* (Christchurch, 28 September 2010).

²⁰⁹ Established under s 72 of the Canterbury Earthquake Recovery Act 2011.

²¹⁰ Canterbury Earthquake Recovery Act 2011, s 73.

(discretionary) extension.²¹¹ Other express limits apply to the use of the s 71 power under subsection (6).²¹² These limitations go some way to limiting the significant powers under the Act.

It might seem odd the CER Act ranks as of less concern than the TPPA Amendment Bill given the enormity of the powers given under it. However, when viewing the circumstances of the CER Act in their totality as compared with those of the TPPA Amendment Bill, this is a sound ordering. First, there was no real alternative to the Canterbury earthquakes given their significance and the need for urgency. Indeed, Phillip Joseph comments that following the second earthquake on 21 February 2011 which killed 185 people, “all criticism fell silent”.²¹³ The disaster was of such significance the Henry VIII powers were manifestly necessary.

Secondly, the actual exercise of that power under the 2010 Act was of significant importance to those affected and pertained to matters of taxes,²¹⁴ education,²¹⁵ social security,²¹⁶ rating,²¹⁷ local government,²¹⁸ transport,²¹⁹ and resource management²²⁰ (to name just a few). While the 2011 Act was repealed by the Greater Christchurch Regeneration Act 2016, several Orders made under s 71 of the 2011 Act remain in force.²²¹

Henry VIII powers in exceptional, emergency circumstances are permissible on the basis that there is no realistic alternative due to the urgency of the situation. Other

²¹¹ Section 73(3).

²¹² For example, an Order may not modify the Bill of Rights 1688, the Constitution Act 1986, the Electoral Act 1993, the Judicature Amendment Act 1972, the New Zealand Bill of Rights Act 1990, or the Parliamentary Privileges Act 2014 (s 71(6)(c)).

²¹³ Joseph, above n 19, at [15.4.3].

²¹⁴ Canterbury Earthquake (Tax Administration Act) Order 2011 and Canterbury Earthquake (Inland Revenue Acts) Order 2011.

²¹⁵ Canterbury Earthquake (Education Act) Order 2011.

²¹⁶ Canterbury Earthquake (Social Security Act) Order 2010, Canterbury Earthquake (Social Security Act) Order (No 2) 2010, Canterbury Earthquake (Social Security Act) Order (No 3) 2010, and Canterbury Earthquake (Social Security Act) Order 2011.

²¹⁷ Canterbury Earthquake (Rating Valuations Act) Order 2010.

²¹⁸ Canterbury Earthquake (Local Government Act 2002) Order 2010.

²¹⁹ Canterbury Earthquake (Transport Legislation) Order 2011.

²²⁰ Canterbury Earthquake (Resource Management Act) Order 2010, Canterbury Earthquake (Resource Management Act) Amendment Order 2010, Canterbury Earthquake (Resource Management Act) Amendment Order 2011, Canterbury Earthquake (Resource Management Act) Amendment Order (No 2) 2011, and Canterbury Earthquake (Resource Management Act) Amendment Order (No 3) 2011.

²²¹ By virtue of s 147, and are contained in Schedule 7 to the Greater Christchurch Regeneration Act 2016.

jurisdictions have used similar powers in natural disaster emergencies.²²² Consequently, while we should be careful of their use and safeguards, there is no real way around the need for Henry VIII clauses unless we put in place prospective “emergency” powers which would be fraught with their own uncertainties. Consequently, the CER Act powers contained a permissible Henry VIII power.

C The Financial Markets Conduct Act 2013

The Financial Markets Conduct Act 2013 (FMCA) illustrates another board category of clauses which are not typically considered to be Henry VIII clauses despite achieving similar outcomes. Indeed New Zealand’s financial markets law is a rich source of examples where ministers and various bodies established under statute essentially make policy decisions. The FMCA is a complex and highly technical statute which is complimented by an extensive range of other Acts including the Financial Markets Authority Act 2011 (FMAA), the Financial Markets Supervisors Act 2011, the Companies Act 1993 and the Takeovers Act 1993.²²³ The FMCA forms part of an overhaul of New Zealand’s financial markets regulation in the wake of the collapse of New Zealand’s finance industry as part of the Global Financial Crisis in 2006 and 2007.²²⁴

Several examples from the financial markets context will be used to illustrate cases where the executive is essentially delegated the power to make policy decisions which are sometimes within the bounds of certain purposes and principles (the ‘big’ policy), and sometimes without. The first is s 7 of the FMCA which defines “financial product”, a fundamental concept in the proper operation of the Act. Where a security is a “financial product”, it is subject to the Act’s rigorous regime. Section 7(2) states:

If an interest or a right is declared by regulations not to be a security for the

²²² For example, the Queensland Reconstruction Authority Act 2011 (Qld) provided Henry VIII powers in response to disastrous Queensland flooding in 2011. See particularly s 43.

²²³ It is worth noting the Ministry of Business, Innovation & Employment has recently conducted a review of two of the key financial markets statutes which is likely to have some impact on the Financial Markets Conduct Act 2013, although not for some time: Ministry of Business, Innovation & Employment “Review of the operation of the Financial Advisers Act 2008 and the Financial Service Provides (Registration and Dispute Resolution) Act 2008” (July 2016).

²²⁴ See N Harris “Finance Company Failures – Observations of the Registrar of Companies” (2008) and Report of the Commerce Commission “2007/08 Financial Review of the Ministry of Economic Development”.

purposes of this Act, the interest or right is not a financial product for the purposes of this Act.

This essentially allows a policy decision to be made about a particular financial product, removing it from the purview of the Act's safeguards. Nevertheless, this power was never considered constitutionally inappropriate. Indeed it was necessary to adjust the boundaries of the Act, particularly in special circumstances where compliance with would not be consistent with the purposes. It is not, however, limited by the purposes of the Act,²²⁵ and so is capable of modifying the policy the Act, perhaps impermissibly.

The second example is the Financial Markets Authority's (FMA's) dual powers of "exemption" and "designation". The FMA may "exempt"²²⁶ specific offers of certain financial products from all or part of the strict frameworks of advertising rules, disclosure requirements and supervising requirements. Essentially, the FMA makes a policy decision but *it is expressly confined to making decisions consistently with the purposes of the Act.*²²⁷ Furthermore, the exemption is to be no broader than is reasonably necessary to address the particular issues giving rise to the exemption.²²⁸

Additionally, the FMA has a "designation power"²²⁹ whereby the FMA can designate that a particular "security"²³⁰ is or is not a financial product, or is a financial product of a different sort. The effects of such a designation may be significant and require substantial changes in the way the offeror of that entire category of product deal with those products.²³¹ This, again, is a policy decision and is very similar to an exercise of the regulation-making power under s 7(2) of the Act, but is expressly restricted by the purposes of the Act.²³²

²²⁵ Sections 3 and 4.

²²⁶ Section 556.

²²⁷ Section 557. The purposes are set out in ss 3 and 4. An exercise of the power must also be no broader than is reasonably necessary to address the matters that gave rise to the exemption (s 557(b)).

²²⁸ Section 557(b).

²²⁹ Section 562.

²³⁰ Defined in s 6, and is essentially anything that amounts to an "investment" (itself not defined in the Act).

²³¹ The only designation currently in force is the Financial Markets Conduct (Tonga Development bank Ave Pa'anga Pau Vouchers) Designation Notice 2016 which exempts certain "vouchers" which are merely agreements between the Tonga Development Bank and New Zealand resident customers to pay a certain amount in Tongan currency to a resident of the Kingdom of Tonga.

²³² Section 563(a).

A further example of these sorts of powers in the financial markets context can be found in the Takeovers Code which regulates the acquisition of certain interests in “code companies”²³³ in order to enhance confidence for overseas investors in the New Zealand financial market. The power to produce this code is a regulation-making power under s 19 of the Takeovers Act 1993 and is contained in the Schedule to the Takeovers Code Approval Order 2000, itself produced by way of an Order in Council. The Act also establishes the Takeovers Panel which has extensive powers in enforcing the Code.²³⁴ This constitutes a fairly significant regulatory regime produced and enforced by the executive. All of these examples were not flagged as being Henry VIII clauses, but they achieve an end which is of a Henry VIII pedigree: the production and regulation of policy.

Interestingly, the examples above are, by virtue of their policy implications, probably more significant than many of the examples which the RRC have actually raised concerns about on the basis they are Henry VIII clauses.²³⁵ These financial markets illustrations can be compared with two further examples which more obviously fall into the classic conception of a Henry VIII clause with varying policy implications. The first is the regulation-making power in s 99 of the Psychoactive Substances Act 2013 which provides:

99 Regulations relating to psychoactive substances

- (1) The Governor-General may, by Order in Council made on the recommendation of the Minister, make regulations declaring, by name or description,—
- (a) a substance, mixture, preparation, article, device, or thing to be or not to be a psychoactive substance for the purposes of this Act:

²³³ Takeovers Act 1993, s 2A.

²³⁴ Takeovers Act 1993, ss 32—43C.

²³⁵ Although, in fairness, the jurisdiction of the RRC would not extend to, for example, the FMA’s decisions. Other examples of Henry VIII clauses flagged by the RRC include the Waitakere Ranges Heritage Area Bill, cl 7; the Dog Control Amendment Bill (No 2), new s 78A; the Reserve Bank of New Zealand Amendment Bill (No 2), new s 157G (although now repealed), and the Policing Act 2008, s 27 (this last example is possibly a little troubling as it enables regulations to create new “policing roles” with powers that include a “police specialist crime investigator” with significant search and surveillance powers (Schedule 1, Part 3).

- (b) any kinds or class of substances, mixtures, preparations, articles, devices, or things to be or not to be psychoactive substances for the purposes of this Act.
- (2) Before making a recommendation under subsection (1), the Minister must—
- (a) be satisfied that the proposed regulations are reasonably necessary for achieving the purpose of this Act; and
 - (b) seek, and have regard to, the advice of the advisory committee in respect of the proposed regulations; and
 - (c) consult any person or organisation that the Minister considers to be representative of the interests of persons likely to be substantially affected by the proposed regulations.

The classification of a substance as a “psychoactive substance”, defined in s 9, is central to the application of the Act. Section 99 enables the government to modify the scope of the meaning of “psychoactive substances” and therefore the Act as a whole. The RRC raised concerns that this section²³⁶ was a Henry VIII clause,²³⁷ but it was nevertheless enacted.

The second example, from the United Kingdom, achieves a similar end but has far more significant policy implications. The Local Government Finance Act 1992 enables the meaning of “dwelling”²³⁸ to be changed by statutory instrument, a power which it has been commented “enables the philosophical basis on which the act operates ... to be changed”.²³⁹ The impact of a particular property falling within the meaning of “dwelling” enables a local authority to collect taxes in respect of it.²⁴⁰ This is of a similar

²³⁶ Then cl 81 of the Psychoactive Substances Bill.

²³⁷ Maryan Street (Chairperson of the Regulations Review Committee) to Paul Hutchison (Chairperson of the Health Committee) regard Regulation-making powers in the Psychoactive Substances Bill (9 May 2013).

²³⁸ Local Government Finance Act 1992, s 3(5) and (6).

²³⁹ Morris, above n 42, at 30.

²⁴⁰ Local Government Finance Act 1992, s 4.

pedigree to the Psychoactive Substances Act, but involves rating, a form of tax, and is therefore a highly policy laden question.²⁴¹

Each of the examples in this section engages a policy decision in some way. In some cases that is restricted by the purposes and therefore the policy of the Act, and in others it is not. Nevertheless, many of the examples where a policy decision is being made have never been characterised as Henry VIII clauses even where they achieve ends more politically significant than provisions which have been raised as Henry VIII clauses by the RRC. This category features third because it often does engage a very real concern: the exercise of policy. However, in some instances this will not be problematic or, by nature of the technical aspects of the area (for example financial markets regulation), it is most effectively addressed by way of regulation.

D The Home and Community Support (Payment for Travel Between Clients) Settlement Act 2016

Sections 26 and 27 of the Home and Community Support (Payment for Travel Between Clients) Settlement Act 2016 (HCS Act) enable regulations to be produced which amend Schedules 1 and 2 of the HSC Act. They are manifestly Henry VIII clauses, and the RRC raised that concern,²⁴² although the Regulatory Impact Statement made no reference to it.²⁴³

The Act implements a settlement between the Crown and various health providers in relation to a claim filed with the Employment Relationships Authority concerning payment for time spent travelling by home and community-based care support services between clients.²⁴⁴ Schedules 1 and 2 to the Act contain current and former employers of those who may claim. The addition to this list is relatively mechanical and intended

²⁴¹ For other sections that fall into this broad category involving the exercise of policy see the Biofuel Bill which sets out a general definition for “qualifying biofuels” and enables the definition to be amended by way of regulation in order to adjust for what are essentially the ‘good’ rather than ‘bad’ biofuels (see new ss 34G and 34GA in particular as set out in the Biofuel Bill, amending the Energy (Fuels, Levies, and References) Act 1989). Additionally, the definition of “notifiable injury or illness” in s 23 of the Health and Safety at Work Act 2015 is critical and can be expanded or contracted by way of regulation.

²⁴² Letter from David Cunliffe (Chairperson of the Regulations Review Committee) to Simon O’Connor (Chairperson of the Health Committee) regarding delegated powers in the Home Community Support (Payment for Travel Between Clients) Settlement Bill (20 November 2015).

²⁴³ Ministry of Health “Regulatory Impact Statement: In-between travel – proposed negotiated outcome”.

²⁴⁴ Home and community Support (Payment for Travel Between Clients) Settlement Bill, explanatory note.

merely to fulfil the settlement claims, and is not altogether controversial. This is a more typical example of a Henry VIII clause where *schedules* rather than the text of the Act are modified.

A similar example exists in the (now stalled) Dog Control Amendment Bill (No 2) which would enable regulations to be produced adding or removing breeds of dogs to Schedule 4 of the Dog Control Act 1996,²⁴⁵ with the effect that that type of dog be subject to an importation ban and muzzling restrictions.²⁴⁶ The RRC raised concerns this was essentially a policy decision,²⁴⁷ but the Bill has fallen off the legislative agenda.²⁴⁸

This class of Henry VIII clauses would also include powers which permit consequential amendments to be made of a minor nature and typically restricted to the changing of terminology in Acts but which do not touch on the policy of a statute. We should be cautious about the sorts of provisions in the proposed Dog Control Amendment Bill and HSC Act principally to ensure that they are restricted to the sort of use they are currently confined to. They are constitutionally significant, of course, but where restricted to updating lists, adjusting sums of money for inflation, and other mechanical updates, they should be regarded as not being constitutionally objectionable. Indeed they are typically linked to a “sunset clause”,²⁴⁹ at which point the power lapses.²⁵⁰ They do not really engage policy issues. Nevertheless, if the United Kingdom experience is anything to indicate the dangers of increased use of these clauses, it should encourage a cautious approach to their development.

The place of schedules in this discussion is also an important one. Schedules to Acts often contain matters that are less substantive and more descriptive. The Dog Control Act is an example of this: the rules are set out in the body of the text while Schedule 4 contains a list of things to which those rules apply. However, the difference between modification of the text of the Act and matters contained in a schedule should not be overstated for two reasons. First, including something in a schedule can amount to a

²⁴⁵ Proposed new s 78A.

²⁴⁶ Dog Control Act 1996, s 30A.

²⁴⁷ Letter from the Regulations Review Committee to the Local Government and Environment Committee regarding the Dog Control Amendment Bill (No 2) 2008 (176-2) (6 March 2008).

²⁴⁸ The Bill was introduced in 2007, is currently at the Committee of the Whole House stage and appears that it is unlikely to proceed any time soon, although it is not clear why.

²⁴⁹ Joseph, above n 19, at [15.4.3].

²⁵⁰ The Legislation Advisory Committee has suggested a rule of thumb of a maximum three year period: Legislation Advisory Committee, above n 8, at [10.1.4].

policy decision even if it merely contains a list of things. By way of example, Schedule 1 to the Building Act 2004 contains a list of building work for which a building consent is not required. It contains a fairly extensive list. To include a whole new type of structure, or to remove one, may have a significant effect on the current regulation of building consents.²⁵¹

Secondly, some schedules to Acts themselves contain general rules. Schedule 1 to the FMCA for example contains an extensive range of exemptions to compliance with the Act. The schedule goes to the heart of the proper functioning of the statutory regime.²⁵² Whether a Henry VIII clause is concerning should therefore not be restricted to its form but be determined by its substance. A Henry VIII clause may be constitutionally concerning where it empowers the amendment of a schedule just as it may not be concerning where it overrides or amends the text of the statute itself. The question with these sorts of clauses ought to be whether an exercise of the power *in substance* is contrary to Parliament's sovereignty in a way that enables the production of new policy, and essentially new law, going beyond the ambit of the policy of the empowering Act. In the case of statutes such as the HCS Act, this is not really engaged, and consequently features fourth on this list.

E The Shop Trading Hours Amendment Bill

The Shop Trading Hours Amendment Bill provides an interesting illustration of the difficulties posed in the preliminary task of identifying a Henry VIII clause. It features last on this list for two reasons. First, it is probably not a Henry VIII clause. Secondly, even if it is, it does not engage the concerns we have in respect of them. Nevertheless, the RRC took issue with the new regulation-making power it contained. The new s 5A of the Shop Trading Hours Act 1990 states:

²⁵¹ Interestingly, too, the Building Code is produced by way of regulation and which is also capable of changing a policy direction in certain respects. While there are various consultation requirements for changes to the building code, under s 403, s 403(5) states that “[a] failure to comply with this section does not affect the validity of any Order in Council or regulations made”.

²⁵² The various tests and exemptions in this schedule are also referred to in other Acts as being the relevant standard. For example a “wholesale client” for the purpose of s 5C of the Financial Advisors Act 2008 includes “wholesale investors” under cl 3 of Schedule 1 to the FMCA, “close business associates” under cls 4 and 5, and a person who is a “wholesale investor” under cl 36(b) to Schedule 1 of the same Act.

5A Power to make bylaws to permit shops to open on Easter Sunday

- (1) A territorial authority may make bylaws to permit shops to open on Easter Sunday in an area comprising—
- (a) the whole of its district; or
 - (b) any part or parts of its district.

...

The RRC was concerned about this clause in the light of s 3 of the Shop Trading Hours Act which states:

3 Shops to be closed on Anzac Day morning, Good Friday, Easter Sunday, and Christmas Day

- (1) Subject to sections 4 and 4A, every shop shall remain closed—

...

- (b) all day on any day that is Good Friday, Easter Sunday, or Christmas Day.

The RRC in three separate letters of advice to the Commerce Commission raised concerns the new s 5A constituted a Henry VIII clause on the basis the clause would give local authorities the power to override s 3 of the principal Act.²⁵³ The Chairperson

²⁵³ David Cunliffe (Chairperson of the Regulations Review Committee) to Melissa Lee (Chairperson of the Commerce Commission) regarding Delegated Power in the Shop Trading House [sic] Amendment Bill (15 February 2016); David Cunliffe (Chairperson of the Regulations Review Committee) to Melissa Lee (Chairperson of the Commerce Commission) regarding Shop Trading Hours Amendment Bill: Departmental Report (7 April 2016); and David Cunliffe (Chairperson of the Regulations Review Committee) to Melissa Lee (Chairperson of the Commerce Commission) regarding Shop Trading Hours Amendment Bill: Information supplied by advisers 15 March 2016 (17 March 2016).

of the Committee, David Cunliffe, also drew attention to these concerns in his capacity as a member of the Labour Party at the Second Reading of the Bill on 28 July 2016.²⁵⁴

The Departmental Report issued by the Ministry of Business Innovation and Employment to the Commerce Committee stated, after noting the RRC's concerns, stated they were not of the opinion such a Henry VIII clause existed at all.²⁵⁵ This was on the basis that once the Bill is enacted, the Amendment Bill would place an exception on the general prohibition and the bylaws²⁵⁶ provided for would merely implement that exception. The Departmental Report goes on to say:²⁵⁷

Enactment of the Bill, then, will be an orthodox example of Parliament setting a general rule, and authorising (in the primary legislation) exceptions to be made to that general rule. Parliament will then delegate to local authorities the power to decide what those exceptions are.

The Report importantly also notes that:²⁵⁸

[i]n this instance *the key policy decision* – that shops can open if the local authority makes a bylaw – *has been included in primary legislation*.
Byelaws will implement that policy decision.

The Report notes a similar structure was adopted in the Freedom of Camping Act 2011 and Psychoactive Substances Act 2013.²⁵⁹ Both provide for a general rule, and then the power for a local authority to create exemptions to it.²⁶⁰ Under the Psychoactive

²⁵⁴ (28 June 2016) 715 NZPD.

²⁵⁵ Ministry of Business, Innovation and Employment “Shop Trading Hours Amendment Bill: Departmental Report to the Commerce Commission” (17 March 2016) at 46.

²⁵⁶ The Bill as enacted provides for a “shop trading policy”, rather than bylaw, to give effect to the power.

²⁵⁷ Ministry of Business, Innovation and Employment, above n 255, at 46.

²⁵⁸ At 47 (emphasis added).

²⁵⁹ Unlike the Psychoactive Substances Bill, the Regulations Review Committee does not appear to have submitted any advice to the relevant select committee.

²⁶⁰ Freedom of Camping Act 2011, ss 10 and 11; and Psychoactive Substances Act 2013, ss 13, 66 and 68.

Substances Act, s 13 enables an “eligible person” to apply for a licence to import, manufacture and deal in psychoactive substances that are not “approved products”. Section 66 then permits territorial authorities to implement a local approved products policy in respect of particular geographic areas in the relevant district.²⁶¹ This creates a general rule, an exception, and a means of engaging that exception not unlike the Shop Trading Hours Amendment Bill.

In respect of the Shop Trading Hours Amendment Bill, the RRC’s concerns were largely side-lined in favour of the view the clause was in fact not a Henry VIII provision at all. The third reading of the Bill drew no attention to the possible constitutional implications of the provisions (presumably adequately ventilated by David Cunliffe in the second reading), and the Bill received royal assent on 29 August 2016.²⁶² Clauses of this sort should generally not amount to Henry VIII clauses because the key policy is already contained in the parent Act and the use of that power does not override the Act as it contains the substance of that exception already. The Shop Trading Hours Amendment Bill therefore contained no Henry VIII clause.

F Why use a Henry VIII Clause at all?

Many of the examples above involve provisions that either typify the Henry VIII clause by expressly permitting amendment to an Act or, alternatively, involve the production of policy with the potential of overriding the policy of the parent Act (to varying degrees). It seems valid to ask, therefore, why those matters are not simply left to be set out in regulations rather than enabling the Act to be amended or overridden and avoid the constitutional issues altogether.

For example, the FMCA uses this structure quite frequently. Section 62 states:

An issuer that prepares, or is required to prepare, a [Product Disclosure Statement] must ensure that the PDS *complies with all*

²⁶¹ Section 68 sets out what must be included in that policy.

²⁶² The text of the empowering provision was heavily amended following the select committee’s report which enabled the relevant policy to be adopted by way of a “local policy” rather than necessitating the rigmarole of producing a byelaw, inherently more fraught with risk from a local authority’s perspective.

requirements of the regulations relating to the form and presentation of the PDS.

The Financial Markets Conduct Regulations 2014 then set out, in significant detail, what must be included in a PDS.²⁶³ Why not take the same measure in relation to, for example, the meaning of a regulated “psychoactive substance” under the Psychoactive Substances Act 2013? Or, in the HCS Act, why not simply list former and current HCS employers in regulations rather than in the schedule? There are several possible reasons this may be so.

The first is that using a Henry VIII clause may offer a safer alternative to putting the entire matter in regulations. For example, a section in an Act that defines a term as including various things *and* anything prescribed in regulations made under the Act means Parliament can ensure the core of the definition is protected: there is a class of things which regulations will not be capable of abrogating from. The ability to add things by regulation acknowledges the capacity for that definition’s scope to fluctuate as necessary and can be adjusted accordingly.

Compare this with the two alternative extremes the first is where the Act contains an exhaustive definition, as is most often the case. This may ossify a definition. Of course s 6 of the Interpretation Act 1999 states “[a]n enactment applies to circumstances as they arise” and may go some way to ameliorating this but is not particularly helpful from an administrative perspective as any decision from a court (whether the matter gets that far) would be retrospective and therefore inherently uncertain from a drafting perspective.

Alternatively, a definition left entirely to regulations carries the risk of taking a meaning quite different from that initially intended. For example, the definition “harmful substance” under s 2 of the Resource Management Act 1991 states:

harmful substance means any substance prescribed by regulations as a harmful substance for the purposes of this definition

²⁶³ Financial Markets Regulations 2014, cls 15—36.

The meaning of “harmful substance” is important under the Resource Management Act as it is a strict liability offence²⁶⁴ to discharge a “harmful substance” in the coastal marine area.²⁶⁵ This opens the door for a policy decision to be made which, although not itself problematic, has the potential to amount to a significant change in the nature of the offence without protecting a core of substances deemed “harmful”.

This is in distinction to the definition of “psychoactive substance” set out above,²⁶⁶ which has many of its aspects set out in the Act with the ability for it to be modified by way of regulation. Importantly, too, that regulation-making power is restricted to substances that are “not to be a psychoactive substance” and therefore only enables the narrowing of the provision rather than its expansion unlike the meaning of “harmful substance” in the Resource Management Act.

A similar design choice was made in respect of s 34G of the Energy (Fuels, Levies, and References) Act 1989 (now repealed) in which the meaning of “qualifying biofuels”, broadly intended to be the ‘good’ or ‘sustainable’ biofuels, contained a certain core meaning to be adjusted by regulations. The select committee for the Biofuel Bill stated legislators have struggled for decades with the meaning of “sustainability”, and the Committee felt it was no better placed to determine a “clear and precise meaning”.²⁶⁷ A hybrid statutory/regulatory approach was therefore taken. This sort of construction may also bring with it a heightened degree of care on the part of the relevant minister (or other decision maker) when exercising what is a more constitutionally significant power.

The second key reason for using a Henry VIII clause rather than leaving the whole of the matter to regulations is it may enhance accessibility. This only applies to Henry VIII powers that enable actual textual changes to the Act, and more typically schedules. The HCS Act, discussed above,²⁶⁸ is a good example of this. It enables important lists or figures to be contained in the Act to which they apply without recourse to other instruments thereby simplifying access to relevant information.

The opposite argument may be made in respect of clauses enabling regulations to apply notwithstanding any Act, for example like the regulation-making power that existed in

²⁶⁴ Section 341B.

²⁶⁵ Section 15B sets out the general prohibition, while s 338(1B) provides that it amounts to an offence against the Act.

²⁶⁶ Psychoactive Substances Act 2013, s 9.

²⁶⁷ Biofuel Bill 148-2 (select committee report) at 11.

²⁶⁸ At Part IV(D).

the CER Act. When looking at a statute you cannot know without recourse to the regulations produced under the CER Act whether that statute is subject to regulations. Arguably, the more of these sorts of provisions that exist the more difficult it will be to determine how a particular regime applies. This is less pronounced in situations like those discussed above in respect of the FMCA where the relevant powers relate only to the regime under which the powers are created. Consequently, there will be less uncertainty.

The third reason why a Henry VIII clause may be used rather than leaving the matter entirely to regulation is that the relevant drafters were faced with a design choice and the creation of a Henry VIII power was deemed to most expedient method of updating the relevant Acts. While this explanation does not have a great deal of depth, it may serve as a more practical explanation for *how* the clauses end up in statutes, albeit it does not answer *why*. Nevertheless it is clear that placing a matter entirely regulation may be an ineffective design strategy that a Henry VIII clause is a more secure option.

V Conclusion

The so-called Henry VIII clause has changed significantly since its first ‘modern’ usage in the United Kingdom’s Local Government Act 1888. In particular our statutory and regulatory landscape has undergone a sea change since that provision in order to respond to emerging technologies, technical areas of practice (such as the financial markets sector), and an increasingly complex social environment. Furthermore, the same criticisms levelled in the United Kingdom against the increase in regulatory power, particularly with respect to Henry VIII clauses, are less pronounced in New Zealand. More robust constitutional protections against the use of regulatory powers and a need in many areas to allow for policy decisions to be made within the metes and bounds of the empowering Act mean that we are in a far less precarious position than the United Kingdom in terms of these clauses.

Nevertheless, we still ought to be cautious about when they should be included and the breadth of their power. On some occasions Henry VIII clauses are realistically the only option. The Canterbury earthquakes are an example of this. Other situations will not import the same degree of urgency, but a Henry VIII clause may be the most effective design choice for that particular regime. Ultimately, whether a particular provision

amounts to a Henry VIII clause is only one question and answers only that the clause is *constitutionally significant*. What it does not do is take the next step and answer whether it is *constitutionally inappropriate*. In order to determine the latter, the substance of the empowering provision must be assessed with the overarching question of whether it empowers the production of new policy going beyond, or in a different direction, to the policy of the parent Act or other Acts that may be subject to it.

The reason the question of policy is such a pertinent one is that it goes to the heart of many of our concerns in respect of Henry VIII clauses: we protect parliamentary sovereignty at least in part so that our elected officials can debate the policy of the reform; we ensure there are checks and balances on regulation-making powers so new policy decisions *are* subject to debate in the House of Representatives and public scrutiny; and we wish to avoid normalising Henry VIII clauses on the basis that reforming policy is fundamentally Parliament's role. However, where the relevant empowering clause enables an amendment to an Act that has little or no policy content, should we really be preventing its passage merely because it enables textual changes to an Act? No.

This paper therefore makes three key conclusions. First, many of our concerns about Henry VIII clauses are direct importations from the United Kingdom despite New Zealand's usage of those clauses and constitutional safeguards operating differently. In particular, our Parliament has far greater capacity to review, revoke, affirm and amend regulations, backed by the RRC's powers. Additionally, the use of Henry VIII clauses in New Zealand is less frequent and the powers narrower. Consequently, our understanding of the Henry VIII clause in New Zealand should be adjusted to our particular concerns.

The second key conclusion is that our real concern in respect of Henry VIII clauses is the potential they may be used by the executive to produce policy. Consequently, there are more clauses that should be termed "Henry VIII clauses" on the basis there are numerous examples where a minister or government entity is empowered to make policy decisions which may or may not be within the scope of the policy of the parent Act. Where the decision is not so confined, it is more problematic as Parliament may not have had the opportunity, and may no longer have the opportunity, to debate that issue.

The third key conclusion follows from the second: if our concerns are focused on questions of policy production, those provisions which provide for mechanical updates of lists in schedules, updating figures, or making consequential languages (particularly in large reforms) should not be considered constitutionally significant. Phillip Joseph has stated that Henry VIII clauses are unobjectionable in two situations:²⁶⁹

when used to deal with unforeseen contingencies resulting from the introduction of new legislation, and when used to facilitate genuine emergency legislation.

This paper agrees with that observation but would also add, in the light of the conclusions above, that a Henry VIII clause ought also to be considered unobjectionable if it is restricted to exercising the policy of the parent Act by reference to expressly stated purposes or principles in the Act, or where the clause enables only mechanical updates to lists or figures in an Act. These sorts of powers do not engage policy that has not already had the opportunity to be ventilated in debate in Parliament. The question of whether a particular clause is appropriate or not should focus on the substance of the empowering provision rather than its form.

The current usage of the term “Henry VIII clause” is to treat that title as somewhat of a blunt instrument. It is a phrase with the potential to be unnecessarily (and sometimes necessarily) pejorative. The better approach would therefore be to ask whether the clause empowers an end to be achieved that is really the purview of Parliament, or whether that power achieves an end expressly or impliedly restricted to the policy of the Act, such that parliament’s sovereignty could not really be said to be infringed in a meaningful way. This is an issue which needs to be treated with greater care as the needs of law reform become more complex and the number of statutory instruments outnumber Acts of Parliament.²⁷⁰ Despite this, New Zealand’s use of these powers is not nearly as endemic as it is in the United Kingdom, a difference that ought to be protected.

²⁶⁹ Joseph, above n 19, at [15.4.3].

²⁷⁰ At [8.2.1(2)].

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