

Diminishing the efficacy of disallowance motions: Quasi-Legislation in State Jurisdictions

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Delegation is a fact of life. As much as they might like to micromanage the world legislatures in highly developed market economies and technologically advanced societies cannot be omnipotent, all seeing/all knowing entities. They inevitably have to delegate authority to either 'Big Government Nanny States' or 'Tea Party-esque small government' inspired executives who rely on delegated powers to extend¹ or retract² the tentacles of government influence. To prevent the legislature from handing the executive a blank cheque in the form of delegated legislation, the legislature must retain oversight and a veto - a simple exchange of 'delegated authority' for 'oversight.' With the introduction of innovative breeds of delegated instruments the compact between the executive and legislature - delegation for oversight - ceases its balancing function and gives rise to a potential shifting of legislative powers to the executive.

This paper revisits the fears expressed about 'quasi-legislation' diminishing parliamentary oversight and examines whether State jurisdictions need to develop safeguards, similar to those enacted by the Legislative Instruments Act 2003 (Cth)(LIA), to manage quasi-legislation. To assess the need for reform the paper examines the use of quasi-legislation such as codes, guidelines, directives and protocols within delegated legislation and questions whether such usage diminishes the effectiveness of parliamentary disallowance powers.

When it comes to legislation the devil is always in the detail. That is not to say that delegated legislation³ is inherently evil, but sometimes the most inequitable, unjust

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¹ See Aronson, Mark. *The Great Depression, This Depression, and Administrative Law* (2009) 37 Federal Law Review 165 for a discussion of the use of delegated legislation and administrative law in the context of social or economic crisis such as the Great Depression, the New Deal, privatisation programs and the global financial crisis. Aronson appears to be suggesting that the current 'economic crisis' will result in an expansion of state activity and regulatory intervention. See particularly 179-185.

² On the contrary Klein would argue that economic or social crisis create a necessary precondition for the imposition of neo-liberal economic structures that are more in line with libertarian principles of 'small government. Klein argues that the post 9-11 Bush Government pursued a 'Corporatists State' whereby key government functions were outsourced. See Klein, Naomi. *The Shock Doctrine: The Rise of Disaster Capitalism* (2007) New York, Metropolitan Books at Chapter 14 & 15.

³ Delegated Legislation is common described as law made by the executive branch of government with the authorisation of Parliament. References in this paper to 'delegated legislation' should be interpreted as a reference to regulatory instruments created pursuant to direct delegation from parliament and

laws and egregious affronts to basic civil rights can only be exercised when they are hidden in the fine print – the seemingly innocuous, mundane and everyday provisions of delegated legislation.⁴ Lord Hewart was one of the first to open fire against the incursions of delegated legislation with his 1929 book *The New Despotism*.⁵ He described delegated legislation as disrupting the roles demarcated by the separation of powers⁶ and undermining the democratic legitimacy of parliament by allowing zealous executives to overextend their administrative mandate without sufficient parliamentary oversight.⁷ By all accounts, the rise and rise of delegated legislation,⁸

which are subject to the full range of common legislative safeguards and subordinate legislation requirements such as regulations, rules, by laws and ordinances.

⁴ In terms of Australia's history with delegated legislation the *Transport Workers Act 1928-1929 (Cth)* which gave the Governor-General wholesale powers to create laws regarding transport workers remains an example of the impact delegated legislation can have on rights. The wide power conferred allowed the government to make regulations that in effect prohibited the employment at Australian ports of people who did not belong to the Waterside Workers' Federation. The question of whether section 3 was ultra vires was tested in *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes v. Dignan* (1931) 46 CLR 73. Parliament in the same year disallowed the *Transport Workers (Waterside) Regulations*. The validity of the disallowance was tested in *Dignan v Australian Steamships Pty Ltd* (1931) 45 CLR 188. For an outline of the use of quasi legislation in the United Kingdom in relation to industrial relations (codes on picketing and closed shop) and social security administration see Ganz, Gabriele. 'Quasi Law' in Third Commonwealth Conference on Delegated Legislation (1989) London, HMSO (Record of Proceedings) at 20-21.

⁵ Lord G Hewart, *The New Despotism* (Benn, London, UK, 1929). In response to the Chief Justice of England and Wales and his claims of delegated legislation producing despotic power whereby government departments placed themselves above parliament and the courts the United Kingdom set up the Donoughmore Committee. The Committee laid the foundation for the justification of delegated legislation much of which is still relevant. See also Morris, Caroline and Malone, Ryan. 'Regulations Review in the New Zealand Parliament' (2004) 4 Macquarie Law Journal 7 at 9.

⁶ Phrasing it in these terms one could assume we have moved on from an absolute and strict separation of powers doctrine and accepted the practicalities of modern government and the extensive use of delegated legislation, which with appropriate safeguards still conforms to the underlying spirit of the separation of powers. Morris & Malone above n 5 at 8.

⁷ In debates after the publication of Hewart's book, some tailored the fear of excessive and overbearing executives to the political fears of the 1930-1950s. Some participating in the debate about delegated legislation suggested that delegated legislation configured the administrative state to be a Trojan Horse for socialism. Aronson above n 1 at 170 citing Michael Taggart, 'From 'Parliamentary Powers' to Privatization: the Chequered History of Delegated Legislation in the Twentieth Century' (2005) 55 *University of Toronto Law Journal* 575, 590-600.

⁸ In the Federal Parliament disallowable instruments have grown from 855 in 1985-86 to 2983 in 2007-08. The biggest increase between 2004 to 2005 (1561 to 2432) can be explained by the introduction of the Legislative Instruments Act 2003. See *Odgers' Australian Senate Practice* (2008) (ed) Evans, Harry, 12th edition, Australia. Parliament. Department of the Senate at 327. See also Pearce, Dennis & Argument, Stephen. 'Delegated Legislation in Australia' (2005), LexisNexis Butterworths (3rd Edition) at 9-10, which breaks down the increasing diversity of instruments between 1988-89 and 2003-04. In

and its lesser-known cousin quasi-legislation,⁹ may suggest that Hewart's polemic did not convince history's legal minds of such tyrannical potential, with such laws becoming an indispensable element of modern governance.¹⁰

Australian parliaments have responded to the concern of executive overreach achieved through delegated legislation with the development of legislative safeguards such as publication and tabling requirements,¹¹ powers to disallow regulations,¹² preparation of Regulatory Impact Statements (RIS)¹³ and establishment of delegated legislation parliamentary review committees.¹⁴ However, in some jurisdictions

NSW during 2007 408 statutory rules were tabled compared to 99 Bills. The proportion of statutory rules to Bills has remained at the ratio for five years. See Lovelock, Lynn & Evans, John. *New South Wales Legislative Council Practice* (2008) Federation Press, Sydney at 423 & footnote 4. For a broad comparative see Berg, Chris. *Policy without Parliament: the growth of regulation in Australia* (November 2007) 19(3) Institute of Public Affairs (Chart 9 and 10 only) as the methodology of measuring regulatory intervention in terms of page volume can be misleading.

⁹ The term quasi-legislation was first used by Megarry in Megarry, R E, *Administrative quasi-legislation* (1944) 60 Law Quarterly Review 125. There is no doubt that Megarry had in mind a particular type of legislation made by administrative bodies. As acknowledged by Ganz, quasi-legislation is not a term of art. Definition is contested particularly because it is an ever expanding and changing field of regulation. Parliaments and departments are constant creating new labels and formats for the presentation of rules. See Ganz above n 4 at 20. For the purpose of the paper quasi-legislation includes but is not limited to instruments such as codes, guidelines, protocols, directives, policy directives, instructions, policy, standards, notices, orders or frameworks.

¹⁰ It may be argued that the demand for delegation of power in parliamentary systems are driven by a more general need for general principles laid down to be practically implemented through the administrative operations of government. In this sense delegated power is not a specific feature of advanced, modern economies and is inherent dimension of political systems. See *Baxter v Ah Way* 1910 8 CLR 626 for the High Court's rationale of delegating authority through subordinate legislation as discussed in Odgers above n 8 at 325.

¹¹ For example see Section 38 of the *Legislative Instruments Act 2003* (Cth) which requires all legislative instruments to be tabled before each House within six sitting days after registration. State jurisdictions also have tabling requirements for delegated legislation.

¹² See Section 42(1) of the *Legislative Instruments Act 2003* (Cth). See also Section 41 *Interpretation Act 1987* (NSW)

¹³ Many Commonwealth jurisdictions make provision for Regulatory Impact Statements (RIS) although requirements and content can vary significantly across jurisdiction. The concept of RIS is to "force policy makers to consult, and to work through a sequential process of articulating the problem, assessing a range of options, recommending the best option and explaining why other options are not as good." See Banks, Gary. *Challenges for Australia in Regulatory Reform* (2001) Regulation Reform Management and Scrutiny of Legislation Conference, Sydney, New South Wales. See also Office of Best Practice Regulation details on Regulatory Impact Statements accessed at <http://www.finance.gov.au/obpr/ris/index.html> on 23/09/2011.

¹⁴ Pearce & Argument above n 8 at 10, which outlines the detail of relevant State, delegated legislation review committees. See also Argument, Stephen, *Apples and Oranges: Comparison of the Work of*

increased use of quasi-legislation in the form of codes, guidelines and protocols has enabled executives to circumvent these traditional safeguards.

With the introduction of the *Legislation Instruments Act 2003 (Cth)* (LIA) imbalance caused by quasi-legislation, between executive administration and parliamentary sovereignty, is largely prevented.¹⁵ Under the LIA most federal quasi-legislation is confronted with publication, tabling and disallowance provisions as instruments are subject to legislative safeguards based on their function¹⁶ not what the executive call them. Calling a regulation a code in the federal sphere will not allow the legislation to hide from parliamentary oversight.

In comparison the vast majority of State and Territory jurisdictions continue to subject regulatory instruments to disallowance provisions based upon their name with the implication that creatively named instruments are immune from parliamentary oversight.¹⁷ If it's not your traditional, run of the mill regulation or ordinance then it's not disallowable. With the exception of Victoria,¹⁸ many States¹⁹ have not kept pace

Various Australian Delegated Legislation Committees (1999) 21 *Australian Institute of Administrative Law Forum* 37. In the NSW context the joint Legislative Review Committee is empowered to review statutory rules. See Lovelock & Evans above n 8 at 437-441.

¹⁵ Pearce, Dennis. 'Rules, Regulations and Red Tape: Parliamentary scrutiny of delegated legislation' (25 June 2004) Presented Senate Occasional Lecture Series at Parliament House at 89. Accessed at <http://www.aph.gov.au/senate/pubs/pops/pop42/pearce.pdf> on 23/09/2011.

¹⁶ See section 5 *Legislation Instruments Act 2003* (LIA) for the definition of 'legislative instrument'. The definition of 'legislative instrument' is an instrument in writing that is of a legislative character. See s 5(1)(a) LIA.

¹⁷ Generally definitions of 'statutory rules' or 'regulations' or 'subordinate legislation' are restricted to a very limited class of instruments although there are a multitude of exceptions in a number of jurisdictions. See *Subordinate Legislation Act 1978* (SA) **Section 4 (regulation)**; *Subordinate Legislation Act 1992* (Tas) **Section 3(1) (subordinate legislation)**; *Interpretation Act* (WA) **Section 5 (subsidiary legislation)**, *Statutory Instruments Act 1992* (Qld) **Section 8 (statutory rule)**; *Subordinate Legislation Act 1989* (NSW), **Section 3 (statutory rule)**; *Interpretation Act (NT)* **Section 61 (regulations)**. For the full listing and detail see **Appendix A**.

¹⁸ The *Subordinate Legislation Amendment Act 2010* (VIC) provides for the classing and exemption of instruments as statutory rules (Section 4) or legislative instruments (Section 4A) through regulation (*Subordinate Legislation (Legislation Instruments) Regulation 2011*(VIC)). Legislative instruments are subject to a parallel process of analysis, public consultation and scrutiny through the regulatory impact

with important reforms delivered by the LIA²⁰ leaving parliaments hobbled when trying to oversee an ever-expanding palette of diverse quasi-legislative instruments.

The full specter of this problem is evident where strong parliamentary majorities empower the executive to use non-disallowable quasi-legislation rather than disallowable instruments such as regulations. A more inconspicuous use of quasi-legislation is in regulations – the wolf in sheep’s clothing. Where ‘Skeleton Acts’²¹ shift the theatre of parliamentary policy battles and defer ‘tough policy’ questions to regulation, quasi-legislation becomes an important tool for the executive. The outsourcing of policy ‘flesh’ to regulation opens up the prospect for greater sub-delegation through quasi-legislation.²² In these circumstances States and Territories

statement (RIS) process if the legislative instrument imposes a significant economic or social burden. While the amendments may ensure a more holistic examination of quasi-legislation instruments in the form of RIS the continuing limitations on disallowance in the Victorian legislation undermine the reform to some degree.

¹⁹ It should be noted that the States and Territories have varying approaches to delegated legislation and in particular quasi-legislation with some having more developed systems and driving greater reform. Some jurisdictions have a greater capacity to manage threats to parliamentary oversight by quasi-legislation. Victoria and Queensland from a comparative perspective have frameworks geared to deal more thoroughly with quasi-legislation when compared to New South Wales, South Australia and Tasmania. However, the majority of jurisdictions have individual and unique deficiencies in dealing with quasi-legislation. **Appendix A** (at the end of the paper) sets out the definition of delegated legislation in each jurisdiction (identifying what each definition includes) and the instruments within the definition to which disallowance motions/provisions apply. In some jurisdictions it is clear that certain types of delegated/quasi legislation is not subject to disallowance meaning there is an inconsistency between what is considered delegated legislation and the type of delegated legislation exposed to disallowance. For example WA’s definition of subsidiary legislation encompasses more instruments than other jurisdiction however only regulations are subject to disallowance. In other jurisdiction there is consistency between definitions and what is disallowed for example NSW where all instruments listed as statutory rules and disallowable.

²⁰ See Pearce & Argument, above n 8 at 111 that provides a general endorsement of State jurisdictions addressing the issue of quasi-legislation ‘head on’ through reform that focuses on subjecting instruments that have legislative effect to the same safeguards traditional forms of delegated legislation are subject to.

²¹ For an up to date discussion about recent debate on Skeleton Acts see Argument, Stephen. *“Leaving it to the Regs” – The pros and cons of dealing with issues in subordinate legislation.* (2011) Australasian Drafting Conference, Adelaide. Accessed at <http://www.pcc.gov.au/pccconf/papers/Stephen%20Argument%20-%20Leaving%20it%20to%20the%20Regs.pdf> on 23/09/2011.

²² The concept behind this statement is that an empowering provision in a Bill allows the legislature to shape the nature of delegation. However, the legislature has little control over additional sub-delegation under regulation.

who have not adopted LIA style reforms or extended traditional safeguards to ‘Skeleton Regulations’ and quasi-legislation may be leaving loopholes in parliamentary oversight.

The Rationale for Quasi-legislation

Why do we need quasi-legislation? For what purpose do executives deploy an ever expanding universe – some may say jungle²³ – of ‘not quite legislation’ such as codes of practice, guidelines, guidance notes, protocols, circulars, policy notes, practice statements, directives, codes of conduct, conventions . . . (and the list could go on, limited only by one’s imagination)?²⁴

Over time parliaments have developed theories for why certain content is placed in an Act and other content is left to regulation.²⁵ Reduced to its simplest, Acts are used to define principles and policy, whereas operational and administrative details are left to the regulations.²⁶ There are practical reasons for adopting this model. Parliaments may not have the time or technical capacity to comprehensively write every single piece of legislation. Delegation allows the departmental apparatus to operationalise the will of the parliament. In the same vein we may ask; what objectives are achieved

²³ See Ganz above n 4 at 20 in reference to the findings of the Committee on Ministers’ Powers (1932) which famously stated of delegated legislation in the United Kingdom; ‘*The most scientific explorer cannot make a map out of a jungle*’

²⁴ See the list provided by Ganz above n 4 at 20.

²⁵ For a broader discussion and critique of traditional justifications for delegated legislation see generally Argument above n 21. Note particularly the discussion of the *Carbon Credits (Carbon Farming Initiative) Bill 2011* at and at 8-10.

²⁶ See Senator Chris Evan’s explanation of this in the context of the *Carbon Credits (Carbon Farming Initiative) Bill 2011*. Senate, *Hansard*, 5 July 2011, at page 89: “[t]he reality of the way legislation works is that we get the framework of the legislation and then we move to regulations or other things that implement that broad legislation. People always want all the detail when, in fact, that is not the way the legislative process works.”

by expanding the hierarchy of legislation to include quasi-legislation, which could not be achieved by more traditional forms of delegated legislation?

Quasi-legislation may have a legitimate role in facilitating the practical dimensions of regulatory harmonisation. Inter-jurisdiction consistency, particularly in policy areas that effect interstate trade and commerce, can be readily achieved by linking State regulations to centralised quasi-legislation produced by Commonwealth Ministerial Councils, Commonwealth Departments or national industry peak bodies.²⁷ Similarly the use of professional codes and standards can be used to shape due diligence requirements via parliament rather than leaving it to the judiciary. Providing guidance in these instruments may also avoid some of the complexities associated with industries understanding judicial precedents on due diligence.

Regulation free from undue political interference or influence has also been raised as a reason why a non-governmental entity might be given powers to develop and publish quasi legislation²⁸ such as the use of self regulatory based codes of practice in the public broadcasting and media sphere.²⁹ Universities seeking to maintain

²⁷ For example national and international wide codes of practice or standards such as the *Agricultural and Veterinary Chemicals Code* (Agvet Code) and the *Australia New Zealand Food Standards Code* are referenced or incorporated into State based regulation.

²⁸ See Burrows, John. 'Legislation: Primary, Secondary and Tertiary' (2011) 42 *Victoria University of Wellington Law Review* 65 at 71-73

²⁹ The link between the themes of press freedom and self-regulation are a common feature of the media regulation debate. Some commentators directly link press freedom as only achievable under self-regulation models, suggesting direct or co-regulatory models will allow government interference in the media. For example see Berg, Chris. 'Have the media watchers undermined press freedom?' (20 September 2011) accessed at <http://www.abc.net.au/unleashed/2907894.html> on 23/09/2011. For a broader discussion on media regulation models see also Senate Select Committee on Information Technologies. 'In the Public Interest: Monitoring Australia's media' (April 2000) Commonwealth of Australia at Chapter 1.

academic freedom may make similar claims that quasi-legislation provides a buffer from political interference.³⁰

The most interesting and revealing use of quasi-legislation is in the context of public asset or service privatisation. Regardless of the economic rationales proffered, government privatisation programs have a tendency to deploy quasi-legislation in order to protect the public from the worst excesses of the free market³¹ without raising political risk alarm bells for investors. Cast in this light, quasi-legislation is painted as a regulatory halfway house, a lawmaking space where market/industry self-regulation is tempered by 'big government interventionism' or where co/self-regulatory approaches - that would otherwise be understood as 'Dracula in charge of the blood bank' - are legitimatised.

Problems posed by Quasi-legislation

For all the legitimate and appropriate use of quasi legislation there remains a suspicion that sometimes its use is not always driven by the desire for regulatory effectiveness, particularly considering the problems of inconsistent and poor drafting³² and accessibility.³³ Quasi-legislation has historically presented real life

³⁰ See Burrows above n 28 at 71-73. The degree to which parliaments actually refrain from entering into the internal politics of universities is debated. See *University of Sydney Amendment By-law 2001* disallowance motion moved in the NSW Legislative Council - *LC Minutes (6/6/2001)* 1009-1010.

³¹ Burrow above n 28 at 72.

³² Quasi-legislation is often drafted by departments or agencies who do not necessarily conform to the rules and procedures applied by centralized drafting agencies such as Parliamentary Counsel Offices or Attorney General's Department. Specifically there may be a lack of numbering, dating and logical expression of rules. See Argument, Stephen. *'Parliamentary Scrutiny of Quasi-legislation'* (May 1992) Papers on Parliament No. 15 at 23.

³³ The problem with accessibility relates to a number of problems. Navigating the expanding universe of statutory instruments and quasi-legislation has become increasingly difficult due to the magnitude of expansion seen in this area of delegated legislation. A specific problem with accessibility is the reference and incorporation of Australian Standards (AS) into delegated legislation whereby access to AS can be cost prohibitive. See Legislative Instruments Act Review Committee *'2008 Review of the Legislative Instruments Act 2003'* (2009) Commonwealth Attorney-General's Department at 29-30.

challenges to those subject to regulation and those charged with interpreting law³⁴ raising difficult questions about how effective such regulation is.

Beyond the practical deficiencies, there are more esoteric concerns pertaining to the potential reduction in parliamentary oversight resulting from quasi-legislation.

*“[I]t is a matter for real concern that government departments will knowingly seek to reduce a parliamentary committee's jurisdiction by adopting forms of statutory instrument that are not caught by the definition "regulation" in the empowering Act.”*³⁵

Others have similarly questioned the motives of the executive and government departments³⁶ who rebrand laws in absence of pressure³⁷ to fulfill regulatory harmonization, regulatory innovation or ‘at arms length’ regulation objectives. In this context, the use of quasi-legislation simply circumvents standardised requirements for publication, drafting, consultation and parliamentary disallowance.

See also Interdepartmental Committee on Quasi-Regulation Report ‘*Grey Letter Law*’ (December 1997) at xvi. However it should be noted that the Register of legislative instruments at the Federal level has greatly improved recording and access to these instruments.

³⁴ *Blackpool Corporation v Locker* [1948] 1 KB 349 at 361-362 per Lord Justice Scott. Lord Justice Scott points out that the rule of law may be broken down by the average citizen remaining ignorant of rights conferred in ‘secret’ or in unpublished delegated legislation. See also *Watson v Lee* (1979) 155 CLR 374 at 394.

³⁵ Wiese, Robert. ‘*A regulation by any other name*’ (22 May 1991) Third Conference of Australian Delegated Legislation Committees, Perth at 1

³⁶ See O’Keeffe, Peter. ‘*Who is Watching the Regulators*’ (October 1989) 58 Business Council Bulletin 32 at 35 and Lord Justice Scott in *Blackpool Corporation v Locker* [1948] 1 KB 349, at 368 both cited in Argument, Stephen. ‘*Parliamentary Scrutiny of Quasi-legislation*’ (May 1992) Papers on Parliament No. 15

³⁷ The evolution of RIS is part of a greater government emphasis on examining regulatory choice and evaluating different modes of regulation. Pressure for smarter and more efficient regulation comes from a range of stakeholders. In the context of quasi-legislation there are pressures both from government and business stakeholders to cut red/green tape and make regulation more effective. See Holmes, S. (1997) *Some Lessons from the Use of Environmental Quasi-Regulation in North America*, Office of Regulation Review Staff Working Paper, Office of Regulation Review, Industry Commission, Canberra at 1 for an introduction to some of the drivers of quasi-legislation use in the context of natural resource and environment management.

Executives may seek to insulate themselves from political risk³⁸ or challenge by substituting disallowable instruments with quasi-legislation³⁹ or by outsourcing regulatory content to quasi-legislation. Many State jurisdictions limit the power to disallow delegated legislation to traditional forms such as regulations or by-laws, meaning that other forms, such as quasi legislation, are given a free run.⁴⁰ For example in NSW the Parliament's power to disallow delegated legislation is limited to statutory rules,⁴¹ which are defined as regulations, by-law, rule or ordinance made or confirmed by the Governor.⁴²

This section examines two key questions with the use of quasi-legislation in regulations; does the presence of quasi-legislation reduce the efficacy of disallowance motions and does it allow regulatory change without parliamentary oversight?

Does it diminish the effectiveness of disallowance motion?

³⁸ Political risk is a prevalent concern in private public partnerships and privatisation processes. Investors and businesses want certainty in contractual arrangements with a Government leading to situations where potential for parliamentary challenge of executive actions are removed. For example in NSW the Acts authorising the privatization of NSW Lotteries and waste services included provisions that made regulations enabled under the respective Acts exempt from been a statutory rule. See Schedule 4 Clause 33 and 34.

³⁹ Section 7A of the *Gene Technology (GM Crop Moratorium) Act 2003(NSW)* involves the use of a non-statutory instruments to achieve what may be interpreted as a policy determination that should be made by parliament. Under the section the Minister can issue an order, not subject to disallowance by parliament, to allow an exemption from a State wide moratorium on genetically modified food plants for a class or breed of GM food plants (such as canola or wheat) based upon voluntary industry protocols. Section 7A is even more problematic due to the insertion of a privative clause which prevents any judicial review of any Ministerial order. For the discussions on the validity of privative clauses both at Commonwealth and New South Wales see *Plaintiff S157/2002 v Commonwealth of Australia* (2001) 211 CLR 476 and *Kirk v Industrial Relations Commission of New South Wales* [2010] HCA 1. See also Ng, Gerald. 'Slaying the Ghost of Henry VIII: A reconsideration of the limits upon the delegation of commonwealth legislative power.' (2010) 38 Federal Law Review 205 at 206-210

⁴⁰ For a full comparative list of disallowance provisions in different jurisdictions see **Appendix A**.

⁴¹ Section 41(1) *Interpretation Act 1987(NSW)*

⁴² Section 21 *Interpretation Act 1987(NSW)* and Section 3 Subordinate Legislation Act 1989 (NSW) noting statutory rules identified in Schedule 4.

For situations where Acts delegate lawmaking power through quasi legislation rather than regulation, disallowance is rendered meaningless. In situations whereby regulations incorporate quasi legislation the impact on disallowance varies. The issue of incorporation of quasi-legislation or external documents ‘by reference’ in regulations has been considered on a number of occasions by the courts.⁴³ Courts have been called upon to examine the validity of regulations that incorporate external material on the grounds of uncertainty and non-publication.⁴⁴ Walsh J in *Wright v TIL Services Pty Ltd*⁴⁵ proposed that incorporation of an external document did not render a regulation invalid on the ground of uncertainty as long as the external document was clearly identifiable and ‘contained no ambiguity in its own terms’.

While the judiciary has cause for concern with the practice in terms of citizens having access to the laws that govern their lives, quasi-legislation poses a different type of challenge for legislatures. Section 42(1) of the *Interpretation Act 1987 (NSW)* provides that a regulation is within power even if it regulates by ‘*applying, adopting or incorporating, with or without modification the provisions of . . . any other publication*’ thereby giving the executive a broad mandate to control the form and structure of delegated legislation. Common empowering provisions such as the Minister may ‘*make regulation*’, ‘*prescribe in regulation*’ and ‘*in regulation define*’ do not ensure all substantive content is numbered and detailed within the body of a

⁴³ See *McDevitt v McArthur* (1919) 15 Tas LR 6, *O’Keefe v City of Caulfield* [1945] VLR 227, *McIver v Allen* (1943) 43 SR (NSW) 266 all been cases where the invalidity of incorporating material into legislation was upheld. See *Wright v TIL Services Pty Ltd* (1956) 56 SR (NSW) 413, *Dainford Ltd v Smith* (1985) 115 CLR 342 and *Dorfler v Pine River Shire Council* [1994] 1 Qd R 507 which support the validity of incorporation. For a discussion of this case law see Pearce & Argument above n 8 at 300-307

⁴⁴ Both *Arnold v Hunt* (1943) 67 CLR 429 and *McIver v Allen* (1943) 43 SR (NSW) 266 dealt with a price list incorporated by reference under national security legislation whereby there was an issue relating to publication. The price list was only available to members of the United Licensed Victuallers Association. See Pearce & Argument above n 8 at 301

⁴⁵ (1956) 56 SR (NSW) 413 at 421-422

statutory rule. The practical function of s 42(1) is to facilitate the application of quasi-legislation as law without integrating all the text into the regulation.

The implication of s 42(1) is that a single clause of a regulation that could be subject to disallowance, may in effect reference an expansive and complex quasi-legislation document containing ‘the good, the bad and the ugly’ of regulatory content. For example, sub-clauses 80A(a) – (f) of the *National Parks and Wildlife Regulation 2009* (NSW) makes reference to six different codes of practice and guidelines. Individual sub-clauses in the regulation can be disallowed but the effect of disallowing a sub-clause is the repeal of the complete referenced document, thereby removing useful as well as detrimental regulatory content.

Most State jurisdictions provide for disallowance of any identifiable portion of a statutory rule.⁴⁶ The validity of disallowing individual portions of delegated legislation was considered in *Borthwick v Kerin*⁴⁷ after the Attorney General and the Solicitor General challenged the ability of the Senate to disallow individual export control orders contained in a single amending order. Ability to identify and disallow pinpointed portions of a statutory instrument prevents the disallowance of regulations from being an ‘*all or nothing*’ proposition.⁴⁸ Parliaments do not have to take the good with the bad and can repeal any numbered and identifiable provision.⁴⁹ Rules that require the disallowance of a regulation in whole can serve as a strong political

⁴⁶ Section 41(6) Interpretation Act 1987 (NSW)

⁴⁷ 87 ALR 527

⁴⁸ There have been examples in the Federal Senate whereby movers of disallowance motions have withdrawn motions as they could not pinpoint or disentangle inappropriate provisions from particular regulations. See Odgers above n 8 at 332.

⁴⁹ There is even greater flexibility in ACT and WA with parliaments not only having the ability to repeal delegated legislation but an additional ability to amend regulations. See Section 42(3)-(4) *Interpretation Act 1984 (WA)* and Section 68 *Legislation Act 2001 (ACT)*

disincentive against disallowance, no matter how repugnant the offending part, clause or sub-clause is.⁵⁰

Use of quasi-legislation in delegated legislation can reintroduce the ‘all or nothing’ problem. While some regulations fully incorporate numbered quasi-legislation into schedules⁵¹ others simply reference whole non-statutory regimes within a single clause. Consider the example of Part 3 of the *Coastal Protection Regulation 2011 (NSW)* which would sit between these two extremes.

⁵⁰ Odgers above n 8 at 332.

⁵¹ *Plantations and Reafforestation (Code) Regulations 2001* utilises a code as the basis of regulation yet inserts the full code (numbered) into the Appendix of the Regulation. The *Housing Regulation 2009* adopts a regulatory code in a similar way by placing the full code in the Schedule of the regulation. In both contexts the full regulatory code is numbered within the Schedule allowing key provisions to be pinpointed for potential disallowance. See also *Animal Research Regulations 2010* Clause 4 and Schedule 1 and *Children and Young Persons (Care and Protection)(Child Employment) Regulation 2010*. See also the *Veterinary Practice Regulation 2006* that inserts the Code of Practice in Schedule 2 of the Regulation and each provision of the Code is numbered.

Part 3 - Requirements relating to emergency coastal protection works

7 Requirements for placement of material as emergency coastal protection works

For the purposes of section 55P of the Act, the requirements set out in Parts 1 and 2 of the Code of Practice relating to the placement of material as emergency coastal protection works are specified.

8 Requirements for maintenance of emergency coastal protection works

For the purposes of section 55R of the Act, the requirements set out in Parts 1 and 3 of the Code of Practice relating to the maintenance of emergency coastal protection works are specified.

9 Requirements for removal of emergency coastal protection works and restoration of land

For the purposes of section 55Y (1) of the Act, the requirements set out in Parts 1 and 4 of the Code of Practice are specified.

10 Requirements for restoration of land in compliance with order to remove certain materials and structures unlawfully placed on beaches

For the purposes of section 55ZA (3) (b) of the Act, the requirements set out in Part 5 of the Code of Practice are specified.

11 Requirements for restoration of land in compliance with order relating to emergency coastal protection works

For the purposes of section 55ZC (5) (b) of the Act, the requirements set out in Part 4 of the Code of Practice are specified.

The *Coastal Protection Regulation 2011* is a good example of a skeleton regulation.⁵²

If a parliamentarian sought to disallow a particular provision of the Code of Practice they would be faced with the situation whereby they could only disallow the whole clause, which means removing multiple chapters of the Code.

Even more problematic are regulations that do not directly reference quasi-legislation and instead create a power for the Minister to publish quasi-legislation by order. For

⁵² However it is not necessarily representative of the form in which quasi-legislation is used in Regulations.

example the *Water Industry Competition (General) Regulation 2008* (NSW) provides for the establishment of a marketing code created by a Ministerial order.⁵³ Similarly the *Mining Regulation 2010* (NSW) allows the Minister to define by order activities that are not prospecting or mining for the purpose of the Act.⁵⁴ This format further divorces the quasi-legislation from the parent regulation and means that quasi-legislation cannot be disallowed without removing the Minister's power to issue an order. From a practical point of view the Minister may not even issue an order creating quasi-legislation until after window of opportunity to lodge a disallowance motion has closed.⁵⁵ Giving a Minister the power to create quasi-legislation under regulation from time to time, after the close of the disallowance window, highlights the point that this legislative format also suffers from the same problem as quasi-legislation that is not 'date stamped'. The Minister can repeatedly vary content without amending the principal regulation.

Does quasi-legislation allow greater malleability of regulations without a corresponding parliamentary oversight?

Parliaments have a degree of oversight into variation or amendment of delegated legislation. Executives cannot just unilaterally change laws or regulations without parliamentary oversight. Creation of an amending regulation opens up the opportunity

⁵³ Clause 26

⁵⁴ Clause 13

⁵⁵ In NSW (other State jurisdictions have similar procedures) a parliamentarian can lay the disallowance motion before the House with the 15 sitting days after the tabling of a regulation in parliament. After 15 sitting days have lapsed since the tabling of a regulation, neither House can disallow the regulation or any part of it. There are obvious difficulties where a Minister does not publish quasi legislation within the 15 sitting day timeframe or intentionally waits until after the 15 day period has expired. The only way to deal with this situation would be to lay a disallowance motion before the house that simply repeals the power of the Minister to publish quasi legislation and leave the motion dormant until the code is published under an order.

for parliaments to disallow amendments. However, what if the content of a regulation could be amended or varied without creating an amending regulation and opening up disallowance powers? Quasi-legislation has the potential to create an additional platform for alteration or variation of content without enacting an amending regulation - the skeleton is the same, just a change of clothes.

This concern is aptly demonstrated by the Commonwealth *Senate Standing Committee on Regulations and Ordinances* in its analysis of the *Airports (Environment Protection) Regulation 1997 (Cth)*. The regulation made reference to a number of environmental testing methods to be applied in fulfilling the Act, which is an external standard established from 'time to time' by the United States Environmental Protection Agency (USEPA).⁵⁶ This outsourced a substantive, operational element of the regulation to an agency outside of the Australian jurisdiction that could be continually altered without parliamentary review.⁵⁷ The Senate Committee found the USEPA standards were not identified (or frozen) at a particular point in time meaning they contravened a provision of the *Acts Interpretation Act 1901 (Cth)* and exceeded power.⁵⁸ Executive or third party legislative change by stealth is avoided by 'date stamping' quasi-legislation referenced in delegated legislation.

In NSW, which is not unique in its use of quasi-legislation, a range of regulations similarly reference external documents. The *Native Vegetations Regulation 2005*

⁵⁶ Clause 1.08 *Airports (Environment Protection) Regulation 1997 (Cth)*

⁵⁷ At the time Section 49A of the Acts Interpretation Act 1901 was in force which allowed the incorporation of materials other than Acts and Regulations but only as they existed at a particular time. Section 46AA of the Acts Interpretation Act 1901 now deals with incorporation of publications in non-legislative instruments. See also LIA section 14.

⁵⁸ See Allars, Margaret. 'A Critique of Criteria and Cases: Parliamentary Scrutiny of Acts, Regulations and Codes.' in Seventh Australasian and Pacific Conference on Delegated Legislation (22 July 1999) at 105

(NSW) uses two highly detailed and comprehensive quasi-legislation documents, an Assessment Methodology⁵⁹ and Code of Practice⁶⁰ to regulate operational and policy elements of native vegetation management. In this case the potential for continued departmental or executive amendment after the closure of the disallowance period of 15 sitting days is avoided through an Act specific procedure for amendment of quasi-legislative documents. Clauses 26(1)(c) and 29D(1)(c) require regulatory amendment of definitions before amendments to these referenced documents can take effect.⁶¹ For example, if the Minister sought to make a rewrite of the Private Native Forestry (PNF) Code of Practice the changes would not come into effect until an amendment regulation was enacted to update the definition of 'PNF Code of Practice'. Through this process the changes made to the non-statutory document are put into a regulatory form and can be subject to disallowance.⁶²

A similar point could be made in relation to the *Coastal Protection Regulation 2011* whereby the definition of the Code of Practice is defined at a particular point in time and published on a particular date.⁶³ In these circumstances 'date stamping' quasi-legislation referenced in regulations prevents the executive from making changes to quasi-legislation that are not subject to the oversight of parliament. It also provides an

⁵⁹ Native Vegetation Regulation 2005 Part 5 (Clause 24)

⁶⁰ Native Vegetation Regulation 2005 Part 5A (Clause 29A)

⁶¹ For example see *Native Vegetation Amendment (Assessment Methodology) Regulation 2010* that amends the Clause 24 by inserting a new date. For a full list of Assessment Methodology revisions see Native Vegetation Regulation 2005 (Notes). However, it should be noted that there is Ministerial scope for changes to the application of the Assessment Methodology and the application of the PNF Code of Practice. See Clause 27-29 and 29C. There may be arguments for and against flexibility in the applicability of these non-statutory documents.

⁶² Disallowing a regulation that changes the definition of a non-statutory document in order to disallow the overall code or methodology may not be a particularly efficient or effective approach to disallowance.

⁶³ See Clause 3(1); In this Regulation: "Code of Practice" means the document entitled *Code of Practice under the Coastal Protection Act 1979* published by the Department in March 2011.

important safeguard against continual executive amendment of regulations after the window for parliamentary disallowance has lapsed.

Despite these examples and the practice of date stamping quasi-legislation being generally required under Section 69 of the *Interpretation Act* (NSW), it is not always applied. An Assessment Methodology central to the operation of the *Threatened Species Conservation (Biodiversity Banking) Regulation 2008*(NSW) is not ‘date stamped’.⁶⁴ While the regulation does create specific procedures for amendment, variation or revocation of a ‘biobanking methodology’⁶⁵ including public consultation and departmental review, the methodology can be altered without creating an amending regulation.

While s 69(1) requires the reference to quasi legislation to be fixed or in force at a particular time, s 69(2) allows a publication to be incorporated into a statutory instrument from ‘time to time’ if such an intention is expressed in the parent Act. This in turn means empowering provisions can be structured by parliament to avoid the requirement of date stamping. An examination of NSW Acts with authorisations under s69(2) raises the question of whether there has been sufficient and consistent parliamentary consideration of empowering such a practice. Acts such as the *Children and Young Persons (Care and Protection) Act 1998*,⁶⁶ *Local Government Act 1993*(NSW),⁶⁷ *Work Health and Safety Act 2011* (NSW),⁶⁸ *Fisheries Management Act*

⁶⁴ See definitions in Clause 2 *Threatened Species Conservation (Biodiversity Banking) Regulation 2008*(NSW)

⁶⁵ Clause 5 to 10 *Threatened Species Conservation (Biodiversity Banking) Regulation 2008*(NSW)

⁶⁶ Section 264(3)

⁶⁷ Section 748(5)

⁶⁸ Section 276(3)

1994 (NSW)⁶⁹ and the *Ports and Marine Administration Act 1995*⁷⁰ are some of the examples of Acts authorising variation of quasi legislation in regulations from time to time without exposing the regulation to disallowance. Notwithstanding the arguments for particular regimes to create such discretion there should be a presumption that all variation of quasi legislation should be subject to parliamentary oversight unless it can be demonstrated that it not of a policy or legislative character.

Improving oversight of Quasi-legislation in Statutory Instruments

State jurisdictions need to consider how to preserve the effectiveness of parliamentary disallowance as quasi-legislation is playing a greater role in the regulatory toolbox. How can equilibrium between parliamentary and executive function be maintained if the executive retains discretion to mould regulation into a form that reduces parliamentary oversight? The LIA approach of exposing instruments to parliamentary safeguards based on their 'legislative character' has a stronger capacity to sort out which laws are legislative and which are pure administrative, enabling a principled approach to balancing parliamentary and executive roles.⁷¹ The inherent logic of this approach makes a strong case for State jurisdictions to build elements of the LIA into their own subordinate legislation and interpretation Acts.

The alternative to LIA inspired reform is targeted amendments to address the problems quasi-legislation causes for disallowance powers. Date stamping all quasi-

⁶⁹ Section 289(3)

⁷⁰ Section 110(3)

⁷¹ See Argument, Stephen. 'Legislative Scrutiny in a Time of Rights Awareness' (March 2005) Ninth Australasian and Pacific Conference on Delegated Legislation & Sixth Australasian and Pacific Conference on the Scrutiny of Bills at 7. See also Giles, Patricia. *Scrutiny of Federal Quasi Legislation in Australia* (1989) Third Commonwealth Conference on Delegated Legislation (1989) London, HMSO (Record of Proceedings) in relation to distinction between administrative vs legislative character.

legislation referenced in regulations will prevent variation without parliamentary oversight or potential disallowance. To ensure universal 'date stamping' s 69(2) of the *Interpretation Act 1987 (NSW)* and any empowering provisions allowing for quasi instruments to be incorporated '*from time to time*' could be repealed.

Full incorporation of quasi-legislation content into regulation schedules is a simple solution to the concealment of regulatory content in referenced material. Already a substantial number of codes of conduct are incorporated into schedules of regulations. Amendment to s 42 of the *Interpretation Act* requiring all 'publications or other material' to be incorporated into the schedule of the principal regulation or instrument would greatly improve the quality of quasi-legislation drafting and open up all elements of quasi-legislation to disallowance, removing the 'all or nothing' proposition. The counter argument is that the drafting flexibility obtained through simply referencing quasi-legislation would be lost if it needed to conform to regulatory drafting standards. But continuance of non-conforming, inconsistent and often poorly drafted quasi-legislation for departmental convenience is not a convincing justification for avoiding full regulatory incorporation. The middle ground would be to allow amendment, not just repeal of regulations under a disallowance motion similar to the disallowance power in Western Australia. In this way, exemptions to particular provision in quasi legislation could be inserted by way of amendment into the regulation.⁷²

Both these suggestions are not without their problems and challenges. Broader reform, consistent with the LIA, will allow State jurisdictions to deal with quasi-

⁷² This practice is sometimes adopted in relation to incorporation by reference of Commonwealth based documents or instruments in State regulation. Individual States may provide some exemptions or turn specific provisions off to tailor the application to their State jurisdiction.

legislation in a more holistic way and have an approach that accurately reflects the balance that needs to be struck between the respective roles of the legislature and the executive.

Appendix A

<u>State</u>	<u>Ambit of delegated legislation definition</u>	<u>Scope of Disallowance Provisions</u>	<u>Rules of Incorporation by Reference for Quasi-legislation</u>
<i>Victoria</i>	Statutory Rule⁷³ and Legislative Instrument⁷⁴ – Sections 4 and 4A respectively of the Subordinate Legislation Act 1994 (Vic)	Statutory Rule and Legislative Instrument – Sections 23 and 25C respectively of the Subordinate Legislation Act 1994 (Vic) ⁷⁵	As in force or ‘from time to time’ with special notification and tabling requirements – Section 32(3) &(4) Interpretation of Legislation Act 1984
<i>Queensland</i>	Subordinate Legislation⁷⁶ – Section 9 Statutory Instrument Act 2001 (Qld)	Subordinate Legislation – Section 50 Statutory Instrument Act 2001 (Qld)	‘As in force’ or ‘from time to time’ – Section 23 Statutory Instruments

⁷³ Under Section 4 the Governor in Council may make regulations prescribing instruments to be statutory rules. Prior to the Subordinate Legislation Amendment Act 2010 section 3 defined statutory rules, which primarily included regulations, rules and any instruments deemed to be statutory rules.

⁷⁴ These are prescribed on an Act-by-Act basis in the Subordinate Legislation (Legislative Instruments) Regulation 2011 (Vic).

⁷⁵ It is important to note that there is no general power of disallowance in Victorian Parliament. A statutory rule or legislative instrument are only disallowable if they meet the preconditions under s 23 and 25C respectively which only allow disallowance if the authorising Act make the delegated legislation subject to disallowance, the Scrutiny Committee has recommend disallowance there was a failure laying the rule before parliament and the Scrutiny Committee has reported the failure.

⁷⁶ This includes statutory rule that is a regulation, rule, by-law, ordinance or statute; a statutory rule that is an order in council or proclamation of a legislative character; any statutory instrument (including an order in council or proclamation) that is declared to be subordinate legislation by an Act or a regulation made under this Act. Note Section 9(2) provided for instruments to be exempted and listed in Schedule 1A.

			Act 1992.
<i>Tasmania</i>	Subordinate Legislation ⁷⁷ – Section 3(1) Subordinate Legislation Act 1992	Regulations ⁷⁸ - Section 47(4) Acts Interpretation Act 1931	No provisions applicable.
<i>Western Australia</i>	Subsidiary Legislation ⁷⁹ – Section 5 <i>Interpretation Act 1984 (WA)</i>	Regulations ⁸⁰ - Section 42(2) Interpretation Act 1984 (WA)	‘From time to time’ - Section 43(8) Interpretation Act 1984 -
<i>South Australia</i>	Regulation ⁸¹ – Section 4 Subordinate Legislation Act 1978 (SA)	Regulation – Section 10 (5a) & (5b) Subordinate Legislation Act 1978 (SA)	‘As in force’ - Section 40 – Acts Interpretation Act 1915
<i>New South Wales</i>	Statutory Rule ⁸² – Section 3(1) Subordinate Legislation Act 1989 (NSW)	Statutory Rule – Section 41(1) Interpretation Act 1987(NSW)	‘As in force’ or if intention expressed in principal Act ‘from time to time’ - Section 69(1) &(2) <i>Interpretation Act (NSW)</i>
<i>Australia Capital Territory</i>	Subordinate Law ⁸³ or Disallowable Instrument ⁸⁴ –	Subordinate Law or Disallowable Instrument –	‘As in force’ or if intention expressed in

⁷⁷ This includes regulations, rule or by-law and any other instrument of a legislative character that is made under the authority of an Act and declared by the Treasurer under subsection (2) to be subordinate legislation for the purposes of this Act.

⁷⁸ This includes rule or by law. See Section 2A *Acts Interpretation Act 1931* (Tas)

⁷⁹ This includes proclamation, regulation, rule, local law, by-law, order, notice, rule of court, local or region planning scheme, resolution, or other instrument, made under any written law and having legislative effect.

⁸⁰ This included includes rules, local laws and by-laws. See Section 42(8)(b).

⁸¹ This includes regulation, rule or by-law made under an Act. Do note that Section 9 of the Subordinate Legislation Act 1978 does enable the Governor to declare by proclamation that any provision of the Act apply to ‘any enactment of a legislative character made pursuant to any Act.

⁸² This included regulation, by-law, rule or ordinance excluding instruments specified in Schedule 4.

⁸³ This includes regulation, rule or by-law (whether or not legislative in nature)

⁸⁴ This includes a statutory instrument (whether or not legislative in nature) that is declared to be a disallowable instrument by an Act, subordinate law or another disallowable instrument or a

	Section 8 and 9 respectively Legislation Act 2001 (ACT)	Section 65 Legislation Act 2001 (ACT)	principal Act 'from time to time' – Section 47 Legislation Act 2001 (ACT)
<i>Northern Territory</i>	Subordinate Legislation⁸⁵ – Section 17 <i>Interpretation Act (NT)</i>	Subordinate Legislation – Section 63(9) Interpretation Act (NT)	As in force - Section 66(b) Interpretation Act (NT)

determination of fees or charges by a Minister under an Act or subordinate law. A statutory instrument is defined under Section 13.

⁸⁵ This includes regulations, rules or by-laws or statutory instruments (meaning an instrument of legislative or administrative character) subject to procedures in Section 63.