



THIRTY-EIGHTH PARLIAMENT

REPORT 19

STANDING COMMITTEE ON LEGISLATION

REVENUE LAWS AMENDMENT BILL 2012

Presented by Hon Donna Faragher MLC (Chairman)

September 2012

STANDING COMMITTEE ON LEGISLATION

Date first appointed:

17 August 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

“4. Legislation Committee

- 4.1 A *Legislation Committee* is established.
- 4.2 The Committee consists of 5 members.
- 4.3 The functions of the Committee are to consider and report on any Bill referred by the House or under SO 125A.
- 4.4 Unless otherwise ordered, any amendment recommended by the Committee must be consistent with the policy of a Bill.”

Members as at the time of this inquiry:

Hon Donna Faragher MLC (Chairman)

Hon Sally Talbot MLC (Deputy Chair)

Hon Mia Davies MLC

Hon Alyssa Hayden MLC

Hon Alison Xamon MLC

Staff as at the time of this inquiry:

Susan O'Brien (Advisory Officer (Legal))

David Driscoll (Parliamentary Officer
(Committees))

Address:

Parliament House, Perth WA 6000, Telephone (08) 9222 7222

lcco@parliament.wa.gov.au

Website: <http://www.parliament.wa.gov.au>

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REPORT OF THE STANDING COMMITTEE ON LEGISLATION

IN RELATION TO THE REVENUE LAWS AMENDMENT BILL 2012

1 REFERENCE AND EXECUTIVE SUMMARY

1.1 The Revenue Laws Amendment Bill 2012 (**Bill**) was referred to the Committee on 23 August 2012 for the purpose of identifying whether it comprised any ‘Henry VIII clauses’. In particular, attention was drawn to the power conferred by clause 42 to make regulations with retrospective effect.¹

1.2 The Committee identified two possible Henry VIII clauses:

- clause 41, which proposes a new section 41C for the *Pay-roll Tax Assessment Act 2002* that authorises, in section 41C(1)(b), regulations prescribing the Commonwealth wages subsidies for employers who employ persons with a disability that will attract an exemption from paying pay-roll tax; and
- clause 42, which proposes power to make retrospective regulations under the same Act.

It sought an opinion from the Clerk, further information from the government and enquired of Hon Ken Travers MLC whether he wished to add to the comments he made in the House. The Clerk’s opinion and letter from the Minister for Finance are appended to this report.

1.3 The Committee was given limited time for its inquiry, being required to report on 12 September 2012. However, the prompt responses to its requests for information have enabled it to give full consideration to the issues.

1.4 The Committee has concluded, on balance, that these clauses are not Henry VIII clauses. Since identification of Henry VIII clauses can be open to debate, the Committee explains its reasoning in this report.

2 HENRY VIII CLAUSES – WHAT ARE THEY AND WHY DO THEY CAUSE CONCERN?

2.1 As the Clerk notes in his opinion, the term ‘Henry VIII clause’ is derived from Henry VIII’s proclivity to “*persuade*” Parliament to empower him to make law by proclamation. The Clerk’s opinion provides a detailed explanation of Henry VIII clauses. In summary, ‘Henry VIII clauses’ are clauses in primary legislation that

¹ Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 23 August 2012, pp5303-6.

authorise the making of subsidiary legislation by some entity other than Parliament (generally the Executive) that overrides, or alters the scope or application of, the primary legislation made by Parliament. The Standing Committee on Public Administration and Finance observed in 2002:

*It is the power given to the executive to override the intention of parliament expressed in an Act that causes consternation over the use of Henry VIII clauses.*²

- 2.2 In a paper delivered to the 2011 Australia-New Zealand Scrutiny of Legislation Conference, Mr Tim Macindoe MP and Hon Lianne Dalziel MP observed:

*The practical significance of Henry VIII clauses lies in the loss of 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.*³

- 2.3 The risk Henry VIII clauses entail is also reflected in Emeritus Professor Mark Aaronson's provocative assertion (again made in a paper delivered to the 2011 Australia-New Zealand Scrutiny of Legislation Conference) that:

*one must now acknowledge that except in constitutional terms, Parliament is no longer the primary legislator.*⁴

² Western Australia, Legislative Council, Standing Committee on Public Administration and Finance, Report 1, *Planning Appeals Amendment Bill 2001*, 27 March 2002, p50.

³ Mr Tim Macindoe MP and Hon Lianne Dalziel MP, 'New Zealand's response to the Canterbury earthquakes,' July 2011, p5. In a paper given at the 2009 Scrutiny of Legislation Conference, Emeritus Professor Dennis Pearce wrote: "matters are often left to be included in regulations because there has not been time to cover all issues in the Bill introduced into the Parliament. Time is thus gained to deal with matters that may be of significance." (D Pearce, "Legislative Scrutiny: Are the ANZACS Still Leaders?", p 5, online at http://www.aph.gov.au/Senate/sl_conference/papers/pearce.pdf, accessed on 4 July 2011). See, for example, Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 56, *Fair Trading Bill 2010*, 23 November 2010, p123 and Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 61, *Occupational Licensing National Law Bill 2010*, 14 April 2011, p11, in which Henry VIII clauses were associated with the policy work not having been completed when the bill is presented.

⁴ Emeritus Professor Mark Aronson, 'Subordinate Legislation: Lively Scrutiny or Politics in Seclusion', (Paper presented to the 2011 Australia-New Zealand Scrutiny of Legislation conference) pages unnumbered. See also Hon George Cash MLC in 2008 during debate on the pre-enactment determination clause originally proposed for the *Pay-roll Tax Assessment Act 2002*, when he said: "There are many reasons we think that the Parliament should not abrogate its responsibility in the making of legislation. This is an elected house. Its members are elected by the people to carry out the various duties and responsibilities that are outlined in the Constitution and certainly under other laws. ... In my view, we are abrogating the role of Parliament in our continued quest to add Henry VIII clauses to legislation generally. ... If [members] do not bother to understand the problems associated with Henry VIII clauses, they will end up legislating away the authority of this Parliament to make decisions and to hand that authority across to the executive. Of course, that in itself is an issue because one thing that is absolutely critical in constitutional law in Australia is paying regard to the doctrine of the separation of powers." (Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*)

- 2.4 The process for scrutinising primary legislation is detailed. That is, there is provision for the seeking of information on the purpose and effect of provisions and capacity to make amendments. Most importantly, the legislation does not have effect without being endorsed by the Parliament. Whereas the only control the Parliament has over subsidiary legislation is the power to disallow after it has come into effect. There is limited capacity to amend. The only detailed scrutiny occurs through reference to a committee.⁵
- 2.5 However, it should be noted that the Joint Standing Committee on Delegated Legislation (JSCDL) is constrained by its terms of reference when scrutinising regulations made under Henry VIII clauses.⁶ Those terms of reference require the JSCDL to inquire into a number of specified matters, with its general inquiry being whether subsidiary legislation is authorised or contemplated by the empowering legislation. In the case of Henry VIII clauses, regulations amending the operation of the primary legislation are clearly authorised in the empowering legislation. The broader the power, the more difficult it is for the JSCDL to identify that a particular ‘Henry VIII’ regulation is not contemplated by the empowering legislation.
- 2.6 The House generally considers Henry VIII clauses objectionable,⁷ only passing such clauses when they have a cogent justification and are limited in scope and longevity

19 June 2008, p4144.)

⁵ Henry VIII clauses may be proposed to avoid the perceived delay that the more stringent scrutiny of primary legislation attracts. See, for example, the explanation provided to the Standing Committee on Uniform Legislation and Statutes Review for the proposal that the Fair Trading Bill 2010 be amended by order: “*Mr Newcombe: ... It would be open to the government of the day to substantively amend the act if it chose to; it has always got that power, so there could be amendments to the act. But the mechanism that we have put in place is really to, as I say, maintain uniformity, deal with the problem of the time lag. If you say they have to be substantive amendments, we know absolutely, from history, that Western Australia will fall a long way behind if the order process is not included, because then, firstly, you would be in breach of the agreement, probably, but you have to make a separate amendment bill every time there is an amendment agreed. Hon LINDA SAVAGE: But with the order, it still has to be passed, does it not, by both houses? Mr Newcombe: It does, but it does not go through the same mechanism. It has not passed, but it does not have the various stages. It does not go to first reading, second reading, and it does not go to committee. The CHAIRMAN: It does go to committee, orders. Mr Newcombe: Well, consideration in detail; the orders do not go into the consideration in detail process.*” (Quoted in Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 56, *Fair Trading Bill 2010*, 23 November 2010, pp75-6.)

⁶ See Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 12, *Spent Convictions (Acts Amendment) Regulations 2005*, 2 September 2005, for a discussion of the issues Henry VIII clauses raise for that Committee.

⁷ See for example, Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 55, *Trade Measurement Legislation (Amendment and Expiry) Bill 2010*, 11 November 2010, pp9-11 and recommendation 2, which led Hon Norman Moore MLC to state: “*I do not know what it is about parliamentary counsel and some government agencies, but they just do not seem to recognise what Henry VIII clauses are, and it is not unusual for us to discover them in this chamber. ... I have a general view that we should not have them.*”

or, on limited occasions, provide a mechanism for increased Parliamentary scrutiny of the subsidiary legislation made under them.⁸ In recent debate in the House, this approach to questioning Henry VIII clauses has been described as having “*basically become a convention*”.⁹

3 CLAUSE 41 – PROPOSED SECTION 41C(1): “DISABILITY WAGES SUBSIDY”

Context

3.1 Clause 41 proposes a pay-roll tax exemption for 24 months on wages paid to new employees with a disability when certain conditions are met. The exemption applies when an employee receives a disability service under the *Disability Services Act 1993* through the State Disability Services Commission. It also applies when a wages subsidy for employing a person with a disability is provided to the employer by the Commonwealth:

- in accord with the Disability Employment Services Deed 2010-2012; or
- under some other prescribed scheme.

3.2 In the absence of an explanation for this provision in the Explanatory Memorandum, the Clerk refers to information provided to the Legislative Assembly during its consideration in detail. The Committee sought an explanation of this clause from the government.

I do not think we should be able to change an act by regulation. I think there is a fundamental problem with that. However, there have been occasions in the past when Henry VIII clauses have been unavoidable. I remember that on one occasion when we identified one such clause in the Mining Act, the previous government went away and came back and said, “We simply can’t do it any other way than to do it with a Henry VIII clause, but it will have a time limit, and it will expire after one year”, I think it was. On the basis of that explanation, I agreed on that occasion that we would allow the bill to go through. But, as a general rule, we should not have them, and I agree entirely with the view that if there is going to be one, a justification needs to be provided to the committee and to the Parliament. ... Hopefully, out of this there will be another little nail in the coffin of Henry VIII clauses, but it is not going to put him in the ground yet by a long shot!” (Hon Norman Moore MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 23 November 2010, pp9249.) See also the House’s consideration of the Personal Property Securities (Commonwealth Laws) Bill 2011 (Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 18 August 2011, pp6109-13) during which Henry VIII clauses were deleted.

⁸ See for example, the House’s approach to the Water Resources Legislation Amendment Bill 2006 in which the House sought an assurance from the responsible Minister that it would be advised on each occasion of use of a Henry VIII clause and the amendment imposing a sunset provision. (Hon Kim Chance MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 5 December 2007, p8185.)

⁹ Hon Simon O’Brien MLC, Minister for Finance, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 20 March 2012, pp811. See also Hon Ken Travers MLC: “*But I think one of the key areas we have continually taken a strong position on as a house of review is the question of Henry VIII clauses. When Henry VIII clauses have been moved in the past, this house, as a house of review, has taken a very strong position on them*”. (Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 23 August 2012, p5303).

- 3.3 The Minister for Finance explained that the Disability Employment Services Deed 2010-2012 referenced in paragraph (a) of the proposed definition of “*disability wages subsidy*” is subject to change at short notice. The power conferred by paragraph (b) of the definition enables prescription of a new deed or:

*any other administrative arrangement used for disability wages subsidies to enable employers to continue to enjoy the exemption.*¹⁰

This provision was considered preferable to an amending bill, which would need to have retrospective effect to preserve the exemption.

Committee comment

- 3.4 Clause 41 is consistent with the underlying scheme of the *Pay-roll Tax Assessment Act 2002* which, as the Clerk observes:

*is one where the Parliament identifies wage types suitable for exemption, with scope for further detail on precise and ‘case by case’ exemptions within specified categories having regard to the policy objective in identifying the wage type.*¹¹

- 3.5 In this context, the definition of “*disability wages subsidy*” in proposed section 41C(1) merely authorises regulations permitting the scheme of the Act to be given effect - by filling in detail, the additional administrative arrangements that fall within the quite narrow exemption category established in the Act. It does not authorise regulations creating a new exemption (for example, by prescribing wages subsidies that may be provided by a charity for employing a person with a disability)¹² or otherwise expanding or limiting Parliament’s intent as expressed in the Act.
- 3.6 The proposed definition of “*disability wages subsidy*” does not require all Commonwealth administrative arrangements for such subsidies to be prescribed. Indeed, it may result in some Commonwealth arrangements for providing a wages subsidy to employers who employ a person with a disability not being prescribed. In this event, not all such arrangements will attract an exemption but this would not alter or limit the primary legislation which, as noted, does not propose a general exemption.

¹⁰ Letter from Hon Simon O’Brien MLC, Minister for Finance, 7 September 2012, p1.

¹¹ See also the definition of “*fringe benefit*” in clause 1 of the Glossary to the *Pay-roll Tax Assessment Act 2002* (set out in the Clerk’s opinion), which authorises prescription of exceptions to that definition. (Internal Memorandum from Mr Malcolm Peacock, Clerk of the Legislative Council, 29 August 2012, p11.)

¹² Except to the extent that such subsidies are an indirect payment of a Commonwealth subsidy.

4 CLAUSE 42 – PROPOSED SECTION 45(4)

Context

4.1 Clause 42 proposes amendment of the *Pay-roll Tax Assessment Act 2002* to insert section 45(4) allowing a regulation to apply retrospectively when the regulation will not adversely affect a person liable to pay payroll tax.

4.2 In addition to the Henry VIII clause issue, retrospective legislation offends the fundamental principle of rule of law: that law should be prospective. This principle arises from a person's entitlement to know the law that they are required to abide by in a well-governed society:

*A person cannot be guided by a retrospective law: it does not exist at the time of action. Whilst there will be some occasional retrospective enactments, these cannot be pervasive or characteristic features of the system otherwise they cannot serve to organise social behaviour by providing a basis for legitimate expectations Dicey's first aspect of the rule of law is centred upon the notion that there can be no punishment without a pre-existing law.*¹³

4.3 In considering retrospective provisions, the Parliament may decide that the 'entitlement to know the law' concern has been met when there has been prior announcement of the date from which proposed legislation will be implemented. This is particularly the case with finance legislation.¹⁴

4.4 The Minister for Finance advises that it is becoming increasingly common for the Commonwealth to announce laws that operate from a particular, sometimes retrospective, date. The Minister further stated that as an alternative to the retrospective regulation-making power conferred by clause 42:

¹³ Hon Justice B J Preston, 'Chief Judge Land and Environment Court of New South Wales', *The enduring importance of rule of law in times of change*, 13 October 2011, pp5-6. (Available at <http://www.ruleoflaw.org.au/wp-content/uploads/2012/08/13-Oct-2011-Speech-Chief-Judge-Land-and-Environment-Court-of-NSW-The-enduring-importance-of-the-rule-of-law-in-times-of-change.pdf>)

¹⁴ As Mr David Gauke MP, Exchequer Secretary to the Treasury, submitted to the United Kingdom Joint Committee on Human Rights: "4. *Finance Acts invariably contain measures which have retrospective effect. The overall analysis of fairness turns to a significant extent on the degree to which P [a person] is being deprived of legal certainty by not being able to predict the legal consequences of P's actions.* 5. *It follows that a distinction may sensibly be drawn between legislation which imposes a set of legal consequences of which P cannot be aware because P's action pre-dated any possible awareness of the legislation (unannounced retrospective effect), and legislation which imposes a set of legal consequences of which P is aware because the proposal to legislate has been announced, and the legislation is not to be made to apply before the making of the announcement (announced retrospective effect).*" (Submission quoted in United Kingdom, Joint Committee on Human Rights, Report 2 of the 2009-10 Session, *Work of the Committee in 2008-09: Government Response to the Committee's Second Report of Session 2009-10 (Finance Bills and Academies Bills)*, 15 September 2010, p16.)

consideration was also given to the possibility of the Government announcing any proposed amendments by media statement with a retrospective commencement date to be the date of the media statement.

*However, this was not considered to be a robust option due to the lack of detail expected to be available at 1 July 2012 ...*¹⁵

- 4.5 Parliamentary practice is that legislation with retrospective effect should be used only in exceptional circumstances and when it will not unduly trespass on individual rights and liberties.¹⁶

Broad ambit of clause 42 raises Parliamentary sovereignty issue

- 4.6 Proposed section 45(4) does not in its terms authorise amendment of any Act. It does not, therefore, authorise the making of regulations that have the effect of amending the *Pay-roll Tax Assessment Act 2002*. The ‘retrospectivity’ is confined to matters dealt with in the subsidiary and administrative realms.
- 4.7 Power to make regulations with retrospective effect raises the question of how to reconcile that power with section 41 of the *Interpretation Act 1984*, which requires subsidiary legislation to be prospective. The Clerk has observed the ‘black letter law’ interpretation that, as the regulations only have retrospective effect on publication, there is no overriding of the *Interpretation Act 1984*.
- 4.8 The Clerk has based his conclusion that clause 42 is a retrospective, rather than Henry VIII clause, on the explanation provided in the explanatory materials – that retrospectivity is required to be consistent with proposed Commonwealth legislation changing fringe benefit treatment of living away from home allowances that will also have retrospective effect. In reaching his conclusion, he notes that the *Pay-roll Tax Assessment Act 2002* defines “*fringe benefit*” as meaning anything that is a fringe benefit under the Commonwealth legislation (subject to prescription of exceptions). Given this provision, the Clerk observes that the proposed regulation-making power does not change the primary legislation: it may simply enable the State to reflect in regulations a change that occurs when the Commonwealth legislation comes into effect.¹⁷

¹⁵ Letter from Hon Simon O’Brien MLC, Minister for Finance, 7 September 2012, pp2 and 4.

¹⁶ See, for example, the House’s debate on recommendations in the Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 47, *Petroleum and Energy Legislation Amendment Bill 2009*, 22 April 2010, p26 and the Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 55, *Trade Measurement Legislation (Amendment and Expiry) Bill 2010*, 11 November 2010.

¹⁷ Internal Memorandum from Mr Malcolm Peacock, Clerk of the Legislative Council 29 August 2012, p11. This observation is consistent with the explanation provided by the Minister for Finance. (See letter from Hon Simon O’Brien MLC, Minister for Finance, 7 September 2012, pp2-3.)

4.9 The Clerk draws the Committee's attention to two matters relevant to his characterisation of clause 42 and comment that (in the identified circumstances) the House should have no objection to passing clause 42:

- proposed section 45(4) is vague and not confined in its operation to Commonwealth fringe benefit treatment of the living away from home allowance, but permits retrospective regulation generally (provided the regulations would not adversely affect a person liable to pay pay-roll tax); and
- the Tax Laws Amendment (2012 Measures No.4) Bill 2012 (Cwlth) was presented to the Commonwealth Parliament on 28 June 2012, with the relevant fringe benefit changes to come into effect from 1 October 2012, not 1 July 2012 as announced.

With respect to the first dot point, the Committee notes that in addition to the unconfined subject matter, there is no limit on the degree of retrospectivity that regulations may impose or time limit for exercise of the power. With respect to the second, the Committee notes that the Explanatory Memorandum appears to have been out of date, and thus inaccurate, when presented to the House.

4.10 The only 'explanation' provided in the Explanatory Memorandum for the broader retrospective regulation-making power is:

*This power will continue to be available for future amendments to the regulations in favour of the taxpayer.*¹⁸

This describes the continuing power but does not explain it.

Further explanation

4.11 The Committee sought an explanation of the need for the broad power to make retrospective regulations and enquired whether that power continued to be required given the developments in Commonwealth legislation.

4.12 The Minister for Finance advises that the primary reason for the broad retrospective power is "*flexibility*".

4.13 The need for flexibility arises from the cross-referencing of the *Pay-roll Tax Assessment Act 2002* with Commonwealth legislation, requiring State legislation to be harmonised as Commonwealth legislation changes. The Minister for Finance points to the disadvantage that delay in legislative changes can impose on taxpayers, with moneys having to be paid and then refunded, and the administrative burden this

¹⁸ Explanatory Memorandum to the Revenue Laws Amendment Bill 2012, p30.

entails.¹⁹ The Committee notes that an additional administrative burden is also imposed on government agencies.

4.14 The Minister for Finance points to a precedent for clause 42 in an equivalent retrospective regulation-making power conferred by section 285(4) of the *Duties Act 2008*.²⁰

4.15 The Minister for Finance observes that the Tax Laws Amendment (2012 Measures No. 4) Bill 2012 was introduced to the Commonwealth Parliament after the Bill was introduced to the Legislative Assembly, which was on 14 June 2012.²¹ The explanatory materials no doubt represent the government's understanding at the time the Bill was presented in the Legislative Assembly.

4.16 However, the Committee expects explanatory materials to be up to date when presented to the House. The House should not be required to make decisions on any legislation on the basis of inaccurate information. This is even more the case when delegated power to make retrospective legislation is sought.

4.17 The Minister for Finance considers that retrospective powers continue to be required to deal with Commonwealth fringe benefit treatment of living away from home allowance. He observes that:

- the final terms of the Commonwealth legislation is not yet settled, pointing to the contentious nature of the legislation, that numerous changes have been made to date and that it is currently before the Senate; and
- given the need for significant consultation between all jurisdictions to determine what, if any, amendments are required to the State's law, the jurisdictions' legislation is unlikely to be ready before 1 October 2012.²²

5 CONCLUSIONS

5.1 As the Clerk has observed, characterisation of subsection (b) of the definition of "*disability wages subsidy*" in proposed section 41C(1), and of proposed section 45(4), is not clear cut.

5.2 Generally, due to the importance of definition provisions in establishing the scope of an Act, provision for regulations to extend definitions in primary legislation will raise the question of whether the provision is a Henry VIII clause.

¹⁹ Letter from Hon Simon O'Brien MLC, Minister for Finance, 7 September 2012, pp2-3.

²⁰ Letter from Hon Simon O'Brien MLC, Minister for Finance 7 September 2012, p3.

²¹ Letter from Hon Simon O'Brien MLC, Minister for Finance, 7 September 2012, p3.

²² Letter from Hon Simon O'Brien MLC, Minister for Finance, 7 September 2012, p3.

- 5.3 However, the Committee agrees with the Clerk's conclusion that the regulation-making power conferred by proposed section 41C(1) cannot be used to override the intention of Parliament as expressed in the *Pay-roll Tax Assessment Act 2002*. Clause 41 does not, therefore, propose a Henry VIII clause.

Finding 1: The Committee finds that clause 41 of the Bill does not propose a Henry VIII clause.

- 5.4 The broad power to make regulations with retrospective effect proposed by clause 42 renders its potential impact difficult to assess. From a 'black letter law' perspective, particularly in light of the definition of fringe benefit in the *Pay-roll Tax Assessment Act 2002* and the framework nature of that Act, proposed section 45(4) does not permit amendment of any Act. It is not, therefore, considered a Henry VIII clause. As the Clerk has observed, clause 42 is better characterised as a clause permitting retrospective subsidiary legislation.
- 5.5 The Committee notes that clause 42 may permit regulations that override Parliament's intent if the basis on which the House passes the clause is that it is limited to harmonising State law with fringe benefit treatment of the living away from home allowance or amendments to relevant Commonwealth legislation.
- 5.6 The Committee also notes that, other than in exceptional circumstances, clauses permitting legislation to have retrospective effect are as objectionable to the House as Henry VIII clauses.

Finding 2: The Committee finds that clause 42 does not propose a Henry VIII clause, rather it proposes a broad power to make regulations that will have retrospective effect.

The Committee draws this finding to the attention of the House.



Hon Donna Faragher MLC

Chairman

12 September 2012

APPENDIX 1
OPINION FROM MR MALCOLM PEACOCK, CLERK OF
THE LEGISLATIVE COUNCIL

APPENDIX 1

OPINION FROM MR MALCOLM PEACOCK, CLERK OF THE LEGISLATIVE COUNCIL



INTERNAL MEMORANDUM

TO: STANDING COMMITTEE ON LEGISLATION

FROM: MALCOLM PEACOCK
Clerk of the Legislative Council

SUBJECT: POSSIBLE HENRY VIII CLAUSES CONTAINED IN THE REVENUE
LAWS AMENDMENT BILL 2012

DATE: 29 August 2012

1. OPINION

- 1.1 I have been requested to advise the Standing Committee on Legislation on certain aspects of the Revenue Laws Amendment Bill 2012. On Thursday August 23, 2012, the House referred the Revenue Laws Amendment Bill 2012 to your committee to "identify if there are any Henry VIII clauses". I note during the second reading debate there was concern expressed that clause 42 would change the substantive legislation on a retrospective basis.

2. WHAT IS A HENRY VIII CLAUSE?

- 2.1 The Macquarie Dictionary of Modern Law says that a 'Henry VIII clause' is "a clause in an enabling Act providing that the delegated legislation under it overrides earlier Acts or the enabling Act itself; so named because of its autocratic flavour". Craies on Statutes Law says that a Henry VIII clause is "a clause delegating power to amend Acts".¹ Similarly, Professor Pearce, in his book on delegated legislation, has said that it is "the inclusion in an Act of power to amend either that Act or other Acts by regulation".²
- 2.2 The Queensland Law Reform Commission's explanation of the term identifies the issue these clauses raise. In its report on Henry VIII clauses in 1990 it stated:

A "Henry VIII clause" is a clause in an Act of Parliament which enables the Act to be amended by subordinate or delegated legislation. The name of the clause is derived from Henry VIII, presumably because that monarch persuaded Parliament to enlarge his power to make law by means of

¹ Seventh edition (1971, Sweet and Maxwell, London), p 293.

² Pearce, DC, *Delegated Legislation in Australia and New Zealand*, (1977, Butterworths Pty. Ltd., Sydney), p 7
co.all.f20829.mem.001.Standing Committee on Legislation (A367940)

Proclamations. Since the time of Coke it has been the law that the Crown cannot legislate by means of Proclamation in the absence of Parliamentary authorization.³

- 2.3 The transfer of power from the legislature to the executive that a Henry VIII clause entails has led to such clauses being treated with suspicion as possibly constitutionally inappropriate. The High Court of Australia has ruled that Henry VIII clauses are not unconstitutional, as long as Parliament retains the right to repeal or amend the primary statute.
- 2.4 However, power conferred on the Executive to override the intention of Parliament expressed in an Act or to legislate in the absence of authorisation causes consternation over their use. (See, for example, the Standing Committee on Public Administration and Finance report on the Planning Appeals Amendment Bill 2001 (tabled March 2002) made the following observation:

Henry VIII clause is a generic term for a section in an Act of Parliament that enables the Act or another Act to be amended by subordinate legislation made by the Executive. It is the power given to the executive to override the intention of parliament expressed in an Act that causes consternation over the use of Henry VIII clauses. In this particular case, the Bill provided for specific provisions of the Town Planning and Development Act 1928: do not apply; or apply with or without specific modification.)

- 2.5 In 1929, the Committee on Ministers' Powers was established under the Chairmanship of Lord Donoughmore, to examine delegated legislation. One of the terms of reference required the Committee to report on "what safeguards are desirable or necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the Law". The Committee condemned the practice whereby Acts of Parliament could be amended by delegated legislation. The Committee reported:

"It cannot but be regarded as inconsistent with the principles of parliamentary government that the subordinate law-making authority should be given by the superior law-making authority power to amend a Statute which has been passed by the superior authority ... Even with safeguards, it is clearly a power which in theory at any rate may be unscrupulously used. If it does prove necessary in the public interest to amend an Act of Parliament, and the matter is of sufficient political urgency, parliamentary time can be found, particularly with the aids available under Standing Orders to curtail debate. It has been found possible to bring certain important and complicated legislative schemes into operation without such a power, relying upon the ordinary method of an amending Bill in Parliament to meet unexpected emergencies. It is a standing temptation to Ministers and their subordinates either to be slipshod in the preparatory work before the Bill is introduced in Parliament or to attempt to seize for their own Departments the authority

³See, case of Proclamations (1611) 12 Coke 74 ; Australian Alliance Assurance Co.v. Goodwyn [1916] St.R.Qd. 225. co.all.120829.mem.001.Standing Committee on Legislation (A367940)

which properly belongs to Parliament. It can only be essential for the limited purpose of bringing an Act into operation and it should accordingly be in most precise language restricted to those purely machinery arrangements vitally requisite for that purpose; and the clause should always contain a maximum limit of one year after which the powers should lapse. The use of the so-called "Henry VIII Clause" should not be permitted by Parliament except upon special grounds stated in the Ministerial Memorandum attached to the Bill."

2.6 Erskine May, 18th edition at page 561, makes the following observation:

Nevertheless, modern statutes do confer power on the executive to make delegated legislation, which amends the statutes themselves. This is done by what is known as the "Henry VIII" Clause, which is used, broadly speaking, 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.

2.7 The Parliament of Western Australia has strongly opposed Henry VIII clauses other than in exceptional circumstances.

2.8 However, on a strict view, nearly all subordinate legislation alters the effect of the principal Act. Clearly, not all regulation-making powers meet the definition of a Henry VIII clause but in many cases it can be difficult to distinguish. As the referral to your Committee illustrates, care needs to be taken in distinguishing between clauses that do no more than permit the scheme of an Act to be given effect through regulations⁴ and Henry VIII clauses which extend, narrow, amend, apply or evade an Act.

2.9 As in the case of this Bill, the question of whether a clause is a Henry VIII clause is often associated with provision for regulations with retrospective effect. The Macquarie Dictionary of Modern Law says that 'retrospective legislation' is a "piece of legislation drafted so as to cover transactions prior to its date of commencement." The overlap with Henry VIII clauses is in the alteration by subordinate legislation of legal rights and obligations previously conferred by the Act. There can also be a retrospective Henry VIII clause that empowers the executive to enact delegated legislation that overrides or amends primary legislation passed before the statute containing the Henry VIII clause.

2.10 Whether a particular clause under consideration is a Henry VIII clause needs to be characterised in the context of the relevant Act as a whole. There is no magic in any set of

⁴ The High Court discussed the scope of a general 'necessary and convenient' regulation-making power in *Shanahan v Scott* (1956) 96 CLR 245. Dixon CJ, Williams, Webb and Fullagar JJ, at 250, said: "Powers of this kind have been discussed in more than one case in this court; The result is to show that such a power does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends."

terms – what may amount to a Henry VIII clause in the context of one legislative scheme may not in another.

3. THE BILL'S REGULATION PROVISION

- 3.1 From 1 July 2012, a pay-roll tax exemption will apply to wages paid in the first two years of employment of new employees with a disability to encourage ongoing employment of disadvantaged and vulnerable members of the community.
- 3.2 It will apply to businesses that hire new employees with a disability (on or after 1 July 2012) who are in receipt of a Commonwealth Disability Employment Service (DES) wage subsidy or who are eligible for any form of Western Australian Disability Services Commission support.
- 3.3 The bill also seeks to amend the *Pay-roll Tax Assessment Act 2002* to allow a regulation to apply retrospectively when the regulation will not adversely affect a person liable to pay payroll tax. This power has been inserted as a mechanism to ensure that proposed changes to the Commonwealth's tax treatment of living away from home allowances can be accommodated in the payroll tax legislation from 1 July 2012 if it is necessary to do so.
- 3.4 The Revenue Laws Amendment Bill 2012 contains two clauses providing for regulation powers, namely clauses 41 and 42:

Clause 41. Section 41C inserted

At the end of Part 5 insert:

41C. Exempt wages — DSC disability support and disability wages subsidy

(1) In this section —

Disability Services Commission means the Disability Services Commission referred to in the Disability Services Act 1993 section 6;

disability wages subsidy means —

(a) a wages subsidy provided by the Commonwealth to employers who employ persons with a disability, under the Wages Subsidy Scheme carried on in accordance with the deed entitled "Disability Employment Services Deed 2010-2012"; or

(b) a wages subsidy provided by the Commonwealth (directly or indirectly) to employers who employ persons with a disability, that is prescribed for the purposes of this definition;

DSC disability support means a disability service, within the meaning of paragraph (a) of the definition of disability service in the Disability Services Act 1993 section 3, provided by or under an arrangement with the Disability Services Commission; new employee has the meaning given in subsection (4).

(2) Wages paid or payable to or in relation to a new employee in respect of a period during the 24 months commencing on the day on which the employee first

commenced employment with the employer are, or are to be treated as if they were, exempt from pay-roll tax if —

(a) the employer received or was entitled to receive a disability wages subsidy in respect of the employee on or before the day on which the employee first commenced employment with the employer; or

(b) the employee was eligible for some form of DSC disability support on the day on which the employee first commenced employment with the employer, and the following apply —

(i) the employee was, on that day, of or above the minimum age necessary to engage in that employment;

(ii) the employee is employed and remunerated in accordance with a binding award or other industrial determination or order or an industrial agreement.

(3) If the Commissioner is satisfied that the employer dismissed or reduced the working hours of an employee solely or primarily in anticipation of, or as a consequence of, employing the new employee —

(a) subsection (2) is taken not to have applied to the wages paid or payable to or in relation to the new employee; and

(b) the Commissioner must make any reassessment necessary to give effect to this subsection.

(4) An employee of an employer is a **new employee** if the employee —

(a) commences employment with the employer on or after 1 July 2012; and

(b) was not an employee of the employer, or of any other employer in a group of which the employer is a 1 member, at any time prior to the commencement of employment referred to in paragraph (a).

(5) Regulations prescribing a wages subsidy for the purposes of the definition of **disability wages subsidy** in subsection (1) may be made and published during a year for which the prescription is expressed to have effect.

42. Section 45 amended

After section 45(3) insert:

(4) Regulations may be expressed to apply to wages paid or payable before the day on which the regulations come into operation if the application of the regulations to the wages would not adversely affect a person who is or may be liable to pay pay-roll tax on the wages.

3.5 Clause 41(1)(b), in the definition **disability wages subsidy**, enables a wage subsidy provided by the Commonwealth (directly or indirectly) to employers who employ persons with a disability that is prescribed for the purpose of this definition. Clause 41(5) provides that regulations prescribing a wages subsidy for the purposes of the definition of “*disability wages subsidy*” in subsection (1) may be made and published during a year for which the prescription is expressed to have effect.

3.6 The explanatory memorandum (EM) to the Bill explains the purpose of clause 41(5) is to:

“provide a power for the prescription of a “disability wages subsidy” to have effect for the whole assessment year in which the regulation is made and published.

No other subsidy is intended to be prescribed at this time, however, should a decision be made to do so, the structure of the definition will allow rebates to be paid if the Commonwealth makes changes to these subsidies in the future.”

3.7 As the Treasurer points out in his response in the Legislative Assembly consideration in detail:

“the legislation provides the capacity to pick up by way of regulation an alternative scheme, should that be required. In other words, should the commonwealth’s disability employment services deed morph into something completely different, we can deal with it by regulation.”

3.8 The *Pay-roll Tax Assessment Act 2002* is predicated on there being exemptions to pay-roll tax. It provides that pay-roll tax is payable on all Western Australian taxable wages other than exempt wages.⁵ Part 5 specifies a number of categories of exemption. These include categories identified in a similar way to that proposed by section 41C, such as wages paid:

by an employer to or in relation to a trainee employed under a training agreement as part of the Australian Traineeship System established by the Governments of the Commonwealth and the State,⁶

and:

as wages of a prescribed kind to a person for services performed by the person at a remote location.⁷

⁵ Section 5 of the *Pay-roll Tax Assessment Act 2002*.

⁶ Section 40(2)(o) of the *Pay-roll Tax Assessment Act 2002*.

⁷ Section 40(2)(r) of the *Pay-roll Tax Assessment Act 2002*.

- 3.9 Part 6 of the *Pay-roll Assessment Act 2002* also authorises the Commissioner to issue administrative exemptions from pay-roll tax for charitable organisations.
- 3.10 The scheme of the *Pay-roll Assessment Act 2002* is one where the Parliament identifies wage types suitable for exemption, with scope for further detail on precise and 'case by case' exemptions within specified categories having regard to the policy objective in identifying the wage type.
- 3.11 I note that in considering a similar clause, Mr Turnbull, QC, stated on 25 November 1991 to the seminar to mark the tenth anniversary of the Senate Standing Committee for Scrutiny of Bills:

“...and then paragraph (e): “such other products as the Minister determines to be hearing products within the meaning of this Act”. What this is doing is not amending the Act, or any other Act. It is not autocratic, it merely extends a definition.””

- 3.12 I concur with this distinction, which goes to the heart of the issue with Henry VIII clauses.
- 3.13 Characterisation of proposed section 41C(1)(b) is not clear cut. At first glance, it appears a Henry VIII clause. But when it is considered in the context of section 41C and the *Pay-roll Tax Assessment Act 2002* as a whole, it is apparent that it does not authorise extension of the Act or variation or departure from the scheme of the primary legislation (see *Shanahan v Scott* at footnote 4). Using Mr Turnbull QC's example, the regulation power conferred by proposed section 41C(1)(b) merely extends the definition and therefore is not a Henry VIII clause. In my opinion, the regulation power only allows for the implementation of the policy of the Bill. The policy of proposed section 41C(1)(a) is to permit exemptions dependent on arrangements made with the Commonwealth for payment of wages to persons with a disability. If the Commonwealth determines to “morph” the current disability employment services deed or implement a new scheme, the executive are empowered to prescribe those changes. Proposed section 41C(1)(b) does not allow the executive to “override the intention of parliament expressed in an Act”.

4. CLAUSE 42 SECTION 45 AMENDED

- 4.1 Clause 42 inserts into section 45 of the *Pay-roll Tax Assessment Act 2002* (principal Act) a new subsection (4). Clause 42 enables amendment of the *Pay-roll Tax Assessment Act* to allow a regulation to apply retrospectively when the regulation will not adversely affect a person liable to pay payroll tax.
- 4.2 The view that the general role of delegated legislation is to fill in details in a legislative scheme is well established. It assumes that once Parliament has approved general principles in primary legislation, the executive might properly be authorised to supply the details in accordance with those principles.

4.3 Section 45 of the *Pay-roll Tax Assessment Act 2002* provides:

- (1) *The Governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed or are necessary or convenient to be prescribed for giving effect to this Act.*
- (2) *Regulations may be made about any or all of the following matters —*
 - (a) *the evidence that the Commissioner may require for the purpose of determining whether or not an employer was an employer for part only of an assessment year, whether or not a person was or was not a member of a group or whether or not an exemption under section 29 should be given;*
 - (b) *benefits on the value of which pay-roll tax is payable (whether or not the benefits are exempt benefits under the FBT Act);*
 - (c) *allowances that are exempt from pay-roll tax, to the extent that is prescribed;*
 - (d) *the records and other evidence required to be kept in respect of—*
 - (i) *specified exempt allowances; and*
 - (ii) *anything affecting the extent to which those allowances are excluded from being wages;*
 - (e) *the value of a fringe benefit paid or payable by an employer that is to be included in a return;*
 - (f) *any other matter for the application of this Act to a fringe benefit, a specified taxable benefit or a specified exempt allowance;*
 - (fa) *the manner of lodging a return or making a payment in a circumstance in which section 28A(1) applies, which may include lodgement or payment by electronic means;*
 - (g) *classes of contracts for the purposes of section 9AA(1)(c).*
- (3) *Regulations may create offences and provide, in respect of an offence so created, for the imposition of a fine not exceeding \$5 000.*

4.4 Section 45 of the *Pay-roll Tax Assessment Act 2002* is drafted very wide as to what might be prescribed in regulations, such as paragraph (f) “*any other matter for the application of this Act to a fringe benefit, a specified taxable benefit or a specified exempt allowance*”.

4.5 The explanatory memorandum to the Bill explains the purpose of clause 42 is to insert into section 45 of the principal Act:

“subsection (4) which authorises that regulations made in favour of a taxpayer that apply to wages which are paid or payable may commence retrospectively.

The insertion of the retrospective regulation making power has been prompted by the Commonwealth Government's announcement to reform the fringe benefits tax treatment of living away from home allowances. As a

consequence of the proposed reforms, fringe benefits that are currently not taxable (or partially taxable) for pay-roll tax purposes would become fully taxable as allowances paid to employees. The Commonwealth reforms are intended (in part) to apply from 1 July 2012. However, due to the delay in the availability of the draft Commonwealth legislation, it is not possible to make any necessary consequential amendments to the pay-roll tax legislation prior to 1 July 2012.

The proposed amendment which authorises regulations that are made in favour of the taxpayer to commence retrospectively will enable amendments to be made by regulation when the Commonwealth legislation is available, and where necessary, backdated to operate from 1 July 2012 to ensure that taxpayers will not be disadvantaged by the Commonwealth changes."

- 4.6 Clause 42 provides for the retrospective operation of regulations and is expressed to permit the regulations to come into operation on a date "*before the day*" of their publication in the *Gazette*.

5. *INTERPRETATION ACT 1984*

- 5.1 The usual position is that regulations operate from the commencement of the day they are published in the *Gazette* or on some later date *after* publication. Regulations are made when signed by the Governor or Governor General. The common law position is that delegated legislation, although made, does not come into operation until it is published: *Johnson v Sargant* (1918) 1 KB 101. The statutory controls in the *Interpretation Act 1984* reflect the common law position by requiring regulations to be published in the *Gazette* and to take effect only at this time or some later time.
- 5.2 However, this does not preclude the Parliament from legislating when a regulation might commence.
- 5.3 Section 41(1) of the *Interpretation Act 1984* provides the formal requirements for the publication and commencement of subsidiary legislation and states:

41. Publication and commencement of subsidiary legislation

- (1) *Where a written law confers power to make subsidiary legislation, all subsidiary legislation made under that power shall-*
- (a) *be published in the Gazette;*
 - (b) *subject to section 42, come into operation on the day of publication, or where another day is specified or provided for in the subsidiary legislation, on that day.*

- 5.4 Section 41(1)(b) permits regulations to come into operation on "*another day*" as "*specified*" in the regulations not being the publication date. This paragraph does not permit the making of regulations that operate prior to the date of publication, as the expression "*another day*" does not contemplate a date of commencement anterior to the date of publication: *Watson v Lee* (1979) 144 CLR 374.⁸
- 5.5 There is no power to make regulations with retrospective operation unless the Act that provides for the making of the regulations permits retrospective operation. There is a presumption used when interpreting statutes, which applies equally to regulations, that the law is not intended to have retrospective operation. If a regulation making power in a statute is equally capable of being interpreted so as to have both a prospective and retrospective operation then it is presumed in the absence of clear words that the legislature intended only a prospective operation of regulations.
- 5.6 Clause 42 of the Bill could have two interpretations. The first interpretation permits regulations to take effect before any publication occurs contrary to the requirements in section 41(1)(a) and (b) of the *Interpretation Act 1984* that all regulations are published and take effect on or after publication in the *Gazette*. The second interpretation is that it only permits retrospective operation of the regulations once the regulations have been published.
- 5.7 Retrospective operation of a beneficial provision is expressly permitted under the Queensland *Statutory Instruments Act 1992*, section 34. Section 34 defines 'beneficial provision' to mean a provision that does not operate to the disadvantage of a person (other than the State, a State authority or a local government) by decreasing the person's rights or imposing liabilities on the person.
- 5.8 The clause apparently enables regulations to be prescribed to exempt any Commonwealth legislative change to the fringe benefits tax, that is "*living away allowance*", to be expressed to apply to wages paid or payable before the day on which the regulations come into operation.
- 5.9 In my opinion clause 42 is not as precise as outlined in the EM, in fact it is vague. I would have expected the clause to refer to "*fringe benefits*" and/or "*living away allowance*". It might well be used for other purposes other than that highlighted in the EM.

⁸ *Watson v Lee* (1979) 144 CLR 374, per Barwick CJ at 379. In the absence of express words, Barwick CJ was of the opinion that the words "(b) shall, subject to this section, take effect from the date of notification, or, where another date is specified in the regulations, from the date specified", did not permit the making of regulations that had effect prior to the date of publication. He said: "A question of the interpretation of ~ (1) (b) of the Acts Interpretation Act was agitated during the hearing. That subsection provides that the regulations shall take effect from the date of their notification "or where another date is specified in the regulations, from the date specified". It was argued that this date could be a date anterior to the notification of the regulation including, of course, its prescription of that date. In my opinion, this date, unless the Parliament has expressly and intractably directed otherwise, must necessarily be a date subsequent to the date of notification. To bind the citizen by a law, the terms of which he has no means of knowing, would be a mark of tyranny. Parliament, in s. 48 (1), has recognised that justice requires that it be notified publicly before it becomes operative. I am quite unable to construe s. 48 (1) as a Parliamentary mode of expression of intention that the law should operate before it is notified. That would be so fundamentally unjust that it is an intention I could not attribute to the Parliament unless compelled by intractable language to do so. In my opinion, no semantic quirks of the draftsman would lead me to that conclusion - a conclusion which would attribute to the Parliament an intention to act tyrannically. In my opinion, what the section means is that the regulation will operate on or from the day it is notified or from such other day, being a subsequent day, as the regulation may specify. Such a construction is both reasonable, textually available and just. (at p379)"

co.all.120829.mem.001.Standing Committee on Legislation (A367940)

- 5.10 It could well be argued that it is the Commonwealth that has made a change to the Western Australia Act by default and the State is merely rectifying that situation with the consent of the Parliament. I note that the *Pay-roll Tax Assessment Act 2002* currently defines fringe benefit as meaning:

anything that is a fringe benefit under the FBTA Act [Commonwealth Fringe Benefit Act] except a benefit prescribed not to be a fringe benefit for the purposes of this definition.⁹

- 5.11 Section 45 of the *Pay-roll Tax Assessment Act 2002* already allows for:

- (b) *benefits on the value of which pay-roll tax is payable (whether or not the benefits are exempt benefits under the FBTA Act);*
- (c) *allowances that are exempt from pay-roll tax, to the extent that is prescribed;*
- (d) *the records and other evidence required to be kept in respect of —*
 - (i) *specified exempt allowances; and*
 - (ii) *anything affecting the extent to which those allowances are excluded from being wages;*
- (e) *the value of a fringe benefit paid or payable by an employer that is to be included in a return;*
- (f) *any other matter for the application of this Act to a fringe benefit, a specified taxable benefit or a specified exempt allowance;*

- 5.12 The *Pay-roll Tax Assessment Act 2002* regulations already allow for “*allowances that are exempt from pay-roll tax, to the extent that is prescribed*” to occur, but not retrospectively.

- 5.13 In my opinion clause 42 is not a Henry VIII clause, as it does not provide for the executive to “*amend either the proposed Act or other Acts by regulation*”, rather it is a retrospective clause.

- 5.14 The regulations will come into effect on the day they are published. However, the regulation may be expressed to apply (a retrospective operation) to the wages paid or payable before the day the regulations come into operation, as long as they do not adversely affect a person who is liable to pay the pay-roll tax. The consequences of the regulation power, I assume, is to ensure the exemption is fair to all employers for the same financial year. That is, to align the FBT change within a financial year. In such a case, the House should have no objection to Clause 42.

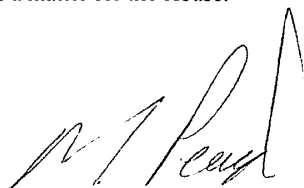
- 5.15 Whether proposed section 45(3) is necessary in light of introduction of the Tax Laws Amendment (2012 Measures No.4) Bill 2012 (Cwth) on 28 June 2012 and advice that:

⁹ Clause 1 of the Glossary to the *Pay-roll Tax Assessment Act 2002*.

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Under the proposed changes a living-away-from-home allowance will generally be treated as assessable income of the employee rather than as a fringe benefit, with effect from 1 October 2012,¹⁰

is a matter for the House.



Malcolm Peacock
Clerk of the Legislative Council
A368033

¹⁰ Australian Taxation Office “*FBT living-away-from-home allowance reform*” (Available <http://www.ato.gov.au/businesses/content.aspx?doc=/content/00301331.htm>, viewed 28 August 2012).

APPENDIX 2
LETTER FROM HON SIMON O'BRIEN MLC, MINISTER
FOR FINANCE, DATED 7 SEPTEMBER 2012

APPENDIX 2
LETTER FROM HON SIMON O'BRIEN MLC, MINISTER FOR
FINANCE, DATED 7 SEPTEMBER 2012



The Hon Simon O'Brien MLC
Minister for Finance; Commerce; Small Business

Your Ref: RLA
Our Ref: 29-22882

Hon Donna Faragher MLC
Chairman
Standing Committee on Legislation
GPO Box A11
PERTH WA 6837

Dear Ms Faragher

A handwritten signature in black ink that reads "Donna".

REVENUE LAWS AMENDMENT BILL 2012

I refer to your request of 4 September 2012 to the Treasurer regarding the Revenue Laws Amendment Bill 2012. As I have been assigned the administration of the *Pay-roll Tax Assessment Act 2002*, I am providing the information requested.

Clause 41 – proposed section 41C

The eligibility for exemption from pay-roll tax for wages paid to new employees with a disability is linked to the employer being in receipt of a disability wages subsidy payable by the Commonwealth or the employee being eligible for support from the Disability Services Commission.

The disability wages subsidies currently payable by the Commonwealth are administered under a deed entitled 'Disability Employment Services Deed 2010-2012'. This Deed provides for administrative schemes that the Commonwealth can alter at short notice and is referenced in proposed section 41C.

In the event of the Commonwealth replacing the current Deed, the legislation will need to refer to the new deed or to any other administrative arrangement used for disability wages subsidies to enable employers to continue to enjoy the exemption. This could be achieved by way of amending legislation with a retrospective commencement date. However, it was considered that this would take at least several months from the date of any changes to implement and result in reassessments of tax. Such reassessments would place administrative costs on both employers and the Department of Finance's Office of State Revenue.

In the event of changes by the Commonwealth, it is considered that the most efficient method of maintaining the policy intent of the exemption is to allow for the prescription of future disability wages subsidies.

- 2 -

Clause 42 – proposed section 45(4)

Question 1 – The reason for the broad retrospective power of proposed section 45(4) and why it is not constrained to the fringe benefit treatment of the living away from home allowance?

The primary reason for the broader power was to ensure a level of flexibility was available, as the announced Commonwealth changes were attracting a large amount of adverse comment, and it appeared likely that the proposed Commonwealth amendments would be subject to change during the passage of the amendments through the Parliament.

The need for flexibility has subsequently been borne out in this case. When the State amendments were originally drafted, it was considered that any necessary regulations to address the Commonwealth changes to the tax treatment of living away from home allowances could be made using the regulation making power contained in section 45(2)(c) (regulations about allowances) of the *Pay-roll Tax Assessment Act 2002*. However, due to changes made to the Commonwealth's reforms during the passage of the amending legislation through the Commonwealth Parliament (which occurred after this Bill had been introduced into the State Parliament), it now appears that the necessary amending regulations may utilise the power in section 45(2)(b) (regulations about benefits).

If the amendments contained in clause 42 were limited to allowances as contemplated by section 45(2)(c) of the *Pay-roll Tax Assessment Act*, as appeared likely at the time of drafting the *Revenue Laws Amendment Bill 2012*, the proposed amendments may have been ineffective in addressing the Commonwealth changes.

At the time of recognising that a retrospective regulation making power was the most advantageous means of accommodating the impending changes to the fringe benefits tax treatment of living away from home allowance for taxpayers, it was acknowledged that similar circumstances could also arise in the future with changes in government policy at both a Commonwealth and State level.

Some aspects of the pay-roll tax legislation has cross references with certain Commonwealth legislation to reduce red tape and compliance cost for business. However, when Commonwealth statute changes occur, this therefore often leads to a need for changes to State legislation.

In this regard, it is becoming increasingly common for the Commonwealth to announce changes to laws that operate from a particular (and sometimes retrospective) date. If these laws have consequential impacts on the State's revenue laws, the detail of the announced changes may not be available in time for the ramifications to be addressed at a State level.

The *Pay-roll Tax Assessment Act 2002* does not have the same type of broad retrospective regulation making power that is contained at section 285(4) of the *Duties Act 2008*. This prevents a Government from making a timely response to events or announcements that might otherwise cause these taxpayers to be disadvantaged through higher pay-roll tax amounts having to be paid and subsequently refunded, as well as bearing the associated administrative costs and red tape.

The benefit of a retrospective regulation-making power was manifest recently when the corresponding Duties Act power was able to be relied on to respond to problems caused by the storm of 22 March 2010, which caused hail damage to large numbers of new vehicles and lowered their market value, but not the value duty was charged on. The Duties Amendment Regulations 2010 were drafted to remedy the issue and published in the *Government Gazette* of 1 April 2010, with an effective date of 23 March 2010. This ensured the majority of taxpayers were able to pay duty on hail damaged new cars at the reduced value, without having to pay the higher amount and seek a refund at a later date.

Proposed section 45(4) was modelled on the retrospective regulation-making power contained in the Duties Act. Similarly, it only applies where the regulation will not adversely affect a taxpayer.

Question 2 – The need for power to make regulations with retrospective effect given introduction of the relevant Commonwealth legislation and delay in its effect from that originally anticipated.

At the time the Revenue Laws Amendment Bill 2012 was introduced into the Legislative Assembly on 14 June 2012, the proposed commencement date of the Commonwealth reforms to living away from home allowance was 1 July 2012.

The Tax Laws Amendment (2012 Measures No. 4) Bill 2012 passed through the House of Representatives on 21 August 2012 with a proposed commencement date of 1 October 2012. Numerous significant changes were made to the Bill as a consequence of recommendations from the House Standing Committee on Economics. The Commonwealth Bill is now before the Senate, which next sits between 10 September and 20 September 2012.

Even if the Commonwealth Bill were to become law before 1 October 2012, given the harmonisation that exists in the pay-roll tax treatment of living away from home allowances between all jurisdictions, significant consultation will need to occur to determine what, if any, amendments will be required to the respective pay-roll tax Acts to try to reach as consistent a position as possible.

With the Commonwealth reforms still not settled and passed through the Parliament and the commencement date of 1 October 2012, it is unlikely that the jurisdictions will be in a position to reach that position before this date.

– 4 –

As an alternative to the retrospective regulation-making power to implement any changes, consideration was also given to the possibility of the Government announcing any proposed amendments by media statement with a retrospective commencement date to be the date of the media statement.

However, this was not considered to be a robust option due to the lack of detail expected to be available at 1 July 2012, being the time such an announcement would have been required under the original Commonwealth proposal.

In addition, it was considered a risk existed that amending legislation following the media statement could not be drafted and passed prior to the end of this parliamentary year. If the amendments were made to operate retrospectively and the legislation had not been passed by the Parliament, taxpayers would be faced with having to pay higher amounts of pay-roll tax for a period of up to six months or more and would then need to seek a reassessment of pay-roll tax when the amending legislation was finalised.

With regard to all of the above queries, I also note that consideration was given to the fact that any regulations made under any of the powers contemplated by the Revenue Laws Amendment Bill 2012 will be disallowable by either House of Parliament pursuant to section 42 of the *Interpretation Act 1984*.

Please let me know if I can be of further assistance in this matter.

Yours sincerely



**SIMON O'BRIEN MLC
MINISTER FOR FINANCE**

7 SEP 2012

cc: Treasurer