From court rules to globalised standards: incorporation by reference in Commonwealth regulations

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There are numerous methods for transforming international legal norms into Australian law. The most well-known method is to incorporate international laws into statutes.[1] There are also administrative forms of incorporation. The simplest of these is to incorporate international law in regulations.[2] They are also sometimes included in legislation as a qualification of a discretionary power.[3]

This article addresses a different administrative means for incorporating internationally made norms into Australian law: incorporation in Commonwealth regulations by reference of standards made by international standard-setting organisations. Commonwealth regulations commonly incorporate standards made by international organisations such as the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC). They also commonly incorporate standards made by United States and European organisations such as the American National Standards Institute (ANSI) and European Committee for Standardization (CEN).

The starting point for my examination of incorporation of international standards in Commonwealth regulations is that the provisions enabling it were not designed for globalisation developments. Section 14 of the *Legislation Act 2003* (Cth) controls the form of incorporation by Commonwealth regulations. I will explain its operation in more detail below and the rationale that was given by the Attorney-General for its initial inclusion in 1964 in the *Acts Interpretation Act 1901* (Cth). The important introductory point is that the initial provision was enacted to facilitate a relatively minor reform: regulating incorporation of other Commonwealth laws into regulations. The particular laws that were in mind at the time were the provisions of the High Court Rules providing for witness expenses. Incorporation by reference facilitated the use of the High Court Rules by other Commonwealth courts and tribunals. That is a long way from incorporation of standards made by international standard-setting organisations. It suggests that reconsideration is beneficial.

In this century, governments regularly act on incentives to include standards made by international standard setters in regulations. There are numerous forms that this takes. One form is to incorporate an international standard to provide the substance of domestic law.[4]

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1 See, eg, *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 12–15A; *National Security Health Act 2007* (Cth) s 6; and National Health Security Bill 2007 — Explanatory Memorandum, p 1.

2 See, eg, UN sanction regulations such as the *Charter of the United Nations* (*Sanctions — Mali*) *Regulations 2018* (Cth); marine orders implementing *International Convention for the Prevention of Pollution from Ships* (eg *Marine Order 96 (Marine Pollution Prevention — Sewage*) *2018* (Cth)); and regulations implementing features of the *Convention on International Civil Aviation* (*eg Air Navigation Regulation 2016* (Cth)).

3 See, eg, *Australian Radiation Protection and Nuclear Safety Act 1998* (Cth) s 84. Andrew Edgar and Rayner Thwaites, 'Implementing Treaties in Domestic Law: Translation, Enforcement and Administrative Law' (2018) 19 *Melbourne Journal of International Law* 24.

4 See, eg, *Therapeutic Goods Order No 95 — Child-resistant Packaging Requirements for Medicines 2017* (Cth) s 9; *Consumer Goods (Self-balancing Scooters) Safety Standard 2018* (Cth) s 7(2); *Radiocommunications (Electromagnetic Radiation — Human Exposure) Standard 2014* (Cth) ss 8–10A.

In this form, the incorporated standard provides for most of the substance of the particular regulation.[5] A second form is to use standards in regulations in a more particular manner. This may involve defining an aspect of domestic law or providing for an approved means for compliance with obligations provided in the regulation. A third form is to include international standards in Commonwealth regulations to impose standards on particular reporting requirements of businesses.[6]

Recently made regulations for the safety of quad bikes are a good example of incorporation by reference. These regulations were made following reports of the risks relating to the use of quad bikes.[7] They are also a good example due to the safety concerns with quad bikes being brought to the attention of Australian public lawyers in a landmark public law case *Kirk v Industrial Court of New South Wales*.[8] In 2019 the Assistant Treasurer, the Hon Michael Sukkar MP, made the *Consumer Goods (Quad Bikes) Safety Standard 2019* (Cth) (Quad Bikes Safety Standard). The main sections of Pt 2 of the Standard are ss 8–10, which require compliance with American National Standard ANSI/SVIA 1–2017: American National Standard for Four Wheel All-Terrain Vehicles, which is published by the American National Standards Institute Inc; or European Standard EN15997:2011 COR 2012: All Terrain Vehicles (ATVs — Quads) — Safety requirements and test methods, which is published by the Comité Européen de Normalisation. The Quad Bikes Safety Standard legislative instrument modifies the two international standards slightly and includes some additional requirements. The Australian Competition and Consumer Commission recommended options to regulate quad bikes that included incorporation of the American and European standards and both were added to the Quad Bikes Safety Standard that was ultimately made.[9] The recommendations were based on stakeholder feedback in consultation processes supporting the use of these standards with additional measures.[10]

The reason for studying incorporation by reference of international standards is not only because they are an under-examined feature of modern legislative law. Incorporation by reference can involve a form of delegation of law-making power and, as such, can raise issues such as those examined in *Victorian Stevedoring & General Contracting Co Pty Ltd & Meakes v Dignan*.[11] It also raises associated questions regarding the appropriateness of delegation of law-making authority in terms of democratic principles. I will focus on these issues. There is also a third issue regarding the difficulty of access to international and domestic standards made by private standard-setters. Since this has been addressed in

5 See, eg, *Greenhouse and Energy Minimum Standards (Three Phase Cage Induction Motors) Determination 2019* (Cth) ss 14, 15, 17, 21; *Agricultural and Veterinary Chemicals Code Regulations 1995* (Cth) Sch 3B — 'Listed chemical products'.

6 See, eg, the range of standards incorporated in the *National Greenhouse and Energy Reporting (Measurement) Determination 2008* (Cth).

7 See Australian Competition and Consumer Commission, *Quad Bike Safety Issues Paper* (13 November 2017) <https://www.productsafety.gov.au/system/files/ACCC%20Quad%20Bike%20Safety%20Issues%20Paper.pdf>; Tony Lower, 'Quad Bikes: Tobacco on Four Wheels' (2013) 37 *Australian and New Zealand Journal of Public Health* 105.

8 (2010) 239 CLR 531.

9 Australian Competition and Consumer Commission, *Quad Bike Safety: Final Recommendation to the Minister* (February 2019) 104–5, 109 <https://www.productsafety.gov.au/system/files/Quad%20bike%20safety%20-%20final%20recommendation%20to%20the%20Minister.pdf#page=118&zoom=110,-286,403>.

10 Ibid 50–1.

11 (1931) 46 CLR 73.

reports and scholarship and does not relate to delegation directly,[12] I will not address it in this article.

It is helpful to explain some terms I will use to differentiate forms of incorporation. I refer to the form of incorporation that can be regarded as an effective delegation of law-making power as 'dynamic incorporation'. This terminology is drawn from an article by Michael Dorf, 'Dynamic Incorporation of Foreign Law'.[13] Dorf uses this term for incorporation that enables the incorporated standard or document to be changed in the future and those changes will have legal effect due to being incorporated in the particular regulation. In Commonwealth law this is referred to as incorporating the particular standard or document from 'time to time'. Dorf distinguishes dynamic incorporation from static incorporation whereby changes to the incorporated material are not included in the incorporating law. Static incorporation is not a form of delegation.

I will focus on the legal and democratic problems relating to delegating law-making powers to private organisations through dynamic incorporation. My argument can be summarised as follows. The best solution to the problems arising from dynamic incorporation is to not allow it. It involves restricting incorporation by reference to static forms. As we will see, however, that is not possible to achieve through a general legislative provision. The best way of resolving it is through parliamentary scrutiny — that is, by the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) alerting the Parliament to provisions that authorise dynamic incorporation by reference. The Scrutiny of Bills Committee already does this. However, as such provisions are nevertheless included in legislation it is necessary to consider supporting measures. Below I will examine the legal requirements in Australia for incorporating standards. I will then explain the increased reliance on private standards, the incentives for domestic administrative officials to adopt them, and the processes by which they are usually made. Finally, I will examine the legal and democratic problems with incorporating standards on a dynamic basis and the potential solutions.

Dynamic incorporation by Commonwealth regulations — principles and practices

There is a well-established legal framework for incorporating laws and standards into Commonwealth regulations. The current legal provision is s 14 of the *Legislation Act 2003* (Cth). It authorises dynamic incorporation of Commonwealth laws and recognises that dynamic incorporation of 'any other instrument or writing' can be authorised by the relevant enabling Act. In this section I will explain s 14 of the Legislation Act and its progenitor, s 49A of the *Acts Interpretation Act 1901* (Cth). I will also explain the mechanism for parliamentary review of standards that are incorporated by reference. The purpose is to highlight a problem that was included in the initially enacted provision that continues in the current provisions.

12 See Joint Standing Committee on Delegated Legislation, Parliament of Western Australia, *Access To Australian Standards Adopted In Delegated Legislation* (Report No 84, June 2016) Ch 6; Productivity Commission, *Standard Setting and Laboratory Accreditation* (Research Report, 2 November 2006) 120–30; Emily S Bremer, 'On the Cost of Private Standards in Public Law' (2015) 63 *University of Kansas Law Review* 279; Peter L Strauss, 'Private Standards Organizations and Public Law' (2013) 22 *William and Mary Bill of Rights Journal* 497; Nina A Mendelson, 'Private Control over Access to the Law: The Perplexing Federal Regulatory Use of Private Standards' (2014) 112 *Michigan Law Review* 737.

13 (2008) 157 *University of Pennsylvania Law Review* 103, 104–5.

I will highlight that, while parliamentary review of incorporated standards has been the overarching concern since the beginning, there are systemic gaps in that review.

Section 14 of the Legislation Act distinguishes incorporation of two different forms of laws and standards. Commonwealth legislation, regulations and rules of court can be incorporated without restriction.[14] Section 14(1) enables them to be incorporated 'as in force at a particular time' — in Dorf's terms, 'static incorporation' or 'as in force from time to time', which in Dorf's terms is 'dynamic incorporation'. Incorporation of other materials is treated differently. Section 14(2) provides for 'any matter contained in any other instrument or writing'[15] and restricts incorporation of them to static forms unless the 'contrary intention appears'. That means that dynamic incorporation of other materials is permitted if the enabling Act authorises it. Section 14 therefore distinguishes between incorporating Commonwealth laws and other materials and does so in order to authorise dynamic incorporation for Commonwealth laws. If other materials are incorporated by reference in a dynamic manner the relevant enabling Act must authorise it.

This framework suggests that the incorporation of laws and standards not sourced in Commonwealth law raises concerns that do not apply to Commonwealth laws. This should be accepted. Commonwealth laws come from the same jurisdiction as the incorporating regulation. They can be accessed from the same free online register of legislation. Incorporating Commonwealth laws into Commonwealth regulations facilitates consistency.

The issues regarding international standards and globalisation relate to what s 14 refers to as 'any matter contained in any other instrument or writing'. Incorporating them dynamically requires what s 14 refers to as a 'contrary intention' provided by the enabling Act. We will see that such provisions in Commonwealth legislation are now common.

The legal framework established by s 14 was previously set out in s 49A of the *Acts Interpretation Act 1901* (Cth). The second reading speech for the amendments adding s 49 A to the Acts Interpretation Act provides important context for how dynamic incorporation is regulated in Commonwealth law. Then Attorney-General, the Hon Sir Billy Snedden QC, explained the problem to be resolved and the solution provided by s 49A. The problem that prompted the enactment of s 49A related to inconveniences arising due to the various Commonwealth rules of courts and tribunals regarding witness expenses.[16] Permitting dynamic incorporation would allow all Commonwealth courts and tribunals to utilise the High Court's scale of witness expenses and for any changes to the High Court's scale to be automatically effective for the other courts and tribunals procedural rules that had incorporated them. The Attorney-General explained in his second reading speech that it was convenient for any change made by the High Court to the scale to also directly apply to other courts and tribunals. Dynamic incorporation was regarded as a convenient standardisation[17] solution for the previous disparity of the procedural rules operating for Commonwealth courts and tribunals.

14 *Legislation Act 2003* (Cth) s 14(1)(a)(i)–(iii).
15 Ibid s 14(1)(b).
16 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 May 1964, 1857 (Attorney-General, Mr Snedden).
17 Ibid.

The Attorney-General also briefly referred to the principles that were relevant for dynamic incorporation. The principle was that changes to Commonwealth regulations must be subject to parliamentary control.[18] The Minister expressly stated that this was not a concern in this instance. In regard to dynamic incorporation he stated:

> the power should be limited to so prescribing by reference to Commonwealth legislative instruments because they are under the control of the Parliament. Accordingly, the amendment makes clear that there may be prescription by reference to any instrument existing at the time of the prescription but that, where the prescription is to be by reference to instruments as in force at any other time or from time to time, the instruments so referred to can only be Commonwealth acts, or regulations or rules under Commonwealth Acts.[19]

The difficulty with this explanation is that, while it may support the solution to the particular problem that was being addressed by the amendments to the Acts Interpretation Act (the incorporation of the High Court's scale of witness expenses into other regulations of Commonwealth courts and tribunals regulations), it did not reflect the scope of the section that was added to the Act. The actual provision did enable laws and standards sourced beyond Commonwealth statutes and regulations to be incorporated by reference dynamically. It did so by stating 'unless the contrary intention appears', which we now know is the common means for incorporating standards made by international standard-setters into Commonwealth regulations. The Attorney-General's second reading speech in 1964 therefore raises the particular tension with the principles of Westminster-model parliamentary democracy regarding incorporating documents and materials that are not Commonwealth laws. However, he did not also seem to recognise that the provision enacted at that time accepts that such forms of incorporation are permissible and that they will clash with the principle.

The concern that incorporation by reference of materials beyond Commonwealth laws can put law-making beyond parliamentary control was subsequently addressed by the Administrative Review Council in its 1992 report *Rule Making by Commonwealth Agencies*. The Council stated that the incorporation of non-Commonwealth laws can 'escape scrutiny'.[20] The solution that it recommended was that non-Commonwealth laws and standards should be tabled in Parliament with the regulation. It is worthwhile quoting the recommendation in full, as it reveals an intention to implement an effective form of parliamentary control of incorporation of documents that are not Commonwealth laws:

> (1) The Legislative Instruments Act should require the text of any document applied, adopted or incorporated by reference to be tabled with the delegated legislation. Failure to table the incorporated document with the legislative instrument should mean that the incorporating provision should cease to have effect.
>
> (2) The document that is applied, adopted or incorporated by reference should be scrutinised to allow the Parliament to determine whether the provision allowing for the application, adoption or incorporation should be disallowed.[21]

This recommendation was not implemented in its terms. A watered-down version was included in the Legislation Act. Section 41 enables either house of Parliament to 'require any

18 Ibid.
19 Ibid.
20 Report No 35, 1992, 52.
21 Ibid 53.

document incorporated by reference in the instrument to be made available for inspection by that House' in the period that the regulation is subject to disallowance.[22] In my searches of the Australian Parliament website I could not find any evidence of this provision being used by either house of Parliament.

The interesting point about s 41 is that it would have little effect on parliamentary scrutiny of documents that are incorporated into Commonwealth regulations dynamically. While it could be utilised in the disallowance period when the document is initially incorporated, changes made to the incorporated document will be effective as Commonwealth laws without any additional step that enables parliamentary review.[23] That means that dynamic incorporation of international and private standards is a form of delegation of law-making power unsupervised by the Australian Parliament.

This may not raise such an issue if provisions enabling dynamic incorporation are rare. However, they are common.[24] They are included in important Commonwealth legislation, including:

- *Banking Act 1959* (Cth) s 11AF(7BA)
- *Competition and Consumer Act 2010* (Cth) ss 51AE and 56GB
- *Customs Act 1901* (Cth) ss 153XD(6), 153ZLB(6), 153ZMB(6), 153ZNB(6), 153ZOB(6) and 153ZPB(6)
- *Health Insurance Act 1973* (Cth) s 124ZT
- *Industrial Chemicals Act 2019* (Cth) s 180(3)
- *Radiocommunications Act 1992* (Cth) s 314A(2) and (5)
- *Road Vehicle Standards Act 2018* (Cth) ss 6, 7, 12 and 82
- *Social Security Act 1991* (Cth) s 592N
- *Space (Launches and Returns) Act 2018* (Cth) s 110
- *Telecommunications Act 1997* (Cth) s 589(1)(b)
- *Tertiary Education Quality and Standards Agency Act 2011* (Cth) s 58
- *Therapeutic Goods Act 1989* (Cth) s 10(4)
- *Veterans' Entitlements Act 1986* (Cth) ss 29 and 45SB
- *Water Act 2007* (Cth) s 256.

22 *Legislation Act 2003* (Cth) s 42 sets that period as 15 sitting days from 'the first sitting day after a copy of the instrument was laid before that House'.

23 Senate Standing Committee on the Scrutiny of Bills, Parliament of Australia, *The Work of the Committee in 2014* (March 2015) 48; Joint Standing Committee on Delegated Legislation (n 12) 19–21, 117–19.

24 A search of the Federal Register of Legislation on 1 June 2016 using the terms 'despite subsection 14(2) of the Legislation Act 2003' had 67 hits.

Although dynamic incorporation by reference of documents beyond Commonwealth laws is the focus of this article, it should be recognised that it is not the only form of incorporation that avoids parliamentary review. There are non-disallowable Commonwealth instruments that commonly incorporate private standards by reference. The clearest example is the safety standards made under the *Competition and Consumer Act 2010* (Cth). The Australian Consumer Law empowers the Commonwealth minister with responsibility for this aspect of the Act to make 'safety standards' including standards approved by Standards Australia.[25] Such safety standards are exempted by the *Legislation Act 2003* from parliamentary disallowance, as they are part of an intergovernmental scheme.[26] That means that product standards, one of the primary areas of standard-setting by private organisations, is expressly authorised by Commonwealth legislation to be incorporated by reference and is not subject to parliamentary review.

While the Attorney-General's second reading speech in 1964 for the initial inclusion of the incorporation by reference provision into the Acts Interpretation Act made clear the relevant principle that is engaged, the provision that was enacted at that time can be understood as recognising that other Acts may authorise incorporation by reference in a manner that is inconsistent with the principle. Dynamic incorporation of non-Commonwealth documents can be permitted by Commonwealth legislation despite its inconsistency with the parliamentary review principle. While parliamentary review is an overarching concern, the loophole that disabled it was included from the outset.

Globalisation, international standards and international law

We can now move on to the incorporation of standards made by international standard-setting organisations. In this section I will explain the incentives to incorporate international standards. It is worth recognising at the outset that the incentive is driven by a similar purpose for international standards as for the incorporation of scales of witness expenses that was relevant in the 1960s when the changes to the Acts Interpretation Act were made. The purpose is standardisation — to harmonise rules in different legal contexts. That purpose is now operating on a much larger scale. It has been driven by international law reforms confirmed in the 1990s that require states to rely more heavily on the standards set by international standard-setting organisations.

Incorporation by reference of international standards is designed to support businesses operating at the international level. Globalised businesses can be confident of compliance in different countries because harmonised standards will apply in the countries in which they conduct their business. It provides companies with confidence that their goods and services can comply with regulations in the jurisdictions in which they operate.[27] It also enables export opportunities that would not otherwise exist. In their groundbreaking work on international standards, Tim Büthe and Walter Mattli explain the significance and benefits to business of reliance on standards set by non-governmental international standard-setters:

25 Australian Consumer Law, s 105, in *Competition and Consumer Act 2010* (Cth) Sch 2.

26 The Australian Consumer Law is an 'intergovernmental scheme' for the purposes of the *Legislation Act 2003* (Cth) s 44(1)(a). See Parliamentary Library, Parliament of Australia, *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010* (Bills Digest No 187, 2009–10, 22 June 2010) 6.

27 David Zaring, 'Free Trade through Regulation' (2016) 89 *Southern California Law Review* 863, 867.

> The commitment by governments to use international rather than domestic standards has enormous economic significance. Governments adopt hundreds of new or revised regulatory measures each year, in which product standards are embedded or referenced. … The shift from domestic regulation to global private rule-making brings substantial gains, particularly to multinational and internationally competitive firms, for which it opens up commercial opportunities previously foreclosed by cross-national differences in standards and related measures.[28]

For such reasons, international standardisation is recognised as a beneficial goal. However, achieving the goal is difficult and includes conflict that tends to arise in relation to which standard prevails in a particular context. Businesses that already comply with a standard when the standard is incorporated into law benefit from not having to adjust to the new standard. The businesses that do not already comply will have to expend resources on making adjustments.[29]

These economic reasons for international standardisation are reflected in international trade law.[30] Article 2 of the World Trade Organization Technical Barriers to Trade Agreement includes a series of provisions establishing obligations in relation to the regulations of member States. Article 2.2 requires regulations to not create 'unnecessary obstacles to international trade' and 'not be more trade-restrictive than necessary to fulfil a legitimate objective' such as national security, protecting health and the environment. Article 2.4 then provides for the use of international standards. It states that:

> [w]here technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

This obligation is strengthened by Art 2.5, which provides that, when a member State's domestic regulations are made 'in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade'. Article 2.5 is referred to as providing a 'safe harbour'.[31] It protects a nation state from a challenge in the World Trade Organization by another country for the particular aspects of its regulatory scheme. The purpose of these provisions of the Technical Barriers to Trade Agreement is clear. They provide legal requirements and incentives for nation states to rely on international standards.

The Technical Barriers to Trade Agreement is not the only international law that includes obligations to rely on international standards. Many of Australia's bilateral agreements

28 Tim Büthe and Walter Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy* (Princeton University Press, 2011) 6–7. See also Junji Nakagawa, *International Harmonization of Economic Regulation* (Oxford University Press, 2011) 4–5.

29 Büthe and Mattli (n 28) 42.

30 For the relevant developments in international trade law, see Alan O Sykes, *Product Standards for Internationally Integrated Goods Markets* (Brookings Institute, 1995) 64–86.

31 Gregory Shaffer, 'How the WTO Shapes the Regulatory State' in Francesca Bignami and David Zaring, *Comparative Law and Regulation: Understanding the Global Regulatory Process* (Edward Elgar, 2016) 447.

also have provisions requiring reliance on international standards in each nation's regulatory laws.[32]

As would be expected, standard-setting organisations have picked up on these developments in international trade law and, in particular, the provisions of the Technical Barriers to Trade Agreement. The ISO and IEC refer to their standards as part of the legal harmonisation project that is framed by the World Trade Organization's Technical Barriers to Trade Agreement.[33] It is also worth noting that harmonisation is developed not only through international trade law obligations and incentives. International standard-setting organisations have processes that are designed to facilitate harmonisation. The main international standard-setters such as the ISO and the European Committee for Standardization achieve this through processes in which national standard-setters participate in the standard-setting processes and make standards based on consensus processes.[34] The common features are that committees made up of delegates from different national standard-setters work on standard solutions to technical problems through consensus forms of decision-making.[35]

The important point is that globalisation has provided the impetus for Commonwealth regulations to move from relying on local-level standardisation (such as for the scale of witness expenses for Commonwealth courts and tribunals referred to by the Attorney-General in 1964 when the initial incorporation by reference provision was included in the Acts Interpretation Act) to global level standardisation. The primary drivers of this shift relate to developments in the global economy and the legal frameworks which were developed to structure it.

Problems and potential solutions

It is clear then that incorporating private standards made by international standard-setting organisations enables transnational harmonisation of legal standards. That is, of course, beneficial for regulating matters that have global significance, such as international trade. However, incorporating such standards into domestic regulations raises concerns that I will address in this section. I refer to them as the 'legal problem' and the 'democracy problem'. My argument is that both of these problems can be resolved fairly simply by limiting incorporation by reference to static rather than dynamic forms of standards incorporation. The more difficult problem relates to how to ensure that this occurs.

32 See, eg, *Australia–US Free Trade Agreement*, signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005) Arts 8.2–8.5; *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, signed 8 March 2018, [2018] ATS 23 (entered into force 30 December 2018) Arts 8.4–8.8; *Thailand–Australia Free Trade Agreement*, signed 5 July 2004, [2005] ATS 2 (entered into force 1 January 2005) Art 705(1); *Singapore–Australia Free Trade Agreement*, signed 17 February 2003, [2003] ATS 16 (entered into force 28 July 2003) Ch 5, Art 4.

33 *Guide 59: ISO and IEC Recommended Practices for Standardization by National Bodies* (2nd ed, 2019) Art 1.

34 Craig N Murphy and JoAnne Yates, *The International Organization for Standardization (ISO): Global Governance through Voluntary Consensus* (Routledge, 2009) 26–32. See also Büthe and Mattli (n 28) 141–6; Sykes (n 30) 59; Harm Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets* (Hart Publishing, 2005) 104–7.

35 In general, 'consensus' in standard-setting processes means there is broad agreement and no sustained opposition amongst members of the standard-setting committees. When put into numerical form it is usually that there is more than two-thirds support and less than one-quarter opposition: Murphy and Yates (n 34) 30; Büthe and Mattli (n 28) 145; Schepel (n 34) 105.

Legal problems

Numerous potential issues have arisen in the past in cases involving incorporation by reference. Courts have determined that incorporation by reference of a document in a regulation was simply not authorised by the enabling provision[36] but later determined that there is no general principle that a power to make regulations does not allow incorporation of other documents.[37] Uncertainty has also been accepted as a basis for invalidating a regulation that incorporates other laws by reference, as it leaves out aspects of the law to be complied with.[38] However, again, the courts have determined there is no general principle that incorporation by reference is necessarily uncertain. The Supreme Court of New South Wales determined in *Wright v TIL Services* that incorporation by reference is not necessarily uncertain if the document is identified and its terms are not ambiguous.[39]

These issues are not so relevant in the current context when, as we have seen, legislation includes express provisions authorising dynamic incorporation. The primary Australian book on delegated legislation, Dennis Pearce and Stephen Argument's *Delegated Legislation in Australia*,[40] refers to dynamic incorporation as being a form of delegation despite, as we will see in this section, it not being treated as such by the courts.[41] Incorporation by reference becomes a form of delegation when the regulation incorporates a standard and states that any changes to the standard are included in the incorporation. The agencies that incorporate standards in this way accept that the standard-setter's development of the standard in the future will determine the content of the regulation.[42] It is delegation because those changes automatically become the law when they are made. The standard-setter, rather than the Parliament or administrative agency, controls the development of the standards that are now law in the jurisdiction.[43] Static incorporation involves incorporation of a particular version of the standard. Rather than authorising the standard-setter to control an area of law on an ongoing basis, administrative officials choose a standard as it is at a particular time. A particular version of the standard is included in a regulation. Any changes that are subsequently made to the standard do not have any effect for the purposes of the regulation.

Dynamic incorporation by reference is not an absolute form of delegation. The agency has control over whether incorporation of the standard or document continues. It can change the incorporation to a different standard or change its incorporation to a version of it at a particular time. Parliament can also repeal the authorisation of dynamic incorporation. The delegation may not be absolute, but it does distance law-making from parliamentary control such as tabling in Parliament and disallowance and it avoids the controls on regulation-making provided by the *Legislation Act 2003* (Cth), such as consultation and explanatory statements.

36 *Arnold v Hunt* (1943) 67 CLR 429.
37 *Dainford Ltd v Smith* (1985) 155 CLR 342, 348. See also *Wright v TIL Services* [1956] SR (NSW) 413, 421–2.
38 See *McDevitt v McArthur* (1919) 15 Tas LR 6, 8–9.
39 (1956) SR (NSW) 413, 422.
40 LexisNexis Butterworths, 5th ed, 2017.
41 Ibid.
42 Ibid 413.
43 Dorf (n 13) 104–5.

Australian courts have rejected arguments that dynamic incorporation by reference of a particular document involves delegation. In both *Dainford Ltd v Smith*[44] and *Dornauf v Steward of Harness Racing Board*[45] the judges did so by disagreeing with a party's claim that the relevant incorporating provision involved a form of delegation. These cases involved application of state laws and there was no reference to provisions such as s 14(2) of the Legislation Act that authorises static incorporation generally and dynamic incorporation only when authorised by the enabling Act. Dynamic incorporation without authority in the enabling Act was recognised in *Comcare v Broadhurst*[46] as breaching s 14(2) of the Legislation Act and the relevant regulation was read down to static incorporation.[47]

There does not seem much point in questioning whether courts could do more to restrict dynamic incorporation by reference. Express provisions of enabling Acts authorising dynamic incorporation can be understood as superseding questions as to whether general principles about delegation would extend to incorporation by reference. Section 14(2) of the Legislation Act also confirms that dynamic incorporation is permissible when authorised by the enabling Act.

It is worth noting that in the United States the rules and practices regarding incorporation by reference have been designed to avoid constitutional restrictions on delegation of law-making powers. Federal US law restricts incorporation by reference to one edition of a document or standard only and expressly does not permit subsequent amendments or revisions to be included.[48] Professor Strauss refers to this restriction as a response to concerns about delegating law-making powers to private organisations[49] and he highlights the risk of that concern by reference to case law of US state courts rejecting regulations that incorporate standards made by private standard-setters on a dynamic basis.[50]

However, provisions authorising dynamic incorporation by reference are unlikely to raise concerns in Australian constitutional law. The only apparent basis on which the issue could be raised is based on Evatt J's reasoning in *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan*[51] (*Dignan*). One of Evatt J's seven factors for determining the constitutionality of delegation of powers was the following:

> [t]he fact that the grant of power is made to the Executive Government rather than to an authority which is not responsible to Parliament, may be a circumstance which assists the validity of the legislation. The further removed the law-making authority is from continuous contact with Parliament, the less likely is it that the law will be a law with respect to any of the subject matters enumerated in ss 51 and 52 of the *Constitution*.[52]

44 (1985) 155 CLR 342, 349 (Gibbs J) and 358 (Wilson J).
45 [1994] 2 VR 302, 309.
46 (2011) 192 FCR 497.
47 Ibid 508 [57]–[60], 512 [73].
48 Office of the Federal Register Regulation, 1 CFR § 51.1(f) (1982) 'Incorporation by reference of a publication is limited to the edition of the publication that is approved. Future amendments or revisions of the publication are not included'.
49 Strauss (n 12) 522.
50 Ibid, footnote 179.
51 (1931) 46 CLR 73.
52 Ibid 120.

Since dynamic incorporation can be regarded as granting power to, in Evatt J's terms, an 'authority that is not responsible to Parliament' and is removed from 'continuous contact with Parliament', concerns are raised that are similar to those expressed by the Attorney-General in his second reading speech for the precursor to s 14 of the Legislation Act. However, in Evatt J's reasons in *Dignan* they are referred to as having constitutional law significance rather than a matter of democratic principle, as seems to have been the case in the Attorney-General's speech.

When we see Evatt J's point in the context of his judgment more broadly, it becomes clear that the difficulties that arise for dynamic incorporation by reference are better understood as being a problem for democratic principle rather than constitutional law. The next of Evatt J's seven points was that the 'scope and extent' of the grant of power will be very important.[53] The scope of powers effectively delegated via dynamic incorporation by reference to international standards is likely to be limited to detailed technical matters. Moreover, while Evatt J regarded Parliament's ability to amend or repeal provisions delegating law-making authority as not a relevant factor for determining whether or not delegation is constitutionally problematic,[54] it was regarded as important by Dixon J.[55]

The result is that, while dynamic incorporation is consistent with the constitutional concerns expressed by Evatt J, there are reasons to think that an actual challenge would have no chance of success. Moreover, a simple legislative change restricting incorporation of standards to static forms of incorporation would not be successful either. It would require amending s 14 of the Legislation Act to restrict incorporation of international standards to static forms only. However, that would not prevent subsequent legislation from enabling regulations to incorporate standards in a dynamic manner that override such a restriction. Section 14(2) of the Legislation Act confirms that particular Acts may authorise dynamic incorporation. It suggests that static incorporation by reference should be the norm for incorporation of private standards. However, its preface '[u]nless the contrary intention appears' recognises that dynamic incorporation can be authorised by the enabling Act. It is a statutory recognition of the general interpretive principle that later Acts repeal earlier inconsistent Acts.[56] Dynamic incorporation is therefore best seen as a matter for Parliament and the focus should shift to parliamentary controls on delegation. This is examined in the next section.

Democratic problems

It is worthwhile examining the potential for parliamentary controls on incorporation by reference by examining the democratic difficulties with the incorporation of international standards. The democratic problem is that the content of some Australian laws is delegated to private international organisations. Standard-setting organisations can change the standard and that change will automatically change the content of a regulation that incorporates the standard without any formal change having to be made to that regulation. As the standard-setter is outside of the regulation-making system, they are also outside the control of the democratic system and its system of accountability. I will develop this analysis primarily

53 Ibid.
54 Ibid.
55 Ibid 102.
56 DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 327.

by reference to Professor Michael Dorf's, 'Dynamic Incorporation of Foreign Law'.[57] Dorf examines dynamic incorporation by reference generally, as a matter of institutional design.[58] His general approach applies to incorporation by reference of international standards notwithstanding that he did not address incorporation of private standards in his analysis. Dorf stated that it 'raises sufficiently distinct issues to warrant its own full treatment'.[59]

Dorf's key point is that dynamic incorporation affects the democratic nature of lawmaking not in an absolute manner but as a matter of degree. He refers to it as involving a spectrum from issues regarding sovereignty to issues regarding delegation.[60] His main point is that the impact on democratic values is proportionate to the difficulty of revoking the decision to dynamically incorporate by reference.[61] Dorf puts it this way:

> All acts of dynamic incorporation of foreign law pose a prima facie threat to democratic principles, but as we move along the spectrum from easily revocable delegations to irrevocable cessions of sovereignty, the burden of justification for dynamic incorporation increases.[62]

It is clear that, at least in a formal sense, incorporation of international standards by regulations raises questions regarding delegation rather than sovereignty for the purposes of Dorf's spectrum. The administrative officials authorised to make regulations will have authority to amend the regulation to remove the incorporated standard. Parliaments can amend enabling Acts to remove the authorisation for dynamic incorporation or any incorporation at all. As a question of formal authority of parliaments and agencies, the burden of justification referred to by Dorf is prima facie at the lowest end of the spectrum.

However, there are practical reasons for thinking they are not so easily revocable. In many cases, the incorporation by reference of international standards will relate to technical details that are far from the matters that engage members of Parliament. Parliaments delegate regulation-making powers for a reason: so that members of Parliament do not need to deal with such matters.[63] There are also legal incentives on the Australian Government in international law, such as the World Trade Organization Technical Barriers to Trade Agreement and bilateral agreements discussed above, to not revoke international standards. It may also be the case that agency officials may not review and revise the international standards that have been incorporated in regulations. In colloquial terms they may 'set and forget'. This could occur due to increased reliance on private standards leading to depletion of agency expertise — a risk that has been raised in the US.[64] There are some reasons, therefore, for

57 Dorf (n 13).
58 Ibid 112.
59 Ibid 114 footnote 29.
60 Ibid 113.
61 Ibid 152.
62 Ibid 113.
63 Cecil Carr, *Delegated Legislation* (Cambridge University Press, 1921) 21–2; John Willis, *The Parliamentary Powers of English Government Departments* (Harvard University Press, 1933) 52–3; Jack Beatson, 'Legislative Control of Administrative Rulemaking: Lessons from the British Experience?' (1979) 12 *Cornell International Law Journal* 199, 211–12.
64 Nina Mendelson, 'Supervising Outsourcing: The Need for Better Design of Blended Governance' in Nicholas Parrillo (ed), *Administrative Law from the Inside Out: Essays on Themes in the Work of Jerry Mashaw* (Cambridge University Press, 2017) 427, 439. See also Bremer (n 12) 328.

thinking that incorporation of international standards may be 'practically irrevocable', as Dorf notes in regard to incorporation of foreign laws.[65]

Dorf's preferred solution for the loss of democratic control of law-making due to dynamic incorporation by reference to foreign law is to mitigate that loss by including national representation within the foreign law-making institution.[66] National governmental representation is not a possible solution for international standards. That is because international standard-setting organisations are non-governmental organisations. The Australian Government may provide funding for standard-setting volunteers to attend overseas meetings,[67] but that is funding rather than governmental representation.

The better place to focus is on whether incorporation processes can involve democratic checks consistent with Westminster-model parliamentary democracy on the content of standards that are dynamically incorporated. I suggest two measures: one for Bills and one for the regulations that incorporate international standards in a dynamic manner.

If governmental representation in the international standard-setters' processes is not a potential solution then the obvious other option would be to review the authorisation of dynamic incorporation by enabling Acts to enable limiting incorporation by reference to static incorporation. The benefit of static incorporation is that it does not involve delegation. Agency officials select a particular version of a standard when making or amending a regulation. Parliaments have supervisory mechanisms that enable escalation of issues with particular standards to parliamentarians with veto powers.

While we have seen that an attempt to legislate a general restriction on future legislation authorising dynamic incorporation by reference will not be effective, the more effective means for controlling the inclusion of such provisions in legislation is parliamentary scrutiny. In the context of the Australian Parliament this is a matter for the Scrutiny of Bills Committee. This committee regularly raises questions about the authorisation of dynamic incorporation in Bills[68] according to its scrutiny criteria that 'insufficiently subject the exercise of legislative

65 Dorf (n 13) 152.

66 Ibid 156–8.

67 Productivity Commission, *Standard Setting and Laboratory Accreditation Productivity Commission Research Report* (November 2006) 55–6.

68 From 2018 until April 2020, 11 Bills were questioned by the Committee for inclusion of provisions authorising dynamic incorporation. See the following reports included in Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, Scrutiny Digests: *Scrutiny Digest No 4 of 2020* 12–14 regarding the Therapeutic Goods Amendment (2020 Measures No 1) Bill 2020; *Scrutiny Digest No 9 of 2019* 1–3 regarding the Customs Amendment (Product Specific Rule Modernisation) Bill 2019; *Scrutiny Digest No 2 of 2019* 64, 70–1, *Scrutiny Digest No 4 of 2019* 27, 33–4 and *Scrutiny Digest No 5 of 2019* 80, 85 for the Treasury Laws Amendment (Consumer Data Right) Bill 2019; *Scrutiny Digest No 13 of 2018* 1, 4–5 regarding the Agricultural and Veterinary Chemicals Legislation Amendment (Streamlining Regulation) Bill 2018; *Scrutiny Digest No 8 of 2018* 30–2 for the Therapeutic Goods Amendment (2018 Measures No 1) Bill 2018; *Scrutiny Digest No 6 of 2018* 46–7 and *Scrutiny Digest No 8 of 2018* 48–50 for the Space Activities Amendment (Launches and Returns) Bill 2018; *Scrutiny Digest No 6 of 2018* 40–1 for the National Redress Scheme for Institutional Child Sexual Abuse Bill 2018; *Scrutiny Digest No 5 of 2018* 79–80 for the Underwater Cultural Heritage Bill 2018; *Scrutiny Digest No 1 of 2018* 82, 94 and *Scrutiny Digest No 4 of 2018* 9, 38–40 for the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017; *Scrutiny Digest No 2 of 2018* 29, 32–3 for the Road Vehicle Standards Bill 2018; and *Scrutiny Digest No 1 of 2018* 32, 55–6 for the Export Control Bill 2017.

power to parliamentary scrutiny' and sometimes also according to 'inappropriately delegate legislative powers'.[69] The Scrutiny of Bills Committee is the appropriate institution for raising questions about dynamic incorporation. However, it should not be regarded as a single solution to the need for a check on the inclusion of enabling provisions authorising dynamic incorporation by reference. While it is a necessary and important check, it does not always result in the removal of such provisions from a Bill. A Bill may be passed despite a concern being raised by the Committee about dynamic incorporation[70] and sometimes Bills are passed before the Committee has completed its scrutiny.[71]

A potential additional check would be for regular mandatory review of regulations that incorporate international standards dynamically.[72] That can be achieved through adjusting sunsetting requirements for regulations that incorporate international standards by reference. The current sunsetting period for Commonwealth legislative instruments is generally 10 years.[73] The potential check on dynamic incorporation would be to impose a shorter interval for regulations that include such incorporation; for example, to five years. A shorter sunsetting period would in effect require departmental review of the legislative instrument and the incorporated international standards; and the remaking of the instrument after the review would enable parliamentary scrutiny and potentially disallowance. It would also engage the consultation requirements included in s 17 of the Legislation Act. This should enable those who are concerned with the standards that are incorporated to have some input into whether they should be incorporated. The advantage is that it is an additional safeguard on dynamic incorporation that is designed to add parliamentary checks and stakeholder participation that are key safeguards for regulation-making in Westminster-based parliamentary democracies.

Michael Dorf's analysis of incorporation of foreign laws encourages us to think about how the democratic deficits that arise due to dynamic incorporation of international standards can be mitigated. My suggestion in regard to dynamic incorporation in Australia is to continue scrutinising Bills to raise concerns about such provisions being included in Acts. This could be supplemented by specific review requirements with mandatory public consultation processes and parliamentary scrutiny and disallowance provisions. This would be a fairly minimal change but would help to mitigate the impact on democratic principles that occurs due to dynamic incorporation.

Conclusion

The incorporation of international standards is now a common feature of Commonwealth regulations. While they are not formally a form of international law, their incorporation into Australian law is due to obligations and incentives in international law. The standards are made by international non-governmental organisations. As such, incorporation of

69 Australian Parliament, Senate Standing Orders, 24(1)(a)(iv) and (v).

70 See, eg, *Road Vehicle Standards Act 2018* (Cth) s 82(6) and *Scrutiny Digest No 2 of 2018* 29, 32–3; *Therapeutic Goods Act 1989* (Cth) s 10(4) added by *Therapeutic Goods Amendment (2018 Measures No 1) Act 2018* (Cth) and *Scrutiny Digest No 8 of 2018* 30–2.

71 See, eg, Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 6 of 2018, 20 June 2018) 40–1 regarding the National Redress Scheme for Institutional Child Sexual Abuse Bill 2018.

72 See Dorf (n 13) 123.

73 *Legislation Act 2003* (Cth) s 50(1).

international standards should be regarded as the implementation of a form of foreign law into domestic law. Unlike implementation of international law, however, incorporation by reference of international standards usually adopts part or the whole of the internationally sourced standard into domestic law. It is not translated or transformed in the process of implementation. That is necessary in order for the standard to have the standardising or harmonising effect that is sought for the purposes of globalisation.

Yet, as Professor Dorf makes clear, the incorporation of foreign laws generally, and international standards more specifically, has impacts on democratic principles. The democratic concerns arising with incorporation by reference has been recognised at least since Attorney-General Snedden's second reading speech for the inclusion of provisions authorising incorporation by reference into the Acts Interpretation Act in 1964. The Administrative Review Council recognised it again at the beginning of the process leading to the Legislation Act. Yet the laws adopted at these times have not adequately mitigated the primary problem — the democratic deficit arising from dynamic incorporation by reference. This is not an easy problem to resolve legally. I have argued that the best we can hope for is through parliamentary scrutiny by the Scrutiny of Bills Committee and through requiring more regular reviews of regulations that incorporate international standards on a dynamic basis. These measures are consistent with others adopted in Westminster-based parliamentary democracies for controlling delegation of law-making powers.