

Henry VIII & the rule of law



Henry VIII clauses

- Henry VIII was King of England and ruled from 1509 till 1547.
- During his reign, a new type of clause appeared in legislation.
- These new clauses operated as a specific clause in a primary Act which gave the power for secondary legislation (regulations) to include provisions which amend, repeal or are inconsistent with the primary legislation.
- The effect of a Henry VIII clause is that whoever who makes the regulations has been delegated legislative power by the Parliament. In other words, the executive arm of government would have the power to make regulations which can modify the application of the primary statute.

The original clause usage

- The original Henry VIII clause was contained in the *Statute of Sewers* in 1531, which gave the Commissioner of Sewers powers to make rules which had the force of legislation (legislative power), powers to impose taxation rates and powers to impose penalties for non-compliance.
- A later *Statute of Proclamations* (1539) allowed the King to issue proclamations which had the force of an Act of Parliament. Both these were passed during the time of Henry VIII.

Rule of law issues

- Are Henry VIII clauses an unconstitutional abdication of power? The High Court has held that they are not, as long as Parliament retains the right to repeal or amend the primary statute – per Mason CJ, Dawson and McHugh JJ in *Capital Duplicators Pty Ltd v ACT*.
- Regulations made under Henry VIII clauses, are not automatically subject to parliamentary scrutiny and debate, yet they are law, unless they are disallowable regulations.
- Henry VIII clauses can give rise to uncertainty and frustration in application when all the law is not contained in the primary statute.
- Henry VIII Clauses are considered unpopular in the courts, but that does not make them invalid, and they are often held valid despite there being often very little guidance in the clause providing the power to make the regulations on what those regulations might be.
- The Court can declare a Henry VIII clause invalid, they must consider that to be valid the clause must be within the boundaries of legislative power of the Parliament, though even if it is within legislative power it must come under a head of legislative power.

Which clauses are valid?

Dixon J in *Dignan*:

“I, therefore, retain the opinion which I expressed in the earlier case that *Roche v. Kronheimer* did decide that a statute conferring upon the Executive a power to legislate upon some matter contained within one of the subjects of the legislative power of the Parliament is a law with respect to that subject, and that the distribution of legislative, executive and judicial powers in the Constitution does not operate to restrain the power of the Parliament to make such a law. This does not mean that a law confiding authority to the Executive will be valid, however extensive or vague the subject matter may be, if it does not fall outside the boundaries of Federal power. There may be such a width or such an uncertainty of the subject matter to be handed over that the enactment attempting **it is not a law with respect to any particular head or heads of legislative power**. Nor does it mean that the distribution of powers can supply no considerations of weight affecting the validity of an Act creating a legislative authority.”

Victorian Stevedoring & General Contracting Co Pty Ltd & Meakes v Dignan (Dignan's Case) (1931) 46 CLR 73.

Operation

- The main justification for creating a Henry VIII clause is that when an Act is put into operation it may require minor amendments for it to work effectively in practice.
- The Donoughmore Committee of the UK in 1932 set out several principles of use including the following:
 - The clauses should only be used exceptionally, not routinely.
 - A sunset provision should be included to mean the regulations created are repealed after a certain period of time and the Henry VIII clause should also be subject to a sunset.

Scrutiny of the clauses in Federal Government

- The Senate and the House of Representatives can disallow regulations.
- The Senate Scrutiny of Bills Committee reads all Bills and identifies Henry VIII clauses. It then publishes alerts and reports to notify members of Parliament that a clause is contained in a Bill.
- Any Senator or Member of the House of Representatives is entitled to give a notice of motion to disallow. The Chair of the Senate Standing Committee on Regulations and Ordinances gives notices of motion on behalf of the Committee relating to the its scrutiny of instruments.
- The Senate Regulations & Ordinances Committee is concerned with objections to regulations. It publishes notices of objections on its website.

Examples of Henry VIII Clauses from the National Consumer Credit Bill 2009

28 Application of this Division

This Division applies on or after 1 July 2011, or a **later day prescribed by the regulations**.

123 Prohibition on suggesting or assisting consumers to enter, or increase the credit limit under, unsuitable credit contracts

(2) The contract will be unsuitable for the consumer if, at the time the licensee provides the credit assistance, it is likely that:

(a) the consumer will be unable to comply with the consumer's financial obligations under the contract, or could only comply with substantial hardship; or

(b) the contract will not meet the consumer's requirements or objectives; or

(c) if the regulations prescribe circumstances in which a credit contract is unsuitable—those circumstances will apply to the contract;

if the contract is entered in the period proposed for it to be entered or the credit limit is increased in the period proposed for it to be increased.

(5) The regulations may prescribe particular situations in which a credit contract is taken not to be unsuitable for a consumer, despite subsection (2).

Student questions

- Does it concern you that there rules made under regulations that have not gone through the proper scrutiny and debate? Do you think this would negatively affect the way research can be done to give advice to a client?
- If you were a Senator, would you consider it of great importance to eliminate these clauses from Bills?
- Do you think it should be easier for the courts to disallow these clauses?
- What limits would you suggest be placed on these clauses? For example, do you think there should be no clauses in the areas of criminal or family law, if so, why should they be different from commercial law?