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Draft

Henry VIII clauses & the rule of law

Definition

A Henry VIII clause is the term given to a provision in a primary Act which gives 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 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

1. 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*.¹
2. Regulations made under Henry VIII clauses, are not automatically subject to parliamentary scrutiny and debate, yet they are law, unless they are disallowable regulations, as in the example of the Australia Card, discussed below.

¹ *Capital Duplicators Pty Ltd v Australian Capital Territory (No 1)* (1992) 177 CLR 248; (1992) 66 ALJR 794.

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3. Henry VIII clauses can give rise to uncertainty and frustration in application when all the law is not contained in the primary statute.
4. 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.
5. 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 - Dixon J in *Dignan*:²

“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.”

6. Responsible government and the incomplete separation of powers between executive and legislature in Australia is potentially a problem, with the Executive being given some of the Legislature’s rule making power. The High Court in *R v Kirby; ex parte Boilermakers’ Society of Australia*³ confirmed it is a doctrine of the court that there is strict separation of **judicial** and **legislative power**. There was no comment on the amount of delegation of legislative power possible.

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.

² *Victorian Stevedoring & General Contracting Co Pty Ltd & Meakes v Dignan (Dignan’s Case)* (1931) 46 CLR 73.

³ *R v Kirby; Ex parte Boilermakers Society of Australia* (1955-56) 94 CLR 254; (1956-57) 95 CLR 529; (1957) AC 288.

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- 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

The Senate and the House of Representatives can disallow regulations. Regulations must be laid before houses within 14 sitting days and they must also be gazetted.

The Senate Regulations & Ordinances Committee provides the following information:

Part 5 of the *Legislative Instruments Act 2003* provides for the parliamentary scrutiny of legislative instruments. Section 42 deals with notices of motion to disallow legislative instruments. In particular, subsection 42(1) provides that if either House of the Parliament, in pursuance of a motion of which notice has been given within 15 sitting days after any legislative instruments have been laid before that House, passes a resolution disallowing any of those legislative instruments, any legislative instrument so disallowed thereupon ceases to have effect.

The *Acts Interpretation Act 1901* was amended on 1 January 2005 to introduce section 46B that provides for the parliamentary scrutiny of non-legislative instruments. Non-legislative instruments that are expressly declared by a provision of an enabling Act or instrument to be disallowable will be subject to the disallowance provisions contained in Part 5 of the *Legislative Instruments Act 2003*.

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.

Examples (not limited to Henry VIII clauses):

The Regulations & Ordinances Committee publishes all notices on their website. The following examples are taken from the Committee website.

Senator Ludlam put forward a notice on the Extradition (United Arab Emirates) Regulations 2010, Select Legislative Instrument 2010 No. 36 on 28/9/2010. The Senate debated the motion on 26/11/2010. The Regulations were not disallowed.

The Regulations & Ordinances Committee put forward a notice on the ASIC Market Integrity Rules (ASX Market) 2010, made under subsection 789G(1) of the *Corporations Act 2001* on 26/11/2010. On 10/2/2011 the Committee gave notice of its intention to withdraw the notice on the next day of sitting. The notice was withdrawn on 28/2/2011.

Notices of disallowance which are agreed with by the Senate:

In 2010 there were 3 disallowances from 15 notices, in 2009 there were 10 disallowances from 36 notices and in 2008 there were 6 disallowances from 36 notices.

The latest disallowance notice with which the Senate agreed was brought by Senator Xenophon regarding the Aviation Transport Security Amendment Regulations 2010 (No. 1), Select Legislative Instrument 2010 No. 80 on 21/6/2010. After debate, the regulations were disallowed on 24 June 2010. They were disallowed due to the regulations creating unfair criminal circumstances.

Senate Scrutiny of Bills Committee

The Senate Scrutiny of Bills Committee has established a reputation for identifying Henry VIII clauses. Its terms of reference include reporting on inappropriate delegation of power and if there is insufficient parliamentary scrutiny of the power delegated, the Committee will report this too.

David Hamer discussed the Committee in his paper 'Can Responsible Government Survive in Australia' published 2004:

"...The trouble is that the committee examines over 200 bills a year, and makes comments on about 40 per cent of them, with the assistance of an independent legal adviser. Not all the comments refer to delegated legislation, and criticisms may be lost in the rush. The committee chairman does not move amendments on behalf of the committee when the bills are considered in the Senate, but at least the comments of the committee are available to senators when they debate the bill. Unfortunately, in that forum amendments tend to be dealt with on party lines, and some inappropriate powers escape. The committee does do some useful work negotiating with ministers to improve the delegation arrangements in the bills. Most ministers are reasonably cooperative, but the committee does not yet have much political clout."

"The committee has an independent legal adviser, who examines each of the 1200 regulations issued each year by the federal government, and draws the attention of the committee to any which seem to infringe its principles, typically about 170 a year. The Senate has no power to amend or to disallow parts of delegated instruments, though it would like the latter power. If the committee agrees with its legal adviser-and it usually does-an attempt is made to negotiate with the responsible minister on the necessary changes, and typically about three-quarters of the queries are satisfactorily dealt with, either by the minister giving an acceptable explanation or an undertaking to make the necessary amendments."

Examples of Henry VIII clauses the Committee has identified are published in this paper from page 6 onwards.

Individual Senators

From the Hamer paper:

“Individual senators can move to disallow regulations, and very occasionally they do, usually for reasons of political publicity. The most dramatic use of this power occurred in 1987 when the Hawke Labor Government introduced a bill to create an identity card, to be called the Australia Card. The Senate was opposed to the idea, and a deadlock ensued. The government invoked the deadlock procedure, both houses were dissolved, and an election was held. It was a convenient moment for the Labor government to hold an election (the opposition was in some disarray) and the Labor Party duly won the election. The Senate still refused to pass the bill, and the government then proposed, still using the deadlock procedure, to hold a joint sitting of the two houses to pass the bill. It was then pointed out in the Senate that regulations would be required to bring the act into effect, and notice was given of an intention to disallow such regulations. The government dropped the bill, not very reluctantly, for the Australia Card was expected to be very unpopular. The fact that the Labor Party won the election, despite the unpopularity of the Australia Card, shows the absurdity of using a general election as a means of resolving a deadlock over a particular piece of legislation.”

Senate Scrutiny of Bills Committee and Henry VIII clauses

The Committee reports on Henry VIII clauses in its monthly digests. The following are those Bills identified to have Henry VIII clauses in 2009-2011, with the Bill names included so the type of legislation subject to these clauses is identifiable:

Digest	Bill	Henry VIII Clauses in Bill	Resulting Amendment to Bill (x for no, ✓ for yes)
2/11	-		
1/11	National Vocational Education and Training Regulator (Transitional Provisions) Bill 2010	1	x (still before Senate)
10/10	-		
9/10	-		
8/10	-		
7/10	-		
6/10	Autonomous Sanctions Bill 2010	1	x (still before Senate)
	Paid Parental Leave Bill 2010	1	x
5/10	Defence Legislation Amendment Bill (No.1) 2010	1	x
4/10	-		
3/10	-		
2/10	ComSuper Bill 2010	1	lapsed
	Corporations Amendment (Financial Market Supervision) Bill 2010	2	x
	Offshore Petroleum & Greenhouse Gas Storage Legislation Amendment (Miscellaneous Measures) Bill 2010	2	x
1/10	-		
15/09	-		
14/09	-		
13/09	Fair Work Amendment (State Referrals and other measures) Bill 2009	1	x
12/09	Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009	1	x
11/09	Education Services for Overseas Students Amendment (Re-registration of providers and other measures) Bill 2009	1	x
	Foreign States Immunities Amendment Bill 2009	1	x
10/09	-		
9/09	National Consumer Credit Protection Bill 2009	9+ & see	x for the named

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		<i>commentary below</i>	sections
	Australian Wine and Brandy Corporations Amendment Bill 2009	2	x
	Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009	1	x
	Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009	3	x
8/09	Australian Business Investment Partnership Bill 2009	<i>Several but Bill negated</i>	
7/09	-		
6/09	-		
5/09	Fair Work (Transitional Provisions & Consequential Amendments) Bill 2009	3	x
	Fair Work Bill 2009	1	x
4/09	-		
3/09	-		
2/09	-		
1/09	-		

National Consumer Credit Protection Bill 2009 – Committee commentary

The Senate Scrutiny of Bills Committee made the following comments on the Bill:

“‘Henry VIII’ clauses

General commentary

There are a large number of ‘Henry VIII’ clauses in the bill which provide for regulations to change entitlements and obligations conferred by the principal legislation. Since its establishment, the Committee has consistently drawn attention to ‘Henry VIII’ clauses and other provisions which (expressly or otherwise) permit subordinate legislation to amend or take precedence over primary legislation. Such provisions clearly involve a delegation of legislative power and are usually a matter of concern to the Committee.

The Committee does not condone the use of ‘Henry VIII’ clauses as a standard drafting practice. However, such clauses have been used so extensively in this bill that it is not possible to provide commentary in relation to all of them. The Committee **leaves to the Senate as a whole** any consideration of the legislative approach taken regarding ‘Henry VIII’ clauses in this particular bill, as well as the question of the apparent increasing reliance on such provisions in legislation more generally.

Where the need and justification for ‘Henry VIII’ clauses in the bill have been explained in the explanatory memorandum (noting, in this context, that the bill gives effect to COAG agreement), the Committee has not made any specific comments. Instead, the Committee has focused its commentary on those clauses that have not been accompanied by any explanations in the explanatory memorandum.”

Clauses that the Senate Scrutiny of Bills Committee has identified recently:

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).

Example of Henry VIII Clause from the Fair Work Bill 2009

35A Regulations excluding application of Act

- (1) Regulations made for the purposes of section 32 or subsection 33(4) or 34(4) may exclude the application of the whole of this Act in relation to all or a part of an area referred to in section 32 or subsection 33(4) or 34(4) (as the case may be).
- (2) If subsection (1) applies, this Act has effect as if it did not apply in relation to that area or that part of that area.

Bibliography

1. *Capital Duplicators Pty Ltd v Australian Capital Territory (No 1)* (1992) 177 CLR 248; (1992) 66 ALJR 794.
2. Fair Work Bill 2009.
3. David Hamer, 'Can Responsible Government Survive in Australia' (2004).
4. National Consumer Credit Bill 2009.
5. *R v Kirby; Ex parte Boilermakers Society of Australia* (1955-56) 94 CLR 254; (1956-57) 95 CLR 529; (1957) AC 288.
6. Senate Standing Committee for the Scrutiny of Bills, Digests 2009-2011.
7. *Victorian Stevedoring & General Contracting Co Pty Ltd & Meakes v Dignan (Dignan's Case)* (1931) 46 CLR 73