The Validity of Henry VIII Clauses in Australian Federal Legislation

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1. *Introduction*

Under the usual type of regulation making power a regulation must be consistent with the empowering Act and other Acts[1]. By contrast, a Henry VIII clause authorises the amendment of a statute by regulation[2]. The High Court of England and Wales defined a Henry VIII clause as "a power granted by Parliament to the Executive to make subordinate legislation which itself counts as if it were primary legislation"[3]. By enacting a Henry VIII clause, Parliament "delegate[s] the power of amendment or repeal"[4].

It appears that such clauses were named after King Henry VIII due to his autocratic reputation[5]. That monarch obtained parliamentary authority giving the force of law to his proclamations. Under the Statute of Proclamations of 1539[6] royal proclamations were given "the force of statutes, but so that they should not be prejudicial to any person's inheritance, offices, liberties, goods and chattels, or infringe the established laws"[7]. However, proclamations issued under the Statute were able to infringe Acts of Parliament enacted after the Statute of Proclamations[8].

In 1932 the Donoughmore Committee of the United Kingdom Parliament proposed that the use of Henry VIII clauses in statutes be "abandoned in all but the most exceptional cases"[9]. However, the use of such provisions has since flourished in the United Kingdom. In the absence of an entrenched Constitution embodying a separation of powers, there are now many United Kingdom examples of such provisions[10].

In recent years the Australian federal Parliament has also enacted numerous Henry VIII provisions in a variety of statutes[11]. For example, some of these provisions authorise amendment of the parent Act by regulation[12]. Other provisions authorise amendment of another specific Act or Acts[13]. This paper considers the constitutional validity of such clauses under the Australian federal Constitution.

2. *Broad Delegations of Federal Legislative Power are Constitutionally Permissible*

In Australia the doctrine of the separation of powers has had a significant practical operation only in respect of the separation of the judicial power from the legislative and executive powers[14]. There is thus an 'asymmetry' between, on the one hand, the separation of the judicial power from those of the political branches, and on the other hand, the separation of power between the legislature and the executive[15].

The High Court has upheld broad delegations of legislative power to the executive in the form of the power to make regulations. The conferral of legislative power upon the Parliament does not prevent that body from delegating part of its power to the executive[16].

3. *Abdication of Federal Legislative Power is Constitutionally Impermissible*

Several national Constitutions expressly prohibit the legislature from abdicating or alienating its legislative power[17]. In Australia such a prohibition has arisen by judicial interpretation of the separation of powers between the legislature and the executive.

The Australian High Court has stated that the federal Parliament may not abdicate its legislative powers[18]. The State Parliaments also may not abdicate their legislative powers[19], though their Constitutions are not entrenched in most respects[20] and do not embody a "formal separation of powers"[21].

Several judgments have indicated that a law conferring an extraordinarily broad delegation might be beyond power as it may not be capable of characterization as a law with respect to a specific head of federal legislative power[22]. Some judges have seen failure of characterization as the reason why an abdication of power would be invalid[23].

The characterization limitation is not a useful test for the validity of a delegation as it is inconsistent with the Court's later decisions regarding the proper approach to characterization[24]. Under the Court's modern precedents a law may be upheld as being with respect to a subject matter of federal legislative power even though it also concerns matters falling within State residuary power[25].

In 1931 the High Court upheld the validity of a Henry VIII clause in the *Dignan* case. The provision allowed the amendment of other Acts but not the empowering Act[26]. Dixon J observed that the Henry VIII clause at issue "may be exercised in disregard of other existing statutes, the provisions of which concerning the same subject matter may be overridden"[27]. A leading commentary on the federal Constitution cites the *Dignan* case for the proposition that "the Executive through a Henry VIII clause can override Acts of Parliament itself"[28].

The Court's concept of abdication is excessively formalistic. It only prohibits an abdication or renunciation of the power of the Parliament to repeal or amend a statute[29]. As Mason CJ, Dawson and McHugh JJ pointed out in the *Capital Duplicators* case, "[s]o long as Parliament retains the power to repeal or amend the authority which it confers upon another body to make laws with respect to a head or heads of legislative power entrusted to the Parliament, it is not easy to see how the conferral of that authority amounts to an abdication of power"[30]. The concept of abdication is so narrow that it has not proved to be a meaningful limitation in practice. The High Court has never invalidated a delegation of legislative power as an abdication of power[31].

The High Court has not considered the constitutional validity of Henry VIII clauses since the *Dignan* case in 1931. The Court's narrow concept of abdication is ripe for reconsideration. It would be open to the Court to develop a more substantive notion of the abdication of legislative power[32]. The High Court is not bound by its own decisions[33]. In recent years the Court has overruled a longstanding constitutional precedent and rejected the previously assumed understanding of the effect of a constitutional provision[34]. The Court has also modified its test for infringement of the implied freedom of political communication[35].

A reconsideration of the Court's narrow concept of abdication would require a rather less dramatic modification of current doctrine so that a delegation of power to amend statute law by regulation would constitute an abdication of legislative power. Subordinate legislation must at least be subordinate to primary legislation (statute law). The delegation of regulation making power should not extend to the amendment of statute law any more than it would extend to the enactment of statute law – either case would be the exercise of primary rather than subordinate legislative power.

It would not be necessary to overrule the prior decisions, only to adopt a more substantive concept of abdication. All that would be required is to make a relatively narrow expansion of the effect of what is already recognised in the case law.

In relation to the use of Henry VIII clauses the following argument for a broader concept of abdication of power is persuasive:

> the Constitution, in vesting legislative power in a Parliament chosen by the people, does not only give that Parliament powers; it also gives it duties. One of these duties is to guide the executive in the performance of its task, and an attempt to abdicate that responsibility is indeed unconstitutional. Abdication in this sense has nothing to do with [the] technical notion of abdication, namely, the transfer of an entire head of power to the executive. […] Rather the impermissibility of Parliament's abdicating its legislative power derives from the purposes of the separation of powers doctrine. These are not confined to preventing one arm of government from unilaterally invading the territory of another. […]. the doctrine has another purpose, namely to vest the powers of government in the appropriate organ of government and this introduces a dimension of responsibility and constitutional obligation into the exercise of those powers. In the case of Parliament, the responsibility with which it has been entrusted is to settle the fundamental principles and policies of the law after due public deliberation among those who represent rival views[36].

4. *Comparative Case Law*

The High Court often has regard to foreign case law if it finds that the reasoning of the decision is persuasive[37]. In the absence of recent Australian authority on point, foreign case law provides some instructive examples of the constitutional infirmities of Henry VIII clauses.

The text and structure of the United States federal Constitution in relation to the vesting of legislative power is very similar to that of the Australian federal

King Henry VIII (1491-1547): King Henry VIII Clauses were named after him due to his autocratic reputation. Henry VIII effectively bypassed the legislature with his clauses. (Photo from Wikipedia)

Constitution. The United States Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States"[38]. The Australian federal Constitution provides that "[t]he legislative power of the Commonwealth shall be vested in a Federal Parliament"[39]. Each Constitution separately vests the judicial and executive powers[40].

The United States Supreme Court has held that the vesting of the legislative power in Congress prohibits Congressional delegation of the power to make laws. To avoid invalidity under this non-delegation doctrine, Congress must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform"[41]. However, the Court has not invalidated a delegation since 1935[42].

The Supreme Court has not considered whether a Henry VIII clause would violate the non-delegation doctrine. However, a 1998 decision suggests that the Court would regard a Henry VIII clause as constitutionally invalid. The Court held that the Line Item Veto Act was unconstitutional. The statute had purported to empower the President to cancel items of expenditure in previously enacted Congressional statutes[43]. The Court held that the Act was inconsistent with the President's veto power[44], to which the Australian Constitution has no equivalent. The Court did not examine the applicability of the non-delegation principle[45]. However, in considering the veto power the Court observed that "[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes"[46].

In relation to the delegation of legislative power the structure but not the text of the South African Interim Constitution was similar to that of the Australian Constitution. In each Constitution legislative, executive and judicial authority was expressly vested in the relevant branch[47].

Under the Interim Constitution the Constitutional Court held that a delegation to the President of a power to amend the empowering Act was invalid as it violated the separation of powers. The Court acknowledged that the conferral upon the executive of regulation making power was necessary in a modern legal system[48].

However, to uphold the validity of the conferral upon the executive of power to amend or repeal a statute would be "quite different". That would be "subversive" of the constitutionally prescribed process of enacting and repealing statute law[49]. The Court observed out that "[t]he authorisation of [such] legislation… allows control over legislation to pass from Parliament to the executive. Later this power could be used to introduce contentious provisions into what was previously uncontentious legislation"[50].

This decision was based upon an implication from the assignment of powers to the branches of government. As Sachs J pointed out in his concurring opinion, the interim Constitution imposed "no express limitation on the power of Parliament to pass a law delegating its legislative authority". However, such a restriction was to be implied from "the design and structure of the Constitution as a whole"[51].

In relation to the assignment of powers the text of the Irish Constitution is quite different from that of the Australian Constitution. However, the structure of the Irish Constitution in this context is broadly similar, with an express division of powers between the three branches[52].

The Irish Constitution expressly declares that the legislature has exclusive power to make laws: "The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas [legislature]: no other legislative authority has power to make laws for the State"[53]. Despite the broad nature of this prohibition, the Irish Supreme Court has held that a statute may validly confer regulation making powers upon the executive[54].

However, the Supreme Court has made clear that Henry VIII clauses infringe the vesting of legislative power in the Oireachtas. The court has held that "delegated legislation cannot make, repeal or amend any law and that, to the extent that the parent Act purports to confer such a power, it will be invalid having regard to the provisions of the Constitution"[55].

In another decision Finlay CJ stated: "The wide scope and unfettered discretion contained in the section [under consideration] can clearly be exercised by a Minister making regulations so as to ensure that what is done is truly regulatory or administrative only and does not constitute the making, repealing or amending of law in a manner which would be invalid having regard to the provisions of the Constitution"[56].

Legislative and executive acceptance of this clear authority has been uneven. A Henry VIII clause appears in recent financial rescue legislation[57]. The President did not refer the Bill to the Supreme Court for its opinion regarding the proposed law's validity[58]. On the other hand, during the previous year a Minister had stated that an existing Henry VIII clause was invalid in the light of Supreme Court authority[59].

The position in Canada is less clear. During the First World War the Canadian Supreme Court upheld the constitutional validity of a Henry VIII clause in a *War Measures Act*[60]. This decision was applied in another Supreme Court case during the Second World War[61]. The Supreme Court has not considered this issue since that time[62]. In the absence of contrary authority, the lower courts continue to apply these wartime decisions[63].

However, the text and structure of the Canadian Constitution in relation to the separation of powers is quite different from that of the Australian federal Constitution. The Canadian Constitution does not contain an express vesting of power in each branch of government[64], with the somewhat anomalous exception of the executive power[65]. The textual source of the separation doctrine is thus entirely different from that in the other jurisdictions discussed herein. The Canadian Supreme Court has held that the Constitution embodies a separation of powers through its preambular statement that the Constitution is "similar in principle to that of the United Kingdom"[66].

Furthermore, the Canadian Constitution does not embody a "strict" separation of powers, even between the judiciary and the executive[67], so Canadian decisions regarding the separation of powers must be approached with caution. By contrast, the Australian Constitution enforces a strict separation of powers between the judiciary and the political branches[68].

The United Kingdom and New Zealand do not offer guidance regarding the constitutional validity of Henry VIII clauses as those jurisdictions do not have entrenched Constitutions embodying a separation of powers[69]. In those nations there is no judicial review of constitutional validity[70].

5. *Questionable Status of a Henry VIII Clause as an Exercise of Legislative Power*

Latham CJ defined an exercise of legislative power as follows: "legislation determines the content of a law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular cases"[71]. The current bench of the High Court has unanimously cited this definition[72].

In the *Plaintiff S157* case five Justices of the High Court expressed considerable scepticism regarding an argument that the *Migration Act* could be validly redrafted so that effectively all of its provisions were no more than guidelines for the executive[73]. These Justices considered that such a provision would be invalid as it was not an exercise of legislative power, since it did not "determine [...] the content of a law as a rule of conduct or a declaration as to power, right or duty"[74]. There is a persuasive argument that the majority's reasoning in *Plaintiff S157* would be fatal for the validity of Henry VIII clauses, as such clauses generally permit the executive to modify all of the provisions of one or more statutes[75].

6. *The Rule of Law*

The High Court has often emphasized that the federal Constitution was framed upon the assumption of the rule of law[76]. The Constitution provides textual and structural support for the rule of law. For example, the High Court's constitutionally entrenched jurisdiction to grant writs of "Mandamus or prohibition or an injunction [...] against an officer of the Commonwealth"[77] has been regarded as a guarantee of an important aspect of the rule of law[78]. That aspect is the principle of the legality of governmental action[79].

The High Court has not used the rule of law as a separate test of the validity of federal legislation. However, the recognition of an implied constitutional doctrine of the rule of law would be a logical consequence of the "text and structure" of the Constitution[80]. The practice of the Supreme Court of Canada before the adoption of the Canadian Charter of Rights and Freedoms would support the recognition of such a doctrine. The Supreme Court regarded the rule of law as "implicitly recognized" by the *Constitution Act* 1867 (formerly the *British North America Act*)[81].

If the High Court declined to recognize an implied constitutional doctrine of the rule of law, the protection of the rule of law is likely to be a major influence upon the Court's interpretation of the other constitutional limits of governmental power. The separation of powers should be no exception.

The rule of law includes the principle that "ordinary (substantive) law should possess certainty, generality and equality"[82]. The rule of law requires that "the law must be governed by general rules which are made in advance"[83] as "only certainty will be able to ensure that the law effectively guides human behaviour"[84].

Henry VIII clauses allow the executive to avoid the operation of "general rules which are made in advance" and are inconsistent with an important element of the rule of law. It has been said that in the United Kingdom "we are continually passing legislation which virtually permits Governments to make new laws as they go along"[85].

It is also difficult to readily determine what a statute actually provides if it has been amended by regulation[86]. This situation is reminiscent of the former Weimar Constitution, which could be amended by a law passed by a special majority but with no requirement that the text of the Constitution itself be expressly amended. As a result "no one could determine what the Constitution provided by reading it – a state of affairs scarcely compatible with the rule of law"[87]. By contrast, the present German Constitution requires that constitutional amendments must expressly amend or supplement its text[88].

It is widely considered that Henry VIII clauses are undesirable for the rule of law[89]. Courts look upon such clauses with suspicion. The New Zealand Court of Appeal described them as "in principle, undesirable"[90]. The New Zealand Supreme Court described a Henry VIII clause as "a blank cheque"[91]. The Ontario Supreme Court described another clause as a "breathtaking power"[92], "constitutionally suspect"[93] and "arbitrary"[94]. Speaking extra-judicially, the Lord Chief Justice of England and Wales has suggested that "Henry VIII clauses should be confined to the basement of history" and that "[w]e must break what I believe to be a pernicious habit"[95].

Even a legislature has recognised that such provisions are problematic for the rule of law. The *Queensland Legislative Standards Act* 1992 identifies "fundamental legislative principles", which "are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law[96]. These principles require that "legislation has sufficient regard to […] the institution of Parliament"[97], which depends upon whether it "authorises the amendment of an Act only by another Act"[98],

In any event the need for Henry VIII clauses is most dubious. Minor amendments to statutes can be enacted through miscellaneous provisions amendment Acts[99]. The federal statute book contains many recent examples of legislation making miscellaneous or consequential amendments to various Acts.

7. *Conclusion*

Over seventy years ago the Australian High Court upheld the validity of a Henry VIII clause in the *Dignan* case. The Court has stated that the federal Parliament may not abdicate its legislative powers. However, the Court's concept of abdication is excessively formalistic. It only prohibits an abdication or renunciation of the power of the Parliament to repeal or amend a statute.

The High Court's concept of abdication is so narrow that it has not proved to be a meaningful limitation in practice. The Court should modify its abdication doctrine so that a delegation of power to amend statute law by regulation would constitute an abdication of legislative power. Subordinate legislation must at least be subordinate to primary legislation. A more modern approach to the separation of powers problems of Henry VIII clauses has been taken by other constitutional courts.

There is also a persuasive argument that the majority's reasoning in the *Plaintiff S157* case would be fatal for the validity of Henry VIII clauses, as such clauses generally permit the executive to modify all of the provisions of one or more statutes. Henry VIII clauses allow the executive to avoid the operation of "general rules which are made in advance" and are thus inconsistent with an important element of the rule of law. Such provisions are of questionable constitutional validity. At the very least it is widely considered that the use of such statutory provisions is constitutionally undesirable.

1 *Laws of Australia*, para. 2.2.660; *De L v Director-General, NSW Department of Community Services (No 2)* (1997) 190 CLR 207 at p. 211 and p. 220.

2 N.W. Barber and A.L. Young, *The Rise of Prospective Henry VIII Clauses and their Implications for Sovereignty*, in «Public Law», vol. 112, 2003, p. 112.

3 *Oakley Inc v Animal Ltd* [2005] RPC 30 (p 713), para. 79; [2005] EWHC 210 (Ch).

4 *Thoburn v Sunderland City Council* [2003] QB 151, para. 13; [2002] EWHC 195.

5 *Report of the Committee on Ministers' Powers* Cmd 4060 (1932), p. 36 (hereafter *Donoughmore*); *Waddell v Governor in Council* (1983) 49 BCLR 305; 5 DLR (4th) 254 at p. 269 (hereafter *Waddell*); Queensland Law Reform Commission, *Henry VIII Clauses*, Report No 39, Brisbane: QLRC, 1990, p. 1; D. Malcolm, *The Limitations, if Any, on the Powers of Parliament to Delegate the Power to Legislate*, in «Australian Law Journal», vol. 66, 1992, p. 255; *Vanstone v Clark* (2005) 147 FCR 299 at para. 122; [2005] FCAFC 189.

6 31 Henry VIII c 8 s 2. The text of the Act is reproduced in J.R. Tanner, *Tudor Constitutional Documents*, Cambridge, Cambridge University Press, 1922, p. 532. The Act was repealed in 1547 by 1 Edward VI c 12 s 4. See generally E.R. Adair, *The Statute of Proclamations*, in «English Historical Review», vol. 32, 1917, p. 34. For examples of the operation of the Act, see R.W. Heinze, *The Pricing of Meat: A Study in the Use of Royal Proclamations in the Reign of Henry VIII*, in «Historical Journal», vol. 12, 1969, p. 583 at pp. 593-595. For another early example of such a provision, see P.R. Roberts, *The 'Henry VIII Clause': Delegated Legislation and the Tudor Principality of Wales*, in T.G. Watkin (edited by), *Legal Record and Historical Reality*, London: Hambledon, 1989, p. 37.

7 T.P. Taswell-Langmead, *English Constitutional History* (9th ed.), London, Sweet and Maxwell,

1929, p. 343.

[8] G.R. Elton, *Henry VIII's Act of Proclamations*, in «English Historical Review», vol. 75, 1960, p. 208 at p. 211; M.L. Bush, *The Act of Proclamations: A Reinterpretation*, in «American Journal of Legal History», vol. 27, 1983, p. 33 at 35.

[9] *Donoughmore* cit., p. 65; see also N. Morag-Levine, *Agency Statutory Interpretation and the Rule of Common Law*, in «Michigan State Law Review», 2009, p. 51 at p. 63.

[10] s 10(2), *Human Rights Act* 1998; s 1(7), *Legislative and Regulatory Reform Act* 2006; s 12(2), *Banking (Special Provisions) Act* 2008; s 51(2), *Constitutional Reform and Governance Act* 2010 (UK); C. Forsyth and E. Kong, *The Constitution and Prospective Henry VIII Clauses*, in «Judicial Review», vol. 9, 2004, p. 17 at pp. 18-21.

[11] It has been argued that Henry VIII clauses may be distinguished from provisions that confer a power to make regulations that modify the effect of a statute in particular cases without making a textual amendment. See S. Bottomley, *The Notional Legislator: The ASIC's Role as a Law-maker*, in «Federal Law Review», vol. 39, 2011, p. 1 at pp. 2-6 and pp. 23-24.

[12] ss 189A(3), 231A(3), *Trade Marks Act* 1995; Sch 1 s 100.7, *Criminal Code Act* 1995; ss 5I(1), 200E(2C), 601YAB(1), 798L(1), 854B(1), 911A(5A), 985K(4), 1200F(2), 1492(2), 1513(2), *Corporations Act* 2001; s 6(7), *Anti-Money Laundering and Counter-Terrorism Financing Act* 2006; ss 64(1), 78(4), 81(4), *Northern Territory National Emergency Response Act* 2007; s 18C(1), *Water Act* 2007; ss 118(5), 255(1), *Personal Property Securities Act* 2009; ss 14(3)(b), 15(5)(b), 110, 123(5), 124(5), 326, 333(2)(b), *National Consumer Credit Protection Act* 2009.

[13] ss 44(3), 46(3), *Northern Territory National Emergency Response Act* 2007; s 14A(2), *Australian National Registry of Emissions Units Act* 2011; s 12(8), *Work Health and Safety Act* 2011.

[14] G.A. Moens and J. Trone, *Lumb, Moens and Trone, The Constitution of the Commonwealth of Australia Annotated* (8th ed.), Sydney, LexisNexis Butterworths, 2012, p. 45 (hereafter Moens and Trone).

[15] *Victorian Stevedoring & General Contracting Co Ltd v Dignan* (1931) 46 CLR 73 at p. 101 (hereafter *Dignan*).

[16] *Dignan* cit., pp. 83-84, p. 86, p. 101, p. 117; *Attorney-General (Cth) v R; Ex parte Boilermakers' Society of Australia* (1957) 95 CLR 529 at p. 545; *Radio Corporation Pty Ltd v Commonwealth* (1938) 59 CLR 170 at p. 179, p. 186, p. 193; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at para. 102 (hereafter *Plaintiff S157/2002*).

[17] s 100(3), *Constitution of Papua New Guinea* (1975); Art 76(1), *Constitution of Sri Lanka* (1978); s 29, *Constitution of Argentina* (1994). For an historical example, see Art 45(1), *Constitution of Sri Lanka* (1972).

[18] *Dignan* cit., p. 121; *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365 at p. 373, p. 381.

[19] *Gould v Brown* (1998) 193 CLR 346 at para. 287 (hereafter *Gould*); *Byrnes v R* (1999) 199 CLR 1 at para. 4, para. 92; *R v Hughes* (2000) 202 CLR 535 at para. 26, para. 94.

[20] *McCawley v R* [1920] AC 691 at pp. 704-705.

[21] B. Selway, *The Constitution of South Australia*, Sydney, Federation Press, 1997, p. 120; A. Twomey, *The Constitution of New South Wales*, Sydney, Federation Press, 2004, pp. 203-204; G. Carney, *The Constitutional Systems of the Australian States and Territories*, Cambridge, Cambridge University Press, 2006, p. 342.

[22] *Dignan* cit., p. 101, pp. 119-21; *Crowe v Commonwealth* (1935) 54 CLR 69 at p. 94 (hereafter *Crowe*); *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at p. 257 (hereafter *Communist Party*).

[23] *Dignan* cit., pp. 119-121; *Crowe* cit., p. 94.

[24] G. Winterton, *Parliament, the Executive and the Governor-General*, Melbourne, Melbourne University Press, 1983, p. 89.

[25] *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1 at p. 22; *Seamen's Union of Australia v Utah Development Co* (1978) 144 CLR 120 at p. 154; *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169 at p. 184, pp. 193-194; *Commonwealth v Tasmania* (1983) 158 CLR 1 at p. 151, p. 270; *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* (1987) 162 CLR 271 at p. 279; *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595 at para. 27, para. 92.

[26] *Dignan* cit., p. 88; G. Ng, *Slaying the Ghost of Henry VIII: A Reconsideration of the Limits Upon the Delegation of Commonwealth Legislative Power*, in «Federal Law Review», vol. 38, 2010, p. 205, at p. 218 (hereafter Ng).

[27] *Dignan* cit., p. 100.

[28] P.H. Lane, *Lane's Commentary on the Australian Constitution* (2nd ed.), Sydney, LBC Information Services, 1997, p. 429.

[29] *Gould* cit., para. 287; *Permanent Trustee Australia Ltd v Commissioner of State Revenue* (2004) 220 CLR 388 at para. 77.

[30] *Capital Duplicators Pty Ltd v Australian Capital Territory (No 1)* (1992) 177 CLR 248 at p. 265. See also *Gould* cit., para. 287.

[31] D. Meyerson, *Rethinking the Constitutionality of Delegated Legislation*, in «Australian Journal of Administrative Law», vol. 11, 2003, p. 45, at p. 46 (hereafter Meyerson).

[32] For a Caribbean example of a more substantive notion of the abdication of legislative power, see *J Astaphan & Co (1970) Ltd v Dominica (Comptroller of Customs)* (1996) 54 WIR 153 at pp. 157-159,

[1999] 2 LRC 569 at pp. 575-576.

33 *Viro v R* (1978) 141 CLR 88 at p. 135; *Nguyen v Nguyen* (1990) 169 CLR 245 at p. 269; *Imbree v McNeilly* (2008) 236 CLR 510 at para. 45.

34 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at p. 8, pp. 178-179, p. 320, p. 604; *Wurridjal v Commonwealth* (2009) 237 CLR 309 at para. 86, para. 189, para. 287.

35 *Coleman v Power* (2004) 220 CLR 1 at para. 93, para. 196, para. 211 (*Lange* test). The Court has also signalled the possibility of a modification to a test for validity: *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at paras. 85-100 (freedom of interstate trade (hereafter *Betfair*)).

36 Meyerson cit., p. 54.

37 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at paras. 13-19, paras. 100-101, paras. 163-165; *Betfair* cit., paras. 33-48.

38 Art I, s 1, *Constitution of the United States* (1787).

39 s 1, *Commonwealth of Australia Constitution* (1900).

40 Art II, s 1, cl 1; Art III, s 1, *Constitution of the United States* (1787); ss 61, 71, *Commonwealth of Australia Constitution* (1900).

41 *J W Hampton Jr & Co v United States* 276 US 394 at p. 409 (1928); *Touby v United States* 500 US 160 at p. 165 (1991); *Loving v United States* 517 US 748 at p. 771 (1996); *Whitman v American Trucking Associations Inc* 531 US 457 at p. 472 (2001).

42 E. Chemerinsky, *Constitutional Law: Principles and Policies* (2nd ed.), New York, Aspen, 2002, p. 320. See *Panama Refining Co v Ryan* 293 US 388 at p. 430 (1935); *A L A Schechter Poultry Corp v United States* 295 US 495 at pp. 541-542 (1935).

43 *Clinton v City of New York* 524 US 417 at p. 436 (1998) (hereafter *Clinton*).

44 Art I, s 7, cl 2, *Constitution of the United States* (1787).

45 *Clinton* cit., pp. 447-448.

46 Ivi, p. 438.

47 ss 37, 75, 96(1), *Interim Constitution of South Africa* (1993). The present Constitution effects a similar vesting of powers: ss 43(a), 85(1), 165(1), *Constitution of South Africa* (1996).

48 *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 at para. 51, [1995] ZACC 8 (hereafter *Executive Council*).

49 Ivi, para. 61.

50 Ivi, para. 63.

51 Ivi, para. 204.

52 Arts 15.2.1, 28.2, 34.1, *Constitution of Ireland* (1937).

53 Art 15.2.1, *Constitution of Ireland* (1937). A somewhat similar provision appeared in Art 12, *Constitution of the Irish Free State* (1922).

54 *Laurentiu v Minister of Justice* [1999] 4 IR 26 at p. 46, pp. 70-71, pp. 83-44; *Kennedy v Law Society of Ireland* [2002] 2 IR 458 at p. 486; *Mulcreevy v Minister for Environment* [2004] 1 IR 72 at p. 87 (hereafter *Mulcreevy*).

55 *Mulcreevy* cit., p. 87.

56 *Harvey v Minister for Social Welfare* [1990] 2 IR 232 at p. 241.

57 s 53, *Credit Institutions (Stabilisation) Act* 2010 (Ireland). In the lower house of parliament the Opposition unsuccessfully attempted to amend this provision. See *Parliamentary Debates. Dáil Éireann*, 15 December 2010, pp. 389-390, pp. 430-431.

58 See Art 26, *Constitution of Ireland* (1937).

59 *Parliamentary Debates. Dáil Éireann*, 27 May 2010, pp. 603-604, p. 667.

60 *Re Gray* (1918) 57 SCR 150 at p. 157, p. 160, pp. 170-171, pp. 175-177; 42 DLR 1 at pp. 2-3, p. 5, pp. 11-13, pp. 16-17.

61 *Reference re Regulations in Relation to Chemicals* [1943] SCR 1 at p. 9, p. 16, p. 33; [1943] 1 DLR 248 at p. 253, p. 258, p. 275.

62 The case has been cited in passing: *Friends of the Oldman River Society v Canada (Minister of Transport)* [1992] 1 SCR 3 at p. 38; 88 DLR (4th) 1 at p. 23.

63 *Waddell* cit., DLR 270; *Ontario Public School Boards' Association v Ontario (Attorney General)* (1997) 151 DLR (4th) 346 at paras. 54-55, reversed on different grounds (1999) 123 OAC 143; 175 DLR (4th) 609; leave to appeal refused [1999] 3 SCR v (hereafter *Ontario*); *Greater Essex County District School Board v International Brotherhood of Electrical Workers, Local 773* (2007) 83 OR (3d) 601 at paras. 76-78; leave to appeal refused by Ont CA 23 May 2007; leave to appeal refused [2007] 3 SCR ix.

64 *Doucet-Boudreau v Nova Scotia (Minister of Education)* [2003] 3 SCR 3 at para. 33. However, the Privy Council held that the separation of judicial power did not require an express vesting of power where pre-existing courts were vested with that power prior to the adoption of the Constitution: *Liyanage v R* [1967] 1 AC 259 at pp. 286-288 (hereafter *Liyanage*); *Hinds v R* [1977] AC 195 at p. 213.

65 s 9, *Constitution of Canada* (1867).

66 *Harvey v New Brunswick (Attorney General)* [1996] 2 SCR 876 at para. 68; *Mackin v New Brunswick (Minister of Finance)* [2002] 1 SCR 405 at paras. 34-35, para. 69; *Canada (House of Commons) v Vaid* [2005] 1 SCR 667 at para. 21, para. 34. For a criticism of this use of the preamble, see *Singh v Canada* [2000] 3 FC 185 at para. 28; leave to appeal refused [2000] 1 SCR xxii.

67 *MacMillan Bloedel Ltd v Simpson* [1995] 4 SCR 725 at para. 52; *Cooper v Canada (Human Rights Commission)* [1996] 3 SCR 854 at paras. 10-11; *Reference re Secession of Quebec* [1998] 2 SCR 217 at para. 15.

68 Eg *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at p. 260, pp. 268-270; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at pp. 17-20.

69 *Liyanage* cit., p. 288 (in relation

to the United Kingdom).

70 *Pickin v British Railways Board* [1974] AC 765 at pp. 789-790; but cp *R (Jackson) v Attorney-General* [2006] 1 AC 262 at para. 102, para. 120; [2005] UKHL 56; *Haliburton v Broadcasting Commission* [1999] NZAR 233 at p. 237; *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154 at para. 13; *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 at para. 95.

71 *Commonwealth v Grunseit* (1943) 67 CLR 58 at p. 82.

72 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at para. 56. This definition was also cited in *Thomas v Mowbray* (2007) 233 CLR 307 at para. 71 (hereafter *Thomas*).

73 *Plaintiff S157/2002* cit., para. 101.

74 Ivi, para. 102. An argument based upon this approach was rejected in *New South Wales v Commonwealth* (2006) 229 CLR 1 at paras. 400 ff.

75 See also Ng cit., p. 222, pp. 224-225, p. 228.

76 *Communist Party* cit., p. 193; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at para. 30; *Thomas* cit., para. 61; *South Australia v Totani* (2010) 242 CLR 1 at para. 61, para. 131, paras. 232-233, para. 423; *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at para. 120.

77 s 75(v), *Commonwealth of Australia Constitution* (1900).

78 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at para. 208; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at para. 64, para. 321; *Plaintiff S157/2002* cit., para. 5, para. 103; *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at para. 113.

79 M. Gleeson, *The Rule of Law and the Constitution*, Sydney, ABC Books, 2000, pp. 67-68.

80 *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at para. 39, para. 171.

81 *Reference re Manitoba Language Rights* [1985] 1 SCR 721 at p. 750; *British Columbia v Imperial Tobacco Canada Ltd* [2005] 2 SCR 473 at para. 57; *British Columbia (Attorney General) v Christie* [2007] 1 SCR 873 at para. 19.

82 B. McLachlin, *Rules and Discretion in the Governance of Canada*, in «Saskatchewan Law Review», vol. 56, 1992, p. 167 at p. 169.

83 *Workplace Relations Amendment (Work Choices) Bill 2005*, Bills Digest n. 66, 2005-06, p. 117 (hereafter Bills Digest).

84 Ivi, p. 117.

85 Lord Rippon of Hexham, *Henry VIII Clauses*, in «Statute Law Review», vol. 10, 1989, p. 205 at p. 206.

86 G.S. Lindell, *Administrative Law: Henry VIII Clauses*, in «Australian Law Journal», vol. 78, 2004, p. 221 at p. 223; Ng cit., pp. 228-229. On an *ad hoc* basis the Attorney-General's Department has incorporated statutory amendments made by regulation into the reprints of some principal Acts. However, the texts of such amendments appear in a table at the end of the Act and are not incorporated alongside the affected provisions, where they would most readily come to the attention of readers. See *Bankruptcy Act* 1966 (Repr 30 January 2012, C2012C00173), p. 67, p. 619; *Patents Act* 1990 (Repr 3 May 2012, C2012C00423), p. 34, p. 250; *Life Insurance Act* 1995 (Repr 27 March 2012, C2012C00334), p. 283. The modified provisions are annotated with the statement "see Table B" without indicating that their operation has been modified. The Notes to the *Trade Marks Act* 1995 merely state that the Act has been modified by the Regulations, but those "modifications are not incorporated in this compilation" (Repr 30 January 2012, C2012C00161), p. 175.

87 D.P. Currie, *The Constitution of the Federal Republic of Germany*, Chicago, University of Chicago Press, 1994, p. 7.

88 Art 79(1), *Constitution of Germany* (1949).

89 Administrative Review Council, *Rule Making by Commonwealth Agencies* (Report No 35, Canberra: AGPS, 1992), para. 2.33; Meyerson cit., p. 52.

90 *Accident Compensation Corporation v Donaldson* [2009] NZCA 167 at para. 26.

91 *Reade v Smith* [1959] NZLR 996 at pp. 1003-1004.

92 *Ontario* cit., para. 50.

93 Ivi, para. 51.

94 Ivi, para. 53.

95 Lord Judge, *Lord Mayor's Dinner for the Judiciary: Mansion House Speech*, 13 July 2010, p. 7.

96 s 4(1), *Legislative Standards Act* 1992 (Qld).

97 s 4(2), *Legislative Standards Act* 1992 (Qld).

98 s 4(4)(c), *Legislative Standards Act* 1992 (Qld). See also s 4(5)(d).

99 Scrutiny of Legislation Committee, *The Use of 'Henry VIII Clauses' in Queensland Legislation*, Brisbane, Legislative Assembly of Queensland, 1997, para. 1.27.