SLAYING THE GHOST OF HENRY VIII: A RECONSIDERATION OF THE LIMITS UPON THE DELEGATION OF COMMONWEALTH LEGISLATIVE POWER

*Gerald Ng**

I INTRODUCTION

Though at times inconvenient for lawyers and their clients, the use by the Commonwealth of delegated legislation to fill lacunae in statutes is hardly remarkable, and the constitutional validity of provisions authorising that use even less a matter of controversy. Nonetheless, there may be reason to doubt whether the same can so readily be said of the inclusion in Commonwealth statutes of so-called 'Henry VIII' clauses — that is, statutory provisions purporting to authorise the promulgation of subordinate legislation that either amends or is inconsistent with the relevant principal statute.[1] In particular, one might ask to what extent such provisions may, regardless of their width, be accommodated within the distribution of power contemplated by the text and structure of the *Constitution*.

The task of answering this question requires, as a first step, that fresh consideration be given to the limits, if any, upon Parliament's ability to confer on other institutions some part of the legislative power of the Commonwealth. This is not to deny that the sheer volume of delegated legislation presently in force should cause one to refrain from a doctrinaire insistence upon such limits. But both the increasing use of 'Henry VIII' clauses in Commonwealth statutes and the High Court's most recent

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* BEc, LLB (Hons) (Sydney); barrister, Sydney. Thanks are due to Alan Robertson SC and Anuja Arunothayam, as well as the referees, for their comments on previous versions of this article. All errors are the author's alone.

1 The common ancestor for these provisions was the notorious *Statute of Proclamations 1539* (31 Henry VIII ch 8), which provided as follows:

> The King for the Time being, with the Advice of his Council, or the more Part of them, may set forth Proclamations under such Penalties and Pains as to him and them shall seem necessary, which shall be observed as though they were made by Act of Parliament.

This Act was subsequently repealed during the reign of Edward VI: see A V Dicey, *Introduction to the Study of the Law of the Constitution* (9th ed, 1948) 50–51.

pronouncements concerning the delegation of legislative power by Parliament suggest that the issue, if by no means novel, [2] is worth revisiting.

To this end, the second part of this article focuses upon those recent pronouncements as a starting point for analysis. For much of the history of Federation, the High Court has accepted that a power to make subordinate legislation may be conferred by Parliament in terms so broad as to render that conferral invalid. However, the basis for this proposition is less clear. Is it merely a matter of concluding that the 'delegated' power in question is so broadly framed as to lack a sufficient connection with any head of Commonwealth legislative power? Or may the proposition also be ascribed to some other principle or concern? As will become apparent, what has recently been said by the High Court appears to recognise the possibility of the latter. And if that be correct, then identification of the relevant principle or concern becomes necessary.

The third part of this article proceeds upon the assumption that the limits on Parliament's ability to authorise delegated legislation may better be understood if the constitutional justification for that ability is itself better apprehended. Consequently, attention is directed towards the justifications previously offered in the decided cases and the difficulties in each.

The fourth part then attempts to articulate an alternative position first as to the matters which support the conclusion that, for the most part, the text and structure of the *Constitution* do not pose an obstacle to the delegation of legislative power by Parliament, and secondly as to the limits upon such delegation. Following this, in the fifth part of the article, a currently operative example of a 'Henry VIII' clause — namely, any one of the so-called 'exemption and modification' provisions in the *Corporations Act 2001* (Cth) — will be discussed, and doubts as to the validity of those provisions canvassed.

Significantly, reference to those provisions serves another purpose. While the discussion in this article will largely be confined to the delegation by Parliament of legislative power, ends similar to those sought to be achieved by use of 'Henry VIII' clauses may be realised by the conferral of a statutory power upon an officer of the Commonwealth to make decisions or orders that modify the operation of the principal statute, either in a given case or in a given class of case. The *Corporations Act 2001* (Cth) is replete with examples of such conferrals. It may be that such powers are better characterised as administrative, rather than legislative, though the distinction between the two categories of power may not always be drawn with ease. Relevantly, whether the conferral of such powers is in conformity with the *Constitution* is a question which this article will highlight at various points. However, at the risk of appearing faint-hearted, detailed consideration of it will have to be reserved for a later occasion.

II RECENT JUDICIAL STATEMENTS CONCERNING THE DELEGATION OF LEGISLATIVE POWER

The joint reasons in *Plaintiff S157/2002 v Commonwealth* record the various attempts made by the Commonwealth, in the course of oral argument, to highlight the supposedly unexceptional nature of the privative clause constituted by what was then

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2 See the Hon Mr Justice David Malcolm, 'The Limitations, if Any, on the Powers of Parliament to Delegate the Power to Legislate' (1992) 66 *Australian Law Journal* 247.

s 474 of the *Migration Act 1958* (Cth).[3] These included positing a hypothetical 'delegation' to the Executive of a 'totally open-ended discretion' as to which aliens may or may not enter into and remain in Australia. The Commonwealth submitted that any purported exercise of that discretion would validly be quarantined from judicial review, subject only to the availability of curial decision-making upon the 'constitutional fact' of alien status.[4] Unsurprisingly, this proposition attracted scepticism from the majority Justices.

In particular, the authors of the joint reasons identified a number of bases upon which to impugn a purported conferral of power upon the Executive 'to make any decision respecting visas, provided it was with respect to aliens'.[5] The most relevant of these was that, despite the breadth with which Parliament may validly authorise the promulgation of subordinate legislation, the hypothetical provisions canvassed by the Commonwealth were said to lack a key attribute of the exercise of legislative power, namely, the determination, as described by Latham CJ in *Commonwealth v Grunseit*,[6] of 'the content of a law as a rule of conduct or a declaration as to power, right or duty'.[7]

The current literature indicates at least two interpretations of their Honours' remarks. The first is reflected in the following comment by Professor Meyerson:

> It seems their Honours meant that such a law [namely, the hypothetical law proposed by the Commonwealth] might not answer the description of a "law with respect to aliens".

This response accords with the High Court's established approach to delegated legislation.[8]

In other words, setting aside the intriguing reference to an 'established approach to delegated legislation', the position articulated in *Plaintiff S157* was concerned ultimately with characterisation of the hypothetical provisions.

The second interpretation is suggested by a submission put by the Australian Workers Union ('the AWU') in the *Work Choices Case* and summarised as follows in the reasons of the Court's majority:

> The AWU submitted that to confer on the Governor-General a power to make regulations as broadly expressed as ss 356 and 846(1) [of the *Workplace Relations Act 1996* (Cth), as amended by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), referred to in the reasons as 'the new Act'] without also stipulating matters stated in the new Act, or to be implied from it, as indicating the parameters within which those regulations could extend, was invalid for two distinct reasons. The first was that no "law" had been enacted, because, in the words of Latham CJ, there had been no indication of a "rule of conduct", and no "declaration as to power, right or duty".[9]

The observations of the Chief Justice in *Grunseit*, which were adopted in *Plaintiff S157*, were thus treated as being pertinent, not to any issue of characterisation, but rather to an anterior question, namely, whether in a given case a law could be said to

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3 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 ('*Plaintiff S157*').
4 Ibid 512 [101] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
5 Ibid 512 [102].
6 (1943) 67 CLR 58, 82 ('*Grunseit*').
7 *Plaintiff S157* (2003) 211 CLR 476, 513 [102].
8 Denise Meyerson, 'Rethinking the constitutionality of delegated legislation' (2003) 11 *Australian Journal of Administrative Law* 45, 46.
9 *New South Wales v Commonwealth* (2006) 229 CLR 1, 176 [400] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) ('Work Choices')(citations omitted).

have been enacted. The fundamental difference between addressing this anterior question and touching upon matters of characterisation is suggested by the circumstance that the Court in *Work Choices* proceeded to consider a separate submission by the AWU to the effect that the relevant regulation-making power was not supported by any head of legislative power.[10]

It must be noted, however, that the majority reasons in *Work Choices* offer a particularly vivid example of the problems in the High Court's recent statements on the delegation of rule-making power by Parliament. It suffices to say, about the provisions of the amended *Workplace Relations Act 1996* (Cth) impugned in the AWU's submissions, that these:

(a) established a regime for governing the creation and operation of workplace agreements, a feature of which was provision for rendering such agreements void to the extent that they contained what was termed 'prohibited content'; and

(b) included s 356 of that statute, which left the task of defining the expression 'prohibited content' to regulations without providing explicitly for any criteria which such a definition would be required to satisfy.

The position urged upon the Court by the AWU was that, in the absence of any stipulated ambit of the regulation-making power, in so far as it concerned the specification of 'prohibited content', the *Workplace Relations Act 1996* (Cth) impermissibly treated such content as being 'whatever the Executive Government says should not be contained in a workplace agreement'.[11]

For reasons not presently relevant, the majority rejected any assertion that there were no constraints placed upon the preferences of the Executive with respect to the definition of 'prohibited content'.[12] This was said to be 'unanswerably fatal to the broad submissions of the AWU as put.'[13] Nonetheless, consideration was then given to a modified version of those submissions, one which accepted the existence of constraints upon the Executive's preferences but proceeded in any event to assert invalidity on the basis of the absence of any defined ambit of the regulation-making power beyond the limit of those constraints.[14]

In responding to this contention, the majority had regard to s 846(1) of the amended *Workplace Relations Act 1996* (Cth), which provided, unremarkably, in the following terms:

> The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters:
>
> (a) required or permitted by this Act to be prescribed; or
>
> (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

It was clear that any regulations defining the expression 'prohibited content' would be supported by s 846(1)(a). However, that head of regulation-making power was not, in any relevant sense, unfettered. The absence of any express provision for the ambit of the power, at least in so far as it touched upon 'prohibited content', did not, in the

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10 Ibid 181–82 [418].
11 *Work Choices* (2006) 229 CLR 1, 178 [407].
12 Ibid 178–80 [407]–[414].
13 Ibid 180 [414].
14 Ibid 180 [415].

majority's view, preclude the conclusion that 'that ambit would be identical with the ambit of the prescription contemplated by s 846(1)(b), namely that the regulations prescribe all matters "necessary or *convenient* to be prescribed for carrying out or giving effect to [the] Act"'(emphasis in original).[15]

Upon this basis, and given the conventional understanding of provisions permitting the promulgation of 'necessary or convenient' regulations,[16] the majority reasoned as follows:

> Section 356 thus has a wide ambit. Its ambit must be construed conformably with the scope and purposes of the new Act as a whole, and with the provisions of Pt 8 in relation to workplace agreements in particular. The extent of the power is marked out by inquiring whether any particular regulation about the prohibited content of workplace agreements can be said to have a rational connection with the regime established by the new Act for workplace agreements.[17]

It follows that although the ambit of the regulation-making power so stated is imprecise, with the result that assessing whether particular regulations are ultra vires may not be easy, s 356, read with s 846(1), is a 'law'.[18]

Two points should be made concerning this passage. First, it proceeds upon an implicit acceptance of the proposition that, quite apart from the process of characterisation, invalidity may attend the conferral of a regulation-making power when that power is so broadly expressed as to have no defined ambit. In other words, the excessive breadth of such a delegation of power may attract invalidity for reasons that do not involve, as an intermediate step, the conclusion that the delegation lacks a sufficient connection with a head of Commonwealth legislative power. Indeed, the Court's search for limits, either express or implied, upon the regulation-making power in s 356 of the amended *Workplace Relations Act 1996* (Cth) appeared more to reflect a concern with ensuring against the possibility that the content of a law might depend entirely upon the preferences of the Executive.

Secondly, there appears in the passage to be a disjuncture between the focus it places upon questions of the stated or implied ambit of a regulation-making power and its framing of the issue as one concerned principally with the existence of a 'law', in the sense discussed in *Grunseit*.[19] The extent of that disjuncture may be illustrated by returning to what was said in *Plaintiff S157*.[20] The hypothetical investiture of power in the Executive which was canvassed by the Commonwealth in that case was, though broadly expressed, described, in terms, as being with respect to aliens. This is a concept which, given the Commonwealth's recognition of the High Court's role in deciding upon the question of alien status, was conceded to be capable of definition by reference to standards external to the preferences of the Executive. If therefore the question of that investiture's status as a law turned ultimately upon the conferred power having a defined ambit, then it could well have been resolved in favour of the conclusion that

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15 Ibid.

16 See *Morton v Union Steamship Co of New Zealand Ltd* (1951) 83 CLR 402, 410 (Dixon, McTiernan, Williams Webb, Fullagar and Kitto JJ).

17 *Work Choices* (2006) 229 CRL 1,181 [416].

18 Ibid [417].

19 (1943) 67 CLR 58.

20 (2003) 211 CLR 476.

there was a law, contrary to the view taken by the Justices who authored the joint reasons.

That this eluded the attention of the majority in *Work Choices* invites one to ask whether, even in the High Court, the limits upon Parliament's ability to authorise subordinate legislation remain, to some degree, imperfectly expressed, if not imperfectly understood. And if so, might this be remedied, even if only in part, by turning first to an anterior issue, namely, why Parliament is regarded, despite the text and structure of the *Constitution*, as having that ability at all? It is this last question which forms the subject of what follows.

III EXPLAINING WHY PARLIAMENT MAY VALIDLY DELEGATE LEGISLATIVE POWER

A Dignan

In *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan*,[21] Dixon J acknowledged that 'the manner in which the *Constitution* accomplished the separation of powers does logically or theoretically make the Parliament the exclusive repository of the legislative power of the Commonwealth'.[22] Nonetheless, this was not always so willingly conceded. In *Baxter v Ah Way*,[23] for instance, a submission had been made to effect that the vesting of legislative power in the Commonwealth Parliament by s 1 of the *Constitution* provided a basis upon which to distinguish that body from colonial legislatures. This was said to favour the conclusion that the powers of Parliament were limited by the maxim *delegatus non delegare potest*, which had long been held not to apply to the legislatures of Great Britain's various colonies.[24] By way of rejoinder, Griffith CJ observed that s 1 'is merely introductory to the provisions of the *Constitution* which deal with the legislature'.[25] His Honour then noted that following these provisions 'come other provisions dealing with the executive power, followed by another series dealing with the judical [sic] power'.[26]

Unsatisfactory though this may seem, especially in light of the High Court's modern Ch III jurisprudence, it does not compare with the attempts variously made to explain the existence, despite the distribution of power implicit in the structure of the *Constitution*, of an ability in the Commonwealth Parliament to nominate other repositories of legislative power.[27] Dixon J's reasons in *Dignan* afford an example. With respect to the delegation of legislative power, two pertinent threads of reasoning coursed through his Honour's judgment. The first was that, however one may seek to describe the power exercised by the Governor-General when promulgating regulations, it is not, strictly speaking, legislative power. It would, 'if not subordinate', be 'essentially legislative.'[28] But — and admittedly, this was proffered only tentatively

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21 (1931) 46 CLR 73 ('*Dignan*').
22 Ibid 101.
23 (1909) 8 CLR 626 ('*Baxter*').
24 See particularly *R v Burah* (1878) 3 App Cas 889.
25 (1909) 8 CLR 626 ('*Baxter*'), 634.
26 Ibid.
27 See on this point the observations of George Winterton, *Parliament, the Executive and the Governor-General* (1983) 86–92.
28 *Dignan* (1931) 46 CLR 73, 100.

— if the Governor-General's power remains under parliamentary control, in the sense that Parliament may take the matter the subject of the relevant regulations back into its own hands, then the power to make those regulations lacks 'the independent and unqualified authority which is an attribute of true legislative power'.[29] The second thread is best understood by reference to Dixon J's own words:

> The existence in Parliament of power to authorize subordinate legislation may be ascribed to a conception of that legislative power which depends less upon juristic analysis and perhaps more upon the history and usages of British legislation and the theories of English law.[30]

In relation to the first of these two threads of reasoning, two key points may be made. First, its force is diminished by the manner in which Dixon J addressed a submission to the effect that the regulation being considered in *Dignan* was invalid because, whilst the validity of the relevant regulation-making power could be supported by s 51(i) of the *Constitution*, and whilst the regulation itself operated upon some part of inter-state or overseas trade and commerce, its promulgation was, in fact, motivated by purposes unrelated to such trade and commerce. His Honour said of this submission that it was 'answered ... by the legislative character of the function entrusted to the Governor-General'.[31] The point being made was that, just as the motives of the Commonwealth Parliament do not detract from the validity of any statute which operates upon inter-state or overseas trade or commerce, so must the motives of the Governor-General, subject to any operation afforded to proscriptions of improper purpose, be irrelevant to determining the validity of regulations made by him or her.[32] The correctness of this may be conceded, but the premise upon which the point proceeds — that is, the legislative character of the Governor-General's regulation-making power — is at odds with the proposition that such power is not 'true legislative power'.

Secondly, if, as Griffith CJ asserted in *Baxter*,[33] and as Dixon J did not dispute in *Dignan*,[34] the maxim *delegatus non potest delegare* does not impose any limit upon the power of Parliament to 'delegate' legislative power, a question arises as to the relevance of the degree of control retained by Parliament as a factor favouring the validity of such 'delegation'. At least in relation to statutory powers, where either the maxim does apply or there is erected a presumption against the possibility of delegation,[35] the degree of control exercised by the repository of power over the conduct of the so-called 'delegate' may be considered in order to determine whether a delegation of power has in fact occurred.[36] However, where the repository is not subject to these or similar constraints (and it is trite that Parliament is not), the concept of control must be of reduced significance.

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29 Ibid 102.
30 Ibid 101–2.
31 Ibid 104.
32 Ibid.
33 (1909) 8 CLR 626, 632–33.
34 (1931) 46 CLR 73, 98. See also Sir Owen Dixon, 'The Common Law as an Ultimate Constitutional Foundation' (1957) *Australian Law Journal* 240, 240.
35 *Racecourse Co-Operative Sugar Association Ltd v Attorney-General (Qld)* (1979) 142 CLR 460, 481 (Gibbs J).
36 *O'Reilly v State Bank of Victoria* (1983) 153 CLR 1, 19 (Mason J); *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 65–66 (Brennan J).

In any event, if, by his reference to 'subordinate legislation which remains under parliamentary control',[37] Dixon J intended to mean that delegated legislation is permitted in a constitutional system which preserves the power of the legislature either to override that legislation or to revoke the authority of its 'delegate', then this was effectively answered by Evatt J, who, in his reasons in *Dignan*, said:

> The fact that Parliament can repeal or amend legislation conferring legislative power will not be a relevant matter because parliamentary power of repeal or amendment applies equally to all enactments.[38]

Importantly, the two points outlined above are not directed towards suggesting that Dixon J was incorrect in emphasising that subordinate legislation is just that — subordinate. Rather, what is being questioned is the denial of the legislative character of the power being exercised in the promulgation of subordinate legislation.

As for the notion that, in this area, 'the history and usages of British legislation, and the theories of English law' may more appropriately be invoked than 'juristic analysis',[39] one may ask whether there is not a tension between this and the proposition that 'constitutional norms, whatever may be their historical origins, are now to be traced to Australian sources.'[40] Given that Dixon J himself had conceded in *Dignan* that the text of the *Constitution*, as a matter of logic and theory, renders Parliament the exclusive repository of the legislative power of the Commonwealth, British constitutional history and theory seem an insufficient basis upon which to displace the primacy of that text.

His Honour's reasons in *Dignan* thus do not identify, with sufficient certainty, the basis upon which Parliament may validly authorise the promulgation of delegated legislation. It is hardly surprising, then, that the only limits upon the power so to authorise which Dixon J could state without qualification were the limits generally upon the legislative power of the Commonwealth. As his Honour put it, '[t]here may be such a width or such an uncertainty of the subject matter to be handed over [by Parliament] that the enactment attempting it is not a law with respect to any particular head or heads of legislative power.'[41]

By the same token, however, his Honour was not prepared to suggest that this was the *only* limit upon Parliament's ability to delegate the legislative power of the Commonwealth; hence, his rejection of the proposition that 'the distribution of powers can supply no consideration of weight affecting the validity of an Act creating a legislative authority.'[42] The circumstance that this statement was accompanied by citation of the Privy Council's decision in *In re Initiative and Referendum Act* indicates that what Dixon J had in mind as an instance of possibility invalidity was a situation in which Parliament purported to establish an entirely new legislative body, perhaps even composed of the entire body of electors, to which would be delegated the full

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37 *Dignan* (1931) 46 CLR 73, 102.
38 Ibid 120.
39 Ibid 100–1 (Dixon J).
40 *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, 570 [66] (Gleeson CJ, Gummow, Hayne and Heydon JJ).
41 (1931) 46 CLR 73, 101.
42 Ibid.

range of its legislative power.[43] As will become apparent, it is important that this is a case significantly more extreme than that offered by the hypothetical provisions canvassed by the Commonwealth in *Plaintiff S157*.

In any event, subsequent Justices of the High Court have had less difficulty than Dixon J with the category of case exemplified in *In re Initiative and Referendum Act*. In *Capital Duplicators Pty Ltd v Australian Capital Territory*, Mason CJ, Dawson and McHugh JJ said:

> There are very considerable difficulties in the concept of an unconstitutional abdication of power by Parliament. So long as Parliament retains the power to repeal or amend the authority which it confers upon another body to makes 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.[44]

While, in some respects, this statement may more appropriately be seen as addressing points raised in *Dignan* by Evatt J, about whose reasons more will be said, there is little doubt that the situation posited by their Honours in the passage just quoted was similar to that suggested in Dixon J's reference to *In re Initiative and Referendum Act*. Given this, it is particularly interesting that, in their Honours' view, no problem of invalidity could arise from a delegation by Parliament of the whole of its powers in circumstances where Parliament nonetheless retained 'the power to repeal or amend the authority which it confers upon another body to make laws'. This, it should be recalled, was precisely the notion upon which Dixon J fastened in asserting that the promulgation of subordinate legislation did not constitute an exercise of 'true legislative power'. Proceeding upon the premise that retention of such parliamentary control provides the constitutional justification for the validity of attempts to delegate legislative power, Mason CJ, Dawson and McHugh JJ concluded, in effect, that any delegation, no matter how complete or extreme, which nonetheless preserved that control, must be good.

That conclusion casts into bold relief the difficulty in reconciling different aspects of Dixon J's position. For if, as his Honour suggested in *Dignan*, the concept of parliamentary control permits the delegation of legislative power to be reconciled with the text and structure of the *Constitution*, then why should a delegation of the sort attempted in *In re Initiative and Referendum Act* have been of doubtful validity in his eyes? After all, Parliament would still be in a position to revoke that conferral of power and thus to assert the very form of control upon which was predicated the notion that delegated legislative power may be distinguished from 'true legislative power'.

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43 See *In re Initiative and Referendum Act* [1919] AC 935, 945, where it was said by Viscount Haldane on behalf of the Privy Council:

> No doubt a body, with a power of legislation on the subjects entrusted to it so ample as that enjoyed by a Provincial Legislature in Canada, could, while preserving its own capacity intact, seek the assistance of subordinate agencies, as had been done when in *Hodge v The Queen* [(1883) 9 App Cas 117], the Legislature of Ontario was held entitled to entrust to a Board of Commissioners authority to enact regulations relating to taverns; but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence.

44 (1992) 177 CLR 248, 265. See also *Permanent Trustee v Commissioner of State Revenue (Vic)* (2004) 220 CLR 388, 420–21 [75]–[77] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

Perhaps it was this difficulty which prompted the tentative manner in which Dixon J advanced the proposition that a statutorily conferred regulation-making power was something other than truly legislative in character.

It is convenient at this point to say something concerning Evatt J's reasons in *Dignan*.[45] More so than Dixon J, Evatt J emphasised the doctrine of responsible government, and the consequent 'close relationship between the legislative and executive agencies of the Commonwealth', in order to explain what he regarded as the incomplete separation of powers effected by Australia's constitutional arrangements.[46] However, this was by no means offered as the sole basis — or any basis at all — for the existence in Parliament of a power to authorise delegated legislation. So much is apparent from his Honour's reference to the ability of Parliament to give 'to a subordinate authority other than the Executive, a power to make by-laws'.[47] If responsible government were the justification for the valid authorisation of subordinate legislation, then the circumstance that such legislation may be made by an entity which is not, in the manner of departments of state, responsible to Parliament would be an anomaly. That Evatt J did not regard this as an anomaly suggests the irrelevance of the doctrine of responsible government in this area. The problem is that, in attempting to explain Parliament's ability 'to vest executive or other authorities with some power to pass regulations, statutory rules, and by-laws which, when passed, shall have full force and effect', his Honour could go no further than to assert that, in its absence, 'effective government would be impossible'.[48]

This is not to say, of course, that Evatt J permitted arguments from necessity to prevail over matters of principle. In this regard, two aspects of what his Honour had to say in *Dignan* merit further consideration.[49] The first is that, like Dixon J, Evatt J considered the heads of Commonwealth legislative power to be prescriptive of the outer limits of Parliament's ability to delegate that power. However, whereas Dixon J had merely posited that width or uncertainty of subject matter could well render a conferral of rule-making power invalid for lacking a sufficient connection with a head of Commonwealth legislative power, Evatt J went one step further. In his view, a hypothetical law which purported to confer upon the Governor-General the power to 'make regulations having the force of law upon the subject of trade and commerce with other countries or among the States' would not be a law with respect to trade and commerce with other countries or among the States;[50] rather, it would better be seen as a law with respect to the legislative power to deal with such trade and commerce.[51] On this basis would such a law be invalid. Arguably, and in light of the cogency of the criticisms made of Evatt J's reasoning on this point,[52] such a provision, if considered by the current High Court and determined to be invalid, would more probably be

45 *Dingan* (1931) 46 CLR 73.
46 Ibid 114.
47 Ibid 118.
48 Ibid 177.
49 Ibid 73.
50 Ibid 119.
51 Ibid 120.
52 See Leslie Zines, *The High Court and the Constitution* (5th ed, 2008) 202.

regarded as invalid by reason of its being something other than a 'law', in the sense suggested by Latham CJ in *Grunseit*.[53]

The second point of interest lies in Evatt J's assertion that Parliament may not validly 'abdicate' its powers of legislation, in the sense of giving 'all its law-making authority to another body'.[54] Interestingly, whereas Dixon J's citation of *In re Initiative and Referendum Act*[55] had seemed to suggest that 'the distribution of powers' would supply the grounds, albeit as yet unclear, upon which such an abdication might be held invalid, Evatt J approached the matter as one of characterisation. In other words, a law which purported to confer upon some new body the full panoply of Parliament's law-making powers would not 'answer the description of a law upon one or more of the subject matters stated in the *Constitution*'.[56] This appears to have been premised upon the distinction, drawn earlier by his Honour, between a law with respect to a subject matter within Commonwealth power and a law with respect to legislative power to deal with that subject matter.

From the failure of this distinction to command the favour of subsequent courts and commentators, it is possible to infer that there are limitations inherent in approaching every question concerning the validity of a regulation-making power as if it were one of characterisation. And yet, in Dixon J's reasons in *Dignan*,[57] and specifically in his elliptical treatment of the problem thrown up by *In re Initiative and Referendum Act*, it is possible also to discern the difficulty of attempting to formulate any further limit upon Parliament's power to confer legislative functions upon some other body or officer in circumstances where the justifications for the existence of that power are only tentatively stated.

B *Giris*

Despite the many questions left unanswered by it, one proposition did clearly emerge from *Dignan*, namely, that the width of a provision purportedly authorising the making of subordinate legislation may suggest an insufficiency of connection with any of the heads of Commonwealth power enumerated in the *Constitution*. The effectiveness of that proposition as a weapon against Commonwealth legislation was tested in *Giris Pty Ltd v Federal Commissioner of Taxation*.[58]

Examples abound in the *Income Tax Assessment Act 1936* (Cth) of idiosyncratic drafting. In its various incarnations, s 99 of that statute has, and continues to, set out the circumstances in which the trustee of a 'trust estate' may be assessed and liable for tax on the net income of that estate as if it were the income of an individual. One such circumstance is the non-inclusion of any part of the net income of the trust estate in the assessable income of a beneficiary. In like manner, s 99A has, in its various forms, set out the circumstances in which the trustee of a trust estate may be assessed and liable for tax on the net income of that estate at a special rate declared by Parliament. This is subject to the proviso that s 99A will not apply to certain forms of trust estate if the Commissioner 'is of the opinion that it would be unreasonable that this section should

53 (1943) 67 CLR 58.
54 *Dignan* (1931) 46 CLR 73, 121.
55 [1919] AC 935.
56 *Dignan* (1931) 46 CLR 73, 121.
57 Ibid.
58 (1969) 119 CLR 365 ('*Giris*').

apply in relation to [a] trust estate in relation to [a given] year of income'. Where the proviso is engaged, then the trustee is to be assessed under s 99.

That proviso supplied the focal point in *Giris* of an attack upon the validity of ss 99 and 99A of the *Income Tax Assessment Act 1936* (Cth). Among the multitude of submissions constructed upon that focal point was the contention that, given that '[i]t must be possible to say that the Parliament has imposed the tax', and given also the discretion conferred upon the Commissioner in their application, ss 99 and 99A could not be supported by reference to s 51(ii) of the *Constitution*, as they were 'so indefinite in their operation that they do not lay down a framework setting out the criteria on which liability arises.'[59]

Setting aside for a moment the possibility that an exaction may be so arbitrary that it ceases to answer the description of a tax,[60] there is an incongruity in arguing that a law is not with respect to taxation on the basis, not of any remoteness of connection between the law and the subject of taxation, but rather of the vagueness of the criteria by which the relevant tax liability might arise. The flavour of this incongruity is suggested by the brevity of Barwick CJ's treatment of the appellant's submissions on this point:

> Together [ss 99 and 99A of the ITAA 1936] prescribe the rule to be applied in assessing the particular class of taxpayer in the year of income, though dependent upon the fact of the Commissioner's opinion upon a matter which itself is no more than a matter of opinion. None the less the subject matter of the law is taxation and it does make a rule with respect to that matter.[61]

And again, it is reflected in Kitto J's observation that '[p]lainly [s 99A] is a law with respect to taxation within the meaning of s 51(ii) of the *Constitution*.'[62]

Addressing this incongruity by reference to the reasons of Barwick CJ and Kitto J is appropriate, since their Honours both appear to have considered the issue of characterisation — which, as noted above, was raised explicitly in the submissions of the appellant — separately from any question of the separation of powers. For example, having concluded that the subject matter of ss 99 and 99A was taxation, Barwick CJ proceeded to address whether, in so far as it was manifest within the *Constitution*, the doctrine of the separation of powers prevented the conferral upon the Commissioner of a 'legislative discretion'.[63] His Honour answered this question in the negative, but not before conceding that '[n]o doubt whilst the Parliament may delegate legislative power it may not abdicate it.'[64] The mode of reasoning thus disclosed indicates that, for his Honour, just as it may have been for Dixon J, the invalidity of an abdication of legislative power was based, not upon any insufficiency of connection with a head of power specified in the *Constitution*, but rather upon 'the distribution of powers' effected by that document.

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59 Ibid 367. This aspect of the dispute in *Giris* was more recently re-visited in *WR Carpenter Holdings Pty Ltd v Commissioner of Taxation* (2008) 237 CLR 198, 204–205.

60 *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622, 640 (Gibbs CJ, Wilson, Deane and Dawson JJ).

61 *Giris* (1969) 119 CLR 365, 373.

62 Ibid 378.

63 Ibid 373.

64 Ibid.

The reasons of Kitto J are more fascinating still. Having disposed of most of the appellant's submissions, his Honour considered whether s 99A was invalid 'as an attempt by the Parliament to transfer a part of its legislative power to the Commissioner.'[65] What Kitto J had to say on this point demands close attention. His Honour began:

> If sub-s (2) [of s 99A] had the effect of setting the Commissioner free, in choosing between s 99A and s 99, to do what he thought fit within the limits of the powers of the Parliament, possibly it should be held invalid as an attempt to invest an officer of the executive government with part of the legislative power of the Commonwealth.[66]

However, this was not the effect of s 99A(2). The exercise of the Commissioner's discretion was guided by s 99A(3), which prescribed a list of matters to which the Commissioner could have regard, but, bearing in mind that the discretion involved an assessment of the unreasonableness of applying s 99A, it was 'extremely difficult for him [the Commissioner] or anyone else to know with any degree of certainty what really is the judgment that he is to form in a given case.'[67] Given this, Kitto J doubted whether the Commissioner, or anyone in the Commissioner's position, could ever form an opinion of the sort described in s 99A, but the consequence of this was not to render s 99A(2), which contained the proviso as to unreasonableness, invalid. It was instead to leave it with no work to do.[68] Section 99A was thus saved, at least in his Honour's eyes, by its own inscrutability.

More importantly, Kitto J also appeared to accept that for reasons unconnected with characterisation, a purported delegation of legislative power by Parliament may, without necessarily amounting to an abdication of it, be so wide as to be invalid.[69] Indeed, the terms in which Kitto J expressed his views on this matter merit further study. In his Honour's opinion, a provision pursuant to which the Commissioner was free to determine which of ss 99 and 99A of the *Income Tax Assessment Act 1936* (Cth) would apply 'should be held invalid as an attempt to invest an officer of the executive government with part of the legislative power of the Commonwealth.'[70] Put simply, a legislative scheme which leaves an authority free to determine whether a certain provision of an Act of Parliament is to apply, as distinct from free to decide whether that provision should be enforced, would be invalid.

This proposition may be contrasted with what was decided in *Dignan*. As originally enacted, the *Transport Workers Act 1928* (Cth), which was at the heart of the dispute in *Dignan,*[71] contained only three sections. The first set out the short name of that statute; the second contained a definition of the expression 'transport workers'; and the third provided as follows:

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65 Ibid 379.
66 Ibid.
67 Ibid 379–80.
68 Ibid.
69 A similar point, though perhaps made in less stark terms, may be found in the reasons of Menzies J, who first described s 99A as a law with respect to taxation and then observed that 'at some point in a process of parliamentary abnegation ... the shifting of responsibility from Parliament to the Commissioner would require consideration of the constitutionality of the delegation': *Giris* (1969) 119 CLR 365, 381.
70 Ibid 379.
71 (1931) 46 CLR 73.

> The Governor-General may make regulations, which, notwithstanding anything in any other Act but subject to the *Acts Interpretation Act* 1901–1918 and the *Acts Interpretation Act* 1904–1916, shall have the force of law, with respect to the employment of transport workers, and in particular for regulating the engagement, service and discharge of transport workers, and for regulating or prohibiting the employment of unlicensed persons as transport workers, and for the protection of transport workers.

The Act was amended in 1929. As a result, ss 4 to 25, which dealt primarily with the licensing of waterside workers, were inserted, and s 3 amended to require that the regulations which the Governor-General was empowered to make not be 'inconsistent with this Act'.

Even in its amended form, s 3 provision purported to authorise the promulgation of regulations which could, in the event of inconsistency, override other Acts of Parliament. In one sense, the Governor-General was thus empowered, albeit within the compass of matters relating to the employment of transport workers, to determine whether laws enacted by the primary repository of legislative power under our constitutional arrangements were to apply. And yet the validity of s 3 was not doubted by any of the Justices before whom *Dignan* had been argued, and some of whom had recognised the overriding effect of regulations made under s 3.[72]

It should be apparent, in any event, that there is nothing novel in the notion that the conferral of a regulation-making power may be invalid for reasons unrelated to matters of characterisation. It may be traced to Dixon J's suggestion in *Dignan* that 'the distribution of powers' may speak to problems of the sort considered in *In re Initiative and Referendum Act*. That concession, obliquely made as it was, to the possibility that the separation of powers may have more to say on the issue of subordinate legislation than was recognised in *Baxter* was then echoed by Kitto J (and quite possibly by Menzies J)[73] in *Giris*.

Against this background, a question arises as to whether the fixation of the majority in *Plaintiff S157* upon Latham CJ's conception in *Grunseit* of a 'law' masks a similar concern for the separation of powers.[74] It has, after all, been already noted that even though the majority in *Work Choices* spoke in terms of determining whether s 356 of the amended *Workplace Relations Act* was in fact a 'law', their Honours appeared more to be focused upon deciding whether the content of a law (in that case, the definition of the expression 'prohibited content') was entirely dependent upon the preferences of the Executive. This can only suggest an underlying disquiet, in their Honours' minds, at the notion that the Executive might, within the confines of a given statutory context, assume a place alongside Parliament as a repository of an unconstrained rule-making power. In short, the majority's adopted mode of expression in both *Plaintiff S157*,[75] and *Work Choices*[76] concealed their Honours' recourse to the doctrine of the separation of powers as a source of constitutional principle.

And if this is correct, then both those cases further indicate that concerns associated with that doctrine may be engaged in situations less extreme than one in which Parliament seeks to devolve the full range of its legislative powers upon a body not

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72 (1931) 46 CLR 73, 100 (Dixon J), 125 (Evatt J).
73 (1969) 119 CLR 365, 381.
74 *Plaintiff S157* (2003) 211 CLR 476.
75 Ibid.
76 (2006) 229 CLR 1.

established by the *Constitution*. Hence, the previously asserted relevance of the circumstance that the hypothetical provisions commented upon in *Plaintiff S157*[77] offered a substantially less extreme case of delegation than was considered in *In re Initiative and Referendum Act*.[78]

However, in any case where the statutory authorisation of subordinate legislation raises concerns grounded in the separation of powers, this cannot merely be not because the relevant purported delegation of legislative power goes further than can be accommodated within a system of responsible government. So much one may glean from Evatt J's recognition in *Dignan* that Parliament may validly authorise the making of subordinate legislation by bodies other than those responsible to it.

Nor can it be because the power thus conferred is sought to be placed beyond the reach of parliamentary control. As Evatt J observed in *Dignan*,[79] the possibility of subsequent overriding by Parliament is inherent in every purported exercise of Commonwealth legislative power, whether it be by Parliament or by its delegate. That possibility, even if capable of being realised by a revocation of law-making authority, does not therefore render an exercise of legislative power by a delegate any more attenuated than an exercise of such power by Parliament.

Moreover, there should not be thought to be a principle that Parliament may delegate legislative power to the extent permitted by 'the history and usages of British legislation, and the theories of English law'.[80] As Gummow J put it, speaking extra-judicially, '[t]he time is now past for the treatment of Australian constitutionalism as controlled by what seems the continuing intellectual agonies attending British constitutionalism'.[81]

Nonetheless, while it is one thing to recognise that the separation of powers has a role to play in explaining, and in shaping the limits upon, Parliament's ability to delegate legislative power, it is another to identify precisely what role that is.

IV LIMITS UPON THE DELEGATION OF LEGISLATIVE POWER

It is necessary, in undertaking that task, to return to Dixon J's concession in *Dignan* that 'the manner in which the *Constitution* accomplished the separation of powers does logically or theoretically make the Parliament the exclusive repository of the legislative power of the Commonwealth'.[82] What follows proceeds upon the footing that that concession was correctly made.

In *R v Davison*,[83] Dixon CJ and McTiernan J described the making of procedural rules of court as '[a]n extreme example of a function that may be given to courts as an incident of judicial power or dealt with directly as an exercise of legislative power'. Significantly, the starting point for this statement on the extent to which such rule-making functions may be conferred upon Chapter III courts was what would later be

77 (2003) 211 CLR 476.
78 [1919] AC 935.
79 (1931) 46 CLR 73, 120.
80 Ibid 102 (Dixon J).
81 The Hon W M C Gummow AC, 'The Constitution: Ultimate foundation of Australian law?' (2005) 79 *Australian Law Journal* 167, 171 (citations omitted).
82 Ibid.
83 (1954) 90 CLR 353 ('*Davison*'), 369. See also *Baxter* (1909) 8 CLR 626, 632.

accepted as the doctrine of the Court in *R v Kirby; Ex parte Boilermakers' Society of Australia*,[84] namely, an insistence on the strict separation of judicial from legislative power. Their Honours thus did not reason upon a premise that, generally speaking, legislative power may be delegated by Parliament to the extent that it is incidental to the primary functions of the delegate. Accordingly, the circumstance that rule-making powers may be conferred upon a Chapter III court as an incident to the exercise of judicial power does not afford any basis for a further contention that, by analogy, rule-making powers may be invested in other agencies of government as an incident to the exercise of their primary powers or functions.

Davison is cited here in aid only of a very limited proposition,[85] namely, that, in certain contexts, the exercise of rule-making power *can be* a proper incident of functions other than the legislative. It remains to be shown how this proposition may assist in justifying the existence of an ability in Parliament to authorise the promulgation of delegated legislation.

When considered in the abstract, there is nothing in the concept of legislative power to suggest that it does not, or cannot, encompass, among other things, the power to delegate its exercise, particularly as a means towards some legislative end. The reasons of Griffith CJ in *Baxter*[86] and of Evatt J in *Dignan*[87] both noted that at or around the time of Federation, legislative power in an Anglo-Australian setting was understood so to encompass.

There is, however, a tension between this characteristic of legislative power and the notion that Parliament is the exclusive repository of the Commonwealth's legislative power. How, after all, is one to conceive of the exclusive conferral of a power which is understood, as if by definition, to be delegable? Should one regard the exclusivity of the grant as detracting from the delegable quality of the power? Or is the delegation of that power to be accommodated to the exclusivity of the grant by recognising that such delegation is permitted if it is employed as an instrument for the purpose of effecting ends legislatively determined by the exclusive repository?

Given that the exercise of rule-making powers can be an incident to functions other than the legislative, and bearing in mind that the *Constitution* is an 'instrument of government meant to endure',[88] the latter course should surely be favoured.

However — and this is of some significance — adoption of that course is neither predicated upon, nor intended to furnish a premise in aid of, some general proposition that the power to promulgate rules is necessarily incidental to the executive power of the Commonwealth. After all, subordinate legislation is not the sole preserve of the Executive; Parliament may authorise its promulgation by bodies or officers other than the Governor-General. To link, then, the Commonwealth Parliament's ability to delegate legislative power with some notion of what is incidental to the executive is to misconceive the scope of, and by extension the basis for, that ability.

It may, moreover, be inappropriate to speak generally of delegated legislative power as being incidental to the primary functions of the delegate. One may posit a

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84 (1956) 94 CLR 254.
85 (1954) 90 CLR 353.
86 (1909) 8 CLR 626, 632.
87 (1931) 46 CLR 73, 117–18.
88 *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, 81 (Dixon J).

law which did little more than confer upon a newly created body the power to make rules with respect to a specific subject matter, with a view to achieving certain ends. The primary function of that body would thus consist in the making of those rules, with the consequence that any description of the body's rule-making power as incidental to some other primary function would be inapt. For this reason, Parliament's ability to delegate legislative power should be thought of as capable of being accommodated to the distribution of power suggested by the text and structure of the *Constitution* to the extent only that the delegated power is incidental or ancillary, not to the primary functions of the delegate, but rather to the scheme of the law by which the power is granted.

However, at the risk of belabouring a point which this article has sought already to underscore, what is offered to explain and to justify Parliament's power, despite the text and structure of the *Constitution*, to authorise subordinate legislation will necessarily shape one's understanding of the limits beyond which that power may not extend. It is therefore necessary to confront the universally accepted notion that Parliament is permitted, in broad and general terms, to empower other bodies or officers to make subordinate legislation.

That Parliament may, within the heads of power enumerated in the *Constitution*, legislate for any purpose is beyond doubt.[89] It must therefore follow that, again subject to the bounds of Commonwealth legislative power, Parliament is free to choose the means by which its legislative purposes will be effected. A corollary of this is that Parliament must also be free to determine what is incidental or ancillary to the effective operation of any scheme contemplated in legislation enacted by it, however vaguely or generally that scheme may be expressed, where such incidents may include the authorisation of delegated legislation. To require, then, that there actually be a scheme, to which such delegation of legislative power can be said to be incidental or ancillary, would not confine the range of legislative choices which Parliament may validly make. That range would be subject only to one proviso, namely, that by the terms of a given statute, Parliament must do more than merely delegate legislative power. There must be some connection to a legislative purpose or scheme other than the delegation itself.

No doubt this will cause scepticism in some, but it should be noted that the proposition thus put has much by way of explanatory power, in the sense that the basis for various outcomes reached, or positions expressed, in the decided cases can be better understood and reconciled if it were accepted as correct.

For example, it is difficult, in one sense, to describe the hypothetical provisions canvassed in *Plaintiff S157*[90] as involving the exercise of something other than legislative power by the Commonwealth Parliament or constituting something other than a law. After all, those provisions would purport to delegate a power to the Executive, and being thus a 'declaration of power', would fall within the ambit of the concept of a 'law', in the sense identified in *Grunseit*.[91] If therefore the validity of those provisions is to be questioned, this could more appropriately be done on the basis that the provisions contemplate no legislative scheme beyond the delegation to the Minister

89 *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1; *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555.

90 (2003) 211 CLR 476.

91 (1943) 67 CLR 58.

of a broad power to make any decision concerning the ability of aliens to enter into and remain in Australia. Hypothetical and imprecisely framed though these provisions might be, they would not address the criteria or the procedure by which such decisions might be made or any other machinery which may be ancillary to such decision-making.

If one were then to focus upon the reasons of Kitto J in *Giris*.[92] it would surely be more plausible to say that the legislative discretion conferred upon the Federal Commissioner of Taxation by what was then s 99A(2) of the *Income Tax Assessment Act 1936* (Cth) was valid because it was part of a broader scheme — that is, 'to prevent avoidance of taxation by the medium of trusts'[93] — than it would be to assert that s 99A(2) has no work to do, it can safely be regarded as valid.

As for the notion that an abdication of power by Parliament would be unconstitutional, a notion accepted by Dixon and Evatt JJ in *Dignan*[94] and Barwick CJ in *Giris*, and consistent with the comments made in the joint reasons in *Plaintiff S157*,[95] one may readily concede that Parliament ultimately retains control of the matter the subject of the abdication. However, given that, for the reasons previously outlined, parliamentary control does not afford an adequate basis upon which to account for the validity of laws authorising subordinate legislation, that proposition is of little relevance. More relevant is the proposition that the abdication of legislative power by Parliament amounts to no more than the bare delegation of such power, unconnected to any broader legislative scheme or purpose. As a result, an abdication of power may well attract invalidity.

Then, of course, there are the apparent tensions between the decided cases. The terms of the regulation-making power in s 3 of the *Transport Workers Act 1928* (Cth), which provided the field of contest in *Dignan*,[96] are reproduced above. That provision was no more or less a 'rule of conduct' or a 'declaration of right' than the provisions canvassed by the Commonwealth in *Plaintiff S157*.[97] Moreover, s 3 did not purport to confer a power significantly less broad than that contemplated in those imprecisely framed hypothetical provisions. After all, the power conferred by those hypothetical provisions upon the relevant Minister to decide 'what aliens can and what aliens cannot come to and stay in Australia'[98] does not fasten upon any less specific a subject matter than did s 3, which spoke of regulations with respect to matters concerning 'the employment of transport workers'. However, whereas s 3 was unanimously held to be valid in *Dignan*,[99] the provisions canvassed by the Commonwealth in *Plaintiff S157*[100] were impugned by a majority of the High Court.

How, if at all, are these outcomes to be reconciled? The first step is to recognise that, as noted above, Parliament may express, in general, if not vague, terms, the scheme to which a power to make delegated legislation must be incidental or ancillary. After all,

92 (1969) 119 CLR 365.
93 *Giris* (1969) 119 CLR 365, 384 (Windeyer J).
94 (1931) 46 CLR 73.
95 (2003) 211 CLR 476.
96 (1931) 46 CLR 73.
97 (2003) 211 CLR 476.
98 *Plaintiff S157* (2003) 211 CLR 476, 512 [101].
99 (1931) 46 CLR 73.
100 (2003) 211 CLR 476.

if Parliament is free to choose its legislative purposes, subject only to those limits placed upon its legislative power by the *Constitution*, it must also be free to determine the level of generality at which it frames those purposes. And if Parliament is free, again subject to sufficiency of connection with any one of its heads of power, to determine the means by which it gives effect to those purposes, then it must be free to determine that delegated legislation is the only means by which it intends to realise the objects of a statute enacted by it.

Section 3 of the *Transport Workers Act 1928* (Cth) must be read with these matters in mind. That provision did not merely authorise the making of regulations by the Governor-General. It contemplated a scheme for the federal regulation of the employment of transport workers. And more specifically still, it contemplated a scheme both for the licensing of transport workers and for prohibiting their employment if unlicensed. It would therefore not be unreasonable to say that the regulation-making power conferred by s 3 should be regarded as having been incidental or ancillary to the operation of a legislative scheme, sought to be established by the *Transport Workers Act 1928* (Cth), which consisted of more than that conferral alone.

The process of identifying such a scheme is not unknown to the law as it currently stands; it is, after all, similar to the task embarked upon by the majority in *Work Choices*.[101] The question which fell for determination in that case at the prompting of the AWU might be re-stated as follows: was the power conferred upon the Governor-General to make regulations defining 'prohibited content' of such a width that it could not properly be described as being incidental or ancillary to the broader scheme of the amended *Workplace Relations Act 1996* (Cth)? The approach to this question adopted in the majority reasons involved two steps. The first was to point to a range of provisions elsewhere in that statute which confined the ambit of the power to define the expression 'prohibited content', and the second involved the discernment, by a process of construction, of an implied requirement that any regulation defining that statutory phrase be 'necessary or convenient' to the giving of effect to the Act. In respect of both steps can it be said that the majority was engaged in ascertaining and then articulating the extent to which the regulation-making power was governed by the dictates of the scheme of the *Workplace Relations Act 1996* (Cth), as amended.

In one sense, the manner in which the majority in *Work Choices* sought to demonstrate the defined ambit of the regulation-making power in s 356 of the *Workplace Relations Act 1996* (Cth) brings to mind the requirement, in the United States, that the delegation of legislative power be accompanied by congressional specification of 'intelligible principles'[102] or 'standards'[103] for the purpose of guiding the delegate's exercise of that power. One might therefore say that the principle contended for in this article bears some resemblance to that which has held sway in the United States Supreme Court for almost a century.

However, that may be overstating things. After all, the process of reasoning which this article commends involves identification, not of standards, but of a scheme or legislative purpose other than the delegation itself, to which the delegation of

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101 (2006) 229 CLR 1.

102 *J W Hampton, Jr & Co v United States*, 276 US 394, 409 (1928).

103 *Panama Refining Co v Ryan*, 293 US 388, 421 (1935); *A L A Schechter Poultry Corp v United States*, 295 US 495, 530 (1935).

legislative power may be regarded as incidental. Determining whether or not the ambit of a conferral of power to make subordinate legislation is defined in the principal statute may assist in the process of identifying that scheme or legislative purpose. Indeed, it may, in many cases, be the only step required in undertaking that process. Nonetheless, the circumstance that s 3 of the *Transport Workers Act 1928* (Cth) was held to be valid in *Dignan*[104] suggests that discernible standards are not, in Australia, a necessary condition for the validity of a delegation of legislative power.

Interestingly, only on two occasions in the United States has the separation of powers been successfully invoked in impugning the delegation of legislative power by Congress.[105] This is unsurprising, given that the Congressional standards required by the Supreme Court need only 'sufficiently [mark] the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will'.[106] To the extent then that this article favours a principle similar to that which prevails in the United States, it must seem a very weak principle indeed.

However, if, as suggested above, there is nothing inherent in the concept of legislative power which would prevent its delegation to institutions other than Parliament, and if the delegation of legislative power affords a useful instrument for governing, then it is only right that the principle be weak. Accordingly, what has been contended for thus far constitutes little, if any, threat either to current orthodoxy or to prevailing constitutional practice. It is instead merely explanatory of those phenomena.

V THE 'EXEMPTION AND MODIFICATION' PROVISIONS IN THE *CORPORATIONS ACT*

In *Plaintiff S157*,[107] the Commonwealth presented an alternative suite of hypothetical amendments to the *Migration Act 1958* (Cth). These preserved the Minister's ultimate power to determine an alien's right to remain in Australia, but rendered the balance of that statute a set of non-binding guidelines for the Minister. However, this too was said in the joint reasons to lack what Latham CJ had identified in *Grunseit* to be the hallmarks of the exercise of legislative power.[108]

Seen through the lens of the preceding section of this article, the view taken in the joint reasons on this point may be understood to shed further light on what is involved in the notion that a provision purportedly delegating legislative power should be incidental or ancillary to a broader legislative scheme. Put simply, it is insufficient, for such a delegation to be valid, that the delegate is put in a position to decide that the scheme established in the balance of the relevant statute does not suit its purposes, and therefore does not need be adhered to. This recalls, to some degree, Kitto J's objection in *Giris* to a provision which would leave an officer of the Commonwealth completely free to determine whether a law should apply in a given case. At any rate, if the proposition put above were accepted, then invalidity may similarly attend any

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104 (1931) 46 CLR 73.

105 *Panama Refining Co v Ryan*, 293 US 388 (1935); *A L A Schechter Poultry Corp v United States*, 295 US 495 (1935).

106 *Yakus v United States*, 321 US 414, 425 (1944).

107 (2003) 211 CLR 476.

108 *Plaintiff S157* (2003) 211 CLR 476, 512 [101].

provision that purported to authorise subordinate legislation which was in turn capable, not merely of giving effect to the scheme of the relevant statute, but also of altering it *in toto*.

Nevertheless, alongside the joint reasons in *Plaintiff S157*[109] (as well as the observations of Kitto J in *Giris*) must again be placed the outcome in *Dignan*.[110] Section 3 of the *Transport Workers Act 1928* (Cth) authorised the making of regulations which would have had effect 'notwithstanding anything in any other Act', and yet the challenge in *Dignan*[111] to the validity of that provision was successfully rebuffed. Still, it is possible to distinguish this result from that contemplated in *Plaintiff S157*[112] by saying that it is one thing for a statute to lay down a rule for resolving conflicts between regulations authorised by it and other statutes and to stipulate that such conflicts should be resolved in favour of the regulations; it is another for such a statute to be applicable only if the Executive decides so or to permit amendments to be made to its own terms by way of regulations or other forms of subordinate legislation. The former is unobjectionable, and the latter possibly invalid.

If this were so, then whether the so-called 'exemption and modification' provisions in the *Corporations Act 2001* (Cth) would be capable of surviving a challenge to their validity is a finely balanced matter. These provisions may best be described by reference to examples. Part 7.9 of the *Corporations Act 2001* (Cth) is principally concerned with standards of product disclosure for financial products. Subsection 1020G(1) of the Act contemplates, in sub-paragraph (c), that the regulations which the Governor-General is empowered generally to make pursuant to s 1364 of that statute may 'provide that [Pt 7.9] applies as if specified provisions were omitted, modified or varied as specified in the regulations'. This is only one of numerous provisions in the Act drafted in similar terms. [113]

More strikingly, pursuant to s 1020F(1)(c), the Australian Securities and Investments Commission ('ASIC') may 'declare that [Pt 7.9] applies in relation to a person or a financial product, or a class of persons or financial products, as if specified provisions were omitted, modified or varied as specified in the declaration'. Unsurprisingly, the balance of the *Corporations Act 2001* (Cth) is littered with provisions empowering ASIC to make similar orders with respect to other parts of that statute.[114]

It is convenient to begin with s 1020G(1)(c), read in conjunction with s 1364(1). This latter subsection provides:

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109 (2003) 211 CLR 476.
110 (1931) 46 CLR 73.
111 Ibid.
112 (2003) 211 CLR 476.
113 *Corporations Act 2001* (Cth), ss 742, 854B, 893A, 926B, 942DA, 951C, 984A, 992C, 1045A.
114 *Corporations Act 2001* (Cth), ss 283GA, 601QA, 655A, 669, 673, 741, 926A, 951B, 92B, 1020F, 1075A.

The Governor-General may make regulations prescribing matters:

(a) required or permitted by this Act to be prescribed by regulations; or

(b) necessary or convenient to be prescribed by such regulations for carrying out or giving effect to this Act.

By parity of reasoning with what was said in *Work Choices*,[115] paragraph (a) of this subsection may be construed impliedly to be subject to a requirement that regulations made in pursuance of it be 'necessary or convenient ... for carrying out or giving effect to this Act'. If so, then s 1020G(1)(c) would anomalously permit the promulgation of regulations omitting, modifying or varying specified provisions in Pt 7.9 of the *Corporations Act 2001* (Cth) which are nonetheless necessary or convenient, in the sense considered in *Shanahan v Scott*,[116] for giving effect to that statute. One might attempt to preserve some sort of role for s 1020G(1)(c) by asserting that it contemplates the omission or modification of what may loosely be termed 'mechanical' provisions in Part 7.9 without altering the substantive rights or obligations of persons bound by it. However, a court, especially one as resistant of distinctions that defy easy application as the High Court,[117] might recoil from having to distinguish the 'mechanical' from the 'substantive' provisions in Pt 7.9, thus giving the language of s 1020G(1)(c) its full effect.

The consequence is that s 1020G(1)(c) of the *Corporations Act 2001* (Cth) and provisions like it might be vulnerable to a successful attack upon their validity. This is on the basis that, as was permitted by the alternative hypothetical provisions canvassed by the Commonwealth in *Plaintiff S157*,[118] Parliament's delegate would be able substantially to alter the relevant statutory scheme, in this instance, Pt 7.9 of the *Corporations Act 2001* (Cth).

As for the powers conferred upon ASIC by s 1020F(1)(c), the analysis commences with the observation that they might more readily be described as administrative rather than legislative. While space does not permit extended discussion on the matter, there are compelling reasons to think that the principle contended for in this article should apply also to powers better thought of as administrative. Indeed, an administrative discretion as to whether a law should apply in a given case is precisely what Kitto J in *Giris* found repugnant to the distribution of power contemplated by the *Constitution*.

Focusing on s 1020F(1)(c) itself, it should be noted that there is, in respect of the powers conferred by that provision, no equivalent to s 1364(2), setting a 'necessary or convenient' limitation upon their scope. It might still be possible to imply into Ch 7, or any other Chapter, of the *Corporations Act 2001* (Cth) a requirement that declarations made by ASIC be necessary or convenient for carrying out or giving effect to the Act. However, the fact that s 1364(2) sets a general limit upon the regulation-making power of the Governor-General while no such provision does the same for ASIC might leave scope for the operation of the maxim *expressio unius est exclusio alterius*. It should follow from this is that there is no 'necessary or convenient' limit imposed by the *Corporations Act 2001* (Cth) upon ASIC's power to issue declarations to the effect that Pt 7.9 of that

115 (2006) 229 CLR 1.

116 (1957) 96 CLR 245.

117 See eg, *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 542–44 [97]–[100] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

118 (2003) 211 CLR 476.

statute 'applies in relation to a person or a financial product, or a class of persons or financial products, as if specified provisions were omitted, modified or varied as specified in the declaration'. And even if there were, the difficulties described above in assessing the validity of s 1020G(1)(c) would, in this context, merely recur *mutatis mutandis*.

The upshot of this is that, in seeking to preserve some scope for efficiency and innovation in Australia's financial markets,[119] the drafters of the 'exemption and modification' provisions might well have taken their own legislative innovations one step too far. If so, then the outcome is not a happy one, especially because the system under which regulatory relief may be granted by ASIC is dependent upon ASIC being able, either in respect of individual cases or of classes of products or persons, to modify the operation of the *Corporations Act 2001* (Cth).[120] However, while this may cause one to pause before asserting, without qualification, that provisions such as ss 1020F(1)(c) and 1020G(1)(c) are invalid, it might just as well prompt the question whether the possibility of invalidity might be avoided if the *Corporations Act 2001* (Cth) were less detailed and prescriptive and permitted more rule-making, as distinct from rule-modification, by the likes of ASIC and the Governor-General.

Another reason for proceeding cautiously when considering the validity of the 'exemption and modification' provisions is that it is all too easy to adopt as correct, on the basis of a conclusion of invalidity, the proposition that every 'Henry VIII' clause in the Commonwealth statute book must similarly be invalid. But such provisions have previously been encountered by courts, and managed to survive the ordeal. In *Isman Ismail v Minister for Immigration and Ethnic Affairs*,[121] Beaumont J noted that 'whilst it may be true to say that the courts have indicated their dislike of the use of Henry VIII clauses ... a finding of invalidity is another matter'.[122]

Still, the provision considered in that case was of significantly narrower scope than s 1020F(1)(c) or s 1020G(1)(c) of the *Corporations Act 2001* (Cth). Indeed, it was arguably an example of a provision which authorised amendment of a statute by regulations but was nonetheless capable of being said to be incidental or ancillary to, or directed towards the effective operation of, that statute. The *Migration Reform Act 1992* (Cth) purported to amend the *Migration Act 1958* (Ch) (for the purposes of what follows, 'the Principal Act') in ways which are of no present interest. What is of interest is s 40 of that statute, which relevantly addressed transitional matters as follows:

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119 *Corporations Act 2001* (Cth), s 760A(a).
120 See ASIC Regulatory Guide 51.
121 (Unreported, Federal Court of Australia, Beaumont J, 25 March 2006) ('*Isman Ismail*').
122 Ibid [16].

(1) In this section:

"amended Act class" means a class of visas that is provided for by, or by regulations under, the Principal Act as amended by this Act;

...

"specified persons" includes:

(a) persons in a specified class; and

(b) persons in specified circumstances; and

(c) persons in a specified class in specified circumstances.

(2) The regulations may provide that a specified provision of the Principal Act repealed or amended by this Act is to continue to apply:

(a) to specified persons; or

(b) in specified circumstances; or

(c) in relation to visas in a specified amended Act class.

(3) The regulations may provide that a specified provision of the amended Act is not to apply:

(a) to specified persons; or

(b) in specified circumstances.

...

(9) A regulation allowed by this section ceases to have effect at the end of 90 sitting days of either House of the Parliament after the regulation commences.

What appears to have been contemplated by this provision was the delegation to the Executive of authority to revive and to modify provisions of the unamended Principal Act, for a limited period of time, in so far as it was necessary to ensure an effective transition between the unamended statute and its subsequently amended form. Seen in this way, s 40 of the *Migration Reform Act 1992* (Cth) is evidently less broad, and less problematic, than either one of s 1020F(1)(c) or s 1020G(1)(c) of the *Corporations Act 2001* (Cth).

It does not therefore follow from what so far has been said that all 'Henry VIII' clauses may successfully be impugned. As is suggested by the contrast between s 40 of the *Migration Reform Act 1992* (Cth) and the 'exemption and modification' provisions of the *Corporations Act 2001* (Cth), and as is to be expected when notions of what is incidental or ancillary fall for consideration, the question is ultimately one of degree. The breadth of the powers granted by ss 1020F(1)(c) and 1020G(1)(c) of the *Corporations Act 2001* (Cth) may more readily support a conclusion of invalidity, but the point of distinction between Henry VIII of clauses of excessive width and those whose validity may more easily be defended must, of necessity, remain imprecise.

VI CONCLUSION

As a legislative device, 'Henry VIII' clauses have been roundly condemned.[123] This is understandable. After all, attempts at navigating the intricacies of Ch 7 of the *Corporations Act 2001* (Cth), which is replete with 'exemption and modification' provisions of the sort considered above, are too often complicated by the realisation

123 See Dennis Charles Pearce and Stephen Argument, *Delegated Legislation in Australia* (3rd ed, 2005) 14–15.

that what appears to be the law as provided in that Chapter is not the law at all. However, the frustrations involved in applying statutes whose operation can be altered by subordinate legislation should not be permitted to obscure the questions prompted by the mere existence of those statutes. Those questions, made all the more relevant by the High Court's recent pronouncements upon the delegation of legislative power, have yet to addressed to any degree of satisfaction. It is hoped that this article may provoke others to attempt the arduous task of ensuring that that is done.