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High Court upholds the validity of 'Henry VIII' regulation affecting an accrued right to compensation

In [ADCO Constructions Pty Limited v Goudappel \[2014\] HCA 18](#) the High Court unanimously upheld the validity of a transitional regulation made under the *Workers Compensation Act 1987* (NSW) extinguishing the respondent's entitlement to permanent impairment compensation. The 2 separate judgments include observations about the operation of 'Henry VIII clauses', the interpretation of 'beneficial' legislation and the validity of legislative instruments that affect accrued rights.

Background

In 2012, the New South Wales Parliament enacted amendments to the *Workers Compensation Act 1987* (NSW) (the WCA) including savings provisions preserving claims for compensation made before 19 June 2012. The amending legislation included a 'Henry VIII clause' permitting regulations to amend the WCA for saving and transitional purposes including to allow a regulation that would affect existing rights.

A transitional regulation was made that removed the WCA's protection of some pre 19 June 2012 claims from the effect of the amendments. Mr Goudappel was an employee of ADCO Constructions Pty Ltd, whose claim for compensation for a workplace injury was rejected on the basis of the transitional regulation. He challenged the validity of the regulation.

The Court of Appeal held that the transitional regulation did not apply to extinguish Mr Goudappel's entitlement to permanent impairment compensation. By special leave, ADCO appealed to the High Court.

The High Court unanimously upheld the validity of the transitional regulation that applied to extinguish Mr Goudappel's entitlement to permanent impairment compensation. The High Court considered a number of issues, 3 of which are highlighted here as particularly relevant to Commonwealth legislative instruments.

'Henry VIII' clauses

This is the first time the High Court has considered the validity of a regulation made under a so-called 'Henry VIII clause' of this kind. The term 'Henry VIII clause' usually refers to a provision of an Act that permits regulations to be made that modify the operation of the Act. The usual approach to interpreting Henry VIII clauses, based on a series of United Kingdom authorities, has been to construe them strictly.

The High Court did not necessarily accept that Henry VIII clauses are, as a matter of course, to be construed strictly. The joint judgment (French CJ, Crennan, Kiefel and Keane JJ) observed that Henry VIII clauses 'have frequently been criticised for good reason' ([at 31]) but did not explicitly endorse taking a strict approach to their interpretation.

In his separate judgment, Gageler J went further and argued against singling out Henry VIII clauses for strict interpretation, at least when delegated legislation made under such clauses

is disallowable by Parliament. After describing the parliamentary oversight to which the regulations in the case were subject, including the fact that regulations are subject to disallowance and that all disallowable regulations are considered by a joint committee of members of Parliament, Gageler J observed: 'That parliamentary oversight, together with the scope of judicial review of the exercise of regulation-making power, diminishes the utility of the pejorative labelling of the empowering provisions as "Henry VIII clauses"' (footnote omitted) (at [61]). His Honour concluded that the empowering provisions strike 'a legislated balance between flexibility and accountability in working out of the detail of replacing one modern complex statutory scheme with another' (footnote omitted) (at [61]).

While the High Court did not explicitly endorse the strict approach to interpreting Henry VIII clauses adopted in the UK, it would be prudent to continue to ensure that delegated legislation made under such a clause is clearly within the terms of the clause.

The interpretation of 'beneficial' legislation

The High Court also made comments relevant to the oft-invoked argument that remedial or beneficial legislation is to be construed liberally.

The joint reasons found that the fact that the WCA as a whole had a clear beneficial purpose does not mean that every provision or amendment to a provision has a beneficial purpose or is to be construed beneficially. The purpose of the provision must be identified. In this case, the clear purpose of the statutory provision amending the regulation-making power was to expand that power to allow regulations to be made that could affect pre-existing rights (French CJ, Crennan, Kiefel and Keane JJ at [29]).

In a similar vein, Gageler J held that the legislative purpose of permitting a transitional regulation would be stifled were the permission limited to a regulation having no effect on an existing right or liability. The legislative purpose would also be impeded if the empowering provisions were to be construed asymmetrically, to permit alteration of an existing right or liability only if beneficial to a worker (Gageler J at [62])

Retrospectivity and accrued rights

The joint reasons described the respondent's characterisation of the disentitling regulation as 'retrospective' as 'something of a distraction' (French CJ, Crennan, Kiefel and Keane JJ at [26]). While the regulation affected an accrued right, it did not take effect before its gazettal. Similarly, for s 12(2) of the *Legislative Instruments Act 2003* (Cth), an instrument is not invalid merely because it affects existing rights detrimentally; it will only be invalid if it takes effect before it is registered on the Federal Register of Legislative Instruments.

In addition to the prohibition against certain retrospective delegated legislation, there is the separate common law presumption that 'a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to past events': *Maxwell v Murphy* (1957) 96 CLR 261 at 267. At the Commonwealth level, this presumption is reflected in s 7(2) of the *Acts Interpretation Act 1901*.

Justice Gageler explicitly held that this presumption applies to the interpretation of regulation-making powers: 'Unless the contrary intention appears with reasonable certainty, the empowering statute is construed so as not to confer power to make regulations which alter existing rights or liabilities' (at [51]). While it is not clear from their reasons, it appears that the joint reasons were prepared to accept this view (at [20] and [29]). (See, also, Katz J in *Rokobatini v Minister for Immigration and Multicultural Affairs* (1999) 90 FCR 583 at [51]-[60].)

At a Commonwealth level, this illustrates that the prohibition in s 12(2) of the *Legislative Instruments Act 2003* against certain retrospective legislative instruments is not the end of

the story. Even if delegated legislation is not retrospective, it may affect accrued rights; if so, its validity may need to be tested against the presumption reflected in s 7(2) of the *Acts Interpretation Act 1901*.

In this case, the High Court found that the regulation-making power exhibited a sufficiently clear intention for regulations to be able to affect accrued rights.

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