

States Act Validity Analysis

1. Is there a head of power?

[State] Parliament must have had a valid source of power to enact the Act.

Plenary Grant of Power

- States have a general plenary legislative power - s2(2) *Australia Acts*; s 107 *CC* ; *Burah* [s106 for Constitutions]
Without a head of power for the Commonwealth to legislate on _ under s 51 and 52, the State has a residual plenary legislative power over _.
 - With 'power to make laws for the Peace, welfare and good government': *Constitution Act* 1902 NSW s 5
 - These words are not words for limitation of state legislative power – *Union Steamship*
 - S 16 *Constitution Act* 1975 (Vic) – 'The Parliament shall have power to make laws in and for Victoria in all cases whatsoever'.
- States also have the power to **amend or repeal their own Constitutions**– s6 *Australia Acts* (AA)
 - Only constrained by S109 of the Cth Constitution (inconsistency) – *Union Steamship*

Territory Constitutions:

1. Territory constitutions are established by the Cth Parliament under ss 111, 112 and 125 of Cth Cn.

Implied Repeal:

1. State legislation passed inconsistent with an earlier Act is presumed to impliedly repeal the earlier act – *McCawley*.

2. Any Constraints (express or implied) on this power?

The following constraints may render the Act in question invalid:

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Express Commonwealth Constitutional Limitations

Express Constitutional Limitations

1. Exclusively Cth domains: A State law is invalidated as it deals with a topic committed exclusively to the Cth parliament: - s52 *CC*
 - a. The seat of Cth Government (Canberra); or all places acquired by Cth for public purposes (i)
 - b. Matters relating to the public service, the control of which is granted to the Executive by the Cn (ii)
 - c. Other matters declared by Cn to be exclusively Parliamentary powers. (iii)
2. The High Court has yet to authoritatively hold that fundamental common law rights or political principles constrain State Parliament legislative power – *Union Steamship*

List of areas under state responsibility (not under s 51/52 of CC):

- **Schools, Hospitals**
- **Roads and Railways & Public transport**
- **Utilities** – electricity & Water supply
- **Mining and agriculture & Forests**
- **Community services & Consumer affairs**
- **Police & Prisons**

Concurrent:

trade and commerce, bankruptcy, family law.

3. Legislation: In the case of an inconsistency between State and Commonwealth legislation, the State legislation will be invalid **to the extent of the inconsistency** –s109 *CC*
If not inconsistent – state that the legislation is incidental to the operation of the [Commonwealth Act] and is not inconsistent.
4. While state legislation can bind the Commonwealth, it cannot restrict or modify the executive capacities of the Commonwealth –*Residential Tenancies*
State legislation cannot interfere with the Commonwealth's **executive capacities** – *Henderson*
Or impact/impair the **integrity or autonomy** of the Commonwealth – *Residential Tenancies*, Kirby J
Legislation must be of **general application**, not targeted at the Commonwealth in particular– *Residential*

Implied Commonwealth Constitutional Limitations::

Implied Freedom of Political Communication

The Act will be invalid where it interferes with the freedom of political communication, a necessary condition of representative government, derived from ss 7 and 24 CC, with no exception for interference. – *Nationwide News*

This applies to **state political discussion**, ‘whether or not it bears on matters at the federal level, given that it is inseparable from Cth political discussion - *Lange*

- Test: Given this implied freedom, if legislation imposes a burden upon freedom of communication, including non-verbal communication – *Levy*, **without a legitimate aim** or an **aim consistent with representative government**, or has **used disproportionate means** to achieve its aim, it will be declared **invalid** – *Lange*
- Legitimate purpose?
- **A presumption exists against legitimate purpose** – *ACTV*
Here, the Act was enacted to fulfil the purpose of ... This purpose is (not) legitimate because...
- Disproportionate means?
If insulting/offensive words were used where the words had a political content or purpose, a penalty constitutes a **burden on freedom of political communication**, and is therefore invalid – *Coleman*
- The restriction on the freedom of political communication here in this case is [not] appropriate to fulfil the purpose as ...
- Thus, the Act is [not] a valid exception to the interference with political discussion, and a court will [not] strike it down.

Voting Equality

The issue is whether this Act breaches the principle of responsible government.

States are not bound by ss 7 and 24 CC to have **universal adult franchise** or voting equality as the ‘trickle down’ argument does not hold as voting inequality at the State level does not have the capacity to interfere with representative government at the Cth level – *McGinty*

- However, Brennan J’s obiter in *McGinty* implied that State Constitutions may have limits similar to ss 7 and 24 CC. If such limits exist, legislative changes to voting qualifications may therefore be unconstitutional if universal adult franchise was compromised.
- Brennan J: ‘In my opinion, the **Commonwealth Constitution** contains **no implication** affecting disparities of voting power among the holders of the franchise for the election of members of a **State Parliament**.’

Abdication

State's power to delegate legislative power was established in *Cobb*.

[State Parliament] may 'delegate its legislative power to the executive', but the delegation must not be in terms that are too wide or uncertain - *Dignan's Case*.

Abdication is unconstitutional and conflicts with principles of responsible and representative government – *Capital Duplicators*, Barwick CJ.

Should the creation of _____ constitutes abdication, the [Act] may be invalid [or the activities of the body it creates may be illegal] (*Taylor*), as a legislature **cannot abdicate its power**, or **bestow legislative authority on another body** – *Capital Duplicators*

State Parliament's plenary power does NOT extend to authorise the elimination of the representative character of the Parliament - Taylor

With the presumption against abdication at the State level (*Spicer*), it is necessary to determine if power has been abdicated or delegated. To do so, the Court may consider the following factors:

Abdication or Delegation?

• Revocability of the delegation power

- Delegation allows Parliament to retain revocability of the transferred power. – *Capital Duplicators*
- Inhibiting the powers of **future** parliaments to enact legislation, or the Ministers **right to propose legislation** constitutes an irrevocable abdication of legislative power – *West Lakes*
(In the present case, [The Minister's] right to propose legislation is clearly inhibited by __, and is likely to constitute abdication)

• Constitutional framework:

- [Action] will be abdication if constitutional principles are at risk from the transfer of power – *Capital*
- The constitutional principle of (representative democracy) here is clearly at risk with... and is thus likely to be held as abdication.

• Scope of the transfer of power

- The issue here is if the delegated power restricted or plenary (wide). - *Comalco*
Analogous to *Dignan's Case*, where the grant of power was **extremely wide** as the regulations would allow the executive to bypass any later legislation, the current grant of power may be said to be extremely wide with...
As the delegation of __ is in too wide/uncertain terms, it likely amounts to abdication – *Dignan*

• Valid Legislation?

- Delegation must be done under a valid law **under a head of legislative power** – *Dignan*

• Supervision and accountability of new body

- If the new body is subject to supervision of the (original) Parliament= and is accountable to, and subject to supervision by, the existing legislature, it will not be abdication. - *Cobb*
- Evidence of Supervision -
Tabling: Delegated legislation put before each House of Parliament after it has been made.
This allows for **scrutiny**, where the delegation legislation is sent to a parliamentary committee, and **disallowance**, where a MP can move a motion that the delegated legislation be **disallowed**.
(Disallowance may be **restricted** by a 2/3s vote provision, and could suggest abdication)

• Elimination of Representative Character of the State Parliament?

- State parliament's plenary power does not extend to the elimination of the representative character of the Parliament - *Taylor*

**Conclusion – Here, (Factors) point to/away from abdication

On balance, the transfer is [not] abdication and the act is hence [in]valid.