

AUSTRALIAN PUBLIC LAW NOTES

LEGISLATURE

Validity Analysis of State Action or Artefacts

- Is the **role** of the official/institution in question validly created by the public law and validly conferred on the agent in question?
- Has that office/institution been validly **empowered** to perform the action in question?
- Has the office/institution complied with valid **procedural requirements** or other valid conditions/regulations on the exercise of the power in question?
- Has the office/institution contravened any valid **limits** imposed on the exercise of the power in question?

Invalidation of Legislation – Commonwealth

- The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is hereinafter called *The Parliament*, or *The Parliament of the Commonwealth*. (Constitution s1)

A law of the Cth Parliament may be **invalidated** on the following grounds:

- No Cth head of power: ie, the topic is not specified as a topic on which the Cth can legislate (eg, in Constitution s.51).
- Breach of constitutional legislative **process** requirements (eg ss.23 and 40).
- Cth law infringes an express **Cth constitutional limitation** (eg, s.116 - religion), or an implied constitutional limitation (eg, infringes implied freedom of political communication).
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Invalidation of Legislation – States

A law of a State Parliament can be invalidated on the following grounds:

- No head of power
- The State law deals with a topic committed exclusively to the Cth or withdrawn from the states (e.g. Cth Constitution s.52 – exclusive topics to Parliament)
- The State law is inconsistent with a valid Cth law on a concurrent topic (s109)
- Breach of constitutional legislative process requirements (s23, 40)
- Constitutional limitations – Cth or State Constitutions
- The State law infringes an express/implied constitutional limitation in the Cth Constitution (e.g. s92)
- The State law infringes an entrenched limitation in the State Constitution (e.g. NSW s7A)
- The State law breaches a ‘common law’ limitation on legislative power (e.g. the doctrine of abdication)

Invalidation of Legislation – Territories

A law of a Territorial parliament can be invalidated on the following grounds:

- Inconsistency with the Cth Constitution or with a valid Cth law on the topic (including the Territory constitution itself).
 - No head of power under the Territory constitution.
 - Breach of constitutional legislative process requirements.
 - Limitation on legislative power under the Territory constitution (eg s.23)

Constitution

- **The Constitution** is the **ultimate source of legal validity**. It is not itself legally valid by reference to a higher positive law.
- The authority of the Constitution may be justified by reference to the fact that the will of the people at large (**Grundnorm** – ground of law) lies behind its formal, power-conferring status. This is to say that it is justified politically rather than validated legally.
- **Popular sovereignty** – Doctrine that all public/state power ultimately resides in and derives from and gains its authority from the will/consent of the people.

Structure and Election of Australian Parliaments

Who can be a Candidate for Election to Federal Parliament

Constitution – Qualifications of Candidates

These sections provide Parliament with the ability to decide who is qualified to be elected to the Senate and House of Rep.

Section 16: - Senator's Qualifications

- *The qualifications of a senator shall be the same as those of a member of the House of Representatives.*

Section 34 – House of Reps Qualifications

- *Until the Parliament otherwise provides, the qualifications of a member of the House of Representatives shall be as follows:*
 - *(i) he must be of the full age of twenty one years, and must be an elector entitled to vote at the election of members of the House of Representatives, or a person qualified to become such an elector, and must have been for three years at the least a resident within the limits of the Commonwealth as existing at the time when he is chosen;*
 - *(ii) he must be a subject of the Queen, either natural-born or for at least five years naturalised under a law of the United Kingdom, or of a Colony which has become or becomes a State, or of the Commonwealth, or of a State.*

Section 51 (xxxvi)

- *The Parliament shall, subject to this Constitution, **have power to make laws for the peace, order, and good government of the Commonwealth with respect to... matters in respect of which this Constitution makes provision until the Parliament otherwise provides***

What had Parliament provided?

Commonwealth Electoral Act 1918 (Cth)

- Section 163 – Qualification for Nomination
 - (1) A person who:
 - (a) Has reached the age of 18 years
 - (b) Is an Australian citizen; and