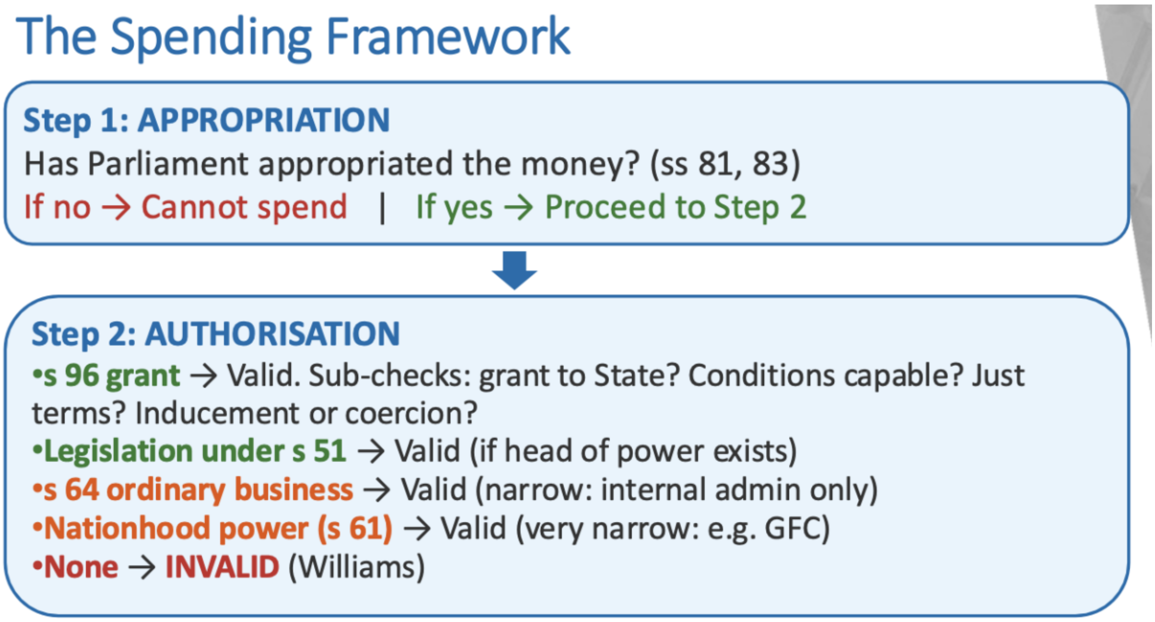
TOPIC 6: SPENDING

2 SPENDING POWERS CONFERRED ON CTH:
1. GRANTS POWER
2. APPROPRIATIONS POWER



THE GRANTS POWER – S96

[1.1] S.96:
Parliament may grant financial assistance to any state on such terms and conditions as the Parliament thinks fit.'

[1.2] TYPES OF GRANTS
[1.2.1] General Revenue
[1.2.2] Special Assistance
[1.2.3] Specific Purpose

[1.3] SCOPE OF S.96 APPLICATION SEEMS LIKE A LIMITLESS POWER BUT ISN'T
- Broad application = FRA case
- S96 not subject to s99 = DFCT, Moran
- State can act as a 'conduit' for CTH [agent/medium] – Moran
  - Use the state as a conduit for the payment of money to private individuals or organisations: *Moran, DOGS*
- Supporting s96 freedom = Second UT case [VIC]
- Require a state to use the money for something outside the Cth's powers: *2nd UTC*

- Require the state to make a co-contribution to whatever is being funded by the Cth: *Federal Roads Act Case , 2ND UTC*
- Distinguish between the states, affording one or more states more favourable treatment than others: *1st UTC*
- Discriminate between the states despite explicit prohibitions in ss 99 and 51(2): *Moran, 1st UTC*
- Induce a state to exercise or abstain from exercising its powers and/or have the purpose of weakening or destroying state activity: *1st UTC,* Latham CJ
- States are formally free to reject any grant [but usually don't bc politics]

[1.4] LIMITS ON S.96 APPLICATION

[1.4.1] STATE LIMIT

[and through that, on CTH]: States must be constitutionally capable of complying [with the conditions of the grant from CTH] - *2nd UTC,* Fullagar J

- Narrow: most policy conditions are within State capacity.
- The Cth cannot require States to breach the Constitution.
  - Cth cannot require a state to do things that the Constitution permits only the Cth to do – *e.g. imposing excise taxes (s 90)*
  - Cth cannot require a state to breach express or implied limitations on the state's powers – *e.g. to enact a law that impermissibly burdens freedom of interstate trade and commerce (s 92) or the implied freedom of political communication*

[1.4.2] CTH LIMIT:

Can the CTH evade its own constitutional limits via s96? [debated area]

- Section 96 is not subject to the express prohibitions on discrimination in ss 51(2) or 99 – Moran, 1st UTC
  - even if the Commonwealth is restricted from discriminating through direct legislation, it can achieve the same result by using financial grants to states with condition attached

- Pye v Renshaw: CTH worked around and changes arrangements, so the law didn't sound like a circumvention. HC **upheld** this law.
  - Confirmed that Section 96 could be used to induce a state to act in a way that the Commonwealth itself is constitutionally prohibited from doing

- ICM: [confirmed old case Magennis, distinguished Pye]:
  - Obiter suggestion that *Pye* would be overruled in future and the Cth would not be able to circumvent s 51(31) by using administrative arrangements to acquire property on unjust terms
  - **Workaround closed**

- DOGS: Held law valid
  - Obiter remarks that section 96 is subject to s 116, meaning that Cth cannot discriminate re religion – here, by funding schools of some religions but not others

- Section 116 (religion) has been recognized as a hard limit – Religious schools case

- These cases indicate that other constitutional limitations on the CTH's powers might be interpreted as constraining s 96 in future

2: THE APPROPRIATIONS POWER – S61, S81, S83

[2.1] BACKGROUND

S.81:
'All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth.*'*
= all $ collected by the Cth must be stored in a bank account (the Consolidated Revenue Fund) for future allocation by the Cth

- Narrower language than 96
- 81: "for purposes of Cth" rather than 96: "for any purpose"

S.83*:*
'No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.'
= the Cth can't withdraw $ from the bank account without a law allocating that $ for a particular purpose

- Reinforces responsible govt and parliamentary control
- **don't create a spending power**

[2.2] PRINCIPLES ON APPROPRIATIONS

- the HC doesn't interfere with CTH spending, can't review appropriations and see if they are for a proper purpose – AAP case, Pape [Pape didn't completely shut out the idea, said reviews might be possible but unlikely]
- appropriating money is not the same as spending money, so s81 and 83 don't concern spending – Pape
- CTH can only spend money if there is a separate law authorising it supported by a relevant HOP – Pape
- government does not need a specific appropriation for everything—as long as spending fits within a broad category, it's legal – Combet
- Advance to Finance Minister for "urgent and unforeseen" needs: valid – Wilkie [confirmed Combet: doesn't have to be too specific]

[2.3] PRINCIPLES ON SPENDING APPROPRIATED POWER

- Williams 1: broad and narrow spending arguments rejected. Held: executive spending requires legislative authority [similar to Pape]
  - BUT: [didn't say anything about needing a HOP] – Williams 2 did
- Williams 2: Even if Parliament passes a law authorizing spending, it must be supported by a specific constitutional power

Why unlegislated spending Is dangerous

1. Parliamentary supremacy
Undermines "the basal assumption of legislative predominance" (Gummow and Bell JJ)

2. Federalism
Enables Cth to "encroach upon areas of State operation" (Kiefel J)

3. Responsible government
Spending would operate "indistinguishably from … a prerogative power" (Crennan J)

[2.4] WHAT CTH CAN/CAN'T SPEND ON:

- CAN: Pursuant to a valid s 51 statute authorising the spending
- CAN: Exercise of prerogative (narrow: e.g. defence, foreign affairs)
- CAN: [PREFERRED] Grants under s 96 (with conditions)

- CAN'T: Directly in a state area with no HOP and no s96
- CAN'T: under just an approp with no legislation

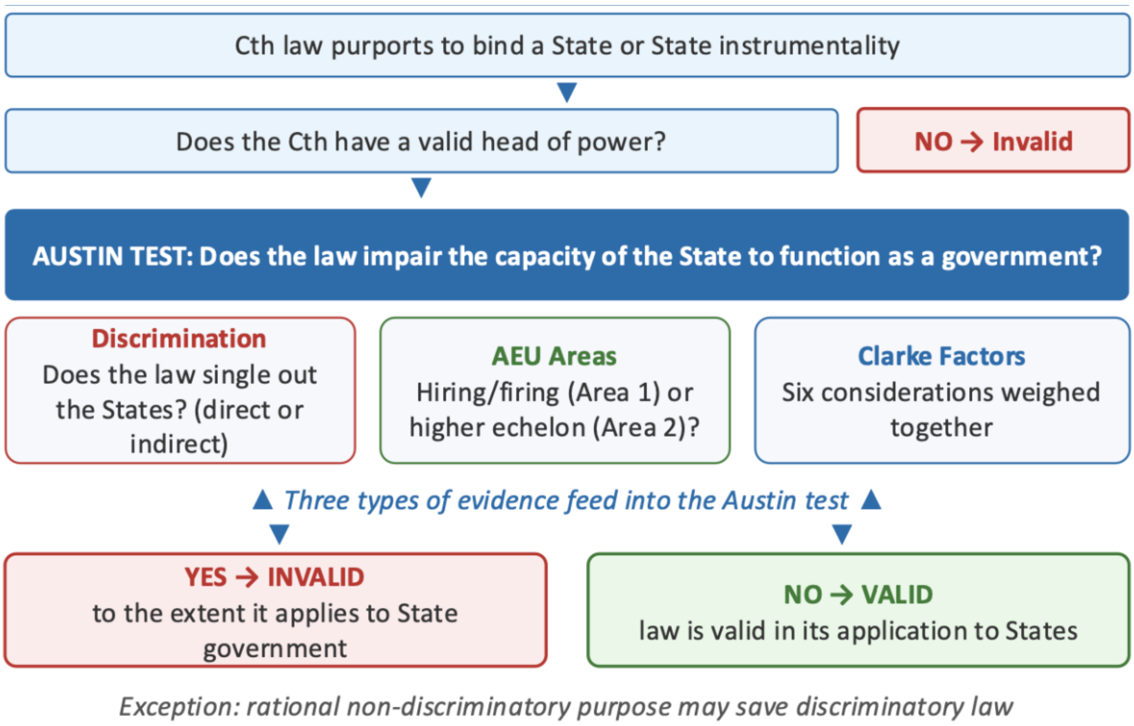
- EHH: Nationhood power [s61 national interest, very narrow scope]
- EHH: Departmental spending [s64, uncertain scope, narrow scope]

TOPIC 7: INTERGOVERNMENTAL IMMUNITIES

BACKGROUND:
Before 1920, the High Court held that neither the Commonwealth nor the States could legislate to bind the other. This was total and symmetrical. It was also unworkable.

BEYOND THESE IGI:
- beyond this, there are no clear constitutional rules limiting how much each level of government can interfere with the other.

EXTENT TO WHICH CTH CAN LEGISLATE TO AFFECT THE STATES



LOOK AT EXAM 1 Q1

RED FLAGS
1. cth affects state functions or vice versa
2. cth imposes a burden on state
3. cth is singling out a state for disadvantegous treatment
4. cth legislating on state employees, state work conditions etc = cant [austin]
5. state legsialting on cth entities or personnel and hence disrupting functions

[1.1] BACKGROUND
Cth and state governments were **wholly immune** from each other's legislation (hence 'intergovernmental immunities')