

WAS THE FUNDING VALIDLY APPROPRIATED?

 Appropriation Act
 Proposed Allocation of Funds within the Cth Government

Sections 81 and 83 of the Constitution authorises appropriations, which can be for any purpose that the Commonwealth thinks fit (*Pharmaceutical Benefits Case*). The purpose of an appropriation can be expressed in an Appropriation Act at a high level of generality; the specificity of an appropriation lies for Parliament to determine (*Wilkie*).

STEP 1: IDENTIFY THE RELEVANT WORDING IN THE APPROPRIATION ACT

In this case, the [insert Appropriation Act] permits the Commonwealth to [insert what it permits].

STEP 2: COMPARE PROPOSED ALLOCATION WITH THAT WORDING

As the proposed allocation is for [insert intended purpose],

- ***IF URGENT NEED:** it is analogous to *Wilkie*, where the High Court held that the allocation of funds to the Australian Bureau of Statistics to conduct a postal survey met the (arguably more stringent) statutory criteria of ‘unforeseen’ expenditure and ‘urgent need’. Additionally, it is noted that the High Court generally takes a broad and deferential approach to appropriations and is unlikely to scrutinise the connection so strictly such that the validity of an Appropriations Act itself could ever be successfully challenged (*AAP; Pape*). The money was likely validly appropriated.
- ***IF FOR HIGHER PAY / PRODUCTIVITY:** it is analogous to *Cormann* where it was held that the allocation of funds to the Department of Employment and Workplace Relations for advertising ‘higher pay, higher productivity workplaces’.

Additionally, it is noted that the High Court generally takes a broad and deferential approach to appropriations and is unlikely to scrutinise the connection so strictly such that the validity of an Appropriations Act itself could ever be successfully challenged (*AAP; Pape*). The money was likely validly appropriated.

***IF APPLICABLE:** CONSIDER IF EXPENDITURE CONSTITUTIONALLY PERMISSIBLE

Sections 81 and 83 of the Constitution do not give the Commonwealth the power to spend appropriated moneys (*Pape*).

- **Examples of routine governmental expenditure:**
 - Salaries and ordinary departmental administration
 - Office leases, equipment and IT services
 - Ordinary procurement of goods and services for government operations
 - Routine governmental communications and publications
 - Maintenance of existing government operations and facilities

Apart from routine governmental expenditure (i.e. expenditure needed to pay for running costs of government departments), there must be a further Act that authorises the spending of the appropriated money that is supported by a Commonwealth head of power (*Williams No 1* and 2). This is because of the principle of responsible government; government spending must be supervised by Parliament (*Williams No 1*). As no specific legislation appears to govern the contract, and the contract does not come within the category of routine governmental expenditure, the Commonwealth’s spending likely did not have lawful authority.

policy / forms part of a system for reviewing an executive detention regime which requires the judge to take into account government policy]. Thus, it is closely connected with the executive government.

Step 2: Function must be performed independently of the executive

IF likely independently: However, not to the same extent as in *Wilson*, where the judge was required to weigh and balance a range of competing policy considerations.

OR

IF likely not independently (because of bias member): On the face of the Act, it appears that the judge functions independently as a member of the [Authority / Panel]. However, the presence of the [insert bias member] e.g. Secretary, the head of the Department], might suggest that independence is less secure in practice here.

OR

IF there is a broad document to be taken into consideration BUT seems independent otherwise because of statutory criterias: On the face of the Act, the [Authority / Panel] forms part of an executive decision-making process and must take into account a broadly framed [insert document] e.g. international Declaration] and, by implication, the Act and its underlying policy objective.

Step 3: Function must not involve discretion exercised on political grounds

IF there factors give too much discretion: The function arguably involves discretion exercised on policy grounds as the [Authority / Panel] must consider the [insert factors per facts], and may consider any other matter. That is a broad policy discretion and is not confined to legal criteria or adjudicative standards. The function is therefore closely connected to executive policy and involves political or policy judgment. On this basis alone, the appointment is highly likely to be invalid.

OR

IF there are strict and normal statutory criterias: Otherwise, then what is stated above, the judge appears to perform their functions independently as a member of the [Authority / Panel] and exercises their discretion according to statutory criteria rather than on political grounds. Beyond taking government policy into account in a general sense, which is characteristic of many administrative bodies. The function appears to be one that must be exercised impartially and without political bias.

CONCLUSION

Overall, section [xx] appears [valid / invalid] on the [*Hilton/Grollo / Wilson / both*] test(s), on the basis that the [insert reasoning] e.g. judge is being required to perform a full-time administrative role for at least 12 months and possibly without consent / function involves broad policy discretion and appears to lack procedural fairness / failure to require ‘reasons’ to be provided is incompatible with the performance of a judicial function in terms of principles of procedural fairness]. The persona designata

STEP 1: DOES THE LAW BURDEN POLITICAL COMMUNICATION?

The first step is to establish whether the law burdens political communication. Political communication includes communication about government and political matters.

DIRECT BURDEN

EXAMPLES of *Direct Burden*:

- **Prohibiting Communication of Government Entity:** As per *Nationwide News*, as this provision prohibits communication of a government entity, it directly burdens political communication that is critical of a government body and its functions. The law seeks to have a deterrent effect through the significant penalty attached to non-compliance.
- **Prohibiting Protest:** This provision prohibits imposes a burden on political communication because [insert conduct in question e.g. testing vaccines on animals] is an issue of public controversy and, on the facts, the [insert State] Government is concerned that [insert group e.g. animal activists]'s presence at [insert prohibited location] will hinder the [insert facts e.g. development and production of vaccines], which form part of a government program. As the law prevents protesting about [insert facts e.g. animal testing], which is part of the government regime, namely [insert facts e.g. testing of trial vaccines on live animals], it directly burdens political communication (*Brown*).

***ADD IF: Prohibited at Specific Locations Only:** Although the law does not impose a total prohibition on communication, it restricts communication at the location where it is most likely to have impact, namely at the point where [insert description of how it will have impact at this location e.g. individuals may be deciding whether to undergo testing].

OR

INDIRECT BURDEN

EXAMPLES of *Indirect Burden*:

- **Regulating criticism of Government Policy:** As per *Coleman* and *Monis*, although this provision seeks to regulate communication more generally rather than target communication itself, prohibiting speech [context e.g. discouraging the use of xxx] could plainly occur in political contexts, such as criticism of [insert State / Cth]'s [insert type of policy e.g. transport] policy, campaigning against [insert based on facts]. As such, the law indirectly burdens political communication.
- **Regulating Something other than Communication:** As per *Levy*, although the provision seeks to regulate [access / safety / public order / use of land] rather than communication itself, preventing individuals from [entering / remaining] in [insert location] may incidentally restrict [political protests / demonstrations / advocacy activities] which could indirectly burden political communication.
- **Regulating Funding to Political Parties:** As per *Unions NSW*, *McCloy* and *Hopper*, although this provision regulates electoral funding rather than political communication itself, limiting the amount and/or sources of funds available to [political parties / candidates] may reduce their capacity to disseminate political messages to voters. Political communication commonly occurs through advertising, campaign events, publications and other forms of electoral advocacy, all of which

	- What exactly does the state law do to the Cth scheme? - Does the state law impose extra conditions / requirements or otherwise interfere with the operation of the Cth scheme? <i>If the answer to step 3 is YES, the state law is inconsistent with the Cth law</i>
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IS THE STATE LAW INCONSISTENT WITH THE CTH LAW?

Section(s) [xx] of the [insert State Act] may raise issues of inconsistency with the Commonwealth law. Three tests for inconsistency must be applied; inconsistency according to any of these tests results in the invalidity of the state Act to the extent of inconsistency.

Section [xx] of [insert State Act] [insert what State law regulates] e.g. prohibits riding a unicycle in Queensland]. The relevant Commonwealth provision(s) is/are [xx] of the [insert Cth Act]. Section [xx] [insert what State law regulates] e.g. prohibits operating a motor vehicle without a permit], while section(s) [insert what State law regulates] e.g. establishes the permit scheme]. The broader Commonwealth scheme is designed to [insert based on Cth's objective] e.g. reduce motor vehicle use and encourage alternatives, especially unicycles]. Section [xx] of the Commonwealth Act requires [insert what Cth mandates/prohibits that contradicts State law] e.g. State and Territory police officers and judges to ride unicycles when travelling in the course of their duties]. (As stated,) we will assume that both acts are valid for the purpose of this analysis.

STEP 1: APPLY SIMULTANEOUS OBEDIENCE TEST

(1) DOES THE <u>CTH LAW</u> COMMAND / FORBID ANY PARTICULAR CONDUCT AND	The Commonwealth law (does not positively require <u>ordinary people to ride unicycles</u> .) it [requires / prohibits] [insert per facts] e.g. operating a motor vehicle without a permit / to ride unicycles when travelling in the course of their duties].
(2) DOES THE <u>STATE LAW</u> COMMAND / FORBID ANY PARTICULAR CONDUCT AND	The Queensland law [requires / prohibits] [insert per facts] e.g. riding a unicycle in Queensland].
(3) IS IT POSSIBLE TO COMPLY WITH BOTH LAWS <u>SIMULTANEOUSLY</u>	A person can simultaneously obey both laws by [insert how they can obey both]. So, for <u>ordinary persons</u> , there is probably no direct inconsistency under the simultaneous obedience test. HOWEVER , there is direct conflict involving <u>State police officers and judges</u> . * REPEAT (1) for the other relevant provision then → A [insert State] police officer or judge [the action that contradicts both laws] e.g. travelling in the course of their duties] could not obey both laws. The Commonwealth law [prohibits / requires] [insert action]; the [insert State] law [requires / prohibits] it.

CONCLUSION

There [is / is no] direct inconsistency under the simultaneous obedience test as [insert reasoning on how a person ON FURTHER ANALYSIS can/still cannot comply with both laws at the same time] e.g. a