

INCONSISTENCY OF LAWS

s 109: Inconsistency of laws

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

- Step-by-Step Guide:

- Does a Cth and State law conflict?
 - If yes, Cth law takes precedence (**s 109**).
- How is the term 'law' defined?
 - A 'law' includes:
 - Act/ Statute of Parliament.
 - Subordinate/ delegated legislation (eg. regulations, statutory rules, industrial agreement made pursuant to Statute- *Ansett v Wardley*).
 - In such cases inconsistency is between Cth statute empowering subordinate legislation and relevant State law.
 - A 'law' is not:
 - Administrative orders.
 - Common law.
 - Territory rules (see **s 122** instead).
- How is 'invalidity' defined?
 - Cth law has superior authority, takes effect to exclusion of inconsistent State law.
 - State law only invalid to extent of inconsistency— ie. inconsistent provisions can be severed.
 - However, if provisions not severable entire Act deemed inoperative from date inconsistency arose (*Wenn v Attorney-General*).
 - The State law is inoperative until the Cth law is repealed (*Carter v Egg and Egg Pulp Marketing Board*).
 - State law revives if inconsistency is removed (not required to re-enact).
- Where the head of power is concurrent, the C'wealth law will override the state law if it is valid and there is an inconsistency.
- Where the head of power is exclusive (eg. currency, defense, s 52 etc), only the C'wealth may legislate (and it is immune in those areas) (*Worthing v Rowell and Muston Pty Ltd*).
- Expressions "a law of the state" and "a law of the C'wealth" are general so as to also apply to inconsistencies in:

- Industrial awards or orders.
- Other legislative instrument or regulation (*Jemena Asset Management (3) Pty Ltd v Coinvest Limited* (2011)).

Categories of Inconsistencies

- Where there is a direct or indirect inconsistency, the state law is invalid to that extent:
 - NB. Different punishments for the same crime is not enough to establish inconsistency (*McWater v Day*), but this was contradicted in *Hume v Palmer*. *McWater v Day* remains authority.
- More than one test may be applied in order to establish inconsistency and to discern whether a “real conflict” exists between a State law and a C’wealth law (*Jemena Asset Management (3) Pty Ltd v Coinvest Limited* (2011)).

Direct Inconsistency:

- There is direct inconsistency if:
 - “One law requires what the other forbids” (*Telstra Corp v Worthing*).
 - Or if both laws cannot be obeyed simultaneously.
 - Because the State law “alters, impairs or detracts” from the operation of the C’wealth law (*Victoria v Commonwealth* (1937))
 - One law takes away rights given by the other (*Mabo v Queensland; WA v Commonwealth*).

<i>Australian Mutual Provident Society v Goulden</i> (1986) 160 CLR 330
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Case summary provided in purchased notes.

- Examples:
 - *R v Licensing Court*— Liquor trading hours state referendum held on same day as Senate election. Cth law prohibited referendums to be held on same day as Senate elections.
 - Held: State law inconsistent as impossible to obey both laws.
 - *McBain v Victoria*— s 8 *Infertility Treatment Act* (Vic) prevented unmarried couple from obtaining IVF. But s 2 *Sex Discrimination Act* (Cth) prohibited such discrimination.
 - Held: Impossible for McBain to obey both, so state law invalid.

Indirect Inconsistency:

- State law is invalid if it ‘takes away a right conferred’ by the other (*Clyde Engineering v Cowburn*).
- Ie. If Cth law confers rights/ privileges/ entitlements and these are taken away by State laws, Cth law prevails

- Examples:
 - *Clyde Engineering*: NSW legislation required 44 hour working week, Cth required 48 hour working week, with pay deductions for less hours worked. Cowburn worked 44 hour week, but employer deducted pay in reliance of Cth law.
 - Held: Inconsistent. Although simultaneous obedience *possible*, State law diminished employer's right under Cth law to expect employees to work 48 hour weeks.
 - *Mabo v Queensland (no 1)*: State law purporting to extinguish traditional property rights to land was invalid because it limited/ diminished human rights under Cth *Racial Discrimination Act*.

Cover the Field (Indirect):

- 'If a competent legislature expressly or impliedly evinces its intention to cover the whole field, that is a conclusive test of inconsistency where other legislature assumes to enter to any extent upon the same field (*Clyde Engineering*).
- There is indirect inconsistency if the Cth wants to "cover the field".
 - Does it appear "from the terms, the nature or the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties"? (*Victoria v Commonwealth* (1937), referred in *Jemena Asset Management (3) Pty Ltd v Coinvest Limited* (2011)).
- Isaacs J's 3-stage test (*Clyde Engineering*):
 - 1. Identify/ characterise the 'field' the Cth law deals with;
 - What is the area/ subject matter of each of the legislative schemes?
 - Has been interpreted both broadly and narrowly in different cases.
 - Examples:
 - *O'Sullivan v Noarlunga*: What field was 'slaughtering stock for export' part of?
 - Held: Broad view: Cth established legislation regulating abattoirs, so State laws fell under Cth field.
 - *Airlines v NSW*: Narrow view- Court Held that legislation covered different sub-areas of air operations and so no inconsistency.
 - *Ansett v Wardley*: Difficult to identify field. Used both views, but narrow prevailed regarding r'ship between Cth IR law and State's equal opportunity law.
 - If overlapping fields, subject matter approach (*Wardley*).
 - Less likely to overlap if laws contain different subject matters.
 - 2. Has the State law attempted to regulate on matters in the 'field'?; and
 - 3. Was it the Cth's intention to 'cover the field' (express (*R v Credit Tribunal; Ex parte General Motors Acceptance Corporation*) or implied (*Clyde Engineering*))?.

- Take into account wording and level of detail (*Wenn v Attorney General*)
 - The breadth of the legislation (*ABC v Industrial Court of SA*).
 - Whether the subject matter is a federal or state one (*R v Lowenthal; ex parte Black*).
- If no intention, no inconsistency.

Victoria v Commonwealth (1937) 58 CLR 618 (the Kakariki case)

Case summary provided in purchased notes.

John Holland Pty Limited v Victorian Workcover Authority (2009) 239 CLR 528

Case summary provided in purchased notes.

Inconsistency may be characterised in more than one way:

- More than one test may be applied in order to establish inconsistency for the purposes of **s 109** (*Jemena Asset Management (3) Pty Ltd v Coinvest Limited (2011)*).
- Tests are for discerning whether a 'real conflict' exists between a C'wealth law and a State law.
- **s 109** does not apply to the resolution of inconsistencies between Territory laws and C'wealth laws.

Commonwealth v ACT (2013) 250 CLR 441

Case summary provided in purchased notes.