

## WEEK 10- INCONSISTENCY OF COMMONWEALTH AND STATE LAWS

1. **Does the scenario involve both a valid Cth and valid State law? (legislation or regulations)**
  2. Is it possible to comply simultaneously with both laws?
  3. Does the State law alter, impair or detract from the operation of the Cth law? (Vic v Cth)
  4. For the purposes of the 'cover the field' test, what is the 'field' of the Cth law?
  5. To determining whether the Cth legislation intended to cover a field- consider:
    - a. Legislative statements (either way)
    - b. The nature of the field
    - c. The level of detail in the Cth legislation
- IF inconsistent, the state law becomes **inoperable** to the extent of the inconsistency (s109) unless/ until the Cth law ceases to operate (WA v Cth; B&Wp 297)

### 1.1.1.1 Constitution 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.**

## 1.2 TWO KINDS OF INCONSISTENCY:

(Telstra Corp v Worthing (1997) CLR):

The court:

In Vic v Cth (The Kakariki) (1937) CLR Dixon J stated two propositions [630] -

1. 'When a State law, if valid, would alter, impair or detract from the operation of the law of the Cth Parliament, then to that extent it is invalid'.
2. 'If it appears from the terms, the nature of 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, then for a State law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Cth law and so as inconsistent'.

The second may apply where the first does not.

If the first applies, then s 109 operates even if, and without the occasion to consider whether, the second proposition applies.

(WA v Cth (Native Title Act Case) (1995))

6HCA J J:

[465] 'The effect of s 109 on a state law that is inconsistent with a law of the Cth is **not to impose an absolute invalidity**. On the contrary, the state law remains valid though it is rendered **inoperative** to the extent of the inconsistency, but only for so long as the inconsistency remains.'

(Vic v Cth (The Kakariki) (1937))

Dixon J:

[630] ‘when a **state law**, if valid, would **alter, impair or detract from the operation of a law of the Cth Parliament, then to that extent it is invalid**’

Dixon J:

[630] ‘Moreover, if it **appears 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, then for a **state law** to regulate or apply to the same matter or relation is **regarded as a detraction** from the full operation of the Cth law and so is inconsistent.’

### 1.3 TESTS OF INCONSISTENCY:

#### 1.3.1 Impossibility of Simultaneous Obedience (obvious inconsistency)

(R v Bris Licencing Court; Ex parte Daniell (1920) CLR):

State referendum on liquor trading hours was fixed by state law for the same day as a federal election.

Cth law provided that a State referendum could not be held on that day.

If it is impossible to obey both laws (logical impossibility: **one law states, you must do X the other law states you must not do X**).

#### 1.3.2 Does the state law alter, impair or detract from the federal law (possible to follow both laws but state law alters, impairs, or detracts)

(Clyde Engineering v Cowburn (1926) CLR):

[478] that two laws will be inconsistent with each other under s 109 when a State law “**takes away a right conferred**” by the Cth.

Thus a State law will be invalid if it **alters, impairs or detracts from the operation of federal law**.

(Colvin v Bradley Bros (1943) CLR):

Cth affirmed that some employers could employ women to work on machines; the state made it an offence to do so.

It was **possible to obey both** laws as nothing in the Cth legislation required the employment of females.

**The Cth law conferred a legal right, privilege or entitlement**, and the other law purports **to take away or diminish** (one law says you can do X, the other law says you cannot do X).

(Mabo v Qld (No1) (1988) CLR):

QLD legislation on Coastal Islands purported to extinguish native title; to **limit or diminish the human rights protections** which were protected by s 10(1) of the Racial Discrimination Act 1975 (Cth), which operated to invalidate provisions attempting to detract from the human rights of groups where a better standard was enjoyed by the rest of the community.

Note: similar result found in WA v Cth (Native Title Case) (1995) CLR, when the Act created rights only for ‘traditional usage’.