

If it is impossible for the person to comply with both Federal and State laws, the State law will be nullified

Test two: Alternation, impairment or detracting from Commonwealth law

Conferral of rights test ('direct inconsistency')

- Where a valid State law, would alter, impair, or detract from the operation of a law of the Commonwealth, then to that extent, it is invalid (*Clyde*)
- Must be a significant impairment

Test three: Indirect inconsistency ('covering the field')

If the Commonwealth legislation evidences an intention to expressly or impliedly regulate the field exhaustively, the State legislation will be invalidated (*Clyde Engineering v Cowburn*)

- When the Cth legislation makes it clear that it is intended to cover the field, that is, its law is intended to be the sole law on that subject matter, any intrusion by State laws on that field is a form of inconsistency

Steps

1. Identify a field that the Commonwealth is purporting to regulate
2. Determine if the Commonwealth intends expressly or impliedly to regulate that field
3. Determine if the State law enters the field that is inconsistent with the Commonwealth's intention

Determining if there is a field where the Commonwealth intends to displace a State law

- Are the Commonwealth laws detailed and elaborate?
 - If they are, it is suggested the Commonwealth laws are intended to cover the field (*O'Sullivan v Noarlunga*)
- Subject matter of the topics
 - For example, Copyright, Weights and Measures, Defence (it would be hard to conceive that the Commonwealth law would not be exhaustive regarding weights and measures)
- External Affairs and Treaty Implementation
 - If the legislation relates to a treaty, it will be seen to cover the field (*Viskauskas v Niland*)
- Whether both laws can operate concurrently
 - If both laws can operate concurrently, it is less likely that the Commonwealth will say there is an indirect inconsistency (*Shipwrecks case*)
- The Commonwealth can express an intention to cover (or not to cover) the field
 - The Commonwealth can expressly state their law excludes State/Territory legislature
 - Commonwealth can falsely manufacture an express intention to cover the law (this will still invalidate the State law)
 - The Commonwealth, however, can't state that States are prohibited from legislating on a matter full stop
 - Stated Commonwealth intentions can't operate retrospectively (*Viskauskas v Niland*)