

# MLL323 CONSTITUTIONAL LAW

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## PROBLEM SOLVING EXAM Q –

1. **Which branch of Gov. are we dealing with?**
  - Usually it will be legislation given and so parliamentary powers are relevant here.
  - State/Federal Gov.
    - State Gov have plenary (legislative) power: *Union Steamship Co.*
    - Cth restricted by what powers are given to them under Constitution – namely; majority in s 51; 52
2. **Sources of power/procedures?**
  - Powers –
    - S 1; 51 Legislature
      - S 51(i) – Trade and Commerce
      - S 51(ii) – Taxation
      - S 51(vi) – External Affairs
      - S 51(xx) – Corporations power
      - S 96 – State Grants Power
    - S 61 Executive
      - Prerogatives – **incidental** power as per s 61
      - Nationhood Power – apply test **Mason J APP Case.**
      - Statutory Powers
      - Common Law capacities.
    - S 71 Judiciary
      - Ch III
3. **Interpretation/Characterisation**
  - What is the law regarding?
  - Does it fall within the scope of one of the head of power so as to make it constitutionally valid?
  - Characterise the law – refer to Characterisation Topic for test.
4. **Limitations on Power**
  - Implied freedom of political Communication: *Lange* – as per ss 7; 24
  - Rights under the Constitution – ss 116 Religion; 117 State Discrimination; s 51(xxxi) Acquisition of Property
  - S 109 – Inconsistency
  - Intergovernmental Immunities – can the Cth/State gov. bind the other Gov?
  - S 55 – laws imposing taxation *must deal only* with the imposition of taxation.
  - RP (manner and form procedures) – see Legislative Procedures of State/Cth
    - S 128 Referendum Process (Cth)
    - S 6 *Australia Acts TEST* (State) – Vic Consti - s 18; s 85;

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## Golden Rules – (for both ultimate issue AND sub-issue)

1. State the applicable rule succinctly in my own words.
2. Give authority for the proposition.
3. **ONLY** state legal propositions which are relevant to the issue being determined.
  - a. If there are nuisances – e.g. case that has held that certain issues need to be determined in a certain way – then always STATE.

# Inconsistency and Intergovernmental Immunities – Topic 9

## S 109 – INCONSISTENCY B/W CTH AND STATE LEGISLATION

- **Are (both) laws valid law?** Must be a valid law of the Cth; and valid law of the State to operate: *Bayside Council v Telstra Corporation*.
  - Cth law only valid where it rests on a head of power – characterise the law.
  - State law will ALWAYS be valid – plenary legislative power – no need for characterisation of the law.
  - Irrelevant which Act was valid first.
- **A law for the purposes of the section** – acts of parliament; subordinate or delegated legislation, statutory rules and industrial awards: *Jemena Asset Management Ltd v Coinvest*.
- **Meaning of invalid – ‘invalid to the extent of the inconsistency’** that is – *Lamb v Cockatoo Docks & Engineering* – merely inoperative (not destroyed).
  - State law becomes inoperative when invalid – it will revive if the Cth law is repealed or otherwise disappears: *Butler v Attorney-General*

### To determine inconsistency (if inconsistent – s 109 operated to invalidate the State law) –

- **Direct Inconsistency b/w the Laws**
  1. Was the **simultaneous obedience** (of both laws) possible? (If so, this may indicate there is no inconsistency).
    - For this to operate, must know the exact terms of both pieces of legislation – unless actually given the terms – cannot be relied upon.
  2. Does the state law **alter, impair or detract** from the **rights conferred** by the Cth legislation? (If so, there is likely to be an inconsistency): *Clyde* per **Know CJ; Gavan Duffy J.**
    - Must determine the purpose/rights of each law (what is the law doing?) and then determine whether the State law detract (takes away) any rights that are conferred by the Cth law.
- **Indirect Inconsistency b/w the Laws – Covering the Field Test**

The test was developed in *Clyde* as per **Isaacs** stating that ‘where the Cth parliament evinces an intention (express or implied) to legislate exhaustively on a subject matter (or to ‘cover the field’), and a state law encroaches upon that area, the State law is said to be indirectly inconsistent to the extent of the inconsistency.’

1. **Identify/Characterise the Field or subject matter that the Cth law deals with and regulates.**
  - *O’Sullivan v Noarlunga Meat* – HELD that the Cth intended to cover the field by looking at the intention of the parliament as elucidated in the **preamble** – if no preamble exists in the legislation – must construct an implied intention. The court determines the field of regulation by looking at the ultimate objective of the laws not necessarily the method used to reach that objective.
  - *Airlines of NSW v NSW* – held that the purpose behind the Acts is entirely relevant to determine the sphere of its operation.
2. **Ascertain whether the State law attempts to regulate a field which the Cth intends to cover. If there is NO OVERLAP of the field – there is no indirect inconsistency.**
  - If the field is cast broadly in Q 1 – there is more likely to be overlap.
  - If it is narrowed – there may not be overlap.
  - Consider the subject matter – are they different?
3. **If the two laws OVERLAP, ascertain if the Cth intended to cover the field: did the Cth parliament intend its law to be the only law on the subject matter in question?**
  - a. **Express Intention** – may be expressly provided in a clause (expressly) excluding the operation of State legislation.
    - *Wenn v Attorney-General* – the HC held that it is clear that the Cth can legislate to indicate its intention to cover the field.
    - *Native Title Case* – HELD that the Cth power is – if the Cth intends to make a law, the exclusive and exhaustive law, upon a subject within its legislative power, the intention may appear from the text or the operation of the law. The text may reveal the intention either by implication or by express declaration.
    - *Work Choices Case* – HC HELD that it is within the power of the Cth to prevent the operation of separate and possibly varying state enactment dealing with the same subject as the Cth.
  - b. **Implied Intention** – the court must ascertain Parliament’s implied intention.
    - i. The Detail of the Legislative Regime – the court will infer an intention to cover the field where the Cth legislation is highly detailed and comprehensive: *O’Sullivan v Noarlunga Meat* – where the **elaborate character** decisively demonstrated the intention to cover the field – in that the terms of the regulations were extremely detailed and elaborate.
    - ii. The Subject Matter of the legislation – Uniform Approach

- Operates when the subject matter/field by its very nature requires a uniform national approach – including:
  - Currency: s 51(xii)
  - Intellectual property;
  - Weights and measures: s 51(xv); and
  - Quarantine: s 51(ix)
  - Preventing collisions at sea: *Hume v Palmer*; *Victoria v Commonwealth (1937)*;
  - Re-employing discharged military personnel: *Wenn v Attorney-General for Vic*;
  - Protecting Cth property from destruction: *R v Loewenthal*
  - Realizing international treaty obligations: *Viskauskas v Niland*.

#### INTERGOVERNMENTAL IMMUNITIES – LIMITS ON LEGISLATIVE POWER

- ✓ **STATE GOVERNMENT AND THE CTH – legislative power over the Cth**
  - The *Cigartic* principle that while the Cth could bind the State, the State could not bind the Cth (as they were given no power to do in the Constitution) was **overruled** in –
  - *Re Residential Tenancies Tribunal of NSW and Henderson*; *Ex Parte Defence Housing Authority* – HELD the majority found that the State Parliament could not legislate so as to affect the capacities and function of the Cth but they could bind the Cth in the *exercise of those capacities*.
    - **Capacities** – the nature of the executive power vested in the Crown – the State CANNOT INTERFERE – as the capacities single out the Cth for special treatment.
    - **Exercise of Capacities** – legislation (of general application) which assumes those capacities and merely seeks to regulate activities in which the Crown may choose to engage in the exercise of those capacities – STATES CAN INTERFERE (LEGISLATE ON)
- ✓ **CTH GOVERNMENT AND THE STATE – legislative power over the States**
  - *Melbourne Corporation* – HELD the Cth had the ability to bind the States in two (limited) specified circumstances –
    - a) **The Cth Gov. could not legislate to discriminate b/w the States; and**
      - Laws which apply specific limitations/prohibitions on the State e.g. tax-burden or disability on a State activity – not applicable to any other authority – only to the States
      - Single out the State specifically
    - b) **The Cth Gov. could not pass legislation that fundamentally hindered the States from carrying out their essential governmental functions.**
      - They are subject to some provision of general application, in its application to them, would so prevent or impede them from performing their governmental functions.
      - NOT discriminatory
      - Applies to the State and/or other essential State agencies – e.g. Vic Police; VicRoads
      - Cth cannot interfere with a State’s right to choose (higher level public servants) –
        - Number and identity of employees (who to hire)
        - Whom it wishes to dismiss on redundancy grounds (who to fire): *Re Aust Education Union*.
        - OR terms and conditions of employment.
        - Public servants – ministers; ministerial assistants and advisors; heads of departments; high level statutory office holders; parliamentary officers; judges.
  - *Austin v Commonwealth* – the HC HELD that the first limb of MCD (discrimination) should not have an independent existence – the effect of this case was **further clarified** in *Clarke v Commissioner of Taxation* – that the Cth CANNOT by the exercise of its legislative power, significantly impair, curtail or weaken the capacity or the actual exercise of the States of their constitutional powers and functions whether they be legislative, executive, or judicial.

**EXAM ANSWER** – As clarified by *Clarke*, under the *Melbourne Corporation* principle, as reformulated in *Austin*, the Cth may not pass laws which fundamentally impede the States from carrying out essential governmental functions (including laws that discriminate against the States). The courts have held this to mean –

- Taxation; banking: *Melbourne Corporation*
- Core machinery of government: *Clarke*;
- Employment of public servants: *Melbourne Corporation*; *Re Aust Education Union*
- Terms and conditions of employment of senior public servants: *Re Aust Education Union*

## S 109 – Resolving Inconsistency between Commonwealth and State Laws

### 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.

In the Australian Federal System, the potential for this type of conflict is high because the allocation of legislative powers between the Commonwealth Parliament and the state parliaments assumes a sharing of responsibilities – **concurrent powers** (s 51).

- There are some Cth legislative powers that are expressed to be **exclusive** – e.g. s 52; or which are practically speaking, exclusive e.g. s 51(iv); (xxix); (xxx).
- The above section only deals with conflicts between the Commonwealth and state laws; conflicts between the Commonwealth laws and laws of the self-governing territories are not dealt with by s 109 – RATHER this is termed *repugnancy*.

### MUST DETERMINE THE VALIDITY OF THE LAWS

Before the section can operate, it is necessary to demonstrate that there is a **valid** law of the Commonwealth and a **valid** law of the State in conflict: *Bayside Council v Telstra Corporation Ltd* (2004).

- An invalid law creates no rights, duties or obligations; it is said to be void from the beginning: *South Australia v Commonwealth (First Uniform Tax Case)* (1942).
- If the State law is invalid > the Commonwealth will simply operate in accordance with its terms as interpreted by the court.
- If the Commonwealth law is invalid > the state law will operate in accordance with its terms, as interpreted by the court.
- The section **has no operation** where only one law relevantly operates – *Butler v Attorney-General of Victoria* (1961) – the case concerned a putative conflict between state and federal legislation concerning the employment of ex-service personnel. In previous litigation the state and federal legislative schemes had given rise to inconsistency questions. However, by 1961 the federal legislation had been repealed –
  - **Taylor J** – ‘The Federal Act can ‘prevail’ only whilst it remains in force and invalidity of the State Act is produced only as the counterpart of the ‘supremacy’ of the Federal Act.’

Show –

1. Commonwealth law only valid where it rests on a head of power (characterisation test)
  - a. State law will ALWAYS be valid – plenary power – no need for characterisation of the law (all laws created are within the States’ legislative power)
2. Not relevant whether State Act was enacted before or after the Commonwealth Law

### WHAT IS A LAW FOR THE PURPOSE OF S 109 –

The word LAW is a reference to legislation and instruments made under the authority of legislation: *R v Foster; Ex Parte Commonwealth Steamship Owners Association* (1953).

- **Acts of Parliament; subordinate or delegated legislation such as regulations, statutory rules and industrial awards.**
  - Administrative orders made under Cth legislation **are not treated as laws** for the purposes of s 109 – and will not override State laws: *Airlines of NSW v NSW (No 1)* (1964)
  - One *unified common law* in Australia (no different common laws b/w federal and states) therefore CAN BE NO CONFLICT of common law – statutes will always be superior to common law
- *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) – ‘The expression ‘a law of the State’ and ‘a law of the Commonwealth’ in s 109 are sufficiently general for s 109 to be capable of applying to inconsistencies which involve not only a statute or provisions in a statute, but also...an industrial order or award, or other legislative instrument of regulation (e.g. delegated legislation), made under a statute.’
- *Clyde Engineering Co v Cowburn and Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) an inconsistency arose between a Commonwealth industrial award and a state law. An industrial award is a regulation made, under the authority of legislation, by a conciliation and arbitration commission

that settles the rights and duties of employers and employees in an industrial dispute. Accordingly, the High Court has said that **where a state law undermines a Commonwealth industrial award, the inconsistency arises between the state law and the Commonwealth law that authorises the industrial award.**

- Rules of court may also be classified as **laws** for the purpose of the section. In *Flaherty v Girgis (1987)*, an inconsistency arose when the appellant claimed that Supreme Court Rules governing extraterritorial service of process were inconsistent with the Service and Execution of Process Act 1901 (Cth). The court proceeded on the basis that the rules were a state 'law' for the purpose of s 109.
- A law of the Commonwealth enacted in relation to a particular territory under s 122 is also a **law** for the purpose of s 109 and can override a state law to the extent of the inconsistency: *Lamshed v Lake (1958)*.

#### THE MEANING OF 'INVALID' –

A decision that a state law is inconsistent with a Commonwealth law means that the state law is 'invalid to the extent of the inconsistency'.

- **Not however, destroyed:** *Lamb v Cockatoo Docks & Engineering Co Pty Ltd [1961]*. Instead, those parts of the state law which are inconsistent with the Commonwealth law become inoperative; other aspects of the state law will continue to operate.
  - If severance of the inconsistent provisions is not possible, the Act is deemed inoperative from the date the inconsistency arose – ab initio – from the beginning (**the entirety of the Act will be inoperative**)
- *Clyde Engineering Co v Cowburn (1926)* – the decision that the Forty-Four Hours Week Act 1925 (NSW) was inconsistent with the Conciliation and Arbitration Act 1904 (Cth) and an award made under the Act **only prevented** the state Act applying to employers and employees covered by the federal award. The Act still applied validly to other employers and employees.
- Where the state law is not drafted in such a way that its provisions can have a separate or independent operation – *Wenn v Attorney-General (Vic) (1948)* concluded that a state act which provided preference in promotion for ex-members of the armed forces was, in its application to private employers, inconsistent with a Commonwealth Act. They said that the 'burden of establishing independence' had been discharged. The state act had been intended to provide a single code on employment of ex-service personnel, applicable to all employers. The extent to which state provisions are capable of separate or independent operation will depend upon principle of severance.
- Because the state becomes **inoperative when invalid** – it will revive if the Commonwealth law is repealed or otherwise disappears: *Butler v Attorney-General (Vic) (1961)*

#### WHEN IS A LAW 'INCONSISTENT'?

Two types of inconsistency – **direct and indirect.**

1. **Direct** – involves a contradiction in the terms of the respective provisions and has been identified through the application of two tests – (in order to apply this, must actually know what the legislation says in order to compare the both)
  - a) 'The impossibility of **simultaneous obedience test**'; and
  - b) The '**inconsistent rights test.**'
2. **Indirect** – involves the idea of the Commonwealth Parliament, as the paramount legislature within the federal system, expressing its intention to cover a field or area exclusively thereby displacing from that field the operation of any state legislation – cover the field test.

#### DIRECT - Simultaneous Obedience Test

- The earliest interpretations of s 109 restricted findings of inconsistency **where it was impossible to obey both the State law and the Commonwealth law.**
  - *R v Licensing Court of Brisbane; Ex Parte Daniel (1920)* – Queensland legislation required a referendum on liquor licensing to be held on the same day as Senate elections. The Cth Electoral Act prohibited referenda on the days of the Senate elections. Both laws could not be **simultaneously obeyed** and thus the State law was held to be invalid.
  - *Australia Boot Trade Employers Federation v Whybrow (1910)* – Cth award min wage of 1 shilling per 1 ½ per hour; state legislation min wage of 1 shilling per hour – **the court found that this did**

- not amount to an inconsistency** – as the laws were able to be obeyed simultaneously by simply abiding/applying the Cth award in the country.
  - **McBain v Victoria (2000) Federal Court** – S 8 Infertility Treatment Act 1995 (Vic) compelled discrimination in fertility treatments on the basis of marriage status; S 22 of the Sex Discrimination Act 1984 (Cth) prohibited such discrimination – **was impossible for Dr McBain to obey both requirements**. The Victorian Act was found invalid for s 109 inconsistency.

**Australian Boot Trade Employees Federation v Whybrow** –

- The test was developed by Griffith, Barton and O’Connor, the architects of the **reserved powers doctrine** which read down many Commonwealth powers in order to maintain the powers of the States.
  - Thus the early narrow interpretation of s 109 reflected the early Court’s desire to preserve as much of the States’ autonomy as possible, reflecting concepts drawn from the reserved powers doctrine. As that conservative approach fell after the **Engineers case in 1920** a modification of the test for s 109 followed.
  - The test is extremely narrow – it really only catches conflicting positive command and not mere prohibitions, recommendations or authorizations.

**DIRECT - Inconsistent Rights Test**

- Developed after **Engineers**.
  - Provides that a s 109 inconsistency may arise not only where there are conflicting duties in the respective provisions but also where there is a conflict across duties, rights, liberties and powers. **This test requires close attention to the respective provisions to determine whether there is a contradiction in their terms.**
    - **Jemena Asset Management (3) Pty Ltd v Coinvest Ltd (2011)** – ‘Section 109 requires a comparison between any two laws which create rights, privileges or powers, and duties or obligations and s 109 resolves conflict if any exists, in favour of the Commonwealth.’
  - **Clyde Engineering Co v Cowburn (1926)** – Knox CJ and Gavan Duffy J By the mid 1920s, the High Court developed a more expansive approach to s 109 This came in **Clyde Engineering Co v Cowburn (1926)** where a majority of the High Court held that state legislation (above) was inconsistent with Commonwealth legislation. The state legislation provided that ordinary working hours should not exceed 44 hours a week and that any worker covered by a federal award fixing a longer working week should be paid the full award wages for working the 44 hours. The award made by the Commonwealth Court of Conciliation and Arbitration, provided that each worker covered by the award should be paid a fixed wage for a working week of 48 hours and that any worker who did not attend for the full time ‘should lose his pay for the actual time of such non-attendance.’ The judges considered that the federal award conferred a right on employers to have their employees work 48 hours a week for a full wage. **The state provision which imposed a duty on employers to apply a full wage for 44 hours a week was in contradiction to the federal award, and consequently, inconsistent for s 109.** While simultaneous obedience was possible (i.e. the worker could work 44 hours and could have his pay docked by 4 hours) the NSW Act **diminished the rights of employers** to expect a 48 hours week to be worked and the rights of employees to be paid the full rate for 48 hours. **The State law was therefore inconsistent by reason of the modification of the rights conferred by the Cth law.**
    - The test was first elucidated by Knox CJ and Gavan Duffy J – who states that two laws will be inconsistent with each other **under s 109** when one law **takes away a right conferred** by the other. **Thus – if a state law alters, impairs or detracts from the operation of a federal law the State law will be inoperative (invalid).**
    - Knox CJ, Gavan Duffy J accepted that the operation of s 109 **was not limited** to the ‘simultaneous obedience test’ of inconsistency – **the narrow test is** ‘not sufficient or even appropriate in every case. Two enactments may be inconsistent although obedience to each of them may be possible without the other. Statutes may do more than impose duties; they may, for instance, confer rights; and **one statute is inconsistent with another when it takes away a right conferred by that other even though the right to be one which might be waived or abandoned without disobeying the statute which conferred it.**’

**Jemena Asset Management (3) Pty Ltd v Coinvest Ltd (2011)** – The crucial notions of altering, impairing or detracting from the operation of a law of the Commonwealth have in common the idea that a state law conflict with a Commonwealth law if the state law undermines the Commonwealth law. Therefore, any



alteration, or impairment of, or detraction from, a commonwealth law must be significant not trivial – adopting Dixon J's statements in *Victoria v Commonwealth (Kakariki Case) (1937)* – 'When a state law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent the law is invalid.'

In applying these two **direct inconsistency tests** – ask –

1. Was **simultaneous obedience** possible? (If so, this may indicate there is no inconsistency).
2. Does the state law **alter, impair or detract** from the **rights conferred** by the Cth legislation? (if so, there is more likely to be inconsistency): *Clyde*.
  - ✓ Must determine the purpose/rights of each law (what is the law doing?) and then determine whether the State law *detracts* (take away) any rights that are conferred by the Commonwealth law.

### **INDIRECT - Covering the Field Test**

This test, developed in *Clyde* looks for **indirect inconsistency** that may not be obvious in the text or operation of the competing laws – it does not generate *actual conflict*.

- **Isaacs – developed the test** - stating that where the Cth parliament evinces an intention (express or implied) to legislate exhaustively on a subject matter (or the 'cover the field'), and a state law encroaches upon that area, the state law is said to be indirectly inconsistent to the extent of the inconsistency.
- **GENERAL RULE** – if the instance where the Commonwealth parliament enacts a law that seeks to implement a treaty, the HC will generally rule that the Cth's intention was to have that law cover the field: *University of Wollongong v Metwally*.

**Three steps –**

#### **1. Identify/Characterise the Field or subject matter, that the Cth law deals with and regulates.**

It is necessary to characterise the subject matter of the conflicting laws to ascertain what field/area they are attempting to regulate.

- *O'Sullivan v Noarlunga Meat (1945)* – the Commonwealth and State laws at issue dealt with the use of premises 'slaughtering stock for export'. The High Court majority found that both laws concerned the same field, being the regulating of slaughtering stock for export. They also found that the Cth **intended to cover the field**, so the State legislation was found to be inoperative. **The court looking to the intention of the Parliament as elucidated in the Preamble**. If no preamble exists, then the court must construct an **implied intention**. **The court determines the field of regulation by looking at the ultimate objective of the laws, not necessarily the method used to reach that subject**. **It follows that the broader the subject of the legislation – the broader the field**.
- *Airlines of NSW v NSW (1965)* – both the Commonwealth and State legislation prohibited the operation of certain commercial air operations without the appropriate license. The Commonwealth legislation was concerned primarily with matters of safety, regularity and efficiency, where the State Act was concerned with the facilitation of competition and public transport demands. The court held that there was no overlap in field. The court took a narrower view of the 'field' and looked to the **purposes behind the Acts**. The purposes were aimed at different elements of the aviation industry and therefore DID NOT OVERLAP.

LOOK TO THE PURPOSE BEHIND THE ACT AND THE SPHERE OF ITS OPERATION.

#### **2. Ascertain whether the State law attempts to regulate a field which the Cth intends to cover. If there is no overlap of the field, there is no indirect inconsistency.**

- If the Court casts the field broadly in Q1 – they are more likely to overlap.
- If they are narrowed – they may not overlap
- *Consider the subject matter – are they different?*

#### **3. If the two laws do overlap, ascertain if the Commonwealth intended to cover the field; did the Cth Parliament intend its law to be the only law on the subject matter in question?**

The Commonwealth's intention may be manifested **expressly** or **impliedly**.