

Answer Plan – Inconsistency between CMW & States

Inconsistency of laws Where there are conflicting laws between State and Commonwealth:

Section 109

“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.”

Need to consider 3 questions:

1. Are the laws valid?
 - a. Commonwealth
 - b. State
2. Is there an inconsistency?
3. What is the effect (of the inconsistency)?

Are the laws valid

In order for inconsistency to arise both laws must be considered valid. Only a valid Commonwealth law can prevail over a State law. When a State law fails because of s. 109, it is not ‘invalid’ (or treated as void ab initio) in the sense that the State Parliament lacks power to pass it. Instead it becomes ‘inoperative’. The State law can be revived if the CMW law is repealed/changed. It should also be noted that “... to the extent of the inconsistency ...” suggests that **severance** will allow consistent parts to operate.

A. CMW

In order for the Commonwealth to enact valid legislation it must be done under a constitutional head of power.

Look at both Act as a whole and provision. What is the relevant law/Act in the facts.

What is the valid head of power?

B. State

The States have plenary power, this means they can legislate on anything subject to the constitution.

Look At Act. Look at provision. What is the relevant law/Act in the facts.

Is there any inconsistency

There are 3 different ways laws between Commonwealth and States can be inconsistent:

1. Simultaneous Obedience

A law will be inconsistent when both the CMW and State law cannot be obeyed at the same time (*R v Licensing Court of Brisbane, Ex Parte Daniel (1912)*). *Mabo v Commonwealth (1988)*.

NB: In *tut Q*, could obey both at the same time, it just required that you don't give full effect to s3 (*liable* to death penalty, don't actually have to sentence/carry out capital punishment).

2. Interference in rights

A law will be deemed inconsistent if one law confers a right the other seeks to limit or interfere (there is no direct textual collision). State law is invalid if it 'alters, impairs or detracts' from the operation of a Commonwealth law *Clyde Engineering Co Ltd v Cowburn (1926)*.

[Apply facts here. What right is CMW giving/limiting. What right is State giving/limiting].

NB: Application from tutorial, CMW – grants you right not to be subject to capital punishment. State law – takes the right away, you are liable to death for heinous crime.

3. 'Cover the field test' (indirect inconsistency) *Clyde Engineering Co Ltd v Cowburn (1926)*

The laws may still be deemed indirectly inconsistent, even if not indirectly inconsistent under simultaneous obedience of interference with rights test.

"If ... a competent legislature expressly or impliedly evinces its intention to cover the whole field, that is a conclusive test of inconsistency where another legislature assumes to enter to any extent upon the same field" *Clyde Engineering Co Ltd v Cowburn (1926)*

If the CMW intends only its laws to apply then only the CMW can legislate on that matter. There are three questions to be asked to determine if the CMW intended to 'cover the field':

1. What field is addressed by the Commonwealth law?

Apply broad, but not too broad! E.g. criminal sentencing too broad, maybe more punishment by way of death.

2. Did the Commonwealth intend to cover the field?

'Where the CMW has not expressly evinced an intention to cover the field we have to draw an implication by looking at the nature of the subject matter the law is dealing with.'

[Application: In *tut* the nature of this law suggests the CMW is trying to cover the field. An international obligation needs to be implemented uniformly across the country.

- Where the external affairs power is being used it is a strong implication that the CMW intends to cover the field.
- Absolute prohibition – more likely intend to cover field
- Discretion – less likely to cover the field
- Human rights – generally *not* intended to cover the field. Intended as a minimum standard, floor base.]

3. Did the State enter that field?

Yes/No the State has/not entered the field by XXX.

What is the effect of the inconsistency?

To the extent of the inconsistency the law is inoperative (*Carter v Egg pulp marketing board (Vic) 1942*).

Conclude:

- Provide advice as to the validity of both acts
 - Apply **severability** if relevant
 - Courts will apply doctrine of severability. Read the law down to exclude the invalid part (S15a of Acts Interpretation Act 1901). The aim is to do as little as possible to preserve it.
 - Sometimes the Act will stand or fall as a whole (*Workchoices*).