

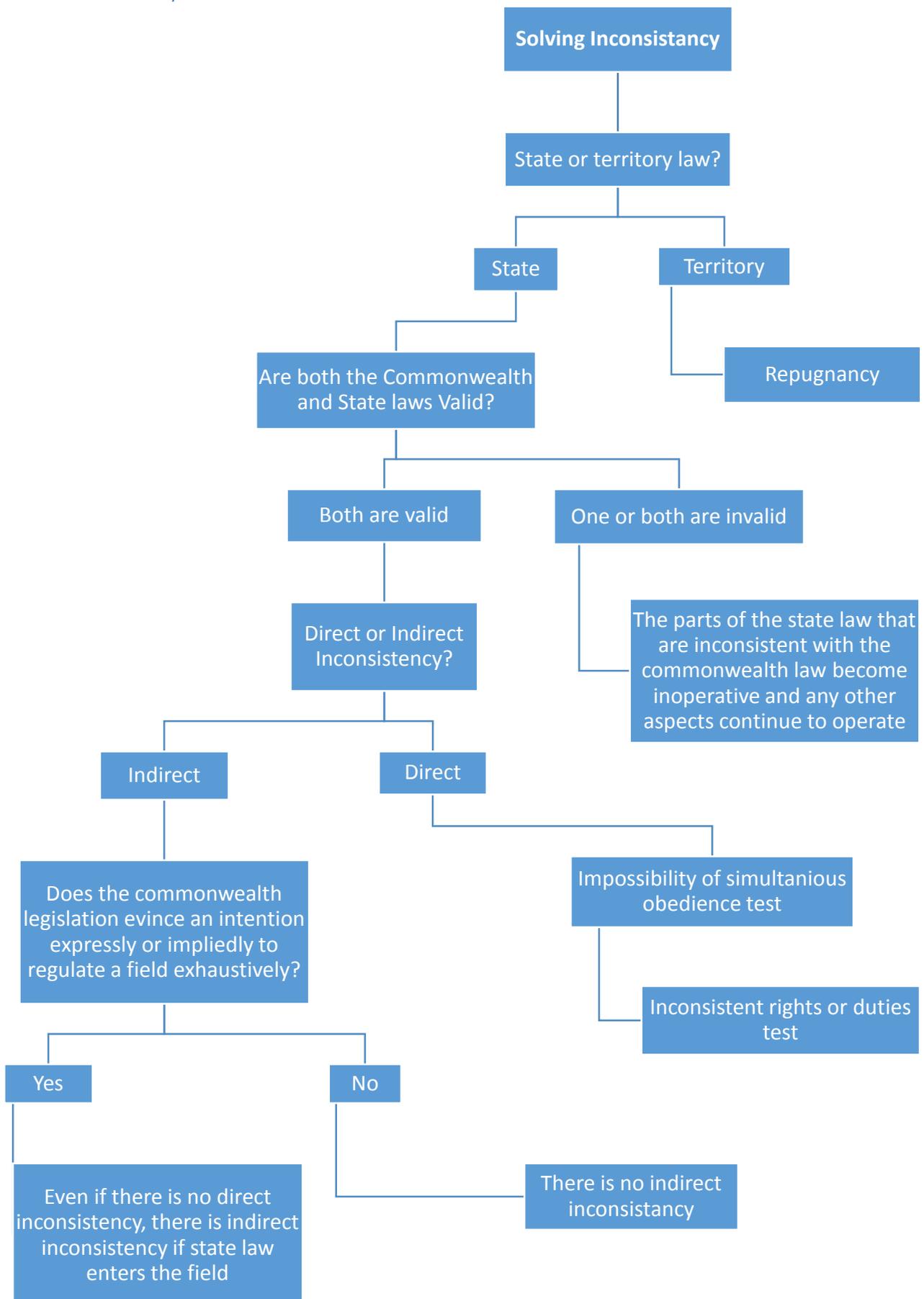
## Inconsistency & Intergovernmental Immunities

- Examination of the legal consequences of a federal system of government that contains nine largely autonomous parliaments (Inconsistency)
  - the Australian Constitution is to explicitly vest a range of legislative powers in the Commonwealth and leave the residuary to the states
  - However the great bulk of legislative powers vested in the Commonwealth can also be exercised by the states (concurrent legislative powers)
- There is a mechanism designed to alleviate problems (inconsistencies) between Commonwealth and state laws

### Commonwealth of Australia Constitution Act s. 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
- Exploration of the often complex issue of when and to what extent can Commonwealth laws bind the activities of state governments and their instrumentalities and vice versa
  - There is an old doctrine (below) however this has since been largely discarded
    - both the Commonwealth and the States were each 'sovereign' within their respective fields and, as the notion of sovereignty involved being subject to no other power, each was to be free to perform its functions and exercise its powers without interference, burden or hindrance from the other government

# Inconsistency



- In Australia, there is a federal paramountcy ('controlled dominance') by the Commonwealth
  - **Tasmanian Dam**
  - As compared to a federal balance

#### Commonwealth of Australia Constitution Act s. 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
    - The above legislation applies only to actual conflicts of laws- not potential for conflict
      - **West v Federal Commissioner of Taxation (NSW) (1937)**
      - **Charles Marshall Pty Ltd v Collins (1957)**
      - Must interpret the legislation and consider their 'field' of operation
- Direct collision is where the State law, if allowed to operate, would impose an obligation greater than that for which the federal law has provided
    - Where the legislation would qualify, impair and, in a significant respect, negate the essential legislative scheme of the commonwealth law
  - Conflicts between a commonwealth law and a territories law are called repugnancy and do not fall under the normal legislation
  - If commonwealth and state law 'overlap' (make the same legislation on the same thing) the commonwealth law applies
    - **Ex Part McLean (1930)**
    - Where the penalties are different for the same offence the commonwealth penalty also applies
    - The intentions of each legislature must be deciphered
  - Before looking at inconsistency, it must be established if both the commonwealth and state laws are valid
    - **Bayside Council v Telstra Corporation Ltd (2004)**
    - An invalid law has no rights, duties or obligations and is void in its entirety
      - **First Uniform Tax case**
    - If the state law is invalid, the commonwealth law will simply operate on accordance with its terms
    - If the commonwealth law is invalid, the state law will operate with its terms
      - **Pirrie v McFarlane (1925)**
  - What is a law? (In the context of inconsistency)
    - 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)**
      - Eg. Where there is an inconsistency between a commonwealth award and a state law, the inconsistency lies in the legislation that gives or denies the award, not the award itself
    - Rules of court may also be classified as laws in this context
      - **Flaherty v Girgis (1987)**
    - A law of the commonwealth enacted in relation to a particular territory under the constitution is also a law in this context
      - **Commonwealth of Australia Constitution Act s. 122**
      - **Lamshed v Lake (1958)**

- Administrative orders and directions are not laws in this context
  - **Airlines of New South Wales Pty Ltd v New South Wales (no. 1) (1964)**
  - They are not laws but they involve the exercise of executive power
- The common law is not law in this context
  - **Master Education Services Pty Ltd v Ketchell (2008)**
  - There is no separate federal and state common law in Australia
  - **Lange v Australian Broadcasting Corporation (1997)**
- What is Invalid?
  - When state law becomes invalid it is not destroyed- the parts of the state law that are inconsistent with the commonwealth law become inoperative and any other aspects continue to operate
    - **Lamb v Cockatoo Docks & Engineering Co Pty Ltd (1961)**
    - However if the commonwealth law is repealed or otherwise disappears the state law will revive
    - **Butler v Attorney-General (Vic) 1961**
  - When the law is drafted in such a way that its provisions cannot have separate or independent operation 'the burden of establishing independence' is discharged
    - **Wenn v Attorney-General (Vic) (1948)**
- There are three existing tests for inconsistency
  - **Dickson v the Queen (2010)**
  - The first and second tests identify 'direct inconsistency'
  - The third test identifies 'indirect inconsistency'
  - All three tests can be applied
  - Any type of inconsistency is sufficient
- Delegated legislation (eg, regulations) are
  - Awards that derive authority from enabling Act
  - Clash between Commonwealth delegated legislation and state legislation characterised as clash between enabling Act and state legislation
- State law inconsistency
  - Inconsistent state legislation is not automatically invalid, although its legal operation may be temporarily suspended to the extent of the inconsistency- it can be revived if the Commonwealth law is repealed
  - State law can continue to operate in areas where no inconsistency provided provisions can have a separate and independent operation

#### Direct Inconsistency & How to Establish it

- 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 it is invalid
  - **Victoria v The Commonwealth**
  - This is direct inconsistency
  - First and second tests (below)
  - Direct inconsistency involves the following
    - **Jemena Asset Management (3) Pty Ltd v Coinvest Limited (2011)**
    - Altering the operation of a law of the Commonwealth
    - Impairing the operation of a law of the Commonwealth
    - Detracting from the operation of a law of the Commonwealth
    - The State law undermining the Commonwealth law
- The first test for inconsistency is the impossibility of simultaneous obedience test

- Finds direct inconsistency
- Where a State law is inconsistent with a Commonwealth law to the extent that obedience to both at the same time is impossible there will be a direct inconsistency
- Two laws inconsistent only when obedience to one law automatically and inevitably involved disobedience to the other law
  - **R v Licensing Court of Brisbane; Ex Parte Daniell (1920)**
- It is now clear that there may be inconsistency where it is possible to obey both the commonwealth and the state law
  - **Viskauskas v Niland (1983)**
  - Where a state law might otherwise detract from the efficacy of a commonwealth law
  - **Clyde Engineering v Cowburn (1926) (Engineers Case)**
  - Where the commonwealth law is intended to be the only and full authority on the matter
- In and of itself this is not sufficient for the purposes of the constitution
  - **Clyde Engineering v Cowburn (1926) (Engineers Case)**

#### Commonwealth of Australia Constitution Act s. 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
- The second test is the alteration, impairment or detraction from commonwealth law test (inconsistent rights or direct inconsistency test)
    - Finds direct inconsistency
    - When a state law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth ... then to that extent it is invalid
      - **Victoria v Commonwealth ('Shipwrecks Case')**
    - Must be significant, not trivial
      - **Jemena Asset Management (3) v Coinvest (2011)**

## Engineers case

- **Facts**
  - ASE served several claims on a number of employers in a number of states
    - Including The minister for trading concerns (MTC) of WA who administered the State Implement and Engineering Works (SIEW) and the State Sawmills (SS)
  - SIEW and SS were both established and regulated by the Western Australia Government
  - ASE's claims were refused
  - ASE then applied to the Commonwealth Court of Conciliation and Arbitration for a determination of the industrial dispute under
    - **Commonwealth of Australia Constitution Act s. 51(xxxv)**
- **Issues**
  - Did the federal Parliament have the power to make laws with respect to the conciliation and arbitration in the settlement of industrial disputes?
  - Did a dispute exist between ASE and the MTC?
- **Result**
  - The court had to regard to reserved powers of the states yet nonetheless confirmed that the commonwealth could regulate the states in their capacity as employers under
    - **Commonwealth of Australia Constitution Act s. 51(xxxv)**
    - Commonwealth can enact general legislation which encompasses regulation of industrial disputes between state and its employees
  - The High court found that there was nothing in the constitution that indicated any limitation of commonwealth power under
    - **Commonwealth of Australia Constitution Act s. 51(xxxv)**
    - The states can however be protected by an overbearing commonwealth parliament by the people through representative institutions
    - Grants of legislative power to be read expansively
  - The constitution should be interpreted as per the ordinary principals of statutory declaration and not be interpreted in such a way as to have regard to implied doctrines (as listed below)
    - Interpreted in a 'natural and ordinary sense'
  - Remember that state laws are invalid to the extent of their inconsistency with federal laws
    - **Commonwealth of Australia Constitution Act s. 109**
  - Policy & 'extrinsic material' including Convention Debates irrelevant