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CONSTITUTIONAL LAW SUMMARY

LAWS 4001

WEEK 3 SUMMARY – INCONSISTENCY

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 extent of the inconsistency, be invalid.

- Note – s 109 only concerns State/Cth inconsistency, NOT Territory/Cth inconsistency - *Northern Territory v GPAO* (1999) 196 CLR 553, 580 [53] (Gleeson CJ and Gummow J); 636 [219] (Kirby J)

Part A) Laws

E.g. in exam say “For the purposes of s 109 a ‘law’ includes otherwise valid Acts of both the Commonwealth and State Parliaments [A-G v Wenn]”

VALID

There must be two **valid laws**. s 109 becomes applicable only if both the Cth and State law are otherwise constitutionally valid.

Thus, in every problem question that deals with inconsistency you will also have to consider the validity of the legislation (both State and Cth) **unless** the question tells you to assume otherwise.

E.g. if a State law is invalid (e.g. not within a power under s 51), s 109 doesn't apply.

SO you need to determine whether:

- a) The Cth law is a ‘law’ and whether it is within Cth legislative power (e.g. under what head of legislative power)
Also, does it breach any prohibitions? (e.g. s 92)
- b) The State law is a ‘law’ and whether it is within State legislative power.
I.e. ‘The State law is prima facie valid as States enjoy plenary legislative power’
Also, does it breach any prohibitions? (e.g. s 92)

LAW

Laws include:

- State and federal **statutes**: *Engineers' case* (1920) 28 CLR 129.
- **Subordinate legislation** such as regulations, statutory rules, rules of Courts and industrial awards are also laws for the purpose of s 109: *Ex parte McLean* (1930) 42 CLR 472; *O'Sullivan v Noarlunga Meats Ltd* (1954) 92 CLR 565; *Jemena Asset Management v Coinvest* (2011) 244 CLR 508
- **Administrative orders** such as navigation orders and notices to pilots have been held not to be "laws" pursuant to s 109: *Airlines of New South Wales v New South Wales (No 1)* (1964) 113 CLR 1.
- The ordinary rules of statutory construction suggest that the **common law is not** a "law" within s 109 - *Butler v A-G (Vic)* (1961) 106 CLR 20

Note – Inconsistency only occurs where the laws are in operation - *Kakariki* case

Part B) Inconsistency

For a problem question, you need to apply the three tests (impossibility of obedience, denial of rights and covering the field).

NOTE - the tests are not rigid categorisations and, in theory, the classes of inconsistency are NOT closed (so note this in answering a question!).

Before jumping into the three tests, you need to characterise the law (work out what it's doing).

E.g. is it an absolute prohibition, is it a licensing scheme (whereby an activity is prohibited without a licence), is it conferring a right

When characterising, you need to learn to distinguish between a law's operation and its consequences.

If there is ambiguity with words, this is a question of statutory interpretation (and you can look to things like the long title, the second reading speech and the context of the Act to help determine what interpretation is most likely correct).

1. Direct Inconsistency

i) Impossibility of Obedience

Where the two laws make **contradictory** provisions upon the same topic such as to make it **impossible to comply with both laws simultaneously** (note – not just difficult. It must be impossible) - *R v Licensing Court of Brisbane, ex parte Daniell* (1912) 28 CLR 23.

The test is based on logical impossibility: One law **commands** what the other law **forbids**. In other words, one law requires that you **must** (not may) do X [= commands X], while another

law requires that you **must not** do X [= forbids X] - *McBain v Victoria* (2000) 99 FCR 116.

Note - if there is some way of complying with both laws simultaneously then this test for inconsistency is not satisfied. eg if Cth law says you *may* do X and State law says you *must not* do X then you can simultaneously obey both laws.

→ R v Licensing Court of Brisbane; ex parte Daniell (1920):

The high court unanimously held that the Commonwealth and QLD laws were inconsistent (due to impossibility of obedience). Thus, the QLD law was invalid.

ii) Denial of Rights

Laws don't only impose duties (ie you must, you must not)

Laws can ALSO confer rights, immunities or privileges (ie 'you may do this', 'A must give to you', etc.). If this is the case, the impossibility of obedience won't arise BUT the denial of rights test may be applicable.

You need to ask what "right" does the Cth law give that the state law detracts from? (Work out what right the Cth law confers)

Where a State law (note - if valid) would **alter, impair or detract from** the operation of a law of the Cth in relation to the **conferral of a right, immunity or privilege** by that Cth law, there will be inconsistency - *Clyde Engineering v Cowburn* (1926) 37 CLR 466 at 478 per Knox CJ and Gavan Duffy J, Isaacs and Rich JJ agreeing (at CLR 522). H571; W324; *Colvin v Bradley Bros* (1943) 68 CLR 151 (H581; W325).

But note – even if it is the other way (ie a Cth law that detracts from a State law), you can normally flip it around so that it actually does also detract from the Cth law (example given in class was employer/employee. Even if the law gives the employee a right, it will also prohibit the employer)

- One statute is inconsistent with another when it takes away a right conferred by that other (even though the right be one which might be waived or abandoned without disobeying the statute that conferred it) - *Clyde Engineering v Cowburn* (1926) 37 CLR 466

→ Colvin v Bradley Bros Pty Ltd (1943)

Direct inconsistency: the permission and prohibition, both of which deal with the same subject matter, so therefore in direct collision.

Licensing Provisions

Licensing provisions typically don't confer absolute positive rights to engage in any conduct. What they do is prohibit certain conduct without a licence. In other words, they tell you what you CAN'T do WITHOUT a licence but they don't actually tell you what you CAN do WITH a licence.

And for the application of the denial of right test we want to know what you can do with a Commonwealth licence. We want to know what “right” is conferred by the Commonwealth law and whether the state law detracts from that “right”.

2. Indirect Inconsistency

Determined through the ‘**covering the field**’ test → Arises where the Cth has legislated in an area or “field” with the intention of covering that “field” and State legislation enters that “field” - *Clyde Engineering v Cowburn* (1926) 37 CLR 466 at 489 per Isaacs J (H571; W326)

3 Step Test:

- (i) Determining the subject matter/field regulated by the Cth (by characterisation of the legislation);
- (ii) Determining whether the State act intrudes into this field; and
- (iii) Determining whether it is possible to evince from the Cth Act an intention to ‘cover the field’

A long title may be of assistance

General Tests

- 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 the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so is inconsistent.” - *Kakariki* case (1937) 58 CLR 618 at 630 (Dixon J)
- “It depends upon the *intention of the paramount Legislature* to express by its enactment, *completely, exhaustively, or exclusively*, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute *discloses such an intention*, it is inconsistent with it for the law of a State to govern the same conduct or matter.” - *Ex parte McLean* (1930) 43 CLR 472 at 483 per Dixon J

Element 1 – The Commonwealth Law Field:

You need to determine the relevant field by **characterising both** the Cth and the state law.

- Determine by reference to: *the rights, duties, powers and privileges which it changes, regulates or abolishes.*

Can be a broad field (*O’Sullivan v Noarlunga Meat* (1954)) or a narrow field (*Airlines of NSW v NSW (No 2)* (1965))

Element 2 - State regulation:

Determining whether the State Act intrudes into the Cth field.

In some cases, the Court has held that the State law makes no attempt to regulate the field of Commonwealth law: *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237 per Stephen J

Important cases:

- *O'Sullivan v Noarlunga Meat* (1954) 92 CLR 565 → broad field
- *Airlines of NSW v NSW (No 2)* (1965) 113 CLR 54 → narrow field
- *Ansett v Wardley* (1980) 142 CLR 237 → A CRUCIAL case because it combines an examination of, and definition of, the field with the intention of Parliament Cth industrial award and a State anti-discrimination law.
A female pilot is denied a job by an airline. She sues under the state anti-discrimination law and employer claims that it is inconsistent with the Cth industrial award.
Majority (4-2) held there was no inconsistency.
The Cth award and the State law are obviously saying different things. Crucial to the determination of the case is how broadly or narrowly we draw the field of the Cth award's operation. Have a look at how the different judges approached this
Look at approaches of Stephen J and Mason J in the majority.

Element 3 – Commonwealth intention:

Once established that both the Cth and State law operate in the same field, element 3 applies.

Third requirement = Cth legislative ***intention*** to cover the field.

This is a matter of statutory interpretation.

e.g. Ask what inferences about legislative intent can be drawn from the law's words, details, subject matter and omissions of silence

Requires an assessment of whether the Commonwealth law "evinces an intention" to state "completely, exhaustively and exclusively" what shall be the law on a particular subject: *Clyde Engineering v Cowburn* (1926) 37 CLR 466 (Isaacs J); *Ex parte McLean* (1930) 42 CLR 472

I.e. inconsistency does not merely lie in the mere existence of two laws which are susceptible to simultaneous obedience - *Ex parte McLean* (1930) 42 CLR 472

Comes down to the facts of the case.

The Commonwealth's intention in its legislation may be evinced:

i) Express Intention to Cover the Field

The Cth can *express its intention* to cover the field in the legislation - *Niland*