# LAWS1116 L5: Inconsistency between federal and state laws

## Two kinds of federal conflict

Intergovernmental (immunities):

Federal laws and the State governments.

State laws and the federal government

## Relevant provisions

ss 51-2: Confer legislatives powers to the Commonwealth that fall within State power.

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.

cl 5: All laws made by the Parliament of the Commonwealth ... shall be binding ... notwithstanding anything in the laws of any State.

### Elements of s 109

#### ‘law’

* Law includes:
  + **statutes** enacted by the Commonwealth or State parliaments; and
  + **regulations** (the force of law; even though they are enacted by the Governor General acting on the advice of the governors of the day) and **subordinate legislation** enacted under the authority of a statute.
* Law does not include:
  + **administrative orders or directions**;
  + **federal industrial awards** (award = decision made by an arbitrator, privately created or identified persons that are made to make a decision between two parties without bringing the matter to court), **unless given force of law by statute**; or
  + **federal common law**.

#### ‘invalid to the extent of the inconsistency’

* Only those aspects of a State law that are inconsistent are affected.
* State laws are not ‘destroyed’, but made ‘inoperative’.
* Upon repeal of the federal law, the State law ‘revives’.
* If the federal law is subsequently found invalid, from that point on, the state law is revived.

#### ‘inconsistency’

Two kinds of ‘direct’ inconsistency:

* conflict of duties
  + State law: a duty to do X
  + Federal law: a duty not to do X
    - Not possible to obey both laws.
* modification of rights
  + Federal law: a right to do X (but no duty to do X).
  + State law: a duty not to do X.
    - Possible to obey both laws by not doing X.

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

Commonwealth industrial award requiring employees in the boot trade to be paid a minimum wage of 1 shilling, 1 ½ pence per hour. State law requiring minimum wage of 1 shilling per hour.

Is there an inconsistency? It is possible to obey both laws by paying 1 shilling 1.5 pence per hour. Therefore, there is no ‘conflict of duties’.

##### *R v Licensing Court of Brisbane; Ex parte Daniell*

Federal law prohibited the holding of a vote or referendum of votes of a State on a day appointed for voting in a federal election. State law required a State referendum to be held on the same day as a particular federal election.

Is there an inconsistency? State electoral officials could not obey both laws. There was a direct inconsistency; a conflict of duties.

##### *Colvin v Bradley Bros Pty Ltd*

NSW law prohibited the employment of women on milling machines. Federal award generally permitted the employment of women unless a Board of Reference made a declaration to the contrary (no such declaration was relevantly made).

Is there an inconsistency? There was a direct inconsistency between the Stat duty not to employ and the federal right to employ.

(The first two cases involved the question of whether there is a conflict of duties. In this one, it applies the modification of rights test.)

##### *Clyde Engineering Co Ltd v Cowburn*

A State law fixed ordinary working hours in the engineering industry at 44 hours, with overtime entitlements for additional hours. A Commonwealth industrial award fixed pay rates and overtime on the basis of a 48-hour week, and gave employers the right to deduct pay from employees working less than the full 48 hours.

Cowburn relied on the State Act to work only a 44 hour week, and claimed full award wages. His employer, relying the federal award, deducted 9s 4d from his wages.

**Held**:

Higgins and Powers JJ (dissenting at 503 and 516): It is possible to obey both laws, by paying the full award wage for 44 hours of work (conflict of rights test).

Knox CJ and Gavan Duffy J (at 478): ‘One statute is inconsistent with another when it takes away a right conferred by that other ...’

Isaacs J (at 489): ‘No doubt the employer *could* obey both, that is physically ... but surely the vital question would be: Was the second Act on its true construction **intended** to cover the whole ground and, therefore, to supersede the first?’

* ‘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.’
* ‘Where wholesale inconsistency does not occur, but the field is partly open, then it is necessary to inquire further and possible to examine and contract particular provisions. If **one enactment makes ... lawful ... that which the other makes unlawful**, the two are to that extent inconsistent.’
* In the present case, there is **inconsistency in both of the senses** I have described.’ (489-90)

Either test is sufficient:

* The minority (Higgins and Powers JJ) applied *only* the conflict of duties test, and concluded that there was no inconsistency.
* The majority (Knox CJ, Gavan Duffy and Isaacs JJ), while agreeing that there was no inconsistency on the conflict of duties test, found that there was an inconsistency on the basis of the modification of rights test (and, in the case of Isaacs

##### *Ex parte McLean*

The State and federal law:

* stipulated the same ‘rule of conduct’ (employees to fulfil their employment contracts); but
* imposed ‘different penal sanctions’.

**Is there inconsistency on the first two tests?**

Held: Notwithstanding the identical ‘rule of conduct’, there was an inconsistency.

Dixon J at 483: ‘[T]he reason is that, by prescribing the rule to be observed, the Federal statute shows an intention to cover the subject matter.’

**Covering the field**:

* What field or subject matter is dealt with or regulated by the federal law?
* Did the Commonwealth intend to cover that field? ie was the federal law intended to be *the* law (and not merely *a* law)on that subject matter?
* Did the State enter that field ie did the State law regulate some part of that subject matter.

**Identifying the federal intention**

The ‘covering the field’ test turns on the intention of the Commonwealth Parliament. That intention can be expressed or implied. Different considerations and issues are raised when dealing with express and implied intentions to cover the field.

Identifying the federal intention: **factors.**

* The nature of the subject matter
* Whether all aspects of that subject matter are dealt with
* The extent to which the federal law prescribes a detailed regime.

##### *Ansett v Wardley*

Under an agreement given force by federal law, employers were entitled to employ and dismiss airline pilots, subject to conditions stipulated in the agreement. State law prohibited discrimination on the ground of sex in employment and dismissal decisions.

Ansett argued that the federal law conferred a right in general terms to employ and dismiss pilots; the State law modified that right. The federal law intended to cover the field.

Were the laws inconsistent? Did the federal law intend to cover the field? What field did te two laws cover?

What is the subject matter of the law? Stephen J at 250:

The subject matter of the State law is the ‘social problem of discrimination based upon sex ... occurring in a variety of areas of human activity’.

The subject matter of the agreement given force by federal law is the ‘settlement of an entirely orthodox industrial dispute’ concerning relations between particular employers and employees.

These are very different fields; there is no inconsistency.

What is the intention of the federal law? Mason J at 259-62:

The question is to identify the intention of the federal law.

It is not a ‘general industry award’ which ‘exhaustively’ determines ‘the respective rights of employer and employee’.

It ‘assumes’ the right at general law of employers to dismiss employees.

It merely ‘regulates’ the procedure and means by which such general law rights are exercised.

The federal law leaves room for State law to define the general law concerning employment, such as imposing a prohibition of discrimination on the ground of sex.

##### *O’Sullivan v Noarlunga Meat Ltd*

State law and federal law provided for separate licensing or registration regimes regarding the slaughtering of stock for export.

The federal law *prohibited the export* of meat unless it had been treated and stored in a ‘registered’ established.

The State law *prohibited the use* of any premises for slaughtering stock for export without a licence.

Noarlunga was registered under the federal law, but did not have a State licence and was prosecuted under the State Act.

Were the laws inconsistent? Did the federal law ‘cover the field’?

**What is the character and intention of the federal law**? Fullagar J at 591-2:

The subject matter of both laws is the same. The federal law **imposed** ‘an extremely elaborate and detailed set of **requirements**’, as to ‘site, materials of construction’ etc. This shows an **intention** ‘to express completely and exhaustively the requirements of the law with respect to the use of premises for the slaughter of stock for export’. The **intention of the federal law is to *cover the field***with a ‘complete’ and ‘exhaustive’ set of requirements.

Taylor (**dissenting** at 602-3):

The subject matter of both laws was different (the State law was concerned with the establishment of slaughter houses, the federal law was concerned with licences for exporting meat). The federal law did not cover the field (it was only concerned to stipulate conditions for the grand of export licences, it was intended to leave open the possibility of, and not to supplant, the regulation of antecedent matters, such as the establishment of slaughter houses.

##### Express intention

**The Commonwealth can expressly declare an intention**:

to cover a particular field

* thus excluding the operation of State laws, even though the Cth does not stipulate anything within that field (*Wenn v Attorney-General (Vic)*)

*not* tocover a particular field

* thus enabling State laws to operate concurrently with the federal law (*R v Credit Tribunal; Ex parte General Motors Acceptance Corporation*)
* this does not overrule s 109, it merely removes the circumstances in which it operates.

How far can the Cth go in expressing an intention *not* to cover the field?

* Can the Commonwealth effectively express an intention to avoid a direct inconsistency?
  + No. It can only express an intention not to ‘cover the field’. It cannot avoid a direct inconsistency, since s 109 unavoidably operates on such an inconsistency, and federal laws cannot overrule the operation of s 109L *R v Loewenthal; Ex parte Blacklock*.
* If it has been held that a federal law does cover the field, can the Cth *retrospectively* express an intention never to have covered the field?

##### *Viskauskas v Niland*

George and Stella Viskauskas ran a hotel in Kempsey. Three aborigines complained they were refused service on the ground of their race. The Commissioner ofor Community Relations commenced an inwquiry under the federal *Racial Discrimination Act*. The three complainants made a separate complaint under the NSW *Anti-Discrimination Act 1977*. Viskauskas commenced proceedings seeking a declaration that the NSW Act was invalid by reason of s 109.

Was the State law inconsistent with the federal law?

* Decision:
  + The federal law covered the entire field of ‘racial discrimination’
    - It was expressed ‘with complete generality’
    - It had to operate ‘equally and without discrimination in all States – with no exceptions allowed under State laws’.
  + The State law dealt with the same subject matter in ‘substantially similar terms’, but with different consequences for breach, thus prescribing different rules of conduct.
* There was inconsistency, and the State law was ‘invalid’.

##### Legislative Response

Enactment of s 6A(1), RDA:

* This Act is not intended, and shall be deemed never to have intended, to exclude or limit the operation of a law of a State or Territory that furthers the object of the Convention and is capable of operating concurrently with this Act.’
  + Express intention to not cover the field.
* Is this effective (retrospective)?
  + It can clearly have a prospective operation.
  + But can it have a retrospective operation to revive State Acts?

##### *University of Wollongong v Metwally*

Mr Metwally was an Egyptian postgraduate student at Wollongong University. He lodged complaints under the NSW *Anti-Discrimination Act*. These complaints were made within the period of purported retrospective operation of s 6A(1) RD. He was awarded damages by the NSW Equal Opportunity Tribunal. The University challenged the finding, arguing that s 6A(1) was invalid insofar as it purported to have a retrospective operation.

###### Decision

All agree:

* s 109 means that State laws are really ‘inoperative’, not ‘invalid’ forever.
* Once an inconsistent Cth law is relevantly repealed or amended, the State law ‘revives’ – ie *prospectively*.
* Generally, the Cth can pass retrospective laws.
* Held: s 6A(1) cannot *retrospectively* revive the NSW Act*.*
* Dissent: it can.

**Gibbs CJ**

Avoiding the operation of s 109 retrospectively would:

‘vary the effect which s 109 had produced at the relevant time’.

‘deprive s 109 … of its operation’.

Cth laws cannot prevail over the Constitution.

Section 109 is of ‘great importance for the ordinary citizen, who is entitled to know which of two inconsistent laws he is required to observe’.

**Deane J**

Australia is fundamentally a ‘union of people;’. The Constitution is ‘ultimately concerned with the governance and protection of the people from whom the artificial entities called the Commonwealth and States derive their authority’.

s 109 serves the ‘important function of protecting the individual from the injustice of being subjected to the requirements of ... inconsistent laws of Commonwelath and State Parliaments on the same subject’.

The Commonwealth cannot retrospectively avoid the operation of s 109.

**Minority: Mason J**

s 109 operates on *factual* inconsistency.

* The Cth cannot enable a State law to operate when *in fact* there *is* an inconsistency.
* However, inconsistency in fact *only exists by virtue of federal laws*, and their effect *depends on the terms and intention of those laws*.
* Thus, federal laws can *remove* the *fact* of inconsistency (by expressing an *intention* not to cover the field).

What Parliament can do prospectively, it can do retrospectively.

* Parliament can therefore retrospectively remove the inconsistency upon which s 109 operates, by expressing an intention not to have covered the field.

s 109 is not a source of individual rights.

* Individual rights arise only where they are affected by the operation of s 109 in rendering a State law invalid.
* s 109 does not protect citizens from retrospective legislation.

##### A fourth test?

Does the state law ‘alter, impair or detract from’ the practical ‘operation’ of a federal law?

* *Commonwealth v Victoria* (*Kakariki case*) (1937)
* *Australian Mutual Provident Society v Goulden* (1986)
* *Telstra Corporation Ltd v Worthing* (1999)
* *APLA Ltd v Legal Services Commissioner (NSW)* (2005)
* *Dickson v The Queen* [2010]