THE TESTS FOR INCONSISTENCY UNDER SECTION 109 OF THE CONSTITUTION

By Allan Murray-Jones*

Mr Murray-Jones is concerned to re-examine the rules which have developed with respect to the interpretation of s. 109 of the Constitution. He looks first at the "cover-the-field" test enunciated by Isaacs J. and its subsequent application by the High Court. He moves on to discuss a second test propounded by Dixon J. which would strike down State laws which altered, detracted or impaired the operation of a Commonwealth law. These tests are, of themselves, insufficient to meet the difficulties and a number of subsidiary tests for direct inconsistency, some of doubtful validity, are critically scrutinized. The position seems clear when the conclusion can be reached that the Commonwealth intended to provide a single, nation-wide code to regulate a particular area. When criminal proceedings for an offence which contravenes both State and Commonwealth law are considered, complications with respect to differing offences and penalties can frequently arise and the author concludes that the difficulties still require satisfactory resolution. One suggestion is that the Courts should more clearly articulate the various factors which they take into account when reaching their decisions.

On the face of it, the courts settled the interpretation of section 109 of the Constitution nearly half a century ago.[1] It is therefore a little surprising to find one leading textbook writer (Professor Howard) saying that there are two tests for inconsistency between Commonwealth and State law under that section, and another (Professor Lane) saying that there are four such tests. A third writer (Professor Sawer) says that there are three.[2] It is also surprising to find the first named two authors putting one case, *Hume* v. *Palmer*,[3] into a category to which it does not belong.[4] The reason for these curiosities, and for some rather stilted reasoning in some recent judgments in the High Court, is, in the opinion of this writer, that the test(s) of inconsistency, and the factors that are relevant to its (their) operation, have never been adequately stated. It is hoped to make a start here on that statement,

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[1] S. 109 provides as follows: "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 basic approach to it is that set out by Dixon J. in *Ex parte McLean* (1930) 43 C.L.R. 472, discussed *infra* p. 32.

[2] Howard, *Australian Federal Constitutional Law* (2nd ed. 1972). Lane, *The Australian Federal System with United States Analogues* (1972). Sawer, *Australian Federalism in the Courts* (1976).

[3] (1926) 38 C.L.R. 441.

[4] See *infra* p. 30.

and to examine critically the best known test, which may be called "cover-the-field" inconsistency.

One preliminary comment can be made. This relates to why it is appropriate to talk of the "tests" of inconsistency. It became apparent, in the course of the development of the law in this area by the High Court, that a simple test of inconsistency, such as the impossibility of obedience to both laws, was inadequate to deal with situations that arose where the Commonwealth had legislated in what was intended to be a comprehensive manner, and a State law affected the matter in such a way that it was possible to obey both laws but, at the same time, the State law derogated from the operation of the Commonwealth law. The obvious example of this is the Commonwealth law that says that a person may do a specified thing, and reveals an intention that he shall be absolutely free to do it, together with a State law that says he may not do it. Both laws are obeyed if he refrains from doing the specified act, but the permission given in the Commonwealth law has been frustrated. At the same time, the wording of section 109 requires that where a State law makes it an offence to do what a Commonwealth law requires to be done, the latter shall prevail, although it is not intended to be comprehensive of the subject matter with which it deals. Consequently, neither a simple test nor one based on the intention of the Commonwealth law to be comprehensive is enough by itself to provide an adequate basis for the operation of section 109. It is because of this that there is more than one "test" of inconsistency.[5]

The Tests of Inconsistency: the Basic Cases

Until 1926, the generally cited (but not the only) test of inconsistency was that laid down in *Whybrow's* case.[6] This was to the effect that a State law was inconsistent with a Commonwealth one to the extent that obedience to both at the same time was impossible. This might be called a test of "simultaneous obedience", and for the reasons given

[5] It is interesting to note that the United States Supreme Court has taken a similar approach in dealing with the equivalent doctrine of law in that country. This is based on Article VI, Section 2 of the U.S. Constitution which provides that Federal law shall be the "supreme law of the land". The Court makes a distinction between invalidity of State law caused by the physical impossibility of complying with both laws (*Florida Lime & Avocado Growers, Inc.* v. *Paul* (1963) 373 U.S. 132, 142) and the invalidity that occurs when Congress explicitly or implicitly prohibits State legislation in the relevant area (*Rice* v. *Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230). A third situation that will lead to the invalidity of the State law is that which occurs when the State law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (*Hines* v. *Davidowitz* (1941) 312 U.S. 52, 67). The first of these categories is similar to the concept of direct inconsistency in the Australian doctrine, the second and third together would represent the cover the field approach (the third being taken in by saying that the legislative intention was comprehensive and effective to avoid situations in which a State law could stand as an obstacle to it).

[6] *Australian Boot Trade Employees Federation* v. *Whybrow & Co.* (1910) 10 C.L.R. 266.

above it was not, in itself, sufficient for the purposes of section 109.

In that year the High Court decided the case of *Clyde Engineering Co. Ltd* v. *Cowburn*.[7] The Court was there concerned with a Commonwealth law (for the purposes of section 109 an Award made by an arbitrator or other tribunal pursuant to an Act of Parliament is a "law") that provided for the payment of wages and certain related benefits to various workers. The wages and overtime allowances were calculated on the basis that a normal working week consisted of 48 hours. A State Act, that purported to apply to the same workers, made these calculations on the basis of a 44 hour week. In the circumstances, an employer could have obeyed both laws by paying overtime for all hours worked in excess of 44, as there was no prohibition of this in the Commonwealth law. However, the State law was held to be invalid.

Isaacs J., using the now classic formula for the first time in a decision of the High Court, said that in determining whether there is an inconsistency between two laws, the vital question was:

> 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 an 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.[8]

His Honour also dealt with the situation that arose when such wholesale inconsistency did not occur and said that it was then necessary to inquire further and compare particular provisions. He said:

> If one enactment makes or acts upon as lawful that which the other makes as unlawful, or if one enactment makes unlawful that which the other makes or acts upon as lawful, the two are to that extent inconsistent.[9]

In his view the laws under examination in this case were inconsistent in both of these "senses".

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[7] (1926) 37 C.L.R. 466.

[8] *Id.* 489. His Honour said that he and Griffiths C.J. had taken this view in *Whybrow's case* (n. 6). His own judgment in that case might be interpreted in this way (330), as may that of Barton J. (299). It is, however, a bit strained to regard the judgment of Griffiths C.J. in this light. Certainly, the phrase "cover the field" had been used in Australia by the time *Whybrow* was decided. In *The Constitution of the Commonwealth of Australia*, 2nd edition (1909) Sir W. Harrison Moore noted that a Commonwealth law "may well be intended . . . [to] . . . be exhaustive of regulation on that subject. In such a case, the whole field of legislation is covered" (409). The term was probably derived from United States law. It was certainly known there: *Hines* v. *Davidowitz* (1941) 331 U.S. 52, 67. See also the reference to a law which "covers the whole subject matter" in *Norris* v. *Crocker* (1851) 13 Howard 429, 438 which is found at 54 U.S. 429, 438. In *Federated Sawmill Employees of Australia* v. *James Moore & Son Pty Ltd* (1909) 8 C.L.R. 465, 535, 536, Isaacs J. referred to the "field" in which laws met.

[9] *Id.* 490.

The difficulty in determining just what the distinction is between these two formulations was shown in the detailed examination of the two laws by his Honour. He did not, in practice, distinguish between them; he simply proceeded to an analysis of what the legislation revealed as the intention of the Commonwealth law-maker. This intention was, essentially, to create both a maximum and minimum normal working week. There was nothing in his Honour's judgment to show the way in which the two "senses" differed. If there is such a difference, it must relate solely to the "width" of the coverage of the Commonwealth law, which is, as shown below, a very unsatisfactory basis for distinction. Moreover, these two "senses", taken together, are not comprehensive. An example of this would be a situation where a Commonwealth law, which is not intended to be comprehensive and only relates to a very specific point, contains a specific provision overriding a State law as to the appropriate penalty for a particular act or omission. Such a law could not be said to "cover the whole field", but would not make unlawful what the State law made lawful (or vice versa).[10] The two are nevertheless clearly inconsistent.

The second of the two "senses" put forward by Isaacs J. is not significantly different to the "simultaneous obedience" test set out in *Whybrow's* case. The joint judgment of Knox C.J. and Gavan Duffy J. was also consistent with the view that this test was still an available test of inconsistency. However, their Honours, although agreeing that this test was still available,[11] defined the alternative test in a way that was somewhat different to the formulation of Isaacs J. They said:

> Two enactments may be inconsistent although obedience to each of them may be possible without disobeying 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 be one which might be waived or abandoned without disobeying the statute which conferred it.[12]

This test is significantly different to the first "sense" defined by Isaacs J. and, it is submitted, inferior to it in that it does not recognize that the inconsistency can only flow from the intention of the paramount legislature that the right conferred is one that cannot be taken away by the inferior legislature. There must always be an examination of the Commonwealth law to see what its intention is: is the right to be subject or not to be subject to the provisions of State law?

The next case that falls for examination is *Hume* v. *Palmer*,[13] one in

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[10] Or at least not without so straining the words of that concept as to make it meaningless. In theory, the tribunal sentencing a person guilty of the offence could only obey one law.

[11] (1926) 37 C.L.R. 466, 478.

[12] *Ibid.*

[13] (1926) 38 C.L.R. 441.

what is now a fairly long line of High Court decisions that have dealt with State and Commonwealth laws which both purport to punish the same behaviour, but which provide for different maximum penalties. In many of them, there are different provisions for jurisdiction and other differences. As will be seen, this is an area that has led to some confusion.[14]

The facts in *Hume* v. *Palmer* were as follows. The Navigation (Collision) Regulations, made under the Navigation Act 1912 (Cth), laid down certain rules for avoiding collisions at sea. The State of New South Wales also had provisions for that purpose. These were in nearly identical terms, the differences relating solely to the punishment to be inflicted in cases where the rules were not obeyed. In particular, the amounts of the available fines were different (greater under the Commonwealth provision), the necessary *mens rea* differed (the Commonwealth punished non-wilful defaults whilst the State did not) and different courts had jurisdiction to deal with alleged offences (the Commonwealth law required, in some circumstances, a trial on indictment). Palmer was prosecuted under the provisions of the State Act and fined. His appeal ultimately reached the High Court, where it was not disputed that the provisions of the Commonwealth law applied to what he had done.

Starke J., with whom Gavan Duffy J. agreed, was of the view that the Commonwealth law provided for "a uniform whole" code of sea rules which would be "disturbed or deranged" if the State Act provided for a different sanction where these were breached. In his Honour's view the laws were inconsistent.[15] Higgins J., pursuing an approach to section 109 in which, by this time, he was alone, found that there was no inconsistency.[16] Isaacs J. held that the two laws were inconsistent in at least four ways. The first of these was based on what was clearly a cover the field type test.[17] The remaining three related to the specific differences referred to above. In referring to these it can safely be assumed that his Honour took the view that there was some sort of direct inconsistency between the two laws, although he did not say this specifically and unfortunately (for present purposes) did not develop an argument to show why this should be so. Such differences would not, it is submitted, themselves be enough to lead to inconsistency under the second "sense" of inconsistency defined by Isaacs J. himself in *Cowburn's* case. Differences in penalty are not really capable of being analysed in terms of one law making lawful what the other made

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[14] See *infra* pp. 47-51.

[15] (1926) 38 C.L.R. 441, 462.

[16] *Id.* 457-460. In effect, his Honour was only prepared to accept the *Whybrow* test. He pursued that view in a number of cases. See Howard *op. cit.* 34, n. 61.

[17] *Id.* 450-451.

unlawful.[18] It is therefore not possible to state the test of direct inconsistency that his Honour used to conclude that the laws were inconsistent. The remaining member of the Court, Knox C.J., agreed with the reasons given by both Starke J. and Isaacs J.

Of the judges who found that the laws were inconsistent, all four found, in effect, that the Commonwealth law covered the field whilst only two were also of the view that there was a direct inconsistency. Professor Lane, who refers to the case as one of direct inconsistency,[19] and Professor Howard, who uses the case as a demonstration of his "direct inconsistency of detail" test, would both seem to have misunderstood what was said in it.[20]

The final early case to be considered is perhaps the best known of all of the decisions dealing with section 109, *Ex parte McLean*.[21] In that case McLean, a shearer, was convicted of an offence of neglecting to fulfil a contract with his employer. Such conduct was penalised by the Masters and Servants Act 1902 (N.S.W.). The particulars of the neglect included causing injury to sheep, failing to inform his employer of such injury and leaving his employment without permission. The contract of employment was, however, governed by an award made under the Conciliation and Arbitration Act 1904 (Cth). On the transfer of the matter from the Supreme Court of New South Wales, the High Court unanimously held that the State Act was inconsistent with the provisions of the Commonwealth one that related to breaches of awards.

Isaacs C.J. and Starke J., dealing with the provisions of the award, said:

> When those provisions are examined, it is seen that they deal completely with the area of industrial relations covered by them. The intention is clear that the requirements of a contract, its form and its obligations, and the consequences of its breach, shall be governed by the Commonwealth law. If that is so, it necessarily follows that any alteration of the Commonwealth provisions of adjustment by State law, whatever be the scope or purpose of that law, must be inconsistent with the enactment of the Federal law.[22]

They held that the State law was invalid on this ground.

Dixon J. noted that there could be inconsistency between two laws even when the rules of conduct prescribed by them were identical, at least where the penalties were diverse. His Honour referred to *Hume* v.

[18] Howard *op. cit.* 36.

[19] Lane *op. cit.* 709. Professor Lane, possibly recognising this problem with his view, says that there was a "patent inconsistency" of law and accuses the judges who rely on the cover the field ground with "subtilizing" or being guity of "mere display".

[20] Howard *op. cit.* 39-41. Howard's view is examined in more detail *infra* pp. 37-38.

[21] (1930) 43 C.L.R. 472.

[22] *Id.* 479.

Palmer, and said that the reason for inconsistency in such cases was that the "Federal statute shows an intention to cover the subject matter and provide what the law upon it shall be". He went on to say:

> If it appeared that the Federal law was intended to be supplementary to or cumulative upon State law, then no inconsistency would be exhibited in imposing the same duties or in inflicting different penalties. The inconsistency does not lie in the mere existence of two laws that are susceptible of simultaneous obedience. It depends on 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.[23]

However, his Honour held that there was no inconsistency of this type in the instant case, as his view was that the laws operated in different fields; one dealt with the breach of industrial awards and the other with the performance of contracts of service. He did find an inconsistency between the laws, based on the following considerations:

> If a Federal statute forbids a particular act or omission and means to state what shall be the law upon that specific matter, any State law which dealt with the same act or omission would become inoperative, and it would probably be of no importance whether each legislature was directing its attention to the same general topic or had dealt with the process of legislating upon two entirely different processes.[24]

As both of the laws required performance of the same contract of service, and provided sanctions for its breach, the State Act was invalid.

The fourth member of the Court, Rich J., stated that he agreed with Dixon J. However, a close reading of his judgment suggests that his Honour was concentrating on the fact that the Commonwealth Act conferred upon the Commonwealth tribunal the power to determine the exclusive rights and duties of the parties to an industrial dispute and that the State law interfered with that jurisdiction.[25] This approach is closer to an application of the cover the field test than to the second of the two tests propounded by Dixon J. It may be, therefore, that the majority of the Court based their decision on the cover the field ground, notwithstanding the fact that Dixon J. expressly held that it did not apply. His statement of the cover the field test does, despite this possibility, remain the basic statement of it.

Apart from the exposition of the cover the field test of inconsistency, *Ex parte McLean* remains interesting for the discussion by Dixon J. of

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[23] *Id.* 483. The first sentence of this passage may suggest that to preserve a State law it is necessary to positively show that the Federal law exhibited the given intention. Of course, the burden is on those attempting to show that the State law is invalid: *Tasmanian Steamers Pty Ltd* v. *Lang* (1938) 60 C.L.R. 111, 128.

[24] *Id.* 485.

[25] *Ibid.* 481-485.

a second test of inconsistency. In subsequent cases his Honour restated the test as one that struck down State laws that would "alter, detract or impair from the operation of a law of the Commonwealth",[26] but the content of the test does not appear to have been regarded as varied.[27] It is not, however, clear whether Dixon J. intended that this test should serve to replace the "simultaneous obedience" test of direct inconsistency. On the assumption that he did have this intention, and that is certainly the view Professor Howard has of his judgment,[28] two observations can be made. The first of these is that it is difficult to perceive the difference between this test and the cover the field test. The language used in the quotations set out above suggests two possible ways of distinguishing the tests. One would be based on the field covered by the State law—the cover the field test only applying if the two laws operated in the same field, the other where the fields are different but "impinge" upon one another at the edges. It is difficult to accept that the field dealt with in the State law could make any difference to the interpretation of the Commonwealth law, particularly as Dixon J., in stating the cover the field test, did not refer to the operation of the State law as being a factor in determining whether the Commonwealth law covered the field. The other possible basis for distinction, and this is the more likely one, is that it depends on the width of coverage of the Commonwealth law. But how does one discover the difference between a Commonwealth law that covers the field and one that merely intends to state the law on a specific matter? For example, what is the significant difference between the law in *Hume* v. *Palmer* and that discussed in *Ex parte McLean?* One suspects that, realistically, it is not possible to devise adequate criteria to distinguish between these situations. The other comment is that the two tests of Dixon J., taken together, do not take in all the situations that can lead to inconsistency. An illustration of this is a Commonwealth law which provides that it is not to exclude the operation of State law, but obedience to which would require disobedience to a State law. This would not seem to give rise to inconsistency on either of the tests of Dixon J., as there would be no intention to cover the field or state what the law on a particular subject matter shall be, yet common sense (and some recent decisions of the High Court)[29] compel the conclusion that there is an inconsistency. It is this common concentration on the implied (or, occasionally, express) intention of the Commonwealth Parliament, together with the practical difficulties of distinguishing between them, that suggests that these two tests are neither different nor comprehensive. The fact that his Honour found it necessary to

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[26] *Victoria* v. *The Commonwealth* (1937) 58 C.L.R. 618, 630 and *Stock Motor Ploughs Ltd* v. *Forsyth* (1932) 48 C.L.R. 128, 136.

[27] Lane *op. cit.* 714 regards it as a different test.

[28] Howard *op. cit.* 39.

[29] See *Infra* pp. 39-40.

articulate a second test illustrates another point: that the use of the word "field' in the cover the field test is very imprecise. To Dixon J. the area dealt with by the award in *Ex parte McLean* was not wide enough to cover a field; to the other members of the Court, it was.

The law on inconsistency has not altered significantly since *Ex parte McLean* and can be summarized as follows. The basic test of inconsistency is the cover the field test, and the statement of this by Dixon J. appears to be well accepted. It is recognized that this test cannot stand alone, and there are a number of statements of subsidiary tests. No one of these has been universally accepted, and some of them are open to serious objection. It is intended to now deal with each proposed subsidiary test in a little more detail, before returning to a discussion of the cover the field test as it has been developed since the decisions dealt with above.

The Subsidiary Tests

(1) *Simultaneous obedience*

Perhaps the clearest test of inconsistency imaginable is that which occurs when it is impossible to simultaneously obey the two laws under consideration. In a number of cases, some of them very recent, the existence of this test has been referred to, sometimes on the basis that it is the only alternative to the cover the field test.[30]

(2) *"Repugnance"*

A test that equated "inconsistency" with "repugnance" within the meaning of the Colonial Laws Validity Act was used in at least one case.[31] It was not pursued, and subsequently doubt was cast on whether the two words were identical.[32] This test has not been used in recent years.

(3) *What one makes lawful, the other makes unlawful*

In *R.* v. *Licensing Court of Brisbane; ex parte Daniell*[33] a State law that required the holding of a local referendum on the granting of a liquor licence was held to be inconsistent with a Commonwealth law that provided that no State matter would be voted on on the same day

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[30] *Robinson* v. *Western Australian Museum* (1977) 16 A.L.R. 623, 648-649 *per* Gibbs J., *Swift Australian Co. Pty Ltd* v. *Boyd Parkinson* (1962) 108 C.L.R. 189, 207 *per* Kitto J. But see *A. Raptis & Son* v. *State of South Australia* (1977) 15 A.L.R. 223, 232.

[31] *Attorney-General for Queensland* v. *Attorney-General for the Commonwealth* (1915) 20 C.L.R. 148, 168. It is interesting to note that Isaacs J. used the cover the field test in a case dealing with this statute before the decision in *Clyde Engineering* v. *Cowburn*. See *Union Steamship Co. of N.Z. Ltd* v. *The Commonwealth* (1925) 36 C.L.R. 130, 149. Also see Zelling, "Inconsistency between Commonwealth and State Law" (1948) 22 A.L.J. 45.

[32] *Ffrost* v. *Stevenson* (1937) 58 C.L.R. 528, 572 *per* Dixon J.

[33] (1920) 28 C.L.R. 23. Reference could also be made to the second test set out by Isaacs J. in *Clyde Engineering* v. *Cowburn*, *supra* p. 27.

as voting was to take place for the Senate as the first made lawful what the other made unlawful. This has not been pursued as a separate test of inconsistency. That case can also be analysed (with difficulty) in terms of the simultaneous obedience test, which is how it is treated by Professor Howard,[34] or treated as a case in which the Commonwealth law covered the field of voting that could take place on the same day as a Senate election.

(4) *Commonwealth permits, State prohibits*

Professor Lane says that inconsistency occurs when the Commonwealth permits something or confers a right and a State law prohibits that thing or takes away that right.[35] Professor Sawer also mentions this as a ground of inconsistency but notes that it tends to merge with direct inconsistency and cover the field inconsistency.[36] In support of the view that this is a separate test of inconsistency Lane lists three cases, which bear a closer examination. Apart from these, support could be found in the joint judgment of Knox C.J. and Gavan Duffy J. in *Cowburn's* case in the passage set out above.

The first case referred to by Lane is that of *Colvin* v. *Bradley Brothers Pty Ltd.*[37] In that case an order made pursuant to a New South Wales Act prohibited the employment of females at a certain machine; a Commonwealth award permitted females to do such work subject to a declaration by a Board of Reference (which had not been made). The High Court struck down the State order. Parts of the judgments of Latham C.J.[38] and Williams J.[39] are capable of bearing the interpretation that the existence of a permission in one law and a prohibition in another is a distinct ground for the inconsistency of these laws. However, Starke J. found that there was a direct inconsistency[40] and the judgment of Williams J. ultimately rested on a view that the Commonwealth law covered the field.[41] The other two members of the Court[42] simply agreed with the decision.

O'Sullivan v. *Noarlunga Meat Limited*,[43] one of the best known authorities in this area, is the next case cited by Lane. The laws considered both dealt with the slaughtering of animals for meat: Commonwealth regulations forbad the export of meat which had been treated other than in accordance with the regulations and a South Australian Act imposed a different set of regulations on all slaughtering.

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[34] Howard *op. cit.* 35.
[35] Lane *op. cit.* 709.
[36] Sawer *op. cit.* 139.
[37] (1943) 68 C.L.R. 151.
[38] *Id.* 160.
[39] *Id.* 163.
[40] *Id.* 160-161.
[41] *Id.* 164.
[42] Rich and McTiernan JJ.
[43] (1955) 92 C.L.R. 565.

The Court divided evenly on the question of the validity of the State law and it was struck down on the casting vote of the Chief Justice. The case is interesting for the detailed analysis of the relevant laws by Fullagar J. (for the statutory majority) and McTiernan and Taylor JJ. This may have resulted, at least in part, from the fact that the case is one of the few in which there has been a significant division in the Court on the question of inconsistency.

The dissenters in *O'Sullivan* v. *Noarlunga Meat Ltd* centred their examination on whether the Commonwealth law covered the field, and there is nothing in their judgments to support Lane's view. Moreover, Fullagar J. expressly found that the State law was invalid on that ground.[44] However, his Honour also found that the Commonwealth law gave a permission which the State law took away and relied on that as a separate ground of inconsistency.[45] Further support for such a test of inconsistency can also be found in the words used by the Privy Council in determining the appeal in this case, although it is important to note that their Lordships set out the cover the field test as if it were the sole test of inconsistency.[46] Indeed, the opinion of the Privy Council appears to illustrate the relationship of the cover the field test to the test proposed by Professor Lane. It is that the latter is an indicium of the former—the fact that the Commonwealth law confers a right on someone leads to an inference that the right shall not be interfered with and that the Commonwealth law has covered the field. This view would be consistent with the treatment of *O'Sullivan* v. *Noarlunga Meat Ltd* in *Swift Australia Co. Pty Ltd* v. *Boyd Parkinson*[47] and by Gibbs J. in the recent decision of *A. Raptis & Son* v. *State of South Australia*.[48]

The third case referred to by Lane is *Williams* v. *Hursey*,[49] where a trade union, registered under the Conciliation and Arbitration Act 1904 (Cth), raised certain political levies as authorised by its registered rules but in contravention of a Tasmanian Act. In a judgment that did not include a lengthy analysis of the law, Fullagar J., who delivered the decision of the Court, held that the Commonwealth law covered the field as to what the union could do and, as its registered rules permitted it to raise levies, the State Act was inoperative insofar as it purported to prevent it from doing so. However, he also referred, in passing, to the fact that the State Act was forbidding something that the Common-

[44] *Id.* 592.
[45] *Ibid.*
[46] (1956) 95 C.L.R. 177. Their Lordships agreed with the judgment of Fullagar J. in general terms, at 185. However, at 182 they quote the test propounded by Dixon J. in *Ex parte McLean* as the test of inconsistency.
[47] (1962) 108 C.L.R. 189.
[48] (1977) 15 A.L.R. 223.
[49] (1959) 103 C.L.R. 30.

wealth Act permitted, and treated this as a separate ground of inconsistency.[50]

These cases do present something which is at least a prima facie case for treating the confers/denies combination as a separate head of inconsistency. The problem that arises is that implicit in this is a statement about the intention of the Commonwealth law-maker. Obviously the intention could be to confer a right subject to State law, just as it could be to confer the right notwithstanding anything contained in a State law. The simple fact that the State law forbids something that the Commonwealth law permits is not, in itself, enough to invalidate the State law. In *Airlines of N.S.W. Pty Ltd* v. *New South Wales (No. 2)*,[51] the relevant Commonwealth law prohibited specified persons from flying aircraft on certain routes and permitted others (including the plaintiff) to do so. A State Act provided for State licences to be a requirement to fly on routes within the State. The appellant, who did not have a State licence to fly on certain routes permitted to him by the Commonwealth, challenged the State law. The State law was upheld as it was decided that the Commonwealth did not have power to exhaustively regulate intra-State flights. A Commonwealth permission to fly on the route was necessary, but was subject to a further permission by the State.[52] The Commonwealth permission was therefore not comprehensive. An example of a case in which the Commonwealth

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[50] *Id.* 68. Professor Lane regards this as "one of our extraordinary High Court decisions" and criticises it because he says the "permission" of the Commonwealth would have been "contentless" without the analysis of social history conducted by the Court, and because the Commonwealth Parliament itself would have no power to impose political levies on unions. The first of these criticisms ignores the cover the field ground for decision. It is possible to confer power on a union to do things notwithstanding State law to the contrary, and the analogy drawn by Fullagar J. between this law and those creating the Commonwealth Bank and the Australian Broadcasting Commission is valuable. The second criticism appears to be a reference to some form of crude characterisation. It is fairly clear that a provision in a law that is a law with respect to a subject matter with respect to which the Commonwealth does have power to legislate will not be invalid simply because it seeks to achieve a policy that the Commonwealth could not legislate directly for. For example, the Commonwealth can, pursuant to its power to legislate for matters with respect to overseas trade, require that environmental matters be taken into account in deciding whether to grant an export permit, although there would be no power to legislate to directly regulate the environment: *Murphyores Incorporated Pty Ltd* v. *The Commonwealth* (1976) 136 C.L.R. 1. The same approach can be taken to the decision in *Hursey* v. *Williams.*

[51] (1963) 113 C.L.R. 54.

[52] *Id.* 147 (*per* Menzies J.), 156 (*per* Windeyer J.), 130 (*per* Taylor J.), 120-122 (*per* Kitto J.), 109 (*per* McTiernan J.), 99-100 (*per* Barwick C.J. dissenting). Lane, *op. cit.* 712, says that there was no inconsistency because the permission and the prohibition operated on different grounds (the one because of safety, the other because of public need). But how does the motive of the N.S.W. government affect the matter if there was a Commonwealth permission and a State prohibition of the same activity, and permission/prohibition is a distinct ground for inconsistency? The essential point is usually the intention of the paramount legislature. In this case the matter turned on the lack of power of that legislature.

could have covered the field was the recent one of *Palmdale-AGCI Ltd* v. *Workers' Compensation Commission of N.S.W.*,[53] in which Mason J., who delivered the judgment of the Court, said that a State law could impose conditions in the licence of an insurer which were the "converse" of the conditions imposed in a licence under a Commonwealth law.[54] These cases illustrate the proposition made above about the importance of the implied intention of the Commonwealth law-maker. It is submitted that the proposition put above about the relationship of Professor Lane's proposed test and the cover the field test (that the former is an indicia of the latter) is also demonstrated by them, although it must be accepted that this is not the view that Fullagar J. would have taken.

(5) *Commonwealth confers or imposes; State modifies*

Professor Lane is of the view that a situation in which the "Commonwealth confers or imposes and a State modifies" creates a separate ground of inconsistency.[55] This is said to differ from the "Commonwealth permits" ground set out above in that the State law modifies rather than prohibits the proposed activity. In putting this forward as a separate ground of inconsistency, Lane[56] quotes Dixon J. in *Victoria* v. *The Commonwealth* where his Honour says that State laws are inconsistent with Commonwealth ones where they "alter, impair or detract from the operation" of the latter.[57] Now, it is difficult to agree that Dixon J. was doing anything more in that passage than restating the second test he set out in *Ex parte McLean*. In any event, Lane recognises that most of the examples of this form of inconsistency can be recast in terms of the "Commonwealth permits" test. It is submitted that this is not a separate test at all, although its use does emphasise some of the very difficult questions that arise as to the extent to which the Commonwealth has to operate within a legal framework which is the responsibility of the States and how this can affect the question of inconsistency of laws.[58]

(6) *Inconsistency of detail*

Professor Howard regards a test based on the inconsistency of the laws when considered in detail as the test of direct inconsistency which supplements the cover the field test.[59] He derives the test from what was said by Dixon J. in *Ex parte McLean*. In effect, an inconsistency of detail will arise where both a State and a Commonwealth law operate in the same "context" and produce different results, and can only apply

[53] (1977) 17 A.L.R. 1.

[54] *Id.* 7.

[55] Lane *op. cit.* 714.

[56] *Ibid.*

[57] (1937) 58 C.L.R. 618, 630.

[58] This shows through very clearly in the judgment of Bray C.J. in the case of *The Queen* v. *Industrial Court of South Australia; Ex parte the Australian Broadcasting Commission* (1976) 13 S.A.S.R. 460, 466 ff.

[59] Howard *op. cit.* 39-44.

if there is no legislative intention to cover the field. Howard[60] says that there was an inconsistency of this type in *Hume* v. *Palmer.*

Three criticisms can be made of this proposed test. The first is that, for it and the cover the field test to be exhaustive when taken together, the word "context" has to be understood very broadly. After all, Commonwealth and State laws that apparently deal with different subject matters can lead to situations in which obedience to one implies disobedience to the other. If it is accepted that the cover the field test does not apply, then "context" has to be used to relate the two if they are to be inconsistent under Howard's test. Once the word is understood in a broad way, a question must arise about the usefulness of the test. The second is that, as it does not appear that Howard would dispute that the intention of the Commonwealth Parliament is important in an examination of whether there is an inconsistency of detail, this test is not significantly different in practice to the cover the field test. The practical process in applying this test would be to first examine the Commonwealth law to see if it evinced an intention to cover the field and, if it did not, then examining it to see whether there was an intention to supplant the State law anyway. This leads into the third criticism: that the proposed test does not say anything useful about what constitutes "inconsistency". To take an example drawn from a decided case,[61] consider a Commonwealth law that deals with the enforcement of the obligations contained in bills of exchange and which is affected by a State law imposing a moratorium on certain debts, including those arising from bills. It can be accepted that the laws operate in the same "context", and it is clear that some debts enforceable under the Commonwealth law standing by itself will not be enforceable if the State law is valid. Is there an inconsistency? The test proposed by Professor Howard does not tell us.[62]

A brief comment may also be made about the treatment of *Hume* v. *Palmer* by Howard. He regards it as an example of "inconsistency in detail". The examination of this (above) showed that the majority of the Court found that there was a cover the field inconsistency.[63] Moreover, there is nothing in the judgment of Isaacs J., who found a direct inconsistency, to suggest that the fact that the two laws operated in the same "context" was a decisive factor in his conclusion that they were inconsistent. Finally, the judgment from which Howard purports to draw his test, that of Dixon J. in *Ex parte McLean,* specifically refers to *Hume* v. *Palmer* as an example of cover the field inconsistency.[64]

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[60] *Id.* 39-40.

[61] *Stock Motor Ploughs Ltd* v. *Forsyth* (1932) 48 C.L.R. 128.

[62] In fact, the case was dealt with as one of possible cover the field inconsistency and it was held by Gavan Duffy C.J. and Starke, Evatt and McTiernan JJ. (Dixon J. dissenting) that the Commonwealth law did not cover the field.

[63] See *supra* p. 30.

[64] (1930) 43 C.L.R. 472, 483.

The effect of the forgoing is, it is submitted, that there is little authority to support the proposed test. In any event, it does not appear to be an improvement on other tests mentioned above.

(7) *Direct inconsistency*

Not infrequently, reference is made to "direct inconsistency" without any attempt to state what it is.[65] This appears to have two possible meanings. The first is that of being a shorthand way of referring to some specific test of inconsistency. The second is to treat "direct inconsistency" as a general reference to the test or tests of inconsistency that exist and are in addition to the cover the field test. The expression is used in this article in the second way. Its use in the first way is, at least, unhelpful, and can lead to confusion.

Such confusion can be seen in the judgment of Barwick C.J. in the case of *Blackly* v. *Devondale Cream (Vic.) Pty Ltd.*[66] In that case the Court was concerned with a State law that provided for a higher minimum wage for certain workers than an applicable Commonwealth one did. Barwick C.J. held that there was a direct inconsistency because the State law imposed "an obligation greater than that which the federal law has provided should be the amount which the employer should be bound by law to pay".[67] Implied in this, but not stated expressly (and perhaps not even recognized), is that the intention of the Federal legislature was to state just what the legal minimum wage should be. If the intention was otherwise, it might have been possible that the two laws should stand together. The use of the term "direct inconsistency" obscured the need to make that logical step. It was explicitly made by the other members of the Court who had regard to the intention of the paramount legislature and found that the Commonwealth law covered the field.[68]

An examination of some recent cases is suggestive of what the High Court presently understands by the term "direct inconsistency". One of these is *R.* v. *Loewenthal; Ex parte Blacklock*[69] in which the Court had to deal with section 11 of the Crimes Act 1914 (Cth), which provides that a person may be prosecuted and convicted under either a law of the Commonwealth or one of a State where an act or omission is an

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[65] Recent examples include *Re Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 14 A.L.R. 257, 271 *per* Mason J.; *Australian Broadcasting Commission* v. *Industrial Court of South Australia* (1977) 15 A.L.R. 609, 617 *per* Stephen J.; *Palmdale-AGCI Ltd* v. *Workers' Compensation Commission of N.S.W.* (1977) 17 A.L.R. 1, 7 *per* Mason J.; and *Miller* v. *Miller* (1978) 22 A.L.R. 119, 127 *per* Jacobs J. In the last named case Barwick C.J. refers to "textual collision" which is apparently the same thing as direct inconsistency (p. 123).

[66] (1967) 117 C.L.R. 253.

[67] *Id.* 258.

[68] See, *e.g.* the judgment of Kitto J., *id.* 262-263.

[69] (1974) 4 A.L.R. 293.

offence against both laws, but not so as to be punished twice for the same offence. It was possible that such a position arose in the instant case although, for reasons examined in more detail below,[70] the Court held that the Commonwealth provision covered the field. Mason J. said that the provision in the Crimes Act did not apply in circumstances in which the Commonwealth law covered the field, or where there was a direct inconsistency (in fact, to no cases where section 109 applied).[71] His Honour examined a similar provision when he delivered the judgment of the Court in *Re Credit Tribunal; Ex parte General Motors Acceptance Corporation Australia.*[72] He held that the section could have no application where there was a direct inconsistency but that provisions of this kind could be effective to avoid the cover the field type of inconsistency by making it clear that the Commonwealth law was not intended "to be exhaustive or exclusive".[73] This latter statement does appear to represent something of a change of position, in that in the first case his Honour said that such provisions did not apply when there was a question of whether the Commonwealth law covered the field. More important in terms of the present discussion, however, is the fact that in the latter case he treated direct inconsistency as something that did not depend on parliamentary intention, in contradistinction to the other form of inconsistency, cover the field inconsistency, that does. This impression is confirmed by another passage in this case in which his Honour speaks of direct inconsistency in terms of "contradiction or impossibility of [simultaneous] performance".[74]

(8) *Conclusions on the tests*

It is apparent that there are a number of tests for direct inconsistency which are intended to operate in addition to the cover the field test. None of these has been universally accepted, although it now appears to be agreed that direct inconsistency does not depend on parliamentary intention. This, of course, has implications for the cover the field test, in that it now has to be understood that this test encompasses all cases of inconsistency that are dependent on an implied or express intention to be exhaustive of the law on a subject matter. This may be achieved by a generous reading of the concept of a "field", which could extend to very small areas of regulation. If the cover the field test is understood in such an expansive way, it may be that cases of inconsistency that are not covered by it can be analysed in terms of only one of the tests set out above, possibly the simultaneous obedience test.[75]

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[70] At p. 49 *infra.*

[71] (1974) 4 A.L.R. 293, 300.

[72] (1977) 14 A.L.R. 257.

[73] *Id.* 270.

[74] *Id.* 271.

[75] *Cf.* Barwick C.J. in *Miller* v. *Miller* [1978] 22 A.L.R. 119, 123 who says that there are two bases of inconsistency: cover the field and "textual collision".

The Cover the Field Test: Criticisms

The most frequently quoted statement of the cover the field test is that set out by Dixon J. in *Ex parte McLean.*[76] As applied, it appears to have largely subsumed the subsidiary test set out by his Honour in that case. Indeed, the case is frequently referred to as an example of the application of the test, without differentiating between the different approaches taken in it. As a result, provisions with quite narrow scopes have been held to cover the field. The test, however, has not been without its critics.

It was first assailed by Evatt J. In one case his Honour said of the expression "cover the field" that:

> This is a very ambiguous phrase, because subject matters of legislation bear little resemblance to geographical areas. It is no more than a *cliché* for expressing the fact that, by reason of the subject matter dealt with, and the method of dealing with it, and the nature and multiplicity of the regulations prescribed, the Federal authority has adopted a plan or scheme which will be hindered and obstructed if any additional regulations whatever are prescribed upon the subject by any other authority. . . .[77]

In *Victoria* v. *The Commonwealth,* his Honour said that "any analogy between legislation with its infinite complexities and varieties and the picture of a two-dimensional field seems to me to be of little assistance".[78]

Whilst the arguments used by his Honour in relation to the relationship between a field and the subject matter of legislation seem to be in the nature of judicial point-scoring, it is true that the cover the field test is simply a shorthand way of referring to the other matters with which he deals. Moreover, one suspects that the use of the ritual formula quite often obscures the relevance that these matters have in determining whether there is any inconsistency. In fact, it is not easy to discover any serious attempt by the High Court to examine the factors that have led it to a conclusion one way or the other. It is not altogether unfair to say that, on occasions, incantation of the formula is used to disguise arguments based on allegation rather than reasoning. This criticism does not deny the difficulties that would face a person who wished to devise a test that would define more precisely what is now dealt with as cover the field inconsistency.[79] A practical illustration of the intellectual hollow that the use of the phrase "cover the field" without a more detailed examination of the relevant factors can lead into is given below.[80]

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[76] (1930) 43 C.L.R. 472, 483. *Supra* p. 31.

[77] *Stock Motor Ploughs Ltd* v. *Forsyth* (1932) 48 C.L.R. 128, 147.

[78] (1937) 58 C.L.R. 618, 634.

[79] This is pointed out by Tammelo, "The Tests of Inconsistency Between Commonwealth and State Laws" (1957) 30 A.L.J. 496, 501.

[80] In the discussion of the "criminal cases", *infra* pp. 47-52.

Other legitimate criticisms have been made of this test. The Court has never really elaborated what it means when it refers to the "field", and the same comment can be made about some of the other words used in the Dixonian formulation.[81] A detailed examination of the authorities assists in the definition of these concepts, but does not make them entirely clear. There are also problems associated with the use of characterisation in these cases.[82] All of these criticisms have some merit. However, the cover the field test is now firmly entrenched in our constitutional law. It has had the cardinal virtue of attracting attention to the fact that a State law can defeat the purpose of a Commonwealth one (deliberately or accidently), without being directly inconsistent with it. With this in mind, it is now desired to turn to a more detailed examination of the factors that influence the decision of whether a Commonwealth law does or does not cover the field.

The Cover the Field Test: Factors

(a) *Express intention*

There are a number of cases in which the effect of an express provision in a Commonwealth law to the effect that the law is to be regarded as comprehensive are discussed. One such case was *Wenn* v. *Attorney-General (Victoria).*[83] The High Court there accepted that such provisions were a valid way of showing the intention of the Commonwealth Parliament and held that the relevant State law was inoperative.[84] Provisions of this nature may not, however, always be upheld. In other cases there is discussion of the possibility of these being "aimed" at the States and attempting to exclude the operation of valid State laws.[85] In practice, this may not be an important qualification.

More recently, there has been some discussion of provisions that attempt to preserve relevant State laws and indicate that the Commonwealth Parliament does not intend its law to cover the field. In *Re Credit Tribunal; Ex parte General Motors Acceptance Corporation, Australia*,[86] the High Court had to consider section 75 of the Trade

[81] Tammelo *op. cit.* 501, says that the "crucial norms" of this test "are not of a nature to render the matters tested by them immediately self evident". Lane makes a similar criticism (Lane *op. cit.* 715).

[82] Pp. 47-52, discussing criminal cases.

[83] (1948) 77 C.L.R. 84.

[84] *Id.* 109 (*per* Latham C.J.), 119 (*per* Dixon J.). For a more recent example see *Australian-International Insurance Ltd* v. *Workers' Compensation Commission of N.S.W.* (1971) 125 C.L.R. 470.

[85] *West* v. *Commissioner of Taxation (N.S.W.)* (1936) 56 C.L.R. 657, 684 *per* Evatt J. (who was very critical of what he called "manufactured inconsistency"); *Insurance Commission* v. *Associated Dominions Assurance Society Pty Ltd* (1953) 89 C.L.R. 78, 85 *per* Fullagar J.; *Wenn* v. *Attorney-General (Vic.)* (1948) 77 C.L.R. 84, 120 *per* Dixon J.; and the cases collected by Mason J. in the *G.M.A.C.* case, (1977) 14 A.L.R. 257, 269. See also *Australian Coastal Shipping Commission* v. *O'Reilly* (1962) 107 C.L.R. 46.

[86] (1977) 14 A.L.R. 257.

Practices Act 1974 (Cth) which provided, in part, that certain provisions of the Act were "not intended to exclude or limit the concurrent operation of any law of a State or Territory". A question arose whether certain conditions implied into contracts by the Act (in sections to which section 75 applied) were consistent with different conditions implied into the same contracts by a South Australian law. The Court held that there was no inconsistency under section 109 of the Constitution and that provisions of the nature of section 75 of the Act were a constitutionally valid way of avoiding inconsistency between State and Commonwealth law "by making it clear that the [Commonwealth] law is not intended to be exhaustive or exclusive".[87] Therefore the fact that the two laws implied different (but not directly conflicting) conditions into the same contracts did not lead to the invalidity of the State Act. A similar problem arose in the case of *Palmdale AGCI Ltd* v. *Workers' Compensation Commission of New South Wales*.[88] Section 100 of the Insurance Acts 1973 (Cth) stated that the intention of the Parliament was that the Acts should not exclude the operation of a State law requiring specified types of contracts of insurance to be made with specified persons. Licences to carry on the business of insurance were given to the appellant pursuant to the Acts. Despite this, the respondent refused the appellant's application made under the Workers' Compensation Act 1926 (N.S.W.) to carry on business as a workers' compensation insurer. The High Court held that the respondent was entitled to do this under the State Act, which was a valid law. Section 100 of the Commonwealth Acts preserved the State law, notwithstanding the detailed provisions in the Acts which may normally have led to the conclusion that they were intended to cover the field.

These decisions are obviously sensible. If the cover the field test depends on the intention of the paramount legislature, an express statement of that intention is the best way to discover what it is. As has been pointed out above, an express statement of intention will not affect the situation where there is a direct inconsistency.

It is interesting to note in passing the argument in the *G.M.A.C.* case that the State Act purported to cover the field and, as it could not do so because of the entry of the Commonwealth into the field, that it was therefore invalid. Mason J. agreed that if this were the case, the State law would be invalid insofar as it attempted to exclude the Commonwealth law. The remainder of the State Act could be dealt with under the standard tests of inconsistency.[89]

(b) *Subject matter of the law*

Some subject matters will require only one set of regulations to deal

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[87] *Id.* 270.

[88] (1977) 17 A.L.R. 1.

[89] (1977) 14 A.L.R. 257, 270.

adequately with them. Others will lend themselves to regulation by several bodies. The result of this is that the subject matter of a Commonwealth law is a relevant factor in determining whether it covers the field. This was confirmed by Evatt J. in *Victoria* v. *The Commonwealth* where his Honour stated that laws dealing with subjects such as bankruptcy, patents and trademarks "permit only one system of law and one system of administration".[90] Much the same sort of thing was said by Starke J. in the same case in relation to collisions at sea.[91] Apart from the matters mentioned by their Honours, it is clear that industrial relations is a field that has been regarded as usually admitting only one system of regulation.[92] Others are listed by Professor Lane, although there must be some doubt whether his inclusion of overseas and interstate trade is useful.[93]

Some decisions justify a conclusion that a Commonwealth law covers the field on the basis that it is clear that the Commonwealth was laying down a common rule throughout Australia. This may reflect the language used in the Commonwealth law being considered, but it may also be an observation based on a belief that the subject matter of the law is such as to require a common rule. The use of the term "common rule" may therefore indicate that the Court is having regard to the subject matter of the Commonwealth law in reaching its decision as to whether the field is covered.[94]

(c) *The legislative method*

The way in which the Commonwealth law deals with the subject matter is a relevant factor in assessing whether it covers the field. An

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[90] (1937) 58 C.L.R. 618, 638.

[91] *Id.* 628. But this example is not as obvious as those given by Evatt J.

[92] Obvious examples of this are *Clyde Engineering Co. Ltd* v. *Cowburn* (1926) 37 C.L.R. 466 and *Blackley* v. *Devondale Cream (Vic.) Pty Ltd* (1967) 117 C.L.R. 253.

[93] Lane *op. cit.* 718. The lack of usefulness of this example flows from the fact that trading activities attract a great deal of regulation by State Governments. Commonwealth laws relating to interstate and overseas trade are perforce made in the context of these laws. State laws that operated on interstate and overseas trade because of its overseas or interstate character are more likely to be invalid where there is a relevant Commonwealth law. In the latter case (regulation because of the interstate nature of the trade) the laws may well infringe section 92 of the Constitution.

It is interesting to note that the United States Supreme Court recognises a similar factor in considering whether a Federal law supersedes a State one. In *Rice* v. *Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230 the Court said that an "Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws of the same subject." The case there quoted (*Hines* v. *Davidowitz* (1941) 312 U.S. 52) dealt with a federal law said to touch upon international relations, which was held to be an area that attracted this doctrine.

[94] In *R.* v. *Loewenthal; Ex parte Blacklock* (1974) 4 A.L.R. 293, Menzies J. (who referred to a "common rule" at 296) appears to have used it in the latter sense.

example of this, discussed in more detail above,[95] is that a Commonwealth permission or licence will frequently be held to put the recipient of the permit or licence beyond the scope of State regulation. A recent illustration of this is the case of *A. Raptis & Son* v. *State of South Australia*,[96] where a Commonwealth law prohibited fishing in certain waters without a Commonwealth licence. The Court was able to infer that licencees had a right to fish in those waters which could not be taken away by a State law. A similar approach was taken by Jacobs J. in *Robinson* v. *Western Australian Museum*. His Honour held that a Commonwealth Act which he held gave rights in the disputed property to certain persons was inconsistent with a State Act which gave what he saw as different rights.[97] A different view was taken by Gibbs and Mason JJ. in that case. Their Honours were both of the view that the Commonwealth law did not itself create any rights, and it was open to the State law to deal with the rights to the disputed property.[98]

Another method of dealing with an area of law that appears to attract the conclusion that the field has been covered is that of laying down a procedure for determining rights under a law. In *Australian Broadcasting Commission* v. *Industrial Court of South Australia*[99] the High Court had to consider section 43 of the Broadcasting and Television Act 1942 (Cth), and in particular sub-section 6 thereof, which provided that the terms and conditions of employment of officers and temporary employees of the Commission were to be as determined by the Commission. A South Australian law conferred upon the Industrial Court of South Australia power to hear and determine questions relating to the dismissal of staff. In doing so it could reinstate any dismissed member of staff. The High Court held that the two laws were inconsistent, as the Commonwealth law covered the field. In doing so it emphasised that the Commonwealth law conferred power on the Australian Broadcasting Commission to determine the terms and conditions of employment. Inferentially, it had the sole power to do so.[1]

(d) *Nature and multiplicity of regulations*

Generally, the more detailed the regulatory scheme provided for in the Commonwealth law, the more likely it is that the field is covered. The best example of this is *O'Sullivan* v. *Noarlunga Meat Ltd*[2] in which all of the judgments consider the scope of the various provisions at

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[95] *Supra* p. 37, where the "Commonwealth confers" technique was discussed.

[96] (1976) 15 A.L.R. 223.

[97] (1978) 16 A.L.R. 623, 672.

[98] *Id.* 649 (*per* Gibbs J.) and 668-669 (*per* Mason J.).

[99] (1977) 15 A.L.R. 609.

[1] Again, there is a similarity here with United States law. "The object sought to be obtained by the federal law and the character of the obligations imposed by it may reveal" a federal purpose to exclude State law: *Rice* v. *Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230.

[2] (1954) 92 C.L.R. 565.

great length. A recent example is the *Palmdale-AGCI* case,[3] in which the general nature of the Commonwealth permission can be contrasted with the more detailed provisions of the State Act.[4]

(e) *The subject matter of the State law*

Analytically, there is no reason why the subject matter of the State law should affect whether the Commonwealth law evinces an intention to cover the field. However, one suspects that this may be a factor that would influence a court in making a decision, although it might not be expressly stated. In particular, a court may be able to see the sort of matters dealt with by a State law, which could assist in determining whether a Commonwealth law is comprehensive. The State law might contain matters not dealt with in the Commonwealth one which, if they are matters that the Court feels a comprehensive law should cover, might suggest that the Commonwealth law was not comprehensive. A State law may also influence the Court by showing clearly what State law it may be striking down—the Court may wish to preserve State laws dealing with, say, health and may read down a Commonwealth law to achieve this result.[5]

Cover the field: characterisation

One specific problem that has been seen with the cover the field test is whether, and to what extent, it involves "characterisation" of the Commonwealth law. In *Colvin* v. *Bradley Bros. Pty Ltd*, Latham C.J. said that "[C]lassification of statutes according to their true nature is, in my opinion, a matter that is irrelevant to any application of s. 109".[6] He gave as an example, among other things, that a State Stamp Act may be inconsistent with both the Commonwealth Audit Act and a Commonwealth Act relating to the acquisition of property.[7]

On the face of it, this is a very difficult proposition to justify. In applying the cover the field test it is necessary to determine at some stage just what the field that is covered is. This looks very much like classification. As a result of this sort of problem, his Honour's proposition has been somewhat criticised. In *O'Sulllivan* v. *Noarlunga Meat Ltd*[8]

[3] *Palmdale-AGCI Ltd* v. *Workers' Compensation Commission of N.S.W.* (1977) 17 A.L.R. 1.

[4] Yet again there is a parallel in United States law. In *Rice* v. *Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230, the Supreme Court said that the "scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it".

[5] *Cf. Palmdale-AGCI Ltd* v. *Workers' Compensation Commission of N.S.W.* (1977) 17 A.L.R. 1, 7.

[6] (1943) 68 C.L.R. 151, 159. In *Palmdale-AGCI* (1977) 17 A.L.R. 1, 7 Mason J. said, "even apart from the operation which s. 100(b) attributes to Part III . . . the State law . . . stands outside the scope of . . . the Commonwealth statute because it does not attempt to deal with obligations of that kind or occupy the relevant field."

[7] *Ibid.*

[8] (1954) 92 C.L.R. 565, 593.

Fullagar J. referred to it with what might be described as a disapproving grunt. Professor Howard, who is of the opinion that Latham C.J.'s reference to classification meant "ascertainment of legislative intention by inspection of the terms of the statute" which is the same as "characterisation", says that the statement is too wide as this process of characterisation within the meaning he ascribes to it is involved in determining what field a law covers.[9]

In part, this dispute is confused by semantic complications. "Characterisation" is a word used in constitutional law to describe the process that is sometimes used to determine whether a law is a valid one: can the law be characterised as one "with respect to" one of the enumerated heads of power? It is unlikely that this is what his Honour had in mind.[9a] Moreover, in some respects his Honour is clearly right. Classification is not relevant when one is talking about the tests of direct inconsistency, nor is classification of the State law relevant to whether the Commonwealth law covers the field.[10] However, it is submitted that the cover the field test in its standard form necessarily involves some classification of the Commonwealth law and then an investigation of whether the State law intrudes into the class of subject matters which may be exclusively dealt with. Of course, this procedure seems a bit long drawn out in cases where the two laws obviously conflict, but that may simply mean that the process of classification which occurs is not specifically set out step by step.

The Criminal Cases: An Application of the Tests of Inconsistency

It is now intended to deal briefly with the situation that arises when a State and a Commonwealth law penalise the same conduct and to use this as an example of some of the problems that are encountered in applying the tests for inconsistency of laws, and particularly the cover the field test.

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[9] Howard *op. cit.* 44.

[9a] In the second Noarlunga Case (*O'Sullivan* v. *Noarlunga Meat Ltd* (1955-1956) 94 C.L.R. 367), the following passage in the joint judgment of Dixon C.J. and Williams, Webb and Fullagar JJ., at 373-374 clarifies the use of the word "characterization":

> The difference of opinion among the judges [in the first Noarlunga Case] was probably traceable rather to the necessity of what may be called "characterizing" the regulations than to any want of unanimity as to the scope and operation of the principle, or rule. But of course, when minds experience a difficulty in agreeing about subsuming an objective thing under a category, it is never certain how far the difficulty is occasioned by varying appreciations of the category and how far by varying apprehensions of the characteristics possessed by the thing.

[10] The example he gave could support the view that he was only referring to classification of State laws, as the one State law could be inconsistent with two separate Commonwealth ones which could not be regarded as having the same character. Sawer, *op. cit.* 140 says that "inconsistency can exist irrespective of the categories to which legislation may belong from the point of view of the power distribution of the Commonwealth and the States".

It is not immediately apparent that the fact that two provisions that prohibit the same course of conduct are inconsistent, whether or not different penalties are provided. Any criminal lawyer would easily be able to conjure up examples of two or more State laws that punish the same act or omission. Such situations give rise to the problem of deciding under which provision any prosecution should be commenced, and, if more than one is commenced, the problem of deciding whether a conviction or acquittal for one affects the other. There is no obvious reason why changing the situation from one in which two State laws are applicable to one in which a State law and a Commonwealth one both apply should change the nature of the legal problems encountered. Indeed, various provisions in Commonwealth statutes envisage such situations, and provide, in effect, that a person can be prosecuted under either provision, but not both.[11] The fact that the discretion to prosecute lies in different authorities, one Commonwealth and one State, should not lead to inconsistency; in *Victoria* v. *The Commonwealth*[12] the fact that that such different authorities both had power to order the removal of wrecked ships did not lead to an inconsistency.

The problem of the two laws that both punished the same conduct but provided for different penalties was not really discussed in the High Court until the decision in *Hume* v. *Palmer*.[13] Prior to this, the State courts had taken the view that the existence of a Commonwealth provision punishing the same conduct as a State provision would not affect prosecutions under the latter.[13a] *Hume* v. *Palmer*, discussed above, clearly showed that it was possible that the Commonwealth law could cover the field, and in that case the State law would be invalid. Dixon J. discussed this problem in *Ex parte McLean*[14] and came to a conclusion that can, perhaps, be best summarised as follows. A State law is invalid if a Commonwealth law applicable to the same conduct shows an intention to be exclusive of offences in the area in which it operates. His Honour also discussed, without deciding the question, whether offences prescribed by State law operating without reference to the subject matter of the Commonwealth law could be punished under the State law where an offence had also been committed under the Commonwealth law. He gave the example of a State law which forbad the unlawful and malicious wounding of an animal operating with a Commonwealth award forbidding the injury of sheep by shearers when shearing.[15]

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[11] Including s. 11 of the Crimes Act 1914 (Cth) and s. 30(2) of the Acts Interpretation Act 1901 (Cth).

[12] (1937) 58 C.L.R. 618.

[13] (1926) 38 C.L.R. 441.

[13a] *Cf. R.* v. *McDonald* (1906) 8 W.A.L.R. 149.

[14] (1930) 43 C.L.R. 472.

[15] *Id.* 486. In fact he was prepared to assume that in such a case there was no inconsistency.

Recent High Court and other decisions throw some more light on the problem. In *R.* v. *Loewenthal; Ex parte Blacklock*[16] the applicant was indicted in the District Court of Queensland on a charge of wilfully and unlawfully destroying the property of a Commonwealth authority. It was apparent that the charge was laid pursuant to the Queensland Criminal Code, although this was not contained in the charge itself. The applicant sought prohibition on the ground that the code was inconsistent with section 29 of the Crimes Act 1914 (Cth), which dealt with wilful and unlawful damage to the property of the Commonwealth or a public authority under the Commonwealth. The case was decided on the ground that the indictment in its terms was sufficient to apply to offences under either provision.[17] Only two of the justices delivered judgments that dealt in detail with the question of inconsistency. Menzies J. came to the conclusion that section 29 should be regarded as exhaustive of the matters with which it dealt. The only reason given to support this conclusion was that the Commonwealth law operated throughout Australia and provided a common rule.[18] The other judgment on this point was delivered by Mason J. who said:

> It is not to be supposed that the Commonwealth law, when it formulated the relevant rule of conduct in relation to Commonwealth property and that of its public authorities, proceeded on the footing that other and different rules of conduct might be enacted in relation to such property. . . .[19]

Neither Menzies J. nor Mason J. went into any real analysis of what factors led to the conclusion that the Commonwealth law covered the field, illustrating a point made above. The most obvious comment that can be made on the merits of the decision (and it is not intended to go into this in any detail) is that if section 29 is the sole legal protection the Commonwealth has from damage to its property (which certainly seems to have been the view taken by Mason J.), then its property is not well protected. Moreover, does section 29 prevent the prosecution of persons under State laws where one element of the offence involves this sort of damage to Commonwealth property? One might also add that a Commonwealth law that did not provide a common rule throughout Australia would be very rare. The reasons given by Menzies J. would suggest that every Commonwealth law covers the field.

The decision of the Queensland Supreme Court in *Kelly* v. *Shanahan*[20] neither quotes nor is referred to in *R.* v. *Loewenthal.* Shanahan was convicted under section 398 of the Criminal Code (Qld) with stealing a telephone handset which was the property of the (Commonwealth)

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[16] (1974) 4 A.L.R. 293.
[17] With Jacobs J. dissenting.
[18] (1974) 4 A.L.R. 293, 296.
[19] *Id.* 300.
[20] [1975] Qd.R. 215.

Postmaster-General. The section provided that "[A]ny person who steals anything capable of being stolen is guilty of a crime" with a penalty of imprisonment with hard labour for three years. He appealed, on the ground that the section was inconsistent with section 71(1) of the Commonwealth Crimes Act 1914 (Cth) which imposed a penalty of seven years imprisonment for stealing Commonwealth property. Hanger C.J. and Hart J. upheld the appeal. Williams J. dissented.

Hanger C.J. found that the Commonwealth law was a complete statement of the law as to the stealing (and fraudulent appropriation) of Commonwealth property. His Honour did not attempt to justify his view; he regarded it as obvious.[21] Hart J. held that, because of the differences in the laws, including the different penalties, the State law altered, impaired, or detracted from the operation of the Commonwealth law. His Honour therefore felt that there was a direct inconsistency, although he doubted that the Commonwealth law covered the field. Nonetheless, the differences in the laws were evidence that the Commonwealth law was intended to exclude the State one.[22] Williams J., in dissenting, considered the Commonwealth law and its legislative history and referred to its failure to deal with offences (such as robbery) involving the theft of Commonwealth property as one element of the crime. In his Honour's view there was nothing in the Commonwealth law that could justify the conclusion that it covered the field. No other ground of inconsistency had been made out.[23]

It is not difficult to be critical of this decision. Hanger C.J. gave a classic cover the field judgment, almost totally devoid of reasoning. Hart J., who treated the question of intention as being relevant to the existence of direct inconsistency, somehow concluded that the fact that the laws were different was in itself a reason for assuming that the intention of the federal law-maker was to exclude the operation of the State law.[24] Each of the three judges decided the case on different grounds.

A subsequent Queensland case illustrates the problems that would be caused if Hanger C.J. were correct. In *R.* v. *Flanders*[25] Matthews J. was faced with a motion to quash an indictment under a Queensland law that alleged robbery involving the theft of the property of a Commonwealth instrumentality. If section 29 of the Commonwealth Crimes Act 1914 (Cth) covered the field of offences involving the theft of Commonwealth property the indictment would have been deficient. His Honour

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[21] *Id.* 218.

[22] *Id.* 222-223.

[23] *Id.* 233.

[24] In certain circumstances this may, as a matter of fact, be a correct assumption. However, to establish that the Court would have to have regard to things like Parliamentary debates.

[25] [1976] Qd.R. 153.

held that the Commonwealth law did not cover that field and upheld the indictment. It is noteworthy that, in doing so, he did not refer to the judgment of Hanger C.J. referred to above, although he did quote from that of Williams J. as well as *R.* v. *Loewenthal.* In reaching his conclusion, Matthews J. had particular regard to the fact that the Commonwealth law did not punish robbery as such. As his Honour said: "[r]obbery and stealing historically . . . are separate and distinct offences".[26]

The final case to which reference will be made is that of *Jackson* v. *R.*[27] In that case the defendant was charged under section 441(b) of the Queensland Criminal Code with making a false entry in a document with intent to defraud. The trial judge asked the jury a series of questions, the answers to which indicated that the jury were satisfied that all the elements of the charge were made out, but that it was unsure whether the intention of the defendant was to defraud his employer or the (Commonwealth) Commissioner of Taxation. The defendant contended that, if the latter were the case, the provisions of section 231(1) of the Income Tax Assessment Act 1936 (Cth), which dealt with acts done with intent to defraud the Commissioner, would apply to the case to the exclusion of the State law. Now, of course, this was a very subversive submission. If the jury had to be certain of an intention to defraud either the Commissioner (in which case the offence could only be against Commonwealth law) or of an intention to defraud his employer (in which case State law would apply), and could not make up its mind, the defendant would theoretically have to go free despite the view of the jury that he had intended to defraud someone.

In these circumstances it is not surprising that both the Queensland Supreme Court and the High Court dismissed the appeal. The Supreme Court said:

> Because there is enacted a federal law which governs fraudulent attempts to avoid the assessment of taxation, it hardly can be said that that legislature intended to express completely, exhaustively, or exclusively what should be the law governing the fraudulent making of a false entry in a book . . ., albeit such entry was for the purpose of defrauding the Taxation Commissioner.[28]

In the High Court, although there was some query about the application of the Commonwealth Act, it was clear that the result reached by the Queensland Court was correct. The reasoning used was, however, a little different, in that the High Court said that the common element between the two provisions was the intention to defraud and the Commonwealth provision could not be regarded as exhaustive of all

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[26] *Id.* 156.
[27] (1976) 9 A.L.R. 65 (High Court), [1975] Qd.R. 388 (Queensland Supreme Court).
[28] [1975] Qd.R. 388, 392.

acts which may have, as one element, an intention to defraud the Commonwealth.[29]

This is a logical enough result, and it is to be doubted that the Commonwealth Parliament would have wished the Income Tax Assessment Act to have the result sought by *Jackson*. However, there was no attempt in the instant case to distinguish the reasoning that led to a contrary result in *R.* v. *Loewenthal*, or to show why one law covered the field and the other did not. Is it too cynical to suggest that if, instead of the fact situation in the latter case, the relevant laws had fallen for interpretation in a case where a jury was unable to decide whether damaged property belonged to the Commonwealth, the question relating to inconsistency would have been decided in another way?

The "criminal" cases demonstrate the most difficult practical problem with the cover the field test, the failure of the Courts to adequately consider and state the principles on which they base their decisions. This has not contributed to a logical development of the law. They also tend to confirm that the existence of different penalties for the same conduct provided for in different laws will not always lead to the conclusion that the laws are directly inconsistent.

Conclusion

A great many critical comments can be made about the cover the field test of inconsistency of laws. One of the most important of these is that based on the failure of the courts to discuss the factors that influence their decisions. Ultimately, there would be value in also discussing the relative importance of these factors, which would give prospective litigants a surer guide of what the law really means. As discussed above, any development of the law along these lines will be within the framework of the cover the field test which, with all its imperfections, is now a well accepted constitutional doctrine.

It would be nice if the Court would also comprehensively define the test of direct inconsistency. At present, cases rarely turn on this point, but the development of "manufactured consistency" through the use of provisions like section 75 of the Trade Practices Act 1974 (Cth) may require a greater refinement of this area of the law. Increasing use of such provisions would, of course, be likely to lead to such a refinement.

[29] (1976) 9 A.L.R. 65, 69 *per* Jacobs J.