"INCONSISTENT" COMMONWEALTH AND STATE LAWS: CENTRALIZING GOVERNMENT POWER IN THE AUSTRALIAN FEDERATION

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The history of Australian federalism is one of the steady accretion of power to the central institutions of government, in particular the Commonwealth Parliament. The continuing shift from the States to the Commonwealth of effective power to regulate so many aspects of Australia's economic and social life has, in general, been accepted and encouraged by the justices of the High Court – at least since the critical *Engineers'* decision.[1]

This acceptance and encouragement has been most conspicuous on those occasions when the High Court has endorsed the Commonwealth's adventurous exploration of its legislative powers;[2] when, for example, the Court decided that the defence and taxation powers would allow the Commonwealth to assume an effective monopoly over income taxation,[3] that the overseas trade and commerce power would allow the Commonwealth to discourage sand mining in Queensland,[4] or that the external affairs power would allow the Commonwealth to proscribe acts of racial discrimination inside Australia.[5]

Less conspicuous has been the encouragement offered by the Court to an enlargement of Commonwealth control through the interpretation and application of s 109 of the Constitution, the inconsistency clause. But the High Court's expansionist reading of the Commonwealth's legislative powers has proceeded in parallel to an increased willingness on the part of the Court to find that Commonwealth and State laws are "inconsistent"; so that, not only has there been an expansion of the areas within which Commonwealth power may be exercised, but there has also been an expansion of the Commonwealth's capacity to assume exclusive control over those areas. Neither of these expansions has proceeded without occasional interruption or contradiction; but the general momentum of the trends has been maintained over the past 65 years – that is, since the *Engineers'* case;[6] to the point where the most recent decision on the impact of s 109 has accorded to that clause a centralizing effect beyond even the ambitions of the current Labor Government of the Commonwealth.[7] It is the purpose of this article to explore the development, by the High Court, of its current approach to the inconsistency clause – in particular, its identification of the concept of inconsistent laws.

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[1] *Amalgamated Society of Engineers* v *Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

[2] See M Crommelin and G Evans, "Explorations and Adventures with Commonwealth Powers", in G Evans (ed) *Labor and the Constitution 1972-1975* 1977, 24-66.

[3] *South Australia* v *Commonwealth* (1942) 65 CLR 373.

[4] *Murphyores Incorporated Pty Ltd* v *Commonwealth* (1976) 136 CLR 1.

[5] *Koowarta* v *Bjelke-Petersen* (1982) 39 ALR 417.

[6] *Amalgamated Society of Engineers* v *Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

[7] *University of Wollongong* v *Metwally* (1984) 56 ALR 1.

1 THE EARLY APPROACH – MINIMIZING THE IMPACT OF S 109

Although some of the legislative powers conferred on the Commonwealth Parliament are expressed to be exclusive,[8] are rendered exclusive by a denial of State legislative competence,[9] or are intrinsically exclusive to the Commonwealth,[10] the bulk of the Commonwealth's legislative powers are concurrent with the general, residual legislative powers of the States.[11]

This sharing of legislative authority between Commonwealth and States makes inevitable some overlap and conflict between State and Commonwealth legislation. The inevitability of that conflict is recognized, and the equally inevitable solution proposed, in s 5 of the Commonwealth of Australia Constitution Act 1900 (UK) and s 109 of the Commonwealth Constitution:

> 5. This Act and all laws made by the Parliament of the Commonwealth under the Constitution shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State ...
>
> 109. When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

The extent of the conflict between State and Commonwealth legislation is by no means fixed and can be manipulated through a variety of techniques: for example, if the Commonwealth's legislative powers are read down (as they were before the High Court formally renounced the "reserved powers" or "implied prohibition" doctrine in the *Engineer's* case),[12] the area within which the States' legislative powers might freely operate would be enlarged; and a willingness to perceive overlapping Commonwealth and State legislation as complementary, rather than as in conflict, would achieve the same result.

During the first 20-odd years of its work, the High Court of Australia used each of these approaches to minimize the potential impact of Commonwealth legislation on State legislation. Early decisions of the Court insisted that two laws were inconsistent only when it was impossible for a person simultaneously to obey both laws, when obedience to one law automatically and inevitably involved disobedience to the other law.

This test of inconsistency was developed by the High Court in the context of assessing the validity of Federal industrial awards, a context quite removed from s 109. The original members of the court, Griffith CJ, Barton and O'Connor JJ, had held that no Federal industrial award could be made under the Conciliation and Arbitration Act 1904 (Cth) if the award was inconsistent with a State law. This inferiority, the converse of the supremacy conferred by s 109, flowed from the majority's view of the nature of "conciliation and arbitration" in s 51(xxxv) of the Constitution; and this view was regularly

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[8] Commonwealth Constitution, s 52.

[9] *Ibid* ss 90, 114 and 115.

[10] *Ibid* ss 51(iv), 51(xxix) and 51(xxx).

[11] As defined in *eg* s 5 of the *Constitution Act* 1902 (NSW) or s 16 of the *Constitution Act* 1975 (Vic) and preserved by s 107 of the Commonwealth Constitution.

[12] *Amalgamated Society of Engineers* v *Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 150 and 155.

attacked by Isaacs and Higgins JJ, appointed to the court three years after the original members.[13]

In *Australian Boot Trade Employees Federation* v *Whybrow & Co*[14] the High Court was asked whether a proposed Commonwealth award would be inconsistent with a State law. The proposed award would have fixed a "minimum rate of wages to be paid to male employees on time-work" in the boot trade in New South Wales, Queensland, South Australia and Victoria of 1s 1½d per hour. In each of these States, a State law provided that employees in that industry should be paid a minimum wage of 1s per hour.

Four members of the court, Griffith CJ, Barton, O'Connor and Higgins JJ held that the inconsistency of the Commonwealth award and the State law depended on a negative answer to the question, "could an employer simultaneously obey the award and the law?" Barton J said:

> The [State] determinations name a minimum, and it is in each case lower than the minimum named by the proposed [Commonwealth] award. By paying the latter minimum an employer will be obeying both laws. The affirmative words of the [Commonwealth] award, therefore, do not "import a contradiction" between it and the determinations. It is impossible to say that the employer cannot obey the one without disobeying the other. Therefore, the former and the latter may stand together.[15]

Higgins J adopted the same approach (although his rejection of the majority's view of the inferiority of Commonwealth awards rendered hypothetical his discussion of the proposed award's inconsistency). He said:

> The direction as to the minimum wage is not inconsistent with the directions of the State Wages Boards as to a lower minimum wage, for obedience to the former is consistent with obedience to the latter, and the enforcement of both laws does not expose a person to a conflict of duties. There is merely an additional duty, not an inconsistent duty.[16]

On the other hand, Isaacs J (for whom the issue was also hypothetical) suggested a broader approach to the question of inconsistency. He was "disposed to agree" that this question should be resolved by asking whether the superior (State) law-maker had "appropriated the ground" or had indicated, "expressly or impliedly", that it wished its rule to be the only rule on that area, "then the least entry upon that area by the Federal arbitrator, is an unwarranted intrusion and inconsistent with the 'law of the land' ". Then, abruptly changing his perspective, he said:

> If this be not inconsistency ... it would be difficult, and perhaps impossible, ever to hold a State law inconsistent with the Federal law on the ground of complete occupation of the field, though the latter assumed to lay down exhaustively its code of regulation under any concurrent power. So long as the Commonwealth Act did not declare any given further act unlawful, the State

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[13] See *eg Federated Saw Mill etc Employees' Association* v *James Moore & Sons Pty Ltd* (1909) 8 CLR 465; and *Australian Boot Trade Employees Federation* v *Whybrow & Co* (1910) 10 CLR 266.

[14] (1910) 10 CLR 266.

[15] *Ibid* 299.

[16] *Ibid* 339.

> law, if this principle be not sound, could supplement what was intended to [be] complete.[17]

Despite Isaacs J's later claim[18] that Griffith CJ had agreed with his broader view of inconsistency, the High Court continued to use the "impossibility of simultaneous obedience" test. However, judicial discussion of inconsistency rarely occurred in the context of s 109 problems. In *Attorney-General for Queensland* v *Attorney-General for the Commonwealth*[19] the High Court decided that a Commonwealth Act was not "repugnant to" Imperial legislation, within s 2 of the Colonial Laws Validity Act 1865 (UK); in *Federated Seamen's Union* v *Commonwealth Steamship Owners' Association*[20] the Court decided that a Commonwealth industrial award was not inconsistent with a Commonwealth statute; and in *Federated Engine-Drivers' and Firemen's Association* v *Adelaide Chemical and Fertiliser Co Ltd* [21], the Court decided that a Commonwealth industrial award was not inconsistent with a State law. In none of these cases was there any s 109 issue. However, in each case, the question of conflict between two legislative norms was approached in the manner outlined in *Whybrow's* case: was it impossible for a person simultaneously to obey both commands?

One s 109 case in this early period was *R* v *Licensing Court of Brisbane: ex parte Daniell.*[22] Section 166 of the Liquor Act 1912 (Qld) provided that a local referendum (on liquor trading) "shall be held at the Senate election in the year 1917 ..." But s 14 of the Commonwealth Electoral (War-time) Act 1917 (Cth) declared that "no referendum or vote of electors of any State or part of a State shall be taken under the law of a State" on a Senate polling day. The High Court was unanimous in holding that the two laws were inconsistent. A majority (Knox CJ, Isaacs, Gavan Duffy, Powers, Rich and Starke JJ, Higgins J dissenting) went on to hold that a local referendum held in part of Brisbane on 5 May 1917 (the Senate polling day) had no legal effect and could not form the basis for administrative proceedings to declare that part of Brisbane "dry". In their joint judgment, the majority described the inconsistency as —

> a conflict, or inconsistency, between the State Act authorizing and commanding the vote on that day and the Commonwealth Act ... forbidding the vote on that day. Then s 109 of the Constitution enacts that in such a case the State law, to the extent of the inconsistency, is invalid.[23]

The Court might have expanded on this decision by pointing out that the State officials responsible for conducting the local referendum could only obey the State law ("commanding the vote") by disobeying the Commonwealth law ("forbidding the vote").

The reasons behind this narrow view of inconsistency were not articulated

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[17] *Ibid* 330.
[18] In *Clyde Engineering* v *Cowburn* (1916) 31 CLR 466, 489.
[19] (1915) 20 CLR 148.
[20] (1922) 30 CLR 144.
[21] (1920) 28 CLR 1.
[22] (1920) 28 CLR 23.
[23] (1920) 28 CLR 29.

by the early Court. However, it may be more than a coincidence that it was developed and maintained by the three original members of the Court, Griffith CJ, Barton and O'Connor JJ, who had also espoused the "reserved powers" doctrine – the proposition that the Commonwealth Constitution should be interpreted in the way which did the least damage to the autonomy (the "reserved power") of the States.[24] A narrow view of inconsistency would serve the same general purpose (preservation of State autonomy) as did the "reserved powers" approach to other parts of the Constitution. It may also be more than a coincidence that the most committed judicial opponent of the "reserved powers" doctrine, Isaacs J, consistently argued for a broader view of inconsistency.

This explanation of the different views of inconsistency (as reflecting the justices' general ideas on the appropriate federal balance – States' rights or centralism?) suffers from one defect: Higgins J, who shared Isaacs J's distaste for the "reserved powers" doctrine, was a persistent advocate of the narrow, "impossibility of simultaneous obedience" approach to s 109.[25] But, despite that flaw in the pattern, the explanation gathers some support from the following observations of O'Connor J in *Woodstock Central Dairy Co Ltd* v *Commonwealth*:

> It is a well known principle of interpretation that a Statute will not be taken as intended to abridge the liberty of the subject unless the legislature has used plain language to express that intention. The same principle must, I think, be applied in considering whether the Commonwealth legislature has expressed an intention to exercise a power which, when once exercised, will necessarily restrict the liberty of State legislatures in regard to the same subject matter.[26]

The issue before the court was not one of s 109 inconsistency. (Until 1920, High Court decisions based upon that section of the Constitution were rare.)[27] The problem raised by the case was one of administrative law: were Commonwealth regulations, requiring export goods to be officially graded and marked, authorized by a Commonwealth statute? But O'Connor J clearly showed a sensitivity to the impact which s 109 could have on State autonomy (or "liberty", as he put it) and a willingness to protect that autonomy.

2 THE TURNING POINT – ENLARGING THE IMPACT OF S 109

If the narrow view of inconsistency was prompted by concern for States' rights, the pressures for the adoption of a broader approach were becoming irresistible. The Court had begun to move towards a more centralist interpretation of the Constitution during the 1914-18 war – impressed, no doubt, by the military and economic demands of total war. The last of the Court's original members (Barton J) died in January 1920 (Griffith CJ had

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[24] See *Peterswald* v *Bartley* (1904) 1 CLR 497; *R* v *Barger* (1908) 6 CLR 41; and *Huddart Parker & Co Pty Ltd* v *Moorehead* (1909) 8 CLR 330.

[25] See *eg* his dissent in *Clyde Engineering* v *Cowburn* (1926) 37 CLR 466, 500.

[26] (1912) 15 CLR 241, 250.

[27] The only clear example I have located is *R* v *Licensing Court of Brisbane; ex parte Daniell* (1920) 28 CLR 23.

retired three months earlier) and Isaacs J was establishing his intellectual leadership of the new Court. Indeed, 1920 was the watershed, for in that year the Court decided the *Engineers'* case,[28] in which it threw out many of the concepts and approaches to consitutional interpretation which the Court had developed and maintained over the first 15 years of its work. Amongst the discarded intellectual baggage was the "reserved powers" doctrine.[29] Once the court accepted that the legislative powers of the Commonwealth were to be read broadly and without regard to preserving the States' position, s 109 issues were likely to appear on the Court's agenda more frequently. (In a sense, the "reserved powers" doctrine had pre-empted s 109 problems.) And, once the issues were raised, the logic of the court's new approach to constitutional interpretation demanded a significant shift in its reading of "inconsistency".

That shift came in *Clyde Engineering* v *Cowburn*,[30] where the High Court held that a State law requiring employers to pay full award wages for a 44-hour week was inconsistent with a Commonwealth law authorizing an industrial award which required workers to work a 48-hour week. The argument in support of the validity of the State law, that employers could obey it without disobeying the Commonwealth law, did not, the Court said, conclude the matter. The two laws were inconsistent either because the State law took away a right conferred on the employer (to demand 48 hours work)[31] or because the State law trespassed on a field which the Commonwealth law maker had intended to regulate exhaustively and exclusively.[32] The conscious expansion of the concept of inconsistency was highlighted by the dissents of Higgins and Powers JJ on the single ground that, where simultaneous obedience to both laws was possible, the laws could not be inconsistent.[33]

However, nothing in the majority judgments suggests that this original, narrow approach had been rejected. Rather, Knox CJ and Gavan Duffy J describe it as "not sufficient or even appropriate in every case".[34] The implication, that there may be some cases where the "impossibility of simultaneous obedience" approach will establish inconsistency, is clear. The justices were proposing to advance beyond the narrow view of inconsistency, without repudiating that view as one of the alternative approaches to inconsistency. So this decision suggests that inconsistency may exist in any one of three situations: where simultaneous obedience is impossible, where one law takes away a right or privilege conferred by the other, and where the State law invades a field which the Commonwealth law was intended to cover.

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[28] *Amalgamated Society of Engineers* v *Adelaide Steamship Co Ltd* (1920) 28 CLR 129.
[29] *Ibid* 150, 155.
[30] (1926) 37 CLR 466.
[31] *Ibid* 477-479 *per* Knox CJ and Gavan Duffy J, 490 *per* Isaacs J, 522 *per* Rich J.
[32] *Ibid* 489-491 *per* Isaacs J, 527 *per* Starke J.
[33] *Ibid* 503 *per* Higgins J, 516 *per* Powers J.
[34] *Ibid* 478.

(a) *"Direct" inconsistency – the analytical approach*

Of these approaches to inconsistency, the first two are relatively simple. They involve no more than a comparative analysis of the legal operation of two pieces of legislation: what are the legal rights and duties which are created or affected by each piece of legislation? And how do those rights and duties compare? Can we say that the duties created by one law make impossible compliance with the duties created by the other law? If not, can we say that the duties created by one law make impossible enjoyment of the rights created by the other law? To confirm the legal analytical nature of these tests of inconsistency, Barwick CJ (with the concurrence of Stephen and Aickin JJ) has contrasted them with the "cover the field" test and described them as "textual collision between the provisions of the Australian Act and of the State Act".[35]

In *Cowburn*, this analysis revealed (as in the earlier, and inverted, *Whybrow's* case)[36] that the duty imposed on employers by State law (the payment of a full award wage for 44 hours work) did not make impossible compliance with the duty imposed by Commonwealth law (the payment of a full award wage for 48 hours work). But the duty imposed by that State law did make impossible enjoyment of the right conferred on employers by Commonwealth law (to demand 48 hours work from each employee who was paid a full award wage).

Colvin v *Bradley Bros Pty Ltd*[37] provides another example of the type of inconsistency found in *Cowburn's* case by Knox CJ, Gavan Duffy, Isaacs and Rich JJ. The High Court held that a State law prohibiting the employment of women on milling machines was inconsistent with a Commonwealth law permitting that employment. The members of the Court described this as "clear inconsistency" and as a "direct collision", between the State prohibition and Commonwealth permission.[38]

A similar problem was resolved with identical reasoning in *Blackley* v *Devondale Cream (Vic) Pty Ltd*,[39] where the Court decided that a State law fixing a minimum wage for workers in ice cream factories in the State was inconsistent with a Commonwealth law (embodied in an industrial award) fixing a lower minimum wage for the same workers. Barwick CJ said:

> In my opinion, there is no need in this case to seek to define the intended field of the federal legislation in order to resolve the question of inconsistency. The case, to my mind, is one of direct collision in which the State law, if allowed to operate, would impose 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.[40]

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[35] *Miller* v *Miller* (1978) 141 CLR 269, 275.
[36] *Australian Boot Trade Employees Federation* v *Whybrow & Co* (1910) 10 CLR 266.
[37] (1943) 68 CLR 151.
[38] *Ibid* 160 *per* Latham CJ, 161 *per* Starke J, 163 *per* Williams J.
[39] (1968) 117 CLR 253.
[40] *Ibid* 258.

The relative simplicity of these approaches to inconsistency is recognized in the label frequently applied to them – "direct" inconsistency.[41]

(b) *"Indirect" inconsistency – covering the field*

The label underlines the relative complexity of the third (or "indirect") approach to inconsistency which can be found, not only where two laws contradict one another, but where there is some overlap or duplication between two laws. There will not always be inconsistency between overlapping laws – they might be regarded as complementary (as in *Airlines of NSW Pty Ltd* v *New South Wales (No 2)*)[42] or as reinforcing one another (as in *Victoria* v *Commonwealth*, the *Shipwrecks* case).[43] Isaacs J proposed a relatively sophisticated test for deciding whether two laws might be inconsistent in this "indirect" sense, a test which poses three questions:

(i) What field or subject matter does the Commonwealth law deal with or regulate?

(ii) Was the Commonwealth law intended to cover that field, to regulate that subject matter completely and exhaustively? Was the Commonwealth law intended as *the* law (and not merely a law) on that subject matter?

(iii) Does that State law attempt to regulate some part of that subject matter or to enter on the field covered by the Commonwealth law?

The Commonwealth intention, to provide *the* law on a subject matter, is paramount: any State attempt to regulate a part of that subject matter will conflict with the Commonwealth intention and be rendered invalid by s 109.

This approach to s 109 has serious implications for the autonomy and effective power of the States. The Commonwealth Parliament could exclude the operation of State legislation in all those "fields" where, according to the Commonwealth Constitution, Commonwealth and State powers are to be concurrent. That exclusion could be effected by the enactment of "field-covering" Commonwealth legislation – legislation which the Courts would read as intended to be an exhaustive and exclusive statement of the law on the topic it dealt with.

However, that dramatic impact on State legislative autonomy can be modified by the open-textured nature of this "cover the field" test. The answers to the specific questions involved in that test depend on judicial evaluation of abstract and often equivocal material. How, for example, does a court identify the field or the subject matter with which a Commonwealth (or State) law deals?[44] How does a court decide whether that law was intended by

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[41] See, in addition to the passages cited at nn 31-2, Mason J in *R* v *Credit Tribunal: ex parte GMAC* (1977) 137 CLR 545, 563 and 565; and Stephen J in *Ansett Transport Industries (Operations) Pty Ltd* v *Wardley* (1980) 142 CLR 237, 253.

[42] (1965) 113 CLR 54.

[43] (1937) 58 CLR 618.

[44] See text *infra* nn 51-76.

Parliament to cover that field – to be the exhaustive and exclusive rule on that subject?[45]

In *Cowburn's* case, Isaacs J sought to answer these questions by reviewing the terms of the Conciliation and Arbitration Act 1904 (Cth) which, he said, indicated the field dealt with and showed Parliament's intention to cover that field.[46] (The reliance on the terms of the Act (rather than the award) reflected a view that awards made under the Conciliation and Arbitration Act 1904 (Cth) were not themselves laws of the Commonwealth. This point was to be made, rather more elaborately, in Dixon J's judgment in *Ex parte McLean*).[47]

Isaacs J referred to a series of sections which, he said, showed that Parliament intended an industrial award made under the Conciliation and Arbitration Act 1904 (Cth) to decide every part of an industrial dispute and thereby conclude the parties: to cover the field of the parties' industrial relations. Later decisions of the Court have suggested that it is necessary to go beyond the terms of the Conciliation and Arbitration Act 1904 (Cth) to determine the field dealt with.[48] Be that as it may, the sections relied on by Isaacs J in *Cowburn* suggest that, in establishing the law-maker's intention to cover a field, the courts will often need to work with equivocal material. The sections directed the Court of Conciliation and Arbitration to investigate all matters affecting an industrial dispute before it, to make an award "determining the dispute", "according to equity, good conscience, and the substantial merits of the case", which award was to be framed without unnecessary technicalities and to be binding on all parties to the dispute.

The decision in *Ex parte McLean*[49] confirmed that, in the High Court's view, the Conciliation and Arbitration Act 1904 (Cth) had been intended, by the Commonwealth Parliament, to confer an exclusive authority upon awards made in settlement of industrial disputes – even to the extent of displacing State legislation which reinforced, rather than undermined, the terms of the award. Dixon J observed that:

> The inconsistency does not lie in the mere coexistence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter.[50]

In the present case, Dixon J said, the Commonwealth Parliament had shown its intention to give an exclusive authority, in matters of industrial relations, to awards made under the Conciliation and Arbitration Act 1904 (Cth); and

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[45] Compare the majority and minority judgments in *Ansett Transport Industries (Operations) Pty Ltd* v *Wardley* (1980) 142 CLR 237.

[46] (1926) 37 CLR 466, 490-491.

[47] (1930) 43 CLR 472.

[48] See *T A Robinson & Sons Pty Ltd* v *Haylor* (1957) 97 CLR 177, 184.

[49] (1930) 43 CLR 472.

[50] *Ibid* 483.

the attempt by the New South Wales Parliament, to regulate some part of an industrial relation dealt with by an award, was inconsistent with the intention of the (paramount) Commonwealth Parliament – even though the State law did no more than provide a penalty for non-performance, by a worker, of a contract of employment, the performance of which was made mandatory by the Commonwealth award.

(i) *Identifying the field*

This approach to inconsistency assumes that the Commonwealth lawmaker has defined a field in which its law is to operate and has proceeded to indicate that its law is to be the only law in that field. But the process of defining the field of the Commonwealth legislation is as problematic as that of characterizing legislation.

Latham CJ asserted, in *Colvin* v *Bradley Bros Pty Ltd*, that "[t]he application of s 109 does not depend upon any assignment of legislation to specific categories . . .", and that "classification of statutes according to their true nature is . . . a matter that is irrelevant to the application of s 109".[51] But it should be stressed that Latham CJ was not dealing with inconsistency of the "cover the field" variety but with a direct conflict between a State law's prohibition and a Commonwealth law's permission;[52] and it is difficult to see how the "cover the field" test of inconsistency can be applied without classifying or characterizing the contending statutes. Indeed, this process has formed the basis of many s 109 decisions.

In *O'Sullivan* v *Noarlunga Meat Ltd*,[53] Fullagar J (with whom Dixon CJ and Kitto J agreed) pointed out that the Commerce (Meat Export) Regulations (Cth) and the Metropolitan and Export Abattoirs Act 1936 (SA) had the same subject matter – the use of premises for slaughtering stock for export. It was therefore unnecessary to consider whether Latham CJ's statements in *Colvin's* case[54] were "not expressed somewhat too widely".[55] Fullagar J went on to hold that the Commonwealth law covered the field (of the use of premises for export slaughtering) and that the State law was inconsistent because it attempted to enter that field.

On appeal,[56] the Privy Council confirmed Fullagar J's view that the Commonwealth Regulations and State Act were inconsistent because the Act dealt with the use of premises for slaughtering for export – "precisely the field which in their Lordship's opinion the regulations evince an intention exhaustively to cover". The Privy Council indicated that there would still be room for the valid operation of those State laws not directed to the control of slaughter for export:

> [The Regulations] do not purport in their Lordships' opinion to oust, for example, State laws, if any, based on town planning considerations which might be of

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[51] (1943) 68 CLR 151, 158-159.
[52] See text *supra* nn 37-38.
[53] (1954) 92 CLR 565.
[54] See text *supra* n 51.
[55] (1954) 92 CLR 565, 593.
[56] (1956) 95 CLR 177.

> vital importance to the State but would normally be irrelevant to the regulation of the export trade.[57]

In *Airlines of NSW Pty Ltd* v *New South Wales (No 2)*[58] the High Court rejected a challenge to the Air Transport Act 1964 (NSW) which, it was claimed, was inconsistent with the Air Navigation Regulations (Cth). Kitto J dealt with the argument that the Air Navigation Regulations (Cth) covered the field of the licensing of commercial air operations in the following way:

> The topic and the only topic to which regs 198 and 199 direct their attention, so far as they apply to intra-State operations, is the safety, regularity and efficiency of air navigation ... The State Act, on the other hand, does not concern itself with that topic in any way ... The Federal Regulations and the State Act each employ a licensing system to serve a particular end; but the ends are different, and that means that the two sets of provisions are directed to different subjects of legislative attention. In my opinion there is no mutual inconsistency in any relevant sense.[59]

Similarly, Stephen J's conclusion in *Ansett Transport Industries (Operations) Pty Ltd* v *Wardley*,[60] that there was no inconsistency between, on the one hand, the Conciliation and Arbitration Act 1904 (Cth) and the Airline Pilots Agreement 1978 and, on the other hand, the Equal Opportunity Act 1977 (Vic), was explained on the basis that the Commonwealth and State laws were "concerned with different subjects".[61] Because the laws were "essentially disparate in character",[62] there was neither direct collision between the laws nor "inconsistency arising under the doctrine of 'covering the field' ".[63] Stephen J explained the significance of the legislation's different subjects:

> Not only will no conscious competition between legislatures be revealed: the context may on the contrary suggest an intent that each measure should keep within its own confines. Their interaction will then involve no more than an intermeshing of laws, each legislature having confined itself to those aspects of a particular situation appropriate to its own particular role in the federal compact.[64]

The most recent discussion of this issue – the interdependence of characterization and the "cover the field" test of inconsistency – was provided in *New South Wales* v *Commonwealth* (the *Hospital Benefits* case),[65] where the Court decided that there was no inconsistency between the National Health Act 1953 (Cth) and the Health Insurance Levies Act 1982 (NSW).[66]

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[57] *Ibid* 187.
[58] (1965) 113 CLR 54.
[59] *Ibid* 121-122.
[60] (1980) 142 CLR 237.
[61] *Ibid* 250.
[62] *Ibid*
[63] *Ibid* 253.
[64] *Ibid* 250.
[65] (1983) 45 ALR 579.
[66] In an action consolidated with these proceedings, the validity of the Hospital Benefits (Levy) Act 1982 (Vic) was raised for decision by the court. As with the New South Wales legislation, the Victorian Act was said to be not inconsistent with the National Health Act 1953 (Cth).

The majority of the High Court[67] held that there was no inconsistency between the Commonwealth Act (which prescribed the relationship between a registered hospital benefits organization and its contributors) and the State Act (imposing a levy on all hospital benefits organizations in the State and extending free hospital out-patient and ambulance services to their contributors). All justices agreed that, to determine whether the State legislation intruded onto a field covered by the National Health Act, it was necessary to characterize both the Commonwealth law and the State law — to identify clearly the field said to be covered by the Commonwealth law or the "subject matter" which it intended to regulate[68] and the "character" of the State law or the "subject matter" with which it intended to deal.[69]

And there was no disagreement over the subject matter or characterization of the National Health Act 1953 (Cth): it dealt with the relationship between registered health benefits organizations and their contributors, including the standard benefits which those organizations could provide to their contributors.[70] On this subject matter, the justices also agreed, the Commonwealth law was intended to be exhaustive and exclusive: it was intended to cover this field.[71]

The disagreement between the majority and Deane J centred on the appropriate characterization of the State Act. For the majority, it was a law which imposed taxes upon hospital benefits organizations. While the practical result of the legislation might be that the organizations' funds were depleted (through the payment of the tax) by an amount equivalent to the cost of providing extra services to the organizations' contributors, the legal operation of the State Act did not affect the legal relationship between the organizations and their contributors: neither was given any rights or duties in relation to the other additional to the rights and duties conferred and imposed by the National Health Act 1953 (Cth).[72] Deane J, on the other hand, characterized the State law by looking at its practical effect: money was collected by the State from the hospital benefit organizations, funnelled through government accounts and applied to paying the costs of extra services which were then supplied to the organizations' contributors. Those services were provided at the indirect cost of the hospital benefit organizations and, accordingly, the State Act trespassed on the field covered by the Commonwealth Act — the provision of benefits, at the cost of a registered hospital benefit organization, to its contributors.[73]

The question whether legislation should be characterized, for constitutional purposes, by looking only at its direct legal operation or by considering its practical effect, is a recurring one. In general, the High Court has preferred

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[67] Gibbs CJ, Mason Murphy and Wilson JJ; Deane J dissenting.
[68] (1983) 45 ALR 579, 587, 590 *per* Gibbs CJ, Murphy and Wilson JJ.
[69] *Ibid* 589, 590 *per* Gibbs CJ, Murphy and Wilson JJ; 602 *per* Deane J dissenting.
[70] *Ibid* 588 *per* Gibbs CJ, Murphy and Wilson JJ; 603 *per* Deane J.
[71] *Ibid* 588, 603.
[72] *Ibid* 590 *per* Gibbs CJ, Murphy and Wilson JJ; 597 *per* Mason J.
[73] *Ibid* 605.

the former course.[74] However, the Court has also shown a sensitivity to arguments based on practical effects, at least in the context of claims that State legislation has invaded the Commonwealth's monopoly of excise duties conferred by s 90;[75] and in the context of claims that legislation has denied the absolute freedom of interstate trade protected by s 92.[76]

(ii) *The law-maker's intention — a matter of inference*

The identification of the field or subject matter of the Commonwealth law (and the State law) is only the first of the problems which must be resolved when using the "cover the field" test of inconsistency. Once that field is identified, the court must decide whether the Commonwealth law maker intended to "cover" that field — to lay down *the* law on that subject matter.[77] As a reading of Isaacs J's judgment in *Cowburn's* case[78] shows, a judicial conclusion that the Commonwealth Parliament intended its legislation to cover a particular field may be based on equivocal indications of Parliament's intentions.[79]

Unless the Commonwealth legislation is explicit and states unequivocally that it intends or does not intend to cover the field, there must be room for differences of opinion on this question: a court will be reduced to drawing inferences from the terms of the legislation or from its subject matter, inferences which will vary according to the perceptions of the person drawing them.

For example, in *O'Sullivan* v *Noarlunga Meat Ltd* [81] a statutory majority of the High Court[81] held that the Commerce (Meat Export) Regulations (Cth) were intended to cover the field of the use of premises for the slaughter of stock for export. Fullagar J described the Regulations as "an extremely elaborate and detailed set of requirements".[82] It was that elaborate character which decisively demonstrated, Fullagar J said, the intention to cover the field.[83]

On the other hand, McTiernan, Webb and Taylor JJ held that the Regulations were not intended to provide an exhaustive code on the regulation of premises for the slaughter of stock for export. Taylor J, with whom Webb J agreed, said that the Regulations did not prescribe rules of conduct but laid down pre-conditions to the grant of an export permit; and that, therefore, it was "clear that their provisions were not intended to supersede,

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[74] See *eg Wragg* v *New South Wales* (1953) 88 CLR 353; *Fairfax* v *Federal Commissioner of Taxation* (1965) 114 CLR 1; and *Murphyores Incorporated Pty Ltd* v *Commonwealth* (1976) 136 CLR 1.

[75] See, *eg Logan Downs Pty Ltd* v *Queensland* (1977) 137 CLR 59.

[76] See, *eg*, *SOS (Mowbray) Pty Ltd* v *Mead* (1972) 124 CLR 529 and *Finemores Transport Pty Ltd* v *New South Wales* (1978) 139 CLR 338.

[77] No doubt the search for this intention is linked with the identification of the field of the Commonwealth law: the more narrowly the field is defined, the easier it will be to infer an intention on the part of the law maker to cover that field.

[78] *Clyde Engineering* v *Cowburn* (1926) 37 CLR 466.

[79] See text *supra* n 46.

[80] (1954) 92 CLR 565.

[81] Dixon CJ, Fullagar and Kitto JJ.

[82] (1954) 92 CLR 565, 591.

[83] *Ibid* 591-2.

pro tanto, all other existing requirements for the establishment of slaughter houses".[84] That view was reinforced by the fact that, when the Regulations had been introduced, State legislation regulating the use of abattoirs had been in force in South Australia (and other States). On appeal, the Privy Council adopted Fullagar J's analysis of the Regulations.[85] The comprehensive nature of the Regulations showed an intention exhaustively to cover the field of slaughtering for export. However, as Lane points out, a fundamental weakness of this approach is that "[t]he 'completeness' of the coverage depends on the knowledge of the assessor. An industrial advocate, now on the bench, may find many gaps in a Federal industrial award. A common lawyer, also on the bench, may be amazed at the comprehensiveness of the same award."[86]

The equivocal nature of the inferences to be drawn from the coverage or comprehensiveness of a Commonwealth law is well illustrated by a comparison of two High Court decisions, *T A Robinson & Sons Pty Ltd* v *Haylor*[87] and *Australian Broadcasting Commission* v *Industrial Court (SA)*.[88]

In the first of these decisions, the Court[89] decided that the omission, in a Commonwealth award, of any reference to employees' rights to long service leave did not indicate that the law maker had intended the award to prescribe exhaustively and exclusively the rights of employees, so as to prevent employees taking advantage of State long service leave legislation. If the arbitrator "had entertained any such intention," the court said, "he should have expressed it in his award."[90]

In the second decision, the Court upheld a challenge to State legislation which gave to the Industrial Court of South Australia power to order re-employment of a temporary employee whose dismissal was "harsh, unjust or unreasonable". This provision was, the Court held, inconsistent with Commonwealth legislation dealing with employment by the Australian Broadcasting Commission.

Although, Mason J acknowledged, the provisions of the Commonwealth legislation dealing with temporary employees were "very much less detailed and less comprehensive than those which apply to [permanent employees]",[91] he said that the Commonwealth Act intended to "cover the field" of employment of temporary employees:

> The absence of detailed provisions applying to them is not an indication that it is contemplated that other laws will apply to them, but rather that the employer has an unqualified authority to make decisions affecting their employment and the termination of their services.[92]

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[84] *Ibid* 603.
[85] *O'Sullivan* v *Noarlunga Meat Ltd* (1956) 95 CLR 177.
[86] Lane, P H, *The Australian Federal System* (2nd edn, Law Book Co., 1979), 894.
[87] (1957) 97 CLR 177.
[88] (1977) 138 CLR 399.
[89] Dixon CJ, McTiernan, Williams, Webb, Kitto and Taylor JJ.
[90] (1957) 97 CLR 177, 184.
[91] (1977) 138 CLR 399, 416.
[92] *Ibid* 417. On this point, compare the majority and minority judgments in *Ansett Transport Industries (Operations) Pty Ltd* v *Wardley* (1980) 142 CLR 237.

To take another approach, the Court might infer from the subject matter of the legislation that the Commonwealth Parliament must have intended to lay down an exclusive code. Some subjects, over which the Commonwealth Parliament has power, are such that uniform control is the only practicable system of regulation: for example, weights and measures (s 51(xv)), copyrights, patents and trademarks (s 51(xviii)), currency (s 51(xii)) and quarantine (s 51(ix)); so that, when the Commonwealth Parliament legislates on these matters, one could reasonably infer that the Parliament meant its legislation to apply to the exclusion of any State legislation.

Topics which have been judicially nominated as requiring uniform regulation include the prevention of collisions at sea;[93] preference in employment for former members of the armed forces;[94] bankruptcy, patents and trademarks;[95] the protection of Commonwealth property;[96] and the fulfilment of international treaty obligations.[97]

On the other hand, in *Victoria* v *Commonwealth* (the *Shipwrecks* case)[98] the High Court inferred from the legislation's subject matter (the removal of shipwrecks which posed a danger to shipping) a Commonwealth intention not to cover the field. Starke J said that "the removal of wrecks ... is not a subject which requires uniform legislation such, for instance, as the regulations for preventing collisions at sea ... [C]oncurrent authority is both useful and necessary."[99] And Dixon J said that the Commonwealth's aim of removal of obstructions to overseas and interstate navigation was "not only compatible with, but is aided by, the co-existence of other powers for securing the removal of wrecks".[100]

In the more recent decision of *Viskauskas* v *Niland*[101] the High Court used a combination of the factors discussed above (subject matter of the legislation and comprehensiveness of the legislation's detail) to infer an intention on the part of the Commonwealth law-maker to cover the field.

The Court had been asked to declare that sections of the Anti-Discrimination Act 1977 (NSW) were inconsistent with the Racial Discrimination Act 1975 (Cth). The relevant sections of the State Act prohibited discrimination on grounds of race in a wide variety of situations, including the provision of goods and services (s 19). Enforcement of these prohibitions involved investigation and conciliation by a State official, followed by enquiry and orders (damages or injunctions) by a State tribunal (Part IX). The Commonwealth Act, enacted to give effect in Australia to an international convention, prohibited racial discrimination in, amongst a wide variety of situations, the provision of goods and services (s 13) and provided for inquiry and conciliation by a Commonwealth Commission, and

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[93] *Hume* v *Palmer* (1926) 38 CLR 441, 462; and *Victoria* v *Commonwealth* (the *Shipwrecks* case) (1937) 58 CLR 618, 628.

[94] *Wenn* v *Attorney-General for Victoria* (1948) 77 CLR 84.

[95] *Victoria* v *Commonwealth* (the *Shipwrecks* case) (1937) 58 CLR 618, 638.

[96] *R* v *Loewenthal; ex parte Blacklock* (1974) 131 CLR 338.

[97] *Viskauskas* v *Niland* (1983) 47 ALR 32.

[98] (1937) 58 CLR 618.

[99] *Ibid* 628.

[100] *Ibid* 630-1.

[101] (1983) 47 ALR 32.

enforcement through civil action in a court of competent jurisdiction (Part III).

The High Court,[102] in a unanimous judgment, conceded that it was possible to obey both laws but held that the State Act was inconsistent with the Commonwealth's intention to cover the field. They discovered this intention in the fact that the Commonwealth legislation had been enacted to discharge an international obligation assumed by the Commonwealth; and in the fact that the terms of the Act were "expressed with complete generality" – extending, for instance, to bind the Crown in right of each State as well as the Crown in right of the Commonwealth.[103]

However, as with so many issues in constitutional law, the identification of a subject matter as requiring centralized regulation is not necessarily an automatic process, free from ambiguity and subjective values. The proposition that some topics demand a single central code, while others allow diversity, is likely to reflect political values and personal experience in such areas as business or public administration. Why, for example, should we accept the view of Evatt J[104] that the topic of bankruptcy requires central control while the topic of aliens does not?

(iii) *Expressed intention to cover the field*

A more certain, less equivocal guide to the intention of the Commonwealth lawmaker may be provided by the inclusion, in its legislation, of a clause expressly excluding the operation of State legislation. In *Victoria* v *Commonwealth* (the *Shipwrecks* case)[105] Evatt J suggested that such a clause could invalidate the Commonwealth law: the Commonwealth's specific legislative powers did not include the "power to define or limit the legislative or executive powers of a State".[106] But it is now settled that the Commonwealth may legislate in those terms.

In *Wenn* v *Attorney-General for Victoria*[107] the High Court held that the Re-establishment and Employment Act 1945 (Cth) covered the field of employment preferences for ex-members of the armed forces, although the Act made provision for preference only in hiring and not in promotion, because s 24 of the Act declared that it was to apply to the exclusion of State laws "providing for preference in any matter relating to the employment of discharged members of the Forces". Latham CJ observed that the High Court had frequently used inference to discover an intention on the part of the Commonwealth Parliament to cover a particular field:

> If such a parliamentary intention is effective when it is ascertained by inference only, there can be no reason why it should not be equally effective when the intention is expressly stated.[108]

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[102] Gibbs CJ, Mason, Murphy, Wilson and Brennan JJ.
[103] (1983) 47 ALR 32, 40-41.
[104] Expressed in *Victoria* v *Commonwealth* (the *Shipwrecks* case) (1937) 58 CLR 618, 638.
[105] (1937) 58 CLR 618.
[106] *Ibid* 638.
[107] (1948) 77 CLR 84.
[108] *Ibid* 110.

In response to the argument that s 24(2) was beyond the constitutional power of the Commonwealth Parliament, Dixon J conceded that there would occasionally be room for the argument that Commonwealth legislation excluding the operation of State laws was invalid because that legislation was "aimed ... at preventing State legislative action"; but, in general, such legislation could be characterized as legislation "with respect to the Federal subject matter".[109] The suggestion, that there were constitutional limits to the Parliament's power to manipulate s 109 of the Constitution so as to exclude, or prevent the exclusion of, State legislation, was to be revived in *University of Wollongong* v *Metwally*.[110]

(iv) *Expressed intention not to cover the field*

An apparently more complex question (one which involves some basic conceptual issues about the nature and function of s 109) is raised by "no inconsistency" clauses, that is, by provisions in Commonwealth legislation declaring the Commonwealth Parliament's intention that its legislation operate concurrently with, rather than to the exclusion of, State legislation.

In *R* v *Loewenthal; ex parte Blacklock*[111] Mason J considered the effect of s 11 of the Crimes Act 1914 (Cth), which provides that a person may be prosecuted and convicted either under a Commonwealth law or a State law where the act or omission is an offence against each law, but so that the person is not punished twice for the same offence. That provision, Mason J said:

> plainly speaks to a situation in which the State law is not inoperative under s 109, as for example when there is an absence of conflict between the provisions of the two laws and the Commonwealth law is not intended to be exclusive and exhaustive.[112]

If Mason J meant to say that the express statement of intention not to cover the field would not displace the implication of such an intention, he did not adhere to that view in *R* v *Credit Tribunal; ex parte General Motors Acceptance Corporation Australia*.[113] In that case the High Court[114] decided that s 40 of the Consumer Credit Act 1972 (SA) was not inconsistent with Part V of the Trade Practices Act 1974 (Cth). Both the State and Commonwealth legislation implied, in consumer sales, detailed but not identical conditions. The Commonwealth legislation declared that, apart from preventing double conviction, Part V was "not intended to exclude or limit the concurrent operation of any law of a State or Territory": s 75. Mason J (with whose reasons Barwick CJ, Gibbs and Stephen JJ agreed) referred to *Wenn* v *Attorney-General for Victoria*[115] and noted that a Commonwealth

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[109] *Ibid* 120. On the analogous question of the limits of the Commonwealth's constitutional power to confer an immunity from State laws, see *Australian Coastal Shipping Commission* v *O'Reilly* (1962) 107 CLR 46 and *Gazzo* v *Comptroller of Stamps (Vic)* (1981) 38 ALR 25.

[110] (1984) 56 ALR 1.

[111] (1974) 131 CLR 338.

[112] *Ibid* 347.

[113] (1977) 137 CLR 545.

[114] Barwick CJ, Gibbs, Stephen, Mason and Murphy JJ.

[115] (1948) 77 CLR 84.

law could expressly indicate an intention to cover the field with which it dealt. Equally, it could expressly indicate that it did not intend to cover that field. In the latter case, the Commonwealth law would not of its own force give State law a valid operation but would "make it clear that the Commonwealth law is not intended to cover the field" and leave room for State laws to operate – so long as those laws did "not conflict with Commonwealth law".[116]

Mason J expanded on this distinction: an express indication of intention not to cover the field could not avoid direct inconsistency – where, for example, it was impossible to obey both laws:

> But where there is no direct inconsistency, where inconsistency can only arise if the Commonwealth law is intended to be an exhaustive and exclusive law, a provision of the kind under consideration will be effective to avoid inconsistency by making it clear that the law is not intended to be exhaustive or exclusive.[117]

As there was no direct inconsistency between the Trade Practices Act 1974 (Cth) and the Consumer Transaction Act 1972 (SA) and the only possible inconsistency was based on a presumed Commonwealth intention to cover the field, it followed that the Commonwealth and State laws could not be inconsistent.

This distinction drawn by Mason J, between direct inconsistency and "cover the field" inconsistency, was confirmed in *Palmdale-AGCI Ltd* v *Workers Compensation Commission (NSW)*,[118] where the High Court held that a State Act, compelling employers to obtain workers' compensation insurance from insurers licensed under the State Act, was not inconsistent with the Insurance Acts 1973 (Cth) which regulated the activities of insurers throughout Australia.

Although the Insurance Act 1973 (Cth) contained detailed regulations of the right of corporations to carry on insurance business, they could not be said to cover the field to the exclusion of State laws because s 100 of the Insurance Act 1973 (Cth) declared that it was "the intention of the Parliament that no provision of this Act shall apply to the exclusion of a law of a State ...". Mason J (with whom Barwick CJ, Stephen, Jacobs and Aickin JJ agreed) said that, considered in the light of the *GMAC* case,[119] this provision "reinforce[d] the view that the Commonwealth Acts do not constitute a comprehensive and exclusive code intended to take effect independently of State law".[120] Mason J then proceeded to consider whether the State Act was in direct conflict with the Insurance Act 1973 (Cth) and concluded that it was not.

Some aspects of the reasoning in *University of Wollongong* v *Metwally*[121] underline the significance of this distinction between direct and indirect inconsistency. In separate judgments, Gibbs CJ, Mason J, Brennan J, and Dawson J endorsed the general proposition that an express declaration of

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[116] (1977) 137 CLR 545, 563.
[117] *Ibid* 563-4.
[118] (1977) 140 CLR 236.
[119] (1977) 137 CLR 545.
[120] (1977) 140 CLR 236, 243.
[121] (1984) 56 ALR 1.

the Commonwealth Parliament's intention could not avoid a direct conflict with State legislation, arising from the express terms of that legislation, but could avoid a judicial conclusion that the Parliament had intended to cover the field.[122]

However, other aspects of the majority's reasoning in *Metwally's* case not only undermine that distinction but suggest that s 109 can operate as a fetter on the legislative power of the Commonwealth Parliament. In *Metwally's* case, a majority[123] of the High Court decided that Part II of the Anti-Discrimination Act 1977 (NSW) was invalid prior to 19 June 1983, by reason of its inconsistency with the Racial Discrimination Act 1975 (Cth), notwithstanding that the Commonwealth Parliament had declared, in the Racial Discrimination Amendment Act 1983 (Cth) (which came into operation on 19 June 1983), that its 1975 Act:

> is not intended, and shall be deemed never to have been intended, to exclude or limit the operation of a law of a State or Territory that furthers the objects of the Convention [on the Elimination of all Forms of Racial Discrimination] and is capable of operating concurrently with this Act.

This declaration (which went on to make elaborate provision for the harmonisation of Commonwealth and State laws) was enacted shortly after the High Court had decided in *Viskauskas* v *Niland*[124] that the Anti-Discrimination Act 1977 (NSW) and the Racial Discrimination Act 1975 (Cth) were inconsistent because the former entered onto a field – the proscription of racial discrimination – which the latter intended to cover. That intention had not been explicitly stated in the 1975 Act but the court had inferred from the subject matter and the detailed provisions of the Act that the Commonwealth Parliament intended its law to be the exclusive code on racial discrimination throughout Australia.[125]

The majority in *Metwally's* case accepted that the Commonwealth Parliament could remove prospectively the basis for an earlier finding of inconsistency between State law and Commonwealth law by expressly renouncing what would otherwise have been an inferred intention to legislate exhaustively and exclusively; and so achieve the prospective revival of any State law which had been rendered invalid because of that earlier finding.[126] (That conclusion might be supported by the analysis of s 109 developed in *Butler* v *Attorney-General for Victoria*[127] that the inconsistency referred to in that section could be temporally limited.)

But, the majority said, the Commonwealth Parliament could not achieve the retrospective revival of any such law through a retrospective renunciation of intention to cover the field. Why was that result beyond the Commonwealth Parliament? Members of the majority adopted different analyses of the

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[122] *Ibid* 5-6 *per* Gibbs CJ; 9 *per* Mason J; 20 *per* Brennan J; 26-27 *per* Dawson J.

[123] Gibbs CJ, Murphy, Brennan and Deane JJ; Mason, Wilson and Dawson JJ dissenting.

[124] (1983) 47 ALR 32.

[125] *supra* n 102.

[126] (1984) 56 ALR 1, 6 *per* Gibbs CJ; 15, 16 *per* Murphy J; 18-19 *per* Brennan J; 21-22, 23 *per* Deane J. See also *ibid* 9 *per* Mason J; 26-27, 29 *per* Dawson J.

[127] (1961) 106 CLR 268, 283.

problem and, while they were agreed as to the resolution of the issue before the Court, those differences could have significant implications for future Commonwealth attempts to manipulate the legislative supremacy conferred by s 109.

For Gibbs CJ, there was an absolute constitutional constraint upon the Commonwealth Parliament: it could not tamper with the result which s 109 had achieved – the invalidation during the period up to 19 June 1983 of Part II of the Anti-Discrimination Act 1977 (NSW). That invalidity had been produced by the Commonwealth Constitution (acting upon, and giving effect to the intention of, the Racial Discrimination Act 1975 (Cth)); and, as Gibbs CJ put it, that invalidity "cannot later be excluded by retrospectively declaring that the truth was other than it was" because "Commonwealth statutes cannot prevail over the Constitution".[128]

Brennan J adopted a similar principle – "[w]here the condition governing s 109 is in truth satisfied, it is not within the power of the Parliament to deem it not to be satisfied";[129] but he appeared to concede that a deeming provision in the terms of the 1983 amending legislation could be read as a retrospective vacating of the field formerly covered by the Commonwealth law, thus providing the opportunity for a State legislature to enter, through the enactment of fresh retrospective legislation, that field. For Brennan J, it seems, the incapacity of the Parliament to deny an established inconsistency meant only that retrospective Commonwealth legislation could not revive State legislation.[130]

That relatively narrow denial of Commonwealth power was made explicitly by Murphy and Deane JJ. Each of them declared that, while the Commonwealth Parliament could not "undo the previous invalidating effect of s 109, it [could] clear the way for the State Parliaments to make a fresh State Act to apply retrospectively in the same terms".[131]

It is implicit in this proposition (that the Commonwealth Parliament could retrospectively clear the way for a State to enter a field) that the Commonwealth Parliament could retrospectively occupy or cover a field so as to prevent a State legislature from entering that field or exclude State legislation already present in that field. That point was recognized by Murphy J ("[o]therwise, Parliament's power to legislate retrospectively would be ineffective");[132] conceded as a possible proposition by Deane J,[133] although he had earlier anathematized it;[134] and not addressed by Brennan J.

However Gibbs CJ rejected the proposition that the Commonwealth Parliament could retrospectively reveal an intention to cover a field so as

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[128] (1984) 56 ALR 1, 7.

[129] *Ibid* 19.

[130] *Ibid* 20.

[131] *Ibid* 16 *per* Murphy J. See also *ibid* 22 *per* Deane J.

[132] *Ibid* 15.

[133] *Ibid* 24.

[134] *Ibid* 21. Deane J described the contention, that the Commonwealth Parliament could retrospectively validate or invalidate State legislation as "a timely one in that it is readily adaptable to Orwellian notions of doublethink".

retrospectively to invalidate a State law, because "Commonwealth statutes cannot prevail over the Constitution".[135] It seems, then, that Gibbs CJ saw the Commonwealth Parliament as having very little capacity retrospectively to manipulate its legislative supremacy: it could not retrospectively validate or invalidate State legislation – that would permit it to "retrospectively deprive s 109 of the Constitution of its operation".[136] And, although Gibbs CJ did not address the point, it would be consistent with his development of those propositions to extend the denial of Commonwealth legislative power so as to prevent the Commonwealth Parliament retrospectively vacating a field which it had formerly covered:

> [T]he Parliament cannot exclude the operation of s 109 by providing that the intention of the Parliament shall be deemed to have been different from what it actually was.[137]

Accordingly, while the four members of the majority were agreed that the Commonwealth Parliament could not achieve the retrospective revival of a State law rendered invalid by s 109 of the Constitution, there was significant disagreement amongst the majority over the broader question of the Commonwealth's capacity to manipulate its legislative supremacy.

The minority views, on the other hand, were consistent and simple: the Commonwealth Parliament could legislate so as retrospectively to remove or create inconsistency with State law where that inconsistency depended upon the Parliament's intention to cover the field. No doubt it would be beyond the legislative capacity of the Commonwealth Parliament to revive a State law which remained inconsistent (because of "direct" inconsistency) with a law of the Commonwealth.[138] But the 1983 Amendment Act had not contradicted s 109 of the Constitution in this way: rather, its effect was "to remove the inconsistency which attracts the operation of that section";[139] or to "change the situation from one upon which s 109 previously operated to one upon which it has ceased to have an operation".[140]

For the minority, the capacity of the Commonwealth Parliament to achieve the retrospective revival of Part II of the Anti-Discrimination Act 1977 (NSW) depended on a series of propositions: first, that the invalidation of the State law had occurred because the Commonwealth Parliament had implicitly indicated, in its 1975 Act, its intention to cover the field;[141] second, that the Commonwealth Parliament could declare, expressly, its intention not to cover that field;[142] third, that what Parliament could enact prospectively it could also enact retrospectively;[143] and, fourth, that when the basis for

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[135] *Ibid* 6-7.
[136] *Ibid* 6.
[137] *Ibid* 7.
[138] *Ibid* 9 *per* Mason J; 26 *per* Dawson J.
[139] *Ibid* 9 *per* Mason J.
[140] *Ibid* 28 *per* Dawson J.
[141] As identified by the High Court in *Viskauskas* v *Niland* (1983) 47 ALR 32.
[142] As confirmed by the High Court in *R* v *Credit Tribunal; ex parte General Motors Acceptance Corporation Australia* (1977) 137 CLR 545 and *Palmdale-AGCI Ltd* v *Workers' Compensation Commission (NSW)* (1977) 140 CLR 236.
[143] A proposition never disputed since *R* v *Kidman* (1915) 20 CLR 425.

inconsistency was removed, the formerly invalid (or inoperative) State law revived from the time when the inconsistency disappeared.[144] In the concise analysis of Mason J:

> the object of s 109, no more and no less, is to establish the supremacy of Commonwealth law where there is a conflict between a Commonwealth and a State law. Where no such conflict arises, or such a conflict is removed by subsequent retrospective Commonwealth legislation, s 109 has no role to play – there is no problem which requires to be solved by an insistence on the supremacy of Commonwealth law.[145]

Much of the disagreement between the majority and the minority in *Metwally's* case can be attributed to their different understandings of the purpose of s 109. Both Gibbs CJ and Deane J, amongst the majority, described s 109 as directed not only to adjusting the competing claims of Commonwealth and State legislatures, but also to "protecting the individual from the injustice of being subjected to the requirements of valid and inconsistent laws of Commonwealth and State Parliaments on the same subject".[146] However, Mason and Dawson JJ, amongst the minority, explicitly rejected this reading of s 109: that provision did not create individual rights or immunities, nor guarantee rights or immunities acquired by an individual through the invalidation of a State law;[147] rather, s 109's object was simply to provide for the supremacy of Commonwealth laws over conflicting State laws.[148]

(c) *Three tests of inconsistency – or one?*

Despite the significant disagreement between the majority and minority in *Metwally's* case (and the differences within the majority), the reasons for judgment indicate substantial judicial support for the proposition that direct inconsistency raises considerations quite distinct from those involved where inconsistency depends upon the Commonwealth Parliament's intention to cover the field. The distinction, and its significant consequences, is acknowledged by Gibbs CJ, Mason, Brennan and Dawson JJ.[149]

Rumble, in his careful and perceptive analysis of "The Nature of Inconsistency under s 109 of the Constitution", argued that direct inconsistency could be avoided by a clause in the relevant Commonwealth law expressly permitting the concurrent operation of the otherwise inconsistent State legislation. He proceeded to argue:

> that the difference between "direct" and "cover the field" inconsistency is merely a matter of words and that these tags, although being convenient descriptions, do not indicate any analytical difference. To say that a State law is directly inconsistent with a Commonwealth law merely means that the State law attempted

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[144] As held in *Butler* v *Attorney-General (Vic)* (1961) 106 CLR 268. Each of these steps is traced in the judgments of Mason J (1984) 56 ALR 1, 9-10; and Dawson J *ibid* 26-28.

[145] (1984) 56 ALR 1, 11.

[146] *Ibid* 21 *per* Deane J; see also *ibid* 7 *per* Gibbs CJ.

[147] *Ibid* 11 *per* Mason J; 29 *per* Dawson J.

[148] *Ibid* 10 *per* Mason J; 17 *per* Wilson J; 28 *per* Dawson J.

[149] *Ibid* 5-6 *per* Gibbs CJ; 9 *per* Mason J; 20 *per* Brennan J; 26-27 *per* Dawson J.

to interfere with the Commonwealth law's rights, powers and obligations in a way in which the Commonwealth did not *intend* to allow.[150]

This merging of the categories of inconsistency is, as Rumble acknowledges, not consistent with Mason J's approach in the *GMAC* case[151] or with Barwick CJ's unequivocal statement in *Miller* v *Miller*.[152] Moreover, that merging cannot be reconciled with the assumptions made by the court in *Metwally's* case.[153]. However, the extent to which the various questions raised in a s 109 problem can shade into one another is illustrated by the reasons for judgment in the High Court's decision in *Ansett Transport Industries (Operations) Pty Ltd* v *Wardley*.[154] The Court had been asked to rule on the validity of the Equal Opportunity Act 1977 (Vic) which, it was argued, was inconsistent with the Conciliation and Arbitration Act 1904 (Cth) and the Airline Pilots Agreement 1978, an industrial agreement registered under the Commonwealth Act.

Section 18(2) of the Equal Opportunity Act 1977 (Vic) prohibited an employer from discriminating against an employee on the ground of sex or marital status by dismissing the employee. Section 37 of the Act authorized the Equal Opportunity Board to inquire into a complaint of discrimination and to order any person to comply with the Act. The Airline Pilots Agreement 1978 (which, because it had been certified by the Flight Crew Officers' Industrial Tribunal, was given the same force as an award of the Commonwealth Conciliation and Arbitration Commission by s 28(3) of the Conciliation and Arbitration Act 1904 (Cth)) authorized an employer of an airline pilot to dismiss that pilot "by seven days' notice in writing" (during the first six months of employment) or "by one month's notice in writing" (after the completion of six months of service). A dismissed pilot was entitled to have the dismissal reviewed by a Grievance Board unless the dismissal occurred during the first 12 months of the pilot's employment. Ansett, which had been ordered by the Equal Opportunity Tribunal to employ Wardley (a woman) as a pilot, claimed that the Equal Opportunity Act 1977 (Vic) did not apply to it in its employment or dismissal of pilots because, in that context at least, the Victorian Act was inconsistent with a law of the Commonwealth. (For all the complexity suggested by the analysis of Federal industrial awards in, for example, *Ex parte McLean*,[155] the court approached the question of inconsistency as if the Airline Pilots Agreement 1978 was the law of the Commonwealth.)

The assertion of inconsistency was based on two arguments: first, that the Airline Pilots Agreement 1978 conferred upon Ansett, as employer, a right to dismiss an airline pilot and the Equal Opportunity Act 1977 (Vic) purported to reduce that right; and, second, that the Agreement had been intended as an exhaustive and exclusive statement, or had covered the field, of the rights

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[150] Rumble G, "The Nature of Inconsistency Under s 109 of the Constitution" (1980) 11 F L Rev 40, 77.

[151] (1977) 137 CLR 545, 563-564; *supra* n 117.

[152] (1978) 141 CLR 269, 275; *supra* n 35.

[153] *Supra* n 146.

[154] (1980) 142 CLR 237.

[155] (1930) 43 CLR 472, 484-485.

and obligations of employers and their pilot employees and the Victorian Act attempted to enter on that field.

The Court concluded by a majority[156] that there was no inconsistency between the Agreement and the Equal Opportunity Act 1977 (Vic), either direct or indirect. In dealing with the question of inconsistency, most members of the Court focused on the intention of the Commonwealth law-maker. For Mason, Murphy and Wilson JJ, there was no inconsistency because the Agreement had not been intended to give to the employer an unqualified right to dismiss nor had it been intended to cover the field of dismissal: rather, it had been intended to deal with the procedure to be followed when an employer exercised its right to dismiss, a right which flowed from and could be modified by the general law. That intention (not to confer an unqualified right of dismissal and not to cover the field of dismissal) was inferred from the Agreement's silence in the face of such general law restrictions as had existed when the Agreement was made in 1978 — for example, s 24 of the Equal Opportunity Act 1977 (Vic) and s 5 of the Conciliation and Arbitration Act 1904 (Cth) (which prohibited the dismissal of an employee on the grounds of her union activities).[157]

On the other hand, the minority maintained (in a judgment written by Aickin J) that the Agreement was intended to deal with all aspects of dismissal — that it was intended to prescribe completely and exhaustively the rights of employer and employee on, amongst other matters, Ansett's right to dismiss pilots, the procedure to be followed on any such dismissal and the pilots' rights to seek review. That intention was discovered, not so much in the terms of the Agreement, as in the essential nature of the process which produced the Agreement. There had been, Aickin J said, a dispute between employees and employer over a variety of matters relating to their employment relationship, including the employer's right to dismiss employees:

> The Flight Crew Officers' Industrial Tribunal was the only body with power to settle that dispute by award, or to certify an agreement between the parties to that dispute which would give it the force of an award. Within the ambit of that dispute that Tribunal had exclusive authority to determine the rights and duties of the employer (Ansett) and its employees being members of the [union]. The Conciliation and Arbitration Act empowers the Flight Crew Officers' Industrial Tribunal to prescribe completely and exhaustively what rights and obligations of the parties to the dispute shall be with respect to all the matters in dispute, i.e. those within the ambit of the dispute.[158]

Accordingly, for Barwick CJ and Aickin J, the Equal Opportunity Act 1977 (Vic) was inconsistent with the Agreement because there was a "direct conflict" between the two — the Agreement permitted what the State Act prohibited,[159] or because the Agreement had intended "to prescribe completely the industrial relations between employer and employee",[160] that is, to cover the field which the State law attempted to enter. Aickin J expanded

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[156] Stephen, Mason, Murphy and Wilson JJ; Barwick CJ and Aickin J dissenting.
[157] (1980) 142 CLR 237, 262-264 *per* Mason J; 289 *per* Wilson J.
[158] *Ibid* 279.
[159] *Ibid* 275, 276.
[160] *Ibid* 280.

on the interaction between these two approaches to inconsistency in the following passage:

> The two different aspects of inconsistency are no more than a reflection of different ways in which the Parliament may manifest its intention that the federal law, whether wide or narrow in its operation, should be the exclusive regulation of the relevant conduct. Whether it be right or not to say that there are two types of inconsistency, the central question is the intention of a particular federal law.[161]

That point was also made by Stephen J: "[t]he question as a whole", he said, "resolves itself, in the end, into a search for legislative intent"[162]; and by Mason J:

> As the various tests which have been applied by the Court are all designed to elucidate the issue of inconsistency it is not surprising that they are interrelated and that in a given case more than one test is capable of being applied so as to establish inconsistency ... [D]espite the emphasis given to the claim of direct inconsistency, the question is whether the provisions of the Agreement were intended to operate, subject to, or in disregard of, the general law.[163]

Indeed, there appeared to be some dispute on the Court as to the nature of the inconsistency argued by the plaintiff in this case: Mason J identified "the major thrust of Ansett's case" as intended to establish "direct inconsistency";[164] while Aickin J said the argument "was primarily directed to the question whether the Agreement was intended to cover the field".[165] This may be not so much a product of disagreement or confusion within the Court as a further indication that, in many situations, the separate tests of inconsistency depend upon substantially the same considerations.

The overlapping between the many issues raised by s 109 problems is illustrated from another perspective by the judgment of Stephen J. His decision, that the Equal Opportunity Act 1977 (Vic) was not inconsistent with the Agreement, was not based, as the decisions of the other majority justices were, upon an assessment of the intention of the Commonwealth law-maker; rather, it depended upon his characterization of the Equal Opportunity Act 1977 (Vic) and the Agreement as "essentially dissimilar both in character and in general content".[166] Stephen J rejected as "unacceptable" the view (accepted by the other members of the majority) that the Agreement dealt only with the procedure to be followed when the employer dismissed a pilot.[167] The Agreement did confer on Ansett a right of dismissal; but this should be understood as "concerned with industrial matters":

> [It] should not be regarded as trespassing upon alien areas remote from its purpose and subject matter, whether those areas concern the nation's foreign affairs or social evils such as discrimination upon the ground of sex.[168]

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[161] *Ibid.*
[162] *Ibid* 248.
[163] *Ibid* 260-261.
[164] *Ibid* 259.
[165] *Ibid* 274.
[166] *Ibid* 248.
[167] *Ibid* 254.
[168] *Ibid* 247.

Or, to employ the language appropriate to the "cover the field" test, the Agreement dealt with and covered the field of industrial relations between employer and pilot employees in the airline industry; but the Equal Opportunity Act 1977 (Vic) dealt with another field – a "broad social policy concerned with the status of women in [the Victorian] community".[169]

3 CONCLUSION

The apparent blurring of the approaches to inconsistency in the *Ansett Transport Industries* case[170] may have reflected the way in which the case was argued before the Court; or it may have reflected the terms of the relevant Commonwealth and State laws which meant that no purpose would have been served by drawing a sharp distinction between those approaches: a conclusion, that the Victorian legislation did not undermine a right or privilege conferred by the Agreement, could not be reached without also concluding that the State law did not enter a field covered by the Commonwealth law. But neither the decision nor the reasoning of the justices suggests that, in every case of alleged inconsistency, the two approaches will produce identical answers. That is, the distinction between these approaches, asserted by Isaacs J in *Cowburn's* case[171] and endorsed by Mason J in the *GMAC* case[172] and by several members of the Court in *University of Wollongong* v *Metwally*,[173] must be regarded as firmly established. The "cover the field" approach should be recognized as expanding the impact of s 109 beyond the somewhat limited range which it would have if inconsistency were limited to what some justices have described as "direct" inconsistency.[174]

The development of this approach to identifying "inconsistent" Commonwealth and State laws has extended to the Commonwealth an invitation for it to take exclusive occupancy, at the expense of State legislation, of those areas which the expansive interpretation of the nominally concurrent powers of the Commonwealth has allowed the Commonwealth to enter. The development has invited (to adapt Rumble's observation) "one of the federal partners, the Commonwealth, to deny to a State, another federal partner, part of its law making power".[175]

There are two ways, one direct and one subtle, in which the High Court might modify this invitation and apply some weight to the States' side of the federal balance. First, the court might invoke "the federal assumptions underlying the Constitution"[176] and assert some implicit constitutional

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[169] *Ibid* 248. In emphasizing the different subject matters or fields of the Commonwealth or State laws, Stephen J was anticipating the High Court's approach in *New South Wales* v *Commonwealth* (the *Hospital Benefits* case) (1983) 45 ALR 579: *supra* n 65.

[170] (1980) 142 CLR 237.

[171] (1926) 37 CLR 466, 490-491; *supra* nn 31-32.

[172] (1977) 137 CLR 545, 563-564; *supra* n 117.

[173] (1984) 56 ALR 1, 5-6 *per* Gibbs J; 9 *per* Mason J; 20 *per* Brennan J; 26-27 *per* Dawson J.

[174] For the use of this term, see the passages cited *supra* nn 38, 41.

[175] Rumble, G, "The Nature of Inconsistency Under Section 109 of the Constitution" (1980) 11 F L Rev 40, 79.

[176] *Ibid* 80.

restraint on an over-reaching Commonwealth Parliament. Those "federal assumptions" are elusive; but Dixon CJ was able to employ such an assumption – the "federal character of the Constitution" – to support his proposition that Commonwealth legislation could not cover the field of taxation so as to prevent the States legislating to raise their own revenues.[177] Twelve years earlier, Dixon J had objected "to the use of [Commonwealth] power to single out States and place upon them special burdens or disabilities".[178] And other justices have found a more broadly expressed assumption behind the language of the Constitution – that Commonwealth legislation could not operate so as to "prevent or impede" the States from peforming "the normal and essential functions of government"[179] or "from continuing to exist and function as such",[180] or so as to "threaten or endanger the continued functioning of the State as an essential constituent element in the federal system".[181] The "federal assumptions" reflected in these various statements might protect the States against the *direct* impact of Commonwealth legislation: that is, those assumptions might confer on State executive governments a degree of immunity from some Commonwealth legislation.[182] But the broad concept of inconsistency poses a different threat to State autonomy – it promises to curtail the autonomous operation of State legislation. Do those "federal assumptions" offer to State legislatures any hint of protection against erosion of their autonomy? I suggest that it will be only if those assumptions can be used to support a revival of the reserved powers doctrine (the "pre-*Engineers* ghosts")[183] that they will play any part in preventing that erosion.

Effective judicial protection for State legislative autonomy is more likely to be extended through a second, and more subtle, process – through the exploitation by the High Court of the ambiguities inherent in the "cover the field" test of inconsistency. We have seen, for example, the High Court use the characterization of Commonwealth and State laws (as dealing with disparate subjects or topics of legislation) to avoid a finding of inconsistency;[184] and we have seen the court use the process of inferring that the Commonwealth law-maker did not intend to prescribe an exclusive and exhaustive code on the subject or topic of its legislation to achieve the same result.[185] Neither of these approaches involves any reworking of the concept

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[177] *Victoria* v *Commonwealth* (the *Second Uniform Tax* case) (1957) 99 CLR 575, 614.

[178] *Melbourne Corporation* v *Commonwealth* (1945) 74 CLR 31, 81.

[179] *Ibid* 66 *per* Rich J.

[180] *Victoria* v *Commonwealth* (the *Payroll Tax* case) (1971) 122 CLR 353, 424 *per* Gibbs J.

[181] *Commonwealth* v *Tasmania* (the *Franklin Dam* case) (1983) 46 ALR 625, 703 *per* Mason J.

[182] See, for example, the caveat offered by the High Court in its unanimous judgment in *R* v *Coldham; ex parte Australian Social Welfare Union* (1983) 47 ALR 225, 236.

[183] *Attorney-General (WA) (at the relation of Ansett Transport Industries (Operations) Pty Ltd)* v *Australian National Airlines Commission* (1976) 138 CLR 492, 530 *per* Murphy J.

[184] As in *Airlines of NSW Pty Ltd* v *New South Wales (No 2)* (1965) 113 CLR 54; *New South Wales* v *Commonwealth* (the *Hospital Benefits* case) (1983) 45 ALR 579; and in the judgment of Stephen J in *Ansett Transport Industries (Operations) Pty Ltd* v *Wardley* (1980) 142 CLR 237.

[185] As in the judgments of Mason and Wilson JJ in *Ansett Transport Industries (Operations) Pty Ltd* v *Wardley* (1980) 142 CLR 237; *T A Robinson and Sons Pty Ltd* v *Haylor* (1957) 97 CLR 177; and *Victoria* v *Commonwealth* (the *Shipwrecks* case) (1937) 58 CLR 618.

of inconsistency which the High Court enlarged so deliberately in *Clyde Engineering* v *Cowburn*[186] and *Ex parte McLean*.[187] It remains implicit in this concept of inconsistency that the Commonwealth Parliament may, through the expressions of its legislative will, occupy some field of social or economic regulation to the exclusion of State legislatures; and that s 109 provides the foundation for centralized (rather than shared) legislative control of a wide range of social and economic activities.

In the High Court's most recent exploration of the impact of s 109, *University of Wollongong* v *Metwally*,[188] some justices have laid the foundation for further concentration of legislative power within the Australian federation. They have prepared the way for a more sweeping invocation of the supremacy of Commonwealth law and the consequential narrowing of the authority of State legislatures. If, as Gibbs CJ and Deane J assert, one of the objectives of s 109 is to free the individual from the "injustice of being subjected to the requirements of valid and inconsistent laws of Commonwealth and State Parliaments on the same subject",[189] then the Court should be much less willing to tolerate the concurrent existence of Commonwealth and State legislation such as that which was allowed to survive in *Airlines of NSW Pty Ltd* v *New South Wales (No 2)*[190] or *New South Wales* v *Commonwealth* (the *Hospital Benefits* case).[191]

If that further development is to be realized, then the impact which s 109 has had on the federal balance – essentially reinforcing the reduction of autonomous State powers effected by the High Court's expansive reading of the Commonwealth Parliament's powers – will be intensified, and the steady accretion of power to the central institutions of government within the Australian federation will not abate.

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[186] (1926) 37 CLR 466.
[187] (1930) 43 CLR 472.
[188] (1984) 56 ALR 1.
[189] *University of Wollongong* v Metwally (1984) 56 ALR 1, 21 *per* Deane J; see also *ibid* 7 *per* Gibbs CJ.
[190] (1965) 113 CLR 54.
[191] (1983) 45 ALR 579.