Heller,[30] that "the result (referring to reaching a just decision in cases of negligent mis-statements) can and should be achieved by the application of the law of negligence and that it is unnecessary and undesirable to construct an artificial consideration". This could represent a policy decision not to extend at this time the remedy afforded by collateral warranties into the field of negligent mis-statement. This is not to say that collateral warranties cannot be used where a contract can be clearly proved, or where such an inference is necessary in the interests of justice. It is likely that at present courts will insist on strict proof of a contract, but the scope of this remedy should be borne in mind when difficulties are encountered in framing an action in tort.

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AN INSTANCE OF CONSISTENCY?

WEST v. *SUZUKA*

West v. *Suzuka*,[1] before the Supreme Court of Western Australia, arose out of prosecutions under s. 291 of the Mining Act, 1904-1957 (Western Australia), of five employees of the Dowa Mining Company of Japan. Section 291 is in the following terms:

> Any Asiatic or African alien found mining on any Crown Land may by order of the Warden, be removed from any goldfield or mineral field, and whether such person has or has not been convicted of an offence against the last preceding section; and no Asiatic or African alien shall be employed as a miner or in any capacity whatever in or about any mine claim, or authorised holding.

The Dowa Company was a shareholder in a local Western Australian mining company which had a working option over an old copper mine. The five defendants were all Japanese brought to Western Australia by the company to test the mine, and they carried out various duties. They apparently entered Australia pursuant to entry permits issued under the Migration Act, 1958, of the Commonwealth. Section 6 of that Act stipulates (*inter alia*) that:

> (1) An immigrant who, not being the holder of an entry permit that is in force, enters Australia thereupon becomes a prohibited immigrant.
> (2) An officer of the Department of Immigration may, in accordance with this Section and at the request or with the consent of an immigrant, grant to the immigrant, an entry permit.
> (3) An entry permit shall be in a form approved by the Minister and shall be expressed to permit the person to whom it is granted to enter Australia or to remain in Australia or both.
> (6) An entry permit that is intended to operate as a temporary entry permit shall be expressed to authorise the person to whom it relates to remain in Australia for a specified period only and such a permit may be issued subject to conditions.

The actual permits granted to the Japanese miners were not in evidence and we do not know the form in which they were expressed nor whether they were issued subject to conditions; for instance, subject to their undertaking no employment in Australia other than in mining operations.

In deciding in favour of the defendants on the ground that the prohibition in the Western Australian Act applied only to employers, the two Puisne

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[30] (1963) 2 All E.R. at 610.
[1] (1964) W.A.L.R. 112.

Judges on the bench declined to discuss a constitutional point raised by Counsel but Wolff, C.J. made the following remarks:

> On the constitutional point the defendants say that as they are in Australia by virtue of a permit granted them under the provisions of the Migration Act 1958 (Com.), they may then, in the absence of any condition in the permit, do anything an Australian national may lawfully do. That being so, they argue that s. 291 denies them these rights . . . If the permits placed no restrictions on their movements or activities, then s. 291 would clash with the operation of Commonwealth law and be invalid. I think the point should be noticed, but in the inconclusive state of the evidence it is not necessary to discuss it in much detail. It is not an *inter se* question . . . but simply a possible case of a State law and a Commonwealth law clashing in the same field: if that were the case the Commonwealth law must prevail.[2]

Since the Chief Justice saw fit to notice this constitutional point, he might have gone into the question a little less superficially. The Migration Act provides that permission may be granted to certain individuals who would otherwise be prohibited migrants and would thereby be subject to deportation under s. 18 of the Act, to enter Australia or remain in Australia. On the other hand, the Western Australian Act provides that certain individuals are prohibited from carrying out mining operations. It is to be noted that no attempt is made to define the nature or degree of the permission granted by the Commonwealth, either by the Chief Justice or the Commonwealth legislature. By being content simply to state that "two laws clash in the same field", and conclude that they are therefore inconsistent, His Honour has glossed over and apparently missed the point of the constitutional question raised by the case. He is content, apparently, to conclude from the fact that a law of the State of Western Australia affects the rights or privileges of persons, the rights or privileges of whom are also affected by a Commonwealth law, that the two laws are inconsistent. This, it is submitted, is a misunderstanding of the nature of "inconsistency" law, at least in the Australian federal system.

> In any system of government under which powers, legislative, executive or judicial are distributed between two or more sovereign or semi-sovereign bodies, there must be some principle by which some final arbiter (usually the Courts) may decide which exercise of power is binding on the subject when, as not infrequently happens, two or more such bodies exercising concurrent powers, issue conflicting commands within those powers which cover the same or a portion of the same subject matter.[3]

In the Australian federal system, s. 109 of the Constitution provides such a principle:

> 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.

A considerable volume of learning, however, has developed out of this, *prima facie*, simple provision. The original question, as it was presumably conceived by the draftsman of the Section was: which command or law is one to obey if the two sovereigns issue conflicting commands? This is answered in deceptively simple terms by s. 109. Over the years of interpretation, however, the problem has not been one of which law to obey, but has often become an enquiry into the circumstances in which one may avoid obeying a State law because of its inconsistency with a law of the Commonwealth.

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[2] *Ibid.* at 117.

[3] H. Zelling, "Inconsistency Between Commonwealth and State Laws" (1948) 22 *A.L.J.* 45.

The critical word of s. 109, as Zelling in his article suggests,[4] is "inconsistent". "Tests" have been proposed by the High Court for determining whether laws are inconsistent, and some of them have been rejected. For instance, the test adopted in *Whybrow's Case*,[5] "Is it possible to obey both laws?",[6] was discredited in *Cowburn's Case*.[7] It appears that most of these are not really intended to be tests, or criteria for determining whether or not there is inconsistency between laws, but are rather the different principles or rules of thumb applied and adopted by the court in different circumstances, either to come to or to justify a conclusion as to whether or not two enactments are inconsistent. Thus the court has observed that the "cover the field" test for instance, is not intended to have universal application, but that its application depends upon the type of situation before the court.[8] There are various situations involving inconsistency, and different tests or criteria are applied to determine whether or not two given laws are inconsistent, according to the type of situation in question. *West's Case* is an example of the kind of situation that the Court held was an instance of inconsistency, in *Colvin* v. *Bradly Bros. Pty. Limited*.[9] There there was an express prohibition by the State authority of that which was pretty well expressly permitted by the Commonwealth authority—hence clear inconsistency. In *Williams* v. *Hursey*[10] the Commonwealth "permission" was not so express, but the Court was still able to find inconsistency.

One statement about s. 109 has received almost universal approval. Dixon, J. in *Ex Parte McLean*[11] observed that inconsistency "depends upon the *intention*[12] 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 matter."[13]

Again in *Pirrie's Case*[14] it was contended on behalf of the defendant, charged with an offence against s. 6 of the Motor Car Act, 1915 (Victoria), that the Commonwealth had given him permission as a duly enlisted member of the Royal Australian Air Force, to drive a motor car on Air Force business although he was unlicensed. It is worthwhile to note the approach of the Court in rejecting this submission:

> These provisions[15] show plainly . . . that the Parliament recognised that the mere fact that a person was a member of the Defence Force acting in the performance of his duty in that capacity, did not relieve him of the duty of obedience to State laws providing for (*inter alia*) the regulation of the traffic.[16]

In other words, the Commonwealth whether or not it had power to do so, did not *intend* to give the members of the defence force a right to drive motor vehicles irrespective of State regulations which provide for the licensing of drivers. Both Dixon, J. and Knox, C.J. consider that the intention of the Commonwealth Parliament as to the operation of its law is of importance in deciding a question of inconsistency.[17]

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[4] *Ibid.* at 47.
[5] *Australian Boot Trade Employees Federation* v. *Whybrow & Co.* (1911) 10 C.L.R. 266.
[6] E.g., *per* Barton, J. at 289.
[7] *Clyde Engineering Co. Ltd.* v. *Cowburn* (1926) 37 C.L.R. 466.
[8] *Per* Isaacs, J. at 489.
[9] (1943) 68 C.L.R. 151.
[10] (1959) 103 C.L.R. 30.
[11] (1930) 43 C.L.R. 472.
[12] The italics are the writer's.
[13] (1930) 43 C.L.R. at 483.
[14] *Pirrie* v. *McFarlane* (1925) 36 C.L.R. 170.
[15] That is, the provisions of the Defence Act, 1903 (C'wlth.).
[16] *Pirrie* v. *McFarlane* (1925) 36 C.L.R. 170 at 183-4.
[17] The importance of the intention of the Commonwealth Parliament is demonstrated by W. A. Wynes, *Legislative, Executive and Judicial Powers in Australia* (1962) at 125ff.

The Chief Justice in *West's Case* did not contemplate at all just what the effect of the granting of an entry permit by the Commonwealth might be. When dealing with this sort of question as it arises under s. 109, it is imperative that one consider the precise intention of the Commonwealth when it purports to grant a right or permission to some particular person and the nature and degree of the right conferred or permission granted.

In *Victoria* v. *The Commonwealth*[18] and again in *Stock Motor Ploughs Ltd.* v. *Forsyth*[19] Dixon, J. said that s. 109 "invalidates a law of a State in so far as it would vary, detract from or impair the operation of a law of the Commonwealth".[20] If the Commonwealth confers a right or privilege on some person, it would certainly detract from the operation of that law if a State law purported to take away the right as it did in *Colvin's Case*.[21] Doubtless, if the Commonwealth permit did allow the Japanese to do anything an Australian national may lawfully do, s. 291 would be inconsistent with it. It would be expressly prohibiting what is permitted by the Commonwealth. But is this in fact the effect of the granting of an entry permit to the Japanese miners? Does the permit confer any positive rights on the Japanese other than a bare negative permission to enter Australia and to remain in Australia simply and negatively? Section 291 certainly does not prevent the Japanese from entering Australia and remaining in Australia.

One must first look to the nature of the right or permission which the Commonwealth law confers: this must be gleaned from the law as a whole. The permission may be a positive and definite right, say to fly aeroplanes from Sydney to Coolangatta notwithstanding any State law which provides to the contrary.[22] It may be that the Commonwealth considers that a particular operator is the only one qualified and competent to operate such a service and that it considers that the safety and health precautions, for instance, taken by that operator are sound and should not be interfered with by individual States. Again, the Commonwealth permission to fly to Coolangatta may be expressly or implicitly subject to compliance by the airline with any Queensland or New South Wales laws with respect to safety of aircraft. The permission bestows a positive right on the airline to make flights, and the State may not interfere except to say, for instance, that 'planes may not dump garbage in mid flight or that they must carry prescribed warning lights.

On the other hand, the permission may be no more than a mere licence; for example, the registration of waterside workers by the Commonwealth. Although a worker is registered and is so licensed by the Commonwealth to work on the waterfront, it does not follow that he is thereby entitled to ignore State laws governing every-day behaviour. He could not, for instance, resist arrest on a charge of pilfering from the wharves, or for that matter on any other charge, on the ground that the Commonwealth had given him permission to work and the State accordingly could not prohibit him from working by taking him into custody. The registration is no more than a statement by the Commonwealth that it will not prevent registered waterside workers from working. It does not purport to give any positive "right" to work on the wharves, and any disability arising under a State law would not be overcome by mere registration. Authorisation to work may follow from engagement by the Australian Stevedoring Industry Authority but not from registration.

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[18] (1937) 58 C.L.R. 618.
[19] (1932) 48 C.L.R. 128.
[20] *Ibid.* at 136. See also (1937) 58 C.L.R. at 630.
[21] (1943) 68 C.L.R. 151.
[22] Apart, of course, from problems raised by s. 92 of the Constitution.

In *Tasmanian Steamers Pty. Limited* v. *Lang*[23] the question was whether the Commonwealth award purported to say that the employer shall make payment in cash of £X to the employee,[24] or whether it operated solely in the creation of the debt, leaving other laws to determine how the debt might be discharged; did the Commonwealth award do anything other than to stipulate a minimum "value" which was to be paid to the employee? There was a further debt owed by the employee to the State Commissioner of Taxation by virtue of the State Act, and it did not alter the effect of the award for the State to require the employer to pay his employee's debts as part satisfaction of the employer's debt owed to the employee. On this point Dixon, J. disagreed with the majority, and said there was a right created entitling the employee to a cash payment. This difference of opinion, it is suggested, is simply a different interpretation given to the law by the individual judges in determining the nature or extent of the right which the Commonwealth confers. Wolff, C.J., after going into the question thoroughly, may still have concluded that the Commonwealth intended to give the Japanese migrants rights equivalent to an Australian national, but one is inclined to doubt this.

In *Clarke* v. *Kerr*,[25] the Court said[26] an award under the Conciliation and Arbitration Act, 1904, operates to settle disputes between parties as to the terms and conditions upon which an employer shall employ an employee. It is not addressed to the question whether it is lawful for the employer to carry on business continuously each day and night. It does not purport to confer on the employer the right to open his shop and sell his goods in periods when the State law requires him to be shut. Before attempting to decide whether the State law governing shop hours prohibits that which the Commonwealth permits, it is necessary first to look to the nature of the benefits that it is argued the Commonwealth law confers. In fact, the Court said it conferred no rights on the employer at all.[27]

The task which the Western Australian Supreme Court should have set itself in *West's Case* is that of deciding, as a matter of statutory interpretation, the precise intention of the Commonwealth: whether it was intended to permit the Japanese to do anything which an Australian national not subject to the Department of Immigration could do, notwithstanding any State law to the contrary, or whether it was intended to have no operation except to provide that these Japanese to whom permits had been issued would not be deported from Australia as prohibited immigrants under ss. 6 and 18 of the Migration Act.

It can be seen that on this approach each case will depend very much upon its individual circumstances, since no two Commonwealth laws are identical in ambit of operation or in the nature of a permission or right granted by them. The High Court, however, does not always adopt this approach in cases involving permission or licence situations. Thus in *Airlines (No. 2)*[28] the Judges in the majority, in effect, carried out an exercise in characterisation of the two laws involved. For example, McTiernan, J. states:[29]

> The (State) Air Transport Act departs completely from the field of safety regulation. Attention should be paid to the discussion of certain provisions of the State Transport (Coordination) Act by Menzies J. in *Airlines of New South Wales Pty. Ltd.* v. *State of New South Wales*.[30]

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[23] (1938) 60 C.L.R. 111.
[24] *Ibid.* at 126.
[25] (1955) 94 C.L.R. 489.
[26] *Ibid.* at 505.
[27] Indeed, the federal award *could not* confer such a right on the employer because then the award would not be dealing with employer-employee relations. See P. H. Lane, *Some Principles and Sources of Australian Constitutional Law* (1964) 70.
[28] (1964) 38 A.L.J.R. 388.
[29] *Ibid.* at 405.
[30] (1963) 37 A.L.J.R. 399. [1964] A.L.R. 876.

> Nothing in the Act even verges toward the subject of that discussion or anything of the kind. I think that (Commonwealth) regulations 198 and 199 are effectively confined within the field of safety.

His Honour concludes that since the New South Wales legislature has not attempted to deal with "safety", the two laws cannot be inconsistent. This is a very legalistic approach to the question and reminiscent of the statement of the Chief Justice in *West's Case*. His reasoning is that since the Commonwealth law deals with immigrants and their rights and since the State law also deals with immigrants (since all Asian or African aliens must be immigrants) the two laws clash in the same field. In the situation in *Airlines (No. 2)* if the Commonwealth law placed requirements upon Airlines of N.S.W. Pty. Ltd., compliance with which would simply mean that the Commonwealth would not restrain Airlines of N.S.W. Pty. Ltd. from flying to Dubbo, then the State could impose further restrictions. But if the Commonwealth said Airlines of N.S.W. Pty. Ltd. are hereby given a right to fly to Dubbo because they are the only people who comply with our safety regulations and there has to be a flight to Dubbo, then it would not be open for the State to restrict this right. A minor restriction on flights might be good, but only insofar as the Commonwealth has not expressed its intention that such a restriction is prohibited, by saying that the flights may be made notwithstanding any such restrictions imposed by the State.

Sometimes the Commonwealth confers a positive right which the State may not take away, while in other circumstances the right is no more than a mere licence, which can be exposed to the normal incidents of State regulations. The court should aim at determining whether there is, in fact, an impairment of the right which is conferred by the Commonwealth, or whether the effect of the State law is to detract from the operation of the Commonwealth law as it was intended by the Commonwealth legislature. Before this can be done, the permission or licence or right bestowed by the Commonwealth must be characterised as a positive right, a mere negative licence or as some degree of permission between these extremes. *Only then* does it become meaningful to talk about the State law impairing or detracting from the operation of the Commonwealth law.

In *West's Case* the literal effect of the grant of a permit to the Japanese is no more than to give them permission (a) to enter Australia and (b) having entered Australia to remain there until the permission is withdrawn. The Commonwealth does not purport to give any other or greater right to the Japanese than that. Certainly no one would suggest that because of their permits, the Japanese are entitled to commit offences against the Western Australian Criminal Code, and the intention of the Commonwealth certainly is not so to entitle them. Nor, one might argue, are they entitled to contravene Western Australian laws with respect to mining by African or Asian aliens. In short, the whole question rests on the nature and content of the "permission" given by the Commonwealth Parliament.

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