# MANUFACTURING AND AVOIDING *CONSTITUTION* SECTION 109 INCONSISTENCY: LAW AND PRACTICE

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## INTRODUCTION

The rule of law is fundamental to our society. Certainty about what the law is, is important to the rule of law.

Those whose activities may be affected both by Commonwealth laws and by State laws need certainty about whether the Commonwealth law overrides, or is subject to, State law. Those who administer Commonwealth law or State law need certainty about the relationship between the two. To participate in law-making on an informed basis, law-makers need certainty about what will be the legal effect of legislation which they enact.

From every point of view, it is desirable that there be certainty about the extent to which Commonwealth law overrides or is subject to State law.

Section 109 of the *Constitution* provides:

> 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.

There has been some uncertainty about the effect of s 109. In particular there has been uncertainty about whether a Commonwealth law which creates a capacity/power/right/obligation can validly control whether there is inconsistency of that law with State law by stating expressly whether the Commonwealth capacity/power/right/obligation created operates regardless of, or subject to, some or all State law.

Thirty years ago I published an article in the *Federal Law Review* in which I addressed these issues.[1] The substance of my argument was:

> While the terms 'direct' and 'cover the field' inconsistency are convenient for describing how inconsistency may arise, the Constitution does not make any distinction between those two kinds of inconsistency.
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> Inconsistency — whether described as 'direct' or 'cover the field' — cannot arise regardless of the intention of the Commonwealth law.

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* Partner DLA Phillips Fox. My thanks to David Fintan and Jennifer Loutit who assisted in research to support this article.

1 'The Nature of Inconsistency under Section 109 of the *Constitution*' (1980) 11 *Federal Law Review* 40.

> Whether a capacity/power/right/obligation validly created by Commonwealth law has effect regardless of, or subject to, State law depends *solely* on the interpretation of the Commonwealth law – does the Commonwealth law intend the operation/exercise/carrying out of the capacity/power/right/obligation which it creates to be subject to State law.
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> There is no constitutional restriction on the way in which the Commonwealth Parliament may express its intention in relation to the relationship of its law to State laws.
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> The so-called 'tests' for inconsistency which had been put forward by the High Court should be understood as guides to ascertaining the intention of the Commonwealth Parliament.
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> An express statement of intention in the Commonwealth law about whether it is intended to operate subject to or regardless of some or all State law must be central to whether or not there is inconsistency with a State law.[2]

In this article I review how those propositions measure up against the last thirty years of High Court authority on s 109. I conclude that most — though not all — High Court authority on the meaning and application of s 109 supports, or is consistent with, that analysis. This authority supports the drafting of Commonwealth laws to deal expressly with issues of inconsistency with State law.

This article also surveys the change in legislative drafting with the more frequent appearance of detailed provisions manufacturing and avoiding s 109 inconsistency with State laws. Such provisions give greater certainty about the interaction of Commonwealth and State laws and are to be welcomed.

I conclude by arguing that even greater certainty could be achieved if State Governments and Commonwealth Parliament and its Committees systematically and routinely scrutinised Commonwealth Bills and delegated legislation for potential impacts on State law so that any potential impacts on State law could be taken into account and provided for on a more informed basis in Commonwealth law-making processes.

## THE LAW ON SECTION 109

The key words in s 109 are 'law', 'inconsistency', 'prevail' and 'invalid'. The terms 'direct' inconsistency and 'cover the field' inconsistency do not appear in s 109 even though these terms often appear in discussion of s 109.

The meanings of 'prevail' and 'invalid' are well established. The *Native Title Act Case* summarises the position:

> If, by reason of inconsistency with a law of the Commonwealth, a State law is to the extent of the inconsistency 'invalid' — that is 'suspended, inoperative and ineffective' … the effect of s 109 on a State law that is inconsistent with a law of the Commonwealth is not to impose an absolute invalidity. On the contrary, the State law remains valid though

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2 Geoffrey Lindell has supported this analysis in 'Grappling with Inconsistency between Commonwealth and State Legislation and the Link with Statutory Interpretation' (2005) 8 *Constitutional Law and Policy Review* 25.

> it is rendered inoperative to the extent of the inconsistency, but only for so long as the inconsistency remains.[3]

This article focuses on the uncertainty which has surrounded the meaning of 'inconsistency of laws' in s 109. Section 109 only applies to Commonwealth 'laws' which are valid. The principles for determining whether a Commonwealth 'law' is a valid law with respect to a Commonwealth legislative power are connected with the issues of interpretation of s 109. Before I turn to the inconsistency issues, it is useful to summarise the principles which have been established for determining whether a Commonwealth law is within power.

## DETERMINING WHETHER A COMMONWEALTH LAW IS WITHIN POWER

Section 109 must be construed as a whole taking into account the general scheme of the *Constitution* including s 107:

> Every power of the Parliament of a Colony which has become … a State, shall, unless it is by this *Constitution* exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth …

In the early decades of the Federation some members of the High Court saw a need to reconcile s 107's continuation of State powers with s 51's grant of power to the Commonwealth to make laws 'with respect to' subject matters. These judges reconciled these aspects of the *Constitution* with the reserved powers doctrine which had two branches:

> Definition: The specific subject matters of Commonwealth legislative power should be construed so as not to impinge on powers impliedly reserved to the States by s 107.
>
> Characterisation of a Commonwealth law as being 'with respect to' a subject matter of Commonwealth legislative power: When the Commonwealth law touched both on a Commonwealth subject matter of power and on a matter impliedly reserved to the States, an assessment had to be made about the 'true character' of the law to determine whether the law was validly 'with respect to' the Commonwealth subject matter of power or invalidly 'with respect to' a subject matter impliedly reserved to the States.[4]

The reserved powers doctrine was rejected in *Engineers* in 1920.[5] Central to the Court's reasoning were the following two points:

> Section 107 did not justify construing the provisions of the *Constitution* conferring Commonwealth legislative powers narrowly because there was no conflict between s107 and those provisions.
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> The Commonwealth cannot validly legislate to deprive the States of *powers* which are continued by s 107. When there is inconsistency with State *laws*, in accordance with s109, the Commonwealth law prevails and the State *law* is

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3 *Western Australia v Commonwealth* (1995) 183 CLR 373, 464–5 ('*Native Title Act Case*').

4 See generally Leslie Zines, *The High Court and the Constitution* (5th ed, 2008) ch 1.

5 *Amalgamated Society of Engineers v Adelaide Steamship Company Ltd* (1920) 28 CLR 129 ('*Engineers*').

'invalid'. This operation of s109 does not deprive the States of powers continued by s 107.[6]

On the foundations of these propositions principles for determining the scope of Commonwealth legislative powers have been established:

Definition: Subject matters of Commonwealth legislative power should be interpreted broadly.

Characterisation: The characterisation of a law as being 'with respect to' a Commonwealth head of power depends on whether the law operates by reference to a Commonwealth subject matter of power. It is not appropriate to look for the single true character of a law. A valid Commonwealth law can have more than one 'character' and may touch on matters which are not within Commonwealth power.[7]

Despite the general acceptance of these principles in the High Court, there have been echoes of the reserved powers doctrine in some High Court considerations of the relationship between ss 107 and 109. I return to this point below.

## MANUFACTURING INCONSISTENCY

From time to time it has been argued that a declaration of intention in Commonwealth legislation to exclude the operation of State legislation is not valid.[8] No legislation has been held to be invalid on the basis of such an argument.

Dixon J's response to this argument in *O'Reilly* was:

> The argument that under a legislative power of the Commonwealth the operation of State laws cannot be directly and expressly excluded has been used without effect in a succession of cases ... The Court has interpreted s 109 as operating to exclude State law not only when there is a more direct collision between federal and State law but also when there is found in federal law the manifestation of an intention on the part of the federal Parliament to 'occupy the field' ... Surely, consistency with that doctrine demands that a legislative power, such as that given by s 51(i) together with s 98, must extend to a direct enactment which expressly excludes the operation of State law provided the enactment is within the subject matter of the federal power. Indeed there can really be no other way of expressing the intention and accomplishing the federal legislative purpose.[9]

The argument was considered again in the *Third Runway Case*.[10] In this case the High Court considered Commonwealth regulations which established a licensing regime to control the carrying out of a project to build a runway for Sydney Airport in Botany Bay relying on rights to extract fill from areas of Botany Bay. The stated objects of the regulations included:

> (b) to remove doubt about the extent to which the laws of the State of New South Wales apply to the carrying out of the works or the exercise of the rights; …

The regulations contained pages of detailed statements of intention about the extent to which State laws were excluded. The regulations described the kinds of State law

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6 Ibid 154.
7 See generally Zines, above n 4, chs 2 and 3.
8 For example, *Wenn v A-G (Vic)* (1948) 77 CLR 84 ('*Wenn*'); *Australian Coastal Shipping Commission v O'Reilly* (1962) 107 CLR 46 ('*O'Reilly*').
9 Ibid 56-57.
10 *Council of the Municipality of Botany v Federal Airports Corporation* (1992) 175 CLR 453 ('*Third Runway Case*').

which were excluded and gave examples of the State laws by referring to specific provisions of State Acts. For example reg 9(2) provided:

> A licensee is authorised to carry out the part of the works and exercise those of the rights referred to in the licence in spite of a law, or a provision of a law, of the State of New South Wales that:
>
> (a) relates to:
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> (i) environmental assessment, including, as examples only, sections 76 and 112 of [the *Environmental Planning and Assessment Act 1979* (NSW)].

The regulations also stated that some other kinds of State laws were not excluded and provided specific examples.

There had previously been Commonwealth legislation which expressly declared an intention to exclude the operation of some *kinds* of State laws. This was the first time the Court had considered Commonwealth legislation which contained such a detailed statement of intention and which specified *particular* State laws the operation of which was excluded. In those respects, the issue before the Court was novel.

The High Court upheld the regulations. In its joint judgment the Court stated:

> There can be no objection to a Commonwealth law on a subject which falls within a head of Commonwealth legislative power providing that a person is authorized to undertake an activity despite a State law prohibiting, restricting, qualifying or regulating that activity. *Indeed, unless the law expresses itself directly in that way, there is the possibility that it may not be understood as manifesting an intention to occupy the relevant field to the exclusion of State law.*[11]

The judgment quoted with approval the remarks set out above which Dixon J had made in *O'Reilly*.[12]

This principle has been reaffirmed by strong joint judgments in the *Native Title Act Case*,[13] *Bayside City Council v Telstra Corporation Ltd*[14] and *Work Choices Case*.[15] *Work Choices* also stated these important positive propositions:

> Section 109 may operate where the Commonwealth chooses to enact a scheme involving a more detailed form of regulation than State law provides. Equally, s 109 may operate where the Commonwealth creates a scheme involving less detailed regulation than State law provides. And s 109 may operate where the Parliament has done what it has in the new Act — to provide a more detailed scheme than State law in some respects and a less detailed scheme in other respects.[16]

These propositions were applied to uphold the legislation before the Court:

> The Commonwealth has legislated to provide a detailed set of rules for particular agreements; it has not dealt, for example, with unfair contracts except in relation to independent contractors, but that does not preclude it from defining a field of

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11 Ibid 465 (emphasis added).

12 Ibid.

13 (1995) 183 CLR 373, 465–8 (Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ; Dawson J concurring).

14 (2004) 216 CLR 595, 627–8 (Gleeson CJ, Gummow, Kirby, Hayne, Heydon JJ), 644–5 (McHugh J) ('*Bayside*').

15 (2006) 229 CLR 1, 159–69 (Gleeson CJ, Gummow, Hayne, Heydon, Crennan JJ) ('*Work Choices*').

16 Ibid 166-7.

relationships between s 5(1) employees and s 6(1) employers, and occupying parts of that field, like unfair contracts, to the exclusion of State law.[17]

This line of authority has provided a solid basis for drafting Commonwealth law to provide certainty by identifying the kinds of State laws or even by identifying specific State laws whose operation the Commonwealth law intends to exclude.[18]

There are still two areas of uncertainty about the extent to which a Commonwealth law may effectively indicate an intention to exclude the operation of State law and attract the operation of s 109. These remaining areas of uncertainty relate to:

- Commonwealth laws 'clearing a field' by providing that there are not to be any rights/obligations/capacities etc under State law in relation to a matter without making any positive Commonwealth provision for that matter; and
- Commonwealth laws preserving the common law from modification by State law.

## CAN COMMONWEALTH LAW EXCLUDE THE OPERATION OF STATE LAW ON A SUBJECT MATTER WITHOUT MAKING POSITIVE PROVISION ON THE SUBJECT MATTER?

In *Wenn* Dixon J stated:

> To legislate upon a subject exhaustively to the intent that the areas of liberty designedly left should not be closed up is, I think, an exercise of legislative authority different in kind from a bare attempt to exclude State concurrent power from a subject the Federal legislature has not effectively dealt with by regulation, control or otherwise. …
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> There is no doubt great difficulty in satisfactorily defining the limits of the power to legislate upon a subject exhaustively so that s 109 will of its own force make inoperative State legislation which otherwise would add liabilities, duties, immunities, liberties, powers or rights to those which the Federal law had decided to be sufficient. But within such limits an enactment does not seem to me to be open to the objection that it is not legislation with respect to the Federal subject matter but with respect to the exercise of State legislative powers or that it trenches upon State functions. Beyond those limits no doubt there lies a debatable area where Federal laws may be found that seem to be aimed rather at preventing State legislative action than dealing with a subject matter assigned to the Commonwealth Parliament.[19]

This passage was quoted with apparent approval in the six member joint judgment in the *Native Title Act Case*.[20]

Neither Dixon J in *Wenn* nor the *Native Title Act Case* joint judgment held any Commonwealth law invalid on the basis that it was 'a bare attempt to exclude State concurrent power from a subject the Federal legislature has not effectively dealt with

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17 Ibid.

18 The recent decision in *Dickson v The Queen* [2010] HCA 30 ('*Dickson*') is consistent with this line of authority. The Court's reasons for concluding that there was inconsistency in that case included that '[The State law] renders criminal conduct not caught by, and indeed *deliberately* excluded from, the conduct rendered criminal by [the Commonwealth law]'. Ibid [22] (emphasis added). See also references to 'deliberate legislative choice' influenced by reviews of criminal law ibid [24].

19 (1948) 77 CLR 84, 120.

20 (1995) 183 CLR 373, 466–7.

by regulation, control or otherwise.' But clearly these judgments left open the possibility that such a law would be invalid.

In *Work Choices* the joint majority noted:

> The Commonwealth specifically declined to contend that if a Commonwealth law simply sought to exclude State law in a field and made no provision whatever on the same subject-matter it was within power.[21]

It was not necessary to decide whether the Commonwealth could enact such legislation because the legislation before the Court was held not to be such legislation.

In my view, if it is ever necessary for the issue to be resolved a strong case can be made in principle for Commonwealth power to 'clear a field' based on the following points.

There is nothing in the terms of s 109 which prevents the Commonwealth from enacting such a law. Section 109 operates by reference to 'laws' not 'fields'. In s 109 'a law' can mean a single operative provision. A Commonwealth law conferring immunity from an obligation imposed by State law is a 'law'. A Commonwealth law extinguishing a right conferred by State law is a 'law'.

There is nothing in the general scheme of the *Constitution* or in established general principles for ascertaining the limits of Commonwealth legislative powers which prevents the Commonwealth from enacting a law which prevents the operation of State law.[22] The arguments which support Commonwealth power to enact legislation which covers a field to the exclusion of State law apply with equal force to Commonwealth power to clear a field of State law.[23]

The suggested distinction between (invalid) Commonwealth 'law' which clears a field of State law without making any positive provision and (valid) Commonwealth 'law' which replaces State law with much less detailed provisions is not maintainable.

When a Court is determining whether a Commonwealth provision is intended to operate subject to, or regardless of, a State it is understandable that there are references to the 'field' which is covered by the Act in which a Commonwealth provision appears. However, the word 'field' does not appear in s 109 and does not have any fixed constitutional meaning. In accordance with general principles for determining the scope of Commonwealth legislative powers, the extent of Commonwealth power to exclude the operation of some particular kinds of State laws — and the breadth of any 'field' which the Commonwealth law may cover or clear — should depend on the nature of the particular Commonwealth power involved and on the circumstances.

High Court decisions have accepted the validity of Commonwealth laws excluding the operation of State laws without making any positive provision on the particular subject matter dealt with by the State laws.

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21 (2006) 229 CLR 1, 166.

22 See discussion above, 447–448.

23 Lindell, above n 2, 37, writing before *Work Choices* expressed a similar view:

> It is difficult to see why the absence of law should be treated as any different from a law which seeks to replace State law with other law — particularly when regard is had to the plenary nature power of the Parliament to pass laws for the peace, order and good government of the Commonwealth.

Often when a Commonwealth law covers a 'field' to the exclusion of a State law or confers immunity from a State law, the Commonwealth law may not have made any positive provision on a particular subject addressed by the State law. In effect the Commonwealth law clears some 'fields' within a larger 'field'. As the *Work Choices* judgment put it: 'And s 109 may operate where the Parliament has done what it has in the new Act — to provide a more detailed scheme than State law in some respects and *a less detailed scheme in other respects*.'[24]

The Commonwealth law cleared each of the particular 'fields' where State law was 'more detailed' than the Commonwealth — that is, where State law made positive provision for matters that the Commonwealth law did not.

In *Ansett Transport Operations v Wardley* no member of the Court denied that it was within the relevant Commonwealth power to confer on an employer an absolute right to terminate employment regardless of State law on sex discrimination without making any Commonwealth provision on sex discrimination.[25] In a passage approved in other decisions[26] Mason J stated: 'If, according to the true construction of the Commonwealth law, the right is absolute, then it inevitably follows that the right is intended to prevail to the exclusion of any other law.'[27]

*O'Reilly*,[28] *Australian Mutual Provident Society v Goulden*[29] and *Bayside*[30] provide examples of Commonwealth law excluding the operation of a State law without making any positive provision on the subject matter — 'field' — dealt with by the State law.

In *O'Reilly*[31] the Court upheld a Commonwealth provision which gave the Commission immunity from State taxes without making any positive provision on State taxation.[32]

In *Goulden* the Court held the Commonwealth *Life Insurance Act 1945* excluded the operation of State anti-discrimination legislation to decisions by the insurer to take into account a customer's disability.[33] The Court discerned in the Commonwealth Act

> [an] underlying legislative assumption that, subject to some qualifications for which the Act provides, the life insurance business of such a company is more likely to prosper and the interests of its policy holders are more likely to be protected, if it is permitted to

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24 (2006) 229 CLR 1, 167.

25 *Ansett Transport Industries (Operations) Proprietary Ltd v Wardley* (1980) 142 CLR 237 ('*Wardley*').

26 *Commercial Radio Coffs Harbour Ltd v Fuller* (1986) 161 CLR 47, 56 (Wilson, Deane, Dawson JJ) ('*Coffs Harbour*'); *Dao v Australian Postal Commission* (1987) 162 CLR 317, 335 (Mason CJ, Wilson, Deane, Dawson, Toohey JJ).

27 (1980) 142 CLR 237, 260.

28 (1962) 107 CLR 46.

29 (1986) 160 CLR 330 ('*Goulden*').

30 (2004) 216 CLR 595.

31 (1962) 107 CLR 46.

32 Ibid. The Commonwealth law had a provision subjecting the Commission to *Commonwealth* tax. But Commonwealth tax and State tax are not the same subject matter. On this point, see Zines, above n 4, 473–83.

33 (1986) 160 CLR 330.

> classify risks and fix rates of premium in that business in accordance with its own judgment founded upon the advice of actuaries and the practice of prudent insurers.[34]

Thus the Commonwealth Act validly cleared the field of discrimination controls over these decisions and actions.

In *Bayside* the main judgment stated:

> A law conferring upon carriers an immunity from all State taxes and charges would be a law with respect to telecommunications services [within the broadcasting power in s 51(v)]; and so is a law conferring an immunity from some State taxes and charges.[35]

McHugh J stated:

> A s 51 power extends beyond laws that authorise, regulate or prohibit subjects that fall within or are incidental to that head of power. A s 51 power also authorises a law that expressly limits the operation of a State law in relation to a subject matter authorised, regulated or prohibited under that head of power. This Court has held on many occasions that, where the Commonwealth has power to regulate an area, it has power to protect entities which operate in that area from the effect of State laws. The cases, where the Court has so held, include *Australian Coastal Shipping Commission v O'Reilly*, *Botany Municipal Council v Federal Airports Corporation* and … the *Native Title Act Case* … [36]

In summary, both principle and High Court decisions indicate that there is nothing in the nature of s 109 inconsistency which prevents the Commonwealth from legislating to exclude the operation of State law in relation to a subject matter without making any positive provision for the subject matter.

Whether or not any particular Commonwealth law which attempts to clear a field is valid should depend solely on the scope of the particular Commonwealth power or powers which are relied on and not on creating 'limits' on the meaning of 'inconsistency'.

Of course, legislative drafters need to work with the remaining uncertainty on the issue. This uncertainty about s 109 is not a major barrier to the design and drafting of Commonwealth legislation because, as discussed above, it is accepted that the Commonwealth may displace the operation of State law with Commonwealth law which is much less detailed than the State law.[37]

## CAN COMMONWEALTH LAWS PREVENT STATE LAWS FROM MODIFYING THE COMMON LAW?

The uncertainty on this point comes from an aspect of the *Native Title Act Case*.[38] The majority in this case held most of the provisions of *Native Title Act 1993* valid. However, the Court held invalid s 12 which provided:

> Subject to this Act, the common law of Australia in respect of native title has, after 30 June 1993, the force of a law of the Commonwealth.

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34 Ibid 336.
35 (2004) 216 CLR 595, 626.
36 Ibid 644.
37 See discussion above, 448–450.
38 (1995) 183 CLR 373.

The Court's reasons for holding s 12 invalid included:

> If s 12 be construed as an attempt to make the common law a law of the Commonwealth, it is invalid either because it purports to confer legislative power on the courts or because the enactment of the common law relating to native title finds no constitutional support in s 51(xxvi) or (xxiv) [sic]. A 'law of the Commonwealth', as that term is used in the *Constitution*, cannot be the unwritten law.[39]

This suggests that a Commonwealth law which clears a field — and thus leaves the common law to operate — would not be valid if it requires Courts to declare the common law because such a function is legislative rather than judicial. It is difficult to accept that this passage was intended to adopt any such general principle because the common law is, by definition, the law identified and declared by courts. Surely the process of identifying and declaring the common law must be central to judicial function.

In another passage which seems to be an alternative ground for holding s 12 invalid the judgment stated:

> Section 12 of the *Native Title Act* does not in terms enact the common law as a law of the Commonwealth. It purports to give the common law 'the force of a law of the Commonwealth'. Section 12 simply attempts to engage s 109 of the *Constitution* in order to make the common law immune from affection by a valid State law. But it is of the nature of common law and of legislative power that the common law is subject to affection by exercise of legislative power. If s 109 could be engaged by s 12 to preclude the affection of the common law by a State law, it would have destroyed some of the legislative power of the State confirmed by s 107 of the *Constitution*. That is not the purpose of s 109. When s 109 is engaged, it does not diminish the legislative power of the State which has enacted the inconsistent law. Rather, s 109 operates only upon State laws that have been made in exercise of the legislative powers of the States confirmed by s 107. If s 12 of the *Native Title Act* were to result in the withdrawal from Parliaments of the States of an effective legislative power to override the common law, it would have diminished the legislative power confirmed by s 107 of the *Constitution*. And that it cannot do.[40]

This is a perplexing passage. First, why would s 12 be construed as a withdrawal of *power* from the States when it is not so expressed? Second, the established understanding of the relationship between Commonwealth legislative power and s 107 is ignored in the statement that:

> If s 109 could be engaged by s 12 to preclude the affection of the common law by a State law, it would have destroyed some of the legislative power of the State confirmed by s 107 of the *Constitution*. That is not the purpose of s 109.

The *Engineers* court dealt with the reserved powers doctrine[41] reliance on s 107 in these terms:

> Section 107 continues the previously existing powers of every State Parliament to legislate with respect to (1) State exclusive powers and (2) State powers which are concurrent with Commonwealth powers. But it is a fundamental and fatal error to read s 107 as reserving any power from the Commonwealth that falls fairly within the explicit terms of an express grant in s 51, as that grant is reasonably construed, unless that reservation is as explicitly stated. The effect of State legislation, though fully within the

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39 Ibid 486–7.
40 Ibid 487–8.
41 See discussion above, 447–448.

> powers preserved by s 107, may in a given case depend on s 109. However valid and binding on the people of the State where no relevant Commonwealth legislation exists, the moment it encounters repugnant Commonwealth legislation operating on the same field the State legislation must give way.[42]

For the *Native Title Act Case* court to state that 'it is of the nature of common law and of legislative power that the common law is subject to affection by exercise of legislative power' begs the question of whether it is within Commonwealth power to declare that some aspect of the common law is not subject to variation by State law. As I show below, it is well established that Commonwealth law may validly protect some aspects of the common law from modification by State law.

As Professor Lindell notes, this aspect of the *Native Title Act Case* casts doubt over the power of the Commonwealth to legislate to clear a field.[43] Professor Lindell favoured reconsideration of this aspect of the *Native Title Act Case* noting that 'if such a reconsideration does not occur', then there is a risk that:

> [Commonwealth] provisions which seek to clear the field of State legislation without replacing that legislation with other substantive legislation may run the risk of offending s 107 if … to clear the field is in effect to revive the negative freedom created by the common law …[44]

It would not be easy to persuade a future Court to reject this aspect of the decision which had the support of all members of the Court. There might be better prospects of persuading a High Court to read this aspect of the case narrowly taking into account the following points.

This Court cannot have meant that the Commonwealth cannot make valid laws preserving the operation of the common law from modification by State law. In most situations where the Commonwealth validly covers a field the result is that the common law — even if not expressly referred to in the Commonwealth legislation — operates because the operation of State law which would have modified the common law is excluded.

In some situations, the 'common law' may not confer positive rights or impose positive obligations in respect of a matter. If the common law applies then there is freedom to do that which is not prohibited. For example, in *Goulden* the Commonwealth law left the insurer with a common law 'right' to discriminate in deciding on what basis the insurer would insure.[45] The Court did not refer to the common law but the continued operation of common law freedom to discriminate was the result of the Commonwealth law's exclusion of State law.

In other cases the operation of the Commonwealth law to prevent State law modifying some aspect of the common law is more obvious. *Wallis v Downard-Pickford (North Queensland) Pty Ltd* provides an example.[46] This case involved the relationship between provisions of the *Trade Practices Act 1974* (Cth) ('the TPA') and provisions of the Queensland *Carriage of Goods by Land (Carrier's Liabilities) Act 1967* ('the Queensland Act'). Section 6(1) of the Queensland Act limited damages recoverable against a carrier under a contract of carriage.

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42 (1920) 28 CLR 129, 154.
43 Lindell, above n 2, 38–9.
44 Ibid 39.
45 See discussion above, 452–453.
46 (1994) 179 CLR 388.

The TPA included:

> 74(1) In every contract for the supply by a corporation in the course of a business of services to a consumer there is an implied warranty that the services will be rendered with due care and skill and that any materials supplied in connexion with those services will be reasonably fit for the purpose for which they are supplied.

The TPA did not expressly deal with damages for breach of contractual warranty. The issue was whether the TPA prevented the Queensland Act operating to limit a carrier's liability for damages. The High Court found 'the warranty created by s 74 carrie[d] with it full contractual liability for breach'.[47] The Court did not refer to the common law but the reference to 'full contractual liability' could only mean full contractual liability *under the common law* on liability for breach of a contractual warranty.

The *Native Title Act Case* itself demonstrates how s 109 and Commonwealth law can protect common law rights from modification by State law. The majority held the *Racial Discrimination Act 1975* protected common law native title from particular modifications by State legislation.

> Section 10(1) … protects the enjoyment of traditional interests in land recognised by the common law ... s 10(1) ensures that ... a State law which purports to diminish that security of enjoyment is, by virtue of s 109 of the *Constitution*, inoperative.[48]

Thus the *Native Title Act Case* decision on s 12 cannot mean that it is beyond Commonwealth power to enact laws backed by s 109 which protect aspects of the common law from modification by State law. Where does that leave the law on s 109 when the Commonwealth clears a field of the operation of State law and in doing so protects common law from modification by State law?

Not all High Court decisions let alone all reasons for decisions can be reconciled. The *Native Title Act Case* decision on s 12 and the reasons given for the decision are difficult to reconcile with the decisions upholding Commonwealth laws which clear fields of the operation of State laws and which have protected common law from the operation of State laws.

Perhaps the s 12 decision can be confined to the other grounds given for holding s 12 invalid or to the point made at the start of the quote above from the majority:

> Section 12 of the *Native Title Act* does not in terms enact the common law as a law of the Commonwealth. It purports to give the common law 'the force of a law of the Commonwealth'.[49]

In *ACCC v CG Berbatis Holdings Pty Ltd* the current Chief Justice of the High Court, then French J of the Federal Court, considered whether the *Native Title Act Case* decision on s 12 indicated that s 51AA of the TPA was invalid.[50]

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47 Ibid 396 (Toohey and Gaudron JJ); and agreed, 393 (Deane and Dawson JJ), 401 (McHugh J).

48 (1995) 183 CLR 373, 437–8.

49 Ibid 487.

50 *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2000) 96 FCR 491. My thanks to Dr Peter Johnston Adjunct Professorial Fellow University of Western Australia for drawing my attention to this case.

Section 51AA expressly operated by reference to the common law – 'the unwritten law from time to time':

> A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.

French J held s 51AA valid. His Honour commented:

> It cannot be said that there is an express line of logic to be found in the reasoning in the *Native Title Act* case which draws a clear distinction between the considerations which led to the invalidation of s 12 and the position in cases such as the present. But the form of s 12 and the direct operation of external judicial decisions on the content of the law, which is transmuted directly into Commonwealth law, was significantly closer as a matter of degree to authorising judicial legislation than s 51AA.[51]

In effect, his Honour confined the *Native Title Act Case* decision to its facts.

Confining the s 12 decision on these bases is not entirely satisfactory but seems to be the best that can be done to reconcile the s 12 decision with other lines of authority. Some such accommodation must be found because those lines of authority are not wiped out by the s 12 decision.

Pending clarification or review of the s 12 decision legislative drafters and advisers to Government do not need to run risks when designing legislation. As Professor Lindell notes, to reduce the risk of breaching s 107 Commonwealth legislation need not rely on 'negative common law freedom' and could 'create positive rights and freedoms that would then undoubtedly enjoy the benefit of s 109.'[52]

## CAN COMMONWEALTH LAWS AVOID INCONSISTENCY WITH STATE LAWS?

It has been suggested that express statements in a Commonwealth law that the law is *not* intended to exclude the operation of State law cannot prevent direct inconsistency. Mason J in *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation, Australia* referred to a 'settled constitutional interpretation' that:

> a provision in a Commonwealth statute evincing an intention that the statute is not intended to cover the field cannot avoid or eliminate a case of direct inconsistency or collision, of the kind which arises, for example, when Commonwealth and State laws make contradictory provision upon the same topic, making it impossible for both laws to be obeyed.[53]

His Honour treated it as being equally settled that general declarations of an absence of intention to exclude State laws will be effective to avoid 'cover the field' inconsistency.[54]

In my 1980 article I took issue with Mason J's reference to 'settled constitutional interpretation' that a general Commonwealth legislative provision *cannot* displace the operation of s 109 in cases of direct inconsistency.[55] My view then and now which I

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51 Ibid 510.

52 Lindell, above n 2, 39. The common law which operates when State legislation is excluded from operation by valid Commonwealth legislation may — like native title — be more complex and have more content than 'negative common law freedom'.

53 (1977) 137 CLR 545, 563–4.

54 Ibid 563–4.

55 Rumble, above n 1, 55–83.

believe is consistent with most case law before and since Mason J's 1977 statement — is that *no* issue of inconsistency can be resolved without first reaching a conclusion on whether the Commonwealth law is intended to operate subject to, or in disregard of, the State law.

Section 109 does not use the terms 'direct' and 'cover the field' and the High Court has not maintained any line between the two kinds of inconsistency. Supposed examples of 'direct' inconsistency — Commonwealth law requiring or authorising that which State law prohibits or vice versa — always depend on a conclusion that the Commonwealth requirement/authorisation/prohibition is intended to operate regardless of State law.

For example, in *Pirrie v McFarlane* a Commonwealth obligation[56] and in *Wardley*,[57] and *Coffs Harbour*[58] Commonwealth rights, were construed as intended to be subject to State prohibitions. The joint judgment in *Third Runway* merges direct and cover the field inconsistency:

> There can be no objection to a Commonwealth law on a subject which falls within a head of Commonwealth legislative power providing that a person is authorized to undertake an activity despite a State law prohibiting, restricting, qualifying or regulating that activity.[59]

That looks like 'direct' inconsistency. However, the Court (including Mason J) then went on:

> Indeed, unless the law expresses itself directly in that way, there is the possibility that it may not be understood as manifesting an intention to occupy the relevant field to the exclusion of State law.

As Aickin J said in *Wardley*:

> The two different aspects of inconsistency [direct and cover the field] 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.[60]

It follows it is open to the Commonwealth Parliament to indicate the intended operation of its legislation and thus to prevent inconsistency arising by declaring that a right/obligation etc which it creates is qualified and is subject to some or all State law.

The judgment in the recent decision in *Dickson* assumed that 'direct inconsistency' and 'cover the field inconsistency' are different kinds of inconsistency.[61] However, the Court did not suggest that either kind of inconsistency could arise regardless of legislative intention.

The Court's decision that there was a 'direct collision' between the State and Commonwealth laws was based on its view that there had been a 'deliberate [Commonwealth] legislative choice' about what conduct was to be rendered criminal and what conduct was not to be criminal.[62] In relation to 'cover the field' inconsistency,

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56 (1925) 36 CLR 170.
57 (1980) 142 CLR 237; see also discussion above, 452.
58 (1986) 161 CLR 47.
59 (1992) 175 CLR 453, 465.
60 (1980) 142 CLR 237, 280.
61 [2010] HCA 30 [22]-[35].
62 Ibid [24]. See also [22] and [25].

the Court referred to a proposition that 'the "intention" of the Parliament is determinative or at least indicative, of the characterisation of the federal law as one which "covers the field" in question or does not do so'.[63] The Court warned that 'caution is required here'.[64]

The 'caution' was the reminder that it is courts which determine the intention of legislation by interpreting the legislation in accordance with rules of interpretation.[65] The Court also cautioned that where there are general declarations in legislation of intention not to cover a field there has to be 'close attention to the place of such a statement in the particular statutory framework in which it is found'.[66]

These aspects of the *Dickson* judgment are consistent with my argument for the centrality of legislative intention to s 109 inconsistency.

## CAN THE COMMONWEALTH REMOVE INCONSISTENCY RETROSPECTIVELY?

In *University of Wollongong v Metwally* the Court held by a 4:3 majority that an amendment of the Commonwealth's *Racial Discrimination Act 1975* to remove inconsistency with State anti-discrimination legislation retrospectively was not effective.[67]

The ratio appears to be that the Commonwealth Parliament cannot affect the operation of s 109 by retrospectively removing an inconsistency.[68]

This proposition is difficult to reconcile with the fact that s 109 deals with the inconsistency of Commonwealth and State *laws* and that it is established that the Commonwealth can amend its laws retrospectively. I agree with the criticisms of the majority decision which have been set out by H P Lee[69] and Zines.[70] I find the minority judgments more persuasive. As Mason J in dissent put it:

> there is no objection to the enactment of Commonwealth legislation whose effect is not to contradict s 109 of the *Constitution* but to remove the inconsistency which attracts the operation of that section.[71]

For the time being the decision needs to be taken into account in drafting Commonwealth legislation.

Statements in the majority judgments of Gibbs CJ and Brennan J also suggest a general proposition that the Commonwealth Parliament cannot avoid direct

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63 [2010] HCA 30 [32].
64 Ibid.
65 Ibid.
66 [2010] HCA 30 [35]. The Court concluded that a declaration in Chapter 7 of the Commonwealth *Criminal Code* of intention not to 'exclude or limit' the operation of State laws 'could not displace or avoid' a 'direct collision' of the State law with provisions in Chapter 2 of the Criminal Code [36]–[37].
67 (1984) 158 CLR 447 (Gibbs, CJ, Murphy, Brennan and Deane JJ; Mason, Wilson and Dawson JJ dissenting) ('*Metwally*').
68 Ibid 455–7 (Gibbs CJ), 469–70 (Murphy J), 473–5 (Brennan J), 478–9 Deane J.
69 HP Lee, 'Retrospective Amendment of Federal Laws and the Inconsistency Doctrine in Australia' (1985) 15 *Federal Law Review* 335.
70 Zines, above n 4, 583–5.
71 (1984) 158 CLR 447, 460.

inconsistency by a declaration that there is no intention to exclude the operation of State law.[72] However, there is also authority to the effect that before it can be determined whether there is direct inconsistency, there needs to be an examination of the Commonwealth law to see whether the rights/obligations which it creates are intended to operate subject to, or in disregard of, State law. Gibbs CJ and Brennan J proceeded on that basis in *Coffs Harbour*.[73] Brennan J joined the unanimous decision in *Third Runway* recognising that principle.[74] Parliament's intention must be central to that principle.

The *Metwally* decision should be taken as limited to the effect of s 109 on Commonwealth power to remove inconsistency retrospectively and not as rebutting the thesis that inconsistency depends on the intended operation of the Commonwealth law.

## DOES THE 'ALTER, IMPAIR OR DETRACT FROM THE OPERATION OF THE COMMONWEALTH LAW' TEST APPLY REGARDLESS OF INTENTION?

In *The Kakiriki* Dixon J stated:

> When a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid.[75]

This is often cited as a 'test' for s 109 inconsistency.[76] References to this test if taken in isolation might be taken as suggesting that inconsistency can arise regardless of whether the Commonwealth law is intended to operate subject to, or to the exclusion of, State law.

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72 (1984) 158 CLR 447, 454–6 (Gibbs CJ), 474–5 (Brennan J).
73 (1986) 161 CLR 47, 50.
74 (1992) 175 CLR 453; see also discussion above, 448–449.
75 *Victoria v Commonwealth* (1937) 58 CLR 618, 630 ('*The Kakiriki*').
76 See, eg, *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61, 76.

However, when the statement which Dixon J made in *The Kakiriki* is read in context it is clear that his Honour did not put this test forward as an alternative to an inquiry into Commonwealth intention. On the contrary, the 'test' appears in the midst of Dixon J's

> brief statement of why I think that *upon its proper construction* s 329 of the [Commonwealth] *Navigation Act* does not exclude the operation of such a State law as s 13 of the [Victorian] *Marine Act* contains, unless at all events some step is taken by the Commonwealth authorities to exert the power given by s 329.[77]

Dixon J's statement is all about the extent to which the Commonwealth law should be construed as 'intended' to exclude the operation of the State law.[78]

In *APLA v Legal Services Commissioner* the Court considered whether a State law prohibiting lawyers from advertising personal injury legal services was inconsistent with any of a long list of Commonwealth provisions, some dealing with rights of appearance of legal practitioners in courts and some dealing with consumers' rights.[79] The 'alter/impair/detract from' test was referred to[80] to support a submission that the 'practical effect analysis, developed in s 92 cases appl[ies] to s 109 cases'.[81]

This submission in turn relied[82] on a statement in *Engineers*: 'This is the true foundation of the doctrine stated in *D'Emden v Pedder* in the so-called rule quoted, which is after all only a paraphrase of s 109 of the *Constitution*.'[83] The 'so-called rule' quoted in *Engineers* from *D'Emden v Pedder* was:

> When a State attempts to give to its legislative or executive authority an operation which, if valid, would fetter, control, or interfere with, the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the *Constitution*, is to that extent invalid and inoperative.[84]

However, the *Engineers* judgment went on to state the 'authority' of *D'Emden v Pedder* was:

> a case of conflict between Commonwealth law and State law. The Commonwealth law (*Audit Act 1901*) made provision as to how public moneys of the Commonwealth were to be paid out: written vouchers were required for all accounts paid ... The irresistible *construction* of the Act is that these vouchers, which the law requires for the protection of the Commonwealth Consolidated Revenue Fund, *are to be under the sole control of the Commonwealth authorities*. A State Act making it an offence to give such a voucher except on a condition imposed by the State Parliament, namely, a tax in aid of the State revenue,

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77 (1937) 58 CLR 618, 630 (emphasis added).

78 Ibid 630–1. In *Dickson* [2010] HCA 30 the Court looked to what the Commonwealth law '*deliberately* excluded' [22] (emphasis added) and '*designedly* left' [25] (emphasis added) 'as the basis for its conclusion that the State law would 'alter, impair or detract' from the operation of the federal legislation [30].

79 *APLA Ltd v Legal Services Commissioner of New South Wales* (2005) 224 CLR 322 ('*APLA*').

80 Transcript of Proceedings, *APLA Ltd v Legal Services Commissioner of New South Wales* (High Court of Australia, Stephen Gageler, SC, 7 December 2004), 7 ('Transcript of Proceedings, *APLA*'); see also Lindell, above n 2, 29–30 and accompanying footnotes.

81 Transcript of Proceedings, *APLA*, above n 80, 3.

82 Ibid 7-8.

83 (1920) 28 CLR 129, 154.

84 Ibid 144 quoting *D'Emden v Pedder* 1 CLR 91, 111.

> was, so far, manifestly inconsistent with the Commonwealth law. Section 109 of the *Constitution* applies to such a case ...[85]

This is a clear statement that inconsistency arose *because* the Commonwealth law *intended* to exclude 'control' other than Commonwealth 'control' — that is, 'control' by State law — from application to these vouchers. Thus *Engineers* is not authority for the proposition that the 'alter/impair/detract from' test has a life of its own independent of Commonwealth intention in relation to exclusion of State law.

Indeed, the submission in *APLA* was not that the 'alter/impair/detract from' test was an alternative to inquiry into intention but rather that:

> when we look at s 109 and look at the inconsistency between laws ... one is looking at the substantive operation of both laws, and, on one view, the covering the field test is one of simply looking at the *intended* practical operation of the Commonwealth law.[86]

And

> What we are seeking to do is look at the *intended* practical operation of the Commonwealth law, that is, if there is a right and it is intended to be exercised or enjoyed.[87]

This submission depended on the scope of the Commonwealth rights created and on Commonwealth intention about the practical operation of those rights.

The majority held that there was no inconsistency.[88] There were references to the 'alter/impair/detract from' test[89] and it seems that it was accepted — at least for purposes of argument — that the practical effect of a State law on the operation of a Commonwealth law could be relevant to an inquiry into s 109 inconsistency. However, there were also references to factors relevant to the intention of the Commonwealth legislation.[90]

Callinan J[91] explained the line from practical effect through the alter/impair test to intention quoting Mason J in the *Hospital Benefits Case*:

> [The 'alter/impair/detract from'] test may be applied so as to produce inconsistency in two ways. It may appear that the legal operation of the two laws is such that the State law, alters, impairs or detracts from rights and obligations created by the Commonwealth law. Or it may appear that the State law alters, impairs or detracts from the object or purpose sought to be achieved by the Commonwealth law. In each situation there is a case for saying that the *intention* underlying the Commonwealth law was that it should operate to the exclusion of any State law having that effect.[92]

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85 Ibid 156 (emphasis added).
86 Transcript of Proceedings, *APLA*, above n 80, 5.
87 Ibid 5.
88 *APLA* (2005) 224 CLR 322 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ; Kirby J dissenting; McHugh J not deciding).
89 See, eg, ibid 354 (Gleeson CJ and Heydon J); 400 (Gummow J), 449 (Hayne J concurring); 424–5 (Kirby J), 489 Callinan J.
90 See references to the 'assumptions', 354-5 (Gleeson CJ, Heydon J); '[the] federal milieu … *assumes* the continued existence of State laws regulating the conduct of the legal profession': 401 (Gummow J).
91 *APLA* (2005) 224 CLR 322, 489.
92 *NSW v Commonwealth* (1983) 151 CLR 302, 330 ('*Hospital Benefits Case*').

Callinan J went on:

> That and other statements indicate that a slight or marginal or insignificant impact of a State law upon a federal law will not give rise to a constitutional inconsistency.[93]

This sits comfortably with my argument that whether or not there is inconsistency depends on whether or not the Commonwealth law intends to operate subject to, or regardless of, State law of the kind in issue. If a Commonwealth law intends to exclude State laws having particular practical effects, then the issue of inconsistency would involve an inquiry into the practical effect of the State law.

**Summary of the law on s 109**

Most High Court authority on s 109 supports, or is consistent with, the proposition that whether a Commonwealth law has validly created a capacity/power/right/obligation which has effect regardless of, or is subject to, State law depends *solely* on whether the Commonwealth law is intended to operate subject to, or regardless of, State law.

The two High Court decisions which do not sit well with this proposition are *Viskauskas*[94] denying Commonwealth power to remove inconsistency by retrospective amendment and the *Native Title Act Case* holding invalid s 12 of the *Native Title Act* giving the common law in relation to native title 'the force of law'. In my view those two decisions can be confined to retrospective amendment and the particular features of s 12, and should not generally prevent Commonwealth legislation from addressing inconsistency issues.

## DRAFTING PRACTICE

Before the 1990s Commonwealth Acts often did not address issues of inconsistency with State laws at all. When inconsistency was addressed, there was usually no more than a general statement which seemed to be intended to prevent it being implied that the Commonwealth Act was intended to cover a field. For example s 4 of the *Occupational Health and Safety (Commonwealth Employment) Act 1991* (Cth) provided:

> It is the intention of the Parliament that this Act is not to affect the operation of a law of a State … that promotes the occupational health and safety of persons and is capable of operating … concurrently with this Act.

Such provisions assumed that there is a clear line between situations when provisions are capable of operating 'concurrently' with one another and situations when they are not. It was not apparent how a provision like s 4 was meant to operate in relation to the very detailed regime for Commonwealth workplaces which the Act provided for. For example, it would have been possible for State and Commonwealth provisions for workplace committee meetings and consultation — perhaps with different frequencies and slightly different agendas — to operate without impossibility of simultaneous obedience. Was s 4 intended to allow 'concurrent' operation of State provisions in those circumstances? That outcome would have seemed anomalous.

Over the last twenty years there have been examples of Commonwealth Acts including very detailed provisions about the extent to which the Commonwealth intention is to exclude or not exclude the operation of State legislation. Provisions 'manufacturing' inconsistency by identifying specific State provisions whose operation

93 *APLA* (2005) 224 CLR 322, 489.
94 *Viskauskas v Niland* (1982) 153 CLR 280.

is to be excluded and provisions 'avoiding' inconsistency by making the operation of Commonwealth law subject to State law are now more common.

For example, there were 10 pages in the *Corporations Act 2001* (Cth) dealing with inconsistency. Within those provisions, ss 5F and 5G avoid s 109 inconsistency with State laws. Section 5F provided for provisions of the corporations legislation in relation to a matter to cease to operate in a State if the State declared the matter to be excluded matter. Section 5G provided — subject to certain conditions being met by the relevant State provisions — that Commonwealth provisions which prohibited, or imposed liability for, the doing of an act did not apply to that act if it was specifically authorised or required by State provisions.[95]

Another example is provided by the *Workplace Relations Amendment (Workchoices) Act 2005* (Cth) which introduced into the *Workplace Relations Act 1996* (Cth) extensive amendments including three pages dealing with inconsistency and other provisions scattered throughout the Act.

We still see provisions which assume that there is a dividing line between concurrent operation of legislation and direct inconsistency of provisions without explaining what that dividing line is. For example s 5E(1) in the *Corporations Act 2001* (Cth) contains a declaration that the legislation is 'not intended to exclude or limit the concurrent operation of any law of a State'. Accordingly, there continues to be some uncertainty about how such provisions are intended to operate. Given that the High Court has not provided certainty about the dividing line between concurrent operation and direct inconsistency, it is not surprising that Commonwealth drafting has reflected that uncertainty.

## LAW-MAKING AND SECTION 109

I do not know why twenty years ago Commonwealth legislation did not deal with inconsistency with detailed provisions. The past uncertainty about whether Commonwealth legislation could validly manufacture or avoid inconsistency may have discouraged express provision dealing with inconsistency. When Governments did not control the Senate, there may have been a reluctance to include express declarations of intention to override State laws in Bills. Such declarations might have attracted opposition to the Bills in the Senate.

The uncertainty about drafting options has been reduced by an accumulation of authority holding that express declarations in Commonwealth legislation about the relationship of the Commonwealth legislation with State law are valid and effective. The few remaining 'pockets of judicial resistance'[96] to the proposition that s 109 is all about intention should not present significant barriers to drafters.

This increasing trend for Commonwealth legislation to deal with inconsistency issues with considered and detailed provisions is a welcome development. However, drafting for inconsistency issues should not be just a matter for Commonwealth drafters.

The States have an interest in the extent to which State laws are overridden by Commonwealth law. The Council of Australian Governments ('COAG') provides a

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95 The provisions are considered in *Loo v DPP (Vic)* (2005) 154 A Crim R 299.

96 Lindell, above n 2, 39.

mechanism for State input for some Commonwealth legislative proposals. Proposals for uniform and model laws are referred by COAG to the Australasian Parliamentary Counsel's Committee ('APCC').[97] However, not all Commonwealth legislative proposals go through COAG or APCC consideration.

The *Best Practice Regulation Handbook* published by the Office of Best Practice Regulation directs those involved in developing Commonwealth legislative proposals to undertake consultation with 'stakeholders'.[98] Across 150 pages the nearest that the Handbook comes to consideration of s 109 inconsistency issues is to state:

> Relevant state, territory and local governments, and Australian Government departments and agencies, should be consulted to ensure that regulatory policies across jurisdictions are consistent and complementary. In order to produce efficient regulation, it is necessary to avoid or minimise duplicating legislative requirements across agencies and government at all levels. This is particularly important where the regulatory processes arise from negotiations between different levels of government and/or involve overlapping responsibilities.[99]

Consideration of inconsistency with State laws could be made an express item for consideration in development of Commonwealth regulatory proposals.

Even if those involved in developing Commonwealth regulatory proposals do turn their minds to the impact of the Commonwealth proposals on State law, they may not necessarily be aware of all State law issues. State administrations are better placed to know their own laws and how they operate than are Commonwealth drafters and law-makers. State administrators may be the only ones with knowledge of State laws that are in preparation or which are being planned.

Flexibility to deal with possible future State laws can be built into Commonwealth Acts by including provision in the Commonwealth Act for regulations rolling back the operation of some provisions in the Commonwealth Act.

It is my understanding that States do not systematically review *all* Commonwealth Bills and other legislative instruments for potential impacts on State laws. The level of resourcing required to carry out such systematic review of all Commonwealth legislation may be onerous. If States did carry out such review they could alert Commonwealth drafters and law-makers to potential interaction with State laws and could propose provisions in the Commonwealth law to deal with that interaction.

There is another aspect of Commonwealth law-making where it is noticeable that interaction with State law is not systematically considered – and that is in the Parliament. Policy and legislation committees encounter such issues on an occasional basis in their own areas.

There are, however, only two committees — the Senate's Scrutiny of Bills Committee and the Regulations and Ordinances Committee — which have responsibilities to review all Bills and legislative instruments before the Parliament against *general* standards of law-making.

The standards against which these two committees assess legislation focus on the impact of law-making on individual rights and liberties and do not include the impact

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97 Australasian Parliamentary Counsel's Committee, <http://www.pcc.gov.au>.
98 Office of Best Practice Regulation, *Best Practice Regulation Handbook* (2010) ch 4.
99 Ibid 52.

of legislation on State law. [100] These standards recognise that uncertainty in law has adverse impacts on rights and liberties. There is now a solid — although not unwavering — line of authority supporting the drafting of Commonwealth laws to provide certainty when Commonwealth law and State law interact.

As *Dickson*[101] demonstrates, boilerplate declarations in Commonwealth Acts of 'intention not to cover a field to the exclusion of State laws to the extent that they are capable of operating concurrently with the Commonwealth law' give courts and others little guidance in dealing with specific issues of inconsistency in relation to particular provisions. The federal Parliament could be more systematic in considering inconsistency with State law and thus in ensuring that legislation which comes before it provides the certainty of law which is part of one of the most important rights of all — the rule of law.

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100 <http://www.aph.gov.au/senate/committee/scrutiny/cominfo.htm>; <http://www.aph.gov.au/senate/committee/scrutiny/regord_ctte/guidelines.htm>.

101 [2010] HCA 30. See especially '... close attention is necessary to the place of such a statement in the particular statutory framework ...'. [36].