

Conflict of Laws

If the laws of a state ever conflict with the laws of the Australian Government, the Constitution says that Commonwealth law is to be followed.

The Australian Government judiciary may also have the power to review decisions by a state judiciary.

Section 109 of the Australian Constitution

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In Australia, legislative power is held concurrently by the Commonwealth and the States. In the event of inconsistency between Commonwealth and State laws, **section 109 of the Constitution of Australia** provides that the laws of the Commonwealth shall prevail over those of a State to the extent of any inconsistency.

The meaning of "invalid" in s 109 does not mean that a State law is invalid in the positivist sense that the State Parliament lacks power to pass it. The State law, though enacted with full validity, merely ceases to operate. Hence, in order for s 109 to come into operation at all, there must be a valid State law and a valid Commonwealth law. (*Carter v Egg and Egg Pulp Marketing Board (Vic)*).

When s 109 takes effect, the State law yields to the Commonwealth law, but remains a valid law of the Parliament which enacted it. The practical significance of this will become apparent if, at some later date, the overriding Commonwealth law ceases to operate.

In the absence of s 109, this function might have been fulfilled by covering clause 5 of the Constitution, which makes Commonwealth laws "binding on the courts, judges and people ... of every part of the Commonwealth".

The evolution of High Court doctrine in s 109 cases has led to three broad approaches to determine when there is inconsistency.

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Full text

“ 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. ”

Direct inconsistency

The first two tests, and in particular the first, are said to involve "direct" inconsistency.

Impossible to obey both laws

Instances may arise when it is impossible to obey two laws simultaneously. A classical example is *R v Licensing Court of Brisbane; Ex parte Daniell*. A state referendum on liquor trading hours was fixed by State law for the same day as a federal Senate election. The Commonwealth law provided that a State referendum could not be held on that day.

One law confers a right which the other purports to take away

In some situations, one law may purport to confer a legal right, privilege or entitlement, while another law purports to take away or diminish some right or entitlement. In other words, one law says that you can do X, the other that you cannot do X. For example, the Commonwealth provision in *Colvin v Bradley Brothers Pty Ltd* affirmed that employers in certain industries could employ women to work on certain machines whilst the State provision made it an offence to do so. It was not impossible to obey both laws, since nothing in the Commonwealth law required the employment of females. This type of inconsistency may require a working-out of the actual effect of both laws in an individual case. Because of this, it could require a more subtle analysis than test 1.

Chief Justice Knox and Justice Gavan Duffy agreed in *Clyde Engineering Co Ltd v Cowburn* that a simple test of logical contradiction was "not sufficient or even appropriate in every case", and enunciated this test.

Covering the field (indirect inconsistency)

It may happen that the Commonwealth law evinces a legislative intention to "cover the field". In such a case there need not be any direct contradiction between the two enactments. What is imputed to the Commonwealth Parliament is a legislative intention that its law shall be all the law there is on that topic. In that event, what is "inconsistent" with the Commonwealth law is the existence of any State law at all on that topic.

This approach may involve answering one or more of the following questions:

1. What field is covered by the Commonwealth law?
2. Is the Commonwealth law intended to be exclusive within its field?
3. Does the State law operate in the same field as the Commonwealth law?

Questions 1 and 2 can be problematic as they frequently depend on a subjective assessment of the scope and operation of a Commonwealth law. In the absence of express intention, the Court will look to a variety of factors, such as the subject-matter of the law and whether for the law to achieve its purpose it is necessary that it be a complete statement of the law on that topic.

This test involves a more indirect form of inconsistency and makes s 109 a much more powerful instrument for ensuring the supremacy of Commonwealth law.

It had first been suggested in *Australian Boot Trade Employees Federation v Whybrow* (1910). Justice Dixon had foreshadowed a similar test in *Commonwealth v Queensland* (1920). This test received its first clear formulation in *Clyde Engineering Co Ltd v Cowburn* by Justice Isaacs. In that case, by covering the field, Isaacs was able to ensure the supremacy of the Commonwealth system.

The "cover the field" test became fully authoritative when Justice Dixon adopted it in *Ex parte McLean* (1930).

Clearing the field

The Commonwealth can avoid covering a legislative "field" by passing an express provision declaring its intention not to do so. This means in practice that the Commonwealth can control the operation of s 109 in a negative way by making it clear that related State laws are to operate concurrently with the Commonwealth law. The leading case is *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977).

Operation of the three tests

In practice, the three tests overlap. For example, in *Commercial Radio Coffs Harbour v Fuller* (1986), the finding that there was no inconsistency depended on all three tests. Conversely, the conclusion that there is an inconsistency may depend on more than one test, as was evident in the divergent reasoning employed in *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980).

See also

- [Supremacy Clause](#)--analogous provision in the [United States Constitution](#)

Quote from Jon Stanhope, Chief Minister for the ACT

In the Australian dated 04-03-2011

The difference is that if the commonwealth took issue with a Victorian or West Australian or South Australian law, it would need to either take the matter to the High Court and argue that the legislation conflicted with the Commonwealth Marriage Act or change the Constitution to remove the right of the States to legislate in that area.