# The Section 109 "Cover the Field" Test of Inconsistency: an Undesirable Legal Fiction

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> The drastic consequences of its operation make the interpretation of ...[s 109] of vital importance for the effective operation, in Australia, of the federal system of government.[1]
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> The development of this approach [the "cover the field" test] to identifying "inconsistent" Commonwealth and State laws has extended to the Commonwealth an invitation for it to take exclusive occupancy, at the expense of State legislation, of those areas which the expansive interpretation of the nominally concurrent powers of the Commonwealth has allowed the Commonwealth to enter.[2]

## *I. Introduction*

As we approach the centenary of Federation, it is important to consider and debate a number of fundamental constitutional issues. One such fundamental issue is the operation of s 109 of the Commonwealth Constitution. This article has been written in the hope that it will stimulate debate on desirable changes to s 109.

The dominant theme of this article is that the "cover the field" test is not an appropriate test for identifying inconsistent Commonwealth and State laws pursuant to s 109 of the Commonwealth Constitution. It will be argued that the "cover the field" test:

(a) is not in accordance with:

  (i) the ordinary meaning of the term inconsistent;

  (ii) the intention of the founding fathers; and

  (iii) the conferral of concurrent powers on the Commonwealth Parliament;

(b) is not supported by persuasive policy arguments; and

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1 *Flaherty v Girgis* (1985) 63 ALR 466, at 469-70 per Kirby P.

2 Hanks, P, "'Inconsistent' Commonwealth and State laws: centralising government power in the Australian Federation" (1986) 16 *Federal Law Review* 107, at 132.

(c) has operated in an extremely unsatisfactory manner.

The experience in Canada on the issue of inconsistency between federal and provincial laws will be examined as it clearly demonstrates that sole reliance on tests of direct inconsistency is a workable and feasible option. Finally, it will be submitted that the obstacles which need to be overcome, in order to abolish the "cover the field" test as a test of inconsistency under s 109 are substantial but not insuperable.

## *II. The Tests Used by the High Court*

Section 109 provides that[3] "[w]hen 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". Originally, to determine whether constitutional inconsistency was demonstrated, a single test was proposed by the High Court of Australia, namely whether obedience to both the federal and State law at the same time was impossible (the "simultaneous obedience" test).[4] The 1984 Fiscal Powers Sub-Committee of the Australian Constitutional Convention has indicated that this test "represents the most obvious test of inconsistency" and that "its operation is straightforward in practice and has given rise to no major problems".[5]

However, in the 1926 case of *Clyde Engineering Co Ltd v Cowburn*,[6] two additional tests were formulated by the High Court.

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3 See also s 5 of the *Commonwealth of Australia Constitution Act* 1900 (UK) which provides that "this Act and all laws made by the Parliament of the Commonwealth under the Constitution shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State ...".

4 See *Federated Sawmill Employees of Australia v James Moore and Sons Pty Ltd* (1909) 8 CLR 465, at 500; *Australian Boot Trade Employees Federation v Whybrow & Co* (1910) 10 CLR 266; *Federated Engine Drivers Association of Australasia v Adelaide Chemical and Fertiliser Co Ltd* (1920) 28 CLR 1, at 12; *Waterside Workers' Federation of Australia v Commonwealth Steamship Owners' Association* (1920) 28 CLR 209, at 234; and *R v Licensing Court of Brisbane, ex p Daniell* (1920) 28 CLR 23.

5 *Australian Constitutional Convention Fiscal Powers Sub-Committee Report*, at 69. A classic example of a finding of inconsistency under this test is furnished by the case of *R v Licensing Court of Brisbane, ex p Daniell* (1920) 28 CLR 23. The Commonwealth enactment provided that "no referendum or vote of electors of any State or part of a State shall be taken under the law of a State" on a Senate polling day. A Queensland statute declared that a local referendum "shall be held at the Senate election in 1917 ...".

6 (1926) 37 CLR 466. It should be noted that not all commentators agree that there are three tests of inconsistency. See, for instance, Murray-Jones, A, "The Tests for Inconsistency under Section 109 of the

The first test, known as the "conferred rights" test, was expounded by Knox CJ and Gavan Duffy J who explained that:[7]

> Statutes may do more than impose duties: they may, for instance, confer rights; and one statute is inconsistent with another when it takes away a right conferred by that other even though the right be one which might be waived or abandoned without disobeying.

The "simultaneous obedience" test and the "conferred rights" test are often referred to as tests of direct inconsistency. It cannot be denied that "in the case of a direct federal-State clash of laws, the operation of s 109 in giving supremacy to the federal law is unexceptionable".[8]

The most significant and far-reaching test for inconsistency, the "cover the field" test, was formulated by Isaacs J. He indicated that[9]

> the vital question would be: Was the second Act [the Commonwealth Act] on its true construction intended to cover the

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Constitution" (1979) 10 *Federal Law Review* 25; and Rumble, G, "The Nature of Inconsistency under s 109 of the Constitution" (1980) 11 *Federal Law Review* 40.

7 (1926) 37 CLR 466, at 478. An example of inconsistency under this test is provided by *Colvin v Bradley Bros Pty Ltd* (1943) 68 CLR 151. A NSW statute prohibited the employment of female staff on milling machines. A Commonwealth award provided that employers covered by the award "may employ females on work in the industries and callings covered by this award".

8 Gilbert, C, *Australian and Canadian Federalism 1867-1984*, Melbourne University Press, 1986, at 135.

9 (1926) 37 CLR 466, at 489. The basic idea for a "cover the field" test was inspired by the solution adopted by the United States Supreme Court to the comparable problem under the United States Constitution - the model used in the Australian Constitution to distribute power between the constituent elements of our federation. For examples of the operation of the doctrine of implied pre-emption (as the American version of the "cover the field" test is known) see: *Gibbons v Ogden* 22 US 1 (1824); *Florida Lime and Avocado Growers v Paul* 373 US 132 (1963); and *Pacific Gas and Electric Co v State Resources Conservation and Development Commission* 461 US 190 (1983). Its possible use in the Australian context was, in fact, suggested long before its adoption in *Clyde Engineering Co Ltd v Cowburn* by, for example, Sir W Harrison Moore in *The Constitution of the Commonwealth of Australia*, 2nd ed, 1909, at 409. In *Federated Sawmill Employees of Australia v James Moore and Sons Pty Ltd* (1909) 8 CLR 465, at 535, 536, Isaacs J referred to the "field" in which laws met. Justice Isaacs also used the "cover the field" test in *Australian Boot Trade Employees Federation v Whybrow & Co* (1910) 10 CLR 266, at 330, albeit in the context of the possibility of a State *statute* having paramountcy over a Commonwealth *award*, and in *Union Steamship Co of NZ Ltd v The Commonwealth* (1925) 36 CLR 130, at 149 (a case dealing with the *Colonial Laws Validity Act* 1865). For more details see Murray-Jones, work cited at footnote 6, at 27, 33.

> whole ground and, therefore, to supersede the first [the State Act]?... If ... a competent legislature expressly or impliedly evinces its intention to cover the whole field, that is a conclusive test of inconsistency where another legislature assumes to enter to any extent upon the same field.

This test is commonly referred to as a test of indirect inconsistency.

## *III. What is the Meaning of the Term "Inconsistent"?*

In relation to s 109, one commentator aptly observed that "the simplicity of these words has proved deceptive".[10] The requirement that an inconsistent State law is invalid only "to the extent of the inconsistency" can be regarded as evidence, albeit equivocal, that s 109 was intended to have a very limited scope and operation.

"Inconsistent" is the negation of "consistent". The etymological origin of "consistent" is the latin verb *consistere*, composed of the prefix *con*, which means "with" or "together", and of the verb *sistere* (a reduplication of *stare*), which means "to place" or "to stand". Thus the term "inconsistent" is a term used to describe matters which are contradictory, incompatible, conflicting or not capable of being placed together or of standing together.[11]

The inability to comply simultaneously with the requirements of both a federal Act and a State Act is clearly the most obvious instance of two Acts which are "not capable of being placed together or of standing together". A similar conclusion can be reached in relation to those circumstances which activate the "conferred rights" test.

The compatibility of the "cover the field" test with the ordinary meaning of the term "inconsistent" is, however, more problematic. It is possible to argue that if a Commonwealth Act is intended by the Commonwealth Parliament to be the sole law on a given topic or subject matter and a State Act also deals with that topic, the two Acts can be regarded as contradictory or incompatible, as the State Parliament has acted in a manner contrary to the wishes of the Commonwealth Parliament. As Dixon J (as he then was) indicated in one of his most famous statements:[12]

> Inconsistency depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or

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10 Zelling, H, "Inconsistency between Commonwealth and State Laws" (1948) 22 *Australian Law Journal* 45.

11 See Tammelo, I, "The Tests of Inconsistency between Commonwealth and State Laws" (1957) 30 *Australian Law Journal* 496; and Bailey, KH, "Inconsistency with Paramount Law" (1939-41) 2 *Res Judicatae* 9.

12 *Ex parte McLean* (1930) 43 CLR 472, at 483.

> exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter.

However, we do not find this line of argument persuasive. To regard a State Act as not capable of being placed together or of standing together with a Commonwealth Act, when the State Act does not require conduct that is completely contrary to the conduct prescribed by a Commonwealth Act and does not interfere with a right or privilege conferred by a Commonwealth Act, appears to entail a distortion of the meaning of the term "inconsistent". In fact, the concept of inconsistency, as a description of matters which are not capable of standing together, appears to require, as a matter of logic, a comparison of the effect and operation of each Act, rather than an inquiry as to whether the existence of the State Act is in accordance with the intention of the Commonwealth Parliament. To put it differently, it is more consonant with the ordinary understanding of the term "inconsistency" to address this issue from the perspective of the people who are bound, or affected, by both enactments than to focus on the wishes of the Commonwealth law maker.

## *IV. That Elusive Intention of the Founding Fathers*

The Convention Debates demonstrate that the "cover the field" test is not in accordance with the intention of the founding fathers. The value of considering the history behind a particular constitutional provision was unanimously recognised by the High Court in *Cole v Whitfield*[13] when it indicated that:[14]

> reference to the history of s 92 may be made ... for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged.

Clause 3, identical to the current s 109, was included in the Commonwealth Bill of 1891. It was discussed only twice by the founding fathers during the 1898 Melbourne session of the

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13 (1988) 78 ALR 42.

14 (1988) 78 ALR 42, at 49. On this point, the Constitutional Commission was of the view that "our task in considering what alterations should be made to the Constitution cannot be confined to the values held by the framers, or by the people, at the end of the last century. That is not, of course, to suggest that many of their values and policies are not still those of the Australian people; others, however, may not be" (Constitutional Commission, *Final Report*, AGPS, 1988, Vol 1, at 70).

Australasian Federal Convention.[15] Craven reached the view that:[16]

> it is apparent from both the lack of time devoted to its discussion, and from the essentially superficial nature of that discussion itself, that the founding fathers did not attach to s 109 a significance comparable to that which it enjoys today. This is, perhaps, surprising in view of the prominence which s 109 has quickly achieved and maintained in Australian constitutional law.

With all due respect, the attitude of the founding fathers cannot be regarded as surprising when one considers their views and beliefs on how the Constitution and s 109 would operate. In fact, the founding fathers were of the view that simultaneous coverage of the same subject matter by a State Act and a Commonwealth Act would be a rare occurrence.[17] This was because, as Craven himself tentatively admits, the founding fathers "felt that they had effected a division between Commonwealth and State subjects of legislative power such that overlap, and hence conflict, would be relatively unlikely to occur".[18] Furthermore, the intention of the framers was that, whenever s 109 was called into play by litigants, the High Court would strive for a solution which would leave unimpaired the legislative autonomy of the States.[19] This intention is clearly not compatible with a broad test of inconsistency such as the "cover the field" test.

In *University of Wollongong v Metwally*[20] Deane J expressed the view that:[21]

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15 *Convention Debates*, Melbourne 1898, at 643-44 and 1911-13.

16 Craven, G, "The Operation of Section 109 of the Commonwealth Constitution", published as Appendix F to the *Australian Constitutional Convention Fiscal Powers Sub-Committee Report* 98, at 101.

17 See, for instance, the comment of Sir George Turner that "the federal Parliament will not have power to legislate on matters left entirely to the State. How, then, could the laws be inconsistent?" (*Convention Debates*, Melbourne 1898, at 1912).

18 Craven, work cited at footnote 16, at 101.

19 Mr Reid, for instance, indicated that "I do not think we propose the Constitution should be so framed that a State law passed on a subject left entirely to the State should 'go down' before a law of the Commonwealth on some other subject without any rhyme or reason, and without any reference to any consequences which may follow" (*Convention Debates*, Melbourne 1898, at 1912).

20 (1984) 56 ALR 1.

21 (1984) 56 ALR 1, at 21. Chief Justice Gibbs indicated that s 109 is "of great importance for the ordinary citizen, who is entitled to know which of two inconsistent laws he is required to observe" ((1984) 56 ALR 1, at 7).

> ... s 109 is not concerned merely to resolve disputes between the Commonwealth and a State as to the validity of their competing claims to govern the conduct of individuals in a particular area of legislative power. It serves the equally important function of protecting the individual from the injustice of being subjected to the requirements of valid and inconsistent laws of the Commonwealth and State Parliaments on the same subject.

If the purpose of s 109 is to provide a fundamental freedom or right, it is extraordinary that the impact on individuals of having to comply with inconsistent Commonwealth and State laws was not debated during the Convention Debates! The correct view is the one outlined by Mason CJ that "the object of s 109, no more and no less, is to establish the supremacy of Commonwealth law where there is a conflict between a Commonwealth and a State law".[22]

## *V. The "Cover the Field " Test: the Policy Dimensions*

There are compelling policy arguments to support the abolition of this broad test of inconsistency. An argument that is commonly put forward by those who support the "cover the field" test is that the test is consistent with the principles of interpretation of the Constitution which were formulated by the High Court in the *Engineers* case.[23] The High Court, in the *Engineers* case, overthrew the doctrine of reserved powers. This doctrine was based on an inference, drawn from the list of powers given to the Commonwealth, that legislative powers over certain subjects were exclusively vested in the States. Unless the contrary intention appeared, the federal powers were construed so as not to impinge on these reserved powers. Since the *Engineers* case, the enumerated powers of the Commonwealth have received their widest interpretation. The relevance of the *Engineers* principle to s 109 has been argued as follows:[24]

> Similarly, the "covering the field" version of the inconsistency rule in s 109 results in a valid Commonwealth law being given a very wide operative effect in that it displaces a valid, competing, but not-directly-conflicting state law. Accordingly, the "covering the field"

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22 (1984) 56 ALR 1, at 11. Similarly, Dawson J noted that "s 109 does not operate as a guarantee of rights or immunities which have been acquired as the result of its operation upon inconsistent laws" ((1984) 56 ALR 1, at 29).

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

24 Gilbert, work cited at footnote 8, at 125. Hanks has pointed out that it may be more than a coincidence that the "simultaneous obedience" test was developed by Griffith CJ, Barton and O'Connor JJ, who had also espoused the "reserved powers" doctrine (Hanks, work cited at footnote 2, at 111).

definition of the rule in s 109 is a logical corollary of the *Engineers* principle of interpretation of Commonwealth legislative powers.

While this argument, that the "cover the field" test is the logical corollary of the *Engineers* principle, appears superficially attractive, it does not withstand close scrutiny. The only logical connection between s 109 and the *Engineers* doctrine is that, as the legislative powers of the Commonwealth are enhanced, the more likely it is that a Commonwealth Act and a State Act will deal with the same subject matter. To go beyond that, by applying the "cover the field" test, cannot be regarded as "a logical corollary of the *Engineers* principle". Section 109 is not a grant of legislative power to the Commonwealth Parliament and it is not apparent, from both logical and policy perspectives, why the choice as to the tests to be applied for determining inconsistency under s 109 should be consistent with, and indeed dictated by, the philosophical rationale and practical effect of the principle implemented by the courts to interpret the legislative powers of the Commonwealth Parliament.

The Constitutional Commission concluded that "there is considerable (though not universal) agreement ... for the ability of the Commonwealth, if it should so wish, to legislate exhaustively on any subject within its power, so that federal law is the only law".[25] It has been argued that allowing the Commonwealth Parliament to legislate exhaustively on any subject within its power will allow the Commonwealth Parliament to exercise *effectively* its legislative powers.[26] This is because allowing the Commonwealth law to be the only law on a given subject matter facilitates the attainment of national goals which have been set by the national government. It is also not difficult to see that regulation of the same activity by two legislative schemes can constitute an inefficient and untidy use of resources.[27]

While it cannot be denied that the policy arguments set out above in favour of the "cover the field" test are valid, it is submitted that they are not as persuasive as the arguments in favour of tests of direct inconsistency. It is one thing to interpret broadly the legislative powers which the Constitution has conferred on the Commonwealth Parliament. It is another thing altogether to allow the Commonwealth Parliament, through the High Court's interpretation of s 109, to exclude State legislation from those areas

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25 Constitutional Commission, work cited at footnote 14, at 648.

26 Rumble, work cited at footnote 6, at 78; and Murray-Jones, work cited at footnote 6, at 42.

27 Lederman, WR, "The Concurrent Operation of Federal and Provincial Laws in Canada" (1963) 9 *McGill Law Journal* 185, at 195.

which State Parliaments are constitutionally authorised to regulate. It must be borne in mind that the vast majority of the legislative powers of the Commonwealth Parliament are concurrent powers, that is to say, they are shared by both the Commonwealth and the States. Hence, to allow the High Court to displace an otherwise constitutionally valid State Act, simply because the Commonwealth Act has evinced an intention to be the only law on that particular topic, is utterly contrary to the notion of concurrent powers. The "cover the field" test has had the practical effect of converting, whenever the Commonwealth legislature has so desired, the Commonwealth's concurrent powers into exclusive powers.

Sole reliance on tests of direct inconsistency would not, in a formal sense, diminish the legislative power of the Commonwealth Parliament. In fact, the Commonwealth Parliament would still have the benefit of the Court's broad interpretation of its powers. It would simply have to tolerate more State Acts on the subjects within the Commonwealth's power than is currently the case. A State Act generally falls within one of the following categories.[28] It may simply duplicate the federal provisions or it may supplement the federal statute by adding something not already in the federal legislation. Finally, the State statute may duplicate and supplement the federal law. In each of these three typical scenarios, the detrimental effect on the effectiveness of the Commonwealth's legislative powers would be insubstantial compared to the effect which the "cover the field" test has had on the legislative autonomy and effectiveness of the States. It is therefore submitted that the implementation of tests of direct inconsistency would involve a more balanced approach to the question of the co-existence of two spheres of legislative power in our federal system. As Professor Hogg has perceptively observed, "duplication is 'the ultimate in harmony'. The argument that it is untidy, wasteful and confusing to have two laws when only one is needed reflects a value which in a federal system often has to be subordinated to that of provincial autonomy".[29]

We must also not lose sight of the fact that diversity has a number of virtues. It should not be difficult to see that it is "important to preserve adequate scope for regional self-determination so that laws and policies can both accommodate and preserve the diversity of political, economic, social and cultural interests found in the Australian community".[30] This desirable goal

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28 See Gilbert, work cited at footnote 8, at 119-120.

29 Hogg, PW, *Constitutional Law of Canada*, 3rd ed, 1992, at 431.

30 McMillan, J, Evans, G and Storey, H, *Australia's Constitution - Time For Change*, George Allen & Unwin, 1983, at 140.

is more likely to be achieved by the sole reliance on the concept of direct inconsistency.

Furthermore, it is not difficult to find cases, which have resulted in a finding of inconsistency pursuant to the "cover the field" test, where it has not been possible to conclude that this result was clearly preferable, on policy grounds, to a finding of no inconsistency. Two examples illustrate the point.

In *O'Sullivan v Noarlunga Meat Ltd*[31] the High Court considered South Australian and Commonwealth laws which purported to regulate, through licensing schemes, the use of premises for the slaughter of stock for the meat export trade. Under the South Australian law, the criteria that needed to be satisfied for the grant of a State licence included being a fit and proper person; proving that the premises were located in a suitable place; and that the public requirements did not necessitate such premises. These criteria were not addressed by the federal law as it was predominantly concerned with matters of quality and hygiene. The displacement of the State Act, by a statutory majority of the High Court,[32] could be said to have had the positive effect of not requiring entities engaged in South Australia in the business of slaughtering, to incur the expense and inconvenience of needing to obtain a State, as well as a Commonwealth, licence. This benefit becomes insignificant, however, when one realises that the practical effect of the Court's ruling was to preclude the State from prohibiting this activity when those concerned in the activity were not fit and proper people or when the public interest required such prohibition.

In *Australian Broadcasting Commission v Industrial Court (SA)*,[33] the High Court considered a provision of a South Australian statute which conferred on the State Industrial Court the power to order the re-employment of an employee whose dismissal was "harsh, unjust or unreasonable". This provision was held to be inconsistent with a Commonwealth award that allowed the ABC to dismiss its employees. It is true that "it would most likely be detrimental to the ABC's operation to subject it to varying State industrial laws, depending on the geographical accident of where the ABC happened to employ people".[34] But, surely, an equally important consideration is that South Australian employees of the ABC had been deprived of a fundamental right which was available to other South Australian workers, namely, the right to seek relief from the State Industrial Court for an unfair dismissal.

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31 (1954) 92 CLR 565.

32 Dixon CJ, Kitto and Fullagar JJ.

33 (1977) 138 CLR 399.

## *VI. The Practical Operation of the "Cover the Field" Test*

The ambiguity and uncertainty of the elements of the "cover the field" test render it largely unpredictable and confer excessive discretion on courts. The "cover the field" test requires the implementation of the following three steps:

(1) a finding as to the field or subject matter regulated by the Commonwealth Act;

(2) a determination as to whether the Commonwealth law intended to regulate that subject matter completely (that is to say, did it purport to cover the field?); and

(3) a determination as to whether the State law interferes with or intrudes upon the field covered by the Commonwealth law.

The inherent ambiguity and subjectivity of this test were satisfactorily captured by Evatt J who indicated that the expression "cover the field" "is a very ambiguous phrase, because subject matters of legislation bear little resemblance to geographical areas"[35] and that "any analogy between legislation with its infinite complexities and varieties and the picture of a two-dimensional field seems to be of little assistance".[36] This is not to say that there are other manifestly superior tests of indirect inconsistency. Tammelo has wisely drawn attention to the difficulties that would be faced in drafting a test that would define more precisely what is now dealt with as "cover the field" inconsistency. He indicated that "whatever tests they [judges] may adopt, they must still resort to an evaluation for which no laid down criteria are available, or which are impossible to capture in any concise formulation".[37] Thus, once it is decided that inconsistency under s 109 is to extend beyond the concept of direct conflict, one must accept that, whatever test is adopted, an enormous level of discretion will *necessarily* be conferred on the courts. The wide discretion inherent in this test has allowed judges to reach the outcome which they regard as desirable in a given s 109 case, but to then attribute that outcome to the application of allegedly policy-free tests such as the fields covered by the relevant enactments and the intention of the Commonwealth Parliament.

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34 Gilbert, work cited at footnote 8, at 125.

35 *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128, at 147.

36 *Victoria v The Commonwealth* (1937) 58 CLR 618, at 634.

37 Tammelo, work cited at footnote 11, at 501; and Murray-Jones, work cited at footnote 6, at 41.

An excellent example of the unlimited flexibility of the concept of indirect inconsistency is provided by s 109 cases dealing with criminal sanctions. In *Hume v Palmer*[38] a federal Act penalised sea captains who breached Commonwealth regulations for preventing collisions at sea. A State law punished breaches of State regulations, which were similar to the Commonwealth regulations. The only difference of significance between both sets of regulations was that the federal penalty for breach was more severe than that of the State. The High Court applied, *inter alia*, the "cover the field" test to render inoperative the State provisions. Similarly, in *R v Loewenthal*,[39] a Commonwealth Act dealing with the offence of wilful damage to Commonwealth property was held to be inconsistent with Queensland law relating generally to the same matter. The penalties prescribed by the two laws differed.

The two cases above are to be contrasted with *Re Winneke; Ex parte Gallagher*[40] and *McWaters v Day*.[41] In the first case, the High Court held that there was no inconsistency between Commonwealth and State laws which imposed different penalties for the offence of refusing to answer a question before a Royal Commission. In the latter case, Queensland and Commonwealth offences of driving a vehicle while under the influence of liquor or drugs were in substantially similar terms but prescribed different penalties. The High Court held that the two laws were not inconsistent.

In each of the four cases outlined above, certain conduct was made subject to the penal sanctions of a federal Act and a State Act. The only major difference between the federal legislation and the State legislation was the harshness of the penalties imposed. In each case, the same test of "cover the field" was applied and yet in the first two cases the High Court found inconsistency but did not make a similar finding in relation to the two more recent cases. It is possible to justify the different outcomes on the basis that in the first two cases the relevant Commonwealth enactments evinced an intention to be the exclusive law while in the two more recent cases no such intention was present. It is submitted that a more convincing explanation for the different outcomes lies in the judges' perceptions as to what was the preferable legislative state of affairs in each case. While displacement of the State legislation was perceived by the judges to be the most desirable outcome in the first two cases, no similar assessment was made in relation to the other two cases.

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38 (1926) 38 CLR 441.

39 (1974) 131 CLR 338.

40 (1982) 44 ALR 577.

41 (1989) 168 CLR 289. See also *R v Stevens* (1991) 102 ALR 42.

These different judicial perceptions can be attributed to the following factors:

(1) In *Hume* and *Loewenthal* the judges felt that prevention of collisions at sea and protection of Commonwealth property, respectively, are topics which require centralised, and thus uniform, regulation.[42]

(2) The *Winneke* and *McWaters* cases were decided in a period during which the High Court took a significantly more favourable stand towards State enactments, when dealing with s 109, than in the past. In fact, in the last ten years or so, a relatively high percentage of cases on s 109 have resulted in a finding of "no inconsistency".[43] These outcomes cannot be attributed to the uniqueness, compared to previous cases, of the legislative provisions under scrutiny but rather to "an attitude that is more in sympathy"[44] with the interests of the States.

The problems caused by the inherent ambiguity of the test have been exacerbated by the High Court's frequent reluctance to enlighten us as to the factors it considers when implementing the test. Craven was entitled to feel that:[45]

> (i) the concept of a field has not been adequately defined;
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> (ii) ...the courts have frequently failed to identify the factors which have led them to discern an exclusionary intention on the part of the Commonwealth Parliament;
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> (iii) the circumstances in which a State law will be held to have "intruded" upon a covered field in the relevant sense have not been adequately defined.

To make matters worse, whenever the High Court has identified the factors which have led it to reach a particular conclusion, these revelations have frequently had the effect of intensifying, rather than alleviating, uncertainty. This is because those criteria have tended to be as ambiguous and unclear as the three requirements of the test.

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42 See Hanks, work cited at footnote 2, at 121.

43 *New South Wales v Commonwealth and Carlton* (1983) 151 CLR 302; *Commercial Radio Coffs Harbour Ltd v Fuller* (1986) 66 ALR 217; *Flaherty v Girgis* (1987) 71 ALR 1; *McWaters v Day* (1989) 168 CLR 289; *Dobinson v Crabb* (1990) 64 ALJR 501; and *Love v Attorney-General (NSW)* (1990) 169 CLR 307.

44 Constitutional Commission, work cited at footnote 14, at 649.

45 Craven, work cited at footnote 16, at 98-99.

Take, for instance, the concept of the fields covered by the Commonwealth and the State enactments. A fairly objective, and easy to implement, means of determining the fields covered by both enactments is to hold that whenever both a State law and a Commonwealth law touch upon the same factual situation, they can be regarded as dealing with the same subject matter. The High Court has not endorsed this view. On a number of occasions it has been expressly stated that a State law which regulates the same factual scenario as the Commonwealth law will not be regarded as dealing with the field covered by the Commonwealth statute, if the purpose of the State enactment differs from that of the Commonwealth law.[46] An excellent illustration of this approach is provided by *Airlines of New South Wales Pty Ltd v New South Wales (No 2)*.[47] The State and federal laws set up two licensing systems to regulate air transport. However, the High Court held that the two enactments dealt with two different fields as[48]

> the topic and the only topic to which regs 198 and 199 [the Commonwealth regulations] direct their attention, so far as they apply to intra-State operations, is the safety, regularity and efficiency of air navigation ... The State Act, on the other hand, does not concern itself with that topic in any way... The federal regulations and the State Act each employ a licensing system to serve a particular end; but the ends are different, and that means that the two sets of provisions are directed to different subjects of legislative attention.

While this approach has the virtue of increasing the possibility of a finding of no inconsistency, there are fundamental conceptual and practical problems with it. To hold that two sets of provisions, which establish licensing systems to regulate the same activity, do not deal with the same subject matter or field involves an unduly artificial approach as it simply does not reflect reality. It is more logical to consider the aim of the State law in the context of determining the intention of the Commonwealth Parliament. The fact that the State law governs a given factual situation in order to achieve a different goal from that sought by the Commonwealth Parliament can be relevant in ascertaining whether the Commonwealth Parliament intended to exclude the State law.

But regardless of how this criterion is used, the fact remains that it is highly ambiguous and that it is difficult to predict the inferences which the Court will draw from it. An excellent example

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46 *Ex parte McLean* (1930) 49 CLR 472, at 485-486 per Dixon J; and *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211, at 219 per Gibbs CJ.

47 (1964) 113 CLR 1.

48 (1964) 113 CLR 1, at 121-122 per Kitto J.

of this uncertainty is provided by *O'Sullivan's* case[49], the facts of which have already been outlined. It is not unreasonable to conclude that, applying the guidelines formulated by the High Court, the field covered by the State law differed from that of the Commonwealth law, as it concerned itself with matters which were not addressed by the federal enactment, such as the suitability of the applicant for the licence. This conclusion did not appeal to the statutory majority.

Even greater problems are encountered when one attempts to discern the intention of the Commonwealth legislature. The best description of this requirement has been provided by Kirby P who pointed out, rather colourfully, that "reference to the 'intention' of a legislature involves, in matters of this kind, an even greater appeal to legal fictions than is ordinarily the case".[50] Similarly, the Constitutional Commission indicated, albeit in a less forthright manner, that "although the formal issue is one of legislative intention, the issue is not usually one to which Parliament has applied its collective mind. The result is that the task of the Court often involves policy judgments and the weighing and balancing of conflicting interests".[51]

One criterion which has been used by the courts to ascertain the intention of Parliament has been the extent to which the Commonwealth law lays down detailed provisions. The unpredictability of this criterion is nicely highlighted by the following three cases which concerned industrial law enactments: the *ABC* case[52], *Wardley's* case,[53] and *Robinson's* case.[54] In *Robinson* the relevant Commonwealth award, unlike the State legislation, made no provision in relation to the employees' entitlement to long service leave. In *ABC* the State Act empowered the State Industrial Court to order the re-employment of an employee whose dismissal was found by the court to be "harsh, unjust, or unreasonable". The relevant Commonwealth legislation authorised the ABC to dismiss its employees but did not deal with the specific grounds upon which dismissal could take place. In *Wardley* a Commonwealth industrial agreement allowed Ansett to dismiss any of its pilots. The agreement did not specify the grounds upon which the power of

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49 (1954) 92 CLR 177.

50 *Flaherty v Girgis* (1985) 63 ALR 466, at 471.

51 Constitutional Commission, work cited at footnote 14, at 648.

52 *Australian Broadcasting Commission v Industrial Court (SA)* (1977) 138 CLR 399.

53 *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 54 ALJR 210.

54 *TA Robinson & Sons Pty Ltd v Haylor* (1957) 97 CLR 177.

dismissal could be exercised. A Victorian statute prohibited discrimination on the ground of sex.

In each of these three cases, the relevant State law dealt with a particular aspect of the employment relationship which had not been addressed by the Commonwealth law, and yet a finding of no inconsistency was arrived at in *Robinson* and *Wardley* but not in *ABC*. To confuse matters further, in *Robinson* and *Wardley*[55] the incompleteness, or generality, of the federal enactment was regarded as evidence of the Commonwealth's intention to allow the co-existence of the relevant State statute. In *ABC*,[56] on the other hand, one of the reasons for the Court's conclusion that the Commonwealth law evinced an intention to cover the field was the absence of detailed provisions in the Commonwealth legislation. Professor Lane was correct when he asserted that[57]

> the "completeness" of the coverage depends on the knowledge of the assessor. An industrial advocate, now on the bench, may find many gaps in a federal industrial award. A common lawyer, also on the bench, may be amazed at the comprehensiveness of the same award.

The action taken by the Commonwealth Parliament, following the decision of the High Court in *Viskauskas v Niland*,[58] provides a well-known illustration of how the intention of the Commonwealth Parliament, as deduced by the High Court, can diverge from the actual intention of Parliament. The High Court held that certain provisions of the *Anti-Discrimination Act* 1977 (NSW) were inconsistent with the *Racial Discrimination Act* 1975 (Cth) because the latter enactment evinced an intention to cover the field. The Commonwealth Act was subsequently amended to provide that it was not intended, "and shall be deemed never to have been intended", to exclude or limit the operation of certain State laws, including the NSW Act. In *Metwally's* case[59] the High Court held, by a four to three[60] majority, that the amendment to the Commonwealth Act was constitutionally ineffective retrospectively to validate the State law.

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55 See, respectively, (1957) 97 CLR 177, at 184; and (1980) 54 ALJR 210, at 212-13 and 218-19.

56 (1977) 138 CLR 399, at 417.

57 Lane, PH, *The Australian Federal System*, 2nd ed, Law Book Co, 1979, at 894.

58 (1983) 47 ALR 32.

59 *University of Wollongong v Metwally* (1984) 56 ALR 1.

60 Gibbs CJ, Murphy, Brennan and Deane JJ; Mason, Dawson and Wilson JJ dissenting.

*Metwally* furnishes a clear illustration of how some judges have incorrectly perceived not only the purpose of s 109, but also their role when interpreting s 109. The misunderstanding concerning the purpose of s 109 has already been canvassed and will not be repeated. The approach of Gibbs CJ provides ample evidence to support the second proposition. He confidently asserted that the Commonwealth Parliament "cannot exclude the operation of s 109 by providing that the intention of the Parliament shall be deemed to have been different from what it actually was".[61] With due respect, this is quite an extraordinary statement when one considers that the only proof of the central legislature's intention was the Court's conclusion in *Viskauskas v Niland* that such intention could be inferred. Hence, what Gibbs CJ was really saying is that the Court's view, in relation to Parliament's intention, is more reliable than a subsequent express legislative statement as to whether Parliament had intended its legislation to be the only law on the topic!

## *VII. A Model for Reform: Inconsistency and the Canadian Supreme Court*

The mechanisms adopted by the Canadian courts to resolve the conflicts which inevitably occur in any federal system have, to a large extent, avoided the uncertainty and excessive reliance on judicial discretion of the "cover the field" test noted above.[62] Instead the Canadian courts have opted for a "course of judicial restraint leaving all but the irreconcilable conflicts to be resolved in the political arena".[63]

The Canadian *Constitution Act* 1867 assigns 30 specific, and expressly exclusive, legislative powers on the Canadian federal Parliament.[64] The provinces are given 15 specific legislative powers by s 92, expressly exclusive to the provinces. The Canadian *Constitution Act* 1867 gives the residue of power to the central legislature.

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61 *University of Wollongong v Metwally* (1984) 56 ALR 1, at 7.

62 See Gilbert, work cited at footnote 8, at 137-151; Hogg, work cited at footnote 29, at 417-434; Lederman, work cited at footnote 27; Laskin, B, "Occupying the Field: Paramountcy in Penal Legislation" (1963) 41 *Canadian Bar Review* 234; Comments, "Legal Theory and the Paramountcy Rule" (1979) 25 *McGill Law Journal* 82; and McDonald, B, "Constitutional Aspects of Canadian Anti-Combines Law Enforcement" (1969) 47 *Canadian Bar Review* 161.

63 Hogg, work cited at footnote 29, at 419.

64 Section 91.

Despite the conferral on the central and regional parliaments of legislative powers that are specifically exclusive of each other, conflicts have arisen between federal and provincial laws. The major cause of this conflict is the Canadian "double aspect" constitutional doctrine. This doctrine was explained in the following terms by Gilbert:[65]

> [S]ometimes legislation will possess two competing aspects of more or less equal importance - a federal aspect supportable under a head of s 91 of the *Constitution Act* 1867, and a provincial aspect sustainable under a head of s 92. Such a law can be validly passed by either the federal Parliament or a provincial legislature.

The Canadian Constitution contains no provision to resolve conflicts between provincial and federal laws; thus, Canadian courts have had to formulate their own rules. Not surprisingly, they have decided that in cases of conflict between federal and provincial enactments, the former will prevail.[66]

Despite an early preference of the Privy Council[67] for a wide test of inconsistency, similar to the "cover the field" test, it is clear that a narrow test of inconsistency is applied by Canadian courts.[68] In *Multiple Access Ltd v McCutcheon* the Supreme Court held that:[69]

> ... in principle, there would seem to be no good reason to speak of paramountcy and preclusion except where there is actual conflict in operation, as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other.

In applying this test Canadian courts have, for example, struck down provincial laws which required purchasers of natural gas to pay tax by reference to a non-standard unit of measurement where a federal law provided that defined standard weights and measures

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65 Gilbert, work cited at footnote 8, at 137.

66 See *Grand Trunk Railway Co of Canada v Attorney-General (Can)* [1907] AC 65, at 68.

67 *Attorney-General of Ontario v Attorney-General of Canada* [1896] AC 348.

68 See *Stephen v R* [1960] SCR 823; *O'Grady v Sparling* [1960] SCR 804; *Mann v R* [1966] SCR 328; *Ross v Register of Motor Vehicles* [1975] 1 SCR 5.

69 [1982] 2 SCR 161, at 191. For recent applications of this test see *Québec (Procureur général) v Picheries de L'Anse-au-Friffon Inc* [1989] RJQ 2732; *Sandner v British Columbia (Director of Employment Standards)* (1987) 17 CCEL 71; and *Bank of Montreal v Hall* [1990] 1 SCR 121. See Colvin, KE, "Paramountcy Duplication and Express Contradiction" (1983) 17 *UBCL Rev* 347 for a critique of the *Multiple Access* test.

were to be used;[70] or have awarded custody to the husband while federal law gave custody to the wife following their separation.[71]

However, provincial laws in the same field as federal laws have been consistently upheld even where the provincial law pursued an objective which was inconsistent with that of the federal law, provided that both laws could be complied with by following whichever rule was the stricter.[72] So, for example, provincial prohibition of advertising directed at children was upheld despite the existence of federal guidelines for such advertising;[73] and provincial minimum wages laws were held to apply despite applicable, less onerous, federal laws on the same subject.[74]

While, in our view, the Canadian courts are to be applauded for their preference for a test of direct inconsistency,[75] it is frequently argued that Canadian principles of constitutional law cannot be relevant to Australia because of "the fundamental difference that exists in the way in which powers are assigned to the national and regional legislatures in both".[76] It is further argued that "the adoption of a 'covering the field' test may detract from the integrity of a mutually exclusive list of legislative powers

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70 *Re Minister of Finance (BC) and Pacific Petroleums* (1979) 99 DLR (3rd) 491.

71 *Gillespie v Gillespie* (1973) 36 DLR (3rd) 421. See also *Royal Bank of Canada v LaRue* [1928] AC 187; *Re Bozanich* [1942] SCR 130; *Attorney-General of Ontario v Policy-holders of Wentworth Ins Co* [1969] SCR 779; *A-G BC v AG Canada (Employment of Japanese)* [1924] AC 203; *A-G (Que) v Lechasseur* (1981) 128 DLR (3rd) 739.

72 Hogg, work cited at footnote 29, at 429. Hogg notes that *Bank of Montreal v Hall* [1990] 1 SCR 121 may be an exception to this as paramountcy (inconsistency) was applied despite the lack of express contradiction: both laws could have been complied with by following the more stringent requirement of notice to the debtor in the provincial law. Further, Hogg also comments that while the Court did purport to apply the express contradiction test, there are dicta at 154-155 that suggest a possible return to the "cover the field" test.

73 *Irwin Toy v Quebec* [1989] 1 SCR 927.

74 *Construction Montcalm v Minimum Wage Commission* [1979] 1 SCR 754. See also, *Robinson v Countryside Factors* [1977] 2 SCR 753; *Schneider v The Queen* [1982] 2 SCR 112; *Rio Hotel Ltd v New Brunswick* [1987] 2 SCR 59; and *Clarke v Clarke* [1990] 2 SCR 795.

75 Their application of this test has not, of course, been without its own problems and has on some occasions involved an unduly artificial and legalistic approach in order to preserve provincial legislation. For example, see *Ross v Registrar of Motor Vehicles* [1975] 1 SCR 5; and *Re the Validity of Section 92(4) of the Vehicles Act* 1957 *(Sask)* [1958] SCR 608, discussed in Hogg, work cited at footnote 29, at 421-423.

76 *Report of the Advisory Committee on the Distribution of Powers*, AGPS, 1987, at 23.

in" Canada.[77] However, it is difficult to see how the difference in the approach to inconsistency adopted by Australian and Canadian courts is attributable to the different distribution of legislative powers by the respective Constitutions. The acceptance by Canadian courts that particular subject matters can be simultaneously regulated, in the absence of any inconsistency, by both federal and provincial laws, renders the Canadian scenario identical to the Australian one. In fact, in both countries, issues of inconsistency cannot arise until, and unless, both legislatures are constitutionally authorised to legislate on a given topic. Once that position is reached the distribution of legislative powers becomes an irrelevant issue.[78]

Furthermore, the Canadian Constitution has established a federal model which emphasises, more than does the Australian system, central dominance. Thus if the tests of inconsistency adopted by Canadian courts were to be selected solely on the basis of the model implemented by the Canadian Constitution, this would probably lead to the adoption of the "cover the field" test. To put it differently, the Canadian courts' attitude to inconsistency is arguably contrary, and not attributable, to the way in which the legislative powers are distributed by the Canadian Constitution. It is, therefore, paradoxical that the Canadian courts have adopted a test for inconsistency which is far more favourable to the regional parliaments than the test applied by the High Court of Australia and that in practice "Canadian federalism is far more decentralised than its Australian equivalent".[79]

But do the different conceptions of federalism evident in Australia and Canada,[80] sufficiently justify the divergent treatment of the problem of inconsistency? We would argue they do not, for the following reasons.[81] Even the Constitutional Commission,[82] while

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77 See work cited at footnote 76. See also, *Huddart Parker Ltd v Commonwealth* (1931) 44 CLR 492, at 526-7 per Evatt J; *South Australia v Commonwealth* (First Uniform Tax) (1942) 65 CLR 373, at 425-6 per Latham CJ; *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657, at 679 per Dixon J; *Victoria v Commonwealth* (Payroll Tax) (1971) 122 CLR 353, at 373 per Barwick CJ, at 397 per Windeyer J; and Sawer, G, *Australian Federalism in the Courts*, Melbourne University Press, 1967, at 97.

78 For a similar view, see Gilbert, work cited at footnote 8, at 150.

79 Gilbert, work cited at footnote 8, at 3.

80 Gilbert, work cited at footnote 8, at 155-157 advances a number of possible explanations including Australia's isolation and relative ethnic homogeneity for the differences. For an extended discussion of the history of Australian federalism as a study of accretion of power to central institutions of government, see Hanks, work cited at footnote 2.

81 Cf the assessment by the late Chief Justice Laskin of the Canadian Supreme Court that "there does not appear to be any rational

expressing reservations about placing too much reliance on the Canadian position, acknowledged that these reservations were overshadowed by the need to find a solution to the uncertainty created by the operation of the "cover the field" test. The Canadian courts have formulated a solution which overcomes many of these problems and which is clearly a feasible option in Australia despite our more centralised version of federalism. Moreover, the rejection by the Canadian courts of the "cover the field" test cannot be said to have impaired the ability of the Canadian government to carry out effectively its functions, as operational conflicts which escape the paramountcy (inconsistency) rule can be resolved by political negotiation.[83]

It is submitted that a similar solution[84] could be pursued in Australia and that judicial activism in favour of central power via the "cover the field" test is therefore both unnecessary and undesirable.[85]

## *VIII. Mechanisms for Achieving Reform*

We have argued throughout this article that the "cover the field" test for inconsistency under s 109 of the Commonwealth Constitution should be abolished. But how should this change take place?

Since the test is entirely a creation of the courts, the best option would be for courts themselves to abandon the test. This would, however, be highly unlikely as the test has been constantly

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explanation of their divergent treatment of the same problem other than to say, perhaps, lamely, that they express different conceptions of federalism" (Laskin, work cited at footnote 62, at 259).

82 Constitutional Commission, work cited at footnote 14, at 646-7.

83 In *Multiple Access Ltd v McCutcheon* [1982] 2 SCR 161, Dickson J adverted to the "developing culture of co-operative federalism in Canada".

84 It has also been suggested that it would be open to Parliament to enact specific provisions expressing an intention to occupy a field of legislation exclusively. Both Hogg, work cited at footnote 29, at 429-430 and Colvin, work cited at footnote 69, at 358 agree that such a provision would be constitutionally valid in the Canadian context. However, we would argue that this is merely a back door re-introduction of a modified version of the "cover the field" test which would be contrary to the concept of concurrent powers and which should therefore only be implemented as a last resort. See our earlier discussion.

85 See comments by the Constitutional Commission, work cited at footnote 14, at 647-8 to the effect that in recent years the judgments of the High Court have been more in sympathy with a non-interventionist approach.

applied since 1926.[86] Any attempt to eviscerate the "cover the field" test by ordinary legislation would probably be unconstitutional. Thus the only option is to amend s 109 through a s 128 referendum.[87] Would a majority of Australians vote in favour of such a proposal? If one were to answer this question solely on the basis of the success rate of past referendum proposals, one would be inclined to say "No". Australians have been asked, since 1906, to consider 42 proposals to amend the Constitution. Only on eight occasions have the requirements prescribed by s 128 of the Commonwealth Constitution been satisfied.[88]

A closer analysis of the results of past referenda, however, shows that most rejected proposals "have fallen into the category of proposals to enlarge the legislative powers of the Commonwealth".[89] Moreover, the rejection of the 1988 referendum proposals, concerning the extension to the States of the right to trial by jury; the right to fair terms for people whose property is acquired by governments; and freedom of religion,[90] tends to indicate that Australians will not accept any restrictions on the powers of the States, even if those restrictions are intended to protect, and are likely to have the effect of protecting, fundamental rights and freedoms of all Australians. It is therefore reasonable to conclude that Australians generally take a pro-States approach when consulted on amendments to the Commonwealth Constitution. Since our proposal would result in a decrease in the number of State Acts which are rendered inoperative by s 109 it would be in accordance with the apparent constitutional philosophy of a majority of Australians. Acceptance of our proposal at a referendum would not be the first instance of Australians disagreeing with the High Court on matters of constitutional law. Mr Justice Dawson has admitted that the High Court has made decisions that have changed the meaning of the Commonwealth Constitution in ways which would

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86 *Cole v Whitfield* (1988) 62 ALJR 303 is, however, a clear reminder that precedents of the High Court cannot be regarded as sacrosanct.

87 Section 128 requires the approval of a majority of electors nationally and a majority of electors in a majority of States.

88 See Campbell, E, "Southey Memorial Lecture 1988: Changing the Constitution - Past and Future" (1989) 17 *Melbourne University Law Review* 1, at 18-23.

89 Campbell, work cited at footnote 88, at 2.

90 The Commonwealth Constitution requires that these fundamental rights and freedoms be observed only by the Commonwealth. For more details on the 1988 referendum, see Lee, HP, "Reforming the Australian Constitution - The Frozen Continent Refuses to Thaw" [1988] *Public Law* 535.

have been rejected by a large majority of Australians at a referendum.[91]

A substantially more difficult obstacle to overcome is the requirement that a referendum cannot be held until the proposed amendment is passed by either House of Parliament. At the moment it is difficult to see either of the two major federal political parties endorsing our proposal. However, the recent developments concerning the issue of Australia's becoming a republic have clearly indicated that the attitude of political parties to constitutional reform can change.[92]

If, however, the proposal is rejected at a referendum, we would advocate, as a minimum, the implementation of one of the recommendations of the Constitutional Commission in the enactment of a standing provision in the Commonwealth *Acts Interpretation Act* 1901, to the effect that a law of the Commonwealth shall not be construed as indicating an intention to regulate exclusively the subject matter dealt with by that law unless that intention appears by express statement. It is therefore necessary to examine in more detail the Constitutional Commission's recommendations.

The main recommendation[93] of the Constitutional Commission, in relation to s 109, was that the federal Parliament should enact a standing provision in the *Acts Interpretation Act* 1901 (Cth), to the effect that a law of the Commonwealth shall not be construed as indicating an intention to regulate exclusively the subject matter dealt with by the law unless that intention appears:

(1) by express statement (Alternative 1); or

(2) by necessary implication (Alternative 2).[94]

The recommendation was "aimed at making the Court more cautious about implying an intention to cover the field, and so to put the onus

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91 Dawson, D, "The Constitution - Major Overhaul or Simple Tune-Up?" (1984) 14 *Melbourne University Law Review* 353, at 355.

92 See Winterton, G, "An Australian Republic" (1988) 16 *Melbourne University Law Review* 467, for a more detailed discussion of the background to the development of the republican debate in Australia.

93 A similar recommendation had been made by Craven, work cited at footnote 16, at 99; the 1984 Fiscal Powers Sub-Committee of the Australian Constitutional Convention, work cited at footnote 5, at 75; the Australian Constitutional Convention, Brisbane, 1985, Vol 1, at 421; and the Advisory Committee on Distribution of Powers, work cited at footnote 76, at 17.

94 Constitutional Commission, work cited at footnote 14, at 645.

on the federal Parliament to make that intention as clear as possible".[95]

One obvious criticism which can be levelled at the Commission's proposal is that it does not deal with the problems caused by the inherently uncertain and important concept of the fields covered by the State and federal legislation. In particular, the determination of the subject matter dealt with by the Commonwealth Act is directly relevant and significant to a conclusion as to the intention of the Commonwealth Parliament. It is fair to say that the more narrowly the field is defined, the easier it will be to infer an intention on the part of the Commonwealth legislature to cover the field.

Despite this we would advocate the implementation of Alternative 1 for the following reasons. Alternative 1 entails the introduction, through a standing provision, of a general *prima facie* assumption concerning the intention of the Commonwealth Parliament that is rebuttable only by an express legislative statement to the contrary, and constitutes a modified and more generalised version of the saving provisions which are frequently found in federal statutes. Saving provisions purport to preserve State laws, which might otherwise be affected. It is clearly established that saving provisions are constitutionally valid. For instance, in *R v Credit Tribunal, ex parte GMAC* Mason J (as he then was) proclaimed that "a provision in a Commonwealth statute which indicates or tends to indicate whether the statute is intended to make such exhaustive or exclusive provision upon a topic within a head of Commonwealth legislative power is itself a valid law...".[96] Forcing the Commonwealth Parliament to reveal its intention expressly to exclude State law can be defended on the ground that "if the paramount legislature does intend to lay down the exclusive rule on the subject matter, it is surely not too much to expect so drastic an intention to be exhibited clearly".[97] The proposal would also have the effect of reducing the uncertainty involved in ascertaining the intention of the federal legislature.

Moreover, adoption of this measure would also have the effect of bringing the Australian version of the "cover the field" test closer to its American model - the doctrine of pre-emption whereby a State law is invalidated by a federal law on the ground that Congress has validly decided exclusively to "occupy the field" as

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95 Constitutional Commission, work cited at footnote 14, at 648.

96 (1977) 137 CLR 545, at 562. See also *Wenn v Attorney-General (Victoria)* (1948) 77 CLR 84; and *Palmdale AGCI Ltd v Workers' Compensation Commission of New South Wales* (1977) 17 ALR 1.

97 Bailey, work cited at footnote 11, at 19.

this doctrine is subject to "a presumption that Congress did not stand to displace State law in the absence of a clear legislative intent to do so".[98]

Different considerations are involved in relation to Alternative 2, namely that no intention to cover the field shall be deduced by the High Court unless that intention appears by necessary implication. It is submitted that this requirement is both unconstitutional and would do nothing to alleviate the present problems. It is one thing to allow the Commonwealth Parliament to expressly state whether it intends, generally or in relation to a particular law, to exclude State law on a particular subject matter. It is another thing altogether to direct the courts as to the test or standard which they are to apply in order to ascertain the intention of Parliament.[99] Section 109, as interpreted by the High Court, simply requires the courts to ascertain, in whatever manner they see fit, whether the Commonwealth Parliament intended to oust State law. It is perfectly proper for a court to imply an intention to cover a field, even though that implication is only plausible and does not appear by necessary implication. Hence a legislative provision that directs the courts that they may make a finding that the Commonwealth Parliament intends to cover the field only if that intention appears by necessary implication, is unconstitutional as it purports to amend s 109 by adding a restriction to it, without first complying with the procedure prescribed by s 128 of the Commonwealth Constitution for amending the provisions of the Constitution.

Even if the proposal is constitutionally valid, it would still not achieve its intended objective of encouraging courts to be more cautious. The notion of intention by necessary implication is just as ambiguous and uncertain as the current three elements of the "cover the field" test. Thus a court with a strong pro-Commonwealth outlook would not, in practice, be restrained by a vague requirement of necessary implication. Moreover, as this requirement also does not deal with the problems caused by the High Court's reluctance to enlighten us as to the factors or considerations it takes into account

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98 *Maryland v Louisiana* 451 US 725 (1981), at 746. The United States Supreme Court's reluctance to find federal pre-emption is said to "comport with both the basic conception of federal law as interstitial in nature and the central role of Congress in protecting the sovereignty of the States" (Tribe, LH, *American Constitutional Law*, 2nd ed, New York, Foundation Press Inc, 1988, at 497).

99 As Gibbs CJ indicated in *Metwally's* case: "The Commonwealth Parliament cannot enact a law which would affect the operation of s 109, ... by declaring that a State law ... which is inconsistent with a Commonwealth law shall be valid" (*University of Wollongong v Metwally* (1984) 56 ALR 1, at 5).

when applying the tests of inconsistency, it should not be implemented.

## *IX. Conclusion*

The "cover the field" test of s 109 of the Commonwealth Constitution is not in accordance with the ordinary meaning of the term "inconsistency"; nor with the intention of the founding fathers; nor with the notion of concurrent powers. This test has allowed "one of the federal partners, the Commonwealth, to deny to a State, another federal partner, part of its law making power".[100] Moreover, there are no compelling policy arguments to justify the "cover the field" test, and the ambiguity and uncertainty of the elements of the test render it largely unpredictable and confer on the High Court excessive discretion. While the recommendations of the Constitutional Commission would go some way towards alleviating the problems inherent in the "cover the field" test, as the Commission itself conceded "no statutory alteration can, in the long run, relieve the Court of many of the problems associated with determining the intention of Parliament in relation to this issue".[101] The dominant theme of this article has been, therefore, to advocate the abandonment of the "cover the field" test in favour of sole reliance on tests for direct inconsistency. The experience in Canada has indicated that this is a workable and feasible option.

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100 Rumble, work cited at footnote 6, at 79.

101 Constitutional Commission, work cited at footnote 14, at 649.