

## PART VII – STATE LEGISLATIVE POWER

### I *Victorian Parliament*

#### A *Structure and Composition*

The *Victorian Constitution* was radically amended in 2003. One consequence of the amendments was to alter the composition of the Parliament and set several limitations on its powers to amend the *Victorian Constitution*.

Section 15 of the *Victorian Constitution* establishes the Parliament of Victoria, which comprises the Governor of the State of Victoria, the Legislative Council and the Legislative Assembly:

**Section 15:**

The legislative power of the State of Victoria shall be vested in a Parliament, which shall consist of her Majesty, the Council, and the Assembly, to be known as the Parliament of Victoria.

The Victorian Parliament is bicameral. Royal assent is required before a Bill become law. Section 16 confers legislative power upon the Parliament of Victoria:

**Section 16:**

The Parliament shall have power to make laws in and for Victoria in all cases whatsoever.

Section 16A provides that the Legislative Council should exercise its powers in recognition of the Government's right to implement its mandate. This right includes:

- Specific mandate (implementation of election promises); and
- General mandate (to govern for and on behalf of the people of Victoria).

However, this provision is more of a prudential reminder than forceful requirement. That is to say, s 16A(2) does not limit legislative power; it is simply a political idea (representative government) codified and formalised by the *Victorian Constitution*.

The lower house (Legislative Assembly) has 88 members drawn from single-member constituencies: s 35(1). This is twice the size of the upper house, which (the Legislative Council) has 40 members from eight regions: s 26.

Parliamentarians from both houses share a four year term: ss 28 and 38. Both Houses therefore expire at the same time and state elections in both Houses are held simultaneously: s 28(2).

Dissolution cuts short the four year parliamentary term. Early dissolution can only occur at the direction of the Governor. Her Majesty's representative may not dissolve the assembly prior to the four year fixed term except when certain conditions are satisfied:

- A motion of no confidence is passed in the Legislative Assembly: s 8A; or
- There is a deadlock under ss 65A–G, and the Premier has given advice to the Governor to this effect: s 65E(2).

## B *Interaction with Commonwealth Constitution*

The various state (then colonial) constitutions survived federation, as provided by s 106 of the *Commonwealth Constitution*:

### **Section 106:**

The *Constitution* of each State of the Commonwealth shall, subject to this *Constitution*, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

Section 107 of the *Commonwealth Constitution* provides that the legislative power of the states shall continue unless withdrawn. However, s 109 provides that in the exercise of concurrent legislative powers any relevant Commonwealth law shall prevail to the extent of any inconsistency (see below).

The effect of these provisions is to grant the states plenary legislative power in areas of exclusive legislative competence, and statutory power to subject to inconsistent Commonwealth legislation in all other areas. State legislative power must be exercised in accordance with state constitutions. In the case of Victoria, this means by the Parliament of Victoria in accordance with the *Victorian Constitution*.

## C *Appropriation Bills in Victoria*

Money bills may be grouped into two classes:

- Taxation Bills (brining money into the state revenue fund); and
- Appropriation Bills (taking money out of consolidated funds for spending): s 62(1).

Like the federal Parliament, money Bills must originate in the lower house of the Victorian Parliament: s 62(1). The upper house must either pass or reject such Bills; it cannot amend them: s 62(2). Importantly, the deadlock provisions provide that even if the upper house rejects an Annual Appropriation Bill, the lower house can pass such a Bill sitting alone: s 65(5)–(8).

The rationale for this arrangement is twofold. First, the government is formed in the lower house (the house of government). It is up to the government to set the parameters of taxation and spending, so they should be able to draft and introduce related Bills. Second, scrutiny by the upper house ensures that there is some degree of accountability between the executive (who control spending policy and usually the lower house) and the legislature. This is tempered by the fact that the upper house need not pass the annual budget for it to become law. This ensures that the upper house cannot block supply, as occurred in the 1975 federal constitutional crisis.

How responsible government works in this situation:

- Voters elect the government. The government cannot govern without money; therefore
- There needs to be some guarantee that their general democratic mandate will be exercisable; however
- Checks and balances are particularly important in the context of appropriation laws, so the Bills excluded from scrutiny by s 65 are defined narrowly.

## E *Deadlocked Bills in Victoria*

Division 9A of the *Victorian Constitution* sets out the procedure for dealing with conflicts between the Houses of the Parliament of Victoria:

- 1 Political processes**  
Leaders in each house will usually meet to reach a compromise or general agreement outside of the chamber;
- 2 Dispute resolution processes**  
If the Legislative Council votes down or amends a Legislative Assembly Bill, and no compromise can be reached, the Bill must be referred to a 'Dispute Resolution Committee' for a 'Dispute Resolution': s 65C(1);
- 3 Deadlocked Bill procedures**  
If no compromise can be reached, the 'Disputed Bill' becomes a 'Deadlocked Bill' and the deadlock procedures of s 65D come into effect: s 65A.

The deadlock provisions do not apply to Annual Appropriation Bills: s 65A(3). Where they do apply, they consist of the following further steps:

- 4 Dissolution**  
The Premier can advise the Governor to dissolve the Assembly due to deadlock: s 65E(2);
- 5 Re-enactment**  
After the election, the Legislative Assembly can attempt to re-enact the Deadlocked Bill;
- 6 Joint sitting**  
If, after the election, the Deadlocked Bill is again rejected by the Legislative Council, the Premier may ask the Governor to convene a joint sitting: s 65F(3). A Bill may be passed by an absolute majority at the joint sitting: s 65G(4).

These provisions are more detailed than their counterparts in s 57 of the *Commonwealth Constitution*. However, beyond the point of deadlock they have much the same effect.

Importantly, dissolution will only occur in very rare circumstances. The government cannot simply force or manufacture a deadlock by attempting to pass legislation twice, and for political reasons is unlikely to be invoked by a vote of no confidence (since other elected representatives themselves have obligations to carry out their mandates). It is therefore *very unlikely* that an early election will be held in Victoria.

## E *Limitations on State Legislative Power*

The most significant limits on state legislative power are those imposed by the *Commonwealth Constitution*. All other limitations are secondary and generally less effective.

### 1 *Limitations imposed by the Commonwealth Constitution*

Some powers are exclusively vested in the Commonwealth Parliament: ss 52 and 90. The state parliaments cannot legislate with respect to these matters. Section 90 means that no excises are able to be levied by the states (see below).

Several express constitutional limitations are also binding on the states:

- Section 117: prevents states from discriminating on the basis of an individual's state of residence
- Section 114: states cannot maintain military forces or tax Commonwealth property
- Section 92: trade, commerce and intercourse shall be 'absolutely free'; this places *some* limit upon the states' abilities to create barriers to free trade

Implied limitations are also applicable:

- Separation of judicial power (*Kable*)
- Implied freedom of political communication (*Lange*; *McGinty*)
  - *Levy v Victoria*
  - *Stephens v West Australian Newspapers*

### 2 *Peace, order and good government*

Section 2(1) of the *Australia Act* provides that legislative power shall be exercised only for the 'peace, order and good government' of the nation. This does not constrain state legislative power in any way. It was noted in *Union Steamship* that: 'Such a power is a plenary power'.

However, *Union Steamship* did note that 'some restraints [are imposed] by reference to rights deeply rooted in our democratic system of government and the common law'. Even if merely institutional or cultural, the influence of such factors cannot be denied.

See further the *BLF Case* (cf Street CJ and Kirby P); *Union Steamship Co of Australia v King*; Goldsworthy.

### 3 *Extra-territoriality*

Section 2 of the *Australia Act* allows states to pass extra-territorial laws (whether this provision confers power or merely confirms existing power is unclear; however, in either case, states are now free to pass such laws). There merely need be shown some nexus between a law operating upon an external subject matter and the state: in other words, some connection with the territory.

### 4 *Acquisition on just terms*

Section 51(xxix) does not limit state legislative power because it is a *grant* of power to the Commonwealth (and not a limitation thereupon). As a result, compulsory acquisition by a state government does not *necessarily* carry an entitlement to just compensation: *Durham Holdings Pty Ltd v New South Wales*.

## 5 *Imperial limitations*

### Imperial Limitations on State Legislative Power

- o Remember the Australia Acts – s. 1, 3 and 8-9

## 6 *Indigenous Rights*

Section 1A of the *Victorian Constitution* includes an acknowledgement of the rights of the indigenous peoples of the State of Victoria. However, it does not effect any substantive change in the manner in which legal recognition is afforded to such rights and is of symbolic value only. This is because it is merely a statement about the status of aboriginal people. It does not create any legislative or interpretive limit unless a Commonwealth Act prevents a state Act from operation (eg, *Native Title Act 1993* (Cth)).

## F *Amending the Victorian Constitution*

Section 18(1) of the *Victorian Constitution* provides for the entrenchment of core constitutional provisions. This means that Parliament can change some aspects of the Constitution, but not 'core' (entrenched) parts. In order to change parts so entrenched, a referendum is required. The default position, however, is that amendment is possible by a three-fifths or absolute majority.

## G *State Parliamentary Sovereignty*

The state parliaments are not sovereign. Limitations from the federal *Constitution* and entrenched state constitutional provisions (at least in Victoria) prevent this. State parliaments are bound by the *Commonwealth Constitution*: cl 5. However, they retain the powers they had before federation: s 107. See further Kirby P in the *BLF Case*. Cf Street CJ in the *BLF Case*.

**Issue:** could the Commonwealth introduce a new limit upon state legislative power? No. Sections 106–7 of the *Commonwealth Constitution* continue the powers of the states. Grants of power made in ss 51–2 and 90 are made 'subject to this *Constitution*', including ss 106–7. Additionally, the doctrine of intergovernmental immunity (*Melbourne Corporation; Austin*) would arguably nullify any prohibitive limitation that was placed upon state legislative power (state legislation being an essential governmental function).

State parliaments do have plenary legislative power; that is to say that they can legislate with respect to whatever subject matter they wish. However, any exercise is subject to the *Constitution*, including s 109 and any grants of power made in respect of similar subject matter to the Commonwealth. In *Union Steamship* it was held that state laws are not subject to federal judicial review just because a state law does not further the public interest or welfare.

Ultimately, however, the Commonwealth Parliament can override state legislation in any area of concurrent jurisdiction: s 109 (see below).

## II **Inconsistency**

### A **General Principles**

An important question in any federal system is the issue of which legislature prevails in the event of conflict between the laws of a state and the Commonwealth. In Australia, the framer's decision was to accord primacy to Commonwealth laws.

When state and Commonwealth laws are inconsistent, certain results therefore follow. They are set out in s 109 of the *Constitution*:

#### **Section 109:**

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of any inconsistency, be invalid.

Inconsistency of this type can only arise in areas of concurrent power. The question of inconsistency presumes from the outset that both laws are valid. If one law is invalid, there can be no inconsistency. Assuming both laws are validly enacted, s 109 provides that the Commonwealth law prevails to the extent of any inconsistency with a state law so that the state law is 'invalid' in that inconsistent respect.

However, 'invalid' does not mean that the state Parliament acted *ultra vires* in purporting to enact it. Rather, it denotes 'operational' inconsistency: the state law shall simply be of no practical effect for so long as the Commonwealth law remains in force (*Carter v Egg and Egg Pulp Marketing Board*).

#### ***Carter v Egg and Egg Pulp Marketing Board (Vic) (1942) HCA:***

##### Reasoning

- Section 109 only requires that the state law remains inoperative for so long as the Commonwealth law is in effect
- The word 'invalid' in s 109 should be interpreted as meaning 'inoperative'
- The state law, though validly enacted, ceases to have practical effect while the Commonwealth law remains
- However, once the Commonwealth law is repealed, the state law automatically regains its operation

Thus, if a state law is enacted in 1990, and an inconsistent Commonwealth law is enacted in 1991. The state law operates until 1991, then 'lies dormant' as a result of the Commonwealth law. However, if the Commonwealth law is repealed in 2000, then the state law resumes its normal legislative effect from that point onwards.

The other effects of inconsistency are considered below. First it is necessary to determine when two laws may be said to be 'inconsistent'.

## B      *Types of Inconsistency*

The case law centres upon four (possibly five: see *Clyde Engineering v Cowburn*) categories of inconsistency. These categories overlap to a considerable degree, so that a single law may be an example of more than one kind.

### 1      *Direct inconsistency*

Where it is impossible to obey both laws simultaneously, a direct inconsistency is said to arise. Most commonly, one law says you must do X and the other law says you must not do X. This has also been described as 'simultaneous obedience' inconsistency (*Ex parte Daniel; McBane's Case*).

#### ***McBane's Case:***

##### Facts:

- Dr McBane was obliged by Commonwealth law not to discriminate on the basis of marriage
- However, a Victorian law made it a criminal offence for him to provide *in vitro* fertilisation to an unmarried couple
- Doctors like McBane obeyed the state law, since they feared criminal penalties and the loss of their medical licences
- He sought a judicial determination of which law he should follow

##### Issue:

- Is there a direct inconsistency?
- If so, what is its effect upon the state law?

##### Decision:

- Applying s 109 to the direct inconsistency, the Court held that he should obey the Commonwealth law: the state law would be invalid to the extent that it applies to him

### 2      *Rights inconsistency*

Another kind of inconsistency occurs where one law confers a right or privilege which the other takes away (*Colvin v Bradley Brothers; Clyde Engineering v Cowburn*). The first question is: does the state law purport to take away a legal right, privilege or entitlement granted by a Commonwealth law? This occurs when the Commonwealth law says you can do X but the state law says that you cannot do X.

#### ***Colvin v Bradley Brothers Pty Ltd (1942) HCA:***

##### Facts

- Section 41 of the *Factories and Shops Act 1912* (NSW) prohibited the employment of women on milling machines
- An award made under the *Commonwealth Conciliation and Arbitration Act 1904* (Cth) permitted employers covered by the award to employ females
- The Commonwealth law effectively allowed female employees to operate particular machinery, but the state law made it an offence so to do

Issue

- Is there a direct inconsistency?
- If not, is there a rights inconsistency?

Reasoning

- There is no direct inconsistency, because the Commonwealth law did not *require* females to operate such machines
- However, there is a rights inconsistency: the Commonwealth award gave employers the right to have women operate the machinery, whereas the state law purported to remove that right

Decision

- The Commonwealth award prevailed

In a sense, rights inconsistency is not inherently different to direct inconsistency. Ultimately, rights inconsistency boils down to a direct conflict between laws in particular circumstances; namely, situations where an individual avails themselves of the Commonwealth right in contravention of the state law. This is, however, essentially the same as saying, 'Commonwealth: X has legal authority to do Z; state: X does not have legal authority to do Z'.

Rights inconsistencies typically arise in two scenarios:

- When licences to carry on a certain activity are made pursuant to inconsistent conditions, such that in some circumstances an individual will have a right so to carry on under one law but not the other
  - If the licensee holds licences under both laws, or neither law, there is no inconsistency
  - There is therefore no direct inconsistency since it is possible to obey both laws by either holding no licences, both licences, or either licence (and not using it in contravention of the other law)
- When inconsistency arises operationally when certain acts are performed
  - If it is illegal for Y to do X under one law, but not the other, then there is no inconsistency until Y in fact carries out X

### 3 *'Covering the field' inconsistency*

Even if there is no direct conflict between the two enactments, there may still be s 109 inconsistency where the Commonwealth law evinces an intention to 'cover the field'. This is an intention that the Commonwealth law be the only law in a given field.

The analysis consists of three steps:

- (a) **What field is covered by the Commonwealth law?**
- (b) **Is the Commonwealth law intended to be exclusive within its field?**
- (c) **Does the State law operate in the same field as the Commonwealth law?**



These are issues of statutory interpretation. As Dixon J noted: to determine whether a statute intends to cover the field, one must examine its 'terms, nature or subject matter': *Victoria v Commonwealth*.

If the first two questions are answered in the affirmative, any state law in the same field will be inconsistent with the federal Parliamentary intention and therefore inoperative under s 109. This is so even if the state law is consistent with (or identical to) the Commonwealth law.

### ***Clyde Engineering Co Ltd v Cowburn* (1926) HCA:**

#### Facts

- The state law prescribed 'ordinary working hours' of 44 per week; the federal award prescribed 48 'ordinary hours of duty'
- Cowburn worked a 44 hour week in reliance on the state law
- His employer deducts the difference from his wages on the basis of the federal law
- There is no direct inconsistency because both laws can be complied with by working a 44 hour week

#### Issue

- Has the Commonwealth Parliament 'appropriated the particular field of legislation'?

#### Reasoning (Isaacs J)

- 'Was the second Act on its true construction intended to cover the whole ground and, therefore, to supersede the first? If it was so intended, then the inconsistency would consist in giving any operative effect at all to the first Act, because the second was intended entirely to exclude it. The suggested test, however useful a working guide it may be in some cases ... cannot be recognised as *the* standard measuring rod of inconsistency.'
- 'If the Commonwealth statute evinces an intention to cover the field, 'the inconsistency is demonstrated, not by comparison of detailed provisions, but by the mere existence of the two sets of provisions.'
- Here, the importance of a uniform federal award system makes it likely that Parliament so intended

#### Decision

- Yes; the two pieces of legislation are inconsistent
- This is so both because the Commonwealth legislation intends to cover the field but also because of rights inconsistency

Where a subject matter inherently requires a unified national obligation (such as where a treaty is being implemented), the Commonwealth Parliament is more likely to be viewed as intending to 'cover the field' (*Viskauskas v Niland*).

### ***Viskauskas v Niland* (1983) HCA:**

#### Facts

- The Commonwealth *Racial Discrimination Act 1975* (Cth) is enacted
- Subsequently, New South Wales enacts the *Anti-Discrimination Act 1977* (NSW)
- Both Commonwealth and state Acts prohibit discrimination

- However, they provide for different consequences for breach

#### Issue

- Is the *Racial Discrimination Act* inconsistent with *Anti-Discrimination Act*?

#### Reasoning

- The Commonwealth intended to cover the whole racial discrimination field
- The subject matter of the Commonwealth legislation was the elimination of racial discrimination across the entire nation
- It implemented a treaty and so called for a national, unified approach to combating racial discrimination
- The Commonwealth law was expressed as binding the state
- '[T]he two legislatures have legislated on the same subject, and have prescribed what the rules of conduct will be and (if it matters) the sanctions imposed are diverse. Clearly in respect of that subject matter there is an inconsistency.'

#### Decision

- The laws are inconsistent because the Commonwealth (presumably) intended to cover the field with the *Racial Discrimination Act*

The Commonwealth Parliament later stated that this was not what it in fact intended. The High Court misinterpreted the Commonwealth Act. Parliament attempts to retrospectively remove the inconsistency by inserting s 6A(1) (stating that state laws can continue to apply in the field where consistent with the objects of the treaty) but a challenge to this amendment is successful on the ground that legislation can only be made prospectively (*University of Wollongong v Metwally*).

### ***University of Wollongong v Metwally* (1984) HCA:**

#### Issue

- Can 'covering the field' inconsistency be retrospectively removed?

#### Decision

- Majority (Gibbs CJ and Deane J):
  - No, constitutionalism and respect for the rule of law dictate that retrospective legislation cannot be valid
  - Temporally inconsistent laws would have a dire affect upon citizens' rights
- Minority (Mason J):
  - Yes, parliamentary sovereignty dictates that Parliament can legislate retrospectively
  - Section 109 is not a source of individual rights

Since *Viskauskas*, Commonwealth legislation will often include a provision stating that 'this Act is not intended to displace state law in the area'. This is treated as implying that the Act is not intended to cover the field.

Importantly, the two fields must be identical. Two laws will not necessarily be inconsistent if they deal with two different subject matters (*Commercial Radio Coffs Harbour*).

**Commercial Radio Coffs Harbour v Fuller (1986) HCA:**Facts

- The *Broadcasting and Television Act 1942* (Cth) requires licences to be issued to commercial radio stations
- A condition of CRCH's licence is that they erect two antennae
- Breach of licence conditions is a criminal offence: s 132(1)
- The *Environmental Planning and Assessment Act 1979* (NSW) requires a further environmental impact assessment to be made

Issue

- Is there inconsistency between the Commonwealth licence condition and the state planning law?

Reasoning

- Gibbs CJ and Brennan J:
  - The licence condition imposes a duty to do a thing and a penalty for failing so to do
  - If it is impossible to do the thing without contravening another law, the provision should be construed as imposing a qualified duty stopping short of requiring contravention of other laws
  - There is therefore no inconsistency
- Wilson, Deane and Dawson JJ:
  - The Commonwealth Act does not purport to state 'exclusively or exhaustively' the law of commercial broadcasting
  - The licence confers a permission to broadcast, not a right immune to state laws
  - By concentrating on technical quality of broadcasting services, the Commonwealth Act actually leaves room for the operation of other laws at both levels of government
  - For example, CRCH had to obtain the permission of the Department of Aviation to erect the antennae, and the land had to be purchased or leased
  - The Act is therefore intended 'to operate within the setting of other laws with which the grantee of a licence will be required to comply'
  - 'The Act was intended to be "supplementary to or cumulative upon State law."'

Decision

- No, there is no inconsistency
- Direct inconsistency
  - Although the Commonwealth Act makes it an offence not to comply with licence conditions, it does not (in the view of the Court) extend to breaching state law so there is no direct inconsistency
- Rights inconsistency
  - The licence condition *required* CRCH to erect the antennae, but does not confer *authority* to do so
  - The planning laws did not *prohibit* construction
  - There is thus no inconsistency of rights
- Covering the field
  - The laws are directed to different purposes and therefore occupy different fields: one concerned technical broadcasting requirements, the other concerns the environment

*Commercial Radio Coffs Harbour* illustrates the difference between a requirement and an authority. A *requirement* says: 'In order to do X you *must* first do Y'. However, it does not inherently confer *authority* to ignore state laws preventing Y. This is especially so where the requirement is imposed by legislation focusing on a specific aspect of the regulation of X (and not Y), and where Z or W also need doing in order to complete Y.

In determining whether the State law 'intrudes' on the field, it is also possible to whether the state law 'alters, impairs or detracts' from the operation of the Commonwealth law: *Telstra Corp v Worthing*. However, in many cases the mere existence of state legislation in a field appropriated by the Commonwealth will be enough to create inconsistency.

**Issue:** does this afford too much scope to the federal Parliament to enlarge its areas of exclusive legislative competency?

### ***Ansett Transport Industries (Operations) Pty Ltd v Wardley (1980) HCA:***

#### Facts

- Ansett refused to employ Deborah Wardley on the basis of her gender
- Pursuant to state legislation, the Equal Opportunity Board ordered her employment
- Ansett argues that s 18 of the *Equal Opportunity Act 1977 (Vic)* is inconsistent with an Airline Pilots Agreement cl 6B, certified under s 28 of the *Conciliation and Arbitration Act 1904 (Cth)* to be an award

#### Issue

- Is there an inconsistency?

#### Reasoning

- Stephen J:
  - Cl 6 of the Agreement does not confer an absolute right of termination
  - It is not a right capable of exercise regardless of state law regulating grounds for its exercise
  - It must be understood in light of state laws
  - The Agreement was not intended to cover the field
    - The agreement is concerned with industrial matters
    - 'They should not be regarded as trespassing upon alien areas remote from tis purpose and subject matter, whether those areas concern the nation's foreign affairs or social evils such as discrimination upon the ground of sex.'
    - They are therefore directed as different subject matter
- Mason J:
  - The tests for inconsistency are interrelated and more than one may be applicable
  - The Agreement is a general industry award determining the rights of employers and employees in the airline industry
  - It focuses on the nature of advancement and does not deal with dismissal at all
  - Instead, it assumes that the general lawof termination will apply
  - Cl 6 of the Agreement is therefore subject to the general law (*contra Aickin J*)
  - There is thus no direct or rights inconsistency between cl 6B and the state Act
  - Further, because the Agreement presumes that general law rights upon dismissal are applicable, the Agreement must be read in light of Victoria's equal opportunity laws
  - The fact that this is required indicates that there can be no intention to cover the field and therefore no inconsistency

Decision

- No, the agreement is not inconsistent with the equal opportunity legislation

***Australian Mutual Provident Society v Goulden (1986) HCA:***Facts

- Goulden takes out a life insurance policy with AMP but Amp refuses to waive a premium benefit on account of Goulden's blindness
- Section 49K(1) of the *Anti-Discrimination Act 1977* (NSW) makes it unlawful to refuse to provide a service on the basis of physical handicap or impairment
- Section 78(1) of the *Life Insurance Act 1945* (Cth) requires that insurers approve policies by actuaries

Issue

- Is there an inconsistency between s 78(1) and s 49K(1)?

Reasoning

- The *Life Insurance Act* assumes that insurers are able to classify risks in accordance with its own judgment
- 'It "would alter, impair or detract from" the Commonwealth scheme of regulation established by the Act if a registered life insurance company was effectively precluded by the legislation of a state from classifying different risks differently'
- State legislation making it unlawful to take account of physical impairment in determining whether to grant insurance is inconsistent with the 'essential scheme of the provisions of the [Commonwealth] Act'
- Such legislation would undermine and negate the legislative assumption of the insurer's ability to self-classify risks and fix premiums according to its actuarial advice

Decision

- Yes, there is covering the field inconsistency

4 *Operational inconsistency*

'Cover the field' inconsistency is sometimes referred to in an expanded sense as connoting 'operational' inconsistency. Laws are operationally inconsistent even when addressing different fields but where the effect of one law is to render inoperative the other. This approach underlay the reasoning in *Goulden*.

It originates from comments made by Dixon J in *Victoria v Commonwealth* ('*The Kakariki*'), where a Commonwealth law regulating sunken ship recovery was to operate 'without interference from any other public authority'.

***Commonwealth v Western Australia (1999) HCA ('Mining Act Case')***Issue:

- Is the *Mining Act 1978* (WA) provision, which qualifies the grant of exploration licences in

respect of a perimeter area, inconsistent with the *Defence Act 1903* (Cth) regulations?

Decision:

- The Commonwealth regulations were not intended to cover the field
- Any inconsistency would be operational only
  - If licences granted under the *Mining Act* were granted over a 'perimeter area' then there would be 'operational' inconsistency
  - However, that situation has not yet arisen
  - For now, there is no inconsistency

### C Consequences of Inconsistency

If an Act (or part of it) is inconsistent and therefore unconstitutional, the Court may:

- Declare the whole law to be invalid;
- Declare a part of the law only to be invalid (severance); or
- Interpret provisions of the law so that it is constitutional (reading down).

#### 1 Invalidity

A court has the power to declare that the whole law is unconstitutional and thus invalid.

The effect is 'retrospective' so that the law was invalid from the time the unconstitutionality arose. When dealing with inconsistent Commonwealth and state laws under s 109, this will normally be the time when the Commonwealth law came into effect, though this may be some time after the enactment of the state law.

#### 2 Reading down

#### **Acts Interpretation Act 1901 (Cth) s 15A:**

A court should read down or sever provisions where it is possible to preserve the operation of the rest of the Act.

See also *Interpretation of Legislation Act 1984* (Vic) s 6.

For an application of reading down, see *Wilson and Dingjan* (Mason CJ and Gaudron J). In *Wilson*, a provision providing that a 'person' could be nominated to conduct an inquiry was read down so as to mean 'any person not a judge of a court exercising federal jurisdiction'.

#### 3 Severance

Severance occurs when a portion of the Act is declared invalid and removed from the remaining provisions. The test is set out in *SS Kabila*:

- (i) **Is severance possible?**  
Severance is only possible if the statute would still make semantic and grammatical sense without the excised portion, without having to substitute words;
- (ii) **Is the result to delete a legal effect, or to change a legal effect?**  
Severance is not legally possible if to do so would change the law's substantive effect;
- (iii) **Is the legislative intention that the statute should stand or fall as a whole?**  
Severance is only possible at an interpretive level if Parliament has not provided that the entire state should fall if any provision is declared invalid

### III **Reform Issues**

#### A *State Bill of Rights*

The Victorian Government has established a Committee to undertake a consultation in Victoria and report to the government on human rights issues in Victoria.

Note this paragraph in the Statement of Intent

*'The Government is concerned to ensure that the sovereignty of Parliament is preserved in any new approaches that might be adopted to human rights. ... A government should be able to pass laws and make policies that affect human rights on the basis that it will be accountable for those actions through the ballot box.'*

Consider this statement in light of Kirby P's comments in the *BLF Case*.

Why is the Victorian Government particularly interested in models that have been adopted in the UK and NZ?

#### B *Constitutional Reform*

Ambit of the Constitutional Commission's terms of reference included:

Whether the governance of Vic would be improved by following reforms:

- Enable Legislative Council to operate effectively as a genuine House of Review
- Give effect to a fixed 4 year term
- Reduction of the numbers of MPs of either House of Parliament
- The removal/modification of the nexus between the Houses in ss 27 and 28

Constitution (Parliamentary Reform) Act 2003, included:

- Providing for a fixed 4 year Parliamentary term (unless the Assembly is dissolved sooner).
- Reconstitute the Legislative Council to consist of 40 members elected from 8 regions each returning 5 members
- joint sitting of both Houses
- Recognising the principle of government mandate
- Procedure included to deal with disputes between LA and LC re Bills
- Amendment of s. 18 - Providing for the entrenchment of certain legislative provisions (referendum) – this was discussed in earlier classes. You should refer to Carolyn Evan's article in your materials on this point.
  - What problems does Carolyn Evans identify with the new entrenchment provisions?