Finally, it may be noted that the New South Wales Supreme Court in *Ex parte Forster, Re University of Sydney*[43] regarded the matter as still open. The Full Court declined to issue mandamus to compel the re-enrolment (or a consideration of re-enrolment) of an excluded student, and therefore found it unnecessary to consider the further question 'whether the matter in any event was not one within the exclusive jurisdiction of the visitor'. Dicta in three passages of the Court's judgment would suggest that their Honours considered the jurisdiction to be 'alive and well'.[44]

IV CONCLUSION

It has been seen that the traditional jurisdiction of the visitor to hear and resolve internal disputes is extensive, if little utilized in recent times. *Patel's* case provides the basis for the revival of the exercise of visitatorial powers, but with what consequences it is impossible to predict. Nonetheless, one may conclude with comments on three aspects of the future development of the jurisprudence in this area.

First, *Patel* seems to settle the basic principles to be applied when determining *locus standi*. Little difficulty may be expected in this regard in the future.

Secondly, the process of characterizing the subject matter of a dispute as 'internal' or 'domestic' may provide a means by which courts may increasingly reserve issues to themselves or the visitor likewise decline jurisdiction. This may occur because of the way in which Kindersley V.-C. left room for intervention by the courts in *Thomson v. University of London.*

Finally, the greatest unknown is the prospect of judicial review of the visitor's actions. For three hundred years the courts have expressed reluctance to interfere with the determinations of the visitor: in the face of this, will modern courts decline the application of *Anisminic*[45] 'error of jurisdiction' principles? Megarry V.-C. makes no specific reference to the point in *Patel*; but perhaps when he writes that '*apart from any impropriety or excess of jurisdiction* [a decision] is final and will not be disturbed by the courts',[46] his Lordship should be understood as importing the full range of judicial review for defects of jurisdiction in its modern sense.

PETER WILLIS*

MILLER v. MILLER[1]

Constitutional law — Inconsistency of New South Wales statute as to telephonic interception with Commonwealth legislation on same subject — Intention manifested by Commonwealth Act to represent whole law on subject — Invalidity of relevant New South Wales provisions to extent of inconsistency — The Constitution, s. 109 — Telephonic Communications (Interception) Act 1960 (Cth), ss. 4 and 5 — Listening Devices Act 1969 (N.S.W.), ss. 4, 6 and 7.

In this case a Full Bench of the High Court[2] considered whether section 7 of the Listening Devices Act 1969 (N.S.W.) was inconsistent with the Telephonic Communications (Interception) Act 1960 (Cth). The Court was also called upon to decide

[43] [1964] N.S.W.R. 1000 (F.C.).
[44] *Ibid.* 1010, *per* Sugerman, Else-Mitchell and Moffit JJ. Sugerman J. was counsel in *Drummond* and *King*, just as Diplock L.J. had been successful counsel in *R. v. Dunsheath, Ex parte Meredith* [1951] 1 K.B. 127 (D.C.).
[45] [1969] 2 A.C. 147, 171, 209 (H.L. (E.)).
[46] [1978] 1 W.L.R. 1488, 1493, 1500 (emphasis added).
* B.A. (Hons.).
[1] (1978) 53 A.L.J.R. 59.
[2] Barwick C.J., Gibbs, Stephen, Jacobs and Aickin JJ.

whether evidence of a conversation overheard by means of telephonic interception was admissible in custody proceedings in the Family Court.

Section 7 of the New South Wales Act provided that where a private conversation had come to the knowledge of a person as a result of the use of a listening device which had been used in contravention of section 4 of the Act, that person could not give evidence of that conversation in any proceedings; however, evidence of private conversations obtained in such a manner was admissible if one other party to the conversation had consented to its use as evidence (section 7(2)(a)), or if the evidence had been obtained in another way as well as by the use of a listening device (section 7(2)(b)) or was to be given in proceedings for an offence against the Act (section 7(2)(c)). This provision was potentially inconsistent with section 5(3) of the Commonwealth Act, which prohibited the communication to another person or the recording or making use of any information obtained by intercepting a conversation passing over the telephone system, and with section 4(1), which defined interception of a telephonic communication as listening to it or recording it by any means without the knowledge of the person making the communication. However, this did not include, *inter alia*, listening to or recording such a communication by a person lawfully on premises where a telephone service was connected, by means of the telephone or 'other device which is part of that service' (section 4(2)(b)). Section 4(3) provided that for the purposes of the Act two or more telephone services connected by the same telephone line to a telephone exchange would be deemed one telephone service.

THE FACTS

In proceedings in the Family Court of Australia as to the custody of a six year old boy, evidence was tendered of telephone conversations between the child and his mother (the respondent). The child had spoken from a telephone in his father's (the appellant's) house, where he was residing at the time. The telephone service installed by the Commonwealth Postmaster General's Department[3] included an extension handset within the house. Both the child's father and stepmother had listened on separate occasions by means of this extension to conversations between the child and his mother. The Family Court rejected this evidence at first instance and again on appeal. On both occasions the Court was sitting in New South Wales and considered itself bound to comply with section 7 of the Listening Devices Act.

On 7 April 1978 the High Court granted special leave to appeal from the order of the Full Court of the Family Court dismissing Mr Miller's appeal. Leave to appeal was limited to the issue of whether or not the evidence referred to was admissible. The appeal filed pursuant to the leave granted included a number of grounds. Firstly, it was argued that the Act was not applicable to proceedings under the Family Law Act 1975 (Cth). Secondly, it was claimed that the extension handset forming part of the telephone handset was not a 'listening device' within the meaning of section 3 of the New South Wales Act. Finally, it was submitted that the child's father was his custodian with the power to consent on the child's behalf to the overhearing of the conversation. After the matter had been called on for hearing in the High Court, leave to amend the grounds of appeal was sought and granted.

The appellant now argued that the Listening Devices Act 1969 (N.S.W.) was inconsistent with the Telephonic Communications (Interception) Act 1960 (Cth) and was accordingly invalid by operation of section 109 of the Commonwealth Constitution; on this basis the conduct of the appellant in listening to the conversations between the respondent and their son was lawful under section 4 of the Telephonic Communications (Interception) Act.

[3] Now called the Australian Telecommunications Commission.

At the hearing of the appeal the State of New South Wales intervened by counsel and the State of South Australia, by leave of the Court, made a written submission. Both States supported the respondent, adopting the argument of her counsel.

THE DECISION

The appellant's case rested mainly upon the inconsistency argument. It was said that there was a direct inconsistency within the meaning of section 109 of the Commonwealth Constitution between the relevant provisions of the two statutes because listening to telephone conversations by means of extension handsets was lawful under the terms of the Commonwealth Act, yet it was stated to be unlawful by the New South Wales Act. It was argued furthermore that the Commonwealth Act evinced an intention to 'cover the field' of telephonic interception and constitute the sole law on this matter. The respondent argued that there was no inconsistency between the two Acts because it was apparent from the terms of section 4 of the Commonwealth Act that the field upon which it operated was telephonic interception other than by means of a part of the telephone service within the premises to which the telephone was connected. According to the respondent's submission, the scope of the Commonwealth enactment was confined to telephonic interception of the sort associated with a surreptitious attachment of listening devices to telephone lines to enable a person to listen to or record conversations without the knowledge of the parties making the communication. On this view of the Commonwealth Act the area of telephonic interception by means of extensions within a house would be beyond the intended scope of the Commonwealth Act. Thus, a State would be at liberty to legislate upon the matter.

Barwick C.J., with whom Gibbs, Stephen and Aickin JJ. agreed, considered that the constitutional law relevant to the case was not in doubt. His Honour pointed out that there were two distinct bases for concluding that there was an inconsistency between a Commonwealth and State law for the purposes of section 109: there may be a 'textual collision' between the provisions of the respective Acts, or the Commonwealth Act may manifest an intention to be the exclusive law on the topic both in what it forbids and what it allows.[4] The issue in the present case was to be resolved by construction of the Commonwealth Act. Was the Act intended to be the law only as to interception of communications passing over the telephone system other than over so much of it as was within premises to which a telephone service was connected? Or was it intended to constitute the whole law on interception of telephonic communication? Barwick C.J. was of the view that the answer to these questions decided the case, for if the Act exhibited only the limited intention set out in the first alternative, the respondent's contention that the State of New Souh Wales was free to legislate on the matter of telephonic interception was unassailable. On the other hand, if an intention were evinced to cover the field both forms of inconsistency would be established. It was held by Barwick C.J. that the Commonwealth Act did evince a clear intention to be the whole law on the matter of telephonic interception.[5] Such a conclusion was unsurprising, his Honour said, given that the telephone system is provided and administered by a Commonwealth instrumentality under Commonwealth law. This fact of itself however would not necessarily provide a ground of inconsistency. Nonetheless, it was clear that no State would have the power to authorize the forfeiture of the extension handset.

Barwick C.J. argued that section 4 of the Commonwealth Act indicated that interception at any point in the telephone system was within its purview. Section 4, despite its appearance of merely containing a definition of what constitutes interception, in fact provided an exception from the total prohibition upon interception

[4] (1978) 53 A.L.J.R. 59, 61.
[5] *Ibid.*

other than that authorized by the Act. The Chief Justice concluded that the listening to a telephonic message by a person lawfully on premises to which a telephone service is connected, by means of an extension within those premises, was lawful. Thus section 7 of the New South Wales Act was invalid to the extent that it contradicted this and to the extent that it precluded the reception in evidence of the information derived from such listening. His Honour decided that the appeal should be allowed, the order of the Family Court set aside and the matter remitted to the Full Court of the Family Court to further hear the appeal by the appellant.

Jacobs J. began his judgment by considering the terms of the Commonwealth Act, especially section 4, which gave meaning and content to the words 'interception of a communication passing over the telephone system'; and section 5, which forbade interception of such communications except in certain circumstances.[6] His Honour thus perceived an implied legislative intention on the part of the Commonwealth to cover the whole subject matter of listening to or recording communications over the telephone system without the knowledge of the person making the communication. Moreover he found that the Commonwealth Act disclosed an implied intention to permit the divulging of any information obtained otherwise than by interception.

This finding did not decide the matter in his Honour's view.[7] Clearly, he appreciated that the Commonwealth law dealt with telephone tapping and related matters, whereas the State Act was concerned with rules of evidence. The other members of the Court, on the other hand, exhibited no awareness of this distinction and did not address themselves to it. According to Jacobs J., the question had to be examined whether the Commonwealth Act was directed to the general subject matter of what evidence would be admissible in a New South Wales court of a communication over the telephone listened to without the caller's knowledge. If a State law allowed as admissible evidence information obtained by means of interception as defined in the Commonwealth Act, then clearly section 109 of the Commonwealth Constitution would render such law invalid to the extent of the inconsistency. This would be an example of direct inconsistency, and it would be irrelevant whether or not the Commonwealth and State laws dealt with the same subject matter. Jacobs J. contrasted

[6] S. 5(1) A person shall not —
(a) intercept;
(b) authorize or suffer or permit another person to intercept; or
(c) do any act or thing that will enable him or another person to intercept a communication passing over the telephone system.
Penalty $1,000 or imprisonment for two years.
(2) The last preceding subsection does not apply to or in relation to —
(a) any act or thing done by an officer of the Department in the course of his duties for or in connection with —
(i) the installation of a telephone line or of any apparatus or equipment or the operation or maintenance of the telephone system; or
(ii) the tracing of the origin of a telephone call during which a person has contravened or is suspected of having contravened or of being likely to contravene a provision of the *Post and Telegraph Act 1901-50* or of any regulation in force under that Act; or
(b) the interception of a communication in pursuance of a warrant.
(3) A person shall not divulge or communicate to another person or make use of or record any information obtained by intercepting a communication passing over the telephone system except —
(a) in or in connection with the performance by the Organizer of its functions or otherwise for the security of the Commonwealth; or
(b) in the performance of any duty of that first mentioned person as an officer of the Department.
Penalty $1,000 or imprisonment for two years.

[7] *Cf.* Barwick C.J., who considered that once an intention to cover the field were shown, the issue was decided, both forms of inconsistency then being established.

this with a situation in which there was at the most an indirect inconsistency — where the Commonwealth purported to cover the field and the subject matter of the respective laws thus becomes very important. His Honour found there to be no direct inconsistency here: the Commonwealth Act was not intended to be a statement of what information obtained by way of interception may or may not be divulged in evidence in civil or criminal proceedings in a State court. Nonetheless, the general prohibition against communicating certain information, found in section 5(3) of the Commonwealth Act, would effectively prevent much evidence being admissible.

The question remained whether section 7 of the New South Wales Act, which provided that evidence obtained by the use of a listening device used in contravention of section 4 was inadmissible in court proceedings, applied to the use of the extension telephone in the particular circumstances of the instant case. Section 4 of the Act had the effect of making the use of an extension telephone to hear, record or listen to a private conversation an offence. Jacobs J. held, therefore, that to the extent to which it applied to the use of a telephone which was part of the telephone system as defined in the Commonwealth Act, section 4 was invalid owing to the operation of section 109 of the Constitution. Because a condition of the application of section 7 was that the use of the listening device be in contravention of section 4, and because the use of the extension telephone in these circumstances did not in fact contravene section 4 due to the latter's partial invalidity, his Honour concluded that section 7 had no application to the use of the extension telephone in this case.[8]

Gibbs J. considered that the Commonwealth Act was intended to express completely the law governing the interception of communications passing over the telephone system.[9] By virtue of section 4(2) of that Act therefore the conduct in the case of listening to a 'phone call without the caller's knowledge was lawful. The combined effect of sections 4 and 7 of the State Act was to enter a field covered by the Commonwealth and this resulted in their invalidity to the extent of their inconsistency with the Commonwealth Act. His Honour found it unnecessary to decide whether section 5(3) of the Commonwealth Act prohibited the giving of evidence of a conversation intercepted within the meaning of the Act, but he doubted whether a Court was 'another person' within the meaning of the subsection. Nonetheless, his Honour considered that even if the subsection failed to render evidence of such conversations inadmissible, a court retained a discretion to exclude evidence unlawfully obtained: *Bunning v. Cross*.[10]

The decision is consistent with earlier High Court judgments in its adoption of the 'covering the field' test of inconsistency. First enunciated by Isaacs J. in *Union Steamship Company of New Zealand Ltd v. Commonwealth*,[11] the test won gradual acceptance in the High Court, receiving what is probably its most celebrated formulation in the judgment of Dixon J. in *Ex parte McLean*.[12] This test of inconsistency continued to be adhered to in later judgments: *e.g. Stock Motor Ploughs Ltd v. Forsyth*[13] and *Victoria v. Commonwealth*.[14] However, the test, which has been used in the United States of America in relation to conflicts between State and federal jurisdiction,[15] has not escaped criticism. Both Rich J. in *Ex parte McLean*[16] and Evatt J. in *Stock Motor*

[8] (1978) 53 A.L.J.R. 59, 63.
[9] *Ibid.* 61.
[10] (1978) 52 A.L.J.R. 561, 567 ff.
[11] (1925) 36 C.L.R. 130.
[12] (1930) 43 C.L.R. 472, 483 f.
[13] (1932) 48 C.L.R. 128.
[14] (1937) 58 C.L.R. 618.
[15] See Zelling H., 'Inconsistency Between Commonwealth and State Laws' (1948) 22 *Australian Law Journal* 45.
[16] (1930) 43 C.L.R. 472, 481.

Ploughs v. Forsyth[17] and *West v. Commissioner of Taxation (N.S.W.)*[18] considered it not entirely satisfactory. Given the demise of the 'double obedience' test — that if both Commonwealth and State laws can be obeyed there is no inconsistency[19] — one test contended for as an alternative to that of 'covering the field' is one adopting a broad approach to the inconsistency issue: *i.e.* by virtue of section 109 of the Commonwealth Constitution any valid Commonwealth law made under a concurrent power overrides the operation of any State law which is inconsistent with it. One difficulty with this formulation is that it does not provide a guide for establishing inconsistency but only says what is to be done once it is established. Perhaps it is for this reason that the 'covering the field' test, with its emphasis upon the ascertainment of the federal Parliament's intention as disclosed in the words of the Act, has become the accepted test to apply in considering the inconsistency issue.[21]

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[17] (1932) 48 C.L.R. 128, 147.
[18] (1937) 56 C.L.R. 657, 690.
[19] See *e.g. Australian Boot Trade Employees Federation v. Whybrow* (1910) 10 C.L.R. 266.
[20] See Zelling, *op. cit.*
[21] See *Australian Broadcasting Commission v. Industrial Court of South Australia* (1977) 52 A.L.J.R. 31; *R. v. Credit Tribunal, Ex parte General Motors Acceptance Corporation, Australia* (1977) 137 C.L.R. 545.

* B.A.