RETROSPECTIVE AMENDMENT OF FEDERAL LAWS AND THE INCONSISTENCY DOCTRINE IN AUSTRALIA

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1 INTRODUCTION

In a federal system there is a constant need to resolve problems created by conflicting provisions of laws enacted by the federal legislature and those enacted by a state or provincial legislature. In the case of a unitary system it is merely the question of a later statute conflicting with an earlier statute enacted by the same legislature, and in such an instance, the conflict is resolved by regarding the earlier law as having been impliedly repealed by the later law.[1]

In the Australian federal system the conflict is resolved by resorting to the express provisions of s 109 of the Commonwealth Constitution,[2] which reads as follows:

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

In some federal systems the primacy of federal law is expressly guaranteed (for example Malaysia[3]) and in other federal systems is acknowledged even in the absence of an express declaration of "supremacy" of federal legislation (for example Canada). In fact, Evatt J of the High Court of Australia had gone as far as to observe:

> as is shown by decisions on the Canadian Constitution, provisions like sec 109 do no more than declare a rule of last resort which would be applied irrespective of express provision.[4]

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[1] However, note the following observation of Mason J in *The University of Wollongong* v *Metwally* (1984) 59 ALJR 48, 53: "In the case of conflicting statutes, one enacted by the Imperial Parliament, the other by a colonial legislature, the problem was resolved in favour of the primacy of the Imperial statute, even if it be the first in time. See, for example, *Co-operative Committee on Japanese Canadians* v *Attorney-General (Canada)* [1947] AC 87 at 103, a decision on s 2 of the Colonial Laws Validity Act 1865 (Imp)."

[2] See also covering clause 5 of the Commonwealth of Australia Constitution Act.

[3] Article 75 of the Malaysian Constitution provides:

If any State law is inconsistent with a federal law, the federal law shall prevail and the State law shall, to the extent of the inconsistency, be void.

[4] *Victoria* v *The Commonwealth* (1937) 58 CLR 618, 634. See also: Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 939; *Broadcasting Commission* v *Industrial Court (SA)* (1977) 138 CLR 399, 418 *per* Murphy J. *cf* Gibbs CJ in *The University of Wollongong* v *Metwally* (1984) 59 ALJR 48, 51. The US Constitution does not have a provision equivalent to s 109. However, State laws found inconsistent with federal laws are struck down by the supremacy clause in art VI, s 2 which is the counterpart of covering clause 5 of the Commonwealth of Australia Constitution Act: PH Lane, *The Australian Federal System with United States Analogues* (1972) 692.

In Australia the law reports abound with cases involving the conflict between state and federal laws. To a large extent, many of these cases concerned the application of some well-settled propositions which have evolved in the course of time as a result of judicial exegesis by the High Court. In a recent case however the Court dealt with a novel question. In *The University of Wollongong* v *Metwally*[5] (hereinafter referred to as the *Wollongong* case), the High Court was confronted with the issue of the operative effect of a retrospective federal law in the context of an inconsistency which had existed, prior to the enactment of the retrospective law, between a federal law and a state law. To see the issue in a clearer perspective it is necessary to spell out the essential facts of the *Wollongong* case.

2 FACTS OF THE WOLLONGONG CASE

In 1981 Mr Metwally, an Egyptian student enrolled in the Doctor of Philosophy degree in the Department of Metallurgy at the University of Wollongong, lodged with the Counsellor of Equal Opportunity under the Anti-Discrimination Act 1977 (NSW) (as amended), a complaint of racial discrimination by the University. The complaint was based on s 7(1) and 2 17(2) (which are located in Part II) of the Anti-Discrimination Act 1977 (NSW). Mr Metwally's enrolment and scholarship were subsequently terminated and in 1982 he lodged another complaint under s 50(1) of the Act, alleging unlawful victimisation.

On 23 November 1983 the Equal Opportunity Tribunal found both complaints to be established and ordered the University, *inter alia*, to pay Mr Metwally damages. The University appealed to the Court of Appeal of New South Wales and Mr Metwally crossappealed on the ground that the damages were manifestly inadequate.

To appreciate the central issue in the case it is necessary to advert to s 3 of the Racial Discrimination Amendment Act 1983 (Cth) which inserted with effect from 19 June 1983 a new section, s 6A, in the Racial Discrimination Act 1975 (Cth). This amendment of the Racial Discrimination Act 1975 (Cth) was necessitated by the fact that on 19 May 1983 the High Court had, in *Viskauskas* v *Niland*[6], held that the provisions of Part II of the Anti-Discrimination Act 1977 (NSW) were inconsistent with the Racial Discrimination Act 1975 (Cth) and were to that extent invalid. Gibbs CJ in the *Wollongong* case said:

> It follows from that decision that during the years 1978-1981, when the alleged acts of racial discrimination occurred, Pt II of the Anti-Discrimination Act was invalid.[7]

The significance of the new s6A was its intended *retrospective* effect. Section 6A(1) provides as follows:

> This Act is not intended, and shall be deemed never to have been intended, to exclude or limit the operation of a law of a State or Territory that furthers

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[5] (1984) 59 ALJR 48.
[6] (1983) 57 ALJR 414.
[7] (1984) 59 ALJR 48, 49.

the objects of the Convention and is capable of operating concurrently with this Act.[8]

In its appeal the University challenged the validity of s 3 of the Racial Discrimination Amendment Act 1983 (Cth) insofar as it purported to have any retrospective operation and effect. This matter was removed into the High Court.[9]

It is interesting to note that when the amendment was passed by the Commonwealth Parliament on 3 June 1983 the then federal Attorney-General, Senator Gareth Evans, said:

> It may be that this savings provision will prove not to be successfully immune from further constitutional challenge, the argument perhaps being that – despite this clear cut statement of intention – the Commonwealth law still *does* cover the field.[10]

The comment proved to be partly prophetic because in the *Wollongong* case it was held by a majority of the High Court (Gibbs CJ, Murphy, Brennan and Deane JJ) that the enactment of the Racial Discrimination Amendment Act 1983 (Cth) did not give the provisions of Part II of the Anti-Discrimination Act 1977 (NSW) a valid operation prior to the date of the enactment of the Racial Discrimination Amendment Act 1983 (Cth), though

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[8] The other sub-sections of s 6A read as follows:

(2) Where –

(a) a law of a State or Territory that furthers the objects of the Convention deals with a matter dealt with by this Act; and

(b) a person has, whether before or after the commencement of this section, made a complaint, instituted a proceeding or taken any other action under that law in respect of an act or omission in respect of which he would, but for this subsection, have been entitled to make a complaint under this Act,

the person shall be deemed never to have been, and is not, entitled to make a complaint or institute a proceeding under this Act in respect of that act or omission and any proceedings pending under this Act at the commencement of this section in respect of such a complaint made before that commencement are, by force of this subsection, terminated.

(3) Where –

(a) a law of a State or Territory that further the objects of the Convention deals with a matter dealt with by this Act; and

(b) an act or omission by a person that constitutes an offence against that law also constitutes an offence against this Act,

the person may be prosecuted and convicted either under that law of the State or Territory or under this Act, but nothing in this subsection renders a person liable to be punished more than once in respect of the same act or omission.

[9] The following questions were posed to the High Court in the *Wollongong* case (1984) 59 ALJR 48, 49 *per* Gibbs CJ:

(1) Whether the enactment of the provisions of s 3 of the *Racial Discrimination Act* 1983 was beyond the power of the Parliament of the Commonwealth in so far as those provisions purport to have retrospective operation or effect for reason that in purporting to do so they deny the operation of s 109 of the Constitution upon an inconsistency which prior to their enactment existed between the *Racial Discrimination Act* 1975 and the relevant provisions of the *Anti-Discrimination Act* 1977.

(2) Whether, in the event of an affirmative answer to (1) above, the provisions of Pt II of the *Anti-Discrimination Act* were invalid prior to the enactment of the *Racial Discrimination Amendment Act* 1983 by virtue of their inconsistency with the *Racial Discrimination Act* 1975 and the operation of s 109 of the Constitution.

[10] G Evans, "Discrimination and Human Rights" Paper presented at the 22nd Australian Legal Convention, Brisbane, 7 July 1983.

not necessarily because the field remained occupied by the Commonwealth law. The dissenting judges comprised Mason, Wilson and Dawson JJ.

It is respectfully submitted that the minority view is more in accordance with established propositions of the High Court and that the majority of the High Court arrived at its conclusion by adopting a questionable perspective of the object of s 109 of the Commonwealth Constitution.

3 SOME PRELIMINARY OBSERVATIONS

It is not intended here to embark on a comprehensive analysis of s 109. For present purposes it is sufficient to note some of the established propositions concerning the operation of s 109.

Section 109 obviously comes into play when Commonwealth and State enactments "produce different legal results when applied to the same facts".[11] As Professor Colin Howard explains "This form of inconsistency is limited, displacing State law only to the extent of the direct conflict".[12] The concept of inconsistency is not confined to a direct conflict or clash between laws. "There may be a conflict between the intentions of two legislatures which is not expressed in actual inconsistency between the terms of the statutes enacted."[13] To cope with this less obvious inconsistency the "covering the field" test of inconsistency was developed. Whilst this test has emerged as the ruling test of inconsistency it must be noted that the test of direct inconsistency is not rendered irrelevant.[14]

The "covering the field" test of inconsistency which was first developed by Isaacs J in *Clyde Engineering Co Ltd* v *Cowburn*[15] was later refined in the following fashion by Dixon J in *Ex parte McLean*:[16]

> When the Parliament of the Commonwealth and the Parliament of a State each legislate upon the same subject and prescribe what the rule of conduct shall be, they make laws which are inconsistent, notwithstanding that the rule of conduct is identical which each prescribes, and sec 109 applies. That this is so is settled, at least when the sanctions they impose are diverse (*Hume* v *Palmer*).[17] But the reason is that, by prescribing the rule to be observed, the Federal statute shows an intention to cover the subject matter and provide what the law upon it shall be. If it appeared that the Federal law was intended to be supplementary to or cumulative upon State law, then no inconsistency would be exhibited in imposing the same duties or in inflicting different penalties. The inconsistency does not lie in the mere coexistence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount legislature to express by its enactment, completely, exhaustively, or 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.[18]

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[11] C Howard, *Australian Federal Constitutional Law* (3rd ed 1985) 41.
[12] *Ibid.*
[13] *Ibid* 38.
[14] *Ibid* 45. As for the third type of inconsistency see G Sawer, *Australian Federalism in the Courts* (1967) 139-140.
[15] (1926) 37 CLR 466, 489-490.
[16] (1930) 43 CLR 472.
[17] (1926) 38 CLR 441.
[18] (1930) 43 CLR 472, 483.

Another point to be made is that if an inconsistency exists the inconsistent State law is, despite the use of the word "invalid" in s 109, merely rendered "inoperative". The significance of this is that the State law, if still unrepealed by the State legislature, "revives" if the Commonwealth law ceases to be law (for example by express repeal by the Commonwealth Parliament or by the effluxion of time in accordance with the terms of the federal law).[19]

A major difficulty arising from the application of the "covering the field" test of inconsistency is how to gauge the intention of the Commonwealth Parliament. On occasions, the Commonwealth Parliament has attempted to minimise the difficulty by providing in its enactments an express statement of its intention, Again, certain propositions concerning such an express statement of intention are "well settled". Thus, it was observed in *Palmdale – AGCI Ltd* v *Workers' Compensation Commission of New South Wales*[20] that:

> a Commonwealth statute may provide that it is not intended to make exhaustive or exclusive provision with respect to the subject with which it deals thereby enabling State laws, not in direct conflict with a Commonwealth law, to have an operation.

Whilst a Commonwealth statute may evince an intention to narrow the field it cannot by this means

> avoid or eliminate a case of direct inconsistency or collision, of the kind which arises, for example, when Commonwealth and State laws make contradictory provision upon the same topic, making it impossible for both laws to be obeyed.[21]

If the Commonwealth Parliament can evince such an intention and legislate to give it a *prospective* operation, to what extent can it legislate to give it a *retrospective* operation? The answer given by the High Court in *R* v *Kidman*[22] is that the Commonwealth Parliament has full power to legislate retrospectively. The thrust of some of the majority judgments in the *Wollongong* case is that the Commonwealth law, despite an express declaration of intention, does not have a valid retrospective operation when it displaces an inconsistency or cause of inconsistency with a State law which has previously arisen.

4 A CRITIQUE OF THE WOLLONGONG CASE

The majority judges arrived at their conclusion by highlighting the effect of the new s 6A and the role of s 109 in the Australian constitutional framework.

Section 6A was regarded as creating a "statutory fiction" which was being used by the Commonwealth Parliament to exclude the operation of s 109. To allow the amendment a valid retrospective effect would result in s 109 being deprived of its operation. Thus, Gibbs CJ said:

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[19] *Butler* v *A-G (Vic)* (1961) 106 CLR 268.
[20] (1977) 140 CLR 236, 243.
[21] *R* v *Credit Tribunal; Ex parte GMAC, Aust* (1977) 137 CLR 545, 563 *per* Mason J.
[22] (1915) 20 CLR 425.

> Parliament cannot exclude the operation of s 109 by providing that the intention of Parliament shall be deemed to have been different from what it actually was and that what was in truth an inconsistency shall be deemed to have not existed.[23]

The majority judges would not concede a valid retrospective operation to the Racial Discrimination Amendment Act 1983 (Cth) so as to render valid what s 109 has made invalid. Otherwise, this would, according to Murphy J, "elevate legislation above the Constitution".[24] In a similar vein, Gibbs CJ said ". . . Commonwealth statutes cannot prevail over the Constitution".[25]

The majority judges based their assertions on what they perceived to be the proper role of s 109. Gibbs CJ said the provisions of s 109 were not only critical in adjusting the relations between the legislatures of the Commonwealth and the States, but were also of "great importance for the ordinary citizen, who is entitled to know which of two inconsistent laws he is required to observe".[26]

Deane J made this very clear when he said that the question removed into the Court raised

> a matter of general constitutional importance, namely, whether s 109 of the Constitution should properly be seen as providing a degree of real protection to the citizen faced with the otherwise impossible predicament of contemporaneous and conflicting demands of Commonwealth and State laws.[27]

He went on to say it was important to acknowledge that

> the Australian Federation was and is a union of people and that, whatever may be their immediate operation, the provisions of the Constitution should properly be viewed as ultimately concerned with the governance and protection of the people from whom the artificial entities called Commonwealth and States derive their authority.[28]

Deane J continued:

> So viewed, 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 Commonwealth and State Parliaments on the same subject.[29]

It is difficult to comprehend how the majority judges could have constructed such a role for s 109. It is respectfully submitted that the minority judges' view of s 109 is a far more acceptable one. According to the minority judges the object of s 109 is, in the words of Mason J,[30] "to establish the

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[23] (1984) 59 ALJR 48, 51.
[24] *Ibid* 56.
[25] *Ibid* 51.
[26] *Ibid.*
[27] *Ibid* 59.
[28] *Ibid.*
[29] *Ibid.*
[30] *Ibid* 53. Quick and Garran said "[s 109] ... places beyond doubt the principle that the Federal Constitution and the laws passed by the Federal Parliament, in pursuance of that Constitution, prevail over the State Constitutions and the State laws passed by the State Parliaments, in pursuance of the State Constitution". *The Annotated Constitution of the Australian Commonwealth* (1901) 939.

supremacy of Commonwealth law where there is a conflict between a Commonwealth and a State law". The section should not be viewed as "a source of individual rights and immunities". This point was further emphasised by Dawson J:

> 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, but if it were to do so it would be ineffective unless it operated to curtail State as well as Commonwealth legislative power.[31]

It may well be that the majority judges were concerned with the fact that if a valid retrospective operation was conceded to s 6A it would result in penalising actions which at the time of their commission were not subject to penalty. Wilson J acknowleged that such a result "will often be abhorrent to those who are concerned to maintain a just society governed by the rule of law".[32] However, he said "But the argument for invalidity of the law cannot derive support from the alleged injustice of its operation".[33] Mason J also said:

> Nor is the section a source of protection to the individual against the unfairness and injustice of a retrospective law. That is a matter which lies quite outside the focus of the provision. In these circumstances to distil from s 109 an unexpressed fetter upon Commonwealth legislative power is to twist the section from its true meaning and stand it upon its head.[34]

Dawson J also said that it would be quite wrong and a distortion of s 109 to inhibit Commonwealth legislative power for that reason.[35]

If there is a need to fetter Commonwealth legislative power to prevent the operation of abhorrent retrospective laws, such a result should be achieved not by an artificial construction of s 109 but by means of a constitutional amendment. For instance, under the Malaysian Constitution, apart from an express declaration of the primacy of federal laws, there is a constitutional guarantee against retrospective laws. Thus, Article 7(1) of the Malaysian Constitution provides:

> No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.

The conclusion of the majority judges is also difficult to reconcile with the acknowledged competence of the Commonwealth Parliament to legislate retrospectively. The argument of a statutory fiction, according to Wilson J, was "not to the point".[36] Mason J observed:

> It is because Parliament is sovereign and its legislative powers are plenary that there is no general objection to the enactment of laws which provide for a statutory fiction.[37]

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[31] (1984) 59 ALJR 48, 63.
[32] *Ibid* 57.
[33] *Ibid*.
[34] *Ibid* 53.
[35] *Ibid* 63.
[36] *Ibid* 57.
[37] *Ibid* 54.

The fallacy in the majority judgments is the failure to distinguish clearly between a law which seeks to affect the operation of s 109 by purporting to amend its provisions and a law, such as s 6A, which seeks to alter the circumstances upon which s 109 operated. The latter is not an attempt at an unconstitutional amendment of s 109. Neither is it an attempt to elevate a Commonwealth law above the Constitution. It is respectfully submitted that Dawson J's description of the way s 109 should function is an apt one:

> Retrospective repeal cannot change the operation of s 109, but it may change the situation from one which s 109 previously operated to one upon which it has ceased to have an operation. Similarly, to deem the Parliament to have had an intention which it did not have at the time Commonwealth law was enacted, as s 6A does in this case, is to do no more than change the circumstances which govern the applicability of s 109 when it comes to be applied. To be sure, the effect may be to make operative a previously inoperative State law and so revive rights or obligations dependent upon the operation of the State law. But it is in the nature of a retrospective law that it changes things in the past and if in so doing it removes a past inconsistency then it removes the circumstances upon which s 109 operated and so denies its present application.[38]

Another point which the minority judges highlighted to reinforce their view was that different techniques could have been employed by the Commonwealth Parliament to achieve the same result. According to Mason J Parliament could have either expressed s 6A in different terms, stating that the Act never intended to have an exhaustive or exclusive operation, or repealed the principal Act and replaced it with a new Act, "expressed to have full force and effect from the date of commencement of the principal Act, containing a provision negativing its exhaustive or exclusive operation".[39]

Two of the majority judges also suggested different techniques which could be used to achieve the required result. Murphy J said that although the Commonwealth Parliament itself could not undo the previous invalidating effect of s 109, it could clear the way for the State Parliament to make a fresh State Act to apply retrospectively in the same terms. He added:

> Thus both Parliaments can legislate retrospectively so that a fresh State law would come into existence giving present legal force to the procedures which have been followed and the remedies which have been obtained by Mr Metwally.[40]

Deane J, whilst refraining from expressing a concluded view, said that his stand did not deny that the Parliaments of the Commonwealth and of a State can effectively combine to legislate retrospectively for the purpose of remedying any unintended operation of the provisions of s 109 of the Constitution. Deane J elaborated:

> If, for example, the New South Wales Parliament were now to pass legislation to the effect of the relevant provisions of the NSW Act and to provide that those provisions would have retrospective operation, the question whether that new law was valid or operative would fall to be determined by reference to the time when it was in fact on the statute book as distinct from the time in which, under its provisions, it was, for the purposes of the law of the State, deemed to have

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[38] *Ibid* 63.
[39] *Ibid* 54.
[40] *Ibid* 56.

> been operative. That being so, the provisions of s 109 would operate to render such a subsequent State law invalid only if, and to the extent that, there was some present inconsistency with subsisting Commonwealth law. Such a situation would be quite different in nature to that for which the respondents have contended in the present case in that it would be the Parliament of New South Wales which would have legislated to give retrospective operation to provisions of its own law and in that, while the citizen would have been subjected to the operation of retrospective legislation, the provisions of s 109 would nonetheless have operated to ensure that there was, in fact, no time at which he was accountable to both a law of the Commonwealth and an inconsistent law of a State.[41]

The difference between the view expressed by Murphy and Deane JJ and that of the minority judges lies in the insistence by Murphy and Deane JJ on a *combined* action by the Commonwealth and the State Parliaments. It is highly questionable whether the view of Murphy and Deane JJ is consistent with the "settled" propositions concerning the operation of s 109. One of these propositions is that an inconsistent State law is rendered "inoperative" during the currency of the Commonwealth law. Why is State initiative required if a State law "revives" when the Commonwealth law is repealed? To highlight the difficulty about Murphy and Deane JJ's view, the following example can be considered. Assume that the Commonwealth Parliament instead of enacting the Racial Discrimination Amendment Act 1983 (Cth) repealed the whole of the Racial Discrimination Act 1975 (Cth) with retrospective effect. In light of the majority judges' conclusion, the State Act is revived prospectively from the date of enactment of the Commonwealth Act. Under Murphy and Deane JJ's view, the State Parliament would have to re-enact the State Anti-Discrimination Act with a provision declaring that the State Act is to have retrospective effect. There would then be on the statute book *two* State enactments, one which has been brought out of its state of abeyance (with prospective effect) and another State law (with expressed retrospective and prospective effect). It is submitted that the minority judges' view is to be preferred as their view does not lead to a distortion of the other established proposition, namely, that the Commonwealth Parliament can legislate retrospectively.

5 CONCLUSION

In the final analysis, it is submitted that the majority conclusion in the *Wollongong* case stemmed from a fallacious premise concerning the purpose/object of s 109 in the Australian constitutional framework. Whilst their underlying aim to protect a citizen from abhorrent retrospective laws in a federal system is laudable, it is not an acceptable reason for distorting the role of s 109 within the Australian constitutional framework.

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[41] *Ibid* 61.