Even though constitutional conventions are not legally enforceable, they are a very important component of Anglo-Australian constitutional law. Indeed, some of the most important rules in Australian constitutional law are "mere" conventions, and their continuous breach would probably prove more intolerable for the population than the persistence of acts which breach constitutional "law".[40] For example, the bare words of the federal Constitution vest the Queen's representative, the Governor-General, with enormous power. He or she may dissolve the lower house of Parliament "as he thinks fit" (s 5), may disallow legislation by refusing his or her assent (s 58), and may sack individual Ministers and even the entire government (s 64). It is only a convention that the Governor-General acts on the advice of the government of the day.[41] This convention has only been broken once at the federal level, and then only arguably, in 1975 when Governor-General Kerr sacked the Whitlam Government (see [1.45]).

There is no definitive list of conventions, so their content is sometimes controversial. The 1975 constitutional crisis was provoked to a large extent by differing arguments on both sides of politics concerning the appropriate conventions governing the passage of supply bills through Parliament.[42]

Why are certain constitutional practices protected by convention rather than law, considering that conventions are inherently uncertain and unenforceable? The fact is that the proper functioning of government has always necessitated the conferral of discretionary power on various persons within the government, to allow a constitution to develop in accordance with new ideas and events without strict legal constraint. It is impossible to codify all of the rules surrounding the processes of government. Conventions generally govern the exercise of these legally conferred discretions.[43] Conventions allow for some flexibility to permit gradual, evolutionary shifts in power.[44] Even the most important conventions, such as those concerning the Governor-General, are arguably best not fixed in law to permit the exercise by that person of emergency powers in unforeseen circumstances.[45]

Bicameralism

[1.30] Most Westminster-style parliaments have a *bicameral* system, in that there are two houses of Parliament. The lower house is the popularly elected house, and generally has the most power. This power is legitimised by its democratic link to the people. Most Australian Parliaments are bicameral, except for Queensland, where the upper house was abolished in 1922, and the Parliaments of the Northern Territory and the Australian Capital Territory.

40 See J Clarke, P Keyzer and J Stellios, *Hanks' Australian Constitutional Law: Materials and Commentary* (8th ed, Butterworths, Chatswood, 2009), p 1061.

41 The comparable United Kingdom Convention is that the Queen only acts on the advice of her Ministers.

42 See Clarke, Keyzer and Stellios, n 40, pp 1052-1062. See further [1.45].

43 See also G Marshall and G C Moodie, *Some Problems of the Constitution* (5th ed, Hutchinson, London, 1971), p 25.

44 See Clarke, Keyzer and Stellios, n 40, p 1061.

45 See also R McGarvie, *Democracy: Choosing Australia's Republic* (Melbourne University Press, Melbourne, 1999), Chapter 7.

In the United Kingdom, the lower house has the anachronistic name of the House of Commons. In the Australian federal Parliament, the lower house is more appropriately known as the House of Representatives. The original "upper house" is the House of Lords in the United Kingdom. Membership of the House of Lords was, until relatively recently, largely hereditary, though about ten per cent of the Lords were appointed by the various political parties for life. The House of Lords descended from the medieval English Parliaments, membership of which was confined to the aristocracy. In 1999, the *House of Lords Act 1999* abolished the hereditary peers in the House of Lords. Pending further reform of the Lords, a few hereditary peers will continue to sit with the life peers. Future reform will not necessarily transform the Lords into a democratic institution.[46] The Lords' lack of democratic legitimacy is perhaps justified by its lack of power. It can only delay the passage of bills by the House of Commons for a period of one year, and may only delay money bills for a period of one month.

At the Commonwealth level, the upper house is the Senate. The Senate is one of the stronger upper houses to develop out of the Westminster system. This is partially explained by the fact that the Senate is elected, so it has democratic credentials. An example of its power is that the Senate legally has the power to veto bills, even money bills (see also [1.45]).

Representative government

[1.35] The doctrine of "representative government" refers to the make-up of the lower house of Parliament, and basically means that the lower house is democratically elected,[47] though the method of actual election is variable. For example, in the United Kingdom, the House of Commons is elected by a first-past-the-post system, where the person with the most votes within a constituency wins that seat, regardless of whether they win an actual majority of votes in the seat. In Australia at the federal level, a preferential voting system determines the composition of the House of Representatives.[48] The Tasmanian lower house, the House of Assembly, is uniquely (within Australia) elected by proportional representation.[49]

In accordance with the doctrine of representative government, all lower houses in the Australian States and at the federal level are democratically elected. As it happens, democratic elections also determine the composition of all Australian upper houses, and the unicameral parliaments of Queensland, the Northern Territory and the ACT.

46 See Ministry of Justice, *An Elected Second Chamber: Further Reform of the House of Lords* (2008) at http://justice.gov.uk/publications/docs/elected-second-chamber.pdf. A further attempt at reform faltered in 2012: see "Draft House of Lords Reform Bill", Report of Joint Committee on the Draft House of Lords Reform Bill, Session 2010-12, 26 March 2012 at http://www.parliament.uk/business/committees/committees-a-z/former-committees/joint-select/draft-house-of-lords-reform-bill/publications.

47 See Commonwealth Constitution, s 24.

48 This system of voting is described at the website of the Australian Electoral Commission at http://www.aec.gov.au/Voting/How_to_vote/Voting_HOR.htm.

49 The Tasmanian system of voting is described at http://www.parliament.tas.gov.au/tpl/backg/HAElections.htm.

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Responsible government

[1.40] Under the doctrine of responsible government, the executive is responsible to the legislature. By convention, the Crown (represented by the Governor-General) acts on the advice of its Ministers. Those Ministers in turn, including the Prime Minister, may only remain in government whilst they have the confidence of the House. In practice this means that the government will only stay in power while their party or coalition commands a majority in the House of Representatives. If they should lose that majority through, for example, by-elections, defections, or a coalition breakdown, the government is required by convention to resign. If no other government can be formed by commanding a new lower house majority, an election must be called by the Governor-General.

The same principle does not apply to the Senate. The government need not command the support of a majority of senators. Indeed, the government's Senate majority from July 2005 was the first such majority in over two decades, and was short-lived, lasting only until the election of the Rudd Government in late November 2007. The potential exclusion of the Senate from the doctrine of responsible government is explained by the United Kingdom precedent. In the United Kingdom, the executive government is only responsible to the House of Commons. This is appropriate, as the House of Lords has no democratic legitimacy, and, in the days of hereditary peers, an in-built Conservative majority. However, the position of Australian upper houses in the scheme of responsible government is uncertain, considering their representative nature.[50] In particular, the position regarding the ability of Australian upper houses to block supply is controversial, as discussed at [1.45] and [1.105].

This commentary describes the doctrine of collective responsibility. Ministers are also individually responsible to Parliament for the activities of the administrative departments that they head by, for example, answering questions in Parliament about the work of those departments. In this way, public service accountability is ensured: public servants are responsible to their Minister who is responsible to Parliament. If serious blunders or misdeeds occur within a government department, or Parliament has been misled over that department's activities, the responsible Minister may be required to resign his or her position.[51]

The doctrine of responsible government links the executive government to the Australian people. The executive government is responsible to the lower house, which is itself responsible to the electorate via the doctrine of representative government. Responsible government is one way of ensuring parliamentary, and therefore popular, supremacy over the executive. However, given strict party discipline, it is rare for lower house majorities to truly hold the executive to account. Indeed, in the absence of very small majorities (where backbenchers are

50 See generally, J Lipton, "Responsible Government, Representative Government, and the Senate: Options for Reform" (1997) 19 *University of Queensland Law Review* 194.

51 The issue of when a Minister should or should not resign appears to be a particularly flexible convention; see Allen and Thompson, n 25, pp 209-228. Indeed, the then New South Wales Education Minister John Aquilina described the expectation that Ministers resign due to the actions of their staff as a "very quaint" view of ministerial responsibility. See *The Australian*, 4 May 2001, p 5.

more powerful) or minority governments, it may be that the legislature is effectively dominated by the executive. In the United Kingdom, the huge lower house majorities for the Thatcher Government in the 1980s meant that the lower house was hardly a restraint on the Thatcherite legislative agenda. The same can be said for the Blair Government from 1997 to 2005.[52] In Australia, however, the tendency towards executive dominance of the legislature has often been tempered by the presence of strong Senate scrutiny of bills passed by the House of Representatives (see [1.105]). Furthermore, legislative scrutiny of the executive in both countries does arise via parliamentary committee investigations and questions in Parliament (for example, the British Prime Minister Tony Blair faced a torrid time in Parliament after 2002 regarding his decision to join the United States and Australia in the war in Iraq, largely from his own party's backbenchers).

Parliamentary control of supply

[1.45] In both the United Kingdom and Australia, supply (the budget for the ordinary annual services of government) must be authorised by Parliament. The emergence of this convention in the United Kingdom helped enshrine the principle of responsible government; no government can govern without money, so parliamentary control of the purse-strings equates with parliamentary control over the executive. The requirement of legislative authority for the appropriation of moneys is enshrined in ss 81 and 83 of the Commonwealth Constitution (see [10.50]).

In the United Kingdom, only the House of Commons has meaningful control over money bills. The Lords may only delay a money bill for a period of one month. In Australia, however, the Senate is not required by any express constitutional or statutory law to allow the passage of a supply bill.[53] The only constitutional restriction on Senate power regarding money bills arises from s 53 of the Constitution, which requires that such bills originate in the House of Representatives, and denies the Senate powers to amend such bills. Therefore, the only potential constitutional restriction on Senate rejection or delay of money bills arises from convention.

Uncertainty regarding the conventional role of the Senate in passing money bills, and the conventional role of the government if such bills should fail to pass through the Senate, was the crux of the 1975 constitutional crisis. The Whitlam Government's budget failed to pass through a Senate controlled by the Opposition. One view is that the Senate breached convention by its unprecedented failure to pass a supply bill. The alternative view is that the Whitlam Government breached convention by failing to resign when it could not guarantee supply. The Governor-General "resolved" the crisis by sacking the Whitlam government and forcing a double dissolution. This debate has never been conclusively resolved.[54]

52 While it retained government in the 2005 General Election, the Blair government's majority was significantly reduced.

53 Indeed, any statutory requirement that the Senate pass a money bill could be unconstitutional.

54 See generally, P Kelly, *November 1975: The Inside Story of Australia's Greatest Political Crisis* (Allen & Unwin, Crows Nest, 1995); Lipton, n 50.

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The separation of powers

[1.50] The "pure" doctrine of separation of powers prescribes that the functions of the three arms of government be clearly and institutionally separated. One justification for such separation is to prevent the concentration of too much power in, and consequent abuse of power by, a single arm of government.[55] Separation of powers ensures that the three arms of government operate as checks and balances upon each other so that no one governmental arm unduly harms the interests of the governed.

In United Kingdom and Australian law however, the distinction between the executive and the legislature has become increasingly blurred (see [5.25]). Indeed, Commonwealth Ministers are simultaneously members of the executive and the legislature, as is required by s 64 of the Commonwealth Constitution, mandating some degree of institutional merger between these two arms of government.

United Kingdom and Australian legal systems generally subscribe to the doctrine of the separation of judicial power from the other arms of government. It is vitally important to the reinforcement of the rule of law that the judiciary be insulated from political influences, so that the law can be interpreted and applied in an independent and impartial manner (see generally Chapter 6).

Federalism

[1.55] Australia is a federal state so constitutional power is shared between two levels of government. There are seven autonomous governments: the federal government operating from Canberra, and the six regional State governments. Political and legal power is split between the two levels of government. Though the two levels of Australian governments can, to a certain extent, interfere with each other's operations,[56] the Constitution presupposes the continued independent existence of all seven governments.[57]

In contrast, the Territorial governments in the Northern Territory and the Australian Capital Territory are not autonomous. They remain under the thumb of the federal parliament which could legally abolish them, and can override any Territorial legislation under s 122, which confers plenary power on the Commonwealth with regard to the Territories. Since the enactment of the *Territories Self-Government Legislation Amendment Act 2011* (Cth), laws passed by the territorial parliaments can no longer be overturned by the federal executive, but the federal parliament retains its power to do so. Similarly, local municipal governments are established and may be legally controlled and even abolished by the State governments.

"Federalism" is not a characteristic shared by the United Kingdom. Despite being four separate "countries", the United Kingdom is a unitarian State, with legal power centralised in the English Parliament in Westminster. Even though measures

55 Baron de Montesquieu, *L'Esprit des Lois* (A Londres, Paris, 1768).

56 For example, the Commonwealth can override State legislation under s 109, in areas where the Commonwealth and the States have concurrent power.

57 See also generally Chapter 8, on intergovernmental immunities.

of devolution occurred in 1998–99, when separate Assemblies for Scotland, Wales and Northern Ireland were created, ultimate sovereign power remains vested in the Westminster Parliament. Westminster retains the constitutional and legal power to revoke the limited grants of power given to Scotland, Wales and Northern Ireland.[58]

Thus, the federal nature of the Australian Constitution is a fundamental characteristic that does not stem from British constitutionalism. The United States system provided the most influential precedent in establishing a federal system for Australia. For example, a United States-style upper house designed to protect the States, also called the Senate, was adopted. The United States system of distributing power – whereby enumerated powers were conferred on the central government, and the residual powers left to the regional governments – was also incorporated.

It is arguable that the relatively small Australian population is over-governed, with almost all persons being subjected to two autonomous levels of government. Why is Australia a federation? One reason is historical: a promise of federation was more likely to bring the self-governing colonies together than a pact to cede all power to a central government. There are also philosophical arguments in favour of federalism. Federalism, like the doctrine of the separation of powers, provides for the decentralisation of power, and thus acts as a check against abuse of power and the development of unwieldy bureaucracies. Decentralisation allows for more local participation in decision-making. Federalism is also a means of preserving the rights and preferences of local communities as well as minorities who are confined to certain territories.[59] For example, in Canada, the province of Quebec acts as a protector of the rights of French-speaking Canadians.

However, the theory of federalism as a vehicle for greater participatory democracy and recognition of minority rights does not always conform to practice. Indeed, no Australian State can be described as one that protects a certain type of minority, though it is arguable that the smaller-populated States act to protect the rights of persons outside the influential Sydney–Melbourne–Canberra "triangle".[60] Furthermore, some of the more notorious government excesses in recent decades have arisen at State level, such as the draconian attacks on freedom of association in 2013, particularly for "bikies", in Queensland. The Bjelke-Petersen National Party Government in Queensland and the Bourke Labor Government in Western Australia in the late 1980s (derailed respectively by the Fitzgerald Inquiry into police corruption in Queensland and the "WA Inc" scandal), as well as the ongoing hearings before the Independent Commission against Corruption ("ICAC") in NSW, demonstrate that it may be easier for corruption to flourish in the smaller ponds of State politics.

Much of Australian constitutional law has been concerned with the demarcation of power between the Commonwealth and the States. The Constitution specifies the

58 Indeed, the Northern Ireland Parliament was temporarily suspended in February 2000.

59 See T Fleiner-Gerster, "Federalism in Australia and other Nations", in G Craven (ed), *Australian Federation* (Melbourne University Press, Melbourne, 1992), p 16.

60 See G Craven, "Varied States hold the Key to our Rich Federal Mosaic: There is more to Australia than Sydmelberra", *The Australian*, 21 March 2001, p 13.

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powers vested in the Commonwealth: the Commonwealth can pass no law without specific constitutional authority for that law. The specific authorisations for federal power are known as "heads of power". The Commonwealth and States have a number of concurrent powers in s 51 of the Commonwealth Constitution. The States retained exclusive authority over the residual powers, those which are not expressly or implicitly conferred on the Commonwealth. Whereas the early constitutional decisions tended to favour the preservation and enhancement of the powers of the States (see [2.10]), the balance of power between the federal partners has for a long time swung inexorably in favour of the Commonwealth.[61] The prevailing interpretations of the tax power (s 51(ii); see [9.10]), the grants power (s 96; see [10.30]), and the prohibition of States' powers to impose excise duties in s 90 (see Chapter 9) have left financial resources and powers disproportionately in the hands of the Commonwealth. Broad interpretations of powers such as the corporations power (s 51(xx); see Chapter 3), the external affairs power (s 51(xxix); see Chapter 4) and the grants power (s 96; see [10.40])) have allowed the Commonwealth to exercise legislative authority in areas which were traditionally understood to be exclusively in the States' domain. The prevailing interpretation of s 109, which dictates that Commonwealth laws prevail over State laws in cases of inconsistency, arguably renders it too easy, via the "cover the field" test, for the Commonwealth to oust the States from areas of supposed concurrent power (see [7.35]).

While there is no doubt Australia remains a federation, the States' abilities to meaningfully exercise their powers are increasingly dependent on a good faith attitude to practical federalism on the part of the central government. In 2014, both major parties seemed committed to the continuation of a workable federal relationship. This was not always the case, with the Labor party traditionally advocating greater centralised power at the expense of the States, and the conservative parties being champions of the preservation of "States' rights".[62] Ironically, the Howard conservative government of the early 21st century displayed considerable centralist characteristics, with proposals being mooted, for example, to centralise control of national ports, universities and health care.[63]

FROM COLONISATION TO FEDERATION

[1.60] The following commentary discusses the historical progression of Australian constitutionalism from the first European settlement through to federation, and the coming into force of the Constitution in 1901.

Colonisation of Australia: The first settlements

[1.65] European settlement dates from 1788 when Governor Arthur Phillip arrived in Sydney with the first fleet. At this time, Phillip imported English law into the territory. As of 1788, the colony of New South Wales "received" all of the

61 See D Solomon, *The Political High Court* (Allen & Unwin, Crows Nest, 1999), p 62.

62 See, for example, B Galligan, *A Federal Republic: Australia's Constitutional System of Government* (Cambridge University Press, Cambridge, 1995), pp 51-53.

63 See, for example, L Taylor, "Imposing a centralist state of mind", *Australian Financial Review*, 12 April 2005, p 4.

suitable English law in force in England in 1788. The same was to occur in all of the Australian colonies upon their formation.[64]

The alleged moral and legal basis upon which Governor Phillip could declare English law to be the law of the land was that Australia was an empty land before English settlement: it was terra nullius.[65] If that had been the case, no Indigenous legal system would have existed, so English law would have filled a complete legal and political vacuum. Of course, Australia was inhabited prior to English colonisation by Indigenous Australians, who had their own system of laws and society. The terra nullius fiction was not legally rejected until the landmark High Court decision in *Mabo v Queensland (No 2)* (1992) 175 CLR 1. Indeed, the Court found that pre-existing Indigenous customary law had to an extent survived the importation of English law. In particular, Indigenous property law (native title) had not been totally extinguished by European settlement. However, the *Mabo* court did not question the validity of the reception of English law into Australia.[66] British settlement and the incorporation of British law was legal in British and international law at the time,[67] if not at Indigenous law [14.15]. In any case, any question of the legal validity in English law was treated as settled by the passage in 1828 by the Imperial Parliament of the *Australian Courts Act 1828*.

Before 1828, the notion of the importation of English law stemmed from the common law only. The *Australian Courts Act 1828* (Imp) asserted that English law was received by the eastern colonies in 1828, thus removing any uncertainty over the issue.[68] The 1828 Act also confirmed the ability of the British Parliament to enact new legislation for its Australian colonies after their settlement. The British Parliament could extend any future Act to its Australian colonies, either by express words or by necessary implication. The *Australian Courts Act 1828* had the status of a United Kingdom Act of Parliament. According to the principle of parliamentary sovereignty, the Act was therefore unquestionably the law of the United Kingdom and its colonies, regardless of any detrimental impact on Indigenous Australians.

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64 The respective dates of the reception of English statutory law were confirmed by the *Australian Courts Act 1828* (Imp) to be 1828 for New South Wales, Tasmania, Victoria and Queensland (though the latter two colonies were not separated from New South Wales until 1851 and 1859 respectively). The reception of the date of English common law is the date of each colony's settlement; see Williams et al, n 20, p 97, though the dates of 1828 for Western Australia and 1836 for South Australia have been legislatively defined as the respective dates of settlement.

65 See *Cooper v Stuart* (1889) 14 App Cas 286. See discussion at [14.10] and following.

66 In *Walker v NSW* (1994) 182 CLR 45, Walker challenged the proposition that indigenous Australians are bound by English law at all, seeing as they never formally consented to it. In particular, Walker claimed he was not bound by English, and therefore Australian, criminal law. The High Court rejected the claim.

67 See G Simpson, "*Mabo*, International Law, *Terra Nullius* and the Stories of Settlement: An Unresolved Jurisprudence" (1993) 19 *Melbourne University Law Review* 195. See also [14.15].

68 However, due to the declaratory nature of common law, it has been argued that the true date of reception remains 1778; see Sir Victor Windeyer, "A Birthright and Inheritance: The Establishment of the Rule of Law in Australia" (1962) 1 *University of Tasmania Law Review* 635 at 636.

enforcement arm, "the sword", of government.[2] However, such vagueness is perhaps necessary to ensure the flexibility that the executive may need to cope with the administrative challenges posed by unforeseen circumstances, such as the advent of new technologies, international developments, and emergency situations.

PERSONS WITHIN THE EXECUTIVE

[5.10] The executive government at Commonwealth and State level is personified by "the Crown".[3] The Crown is a legal person, capable of seeking enforcement of its rights in Court, and enjoying rights under common law and statute.[4] The Crown is essentially an artificial person like a corporation, and acts through its personnel.

Section 61 vests federal executive power, and states:

> The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

Section 61 expressly vests executive power in the Queen, and declares that her powers are exercisable by the Governor-General as her delegate.[5] This confirms Australia's status as a constitutional monarchy. Executive government is therefore vested in the Crown, and is carried out by Crown servants, such as Ministers and employees in Ministerial departments. It has become unfashionable to refer to the executive governments of either the Commonwealth or the States by explicit reference to "the Crown", given Australia's independence from the United Kingdom. Rather, references are generally made to the respective "executive governments".[6]

The ensuing provisions in Chapter II state that certain powers are exercisable by the Governor-General alone, whilst others are exercisable by the "Governor-General in Council", defined in s 63 as: "the Governor-General acting with the advice of the Federal Executive Council". The Federal Executive Council (FEC) is in turn defined in s 62 as persons "chosen and summoned by the Governor-General", who "hold office during his pleasure". Section 64 authorises the creation of administrative departments supervised by "the Queen's Ministers of State for the Commonwealth". Ministers are members of the FEC, and "hold office during the pleasure of the Governor-General", so they can constitutionally be sacked by the Governor-General. Section 64 also prescribes that no Minister may hold office for more than three months without becoming a member of the Commonwealth Parliament,

2 For example, the executive branch includes the police and the army.

3 The Crown in its various Australian guises is distinguished by referring to "The Crown in Right of the Commonwealth" and the "Crown in Right of the [relevant State]". See J Clarke, P Keyzer and J Stellios, *Hanks' Australian Constitutional Law: Materials and Commentary* (9th ed, LexisNexis Butterworths, Chatswood, 2013), pp 857-862.

4 Clarke, Keyzer and Stellios, n 3.

5 Under s 2 of the Constitution, the Governor-General is appointed by the Queen. By convention she acts on the advice of the Prime Minister.

6 G Winterton, "The Relationship between Commonwealth Legislative and Executive Power" (2004) 25 *Adelaide Law Review* 21 at 34.

ensuring a measure of individual "Ministerial responsibility".[7] The remaining provisions of Chapter II deal with miscellaneous issues, such as the payment of Ministerial salaries, and the confirmation of the Governor-General as the Commander-in-Chief of the Commonwealth armed forces.

It is plain from the above commentary that Chapter II vests enormous legal power in the Governor-General, and identifies that person as the head of the Commonwealth executive acting as the Queen's surrogate. Important executive officers such as the Prime Minister and the Cabinet are absent from its text. This is, of course, a far cry from the reality of the way Commonwealth executive power is truly exercised.

For example, the principle of responsible government requires that the Governor-General acts only on the advice of the Prime Minister and Cabinet (see [1.40]). Therefore, executive power is truly exercised at the behest of the government of the day, rather than according to the whims of the unelected Governor-General. The Prime Minister and Cabinet are themselves creatures of convention. The Cabinet is a modern-day reduced version of the FEC. By convention, the FEC contains only present government Ministers. The Cabinet, since the 1950s, is an inner core of Ministers, separate from the outer Ministry. The size and portfolios within the Cabinet vary according to the arrangements of the government of the day.

Thus, the legal picture of Commonwealth executive power in Chapter II prescribes the following executive personnel: the Governor-General, the FEC, the Ministers, Ministerial departments, and the armed forces. This picture is misleading and incomplete. The conventional or "real" players are the Prime Minister, the Cabinet, the outer Ministry, Ministerial departments, the armed forces, statutory bodies and commissions, administrative tribunals, and miscellaneous government workers such as police officers, postal workers, quarantine and customs officials. The Governor-General is the official head of State but generally has only formal and ceremonial duties, and rarely acts independently of the Prime Minister and Cabinet.

The reserve powers

[5.15] Certain powers may, by convention, be exercised by the Governor-General acting alone, without (or indeed against) the advice of the Prime Minister and Cabinet. These are known as the "reserve powers". However, these powers are not codified so their identification and application is controversial.

Three powers are generally identified as reserve powers: appointment of a Prime Minister, refusal to dissolve Parliament, and dismissal of a Prime Minister. The first power may be exercised to commission the leader of the party who has won the confidence of the lower house as Prime Minister, whether after a general election or between elections.

The second power may be exercised when an incumbent Prime Minister advises the Governor-General to dissolve Parliament after a vote of no confidence, but the leader of another party has in fact gained the confidence of the lower house (see

7 See [1.40] on the notion of individual Ministerial responsibility.

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also [1.40]). It is also possible that a Governor-General may have reserve power to refuse to call a double dissolution under s 57 on the grounds that the prerequisites for a double dissolution have not been satisfied.[8]

The final reserve power, the power to dismiss a Prime Minister and therefore a government, is the most contentious. A Prime Minister can certainly be dismissed after he or she has lost a vote of no confidence in the lower house and refuses to resign or call an election. He or she can also be dismissed if the government has persistently engaged in a fundamental breach of the Constitution, despite a court judgment and/or calls by the Governor-General to desist.[9]

The final instance, where a Governor-General may be able to dismiss a Prime Minister, occurs when the latter cannot guarantee supply; he or she cannot guarantee that the Parliament will pass the budget for the ordinary annual services of government. The Governor-General is certainly entitled to sack the Prime Minister if that person cannot guarantee passage of supply through the lower house, as this effectively amounts to a vote of no confidence by that house. However, as the budget must be passed by both houses, it is possible for supply to be thwarted by a hostile Senate. The indefinite deferral of a Senate vote on the budget in 1975 prompted Governor-General John Kerr to sack the Whitlam government. Commentators remain split over whether the Governor-General broke convention, or legitimately exercised a reserve power.[10]

SCOPE OF EXECUTIVE POWER

[5.20] Section 61 outlines the following types of executive power: execution and maintenance of the Constitution, and execution and maintenance of the laws of the Commonwealth.

Execution and maintenance of the laws of the Commonwealth

[5.25] The executive is charged under s 61 with the administration and implementation "of the laws of the Commonwealth", namely the statutes enacted by the Commonwealth Parliament. For example, the Department of Immigration and Citizenship Affairs and the Federal Police will generally be charged with the implementation and application of, respectively, immigration legislation and Commonwealth criminal laws.

The legislature often authorises the exercise of considerable power by the executive with regard to the implementation of legislation. Indeed, the executive is often delegated power to enact binding subordinate legislation, often called "rules", "regulations", or "delegated legislation". Thus, much of the power exercised by the

8 See Report of the Republic Advisory Committee, *An Australian Republic: The Options* (AGPS, Canberra, 1993), p 92. See also [1.105] on s 57.

9 The Lang government in New South Wales was dismissed by the Governor on the grounds of illegality in 1932. The weight of opinion holds that this dismissal was premature and improper. See for example, G Williams, S Brennan and A Lynch, *Blackshield and Williams' Australian Constitutional Law and Theory: Commentary and Materials* (6th ed, Federation Press, Annandale, 2014), pp 358-359.

10 See generally, P Kelly, *November 1975: The Inside Story of Australia's Greatest Political Crisis* (Allen & Unwin, Crows Nest, 1995). See also [1.45].

executive is essentially legislative power that has been delegated by the Parliament. There is therefore no clear separation of powers between the legislature and the executive in Australia (see also [1.50]). The true issue with regard to the demarcation of executive and legislative power concerns the extent to which legislative power can be conferred upon the executive.

In *Victorian Stevedoring and General Contracting Co v Dignan* (1931) 46 CLR 73, the validity of s 3 of the *Transport Workers Act 1928* (Cth) was challenged. Section 3 authorised the Governor-General to make regulations, which, "notwithstanding anything in any other Act ..., shall have the force of law", with regard to "the employment of transport workers". Section 3 was a particularly broad grant of legislative power for a number of reasons. First, there were no discretionary guidelines imposed on the Governor-General, indicating that the executive had unfettered discretion to make any law with regard to transport workers' employment. Secondly, the Act itself did not set up a legal regime with respect to transport workers; its sole effect was to authorise the making of the regulations.[11] Thirdly, the delegation expressly authorised the overriding of prior Acts of Parliament. It was therefore apparent that legislative power with regard to the important and highly politicised topic of transport workers' employment was wholly delegated to the executive under s 3.[12] Section 3 was duly challenged in *Dignan* on grounds mainly related to its sheer breadth. This challenge was unanimously rejected. Evatt J explained (at 114):

> In dealing with the doctrine of "separation" of legislative and executive powers, it must be remembered that, underlying the Commonwealth frame of government, there is the notion of the British system of an Executive which is responsible to Parliament. That system is not in operation under the *United States Constitution*. Nor, indeed, had it been fully developed in England itself at the time when Montesquieu first elaborated the doctrine or theory of separation of governmental powers. But, prior to the establishment of the Commonwealth of Australia in 1901, responsible government had become one of the central characteristics of our polity. Over and over again, its existence in the constitutional scheme of the Commonwealth has been recognised by this Court.
>
> This close relationship between the legislative and executive agencies of the Commonwealth must be kept in mind in examining the contention that it is the Legislature of the Commonwealth, and it alone, which may lawfully exercise legislative power.

Evatt J continued (at 117-118):

> It is very difficult to maintain the view that the Commonwealth Parliament has no power, in the exercise of its legislative power, to vest executive or other authorities with some power to pass regulations, statutory rules, and by-laws which, when passed, shall have full force and effect. Unless the legislative power of the Parliament extends this far, effective government would be impossible.
>
> In truth the full theory of "Separation of Powers" cannot apply under our Constitution. Take the case of an enactment of the Commonwealth Parliament which gives to a subordinate authority other than the Executive, a power to make by-laws. To such an instance the theory of a hard and fast division and sub-division of powers between and

11 See Williams, Brennan and Lynch, n 9, pp 398-399.

12 For a lively account of the circumstances surrounding the *Dignan* case, see L Zines, "Social Conflict and Constitutional Interpretation" (1996) 22 *Monash Law Review* 195 at 199-203.

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> among the three authorities of government cannot apply without absurd results. It is clear that the regulation-making power conferred in such a case upon the subordinate authority is not judicial power. If it is a "power" of the Commonwealth at all, it must, according to the theory, be either legislative or executive power. But, if the former, the statute granting power would be invalid because the Legislature itself was not exercising the power; and if the latter, the statute would be bad because an authority other than the Executive Government of the Commonwealth was vested with executive power in defiance of s 61 of the Constitution. It is no longer disputed that, if Parliament passes a law within its powers, it may, as part of its legislation, endow a subordinate body, not necessarily the Executive Government, with power to make regulations for the carrying out of the scheme described in the statute. Does the Constitution impliedly prohibit Parliament from enlarging the extent of the powers to be conferred on subordinate authorities?
>
> In my opinion every grant by the Commonwealth Parliament of authority to make rules and regulations, whether the grantee is the Executive Government or some other authority, is itself a grant of legislative power. The true nature and quality of the legislative power of the Commonwealth Parliament involves, as part of its content, power to confer law-making powers upon authorities other than Parliament itself. If such power to issue binding commands may lawfully be granted by Parliament to the Executive or other agencies, an increase in the extent of such power cannot of itself invalidate the grant. It is true that the extent of the power granted will often be a very material circumstance in the examination of the validity of the legislation conferring the grant. But this is for a reason quite different and distinct from the absolute restriction upon parliamentary action which is supposed to result from the theory of separation of powers. ...
>
> The following matters would appear to be material in examining the question of the validity of an Act of the Parliament of the Commonwealth Parliament which purports to give power to the Executive or some other agency to make regulations or by-laws:
>
> 1. The fact that the grant of power is made to the Executive Government rather than to an authority which is not responsible to Parliament, may be a circumstance which assists the validity of the legislation. The further removed the law-making authority is from continuous contact with Parliament, the less likely is it that the law will be a law with respect to any of the subject matters enumerated in ss 51 and 52 of the Constitution.
> 2. The scope and extent of the power of regulation-making conferred will, of course, be very important circumstances. The greater the extent of law-making power conferred, the less likely is it that the enactment will be a law with respect to any subject matter assigned to the Commonwealth Parliament. ...
>
> ... The fact that the regulations made by the subordinate authority are themselves laws with respect to a subject matter enumerated in s 51 and 52, does not conclude the question whether the statute or enactment of the Commonwealth Parliament conferring power is valid. A regulation will not bind as a Commonwealth law unless both it and the statute conferring power to regulate are laws with respect to a subject matter enumerated in s 51 or 52. As a rule, no doubt, the regulation will answer the required description, if the statute conferring power to regulate is valid, and the regulation is not inconsistent with such statute.

On final analysis therefore, the Parliament of the Commonwealth is not competent to "abdicate" its powers of legislation. This is not because Parliament is bound to perform any or all of its legislative powers or functions, for it may elect not to do so; and not because the doctrine of separation of powers prevents Parliament from granting authority to other bodies to make laws or by-laws and thereby exercise legislative power, for it does so in almost every statute; but because each and every one of the laws passed by Parliament must answer the description of a law upon one or more of the subject matters

stated in the Constitution. A law by which Parliament gave all its law-making authority to another body would be bad merely because it would fail to pass the test last mentioned.

Under s 3, the executive could indeed enact legislation which impliedly or expressly altered prior Acts of Parliament. Evatt J stated (at 125):

> Regulations validly made by a Commonwealth authority other than Parliament itself, acquire the character of laws of the Commonwealth. Whether they supplant any previous Commonwealth law, depends upon the circumstances of the particular case. But if the express will of the Commonwealth Parliament is that the regulations shall prevail over statutes passed by Parliament itself, then prevail they do. Section 3 clearly expresses such an intention on the part of Parliament. It follows that if regulations which are otherwise valid, operate so as to override Commonwealth statutes, they may also override awards or orders which themselves take their force and sanction from a Commonwealth statute.

Indeed, the Commonwealth Parliament can in fact delegate power to the executive to amend or override the Act in which that delegation is contained. Such a delegation is known as a "Henry VIII" clause.[13]

In *Dignan*, Evatt J stated that Parliament could *delegate* legislative power, but it could not *abdicate* such power. It must always retain the ability to divest the executive of its legislative power in all delegated areas (see Dixon J at 102 and Evatt J at 121). He also stated that a delegation could fail for reason of its breadth. An overly broad delegation may well fall outside the legislative power of the Commonwealth, as it will be incapable of being "characterised" as a law "with respect to" a Commonwealth head of power (see also Chapter 2). The Parliament obviously cannot delegate power that it does not have (see Dixon J at 101 and Evatt J at 119-20). Evatt J gave an example (at 119-120):

> The matter may be illustrated by an example. Assume that the Commonwealth Parliament passes an enactment to the following effect: "The Executive Government may make regulations having the force of law upon the subject of trade and commerce with other countries or among the States." Such a law would confer part of the legislative power of the Commonwealth upon the Executive Government, and those who adhere to the strict doctrine of separation of powers, would contend that the law was ultra vires because of the implied prohibition contained in ss 1, 61 and 71 of the Constitution. For the reasons mentioned such a view cannot be accepted.
>
> At the same time, I think that in ordinary circumstances a law in the terms described would be held to be beyond the competence of the Commonwealth Parliament. The nature of the legislative power of the Commonwealth authority is plenary, but it must be possible to predicate of every law passed by the Parliament that it is a law with respect to one or other of the specific subject matters mentioned in ss 51 and 52 of the Constitution. The only ground upon which the validity of such a law as I have stated could be affirmed, is that it is a law with respect to trade and commerce with other countries or among the States. But it is, in substance and operation, not such a law, but a law with respect to the legislative power to deal with the subject of trade and commerce with other countries or among the States. Thus, s 51(1) of the Constitution operates as a grant of power to the Commonwealth Parliament to regulate the subject of inter-State trade and commerce, but the grant itself would not be truly described as being a law with respect to inter-State trade and commerce.

13 See G Moens and J Trone, "The Validity of Henry VIII Clauses in Australian Federal Legislation" (2012) 24 *Giornale di Storia Costituzionale* 133 at 134-135. See also *Capital Duplicators Pty Ltd v ACT (No 1)* (1992) 177 CLR 248 at 265 per Mason CJ, Dawson and McHugh JJ.

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Outside these limits, Parliament has extensive power to delegate legislative power to the executive. The executive is frequently conferred broad discretionary powers under legislation. Indeed, the High Court has never ruled legislation invalid "for contravening the separation between legislative and executive power".[14]

For example, in *New South Wales v Commonwealth (Work Choices case)* (2006) 229 CLR 1, s 356 of the *Workplace Relations Act 1996*, as amended, provided that "prohibited content" in the context of workplace agreements between employers and employees would be specified in regulations. Section 356 effectively delegated to the executive the power to decide what would and what would not be allowed in workplace agreements. The plaintiffs in *Work Choices* claimed that this delegation of power was too broad, and did not in fact amount to a "law", as there were no constraints on the executive in deciding upon the scope of "prohibited content". The majority agreed (at 175) that "the technique employed in s 356 [was] an undesirable one which ought to be discouraged". Nevertheless, the delegation was valid. Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ stated (at 181):

> The new Act has laid down the main outlines of policy in relation to workplace agreements but has indicated an intention of leaving it to the Executive to work out that policy in relation to what workplace agreements may not contain by specific regulation. Section 356 thus has a wide ambit. Its ambit must be construed conformably with the scope and purposes of the new Act as a whole, and with the provisions of Pt 8 in relation to workplace agreements in particular. The extent of the power is marked out by inquiring whether any particular regulation about the prohibited content of workplace agreements can be said to have a rational connection with the regime established by the new Act for workplace agreements.
>
> It follows that although the ambit of the regulation-making power so stated is imprecise, with the result that assessing whether particular regulations are ultra vires may not be easy, s 356, read with s 846(1), is a "law".

In contrast, Kirby J in the minority found the regulation-making power to be opaque and unconstitutional. In a rare (and exasperated) judicial attack on the breadth of parliamentary delegations, his Honour stated (at 197-198):

> Under the Constitution, it is the duty of this Court to uphold the law-making and supervisory powers of the Parliament. We should not sanction still further erosion of those powers and their effective transfer to the Executive Government … There comes a point when a regulation-making power becomes so vague and open-ended that the law which establishes it ceases to be a law with respect to a subject of federal law-making power, becoming instead a bare federal attempt to control and expel State laws. When that line is crossed, this Court has a duty to say so.
>
> Until this Court exhibits its disapproval in a judicial fashion, by invalidating such provisions, the lesson of history is that executive governments will present such provisions in increasing number to distracted or inattentive legislators. The legislators will be unlikely to notice them in the huge mass of legislative materials, such as those presented in the present case, and contest them. They will overlook the affront to proper parliamentary supervision, particularly in the context of regulation-making provisions that are typically found at the end of bills and ordinarily attract little parliamentary attention because they are assumed to be in the standard form.

14 Winterton, n 6, p 38.

> The relationship between the Parliament's function of lawmaking and the legitimate delegation to the Executive Government of promulgating regulations to carry a law into effect, is a point of great constitutional significance. … The plaintiffs' challenge to the constitutional acceptability of the mode of delegation adopted in the present legislation should be upheld both to defend the proper constitutional role of the Federal Parliament and to discourage future similar measures. The impugned provisions border on an endeavour to enact an abdication of the Parliament's responsibilities. This Court should say so and forbid it.

These limbs of executive power, that is regarding execution and maintenance of the laws of the Commonwealth, are obviously subject to control by the legislature, which can alter or remove the executive's delegated power altogether. Indeed, each House of the Commonwealth Parliament is entitled to "disallow" delegated legislation under s 48 of the *Acts Interpretation Act 1901* (Cth).

These days the courts, through the process of judicial review of administrative action, provide a substantial fetter on the executive's delegated powers. For example, in *Giris Pty Ltd v Commissioner of Taxation* (1969) 119 CLR 365, the Court permitted the delegation of vast discretionary power to the Federal Commissioner of Taxation. Most Justices were expressly influenced in their decisions by the ability of the courts to import some limits on the Commissioner's discretion.[15]

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Execution of the Constitution

[5.30] The Constitution confers specific miscellaneous powers upon the executive, apart from the broad grant of power in s 61. For example, s 67 vests power to appoint civil servants. Section 72 vests power to appoint High Court and federal court judges. Section 86 vests the power to collect and control duties of customs and excise within the Commonwealth executive. Under s 64 of the Constitution, the executive has power to administer government departments, and to spend money towards that end on the ordinary activities of government [5.55]. As such powers are specifically conferred by the Constitution, they presumably cannot be removed or amended by legislation without constitutional amendment by referendum.

Maintenance of the Constitution

[5.35] This limb of executive power appears to confer specific power upon the Commonwealth executive to take measures to protect the Constitution or rather, the Australian constitutional system of government.[16] Gummow, Crennan and Bell JJ recently described this limb of s 61 as conveying "the idea of the protection of the body politic or nation of Australia".[17] Such measures include the power to defend the nation against external and internal threats. For example, the Australian Security Intelligence Organisation (ASIO) was initially established by the Chifley government without statutory authority, though it now operates on a statutory

15 Clarke, Keyzer and Stellios, n 3, p 113.

16 G Winterton, *Parliament, The Executive, and the Governor-General* (Melbourne University Press, Melbourne, 1983), p 32. See for example, *Communist Party case* (1951) 83 CLR 1 at 151, 211-212, 232, 255.

17 *Pape v FCT* (2009) 238 CLR 1 at 83.

(3) When does an "inconsistency" arise?

WHAT IS A "LAW" FOR THE PURPOSES OF SECTION 109?

[7.10] Naturally Acts of Parliament are treated as "laws" for the purpose of s 109 inconsistency. Where Acts of Parliament operate through subordinate or delegated legislation, such as regulations, statutory rules, and industrial awards, those subordinate forms of laws come within the reach of s 109 because they are made under the authority of the primary Act. For example, in *Ex parte McLean* (1930) 43 CLR 472 Dixon J explained (at 484) that inconsistency arises between the Commonwealth statute which empowers the arbitration of an award, and the relevant State provisions, rather than between the award itself and the State law.[3]

Administrative orders made under the authority of Commonwealth legislation are not treated as laws for s 109 purposes, and will not override State laws. In *Airlines of NSW v NSW (No 1)* (1964) 113 CLR 1 a majority found that administrative directions such as air navigation orders, information and notices to pilots, and similar directives did not amount to "laws of the Commonwealth".

In the context of s 109 "law" does not refer to the common law as such. Normal rules of construction dictate that the common law will be set aside by any valid statute, whether Commonwealth or State, operating in the relevant jurisdiction. If federal and State jurisdiction both apparently operate, the federal jurisdiction prevails. As Walsh J explained in *Felton v Mulligan* (1971) 124 CLR 367 (at 412):

> In my opinion the problem must be resolved by treating the Commonwealth law as paramount and as excluding, in relation to the matters to which that law applies, the operation of the laws under which the State jurisdiction of the court would be exercised.

Section 109 does not resolve conflicts between laws of the Territories, and those of the Commonwealth. Section 122 is the source of paramountcy of Commonwealth laws with respect to the Territories, and although the Australian Capital Territory and the Northern Territory enjoy self-governing status, the Commonwealth may displace Territory laws through that head of power.[4]

MEANING OF "INVALIDITY"

[7.15] Section 109 prescribes that an inconsistent State law will be "invalid to the extent of the inconsistency". Only the inconsistent portions of a State law are invalidated. For example, one provision or section of a State law may be found inconsistent with a Commonwealth law and thus inoperative, but the rest of the Act will continue to operate. The inconsistent provisions in a State Act can occasionally be severed for inconsistency [1.235]. However, if the provisions are not severable, the whole Act is deemed inoperative ab initio, or from the date that the inconsistency arose. This is demonstrated in the case of *Wenn v Attorney-General for Victoria* (1948) 77 CLR 84, where the High Court found inconsistency between State

3 Note that until its amendment in 2009, the *Workplace Relations Act 1996* (Cth), s 152 expressed Parliament's intention that the awards made under the Act operate to the exclusion of State laws and awards. See also *Jemena Asset Management v Coinvest* (2011) 244 CLR 508 at 516-517.

4 See Lockhart J in *Attorney-General (NT) v Minister for Aboriginal Affairs* (1989) 90 ALR 59 at 75.

and federal legislation regulating employment for returned military personnel. Although the inconsistent provisions related to employment in the private sector, and there was no inconsistency regarding employment in the public sector, the High Court found that the whole of the State Act was invalidated under s 109. This was based on the finding that the State legislation was intended to provide a single code of employment for returned military personnel, and that the Victorian Parliament did not intend to enact a Statute which only regulated those servicemen who found work in the public sector. The impugned provisions were not severable because the Court considered that the State law was dependent on the validity of the inconsistent private sector provisions for its efficacy.[5]

The High Court has interpreted "invalid" to mean "inoperative". Consequently, State laws struck down for inconsistency under s 109 may "revive" if the relevant Commonwealth law is repealed. The State Parliament is not required to re-enact the dormant law in order to restore its application if the source of the inconsistency is removed or modified. This has been confirmed by the High Court in *Carter v Egg and Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557 and *Butler v Attorney-General (Vic)* (1961) 106 CLR 268.

TESTS FOR INCONSISTENCY

[7.20] As a starting point to any inquiry into the matter of inconsistency, it must be established that valid laws are in fact operative on the subject matter in question. If either the Commonwealth or State law is found to be invalid or ultra vires (for reasons other than s 109), there will of course be no need to test for inconsistency.

Having established that the laws in issue are within the scope of the relevant legislature's power, and otherwise operative, the inquiry then turns to the question of inconsistency. Three principal tests or approaches to inconsistency have evolved over the past century: the "simultaneous obedience" test, the "conferral of rights" test, and the "cover the field" test. The first and second tests are often described as "direct" forms of inconsistency, in contrast with the third "indirect" inconsistency test. However, the distinction between direct and indirect, particularly with reference to the conferral of rights test, is not always clear-cut, and many have called for a re-evaluation of the utility of these descriptions, as explored at [7.70].

IMPOSSIBILITY OF SIMULTANEOUS OBEDIENCE

[7.25] The earliest interpretations of s 109 restricted findings of inconsistency to situations where it was impossible to obey both the State law and the Commonwealth law, which arises when one law commands what the other forbids, or when one law compels disobedience of the other. For example in *R v Licensing Court of Brisbane; Ex parte Daniell* (1920) 28 CLR 23, Queensland legislation required a referendum on liquor licensing to be held on the same day as Senate elections, while the *Commonwealth Electoral (Wartime) Act 1917* (Cth) prohibited referenda on

5 A judge will sever a provision, or text within a provision, if the remaining text, in her or his opinion, still basically reflects the enacting Parliament's intention when initially enacting the relevant statute or provision.

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days when Senate elections were being conducted. It was impossible to simultaneously obey both laws, thus the State law was found invalid for inconsistency.

This rather limited test for inconsistency clearly left many State laws intact, even where they modified rights granted in Commonwealth laws. For example, in *Australian Boot Trade Employees Federation v Whybrow* (1910) 10 CLR 266, the industrial laws in a number of States prescribed a lower minimum wage than that prescribed by the Commonwealth under its conciliation and arbitration legislation. The laws, however, were not found to be constitutionally inconsistent, as it was possible to obey both laws by paying the higher minimum wage.

The simultaneous obedience test arose in *McBain v Victoria* (2000) 99 FCR 116. In *McBain*, Sundberg J of the Federal Court found that s 8 of the *Infertility Treatment Act 1995* (Vic) was invalid for inconsistency with s 22 of the *Sex Discrimination Act 1984* (Cth). The Victorian Act compelled discrimination on the basis of marital status in relation to access to a service, while such discrimination was prohibited by the Commonwealth Act. It was accordingly impossible for a provider of IVF services to obey both Acts.

The early narrow interpretation of s 109 reflected the early Court's desire to preserve as much of the States' autonomy as possible, reflecting concepts drawn from the "reserved powers" doctrine. As that approach fell away after the *Engineers case* in 1920 (see [2.15]), a modification of the test for s 109 followed.

CONFERRAL OF RIGHTS

[7.30] The "conferral of rights" test developed after *Engineers*. In *Clyde Engineering v Cowburn* (1926) 37 CLR 466, Knox CJ and Gavan Duffy J stated (at 478) that two laws will be inconsistent with each other under s 109 when a State law "takes away a right conferred" by the Commonwealth. Thus, a State law will be invalid if it alters, impairs or detracts from the operation of a federal law. This test became particularly important regarding conflicting standards in industrial relations.

For example, in *Clyde Engineering*, this test was applied to laws which regulated working hours. The *Forty Four Hours Week Act 1925* (NSW) provided that a worker's "ordinary working hours" were to be 44 hours per week (with overtime rates payable beyond that period). The Commonwealth award made under the *Conciliation and Arbitration Act 1904* (Cth) fixed the ordinary working hours at 48 hours; deductions had to be taken out of the standard wage for less hours worked. Cowburn worked the 44-hour week as set out in the State Act, but his employer deducted an amount in reliance on the Commonwealth standard of 48 hours. Simultaneous obedience was possible, as the employee could work a 44-hour week, and then have his pay docked four hours for failing to work the 48 hours stipulated in the Commonwealth legislation. However, the State law was diminishing the rights conferred on the employer to expect a 48-hour week to be worked, and the right of the worker to be paid the full rate for those 48 hours. The State law was therefore inconsistent by reason of the modification of the rights

conferred by the Commonwealth. The High Court found the State Act was invalid to the extent of the inconsistency, and was inapplicable to workers employed under the Commonwealth award.

In *Colvin v Bradley Bros Pty Ltd* (1943) 68 CLR 151 a Commonwealth award, again enacted under the *Conciliation and Arbitration Act 1904* (Cth), stated that relevant employers could employ females to work in the industries covered by the award, which included milling machines. The *State Factories and Shops Act 1912* (NSW) made it an offence to employ females on such machinery. It was possible to obey both laws, by not employing women on the specified machines. However, the rights conferred on the employers and the prospective female workers were diminished by the State law, so an inconsistency was found.

The *Racial Discrimination Act 1975* (Cth) confers certain rights of equality and non-discrimination on the basis of race or ethnic origin. This Act was considered by the High Court in *Mabo v Queensland (No 1)* (1988) 166 CLR 186, a hearing that arose within the course of the ten years of litigation that culminated in the decision of *Mabo v Queensland (No 2)* (1992) 175 CLR 1, when the High Court decided that Indigenous native title rights had survived European settlement. During the course of the hearings, Queensland introduced the *Queensland Coast Islands Declaratory Act 1985* (Qld), which purported to extinguish any traditional rights to land which the Torres Strait Islander plaintiffs might have had. Although the High Court had not yet decided whether native title in fact existed, it was prepared to hear the plaintiffs' demurrer to the defence mounted by Queensland. The plaintiffs argued that the Queensland Act was inconsistent with the *Racial Discrimination Act 1975* (Cth) because of a diminution of rights conferred. Section 10(1) of the Commonwealth Act provides:

> If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

The reference to a "right" in subs (1) includes the rights articulated in Art 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination*, which includes the right to own property, and the right to inherit, as rights to which equality before the law must be guaranteed.[6] The Queensland Act indeed sought to diminish the property rights of a group of Indigenous Australians, should such rights eventually be articulated by the High Court, specifically on the basis of their race. Brennan, Toohey and Gaudron JJ, with whom Deane J agreed, found as follows (at 218):

> By extinguishing the traditional legal rights characteristically vested in the Meriam people, the 1985 Act abrogated the immunity of the Meriam people from arbitrary deprivation of their legal rights in and over the Murray Islands. The Act thus impaired their human rights while leaving unimpaired the corresponding human rights of those

6 *International Convention on the Elimination of all Forms of Racial Discrimination 1966*, 660 UNTS 195, Art 5(d)(v) and (vi).

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> whose rights in and over the Murray Islands did not take their origin from the laws and customs of the Meriam people … the 1985 Act has the effect of precluding the Meriam people from enjoying some, if not all of their legal rights in and over the Murray Islands, while leaving all other persons unaffected in their legal rights in and over the Murray Islands.[7]

The State law, which purported to extinguish native title, worked to limit or diminish the human rights of the Indigenous plaintiffs. It could not prevail over s 10(1) of the *Racial Discrimination Act 1975*, which operated to restore and preserve the human rights of those plaintiffs to the same standard enjoyed by the rest of the community. The State Act thus failed for s 109 inconsistency.

The High Court again found that a State Act that diminished the rights of native title holders was inconsistent with s 10 of the *Racial Discrimination Act 1975* (Cth) in *Western Australia v Commonwealth (Native Title Act case)* (1995) 183 CLR 373. Six members of the Court found a conferral of rights inconsistency. The Court held (at 442) that s 7 of the *Land (Titles and Usage) Act 1993* (WA) purported to extinguish any native title to land existing before the commencement of the Act, and created only rights of "traditional usage" for Indigenous persons who formerly held, or would have been entitled to, native title. As the rights of "traditional usage" were less secure than native title rights, the majority of the Court found that the State Act purported to diminish the rights of native title holders, and was inconsistent with the *Racial Discrimination Act 1975*, citing *Mabo (No 1)* at 438.[8]

It is not always easy to know what rights the Commonwealth intends to confer or remove with the enactment of a statute. For example, in *Ansett Transport Industries v Wardley* (1980) 142 CLR 237 the High Court had to consider the rights conferred by the State and Commonwealth Acts at issue. The *Equal Opportunity Act 1977* (Vic) prohibited discrimination on the grounds of a person's sex or marital status. The federal Airline Pilots Agreement, which had the status of an industrial award under the *Conciliation and Arbitration Act 1904* (Cth), prescribed a certain procedure to be followed if a pilot was to be sacked. That procedure did not have to be followed if the pilot was sacked within a year of commencing employment.

Ms Wardley sought employment with Ansett as a trainee pilot but was refused, on the grounds of her gender. Ansett was in clear breach of the Victorian Act, so the Equal Opportunity Board (Vic) ordered the company to employ Wardley. At the time Ansett came before the High Court, Wardley had been employed for less than six months. Ansett sought a declaration from the High Court to the effect that the State Act was not applicable with regard to the employment or dismissal of the defendant, by reason of inconsistency with the Commonwealth Agreement. It argued that the Victorian law was directly inconsistent with the rights conferred upon it by the federal Agreement as, in Ansett's view, the Agreement granted it an

7 Mason CJ and Dawson J were not prepared to make assumptions of fact regarding the possibility of finding in favour of the plaintiff's native title claim, so they did not decide the s 109 issue. Wilson J dissented (at 206) on the basis that the Queensland Act did not create an inequality between the Meriam people and other people, but in fact removed a source of inequality (as native title rights vested only in Indigenous peoples), and thus the Act did not discriminate in the sense prohibited by s 10 of the *Racial Discrimination Act 1975* (Cth).

8 See also *Gerhardy v Brown* (1985) 159 CLR 70.

absolute right to sack employees before they had worked 12 months. The Victorian Act diminished that unlimited right, as it prohibited dismissal for reason of one's gender. Ansett also submitted that there was indirect inconsistency; see [7.35].

The crucial question regarding direct inconsistency in this case was: what right or immunity did the Commonwealth intend to confer? Did the Commonwealth intend to confer upon the airlines an absolute right to dismiss, so long as any relevant procedure in the agreement was followed? That finding would lead to a finding of direct inconsistency with the *Equal Opportunity Act 1977* (Vic). However, if the Commonwealth did not intend to confer such an unqualified right, and only conferred a limited right to dismiss, then no direct inconsistency ensued.

Barwick CJ and Aickin J found that the Commonwealth had intended to confer an unlimited right for airlines to dismiss staff before they had been employed for a year, so there was direct inconsistency with the Victorian law. The majority, however, found there was no Commonwealth intention to confer an absolute right to dismiss. Three Justices in the majority found that the federal Agreement was intended to regulate only the *process* of dismissing pilots, and conferred no rights on employers regarding the *grounds* for the dismissal of airline pilots. This conclusion meant that there was scope for the operation of a State law which regulated the grounds for dismissal, such as the Victorian Act.

Stephen J took a different approach. He agreed that, to a certain extent, the federal Agreement did grant Ansett a right to dismiss employees, but only in the context of orthodox industrial disputes. Otherwise, the right to dismiss was limited by the "general law", which included Victorian anti-discrimination laws. He explained (at 246-247):

> In my view there is in this case no inconsistency within the meaning of s 109 of the Constitution. I regard the right of termination of the contract of employment which cl 6 of the Agreement confers as no absolute right, such as that for which Ansett contends. The right which it confers is not one which is capable of exercise regardless of the unlawfulness under State law of the ground for its exercise. On the contrary it is a right the nature of which is to be understood against the background to its operation which general laws of the land, whether State or federal in origin, provide.
>
> The Agreement is not, I think, to be read as if creating a partial vacuum, within which the relationship between Ansett and its pilots lies wholly withdrawn from the operation of those general laws of the land which are applicable to other members of the community. … The present industrial agreement, made in settlement of an industrial dispute, is concerned with industrial matters and its terms should be construed accordingly; they should not be regarded as trespassing upon alien areas remote from its purpose and subject matter, whether those areas concern the nation's foreign affairs or social evils such as discrimination upon the ground of sex.
>
> When the power of termination which cl 6B confers upon the parties to the contract of employment comes to be construed it can be seen to contain nothing in its quite unexceptional wording to suggest that it should stand inviolate, unresponsive to a general law applicable to the community at large and directed to the prevention of some evil practice which, of its nature, may manifest itself in a variety of ways, including the exercise by an employer of his power of dismissal. The concern of the Agreement is, after all, entirely unremarkable, being exclusively devoted to the settlement of an industrial dispute. This is an inherently improbable source in which to discover, in the form of a simple power to bring their contract to an end conferred upon both parties to a contract of

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employment, a right on the employer's part to practise discrimination upon the grounds of sex, contrary to, and immune from the prohibition of, State law.

In Stephen J's view, the federal Agreement was never intended to impact upon the area of sex discrimination. That was (at 251) "simply not a subject within the purview of the award".

The judgments in *Ansett* suggest that some flexibility exists within the test of direct inconsistency. Direct inconsistency can be eliminated by attributing to the Commonwealth an intention that the rights in the relevant law be read narrowly, or that the law be read so as not to limit the operation of the relevant State law.[9] Alternatively, direct inconsistency can be contrived by attributing an intention that the rights conferred by the relevant law be read expansively so as to eject the application of any State law.

INDIRECT INCONSISTENCY/COVERING THE FIELD

[7.35] Both the tests described at [7.25]-[7.30] are "direct" in the sense that they prohibit inconsistency which is apparent in the text or factual application of the competing laws in question. A third analysis has developed which tests for indirect inconsistency, that is inconsistency where the text or the factual operation of the laws does not generate actual conflict. Isaacs J explained the "cover the field" test for indirect inconsistency in *Clyde Engineering v Cowburn* (1926) 37 CLR 466 (at 489):

> 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.

Dixon J explained the nature of this indirect test in *Ex parte McLean* (1930) 43 CLR 472 (at 483):

> [Inconsistency] depends upon the intention of the paramount legislature to express by its enactment, completely, exhaustively, exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such intention, it is inconsistent with it for the law of a State to govern the same conduct or matter.

Where the Commonwealth has legislated in an area or "field" and intends to "cover" that field, any State legislation in that "field" will be deemed to be inconsistent. There are three steps, first outlined by Isaacs J in *Clyde Engineering* at (489-490), to be followed in applying the "cover the field" test:

(a) Identify or characterise the field, or subject matter, that the Common-wealth law deals with and regulates.

(b) Ascertain whether the State law attempts to regulate a field which the Commonwealth intends to cover. If there is no overlap of the fields, then no indirect inconsistency will be found.

(c) If the two laws do overlap, ascertain if the Commonwealth intended to cover the field – did the Commonwealth Parliament intend its law to be the only law on the subject matter in question?

9 See JD Goldsworthy, "Legal Rights Subject Matters and Inconsistency: Ansett Transport Industries (Operations) Pty Ltd v Wardley" (1981) 7 *Adelaide Law Review* 486. This article contains a thorough analysis of the *Ansett* decision.

If no such intention to cover the field is evident, then no indirect inconsistency will be found. Where a State law does purport to encroach on a "field" or area, or subject matter, which the Commonwealth legislation intends to cover, then that intrusion will represent a conflict or inconsistency with the Commonwealth's intention to "cover the field", and a breach of s 109 will arise.

This test certainly represents an expansion of the scope of s 109, and thus has considerable impact upon the operation of a wider range of State laws than that of the "direct" tests.

Identification of the "field"

[7.40] The principles or indicia of how to identify the field apply to both State and Commonwealth laws, and involve characterising the subject matter of the competing legislative regimes. A number of cases demonstrate this process, and the outcomes of those cases demonstrate the difficulty in predicting the application of the indirect test for inconsistency.

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In *O'Sullivan v Noarlunga Meat* (1954) 92 CLR 565 the Commonwealth and State laws at issue dealt with the use of premises for "slaughtering stock for export". The *Commerce (Meat Export) Regulations* (Cth) established a licensing regime for premises used for export meat production, and set appropriate standards of hygiene and production quality. The *Metropolitan and Export Abattoirs Act 1936* (SA) also regulated the slaughter of stock for export purposes, although this Act was concerned with the licensing of "fit and proper" persons and ensuring that slaughtering premises were in suitable locations.

The High Court in a statutory majority found that both laws concerned the same field, being the regulation of slaughtering stock for export. By considering the wider subject matter of the legislation, the regulation of abattoirs, the Court cast the "fields" as overlapping. They went on to find that the Commonwealth intended to cover the field, so the State legislation was held not applicable due to indirect inconsistency. The approach of the bare majority was affirmed by the Privy Council on appeal at (1955) 95 CLR 177.

This outcome should be contrasted with a similar case regarding overlapping licensing requirements in *Airlines of NSW v NSW (No 2)* (1965) 113 CLR 54. Both the *Air Navigation Regulations 1947* (Cth) and the *Air Transport Act 1964* (NSW) prohibited the operation of certain commercial air operations without the appropriate licence. The Commonwealth licence would be granted upon consideration of matters of safety, regularity and efficiency of air navigation. Award of the State licence required consideration of matters such as public transport demands, the facilitation of competition in the industry, and the suitability of the applicant.

The Court, if it had followed the methodology in *O'Sullivan*, could have identified the "field", as the subject matter of "licensing commercial air operations". If this were the approach the laws would have overlapped in their fields, and an inquiry as to the Commonwealth's intention would have ensued. However, the Court instead noted that the State Act did not concern itself with any of the topics with which the Commonwealth Act dealt. So, even though both Acts concerned a

licensing system within the same industry, the Court considered that the purposes of the licences were dissimilar, and thus the Acts concerned different fields.

In *O'Sullivan's* case, the "field" was cast in wide terms, increasing the likelihood of overlap, whereas in the *Airlines case (No 2)*, the "field" was characterised in narrow terms, reducing the opportunity for overlap.[10]

In *Ansett v Wardley*, narrow and broad approaches to definition of the field were evident in the one case. With regard to Ansett's submission regarding indirect inconsistency, the minority adopted a broad approach to "the field" of the Commonwealth award, interpreting that field as the dismissal of airline pilots. The majority indicated that the field was merely the procedure for the dismissal of pilots. Therefore, the State anti-discrimination law, which limited the grounds upon which a person could be dismissed, trespassed on the minority's field but not on that of the majority. Thus, indirect inconsistency was impossible on the majority's analysis, regardless of whether the Commonwealth intended to cover the field of its law. The differing views were clearly influenced by the respective judges' views on the parallel "direct inconsistency" argument, which is discussed at [7.30].

The test for identification of the field does not therefore appear to offer objective criteria for analysis. Consider the prophetic warning offered by Evatt J in *Victoria v Commonwealth (Shipwrecks case)* (1937) 58 CLR 618 on the difficulties inherent in the use of the "cover the field" test (at 634):

> ... any analogy between legislation and its infinite complexities, and varieties, and the picture of a two dimensional field seems to be of little assistance.

Overlapping fields: The subject matter approach

[7.45] The indicia of how to identify the field are similar for both State and Commonwealth laws. Therefore, just as there are difficulties in ascertaining the definition of the Commonwealth "field", there are also difficulties in ascertaining whether the State has trespassed on that field.

One approach to the issue of encroachment is the so-called "subject matter" approach taken by Stephen J in *Ansett Transport Industries v Wardley* (1980) 142 CLR 237. On the indirect inconsistency submission Ansett had argued that the Federal Pilots' Agreement was intended to "cover the field" regarding the employment conditions of pilots or at the very least the field of the dismissal of pilots. Thus it was argued that there was no scope for any operation within those respective subject matters for the Victorian Equal Opportunity legislation. Stephen J rejected Ansett's contention and stated (at 251):

> The Victorian legislature has concerned itself quite generally with the social problem of discrimination based upon sex or marital status and occurring in a variety of areas of human activity. It has declared various manifestations of such discrimination to be unlawful. This is a subject matter upon which the *Commonwealth's Conciliation and Arbitration Act* is understandably silent, silent because of its general irrelevance to the

10 The definitions of the "field" in the *O'Sullivan* and *Airlines (No 2)* cases were undoubtedly influenced by the definition given to the scope of the Commonwealth's power under s 51(i) in those respective cases. See [2.30]. A more recent example of a narrow drawing of the fields, such that they were found to co-exist, arose in *Jemena Asset Management v Coinvest* (2011) 244 CLR 508.

> subject matter of that Act. That silence will necessarily extend to the factum through which it operates, the present Agreement. The disputes with which the *Conciliation and Arbitration Act* are concerned are disputes as to industrial matters, pertaining to the relationship of employer and employee; they have nothing inherently to do with questions of discrimination on the grounds of sex. No doubt it may happen that in a particular dispute, apparently of an industrial character, some question of discrimination of this sort may appear to be involved. The precise nature of its involvement may then determine whether or not the dispute is indeed an industrial dispute. However in the present case the Agreement gives not the slightest indication of any such involvement and has all the hallmarks of being made in settlement of an entirely orthodox industrial dispute.

Earlier Stephen J stated (at 247):

> The present industrial agreement, made in settlement of an industrial dispute, is concerned with industrial matters and its terms should be construed accordingly; they should not be regarded as trespassing upon alien areas remote from its purpose and subject matter, whether those areas concern the nation's foreign affairs or social evils such as discrimination upon the ground of sex.[11]

In *Commercial Radio Coffs Harbour v Fuller* (1986) 161 CLR 47 the Court examined whether there was "cover the field" inconsistency between the *Broadcasting and Television Act 1942* (Cth) and the *Environmental Planning and Assessment Act 1979* (NSW). It was argued that the Commonwealth Act "covered the field" regarding the regulation of the height of broadcasting antennae, thus excluding any limitations placed on that height by the New South Wales Act. The Commonwealth found that the laws at issue were directed towards quite different purposes, and thus no encroachment into the "fields" could be found.[12] Wilson, Deane and Dawson JJ stated (at 57-58):

> The intention of the Commonwealth Act is to maintain the provision of high quality and technically efficient broadcasting services which are commercially viable and receptive to the needs of the community. It does so by the prohibition of broadcasting except under licence granted subject to certain conditions. But the relaxation of the prohibition by the granting of a licence does not confer an immunity from other laws, Commonwealth or State. The Act does not purport to lay down the whole legislative framework within which the activity of broadcasting is to be carried on. It is intended to operate within the setting of other laws with which the grantee of a licence will be required to comply. ... In the words of Dixon J in *Ex Parte McLean* ... the Act was intended to be "supplementary to or cumulative upon State law".[13]

Thus, the "subject matter" approach indicates that Commonwealth and State laws are less likely to overlap when they concern objectively different subject matters. In

11 It may be noted that Stephen J here inverts the test of "trespass" by asking if the federal law trespassed on the State field. Any differences that flow from the inversion of the test are probably of academic interest only.

12 G Williams, S Brennan and A Lynch, *Blackshield and Williams' Australian Constitutional Law and Theory: Commentary and Materials* (6th ed, Federation Press, Annandale, 2014), pp 302-303.

13 An argument was also made regarding direct inconsistency. The argument was that the Commonwealth Act granted a right for the radio station to have an antenna of a certain height, which was removed by the State Act. The Court found that the Commonwealth did not intend to confer such a right, so there was no direct inconsistency. The case is thus similar to *Ansett v Wardley* in terms of the arguments made and the outcome.

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The Commonwealth Parliament may express an intention to clear the field, and leave the State laws operating alongside the Commonwealth's laws as a complementary regime. The effectiveness of such expressions of consistency was examined in *R v Credit Tribunal; Ex parte General Motors Acceptance Corp* (1977) 137 CLR 54. A majority in that case found that the Commonwealth could express that there was no intention that its law be the exhaustive or exclusive regulatory regime on the given topic. In that case, s 75 of the *Trade Practices Act 1974* (Cth) provided:

> (1) Except as provided by sub-section (2), this Part is not intended to exclude or limit the concurrent operation of any law of a State or Territory. ...
>
> (3) Except as expressly provided by this Part, nothing in this Part shall be taken to limit, restrict or otherwise affect any right or remedy a person would have had if this Part had not been enacted.

After considering *Wenn's* case, Mason J treated the Commonwealth's intention to clear the field as entirely valid (at 563):

> [A] Commonwealth law 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 inconsistent with Commonwealth law, to have an operation. Here again the Commonwealth law does not of its own force give State law a valid operation. All that it does is to make it clear that the Commonwealth law is not intended to cover the field, thereby leaving room for the operation of such State laws as do not conflict with Commonwealth law.[15]

However, Mason J also pointed out that such an express intention could not save a State law from invalidation due to direct inconsistency, that is where simultaneous obedience is impossible, or where one law modifies rights conferred by the other. An express indication of the Commonwealth's intention to clear the field will only save a State law that might have otherwise been considered indirectly inconsistent. Mason J's view on this distinction between direct and indirect inconsistency with regard to express clearances of the field was upheld in *Palmdale AGCI v Workers Compensation Commission (NSW)* (1978) 140 CLR 236.[16]

An interesting example of this expressed intention is found in the case of *University of Wollongong v Metwally* (1984) 158 CLR 447, which arose out of a change to the *Racial Discrimination Act 1975* (Cth), which had been prompted by the result in an earlier case, *Viskauskas v Niland* (1983) 153 CLR 280. In *Viskauskas* the High Court had to consider whether the *Racial Discrimination Act 1975* (Cth) was intended to cover the field of race discrimination. The Court accepted that the Act implemented the Commonwealth's international obligations to combat discrimination on the basis of race, giving effect to the *International Convention on the Elimination of all Forms of Racial Discrimination*, to which Australia is a party. The Court found that implementation of international obligations was a subject matter which required a uniform regime. Hence the Court found that the Commonwealth impliedly intended to cover the field of race discrimination, rendering the *Anti-Discrimination Act 1977* (NSW) inoperative.

15 See, also, eg, *John Holland Pty Ltd v Victorian Workcover Authority* (2009) 239 CLR 518.

16 See also J Clarke, P Keyzer and J Stellios, *Hanks' Australian Constitutional Law: Materials and Commentary* (9th ed, LexisNexis Butterworths, Chatswood, 2013), pp 475-476.

Immediately after the *Viskauskas* decision was handed down, the Commonwealth Parliament amended the *Racial Discrimination Act 1975* so as to make it explicit that the Commonwealth did not intend to exclude any State regimes that pursued similar social justice objectives. That amendment, s 6A, was inserted into the Commonwealth Act and came into force in June 1983:

> (1) 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 the objects of the Convention and is capable of operating concurrently with this Act. [emphasis added]

The Court unanimously decided in *Metwally* that the Commonwealth amendment to the *Racial Discrimination Act 1975* could prospectively remove the implied Commonwealth intention to cover of the field of race discrimination. Thus s 6A revived the State anti-discrimination regime as of the date it came into force, June 1983. However, in the case at issue, the University was challenging a finding for damages awarded by the New South Wales Equal Opportunity Tribunal to Mr Metwally in response to a complaint from March 1981.

The High Court majority found that Metwally was precluded from relying on the New South Wales legislation, because his complaint dated back to a time when the State regime was inoperative, in conformity with the finding of inconsistency in *Viskauskas*. The order in his favour made by the New South Wales Equal Opportunity Board was void and unenforceable. The majority found that the Commonwealth could not uncover the field and retrospectively revive a State law which had been previously invalidated under s 109, for this would permit an ordinary Commonwealth statute to prevail over the Constitution. Gibbs CJ explained the majority's position (at 457-458):

> Before the *Amendment Act* came into effect, the Commonwealth Act, on its proper construction, was intended to be a complete and exclusive statement of the law of Australia with regard to racial discrimination, and Part II of the *Anti-Discrimination Act* was inconsistent with that law and therefore invalid by force of s 109. What the Amendment Act in effect provides is that the Commonwealth Act should now be understood as though it did not have that intention and that Part II of the *Anti-Discrimination Act* was therefore not inconsistent with it. In other words, the Parliament has attempted to exclude the operation of s 109 by means of a fiction. The short answer to the submissions of the respondents is that the 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 and that what was in truth an inconsistency shall be deemed to have not existed. Section 109 deals with "a matter of prime importance" in the constitutional framework ..., namely the effect of an inconsistency between the enactments of two legislatures both of which operate in the same territory. Its provisions are not only critical in adjusting the relations between the legislatures of the Commonwealth and the States, but of great importance for the ordinary citizen, who is entitled to know which of two inconsistent laws he is required to observe.

In contrast the minority felt that what the Parliament could do prospectively, it could also do retrospectively. It could therefore retrospectively revive a State law, for the purposes of the test of indirect (though not direct) inconsistency. Mason J pointed out that s 109 has no role as a guarantee of individual rights, but is a purely mechanical provision, resolving conflicts between statutes (at 463):

> 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. Where no such

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What is "protectionism"?

[11.45] There was general relief at the apparent certainty in s 92 after *Cole* was handed down. The unanimity of the approach the High Court had adopted gave the decision a great deal of authority and ostensible stability. However, this relief was fleeting: a few weeks later the Court handed down the decision in *Bath v Alston Holdings* (1988) 165 CLR 411. The Court all agreed on what the test for breach of s 92 was, but split 4:3 on how that test was to be applied.

The *Business Franchise (Tobacco) Act 1974* (Vic) prohibited all sales of tobacco without a licence. Section 10(1)(c) and (d) dictated that a retail licence would cost a small flat fee plus 25 per cent of the value of tobacco sold during a previous 12-month period.[13] However, tobacco bought in Victoria from a trader with a wholesale tobacco licence was exempted from the calculation of the 25 per cent variable fee. The retail licence scheme, when viewed in isolation, clearly seemed to encourage retailers to stock Victorian rather than interstate tobacco. Alternatively, the fee would encourage Victorian retailers to raise the price of interstate sourced tobacco by 25 per cent, which would confer a comparative price advantage on Victorian tobacco. Alston Holdings, a tobacco retailer, accordingly argued that the scheme breached s 92.

However, the Act also provided for Victorian tobacco wholesalers to pay a 25 per cent fee on tobacco at the wholesale level. Thus, the Act ensured that a 25 per cent fee was paid at some stage on all tobacco products before they reached the consumer in Victoria. If the tobacco was produced in Victoria, the wholesaler would pay the 25 per cent. If the tobacco came from interstate, the retailer would pay the 25 per cent. It was thus arguable that the retail fee merely "levelled out the playing field" between Victorian tobacco, which was subjected by Victorian law to a 25 per cent wholesale fee, and other tobacco, which was not (although arguably the amount would differ slightly because of the different cost base used to determine the value of the assessable tobacco product).

The majority (Mason CJ, Brennan, Deane and Gaudron JJ) found that the retail fee breached s 92 (at 425):

> [T]he retailer who sells only tobacco products purchased by him from a Victorian wholesaler will pay the appropriate flat fee for his licence, while a retailer who sells only tobacco products purchased from an inter-State wholesaler will pay that flat fee plus 25 per centum of the value of tobacco sold in the preceding relevant period. It follows that, if they be viewed in isolation, the provisions of the Act imposing the obligation to pay a retail tobacconist's licence fee of [a low flat rate of either $50 or $10] plus an amount calculated by reference to the value of tobacco sold which has not been purchased in Victoria from a licensed wholesaler, discriminate against inter-State purchases of tobacco in favour of purchases in Victoria. If it be viewed in isolation, that discrimination is undeniably protectionist both in form and substance.

13 The licence structure utilised a "backdating device" to avoid the constraints of s 90. See discussion of *Philip Morris Ltd v Commissioner of Business Franchises* (1989) 167 CLR 399 at [9.55].

The majority therefore pointed out the obvious fact that the retail fee was discriminatory and protectionist in its form. However, they also found that the fee substantively discriminated against interstate trade, even when read in light of the wholesale fee (at 425-427):

> Even when the provisions of the Act imposing the liability to pay the retail tobacconist's licence fee are read in the context of the Act as a whole, they retain their discriminatory and protectionist character. Such a reading reveals the explanation for the exclusion from the basis of calculation of the retailer's licence fee of tobacco products purchased within Victoria from a licensed wholesaler. That explanation is that the licence fee which the Act requires Victorian wholesalers to pay to the Victorian Government will not have been paid to the Victorian Government by an out of State wholesaler who does not carry on business in Victoria and therefore does not require a licence in that State. The explanation tends, however, to underline, rather than remove, the protectionist character of the discrimination at the retail level effected by the provisions imposing the tax. If wholesalers of tobacco products in another State already pay taxes and bear other costs which are reflected in wholesale prices equal to or higher than those charged by Victorian wholesalers, the practical effects of the discrimination involved in the calculation of the retailer's licence fee would be likely to be that the out of State wholesalers would be excluded from selling into Victoria and that the products which they would otherwise sell in inter-State trade would be effectively excluded from the Victorian market. On the other hand, if out of State wholesalers pay less taxes and other costs than their Victorian counterparts, and in particular if they pay no (or a lower) wholesale licence fee, the effect of the discriminatory tax upon retailers will be to protect the Victorian wholesalers and the Victorian products from the competition of the wholesalers operating in the State with the lower cost structure. Either way, the operation and effect of the provisions of the Act imposing the retail tobacconist's licence fee are discriminatory against inter-State trade in a protectionist sense. For practical purposes, their operation is to impose on Victorian retailers who, during the relevant earlier period, purchased tobacco products both locally and in the markets of another State, an obligation to pay to Victorian consolidated revenue an ad valorem tax calculated by reference to the sale value of so much of those products as came from inter-State. Ignoring the flat fee of $50 or $10, the effect of s 10(1)(c) and (d) is to discriminate against tobacco products sold by wholesalers in the markets of another State and to protect both Victorian wholesalers and the products which they sell from the competition of out of State wholesalers and their products. The wholesaler's licence fee, imposed on local wholesalers by reference to all their local sales, does not infringe s 92 in that it does not discriminate against goods coming from another State. The ad valorem content of the retailer's licence fee does infringe s 92 in that it discriminates against inter-State trade and commerce in a protectionist sense by taxing a retailer only because of, and by reference to the value of, his actual or imputed purchases of products in any State other than Victoria.

Thus, the majority appeared to define protectionist laws as being of two types. Protectionism would arise when; (a) a State law conferred a competitive advantage on local industry; or (b) a State law removed a competitive advantage from interstate industry. Depending on the prevailing facts, the majority felt that one of these two consequences would always ensue under the impugned Victorian retail fee structure. The exclusive imposition of the retail fee on interstate tobacco would deprive that tobacco of its competitive advantage if it had not been subjected to an interstate wholesale fee. It would confer a competitive advantage on local tobacco if the interstate tobacco had been subjected to an interstate wholesale fee.

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The majority confirmed its rejection of the "level playing field" argument (at 428-429):

> It provides no answer to the question whether, for the purposes of s 92, a particular tax is properly to be characterized as discriminatory in a protectionist sense to say that it is but one method of collecting a "tax on goods" which is imposed in an equal amount in respect of all local and imported goods of that kind. If a tax is challenged on the ground that it offends s 92, it is necessary first to identify what is the transaction or thing which attracts liability. If the tax is imposed, whether directly or indirectly, on a transaction in the chain of distribution of goods, the relevant inquiry is whether the tax is imposed only on transactions where the goods involved have come from or are going to another State or whether the tax is imposed on all transactions of the relevant kind without differentiation based on the source or destination of the goods involved. If the tax is imposed on transactions in a particular market – in this case, the Victorian retail tobacco market – it is the effect of the tax on transactions in that market which is material. In this case, the effect is on the supply of goods to that market. The effect of an equivalent tax on transactions at another stage in the chain of distribution of the same goods or goods of the same kind is immaterial.

Thus, the majority argued that any burdens imposed upon interstate goods after their entry into a State must be equally imposed upon local industry. Therefore, the imported product must retain any competitive advantage held at the time of its entry.[14]

The minority was made up of Wilson, Dawson and Toohey JJ, who stated (at 431-432):

> [The defendant's] argument has a superficial plausibility in that tobacco purchased from another State is purchased from a person who is not the holder of a wholesale licence under the Act and the purchaser in Victoria, when he sells that tobacco, is therefore subject to the ad valorem component of the fee in relation to it. But to put the matter thus is to present an incomplete picture of the practical operation of the Act and, as was observed in *Cole v Whitfield*, it is the practical operation of the legislation which will largely determine whether there is discrimination upon protectionist grounds. What the argument put in that way leaves out of account is the fact that an interstate wholesaler is not subject to any franchise fee under the legislation and is able to sell tobacco to the Victorian retailer at a price which will reflect the absence of this expense. This advantage which the interstate wholesaler has is, however, balanced by the fact that the Victorian retailer who imports the tobacco will bear a fee calculated by reference to its value when it is sold in Victoria and this fee will be reflected in the price of the product to the ultimate consumer. The legislation does not seek to operate to the advantage or disadvantage of the retailer according to whether he obtains his tobacco within or outside the State.
>
> ... All trade in tobacco in Victoria is subjected to the expense of the franchise fee at one point or another and the economic effect of the tax is the same, whether the tobacco is acquired by the retailer from within or outside the State.

Further, the minority explained the policy reasons behind the complex structure of the tobacco licence fees:

> It is obvious that the reason why the legislation imposes the fee at the wholesale level where it is possible to do so is because there is only a small number of wholesalers but many retailers and it is easier for that reason to collect the tax from the former rather than from the latter.

14 Zines, n 6, pp 185-186.

The minority's view seems more logical. Consider its comments (at 433-434):

> If the argument were to be accepted that the manner in which licence fees are calculated and imposed under the Act discriminates against interstate trade in a protectionist manner, two alternatives would exist to cure the defect. On the one hand the legislation might be amended to exclude the value of tobacco purchased in the course of interstate trade from the calculation of the ad valorem component of the retail tobacconist's licence fee. This would, however, result in a preference being given to interstate trade and s 92 can scarcely be read as requiring such a result. On the other hand, the collection of the fee could be restricted to the retail level and be calculated upon the value of all sales of tobacco. The practical result produced by the second alternative is no different in economic terms from that produced by the Act in its present form, save that the tax would be a great deal more difficult to collect. Consideration of these alternatives serves to demonstrate the danger of restricted analysis in any attempt to ascertain whether the legislation gives rise to discrimination of a protectionist kind.

The minority clearly focused more on the substantive effects of the law than the majority, and their decision is more in line with the emphasis placed upon substantive economic effects in *Cole*.[15] As the minority stated, the imposition of a uniform retail fee of 25 per cent would have the same economic impact as the imposition of 25 per cent fees on all tobacco, albeit at different stages in the supply chain, under the impugned scheme. Any competitive advantages or disadvantages conferred on interstate tobacco by the tobacco licence structures of other States (a clear concern of the majority) would be maintained in either scenario, as, in either case, the price of all tobacco would go up by 25 per cent. However, the former arrangement would be more difficult to administer than the latter, as it would necessitate collection from a larger number of people. Nevertheless, in the view of the majority, the former arrangement, but not the latter, was constitutionally valid.

The *Bath* majority defined protectionist laws as ones which would result in one of two consequences: either (a) the conferral of a competitive advantage on local industry; or (b) the removal of a competitive advantage from interstate industries, as explained above. A law will not, however, breach s 92 if it is protectionist according to the *Bath* definition, but *not relevantly discriminatory*. For example, it is probably constitutional for a State to offer certain commercial benefits to entice commercial enterprises to set up within the State, such as infrastructure guarantees (for example, promises to build roads within the vicinity of a company's factory), or greater industry deregulation. Perhaps it is arguable that such measures are protectionist, as their effect may be to confer competitive advantages on local industries, or deprive interstate industries of their competitive advantages. For example, a State law which removes environmental regulations could reduce a local trader's environmental compliance costs so as to confer a competitive advantage on that trader vis-à-vis interstate competitors. However, such measures do not *discriminate* against interstate industries, as the legislating State is simply not in a position to offer similar advantages to industries located interstate.[16]

15 Zines, n 6, p 186.

16 See also M Coper, "Section 92 of the Australian Constitution Since Cole v Whitfield" in HP Lee and G Winterton, *Australian Constitutional Principles* (Law Book Company, North Ryde, 1992), pp 141-142.

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Thus, a potentially "protectionist" law which is not discriminatory does not breach s 92. Conversely, a discriminatory law will not breach s 92 if it does not have a protectionist effect.

In *Betfair v Racing NSW ("Betfair 2")* [2012] HCA 12, the appellant company, an online gambling business, challenged the validity of the licence fees imposed by NSW racing authorities under cl 16(2) of the *Racing Administration Regulation 2005*, which required wagering services to pay up to 1.5 per cent of their "wagering turnover" in licence fees. Betfair, an interstate trader, conducted its business with low profit margins, compared to other traders, including local NSW traders, who operated with much higher margins. Betfair claimed that the effect of the law was to discriminate against it, because the licence fee claimed a disproportionate share of its profits compared to those of intrastate traders. "It is upon the differing business models with respect to profit margins that Betfair [laid] a foundation of its case".[17]

Betfair lost the case for a number of reasons, one of which was that it failed to establish any relevant protectionist effect. While the law may have disproportionately reduced its profits and therefore had an adverse and even discriminatory effect on the company, there was no evidence that the law operated so as to reduce its competitiveness or share in the NSW gambling market.[18] As Kiefel J put it (in explaining the lower court decision against Betfair, which was upheld) at para 103, "Betfair had not shown it to be likely that punters would be deterred from placing bets with it or that it would lose any market share to [an intrastate trader]". Betfair failed, in part, because it had not demonstrated "some likely effect on its ability to compete as an interstate trader" (Kiefel J at para 119).

Hence, *Betfair 2* reinforces that a discriminatory impact must be a protectionist impact in order for a breach of s 92 to arise. A protectionist impact is one which reduces or is likely to reduce the competitiveness of interstate trade. Not all discriminatory impacts are, therefore, relevant impacts. Any adverse impact on low margin operators like Betfair, compared to higher margin operators, was not a relevant adverse impact.[19]

As noted at [11.65], Betfair's argument also failed because it had not established discrimination against interstate trade as opposed to (possible) discrimination against it as one interstate trader. Indeed, the High Court dwelt on this point more than on the one highlighted directly above. Perhaps Betfair might have won the case had there been evidence that interstate traders generally ran as low margin operators while intrastate traders did not. Nevertheless, *Betfair 2* indicates that the regulation would have survived, because a discriminatory impact on interstate profits would not necessarily translate into an impact on interstate competitiveness. The latter is a protectionist effect but the former is not.

17 *Betfair v Racing NSW* [2012] HCA 12 at para 26.

18 See French CJ, Gummow, Hayne, Crennan and Bell JJ at para 56.

19 See French CJ, Gummow, Hayne, Crennan and Bell JJ at para 55. That is not to say that Betfair managed to establish discrimination had occurred at all. There was no need to decide if it had, as such discrimination was ultimately irrelevant to the question of constitutionality under s 92.

Export restrictions and section 92

[11.50] Interstate trade comes in two forms: importation and exportation. At first glance, a discriminatory burden imposed solely on exports appears to hurt local industries, as their entry into external markets is restricted while external industries remain free to enter the local market. In that sense, export restrictions appear to be anathema to the notion of protectionism. Can export restrictions ever breach s 92?

Export restrictions may arise under marketing schemes. Compulsory marketing or pooling schemes, whereby agricultural products have to be sold through a central board, have been a popular method of regulating and stabilising agricultural costs and prices in Australia, particularly for grains such as wheat. Such statutorily mandated marketing boards often arranged marketing, established grades, classes or descriptions, and fixed the terms and conditions of payment for the particular commodity, including prohibition on private sales of the commodity. The legislation regulating such marketing regimes was often challenged, pre-*Cole*, for breach of s 92. The potential for that breach arose whenever a marketing scheme touched upon interstate trade and commerce, particularly under the individual rights test, where the existence of protectionist effects was irrelevant.[20]

In *Barley Marketing Board v Norman* (1990) 171 CLR 182, the *Marketing of Primary Products Act 1983* (NSW) came under scrutiny. It operated so as to vest all the barley grown in New South Wales in that State's Barley Marketing Board. The Board had power to market, grade and sell all of the State's barley, and maximise returns to the New South Wales growers. The scheme dictated that any contracts for sale of barley that were made directly with a New South Wales grower would be void, so all sales of the commodity were prohibited except through the Marketing Board regime. Norman, a New South Wales barley grower, sought to sell barley direct to a Victorian maltster. The Board sought to have the contracts voided, pursuant to the legislation. Norman claimed that the legislation breached s 92 due to the consequent burden on interstate (export) trade of New South Wales barley.

The High Court held, in a unanimous judgment, that the scheme did not infringe s 92, as the Act treated all purchasers of barley the same. The Act did not impose any greater burden on interstate buyers as opposed to New South Wales buyers: all had to purchase New South Wales barley from the Board. The Court did go on, however, to state that laws which discriminate against exports can, depending on the facts, create protectionist effects. The Court stated (at 204):

> If a State having a scarce resource or the most inexpensive supplies of a raw material needed for a manufacturing operation prohibited the export of material from that resource or those supplies in order to confer a benefit on its domestic manufacturers as against their out-of-state competitors, that prohibition would discriminate against interstate trade and commerce in a protectionist sense.

So for instance where one State has a rare or especially cheap commodity and prohibits or restricts its export to other States, without imposing similarly detrimental restrictions on sales of the commodity within that State, a breach of s 92 will be found. The protectionism would arise with regard to industries that were

20 See for example, *Clarke King v Australian Wheat Board* (1978) 140 CLR 120 and *Uebergang v Australian Wheat Board* (1980) 145 CLR 266.

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dependent on that restricted commodity, rather than with regard to the trade in the restricted commodity. As the Court stated in obiter (at 204-205):

> Plainly enough, the mischief at which the section [92] is directed embraces discrimination against out-of-State producers and traders achieved by restrictions upon commodities or services upon which those producers and traders rely in competing with in-State producers and traders in trade or commerce of the same kind. But [*Cole v Whitfield*] should not be understood as holding that such discrimination cannot occur where the commodities or services upon which a restriction is imposed are not the particular commodities or services which are affected by discrimination. In such a case, the relevant discrimination is to be found by comparison between in-State trade or commerce and out-of-State trade or commerce of the same kind, the restrictions imposed on commodities or services which result in differential treatment of in-State and out-of-State trade or commerce being the means by which that discrimination is created.

The principle can be illustrated by way of example. Suppose the marketing scheme in *Norman* had discriminated against the export of barley compared to the intrastate trade in Barley. Suppose also that New South Wales was the only barley-producing State. The export restriction would not have the effect of protecting the New South Wales barley industry from interstate competition. First, on these hypothetical facts there is no interstate competition. Secondly, the markets for the New South Wales barley industry are being restricted, which is not a protectionist effect. However, the barley export restrictions would protect New South Wales industries that were dependent on barley, such as maltsters, as interstate maltsters would be deprived of an essential ingredient for their products. Thus, the law would breach s 92.

The analytical process regarding s 92 is more complex when the interstate restrictions at issue concern exports rather than imports. Discriminatory export restrictions have not yet been directly examined by the High Court in the post-*Cole* era, although the impact of the *Betfair 1* case should be considered (see [11.60]).

Proportionate regulation as an exception

[11.55] In *Cole*, the Court recognised that sometimes protectionist burdens can be legitimate and not violate s 92. That can be the case where the purpose of the legislation is to secure some legitimate non-protectionist objective and any discriminatory burdens on interstate trade are incidental and not disproportionate to achieving that legitimate objective. *Castlemaine Tooheys v South Australia* (1990) 169 CLR 436 illustrates this proposition.

The plaintiffs were part of the Bond Brewing group, which produced packaged beer in Queensland, New South Wales and Western Australia, and sold it throughout Australia. Bond claimed that the substantive effect of the *Beverage Container Act 1975* (SA) constituted discrimination against its trade and commerce in favour of South Australian manufacturers of packaged beer, contrary to s 92.

Bond sold beer in non-refillable bottles, while the South Australian-produced beer was sold mostly in refillable bottles. At a time when the Bond group set out to increase its market share, amendments were made to the Act. First, retailers were obliged to refund 15 cents to consumers on each non-refillable bottle. They were only obliged to refund 4 cents on each refillable bottle. Secondly, the amendments required that retailers who sold beer in non-refillable bottles had to accept returns

of any of those bottles from anyone, even if the person was not the consumer or purchaser of the beer. Meanwhile, retailers of beer in refillable bottles were exempted from accepting returns and providing refunds. The refillable bottles could be taken to designated collection points, where refunds were provided. The collection depots did not accept returns of non-refillable bottles, and gave no refunds for those types of bottles.

Bond asserted that the Act rendered their product less competitive in the South Australian market. The sale of beer in non-refillable bottles became disadvantageous to South Australian beer retailers. This was because the non-refillable bottled beer was more expensive (because the larger compulsory refund was built into the price) than the refillable bottled beer, and because the returns system for non-refillable bottles imposed logistical burdens on retailers. Bond submitted that the commercial result of the refund and returns systems was to discourage retailers from stocking beer in non-refillable bottles. Therefore, the practical effect of the amendments to the *Beverage Container Act 1975* was to prevent Bond from obtaining a natural market share of the packaged beer market so long as it used non-refillable bottles. It was further shown that it was uneconomical for Bond to alter its existing interstate bottling plants to use refillable bottles. So, Bond argued, the law discriminated against its interstate trade in beer, and conferred a protectionist advantage on the South Australian packaged beer market.

South Australia conceded that its system treated some traders differently from others, but submitted that the difference was based upon the type of bottles they used, not on whether they were an interstate trader or not. They further argued that the real purpose of the Act and regulations was to promote litter control, and to conserve the State's finite energy resources. Non-refillable bottles necessitated the consumption of more energy as the bottles had to be melted down and remoulded in order to be reused, unlike refillable bottles. So the defendant argued that the objective of the Act was not to protect the South Australian market in packaged beer but the legitimate, non-protectionist objective of protecting the environment and conserving resources.

The law did not on its face discriminate between South Australian and interstate beer manufacturers. Indeed, another interstate trader from Victoria, CUB, suffered no disadvantage under the Act as it sold its beer in South Australia in refillable bottles. Nevertheless, the High Court found that the practical effect of the law was to give South Australian brewers a competitive or market advantage over Bond, so there was a prima facie breach of s 92. This issue is discussed further at [11.65].

The Court then turned to whether the discriminatory protectionist effect of the law was "saved", in that it constituted proportionate regulation. The majority (Mason CJ, Brennan, Deane, Dawson and Toohey JJ) explained this exception (at 472-473, Gaudron and McHugh JJ did not disagree):

> In determining what is relevantly discriminatory in the context of s 92, we must take account of the fundamental consideration that, subject to the Constitution, the legislature of a State has power to enact legislation for the well-being of the people of that State. In that context, the freedom from discriminatory burdens of a protectionist kind postulated by s 92 does not deny to the legislature of a State power to enact legislation for the well-being of the people of that State unless the legislation is relevantly discriminatory.

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