# The premise of inconsistency: Section 109

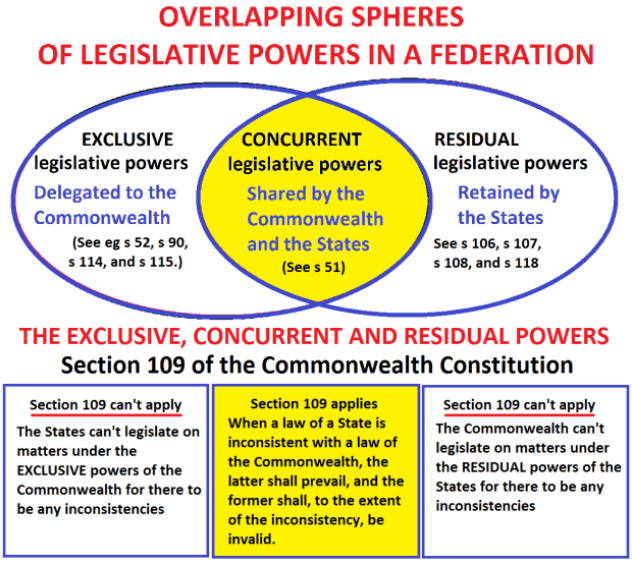
Section 109 of the *Commonwealth Constitution* provides:

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

The purpose of this provision was to clarify that in situations where both the States and the Commonwealth can legislate regarding a certain subject, Commonwealth laws will prevail to the extent of any inconsistency.

This is an important point to initially note, as the provision cannot apply to the EXCLUSIVE legislative powers delegated to the Commonwealth, (as the States have no constitutional source of power to legislate in this area in order for an inconsistency to arise in the first place), nor can it apply to the RESIDUAL legislative powers retained by the States, (as the Commonwealth has no constitutional source of power to legislate in this area in order for an inconsistency to arise in the first place). In such situations, the laws would be ultra-vires, (beyond power) as opposed to inconsistent.

It can only apply to laws made under the CONCURRENT legislative powers, where both the States and the Commonwealth can legislate, and therefore an inconsistency may possibly arise.




See ***Corica v Shire Of Mundaring [2016] WASC 356***:

> *"Section 109 deals with any conflicts between Commonwealth and State laws made in the exercise of concurrent legislative power by providing that, if a Commonwealth law and a State law are inconsistent, the former prevails and the latter is inoperative to the extent of any inconsistency."*

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***Parliament's Development of Federalism***; Professor Brian Galligan:

> Borrowing largely from the American model, the founders adopted a federal system that divided the powers of government between the national or Commonwealth sphere, and the sub-national or State sphere. The National Government was given defined powers-either exclusive or concurrent-whereas the States retained the residual. Where there is overlap, Commonwealth laws prevail to the extent of any inconsistency. By adopting a written Constitution, notions of parliamentary sovereignty were confined by the terms of the Constitution itself. Unlike Westminster, the Commonwealth Parliament is not supreme. Rather the people have sovereign authority over the constitutional system and participate as citizens in two spheres of government. One sphere is national and the other State-based.
>
> Support for a federal rather than a unitary constitution was unanimous amongst the delegates to the 1891 and 1897-1898 Conventions. Labor provided some support for a unitary model but the party itself was not sufficiently established as a force at the national level to influence either the Convention Debates or to shape the federal model in the very early years of the Commonwealth. The appeal of the federal model was that it enabled the creation of a new sphere of national governance while preserving the established colonial systems of self-government including local government.

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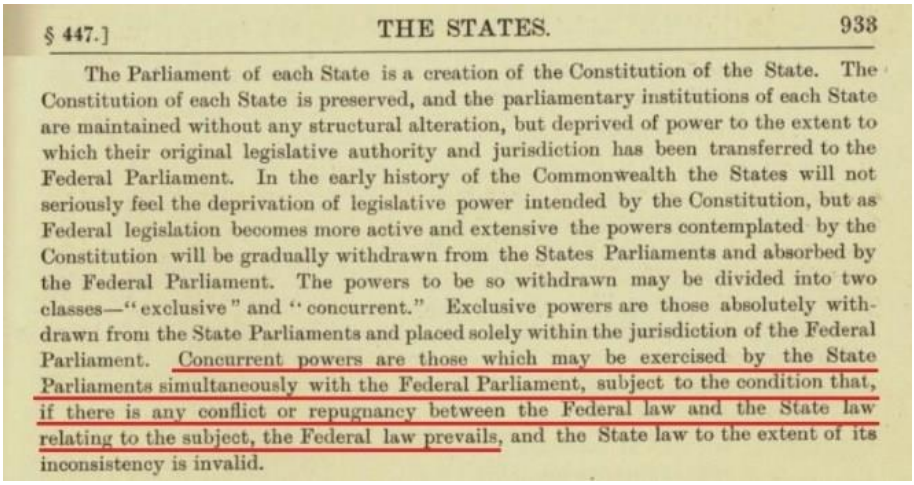
The authority of these Residual Powers creates a problem for those who attempt to apply a few different pseudo legal theories, that are inevitably overruled on this one point, and therefore never succeed in appeals. One example would be disregarding Local Government because they are not recognised in the *Commonwealth Constitution*, and another, claiming inconsistency under section 109 regarding State Roads and Traffic legislation, both of which are, in terms of the *Constitution*, among the Residual Powers of the state. The Commonwealth doesn't even have the power to legislate in respect of these matters, it would be ultra vires.

As Robert Garran points out on ***page 933*** of *The annotated constitution of the Australian Commonwealth:*

> *"The powers to be so withdrawn may be divided into two classes—"exclusive" and "concurrent." Exclusive powers are those absolutely withdrawn from the State Parliaments and placed solely within the jurisdiction of the Federal Parliament. Concurrent powers are those which may be exercised by the State Parliaments simultaneously with the Federal Parliament, subject to the condition that, if there is any conflict or repugnancy between the Federal law and the State law relating to the subject, the Federal law prevails, and the State law to the extent of its inconsistency is invalid."*

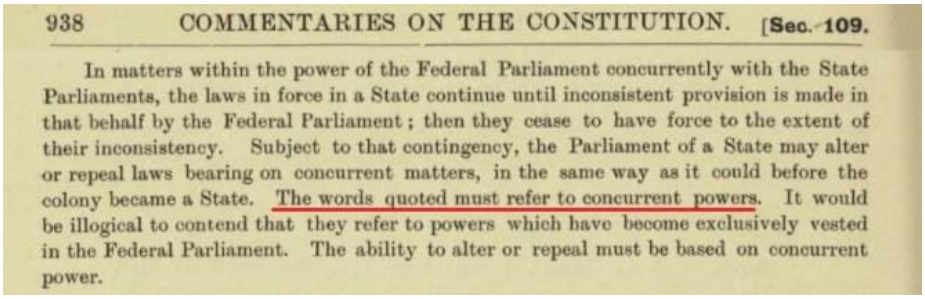


§ 447.] THE STATES. 933

The Parliament of each State is a creation of the Constitution of the State. The Constitution of each State is preserved, and the parliamentary institutions of each State are maintained without any structural alteration, but deprived of power to the extent to which their original legislative authority and jurisdiction has been transferred to the Federal Parliament. In the early history of the Commonwealth the States will not seriously feel the deprivation of legislative power intended by the Constitution, but as Federal legislation becomes more active and extensive the powers contemplated by the Constitution will be gradually withdrawn from the States Parliaments and absorbed by the Federal Parliament. The powers to be so withdrawn may be divided into two classes—"exclusive" and "concurrent." Exclusive powers are those absolutely withdrawn from the State Parliaments and placed solely within the jurisdiction of the Federal Parliament. Concurrent powers are those which may be exercised by the State Parliaments simultaneously with the Federal Parliament, subject to the condition that, if there is any conflict or repugnancy between the Federal law and the State law relating to the subject, the Federal law prevails, and the State law to the extent of its inconsistency is invalid.

On ***page 938*** he states:

> *"The words quoted must refer to concurrent powers. It would be illogical to contend that they refer to powers which have become exclusively vested in the Federal Parliament. The ability to alter or repeal must be based on concurrent power."*

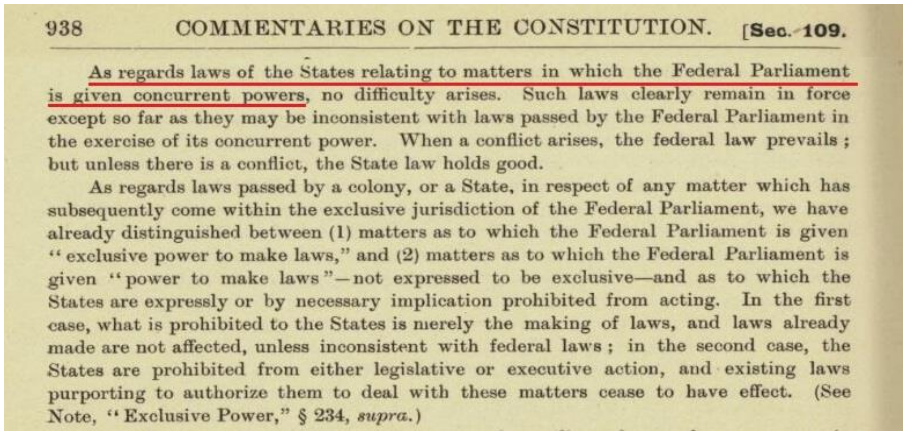


938 COMMENTARIES ON THE CONSTITUTION. [Sec. 109.

In matters within the power of the Federal Parliament concurrently with the State Parliaments, the laws in force in a State continue until inconsistent provision is made in that behalf by the Federal Parliament; then they cease to have force to the extent of their inconsistency. Subject to that contingency, the Parliament of a State may alter or repeal laws bearing on concurrent matters, in the same way as it could before the colony became a State. The words quoted must refer to concurrent powers. It would be illogical to contend that they refer to powers which have become exclusively vested in the Federal Parliament. The ability to alter or repeal must be based on concurrent power.

Also on ***page 938***:

> *"As regards laws of the States relating to matters in which the Federal Parliament is given concurrent powers, no difficulty arises. Such laws clearly remain in force except so far as they may be inconsistent with laws passed by the Federal Parliament in the exercise of its concurrent power. When a conflict arises, the federal law prevails ; but unless there is a conflict, the State law holds good."*



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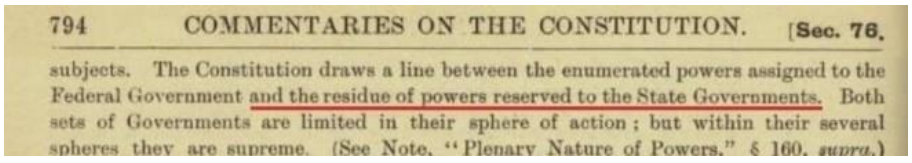
As regards laws passed by a colony, or a State, in respect of any matter which has subsequently come within the exclusive jurisdiction of the Federal Parliament, we have already distinguished between (1) matters as to which the Federal Parliament is given "exclusive power to make laws," and (2) matters as to which the Federal Parliament is given "power to make laws"—not expressed to be exclusive—and as to which the States are expressly or by necessary implication prohibited from acting. In the first case, what is prohibited to the States is merely the making of laws, and laws already made are not affected, unless inconsistent with federal laws; in the second case, the States are prohibited from either legislative or executive action, and existing laws purporting to authorize them to deal with these matters cease to have effect. (See Note, "Exclusive Power," § 234, *supra*.)

On ***page 794*** he states:

> *"The Constitution draws a line between the enumerated powers assigned to the Federal Government and the residue of powers reserved to the State Governments. Both sets of Governments are limited in their sphere of action, but within their several spheres they are supreme."*



794 COMMENTARIES ON THE CONSTITUTION. [Sec. 76.

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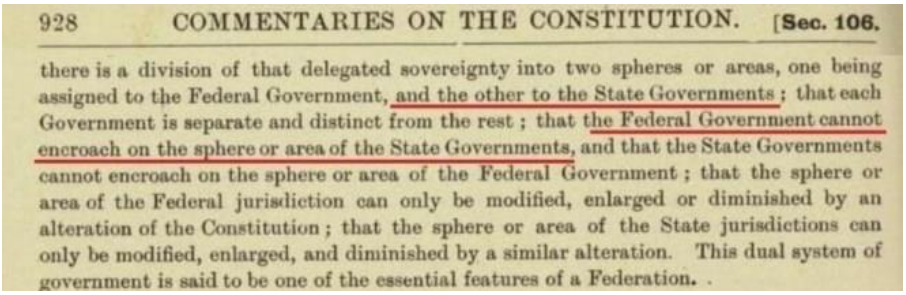
On ***page 928***, he states:

> *"…that in the Constitution there is a division of that delegated sovereignty into two spheres or areas, one being assigned to the Federal Government, and the other to the State Governments ; that each Government is separate and distinct from the rest; that the Federal Government cannot encroach on the sphere or area of the State Governments, and that the State Governments cannot encroach on the sphere or area of the Federal Government; that the sphere or area of the Federal jurisdiction can only be modified, enlarged or diminished by an alteration of the Constitution ; that the sphere or area of the State jurisdictions can only be modified, enlarged, and diminished by a similar alteration. This dual system of government is said to be one of the essential features of a Federation."*



928 COMMENTARIES ON THE CONSTITUTION. [Sec. 106.

there is a division of that delegated sovereignty into two spheres or areas, one being assigned to the Federal Government, and the other to the State Governments ; that each Government is separate and distinct from the rest ; that the Federal Government cannot encroach on the sphere or area of the State Governments, and that the State Governments cannot encroach on the sphere or area of the Federal Government ; that the sphere or area of the Federal jurisdiction can only be modified, enlarged or diminished by an alteration of the Constitution ; that the sphere or area of the State jurisdictions can only be modified, enlarged, and diminished by a similar alteration. This dual system of government is said to be one of the essential features of a Federation. .

Thus, as cited in ***Flaherty v Girgis [1987] HCA 17*** (at 588):

> *"…where both Commonwealth and state legislation confer concurrent or parallel powers in relation to the same matter or thing, an inconsistency may arise in their practical application, which is to be resolved by giving supremacy to the Commonwealth legislation in the particular situation: **Victoria v. The Commonwealth (1937) 58 CLR 618**; **Carter v. Egg and Egg Pulp Marketing Board (Vict.) (1942) 66 CLR 557**, at pp 574-576."*

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This category of inconsistency has attracted the epithet "operational". See ***Commonwealth v Western Australia [1999] HCA 5*** (at 61); and ***AMS v AIF [1999] HCA 26*** (at 37).

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In ***Victoria v The Commonwealth [1937] HCA 82*** (at 630), Dixon J referred to two approaches which might be taken to the question whether an inconsistency might be said to arise between State and Commonwealth laws.

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They were subsequently adopted by the Court in ***Telstra Corporation Ltd v Worthing [1999] HCA 12*** (at 76-77), ***Dickson v The Queen [2010] HCA 30*** (at 502) and ***Jemena Asset Management (3) Pty Ltd v Coinvest Ltd [2011] HCA 33*** (at 524).

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https://freemandelusion.com/wp-content/uploads/2022/03/Jemena-Asset-Management-3-Pty-Ltd-v-Coinvest-Limited-2011-HCA-33.pdf

The test for applying section 109 is set out in the following passage from ***Work Health Authority v Outback Ballooning Pty Ltd (2019) HCA 2*** (at 32-34 per Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), citing Dixon J in ***Victoria v The Commonwealth [1937] HCA 82*** (at 630):

> *"The first approach has regard to when a State law would 'alter, impair or detract from' the operation of the Commonwealth law. This effect is often referred to as a direct inconsistency'. Notions of 'altering', impairing' or 'detracting from' the operation of a Commonwealth law have in common the idea that a State law may be said to conflict with a Commonwealth law if the State law in its operation and effect would undermine the Commonwealth law.*
>
> *The second approach is to consider whether a law of the Commonwealth is to be read as expressing an intention to say 'completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed'. This is usually referred to as an 'indirect inconsistency'. A Commonwealth law which expresses an intention of this kind is said to 'cover the field' or, perhaps more accurately, to 'cover the subject matter' with which it deals. A Commonwealth law of this kind leaves no room for the operation of a State or Territory law dealing with the same subject matter. There can be no question of those laws having a concurrent operation with the Commonwealth law.*
>
> *The question whether a State or Territory law is inconsistent with a Commonwealth law is to be determined as a matter of construction. In a case where it is alleged that a State or Territory law is directly inconsistent with a Commonwealth law it will be necessary to have regard to both laws and their operation. Where an indirect inconsistency is said to arise, the primary focus will be on the Commonwealth law in order to determine whether it is intended to be exhaustive or exclusive with respect to an identified subject matter."*

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In ***Telstra Corporation Limited v Worthing [1999] HCA 12*** (at 27-28) the Court added in relation to these two statements:

> *The second proposition may apply in a given case where the first does not, yet, contrary to the approach taken in the Court of Appeal, if the first proposition applies, then s 109 of the Constitution operates even if, and without the occasion to consider whether, the second proposition applies.*
>
> *"The applicable principles are well settled. Cases still arise where one law requires what the other forbids. It was held in **Wallis v Downard-Pickford (North Queensland) Pty Ltd (1994) 179 CLR 388** [at 398] that a State law which incorporated into certain contracts a term which a law of the Commonwealth forbade was invalid. However, it is clearly established that there may be inconsistency within the meaning of s 109 although it is possible to obey both the Commonwealth*

*law and the State law. [**Viskauskas v Niland (1983) 153 CLR 280** at 291-292.]. Further, there will be what Barwick CJ identified as "direct collision" where the State law, if allowed to operate, would impose an obligation greater than that for which the federal law has provided. [**Blackley v Devondale Cream (Vic) Pty Ltd (1968) 117 CLR 253** at 258-259; see also at 270 per Taylor J, 272 per Menzies J; **Australian Broadcasting Commission v Industrial Court (SA) (1977) 138 CLR 399** at 406; **Dao v Australian Postal Commission (1987) 162 CLR 317** at 335, 338-339.]. Thus, in Australian Mutual Provident Society v Goulden, in a joint judgment, the Court determined the issue before it by stating that the provision of the State law in question "would qualify, impair and, in a significant respect, negate the essential legislative scheme of the Commonwealth Life Insurance Act" [**(1986) 160 CLR 330** at 339.]. A different result obtains if the Commonwealth law operates within the setting of other laws so that it is supplementary to or cumulative upon the State law in question. [**Ex parte McLean (1930) 43 CLR 472** at 483; **Commercial Radio Coffs Harbour v Fuller (1986) 161 CLR 47** at 57-58.] But that is not this case."*

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As recognised in ***R v Winneke; Ex parte Gallagher [1982] HCA 77***; (at 216), the circumstance that federal and state legislation may confer upon different repositories, powers in respect of the same subject matter, will not of itself engage the operation of Section 109. In ***Winneke***, the second qualification was expressed as follows:

> *The words of s. 109 make it plain that it deals only with inconsistency between laws. It does not deal with inconsistency between powers: **O'Sullivan v. Noarlunga Meat Ltd. (1956) 95 CLR 177**, at p 183 . It does not deal directly with inconsistency between executive or judicial acts done under a power conferred by a federal law, on the one hand, and acts of that kind done under a State law, on the other hand. If a federal law validly confers a power which is intended to be exclusive, so that no one else can do the same thing, s. 109 directly operates, with the result that a State law conferring a power to do that thing would be invalid. However the federal law may reveal an intention that although the power which it confers is not exclusive, an exercise of that power will be exclusive; in that event, s. 109 will give paramountcy to the law under which the power is exercised, with the result that State law cannot validly operate once the power has been exercised.*

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A good example of where the Commonwealth has not legislated in regard to a concurrent power to intend it to be exclusive, can be found in ***Glew v Shire of Greenough [2006] WASCA 260*** (from 3, and 27):

> *"Taxation, which is referred to in s 51(ii), is a non-exclusive power, so that both State and Commonwealth Parliaments can pass laws dealing with taxation. However, because of the existence of s 109 of the Commonwealth Constitution, it is possible for the Commonwealth Parliament to give priority to its own taxation law, and/or to impose taxation at a rate such that the practical effect would be that it would not be politically possible for a State to tax the same subject matter. This was the effect achieved in relation to income tax in a case to which the appellants refer, South Australia v The Commonwealth (1942) 65 CLR 373. In other areas of*

*taxation, where the Commonwealth has not legislated, it remains both politically and practically possible for the States to impose taxation; an example of such a tax would be land tax."*

*"As I have pointed out, the taxation power is not one which is exclusive to the Commonwealth, but one which is concurrent, so that laws imposing taxation can be passed by both State and Federal Parliaments. Further, s 109 renders invalid or inoperative only State laws which are inconsistent with relevant Commonwealth law. There is no Commonwealth law relevant to local council rates, since the Commonwealth has not enacted legislation "covering the field" of rates on land."*

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I should also mention the observation by Gummow J in ***APLA Ltd v Legal Services Commissioner of New South Wales [2005] HCA 44*** (at 205-206) concerning the first of Dixon J's statements:

*"In* **Australian Mutual Provident Society v Goulden (1986) 160 CLR 330** *at 337, the Court stated: "In the words of Dixon J in* ***Victoria v The Commonwealth (1937) 58 CLR 618*** *at 630, it 'would alter, impair or detract from' the Commonwealth scheme of regulation established by the [Life Insurance Act 1945 (Cth)] if a registered life insurance company was effectively precluded by the legislation of a State from classifying different risks differently, from setting different premiums for different risks or from refusing to insure risks which were outside the class of risk in respect of which it wished to offer insurance." (emphasis added)*

*Against this background, the Commonwealth put a submission more narrowly expressed than that of Victoria and its supporters. The Commonwealth met the plaintiffs' contention that s 109 is engaged if, in the light of the practical operation of the State law, there is anything more than a de minimis impairment of the enjoyment of a federal right by saying that the question is always one of fact and degree. This approach should be adopted. The starting point in the resolution of any assertion that Section 109 of the Constitution is engaged is the construction of the laws said to be inconsistent. It is only an inconsistency disclosed by the proper construction of each of those laws that will operate to invalidate the relevant State law."*

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And also the observations of Gleeson CJ AND Gaudron J. in ***Commonwealth v Western Australia [1999] HCA 5*** (from 61):

*"Section 109 of the Constitution operates to render a State law inoperative only to the extent of its inconsistency with a law of the Commonwealth and only for so long as the inconsistency remains. (****Western Australia v The Commonwealth (Native Title Act Case) (1995) 183 CLR 373*** *at 465 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.) Although there may be "operational inconsistency" between the Mining Act and the Defence Regulations in the event and to the extent that authority is conferred pursuant to the former to enter upon or engage in activities on land in the perimeter area at a time when a defence operation or practice is*

*authorised underreg 51(1) of the Defence Regulations, that situation has not yet arisen. Thus, at the present time, there is no inconsistency between the Mining Act and the Defence Regulations.*

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