

# MANUFACTURED INCONSISTENCY

NICOLAS DOUR\* AND GREG TAYLOR\*\*

*Manufactured inconsistency under s 109 of the Constitution has had little attention devoted to it. This article undertakes a detailed consideration of manufactured inconsistency in two important respects. First, the principle of manufactured inconsistency is analysed in order to derive a definitional understanding of the term beyond the vague description that the Commonwealth may not ‘create’, ‘fabricate’ or ‘manufacture’ an inconsistency. This article argues that the key to manufactured inconsistency lies in the concept of bad faith in legislating, whereby bad faith is evident where Commonwealth legislation is directed against the states’ capacity to legislate rather than enacted for any reason of policy. The concepts of good faith and bad faith in constitutional law are then analysed in order to identify indicia that might establish manufactured inconsistency. This leads to the conclusion that the actual intention of the Commonwealth is central to determining manufactured inconsistency, and principles of legislative intent and legislative motive are also considered. Second, this article considers whether there is any basis for implying such a doctrine into constitutional law under the requirements set out in Lange v Australian Broadcasting Corporation for drawing implications. While there is limited support for the implication, it is contended that manufactured inconsistency should not develop as a separate body of doctrine, but should instead fall within the Melbourne Corporation principle because manufacturing an inconsistency with state laws can properly be characterised as destroying the states’ capacity to govern.*

## I INTRODUCTION

[I]t is to be borne at the forefront of consideration that the issue of inconsistency of laws is fundamental to the framework of the system of government for which the *Constitution* provides. Proper formulation and application of constitutional principle cannot yield to considerations of what may be temporarily expedient or convenient. Nor can the wishes of those who promote or support particular legislation be given precedence over the proper application of the *Constitution*.<sup>1</sup>

Australian courts have suggested that the Commonwealth may not ‘manufacture’ an inconsistency in order to take advantage of the legislative primacy conferred upon it by s 109 of the *Constitution*. Most recently, the High Court has said that ‘[a] description of inconsistency as “manufactured” may beg the question’.<sup>2</sup> Is there any such constitutional doctrine as manufactured inconsistency?

\* BCom, LLB (Hons) (Monash).

\*\* Associate Professor, Faculty of Law, Monash University; Honorary Professor, Faculty of Law, University of Marburg, Germany.

1 *Momcilovic v The Queen* (2011) 245 CLR 1, 148–9 [369] (Hayne J) (‘*Momcilovic*’).

2 *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595, 628 [36] (‘*Bayside*’).

The High Court of Australia has applied s 109 in accordance with three different types of inconsistency falling under two categories: direct and indirect inconsistency.<sup>3</sup> The first type of direct inconsistency arises where simultaneous obedience of the Commonwealth and state laws is impossible. This is simply because one law requires something to be done which the other prohibits.<sup>4</sup> The second type, also a case of direct inconsistency, occurs when a state law, significantly and not trivially,<sup>5</sup> alters, impairs or detracts from the operation of a Commonwealth law. To the extent that a state law has this effect, it is invalid.<sup>6</sup> The third type of inconsistency, known as indirect inconsistency, is where the Commonwealth law evinces a legislative intention to ‘cover the field’ and any state law operating in that same field is accordingly invalid.<sup>7</sup> Although the metaphor of ‘covering the field’ has been criticised,<sup>8</sup> it has been adopted by the Commonwealth Parliament in legislation and on this basis will be used throughout this article for convenience.<sup>9</sup> ‘Covering the field’ arises where the Commonwealth Parliament intends its law to be exclusive or exhaustive<sup>10</sup> and the courts, having identified both this intention and the relevant field, find the state law to encroach into this field. In *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation*,<sup>11</sup> it was held that the Commonwealth could validly express an intention to save state laws. Here, the question is whether it can validly do the opposite, and express an intention to oust state laws. The answer is generally yes, but an important question remains: what if there is no genuine attempt to lay down the law applicable to a particular field, but instead a desire to ‘get at’ the states? What if, in other words, an inconsistency is manufactured for that purpose? It will be suggested below that one prominent case does indeed fall into that category.

Discussion about this possibility may be traced back to the dictum of Evatt J in *West v Commissioner of Taxation (New South Wales)*,<sup>12</sup> in which his Honour stated that

- 3 These categories are for convenience only, and should not divert attention from the task of determining whether inconsistency arises. See, eg, *Momcilovic* (2011) 245 CLR 1, 134 [318] (Hayne J).
- 4 Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 5<sup>th</sup> ed, 2010) 333.
- 5 *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508, 525 [41] (‘*Jemena*’); *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61, 76 [27]. It is beyond the scope of this article to evaluate just how ‘significant’ the alteration, impairment or detraction must be.
- 6 *Victoria v Commonwealth* (1937) 58 CLR 618, 630 (Dixon J) (‘*Kakariki Case*’), applied in *Momcilovic* (2011) 245 CLR 1, 116 [261] (Gummow J), 140 [339] (Hayne J), 232–3 [627]–[629] (Crennan and Kiefel JJ); *Jemena* (2011) 244 CLR 508, 524 [39].
- 7 Blackshield and Williams, above n 4, 333.
- 8 There are numerous examples: Gummow J eschewed the phrase ‘cover the field’ because it serves ‘only to confuse what is a matter of statutory interpretation’, is ambiguous and, significantly, was not used in any classical formulation by Dixon J: *Momcilovic* (2011) 245 CLR 1, 116–19 [262]–[265]. See also *Momcilovic* (2011) 245 CLR 1, 189 [475] (Heydon J); Mark Leeming, *Resolving Conflicts of Laws* (Federation Press, 2011) 151–5.
- 9 See, eg, *International Arbitration Act 1974* (Cth) s 21 where the heading to the section is ‘Model law covers the field’ and the provision states ‘[i]f the Model Law applies to an arbitration, the law of a State or Territory relating to arbitration does not apply to that arbitration’.
- 10 *Ex Parte McLean* (1930) 43 CLR 472, 483 (Dixon J).
- 11 (1977) 137 CLR 545.
- 12 (1937) 56 CLR 657, 707 (‘*West*’). Further instances of the doctrine being mentioned may be found in Leeming, above n 8, 171–2.

attempts by the Commonwealth Parliament to manufacture ‘inconsistency’ between its own legislation and that of the States will often be essayed only at the price of making the Commonwealth legislation *ultra vires*.

Leaving aside the qualification his Honour makes (‘often’), developments in characterisation doctrine since the 1930s — in particular, the development of dual characterisation and the conclusion that a statute does not cease to be on one topic simply because it can also be said to be concerned with other topics — make it less likely that such a ready-made answer to the problem of manufactured inconsistency will be available.

Determining whether manufactured inconsistency exists as a doctrine of constitutional law is more of a live issue today than it was in the early half of the 20<sup>th</sup> century, not merely because of developments in characterisation doctrine, but also because of the current approach to the drafting of Commonwealth legislation. Federal statutes increasingly include ‘save or destroy’ provisions. These provisions are designed to specifically control the operation of state laws or to exclude state laws entirely by covering the field and thereby engaging inconsistency through s 109 to render the state laws inoperative.<sup>13</sup> The use of these provisions to control the operation of state laws via paramountcy may conceivably be ‘manufacturing’ an inconsistency beyond what is permitted by s 109. However, the High Court has upheld the validity of these provisions against accusations of manufactured inconsistency<sup>14</sup> and bare attempts to limit state power.<sup>15</sup> These provisions have been upheld as valid because they have been enacted pursuant to a Commonwealth head of power and are construed as a means by which the Commonwealth can manifest its intention to cover the field exclusively and also as a means to assist the Court to identify this intention.<sup>16</sup> Such provisions are normally expressed to:<sup>17</sup>

13 Leeming, above n 8, 157–68, especially 158.

14 Rumble believes that manufactured inconsistency are those provisions which expressly exclude state laws: Gary A Rumble, ‘Manufacturing and Avoiding *Constitution* Section 109 Inconsistency: Law and Practice’ (2010) 38 *Federal Law Review* 445, 448–50. It will be apparent that the definition adopted here conforms to the more usual concept.

15 Gummow J lists extensively (and with approval) the cases which have upheld such legislation: *Momcilovic* (2011) 245 CLR 1, 115–16 [260]. His Honour also explains briefly the historical emergence of the use of these provisions: at 119–21 [266]–[272].

16 The High Court of Australia in *Botany Municipal Council v Federal Airports Corporation* (1992) 175 CLR 453, 465 (‘*Botany*’) said:

There can be no objection to a Commonwealth law on a subject which falls within a head of Commonwealth legislative power providing that a person is authorized to undertake an activity despite a State law prohibiting, restricting, qualifying or regulating that activity. Indeed, unless the law expresses itself directly in that way, there is the possibility that it may not be understood as manifesting an intention to occupy the relevant field to the exclusion of State law.

See also *Wenn v A-G (Vic)* (1948) 77 CLR 84, 110 (Latham CJ) (‘*Wenn*’); *Australian Coastal Shipping Commission v O’Reilly* (1962) 107 CLR 46, 56–7 (Dixon CJ), quoted with approval in *Bayside* (2004) 216 CLR 595, 627 [35] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ), 644 [91] (McHugh J); *Momcilovic* (2011) 245 CLR 1, 131 [306] (Hayne J); P H Lane, *A Manual of Australian Constitutional Law* (Law Book, 6<sup>th</sup> ed, 1995) 366, citing *Gerhardy v Brown* (1985) 159 CLR 70, 81, 121.

17 The Court’s analysis is normally considered in the context of ‘covering the field’ inconsistency in order to determine the field the Commonwealth wishes to define, its boundaries and whether it has left room for state action.

- make the Commonwealth Act apply to the exclusion of all specified types of state or territory laws;<sup>18</sup>
- authorise conduct in spite of a law, or a provision of a law, of a state;<sup>19</sup>
- deprive a state or territory law of effect to the extent to which the law discriminates against a specified person, conduct, corporation or Commonwealth instrumentality;<sup>20</sup> or
- cover the field to the exclusion of state laws.<sup>21</sup>

As can be seen, these provisions raise the issue of the extent of Commonwealth and state legislative power. Accordingly, a proper consideration of manufactured inconsistency is necessary due to these provisions regularly raising the constitutional issue of the legislative extent to which the Commonwealth may use s 109 to achieve a desired result in relation to state legislative action.

## II NATURE OF MANUFACTURED INCONSISTENCY

### A Past Attempts at Definition

There has been little analysis devoted to a definitional understanding of manufactured inconsistency. It is helpful to consider past descriptions in order to identify issues and exclude certain explanations so that a suitable explanation can be narrowed down. Most explanations, however, simply mention the standard reference to Evatt J and his Honour's injunction against manufactured inconsistency, followed perhaps by a cursory analysis of what it is and normally (but not always) a conclusion that it does not apply or exist.<sup>22</sup> The problem with this approach is that it is not useful to say that 'manufactured inconsistency' does not apply or exist, but nonetheless remain unclear about what 'manufactured inconsistency' is. How do we know when to apply or reject 'manufactured inconsistency' if we cannot identify it? For example, Lane says 'the Commonwealth may attempt to manufacture or fabricate inconsistency by overreaching its limited catalogue of enumerated specific powers'.<sup>23</sup> Similarly, Lumb and Moens say:

18 See, eg, *Workplace Relations Act 1996* (Cth) s 16(1) in dispute in *New South Wales v Commonwealth* (2006) 229 CLR 1 ('*Work Choices*'); *Tertiary Education Quality and Standards Agency Act 2011* (Cth) s 9 where the heading is 'Act excludes State and Territory higher education laws' and the section provides exemptions to certain entities from complying with state or territory laws specified in the Act or its regulations.

19 See, eg, reg 9(2) of the *Federal Airports Corporation Regulations*, pursuant to s 74 of the *Federal Airports Corporation Act 1986* (Cth) in dispute in *Botany* (1992) 175 CLR 453.

20 See, eg, *Telecommunications Act 1997* (Cth) sch 3 div 8 cl 44(1) in dispute in *Bayside* (2004) 216 CLR 595.

21 See, eg, *International Arbitration Act 1974* (Cth) s 21.

22 See, eg, Leeming, above n 8, 171; LexisNexis, *Halsbury's Laws of Australia* (at June 2011) 90 Constitutional Law, '3 Legislative Powers' [90-2030] n 2.

23 Lane, above n 16, 366.

the Commonwealth cannot give its legislation an operation outside the limits of its power by ‘manufacturing’ an inconsistency with legislation enacted by a State under its residuary power ...<sup>24</sup>

Although based upon Evatt J’s original dictum, these explanations are not particularly helpful in describing manufactured inconsistency because the proposition that the Commonwealth cannot give its legislation an ‘operation outside the limits of a head of power’ or ‘beyond its enumerated power’ is simply another way of saying that a Commonwealth law must be supported by a head of power. Yet s 109 applies only in respect of *validly* enacted laws of the Commonwealth and state laws.<sup>25</sup> That is, s 109 applies in respect of Commonwealth laws supported by a head of power. Indeed, in later editions of Lumb and Moens’ commentary, the reference to manufactured inconsistency has been removed.<sup>26</sup>

The most striking example of a shallow discussion about manufactured inconsistency is provided by *Halsbury’s Laws of Australia*, which cites, without explanation,<sup>27</sup> the case of *Australian Coastal Shipping Commission v O’Reilly* as authority for a common law rejection of the doctrine of manufactured inconsistency.<sup>28</sup> In that case, the High Court held that the Commonwealth could validly exempt a trading corporation owned by it from state taxes, and two of their Honours doubted Evatt J’s dictum about manufactured inconsistency.<sup>29</sup> On this basis, Rumble believes that the Commonwealth may manufacture an inconsistency because the High Court, starting with *Australian Coastal Shipping Commission*, has upheld the ability of the Commonwealth to expressly exclude the operation of state laws via a ‘save or destroy’ provision. In Rumble’s opinion, the mere use of a ‘save or destroy’ provision to exclude state laws constitutes manufactured inconsistency.<sup>30</sup>

However, *Australian Coastal Shipping Commission* was not a case of manufactured inconsistency at all. The mere fact that the Commonwealth displaces state laws expressly does not mean that an inconsistency is manufactured where it does not really exist. There must be something more than an express statement of a conclusion that we might otherwise reach, even without the explicit legislative declaration that s 109 is engaged. We shall now show that this ‘something more’

24 R D Lumb and G A Moens, *The Constitution of the Commonwealth of Australia Annotated* (Butterworths, 5<sup>th</sup> ed, 1995) 523.

25 *Momcilovic* (2011) 245 CLR 1, 143 [348] (Hayne J).

26 Gabriel A Moens and John Trone, *Lumb & Moens’ The Constitution of the Commonwealth of Australia Annotated* (Butterworths, 6<sup>th</sup> ed, 2001) 359. The case of *Airlines of New South Wales Pty Ltd v New South Wales [No 2]* (1965) 113 CLR 54 is instead used for the proposition that: ‘it is only a valid Commonwealth law which prevails over a State law. If the Commonwealth statute is held to be outside the constitutional limits of the Commonwealth Parliament, no question of inconsistency can arise’. This statement seems to confirm our interpretation of their definition of manufactured inconsistency.

27 *Halsbury’s Laws of Australia*, above n 22, [90–2030] n 2.

28 (1962) 107 CLR 46 (*‘Australian Coastal Shipping Commission’*).

29 *Ibid* 63–4 (Menzies J), 71 (Owen J).

30 Since these provisions have been upheld he concludes that means the Commonwealth can manufacture an inconsistency: Rumble, ‘Manufacturing and Avoiding *Constitution* Section 109 Inconsistency’, above n 14, 448–50.

is bad faith: the misuse of s 109 for purposes other than those for which it was intended.

## **B Bad Faith as the Key**

Manufactured inconsistency is an offence of intention. This emerges from a number of cases to be considered in this section, but most clearly in the 2004 case of *Bayside*.<sup>31</sup> In that case, five Justices of the High Court extracted the following passage from Dixon J's judgment in *Wenn*:

There is no doubt great difficulty in satisfactorily defining the limits of the power to legislate upon a subject exhaustively so that s 109 will of its own force make inoperative State legislation which otherwise would add liabilities, duties, immunities, liberties, powers or rights to those which the Federal law had decided to be sufficient. But within such limits an enactment does not seem to me to be open to the objection that it is not legislation with respect to the Federal subject matter but with respect to the exercise of State legislative powers or that it trenches upon State functions. Beyond those limits no doubt there lies a debatable area where Federal laws may be found that seem to be aimed rather at preventing State legislative action than dealing with a subject matter assigned to the Commonwealth Parliament.<sup>32</sup>

In *Bayside*, their Honours added that it was not necessary to consider the 'debatable area' in the case currently before the Court.<sup>33</sup> However, the word 'aim' requires an examination not merely of the words of the statute, but also of Parliament's intention, in order to determine the nature of the legislation's purpose when it was enacted.

A red herring should be disposed of first. Manufactured inconsistency is sometimes referred to as 'a bare attempt on State power' and as prohibiting the Commonwealth from 'effectuat[ing] a bare exclusion of State law'.<sup>34</sup> Manufactured inconsistency and a bare attempt on state power are sometimes treated as separate principles.<sup>35</sup> However, both seek to protect the states in the same way from the same thing, and any subtle differences collapse into the same test (of intention and purpose) when the principle is to be applied. The quotation reproduced from the judgment of Dixon J in *Wenn* shows this point also, for immediately beforehand his Honour was speaking of the idea of bare attempts on state power. In *Bayside* itself, where the quotation was reproduced, their Honours however spoke only of manufactured inconsistency. When manufactured inconsistency is understood

31 (2004) 216 CLR 595.

32 *Bayside* (2004) 216 CLR 595, 628 [36], citing *Wenn* (1948) 77 CLR 84, 120 (Dixon J). According to Blackshield and Williams, neither Latham CJ nor Dixon J excluded the possibility of the existence of manufactured inconsistency in this case: Blackshield and Williams, above n 4, 349.

33 *Bayside* (2004) 216 CLR 595, 628–9 [37].

34 *Work Choices* (2006) 229 CLR 1, 166 [368]. See also *Lamshed v Lake* (1958) 99 CLR 132, 147–8 (Dixon J).

35 Leeming, above n 8, 171–2; *Work Choices* (2006) 229 CLR 1, 165–7.

as including an element of bad faith, the term can be used synonymously with a ‘bare attempt on State power’.

In fact, it may sometimes be desirable that the Commonwealth should have the ability to manufacture inconsistency in good faith by a law passed solely to eliminate state laws. The *Human Rights (Sexual Conduct) Act 1994* (Cth) upheld in *Croome v Tasmania* comes to mind because of the human rights complaint that the Tasmanian law engendered.<sup>36</sup> Here it was quite legitimate, both legally and in policy terms, to bring about an absence of law on the topic in question by enacting the provision that ‘[s]exual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the *International Covenant on Civil and Political Rights*’.<sup>37</sup> Although this provision was enacted with the single purpose of ‘knocking out’ state legislation, the law was not a bare attempt on state power, because of the good faith in which it was enacted which arose from a legitimate policy choice according to the Federal Government.

This example also shows that, without a test in the nature of bad faith, such a principle would ostensibly result in all legislative vacuums amounting to a bare attempt on state power because a vacuum is the absence of all law in an area. However, a vacuum is not invalid per se. This can best be explained by looking at the intention of Parliament when enacting the legislation that creates the vacuum, and determining whether this legislation taints the vacuum’s validity. Does the Commonwealth believe that an area should be unregulated (or the common law applying to it to remain in force unchanged), or does it rather intend merely to prevent the states from legislating?

It has also recently been said in the High Court that

[i]nconsistency between a State law and a federal law does not spring from the political motives of the respective law-making authorities. Section 109 is concerned with inconsistency of laws, not inconsistency of political opinion.<sup>38</sup>

Thus, there must be something objectionable, legally and not politically, about the purpose of the Commonwealth Parliament’s enactment of legislation. If the law is to retain its reputation for enforcing neutral principles, which are needed above all in interpreting an instrument that gives the power to make laws, it cannot express a preference between competing policies, but may object only to laws which have been enacted for no policy reason at all beyond a desire to ‘get at’ the states — instruments of government established by the *Constitution* itself. The powers granted in s 51 are granted for the purpose of legislating — the section is quite neutral about the principles Parliament might adopt and pursue. Although

36 (1997) 191 CLR 119.

37 *Human Rights (Sexual Conduct) Act 1994* (Cth) s 4(1).

38 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 355 [45] (Gleeson CJ and Heydon J), quoted in *A-G (Vic) v Andrews* (2007) 230 CLR 369, 408 [86] (Gummow, Hayne, Heydon and Crennan JJ).

the example of *Croome* has just been given, whether we might find the policy rationale of the law praiseworthy has nothing to do with the case; it is merely necessary that there should be such a substantive policy. Thus, bad faith consists in using the powers in s 51 not for the purpose of legislating in pursuit of a particular policy, but solely for the prevention of other legislation.

Another example is the *Euthanasia Laws Act 1997* (Cth), which was passed to repeal the *Rights of the Terminally Ill Act 1995* (NT). The earlier Act made euthanasia lawful in the Northern Territory. For the sake of argument, we could assume that a state had enacted this legislation. For the purposes of s 109, the federal law was not objectionable. Here the Commonwealth believed that legalising euthanasia was not in the best interests of Australia and legislated accordingly. The Commonwealth's decision to override a democratically elected legislature may not be desirable in a federal compact, but it is not an abuse of the power: rather, it called upon s 109 for the very purpose for which it was designed. The Commonwealth law gave effect to genuinely held views about the desirable state of the law.

Furthermore, in *Momcilovic*, several members of the High Court reaffirmed the general proposition that the Commonwealth can decide to leave certain aspects free of regulation and it would be inconsistent for the states to legislate in these areas the Commonwealth had 'designedly left' free.<sup>39</sup>

### C Direct Inconsistency

In direct inconsistency cases, bad faith can be indicated by the Commonwealth Parliament's distrust in how the states will exercise their legislative powers, matched with its attempt to block undesired state legislation pre-emptively or otherwise oust current state legislative enactments. An example of bad faith in the former sense is provided by *Western Australia v Commonwealth*,<sup>40</sup> which will be explained below. In the context of indirect inconsistency, bad faith can be indicated by the expression that the field is covered to the exclusion of state laws when in fact there are no or very few substantive Commonwealth provisions in respect of that coverage to justify the statement that the Commonwealth has, in fact, covered the field. Similarly, there might also be no indication as to whether the law declines to cover the field.

As a matter of constitutional law, bad faith has been considered most prominently in the external affairs cases. The Commonwealth is seen as acting in bad faith if it enters a treaty 'merely to give colour to an attempt to confer legislative power upon the Commonwealth Parliament'<sup>41</sup> or as a 'device to attract domestic legislative power'.<sup>42</sup> This concept of bad faith is not directly applicable to manufactured inconsistency because s 109 is a question 'not between powers, but between

39 *Momcilovic* (2011) 245 CLR 1, 122 [276], 190 [477], 190 [479], 234 [633], 241 [660].

40 (1995) 183 CLR 373 ('*Native Title Act Case*').

41 *Commonwealth v Tasmania* (1983) 158 CLR 1, 219 (Brennan J) ('*Tasmanian Dams Case*').

42 *Ibid* 259 (Deane J).



laws made under powers'.<sup>43</sup> The bad faith used in external affairs is about the Commonwealth trying to gain legislative power it does not have; the bad faith in manufactured inconsistency is about the exercise of a legislative power which the Commonwealth already possesses.

Apart from this example, bad faith is a concept not usually encountered in other areas of Australian constitutional law. However, bad faith is a general doctrine of constitutional law in other jurisdictions. *Bundestreue* is an unwritten principle inferred from the various structures and relationships created by the constitution, whereby there is 'essentially a relationship of trust between the federation and Länder' such that each 'has a constitutional duty to keep "faith" (*Treue*) with and respect the rightful prerogatives of the other'.<sup>44</sup> This principle of respecting each level of government can be adapted to the Australian context. In direct inconsistency cases, the bad faith (or disrespect) is indicated through distrust by the Commonwealth of how the states will exercise their legislative powers. Expressed in these terms, it may be said that the Australian constitutional system cannot countenance the idea that the Commonwealth will not trust its partners in the federation even to perform the most basic function of government — legislating — through the medium of the highest organs of state constitutional law, the Parliament. Another example of the idea of 'comity' is that between Member States in the international arena, where comity 'extends to the implicit agreement that a state would act in good faith and not spoil its relationship with other states'.<sup>45</sup>

### D Three Opposing Case Studies

This idea of 'distrust' in the political arena can be shown by using the *Native Title Act Case*.<sup>46</sup> The *Native Title Act Case* concerned a challenge to the *Native Title Act 1993* (Cth) ('*NTA*'), which was enacted in response to the High Court decision in *Mabo*.<sup>47</sup> The political background at the time was heated. Initially, the states were hostile to the decision in *Mabo* and indicated that they would legislate to overrule it.<sup>48</sup> At the time, *The Age* reported:

43 *O'Sullivan v Noarlunga Meat Ltd [No 2]* (1956) 94 CLR 367, 374 quoted in *Momcilovic* (2011) 245 CLR 1, 144 [350] (Hayne J).

44 Donald P Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, 3<sup>rd</sup> ed, 2012) 90. The word 'Länder' translates to 'countries', but in the constitutional context refers to the sixteen constituent states of the Federal Republic of Germany.

45 Afshin A-Khavari, 'Blind Spots, Rigid Approaches and Uncertainties: The External Affairs Power and Australian Courts in 2003' [2003] *Australian International Law Journal* 141, 145, referring to the decision of the High Court in *Oates v A-G (Cth)* (2003) 214 CLR 496.

46 (1995) 183 CLR 373.

47 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 ('*Mabo*').

48 One newspaper reported:

Mr Keating was largely supported by Queensland and South Australia in his support for native title, but opposed by Western Australia, Victoria and Tasmania. NSW appeared to stay in the middle initially, while the Northern Territory and ACT kept quiet.

Paul Chamberlin, 'States in Deadlock over *Mabo*', *The Sydney Morning Herald* (Sydney), 9 June 1993, 1.

There were deep and bitter divisions between Mr Keating and a bloc of hard-line premiers comprising Mr Kennett, of Victoria, Western Australia's Mr Court and Mr Croom [of Tasmania]. They wanted, in effect, to legislate the *Mabo* judgment out of existence.<sup>49</sup>

In contrast, the Federal Government was trying to negotiate the implementation of the *NTA* and to protect *Mabo* from state termination.<sup>50</sup> However, the Western Australian Government responded to *Mabo* with legislative intervention. It enacted the *Land (Titles and Traditional Usage) Act 1993* (WA) ('*LTA*'), which purported to extinguish native title in Western Australia and replace it with rights of 'traditional usage'.<sup>51</sup> Victoria also indicated that it might legislate to exclude the operation of *Mabo*,<sup>52</sup> convening a session of Parliament specifically on this issue.<sup>53</sup> Meanwhile, the Commonwealth explicitly stated that it would override any law legislating against *Mabo*.<sup>54</sup> *The Sydney Morning Herald* reported:

The Prime Minister has declared he will legislate to override any State or Territory legislation on *Mabo*, and will not accept any rejection of the High Court's definition of native title ... This causes problems immediately for three States — Victoria, Western Australia and Tasmania — which have not recognised native title, at least in the form identified by the High Court.<sup>55</sup>

Although most states were brought around, more or less, to the Commonwealth's plan, Western Australia continued to disregard the *NTA* and eventually challenged its constitutional validity. In turn, a group of Wororra people challenged the validity of the *LTA*.<sup>56</sup>

In response to the Western Australian legislation and the hostile views expressed by the states, the Commonwealth sought to protect the common law of native title and inserted s 12 into the *NTA* to achieve this. Section 12 of the *NTA* read:

Subject to this Act the common law of Australia in respect of native title has, after 30 June 1993, the force of a law of the Commonwealth.

The High Court held that s 12 was invalid.<sup>57</sup> The Court found that s 12 purported to destroy the state's ability to legislate to override the common law, a move that breached s 107 of the *Constitution*. The finding that s 12 was invalid has been

49 Geoffrey Barker, 'Bitter *Mabo* Clashes', *The Age* (Melbourne), 9 June 1993, 1.

50 *Ibid.*

51 Michael Millet and Geoff Kitney, 'Downer under Fire from All Sides over *Mabo* Plans', *The Sydney Morning Herald* (Sydney), 2 August 1994, 2.

52 Michael Magazanik and Margaret Easterbrook, 'State Libs Split on *Mabo*', *The Age* (Melbourne), 29 November 1993, 1: 'The Opposition's united front on *Mabo* was undermined yesterday, when the Liberal Party's Victorian state council rejected a resolution supporting the concept of native title'.

53 Tom Ormonde and Margaret Easterbrook, 'Kennett Sparks New Row on *Mabo*', *The Age* (Melbourne), 10 July 1993, 1.

54 Paul Chamberlin and Mark Coultan, '*Mabo*: PM Will Override States', *The Sydney Morning Herald* (Sydney), 19 June 1993, 1.

55 *Ibid.*

56 *Native Title Act Case* (1995) 183 CLR 373.

57 *Ibid.* 488.

criticised by legal scholars.<sup>58</sup> Rumble points out that earlier in its judgment, the High Court confirmed the validity of a provision comparable to s 12.<sup>59</sup> Rumble considers that position difficult to reconcile with the invalidity of s 12 seeking to protect the common law as a law of the Commonwealth.

However, a more sophisticated interpretation of the Court's reasoning is possible, explaining the decision more convincingly. The Court held s 12 invalid, but not any other provision, because it did not approve of the distrust evinced by the Commonwealth towards the states in respect of native title at common law. Section 12 was a provision enacted in bad faith with the aim of preventing state legislative action on native title no matter what it might be. Simply put, the Commonwealth did not trust the states to legislate on the topic and wished to exclude the possibility entirely in advance of any knowledge of their prospective legislative positions. Its sole policy in enacting s 12 was to prevent state action of any description. The provision therefore amounted to a misuse of the Commonwealth's own legislative power because it was exercised not for the purpose of legislating, but for the purpose of preventing its constitutional partners in the Australian federation from legislating.

This explanation suggests how to reconcile the contradictions mentioned by Rumble and the uncertainties the case has created over whether the Commonwealth may take the common law, or a particular common law doctrine,<sup>60</sup> in its entirety and purport to invest it with the force of a law of the Commonwealth by referring to it within a legislative instrument. Furthermore, the case would not be the first time that judges were said to have decided a case for different reasons than those expressed in their judgment.<sup>61</sup> Perhaps, however, their Honours could not quite discern the basis for their instinctive reaction to s 12.

One may usefully contrast the *NTA* with s 20(1) sch 2 of the *Competition and Consumer Act 2010* (Cth) (formerly s 51AA of the *Trade Practices Act 1974* (Cth)), which provides:

A person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time.

The Commonwealth enacted this provision with the intention of enabling the broader *Trade Practices Act 1974* (Cth) remedies to be available at common law.<sup>62</sup> Crucially, this intention is different from that behind s 12 of the *NTA*, which was

58 Rumble, 'Manufacturing and Avoiding *Constitution* Section 109 Inconsistency', above n 14, 453–7; Geoffrey Lindell, 'Grappling with Inconsistency between Commonwealth and State Legislation and the Link with Statutory Interpretation' (2005) 8(2) *Constitutional Law and Policy Review* 25, 37–9.

59 Rumble, 'Manufacturing and Avoiding *Constitution* Section 109 Inconsistency', above n 14, 456. Rumble refers to the following passage from the *Native Title Act Case*: 'Section 10(1) [*Racial Discrimination Act 1975* (Cth)] ... protects the enjoyment of traditional interests in land recognised by the common law ... [and] ensures that ... a State law which purports to diminish that security of enjoyment is, by virtue of s 109 of the *Constitution*, inoperative': at 437–8.

60 For example, the common law doctrine of unconscionability, considered further in the article, below.

61 See generally Jeffrey Goldsworthy, 'The Limits of Judicial Fidelity to Law: *The Coxford Lecture*' (2011) 24 *Canadian Journal of Law and Jurisprudence* 305.

62 *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 81–3; Rumble, 'Manufacturing and Avoiding *Constitution* Section 109 Inconsistency', above n 14.

suggested earlier to have been enacted in bad faith. Here, the intention is in good faith because there is some substantive policy lying behind the federal statute; it is not an attempt to kneecap the states. The constitutional validity of s 51AA was upheld at first instance by French J.<sup>63</sup> His Honour also appeared to confine the *Native Title Act Case* to its facts. Carr J, in an unreported judgment, agreed generally with French J.<sup>64</sup>

The analysis presented here attempts to explain why this section is valid, whereas the section considered in the *Native Title Act Case* was not: the difference is bad faith. Section 51AA was enacted not in order to prevent the states from legislating on unconscionable conduct, but rather to make further remedies available for breach of the common law.

The third case study occupies a middle position between these two clear examples. Blackshield and Williams, Lumb and Moens, and Leeming have all suggested that manufactured inconsistency may have been, or indeed was, applied in *Airlines of New South Wales Pty Ltd v New South Wales [No 2]*.<sup>65</sup> The Commonwealth favoured Airlines of NSW Pty Ltd and enacted a scheme for its advantage, while the NSW government enacted a scheme in favour of its preferred airline operator, East-West Airlines Pty Ltd.<sup>66</sup> In *Airlines of New South Wales Pty Ltd v New South Wales*,<sup>67</sup> the High Court of Australia ‘treated [the situation as] a political deadlock which involved no legal inconsistency, and accordingly refused to interfere’.<sup>68</sup> A change of leadership in New South Wales saw the new government enact stronger legislation in favour of East-West Airlines Pty Ltd, and the Commonwealth also reinforced its position. It enacted reg 200B of the *Air Navigation Regulations 1947* (Cth). If valid, reg 200B would have created an inconsistency because it provided authority to the holder of a Commonwealth licence to fly within specified intrastate air routes irrespective of any state law. A unanimous High Court held reg 200B invalid under the Commonwealth powers in respect of trade and commerce, or external affairs.<sup>69</sup> Apart from Kitto J, no member of the Court considered the question dealt with here — the main question was whether the regulation was valid at all under those powers. Kitto J said:

I can see no escape from recognizing that the operation which reg 200B purports to have is, not to protect from State interference a ‘right’ acquired under federal law, but to supplement the grant of an exemption from a

63 *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd [No 2]* (2000) 96 FCR 491. This decision was reversed on other grounds on appeal: *C G Berbatis Holdings Pty Ltd v Australian Competition and Consumer Commission* (2001) 185 ALR 555. A further appeal against the reversal was dismissed: *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51.

64 *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd* [2000] FCA 1725 (29 November 2000) [51].

65 (1965) 113 CLR 54 (‘*Second Airlines Case*’). See Blackshield and Williams, above n 4, 351; Lumb and Moens, above n 24, 523; Leeming, above n 8, 171 n 157.

66 See Blackshield and Williams, above n 4, 350.

67 (1964) 113 CLR 1 (‘*First Airlines Case*’).

68 Blackshield and Williams, above n 4, 350.

69 *Second Airlines Case* (1965) 113 CLR 54, 88, 98 (Barwick CJ), 107 (McTiernan J), 119 (Kitto J), 126–7, 132 (Taylor J), 148 (Menzies J), 155 (Windeyer J), 168 (Owen J).

particular prohibition under federal law by conferring in addition an immunity from any prohibition which State law may impose. The character of the regulation in its application to intra-State operations is therefore not that of a law with respect to a matter within federal power, but is that of a law with respect to the application of State laws — a matter not within federal legislative competence. By no line of reasoning that I have found it possible to accept can reg 200B be supported as valid federal legislation.<sup>70</sup>

Blackshield and Williams believe that Kitto J's conclusion is expressed in a way that 'seems[s] to bear directly on the issue of "manufactured" inconsistency'<sup>71</sup> and Leeming suggests that this is possibly the only example of an application of manufactured inconsistency.<sup>72</sup> Kitto J found that the 'character' of the regulation is not a 'matter within federal power' and is one with 'respect to the application of State laws'. In other words, his Honour disapproved of the Commonwealth's intention to create the inconsistency and decided that the regulation was in fact 'aimed' at preventing state legislative action on air navigation.

This language is couched in terms of characterisation analysis. However, it is suggested that it was bad faith which lies at the bottom of Kitto J's reasoning even if his Honour does not explicitly say so. The bad faith arises not from the Commonwealth's decision to favour Airlines of NSW as such (undesirable though that may have been), but from the decision to go to the lengths of restricting the State's legitimate exercise of its legislative capacity — not merely to authorise, but to make immune.

Nevertheless, the analysis of Kitto J's judgment in these terms does assume that the decision to favour the airline was not wholly a legitimate policy choice that would justify aiming legislation at the State, comparable to the decisions to legalise gay sex in Tasmania, prohibit euthanasia or make more remedies available for unconscionability. If that were so, it may not matter if the federal intention were not ultimately aimed at the states as distinct from the airline, as this would (to borrow the language of criminal law) confuse intention with desire.

In fact, the background to all of this was the Two Airlines Policy: while the government of New South Wales wished to favour a local airline, Airlines of NSW was Ansett by another name and thus the beneficiary of federal policy.<sup>73</sup> Therefore, the Commonwealth did have a valid policy-based reason for what it was doing. It is not relevant that the economic thinking behind the Two Airlines Policy would hardly even be contemplated today. It accordingly seems more likely that the case would now come under the principle that the Commonwealth can indeed confer immunity from state law,<sup>74</sup> as long as it has a head of power

70 Ibid 119.

71 Blackshield and Williams, above n 4, 351.

72 Leeming, above n 8, 171 n 157.

73 The episode is recounted with some wit in Stanley Brogden, *Australia's Two-Airline Policy* (Melbourne University Press, 1968) 160–5.

74 See generally above n 16.

to do so, acts for a legitimate reason beyond a desire to inhibit state legislation (whatever form it may take), and is not merely manufacturing an inconsistency.

### **E Indirect Inconsistency**

In indirect inconsistency cases a good indication of bad faith is when the Commonwealth indicates the field is covered to the exclusion of state laws when in fact there are no (substantive) Commonwealth provisions to justify that statement, or so few that a mere fig leaf is involved. The manufactured inconsistency arises because the coverage of the field is ‘artificial’ or ‘fabricated’ when considered in light of the purported expression that the Commonwealth has ‘covered’ the field.

For example, if the Commonwealth enacted legislation covering postal services with few provisions mostly setting out the purposes and objects of the Act, it would be hard to say that the Commonwealth has covered the field as it purports to have done, provided that the Commonwealth was not trying to leave certain areas of postal conduct ‘designedly free’ of regulation. This observation appeared in the submissions of the Attorneys-General in *Momcilovic*, which was paraphrased by Gummow J as follows:

an express statement of Commonwealth legislative intention ... is effective ... for the purpose[s] of s 109 ... provided only that the statement be supported by a head of federal legislative power *and by the substantive provisions of the federal law in question*.<sup>75</sup>

Of course, the High Court re-emphasised that while legislative intention is an important consideration, it cannot be singularly determinative or conclusive.<sup>76</sup> Moreover, Gummow J did not specifically endorse this argument.<sup>77</sup>

The problem with the indicator of bad faith is that it is easily avoidable: the extent to which the Commonwealth must substantively cover the field is not a difficult onus to satisfy. In *Work Choices*, Western Australia submitted that ‘the Commonwealth had attempted ... to manufacture inconsistency for the purposes of s 109 of the *Constitution* in attempting to take the “covering the field” test beyond what s 109 permits’.<sup>78</sup> Counsel for Western Australia argued that failing to comprehensively regulate a field was both a bare attempt on state power and an attempt to manufacture inconsistency.<sup>79</sup> The High Court rejected both aspects of the submission. Western Australia provided no case law in support of the argument that s 109 will not render a state law invalid ‘*unless* the Commonwealth

<sup>75</sup> *Momcilovic* (2011) 245 CLR 1, 100 [208] (emphasis added) quoting Attorney-General (Vic) et al, ‘Written Submissions of the Second Respondent and of the Attorney-General of the Commonwealth, New South Wales, Western Australia, South Australia, Tasmania and the Australian Capital Territory (Intervening) on Questions 1–3 of the High Court’s Letter Dated 1 March 2001’, Submission in *Momcilovic v The Queen*, M134/2010, 28 March 2011, [9].

<sup>76</sup> See, eg, *Momcilovic* (2011) 245 CLR 1, 131 [307] (Hayne J).

<sup>77</sup> *Momcilovic* (2011) 245 CLR 1, 119–21 [266]–[272] (Gummow J). Gummow J earlier commented that the submission of the Attorneys-General was ‘too broadly framed’: at 100 [208].

<sup>78</sup> (2006) 299 CLR 1, 164 [365].

<sup>79</sup> *Ibid* 164–6.

law provides some regime for regulating *each particular* aspect of the topics dealt with by the State law'.<sup>80</sup> Although there is no way of measuring exactly the minimum level of regulation needed in order to cover the field sufficiently, the test as stated appears to be easily satisfied as long as the Commonwealth can point to *some* provisions within the Act.<sup>81</sup>

In reality, the touchstone is good faith. It may be that, for example, a vacuum is created in perfectly good faith and the Commonwealth does not wish to have provisions on the topic in question. Lindell has suggested that the 'debatable area' for manufactured inconsistency described by Dixon J was to do with the creation of a vacuum.<sup>82</sup> Lindell and Rumble argue that the Commonwealth can legislate to create a vacuum without replacing displaced state laws (in other words, the Commonwealth can exclude state laws on a subject matter without enacting positive laws).<sup>83</sup> This is surely correct, provided that the legislation creating the vacuum is enacted in good faith. The vacuum here is an absence of all law in the area, either at Commonwealth or state level. For example, the Commonwealth may believe that the best regulation for gambling is to withdraw all restrictions on poker machines, covering the field such that the states cannot legislate on the topic. This would not be manufactured inconsistency, as there is nothing *legally* objectionable about the Commonwealth's intention. On the other hand, the legislation considered in the *Native Title Act Case* would be invalid also as an attempt to cover the field and leave no room for the states to supplement the rules set out in *Mabo* without contradicting them: it was a bad faith attempt to cover the field with the rules of the common law transformed into statute, as well as the attempt to set up direct inconsistency with state laws by abolishing native title outright.

The vacuum is objectionable only when it is 'aimed' at preventing state legislative action. In other words, it is objectionable when enacted in bad faith in relation to the states. Thus, Dixon J in *Wenn* said that:

*To legislate upon a subject exhaustively to the intent that the areas of liberty designedly left should not be closed up is, I think, an exercise of legislative authority different in kind from a bare attempt to exclude State concurrent power from a subject the Federal legislature has not effectively dealt with by regulation, control or otherwise ... This is not a case which, in my opinion, falls within the description of legislation so powerfully attacked by Evatt J in West ...*<sup>84</sup>

The test of bad faith is the most helpful. As we have seen, there have been occasions on which it was applied, explicitly or implicitly, to invalidate federal legislation passed for no reason beyond the prevention of state legislation.

80 Ibid 166 [370] (emphasis added).

81 The High Court in *Momcilovic* (2011) 245 CLR 1 and *Jemena* (2011) 244 CLR 508 might have inadvertently reduced the persuasive force of this aspect of *Work Choices* (2006) 299 CLR 1.

82 Lindell, above n 58, 37.

83 Ibid 37–9; Rumble, 'Manufacturing and Avoiding Constitution Section 109 Inconsistency', above n 14, 450–3.

84 *Wenn* (1948) 77 CLR 84, 120 (emphasis added) (citations omitted).

## F Good Faith

It must be accepted that, to some extent, bad faith is not an ideal test. In *Koowarta v Bjelke-Petersen*, Gibbs CJ described the test as a ‘frail shield’.<sup>85</sup> It would indeed be rare for a court to find a ‘speculative’ intent by Parliament without solid evidence to manufacture an inconsistency.<sup>86</sup> To help identify whether the Commonwealth has legislated in bad faith, it may be useful to identify some criteria for when the Commonwealth might be legislating in good faith, because good faith is, at least in international law,<sup>87</sup> accepted as a normative interpretive rule.<sup>88</sup>

According to Professor Corcoran:

Good faith as a principle of interpretation can be defined as involving a finding that the purported intention and conduct of a party or parties is, or is not, appropriate for legal recognition given the factual and legal context ... The last part of the definition referring to the factual and legal context refers to all of the relevant indicia for interpreting any situation that has legal ramifications.<sup>89</sup>

The wider meaning of intent (described in Part II.G below) would assist a court to identify the relevant factual and legal context in order to determine the intention behind the Commonwealth’s enactment.

Professor Corcoran identifies four types of good faith relationships: (1) contractual relationships, (2) relationships based on proximity, (3) fiduciary relationships, and (4) mixed relationships.<sup>90</sup> It is submitted that there is a fifth type of relationship: a good faith relationship between each branch of government. This would extend horizontally — between the three branches of government: the legislature, the judiciary and the executive<sup>91</sup> — as well as vertically, between the Commonwealth and the states (in the *Bundestreue* sense). Perhaps this kind of relationship could

85 (1982) 153 CLR 168, 200.

86 See *Bank of Toronto v Lambe* [1887] 12 App Cas 575, 586: ‘But their Lordships cannot conceive that when the Imperial Parliament conferred wide powers of local self-government on great countries such as Quebec, it intended to limit them on the speculation that they would be used in an injurious manner’ (Lord Hobhouse) (emphasis added), quoted in *Forbes v Attorney-General for Manitoba* [1937] AC 260, 270. See also *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 153; *Work Choices* (2006) 229 CLR 1, 117–18 [187]–[189].

87 See, eg, *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(1).

88 See Suzanne Corcoran, ‘Good Faith as a Principle of Interpretation: What is the Positive Content of Good Faith?’ (2012) 36 *Australian Bar Review* 1, 7–8.

89 *Ibid* 8.

90 *Ibid* 10–11.

91 See the decision of Murphy J in *Sillery v The Queen* (1981) 180 CLR 353, 358–61. His Honour came to the conclusion that, upon a proper construction of the statute in question, the penalty for a criminal offence was and should be held to be different to that prescribed by the legislation. After considering the legislative history of the enactment, Murphy J did not accept the penalty prescribed by the legislation. His Honour said: ‘it is not fair to legislators and tends to undermine the standing of Parliament; it is inconsistent with a proper relationship between the three branches of government’: at 361. The separation of powers also comes to mind in relation to this horizontal relationship.



fall under ‘relationships based on proximity’, although Professor Corcoran does not identify this relationship in her discussion of ‘public law relationships’.<sup>92</sup>

Using the external affairs cases as a guide, in the context of s 109 analysis, a Commonwealth law will have some of the following indicia if it was enacted in good faith:

- The Commonwealth law does not prohibit or control state legislative capacity out of mistrust in the way the state might legislate.
- The Commonwealth law is enacted in furtherance of a policy the Commonwealth believes to be in the national interest.<sup>93</sup>
- The Commonwealth law concerns an area that is predominately regulated by the Commonwealth.
- The Commonwealth law is trying to achieve national uniformity of law (such as to reduce the burden of compliance costs across jurisdictions or to establish minimum standards across Australia).
- The Commonwealth law is enacted in a ‘faithful pursuit of the purpose’<sup>94</sup> underlying its enactment. There are many other ways to phrase this: for example, where there is ‘[a] “reasonable proportionality” between that purpose or object and the means which the law adopts to pursue it’<sup>95</sup> or where the law is not enacted ‘merely to give colour to an attempt to confer legislative power upon the Commonwealth Parliament’.<sup>96</sup> Whichever phrase is preferred, each has as its touchstone what Professor Corcoran describes as ‘integrity of purpose’.<sup>97</sup>

The above indicia may be somewhat vague, which is one reason for the High Court’s refusal to adopt good faith in contract law. However, one aim of this article is to provide examples, context and guidance to help identify a use of s 109 in bad faith. The above factors assist in this endeavour. Perhaps the difficulty in identifying manufactured inconsistency lies in the blur between the separation of the real intention of the executive from the legislative intent of Parliament.

92 Corcoran, above n 88, 11.

93 It is sensible that the Commonwealth as the nationally elected government should have the capacity to legislate (if supported by a head of power) for, and on behalf of, the national electorate and therefore validly hinder a state’s action which is inconsistent with policy objectives the Federal Government was conceivably elected to act upon. This is one aspect of the notion of ‘responsible government’. An analogy can be drawn to the approach adopted by the Supreme Court of Canada. Where matters take on a national dimension, the Supreme Court of Canada has generally accepted that these matters can be regulated by the Federal Parliament as ‘this is the corollary to [the principle of] subsidiarity, namely, that those matters that cannot be effectively regulated at the provincial level should be the responsibility of the more distant federal level of government’: Hogg, *Constitutional Law of Canada* (Thomson Carswell, 5<sup>th</sup> ed, supplemented, 2011 release 1) vol 1, 5-15–5-25. Note, however, in Canada the residual powers are with the Centre, not the provinces and ‘these matters’ may actually be falling under this residuary power, and rather than provinces in Australia it would be the states.

94 See Dixon J in *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, 674, considering the use of the external affairs power.

95 *Richardson v Forestry Commission* (1988) 164 CLR 261, 311–12 (Deane J).

96 *Tasmanian Dams Case* (1983) 158 CLR 1, 219 (Brennan J).

97 Corcoran, above n 88, 9.

### **G Legislative Intent and Legislative Motive — Establishing Questions of Fact in Constitutional Cases**

The role of legislative intent in s 109 analysis and constitutional analysis is an important consideration when determining any question of manufactured inconsistency. This is because intention is likely to be tangled up with any assessment of whether something was done in ‘good faith’ or ‘bad faith’. More importantly, the legislature’s actual intention is a crucial aspect of ascertaining whether manufactured inconsistency has occurred as a matter of fact. As such, it is necessary to explore what evidence may, or should be, admissible to establish whether the Commonwealth has legislated to manufacture an inconsistency in bad faith.

The current understanding under s 109 is that ‘intent’ is the legislative intention ‘used here to direct the courts to the objective criteria of construction’<sup>98</sup> and not Parliament’s actual intent when enacting the statute. Indeed, some scholars have suggested that legislative intention is the only test for determining inconsistency.<sup>99</sup> However, legislative intent cannot be the only test and this is apparent by the implicit willingness of the High Court to consider legislative motive in situations like the external affairs cases or bare attempts to limit state power. Perhaps this is why the High Court has held that legislative intention, even under s 109, is only a persuasive but not conclusive consideration.<sup>100</sup>

Where the good faith of Parliament is challenged, an assessment of whether an enactment has been made in bad faith may require us to look further than legislative intent and consider additional factors not evidenced in the explanatory memoranda or second reading speeches.<sup>101</sup> A focus on legislative intent alone fails to appreciate the context in which the federal and state statutes are being interpreted under s 109 of the *Constitution*. At this point we are not engaged merely in an exercise of statutory construction, but rather an exercise in constitutional interpretation to ensure the federal legislation is ‘bounded by what the *Constitution* permits’.<sup>102</sup> The interpretation of a statute against the parameters set by the *Constitution* is necessarily an exercise different to that employed under conventional statutory interpretation principles, which are concerned with arriving at a construction that promotes the underlying ‘purpose’ or ‘object’ of the Act over a construction that does not promote such a ‘purpose’ or ‘object’.<sup>103</sup>

98 *Momcilovic* (2011) 245 CLR 1, 85 [146], citing *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298, 410–13 [430]–[434]; Lindell, above n 58, 31.

99 Gary A Rumble, ‘The Nature of Inconsistency under Section 109 of the *Constitution*’ (1980) 11 *Federal Law Review* 40, 79. According to Rumble the reason terms like ‘direct’ and ‘indirect’ are still in use is because of a ‘reluctance to acknowledge that the key to inconsistency is the intention of one of the federal partners, the Commonwealth, to deny to a State, another federal partner, part of its law making power’.

100 *Momcilovic* (2011) 245 CLR 1, 74 [112] (French CJ), 134 [316] (Hayne J).

101 *South Australia v Commonwealth* (1942) 65 CLR 373, 410 (Latham CJ).

102 *Momcilovic* (2011) 245 CLR 1, 124 [285] (Hayne J).

103 *Acts Interpretation Act 1901* (Cth) ss 15AA, 15AB. All states and territories have an equivalent provision in their respective statutory interpretation legislation, for example, *Interpretation of Legislation Act 1984* (Vic) s 35.

Once it is understood that the exercise is one of constitutional interpretation, factors which evidence legislative motive to manufacture an inconsistency in bad faith should be admissible. This would include reconstructing the political situation at the time the relevant federal law was enacted with the use of information that is public knowledge (as we have done when describing the events leading up to the *Native Title Act Case*). This was explained most clearly by Evatt J in *Deputy Federal Commissioner of Taxation (NSW) v WR Moran Pty Ltd*:

In considering the question of admissibility of evidence, a fundamental distinction has to be drawn between cases where the court has no function committed to it except that of interpreting a statute, and cases where, in accordance with a constitutional charter, the court has to determine whether there has been an infringement by the legislature of some overriding constitutional provision. In the former case, the court's function is to interpret the language which the legislature has employed, *though, even there, the court is not bound to shut its eyes to public general knowledge of the circumstances in which the legislation was passed. In the latter case, the court may entirely fail to fulfil its duty if it restricts itself to the language employed in the Acts which are challenged as unconstitutional. As the Privy Council has said: 'Where the law-making authority is of a limited or qualified character, obviously it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what it is that the legislature is really doing'*.<sup>104</sup>

According to his Honour, the types of evidence admissible would include 'public announcements of governmental policy, official governmental records and communications'.<sup>105</sup> It is important to realise this approach has the aim of informing the court of 'the truth of some question of fact which the statute postulates' (the good faith or bad faith legislative motive behind the enactment) before any interpretation may be undertaken.<sup>106</sup>

Whether the relevant enquiry is, or should be, grounded on political or similar considerations rather than legal considerations, however, is a difficult question. The court is not here concerned with the merits of the particular political debate, because it should endeavour to apply neutral principles, as described above. However, as to the determination of a question of fact, political considerations should not be shunned in favour of legal considerations only. As Dixon J says:

In the many years of debate over the restraints to be implied against any exercise of power by Commonwealth against State and State against Commonwealth calculated to destroy or detract from the independent exercise of the functions of the one or the other, it has often been said that political rather than legal considerations provide the ground of which the restraint is the consequence. The *Constitution* is a political instrument.

104 (1939) 61 CLR 735, 793 (Evatt J) (emphasis added).

105 Ibid 794.

106 Henry Wolf Biklé, 'Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action' (1924) 38 *Harvard Law Review* 6, 6.

It deals with government and governmental powers. The statement is, therefore, easy to make though it has a specious plausibility. But it is really meaningless. It is not a question whether the considerations are political, for nearly every consideration arising from the *Constitution* can be so described, but whether they are compelling.<sup>107</sup>

Thus, the courts should accept, as they do under the *Melbourne Corporation* principle, the most compelling argument as to the reasons behind the exercise of Commonwealth legislation that purports to use s 109 to supplant state legislation, whether or not those reasons are formulated under political or legal considerations.

### III A BASIS FOR THE PRINCIPLE

#### A A Freestanding Implication

Since the High Court decision in *Lange v Australian Broadcasting Corporation* it has been clear that an implication can be drawn only from the text and structure of the *Constitution*.<sup>108</sup> Can manufactured inconsistency be set up as a freestanding constitutional implication in accordance with this criterion?

The first step is to determine the implications of the text and structure of the *Constitution* for s 109. The insertion of s 109, in combination with ss 106, 107 and 108 into the *Constitution*, were explained by Quick and Garran:

Section 106 provides that the *Constitution* of each State is to continue, subject to the *Constitution* of the Commonwealth. Section 107 provides that the power of each State Parliament is to continue, subject to the *Constitution* of the Commonwealth. Section 108 provides that every law in force in a colony is to continue, subject to the *Constitution* of the Commonwealth. The consequence of this subjection of *State Constitution*, State Parliamentary power, and State law, to the *Federal Constitution*, would have been obvious without the insertion of s 109. That section, however, places beyond doubt the principle that the *Federal Constitution* and the laws passed by the Federal Parliament, in pursuance of that *Constitution*, prevail over the *State Constitutions* and the State laws passed by the State Parliaments, in pursuance of the *State Constitutions*.<sup>109</sup>

<sup>107</sup> *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 82 ('*Melbourne Corporation*').

<sup>108</sup> (1997) 189 CLR 520, 566–7.

<sup>109</sup> John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, first published 1901, 1995 ed) 939. This paragraph was endorsed by the High Court in *Jemena* (2011) 244 CLR 508, 523 [37]. See generally *Momcilovic* (2011) 245 CLR 1, 104 [220] (Gummow J), 132 [311] (Hayne J).

The very purpose of s 109 is to resolve the inherent problem of conflicting legislative powers and s 109 therefore ‘defines the hierarchy of federalism’<sup>110</sup> by stating the legal solution adopted in cases of inconsistency of laws.<sup>111</sup>

Section 109 performs the role of prioritising laws in favour of the Commonwealth but it would be a distortion to make this into a *conclusion* that s 109 entrenches the supremacy of the Commonwealth as the accepted purpose or effect of the section.<sup>112</sup> Section 109 is also premised on the preservation of two levels of independent governments in a federal compact,<sup>113</sup> an essential conception of federalism. Implicit in it is the assumption that declaring the Commonwealth to be the supreme or paramount legislature has value; the supremacy of the Commonwealth is over a class of subjects (the states) and in order for this supremacy to have meaning it implies that the ‘subjects’ have a useful role to play. It would be superfluous to declare supremacy for Commonwealth law if the Commonwealth is the only branch that can legislate in any meaningful way. Thus the structure of the *Constitution* does indeed lend some, although hardly conclusive support to the idea that the states must have a useful legislative role and that their legislative capacity should not be nullified in bad faith by the Commonwealth. On the other hand, there may be no need to resort to implications. The word ‘inconsistent’ itself might very well be interpreted to mean a genuine inconsistency, not one arising in bad faith.

## B Citizens’ Rights

Section 109 has been described to be of ‘great importance for the ordinary citizen, who is entitled to know which of two inconsistent laws he is required to observe’.<sup>114</sup> The idea that s 109 could be a source of individual rights was widely criticised,<sup>115</sup> and this criticism makes it difficult to seek support for manufactured inconsistency from this angle. In any case, even if s 109 was a source of individual rights it is doubtful whether it could support the doctrine of manufactured inconsistency because the importance to the citizen is what s 109 does (ie to entitle the citizen to know which of two inconsistent laws to observe), and not how it goes about determining the inconsistency.

Linked with the entitlement to know which of two inconsistent laws a citizen is required to observe is knowledge about which level of government is officially responsible for legislating in a particular area so that citizens can exercise their

110 Laurence H Tribe, *American Constitutional Law* (Foundation Press, 3<sup>rd</sup> ed, 2000) vol 1, 1026.

111 Lindell, above n 58, 26; *Momcilovic* (2011) 245 CLR 1, 100–1 [209]–[212], 109–10 [239]–[242] (Gummow J).

112 See, eg, Rumble, ‘The Nature of Inconsistency’, above n 99, 79–80; *Momcilovic* (2011) 245 CLR 1, 109 [239] (Gummow J), 131–2 [309]–[310] (Hayne J), 232 [625] (Crennan and Kiefel JJ).

113 See, eg, *Momcilovic* (2011) 245 CLR 1, 104 [221] (Gummow J), 123–4 [282], 146 [357] (Hayne J).

114 *University of Wollongong v Metwally* (1984) 158 CLR 447, 458 (Gibbs CJ), 476–9 (Deane J).

115 Lindell, above n 58, 26; Leslie Zines, *The High Court and the Constitution* (Federation Press, 5<sup>th</sup> ed, 2008) 584–5.

right to vote in an informed way.<sup>116</sup> With the expansion of Commonwealth legislative power it is more difficult for a citizen with no legal background to understand which areas the Commonwealth is in charge of regulating. Section 109, by resolving inconsistency of laws, takes on the additional role of enabling the citizen to apportion this responsibility and blame, but this too is not a human right.

Whatever the virtues of the idea of s 109 as a source of individual rights might be, clearly that idea cannot be the source of an implication relating to manufactured inconsistency, which is directed to preserving the states' capacity to legislate rather than promoting human rights.

### C Section 51

The text and structure of the *Constitution* concerning the legislative powers of the Commonwealth cannot, under the present methods of interpretation, support the implication of manufactured inconsistency either.

Although it was said above that the powers given by s 51 were given for the purpose of legislating, not preventing the states from legislating, there are several reasons for doubting that manufactured inconsistency can be derived by implication from s 51. The first is that manufactured inconsistency requires an analysis of the intention of Parliament whereas the approach to s 51 at times does not permit an enquiry into the motives of the legislature.<sup>117</sup> This is an important distinction. A law can be characterised as falling under s 51 irrespective of the motives behind its enactment and this analysis is separate from, and says nothing about, whether the law was enacted in bad faith.

Furthermore, questions of inconsistency do not arise until a law has passed s 51 and other prior tests of validity. It is not immediately obvious how the text or structure of s 51 can support a doctrine which appertains to a constitutional test that logically comes only after s 51 has been disposed of.

Finally, as was mentioned above, the doctrine of dual characterisation also militates against deriving a prohibition on manufactured inconsistency from s 51, because a law does not cease to be about one topic simply because it is also about the states' capacities to legislate.<sup>118</sup> As we saw, this was not fully recognised in the earlier cases before the doctrine of dual characterisation had been fully unfolded, but that doctrine would today be a formidable obstacle.

Bad faith was defined above as the misuse of the Commonwealth's legislative powers to undermine the legislative power of the states. Under current characterisation doctrine, this cannot be seen as a corollary of the powers themselves, a state

116 Tribe, above n 110, 879 n 5. See also *Work Choices* (2006) 229 CLR 1, 326 [785] (Callinan J); Cheryl Saunders, 'A New Direction for Intergovernmental Arrangements' (2001) 12 *Public Law Review* 274, 284.

117 *Fairfax v Commissioner of Taxation (Cth)* (1965) 114 CLR 1, 16 (Taylor J), 17 (Menzies J).

118 *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1; *Fairfax v Commissioner of Taxation (Cth)* (1965) 114 CLR 1, 16 (Taylor J).

of affairs which may in truth be a commentary on the rudimentary nature of that doctrine. Manufactured inconsistency must accordingly also be seen as a principle that does not emerge from the powers themselves, but rather from s 109, the mechanism by which cases of inconsistency between state and federal legislation are decided.

#### **D The Melbourne Corporation Principle**

So far, only one possible basis for a principle against manufacturing an inconsistency has been identified, namely s 109 of the *Constitution* itself. This is not a surprising discovery, given that a manufactured inconsistency is not a genuinely created one and therefore may well be said not to fall within the literal meaning of s 109 itself.

It is suggested, however, that a more obvious and convincing rationale for the manufactured inconsistency principle is as an application of the implied immunities protecting the states against certain forms of federal legislation — the implication identified in *Melbourne Corporation*<sup>119</sup> and reformulated in *Austin v Commonwealth*,<sup>120</sup> referred to as the *Melbourne Corporation* principle. In general terms, the *Melbourne Corporation* principle confers upon the states an implied immunity from Commonwealth laws that curtail the capacity of the states to function as governments.<sup>121</sup>

The *Melbourne Corporation* principle has not to date been applied in order to protect the states' capacities to legislate — it has only been applied to the executive and judicial branches — but there is no reason why it should not be. Indeed, the capacity to legislate is the most distinctive and most important function of any governmental unit. Dixon J refers to it when he says that some ingenuity may be needed for a Commonwealth law to 'effect ... a restriction or *control* of the State in respect of some exercise of its executive authority or for that matter in respect of the working of the judiciary or of the *legislature* of a State'.<sup>122</sup> An important point is evident in his Honour's application of the *Melbourne Corporation* principle and its relationship to manufactured inconsistency: the idea of *control* of the state in respect of the *legislature*, the very thing that can result from manufactured inconsistency, and the very thing the Commonwealth purported to effectuate in the *Native Title Act Case*.

In fact, his Honour even relies on 'the policy which causes' the exercise of federal power to draw a distinction between, on the one hand, federal legislation that reaches, as a matter of purpose, into fields lying under state legislative authority, and on the other hand, the use of federal power for a purpose of restricting or burdening the state in the exercise of its constitutional powers.<sup>123</sup> According

119 (1947) 74 CLR 31.

120 (2003) 215 CLR 185 ('*Austin*').

121 *Ibid* 249 [124] (Gaudron, Gummow and Hayne JJ).

122 *Melbourne Corporation* (1947) 74 CLR 31, 80 (emphasis added).

123 *Ibid*.

to his Honour, the latter enactment may potentially infringe the *Melbourne Corporation* principle because it affects the states' capacities without any policy support behind doing so. His Honour further makes the point, albeit somewhat obvious, that not all legislation aimed at the states, or burdening or controlling the states, will amount to an infringement of the implied immunity doctrine.<sup>124</sup> In these particular instances, the distinction with which his Honour appears to rely bears close resemblance to the application of the above analysis regarding a bad faith enactment in the absence of a particular policy choice.

The purpose behind federal action is already considered in orthodox *Melbourne Corporation* analysis. Indeed, Professor Zines points out that the existence of an anti-federal purpose (in the *Bundestreue* sense) was at the very heart of Dixon J's reasoning in creating the principle in the first place.<sup>125</sup> In *Austin*, all of their Honours who participated in the reformulation of the principle pointed out the relevance of intention. Gleeson CJ described the principle as applicable to 'legislation aimed at the destruction of the States or State agencies, or of one or more of their governmental attributes or capacity',<sup>126</sup> while Gaudron, Gummow and Hayne JJ cited Dixon J on no fewer than three occasions referring to the aim, intent or purpose of legislation.<sup>127</sup>

It is not an objection that only some portion — perhaps even a very small portion — of the states' capacity to legislate might be affected by a provision enacted in bad faith such as s 21 of the *NTA* considered in the *Native Title Act Case*. The same might be said of the impost considered in *Austin*, which did not affect the entire judicial remuneration package, let alone the entirety of state judicial power.

If the heart of manufactured inconsistency is, as suggested here, the enactment of federal legislation in bad faith simply in order to prevent the states from legislating for no legitimate reason, the *Melbourne Corporation* principle is already able to deal with such cases.

#### IV CONCLUSION

Manufactured inconsistency has good roots in two constitutional principles: one express (s 109), and the other implied (*Melbourne Corporation*). It is not to be dismissed as a non-existent spectre of fevered imaginations, but lies, in fact, behind two judgments of the High Court of Australia in the 20<sup>th</sup> century holding federal legislation invalid. As the expansionary possibilities inherent in federal powers come to be understood and used more and more after *Work Choices*, it is a good thing that the Commonwealth is on notice that legislation simply to knock the states out of the ring for no good reason will be invalid as a bad faith enactment to manufacture inconsistency. It should be well understood

124 Ibid 80–1, regarding the discussion of taxation laws aimed at the states.

125 Zines, above n 115, 449.

126 *Austin* (2003) 215 CLR 185, 217.

127 Ibid 251, 255–6, 266.



that sometimes it is quite legitimate for the Commonwealth to wish to knock the states out of the ring, when there is a legitimate policy behind the attempt to do so and not merely mistrust.

This article explored two central ideas. First, that manufactured inconsistency may arise where the Commonwealth legislates in bad faith. In this respect, various factors based on the idea of 'integrity of purpose' and other good faith indicia were outlined to assist in the identification of a bad faith enactment. This led to the conclusion that the actual intention of the Commonwealth is central to determining manufactured inconsistency. Second, that it is not necessary for a separate body of doctrine to develop on the topic of manufactured inconsistency. Instead, manufactured inconsistency should now be considered under the well-known requirements of the *Melbourne Corporation* principle with all the advantages of access to a broader line of principle and precedent that that entails.