In 2005 Professor Geoff Lindell wrote that the High Court had “refrained from determining the ultimate basis of all the so-called tests” of inconsistency under s.109.¹ I want to explore whether that remains the case and to suggest the possibility that the Court has settled on a unified and workable approach to s.109.

Section 109 performs an essential function in the federation — so much so that it has often been remarked that, had it not been in the Constitution, it would have been implied into it anyway.² That is indeed the United States experience.³

Where a Commonwealth and State statute are “inconsistent”, the State statute is invalid to the extent of the inconsistency by force of s.109 of the Constitution. In the working out of this provision, the cases have for many years identified a number of different ways in which inconsistency may arise.

The first is often termed “direct” inconsistency. Such direct inconsistency may be identified, for instance, where the laws create conflicting commands.⁴ It may also be identified where a Commonwealth law expressly or implicitly provides for certain

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² See ibid at 26.
⁴ See, e.g., R v Brisbane Licensing Court; Ex parte Daniell (1920) 28 CLR 23 at 29 (Knox CJ, Isaacs, Gavan Duffy, Powers, Rich and Starke JJ).

* I wish to thank Rudi Kruse for his very considerable assistance in the course of preparing this paper.
conduct not to be regulated — an “area of liberty” — such that a State law which regulated that area would “close up” that area of liberty and would thus alter, impair or detract from the operation of the Commonwealth law.\(^5\) More of that phrase later.

The second way in which inconsistency may arise is where it appears from the terms, nature or subject matter of a Commonwealth law that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, and a State law seeks to regulate or apply to the same matter.\(^6\) This is a more subtle notion than direct inconsistency.\(^7\) It is often termed “indirect” or “covering the field” inconsistency. The notion of indirect inconsistency is said to rest upon identifying in the Commonwealth law an intention to “cover the field”.\(^8\) That may be stated expressly in the Commonwealth law. Conversely, where it is not stated expressly, the implication of such an intention from the other provisions may be denied by an express provision to the contrary. Such a provision will generally be effective to preclude a conclusion that a Commonwealth law is intended to cover a particular field.\(^9\) However, it is not determinative, as it is just one factor which, through the conventional processes of statutory construction, discloses the “intention” of Parliament.\(^10\) More on intention later as well.

The third way in which inconsistency may arise is where Commonwealth and State laws confer powers on authorities which, if exercised in relation to the same subject

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\(^6\) *Victoria v Commonwealth* (“The Kakariki”) (1937) 58 CLR 618 at 630 (Dixon J); *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at [28] (the Court).

\(^7\) *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at [40] (the Court).

\(^8\) *Clyde Engineering Company Ltd v Cowburn* (1926) 37 CLR 466 at 489 (Isaacs J).

\(^9\) *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545 at 563 (Mason J); *John Holland Pty Ltd v Victorian Workcover Authority* (2009) 239 CLR 518 at [21] (the Court); *Momcilovic v The Queen* (2011) 245 CLR 1 at [111]-[112] (French CJ), [272] (Gummow J), [482]-[484] (Heydon J), [654] (Crennan and Kiefel JJ).

\(^10\) *Momcilovic v The Queen* (2011) 245 CLR 1 at [110], [112] (French CJ).
matter, may conflict.\textsuperscript{11} In such cases, it is not the laws themselves which are inconsistent but their operation in particular circumstances. Accordingly, only the exercise of power under the State law, not the conferral of power by the State law, is invalid. This form of inconsistency is often called “operational” inconsistency. An example is \textit{Carter v Egg and Egg Pulp Marketing Board (Vic)}.\textsuperscript{12} A Commonwealth law provided for the expropriation of eggs by a Commonwealth authority. Failure to comply with the requirements of that authority was an offence under Commonwealth law. The Commonwealth law did not exclude the operation of a State law which also authorised acquisition of eggs by a State authority. But if both the Commonwealth and the State authorities sought to acquire the same eggs, there would be an operational conflict and the Commonwealth action would prevail.

Expressions such as “direct” and “indirect”, the metaphor of “covering the field” and the phrase “operational inconsistency” all describe outcomes. But they are not necessarily helpful to an understanding of what s.109 requires, even if they are useful to describe the way the result which has been reached in its application in individual cases.

In recent times, another phrase has gained currency, also derived from the older cases: “alter, impair or detract”. It is the most obvious candidate for an ultimate so-called “test” of inconsistency, so we need to look at it more closely.

The phrase is usually traced to the judgment of Sir Owen Dixon in \textit{Victoria v The Commonwealth (“The Kakariki”).}\textsuperscript{13} State and Commonwealth laws permitted removal of a shipwreck at the instance of State and Commonwealth authorities respectively. In a classic case of “operational” inconsistency, the Court held that the

\textsuperscript{11} See the recent summary in \textit{Momcilovic v The Queen} (2011) 245 CLR 1 at [246]-[257] (Gummow J).

\textsuperscript{12} (1942) 66 CLR 557 at 574-576 (Latham CJ), discussed in \textit{R v Winneke; Ex parte Gallagher} (1982) 152 CLR 211 at 217 (Gibbs CJ).

\textsuperscript{13} (1937) 58 CLR 618.
mere existence of the powers did not constitute inconsistency — but their exercise would. Dixon J said this:14

I shall confine my reasons to a brief statement of why I think that upon its proper construction sec 329 of the *Navigation Act* does not exclude the operation of such a State law as sec 13 of the *Marine Act* contains, unless at all events some step is taken by the Commonwealth authorities to exert the power given by sec 329.

Such a statement must, of course, begin with some formulation of what I understand to be the test of inconsistency under sec 109 adopted in this court. ... *When a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid.* Moreover, if it appears from the terms, the nature or the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so as inconsistent. Cf., too, *Stock Motor Ploughs Ltd v Forsyth*.

Dixon J referred here not only to *Stock Motor Ploughs v Forsyth*,15 but also to *Ex parte McLean*,16 a s.109 case that is still regularly quoted, especially the relevant passage to which we will return. Both passages are from Dixon J’s own judgments. In neither of them does he use the “alter, impair or detract” formulation, although the passage in *Stock Motor Ploughs* bears a close resemblance to that cited above, employing the expression “vary, detract from or impair”17.

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14 (1937) 58 CLR 618 at 630 (emphasis added).
15 (1932) 48 CLR 128 at 136 (Dixon J).
16 (1930) 43 CLR 472 at 483, 487 (Dixon J).
17 (1932) 48 CLR 128 at 136.
“alter, impair or detract” is “the test of inconsistency” under s.109. Although the judgment goes on, in the sentence commencing “Moreover …” to describe what is usually regarded as “covering the field” inconsistency, this has from time to time been treated as indicating that Dixon J saw that kind of inconsistency as a subset of the first. That was the conclusion of Hayne J in his dissenting judgment in *Momcilovic*; Gummow J appeared to agree.19 The repetition of the word “detract” perhaps supports that view, and in proposing the formulation in *Stock Motor Ploughs v Forsyth*, Dixon J similarly treated “covering the field” inconsistency as a species of “impairment”.

In *Momcilovic*, relying substantially on his analysis of the judgments of Dixon J referred to above, Hayne J went further and described the “fundamental question” as being whether the State law alters, impairs or detracts from the Commonwealth law.21 That is consistent with the approach of Kirby J in *APLA*, who described such an analysis as being necessary “in every case”. Mr Gageler SC had argued in *APLA* that “alter, impair or detract” serves as a comprehensive test of inconsistency (taking account of practical operation and effect).23 Leeming JA, writing extra-judicially, has also supported this analysis.24

But I would suggest it is far from clear. On another reading, Dixon J is describing two distinct kinds of inconsistency, and “alter, impair or detract” is more like “direct”

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18 *Momcilovic v The Queen* (2011) 245 CLR 1 at [339].
19 (2011) 245 CLR 1 at [242]; but see n 25 below.
20 (1932) 48 CLR 128 at 136.
21 (2011) 245 CLR 1 at [340]; see also at [317], [321].
22 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at [302].
23 *APLA Ltd v Legal Services Commissioner (NSW)* [2004] HCATrans 492.
inconsistency. That was the way the passage was treated, for example, by Crennan and Kiefel JJ in *Momcilovic*.\(^{25}\)

Perhaps a third view is that found in the Court’s judgment in *Telstra v Worthing*,\(^{26}\) which stated that the second of Dixon J’s propositions in *The Kakariki* may apply where the first does not — in other words, there can be covering the field inconsistency even where the State law does not alter, impair or detract from the operation of the Commonwealth law. This statement seems at odds with the approach of Kirby J and Hayne J described earlier. Yet both were members of the unanimous Court in *Telstra v Worthing*.

This is where the ultimate lack of assistance which the labels offer becomes plain. What is unarguable is that the Court has, in more recent times increasingly, referred to laws which are invalid by reason of s.109 as “altering, impairing or detracting from” Commonwealth laws so as to produce inconsistency.\(^{27}\)

In 2005, Professor Lindell described the argument of Mr Gageler SC in *APLA* as “bold and interesting”.\(^{28}\) Lindell preferred the expression not to be used as an independent test, but to be seen as a synonym for inconsistency.\(^{29}\) Some support for that approach is found in the judgment of Mason J in *New South Wales v The Commonwealth and Carlton*\(^{30}\) which Callinan J cited in *APLA*:\(^{31}\)

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\(^{25}\) (2011) 245 CLR 1 at [628]; see, similarly, *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at [54] (Gaudron J), cited with apparent approval by Gummow J in *Momcilovic* at [249].

\(^{26}\) *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at [28].

\(^{27}\) *Telstra v Worthing* (1999) 197 CLR 61 at [28] (the Court); *APLA* (2005) 224 CLR 322 at [43] (Gleeson CJ and Heydon J), [302] (Kirby J), [484]-[485] (Callinan J); *Dickson v The Queen* (2010) 241 CLR 491 at [22] (the Court); *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at [39] (the Court).

\(^{28}\) Lindell, above n 1 at 29-30.

\(^{29}\) Ibid at 37.

\(^{30}\) (1983) 151 CLR 302 at 330 (emphasis added).

\(^{31}\) (2005) 224 CLR 322 at [485].
[The “alter, impair or detract from”] test may be applied so as to produce inconsistency in two ways. It may appear that the legal operation of the two laws is such that the State law alters, impairs or detracts from rights and obligations created by the Commonwealth law. Or it may appear that the State law alters, impairs or detracts from the object or purpose sought to be achieved by the Commonwealth law. In each situation there is a case for saying that the intention underlying the Commonwealth law was that it should operate to the exclusion of any State law having that effect.

So far, despite the popularity of the formulation, it has not emerged as a universal test. The leading judgments supporting it have both been in dissent — in each case giving a wider operation to s.109 than the majority. One problem with the formulation as a test for inconsistency is the very fluidity of the words. It tends to risk going beyond a comparison of laws and comparing underlying legislative policies — a danger against which Gleeson CJ andHeydon J warned in APLA.32

Establishing that a State law might make it harder to achieve the policy of a federal law is no substitute for analysis of the legal operation of the laws in question. To take an obvious example, consider a hypothetical Commonwealth law attaching particular eligibility criteria to federal funding for nursing homes, aimed at securing a particular policy outcome (for example, encouraging the location of nursing homes predominantly in urban areas); and a State law prescribing criteria for State funding of nursing homes which were directed to a conflicting policy (for example, providing for nursing homes predominantly in remote areas). There would be no “textual collision” giving rise to a direct inconsistency, nor any “operational inconsistency”. Yet the State law could be said to alter, impair or detract from the operation of the Commonwealth law because someone who would otherwise establish a nursing home in an urban area to obtain federal funding might, given the subsidies to be

provided under the State law, choose a remote location instead. Such a State law may entirely thwart the efficacy of the intended operation of the federal law, and explicitly intend to do so. It is submitted that, by itself, that does not mean that s.109 would invalidate the State law.

*Telstra v Worthing* seems, at least for now, to make it clear that there can be s.109 inconsistency even where a State law does not alter, impair or detract from a Commonwealth law. If so, then the expression should be treated as another label, useful in describing the outcome of the s.109 analysis but not a form of words that can be applied to every case. That is consistent with what the Court recently said in *Jemena*, namely that the different approaches to inconsistency are interrelated, but there is utility in considering them separately, as they represent categories of case in which inconsistency has been identified in the past.

This takes us back, it seems, to the position described by Mason J and Aickin J respectively in *Ansett Transport Industries (Operations) Pty Ltd v Wardley*. Mason J said:

> As the various tests which have been applied by the Court are all designed to elucidate the issue of inconsistency it is not surprising that they are interrelated and that in a given case more than one test is capable of being applied so as to establish inconsistency. ...

> ... In truth the case which Ansett makes is one of inconsistency between the Act and the State Act, s. 109 giving paramountcy to the Act with the result that the State Act cannot operate if, pursuant to the Act, the Commission has exercised its power to the exclusion of the provisions made by State law on the topic. The issue therefore turns upon the interpretation of the Agreement

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33 *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at [42].


and, despite the emphasis given to the claim of direct inconsistency, the question is whether the provisions of the Agreement were intended to operate, subject to, or in disregard of, the general law.

Aickin J said:36

The two different aspects of inconsistency are no more than a reflection of different ways in which the Parliament may manifest its intention that the federal law, whether wide or narrow in its operation, should be the exclusive regulation of the relevant conduct. Whether it be right or not to say that there are two kinds of inconsistency, the central question is the intention of a particular federal law. The field of its operation may be regarded as wide or narrow and produce inconsistency because of the intention to cover a particular field exclusively or because of an intention to regulate specific conduct so that any other regulation of that conduct is inconsistent because the attempt to regulate the identical conduct in a different manner, or perhaps at all, necessarily impairs the operation of the federal regulation of that conduct.

The Court in Jemena expressed agreement with Mason J regarding the interrelationship between the different tests for inconsistency, adding that the tests are all directed at ascertaining whether a “real conflict” exists between the two laws in question.37 This expression, which importantly draws attention to the need for the inconsistency to be significant, not trivial, before s.109 applies, was repeated by Crennan and Kiefel JJ in Momcilovic.38 But otherwise it does not seem that “real conflict” was meant as an overarching principle, rather than another synonym for inconsistency.

36 (1980) 142 CLR 237 at 280 (emphasis added).
37 (2011) 244 CLR 508 at [42], [60], citing the use of that phrase in Collins v Charles Marshall Pty Ltd (1955) 92 CLR 529 at 553 (Dixon CJ, McTiernan, Williams, Webb, Fullagar and Kitto JJ).
38 (2011) 245 CLR 1 at [630].
Where does this leave the quest for the ultimate basis of s.109 inconsistency? I suggest it is not as hopeless as it may appear. The “central question” described by Aickin J, the intention of the federal law, has more recently moved into prominence. I want to suggest that the High Court has adopted this as the key to understanding and applying s.109.

First, we must dispel any lingering confusion about the use of the word “intention” in this context. The Court has told us in Zheng v Cai that: 39

> It has been said that to attribute an intention to the legislature is to apply something of a fiction. However, what is involved here is not the attribution of a collective mental state to legislators. That would be a misleading use of metaphor. Rather, judicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws. As explained in NAAV v Minister for Immigration and Multicultural and Indigenous Affairs, the preferred construction by the court of the statute in question is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy.

The joint judgment in Lacey v Attorney-General (Qld) explained further: 40

> The objective of statutory construction was defined in Project Blue Sky Inc v Australian Broadcasting Authority as giving to the words of a statutory provision the meaning which the legislature is taken to have intended them to have. An example of a canon of construction directed to that objective and given in Project Blue Sky is “the presumption that, in the absence of unmistakable and unambiguous language, the legislature has not intended to

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interfere with basic rights, freedoms or immunities”. That is frequently called the principle of legality. The legislative intention there referred to is not an objective collective mental state. Such a state is a fiction which serves no useful purpose. Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts.

In other words, Aickin J’s “central question” about the intention of the federal law is a question about the statutory interpretation of that federal law. This was acknowledged by all members of the Court in *Momcilovic*, despite the disparate nature of the judgments in that case.\(^4\)

Gummow J, with whom Bell J agreed in this respect, made the following points:

1. Speaking of different classes of inconsistency tends to obscure the task always at hand in s.109 cases, namely to apply that provision “only after careful analysis of the particular laws in question to discern their true construction”.\(^4\)

2. The first task in any application of s.109 is to construe the federal law in question in accordance with its true construction and having regard to its subject, scope and purpose.\(^4\)

3. The federal law may expressly exclude the rights or duties which it creates from qualification by State laws of a particular kind.\(^4\)

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\(^4\) (2011) 245 CLR 1 at [111] (French CJ), [245], [258], [261] (Gummow J), [315] (Hayne J), [474] (Heydon J), [637]-[638] (Crennan and Kiefel JJ), [660] (Bell J).

\(^4\) (2011) 245 CLR 1 at [245].

\(^4\) (2011) 245 CLR 1 at [258], [261].

\(^4\) (2011) 245 CLR 1 at [260].
4. The detailed character of the federal law may also evince a legislative intention, in the sense described above, to deal completely and thus exclusively with the law governing a particular subject matter.\(^{45}\)

5. The question then is whether the State law is on the same subject matter and, if so, whether it is inconsistent with it because it detracts from or impairs that negative implication.\(^{46}\)

To this may be added the accepted need, referred to earlier, for any inconsistency identified to be significant rather than trivial.

Paradoxically, this approach brings in the language of detracting or impairing, but it makes it clear what is detracted from or impaired — the implication (or in other cases the express stipulation) that the federal law is to deal completely with the matter. In other words, the inquiry comes back to the question, does the federal law operate subject to, or to the exclusion of, State law making different provision. In \textit{Momcilovic} Crennan and Kiefel JJ said, to similar effect, that:\(^{47}\)

\begin{quote}
What is required in every case is that the two laws being compared be construed so as to determine their operation, as a matter of construction, and, in particular, so as to determine whether the Commonwealth’s coverage of the subject matter is complete, exhaustive or exclusive.
\end{quote}

The five propositions extracted from the judgment of Gummow J above are consistent with the position taken by Professor Lindell in 2005\(^{48}\) and in two important articles by Dr Gary Rumble in 1980\(^{49}\) and 2010\(^{50}\) (Gummow J refers in the

\begin{footnotes}
\footnote{45}{(2011) 245 CLR 1 at [261].}
\footnote{46}{(2011) 245 CLR 1 at [261].}
\footnote{47}{(2011) 245 CLR 1 at [637].}
\footnote{48}{See above n 1.}
\end{footnotes}
paragraphs cited above to the two more recent articles\textsuperscript{51}). They also appear to reflect Dixon J’s famous formulation in \textit{Ex parte McLean},\textsuperscript{52} which, as will be recalled, Dixon J relied upon in \textit{The Kakariki}.	extsuperscript{53} In \textit{Ex parte McLean}, Dixon J said:\textsuperscript{54}

When the Parliament of the Commonwealth and the Parliament of a State each legislate upon the same subject and prescribe what the rule of conduct shall be, they make laws which are inconsistent, notwithstanding that the rule of conduct is identical which each prescribes, and sec. 109 applies. That this is so is settled, at least when the sanctions they impose are diverse. But the reason is that, by prescribing the rule to be observed, the Federal statute shows an intention to cover the subject matter and provide what the law upon it shall be. If it appeared that the Federal law was intended to be supplementary to or cumulative upon State law, then no inconsistency would be exhibited in imposing the same duties or in inflicting different penalties. The inconsistency does not lie in the mere coexistence of two laws which are susceptible of simultaneous obedience. \textit{It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter.}


\textsuperscript{51} See, in particular, \textit{Momcilovic} (2011) 245 CLR 1 at [261] n 562.

\textsuperscript{52} (1930) 43 CLR 472.

\textsuperscript{53} (1937) 58 CLR 618 at 630.

\textsuperscript{54} (1930) 43 CLR 472 at 483 (reference omitted) (emphasis added).
In Dixon J’s view, that formulation provided “all that [was] required for the purpose” of resolving the issue in *The Kakariki*. The idea that intention is paramount is not new.

There is a recent, albeit somewhat oblique, indication that the above principles are now endorsed by at least six members of the current High Court. In the *Marriage Act Case*, on which all Justices except Gageler J sat, the Court stated that the concurrent operation of Commonwealth and Territory laws depended upon the proper construction of the relevant laws, starting with the determination of the legal meaning of the relevant federal Act. Their Honours cited the above paragraphs from the judgment of Gummow J in *Momcilovic* in support of that proposition. Whether or not that answers the question I raised at the start of this paper, it affords a solid basis for approaching s.109 in the meantime.

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55 (1937) 58 CLR 618 at 630.
58 (2013) 88 ALJR 118 at [54], [56].
59 See above nn 42-46.