

Same-sex marriage – Inconsistency between Commonwealth and Territory Laws

By Anne Twomey*

Introduction

The Australian Capital Territory, in enacting the *Marriage Equality (Same Sex) Act 2013* (ACT), is relying, in part, on the fact that the inconsistency rule that applies to its laws is narrower than the constitutional provision that applies to inconsistency between Commonwealth and State laws. It argues that even if the Commonwealth's *Marriage Act 1961* (Cth) is intended to cover the field with respect to all forms of marriage in Australia, this does not have an impact upon the operative effect of the ACT's *Marriage Equality (Same Sex) Act 2013*, which will continue in operation 'to the extent that it is capable of operating concurrently with' the Commonwealth law.

This paper considers the history of inconsistency between Territory and Commonwealth laws. It seeks to identify the source of the inconsistency rule in s 28 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth), and to provide alternative approaches to its interpretation and application.

Territories and Inconsistency

Section 109 of the Commonwealth Constitution only applies to inconsistency between Commonwealth and State laws. It does not apply in relation to Territory laws.¹ Commonwealth laws apply in the territories and bind the courts, judges and people of the territories, because the territories form 'part of the Commonwealth'² for the purposes of covering clause 5 of the Constitution. The Commonwealth Parliament also has a plenary head of power to make laws 'for the government of any territory surrendered by any State to and accepted by the Commonwealth' under s 122 of the Commonwealth Constitution. Both the Northern Territory³ and the Australian Capital Territory⁴ were surrendered to the Commonwealth by States, and accepted by the Commonwealth.

Prior to the attainment of self-government, the rule of repugnancy applied to conflicts between ordinances made by the Governor-General with respect to the territories and Commonwealth laws.⁵ In the Australian Capital Territory, an ordinance-making power was conferred upon the Governor-General by s 12 of the *Seat of Government (Administration) Act 1910* (Cth). Dixon J, in *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd*, held that s 12 'could not, in my opinion, be read as

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¹ *Northern Territory v GPAO* (1999) 196 CLR 553, 580 [53] (Gleeson CJ and Gummow J); 636 [219] (Kirby J).

² *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248, 274 (Brennan, Deane and Toohey JJ); 285 (Gaudron J).

³ *Northern Territory Surrender Act 1907* (SA); *Northern Territory Acceptance Act 1910* (Cth).

⁴ *Seat of Government Surrender Act 1909* (NSW); *Seat of Government Acceptance Act 1909* (Cth).

⁵ *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd* (1929) 42 CLR 582.

authorizing the Governor-General to make ordinances repugnant to a Commonwealth statute'.⁶ Brennan J added in a later case that s 12 also does not 'sustain an Ordinance if it becomes repugnant to a later Act of the Parliament'.⁷ Hence, even if an Ordinance was initially validly made, the legislative provision that supported it would cease to sustain its operation if a later Commonwealth law came into conflict with the Ordinance.

One critical difference between the doctrine of repugnancy and that of inconsistency under s 109 of the Constitution is that repugnancy affects the *power* to make a law,⁸ whereas s 109 inconsistency affects only the operative effect of the law.⁹ On this basis, if a Territory law was repugnant to a Commonwealth law, it would be invalid, meaning that there was no power to make the law or that the power sustaining its continuing existence ceased to apply. The legislative power conferred upon a territory would be read as excluding any power to enact laws that are repugnant to Commonwealth laws.

Another possible difference arises from uncertainty as to whether the concept of repugnancy covers only direct inconsistency or extends as far as the 'cover the field' form of indirect inconsistency.¹⁰ Brennan J argued, in *Webster v MacIntosh*, that one must focus on interpreting the conflicting inferior law, rather than on limiting the scope of operation of the superior law. He contended:

Where one of the laws is an Act of the Parliament and the other is an Ordinance of the Australian Capital Territory made under s 12 of the *Seat of Government (Administration) Act* 1910 (Cth), the relevant question is not whether the Act can be so construed as to leave room for the operation of the Ordinance, but whether the Ordinance is repugnant to the Act.¹¹

Brennan J concluded that there was no power to make an Ordinance that was repugnant to a Commonwealth law.¹²

Self-Government and inconsistency rules

The High Court has previously accepted that the Commonwealth Parliament has power under s 122 of the Constitution to grant self-government to a territory, including its own

⁶ *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd* (1929) 42 CLR 582, 588 (Dixon J).

⁷ *Webster v MacIntosh* (1980) 49 FLR 317, 320 (Brennan J).

⁸ *Phillips v Eyre* (1870) 6 LR QB 1; *R v Marais; Ex parte Marais* [1902] AC 51; *Commonwealth v Kreglinger & Frenau Ltd* (1926) 37 CLR 93, 410-11 (Isaacs J); *Frost v Stevenson* (1937) 58 CLR 528, 573 (Dixon J).

⁹ *Carter v Egg and Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557.

¹⁰ *Frost v Stevenson* (1937) 58 CLR 528, 572 (Dixon J); *University of Wollongong v Metwally* (1984) 158 CLR 447, 464 (Mason J); *Yougarla v Western Australia* (2001) 207 CLR 355, [17] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

¹¹ *Webster v MacIntosh* (1980) 49 FLR 317, 320 (Brennan J).

¹² *Webster v MacIntosh* (1980) 49 FLR 317, 320-1 (Brennan J).

representative institutions.¹³ The Commonwealth can only grant to the territories such powers as the Commonwealth has itself (eg, through s 122), although even those powers may be limited by additional implications, so that the Commonwealth cannot confer upon the ACT Legislative Assembly the Commonwealth's power to impose excises.¹⁴ When the Legislative Assembly exercises its powers, it is not exercising the Commonwealth's legislative power as an agent or delegate, but its own power as a legislative body.¹⁵ The Commonwealth has neither abdicated nor delegated its legislative power – instead, it has created 'a legislature with its own legislative powers concurrent with, and of the same nature as, the powers of the [Commonwealth] Parliament.'¹⁶

The conflict is not, therefore, one between two Commonwealth laws, but rather, one between the laws of two legislative bodies, one of which was created by, and received its powers from, the other. In those circumstances, the law of the superior legislative body prevails.¹⁷ As Kirby J put it:

[I]n a case where the apparent inconsistency arises at the intersection of a federal and sub-federal law, if the former be constitutionally valid and applicable, it has primacy.¹⁸

Self-government was granted to the Northern Territory in 1978, to Norfolk Island in 1979 and the Australian Capital Territory in 1988. In each case the issue of inconsistency between territory laws and Commonwealth laws was dealt with differently.

Inconsistency in the Northern Territory

In the Northern Territory, no provision was included in the *Northern Territory (Self-Government) Act 1978* (Cth) concerning inconsistency of laws. Although s 109 did not apply, it was assumed that the repugnancy principle outlined above would continue to apply where there was inconsistency between territory and Commonwealth laws.

¹³ *Berwick v Gray* (1976) 133 CLR 603. Mason J observed at 607 that s 122 of the Constitution is a plenary power which is 'wide enough to enable Parliament to endow a Territory with separate political, representative and administrative institutions, having control of its own fiscus'.

¹⁴ *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248, 278-9 (Brennan, Deane and Toohey JJ). See also: Gaudron J at 290.

¹⁵ *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248, 282 (Brennan, Deane and Toohey JJ); 284 (Gaudron J).

¹⁶ *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248, 283 (Brennan, Deane and Toohey JJ). See also Gaudron J at 284. See also: 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, 26. Note the criticism of the High Court's reasoning in: G Lindell and A Mason, 'The Resolution of Inconsistent State and Territory Legislation' (2010) 38(3) *Federal Law Review* 391, 407.

¹⁷ *Attorney-General (Northern Territory) v Hand* (1989) 25 FCR 345, 366-7 (Lockhart J); *Commonwealth v Newcrest Mining* (1995) FCR 167, 179 (Black CJ and Foster J).

¹⁸ *Northern Territory v GPAO* (1999) 196 CLR 553, 636 [220] (Kirby J). See to similar effect: *University of Wollongong v Metwally* (1984) 158 CLR 447, 463 (Mason J): 'And in a federal context, where the conflict is between a statute of the federal legislature and a statute of a State or provincial legislature, the conflict is resolved in favour of the primacy of the federal statute, even in the absence of a provision such as s 109'. See also Murphy J at 467.

This position is qualified, but also reinforced, by an exception. The Northern Territory Legislative Assembly was given the power in s 57 of the *Northern Territory (Self-Government) Act* to amend or repeal any existing laws in force in the Northern Territory at the time self-government was granted, including Ordinances previously made by the Commonwealth, but *not* Acts of the Commonwealth Parliament or instruments made under them. Hence, the Legislative Assembly's powers did *not* include the power to enact laws that would, if they had full effect, impliedly amend or repeal existing Commonwealth laws.¹⁹ Gleeson CJ and Gummow J noted in *Northern Territory v GPAO* that the power in s 6 of the *Northern Territory (Self-Government) Act* to make laws for the peace, order and good government of the Territory is made 'subject to this Act' and therefore 'subject to the limitation found in s 57 upon the power to alter or repeal laws in force in the Territory immediately before the commencing date.'²⁰ They went on to observe:

It is consistent with the imposition of this limitation upon the power of the Legislative Assembly with respect to pre-existing laws of the Commonwealth that no provision is made in the Self-Government Act with respect to the alteration or repeal by the Legislative Assembly of laws subsequently enacted by the Parliament of the Commonwealth. The phrase "to make laws for the peace, order and good government of the Territory" in s 6 of the Self-Government Act should not be construed as conferring such an extensive form of authority.²¹

This approach is consistent with the previous repugnancy test – that it operates as a limitation on the *power* to enact the law, rather than upon the operative effect of a valid law. It is a position also supported by Brennan J in *R v Kearney; Ex parte Japanangka*²² and by Lockhart J in *Attorney-General (Northern Territory) v Hand*.²³ One consequence of this approach is that it gives rise to timing issues. Leeming has put the position thus:

If the Territory's law is later in time, then the question will be whether the Territory's law-making power authorises a law which conflicts with the Commonwealth law (answer: no, save for the Commonwealth delegated legislation in force in the Territory prior to self-government for which express provision has been made; the grant of legislative power is not construed so as to authorise Territory laws which conflict with present or future laws of the Commonwealth). On the other hand, if the Commonwealth law is later in time, the question is whether there has been by necessary implication a restriction in the

¹⁹ *Northern Territory v GPAO* (1999) 196 CLR 553, 578 [45]-[46] (Gleeson CJ and Gummow J).

²⁰ *Northern Territory v GPAO* (1999) 196 CLR 553, 579 [48] (Gleeson CJ and Gummow J).

²¹ *Northern Territory v GPAO* (1999) 196 CLR 553, 579 [49] (Gleeson CJ and Gummow J).

²² *R v Kearney; Ex parte Japanangka* (1984) 158 CLR 395, 418-9 (Brennan J).

²³ *Attorney-General (Northern Territory) v Hand* (1989) 25 FCR 345, 366-7 (Lockhart J): 'It is not a question of inconsistency between the two sets of laws which may otherwise be valid, rather it is a question going to the competency of the subordinate legislature to enact laws or to cause laws to operate in a manner inconsistent with or repugnant to laws of the paramount legislature.'

operation of the Territory law by reason of a cutting down of the law-making power in the *Self-Government Act*.²⁴

Accordingly, as the *Marriage Act* 1961 (Cth) was a pre-existing law at the time self-government was achieved in the Northern Territory, s 57 makes it clear that the Legislative Assembly could not amend or repeal the application of the *Marriage Act* in the Northern Territory and would not have the power to enact any law inconsistent with it. As for the amendments to the *Marriage Act* made in 2004, they occurred after self-government so that s 57 does not apply in relation to them. Nonetheless, the scope of s 6 would appear to be impliedly limited so that the Northern Territory Legislative Assembly would have no legislative power to enact a law that is repugnant to, or inconsistent with, the application of an existing Commonwealth law.

If the Northern Territory were to enact a same-sex marriage law, the question would then be whether or not the law was inconsistent with a Commonwealth law. This raises the question of whether inconsistency, for these purposes, includes the form of indirect inconsistency that utilises a ‘cover the field’ test. This was addressed in detail by Gleeson CJ and Gummow J in *Northern Territory v GPAO*:

There may be discerned in a law which is of general application throughout the nation and is made by the Parliament in exercise of a power conferred by s 51 of the Constitution the legislative intention to make exhaustive or exclusive provision on the subject with which it deals. Section 109 of the Constitution then will apply on the footing that “when the Parliament appears to have intended that the Federal law shall be a complete statement of the law governing a particular relation or thing... the operation of the Federal law would be impaired if the State law were allowed to affect the matter at all”.²⁵ In such a case, it is to be expected also that this field will be covered with respect to the territories. For example, one would be slow to attribute to the Parliament the intention that a law with respect to defence would occupy two fields and, in that sense, operate differentially across Australia, or that a law with respect to marriage would segregate the population by a criterion of residence in a territory rather than elsewhere in Australia.²⁶

We can therefore be relatively confident that the High Court would be reluctant to attribute to the Parliament an intention to exclude the application of the covering the field test to cases of inconsistency between Commonwealth and Territory laws, where the Commonwealth law covers the field to the exclusion of State laws. The absurdity of the result, as noted in relation to both defence and marriage, would suggest that the High Court would not lightly reach such a conclusion. Hence, it would be reasonable to conclude that if the Northern Territory Legislative Assembly were to enact a same-sex marriage law, and the Commonwealth’s *Marriage Act* was regarded as covering the

²⁴ Mark Leeming, *Resolving Conflicts of Laws*, (Federation Press, 2011) 235.

²⁵ *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128, 136.

²⁶ *Northern Territory v GPAO* (1999) 196 CLR 553, 581-2 [57] (Gleeson CJ and Gummow J).

entire field of marriage, then the Northern Territory law would be invalid, as it would be beyond the legislative power of the Northern Territory Legislative Assembly to enact it.

Inconsistency in Norfolk Island

The position in Norfolk Island and the Australian Capital Territory, however, is potentially different from that of the Northern Territory because of the application of express rules regarding inconsistency. The form of self-government achieved in Norfolk Island is in some ways greater in scope than that of the Northern Territory. Commonwealth laws only extend to Norfolk Island if it is specifically stated in those laws that they do so.²⁷ An example is s 8 of the *Marriage Act* 1961 (Cth), which expressly applies the entirety of the Act to Norfolk Island, supporting an intention to cover the field of marriage right across Australia, including Norfolk Island and the external territories of Christmas Island and the Cocos Islands.

The consequence is that while Norfolk Island could not enact a law inconsistent with the *Marriage Act*, it can enact laws that deal with issues such as immigration and customs that are inconsistent with Commonwealth laws that apply on mainland Australia.²⁸ However, given the small size of Norfolk Island, there are also greater oversight constraints imposed upon it. For example, when the Norfolk Island Legislative Assembly makes laws affecting certain listed subjects, such as fisheries, customs, immigration, education and industrial relations, the Administrator has to act on the advice of the responsible Commonwealth Minister (rather than the Norfolk Island Executive Council) in giving assent to such laws.²⁹ Further the Governor-General can disallow laws within six months of assent.³⁰ Certain other types of laws must be reserved for the Governor-General's consent.³¹ Critically, in rare circumstances, the Governor-General can make an Ordinance that applies as part of Norfolk Island law.³² It is in relation to these ordinances, that an express rule regarding inconsistency was included in the *Norfolk Island Act* 1979 (Cth).

Section 29(1) of the Act provides:

29. (1) Where an enactment made [by the Norfolk Island Legislative Assembly] is inconsistent with an Ordinance made by the Governor-General under section 27, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid, but an enactment and an Ordinance shall not be taken for the purposes of this sub-section to be inconsistent to the extent that they are capable of operating concurrently.

²⁷ *Norfolk Island Act* 1979 (Cth), s 18.

²⁸ Gerard Carney, *The Constitutional Systems of the Australian States and Territories*, (CUP, 2006) 464-5.

²⁹ *Norfolk Island Act* 1979 (Cth), s 21(6).

³⁰ *Norfolk Island Act* 1979 (Cth), s 23.

³¹ *Norfolk Island Act* 1979 (Cth), ss 21-2.

³² *Norfolk Island Act* 1979 (Cth), s 27.

As the making of an ordinance by the Governor-General amounts to a direct interference in the legal system of Norfolk Island, it makes sense to narrow the extent of that interference to one of direct inconsistency. The burden is placed upon the Governor-General (as advised by Commonwealth Ministers) to be precise about the form of inconsistency that such an ordinance would produce in relation to Norfolk Island laws. If the Ordinance is capable of operating concurrently with local laws, then it will do so. As for conflicts between other Commonwealth laws applying to Norfolk Island and local laws, this was left to the previous repugnancy doctrine, as applied in the Northern Territory.

Inconsistency in the Australian Capital Territory

The early reports on self-government for the Australian Capital Territory exhibited similar concerns to those in relation to Norfolk Island. On the one hand, it was not considered necessary to make a specific rule about inconsistency, because it was assumed that any Legislative Assembly of the ACT would be a subordinate body exercising delegated legislative power and it could not make laws that conflicted with Commonwealth laws.³³ The 1984 Task Force report on self-government for the ACT observed that:

As subordinate legislation, laws made by the ACT legislature will be subject to the overriding effect of Commonwealth Acts: if ACT laws are inconsistent with such Acts, they will be invalid at least to the extent of such inconsistency.³⁴

It also recognized that the Commonwealth had certain federal roles which it would perform in a uniform manner throughout the Commonwealth:

As the national government the Commonwealth exercises most of its functions, for example, defence, foreign affairs and social security, uniformly throughout Australia. It is not appropriate for the ACT elements of these functions to be transferred to an ACT Government.³⁵

While this paragraph of the report was directed at the question of the transfer of executive power, it does acknowledge the intended uniformity of Commonwealth legislation within its heads of power and the inappropriateness of ACT involvement in them. It would therefore appear surprising if it was intended that the ACT's laws operate within such fields in the absence of direct inconsistency.

³³ Commonwealth, Department of the Interior, 'Self-Government for the Australian Capital Territory' (Cth Gov Printer, May 1967) 22 [94]. Note that such assumptions were later overturned by the High Court in the *Capital Duplicators* case discussed above.

³⁴ Commonwealth Parliament, Task Force on Implementation of ACT Self Government, *Report*, (May 1984), 28 [5.11]. The report added that the degree of Commonwealth control over laws in the ACT would be 'no less than in the Northern Territory': Supplementary Report, 153 [5.6].

³⁵ Commonwealth Parliament, Task Force on Implementation of ACT Self Government, *Report*, (May 1984), 61 [11.4].

The 1988 proposal that immediately preceded the enactment of the *Australian Capital Territory (Self-Government) Act 1988*, stated simply that ‘Assembly law is subordinate to Commonwealth law’. It did not make any qualifications to this state of affairs.³⁶

However, as Canberra is the national capital and houses important departments of state, it was regarded as necessary that the Commonwealth be able to legislate quickly and specifically for the ACT in order to protect the Commonwealth’s interests. Thus, like Norfolk Island, there were two types of Commonwealth law in issue – those that applied specifically to the ACT, which were intended to override local ACT laws, and those that applied generally as Commonwealth laws across the nation.

It was the first category where there was a desire to ensure that if the Commonwealth was interfering with self-government by imposing specific laws for the ACT only, it did so by way of a directly inconsistent law, rather than through indirect (cover the field) inconsistency. Thus, when a Task Force in 1976 recommended that the Governor-General retain a power to make ordinances for the ACT, which would be able to override local ACT laws, it recommended the inclusion of a provision stating that such a Commonwealth ordinance shall not be taken as overriding an ACT law unless the ordinance is expressly stated to do so or unless the ACT law is inconsistent with an express provision of the ordinance.³⁷ This approach, which was later refined and applied in relation to Norfolk Island in 1979, was also largely followed in the *Australian Capital Territory Council Bill 1986*. Clause 48 of the Bill retained the power of the Governor-General to legislate for the ACT by making ordinances, but the Bill applied an inconsistency provision that acknowledged that there would be no inconsistency where the two laws could operate concurrently. While this Bill was blocked in the Senate, it formed a template for much of the later 1988 Act.

The Discussion Paper which preceded the 1988 Act also proposed that the Governor-General continue ‘to have the power to make laws in respect of matters for which the Assembly has legislative power’. This was expressly included in cl 34 of the *Australian Capital Territory (Self-Government) Bill* as first introduced into the House of Representatives. However, the Opposition objected to the provision³⁸ and the deal negotiated with the Government was that the Governor-General’s ordinance-making power would be confined to those subjects upon which the Commonwealth retained control and would not extend to those functions granted to the ACT.³⁹ Hence the original 1976 rationale behind the requirement for direct inconsistency where an Ordinance made by the Governor-General interfered with self-government by overriding local territory laws was lost, without any alteration being made to the inconsistency clause.

³⁶ Gary Punch, Minister for the Arts and Territories, ‘A Possible Model for ACT Self-Government – A Discussion Paper’, 13 April 1988.

³⁷ Commonwealth, ‘Self-Government in the Australian Capital Territory – Report of the Task Force’ (AGPS, March 1976) 9 [6.10].

³⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 1988, p 2423 (Mr Brown).

³⁹ Commonwealth, *Parliamentary Debates*, Senate, 23 November 1988, p 2591 (Senator Hill). See the amendment made to s 12 of the *Seat of Government (Administration) Act 1910* (Cth) by the *ACT Self-Government (Consequential Provisions) Act 1988* (Cth).

The difference, however, between the Norfolk Island provision and the ACT inconsistency clauses in the 1986 and 1988 Bills is that the latter two were not confined to conflicts between the Governor-General's Ordinances and local laws. They were drafted more simply in a way that picked up inconsistency with *all* Commonwealth laws.⁴⁰ One would assume that there must have been a reason for making that change. What is interesting from the drafting record is the complete absence of any observation that such a change was being made or about its purpose or significance. None of the reports, discussion papers or other documents on the development of self-government, to which I have had access,⁴¹ has shown any intention to narrow the scope of inconsistency in the Australian Capital Territory so that it excludes indirect inconsistency with Commonwealth laws that apply generally across Australia. It would be very surprising, if that was the intention, that it was not noted in any of the significant reports. This is particularly so given the intense focus in those documents upon protecting the Commonwealth's position and retaining its control.

The interpretation of s 28 of the ACT Self-Government legislation

Section 28 of the *Australian Capital Territory (Self-Government) Act 1988 (Cth)* provides:

28 (1) A provision of an enactment [of the Legislative Assembly] has no effect to the extent that it is inconsistent with a law defined by subsection (2), but such a provision shall be taken to be consistent with such a law to the extent that it is capable of operating concurrently with that law.

(2) In this section:

"law" means:

- (a) a law in force in the Territory (other than an enactment or a subordinate law); or
- (b) an order or determination, or any other instrument of a legislative character, made under a law falling within paragraph (a).

While the drafting history might suggest that there was no intention to exclude the application of an indirect inconsistency test in relation to the application of Commonwealth laws of general application, the courts will also look to the meaning of the express words in the provision and the context in which they were enacted.

Two conclusions may be drawn from the express words. First, the provision is not directed towards the power to make the law, but rather the operative effect of the law.⁴²

⁴⁰ Note that most State and Imperial laws applying to the ACT were converted into 'enactments' by s 34 of the *Australian Capital Territory (Self-Government) Act 1988 (Cth)* and therefore excluded from the application of s 28.

⁴¹ Note that I have not had an opportunity to search the ACT Archives or the National Archives, so there may be other material that has not yet been publicly revealed.

⁴² *Re the Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322, [75] (Gummow and Hayne JJ).

Instead of there being any implied limitation imposed upon the ACT Legislative Assembly's power to enact such laws, there is Commonwealth legislative acceptance of their validity but lack of operative effect where inconsistency arises. This appears to evince an intention to adopt the s 109 approach to inconsistency, rather than the earlier repugnancy approach.

Secondly, s 28 would appear on its face to exclude the operation of indirect inconsistency by exhibiting an intention to accept the concurrent operation of Territory and Commonwealth legislation, as long as there is no direct inconsistency. Can this apparent intention be taken at face value or can it be interpreted differently when taking into account the context in which it was enacted?

The context in which s 28 was enacted

Similar terminology has been used in Commonwealth Acts since at least 1974. It appears that the first Commonwealth provision to use the same terminology concerning laws 'capable of operating concurrently', was one that applied to inconsistency between the *Canberra Water Supply (Googong Dam) Act 1974* (Cth) and any New South Wales laws picked up and applied to the Googong Dam area by the *Commonwealth Places (Application of Laws) Act 1970* (Cth). It therefore dealt with a conflict between two types of Commonwealth laws – one directly enacted by the Commonwealth Parliament and others originally enacted by a State Parliament, but given application by a Commonwealth Act.

Shortly afterwards, a more relevant use of the phrase was made in s 19 of the *Financial Corporations Act 1974* (Cth) and s 37 of the *Foreign Takeovers Act 1975* (Cth). In each case the provision stated that the Act was not intended to exclude or limit the operation of any laws of a State or Territory, in so far as those laws were capable of operating concurrently with the Act. The purpose appeared to be the clarification of the fact that the particular Act was not intended to cover the field, so that the operation of a State or Territory law would only be affected where there was a direct inconsistency. A similar, and more highly litigated, provision was included in s 74 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), which provided that the Act 'does not affect the application to Aboriginal land of a law or the Northern Territory to the extent that the law is capable of operating concurrently with this Act'.⁴³

Meanwhile, the High Court also began to recognise that the Commonwealth could not only cover the field, but could also clear the field if it expressed its intention clearly enough. For example, in 1977 Mason J noted in *Palmdale-AGCI Ltd v Workers' Compensation Commission (NSW)*:

[A] Commonwealth statute may provide that it is not intended to make exhaustive or exclusive provision with respect to the subject with which it deals thereby

⁴³ See, eg: *Gumana v Northern Territory* (2007) 158 FCR 349, [103] (French, Finn and Sundberg JJ).

enabling State laws, not in direct conflict with a Commonwealth law, to have an operation.⁴⁴

The statutory recognition of the potential concurrent operation of laws became most prominent as a consequence of the High Court's judgment in *Viskauskas v Niland*. The Court held that the provisions of the *Anti-Discrimination Act 1977* (NSW) concerning racial discrimination were inoperative because they were inconsistent with the *Racial Discrimination Act 1975* (Cth). Both Acts covered the issue of racial discrimination. The Court observed that the subject matter of the Commonwealth Act 'suggests that it is intended to be exhaustive and exclusive' and its terms suggested that it was intended 'as a complete statement of the law for Australia relating to racial discrimination.'⁴⁵ There were differences between the procedures and remedies provided by the two Acts. The Court concluded that this also resulted in inconsistency.⁴⁶

The Commonwealth Parliament disagreed with the High Court's interpretation and one month later it enacted s 6A of the *Racial Discrimination Act 1975* (Cth), which provided:

6A(1) This Act is not intended, and shall be deemed never to have been intended, to exclude or limit the operation of a law of a State or Territory that furthers the objects of the Convention and is capable of operating concurrently with this Act.

While the retrospective effect of this provision was held by a slim majority of the High Court to be invalid,⁴⁷ the Court accepted that in its prospective operation, the Parliament could make clear its intention not to cover the field by the use of such words.⁴⁸

These cases were particularly controversial at the time. The Fiscal Powers Sub-Committee of the Australian Constitutional Convention saw *Viskauskas v Niland* as an example of a case where Parliament had not intended to cover the field, but the Court had been too ready to attribute to Parliament an intention to do so. It recommended that the Commonwealth legislate to reverse the onus of establishing an intention to cover the field so that 'no law of the Commonwealth shall be construed to exclude the operation of a law of a State by reason that the Commonwealth law evinces an intention to exclusively regulate the subject matter dealt with by that law, unless such an intention appears by express statement in the Commonwealth law or its existence is logically necessary'.⁴⁹ This recommendation was taken up by the Australian Constitutional Convention in 1985, along with a further recommendation that the practice of inserting provisions into

⁴⁴ *Palmdale-AGCI Ltd v Workers' Compensation Commission (NSW)* (1977) 140 CLR 236, 243 (Mason J, with Barwick CJ, Stephen, Jacobs and Aickin JJ agreeing). See also: *The Queen v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545, 563-4 (Mason J).

⁴⁵ *Viskauskas v Niland* (1983) 153 CLR 280, 292.

⁴⁶ *Viskauskas v Niland* (1983) 153 CLR 280, 292-3.

⁴⁷ *University of Wollongong v Metwally* (1984) 158 CLR 447, 457 (Gibbs CJ); 469 (Murphy J); 474-5 (Brennan J); 479 (Deane J).

⁴⁸ *University of Wollongong v Metwally* (1984) 158 CLR 447, 456 (Gibbs CJ); 461 (Mason J); 469 (Murphy J); 483 (Dawson J).

⁴⁹ Australian Constitutional Convention, Fiscal Powers Sub-Committee Report, July 1984, para 4.34.

Commonwealth laws that save the application of State laws be continued and extended.⁵⁰ Both recommendations were also supported, with slightly different wording, by the Constitutional Commission in 1988.⁵¹

The Fiscal Powers Sub-Committee also addressed the somewhat different problem of whether a State law actually intrudes into the field that the Commonwealth intends to cover, or whether it deals with a matter in a different field and can run in parallel with the Commonwealth laws. It described the problem and its proposed solution as follows:

One problem that arises, for example, is where both a State and a Commonwealth law touch upon the same factual situation but from a different perspective or for a different purpose. It should not necessarily be the case that in these circumstances the State law is invalidated on the ground that it has encroached upon a field covered by the Commonwealth law. In some cases the High Court has expressly accepted that a State law which touches upon the same factual situation as the Commonwealth law does not intrude into the same field unless it does so on a basis that forms an element of the subject matter intended to be regulated by the Commonwealth law. In other cases, however, there is little detailed consideration of this issue and a tendency on the part of the Court to assume that a State law which touches upon the same factual situation as the Commonwealth law is invalid as soon as it is determined that the Commonwealth law covers the field.⁵²

The Sub-Committee therefore recommended that Commonwealth legislation be enacted ‘to the effect that no law of the Commonwealth shall be construed as intending to exclude the operation of a law of a State by reason only that the State law applies to the same subject matter as the Commonwealth law, unless the State law alters, impairs or detracts from the effect of that law’.⁵³ This recommendation (known as B2P) was approved by the Australian Constitutional Convention in 1985,⁵⁴ but was subsequently discarded as unnecessary in 1988 by the Constitutional Commission on the basis that it merely reflected current law.⁵⁵

This was the context into which s 28 of the *Australian Capital Territory (Self-Government) Act* 1988 (Cth) and its earlier counterpart, cl 42 of the *Australian Capital Territory Council Bill* 1986 (Cth), were born. There was a history of using terminology concerning the concurrent operation of laws as a means of denying an intention to cover the field. There was a recognised public interest in requiring the Commonwealth to be explicit about any intention to cover the field. Finally, there was an argument that State

⁵⁰ *Minutes of Proceedings of the Australian Constitutional Convention*, Brisbane, July-August 1985, (Government Printer, Qld), Vol I, p 421.

⁵¹ Constitutional Commission, *Final Report of the Constitutional Commission* (AGPS, 1988), Vol 2, para 10.29.

⁵² Australian Constitutional Convention, Fiscal Powers Sub-Committee Report, July 1984, para 4.37.

⁵³ Australian Constitutional Convention, Fiscal Powers Sub-Committee Report, July 1984, para 4.38.

⁵⁴ *Minutes of Proceedings of the Australian Constitutional Convention*, Brisbane, July-August 1985, (Government Printer, Qld), Vol I, p 421, Item B2P.

⁵⁵ Constitutional Commission, *Final Report of the Constitutional Commission* (AGPS, 1988), Vol 2, para 10.48.

laws should not be automatically denied operation if they concern factual matters that are also dealt with by Commonwealth laws where there is no actual conflict.

The literal interpretation of s 28

In that context, how should s 28 be interpreted? Is it really an attempt to exclude the covering the field test in relation to Commonwealth laws applying in the ACT, or can it be given a more nuanced interpretation? There is little in the way of authority on the matter. The most relevant appears to be some *obiter dicta* from Gleeson CJ and Gummow J in *Northern Territory v GPAO* – a case that concerned inconsistency in the Northern Territory, rather than the Australian Capital Territory. Their Honours made the following comment in attempting to contrast the ACT provision against the position in the Northern Territory:

It will be apparent that s 28 operates not as a denial of power otherwise conferred by s 8, but as a denial of effect to a law so made “to the extent” of its inconsistency. To that extent the analogy with s 109 will be apparent. However, the criterion for inconsistency – incapacity of concurrent operation – is narrower than that which applies under s 109, where the federal law evinces an intention to make exhaustive or exclusive provision upon a topic within the legislative power of the Commonwealth.⁵⁶

While such a view could clearly be taken of other provisions in Commonwealth Acts that use the same wording to ensure that the particular Act is not taken to cover the field, it is harder to justify such an interpretation of s 28. This is because all the other examples noted above, except for Norfolk Island (which was confined to a very small category of Ordinances to be made in the future), involved the Commonwealth Parliament asserting that a *particular* Act of that Parliament was not intended to cover the field. In those cases, the Parliament was directly addressing a specific Commonwealth law and the extent of its intended application. In contrast, s 28 deals blindly with *all* Commonwealth Acts that might come into conflict with ACT laws. How can the Commonwealth Parliament, at that moment in 1988, express such an intention in relation to *all* previous Commonwealth laws or purport to do so in relation to future Commonwealth laws? How can it intend that some of its laws cover the field completely and exhaustively in relation to a particular subject-matter, but somehow cease to be complete and exhaustive with respect to that subject-matter when they apply in the Australian Capital Territory? Either the intention to cover the field completely and exhaustively exists or it does not.

One explanation for s 28 might be that it was intended to be the vanguard for a broader proposal to implement the recommendations of the Australian Constitutional Convention

⁵⁶ *Northern Territory v GPAO* (1999) 196 CLR 553, 582-3 [60] (Gleeson CJ and Gummow J). See also: Geoffrey Lindell, ‘The Arrangements for Self-government for the Australian Capital Territory: A Partial Road to Republicanism in the Seat of Government?’ ((1992) 3 *Public Law Review* 5, 11; and the Joint Opinion of D F Jackson QC and S J Gageler SC, ‘Re *Civil Partnerships Bill* 2006 (ACT); Ex parte: Australian Capital Territory’, 5 May 2008, [28]-[31]: https://cdn.justice.act.gov.au/resources/uploads/Marriage_Equality_Advice.pdf.

and the Constitutional Commission, requiring the Commonwealth to be more explicit about when it intended to cover the field. In the case of the ACT, such an experiment would have been counter-balanced by the Commonwealth's retention of power, through the Governor-General, to disallow any ACT law that trespassed into fields that the Commonwealth intended to cover in their entirety.⁵⁷ Certainly, all the reports on self-government leading up to its implementation emphasised the need for the Commonwealth to be able to disallow ACT legislation, either through the Commonwealth Parliament⁵⁸ or the Governor-General,⁵⁹ as a means of limiting the exercise of a grant of plenary legislative power to the ACT Legislative Assembly.⁶⁰ It could then be argued that this balance had been upset, perhaps unintentionally,⁶¹ by the repeal of the disallowance power by the *Territories Self Government Legislation Amendment (Disallowance and Amendment of Laws) Act 2011* (Cth).

An alternative interpretation of s 28

One possible way of interpreting s 28 is that its terms should be read in the light of the move away from the doctrine of repugnancy, which is directed at the power to make and sustain the validity of a law, to a doctrine of inconsistency, which is directed at the effective operation of a valid law. Where the doctrine of repugnancy applies, there is no power to enact the repugnant law, hence there is no capacity to read it down to avoid an inconsistency. This different rule of inconsistency, however, casts open the possibility of reading down a law so that it can continue to operate concurrently with a Commonwealth law to which it would otherwise be inconsistent. It could be argued, therefore, that the last clause of s 28(1) simply reflects that fact and does not purport to affect the operation of Commonwealth laws.⁶²

One might well take that approach further, by arguing that s 28 is intended to accommodate the possibility of concurrently operating laws in circumstances where the Commonwealth has not intended to cover the field, or where, as in Recommendation B2P of the Australian Constitutional Convention, the Commonwealth has intended to cover

⁵⁷ On the disallowance power, see: *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248, 260-1 (Mason CJ, Dawson and McHugh JJ).

⁵⁸ Commonwealth Parliament, Joint Committee on the Australian Capital Territory, 'Self-Government and Public Finance in the Australian Capital Territory', (December 1974) 32-3; Commonwealth, 'Self-Government in the Australian Capital Territory – Report of the Task Force' (AGPS, March 1976) 13-14 [7.1]-[7.4].

⁵⁹ Commonwealth Parliament, Task Force on Implementation of ACT Self Government, *Report*, (May 1984), 28 [5.15]

⁶⁰ Note also the 1976 report and the 1984 report that recommended Commonwealth control over the granting of assent to ACT laws so that assent could be refused, when in the national interest, at a stage before the law commenced: Commonwealth, 'Self-Government in the Australian Capital Territory – Report of the Task Force' (AGPS, March 1976) 7-9; Commonwealth Parliament, Task Force on Implementation of ACT Self Government, *Report*, (May 1984), 29 [5.22].

⁶¹ Geoffrey Lindell raised this issue to the attention of the Senate Legal and Constitutional Affairs Legislation Committee in his submission, 11 March 2011, para 21. However, its significance does not appear to have been recognized: Senate, Legal and Constitutional Affairs Legislation Committee, *Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010*, (May, 2011).

⁶² Mark Leeming, *Resolving Conflicts of Laws*, (Federation Press, 2011), 240-1.

the field but although the two laws relate to the same factual matter they can be interpreted as falling within different fields.⁶³ The Explanatory Memorandum to the *Australian Capital Territory (Self-Government) Act* suggested as much. It stressed the pre-eminence of Commonwealth law while noting merely the possibility that an Assembly law could operate concurrently with Commonwealth laws. It did not assert any intention to limit the application of Commonwealth laws so that they do not cover the field. The Explanatory Memorandum stated:

This clause provides that laws of the Assembly are subordinate to Commonwealth Acts, regulations made under those Acts, Ordinances, regulations made under those Ordinances and to other Commonwealth instruments of a legislative character. However, an Assembly law may operate concurrently with Commonwealth laws.

Leeming has also argued that s 28 is not directed towards limiting the application of Commonwealth laws, but rather towards the interpretation of Territory laws:

Section 28(1) requires, where possible, a confined legal meaning to be given to Territory laws so as to enable their concurrent operation. It is *not* a confirmatory provision to the effect that the Commonwealth law is not to be taken to be exhaustive, rather it is a constraint upon the operation of the Territory law.⁶⁴

This approach is similar to that of Brennan J in *Webster v MacIntosh*, where he observed that ‘the relevant question is not whether the Act can be so construed as to leave room for the operation of the Ordinance, but whether the Ordinance is repugnant to the Act’.⁶⁵ The focus, therefore, is placed upon the scope of the ACT enactment and whether it can be read down in such a way as to avoid inconsistency with the Commonwealth law.⁶⁶ On this interpretation, s 28 does not alter or affect the scope of the application of the Commonwealth law or any intention that it cover the field. If the ‘co-existence of the two sets of provisions’ in the ACT and Commonwealth laws respecting marriage produced ‘an antinomy inadmissible in any coherent system of law’,⁶⁷ then the ACT enactment would be inoperative to the extent of the inconsistency.

This approach has two advantages. First, it avoids the conceptual absurdity of Commonwealth laws that evince an intention to cover the field, but which, according to another law enacted by another Commonwealth Parliament at a different time, are not intended to cover the field in their application in the Australian Capital Territory. Secondly, it is consistent with the approach taken by a majority of the High Court in *Capital Duplicators [No 1]*, which concluded that the self-governing territories were to be treated, by analogy, as being subject to the same constraints in their relationship with

⁶³ See, eg: *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237.

⁶⁴ Mark Leeming, *Resolving Conflicts of Laws*, (Federation Press, 2011) 240.

⁶⁵ *Webster v MacIntosh* (1980) 49 FLR 317, 320 (Brennan J).

⁶⁶ See, for a similar approach, the reading down of Northern Territory legislation to avoid inconsistency under ss 73 and 74 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), in cases including *Gumana v Northern Territory* (2007) 158 FCR 349, [103] (French, Finn and Sundberg JJ).

⁶⁷ *Frost v Stevenson* (1937) 58 CLR 528, 572 (Dixon J).

the Commonwealth as apply to the States. This relationship was described by Gaudron J as follows:

Given that the Internal Territories are constituent parts of the Commonwealth, both geographically and politically, it is also arguable that, as s 122 appears in Ch VI which is concerned with the admission and establishment of new States, it only authorizes the alteration of their status from dependent Territory to that involving a separate body politic with separate organs of government, on the basis that, as separate bodies politic, they are subject to the same restraints as the Constitution imposes on the States.⁶⁸

On this basis, even though s 109 does not formally apply, the same principles apply regarding inconsistency between Commonwealth and Territory laws, including the application of the cover the field test. It is then at least arguable that it is incompetent for the Commonwealth Parliament to purport to remove this form of inconsistency on a blanket basis in circumstances where it is clear that particular laws do *in fact* evince an intention to cover the field.

The possibility of a clash between an intention to cover the field manifested by the terms of the Act and an expressed intention not to cover the field was raised by Gibbs CJ in *University of Wollongong v Metwally*. He speculated that:

It is perhaps possible to imagine a case in which a Commonwealth Act did in truth fully cover the whole field with which it dealt, notwithstanding that it said that it was not intended to do so, but such a case may be left for consideration until it arises.⁶⁹

Such a conflict is more likely to arise when the statement of intention that a law not cover the field is included in a separate Act and applied generally to all laws, or a class of laws, rather than a statement in a specific law about the intended coverage of that particular law. There is a better case for arguing that a general expression of an intention not to cover the field may be defeated by a law that *in fact* does cover the whole field.

The temporal problem

Finally, even if this alternative approach is not taken and s 28 is regarded as effectively excluding indirect inconsistency from the assessment of potential conflicts between Commonwealth and ACT laws, there is still a temporal problem that needs to be addressed. If s 28 had the effect of clearing the field with respect to existing Commonwealth Acts in 1988, so that Territory laws could have a concurrent operation where there was no direct inconsistency, any later Commonwealth law that covers the field may yet be regarded as impliedly repealing s 28 to that extent.⁷⁰

⁶⁸ *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248, 288-9 (Gaudron J).

⁶⁹ *University of Wollongong v Metwally* (1984) 158 CLR 447, 456 (Gibbs CJ).

⁷⁰ Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (CUP, 2006) 148.

This temporal aspect works awkwardly in relation to marriage. The *Marriage Act 1961* (Cth), which it would be fair to say was intended to cover the field of marriage to the exclusion of existing State and Territory laws,⁷¹ was enacted prior to 1988 and would therefore be subject to s 28 and the expression of an intention that Territory laws be capable of operating concurrently with it. However, the 2004 amendments made by the *Marriage Amendment Act 2004* (Cth) were enacted after 1988. To the extent that they are intended to cover the field, they may impliedly repeal s 28 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth).

The Explanatory Memorandum to the *Marriage Amendment Act 2004* (Cth) states that:

The purpose of the Marriage Amendment Bill 2004 ('the Bill') is to give effect to the Government's commitment to protect the institution of marriage by ensuring that marriage means a union of a man and a woman and that *same sex relationships cannot be equated with marriage*. [my emphasis]

It would appear clear from this statement that it was the intention of the Commonwealth Parliament to cover a field that was sufficiently wide to exclude not only the marriage of same-sex couples but also any law that seeks to equate same sex relationships with marriage. This is precisely what the *Marriage Equality (Same Sex) Act 2013* (ACT) purports to do, both in name and substance. How one applies this temporal application where an amending Act enacted after 1988 amends a principal Act enacted before 1988, is unclear. However, at the very least there is a plausible argument that the *Marriage Amendment Act 2004* (Cth), on its own, was intended to cover the field to the exclusion of the Territory Act, and that this had the effect of overriding any contrary application of s 28 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth). The *Marriage Equality (Same Sex) Act 2013*, to the extent that it establishes a category of same-sex marriage that is to be equated with marriage, would 'alter, impair or detract from the operation of a law of the Commonwealth Parliament' and to that extent would be invalid.⁷²

Conclusion

Regardless of what outcome one might wish to be achieved in relation to same-sex marriage, it feels intuitively wrong that certain Commonwealth laws cover the field to the exclusion of all State laws and all other territory laws, but not in relation to the laws of the Australian Capital Territory. While the words of s 28 of the *Australian Capital Territory (Self-Government) Act 1988* do on their face potentially support such an outcome, the drafting history and context do not. This paper has attempted to show that there are other ways in which s 28 might be explained and interpreted. Like many

⁷¹ Note also the observation of Gleeson CJ and Gummow J that Part VII of the *Family Law Act 1975* (Cth) 'is drawn from several sources, including s 122, but the scheme of the legislation is that it operates exclusively across the field it covers, whether in the States or the territories.': *Northern Territory v GPAO* (1999) 196 CLR 553, 582 [58].

⁷² *Victoria v Commonwealth* (1937) 58 CLR 618, 630 (Dixon J).

aspects of the same-sex debate, it is not a matter of clear-cut black and white distinctions, leaving the High Court with a range of difficult issues to resolve.