top of page 13 of case woollongong university v metwally s116 racial discrim case 1984 Use the quote from engineers case as well. There are many cases with section 109 and Covering Clause 5. Use inconsistency with sections btw 2008 and 1995 evidence acts.

MURPHY J. Uni of Woolongong v Metwally 1984

Validity of the Amendment Act is presumed. In this proceeding, the only question of validity is concerned with s.109 of the Constitution. The real question is the validity of parts of the State Act during the period 1977-1983.

Inconsistency
4. Our legal system is based on the principle that there cannot be inconsistent laws. This principle operates at federal and State levels and whatever the source of law (constitutional, legislative, delegated legislative or decisional (common) law). If these laws would produce an inconsistency, then one prevails; the other or others are not law, and are often described as invalid or inoperative. The supremacy between what would otherwise be inconsistent laws is resolved in a number of ways. For example, where two laws emanate from one legislature, the later prevails. Where they emanate from different legislatures, constitutional law provides that one is superior, and its law will prevail. In Australian constitutional law, there are two general supremacy clauses, one in the covering clauses of the Commonwealth of Australia Constitution Act (s.5) and the other in the Constitution proper (s.109). Another limited clause is s.105A (agreements with respect to State debts). Section 106 subjects State Constitutions to the Constitution; s.108 similarly subjects State laws to it.

5. The binding Federal law includes not only the express words but also the common law of the Constitution, that is, the implications and silent principles (recognized in the decided cases), such as separation of judicial from other powers (see The Queen v. Kirby; Ex parte Boilermakers' Society of Australia [1956] HCA 10; (1956) 94 CLR 254) or responsible government (see Commonwealth v. Kreglinger and Anor [1926] HCA 8; (1926) 37 CLR 393, 411-415). The phrase "all laws made by the Parliament ... under the Constitution" makes clear the supremacy of the Constitution - the only federal laws which bind judges as well as others are those authorized by the Constitution.

S.109 of the Constitution
6. Section 109 expresses the supremacy of any "law of the Commonwealth" over any "law of a State". "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid".
7. Section 109 is invalidating or destructive; it has no reconstructive aspect. Its operation is automatic and does not require a judicial order.

8. The laws referred to in s.109 include the decisional or common law, as well as legislation. Often it is State common law which is invalidated by a law of the Commonwealth.
9. Section 109 does not apply only to laws which are on the statute book at the same time. It must apply to an inconsistency between a State Act and a retrospective Act (that is a federal Act).
Otherwise, Parliament's power to legislate retrospectively would be ineffective. Many, if not most, retrospective Acts will be inconsistent with State laws (statutory or common law). Retrospective Acts would not be effective if they did not prevail over what would otherwise be inconsistent State law. Equally, s.109 applies where there is an inconsistency between an Act and a retrospective State Act, even if they were not "on the statute book" at the same time. It is enough that if both were laws they would be inconsistent, whether that inconsistency is produced by prospective operation of both or retrospective operation of both, or by retrospective operation of either.

Section 109 laws
10. Can s.109 invalidation be overcome by legislation? At the time of the commission of the acts of racial discrimination, the State Act was invalid by reason of s.109 of the Constitution (the Viskauskas case). It was invalid from its inception and continued to be invalid at least until the operation of the Amendment Act. Can the invalidating effect of s.109 during that period be removed by an Act? This is a question of the utmost importance. The answer depends not on any precedent, but on the direct operation of s.109.

11. To take the extreme, suppose the Racial Discrimination Act were entirely repealed by an Act which declared that the Racial Discrimination Act was to be treated as if it had never existed.
Would the consequence be that the State Act has been operative from the time of its enactment? The answer is that s.109 would already have operated throughout that time to invalidate the State Act. Parliament cannot alter the incidence of s.109 so as to render the State Act valid during that time. An Act cannot undo the invalidating effect which s.109 has had on a State Act.

12. As from the commencement of operation of the Amendment Act, the basis on which s.109 could operate in respect of any State Act that "furthers the objects of the Convention and is capable of operating concurrently with" the Racial Discrimination Act as amended, was removed.
But that did not affect the previous operation of s.109. If an inconsistency occurs because of prospective or retrospective operation of federal or State law, s.109 operates to render the State law invalid to the extent of the inconsistency. But retrospective operation of federal law cannot render valid what s.109 made invalid. This would elevate legislation above the Constitution.

13. Equally, State legislation cannot overcome the invalidating effect of s.109. Suppose aninconsistency arose only because of a particular feature of a State Act but the result was the invalidity not merely of that feature but of the whole

State Act. Suppose the State retrospectively amended the State Act to delete that feature. Nevertheless the State Act would remain invalid until the amendment.

14. Neither Federal nor State Parliament can render valid what s.109 has made invalid. But of course either can legislate to remove an inconsistency so that s.109 will not continue to apply.
Also, although the Federal Parliament itself cannot undo the previous invalidating effect of s.109, it can clear the way for the State Parliament to make a fresh State Act to apply retrospectively in the same terms. Thus both Parliaments can legislate retrospectively so that a fresh State law would come into existence giving present legal force to the procedures which have been followed and the remedies which have been obtained by Mr Metwally.

15. In expressing the view that legislative action by State Parliament as well as the Federal Parliament could restore Mr Metwally to where he would be if the State Act had been valid, I am not suggesting that this course be undertaken. Because Mr Metwally has in good faith relied upon

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what the State legislature has enacted he has become embroiled in highly complex constitutional problems, transcending his own case. Without expressing any opinion on the merits, these circumstances suggest that the interests of justice might best be served by other measures, perhaps an executive remedy, rather than legislative action which has the potential for further lengthy constitutional litigation.

Gummow.J within Momcilovic v The Queen [2011] HCA 34 (8 September 2011).
Quote: “Paragraph 210: Section 109 states: "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."
211: The interaction of federal and state or provincial laws must be a matter of first importance in framing a federal constitution. Covering cl 5**[318]** makes not only federal laws, but also the Constitution itself, binding in the manner it specifies**[319]**. As Quick and Garran noted at the time**[320]**, covering cl 5 is substantially similar in scope and intention to the Supremacy Clause (Art VI cl 2) of the United States Constitution**[321]**. But the framers of the Commonwealth Constitution went further by making the express provisions of Ch V (ss 106-120). Chapter V is headed "The States" and includes s 109. Whatever may be the relationship between the amendment provision in s 128 of the Constitution and the covering clauses, there could be no doubt that s 128 applies to s 109.” End Quote.

As per the case below Section 109 is outlined and page. Jemena Asset Management (3) Pty Ltd v Coinvest Limited [2011] HCA 33 (7 September 2011) FRENCH CJ, GUMMOW, HEYDON, CRENNAN, KIEFEL AND BELL JJ. Quote: "**The paramountcy[53] of the Parliament of the Commonwealth under the Constitution resolves any conflict between Commonwealth and State law as set out in covering cl 5 and s 109 of the Constitution:**

"5 This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and every part of the Commonwealth, notwithstanding anything in the laws of any State ...

109. "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

Quick and Garran describe s 109 as "practically a corollary"[54] of ss 106, 107 and 108 of the Constitution which deal respectively with the saving of State Constitutions, powers of State Parliaments and State laws, all of which are made subject to the Constitution. In the context of the law-making powers of the State and Commonwealth Parliaments under their respective Constitutions, s 109 requires a comparison between any two laws which create rights, privileges or powers, and duties or obligations, and s 109 resolves conflict, if any exists, in favour of the Commonwealth."