

CONSTITUTIONAL LAW GUIDEBOOK

Chapter 16 – Inconsistency

Problem Question (pg 243)

A recent study by the CSIRO has concluded that in order to prevent electronic interference in the operation of telephone and fax machines, all telephone and fax machines should have 9mm of shielding on parts subject to interference. In 2007 the Queensland Parliament enacts the *Telecommunications Act 2007* (Qld), the long title of which states that it is 'an Act to regulate telephone communication standards in Queensland'. Section 4 of the Act empowers the Minister of Business Affairs to 'make such regulations as are necessary to give effect to the Act'. The Minister enacts the *Telecommunications Regulations 2007* (Qld), part of which states as follows:

26 Shielding

No telecommunications device shall be sold unless every reception component therein is encased in lead shielding of 15mm or more.

27 Earpieces

No telecommunications device shall be sold unless its earpiece is manufactured wholly from ceramics.

Subsequently, the Commonwealth enacts the *Commonwealth Telecommunications Standardisation Act 2008* (Cth), the long title of which is 'an Act to provide for national standards relating to telecommunications devices in Australia'. Each type of telecommunications device (faxes, modems, videophones, telephones etc) is dealt with in its own Chapter of the Act. Chapter XXIV deals with telephones, and contains just one section, which states as follows:

435 Telephone shielding

- (1) A seller of telephones must obtain a licence under this Act
- (2) A licence shall not be issued to a person under sub-section (1) of this section unless every reception component contained in the telephones that person sells is encased in shielding of no less than 9mm.

Mary Marconi operates a business in Brisbane, selling telephones. The telephones that she sells have shielding of 9mm thickness, and do not have ceramic earpieces. Mary has obtained a licence under s 435 of the Commonwealth Act. She has been prosecuted by the Queensland DPP for breaching ss 26 and 27 of the *Telecommunications Regulations 2007* (Qld). She approaches you for advice.

How to answer this problem - issues to consider:

1. What are the tests for inconsistency between Commonwealth and State law?

CONSTITUTIONAL LAW GUIDEBOOK

2. Does the fact that Mary has obtained a licence under Commonwealth law automatically mean that she does not have to comply with State law?
3. Looking first at s 26 of the State Act, what type of consistency do you think is involved, and why?
4. Is s 27 of the State Act inconsistent with the Commonwealth law? If it is, what type of inconsistency would be relevant?
5. What are the factors that a court considers in determining whether this type of inconsistency exists, and what do you think will be the outcome in this case?