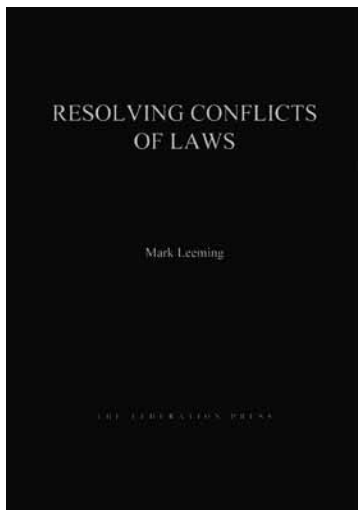


Resolving Conflicts of Laws

Mark Leeming | The Federation Press | 2011



The subject of this book is how the process of resolving conflicts between laws operates in Australia. This book is not about private international law but deals with inconsistency between laws: how to work out if they are inconsistent and how to resolve any inconsistency.

It is a major contribution to Australian constitutional law. Importantly, it reflects the experiences of a working lawyer.

The chapters are as follows:

1. Fundamental concepts
2. Australian sources of law
3. Resolving conflicts between laws having the same source
4. Repugnancy: A single test for legislative conflict
5. Inconsistent Commonwealth and state laws
6. Conflicts between state laws
7. Conflicts involving Territory laws.

The basic contention is that two stages are involved: the first is interpretative, that is to resolve apparent conflict as a matter of legal interpretation and only then, at the second stage, to apply conflict resolution rules.

The author makes the important and useful statement (at p 91.3) that it is not the case that two legal texts are inconsistent: inconsistency can only be determined by reference to the *legal meaning* of legal texts. Only after legal meaning has been given to the legal texts can the question whether they are inconsistent be addressed.

The book is informed by wide learning in relation to such difficult but important and very practical topics of federal jurisdiction; federal constitutional law; and state constitutional law and deals lucidly with whether there is a single common law of Australia and with states' extraterritorial legislative competence.

One of the themes of the book, expounded convincingly by reference to historical usage, is that 'inconsistency', 'repugnancy' and 'contrariety' are interchangeable terms in this context. Chapter 4 deals with this issue at length and contends for a single notion of legislative conflict:

Either the rights, obligations, powers, immunities or privileges conferred by two laws conflict or they do not.

The book covers, in a spare style, principles of statutory construction, validity of delegated legislation and constitutional concepts.

It covers and refers to North American authority as well as United Kingdom and New Zealand materials. Much significant history is described and explained.

The conclusion on statutory construction is that to achieve a 'harmonious construction' of provisions claimed to conflict requires attention to identifying which provisions are leading and which are subordinate and which must give way to the other: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [70] and the words of Lord Herschell LC in *Institute of Patent*

Agents v Lockwood [1894] AC 347 at 360 there cited.

Mark Leeming, rightly in my opinion, is harsh on metaphors whether those metaphors be 'laws standing together' or 'living together' or whether a law 'covers the field'.

Of course much has been written about inconsistent Commonwealth and state laws and s 109 of the Constitution; but very little has been written by judges on conflicts between state laws, as the author says in the opening to chapter six:

This chapter contributes to a body of learning on a topic which courts have scarcely needed to address for the past 110 years: how is a conflict between the laws of two States resolved?

This chapter is particularly instructive as it addresses those real conflicts between states laws not able to be avoided by construction or by choice of law.

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As the author notes in his Preface, much of the content of the book is material which is not otherwise readily to hand but which is necessary to analyse increasingly complex and interrelated and all-permeating legislative regimes.

The author is also robust in the views he expresses. This short

extract from Chapter 6 illustrates the style and virtues of the book.

Three heterodox accounts have been propounded by Michael Detmold, Justice Deane and Graeme Hill; these are addressed, but rejected. Instead, the solution propounded in this chapter is based upon the conventional "predominant territorial nexus" test, although modified in two main ways.

The author has succeeded in his aims of making the book useful and also readable. This is an excellent book from The Federation Press.

There are as well tantalising hints of other works in the series: an account of the jurisdiction of courts in the Australian legal system (page 16.1); the resolution of conflicts between statute law and common law (page 43.5); and the centrality of s 79 of the *Judiciary Act 1903* to the operation of the Australian legal system (page 79.9)

Reviewed by the Hon Justice Alan Robertson