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## **The territory of marriage: Constitutional law, marriage law and family policy in the ACT same sex marriage case\***

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*This article reviews the background to the High Court's decision in the ACT same sex marriage case and traces the origin of the court's surprisingly broad definition of what marriage is for the purposes of the marriage power in s 51(xxi) of the Australian Constitution. It reached this definition largely as a result of suggestions put from the Bench in oral argument, without the benefit of detailed written submissions on the subject by either the Commonwealth or the Australian Capital Territory, and in the absence of a contradictor. Intrinsic to the court's reasoning was the proposition that unless 'marriage' in s 51(xxi) included same-sex marriage then the Commonwealth would not be able to legislate so as to prevent the states or territories from establishing same-sex marriage. In finding the Commonwealth's power with respect to marriage does extend to same-sex and other forms of marriage, the court adopted a remarkably one-sided view of the existing case law on the scope of Commonwealth heads of power. It also did not take into consideration the wealth of case law directed specifically to the scope of the marriage power. The importance of the new definition is that now marriage policy in Australia does not depend in any significant way on issues of Constitutional law. While much has thereby been settled, much is now also unsettled. Marriage is, to a great extent, whatever the Federal Parliament says it is, so long as the union is a consensual one between persons (however young) and recognised by law as intended to endure. Specifically, the court has determined that the Constitution places no barrier in the way of polygamous relationships. What view of marriage the parliament chooses to adopt is a matter for political debate. Four options for a coherent policy on marriage and family are identified in the light of the High Court's judgment on the scope of the marriage power. These are (1) to continue with the current policy of treating all kinds of unions as if they were marriages, irrespective of consent and whether or not they are intended to endure, (2) to differentiate clearly between ceremonial marriage and informal relationships, (3) to return to the idea that marriage is based on nothing more than witnessed consent without the need for a celebrant, and (4) to base family policy on the twin axes of marriage and parenthood.*

### **Introduction**

It was the fire that burned brightly for a moment, but rapidly burned itself out, leaving nothing left. The Australian Capital Territory's bold attempt to introduce same-sex marriage for Australia<sup>1</sup> was passed on 22 October 2013 by a majority of 9 votes to 8, and weddings were permitted to take place in accordance with this legislation from 7 December; but the legislation was struck down less than a week later in a unanimous decision of the High Court on 12 December 2012.<sup>2</sup> The High Court acted with impressive speed in bringing this highly sensitive and controversial issue on for hearing and then providing a written judgment within 9 days of that hearing.

The outcome of the case was entirely unsurprising. The ACT legislation was held to be invalid in its entirety as being inconsistent (within the meaning of s 28(1) of the Australian Capital Territory (Self-Government) Act 1988) with the Commonwealth Marriage Act 1961. For all but a few 'true believers', that ought to have been a foregone conclusion.<sup>3</sup> What was surprising, however, is that the court based its decision on a premise which neither the Commonwealth, the Australian Capital Territory nor the amicus curiae, Australian Marriage Equality, advocated as a *basis* for its case. The court decided, contrary to the parties' submissions, that it needed first to determine whether the Federal Parliament *could* enact a law allowing same sex couples to marry. Because it answered that question in the affirmative, and the Marriage Act 1961 is intended to be a uniform law for Australia as a whole, it followed that the ACT legislation was

inconsistent and of no effect.

The Commonwealth in particular had submitted there was no need to determine the scope of the marriage power. While it preferred a broader view of that power, it argued the Marriage Act 1961 was clearly within power, and clearly intended to be the only law on marriage for the nation. That was a sufficient basis for declaring the ACT legislation as having no effect. The Australian Capital Territory and Australian Marriage Equality both put the argument that the Marriage Act 1961 should be read as only determining the law of marriage for heterosexual couples, leaving the sphere of same-sex marriage to the states.<sup>4</sup>

In determining that the Federal Parliament has the power to make laws allowing for marriage between same-sex couples, the court held that:

'marriage' is to be understood in s 51(xxi) of the Constitution as referring to a consensual union formed between natural persons in accordance with legally prescribed requirements which is not only a union the law recognises as intended to endure and be terminable only in accordance with law but also a union to which the law accords a status affecting and defining mutual rights and obligations.<sup>5</sup>

This definition has quite radical implications. Although the High Court began its judgment by saying that the 'only issue which this court can decide is a legal issue' it went well beyond what was necessary to determine the case and to resolve the controversy at hand. While this is far from unknown for final courts of appeal, normally when appellate judges provide an exposition of legal principles which go beyond what is needed to resolve the dispute, they do so in response to the arguments put forward by the parties in the case.

However, the decision should not be understood as taking any particular position in the same-sex marriage debate. Its real effect is to say that the definition of marriage is an issue for the politicians, and the Australian Constitution imposes very few constraints. Arguably, as will be seen, even the constraints the court said were implicit in the constitutional definition of marriage could be challenged on the basis of the same reasoning which the court itself adopted in coming up with its definition.

While the decision, strictly read, has no implications for the substance of the same-sex marriage debate, it does have implications for what ought to be regarded as proper processes of legal reasoning. Notwithstanding that the decision was unanimous, it is at least arguable that the court failed to adhere to the standards of legal reasoning and process that it justifiably expects of lower courts. If a lower court were to make a decision of such importance without the benefit of a contradictor, and without properly reviewing the considered dicta contained in previous High Court judgments for and against the position in dispute, one might expect the High Court to be very critical.<sup>6</sup> *Quis custodiet ipsos custodes?*<sup>7</sup>

This article first reviews the ACT legislation, and then goes on to explain its origins in arguments put forward by constitutional law scholar Professor George Williams. The arguments before the court are then reviewed, with particular reference to the transcript of the hearing in which Hayne J advanced the propositions which were to form the basis of the court's judgment. In the last part of the article, the implications of the High Court's view of the marriage power are examined.

## **The constitutional background**

In the last 3 years, there has been an intense public debate concerning whether Australia should follow the path of certain other jurisdictions to permit same-sex couples to enter into a legal marriage. This article is not concerned with the merits of that debate -- it has been argued exhaustively elsewhere<sup>8</sup> -- but rather to examine the background to and basis of the High Court's decision and what that decision means for the future of marriage policy in Australia.

In September 2012, two Bills which would have permitted marriages of same-sex couples were decisively defeated in the Federal Parliament.<sup>9</sup> The assumption which was widely held in the media at that time was that the Federal

Parliament had the power to amend the Marriage Act in this way. In fact, that was less than clear. Although the preponderance of contemporary academic legal opinion tended to favour the proposition that the power exists, doubts had also been expressed.<sup>10</sup>

One of the most fundamental principles of constitutional interpretation is that the words of the Constitution are to be understood by reference to their meaning when enacted in 1900.<sup>11</sup> Closely accompanying this principle, however, is the proposition that a distinction needs to be drawn between the meaning the words had in 1900 and the application of those words to changing circumstances. The High Court has often used the philosophical terms 'connotation' and 'denotation' to draw this distinction. The connotation is the definition or essence of the concept referred to, whereas the denotation is the class of objects or things which at any particular time are designated by a word. The point was put clearly by Windeyer J in the *Professional Engineers* case in 1959:

We must not, in interpreting the Constitution, restrict the denotation of its terms to the things they denoted in 1900. The denotation of words becomes enlarged as new things falling within their connotations come into existence or become known. But in the interpretation of the Constitution the connotation or connotations of its words should remain constant. We are not to give words a meaning different from any meaning which they could have borne in 1900. Law is to be accommodated to changing facts. It is not to be changed as language changes.<sup>12</sup>

The distinction between connotation and denotation does not of itself resolve the issue in constitutional interpretation because it still remains necessary to identify the meaning of the terms used by the Constitution, which is not a straight-forward task. As Dixon J pointed out in *R v Brislan*, the subject matter of a head of power must be defined on the basis of certain 'definite characteristics'.<sup>13</sup> But how are the defining characteristics of the variety of topics referred to in s 51 to be identified?<sup>14</sup> The constitutional meaning of a term such as marriage cannot simply be identical with its ordinary legal meaning in 1900, for otherwise the relevant head of power would not confer any real capacity to change the law on the topic.<sup>15</sup> However, nor can the constitutional concepts be entirely malleable or else it will be possible for the parliament to declare anything to fall within a constitutional category as a pretext to regulating it.<sup>16</sup> Therefore, even if the denotation or outer circumference of the constitutional concept of marriage now embraces same sex unions,<sup>17</sup> responsible constitutional interpretation requires the court to identify its connotation or its core meaning as well;<sup>18</sup> but doing that is not an easy matter.

The traditional definition, that marriage is the voluntary union of a man and a woman for life to the exclusion of all others, is derived from the classic definition of Sir James Wilde (who later became Lord Penzance) in *Hyde v Hyde and Woodmansee* (1866).<sup>19</sup> There are four elements to that definition. A marriage must be:

- (1) a voluntary union;
- (2) for life;
- (3) of one man and one woman; and
- (4) to the exclusion of all others.

*Hyde v Hyde and Woodmansee* was a decision on the construction of a statute which conferred jurisdiction on the court for Divorce and Matrimonial Causes in England to grant a divorce. It had no necessary bearing on the meaning of marriage for the purposes of the Commonwealth Constitution. Nonetheless, it was what marriage had meant in English and Australian law in 1900. Beyond the definition of marriage contained in that judgment, there were other elements that made up the eligibility requirements for marriage at that time. There were numerous constraints upon who was an eligible marriage partner based upon consanguinity and affinity. Conversely, however, there was a less restrictive position taken than now on the minimum age for marriage. At common law, the minimum age was 14 for boys and 12 for girls. That was the position in all the states until Tasmania amended its law in 1942 to set a minimum marriageable age of 18 for males and 16 for females.<sup>20</sup>

If the definition of marriage for constitutional purposes is wider than the *Hyde v Hyde* definition, which elements of this definition can legitimately be discarded, and to what extent? Could the Federal Parliament pass a law on the basis of the

marriage power that permits an arranged marriage of an adult man to a 13-year-old girl when the adult man is already lawfully married to another woman? Even accepting that the usage of a term may evolve over time (and certainly the concept of marriage has changed over the centuries) there was a powerful argument to be made that the term 'marriage' as used in s 51(xxi) of the Constitution could not be stretched so far as to embrace a form of marriage involving sexual unions which were prohibited by the criminal law at the time of Federation, at least if any account was to be taken of the meaning of marriage at that time. To avoid this, some kind of non-interpretive, purposive approach to determining the scope of the marriage power would be necessary.<sup>21</sup>

Whatever the merits of that argument (and constitutional lawyers acknowledged it could be argued both ways), the High Court resolved the matter by an *ex cathedra* declaration in the ACT case, laying down a definition of marriage as a 'topic of juristic classification' for the purposes of s 51(xxi) of the Constitution. In the wake of the High Court's decision, it is now up to the Federal Parliament to determine whether it will seek to extend the meaning of marriage under the Marriage Act to permit same sex couples to marry.

## **The ACT enactment**

The background to the ACT legislation was that those campaigning for laws allowing same-sex couples to marry thought there was a possibility that such laws could be passed in the states and territories. They also thought that such legislation might survive constitutional challenge.

The Labor Premier of Tasmania, Lara Giddings, and Greens leader Nick McKim, jointly sponsored a Bill in the Parliament of Tasmania to enact a law on same-sex marriage. It passed the Lower House by 13 votes to 11 at the end of August 2012, but was eventually defeated by a narrow majority in the Upper House in September of that year by 8 votes to 6. In South Australia, a Marriage Equality Bill was introduced with the support of the Premier.<sup>22</sup> Bills were also introduced in Victoria and Western Australia.<sup>23</sup> The NSW Legislative Council established an inquiry to determine whether legislation should be enacted in that state.<sup>24</sup> There was frenzied activity.

The ACT Bill was the first to pass a legislature. The territory has only one Chamber.

## **The provisions on marriage and dissolution**

The Marriage Equality (Same Sex) Act 2013 (ACT) defined 'marriage' as 'the union of 2 people of the same sex to the exclusion of all others, voluntarily entered into for life'. The definition specifically excluded a marriage within the meaning of the Marriage Act 1961 (Cth).<sup>25</sup> By this means, the ACT legislature sought to reconcile its legislation with the Marriage Act. A couple could not marry in the ACT if they could do so under that Act.

A marriage between people of the same gender entered into under the ACT law had almost all the characteristics of marriage as conventionally understood in the Western world. Indeed, the legislation replicated the Marriage Act in almost every respect save that no-one could marry under the ACT law below the age of 18.<sup>26</sup> There were conventional provisions on solemnisation of marriage, and governing how people were authorised to celebrate a marriage.

Parties to the marriage were to be reminded that: 'you are voluntarily entering into a lawful and binding union, for life, to the exclusion of all others' (s 14). The legislation also replicated federal divorce law, inasmuch as the grounds for a dissolution order in s 25 were very similar to a divorce under s 48 of the Family Law Act 1975 (Cth).<sup>27</sup>

There was nonetheless one highly unusual aspect to the ACT enactment. Section 33 provided:

A marriage under this Act ends if either of the parties to the marriage later marries someone else under --

- (a) a Commonwealth law (including a marriage in another jurisdiction that is recognised by the Commonwealth as a valid marriage); or
- (b) a law of another jurisdiction that substantially corresponds to this Act.

It followed that a bisexual man or woman could automatically bring an ACT marriage to an end, without seeking a dissolution, by the simple expedient of marrying someone of the opposite gender either under the Marriage Act 1961 (Cth) or a same-sex marriage law of another jurisdiction.<sup>28</sup> In the same way a man who was married under ACT law to another man could automatically end that marriage if he were to enter into a same-sex marriage with someone else under the law of another jurisdiction such as Canada. His former partner would not even need to be aware that his ACT marriage had been unilaterally terminated. An ACT marriage could thereby be terminated by one person at will without the need for a legal process.

### **The absence of a residence requirement**

The good burghers of Canberra were not content just to allow the marriage of same-sex couples living in that small city or its environs. They had ambitions for the ACT law to be a same-sex marriage law for the nation. The enactment purported to allow same-sex couples to marry who had no connection with Canberra whatsoever -- people from all over Australia and perhaps beyond. In the 5 day window in which such ceremonies could be held, one MP of the WA Parliament was among those who tied the knot.<sup>29</sup>

Simon Corbell, the Attorney-General of the ACT defended the absence of a residence requirement by saying:

The position of the Government is that a geographical restriction is not consistent with equality. We cannot purport to promote equality and then restrict that equality to permanent residents of the territory.<sup>30</sup>

### **The constitutional issues**

Did the ACT legislation ever have a chance of surviving challenge? Needless to say, the ACT Government thought so; but the obstacles were always going to be immense, for the law could only be valid if it was not inconsistent with, or was capable of operating concurrently with, a law of the Commonwealth.<sup>31</sup>

#### **One law for the Commonwealth**

Until 1961, marriage law was a matter for each state to determine. However, the Commonwealth Constitution gives the Federal Parliament the concurrent power to make laws concerning marriage for the sake of national consistency. It finally exercised this power in the Marriage Act 1961 which was intended to provide a national and uniform law on marriage. Taylor J, in the Marriage Act Case (1962),<sup>32</sup> stated explicitly that this is its effect. He wrote:

The Marriage Act 1961 is a comprehensive statute enacted pursuant to the power of the Parliament of the Commonwealth to make laws for the peace order and good government of the Commonwealth with respect to 'Marriage'. It contains a great many provisions and its main purpose is to establish a uniform marriage law throughout the Commonwealth.<sup>33</sup>

This is an entirely uncontroversial proposition for anyone familiar with the legislative history of this Act.<sup>34</sup> There is absolutely nothing in the *Marriage Act* case to suggest that state laws concerning solemnisation of marriages could survive the enactment of this uniform national law, or that the states retained any residual legislative capacity in relation to the solemnisation of marriage. The Victorian government challenged the Marriage Act only on the basis that it covered areas such as legitimacy and bigamy which, it argued, were beyond the legislative capacity of the Federal Parliament. There was no argument that a state could continue to provide for the solemnisation of marriages in accordance with its own laws.

That the Act was intended to create one uniform national law for marriage is apparent from the statute itself. Some

room was left for state law (s 6) but only in relation to the registration of marriages, not their solemnisation. The Act created a federal system for authorisation of celebrants, and s 28 provided for the transfer of state registers of authorised celebrants. Section 39 provided:

A person who, under the law of a State or Territory, has the function of registering marriages solemnised in the State or Territory or a part of the State or Territory may solemnise marriages in that State or Territory or in that part of the State or Territory, as the case may be.

The Act therefore authorised people who were previously appointed to solemnise marriages under the law of a state or territory to continue in that role, but their continuing authorisation was to conduct marriages in accordance with the Marriage Act, not state laws. There was nothing in the Act which contemplated the continuing existence of two alternative regimes of marriage solemnisation, one state, one federal, after the Marriage Act came into force.

It is true that the Marriage Act is not explicit about covering the field. It does not, for example, say in direct terms that a marriage solemnised after the commencement of the Act, but under a pre-1961 state law, will be ineffective. It does deal with the validity of marriages contracted overseas. However, it is a sufficient answer to this that the Marriage Act was drafted on the assumption that it would provide one uniform law for the country and for that reason it only needed to deal with the validity of marriages contracted overseas, not those that might (theoretically) be contracted under state laws. The issue of giving recognition to a marriage purportedly contracted under state law after the commencement of the Marriage Act simply did not arise.

The ACT legislation was therefore a direct challenge to the idea that there should be only one law for Australia on marriage.

### **Professor Williams' argument**

The principal question the High Court needed to determine was whether the Marriage Act left any room for the states to enact laws that would allow a same-sex couple to be treated as married. The ACT legislation rested on the view that there would be no necessary inconsistency within the meaning of s 28 of the ACT Self-Government Act between a Commonwealth law that allows a heterosexual couple to marry and a territory law that permits a same-sex couple to marry.

Professor George Williams had expressed the opinion that there was no necessary inconsistency if a state were to enact a law allowing only for same-sex marriage. The inconsistency of Commonwealth and state laws is, of course, regulated by s 109 of the Constitution. Defending the constitutionality of the Tasmanian Bill, he explained:

The one legal impediment to a state same-sex marriage law is that it might be inconsistent with the federal Marriage Act under section 109 of the Constitution. In this case, the state law is not struck off the statute book, but lies dormant until the inconsistency is removed.

In any event, there are good reasons why inconsistency might not arise. This is because the laws operate in different fields, with the federal law covering heterosexual marriage and the Tasmanian bill dealing only with same-sex marriage. It is impossible for a person to be married under both at the same time.<sup>35</sup>

This, he said, was the outcome of amendments to the Marriage Act in 2004 which had inserted a definition of 'marriage' into the Act.<sup>36</sup> In a later article, he further observed:

the Federal Marriage Act was amended to make it abundantly clear that for its purposes marriage only means:

"the union of a man and a woman to the exclusion of all others, voluntarily entered into for life."

The change was championed by Prime Minister John Howard and was intended to remove any possibility of same-sex marriage being recognised under federal law.

The 2004 changes were effective in limiting the scope of the federal Marriage Act. However, by explicitly and carefully narrowing the scope of that Act to different sex marriage, it also made it clear that the Act covers the field only with respect to those types of marriages.

This outcome is perverse given the intentions of the Prime Minister, but in my view it is the legal consequence of the changes he brought about.<sup>37</sup>

A similar line of reasoning was later proposed in an opinion given by Bret Walker SC, Chris Young and Perry Herzfeld for Australian Marriage Equality, which was publicly released.<sup>38</sup> In that advice they concluded that the Marriage Act 1961 and the Tasmanian Bill were not inconsistent, either directly or indirectly. In particular, their view was that the Commonwealth law and the proposed state law dealt with different 'fields' and would therefore not be indirectly inconsistent: the former, when originally enacted in 1961, had been concerned with 'the existing status of marriage', available only to persons of the opposite sex, while the Tasmanian Bill regulated the status of 'same sex marriage', available only to persons of the same sex.<sup>39</sup> Moreover, in relation to the 2004 amendments to the definition of marriage in the Marriage Act, they offered two main arguments. First, if the implication of the amendment was that no state may permit same sex couples to marry, they considered that the Tasmanian Bill avoided this by being concerned only with the field of same-sex marriage.<sup>40</sup> Second, they denied that any implication should be drawn from the amendment to suggest that no state may accord a status to same-sex couples which is 'sufficiently similar to marriage'.<sup>41</sup>

The argument that the amendments brought about by the Marriage Amendment Act 2004 might be given an interpretation diametrically opposite to the plain intention of the government that introduced those amendments was certainly a bold one, given the endorsement by both statute and case law, of the idea of purposive interpretation, albeit objectively understood.<sup>42</sup> Professor Williams' argument would have required a court to find that it was the intention of Parliament in 2004 that the Marriage Act 1961 should no longer cover the field on the solemnisation of marriages in Australia and that there need no longer be a uniform marriage law for the country. However, the intentions of Parliament were as clear in 2004 as they were in 1961.<sup>43</sup> The Explanatory Memorandum to the Marriage Amendment Bill 2004 (Cth) stated that the purpose of the amending Bill was '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'.<sup>44</sup> It did not indicate any intention to abandon covering the field of marriage regulation. As the Attorney-General's Second Reading Speech made clear,<sup>45</sup> there was intended to be only one law of marriage for all of Australia, one which defined marriage in the terms in which it had been traditionally understood in Australia and the countries from which it derives its social heritage. The Marriage Act 1961 does not purport to cover only *heterosexual* marriage. It purports to address the entire topic of marriage completely and definitively. The 2004 amendment defines that term, in s 5, in accordance with the old common law definition:

*marriage* means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.

## **The indivisibility of marriage**

With respect, the fallacy of Professor Williams' view rested in the notion that there is such a status as 'same-sex marriage' which might exist in a constitutional space separately from 'heterosexual marriage'.<sup>46</sup> In fact, the status of same-sex marriage exists nowhere in the world, even though the expression is used constantly. What there is in every country is a body of law concerning *marriage*. A small, but growing, number of jurisdictions allow the relationship of a same-sex couple to be solemnised as a marriage. In the jurisdictions that have opened up the status of marriage to same-sex couples, those couples do not enter into a different form of marriage; rather they represent a different kind of couple who are now permitted to marry. Where the marriage of a same-sex couple is permitted, the couple are governed

by the same laws and procedures as heterosexual couples both for entry into, and exit from, marriage, and issues concerning the validity of a marriage or its dissolution are dealt with in the same courts.

The marriage of a man and a woman is a cultural institution that exists in some form or another in almost every culture, and gains international legal recognition from its universal cultural acceptance. For example, Art 23 of the International Covenant on Civil and Political Rights recognises the 'right of men and women of marriageable age to marry and to found a family'. However, not all marriages are recognised everywhere. Many countries have for centuries recognised polygamous marriages, while other countries have rules that withhold or forbid recognition of a polygamous marriage. This is because polygamy does not command international acceptance. Indeed in cultures with a Judeo-Christian heritage, bigamy or polygamy is regarded as a crime. A polygamous marriage may well be recognised in other countries that permit polygamy, but not beyond those like-minded nations. Marriages involving same-sex partners fall into the same category as polygamous marriages in the sense that they do not command universal international recognition as marriages.<sup>47</sup> Be that as it may, limited-recognition marriages are still forms of marriage.

Any law of marriage must specify which relationships can be solemnised as marriages, and which cannot be. The Marriage Act 1961 does so in various ways, one being by means of the definition of marriage. If the concept of marriage were divisible, so that state laws could authorise people to marry who were not authorised to do so under federal law, the startling consequence would be that, for example, a NSW law which allowed 14 year olds, or brothers and sisters, to marry, would be valid. So too would a law that permitted polygamous marriages. What would be undermined by this is the idea that the Federal Parliament can determine, exclusively of the states, who is permitted to marry whom and in what circumstances. The acceptance of Professor Williams' view would arguably have meant that state parliaments could not only enact laws permitting same sex marriage, but also polygamous marriages, marriages of those under 16, marriages which were not voluntarily entered into, and kinds of marriage yet to be invented, such as fixed term marriages -- those which expire after a set period.

### **State-based same-sex marriage Bills**

Professor Williams' argument in relation to the Tasmanian Bill was that a law which allows for marriage between same-sex couples would not be inconsistent with the Marriage Act because 'the laws operate in different fields'. From a constitutional point of view the argument was not without merit, for it was based on a long-established approach to determining certain kinds of inconsistencies between Commonwealth and state laws.<sup>48</sup> On the 'covering the field' approach, however, the problem is always one of identifying not only the purpose of the Commonwealth law, but also the relevant fields.<sup>49</sup> It is not easy to be certain about how a state law might successfully be drafted both to provide in some way for 'same-sex marriage' and to avoid inconsistency with what the Marriage Act says about 'marriage'. Certainly, the greater the differences between the two kinds of marriage, the more likely they will be found to fall within different fields; but such an assessment is always a question of degree, about which reasonable minds may differ, making it sometimes very difficult to predict what the High Court will say.

We understand it was these kinds of concerns which led Professor Williams to form the view that the safest course for advocates of same-sex marriage was to rely on both strategies: the argument that the Commonwealth law is only concerned with the field of 'heterosexual marriage', leaving the states and territories free to create same sex marriage, and the argument that a state or territory law which created a new legal status which was sufficiently different from Commonwealth marriage would evade the 'field' that the Marriage Act purports to cover.<sup>50</sup>

Given the difficulties involved, the 'marriage equality' Bills which were introduced in Tasmania<sup>51</sup> and South Australia<sup>52</sup> took some care to distinguish the specific kind of marriage for which they made provision. To this end they attempted to create a new and different kind of status, hitherto unknown anywhere else in the world, called a 'same sex marriage' as opposed to being simply a 'marriage' between same sex partners.

For example the Marriage Equality Bill 2012 in South Australia used the language of a 'same sex marriage', not a 'marriage' throughout. The authorised celebrant was to explain (s 14):



I am duly authorised by law to solemnise same sex marriages according to law;

Before you are joined in same sex marriage in my presence and in the presence of these witnesses, I am to remind you of the solemn and binding nature of the relationship into which you are now about to enter;

Same sex marriage, according to law in South Australia, is the lawful union of 2 persons to the exclusion of all others, voluntarily entered into for life',

or words to that effect.

This new status would have had its own governing law, authorised celebrants (Pt 4) and register (Pt 5). If such a law were passed, a same-sex couple who went through a ceremony of 'same sex marriage' would not be registered as married on the same register as heterosexual couples. Instead their relationship would be recorded on the Register of Same Sex Marriages. Marriage celebrants, authorised to conduct weddings, would not automatically be licensed to conduct a 'same sex marriage'; they would need to apply for such authorisation from the authorities in South Australia.

The form of these Bills was shaped by a perception of the constitutional limitations on state power to legislate contrary to the Federal Marriage Act. The view was evidently taken that if a state law concerning 'same sex marriage' were to have a chance of surviving constitutional challenge then it would need to create a status that is not marriage as such, however much it was made to *look like* marriage by copying various aspects of the Marriage Act and by using the language of 'marriage'. The problem was that the more it was made to look like marriage, the greater the risk of constitutional invalidity.

It is in the light of this history that the ACT Bill can be better understood. In directly creating a status of marriage for same-sex couples, rather than the new and hitherto unknown legal status of a 'same-sex marriage', the ACT legislature was relying purely on the argument that the federal law only covered heterosexual marriage. Professor Williams himself advised them that this was unlikely to be sufficient and that the legislation ought to be drafted also to take advantage of the second line of defence. He urged the Attorney-General of the ACT to make substantial amendments.<sup>53</sup> However, the ACT government had committed itself to achieving marriage equality, not a hybrid status somewhere between a real marriage and a de facto relationship called a 'same-sex marriage'. Furthermore, it had its own constitutional advice that, as a territory, it was in a different position from the states in terms of the relevant test for inconsistency with federal law.<sup>54</sup> Like Lord Cardigan's famous Charge of the Light Brigade in Crimea, it was a courageous endeavour, but one doomed to failure.

### **The marriage power in the written submissions**

Any optimism in the ACT's camp was surely dashed once the Commonwealth's written submissions were made available. The Attorney-General's legal team, led by Justin Gleeson SC, the Solicitor-General, presented an overwhelming case based on considerable historical research that the Marriage Act was objectively intended to avoid the conflict of laws problems that can arise when each state has a different marriage law.<sup>55</sup> In essence, the Commonwealth argued that marriage is a status regulated by law which naturally invites uniform regulation across a polity; and that while it took 60 years for the Commonwealth to exercise its powers in this area, the text, structure and historical background of the Marriage Act and the Matrimonial Causes Act 1959 (Cth) (later carried through to the Family Law Act 1975 (Cth)) convey the Commonwealth Parliament's purpose to have a uniform set of rules for the nation to govern both the essential and formal characteristics for the holding or attaining of the status of marriage, and the resolution of controversies concerning the determination of matrimonial causes.

One of the central claims made by the Commonwealth, reflecting the argument given above, was that in Australian marriage law, marriage 'is a single and indivisible concept'. In the light of this, the Commonwealth argued:

It is not open under the law of Australia for any other legislature to purport to clothe with the legal status of marriage (or a form of marriage) a union of persons, whether mimicking or modifying any of those essential requirements of marriage, or to purport to deal with causes arising from any such union.<sup>56</sup>

Furthermore, the Marriage Act:

leaves no room for a State or Territory legislature to create a status of 'bigamous marriage', 'polygamous marriage', 'arranged involuntary marriage', 'under age marriage' or 'trial marriage'. Similarly, within and by reason of the schema of the Marriage Act, couples who are not man and woman (whether same sex or intersex) are and must remain for the purposes of Australian law 'unmarried' persons.<sup>57</sup>

On the other hand, the Marriage Equality (Same Sex) Act 2013 (ACT), it was submitted, had as its stated objective the provision of 'marriage equality' by 'purporting to clothe with the legal status of marriage' unions solemnised in the ACT between persons of the same sex.<sup>58</sup> It followed from this, according to the Commonwealth, that the ACT's Marriage Equality (Same Sex) Act was inconsistent with the Marriage Act and the Family Law Act, within the meaning of s 28(1) of the Self-Government Act.

On the approach taken by the Commonwealth, there was no need to ascertain whether the marriage power extended to allow the Federal Parliament to permit marriage of same sex couples. The Commonwealth argued the 'the better view is that the constitutional concept of "marriage" includes a marriage between members of the same sex',<sup>59</sup> but that observation was made in passing. Indeed, during a directions hearing held on 25 October 2013, when asked by the Chief Justice whether the Commonwealth's case was dependent upon any premise about the scope of the marriage power, the Solicitor-General clearly indicated the Commonwealth did not 'intend to hinge [its] argument around that question'.<sup>60</sup> The Commonwealth did not, therefore, argue the point about the scope of the Commonwealth marriage power by reference to the various dicta on the question for or against, for its primary position was that:

Even if ... there is some operative constraint placed upon s 51(xxi) (eg, by reference to the 'customs of our society'),<sup>61</sup> that legislative power permits the Commonwealth to determine exhaustively for the whole of Australia what unions are to be regarded as 'marriage'.<sup>62</sup>

The written submissions of the ACT offered little by way of cogent response to these particular arguments.<sup>63</sup> The territory sought to argue that, while the Commonwealth had the power to legislate for same-sex marriage, neither the Marriage Act nor the Family Law Act manifested an intention to be an exhaustive or exclusive statement of the law governing the institution of marriage and that the Commonwealth had not exhausted its power either to allow or prohibit same sex marriage.<sup>64</sup> Adopting Professor Williams' 'different fields' argument, it asserted that the Marriage Act was concerned only with heterosexual marriage as defined under that Act, and that the Marriage Act 'does not speak to same-sex marriages solemnised in Australia'. It further argued that the Commonwealth had not identified any relevant provision of the Marriage Equality (Same Sex) Act that demonstrates that it is not capable of operating concurrently with the Marriage Act nor the Family Law Act within the meaning of s 28 of the Self-Government Act.<sup>65</sup> This left room for the ACT legislation to make provision for same-sex marriage.

The ACT submission did not attempt to refute the Commonwealth's exhaustive examination of the history of marriage regulation. Nor could it have done so; it was, quite simply, on the wrong side of the legislative history in this respect. It could rely only on an adaptation of Professor Williams' original argument that, notwithstanding the clear intention of parliament in amending the Marriage Act in 2004 to make clear that a same-sex union could not be recognised as a valid marriage, this manifest purpose of the Commonwealth law had to give way to a narrow construction of its specific provisions.<sup>66</sup>

This, as we have suggested, was not an approach that could easily be supported by contemporary approaches to statutory interpretation. As McHugh J put it in *Kelly v R*, '[t]he literal meaning of the legislative text is the beginning, not the end, of the search for the intention of the legislature'.<sup>67</sup> The role of the court is now seen to be to give effect to

the ordinary meaning of the words as they are to be understood in the light of the legislation as a whole and the purposes which that Act was designed to achieve.

The amicus curiae, Australian Marriage Equality, adopted a somewhat different emphasis in its submissions. While it, too, argued that the Marriage Act was concerned only with heterosexual unions, leaving the topic of same sex unions open to state and territory regulation, it maintained that there could be no inconsistency between the Commonwealth law and state or territory laws if the marriage power did not extend to same sex marriages, a submission apparently calculated to ensure that if the ACT law was held inconsistent, at least the Commonwealth's power to legislate to create same sex marriage would be affirmed.<sup>68</sup> It supported its contentions by submitting that the divisibility of marriage into different kinds was analogous to the divisibility of 'trade' into various kinds of trade (as referred to in s 51(i) of the Constitution) and the divisibility of 'corporations' into various kinds of corporations ie, 'trading', 'financial' and 'foreign' (as referred to in s 51(xx)).<sup>69</sup> Its written submissions did not address the very obvious difficulty with this proposition, namely, that unlike the trade and corporations powers, the marriage power (s 51(xxi)) on its face draws no such distinctions between various kinds of marriage.

The Commonwealth responded to the arguments of the ACT and the amicus curiae by reference to orthodox principles of statutory interpretation.<sup>70</sup> Repeating again that its submissions did not rest upon a view of the scope of the marriage power, the Commonwealth reiterated that even if the power does not extend to the topic of same sex marriages, a Commonwealth law could 'validly state that certain defined unions and no others are to bear the status of marriage'.<sup>71</sup> Rejecting the submissions of the amicus curiae, the Commonwealth pointed out that all that is necessary is that a law has a 'sufficient connection' with the subject matter of marriage. The Commonwealth can clearly prescribe what unions are to be regarded as 'marriage', and for this power to be efficacious, this necessarily involves a determination of 'what marriage is not'. Therefore, under the banking power (s 51(xx) of the Constitution) the Commonwealth can determine that a body that is not licenced as a bank may not use the term 'bank' or 'banking' in providing financial services. Similarly, under the marriage power, the Commonwealth can prohibit polygamous marriages whether or not it would be within power for it to make polygamous marriages lawful. The same reasoning, the Commonwealth argued, applied to same sex marriage.<sup>72</sup>

### **The marriage power in oral argument**

While the Commonwealth's submissions did not rely upon determining the issue of whether the constitutional meaning of the marriage power could extend beyond regulating the union of a man and a woman, the Solicitor-General had scarcely begun his presentation at the hearing of the matter before the issue was raised by Hayne J, who asked whether any question about the ambit of s 51(xxi) lay as a premise behind the questions that the Commonwealth said needed to be determined.<sup>73</sup> Mr Gleeson SC responded:

Our answer, in short, to that constitutional question will be it is unnecessary for this Court to determine the reach of the powers, although we have expressed our submission as to the better view for this reason, that if the power were broad and it included an ability in Parliament to make laws which went beyond the *Hyde v Hyde* definition of marriage -- at least as to the sex of the parties -- then the power would amply allow Parliament to say marriage for Australia will go this far and no further ... [I]f the constitutional power is only in respect to marriages between man and woman -- it is open to the Parliament to say, since we are regulating marriage, since we are drawing the line in law between married and unmarried, the line shall be drawn at that place we stipulate, the result being that other polities can obviously regulate different relationships which are not marriages and they can also, within their own power, extend rights and duties as if persons were in a marriage but the answer to whether you are married is a singular one under the federal law.<sup>74</sup>

The argument had not progressed too much further before Kiefel J again raised the constitutional question:

But is not the first question whether or not the constitutional background will inform the question that is before us?<sup>75</sup>

When French CJ also began to explore this issue, Mr Gleeson replied that the marriage power enabled the Commonwealth to determine on 'which side of the line' a person falls -- ie, either as married or not married -- and that

this line could be set either 'within the outer circumference or up to the outer circumference of the power'.<sup>76</sup> And on further questioning, he made clear that the same question arose in relation to the prospect of 'trial' marriages or polygamous marriages, the implication being that the Commonwealth must be able to deny these kinds of unions as marriages whether or not its constitutional power enabled it to authorise them as marriages.<sup>77</sup>

A little later, Hayne J returned to the theme that the court would need to consider the Commonwealth's constitutional power and that this question could not just go by concession of the parties. Mr Gleeson responded:

First of all, we have put something as the better view. The ACT commends that view. The intervener enthusiastically commends that view. The court does not have a contradictor on that question. The court would not decide any matter merely on agreement. That is just not on, absolutely not on. If the matter needs to be decided, the court will decide it and what I had proposed to do, given there was not a contradictor, was to identify what I will call the narrow argument and then deal with what I will call the broader argument. So I will seek to identify both those arguments, there being no contradictor. But I do not retreat from the proposition that because our law on any view has stayed on the right side of the relevant part of the circumference of the circle, it is either at the circumference or it is inside it. In that sense, it is not necessary to decide the constitutional question.<sup>78</sup>

Recognising the interest of the court in the scope of the marriage power, Mr Gleeson went on to discuss the broad and narrow interpretations of the power and proposed possible arguments supporting each, which generated a somewhat animated dialogue with members of the bench. Clearly, in 1900, polygamous relationships could be valid marriages in some countries, and indeed some Aboriginal customary marriages were polygamous. Mr Gleeson acknowledged the strength of the historical arguments for saying that the marriage power extended beyond monogamous marriages.

Evidently, then, both narrower and broader views of the marriage power were presented to the High Court, but there was no contradictor in the case who was there to argue that the scope of the marriage power, even if it went beyond the current definition in s 5 of the Marriage Act, extended so far as to allow parliament to change the definition of marriage to allow same-sex couples to marry.

When the ACT came to argue its side, Kiefel and Hayne JJ were also in the vanguard in exploring the constitutional aspects. There was this exchange between Hayne J and Ms Eastman SC:

**MS EASTMAN:** We certainly agree with the Commonwealth that the constitutional meaning of marriage is not limited to the *Hyde v Hyde* concept and that since we agree...

**HAYNE J:** ... and therefore extends to personal unions from which flow legal consequences. I suspect there has to be an element injected of enduring, has there not?

**MS EASTMAN:** There does, your Honour.

**HAYNE J:** Dissoluble only by processes according to law.

**MS EASTMAN:** Yes. So could I then turn to the other matters that I want to deal with, that...

**HAYNE J:** Forgive me for persisting a moment.

**MS EASTMAN:** This is the benefit of being second, perhaps.

**HAYNE J:** There is no benefit to being second, Ms Eastman. The consequence is that you are denied, are you not? The Territory is denied the argument that says there are two kinds of personal relationship, one about which the Commonwealth can legislate, another about which the Territory has.<sup>79</sup>

Later, in oral argument, Ms Eastman said:

we agree with the Commonwealth that it is not limited to the *Hyde v Hyde* meaning of marriage. It might be broader but I do not, for ACT purposes, seek to say what the outer limits are. But we certainly say, as we have said in our written submissions, that we do not see that there is any intrinsic limitation.

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Mr Kirk SC, appearing for Australian Marriage Equality, also preferred a wide view of the marriage power. In its written submissions, Australian Marriage Equality had placed the constitutional issue as the starting point for determination of the case.<sup>81</sup> It argued:

If Commonwealth legislative power does not extend to recognition and regulation of marriage of same-sex couples, then it would have no power to regulate that part of the legislative field. If s 51 (xxi) was to be construed as if the word 'marriage' meant 'marriage between men and women', a Commonwealth Act which prohibited State or Territory legislation providing for marriage of same-sex couples would not be with respect to that head of power. Regulation of marriage between couples of the same-sex would necessarily be a different -- if closely related -- subject matter to marriage in the constitutional sense.<sup>82</sup>

This was indeed the most ambitious argument that could be run on behalf of the validity of the ACT legislation. If the Commonwealth is limited in its power to regulate marriage (so that it can neither authorise nor deny the status of marriage to same sex couples), and the states are not so confined by those same constitutional limitations, then arguably at least, a state or territory law which addresses same sex marriage could not be inconsistent with a Commonwealth law which adopts a narrower definition. Significantly, however, Australian Marriage Equality did not in fact argue for a limited scope to be given to the marriage power. Rather, it asserted as a matter of first importance that it would be within power for the Marriage Act to regulate marriages between couples of the same-sex.<sup>83</sup> Thus, its argument against inconsistency had to rest upon the proposition, also relied upon by the ACT, that the Marriage Act was only intended to govern how heterosexual unions could be given the status of marriage. Mr Kirk further sought to argue, relying on the second line of defence, that the ACT law created a status of marriage which was sufficiently different to marriage under the Marriage Act. This argument was given short shrift in the High Court's judgment.<sup>84</sup>

As to the scope of the marriage power, Mr Kirk offered a non-exhaustive definition of the marriage power in these terms:

It should be held that the marriage power in s 51(xxi) extends at least as we say the attribution of legal status that marriage to personal unions of persons who wish to be recognised as having that joint legal status [sic]. Now, we might also add to that the notion of on an enduring basis ... we pick up some of the aspects of *Hyde v Hyde* but only some. We pick up, obviously, the notion of union, the notion of status and perhaps also the notion of enduring basis, but we exclude issues of man and woman, obviously enough, and we exclude also the issue of to the exclusion of all others ...<sup>85</sup>

However, while Mr Kirk acknowledged the dangers in seeking to be too definitive, he did not explain the juridical basis on which he was free to choose some aspects of the *Hyde v Hyde* definition while discarding others or why he chose the elements he did as being criteria for a marriage under the marriage power.

## The judgment

And so, finally, to the unanimous judgment of the six members of the court.<sup>86</sup> It began somewhat inauspiciously with a statement that the above analysis cannot fully support. The judges wrote:

The Commonwealth, the Territory and Australian Marriage Equality Inc (as amicus curiae) all submitted that the Federal Parliament has legislative power to provide for marriage between persons of the same sex. That submission is right and should be accepted.<sup>87</sup>

The Commonwealth certainly submitted that they thought this was the better view, but Mr Gleeson was at pains to explain the case for both a broader and narrower reading of the marriage power, and his argument was that the court did not need to determine the scope of the marriage power. Furthermore, he had said:

The court would not decide any matter merely on agreement. That is just not on, absolutely not on.<sup>88</sup>

But it appears that it *was* on. While in para 8 of the judgment the court said that the issue of constitutional power could not be determined by agreement or concession, the fact is that there was no controversy between the parties on the scope of the marriage power. In oral argument, counsel affirmed their agreement with propositions advanced by Hayne J. The court did not have the benefit of an argument presented fully by a contradictor.

The court then went on to explain, contrary to the submission of the Commonwealth, that it needed to determine the scope of the marriage power, accepting in this regard the proposition advanced, but not relied upon, by Australian Marriage Equality:

This court must decide whether s 51(xxi) permits the Federal Parliament to make a law with respect to same sex marriage because the ACT Act would probably operate concurrently with the Marriage Act if the Federal Parliament had no power to make a national law providing for same sex marriage. If the Federal Parliament did not have power to make a national law with respect to same sex marriage, the ACT Act would provide for a kind of union which the Federal Parliament could not legislate to establish. By contrast, if the Federal Parliament can make a national law providing for same sex marriage, and has provided that the *only* form of marriage shall be between a man and a woman, the two laws cannot operate concurrently.<sup>89</sup>

This was, of course, the position Hayne J had articulated in argument with Ms Eastman. Why then, according to the court, did the marriage power extend to allow the parliament to enact a law which permits marriage between same-sex couples? In the absence of serious argument from the bar table, the court set up an argument it would then knock down:

All arguments to the contrary of the conclusion that s 51(xxi) would support a law providing for same sex marriage begin by referring to what is asserted to have been the settled understanding of the meaning of 'marriage' at the time of federation. It is said that, at federation, 'marriage' was well understood to have the meaning given to it by several nineteenth century English cases and that the reference to 'marriage' in s 51(xxi) must be read accordingly. That is, reference is made to the nineteenth century judicial definitions of marriage on the footing that s 51(xxi) uses a legal term of art, the particular content of which is fixed according to its usage at the time of federation.<sup>90</sup>

No 'arguments to the contrary' were actually referenced; no reputable scholar was cited as advancing the proposition the court went on to reject. The argument that the marriage power could extend no further than to encompass the voluntary union of a man and a woman for life to the exclusion of all others is perhaps the narrowest possible view of the marriage power. A broader view might have been that the marriage power extended at least to the recognition of Aboriginal customary marriages including those which were actually or potentially polygamous, and that it also might include giving marital status to informal marriages involving the exchange of promises between a man and a woman without a priest or other marriage celebrant conducting the ceremony, as had been the case at common law for much of the history of Christendom. A wider view still would have been that the marriage power extended to recognising all forms of polygamous marriage, since this was a very well-established form of marriage at the time of federation.

The court cited Windeyer J's judgment in the *Marriage Act Case* with approval in various places, but did not set out an important passage in which he explained his view of the scope and limitations of the marriage power. That passage, the most substantial discussion of the issue by any High Court judge prior to the ACT case, was as follows:

It has been suggested that the Constitution speaks of marriage only in the form recognized by English law in 1900. The word, it is said, is to be read as defined by the famous phrase of Lord Penzance in *Hyde v Hyde* (1866) LR 1 P & D at 133, 'the voluntary union for life of one man and one woman, to the exclusion of all others'; and that therefore the legislative power does not extend to marriages that differ essentially from the monogamous marriage of Christianity. That seems to me an unwarranted limitation. Marriage can have a wider meaning for law. For example, Justinian described it broadly as the union of husband and wife involving the habitual intercourse of daily life, *nuptiae sive matrimonium est viri et mulieris coniunctio, individuum consuetudinem [sic]*

*vita continens* (Inst 1, 9, 1); and he said that those citizens are joined together in lawful wedlock who are united according to law, *qui secundum praecepta legum coeunt* (Inst 1, 10, 1). And Higgins J. in the course of his judgment in the *Brewery Labels Case* -- that it was a dissenting judgment is immaterial for present purposes -- said: 'Under the power to make laws with respect to marriage I should say that the Parliament could prescribe what unions are to be regarded as marriages' and later, he was speaking of trade marks: 'The usage in 1900 gives us the central type; it does not give us the circumference of the power'. I express no view on whether, theoretically, it would be within the power of the Commonwealth Parliament to make polygamy lawful in Australia. That question has absolutely no reality. But for some purposes, including the legitimacy of children and rights of succession, our law does recognize polygamous, or potentially polygamous, marriages contracted in countries where such marriages are lawful by persons domiciled there ... If, instead of leaving the resolution of such matters to the principles of comity and private international law, the Commonwealth Parliament were to legislate expressly for the recognition by Australian courts of such unions when lawful by domiciliary law, such an enactment would, I should think, be within its power. And a law dealing with the tribal marriages of aboriginal inhabitants of Australia might also, I would think, be within power.<sup>91</sup>

The proposition that marriage *can* have a wider meaning for constitutional purposes, but is still limited to some extent by what was understood in 1900 to be the central type of marriage, was the kind of intermediate proposition that might have been advanced by an able contradictor in the ACT case. Windeyer J's view of the marriage power represented an orthodox and thoughtful application of the connotation/denotation distinction. The court in the ACT case cited aspects of Windeyer J's view while ignoring others. It wrote:

The description given by Windeyer J identifies the content of the relevant topic of juristic classification in a way which does not fix either the concept of marriage or the content and application of choice of law rules according to the state of the law at federation.<sup>92</sup>

That is so, but Windeyer J also expressed no more than an open mind as to whether the marriage power was wide enough to allow parliament to legalise polygamy. He did ground his view clearly in the notion that the meaning of a word in 1900 gives the central type, if not the circumference of power.

Having set up the narrowest possible view of the marriage power as if it were the only view that stood in the way of accepting that the power extended to marriage between same sex couples, the court went on to demolish that straw man. The court stated that marriage was used in the Constitution in the sense of a 'topic of juristic classification'. The court reasoned:

The status of marriage, the social institution which that status reflects, and the rights and obligations which attach to that status never have been, and are not now, immutable. Section 51(xxi) is not to be construed as conferring legislative power on the Federal Parliament with respect only to the status of marriage, the institution reflected in that status, or the rights and obligations attached to it, as they stood at Federation.<sup>93</sup>

Such a proposition is, of course, entirely valid, given the history of marriage over the centuries. After reviewing further the nineteenth century case law and explaining that it could not and should not be controlling for the purposes of determining the scope and limits of the marriage power in the Australian Constitution, the court said:

Once it is accepted that 'marriage' can include polygamous marriages, it becomes evident that the juristic concept of 'marriage' cannot be confined to a union having the characteristics described in *Hyde v Hyde* and other nineteenth century cases. Rather, 'marriage' is to be understood in s 51(xxi) of the Constitution as referring to a consensual union formed between natural persons in accordance with legally prescribed requirements which is not only a union the law recognises as intended to endure and be terminable only in accordance with law but also a union to which the law accords a status affecting and defining mutual rights and obligations.<sup>94</sup>

The court went on to indicate that it was not essential to marriage for the purposes of the marriage power that there be a celebrant:

The formal requirements to establish the union, and thus the legally recognised status of marriage, may be very simple (for example, no more than the exchange of certain promises before witnesses).<sup>95</sup>

Having decided that the Commonwealth could legislate for same-sex marriage, the court went on to hold that the Marriage Act provided a national law on who may marry. It concluded thus:

These particular provisions of the Marriage Act, read in the context of the whole Act, necessarily contain the implicit negative proposition that the kind of marriage provided for by the Act is the only kind of marriage that may be formed or recognised in Australia. It follows that the provisions of the ACT Act which provide for marriage under that Act cannot operate concurrently with the Marriage Act and accordingly are inoperative.<sup>96</sup>

This use of the unqualified term 'marriage' is significant. As the court noted, the express purpose of the ACT Act was to secure 'marriage equality' and therefore provided for a status of 'marriage' per se.<sup>97</sup> This distinguished the ACT Act from the Tasmanian Bill, which consistently referred to 'same-sex marriage' as a status putatively distinct from 'heterosexual marriage'. Does this leave open the argument that the states and territories remain free to establish same-sex marriage provided they define it as a status that does not purport to regulate the same status of marriage regulated by the Marriage Act? Given the court's reasoning, we think not.

There are several features of the court's reasoning which suggest that a law even in the form of the Tasmanian Bill would now be found inconsistent with the Marriage Act. The first is that not only did the court characterise the Marriage Act as laying down 'a comprehensive and exhaustive statement of the law' with respect to marriage,<sup>98</sup> but it considered that the Marriage Act gives rise to an 'implicit negative proposition that the kind of marriage provided for by the Act is the *only* kind of marriage that may be formed or recognised in Australia'.<sup>99</sup> Adopting Professor Williams' 'two fields' argument, the Territory had submitted its Act did not regulate the 'same status of "marriage"'. However, the court made two essential points in response. The first was that what mattered was the 'legal content and consequences of the status' created by the ACT Act, 'not merely the description given to it'. Therefore, it seems that a state or territory cannot get around the Marriage Act simply by calling something 'same sex marriage'; what matters is the substance of the law. The second point was that although the Marriage Act 'carves out [only] a *part*' of the entire 'domain' of marriage considered as a 'topic of juristic classification', the court made clear that the negative implication that arises from the Act 'governs the *whole* of that domain' such that 'the *only* form of marriage which may be created or recognised is that form which meets the definition provided by the Marriage Act'.<sup>100</sup>

Given the Marriage Act thus 'sets the bounds' of the legal status of marriage in Australia,<sup>101</sup> there seems now to be very little room for the states to construct an alternative status of 'same sex marriage', no matter how carefully or narrowly the law is drafted. Only if the new status could not, on analysis, be characterised as a 'marriage' of some kind, would it avoid the negative implication that the court said flows from the language of the Marriage Act.

## Constitutional pragmatism

If these are the implications of the judgment, what are we to say about the cogency of its reasoning? Paragraph 33 of the judgment, defining marriage for the purposes of the marriage power, seems to us to be especially problematic, for it involves a considerable leap of logic. It is one thing to say that the juristic concept of 'marriage' cannot be confined to a union having the characteristics described in *Hyde v Hyde* and other nineteenth century cases. It is another to say that the marriage power extends to a form of marriage which was unknown anywhere in the world in 1900, and which would have been seen as quite contrary to the sexual mores of the time -- at least as reflected in the criminal law. On the High Court's definition, only one element of the *Hyde v Hyde* definition remained -- that a marriage must be a *voluntary* union. Even the idea that marriage should be presumptively for life was replaced with the notion that the law should recognise the relationship as 'enduring' *unless and until* terminated in accordance with law. The logical problem concerns not only the elements of the definition that are excluded, but those that are positively included as well.<sup>102</sup>

It is clear from the written submissions and oral argument that the origins of this definition lay not in the submissions of the parties concerning the scope to be given to the marriage power (even Mr Kirk SC ventured at most a non-exhaustive definition) but in the ideas put to senior counsel by Hayne J. Mr Kirk picked up the notion that the idea that the relationship should be intended to endure from Hayne J's observations in dialogue with Ms Eastman SC.



What is remarkable about the court's judgment is that in coming up with this definition of marriage for the purposes of the marriage power, the court made almost no reference to the considered dicta of a number of previous members of the High Court concerning the scope of the marriage power. No reference was made, for example, to the comment of Brennan J in *Fisher v Fisher* that:

[t]he nature and incidents of the legal institution which the Constitution recognises as 'marriage' and which lie within the power conferred by s 51(xxi) are ascertained not by reference to laws enacted in purported pursuance of the power but by reference to the customs of our society, especially when they are reflected in the common law, which show the content of the power as it was conferred.<sup>103</sup>

Nor was there any discussion of his dicta in *R v L* which referred back to the *Hyde v Hyde* definition.<sup>104</sup> Other dicta might also have been considered.<sup>105</sup>

The High Court's definition of marriage for the purposes of the marriage power was grounded neither in tradition nor authority. The basis for saying that the marriage power could include same sex unions was based only on the proposition that because other legal systems *now* provide for marriage between persons of the same sex, the juristic concept of marriage in s 51(xxi) includes such unions.<sup>106</sup> By failing even to consider Brennan J's notion that the meaning of marriage might be determined in some way by reference to the customs of Australian society as reflected in the common law, the court essentially held that marriage can be whatever another country says it is. No longer is it to be anchored, even to a limited extent, in the traditions and values of this country or the connotation of the word at the time of federation. This was constitutional interpretation transformed by globalisation.

At the same time, however, the court also adopted certain positive elements as part of the constitutional definition of marriage: it must be *consensual*, it must be between *natural persons*, it must be in accordance with *legally prescribed requirements*, it must be *intended to endure* (although *terminable in accordance with law*) and it must be a union to which the law *accords a status* and attaches *mutual rights and obligations*. Given the reasoning of the court used to reject the *Hyde v Hyde* definition, this insistence upon particular positive elements is all the more remarkable. Plainly, the requirement that marriage must be consensual excludes non-consensual 'arranged marriages'. On what ground are these excluded? The laws and practices of other countries clearly allow such marriages to exist. Certainly, prevailing Australian customs and mores oppose the legal recognition of such unions, but why insist on these customs and mores and not others? The court's reasons for rejecting an exclusive heterosexual definition of marriage seem to preclude any appeal to 'morality', for the court was explicit and insistent that the juristic conception of marriage must not be confined by any 'preconceived notion of what marriage "should" be'.<sup>107</sup> But what other than normative reasons could provide a sound basis for maintaining that the constitutional meaning of marriage is limited to consensual unions?

If a committed contradictor had been available to scrutinise these propositions, these inconsistencies in reasoning might have been avoided. None of the states chose to intervene in the case, even though, as it transpired, the court made a very significant determination about the scope of the Commonwealth's power to legislate with respect to marriage. If a state Solicitor-General had the opportunity to question the wide view of Commonwealth power that was in issue, the reasoning of the court, if not the result, might have been very different. For example, much reliance was placed on the observation of Higgins J in the *Brewery Labels Case*, that the constitutional conception of marriage cannot be tied to the state of the law at any particular time, for otherwise the power to *make* law will become illusory.<sup>108</sup> Reasoning in this way draws attention to only one side of the argument - the side that pushes in the direction of expanded Commonwealth legislative power. But Higgins J in that case also drew attention to the other side of the argument: the Commonwealth cannot be allowed to proclaim simply *anything* to be a marriage, for that would render the specificity of the Commonwealth's enumerated legislative powers similarly illusory. The Commonwealth, he pointed out, cannot be allowed to have power under the Constitution to enact what he called a 'sham' law which deems some other entirely different subject matter to be a 'trade mark' as a pretext to regulating it.<sup>109</sup>

This is not to say that the court's conclusion that the Commonwealth's power extends to the authorisation of polygamous or same sex marriages is necessarily incorrect. But it is to question the one-sided mode of reasoning that led to this

conclusion, as well as to a constitutional definition of marriage which contains positive elements which were not themselves the subject of adversarial forensic scrutiny. Indeed, the court could, as the Commonwealth urged, have avoided adopting a view about the outer limits of the marriage power. For it is surely correct that a power to legislate with respect to some subject matter which involves a special status, office or function (such as marriage, aliens or banking) includes a power to determine whether a person or body does or does not have that status, office or function. To take a less controversial example: imagine if the Commonwealth had a power to legislate with respect to 'universities'. Can it be seriously doubted that, whatever definition of universities might be adopted, the power would include the ability to determine that the term 'university' could not be used by a particular institution unless it met certain criteria? Just because the states could not be precluded under s 109 from legislating with respect to non-universities would not prevent the Commonwealth from determining that they would not have power to accord the status and name of 'university' to such institutions.<sup>110</sup>

That said, it would be a mistake to think that the High Court was expressing an opinion in favour of same sex marriage as a matter of policy. After all, the same definition and logic, based in the history of marriage across many cultures and centuries, would allow a federal statute to permit polygamous marriages of 13-year-old girls, provided the union is consensual. The restraints upon parliament so doing are political, not constitutional. In the High Court's view of the marriage power, the juristic concept of marriage is broad enough to include other countries' understanding of marriage even if their cultural mores are sharply at variance with our own.

Clearly then, the High Court was not taking a position on what the eligibility requirements for marriage ought to be. Rather, the most likely basis for the *ex cathedra* definition of marriage was constitutional pragmatism. Decisively, the High Court took itself out of the equation in the intense social debate about same sex marriage. It settled the controversy about which legislature has the power to determine the issue. In deciding that only the Federal Parliament can determine this, it also made it clear that unelected judges had no role to play in determining the issue on its merits. Once again, the court avoided the idea that the great moral and social issues of our time are to be determined by an oligarchy of the elite, as happens in the United States and Canada, often by the barest of majorities. The High Court's decision may have been based neither in tradition nor authority, but it was reflective of a more fundamental view of the judicial role. Whether such a view ultimately is more likely to maintain respect for the law than determining questions about which the oligarchy has no special wisdom, remains an open question.

### **Implications of the broad view of the marriage power**

Much has been settled by the ACT case, but much also is unsettled. One question that arises is whether, if some elements of the accepted definition in 1900 are not essential to the marriage power, why could not other elements be jettisoned also? Why does marriage need to be intended to endure, as Hayne J thought? Could not the Federal Parliament enact a provision in the Marriage Act that such unions automatically terminate after 10 years unless the vows are renewed? Furthermore, as our analysis above points out, it has not always been of the essence of marriage that it is a voluntary union. Arranged marriages have long played a part in customary social organisation. Marriages arranged between the royal families of Europe were for centuries an important element of international relations. There have no doubt been varying degrees of voluntariness and choice for the parties involved in such marriages, but it would be reasonable to assume there have been many daughters throughout history who have been given away in marriage without any real choice at all.

If the basis for the court's view of the marriage power is that marriage has evolved in various ways throughout history and differs from one culture to another, then arguably there are no theoretical limits to what Parliament could define as a marriage. It is somewhat arbitrary to insist that some elements remain essential to marriage for the purposes of the marriage power while others do not. If the present members of the court can pick and choose, without grounding their argument in the connotation of marriage as it stood in 1900, nor in the considered dicta of their predecessors, then their successors can do so as well.

The future of marriage is now firmly with the Federal Parliament. The High Court's definition of what is within the

scope of the marriage power says nothing about what marriage and family policy in Australia ought to be. Australian law on relationships is currently in a complete muddle. In various places around the country, there are marriages, civil partnerships or civil unions,<sup>111</sup> registered de facto relationships,<sup>112</sup> and unregistered de facto relationships,<sup>113</sup> all of which end up being treated in almost exactly the same way as marriages at least once certain thresholds are met (and subject to proof if the existence of the relationship is contested).

Accordingly, Australian law accords almost all the rights and obligations of marriage to any consensual union formed between natural persons without the need to enter formally into, or exit from, that status by means of a ceremony or a court order, and whether or not the relationship was intended to endure. There are almost no eligibility requirements to be treated as being in a de facto relationship other than a prohibition on a few relationships by consanguinity or through adoption.<sup>114</sup> There is no minimum age (although the age of consent may make sexual intercourse within a de facto relationship illegal in some circumstances), no impediment if one is already married to another person<sup>115</sup> and no requirement that the relationship be monogamous.<sup>116</sup>

Under the current law, marriage-like obligations are imposed upon same sex and opposite sex couples irrespective of their intentions, without their consent, and often without their knowledge. When couples break up, one of them may well be shocked to find that he or she is treated for the purposes of property division and maintenance as if he or she had made a commitment to marry -- with all that this entails -- when this was not what was intended by either of them. One of the issues that needs to be considered very carefully in any principled revision of the law of relationships therefore is the freedom not to be treated as if one were married despite consciously choosing not to enter into matrimony.

There is also a need for consistency. Courts exercising jurisdiction under the Family Law Act now regularly allow an applicant to assert that he or she was in a de facto relationship, and thereby to claim that the other person owes obligations akin to marriage to them in terms of property settlement, even after a history of telling Centrelink or the Australian Taxation Office that he or she is single.<sup>117</sup>

### **The future of marriage policy**

Broadly speaking, we suggest there are four options for the future of marriage and family policy in Australia in the light of the High Court's bold new definition of the meaning of marriage for the purposes of the marriage power. The first is that we continue to muddle through, treating both unions in which the parties intend to marry and those in which they do not, as marriages in terms of the mutual rights, obligations, privileges and responsibilities that the relationship involves -- notwithstanding the High Court's emphasis upon a 'consensual union' formed 'in accordance with legally prescribed requirements' as the basis for marital rights and obligations.

The second is that the law reaffirms an understanding of marriage, whether or not it includes same-sex couples, based upon the notion that it is a voluntary union of two persons for life to the exclusion of all others, which is pronounced as being in existence by a marriage celebrant lawfully authorised to do so. The logic of such a reaffirmation would be to say that those who have not chosen to enter into such a union which is intended to endure (as the High Court suggests), and who have not agreed to accept mutual rights and obligations, should not be treated as if they were married.

The third is that the concept of marriage should be returned to its foundational core, being based only on the consent of the parties to take on those mutual rights and obligations, and thereby to accept those legal privileges associated with being married. On such an approach, there would be no need for a celebrant. Marriage would be effected by registration, and non-registered informal relationships would not be recognised as giving rise to the mutual rights and obligations of marriage.

As a matter of history, ecclesiastical law recognised that a marriage could be entered into merely by consent through *verba de praesenti* or *verba de futuro subsequente copula* -- that is, an exchange of promises involving present intent to marry or a promise to marry in the future which was consummated by sexual intercourse. No witnesses were necessary. The priest's role originally emerged because the Church, from about the thirteenth century onwards, encouraged people

to enter into their mutual promises *ad ostium ecclesiae* -- at the doors of the Church -- and with the priest as a reliable witness. Even having witnesses has not, historically, been central to marriage, although they may have been important to its proof.<sup>118</sup>

Returning to the core understanding of a marriage as a consensual union which is adequately evidenced, and which does not rely upon state approval, would place the government in a position of neutrality in terms of different understandings of marriage, for subject to basic eligibility requirements, marriage would be defined by self-election and description rather than by governmental recognition. If this view of marriage were adopted, then arguably, those eligibility requirements ought to be no greater than currently exist for a de facto relationship, since, as Australian law has now developed, it makes no sense to impose eligibility requirements for marriage when almost all the rights, obligations, privileges and responsibilities of marriage apply to people whether or not they satisfy those eligibility requirements. Having said that, the eligibility requirements for legal recognition of a de facto relationship are so few that these may need to be reconsidered. In particular, a 13-year-old girl could be recognised as being in a de facto relationship,<sup>119</sup> with all its rights, obligations, privileges and responsibilities even if her adult partner was lawfully married to someone else. Of course, if there were proof of sexual intercourse with her then criminal law issues would arise; and the child protection authorities might get involved. Yet such is the laxity and confusion surrounding family policy in Australia that the law would potentially treat such a de facto relationship as being one that the law should recognise.

If parliament were to redefine marriage as resting entirely on the consent of the parties, evidenced by witnesses in the same way that other much less important legal commitments need to be witnessed, then marriage could be restored to its former position as predominantly a religious, cultural and customary institution that does not rest upon state recognition or approval.

The fourth option is that the law should recognise mutual rights and obligations as arising from only two sources, marriage and parenthood. Couples who choose to marry would assume the rights and obligations associated with the marital state by consent. Couples whose relationship resulted in the birth of a child would have mutual rights and obligations inter se arising out of their shared duty to take care of their child, irrespective of whether they have ever lived together.<sup>120</sup> It would avoid the problem that a father who may well be able to afford it does not need to make any contribution of capital to house the mother of his child, but has all the obligations associated with marriage if he is adjudged to have in some sense 'lived together' with the mother sufficiently to be treated to be in a de facto relationship with her.<sup>121</sup>

These are not mutually exclusive. The fourth option is compatible with the understanding of marriage in either the second or third approaches.

These are matters for the state, territory and Commonwealth Parliaments, and they would need to work together to provide a coherent set of laws on familial relations for the nation as a whole.

## Conclusion

The High Court has indicated that the Constitution has almost nothing to say on the subject of the eligibility requirements for marriage other than that it be consensual. Even that is open to challenge based on historical and comparative cultural analysis, based upon the High Court's reasoning. The High Court's judgment was commendably handed down in only 9 days, but perhaps it would have been better if the judges had taken a little longer, and allowed more debate about a question of such constitutional, political, social, moral and religious significance. What is clear is that these dimensions of our marriage policy cannot be avoided in the political debate.

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1 Marriage Equality (Same Sex) Act 2013 (ACT).

2 *Commonwealth v Australian Capital Territory* (2013) 304 ALR 204; 88 ALJR 118; [2013] HCA 55; BC201315603.

3 The term is taken from E Hoffer, *The True Believer: Thoughts On The Nature Of Mass Movements*, Perennial Classics, 1951. The book explores the psychological origins of fanaticism in mass movements.

4 The Federal Parliament has legislative authority in relation to marriage and divorce. The six states and two self-governing territories have general legislative competence, subject to the Constitution and valid federal legislation.

5 (2013) 304 ALR 204; 88 ALJR 118; [2013] HCA 55; BC201315603 at [33].

6 Consider, for example, the High Court's scathing criticisms of the NSW Court of Appeal in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; 236 ALR 209; [2007] HCA 22; BC200703851 for developing new doctrine on recipient liability in cases of breach of trust or fiduciary duty without adhering to conventional processes of legal reasoning -- including deference to considered dicta of the High Court.

7 This may be translated as 'who guards the guards themselves?' It is taken from Juvenal, *Satire VI*, lines 347-8 (attributed).

8 For an introduction to the arguments, see L Wardle, M Strasser, W Duncan and D Coolidge (Eds), *Marriage and Same-Sex Unions: A Debate*, Praeger, Westport, 2003. For an Australian examination of the issues see, eg, N Witzleb, 'Marriage as the "Last Frontier"? Same-Sex Relationship Recognition in Australia' (2011) 25 *International Journal of Law, Policy and the Family* 135. A useful bibliography of the (mostly American) literature is at <<http://www-rci.rutgers.edu/~axellute/SSM.html>> (accessed 11 August 2014).

9 For explanation of the various Bills, see L Taylor, 'Getting over it? The future of same-sex marriage in Australia' (2013) 27 *AJFL* 26 at 30-1.

10 Cf D Meagher, 'The Times Are They A-Changin'? -- Can the Commonwealth Parliament Legislate for Same Sex Marriages?' (2003) 17 *AJFL* 134; G Lindell, 'Constitutional Issues Regarding Same-Sex Marriage: A Comparative Survey -- North America and Australasia' (2008) 30 *Syd LR* 27; M Brock and D Meagher, 'The legal recognition of same-sex unions in Australia: a constitutional analysis' (2011) 22 *Pub LR* 266; Report of the Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Marriage Equality Amendment Bill 2010*, 2012; A Zimmermann, 'The Constitutionality of Same-Sex Marriage in Australia (and Other Related Issues)' (2012) 27 *BYU Jnl of Public Law* 465.

11 *Attorney-General for NSW v Brewery Employees Union of NSW* (1908) 6 CLR 469 at 501 per Griffith CJ, 521 per Barton J, 535-6 per O'Connor J, 610 per Higgins J; 14 ALR 565; BC0800029 (*Brewery Labels*).

12 *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Association of Professional Engineers* (1959) 107 CLR 208 at 267; 33 ALJR 236; BC5900020.

13 *R v Brislan; Ex parte Williams* (1935) 54 CLR 262 at 294; [1936] ALR 45; (1935) 9 ALJR 348; BC3600010.

14 Section 51 provides a list of matters that are within the legislative competence of the Federal Parliament, concurrently with the states. Matters that are exclusively within the competence of the Federal Parliament are contained in s 52.

15 *Brewery Labels* (1908) 6 CLR 469 at 611 per Higgins J; 14 ALR 565; BC0800029: 'Power to make laws as to any class of rights involves a power to alter those rights, to define those rights, to limit those rights, to extend those rights, and to extend the class of those who may enjoy those rights.'

16 *Ibid*, at CLR 614 per Higgins J; *Pochi v McPhee* (1982) 151 CLR 101 at 109 per Gibbs CJ; 43 ALR 261; 56 ALJR 878; BC8200116.

17 Eg, *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 553 per McHugh J; 163 ALR 270; [1999] HCA 27; BC9903189.

18 As Windeyer J explained in a family law case, 'The content of a constitutional power is determined by the connotation of the words in which it is expressed, not limited by their denotation at any particular time'. *Lansell v Lansell* (1964) 110 CLR 353 at 369; [1965] ALR 153; (1964) 38 ALJR 99; BC6400170. See also Kitto J at 363, Menzies J at 369.

19 (1866) LR 1 P&D 130 at 133: 'Marriage as understood in Christendom, may be defined as the voluntary union for life of one man and one woman to the exclusion of all others'. For historical background and commentary, see S Poulter, 'The Definition of Marriage in English Law'

(1979) 42 *MLR* 409; R Probert, 'Hyde v Hyde: Defining or Defending Marriage?' (2007) 19 *CFLQ* 322.

20 G Barwick, 'The Commonwealth Marriage Act 1961' (1962) 3 *MULR* 277 at 284-5.

21 J Goldsworthy, 'Interpreting the Constitution in its Second Century' (2000) 24 *MULR* 677 at 699-700.

22 S Johnson, 'Tasmania, SA to allow gay marriage', *The Australian*, 11 August 2012, at <<http://www.theaustralian.com.au/national-affairs/tasmania-sa-to-allow-gay-marriage/story-fn59niix-1226448236343>> (accessed 11 August 2014).

23 On the detail of the state Bills, see Taylor, above n 9, at 31-7.

24 It reported on 26 July 2013: Standing Committee on Social Issues, *Same-sex marriage law in New South Wales*, Parliament of NSW, Sydney.

25 See Marriage Equality (Same Sex) Act 2013 (ACT) and Dictionary.

26 Under the Marriage Act 1961 (Cth), s 12, a person 16 years or older may marry with the consent of a court if it is satisfied that there are 'exceptional circumstances'. Parents also must consent or their consent be dispensed with by the court (s 13).

27 Section 25 of the ACT enactment provided:

- (1) An application for a dissolution order in relation to a marriage under this Act must be based only on the ground that the marriage has broken down irretrievably.
- (2) The ground is taken to have been established, and the dissolution order may be made, only if the Supreme Court is satisfied that the parties to the marriage under this Act--
  - (a) have separated; and
  - (b) have lived separately and apart for a continuous period of at least 12 months immediately before the application for the order is made.
- (3) However, if the Supreme Court is satisfied that there is a reasonable likelihood that the parties to a marriage under this Act will resume living together, the court must not make a dissolution order in relation to the marriage.

28 There was a similar provision in the Tasmanian Bill, although in that Bill subsequent marriage rendered the same-sex marriage void: Same-Sex Marriage Bill 2012 (Tas) s 40.

29 At <<http://www.abc.net.au/news/2013-12-07/an-first-same-sex-marriages-in-canberra/5142036>> (accessed 11 August 2014).

30 Letter to the first author, 21 October 2013.

31 Australian Capital Territory (Self-Government) Act 1988 (Cth) s 28.

32 *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529; [1962] ALR 673; (1962) 36 ALJR 104; BC6200270.

33 *Ibid*, at CLR 558.

34 See the article by Sir Garfield Barwick, the Attorney-General of the day, above n 20.

35 At

<<http://www.smh.com.au/opinion/politics/states-leave-canberra-behind-in-rush-to-samesex-marriage-20120919-266wa.html#ixzz28sysQ7l>> (accessed 11 August 2014). See also G Williams, *Advice re proposed Same-Sex Marriage Act*, Tasmanian Gay & Lesbian Rights Group, <[http://tglrg.org/more/82\\_0\\_1\\_0\\_M3/](http://tglrg.org/more/82_0_1_0_M3/)> (accessed 11 August 2014).

36 Marriage Act 1961 (Cth) s 5.

37 G Williams, 'Can Tasmania Legislate for Marriage Equality?' (2012) 31 *Univ Tas LR* 117 at 130. For an early contrary view, see G Lindell, 'State Legislative Power to Enact Same-Sex Marriage Legislation, and the Effect of the Marriage Act 1961 (Cth) as Amended by the Marriage Amendment Act 2004 (Cth)' (2006) 9 *CLPR* 25.

38 At <<http://www.hrlc.org.au/wp-content/uploads/2013/10/Memorandum-of-advice-on-the-NSW-Bill.pdf>> (accessed 11 August 2014).

39 Ibid, at [98]-[99], [104]-[110].

40 Ibid, at [112].

41 Ibid, at [114]-[118].

42 See, eg, s 15AA of the Acts Interpretation Act 1901 (Cth), which provides: 'In the interpretation of a provision of an Act a construction which would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.' See also *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; 153 ALR 490; 72 ALJR 841; BC9801389; *Kelly v R* (2004) 218 CLR 216 at 251 per McHugh J; 205 ALR 274; [2004] HCA 12; BC200400836. It needs to be noted that the High Court has insisted that the inquiry is directed not to ascertaining the subjective intentions of members of Parliament, but rather an objective intention arrived at through the application of orthodox methods of statutory construction, which may include consideration of the legislative history.

43 Section 46 of the Marriage Act, as originally enacted, required the celebrant to say words to the effect that 'marriage, according to law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'.

44 Explanatory Memorandum, p 1. Similar observations may be made about the Second Reading speech, which referred to 'the institution of marriage' and 'the fundamental importance of the place of marriage in our society': Commonwealth, *Parliamentary Debates*, Hansard, House of Representatives, 24 June 2004, p 31,456 (Philip Ruddock). In their Opinion, Walker, Young and Herzfeld referred to these as relevant to discerning the purpose of the amendment, but they asserted, contrary to the plain language of these statements, that the 'object' of the 2004 amendment 'was only to make it clear that same-sex couples could not be married under the Marriage Act': at [115].

45 Commonwealth, *Parliamentary Debates*, Hansard, House of Representatives, 24 June 2004, p 31,456 (Philip Ruddock).

46 For further explanation, see P Parkinson, submission to the Inquiry into Same-Sex Marriage Law in NSW, no 102, at <[http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/5790cdd66dc611a0ca257b0b000346f1/\\$FILE/0102%20Prof%20Patrick%20Parkinson%20AM.pdf](http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/5790cdd66dc611a0ca257b0b000346f1/$FILE/0102%20Prof%20Patrick%20Parkinson%20AM.pdf)> (accessed 11 August 2014).

47 K Boele-Woelki, 'Legal Recognition of Same-Sex Relationships within the European Union', (2008) 82 *Tul LR* 1949; L Vaig, 'The Problematics of Recognition of Same-Sex Marriages Originating From Member States According to the EU Legal Regulation' (2012) 4 *Societal Studies* 755. On the position in the United States, following the decision of the Supreme Court of the United States in *United States v Windsor* (2013) 570 US 12, see W Baude, 'Interstate Recognition of Same-Sex Marriage after Windsor' (2013) 8 *NYU Journal of Law & Liberty* 150. See also *Henry v Himes*, Case No 1:14-cv-129 (US District Court, Southern District of Ohio), 14 April 2014.

48 *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 at 489-90 per Isaacs J; [1926] ALR 214; BC2600029; *Ex Parte McLean* (1930) 43 CLR 472 at 479 per Isaacs CJ and Starke J, 483 per Dixon J (with whom Rich J agreed); [1930] ALR 377; (1930) 4 ALJR 103; BC3000007; *Hume v Palmer* (1926) 38 CLR 441; [1927] ALR 66; BC2600004 at 448 per Knox CJ, 450-1 per Isaacs J, 461-2 per Starke J; (with whom Gavan Duffy J agreed); but see 455-8 per Higgins J; *Victoria v Commonwealth* (*The Kakariki*) (1937) 58 CLR 618 at 630-1 per Dixon J; [1938] ALR 97; (1937) 11 ALJR 344a; BC3800001.

49 Well-considered views often differ about these matters. See, eg, *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565; [1955] ALR 82; (1954) 28 ALJR 585; BC5400800; *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237; 28 ALR 449; 54 ALJR 210; BC8000065.

50 Personal communication with the first author, emails, 12-13 May 2014.

51 Same-Sex Marriage Bill 2012 (Tas): at <[http://www.parliament.tas.gov.au/bills/pdf/41\\_of\\_2012.pdf](http://www.parliament.tas.gov.au/bills/pdf/41_of_2012.pdf)> (accessed 11 August 2014).

52 At <<http://www.austlii.edu.au/au/legis/sa/bill/meb2012197>> (accessed 11 August 2014).

53 Above, n 50.

54 Ibid. An opinion prepared by Brett Walker SC and Perry Herzfeld on the ACT Bill considered it unlikely that the ACT legislation could be successfully defended on the basis that the test of inconsistency is narrower under the Self-Government Act. They also concluded that a law in the form of the ACT Bill would be inconsistent and therefore of no effect because it would purport to regulate the same status of marriage regulated by the Marriage Act rather than a different status, namely, 'same-sex marriage'. The Opinion is at <[http://www.hrlc.org.au/wp-content/uploads/2013/10/Memorandum\\_of\\_advice\\_re\\_ACT\\_marriage\\_21\\_10\\_13.pdf](http://www.hrlc.org.au/wp-content/uploads/2013/10/Memorandum_of_advice_re_ACT_marriage_21_10_13.pdf)> (accessed 11 August 2014).

55 The written submissions are at <[http://www.hcourt.gov.au/assets/cases/c13-2013/Cth-ACT\\_Plf.pdf](http://www.hcourt.gov.au/assets/cases/c13-2013/Cth-ACT_Plf.pdf)> (accessed 11 August 2014).

56 Ibid, p 2 at 5.4.3.

57 Ibid, p 12 at 26.

58 Ibid, p 2 at 5.6; p 15 at 37.

59 Ibid, p 15 at 35.

60 [2013] HCATrans 257 at line 96ff.

61 Ibid.

62 Citing *Fisher v Fisher* (1986) 161 CLR 438 at 455-6 per Brennan J; 67 ALR 513; 60 ALJR 731; BC8601372.

63 Annotated Submissions of the Australian Capital Territory, at <[http://www.hcourt.gov.au/assets/cases/c13-2013/Cth-ACT\\_Def.pdf](http://www.hcourt.gov.au/assets/cases/c13-2013/Cth-ACT_Def.pdf)> (accessed 11 August 2014).

64 Ibid, pp 1-2 at 6(a), (c), (d).

65 Ibid, p 2 at 6(e), (g), (h) and (i).

66 Ibid, p 14.

67 (2004) 218 CLR 216; 205 ALR 274; [2004] HCA 12; BC200400836 at [98].

68 Submissions of Australian Marriage Equality Inc, p 2 at 10(a); pp 4-5 at 15-18.

69 Ibid, p 5 at 17.

70 Reply at <[http://www.hcourt.gov.au/assets/cases/c13-2013/Cth-ACT\\_Reply.pdf](http://www.hcourt.gov.au/assets/cases/c13-2013/Cth-ACT_Reply.pdf)> (accessed 11 August 2014).

71 Submissions of the Plaintiff in Reply, p 1 at 3.

72 Submissions of the Plaintiff in Reply, p 1 at n 1.

73 The transcript is at <<http://www.austlii.edu.au/au/other/HCATrans/2013/299.html>> (accessed 11 August 2014).

74 [2013] HCATrans 299, p 3 at line 49ff.

75 Ibid, p 8 at line 283ff; see also p 7 at line 261ff. The question was also raised by Crennan J: *ibid*, p 6 at line 200ff.

76 Ibid, p 9 at line 338ff.

77 Ibid, p 10 at line 397ff.

78 Ibid, p 15 at line 613ff.

79 Ibid, p 58 at line 2569ff.

80 Ibid, p 60 at line 2683ff.

81 At <[http://www.hcourt.gov.au/assets/cases/c13-2013/Cth-ACT\\_AME.pdf](http://www.hcourt.gov.au/assets/cases/c13-2013/Cth-ACT_AME.pdf)> (accessed 11 August 2014).

82 Ibid, p 5 at 17.

83 Ibid, p 12 at 42.

84 The court said (at 3):

As the title of the ACT Act indicates, its object is to provide for marriage *equality* for same sex couples, not for some



form of legally recognised relationship which is relevantly different from the relationship of marriage which the federal laws provide for and recognise.

85 Transcript, p 75 at line 3358ff.

86 Gageler J was not sitting as he had previously given advice to the Commonwealth on the issue in his former role as the Solicitor-General.

87 (2013) 304 ALR 204; (2013) 88 ALJR 118; [2013] HCA 55; BC201315603 at [2].

88 Transcript, p 15 at line 615ff.

89 (2013) 304 ALR 204; (2013) 88 ALJR 118; [2013] HCA 55; BC201315603 at [9].

90 Ibid, at [11].

91 *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529 at 576-7; [1962] ALR 673; (1962) 36 ALJR 104; BC6200270.

92 (2013) 304 ALR 204; (2013) 88 ALJR 118; [2013] HCA 55; BC201315603 at [23].

93 Ibid, at [16].

94 Ibid, at [33].

95 Ibid, at [34].

96 Ibid, at [59].

97 Ibid, at [60].

98 Ibid, at [57]-[58].

99 Ibid, at [59] (original emphasis).

100 Indeed, the court avoided using the language of 'covering the field' or of identifying the 'field' or 'fields' in which the Commonwealth and territory laws operated, preferring to say that the problem with the ACT Act was that it purported 'alter, impair or detract' from the Marriage Act: *ibid*, at [59]. To use such language was to continue a recent trend in the court's jurisprudence, in which the 'alter, impair or detract' formula has become very prominent. (See *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 76; 161 ALR 489; [1999] HCA 12; BC9901017; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 425 per Kirby J; 219 ALR 403; [2005] HCA 44; BC200506315; *Dickson v R* (2010) 241 CLR 491 at 502; 270 ALR 1; [2010] HCA 30; BC201006930; *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at 524-5; 280 ALR 206; [2011] HCA 33; BC201106844; *Momcilovic v R* (2011) 245 CLR 1; 280 ALR 221; [2011] HCA 34; BC201106881 at 111-12 per Gummow J, 140-1 per Hayne J, 233-4 per Crennan and Kiefel JJ. But it was also to downplay the possibility that a 'two fields' argument might work.

101 (2013) 304 ALR 204; (2013) 88 ALJR 118; [2013] HCA 55; BC201315603 at [57].

102 Cf *Cheatle v R* (1993) 177 CLR 541; 116 ALR 1; 67 ALJR 760; BC9303555; *Katsumo v R* (1999) 199 CLR 40; 166 ALR 159; [1999] HCA 50; BC9906269; *Brownlee v R* (2001) 207 CLR 278; 180 ALR 301; [2001] HCA 36; BC200103185 and *R v LK* (2010) 241 CLR 177; 266 ALR 399; [2010] HCA 17; BC201003366, discussing the essential elements of trial by jury for the purposes of s 80 of the Constitution.

103 *Fisher v Fisher* (1986) 161 CLR 438 at 454-6; 67 ALR 513; 60 ALJR 731; BC8601372.

104 *R v L* (1991) 174 CLR 379 at 392; 103 ALR 577; 66 ALJR 36; BC9102611.

105 See, eg, *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529 at 549 per McTiernan J, 576-7 per Windeyer J; [1962] ALR 673; (1962) 36 ALJR 104; BC6200270; *Russell v Russell* (1976) 134 CLR 495 at 524 per Gibbs J; 9 ALR 103; 50 ALJR 594; BC7600041; *Cormick and Cormick v Salmon* (1984) 156 CLR 170 at 182 per Brennan J; 56 ALR 245; 59 ALJR 151; BC8400453; *Re F; Ex parte F* (1986) 161 CLR 376 at 389 per Mason and Deane JJ, 399 per Brennan J; 66 ALR 193; 60 ALJR 594; BC8601441.

106 (2013) 304 ALR 204; (2013) 88 ALJR 118; [2013] HCA 55; BC201315603 at [37].

107 Ibid, at [36].

108 *Brewery Labels* (1908) 6 CLR 469 at 610-612; 14 ALR 565; BC0800029.

109 Ibid, at CLR 614.

110 See, similarly, Lindell, above n 10, at 43.

111 Civil Unions Act 2012 (ACT); Civil Partnerships Act 2011 (Qld).

112 See O Rundle, 'An Examination of Relationship Registration Schemes in Australia' (2011) 25 *AJFL* 121.

113 For a critique, see D Kovacs, 'A federal law of de facto property rights: The dream and the reality' (2009) 23 *AJFL* 104.

114 Acts Interpretation Act 1901 s 2F(1)(b) and(6).

115 Acts Interpretation Act 1901 s 2F(5) 'a de facto relationship can exist even if one of the persons is legally married to someone else'.

116 Acts Interpretation Act 1901 s 2F(5): 'a de facto relationship can exist even if one of the persons is ... in a registered relationship ... or is in another de facto relationship'.

117 See, eg, *Christofis v Zorbas* [2011] FMCAfam 571; BC201104815; *Gissing v Sheffield* [2012] FMCAfam 1111; BC201210369; *Brady v Harris* [2012] FamCA 420; BC201250601.

118 See M A Glendon, *State, Law, and Family: Family Law in Transition in the United States and Western Europe*, North-Holland Publishing Co, 1977. See also J Witte, *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition*, 2nd ed, Westminster John Knox Press, Louisville, Kentucky, 2012.

119 Acts Interpretation Act 1901 s 2F makes no reference whatsoever to a minimum age.

120 P Parkinson, 'The Property Rights of Cohabitees: Is Statutory Reform the Answer?' in *Frontiers of Family Law*, D Pearl, A Bainham and R Pickford (Eds), 2nd ed, John Wiley, Chichester, England, 1995, p 301; P Parkinson, 'Quantifying the Homemaker Contribution in Family Property Law' (2003) 31 *F L Rev* 1; P Parkinson, *Family Law and the Indissolubility of Parenthood*, Cambridge UP, New York, 2011.

121 A large body of case law now indicates that this living together need not be anywhere close to full-time. The Full Court indicated in *Jonah v White* (2012) 48 Fam LR 562; (2012) FLC 93-522; [2012] FamCAFC 200; BC201250756 at [40] that 'the definition may be fulfilled where parties have lived together for limited periods provided that other indicia or the circumstances of the matter enable a finding that they were "living together on a genuine domestic basis"'. See also *Taisha v Peng* (2012) 48 Fam LR 150; [2012] FamCA 385; BC201250525; *Asprey v Delamarre* [2013] FamCA 214; BC201350214.

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