HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL, BELL AND KEANE JJ

THE COMMONWEALTH OF AUSTRALIA PLAINTIFF

AND

THE AUSTRALIAN CAPITAL TERRITORY DEFENDANT

The Commonwealth v Australian Capital Territory
[2013] HCA 55
12 December 2013
C13/2013

ORDER

The questions reserved for determination by the Full Court on 4 November 2013 be answered as follows:

1. *Is the* Marriage Equality (Same Sex) Act *2013 (ACT), in part or in its entirety:*

(a) *inconsistent with the* Marriage Act *1961 (Cth) within the meaning of s 28(1) of the* Australian Capital Territory (Self-Government) Act *1988 (Cth); and/or*

(b) *repugnant to the* Marriage Act *1961 (Cth)?*

Answer: *The whole of the* Marriage Equality (Same Sex) Act *2013 (ACT) is inconsistent with the* Marriage Act *1961 (Cth).*

2. *If the answer to question 1(a) is "yes", to what extent, if any, is the* Marriage Equality (Same Sex) Act *2013 (ACT) of no effect?*

Answer: *The whole of the* Marriage Equality (Same Sex) Act *2013 (ACT) is of no effect.*

3. *If the answer to question 1(b) is "yes", to what extent, if any, is the* Marriage Equality (Same Sex) Act *2013 (ACT) void?*

   Answer: *This question need not be answered.*

4. *Is the* Marriage Equality (Same Sex) Act *2013 (ACT), in part or in its entirety:*

   (a) *inconsistent with the* Family Law Act *1975 (Cth) within the meaning of s 28(1) of the* Australian Capital Territory (Self-Government) Act *1988 (Cth); and/or*

   (b) *repugnant to the* Family Law Act *1975 (Cth)?*

   Answer: *This question need not be answered.*

5. *If the answer to question 4(a) is "yes", to what extent, if any, is the* Marriage Equality (Same Sex) Act *2013 (ACT) of no effect?*

   Answer: *This question need not be answered.*

6. *If the answer to question 4(b) is "yes", to what extent, if any, is the* Marriage Equality (Same Sex) Act *2013 (ACT) void?*

   Answer: *This question need not be answered.*

7. *In light of the answers to the preceding questions what, if any, orders should be made for the final disposition of these proceedings?*

   Answer: *There should be judgment for the plaintiff for a declaration that the whole of the* Marriage Equality (Same Sex) Act *2013 (ACT) is inconsistent with the* Marriage Act *1961 (Cth) and of no effect.*

8. *What orders should be made in relation to costs of the questions reserved and of the proceedings generally?*

   Answer: *The defendant should pay the plaintiff's costs of the questions reserved and of the proceedings generally.*

Representation

J T Gleeson SC, Solicitor-General of the Commonwealth with M P Kearney SC, G A Hill and C L Lenehan for the plaintiff (instructed by Australian Government Solicitor)

P J F Garrisson SC, Solicitor-General for the Australian Capital Territory and K L Eastman SC with H Younan for the defendant (instructed by ACT Government Solicitor)

J K Kirk SC for Australian Marriage Equality Inc, as amicus curiae (instructed by Human Rights Law Centre)

CATCHWORDS

The Commonwealth v Australian Capital Territory

Constitutional law (Cth) – Powers of federal Parliament – Section 51(xxi) – Marriage – Whether s 51(xxi) confers power with respect to same sex marriage.

Territories (ACT) – Inconsistency of Commonwealth and Territory laws – *Marriage Act* 1961 (Cth) defined "marriage" as "the union of a man and a woman" – *Marriage Equality (Same Sex) Act* 2013 (ACT) provided for "marriage" between "2 people of the same sex" – Whether ACT Act capable of operating concurrently with Commonwealth Act under s 28(1) of *Australian Capital Territory (Self-Government) Act* 1988 (Cth).

Words and phrases – "consistent ... to the extent that it is capable of operating concurrently", "marriage".

Constitution, ss 51(xxi), 51(xxii).
Australian Capital Territory (Self-Government) Act 1988 (Cth), s 28(1).
Marriage Act 1961 (Cth), ss 5(1), 88EA.
Marriage Amendment Act 2004 (Cth).
Marriage Equality (Same Sex) Act 2013 (ACT), s 3, dictionary.

1 FRENCH CJ, HAYNE, CRENNAN, KIEFEL, BELL AND KEANE JJ. The only issue which this Court can decide is a legal issue. Is the *Marriage Equality (Same Sex) Act* 2013, enacted by the Legislative Assembly for the Australian Capital Territory, inconsistent with either or both of two Acts of the federal Parliament: the *Marriage Act* 1961 and the *Family Law Act* 1975? That question must be answered "Yes". Under the Constitution and federal law as it now stands, whether same sex marriage should be provided for by law (as a majority of the Territory Legislative Assembly decided) is a matter for the federal Parliament.

2 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.

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. The *Marriage Act* does not now provide for the formation or recognition of marriage between same sex couples. The *Marriage Act* provides that a marriage can be solemnised[1] in Australia only between a man and a woman and that a union solemnised in a foreign country between a same sex couple must not be recognised[2] as a marriage in Australia.

4 Those provisions of the ACT Act which provide for marriage under that Act are not capable of operating concurrently with the *Marriage Act*.

5 Because the ACT Act does not validly provide for the formation of same sex marriages, its provisions about the rights of parties to such marriages and the dissolution of such marriages cannot have separate operation and are also of no effect. Questions of inconsistency between the property and dissolution provisions of the ACT Act and the *Family Law Act* are not reached. The whole of the ACT Act is of no effect.

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1 Pt IV (ss 25-59) read with the definition of "marriage" in s 5(1) as "the union of a man and a woman to the exclusion of all others, voluntarily entered into for life".

2 s 88EA.

6 To explain this conclusion it is necessary first to consider s 51(xxi) of the Constitution and the ambit of the federal legislative power with respect to marriage, second to identify what the ACT Act provides and finally to consider whether the ACT Act can operate concurrently with the two federal Acts.

Federal legislative power with respect to same sex marriage

7 Section 51(xxi) of the Constitution gives the federal Parliament power to make laws with respect to "marriage". Section 51(xxii) gives the Parliament legislative power with respect to "divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants". Both powers were included in the Constitution to avoid what the framers saw[3] as a great defect in the United States Constitution. The object of the powers was to enable the federal Parliament to provide uniform laws governing marriage and divorce. That this object was not fully realised for more than half a century, by the enactment of first the *Matrimonial Causes Act* 1959 (Cth)[4] and then the *Marriage Act*, should not obscure the national purpose for granting the powers to the federal Parliament. For the purposes of this case, chief attention must be directed to the marriage power in s 51(xxi).

8 Although the Commonwealth and the Territory both submitted that s 51(xxi) gives the federal Parliament power to make a law providing for same sex marriage, their submissions do not determine that question. Parties cannot determine the proper construction of the Constitution by agreement or concession.

9 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

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3 *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 22 September 1897 at 1080.

4 None of the earlier federal matrimonial causes legislation (*Matrimonial Causes (Expeditionary Forces) Act* 1919 (Cth), *Matrimonial Causes Act* 1945 (Cth), *Matrimonial Causes Act* 1955 (Cth) or *Marriage (Overseas) Act* 1955 (Cth)) superseded the relevant laws of the States and Territories dealing with divorce and matrimonial causes.

had no power to make a national law[5] 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.

10 These reasons will show that the Commonwealth and the Territory were right to submit that s 51(xxi) gives the federal Parliament power to pass a law providing for same sex marriage.

11 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.

12 This understanding of s 51(xxi) is reflected in Quick and Garran's treatment[6] of the power and, in particular, their reference to *In re Bethell; Bethell v Hildyard*[7]. Quick and Garran said[8] that this case showed that "[a]ccording to the law of England a marriage is a union between a man and a woman on the same basis as that on which the institution is recognized throughout Christendom, and its essence is that it is (1) a voluntary union, (2) for life, (3) of

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5 In the sense of a law "of general application throughout the whole of the Commonwealth and its territories": *Spratt v Hermes* (1965) 114 CLR 226 at 278 per Windeyer J; [1965] HCA 66. See also *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 221-222 per Gaudron J; [1992] HCA 45.

6 *The Annotated Constitution of the Australian Commonwealth*, (1901) at 608-609.

7 (1888) 38 Ch D 220.

8 *The Annotated Constitution of the Australian Commonwealth*, (1901) at 608.

one man and one woman, (4) to the exclusion of all others." Reference might also have been made (and now commonly is made) to the earlier decision of Lord Penzance in *Hyde v Hyde and Woodmansee* and the statement[9] that "marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others".

13 Two series of points must be made about this use of such definitions of marriage: the first about constitutional interpretation, the second about the cases which are relied on as providing the relevant definition.

Interpreting s 51(xxi) (the marriage power)

14 The utility of adopting or applying a single all-embracing theory of constitutional interpretation has been denied[10]. This case does not require examination of those theories or the resolution of any conflict, real or supposed, between them. The determinative question in this case is whether s 51(xxi) is to be construed as referring only to the particular legal status of "marriage" which could be formed at the time of federation (having the legal content which it had according to English law at that time) or as using the word "marriage" in the sense of a "topic of juristic classification"[11]. For the reasons that follow, the latter construction should be adopted. Debates cast in terms like "originalism" or "original intent" (evidently intended to stand in opposition to "contemporary meaning"[12]) with their echoes of very different debates in other jurisdictions are not to the point and serve only to obscure much more than they illuminate.

15 In *Attorney-General (Vict) v The Commonwealth* ("the *Marriage Act Case*"), Windeyer J rightly emphasised[13] that the scope of the powers which the

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9 (1866) LR 1 P & D 130 at 133. See also *Warrender v Warrender* (1835) 2 Cl & F 488 [6 ER 1239].

10 *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51 at 75 [41]-[42] per Gummow J; [2002] HCA 18.

11 *Attorney-General (Vict) v The Commonwealth* (1962) 107 CLR 529 at 578 per Windeyer J; [1962] HCA 37.

12 cf *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 522-525 [110]-[118] per Kirby J; [2000] HCA 14.

13 (1962) 107 CLR 529 at 576.

Constitution gives is "not to be ascertained by merely analytical and a priori reasoning from the abstract meaning of words". (Although Windeyer J dissented from some of the conclusions reached by the Court in the *Marriage Act Case*, this approach to constitutional construction is wholly orthodox[14].) No doubt, as Windeyer J observed[15], the Constitution was "written in language expressive of the concepts of [English] law" and "[c]onstitutional interpretation is affected by established usages of legal language." But when s 51(xxi) gives the Parliament legislative power with respect to "marriage", it gives legislative power with respect to a status, reflective of a social institution, to which legal consequences attach and from which legal consequences follow. In the *Marriage Act Case*, Dixon CJ said[16] of s 51(xxi) that it covers "the status of the married parties", that is, "the particular legal position they hold by reason of their married state". His Honour continued[17], "'marriage' is considered as the source of the mutual rights and of the legal consequences which flow from it but requiring the definition, the support and the enforcement of the federal law".

16 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.

17 One obvious change in the social institution of marriage which had occurred before federation is revealed by reference to the elements which Quick and Garran described as being of the "essence" of marriage, namely that the union be "the voluntary *union for life* of one man and one woman to the exclusion of all others"[18] (emphasis added). By the time of federation, marriage

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14 See, for example, *Attorney-General for NSW v Brewery Employés Union of NSW* (1908) 6 CLR 469 at 610-612 per Higgins J; [1908] HCA 94; *Grain Pool* (2000) 202 CLR 479 at 492-495 [16]-[22] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

15 (1962) 107 CLR 529 at 576.

16 (1962) 107 CLR 529 at 543.

17 (1962) 107 CLR 529 at 543.

18 *Bethell v Hildyard* (1888) 38 Ch D 220 at 234.

could be dissolved by judicial decree of the civil courts. With the enactment of the *Matrimonial Causes Act* 1857 (UK)[19], and equivalent legislation in the Australian colonies[20], marriage became a voluntary union *entered into* for life. It was no longer a union *for* life. These legislative changes altered the social institution of marriage in ways which have continued to play out, not only before federation but ever since. The legal rights and obligations attaching to the status of marriage, once indissoluble, could be dissolved. Upon judicial separation, the wife had[21] rights different from her rights during marriage. Upon dissolution, new rights and obligations could be created[22] by order or undertaken by remarriage. The particular detail of these changes is not important. What is important is the observation that neither the social institution of marriage nor the rights and obligations attaching to the status of marriage (or condition of being married) were immutable.

18 More generally, it is essential to recognise that the law relating to marriage, as it stood at federation, was the result of a long and tangled development. Whether that development is usefully traced to canon law before the Council of Trent (as Windeyer J did[23] in the *Marriage Act Case*) or to Roman law (as the Commonwealth's submissions sought to do) need not be decided. It is enough to notice that, in the *Marriage Act Case*, Windeyer J referred[24] to some of the more important legislative changes made between 1540 and 1857. And the consequence of those changes was that, by the time of federation, the law relating to marriage was largely statutory. As Windeyer J said[25]:

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19 20 & 21 Vict c 85.

20 *Matrimonial Causes Act* 1873 (NSW); *Divorce and Matrimonial Causes Act* 1861 (Vic); *Matrimonial Causes Act* 1858 (SA); *Matrimonial Causes Jurisdiction Act* 1864 (Q); *Matrimonial Causes Ordinance* 1863 (WA); *Matrimonial Causes Act* 1860 (Tas).

21 *Matrimonial Causes Act* 1857, ss 25 and 26.

22 *Matrimonial Causes Act* 1857, s 32.

23 (1962) 107 CLR 529 at 578.

24 (1962) 107 CLR 529 at 578-580.

25 (1962) 107 CLR 529 at 579.

> "The statute law of marriage may seem to be in a small compass. But it embodies the *results of a long process of social history*, it codifies much complicated learning, it sets at rest some famous controversies." (emphasis added)

19 Because the status, the rights and obligations which attach to the status and the social institution reflected in the status are not, and never have been, immutable, there is no warrant for reading the legislative power given by s 51(xxi) as tied to the state of the law with respect to marriage at federation. Tying the ambit of the head of power to the then state of the law would fail to recognise that, as Higgins J said[26] in *Attorney-General for NSW v Brewery Employés Union of NSW* ("the *Union Label Case*"), it is necessary to construe the Constitution remembering that "it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be". Not only that, it would fail to recognise that, as Windeyer J demonstrated[27] in the *Marriage Act Case*, "[m]arriage can have a wider meaning for law" than the meaning given in *Hyde v Hyde*. The definition in *Hyde v Hyde* was proffered[28] as a statement of "essential elements and invariable features" in answer to the question "What, then, is the nature of this institution as understood in Christendom?" The answer to that question cannot be the answer to the question "What is the nature of the subject matter of the marriage power in the Australian Constitution?"

20 It may readily be accepted that what Windeyer J described[29] as "the monogamous marriage of Christianity" would have provided, at federation, the central type of "marriage" with respect to which s 51(xxi) conferred legislative power. But, as Higgins J said[30] in relation to the trade marks power, usage of the term in 1900 may give the centre of the power but "it does not give us the

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26 (1908) 6 CLR 469 at 612. See also *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 81; [1945] HCA 41; *Grain Pool* (2000) 202 CLR 479 at 493-495 [19]-[20]; cf *McCulloch v Maryland* 17 US 316 at 407 (1819).

27 (1962) 107 CLR 529 at 577.

28 (1866) LR 1 P & D 130 at 133.

29 (1962) 107 CLR 529 at 577.

30 *Union Label Case* (1908) 6 CLR 469 at 610.

circumference of the power" (emphasis added). Hence, as Windeyer J rightly said[31] in the *Marriage Act Case*, "[m]arriage law is not a matter of precise demarcation". It is, instead, "a recognized topic of juristic classification".

21 One of the several examples which Higgins J gave[32] in amplification of the proposition that the boundaries of the class of trade marks and other subjects referred to in s 51(xviii)[33] were not fixed according to the state of the law in 1900 was the marriage power. Higgins J said[34] that under the marriage power "the Parliament could prescribe what unions are to be regarded as marriages". The reasons given by Higgins J for rejecting the argument that the boundaries of the power to make laws with respect to trade marks were fixed according to the state of the law in 1900 apply equally to the marriage power. To adopt and adapt what Higgins J said[35] in respect of the trade marks power, if s 51(xxi) uses "marriage" in a sense tied to the state of the law in 1900:

> "In place of Australia having by its Constitution acquired for the Australian Parliament the power of dealing with *the whole subject* [of marriage], it turns out that the Federal Parliament can deal only with [marriage having the characteristics and consequences it had] in 1900, and that each of the States separately must deal with the other parts of the subject." (emphasis added)

Also apposite to the marriage power, at least by way of analogy, is the observation[36] by Higgins J, quoted[37] by six Justices of this Court in *Grain Pool of Western Australia v The Commonwealth*:

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31 (1962) 107 CLR 529 at 578.

32 (1908) 6 CLR 469 at 610.

33 "Copyrights, patents of inventions and designs, and trade marks".

34 (1908) 6 CLR 469 at 610.

35 (1908) 6 CLR 469 at 603.

36 (1908) 6 CLR 469 at 611.

37 (2000) 202 CLR 479 at 494 [20].

> "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."

22 What then is the relevant "topic of juristic classification"? Accepting that it "is not a matter of precise demarcation", it is sufficient, for the purposes of this case, to adopt the description of the topic given[38] by Windeyer J in the *Marriage Act Case*: laws of a kind "generally considered, for comparative law and private international law, as being the subjects of a country's marriage laws".

23 This description does not confine the topic to marriage as it was understood in nineteenth century England or Australia. It recognises that the law of marriage relates to personal status and that marriage is a status of differing content in different systems of law. It also gives due weight to the observation that marriage is a status which Anglo-Australian choice of law rules have always treated as being created and governed (in at least some cases) by foreign law, whether the law of the place of celebration of the marriage or the law of the domicile of the parties. 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.

24 Something more should be said about the nineteenth century cases "defining" marriage.

The nineteenth century cases

25 The cases commonly referred to as providing a definition of "marriage" in s 51(xxi) of the Constitution must be read in the light of the issues decided in those cases. Each case dealt with a particular question about either succession to property or the jurisdiction of the English courts to grant a decree of dissolution in cases concerning a marriage contracted in, and governed by the law of, a foreign country.

26 *Bethell v Hildyard*[39] concerned succession to property by the child of a marriage contracted by an English man in Bechuanaland with a Baralong woman

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38 (1962) 107 CLR 529 at 578.

39 (1888) 38 Ch D 220.

according to the customs of the Baralong people. The marriage was held not to be a valid marriage according to the law of England because the customs of the Baralong people permitted polygamy. The child was held not entitled to succeed to her father's property.

27 What was said in *Hyde v Hyde*[40] was directed to the construction of the statute which conferred[41] jurisdiction on the Court for Divorce and Matrimonial Causes to grant a decree of dissolution of marriage. The marriage which the petitioner sought to dissolve had been formed in what was then the Territory of Utah. The law which governed the marriage permitted the husband to take a second wife. The *Hyde v Hyde* definition was proffered in the course of identifying the difficulties that would have been encountered in seeking to apply the statute (including, as it then did[42], the matrimonial offence of adultery) to a potentially polygamous marriage.

28 Observing that, at federation, English law would recognise as a marriage only a union having the characteristics described in *Hyde v Hyde,* and would not provide matrimonial remedies in respect of any other kind of union, accurately describes the then state of the law. But the definitions of marriage given in *Hyde v Hyde* and similar nineteenth century cases governed what kinds of marriage contracted in a foreign jurisdiction would be treated as yielding the same or similar rights and consequences as a marriage contracted in England in accordance with English law. They were cases which necessarily accepted that there could be other kinds of relationship which could properly be described as "marriage" and the cases sought to deal with that observation by confining the kinds of marriage which would be recognised in English law to those which closely approximated a marriage contracted in England under English law.

29 The great conflict of laws writer, A V Dicey, described[43] the rule which was adopted in the cases as an "instance of the principle that the rules of (so-called) private international law apply only amongst Christian states". The

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40 (1866) LR 1 P & D 130.

41 *Matrimonial Causes Act* 1857, ss 6 and 31.

42 *Matrimonial Causes Act* 1857, ss 16 and 27.

43 *A Digest of the Law of England with Reference to the Conflict of Laws,* (1896) at 639 fn 2.

rule treated some, but not all, forms of marriage contracted according to other laws as either not worthy of recognition or not able to be recognised because their incidents were not compatible with English law. But the rule necessarily accepted that there were other systems of law providing for forms of marriage other than marriage of the kind for which English law provided. The rule depended upon classifying the legal systems which provided for such other forms of marriage as not being the legal system of a "Christian state".

30 These being the bases for the nineteenth century decisions, those decisions did not then, and do not now, define the limit of the marriage power (or the divorce and matrimonial causes power) in the Constitution. Decisions like *Hyde v Hyde* reflect no more than the then state of development of judge-made law on the subjects of marriage and divorce and matrimonial causes. Subsequent development of both judge-made law and statute law shows this to be so.

31 First, it was established in 1890 by *Brinkley v Attorney-General*[44] that, despite the frequent reference found in earlier decisions to "Christian marriage" and "marriage in Christendom" as distinct from "infidel" marriages[45], a monogamous marriage validly solemnised according to the law of Japan between "a natural born subject of the Queen ... having his domicil in Ireland" and "a subject of the empire of Japan", though not a Christian marriage, would be declared to be valid in English law. References made in earlier cases to a religious basis for the adoption of a particular definition of marriage must be seen in this light.

32 Second, statements made in cases like *Hyde v Hyde*, suggesting that a potentially polygamous marriage could never be recognised in English law, were later qualified by both judge-made law and statute to the point where in both England and Australia the law now recognises polygamous marriages for many purposes[46].

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44 (1890) 15 PD 76 at 76.

45 *Warrender v Warrender* (1835) 2 Cl & F 488 at 532 [6 ER 1239 at 1255]; *Hyde v Hyde* (1866) LR 1 P & D 130 at 133-136.

46 See, for example, *Family Law Act* 1975, s 6. As to judge-made law generally and some English statute law, see *Dicey and Morris on the Conflict of Laws*, 10th ed (1980), vol 1 at 308-328 and the discussion by Lord Maugham LC of the

(Footnote continues on next page)

33 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.

34 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). The rights and obligations which stem from that status will commonly include rights and obligations about maintenance and support, succession to and ownership of property (both as between the parties to the marriage and between the parties and others) and, if there are children of the union, rights and obligations in relation to them.

35 The social institution of marriage differs from country to country. It is not now possible (if it ever was) to confine attention to jurisdictions whose law of marriage provides only for unions between a man and a woman to the exclusion of all others, voluntarily entered into for life. Marriage law is and must be recognised now to be more complex. Some jurisdictions outside Australia permit polygamy. Some jurisdictions outside Australia, in a variety of constitutional settings, now permit marriage between same sex couples.

36 These facts cannot be ignored or hidden. It is not now possible (if it ever was) to decide what the juristic concept of marriage includes by confining attention to the marriage law of only those countries which provide for forms of marriage which accord with a preconceived notion of what marriage "should" be. More particularly, the nineteenth century use of terms of approval, like "marriages throughout Christendom"[47] or marriages according to the law of

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nineteenth century cases in *The Sinha Peerage Claim* [1946] 1 All ER 348n at 348-349.

47 *Bethell v Hildyard* (1888) 38 Ch D 220 at 234.

"Christian states"[48], or terms of disapproval, like "marriages among infidel nations"[49], served only to obscure circularity of reasoning. Each was a term which sought to mask the adoption of a premise which begged the question of what "marriage" means. The marriage law of many nations has always encompassed (and now encompasses) relations other than marriage as understood in *Hyde v Hyde*.

37 Other legal systems now provide[50] for marriage between persons of the same sex. This may properly be described as being a recent development of the law of marriage in those jurisdictions. It is not useful or relevant for this Court to examine how or why this has happened. What matters is that the juristic concept of marriage (the concept to which s 51(xxi) refers) embraces such unions. They are consensual unions of the kind which has been described. The legal status of marriage, like any legal status, applies to only some persons within a jurisdiction[51]. The boundaries of the class of persons who have that legal status are set by law and those boundaries are not immutable[52].

38 When used in s 51(xxi), "marriage" is a term which includes a marriage between persons of the same sex.

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48 Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws*, (1896) at 639 fn 2.

49 *Bethell v Hildyard* (1888) 38 Ch D 220 at 234.

50 It is enough to refer to Canada (*Civil Marriage Act* SC 2005, c 33, ss 2 and 4), New Zealand (*Marriage Act* 1955 (NZ), s 2(1), as amended by *Marriage (Definition of Marriage) Amendment Act* 2013 (NZ), s 5) and England and Wales (*Marriage (Same Sex Couples) Act* 2013 (UK), s 1(1)). The examples could be multiplied.

51 cf *Ford v Ford* (1947) 73 CLR 524 at 529; [1947] HCA 7.

52 cf *Union Label Case* (1908) 6 CLR 469 at 610 per Higgins J.

The ACT Act

39 The ACT Act defines[53] "marriage" under that Act as:

> "(a) the union of 2 people of the same sex to the exclusion of all others, voluntarily entered into for life; but
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> (b) does not include a marriage within the meaning of the *Marriage Act 1961* (Cwlth)."

It defines[54] "legally married" to include "married under a law of another jurisdiction that substantially corresponds" to the Act.

40 The ACT Act provides for who is eligible for marriage under the Act[55], how marriage under the Act is solemnised[56], what marriages are void under the Act[57], how marriages under the Act may be ended[58], who is or may be authorised to solemnise marriage under the Act[59], and which marriages solemnised in other jurisdictions are to be recognised as "a marriage under this Act for territory law"[60].

41 Most of the provisions of the ACT Act are very similar to provisions of either the *Marriage Act* or the *Family Law Act*. For present purposes, it is enough to notice only the chief similarities.

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53 s 3 and the dictionary to the Act.

54 s 3 and the dictionary to the Act.

55 Pt 2, Div 2.2 (s 7).

56 Pt 2, Div 2.3 (ss 8-20).

57 Pt 3 (s 21).

58 Pt 4 (ss 22-33).

59 Pt 5 (ss 34-39).

60 Pt 6 (s 40).

42 First and foremost is the definition of marriage for which the ACT Act provides. Whereas the *Marriage Act* defines[61] marriage as "the union of a man and a woman to the exclusion of all others, voluntarily entered into for life", the ACT Act provides[62] for "the union of 2 people ... to the exclusion of all others, voluntarily entered into for life" (excluding a marriage within the meaning of the *Marriage Act*). Both Acts are thus directed to the creation of a legal status deriving from the agreement of natural persons to form an enduring personal union which can be dissolved only in accordance with law and which entails legal consequences for mutual support.

43 Eligibility to marry is fixed by the two Acts with only one difference. Under the *Marriage Act*, a person aged between 16 and 18 years may marry[63] if certain consents are given or judicial authorisation is obtained. Under the ACT Act, an adult person may marry[64]. Both Acts prohibit[65] marriage between persons within the same prescribed degrees of affinity or consanguinity.

44 The forms of marriage are not relevantly different. Each person to be married calls[66] on those present to witness that he or she takes the other party "to be my lawful wedded" spouse. Each form of marriage requires[67] the celebrant to remind the persons being married "of the solemn and binding nature of the relationship into which [they] are about to enter".

45 Subject to one important exception, the grounds on which a marriage is to be held to be void are substantially identical in the two Acts. The exception is that the ACT Act provides[68] that a marriage under that Act is void if the parties

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61 s 5(1).

62 s 3 and the dictionary to the Act.

63 ss 12-21, Schedule.

64 s 7(1)(a).

65 *Marriage Act*, s 23B(1)(b) and (2); ACT Act, s 7(1)(d).

66 *Marriage Act*, s 45(2); ACT Act, s 13(2).

67 *Marriage Act*, s 46(1); ACT Act, s 14.

68 s 21(1)(a).

were ineligible to marry. To be eligible to marry under the ACT Act, the persons must be *unable*[69] to marry under the *Marriage Act because* the marriage is not a marriage within the meaning of that Act. The effect of these provisions, therefore, is that, if the *Marriage Act* definition of marriage were to be amended to permit same sex marriage under the federal law, a marriage subsequently solemnised under the ACT Act would be void.

46 The ACT Act provides for dissolution of marriages under that Act in either of two cases. The first is cast in terms not relevantly different from the provisions of s 48 of the *Family Law Act*: a court (under the ACT Act, the Supreme Court of the Territory) being satisfied[70] that the parties have separated and thereafter "have lived separately and apart for a continuous period of at least 12 months immediately before the application [for dissolution] is made". The second case for which the ACT Act provides[71] is for the *automatic* dissolution of the marriage if a party marries another under a law of the Commonwealth, or under a law of another jurisdiction that substantially corresponds to the ACT Act.

47 Other similarities between the ACT Act and the two federal Acts were referred to in argument but it is not necessary to describe them. The fundamental observation to make is that the ACT Act provides for the creation of a legal status, defined as the union of two natural persons to the exclusion of all others, voluntarily entered into for life. That legal status is created by the exchange of promises, before witnesses and in the presence of an authorised celebrant. If the parties separate and live apart for more than 12 months the status may be terminated by court order. The status given by the ACT Act will come to an end if a party acquires the status of marriage under the *Marriage Act*. If the *Marriage Act* permits marriage between same sex couples, a same sex couple may not validly acquire the status of marriage under the ACT Act.

Inconsistency

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

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69 s 7(1)(c).

70 s 25(2).

71 s 33.

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

(2) In this section:

law means:

(a) a law in force in the Territory (other than an enactment or a subordinate law); or

(b) an order or determination, or any other instrument of a legislative character, made under a law falling within paragraph (a)."

49 The ACT Act is an "enactment"[72] for the purposes of s 28 of the Self-Government Act. Both the *Marriage Act* and the *Family Law Act* are laws in force in the Territory. Is the ACT Act inconsistent with the *Marriage Act*, the *Family Law Act* or both? Can the ACT Act operate to any extent concurrently with the *Marriage Act* and the *Family Law Act*?

50 Some argument was directed in this matter to whether, and to what extent, the effect of s 28 of the Self-Government Act differs from the operation of s 109 of the Constitution. In that regard, reference was made to the statement[73] by Gleeson CJ and Gummow J, in *Northern Territory v GPAO*, that "the criterion for inconsistency – incapacity of concurrent operation – is narrower than that which applies under s 109, where the federal law evinces an intention to make exhaustive or exclusive provision upon a topic within the legislative power of the Commonwealth". It is not necessary, however, to trace the whole of the course of the argument.

51 The Territory submitted that "[i]n circumstances where the Parliament appears to have intended that the Commonwealth law shall be a complete statement of the law governing a particular relation or thing", s 28 requires that "the Territory law would not be inconsistent with the Commonwealth law to the

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72 Self-Government Act, s 3.

73 (1999) 196 CLR 553 at 583 [60]; [1999] HCA 8.

extent that the former was capable of operating concurrently with the latter". How a Territory enactment *could* operate concurrently with a federal law which is a complete statement of the law governing the relevant relation or thing was not explained.

52 The Territory accepted, correctly, that s 28 operates "not as a denial of power otherwise conferred by the Self-Government Act upon the Assembly but as a denial to *a law so made* of effect 'to the extent' of its inconsistency"[74] (emphasis added). These reasons will show that it follows that, if a Commonwealth law is a complete statement of the law governing a particular relation or thing[75], a Territory law which seeks to govern some aspect of that relation or thing cannot operate concurrently with the federal law to any extent.

53 Section 28(1) is directed to "[a] provision of an enactment". The opening words of the sub-section provide that a provision of an enactment has no effect to the extent that it is inconsistent with (among other things) a law of the federal Parliament. The concluding words of s 28(1) provide that "such a provision [of an enactment by the Territory Assembly] shall be taken to be consistent with such a law [of the federal Parliament]" to the extent described. The text of s 28 thus makes plain that the section is directed to the effect which is to be given to an enactment of the Assembly; it is *not* directed to the effect which is to be given to a federal law. That is, s 28 is a constraint upon the operation of the enactment of the Territory Assembly. It does not say, and it is not to be understood as providing, that laws of the federal Parliament are to be read down or construed in a way which would permit concurrent operation of Territory enactments.

54 To the extent, if any, to which the Territory's submissions depended upon construing s 28 as requiring the reading down of the relevant federal law, the text of the section requires rejection of the submission. And as *Re Governor, Goulburn Correctional Centre; Ex parte Eastman*[76] makes plain, what was said

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74 *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 351 [75]; [1999] HCA 44.

75 cf *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128 at 136-137 per Dixon J; [1932] HCA 40; *Victoria v The Commonwealth* ("*The Kakariki*") (1937) 58 CLR 618 at 630 per Dixon J, 638 per Evatt J; [1937] HCA 82.

76 (1999) 200 CLR 322 at 351 [75].

in *GPAO*[77] does not support such a construction of s 28. Rather, the starting point for any consideration of the operation of s 28 must be the determination of the legal meaning[78] of the relevant federal Act (in this case the *Marriage Act*). Only then is it possible to consider whether and to what extent the enactment of the Territory Assembly can be given concurrent operation.

55 The argument in favour of concurrent operation of the ACT Act and the *Marriage Act* depended ultimately upon the proposition that, because the *Marriage Act* defines marriage as between persons of the *opposite* sex, the ACT Act can operate concurrently with respect to marriage between persons of the *same* sex. This proposition is flawed and must be rejected. The ACT Act is not capable of operating concurrently with the *Marriage Act* to any extent.

56 It is necessary to bear steadily in mind that the federal Parliament has power under s 51(xxi) to make a national law with respect to same sex marriage. (The Parliament's power under s 122 of the Constitution to make laws for the government of any Territory need not be considered.) The federal Parliament has not made a law *permitting* same sex marriage. But the absence of a provision *permitting* same sex marriage does not mean that the Territory legislature may make such a provision. It does not mean that a Territory law permitting same sex marriage can operate concurrently with the federal law. The question of concurrent operation depends[79] upon the proper construction of the relevant laws. In particular, there cannot be concurrent operation of the federal and Territory laws if, on its true construction, the *Marriage Act* is to be read as providing that the only form of marriage permitted shall be a marriage formed or recognised in accordance with that Act.

57 The *Marriage Act* regulates the creation and recognition of the legal status of marriage throughout Australia. The Act's definition of marriage sets the bounds of that legal status *within* the topic of juristic classification with which the Act deals. Read as a whole, the *Marriage Act*, at least in the form in which it now stands, makes the provisions which it does about marriage as a

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77 (1999) 196 CLR 553.

78 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 [78]; [1998] HCA 28; *Momcilovic v The Queen* (2011) 245 CLR 1 at 112 [245], 115-116 [258]-[261]; [2011] HCA 34.

79 *Momcilovic* (2011) 245 CLR 1 at 112 [245], 115-116 [258]-[261].

comprehensive and exhaustive statement of the law with respect to the creation and recognition of the legal status of marriage. Why otherwise was the *Marriage Act* amended, as it was in 2004[80], by introducing a definition of marriage in the form which now appears, except for the purpose of demonstrating that the federal law on marriage was to be complete and exhaustive?

58 The 2004 amendments to the *Marriage Act* made plain (if it was not already plain) that the federal marriage law is a comprehensive and exhaustive statement of the law of marriage. Those amendments applied the newly introduced definition of marriage to the provisions governing solemnisation of marriage and gave effect[81] to that definition in the provisions governing the recognition of marriages solemnised outside Australia. Section 88EA of the *Marriage Act* (inserted[82] by the 2004 amendments) provides expressly that a union solemnised in a foreign country between persons of the same sex must not be recognised as a marriage in Australia.

59 These particular provisions of the *Marriage Act*, read in the context of the whole Act, necessarily contain[83] 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[84]. Giving effect to those provisions of the ACT Act would alter, impair or detract from the *Marriage Act*. Within the Commonwealth, the *Marriage Act* determines the capacity of a person to enter the union that creates the status of marriage with its attendant rights and obligations of mutual support and advancement. Under the *Marriage Act*, a person has no legal capacity to attain that status, with the rights and obligations attendant on it, by entry into a union with a person of the same sex.

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80 *Marriage Amendment Act* 2004 (Cth), s 3, Sched 1, item 1.

81 s 88B, as amended by the *Marriage Amendment Act* 2004, s 3, Sched 1, item 2.

82 *Marriage Amendment Act* 2004, s 3, Sched 1, item 3.

83 See, for example, *Momcilovic* (2011) 245 CLR 1 at 111 [244].

84 cf *Butler v Attorney-General (Vict)* (1961) 106 CLR 268 at 274 per Fullagar J, 278 per Kitto J, 282-283 per Taylor J, 286 per Menzies J, 286 per Windeyer J; [1961] HCA 32; *Ex parte Eastman* (1999) 200 CLR 322 at 351 [75].

60 The Territory submitted that the *Marriage Act* and the ACT Act "do not regulate the same status of 'marriage'". Certainly, the conditions for the attainment of the status for which each Act provides differ. But the ACT Act provides for a status of *marriage*. And as both the short title[85] and the long title[86] to the ACT Act show, the Act is intended to provide for *marriage equality*. The status for which the ACT Act provides falls within the one topic of juristic classification identified by Windeyer J. And contrary to the submissions of the Territory, the topic within which the status falls must be identified by reference to the legal content and consequences of the status, not merely the description given to it. By providing for marriage equality, the ACT Act seeks to operate within the same domain of juristic classification as the *Marriage Act*. And while the *Marriage Act* carves out a *part* of that domain for regulation of the creation and recognition of marriage, the *Marriage Act* also contains a negative proposition which governs the *whole* of that domain. The negative proposition governs the whole of the domain by providing that the *only* form of marriage which may be created or recognised is that form which meets the definition provided by the *Marriage Act*.

61 So long as the *Marriage Act* continues to define "marriage" as it now does and to provide, in effect, that only a marriage conforming to that definition may be formed or recognised in Australia, the provisions of the ACT Act providing for marriage under that Act remain inoperative. Because those provisions are inoperative, the provisions of the ACT Act which deal with the rights of parties to marriages formed under that Act and with the dissolution of such marriages can have no valid operation. Whether any of those provisions could have operated concurrently with the provisions of the *Family Law Act* is a question which is not reached. The whole of the ACT Act is inconsistent with the *Marriage Act*. It is, therefore, not necessary to consider whether the ACT Act is, in some separate sense[87], "repugnant" to the *Marriage Act*.

62 The questions reserved by the Chief Justice for determination by the Full Court should be answered as follows:

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85 *Marriage Equality (Same Sex) Act* 2013.

86 "An Act to provide for marriage equality by allowing for marriage between 2 adults of the same sex, and for other purposes".

87 cf Leeming, *Resolving Conflicts of Laws*, (2011) at 84-139.

1. Is the *Marriage Equality (Same Sex) Act* 2013 (ACT), in part or in its entirety:

   (a) inconsistent with the *Marriage Act* 1961 (Cth) within the meaning of s 28(1) of the *Australian Capital Territory (Self-Government) Act* 1988 (Cth); and/or

   (b) repugnant to the *Marriage Act* 1961 (Cth)?

   Answer: The whole of the *Marriage Equality (Same Sex) Act* 2013 (ACT) is inconsistent with the *Marriage Act* 1961 (Cth).

2. If the answer to question 1(a) is "yes", to what extent, if any, is the *Marriage Equality (Same Sex) Act* 2013 (ACT) of no effect?

   Answer: The whole of the *Marriage Equality (Same Sex) Act* 2013 (ACT) is of no effect.

3. If the answer to question 1(b) is "yes", to what extent, if any, is the *Marriage Equality (Same Sex) Act* 2013 (ACT) void?

   Answer: This question need not be answered.

4. Is the *Marriage Equality (Same Sex) Act* 2013 (ACT), in part or in its entirety:

   (a) inconsistent with the *Family Law Act* 1975 (Cth) within the meaning of s 28(1) of the *Australian Capital Territory (Self-Government) Act* 1988 (Cth); and/or

   (b) repugnant to the *Family Law Act* 1975 (Cth)?

   Answer: This question need not be answered.

5. If the answer to question 4(a) is "yes", to what extent, if any, is the *Marriage Equality (Same Sex) Act* 2013 (ACT) of no effect?

   Answer: This question need not be answered.

6. If the answer to question 4(b) is "yes", to what extent, if any, is the *Marriage Equality (Same Sex) Act* 2013 (ACT) void?

   Answer: This question need not be answered.

7. In light of the answers to the preceding questions what, if any, orders should be made for the final disposition of these proceedings?

   Answer: There should be judgment for the plaintiff for a declaration that the whole of the *Marriage Equality (Same Sex) Act* 2013 (ACT) is inconsistent with the *Marriage Act* 1961 (Cth) and of no effect.

8. What orders should be made in relation to costs of the questions reserved and of the proceedings generally?

   Answer: The defendant should pay the plaintiff's costs of the questions reserved and of the proceedings generally.