IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No. C13 OF 2013

BETWEEN:

THE COMMONWEALTH OF AUSTRALIA
Plaintiff

THE AUSTRALIAN CAPITAL TERRITORY
Defendant

SUBMISSIONS OF AUSTRALIAN MARRIAGE EQUALITY INC

PART I: PUBLICATION ON THE INTERNET

1. This submission is in a form suitable for publication on the internet.

PART II: BASIS OF APPLICATION

2. By summons filed 25 November 2013, Australian Marriage Equality Inc (**AME**) seeks leave to be heard as *amicus curiae*, with leave to file these written submissions and make oral submissions which it estimates would be of the order of 30 minutes.

PART III: REASONS LEAVE SHOULD BE GIVEN

3. AME's appearance as *amicus curiae* will not occasion any significant cost or delay to the parties, recognising that the matter has been listed for two days. Conversely, its submissions will assist the Court, including because (as elaborated below) they address topics critical to the resolution of this matter in a manner distinct from the approach of the parties.[1]

4. The interests of AME, its members and others associated with it will be affected by the outcome in this matter, for the following reasons (with references to the affidavit of Rodney Peter Croome, National Director of AME, affirmed 22 November 2013). AME is the peak, and only national, Australian lobby group dedicated to law reform to permit marriage of same-sex couples: [10]. It has been active for a decade: [5]. It is the organisation to which most law-makers and media representatives turn when seeking community views, information and comment in favour of such reform: [20].

5. AME has branches and members in every State and Territory other than the Northern Territory: [11]. Over 40,000 people subscribe to its mailing list; many hundreds live in the Australian Capital Territory (**the ACT**): [12]. On 13 October 2013, AME established a process by which couples seeking to marry in the ACT could register on its website: [13]. As at 20 November 2013, nearly 1000 couples had done so: [14].

6. AME is active in lobbying governments (including the ACT government in respect of the *Marriage Equality (Same Sex) Act 2013* (ACT) (**the ACT Act**)), making submissions to inquiries, undertaking research and public education, and participating in public debate:

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[1] *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 86 ALJR 205; 284 ALR 222 at [4], [6].

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[15]–[22]. Its role was publicly recognised by the Tasmanian government in connection with the *Same-Sex Marriage Bill 2012* (Tas): [19].[2]

PART IV: APPLICABLE PROVISIONS

7. Applicable provisions are identified in the plaintiff's submissions (**PS**).

PART V: ARGUMENT

8. The Commonwealth's case, as AME understands it, is that:

   a. on its proper construction, the *Marriage Act 1961* (Cth) (**the Marriage Act**) exclusively and exhaustively regulates who may be married in Australia;

   b. the ACT Act is inconsistent with the Marriage Act because it purports to regulate the same topic as the Marriage Act by permitting same-sex couples to marry under the ACT Act;

   c. amendments to the *Domestic Relationships Act 1984* (ACT) (**the Domestic Relationships Act**) effected by the ACT Act are inconsistent with the *Family Law Act 1975* (Cth) (**the Family Law Act**); and

   d. the ACT Act is therefore of no effect by reason of s 28 of the *Australian Capital Territory (Self-Government) Act 1988 (Cth)* (**the Self-Government Act**) or the doctrine of repugnancy.

9. AME seeks to make submissions on points (a), (b) and (c).

10. In outline, AME submits as follows:

    a. The inconsistency posited between the Marriage Act and the ACT Act involves construing the Marriage Act as implicitly prohibiting that which the ACT Act permits. The Marriage Act does not operate more broadly in the Territories than in the States. It must therefore be supported by s 51(xxi) of the Constitution. If "marriage" in s 51(xxi) meant "marriage between men and women", the Marriage Act could only regulate marriage throughout Australia in that constitutional sense and could not implicitly prohibit State or Territory legislation permitting marriage of same-sex couples (contrary to the Commonwealth's alternative submission at PS [35]). It is thus necessary to determine whether federal regulation of marriage of same-sex couples would be within the marriage power. The Court should conclude that it is.

    b. The Marriage Act exhaustively regulates attainment of the status of marriage in Australia, as understood at general law at the time of enactment — namely, heterosexual unions. So much was confirmed by the amendments in 2004. The question is whether the ACT Act seeks to regulate that same status. It does not. The question is not answered by focussing upon the rights and liabilities attaching to the status of marriage under the Marriage Act or the ACT Act, or the degree to which the processes under the ACT Act are similar to those under the Marriage Act.

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[2] RPC-3, p 44; Tasmania, *Parliamentary Debates* (Hansard), House of Assembly, 30 August 2012, p 58.

c. If it is concluded (as it should be) that the ACT Act regulates a different status from that regulated by the Marriage Act, there is no inconsistency between the ACT Act or the Domestic Relationships Act and the Family Law Act.

11. The resolution of this matter requires close and careful consideration of what it means *as a matter of law* to be married under the Marriage Act.[3] It is not answered by consideration of what it means to be married as a matter of societal perceptions, religious doctrine or personal feeling. That is not to suggest that those aspects of marriage are not of real importance in society, including to same-sex couples who wish to be married. But the questions presented to the Court are legal questions.[4]

10 12. Nor are the issues presented answered by submissions that marriage "naturally invites uniform regulation across a polity" (PS [5.1]), that it is "a single and indivisible concept" (PS [5.3.1]) or that it is "an important institution in society which the law and, in the modern era, the sovereign state has a strong interest in regulating" (PS [6]). Those propositions are belied by the history of the regulation of marriage in Australia (PS [12]–[16]). Further, the legal recognition of de facto relationships in Australia, and the power of the States and Territories to treat couples distinctively as they see fit within their constitutional ambit, has meant that the Commonwealth's supposed ideal of uniformity does not exist.[5] That is unsurprising in a federal nation. It was the States and Territories who led the way in recognising de facto couples,[6] with the Commonwealth later
20 following. And in various other federal nations the regulation of marriages of same-sex couples has occurred at State or provincial level, at least at first.[7] These matters evidence that the choices made by governments as to what (if any) relationships they label and preference are mutable, and divisible between national and sub-national governments. In any event, recourse to slogans apt for political debate distracts attention from the legal, and narrow, issues the subject of this matter.

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3 See, eg, *Momcilovic v The Queen* (2011) 245 CLR 1 at [111], [242]–[245], [261], [315], [327], [341], [474], [637]–[638], [654], [660].

4 Note *Fisher v Fisher* (1986) 161 CLR 438 at 455: "Marriage is a social and legal institution. For many, marriage is also, and primarily, a sacrament or an institution of religious significance, but it is in the character of a legal institution that marriage is a subject of legislative power conferred on the Parliament by s 51(xxi) of the Constitution."

5 For the recognition of de facto relationships at the State and Territory level, see *Family Provision Act 1982* (NSW); *De Facto Relationships Act 1984* (NSW); *Property Relationships (Amendment) Act 1999* (NSW); *Property Law (Amendment) Act 1987* (Vic); *Relationships Act 2008* (Vic); *Family Court Amendment Act 2002* (WA); *Acts Amendment (Lesbian and Gay Law Reform) Act 2002* (WA); *De Facto Relationships Act 1996* (SA); *Property Law Amendment Act 1999* (Qld); *De Facto Relationships Act 1999* (Tas); *Relationships Act 2003* (Tas); *De Facto Relationships Act 1991* (NT); *Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003* (NT); *Domestic Relationships Act 1994* (ACT); *Civil Partnerships Act 2008* (ACT).

6 Commencing with the *De Facto Relationships Act 1984* (NSW).

7 See, eg, *Reference re Same-Sex Marriage* [2004] 39 SCR 698 at [65]; *United States v Windsor* (2013) 570 US ____ (p 14); *Marriage (Same-Sex Couples) Act 2013* (UK) (applying only to England and Wales). See further Gardiner, "Same-Sex Marriage: A Worldwide Trend?" in Gerber and Sifris (eds), *Current Trends in the Regulation of Same-Sex Relationships* (2011) p 92.

(a) The scope of s 51(xxi) of the Constitution

(i) The need to determine the scope of s 51(xxi)

13. The Commonwealth submits that the Marriage Act "leaves no room for there to be any other laws in Australia which purport to clothe a union with the legal status of marriage (or a form of marriage)" (PS [24]). It asserts that the Commonwealth has made exhaustive and exclusive provision for that subject (PS [23]–[26], [45], [51]). The inconsistency posited by the Commonwealth between the ACT Act and the Marriage Act is in essence that which, in the context of s 109 of the Constitution, has been described as "indirect" or "covering the field" inconsistency.

14. Inconsistency depends on ascertaining the intention manifest in the Commonwealth law. The reference to "intention" is a metaphor: the search is for the objective intention manifested by the Marriage Act, in other words the proper construction of that Act.[8] As there is no express provision of the Marriage Act that states that it is intended to exclude the operation of laws of the States or Territories on the same subject matter,[9] the Commonwealth's case must rest upon implication from the terms, subject matter, scope and purpose of the Marriage Act.[10] The case is thus of the kind which was described, in the s 109 context, by Gummow J in *Momcilovic v The Queen*:[11]

> the essential notion is that, upon its true construction, the federal law contains an implicit negative proposition that nothing other than what the federal law provides upon a particular subject matter is to be the subject of legislation; a State law which impairs or detracts from that negative proposition will enliven s 109.

15. The Commonwealth's case is thus that the Marriage Act implicitly prohibits State or Territory legislation which provides for the marriage of same-sex couples. There is no doubt that it would be within the power of the Commonwealth Parliament pursuant to s 122 of the Constitution to legislate with that effect within the ACT. However, it cannot be supposed that the Marriage Act is to have a different construction in the Territories to that which it has in the States.[12] Accordingly, in order to construe the Marriage Act to determine whether it contains an implicit negative proposition inconsistent with the ACT Act, it is necessary to consider whether it would be within the power of the Commonwealth Parliament pursuant to s 51(xxi) to make such provision.

16. The Commonwealth submits (PS [35]) that the power conferred by s 51(xxi) is broad enough to regulate marriages between members of the same sex. But it goes on to submit

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8 *Dickson v The Queen* (2010) 241 CLR 491 at [32]–[34]; *Momcilovic v The Queen* (2011) 245 CLR 1 at [111], [242]–[245], [261], [315], [327], [341], [474], [637]–[638], [654], [660].

9 cf *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1976) 137 CLR 545 at 562–564; *John Holland Pty Ltd v Victorian Workcover Authority* (2009) 239 CLR 518; *Momcilovic v The Queen* (2011) 245 CLR 1.

10 *Dickson v The Queen* (2010) 241 CLR 491 at [34]; *Momcilovic v The Queen* (2011) 245 CLR 1 at [244], [261].

11 (2011) 245 CLR 1 at [244].

12 See *Spratt v Hermes* (1965) 114 CLR 226 at 278; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 221–222; *Newcrest Mining (WA) Ltd v BHP Minerals Ltd* (1997) 190 CLR 513 at 533–534, 549, 559, 564.

in that paragraph that even if it were otherwise, that legislative power is broad enough to permit the Commonwealth "to determine exhaustively for the whole of Australia what unions are to be regarded as 'marriage'". In that way, it seems the Commonwealth suggests that the scope of the marriage power to regulate marriage of same-sex couples is not in issue. That suggestion is incorrect.

17. 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. The position would be akin to that applicable to s 51(i), permitting laws with respect to only certain kinds of trade, or s 51(xx), permitting laws with respect to only certain kinds of corporation. It is a constitutional truism that the Commonwealth does not have legislative power to make exhaustive and exclusive regulation for all corporations, even if only preventing the creation of corporations which were not trading, financial or foreign. If the marriage power were so limited, the Marriage Act would not be construed as implicitly regulating matters beyond power.[13] No inconsistency could then arise.

18. In this context, the issue of the scope of the power in s 51(xxi) cannot be sidestepped in the manner suggested by the Commonwealth.

(ii) Applicable constitutional principles

19. There can be little doubt that at the time of Federation the word "marriage" did not as matter of ordinary meaning encompass a union between two men or two women. The ordinary meaning of the word marriage at the time may be taken to reflect the accepted legal meaning, namely "the voluntary union for life of one man and one woman, to the exclusion of all others".[14]

20. Nevertheless, that acceptance as to the ordinary meaning of the word at the time of Federation is the beginning of analysis of the constitutional term, not the end of it. It is well accepted that words or expressions may in some cases have a different contemporary operation from the one they would have had at Federation.[15] Different labels or notions have been employed to explain this constitutional characteristic, including reference to the connotation or essential meaning of a phrase, or recognition that a broad and purposive construction should be given to constitutional terms. Further, and relevantly to this case, some words used in the Constitution did not have a fixed meaning at Federation but described a concept that was evolving or uncertain at that time, and, in such cases, the meaning of the word can encompass growth and developments since Federation.[16]

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[13] *Acts Interpretation Act 1901* (Cth), s 15A; *Wainohu v New South Wales* (2011) 243 CLR 181 at [97].

[14] *Hyde v Hyde* (1866) LR 1 P & D 130 at 133.

[15] See generally *Singh v Commonwealth* (2004) 222 CLR 322 at [159]–[160].

[16] *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 482; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 203 CLR 82 at [34]; *Truth About Motorways Pty Ltd v Macquarie*

21. Different analytical labels or notions may be apposite in different contexts, or in different eyes. What underlies all such statements in the constitutional context is the core notion articulated by Dixon J in 1945: "it is a Constitution we are interpreting, an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances".[17] Similar statements had been made as early as 1908 by O'Connor J and Higgins J.[18]

22. The notion of marriage has long been an evolving notion, not one with a fixed and certain meaning. The grant of power over "marriage" in s 51(xxi) is not one which should be regarded as closely confined to the ordinary meaning at the time of Federation (and such would not likely have been intended). So much has been recognised in at least some judgments in this Court.

(iii) The history of marriage law prior to Federation

23. The subject of the history of marriage in the law is vast, and will only be touched upon here.[19] For many hundreds of years, marriage in England was regulated entirely by non-statutory law. Under ecclesiastical law applicable throughout Western Europe from the late twelfth century, marriage required nothing more than the consent of the parties. Marriages were commonly celebrated at the church door, in the presence of a priest, and followed by a religious service. But private marriages, in the absence of a priest or witnesses, were also recognised.[20]

24. The age of consent was fixed by the common law as twelve years for girls and fourteen years for boys. A want of consent could also be shown in the case of a previous marriage with another spouse and impotence at the time of marriage. In addition, it could be shown if the parties were within the "prohibited degrees" of consanguinity (a blood relationship) or affinity (a relationship by marriage or carnal connection). The prohibited degrees were to some extent (but not completely) placed on a statutory footing in 1540.[21] Among other things, a man could not marry his deceased wife's sister and a woman could not marry her deceased husband's brother.

Infrastructure Investments Management Ltd (2000) 200 CLR 591 at [100]; *Grain Pool (WA) v Commonwealth* (2000) 202 CLR 479 at [23], [41].

17 *Australian National Airways Pty Ltd v Commonwealth (Airlines Nationalisation Case)* (1945) 71 CLR 29 at 81.

18 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367-8 per O'Connor J; *Union Label Case* (1908) 6 CLR 469 at 612 per Higgins J (dissenting).

19 See generally Barwick, *The Commonwealth Marriage Act 1961* (1961–62) 3 *Melbourne University Law Review* 277; *In the Marriage of W and T* (1998) 146 FLR 323 (FamCA FC) at 334ff; Bates, "The History of Marriage and Modern Law" (2000) 74 *Australian Law Journal* 844; Baker, *An Introduction to English Legal History* (4th ed, 2005), Ch 28.

20 In *R v Millis* (1843) 10 Cl & Fin 534 [(1844) 8 ER 844] half of an evenly divided House of Lords held that it was a requirement of the English common law that the marriage be celebrated in the presence of an episcopally ordained priest, by reason of ancient Anglo-Saxon law. This involved a misreading of history, which it has been suggested was wilful, and calculated to end the possibility of informal marriage: see *In the Marriage of W and T* (1998) 146 FLR 323 (FamCA FC) at 336 and the authorities cited there; Baker, *An Introduction to English Legal History* (4th ed, 2005), p 483. *R v Millis* was at first not followed in Australia: *Catterall v Catterall* (1847) 1 Rob Ecc 580 [163 ER 1142]. But it was followed in later cases: see *Kuklycz v Kuklycz* [1972] VR 50 at 53ff; cf *Hooshmand v Ghasmezadegan* (2000) FLC 93-044 (FCWA).

21 *Marriage Act 1540* (Eng), 32 Hen VIII, c 38.

25. The requirement of two adult witnesses and the presence of a priest was introduced in Western Europe by the Tametsi decree of the Council of Trent (1545–1563). But, being after the Reformation, this did not apply in England and the ancient ecclesiastical law continued to apply there for another two hundred years.[22]

26. In 1753, *Lord Hardwicke's Act*[23] significantly reformed the law of marriage in England. The publication of banns or purchase of a licence, parental consent to marriage for persons under the age of 21 years, the presence of at least two witnesses and a minister, the solemnisation of the marriage in a church or chapel and the recording of the marriage in a public register were all made essential requirements for validity. Marriages of Quakers and Jews were exempted.

27. Legislative reform continued in England thereafter. In 1823, *Lord Hardwicke's Act* was repealed and replaced; at the same time, *bona fide* marriages were protected against invalidity caused by unwitting failures to comply with the law.[24] In 1835, marriages within the prohibited degrees were made absolutely void.[25] In 1836, marriage in a register office or registered building was introduced as an alternative to marriage in a church or chapel.[26]

28. *Lord Hardwicke's Act*, and other reforms mentioned in the previous paragraph, were not expressed to apply outside of England. Accordingly, they did not apply to the already established Australian colonies. The common law continued to regulate marriages there[27] until the colonies enacted their own marriage legislation over the course of the nineteenth century.

29. Among other things, there was a difference of approach between colonial and English marriage legislation as to the validity of a marriage between a person and a brother or sister of their deceased spouse. The marriage legislation of the Australian colonies of South Australia, Victoria, Tasmania, New South Wales, Queensland and Western Australia countenanced such marriages but English legislation did not.[28] The position in England was not changed until some years after Federation.[29]

30. Among the Australian colonies, there were also differences of approach, for instance to marriages within the prohibited degrees. In the older colonies, the English legislation of 1835, which made marriages within the prohibited degrees void, did not apply; but it

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[22] Subject to a short period during the Interregnum, when *An Act Touching Marriages and the Registering thereof; and also Touching Births and Burial 1653*, required that marriages take place before a justice of the peace. After the Restoration, that legislation was repealed.

[23] *An Act for the Better Preventing of Clandestine Marriage 1753* (Eng), 26 Geo II, c 33.

[24] *Marriage Act 1823* (Eng), 4 Geo IV, c 76.

[25] *Lord Lyndhurst's Act 1835* (Eng), 5 & 6 Will IV, c 54.

[26] *Marriage Act 1836* (Eng), 6 & 7 Will IV, c 85.

[27] *R v Maloney* (1836) 1 Legge 74; *Catterall v Catterall* (1847) 1 Rob Ecc 580 at 582 [163 ER 1142 at 1143].

[28] Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901, rep 2002), pp 608–609.

[29] *Deceased Wife's Sister's Marriage Act 1907* (UK), 7 Edw VII, c 47; *Deceased Brother's Widow's Marriage Act 1921* (UK), 11 & 12 Geo V, c 24.

became part of the law of South Australia upon its establishment and was expressly adopted in Western Australia.[30]

31. At the same time as the various changes taking place to the people who might enter marriage, and the process by which they did so, changes took place as to the way in which people might terminate a marriage. The common law permitted escape from marriage — conferring freedom to remarry — only if there was a want of capacity to marry or a want of consent (including by reason of the matters identified in paragraph 24 above). However, by the end of the eighteenth century, the ecclesiastical courts in England had developed a jurisdiction to licence spouses to live apart, though not to remarry, in cases of marital misconduct, such as adultery, cruelty, sodomy or heresy, or if there was a fear of future injury. Further, by the end of the seventeenth century, it was possible to obtain a private Act of Parliament dissolving a marriage, and permitting remarriage, in cases of adultery. In 1857, the Court of Divorce and Matrimonial Causes was established in England, from which an order for divorce could be obtained on grounds of adultery.[31]

32. In the Australian colonies, prior to the introduction of similar legislation, the only way a person could obtain a divorce was by private Act. However, jurisdiction to grant an order for divorce on grounds of adultery was, soon after 1857, reposed in the Supreme Courts of the colonies by colonial legislation. However, the approach of the colonies to divorce was not identical. Indeed, during the Convention Debates, debate about the marriage power was dominated by concern from South Australia about the "easier" divorce laws of New South Wales and Victoria.[32]

33. In addition to these legislative developments, forms of marriage quite different from the Christian tradition were well known at the time of Federation. As a matter of ordinary language at the time, they were perfectly capable of being described as "marriages", even if not recognised as valid marriages. In particular, by the time of Federation, there had been cases in which polygamous unions had come before the Courts, in which they were without difficulty described as "marriages" (though not valid and sometimes said to be "falsely called marriage").[33]

(iv) Previous statements by judges of this Court

34. In 1908, in *Attorney-General (NSW) v Brewery Employees' Union (NSW)*,[34] in the context of considering the power with respect to "trade marks", Higgins J 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. Under the power to make laws with respect to "parental rights," I should say that it could define what those rights are to be. Under the power to make laws with respect to "promissory notes," I should say that it could increase the class of documents

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30 *Imperial Acts Adopting Act 1844* (WA), 7 Vict, No 13.

31 *Matrimonial Causes Act 1857* (Eng), 20 & 21 Vict, c 85.

32 *Official Record of the Debates of the Australasian Federal Convention* (Sydney), pp 1077ff.

33 See, eg, *Hyde v Hyde* (1866) LR 1 P & D 130; *R v Byrne* (1867) 6 SCR (NSW) 302 (FC) at 305; *Harvey v Farnie* (1880) 6 PD 35 at 43; *Re Bethell* (1887) 38 Ch D 220. See also *Warrender v Warrender* (1835) 2 Cl & Fin 488 at 533 [6 ER 1239 at 1255].

34 (1908) 6 CLR 469 at 610.

> which in 1900 were known as promissory notes. Under the power to make laws with respect to trade marks, I cannot see why Parliament cannot, at the least, bring into the class of trade marks printed trade names and the "get up" of goods—rights in the nature of trade marks, things which were treated on the same principles as trade marks, but not hitherto called "marks" in current language.

However, this was not because Parliament could define anything it liked as a "marriage" or a "trade mark". As Higgins J said, the Parliament could not define a spade as a trade mark and then legislate with respect to spades.[35] Rather:

> we are to ascertain the meaning of "trade marks" as in 1900. But having ascertained that meaning, we have then to find the extent of the power to deal with the subject of trade marks ... The usage in 1900 gives us the central type; it does not give us the circumference of the power.

35. In 1962, in *Attorney-General (Vic) v Commonwealth*,[36] Windeyer J, citing *inter alia* the reasons of Higgins J referred to above, said:

> 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*, "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. ... 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.

36. In 1991, in *R v L*,[37] Dawson J said that the power of the Commonwealth "to legislate with respect to marriage ... is predicated upon the existence of marriage as a recognizable (although not immutable) institution". And in 1999, in *Re Wakim; Ex parte McNally*,[38] McHugh J said:

> [I]n 1901 ''marriage'' was seen as meaning a voluntary union for life between one man and one woman to the exclusion of all others. If that level of abstraction were now accepted, it would deny the Parliament of the Commonwealth the

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[35] (1908) 6 CLR 469 at 614. See also *Re F; Ex parte F* (1986) 161 CLR 376 at 389; *Cormick v Salmon* (1984) 156 CLR 170 at 182.

[36] (1962) 107 CLR 529 at 576–7.

[37] (1991) 174 CLR 379 at 404.

[38] (1999) 198 CLR 511 at [45].

power to legislate for same sex marriages, although arguably "marriage" now means, or in the near future may mean, a voluntary union for life between two people to the exclusion of others.

37. There are statements of judges of this Court which have emphasised the inherent limitations in the concept of "marriage".[39] However, they should not be read as denying the prospect that Commonwealth legislation, supported by s 51(xxi), may alter the process by which people can be married or the class of people who may enter into marriages with each other. As explained above, such a limitation would be contrary to the history of marriage law prior to Federation. Rather, these statements emphasise, as Higgins J did over one hundred years ago, that there is a limit to how far such changes may go before the result is to take the relationship beyond that which may properly be recognised as "marriage". That does not answer the question at issue here, namely whether that limit is exceeded by legislation with respect to marriage of same-sex couples.

(v) Section 51(xxi) and marriage of same-sex couples

38. The *Hyde v Hyde*[40] formula — "the voluntary union for life of one man and one woman, to the exclusion of all others" — has a certain simplicity about it. It may be noted that the formula makes no reference to children. Its simplicity does not define marriage as it has evolved in Australia, nor even as it stood in 1900.

39. Divorce and judicial separation was available in 1900, and is more readily available now. That undermines the feature of being *for life*. And there is good reason to consider that the Commonwealth's marriage power is not limited to regulating monogamous marriages. That is not to suggest for a moment that there is any likelihood of such marriages ever being *provided for* in Australia (and that is no part of AME's aims). But the existence of polygamous marriages was well-known at 1900. Such marriages were not then recognised as valid at common law.[41] That is not necessarily the view of the common law now and the position has been further altered by the Marriage Act itself.[42] Increased migration and trans-national movement of persons and assets mean that injustice (in particular to women) may well result if the existence of such marriages overseas are ignored. Of course, whether or not to recognise such marriages also raises fundamental issues of public policy. The resolution of such issues would naturally lie within the scope of the federal marriage power.[43]

40. Further, as Windeyer J alluded to, in some areas of Australia there was some traditional practice of polygamous marriages by some Aboriginal peoples.[44] Again, regulation of

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[39] *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529 at 549 per McTiernan J; *Re F; Ex parte F* (1986) 161 CLR 376 at 399 per Brennan J; *Fisher v Fisher* (1986) 161 CLR 438 at 455–6 per Brennan J.

[40] (1866) LR 1 P & D 130 at 133.

[41] See the authorities cited in n 33 above.

[42] Davies, Bell and Brereton, *Nygh's Conflict of Laws in Australia* (8th ed, 2010) at [24.44]–[24.52].

[43] It may be noted that, in *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529, McTiernan and Windeyer JJ disagreed as to whether laws concerning polygamous marriage would go beyond the concept of "marriage" in s 51(xxi).

[44] See Australian Law Reform Commission, Report No 31, *The Recognition of Aboriginal Customary Laws* (1984) at [225], [226], [228], [258].

such practices, and the consequences thereof, would naturally be taken to fall within the scope of s 51(xxi).

41. It is no doubt true that, among the many changes to the legal concept of marriage in England and the Australian colonies up to Federation surveyed above, there is no suggestion of marriages of same-sex couples.[45] However, the Court should conclude that s 51(xxi) is broad enough to encompass such marriages:

a. As set out above, marriage was not and is not a fixed and immutable legal construct. It had been subject to significant changes throughout history in England and the Australian colonies, some in the years not very distant from Federation. It remained the subject of legislative intervention and difference among the colonies, and between the colonies and England.

b. The history reveals that marriage is a legal construct that is inherently susceptible to legislative change. By the time of Federation, what had once been an ecclesiastical concept had been adopted into the common law and then subjected to considerable legislative interference.

c. Marriage has at all times been a legal construct that has been changed in response to changing circumstances. Thus, in the early period, "to reduce the chances of exposure to deadly sin through sexual waywardness, the Church maximised the number of ways in which a lawful union could be contracted".[46] Much later, a reason for the establishment of the Court for Divorce and Matrimonial Causes was to avoid the need for a private Act in order to procure a divorce.[47]

d. The contemporary meaning of "marriage" is broad enough to encompass same-sex unions. Its use in that way in many overseas jurisdictions is testament to that fact.[48] The use of the word to encompass such unions does not stretch it beyond the meaning which it may today reasonably bear. Such unions involve the attribution of a legal status to two persons as a couple, who wish formally to be recognised and treated as joined as such in intimate union.

e. If marriage of same-sex couples is not within the power, then increasing difficulties will arise in regulating the recognition, and attribution of consequences, to such unions, where such unions will become increasingly common in light of international developments.

f. In its submissions, the Commonwealth has given great emphasis to the importance of uniform regulation of the issue of marriage in Australia. That

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[45] Historical references to such unions in the Ancient world may be found: see, eg, Williams, *Roman Homosexuality* (2nd ed, 2010), appendix 2, pp 279ff. More controversially, it has been suggested that such unions were solemnised in the Christian tradition during the middle ages: Boswell, *Same-Sex Unions in Premodern Europe* (1994).

[46] *In the Marriage of W and T* (1998) 146 FLR 323 (FamCA FC) at 334.

[47] Baker, *An Introduction to English Legal History* (4th ed, 2005), p 496.

[48] See, eg, *Reference Re Same-Sex Marriage* [2004] 3 SCR 698; *Civil Marriage Act 2005* (Can); *Marriage (Same Sex Couples) Act 2013* (UK); *United States v Windsor* (2013) 570 US ____. See further Gardiner, "Same-Sex Marriage: A Worldwide Trend?" in Gerber and Sifris (eds), *Current Trends in the Regulation of Same-Sex Relationships* (2011) p 92.

> general objective was no doubt a significant reason for including the power within s 51. That objective will be undermined if the power is construed so as not to encompass this form of union.[49]

(b) Inconsistency with the Marriage Act

42. Once it is concluded that it would be within power for the Marriage Act to regulate marriages between couples of the same-sex, it is then necessary to consider whether it has done so and whether the ACT Act seeks to regulate the same subject matter. It is necessary to identify *with precision* what is the "particular subject matter" that is said to be exclusively regulated by the Marriage Act. Only if the ACT Act is upon the same subject matter is there inconsistency.[50] The appropriate starting point is to address what marriage *is*.

(i) Marriage as a status

43. By the time of Federation, marriage was a recognised legal relationship, between one man and one woman, which conferred a particular *status* upon the parties. This was explained in *Hyde v Hyde*:[51]

> Marriage has been well said to be something more than a contract, either religious or civil — to be an Institution. It creates mutual rights and obligations, as all contracts do, but beyond that it confers a status. The position or status of "husband" and "wife" is a recognised one throughout Christendom: the laws of all Christian nations throw about that status a variety of legal incidents during the lives of the parties, and induce definite lights upon their offspring. What, then, is the nature of this institution as understood in Christendom? Its incidents vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must needs (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceive 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.

44. The notion of a legal "status" has been described as "the legal position of the individual in or with regard to the rest of the community",[52] "the condition of belonging to a class in society to which the law ascribes peculiar rights and duties, capacities and incapacities"[53] and "a condition attached by law to a person which confers or affects or limits a legal capacity or exercising some power that under other circumstances he could not or could exercise without restriction".[54] As can be seen, as a matter of law this issue of status relates to legal matters not to the social, cultural or other dimensions that conferral of the status might involve.

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[49] Note discussion by Professor Goldsworthy in "Interpreting the *Constitution* in its Second Century" (2000) 24 *Melbourne University Law Review* 677 at 699–701.

[50] *Momcilovic v The Queen* (2011) 245 CLR 1 at [261].

[51] (1866) LR 1 P & D 130 at 133.

[52] *Niboyet v Niboyet* (1878) 4 PD 1 (CA) at 11, quoted in *Ford v Ford* (1947) 73 CLR 524 at 535–6.

[53] *Ampthill Peerage Case* [1977] AC 547 at 577.

[54] *Daniel v Daniel* (1906) 4 CLR 563 at 566.

45. The proposition that marriage is or confers a particular status is well accepted in Australian law.[55] In describing the power of the Federal Parliament with respect to marriage in s 51(xxi) of the Constitution, Quick and Garran said in 1901:[56]

> Marriage is a relationship originating in contract, but it is something more than a contract. It is what is technically called a status, involving a complex bundle of rights, privileges, obligations, and responsibilities which are determined and annexed to it by law independent of contract.

As noted by Quick and Garran, various rights and obligations are "annexed" to the status of marriage by other parts of the law. That is, various legislative provisions and common law doctrines apply to married persons, so as to confer or alter rights, duties, liabilities or immunities.

46. The notion of marriage as a status could be clearly discerned at Federation, when many legal rights and liabilities hinged about whether a person had or did not have that status. It is more difficult to discern today. As the Commonwealth concedes (PS [27]), State and Territory laws may validly extend, and in many cases have extended, to unmarried couples the same substantive rights and liabilities as are extended to married couples. This decreases the distinctive significance of marriage, as the Commonwealth accepts (PS [7] fn 7). Further, the legal significance of marriage has decreased because it is no longer employed as a discrimen in a range of areas — for example, legal limitations on the rights of women (eg with respect to property and capacity to contract) have been overturned by statute. In the face of these substantial legal changes, to describe marriage as a status is to describe a legal characteristic which, for legal (though not social, religious or personal) purposes, is of reduced distinctive legal significance.

47. That being said, there remain some rights and liabilities, both at general law[57] and under statute,[58] that differentiate between married and unmarried persons. More fundamentally, s 51(xxi) of the Constitution operates on the premise that marriage is a distinct legal status that may be regulated by the Commonwealth Parliament. That would be so even if, by dint of Commonwealth, State and Territory legislation, it was a status which conferred no rights or liabilities different from those conferred on others.

(ii) The "field" of the Marriage Act

48. Be that as it may, significantly, neither *Lord Hardwicke's Act* in England, nor the Australian colonial legislation, purported to *define* marriage or to establish a legislative status of marriage different from that recognised at common law.[59] Rather, they took as

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[55] See, eg, *Shanks v Shanks* (1942) 65 CLR 334 at 336; *Ford v Ford* (1947) 73 CLR 524 at 531, 535–6; *Powell v Powell* (1948) 77 CLR 521 at 524; *R v L* (1991) 174 CLR 379 at 392.

[56] *The Annotated Constitution of the Australian Commonwealth* (1901, rep 2002), p 608.

[57] For example, the equity recognised in *Yerkey v Jones* (1939) 63 CLR 649, and the presumption of advancement (eg *Calverley v Green* (1984) 155 CLR 242), apply distinctively to married persons.

[58] For example, in New South Wales marriage, but not entry into a de facto relationship, causes a will to be revoked (*Succession Act 2006* (NSW), s 12) and while a former husband or wife may make a family provision claim only a current de facto partner may do so (*Succession Act 2006* (NSW), s 57).

[59] The colonial marriage legislation in force immediately prior to Federation was as follows (as amended up to the time of Federation): *Marriage Act 1864* (Qld); *Marriage Act 1867* (SA); *Marriage Act 1890* (Vic); *Marriage Act 1899* (NSW); *Marriage Act 1894* (WA); *Marriage Act 1895* (Tas).

their premise the existing and well-recognised status. They sought to regulate the process by which it was attained by persons and, to some degree, the persons who may attain it. As to the latter, however, there was no departure from the proposition that the status could be attained only by one man and one woman. This basic approach was replicated by legislation of the States after Federation.[60] Different marriage legislation applied in different States. In all cases, the subject of the regulation was the existing status of marriage.

49. The same approach was taken in the Marriage Act. It contained no definition of "marriage" and attempts to insert such a definition during the passage of the relevant Bill were resisted.[61] The focus of the Marriage Act, like the legislation before it, was the regulation of an existing status. It was not the creation of a new status. The legislation conceived of "marriage" as a status existing outside and independently of the Marriage Act. That this is so is seen particularly in s 7 of the Marriage Act. The preservation of the validity of marriages entered into prior to the commencement of the Marriage Act, under State legislation, reveals that the focus of the Marriage Act was on the same status as was previously the subject of State legislation, not some new status created by the Marriage Act itself.

50. The "field" of the Marriage Act may thus properly be seen as the regulation of attainment of the existing status of marriage, and associated issues of recognition. As Mason CJ, Deane and Toohey JJ stated in *R v L*:[62]

> The *Marriage Act 1961* (Cth) is concerned with capacity to marry, the formalities required for the solemnisation of marriages in Australia and the recognition of foreign marriages. In no way does it attempt to regulate the rights and obligations of the parties to a marriage.

51. The rights, duties, immunities and liabilities that arose from attaining the status of marriage depended upon the content of the general law, of federal statutory law, and of the statutes of the States and Territories. The States and Territories were and are not obliged to give particular distinctive treatment to married persons, whether beneficially or detrimentally, in their statutory schemes. Nor are they prevented from extending any such distinctive treatment to, say, those in de facto marriages.

52. As discussed above, the general law notion of marriage has been limited to heterosexual unions. The status of marriage, as understood when the Marriage Act was enacted, was limited to the voluntary union of one man and one woman. It is the attainder of *that status* which was and is addressed by the Marriage Act. The amendments introduced to the Marriage Act in 2004 by the *Marriage Amendment Act 2004* (Cth) simply confirmed

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60 In South Australia, the *Marriage Act 1867* (SA) continued until replaced by the *Marriage Act 1936* (SA). In Victoria, the *Marriage Act 1890* (Vic) continued until replaced by the *Marriage Act 1915* (Vic). In Tasmania, the *Marriage Act 1895* (Tas) continued until replaced by the *Marriage Act 1942* (Tas). The pre-Federation Western Australian legislation continued until repealed by the *Statute Law Revision Act 1967* (WA). The pre-Federation New South Wales legislation continued until repealed by the *Registration of Births, Deaths and Marriages Act 1973* (NSW). The pre-Federation Queensland legislation continued until repealed by the *Acts Repeal Act 1991* (Qld).

61 See Commonwealth, *Parliamentary Debates* (Hansard), Senate, 18 April 1961, pp 542–554.

62 (1991) 174 CLR 379 at 386.

what was already implicit in the Marriage Act in that regard, and went further in precluding recognition of foreign marriages of same-sex couples.

53. The Marriage Act exhaustively regulates attainment of the status of marriage in Australia, as understood at general law at the time of enactment – namely, heterosexual unions – to the exclusion of State and Territory legislation (PS [23]–[26]), subject to the issue of the claimed distinctive operation of s 28 of the Self-Government Act (on which point AME does not seek to make submissions). The object of the Marriage Act was to replace the differing State regimes with a single Federal "code". That appears from the extrinsic material.[63] More importantly, it also appears from the provisions of the Marriage Act itself. The express provision in s 6 that the Marriage Act shall not be taken to exclude the operation of State laws on only specified topics suggests that, otherwise, it *does* exclude their operation. The preservation by s 7 of the validity of marriages that took place before the commencement of the operative provisions of the Marriage Act, ie under State marriage legislation, implies that the validity of marriages under State marriage legislation *is* affected by those provisions of the Marriage Act after their commencement. Among them is s 48, which provides that a marriage solemnised otherwise than in accordance with Div 2 of Pt IV — ie including under State legislation — is not a valid marriage.

54. Thus, had the State marriage legislation which preceded the Marriage Act not been repealed,[64] it would have been invalid by force of s 109 of the Constitution. So too, for instance, new State legislation which purported to permit persons in "prohibited relationships" to be married. In these cases, it would be evident that the State legislation was seeking to regulate attainment of the same status as is now exclusively regulated by the Marriage Act. Subject to the operation of s 28 of the Self-Government Act, the same would apply for ACT legislation.

(iii) The operation of the ACT Act

55. The critical question in the present case is therefore whether the ACT Act is to be construed as an inconsistent attempt to regulate attainment of the status of marriage which is regulated by the Marriage Act. It is not. The ACT Act attributes a character or status to relevant same-sex couples, being a type of status which was never regulated (and is now expressly self-limited) by the Commonwealth in the Marriage Act.

56. The position may be distinguished from examples of marriage between under-age persons or polygamous marriage, cited by the Commonwealth in PS [26], which are the subject of s 23(1) of the Marriage Act. That section provides grounds upon which marriages are void but concludes with the emphatic words "and not otherwise". For a State or Territory

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[63] See esp the second reading speech to the Marriage Bill 1960 (Cth), Commonwealth, *Parliamentary Debates* (Hansard), House of Representatives, 19 May 1960 (Sir Garfield Barwick). See also Barwick, "The Commonwealth Marriage Act 1961" (1961–62) 3 *Melbourne University Law Review* 277.

[64] From the commencement of the federal Marriage Act, the various State legislation then in force was progressively repealed. The *Marriage Act 1864* (Qld) was repealed by the *Acts Repeal Act 1991* (Qld). The *Marriage Act 1894* (WA) was repealed by the *Statute Law Revision Act 1967* (WA). The *Marriage Act 1899* (NSW) was repealed by the *Registration of Births, Deaths and Marriages Act 1973* (NSW). The *Marriage Act 1936* (SA) was repealed by the *Registration of Births, Deaths and Marriages Act 1966* (SA). The *Marriage Act 1942* (Tas) was repealed by the *Marriages Registration Act 1962* (Tas). The *Marriage Act 1958* (Vic) continues in force but the relevant provisions were repealed by the *Registration of Births, Deaths and Marriages (Amendment) Act 1962* (Vic).

to legislate to permit marriages which are rendered void by this section collides directly with its terms. The fact that a couple is of the same-sex is not a ground upon which a marriage is rendered void by s 23(1). Rather, as is made clear by the 2004 amendments, the Marriage Act is not, and has never been, concerned with according a legal status to unions between such couples.

57. The heart of the Commonwealth's counter-argument is set out at PS [37]–[38] (also [5.4.3]). It seems to involve the following propositions:

a. Whilst the ACT Act "could have validly extended rights under ACT law to same-sex couples *as if* they were in a marriage", it cannot "authorise and clothe in legality [such relationships] *as a marriage or equal form of marriage*".

b. The ACT Act has done so by "mimicking the structure and terms" of the Marriage Act, in particular as to essential and formal requirements and mechanisms for divorce.

c. The ACT Act also does so by using the word "marriage".

58. These propositions do not establish the Commonwealth's claim.

(iv) Attachment of substantive legal rights or liabilities

59. As submitted above, "marriage" is in substance an identifying legal label, which has various legal consequences pursuant to other legal doctrines and statutes. The Commonwealth's marriage power involves the power to decide who is entitled to the rights (etc) that attach, under the general law, to the status of being married. As submitted above, it lies within Commonwealth legislative power to confer that status on same-sex couples. The Commonwealth can, of course, determine whether statutory rights (etc) under federal statutory law extend to same-sex couples in any event. As the Commonwealth notes, by and large it has already made that extension (PS [27] fn 71). The marriage power does not extend to deciding who is entitled to the rights that attach, under State legislation, to the status of being married. Under State/Territory statutory law, the substantial legal significance of being married — whether under the Marriage Act or under some broader notion — will always depend upon the particular terms of the statute in question. The States and Territories may, within their constitutional ambit, remove the distinctive significance of legal marriage (as compared to other similar relationships) both under the terms of their own statutes and at general law (by altering the substantive law in that regard).

60. For the reasons in paragraph 46 above, less and less separates de facto relationships from those recognised as marriage. The Commonwealth has conceded (PS [27]) that the States and Territories may validly regulate within their constitutional ambit the recognition of, and legal rights and liabilities attaching to, de facto relationships. In substance, therefore, the Commonwealth has accepted that State and Territory legislation may validly accord couples in de facto relationships a particular status or legal character and significance for the purpose of the statutory and general law applicable in that State or Territory.

61. Of course, the State and Territory de facto partnership legislation cannot compel any particular legal consequences at the Commonwealth level or with respect to the laws of other States or Territories. Whether or not such legislation — or the ACT Act — leads to an extension at general law of doctrines hitherto limited to married couples (and which

doctrines have not been directly affected by statutory modification) is a matter for the general law itself to determine over time.[65]

62. In this light, the Commonwealth correctly concedes that the attachment, by ACT legislation, to couples married under the ACT Act of the same legal rights and liabilities that ACT legislation attaches to couples married under the Marriage Act does not bear upon the present question. Like the Marriage Act, the ACT Act is concerned with the attainment of a status or legal character, not the rights and obligations of the parties to a marriage under the ACT Act.[66] The consequent legal significance of the relationship having that character is spelt out in other ACT legislation.[67]

10 63. One of the distinctive features of getting married at law is that the act or marriage of itself, immediately and clearly, creates the new status and thus the entitlement and liability to being treated as part of a union. It has the advantages both of potential quickness and having a piece of paper to prove the status. Yet these features need not be distinctive to marriages. For example, it can hardly be doubted that the States might provide a process whereby de facto couples formally testify to, and register, their status. This could be after a long period of time or a shorter one. The qualifying features will vary, depending on the choices of the polity concerned.

64. Some of the States and Territories have taken this step, with de facto partnership legislation enabling a process of registration of relationships, leading to certain automatic
20 legal effects.[68] The Commonwealth has not suggested the invalidity of such laws. It could hardly do so, when registration pursuant to such State and Territory legislation is recognised by the Family Law Act as a circumstance relevant to whether a couple is in a de facto relationship, so as to permit the making of various orders under the Family Law Act.[69]

65. There is no difference in substance between a registration to achieve the legal character of being in a "de facto" or "domestic" relationship — or whatever other term is preferred — and the process employed under the ACT Act. A particular legal character or status is conferred pursuant to a formal legal process, being a legal character or status distinct from that addressed in the Marriage Act.

30 66. As to the claimed inconsistency in mimicking the Marriage Act with respect to essential requirements of eligibility, there have to be *some* requirements for qualification for recognition of de facto (etc) relationships. It is hardly surprising that moves towards civil

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[65] Note discussion eg in *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at [22]

[66] cf *R v L* (1991) 174 CLR 379 at 386.

[67] See, eg, *Legislation Act 2001* (ACT), s 169, Dictionary ("marriage", "spouse"); *Administration and Probate Act 1929* (ACT), ss 45A, 46, 49B, Dictionary; *Adoption Act 1933* (ACT), ss 14, 16, Dictionary; *Births Deaths and Marriages Act 1997* (ACT), ss 30–32E; *Discrimination Act 1991* (ACT), s 26, Dictionary; *Domestic Relationships Act 1994* (ACT), s 3; *Evidence Act 2011* (ACT), ss 18, 19; *Family Provision Act 1969* (ACT), s 7; *Married Persons Property Act 1986* (ACT); *Parentage Act 2004* (ACT), ss 7, 38, 39; *Wills Act 1968* (ACT), ss 8–8B, 20, 20A, Dictionary.

[68] See *Relationships Act 2003* (Tas), Pt 2; *Relationships Act 2008* (Vic), Ch 2; *Civil Partnerships Act 2008* (ACT), Pt 2 (repealed by the ACT Act); *Relationships Register Act 2010* (NSW), Pt 2; *Relationships Act 2011* (Qld), Pt 2.

[69] See, eg, Family Law Act, ss 4AA(2)(g), 90SB(d); *Family Law Regulations 1984* (Cth), reg 15AB (prescribing each of the Acts referred to in n 68 above).

partnerships involve employing similar criteria to those which have evolved for *de jure* marriages. The same is true of the ACT Act. In any case, the requirements in the ACT Act are not identical to those in the Marriage Act.

(v) Form of ceremony etc.

67. The form of ceremony by which one enters into a marriage under the ACT Act, and other procedural aspects of the ACT Act, are similar to aspects of the Marriage Act. However, as just noted, State and Territory legislation permitting recognition of de facto couples by a process of registration is specifically contemplated by the Family Law Act. The nature of the steps involved to achieve registration, the degree of formality, the sense of occasion occasioned, are simply incidents of that process of recognition. There is no reason why alteration of the process, to include a ceremony and other formal steps, would render such legislation inconsistent with the Marriage Act. The same is true of the ACT Act.

68. Had it been intended that the recognition of same-sex relationships, by a status other than marriage which is attained by a process "too similar to marriage", be prohibited, that could have been expressly stated. Such a decision would involve a deliberate decision to discriminate. It would be expected that such a decision be reflected in express words, not doubtful implication. There is something to be said here for application of an approach akin to the "principle of legality":[70] if the Commonwealth Parliament seeks to achieve this result, it "must squarely confront what it is doing and accept the political cost".[71]

(vi) The description of the status

69. Bills recently proposed in Tasmania and New South Wales described the status which they sought to create and regulate as "same-sex marriage", not "marriage".[72] Just as the commonly used expressions "de facto marriage"[73] and "common law marriage"[74] have long been used in the past to describe a status different from marriage (ie "*de jure* marriage"), so too is the expression "same-sex marriage" used in those Bills. The mere use of the word "marriage" does not indicate that the status is the same. To the contrary, the preceding words ("de facto", "common law" or "same-sex") serve to distinguish the status from marriage.

70. For that reason, references in the Commonwealth's submissions to "marriage *(or a form of marriage)*" (see eg PS [26]) are apt to confuse. The question is one of identity of status, not similarity of name. It would be most surprising for a Commonwealth Act to seek in substance to regulate the use of a word such as "marriage" and prohibit it from being used, in conjunction with other words, to describe a status different from marriage as regulated by the Act. One reason it would be surprising is that the mere notion of

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[70] See generally *Lacey v Australian Attorney-General (Qld)* (2011) 242 CLR 573 at [17], [20], [43].

[71] *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 at 131.

[72] *Same-Sex Marriage Bill 2012* (Tas); *Same-Sex Marriage Bill 2013* (NSW).

[73] See, eg, *Boshell v Boshell* [1972] 1 NSWLR 52 at 58; *Ferris v Winslade* (1998) 22 Fam LR 725 (ACTSC) at [29]; *De Sales v Ingrilli* (2002) 212 CLR 338 at [8], [12]; *R v Rose* [2010] 1 Qd R 87 (CA) at [24].

[74] See, eg, *Thwaites v Ryan* [1984] VR 65 (FC) at 94. This use of the expression "common law marriage" is different from the use of that expression to mean "a marriage valid at common law": see eg *In the Marriage of W and T* (1998) 146 FLR 323 (FamCA FC) at 338–9.

regulating the use of an ordinary English word is unusual.[75] Another reason it would be surprising is that, as noted above, "marriage" is a word that has often been used in conjunction with other words to describe statuses different from marriage. If it was intended to be done, it would be expected to have been done clearly.

71. In any event, the Commonwealth does not appear to have submitted that the Marriage Act regulates the use of the *word* marriage; what it says cannot be done is "purport[ing] to clothe with the legal status of marriage (or a form of marriage) a union of persons ..." (PS [5.4.3]). Moreover, there is no provision of the Marriage Act which seeks to regulate the use of that word. A large question would arise as to the validity of any such provision, depending upon its precise nature and effect.

72. Unlike the Tasmanian and New South Wales Bills referred to above, the ACT Act does not use the expression "same-sex marriage" to describe the status which it seeks to regulate. Accordingly, this point of differentiation from the Marriage Act, which would have been applicable with respect to those Bills, is not applicable to the ACT Act. Nevertheless, the key question remains whether or not the ACT Act seeks to provide same-sex couples with the same status as that the attainder of which is regulated by the Marriage Act. The label employed is, at most, a feature of form of limited relevance with respect to that issue.

(c) Inconsistency with the Family Law Act

73. If the status regulated by the ACT Act is different from the status of "marriage" under the Marriage Act, it necessarily follows that there is no inconsistency with the scheme established by the Family Law Act for the ending of marriages and financial adjustment consequent thereon. Further, the Commonwealth's argument here is again undermined by its concession with respect to de facto partnership legislation. If such partnerships are given legal significance then it is practically inevitable that provision must be made for the ending of the relationship, and the consequences thereof.

74. Following from a referral of power by the States to the Commonwealth,[76] the Family Law Act now covers same-sex couples in de facto relationships. Some same-sex couples who are married under the ACT Act would also fall within those provisions and, hence, would be amenable to orders under the Family Law Act by the Family Court. There is some complexity concerning the interaction between the Domestic Relationships Act and the Family Law Act in this regard, having regard to the terms of s 90RC of the Family Law Act. Whilst that section generally provides that the provisions of the Family Law Act concerning financial adjustment and maintenance orders in respect of de facto relationships are exclusive of equivalent State and Territory laws, this is subject to exceptions. For instance, in general, orders may be made under the Family Law Act only in respect of de facto relationships of longer than two years.[77] That will not necessarily be so for all same-sex couples in respect of whom orders for financial adjustment or maintenance are sought under the Domestic Relationships Act. In such cases, s 90RC of

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[75] cf *Davis v The Commonwealth* (1988) 166 CLR 79.

[76] *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW); *Commonwealth Powers (De Facto Relationships) Act 2004* (Qld); *Commonwealth Powers (De Facto Relationships) Act 2004* (Vic); *Commonwealth Powers (De Facto Relationships) Act 2006* (Tas); *Commonwealth Powers (De Facto Relationships) Act 2006* (WA); *Commonwealth Powers (De Facto Relationships) Act 2009* (SA).

[77] See Family Law Act, s 90SB.

the Family Law Act expressly provides that it does not apply to the exclusion of State and Territory laws.

75. Accordingly, which of the Family Law Act and the Domestic Relationships Act would apply in a particular case may not be straightforward. At least in some cases, only the latter would apply. In other cases, only the Family Law Act would apply.

76. But none of this demonstrates inconsistency with the provisions of the ACT Act providing for marriages of same-sex couples, or indeed the provisions of the Domestic Relationships Act concerning such couples. It says nothing at all about the former. As to the latter, it simply means at most that, in cases where the Family Law Act applies, and only in those cases, the Domestic Relationships Act must be taken not to apply by reason of s 28 of the Self-Government Act.[78] And the issue arises for the Domestic Relationships Act generally; it is not distinctive to marriages between same-sex couples under the ACT Act.

PART VI: ORAL ARGUMENT

77. AME seeks to make oral submissions on the matters identified in Part V. It estimates that such submissions would be of the order of 30 minutes.

Dated: 25 November 2013

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[78] On its terms, s 28 of the Self-Government Act, like s 109 of the Constitution, operates only to the extent of the inconsistency. The operation of the Domestic Relationships Act in cases not covered by the Family Law Act would continue unaffected because that operation may be severed: see generally *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 502–3; *Momcilovic v The Queen* (2011) 245 CLR 1 at [223]–[224]. This is so by force of s 28 of the Self-Government Act, not the requirement in s 120 of the *Legislation Act 2001* (ACT) that ACT legislation be construed so as to operate to the extent that it does not exceed the power of the ACT Legislative Assembly. That provision is not addressed to questions of inconsistency with Commonwealth legislation: *Sportsbet Pty Ltd v New South Wales* (2012) 86 ALJR 446; 286 ALR 404 at [13].