IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY **NO C13 OF 2013**

BETWEEN: **COMMONWEALTH OF AUSTRALIA**
Plaintiff

AND: **AUSTRALIAN CAPITAL TERRITORY**
Defendant

ANNOTATED SUBMISSIONS OF THE PLAINTIFF

Filed on behalf of the Plaintiff by:

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PART I FORM OF SUBMISSIONS

1. These submissions are in a form that is suitable for publication on the internet.

PART II ISSUES

2. The issues are accurately stated in the Questions Reserved.[1]

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

3. The Commonwealth has given two notices under s 78B of the *Judiciary Act 1903* (Cth)[2] and does not consider further notice is required.

PART IV FACTS

4. The background is set out in the Amended Statement of Claim.[3]

PART V ARGUMENT

SUMMARY OF COMMONWEALTH SUBMISSIONS

5. The Commonwealth submits in summary:

   5.1. An enquiry into the history of the law of marriage pre 1901 illuminates that marriage is a status regulated by law which naturally invites uniform regulation across a polity **[Section One]**;

   5.2. Although the new Commonwealth was conferred ample powers under ss 51(xxi) and (xxii) to enact *uniform* laws of marriage and divorce for the whole nation, and although the divergence in State and Territory laws cried out for exercise of the powers, it took 60 years to bring that exercise to fruition **[Section Two]**;

   5.3. The object and text of the *Marriage Act 1961* (Cth) (**Marriage Act**) and the *Matrimonial Causes Act 1959* (Cth) (**Matrimonial Causes Act**) (later carried through to the *Family Law Act 1975* (Cth) (**FLA**)) convey the Commonwealth Parliament's purpose to have a uniform set of rules for the nation to govern both:

      5.3.1. the essential and formal characteristics for the holding or attaining of the status of marriage, which, for the law of Australia, is a single and indivisible concept; and

      5.3.2. the resolution of controversies and institution of proceedings concerning the determination of matrimonial causes.

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[1] Questions Reserved Book (**QRB**), 41-42.
[2] A notice dated 23 October 2013: **QRB, 4-6.** The Commonwealth filed and served a revised notice of constitutional matter on 13 November 2013.
[3] See particularly Amended Statement of Claim, [4]-[9], [18]-[21], [27]-[28]: **QRB, 11, 13, 15-17.** These matters are not in controversy: see Defence dated 1 November 2013, [4]-[6], [11]-[14], [20]-[21]: **QRB, 36-38.**

5.4. This conveys three critical consequences as to Parliament's intent:

5.4.1. any scope for the patchwork of varying State (or Territory) laws - and consequent private international law issues within the nation - is to disappear;

5.4.2. a lawful marriage for the purposes of Australian law must have the essential characteristics as determined by Commonwealth law from time to time, including presently of being a union between a man and a woman; and

5.4.3. it is not open under the law of Australia for any other legislature to purport to clothe with the legal status of marriage (or a form of marriage) a union of persons, whether mimicking or modifying any of those essential requirements of marriage, or to purport to deal with causes arising from any such union **[Section Three]**.

5.5. The 2004 amendments to the Marriage Act confirmed the Commonwealth Parliament's legislative choice that a union which did not involve a man and a woman was not to be recognised as a 'marriage' for the purposes of Australian law **[Section Four]**.

5.6. The *Marriage Equality (Same Sex) Act 2013* (ACT) (**ACT Marriage Act**), in purporting to clothe with the legal status of marriage unions solemnised in the ACT between the persons it identifies (including but not limited to its purported extension of marriage to same-sex unions), is:

5.6.1. inconsistent, within the meaning of s 28(1) of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) (**ACT Self-Government Act**), with the Marriage Act and the FLA; and

5.6.2. repugnant to the Marriage Act and the FLA **[Sections Five and Six]**.

SECTION ONE: A BRIEF HISTORY OF MARRIAGE PRE 1901

6. Five main points stand out of a much larger canvas. *First*, since at least the time of the Romans,[4] marriage has been recognised as an important institution in society which the law and, in the modern era, the sovereign state has a strong interest in regulating.[5] The form of regulation has included identifying (in varying forms over time) the essential and formal aspects for the validity of a marriage in law; and the circumstances (if any) in which the marriage may be brought to a

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[4] Book 23 of Justinian's *Digest* contains copious rules concerning the valid formation of a marriage; and other books deal with other aspects of the relationship (including divorce). The famous definition of marriage by Modestinus cited at the beginning Book 23, Title 2 of the *Digest* is: 'Marriage is the union of a man and a woman, a partnership for life involving human and divine law'. See generally G Mousourakis, *Fundamentals of Roman Private Law* (2012) 97-108.

[5] **[1]** '[A]lthough marriage and the dissolution thereof are in many ways a personal matter of the parties, social history tells us that the state has always regarded them as matters of public concern': *Russell v Russell* (1976) 134 CLR 495 (***Russell v Russell***) at 546 per Jacobs J. **[2]** 'The [marriage] relation is always regulated by government. It is more than a contract... In every enlightened government, it is pre-eminently the basis of civil institutions, and thus an object of the deepest public concern... It is a great public institution, giving character to our whole civil polity': *Maynard v Hill,* 125 US 190 (1888) at 213 per curiam (quoting with approval two earlier decisions of State courts).

lawful end.[6]

7. *Second*, the law has thereby recognised that marriage is a status which sets married people apart from unmarried people. A person, by being married, becomes subject to a range of rights, duties, capacities, immunities and privileges to which a person who is unmarried is not subject.[7] As was expressly acknowledged in the mid-19th century in the leading case of *Hyde v Hyde* (and has been acknowledged in a number of cases since), marriage:

> creates mutual rights and obligations, as all contracts do, but beyond that it confers a status... the laws of all Christian nations throw about that status a variety of legal incidents during the lives of the parties...[8]

8. From the earliest times, the content and application of many common law, equitable and statutory rules concerning real and personal property, inheritance, legitimacy, debt, contracts, tort and legal procedure have regularly turned on a person's marital status. The precise content of the various legal consequences of marital status has changed over time, but the fact that that status will carry consequences of this nature under law has not.[9] When the law recognises a status, it necessarily carves a divide of this kind between those who hold the status and those who do not. A person is married or unmarried; bankrupt or not bankrupt; insolvent or not insolvent; an alien or not an alien.[10]

9. *Third*, within English legal history up until the 19th century, marriage was largely the concern of the ecclesiastical courts, although increasingly over time subject to regulation by statute.[11] Up until the mid-18th century, the body of marriage law administered by the ecclesiastical courts was scholastic in its intricacy (as the marital history of Henry VIII illustrates[12]). The rules allowed for a valid marriage to

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[6] For the common law world, the institution of marriage originated in local Anglo-Saxon custom which, in the course of the middle ages, came to be increasingly regulated by a developing body of canon law on the subject. The canon law of marriage had attained doctrinal stability by 1300. Its rules included criteria for the validity of a marriage and the circumstances in which a marriage might be ended, or at least annulled. Thereafter the English law of marriage did not significantly alter until *Lord Hardwicke's Act 1753*: RH Helmholz, *The Oxford History of the Laws of England. Volume 1: The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (2004) **(Helmholz)** 7-8, 44, 522, 563; and 523-556 for the content of that law's rules on the formation of a marriage, matrimonial causes, and divorce. On these same matters see also Pollock and Maitland, *The History of English Law*, vol 2 (2nd ed, 1898, 1968 reissue) **(Pollock and Maitland)** 364-389.

[7] h that position has been diluted somewhat by legislation increasingly extending equivalent substantive rights and obligations to de facto couples – see further para 27 and n 71 below.

[8] *Hyde v Hyde and Woodmansee* (1866) LR 1 P & D 130, 133. For later statements to similar effect see *Ford v Ford* (1947) 73 CLR 524 ***(Ford v Ford)*** at 529 per Latham CJ, 534 per Dixon J; and *Salvensen or Van Lorang v Administrator of Austrian Property* [1927] AC 641 at 653 per Viscount Haldane. And see also Windeyer J in *Attorney-General (Vic) v The Commonwealth* (1962) 107 CLR 529 (***Marriage Act Case***) at 578 and J Quick and RR Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) **(Quick and Garran)**, 608.

[9] For an overall historical survey see JH Baker, *An Introduction to English Legal History* (4th ed, 2002) **(Baker)**, 484-490. For the legal significance of marital status in the earliest periods of the common law in particular see Pollock and Maitland, vol 2, 374-378, 383-384, 394-399, 404-436. For an extensive survey as at the 18th century see the lengthy entry on 'baron and feme' in C Viner, *A General Abridgment of Law and Equity* (2nd ed, 1791-95) vol IV.

[10] *Ford v Ford* (1947) 73 CLR 524 (***Ford v Ford***) at 529 per Latham CJ.

[11] See n 6 above, and *The Queen v L* (1991) 174 CLR 379, 391 per Brennan J. From medieval times the canon law, administered in and by the Church's courts, proclaimed the exclusive jurisdiction of its judges over matrimonial claims. In England the common law courts did not contest this claim: Helmholz, 522; Pollock and Maitland, vol 2, 367-368. That remained the case until 1857, when the jurisdiction over marriage and matrimonial causes was transferred by statute to the secular courts: Baker, 132.

[12] Baker, 493-494.

be created by consent alone, without any ceremony. However, there was much complex learning on the requisite formal expression of that consent, and consequent opportunity for litigation as to the validity of a marriage (even many years after the ceremony).[13] This situation was addressed by *Lord Hardwicke's Act*, 26 Geo II c 33 Act (1753). Thereafter the courts were in a position to declare and apply, in a singular fashion befitting a unitary system, essential and formal requirements for the valid solemnisation of a marriage in a way close to the modern form of marriage ultimately recognised in Australia, even if some elements were subject to further variation over time.[14]

10. *Fourth*, it was radically uncertain as to whether the English simplified unitary conception of marriage was carried to the infant Australian colonies. *Lord Hardwicke's Act* was expressed not to apply 'to any marriages solemnized beyond the seas' (s 18). Ultimately, in 1836 those reforms were held not to be applicable to the circumstances of the penal colony.[15] Even before then some people had proceeded on the basis that the old, pre-1753 ecclesiastical rules applied in the penal colony; but that too was in doubt, and so was the correct operation of those rules in any event.[16] There were other significant local divergences from the English position.[17] Later, as the colonies gained separate powers of legislation, the Australian law of marriage further diverged as variances emerged through the statute law of the colonies. By the 1890s, divorce in particular was an area where some colonies favoured significantly more liberal laws than others.[18] By parallel, in the United States, where no express power of marriage was given to Congress,[19] the 19th century saw variations there in State law as to the formal and essential requirements for marriage and the rules

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[13] Baker, 479-482; Helmholz, 524-530; Pollock and Maitland, vol 2, 364-372. Sir Victor Windeyer, in his *Lectures on Legal History* (2nd ed revised, 1957) at 229, quoted the historian GM Trevelyan to demonstrate the mischiefs arising from this situation.

[14] For further reforms after *Lord Hardwicke's Act*, see Baker 483. As to divorce, prior to 1857 true 'divorce' (in the sense of dissolution of a marriage) was not permitted. However the ecclesiastical courts could determine that there never was a valid marriage in the first place (e.g. for want of consent or capacity), or, on limited grounds (e.g. adultery, cruelty) make an order for what today would be termed judicial separation—although this did not end the marriage: see Baker, 491-493.

[15] *R v Maloney* (1836) 1 Legge 74, 77-82. Cf *Miller v Major* (1906) 4 CLR 219 at 222 per Griffith CJ.

[16] *R v Roberts* (1850) 1 Legge 544, 548-549 per Stephen CJ and 573 per Therry J; cf 572 per Dickinson J. Also Kercher *Debt, Seduction & Other Disasters: The Birth of Civil Law in Convict New South Wales* (1996) **(Kercher)**, 68-69 and CH Currey, 'The Law of Marriage and Divorce in New South Wales (1788-1858)' (1955) 41 *Journal of the Royal Australian Historical Society* 97, 98-101. Indeed, jurisdiction in divorce and matrimonial causes was intentionally withheld by the Imperial authorities from the local courts, to help 'stabilise' the social life of the colonies: Castles, *An Australian Legal History* (1982) **(Castles)** 140-141.

[17] E.g. in early cases certain English common law rules pertaining to married women were simply not applied (see Kercher, 67-71) or, with more formal correctness, were held to be inapplicable to the circumstances of a convict colony: *Beale v Raine* (1829) NSW Sel Cas (Dowling) 111. See also *Doe dem Jenkins v Pearce and wife* [1818] NSWKR 4.

[18] Within 15 years of the passage in England of the *Matrimonial Causes Act 1857*, all the Australian colonies followed suit by passing their own divorce statutes in similar terms. These allowed the husband to obtain a divorce on the grounds of adultery (alone), and a wife to obtain a divorce on the grounds of adultery when combined with some other stipulated ground such as cruelty or desertion. However, this relative uniformity across the colonies did not last. By 1892 both NSW and Victoria had substantially liberalised their divorce laws to allow either party to a marriage to obtain a dissolution on the grounds not available in other colonies: desertion, drunkenness (in combination with cruelty or neglect), imprisonment, and violent assault. Wives could also obtain a dissolution on the ground of adultery alone. See *Matrimonial Causes Amendment Act 1879* (NSW), s 2, *Divorce Amendment and Extension Act 1892* (NSW), *Marriage Act 1890* (Vic), s 74; and also Castles at 366 and Kercher, *An Unruly Child: A History of Law in Australia* (1995), 137-140.

[19] The Constitution of the United States does not confer any express power on Congress with respect to marriage, matrimonial causes or divorce. See e.g. *Haddock v Haddock* 201 US 562 (1905), at 575 per the Court. This and other passages to similar effect were recently cited with approval by a majority of the Supreme Court in *US v Windsor* 133 S Ct 2675 (2013) **(*Windsor*)**, 2691.

governing dissolution.[20]

11. *Fifth*, a consequence of this fragmentation of law between the Australian colonies (and equally between the various states of the United States) was that when it came to the subject of marriage and its dissolution, the colonies (or US states) were treated as separate sovereigns. Resort was necessary to the complex rules of private international law, sometimes put on a statutory footing by local legislation, to determine whether a marriage solemnised in one was valid in another, and likewise with questions of dissolution of marriage.[21] In the United States the consequent disharmony of State laws on the subject of marriage and divorce, and the want of a federal marriage power to remedy the situation, was a matter of lament.[22] Beginning in 1884 numerous proposals to amend the US Constitution to confer power on the federal legislature to make laws with respect to marriage and divorce were introduced into Congress but failed to progress.[23] Delegates to the Sydney Constitutional Convention in 1897 regarded the American position with horror describing it as '[a] scandal' and observing that:

> unless we wish to repeat in these communities the condition of things which has obtained in America, it is necessary to provide for uniformity in the law of divorce...[24]

SECTION TWO: MARRIAGE IN THE NEW COMMONWEALTH: 1901-1960

12. There are three key points to make here. *First*, the Convention Debates recognised that there was a substantial public interest in arming the new Commonwealth Parliament with the legislative ability to enact a uniform scheme across the nation regulating the attaining and holding of the status of marriage,[25] and the rules governing its dissolution. In short, marriage, and its accompaniment divorce, were obviously fit subjects for uniform legislation.[26] While some colonies initially held the view they should not lose their autonomy to regulate divorce,

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[20] See J Story, *Commentaries on the Conflicts of Law* (8th ed, 1883) **(Story)** s 202 (276) for the 'diversity of principle and practice' as to the grounds for divorce in the various States of the United States.

[21] **[1]** For the pre-1901 position in the United States see Story, s 89 (at 114ff) on capacity to marry, s 113 (at 187-188 and note a on 215ff) on the validity of marriage ceremonies and ss 228-230a (pp.306-314) for discussion of the conflict of laws rules governing proceedings for dissolution. For examples of the application of the rules of private international law in the cases see e.g. *Medway v Needham* 16 Mass R 157 at 159 (1819); *Sutton v Warren,* 51 Mass 451 at 452 (1845); *Pennegar v State*, 10 SW 305, 306 (1889). **[2]** As to the Australian colonies see e.g. *Splatt v Splatt* (1889) 10 NSWLR 227; compare *Jackson v Jackson* (1892) 18 VLR 766; *Long v Long* (1892) 18 VLR 792; *Ledwell v Ledwell* (1900) 26 VLR 595 and *Cremar v Cremar* (1886) 12 VLR 738, 748 (each discussing 'domicile' in s 74 of the *Marriage Act 1890* (Vic)).

[22] See e.g. EL Godkin 'The Constitution and its Defects' (1864) 99 *North American Review* 117 at 144-145.

[23] *Williams v North Carolina,* 317 US 287 at 305. See also HV Ames, 'Proposed Amendments to the Constitution of the United States during the First Century of its History' in *Annual Report of the American Historical Association 1896* (vol 2) at 190.

[24] *Official Record of The Debates of the Australasian Federal Convention* **(Convention Debates)**, Sydney, p 1080 (Mr Symon and the Hon RE O'Connor). See also Convention Debates, Sydney, 1891, at 28 (Mr Parkes) and see also Quick and Garran at 610 referring to the 'great mistake' made by the framers of the US Constitution, going on to observe that it had been well said that 'if there is one defect in that Constitution more conspicuous than another it is its inability to provide a number of contiguous and autonomous communities with uniformity of legislation on subjects of such vital and national importance as marriage and divorce'.

[25] From the outset, the term 'marriage' in s 51(xxi) was understood to refer to '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': Quick and Garran at 608.

[26] Note, in that regard, that in Inglis Clark's analysis of the Constitution, published in 1901, he listed 'marriage' as one of the subject matters that 'remain subject to the legislative power of the Parliaments of the States *until* the Parliament of the Commonwealth exercises its legislative authority in regard to them' (emphasis added): Inglis Clark, *Studies in Australian Constitutional Law* (1901) at 88.

they gave way on this.[27] There were important structural reasons for that approach. As Jacobs J later said in *Russell v Russell*,[28] in a single community, throughout which intercourse was to be absolutely free (s 92), the absence of such uniform laws had the potential to lead to differences between the States in the laws governing the status and the relationship of married persons that could be 'socially divisive to the harm of the new community which was being created'. There are obvious similarities between that conception of the object underlying the marriage power and the historical understanding of the imperative for national unity in a 'commercial federation' that has informed this Court's approach to Chapter IV.[29]

13. The head of power ultimately inserted in the Constitution as s 51(xxi) has been said to be a 'broad constitutional power'.[30] It is within the limits of that power (and that conferred by s 51(xxii)) to prescribe 'who might be married and how';[31] 'what unions are to be regarded as marriage';[32] the 'consequences of the relation, including the status of the married parties [and] their mutual rights and obligations';[33] how such unions could be brought to an end;[34] and what further matrimonial causes should be dealt with by the courts. Consistent with the intention of the framers, and by reason of s 109 of the Constitution, it has always been within the power of the Commonwealth to exercise that power to legislate to declare a single and uniform rule for Australian society as to what constitutes a valid marriage.[35] This represented a considerable, and (as is apparent from the passage from the Convention Debates extracted above) deliberate, departure from the position in the United States.

14. *Second*, at the Commonwealth level, the new powers were for the first 60 years exercised within only a very limited compass (despite the expectation of some members of the Convention Debates that the power would be exercised at the 'earliest opportunity'[36] and the introduction in 1901 of a Divorce Bill for a national

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[27] Convention Debates, Sydney, second session, 1897, at 1077-1082. Concern was there expressed about retaining what was then sub-clause 23 (marriage and divorce) – see in particular Mr Glynn at 1077-1078. However, 'The sense of the desirability of uniform laws of marriage prevailed... and the sub-clause was agreed to' (Quick and Garran, at 608). See also Convention Debates, Melbourne, 1890, at 88 (Mr Deakin); Sydney, 1891 at 28 (Sir Henry Parkes); Sydney, 1897, at 872 (Mr Kingston); and Adelaide, first session, 1897, at 790 (Mr Kingston).

[28] (1976) 134 CLR 495 at 546.

[29] *Betfair v Western Australia* (2008) 234 CLR 418 at 455-464 [23]-[48]; *Ha v New South Wales* (1997) 189 CLR 465 at 494-495.

[30] *Marriage Act Case* at 560 per Taylor J.

[31] *Marriage Act Case* at 579 per Windeyer J; *Attorney-General for New South Wales v Brewery Employees Union of New South Wales* (1908) 6 CLR 469 at 610 per Higgins J.

[32] *Attorney-General for New South Wales v Brewery Employees Union of New South Wales* (1908) 6 CLR 469 at 610 per Higgins J.

[33] *Marriage Act Case* at 543 per Dixon CJ referring to Quick and Garran at 608.

[34] Expressly dealt with in s 51(xxii), but a matter which would have been within s 51(xxi) in any event: see Marriage Act Case at 560 per Taylor J and *Russell v Russell* at 539-540, 547-548.

[35] See, seemingly assuming that such a law is within power, the *Marriage Act Case* at 558 per Taylor J and *Russell v Russell* at 546-547 per Jacobs J.

[36] Convention Debates, Sydney 1897, p1081 (Sir John Downer).

uniform law which failed[37]). Primarily, there were the 1945 and 1955 Acts.[38] Each was limited to the field of divorce proceedings and they were designed to enable Australian women to institute divorce proceedings against foreigners in Australia, or against Australians in their state of residence, thereby overcoming the rule that the wife must sue in the place of the husband's domicile. These Acts dealt with some of the more egregious difficulties arising from treating the various States as separate sovereigns and thereby needing to apply rules of private international law. They did not touch the larger area of matrimonial causes, nor the question of the validity of marriage itself.

15. *Third*, the consequence of only limited use of the new legislative Commonwealth powers was that there continued to be a patchwork of State laws regulating marriage, divorce and other matrimonial causes.[39] That patchwork meant continued fragmentation of law and necessitated continued resort to the rules of private international law. The result was uncertainty in matrimonial relations which, as Isaacs J said in *Fremlin v Fremlin*,[40] was a 'scandal' to be deprecated (echoing the discussion in the Convention Debates of the position in the United States). By way of illustration:

15.1. The 'essential validity' of a marriage (directed to the capacity of the parties to contract) was said to be determined by the antenuptial domicile of each of the spouses at the time of marriage, although this proposition was not without controversy.[41] The 'dual domicile rule' required each party to the marriage to have capacity to marry the other under the law of their own domicile, and a lack of capacity in either would result in the marriage being void even if the marriage would otherwise be valid under Australian law.[42]

15.2. By contrast, the 'formal validity' of a marriage (attendance to the appropriate formalities) was generally to be governed by the law of the place in which the marriage was contracted.[43] This position was subject to a number of countervailing principles, including that a marriage valid according to the requirements of the place where it was celebrated would not be recognised where it was 'forbidden by the law of the place of domicile as contrary to

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[37] Tasmanian Senator Henry Dobson was granted leave by the Senate on 5 July 1901 to 'bring in a Bill to regulate divorce and matrimonial causes within the Commonwealth' (Senate Hansard, 5 July 1901, 2116). The Matrimonial Causes Bill 1901 (Cth) was presented in 1901 (Senate Hansard, 11 September 1901, 4668), but then discharged in 1902 without receiving a second reading (Senate Hansard, 10 October 1902, 16728).

[38] See the *Matrimonial Causes Act 1945* (Cth) and *Matrimonial Causes Act 1955* (Cth). The Commonwealth had also enacted legislation dealing with marriages of Australian soldiers overseas: *Matrimonial Causes (Expeditionary Forces) Act 1919* (Cth) and *Marriage (Overseas) Act 1955* (Cth).

[39] Harrison Moore observed in 1910 that 'There is a good deal of diversity in the divorce laws of the States; and it is quite possible, so long as the States remain separate law districts, that parties may be married persons in the view of one State and single persons according to the law of another. The matter is complicated by the fact that the relation is principally governed by domicil, and in countries like Australia conditions of life make it peculiarly difficult to ascertain that domicil': *The Constitution of the Commonwealth of Australia* (2nd ed, 1910), 475.

[40] (1913) 16 CLR 212 at 230.

[41] See *Brook v Brook* (1861) 9 HL Cas 193; *Sottomayor v De Barros (No 1)* (1877) 3 PD 1; *Sottomayer v De Barros (No.2)* (1879) 5 PD 94; *In the Marriage of Barriga* (No.2) (1981) 7 Fam LR 909 at 912 per Baker J.

[42] In *Miller v Teale* (1954) 92 CLR 406 (***Miller v Teale***) at 414 this Court considered an oft criticised exception recognised in England (*Sottomayer v De Barros (No.2)* (1879) 5 PD 94).

[43] *Berthiaume v Dastous* [1930] AC 79; *Fokas v Fokas* [1952] SASR 152; the *lex loci celebrationis* rule. See also *Matrimonial Causes Act*, s 18(1)(c) (as enacted).

religion, or morality, or to any of its fundamental institutions'[44] and the controversial proposition that a valid marriage might arise from overseas ceremonies sufficient to create a common law marriage 'irrespective of the nationality or the domicile of the parties at the time of the ceremony'.[45] It had also been recognised at least in the context of polygamous marriages that the requirements for validity could change both with a change in the law or religion of the place of marriage[46] and where there was a change in the domicile of the spouses.[47]

15.3. The differing bases between the States for dissolution of a marriage and the differing obligations and entitlements arising upon dissolution resulted in controversy as to the place in which an application for dissolution and any consequential relief was to be determined. At common law the domicile of the parties was the test of jurisdiction to dissolve a marriage[48] and as the husband and wife were one person and had a common domicile it was the domicile of the husband that was determinative, a wife's changing with that of her husband during the marriage and remaining that of her husband's until dissolution and regardless of physical separation.[49] This led to unusual results.[50] Issues also arose as to the recognition between States of a dissolution granted in one State that would not have been available in the other and divergent views were held by courts.[51]

SECTION THREE: THE COMMONWEALTH ACTS OF 1959 AND 1961

16. Four points are made here. *First*, as to object and purpose, while the mischief was long evident, the task of producing Commonwealth laws which took up the amplitude of power in ss 51(xxi) and (xxii) was a large and complex one. After the early steps in 1901 towards that goal failed, efforts were renewed in earnest in 1947 when Dr Evatt, as Attorney-General, set up a committee of three members of the Bar (including Joske MP),[52] to produce a draft bill for uniform divorce law. That draft bill was later taken up by the Law Council and submitted to the

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[44] *Brook v Brook* (1861) 11 ER 703; *Ogden v Ogden* [1908] P. 46. But note *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 533 [63] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ: s 118 of the Constitution may prevent one State from refusing to give effect to another State statute dealing with tort liability on 'public policy' grounds.

[45] See *Nygh's Conflict of Laws in Australia* (8th ed, 2010) [25.5] to [25.14]

[46] *Parkashov Singh* [1968] P 233; *R v Sagoo* [1975] 2 All ER 926; *Attorney-General for Ceylon v Reid* [1965] AC 720

[47] *Ali v Ali* [1968] P 564

[48] *Le Mesurier v Le Mesurier* [1895] AC 517; *Foster v Foster* [1907] VLR 159; *Ruddock v Ruddock* (1913) 31 WN (NSW) 6 at 7; *Tracy v Tracy* (1939) 39 SR (NSW) 447

[49] *Attorney-General of Alberta v Cook* [1926] AC 444 at 461, 465; *Pezet v Pezet* (1946) 63 WN (NSW) 238 (***Pezet v Pezet***) at 64; *Lord Advocate v Jaffrey* [1921] 1 AC 146; *Miller v Teale* (1954) 92 CLR 406; *Tracy v Tracy* (1939) 39 SR(NSW) 447.

[50] For example in *Miller v Teale*, this Court declared null and void a marriage entered by a person in New South Wales during the 3 month period following entry of a decree nisi in South Australia dissolving her prior marriage. The Court found that the respondent was domiciled in South Australia as a result of her first marriage which domicile persisted despite the circumstances of the respondent being such that, had it then been possible to do so, she would have acquired a domicile of choice in NSW by the time of the divorce. See also *Pezet*.

[51] *Travers v Holley* [1953] P 246; *Sheldon v Douglas* (No.1) [1963] NSWR 129; *Fenton v Fenton* [1957] VR 17

[52] Who introduced the private member's bill that became the 1955 Act: see Barwick, 'Some aspects of the new Matrimonial Causes Act' (1961) 3 *Sydney Law Review* 409 (**Barwick SLR Article**) 412-413.

government,[53] which refused to introduce it. Introduced instead as a private member's bill,[54] it lapsed after generating substantial criticism, principally because it sought to achieve uniformity by collating the existing grounds of divorce in the States 'on the basis of the highest common denominator'.[55] But it nevertheless laid the ground for the later development of comprehensive legislative measures by the Australian government, being the Matrimonial Causes Act and the Marriage Act. Their architect, Sir Garfield Barwick, regarded those enactments as component parts of the same scheme – observing that they were, in a sense, 'a necessary complement to each other' and that 'together' they represented 'considerable achievement in social law reform'.[56]

17. There can be no doubt as to the fundamental legislative object[57] of those two Acts: to take up the amplitude of power which had rested with the Commonwealth for 60 years but lain dormant for the major part; and to declare for the nation a single set of rules as to what unions would bear the status of 'marriage' within society (both as a matter of essential and formal characteristics); how such unions could be brought to an end; and what further matrimonial causes should be dealt with by the courts; and to provide for such controversies to be resolved in the exercise of a uniform federal jurisdiction.

18. These objects are evident from the extrinsic materials. The Matrimonial Causes Act was said to have been introduced 'to deal comprehensively and uniformly on a national basis' with divorce and matrimonial causes and commenced on 1 February 1961.[58] Referring to s 51(xxii), it was said in the second reading speech that the framers considered it appropriate that 'regulation of these matters should be on an Australia-wide basis'.[59] The purpose of the Marriage Act was similarly identified as being to provide for a uniform law with respect to marriage on an Australia-wide basis. In the Second Reading Speech it was said that the Bill placed:

> the law with respect to marriage on an Australia-wide basis, so that we might have an Australian marriage evidenced by documents which were common to all marriages throughout the whole of the country...creating one uniform law of marriage applicable throughout the Commonwealth and at least some of its

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[53] See H Woolf 'The proposed Commonwealth Divorce Law' (1952) 25 ALJ 307; 'Uniform Divorce Law' (1955) 29 ALJ 55.

[54] Commonwealth House of Representatives Hansard (**HoR Hansard**), 11 April 1957, 775.

[55] Barwick SLR Article at 413.

[56] HoR Hansard, 19 May 1960, 2000 (Sir Garfield Barwick). That was the second reading speech to the Marriage Bill 1960 (which lapsed). However, the 1961 Bill was in substantially similar form and, because of that similarity, went to the Committee stage without a second reading debate: see HoR Hansard, 21 March 1961, 387) (Sir Garfield Barwick) and G Barwick 'The Commonwealth Marriage Act 1961' (1962) 3 *Melbourne University Law Review* 277 (**Barwick MULR Article**) 278.

[57] See, as to the relevance of that object to the task of construction: section 15AA of the *Acts Interpretation Act 1901* (Cth); *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397, Dixon CJ; and *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69], McHugh, Gummow, Kirby and Hayne JJ. The difficulties that arose in *Carr v Western Australia* (2007) 232 CLR 138 at 143 per Gleeson CJ (cited with approval in *Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd* (2013) 87 ALJR 1009 at 1016, [40]-[41] per Crennan, Kiefel, Bell, Gageler and Keane JJ) do not apply here – for there can be little doubt about the extent to which the legislation pursues that purpose.

[58] HoR Hansard, 14 May 1959, 2222 (Sir Garfield Barwick).

[59] HoR Hansard, 14 May 1959, 2222 (Sir Garfield Barwick) It later became apparent that the Act was supported by both s 51(xxi) and (xxii): See the *Marriage Act Case* at 560 and 572; *Russell v Russell* (1976) 134 CLR 495 at 539 per Mason J (Stephen J agreeing at 529) and 550 (Jacobs J); *Re F; Ex Parte F* (1986) 161 CLR 376 at 387; *P v P* (1994) 181 CLR 583 at 600.

territories [including the Australian Capital Territory].[60]

19. That approach was said, in the second reading speech, to recognise that 'the relationship of husband and wife, parent and child, is common to all of us, whether we derive from one State or another'.[61] And as with the Matrimonial Causes Act, that was said to give effect to the intention of the framers that 'these fundamental relationships should be governed by a national law'.[62]

20. Turning, *second,* to the Marriage Act, while it contained no definition of marriage as such until 2004, the essential requirements for the validity of a marriage arose through a combination of provisions:

10 20.1. Section 46(1) has always required an authorised celebrant, not being a minister of a recognised denomination to say words to the effect of:

> Marriage, according to the law of Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.

20.2. Part II of the Marriage Act defines the marriageable age as 18 (s 11), and provides for persons under the age of 18 to obtain permission to marry. These provisions apply, notwithstanding any common law rule of private international law, to marriages in Australia by authorised celebrants, and overseas marriages of Defence Force Members (s 10(1)).[63] When first enacted, those provisions had the effect of increasing the marriageable age
20 to 18 for females and 16 for males throughout Australia (a position that previously applied only in South Australia). In determining the 'proper marriageable age to set for the Australian people' Parliament's concern (at least in part) appears to have been informed by international concerns about the appropriate minimum age for marriage.[64]

20.3. Part III, Div 2 of the Marriage Act provides that a marriage is void on the grounds specified in s 23B(1) 'and not otherwise'. That Division applies to all marriages solemnised in Australia after 7 April 1986 (other than marriages by foreign diplomatic or consular officers).[65] The specified grounds include that either of the parties is lawfully married to another
30 person; the parties are in a 'prohibited relationship'; the consent of either of the parties is not a real consent; either of the parties is not of marriageable age: s 23B(1)(a), (d), (e). As with 'marriageable age' the provisions regarding 'prohibited relationships' involved the rationalisation, at the national level, of the prohibited degrees of consanguinity and affinity, which had previously varied from State to State.[66]

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[60] HoR Hansard, 19 May 1960, 2000 (Sir Garfield Barwick), see also 2001. That was seemingly accepted in the *Marriage Act Case*. In particular, Taylor J observed that the enactment was a 'comprehensive statute' the main purpose of which was to 'establish a uniform marriage law throughout the Commonwealth' (at 558).
[61] HoR Hansard, 19 May 1960, 2000 (Sir Garfield Barwick).
[62] Ibid.
[63] Note ss 11 and 12, and ss 18 and 19 as relevant, apply to marriages performed by foreign consular or diplomatic officials under Pt IV, Div 3, and the marriage of any person domiciled in Australia, wherever the marriage takes place: s 10(2).
[64] HoR Hansard, 19 May 1960, 2002 (Sir Garfield Barwick).
[65] Marriage Act, s 23A(1)(a), (2). These provisions also apply to the marriage of defence force members under Pt V: s 23A(1)(b). Section 23B(1) applies to marriages solemnised after the commencement of s 13 of the *Marriage Amendment Act 1985* (Cth), which was on 7 April 1986.
[66] See ss 23(1)(b),(2)- (6) and 23B(1)(b), (2)-(6) and Barwick SLR Article at 282-283.

20.4. Part VA (added in 1985[67]) provides for recognition of foreign marriages. Part VA abrogates the common law rules of private international law for marriages solemnised in Australia after 7 April 1986.

20.5. Part VII of the Marriage Act sets out offences, including bigamy (s 94) and marrying a person not of marriageable age (s 95).

21. The formal requirements of marriage were (and are) specified as follows.

21.1. Part IV, Div 2 sets out the requirements for marriages solemnised by or in the presence of an authorised celebrant. These requirements include the notice to be given (s 42), the witnesses required (s 44), the words that must be said at the ceremony (ss 45 and 46), and preparation of marriage certificates (s 50). These provisions apply to and in relation to all marriages solemnised, or intended to be solemnised, in Australia (other than marriages by foreign consular or diplomatic officials) (s 40).

Reflecting the flexibility required of a national scheme for a socially diverse population, the Act was said to pay 'full deference to the religious persuasions of the parties'[68] by providing that a marriage may be solemnised by 'any form and ceremony recognised as sufficient' for the purpose by the religious body or organisation: s 45(1).

21.2. Part IV, Div 3 provides for marriages by foreign diplomatic or consular officials. Pt V provides for marriage of Defence Force members overseas.

22. Section 6 (both as enacted, and currently) provides that the Act 'shall not be taken to exclude the operation of ... a law of a State or of a Territory, in so far as that law relates to the registration of marriages'. This provides a strong indication that State and Territory laws relating to other aspects of marriage are excluded.

23. The clear objective intention of the Marriage Act is that under the law of Australia there shall be one form of union that shall be recognised as a marriage under law, namely a marriage which complies with the essential and formal requirements set out in that Act or which is recognised under Part VA. The intent is that, not just for the purposes of society, but for the very purpose of law itself, and law across the entire nation, it will be compliance or not with the Marriage Act that will determine whether a person carries the status of being a married person or remains an unmarried person. Indeed, that is starkly revealed by the provisions dealing with 'second religious ceremonies'. When the Act first commenced, Islamic celebrants were not authorised under the Act to solemnise marriages by reason of concerns regarding polygamy.[69] Instead, special provision was made for people of that faith (and others) to first be 'legally married' and then go through a second 'religious ceremony of marriage': see s 113(5), which remains in the current form of the Act. A necessary condition of conducting such a ceremony is that the parties provide proof of their existing marriage (being a marriage conducted under the Act or recognised as valid in Australia). The Act

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[67] Part VA was introduced by the *Marriage Amendment Act 1985* (Cth) to give effect to Australia's obligations under the *Convention on Celebration and Recognition of the Validity of Marriages* (The Hague, 14 March 1978, ATS 1991 No. 16): Senate Hansard (22 Feb 1985) 57; HoR Hansard (20 March 1985) 616.

[68] Barwick MULR Article, 295.

[69] See Barwick MULR Article, 293-294. Note, in that regard, ss 26 and 29(a) as regards 'recognized denominations'.

thus evinces an intention to comprehensively regulate all 'marriage' ceremonies.[70] But transformation of a person's status to that of a married person for the purposes of Australian law is only effected by means of solemnisation under Part IV, Div 2 or a marriage recognised under Part VA.

24. The Marriage Act is thus an expression by the Parliament that, within the field of its sovereignty, the binary division in status between married and unmarried will be demarcated by the terms of that Act. It 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). It does not matter whether that other law or laws purports to mimic identically the essential and formal requirements of the Marriage Act, or to mimic it in some parts while varying it in other parts. The Act simply does not permit of the possibility that there will be in addition to the status of 'married' and its converse 'unmarried', one or more variations on a theme: 'married through the eyes of the law of X State' or 'married through the eyes of Y Territory' or 'married through the eyes of Z religion'.

25. Nor does the Marriage Act permit a union that cannot be solemnised under the Act, that is some variant of the unions under the Act, to be given the status of marriage, or another form of marriage. There are various reasons why a union may not meet the essential or formal requirements of Act. The persons may lack the *capacity* to marry: thus one partner may already be married (s 23B(1)(a)), or the partners may be other than man and woman (s 5(1)), or one or both partners may be underage (ss 11 and 23B(1)(e)). Or they may fail to satisfy the requirements for *consent* to marry: one partner may be acting under duress or in an arranged and involuntary marriage (s 23B(1)(d)). Or again the partners may be unable or unwilling to go through the *forms* that are required for a valid marriage: they might for instance say they want to be married but for them marriage is to be on a trial basis: it has a sunset clause of say 5 years, and the marriage automatically ends after 5 years unless they choose to renew it.

26. The Marriage Act simply does not permit of the possibility that a State or Territory might clothe with the legal status of marriage (or a form of marriage) a union of these kinds. It leaves no room for a State or Territory legislature to create a status of 'bigamous marriage', 'polygamous marriage', 'arranged involuntary marriage', 'under age marriage' or 'trial marriage'. Similarly, within and by reason of the schema of the Marriage Act, couples who are not man and woman (whether same sex or intersex) are and must remain for the purposes of Australian law 'unmarried' persons. They remain on that side of the binary divide.

27. Of course for the purposes of many other laws, federal,[71] State, Territory[72] or common law, substantive rights and obligations have increasingly been extended

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[70] Note also s 94(1), referring to a 'form or ceremony of marriage' involving bigamy, which is necessarily void, and s 91 which regulates, as regards the legitimacy of children, the consequences of a ceremony resulting in a void marriage, held valid in the *Marriage Act Case*: see 547 (Dixon CJ, although note that his Honour dissented on the validity of s 91 – at 546-547), 550-551 (McTiernan J), 555-558 (Kitto J), 559-560 and 571 (Taylor J), 574 and 575 (Kitto J), 597-599 and 600 (Windeyer J) and 601, 602-603 (Owen J).

[71] See the various amendments made by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008* and the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws –General Law Reform) Act 2008* which provide that de facto partners include same-sex partners (note in particular ss 2D, 2E and 2F of the *Acts Interpretation Act 1901*). In turn the substantive Commonwealth laws on the relevant subject generally give the same rights to such de facto partners as married partners.

[72] See eg 'civil partnerships' under the *Domestic Relationships Act 1984* (ACT) and s 6(2) of the (now repealed) *Civil Unions Act 2012* (ACT).

to persons in de facto relationships, including same-sex de facto relationships, *as if* they held the status of marriage. Such laws are made by the Commonwealth within its ambit of constitutional power (such as in relation to social security benefits), and the States and Territories within their ambit (such as in relation to probate). But this is done on the express recognition that the binary distinction between the status of married and unmarried established by the Marriage Act under the Commonwealth's marriage power is maintained. The position is similar to that reached in *Ford v Ford*[73] in respect of a decree of judicial separation which similarly did not affect the status of a person under a law relating to marriage or divorce, even though it affected some of the incidents of that status.

28. Turning, *third*, to the Matrimonial Causes Act, which relevantly set the scene for the later FLA, it made provision for a single regime by which marriage in Australia could be brought to an end. A major part of its task was to survey the various grounds for divorce in the various State laws and to identify, and codify, the grounds available for divorce. The Act increased the number of grounds available in some States, reduced the number of grounds in others, and introduced new grounds for divorce in all States.[74] It then further created a single form of federal jurisdiction (invested then in State Courts – see s 23) to determine controversies over divorce or nullity. It further determined, again in a singular, unified fashion, what consequential matrimonial causes should be the subject of the vesting of such federal jurisdiction.

29. That meant that there could no longer be different and inconsistent answers given by different courts throughout Australia to such basic questions as whether two persons were married or had been divorced.[75] The 'scandal' deprecated by Isaacs J in *Fremlin* could occur no more. Any person domiciled in Australia was to be able to institute proceedings under the uniform law in any State or Territory.[76] Marriage, under the two enactments, was a singular, indivisible status, and there was to be no return to old days of complexity and uncertainty about the status of marital relations.

30. Despite some significant substantive differences,[77] the FLA continued that uniform scheme. For present purposes, the essential features of that enactment are as follows:

    30.1. Section 8(1)(a) provides that proceedings by way of matrimonial cause are not to be commenced except under the FLA;[78]

    30.2. Section 39 invests federal jurisdiction in various specified federal, State and Territory courts in relation to matrimonial causes;

    30.3. Those provisions, together with Parts VI and VIII and XIV, establish the uniform law that is to apply throughout Australia for the resolution of controversies consisting of matrimonial causes concerning divorce, validity and nullity of marriage, the alteration of interests in property and spousal

[73] At 530 per Latham CJ, 533 per Starke J, 539 per Dixon J, 547-548 per Williams J.
[74] HoR Hansard, 12 November 1959, 2679 (Mr Barnard) and 14 May 1959, 2224 (Sir Garfield Barwick).
[75] See s 8(1), which was subject to the transitional provisions in Part XIII.
[76] See s 23, the only qualification being that a short period of domicile was required before commencing proceedings in a Territory (s 23(7)).
[77] Notably, the introduction of a single ground for divorce, being irretrievable breakdown of the marriage, and the establishment of the Australian Family Court.
[78] See similarly s 8 of the Matrimonial Causes Act.

maintenance.

31. *Fourth*, this scheme of Acts together had two great impacts on private international law. On the one hand, for any dispute about the status of marriage or divorce arising *within* Australia, it was no longer necessary or available to treat the States (or Territories) as foreign countries to each other. There was a single legal answer to whether the status of marriage was held, attained or retained, and it was found in the application of the provisions of the two Acts and in the decisions given under them in federal jurisdiction.

32. For example, if a dispute arose in a court in Victoria as to whether two people who went through a ceremony of marriage in a place in Australia held the status of 'married' persons, the answer lay solely in the application of the Commonwealth Acts. Any law on that matter of the State where the marriage was solemnised, or of the domicile of the parties, would simply be of no legal effect. In time, such laws at State level simply came to be repealed as being of no present or likely future utility.[79] The Territories were and are in no different position.

33. On the other hand, where a dispute arose in a court *outside* Australia and the private international law rules of the forum directed attention to the law of this country to determine if the persons were married, the two Acts together produced a single answer under the law of Australia. In effect, for private international law rules framed in terms of the law of the place of the solemnisation of the marriage, the relevant place became simply 'Australia', and for rules hinging on domicile, the domicile would likewise become 'Australia'. The two Acts prevented any further subdivision (for these purposes) into separate States or Territories of Australia.

SECTION FOUR: THE SIGNIFICANCE OF THE 2004 AMENDMENT

34. When first enacted, the Marriage Act did not define marriage. However, it was at that time understood that it gave effect to the 'marriage customs of the community'.[80] The Act was amended by the *Marriage Amendment Act 2004* (Cth) to add to s 5(1) a definition of 'marriage' as the union of a 'man and a woman' to the exclusion of all others, voluntarily entered into for life. The Explanatory Memorandum stated that the purpose of the amending Bill was 'to give effect to the Government's commitment to protect the institution of marriage by ensuring that marriage means a union of a man and a woman and that same sex relationships cannot be equated with marriage'.[81] The second reading speech similarly suggested that the object was to reinforce the traditional, 'majority view' of marriage and to 'provide certainty to all Australians about the meaning of marriage in the future'.[82]

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[79] Acts dealing with marriage and matrimonial causes were gradually repealed in each State and Territory (save for South Australia, where the *Matrimonial Causes Act 1929* has not been repealed). See, e.g. *Registration of Births, Deaths and Marriages (Amendment) Act 1962* (Vic) (repealing Pts I-VI of the *Marriage Act 1958* (Vic)); *Acts Revision Act 1977* (ACT) (repealing the relevant marriage and matrimonial causes Ordinances applicable in the ACT); and *Acts Repeal Act 1991* (Qld) (repealing the *Marriage Act 1864* (Qld) and the *Matrimonial Causes Jurisdiction Act 1864* (Qld)).

[80] HoR Hansard, 18 August 1960, 229 (Mr Beazley). That was reflected, in particular, by the prohibition on bigamy and by providing that bigamous marriages are void: HoR Hansard, 19 May 1960, 2005 (Sir Garfield Barwick). See now ss 23(1)(a) and 23B(1)(a) of the Marriage Act and note also s 46(1).

[81] Page 1.

[82] HoR Hansard, 24 June 2004, p 31459 (Mr Ruddock).

35. As submitted above, the power conferred by s 51(xxi) is broad and (although yet to be determined by this Court) the better view is that the constitutional concept of 'marriage' includes a marriage between members of the same sex.[83] Assuming that to be so, the enactment of the definition of 'marriage' in s 5(1) represented an affirmative legislative choice that such unions are *not* to be accorded the legal status of 'marriage' under Division 2 of Part IV of the Act. Even if it were otherwise and there is some operative constraint placed upon s 51(xxi) (eg by reference to the 'customs of our society'[84]), that legislative power permits the Commonwealth to determine exhaustively for the whole of Australia what unions are to be regarded as 'marriage'. Indeed, as submitted above, the framers envisaged that it would be deployed to do that very thing.

36. Parliament's legislative choice to confine that concept to the marriages in the definition in s 5(1) was confirmed by the new s 88EA.[85] It would be an anomalous result if a union solemnised in a foreign country between same sex partners is not to be recognised as a marriage in Australia, and yet a State or Territory may legislate so as to confer such a status. There is, in that sense, a 'negative implication' that such matters will not be differently regulated by State or Territory law.[86]

SECTION FIVE: A CLOSER LOOK AT THE INCONSISTENCY GENERATED BY THE ACT MARRIAGE ACT

37. Once the reach and intent of the Commonwealth statutes is identified, the inconsistency in the ACT statute is obvious. Expressed at a level of generality, the ACT Marriage Act simply cannot achieve its self-stated objective ('an Act to provide for marriage equality') without contradicting the terms and effect of the two Commonwealth Acts. Of course, the ACT Marriage Act could have validly extended rights under ACT law to same-sex couples *as if* they were in a marriage – thereby accepting and acting upon the demarcation of status effected by the Commonwealth Acts. But what it purports to do instead is to authorise and clothe in legality *as a marriage or equal form of marriage* that which under Australian law cannot be such.

38. This is not just a matter of the ACT including the term 'marriage' in the Act, although it is hard to see how any State or Territory law legalising a union and including 'marriage' in the title could escape inconsistency. The ACT Legislative Assembly has gone further: at every turn in the ACT statute it is clear that the Assembly has followed the Commonwealth Acts. It has done so by generally mimicking their structure and terms – as to essential and formal requirements for validity and then as to the mechanisms for divorce – but then at critical junctures substituting the ACT's preferred element, and preferred court.

39. The variances can be demonstrated by the comparative table attached to these

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[83] See *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 553 per McHugh J, and note the decision of the Canadian Supreme Court in *Reference re Same-Sex Marriage* (2004) 246 DLR (4th) 193. As with all heads of power, the term 'marriage' should be construed with all the generality that the words used permit.
[84] *Fisher v Fisher* (1986) 161 CLR 438 at 455-456 per Brennan J and see also *Re F; Ex Parte F* (1986) 161 CLR 376 at 399 per Brennan J. Cf *Windsor,* 133 S Ct 2675, 2692-3 (per Kennedy J).
[85] Also added by the *Marriage Amendment Act 2004* (Cth).
[86] *Momcilovic v The Queen* (2011) 245 CLR 1 **(*Momcilovic*)** at 111 [244], 116 [261] and 122 [276] per Gummow J.

submissions.

Inconsistency with Marriage Act

40. The ACT's grant of permission to marry to a subset of the class of persons who under the Marriage Act cannot marry is of course the most notable variation. It flows through to the form of ceremony. But beyond that, as the Table demonstrates, the ACT has purported to modify marriageable age; to vest its Supreme Court with jurisdiction to hear matrimonial causes as a form of Territory jurisdiction; to provide a mechanism for automatic and instantaneous dissolution of marriage; and to produce different consequences on breakdown for property and maintenance jurisdiction.

Inconsistency with FLA

41. In addition, inconsistency arises between the ACT Marriage Act and the FLA. As submitted above, the national scheme established by the Marriage Act and the FLA provides the sole and exclusive means by which disputes as to a marriage, matrimonial causes and de facto financial causes (by referral and in the Territories) are to be determined. A State or Territory law may only operate in respect of de facto financial causes to the extent that an order is not able to be made under the FLA (s 90RC(3)), is prescribed by the Commonwealth or upon cessation of a referral of power from the relevant State.

42. The ACT Marriage Act creates a separate procedure and jurisdiction for the determination of disputes as to marriage and the financial consequences of marriage, consequent upon solemnisation of a marriage under that Act. Proceedings in relation to the validity, nullity and dissolution of marriage are to be determined under Part 4 of the ACT Marriage Act and proceedings in relation to the alteration of interests in property and maintenance are to be determined under Part of the *Domestic Relationships Act 1984* (ACT) (**DRA**).

43. The FLA, the ACT Marriage Act and the DRA will inevitably conflict in a number of areas.

    43.1. *First*, the ACT Marriage Act (s 33) permits an ACT marriage to be ended by the unilateral act of one party to it entering into a marriage under the Marriage Act or a 'corresponding law' of another jurisdiction. That is at odds with the uniform scheme of the FLA, under which divorce requires a Court order and a finding of irretrievable breakdown (Part VI).

    43.2. *Second*, the effect of those enactments is to create a complex patchwork, whereby either the FLA or the DRA and in some cases neither of those enactments will govern the rights of the 'married' parties. That will depend upon matters such as the jurisdictional requirements of the two enactments[87] and the operation of s 90RC of the FLA. The resulting difficulties are most acute for couples who do not meet the jurisdictional requirements of the DRA and are not 'de facto' partners under the FLA: they end up 'married' under the ACT scheme but without relief for property or maintenance under either scheme. This is at odds with the objective intention reflected in the terms of the FLA, being that all married persons

[87] See ss 4AA, 90RC(2)(a) and 90SB of the FLA and ss 11 and 12 of the DRA.

should have access to such relief.

43.3. *Third*, the ACT Marriage Act permits a declaration as to validity of a marriage under that Act (s 23(2)(c)). The FLA permits a declaration as to the invalidity of that marriage (s 113) or in cases where it applies and upon the basis of the parties having lived together 'as a couple ... on a genuine domestic basis', a declaration as to the existence of a de facto relationship (s 90RD). The ACT Supreme Court would declare the same-sex couple married; but the court invested with federal jurisdiction would, on the basis they were unmarried, declare them de facto partners.

44. These variations give rise to an inconsistency, because the Marriage Act (and the FLA) do not simply provide for one form of marriage leaving open the possibility for other forms, but define what relationships can be given the status of 'marriage' in Australia[88] and provide, in an exhaustive fashion, for the resolution of matrimonial causes arising as a consequence of the status. As such, that antinomy extends beyond so-called 'operational inconsistency'.[89] The Commonwealth's marriage laws necessarily exclude State laws on that topic, just as Commonwealth bankruptcy laws necessarily exclude State bankruptcy laws. In both cases, there is no room for both national and regional laws on the topic.[90]

SECTION SIX: THIS IS RELEVANT INCONSISTENCY WITHIN S 28 OF THE ACT SELF-GOVERNMENT ACT AS WELL AS REPUGNANCY

45. The preceding analysis demonstrates that the Marriage Act and the FLA establish a uniform national set of rules governing the status of marriage. If this case were concerned with a State law, there would be clear inconsistency under s 109 of the Constitution. In the case of laws enacted by the ACT Legislative Assembly, however, it is necessary to have regard to s 28(1) of the ACT Self-Government Act. The ACT Marriage Act is an 'enactment', and the Marriage Act and the FLA are each a 'law' within the meaning of that provision.[91] There are statements suggesting that s 28 might have a narrower operation (that is, more protective of ACT laws) than s 109 of the Constitution. In particular, in *Northern Territory v GPAO*,[92] Gleeson CJ and Gummow J (with Hayne J agreeing) observed (in obiter comments) that the criterion for inconsistency under s 28 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.[93]

46. Some care is required when approaching those (obiter) comments. In addressing that issue in passing, their Honours did not develop why or how there may be a narrower approach under s 28 as compared to s 109.

47. At the very least, nothing in that statement was meant to suggest that a

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[88] Contra Defence, [8](b)-(c) **QRB, 36**.
[89] Cf *Victoria v The Commonwealth* (1937) 58 CLR 618 (***The Kakariki***) at 630-631 per Dixon J and *Momcilovic* at 237 [648]-[649] per Crennan and Kiefel JJ.
[90] See *The Kakariki* at 638 per Evatt J. See, by analogy, *International Shoe Co v Pinkus,* 278 US 261 at 265 (1929). Note also the *Marriage Act Case* at 575 per Menzies J.
[91] See para (a) of the definition of 'enactment' in s 3 and the definition of 'law' in s 28(2).
[92] (1999) 196 CLR 553 (***GPAO***).
[93] *GPAO* at 582-583 [60]. See also, referring to that passage, *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (2000) 200 CLR 322 at 351 [75] per Gummow and Hayne JJ.

Commonwealth Act that made exclusive provision on a topic could not exclude Territory laws on that topic. Gleeson CJ and Gummow J also observed in *GPAO* that, if the Commonwealth makes a law that operates generally throughout Australia that is intended to make exhaustive or exclusive provision on a subject, 'it is to be expected also that this field will be covered with respect to the territories'.[94] Their Honours then said (at 581-582 [57]), in a statement bearing directly on the present issue:

> [O]ne would be slow to attribute to the Parliament the intention that ... a law with respect to marriage would segregate the population by a criterion of residence in a territory rather than elsewhere in Australia.

48. In such a case, the analysis of King CJ in *Tucker v Dickson*[95] on resolving a conflict between an Act and subordinate legislation is apposite:

> If its true meaning and effect is that it is to apply as the sole rule regulating the particular subject matter and to the exclusion of all other rules, then the other rules are necessarily inconsistent with it and must give way.

49. That follows from the fact that s 28 does not say anything about the intended operation or construction[96] of Commonwealth laws (including a Commonwealth law that is intended to operate to the exclusion of State or Territory law). Rather, the self-evident object of s 28 is to impose a constraint upon the operation of *Territory law*. It withdraws the effect of an inconsistent *ACT* law, and requires, as a command of the paramount legislature, an ACT law to be read down (where possible) to preserve only the 'concurrent' operation of that law. In this sense, s 28 is a binding rule of construction of *ACT laws*.

50. And that explains the obiter observation in *GPAO*. To adapt what was said by Gummow J in *Momcilovic*, by reason of the construction required to be given to the Territory law, there will be greater likelihood of a concurrent operation of the two laws in question and, as a corollary, a narrower scope for inconsistency.[97] But, in the present case, no reading down is possible – the whole object of the ACT Marriage Act is to alter the definition of the status of marriage, so as to conflict with the objects and text of the Marriage Act and the FLA. Effect can only be given to that object by choosing not to apply the exhaustive statement of the law of the paramount legislature on those subject matters. The need to make such a choice is the antithesis of 'concurrent' operation and bespeaks antinomy.[98]

51. Even if a narrower test of inconsistency were used, it is clear that the ACT Marriage Act would, if valid, 'alter, impair or detract from' the Marriage Act and the FLA. The 'alter, impair or detract from' test of inconsistency is attracted where there is an intention that the Commonwealth law operate to the exclusion of the relevant State law.[99] In other words, whether a Commonwealth law and

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[94] *GPAO* at 581 [57].

[95] (1980) 27 SASR 321 at 329 (with Sangster J agreeing and Legoe J agreeing on this point); applied in *Wain v Maroondah City Council* [2000] VSC 540 at [18] per Smith J; *Ho v Greater Dandenong City Council* [2012] VSC 165 at [58] per Macaulay J.

[96] Cf the various statements of intention directed to the construction of a Commonwealth law collected by Gummow J in *Momcilovic* at 120-121 [270]-[271].

[97] See at 121 [272].

[98] *Momcilovic* at 142-143 per Hayne J (dissenting in the result).

[99] *New South Wales v The Commonwealth* (1983) 151 CLR 302 at 330 per Mason J. This test has been described both as an aspect of 'direct' inconsistency, but also 'indirect' inconsistency: compare *Dickson v*

State law can operate side by side without textual collision depends largely on the intention of the Commonwealth Parliament as perceived from the true construction of its law.[100] Here, the intention of the Commonwealth Parliament is to set out a single national set of rules governing the status of marriage. It is a complete statement of the law on that question of status. Any ACT law that purports to 'affect the operation of a law of the Commonwealth or to destroy or detract from a right thereby conferred' is inconsistent with or repugnant to the Commonwealth Acts, and is not saved by s 28 of the ACT Self-Government Act.[101]

10 52. For these reasons, s 28 of the ACT Self-Government Act has no different operation from s 109 of the Constitution at least in a case like the present.[102]

53. Alternatively, there operates at the level of the grant of legislative power conferred by s 22(1) an implied constraint upon the law making power of the ACT Legislative Assembly. An essentially similar principle to that which applies in the case of subordinate legislation is applicable here: that is, '[t]he true nature and purpose of the [grant of] power must be determined'.[103] For the reasons given by Gleeson CJ and Gummow J in *GPAO* at 581-582 [57], it is inherently unlikely that Parliament objectively intended that the Territory would have power under s 22(1) to meddle in the operation of a Commonwealth law 'of general application
20 throughout the nation' on subject matter requiring uniform national regulation. The words 'of the Territory' in s 22(1)[104] suggest otherwise. Absent such power, there is repugnancy between the ACT Marriage Act and the Marriage Act/FLA,[105] with the result that the ACT Marriage Act is void.

54. A final manifestation of inconsistency is that the ACT Marriage Act will reintroduce the need to use rules of private international law to determine the effect of an ACT 'same sex marriage' elsewhere in Australia. This will reintroduce the consequent uncertainty and complexity that the Marriage Act and FLA are intended to make unnecessary. Examples of these mischiefs could be multiplied.

The Queen (2010) 241 CLR 491 (***Dickson***) at 502 [13]-[14] per curiam with *Momcilovic* at 111 [242] per Gummow J (with Bell J agreeing on this point); see also 141 [341] per Hayne J (dissenting on s 109). So understood, the different tests are just different ways of asking whether there is a 'real conflict' between the laws: *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at 525 [42] per curiam.

[100] *Grace Bros Pty Ltd v Magistrates Court (NSW)* (1988) 84 ALR 492 at 502-503 per Gummow J. The 'intention' of the Commonwealth is determined objectively: *Momcilovic* at 120-121 [271], read with 85 [146](v), per Gummow J (with Bell J agreeing), 133-134 [315] per Hayne J (dissenting and with French CJ agreeing on this point), 189 [474] per Heydon J), 253 [638] per Crennan and Kiefel JJ; see also *Dickson* at 506-507 [32] per *Curiam*.

[101] See *R v Kearney; Ex parte Japanangka* (1984) 158 CLR 395 (***Japanangka***) at 418 per Brennan J (with Deane J agreeing) (emphasis added), discussing laws made under the *Northern Territory (Self-Government) Act 1978* (Cth) and *The Kakariki* at 630-631 per Dixon J.

[102] With State laws, there may be some doubt as to whether an inconsistent State law is required to be read down to avoid inconsistency in the manner required by s 28(1) of the Self-Government Act: the provisions of the State interpretation acts and the principle of construction referred to in *Monis v The Queen* (2013) 87 ALJR 340 at 404-405 [327], [328] and [332] per Crennan, Kiefel and Bell JJ are each directed to absence of legislative power, rather than a clash of concurrent powers: cf *Peters v The Attorney-General* (1988) 16 NSWLR 24 at 30 per Mahoney JA.

[103] *Plaintiff M47/2012 v Director General of Security* (2012) 86 ALJR 1372 at 1393 [54] per French CJ; *Williams v City of Melbourne* (1933) 49 CLR 142 at 155 per Dixon J.

[104] Seemingly a jurisdictional limitation operating by reference to the 'body politic' established by s 7 - see s 3 and note *Barcelo v Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391 at 423–424 per Dixon J.

[105] *Japanangka* at 418 per Brennan J.

PART VI LEGISLATIVE PROVISIONS

55. The Commonwealth will serve a volume of legislation containing the Marriage Act, the Matrimonial Causes Act, the ACT Marriage Act, and the relevant provisions of the FLA, together with the relevant extrinsic materials. A comparative table of the key provisions in issue is attached.

PART VII ORDERS SOUGHT

56. The Commonwealth contends that the questions reserved should be answered as follows: (1) Yes. (2) The ACT Marriage Act is wholly inconsistent with the Marriage Act. (3) Unnecessary to answer. (4) Yes. (5) Part 4 of the ACT Marriage Act is inconsistent with the FLA. (6) Unnecessary to answer. (7) There should be a declaration that the ACT Marriage Act is of no effect. (8) The Defendant should pay the costs of the Plaintiff.

PART VIII ESTIMATED HOURS

57. It is estimated that 3 hours will be required for the presentation of the oral argument of the plaintiff in chief and 1/2-3/4 hour in reply.

Dated: 13 November 2013

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Commonwealth v ACT (C13 of 2013) Plaintiff's comparative table of provisions

	Subject	*Marriage Act 1961* (Cth) / *Family Law Act 1975* (Cth)	*Marriage Equality (Same Sex) Act 2013* (ACT) and associated legislation
1.	Long title	An Act relating to marriage.	**An Act to provide for marriage equality by allowing for marriage between 2 adults of the same sex, and for other purposes**
2.	Definition of marriage	'the union of a man and woman to the exclusion of all others, voluntarily entered into for life' [MA, s 5(1)]	'the union of **two people of the same sex** to the exclusion of all others, voluntarily entered into for life' **but not including a marriage within the meaning of the Cth Act** [dictionary]
3.	Marriageable age	18 yrs [s 11] (16 yrs permitted with certain consents and authorisation of a judge [MA ss 13-16]	18 yrs (**no exceptions**) [s 7(1)(a) in conjunction with definition of 'adult' in *Legislation Act*]
4.	Prohibited relationships	(a) person – ancestor / descendant (b) brother-sister (whether whole or half-blood) [all adoptive relationships, deemed to be natural relationships] [MA, s 23(1)(b) & s 23(s)]	Same [s 7(1)(d) & (2)-(4)]
5.	Religious ceremony allowed?	Yes—'according to any form and ceremony recognised as sufficient for the purpose of the religious body' [MA, s 45(1)]	Yes—'according to any form recognised by the religious body' [s 13(1)].
6.	Marriage solemnised in presence of:	An authorised celebrant (s 41) (a person registered on register kept for purposes of the Act)	An authorised celebrant (s 8) (a person registered on **register kept** for purposes of the **2013 Act**)
7.	Notice of intention required?	Yes – 1 to 18 months before marriage [MA, s 42] - except if later religious ceremony under s113(5) (see 113(6)).	Same [ss 9(2), 19(1) and 19(2)(a)]
8.	Words to be used by parties if non-religious ceremony	*I call upon the persons here present to witness that I, AB* (or *CD) take thee, CD* (or *AB), to be my lawful wedded wife* (or *husband)* or words to that effect [MA, s 45(2)]	*I call on the people here to witness that I,* [name of party], *take you,* [name of other party], *to be my lawful wedded* [***spouse, husband, or wife***] (**whichever is preferred by the parties**) or words to that effect [s 13(2)]
9.	Words of explanation to be used by celebrant	*I am duly authorised by law to solemnise marriages according to law.* *Before you are joined in marriage in my presence and in the presence of these witnesses, I am to remind you of the solemn and binding nature of the relationship into which you are now about to enter.*	*I am authorised* ***under the Marriage Equality (Same Sex) Act 2013*** *to solemnise marriages* ***under that Act.*** *Before you are joined in marriage in my presence and the presence of these witnesses, I remind you of the solemn and binding nature of the relationship into which you are about to enter.* ***Under the law, this wedding recognises that you are*** *voluntarily entering into a*

	Subject	*Marriage Act 1961* (Cth) / *Family Law Act 1975* (Cth)	*Marriage Equality (Same Sex) Act 2013* (ACT) and associated legislation
		Marriage, according to law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life. or words to that effect. [required only in ceremonies other than those solemnised by a minister of religion of a recognised denomination: MA, s 46(1)]	***lawful and binding** union, for life, to the exclusion of all others.*
10.	Marriage void if:	(a) either of parties is already married (b) parties are in a prohibited relationship (c) marriage not valid because of defect in procedure (but subject to s 48(3)) (d) consent not real because of duress, fraud, mistake, incapacity (e) parties not of marriageable age [ss 23, 23B]	(a) person is already married [ss 7(1)(b) & 21(1)] (b) parties are in a prohibited relationship [ss 7(1)(d) & 21(1)] (c) marriage not valid because of defect in procedure **(similar but not identical to Cth Act's list of defects)** (d) consent not real because of duress, fraud, mistake, incapacity (e) party is **not an adult** [s 7(1)(a) & 21(1)(a)] (f) **the person can marry the proposed spouse under the Cth Act** [ss 7(1)(c) & 21(1)(a)
11.	Ground for dissolution	Marriage has broken down irretrievably; established only if the Court is satisfied that the parties separated and 'thereafter lived separately and apart for a continuous period of not less than 12 months immediately preceding the date of filing of the application for the divorce order' [FLA, s 48]	Marriage has broken down irretrievably; established only if **the Court** is satisfied that the parties have separated and 'have lived separately and apart for a continuous period of at least 12 months immediately before the application is made' [s 25] **But marriage also ends automatically if a party marries someone else under a Cth law or a law of another jurisdiction** [s 33]
12.	Decree of nullity available?	Yes—only on the ground the marriage is void [FLA, s 51]	Same [s 26]
13.	Dec. as to validity	Yes [FLA s 113]	Yes [s 23(2)(c))] but from the **Court.**
14.	Remarriage	Yes—once a divorce order has taken effect [FLA, s 59]	Yes—once a dissolution order has taken effect [s 32] **or the marriage has automatically ended [s 33]**
15.	Property adjustment	Ct may make such order as it considers appropriate altering the interests of the parties in property; Ct must be satisfied it is just and equitable to make the order, taking into account various stipulated matters, eg financial and non-financial contributions to it, etc ([FLA, s 79(1)(a), (2), (4)]	**On application by a party to a 'domestic relationship' (defined to include a marriage under the ACT Marriage Act), a court may make an order adjusting the interests in the property of either or both of the parties that seems just and equitable, having regard to various stipulated matters e.g. nature and duration of the relationship, financial or non-financial contributions to it, etc**

	Subject	*Marriage Act 1961* (Cth) / *Family Law Act 1975* (Cth)	*Marriage Equality (Same Sex) Act 2013* (ACT) and associated legislation
			[*Domestic Relationships Act 1994* (ACT), s 15] **NB however, it appears that the ACT marriage must have existed for 2 years** [*Domestic Relationships Act 1994* (ACT) s 12] **or satisfy the alternate requirements in s 12(2)**
16.	Maintenance	-- A party to a marriage is liable to maintain the other if that other party is unable to support himself or herself adequately whether by reason of having the care and control of a child of the marriage who is under 18, age or physical or mental incapacity for appropriate gainful employment or for any other reason [FLA, s 72(1)] --In proceedings with respect to the maintenance of a party to a marriage, the court may make such order as it considers proper for the provision of maintenance in accordance with Pt VIII; in making such an order the Ct must take into account only various stipulated matters [FLA ss 74(1), s 75]	**--No general right to maintenance** [*Domestic Relationships Act 1994* (ACT), s 18; but: **--Court may order one party to a domestic relationship [defined to include an 'ACT Marriage'] to pay to the other party maintenance if other party unable to support himself or herself adequately because of care and control of child of parties, or because earning capacity has been adversely affected by the circumstances of the relationship (plus other criteria)—Ct must have regard to various stipulated matters** [*Domestic Relationships Act 1994* (ACT), s 19]
17.	Other matrimonial causes	Other traditional matrimonial causes (proceedings for restitution of conjugal rights, jactitation of marriage or judicial separation) abolished (FLA, s 8)	Other traditional matrimonial causes (proceedings for restitution of conjugal rights, jactitation of marriage or judicial separation) not provided for.
18.	Offence of bigamy?	Yes [MA, s 94]	**No statutory offence—marriage is void**
19.	Irregular conduct by celebrant an offence?	Yes e.g. if celebrant proceeds whilst holding a reasonable belief there is an impediment to the marriage? [MA, s 100]	Yes e.g. if celebrant proceeds whilst the celebrant has reasonable grounds to believe that there is a legal impediment to the marriage or that the marriage would be void under s 21(1)(b) [s 41(4)]

Notes to comparative table

- Words in bold identify material differences between the Commonwealth Acts and the ACT Acts.
- For the purposes of items 11-16, 'Court' under the Commonwealth Act means the Family Court of Australia or the Family Court of Western Australia whereas under the ACT Marriage Act it means the ACT Supreme Court and under the *Domestic Relationships Act 1994* (ACT) it means the ACT Supreme Court or (subject to monetary limits as to jurisdiction) the ACT Magistrates Court.