



Date and Time: Monday, March 13, 2023 9:44:00AM EDT

Job Number: 192414559

Document (1)

1. [Articles: *Getting over it? The future of same-sex marriage in Australia, 2013 AJFL LEXIS 11*](#)

Client/Matter: -None-

Search Terms: taylor, luke

Search Type: Natural Language

Narrowed by:

Content Type

Secondary Materials

Narrowed by

Sources: Australian Journal of Family Law (AJFL)

[*1] Articles: Getting over it? The future of same-sex marriage in Australia

April 2013

Reporter

2013 AJFL LEXIS 11 *

Length: 21178 words

Author: Luke Taylor¹

Text

Introduction

Thankfully, the majority of Australians across all sectors agree -- from the cities, to the suburbs, to the bush and to the regions there is an overwhelming feeling that, if people want to get married, who cares whether they are straight or gay?

I say that, remembering a T-shirt I saw in a town I was visiting in rural Victoria during the election in 2010. It was a young guy, and he was wearing a T-shirt that said: 'Some dudes love dudes. Get over it.' I thought: 'You know what? Well said'.²

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In 2012, Australia witnessed a flurry of legislative activity at the Commonwealth and State levels regarding same-sex marriage. While two federal bills and one State bill were defeated, community calls for marriage equality grew noticeably louder. An online survey conducted in 2012 by the House of Representatives' Standing Committee on Social Policy and Legal Affairs (House Committee) found that 64% of respondents favoured the federal marriage equality bill introduced by Greens Party MP Adam Bandt and Independent Andrew Wilkie, while 60.5% of respondents supported a similar federal bill introduced by Labor Party MP Stephen Jones.³ Similarly, the Senate's Standing Committee on Legal and Constitutional Affairs (Senate Committee), in its report on the Marriage Equality

¹ BA / LLB (Hons) (UNSW), Solicitor. My thanks to the editor and anonymous reviewers who provided useful feedback on an earlier draft of this article.

² Commonwealth, Senate, *Parliamentary Debates*, 17 September 2012 (Senator Sarah Hanson-Young). On the arguments for and against same-sex marriage and a summary of the 'relationship recognition menu' available to Australian same-sex couples see A Sifris and P Gerber, 'Same-sex marriage in Australia: A battleground for equality' (2011) 25 *Australian Journal of Family Law* 97.

³ Commonwealth, House of Representatives, Standing Committee on Social Policy and Legal Affairs, Advisory Report: Marriage Equality Amendment Bill 2012 and Marriage Amendment Bill 2012 (June 2012) at32, Table1. It is to be noted that the survey 'was not a statistically valid, random poll' since it involved self-selection by respondents and was anonymous. Checks to eliminate multiple responses from individuals were conducted: at32 [3.69]-[3.70].

Amendment Bill 2010 (Cth), found that approximately 59% of respondents supported that Bill.⁴ The Senate Committee observed:⁵

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In the committee's opinion, this appears to demonstrate a call by the Australian community for the acceptance of marriage equality, and related issues of sexual orientation and gender diversity, as essential components of true social justice and equality for all. In addition to increasing public support within Australia, the committee is also mindful of the increasing number of overseas jurisdictions which recognise or are considering the recognition of marriage equality for same-sex couples.

Despite this level of public support for same-sex marriage, in September 2012, the Bill introduced by Stephen Jones MP, and another Bill introduced into the Senate earlier that month by Labor Senators, were defeated.⁶ Soon after, the House of Assembly in Tasmania voted in favour of the Same-Sex Marriage Bill 2012 (Tas), though it was narrowly defeated in the Legislative Council. Other States and the Australian Capital Territory are, however, moving ahead with plans to legislate for same-sex marriage. Four States (South Australia, Victoria, New South Wales and Western Australia) currently have marriage equality bills before their parliaments. Enactment of marriage equality laws appears more **[*5]** likely in NSW and South Australia with both sides of Parliament in the two States granting their members conscience votes on the issue; the Legislative Assembly of the ACT has also declared that it is working with the Tasmanian Government to develop same-sex marriage legislation.⁷

International developments in 2013 may also have an impact on Australian politicians' positions on same-sex marriage. On 5 February 2013, the British House of Commons, in a move signalling the imminence of marriage equality in England and Wales, voted in favour (400 to 175) of the Marriage (Same Sex Couples) Bill. On 17 April 2013, the New Zealand Parliament passed the Marriage (Definition of Marriage) Amendment Bill. On 23 April 2013, the French National Assembly passed (321 to 225) legislation providing for marriage and adoption for same-sex couples.⁸ Critically, in March 2013, the United States Supreme Court heard two same-sex marriage cases: *Hollingsworth v Perry*,⁹ which deals with the question of whether the Fourteenth Amendment of the United States Constitution prohibits California from defining marriage in that State as the union of a man and a woman;¹⁰ and *United States v Windsor*, **[*6]**¹¹ which involves the question of whether the Defense of Marriage Act 1996,¹² which defines marriage as being between a man and a woman for the purposes of federal law, infringes the Fifth

⁴ Commonwealth, Senate, Standing Committee on Legal and Constitutional Affairs, Marriage Equality Amendment Bill 2010 (June 2012) (Senate Report), [4.24]-[4.25]. The number of submissions received (46,000) by the Committee on that Bill was the highest ever received by a Senate committee: at[4.24].

⁵ *Ibid*, at [4.26].

⁶ The Marriage Equality Bill 2009 (Cth), also introduced by the Greens, was voted down in the Senate. An earlier Bill, the Marriage (Relationships Equality) Amendment Bill 2008 (Cth), lapsed at the conclusion of the 42nd Parliament.

⁷ The Bills introduced by Senator Hanson-Young and MPs Bandt and Wilkie also remain before federal Parliament, although the chances of either being passed appear at best slim in the current federal political climate, with Opposition Leader Tony Abbott denying Liberal Party members a conscience vote on the issue. For similar reasons, it appears unlikely that the Bills before the West Australian Parliament and the Victorian Parliament will be passed in 2013.

⁸ B Crumley, 'France Legalizes Gay Marriage Despite Vocal and Angry Opposition', *Time*, 23 April 2013 <<http://world.time.com/2013/04/23/france-legalizes-same-sex-marriage/>> (accessed 6 May 2013).

⁹ Appeal from *Perry v Brown*, 671 F3D 1052 (9th Cir. 2012).

¹⁰ See ArtI, s7.5 of the California Constitution, inserted by the constitutional amendment known as Proposition 8 following the judgment of the California Supreme Court in *In re Marriage Cases*, 183 P3d 384 (2008).

¹¹ Appeal from *Windsor v United States*, 699 F3d169 (2nd Cir. 2012).

¹² 110 Stat 2149, 1 USC §7 and 28 USC §1738C.

Amendment's guarantee of equal protection. The Supreme Court is expected to deliver its decision around the middle of 2013.

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In light of these developments, this paper provides an overview of proposed same-sex marriage laws in Australia; it then considers the constitutionality of State and Territory same-sex marriage laws, and the power of the Commonwealth to enact same-sex marriage laws. The paper begins with a discussion of the relevant provisions of the Marriage Act 1961 (Cth) (Marriage Act) and amendments made to that Act by the former Howard Government in 2004 which inserted the current definition of 'marriage' into that Act. Consideration of the Marriage Act is important because the specificity of its definition of 'marriage' may enable or preclude State-based same-sex marriage. The next part of the paper considers proposed same-sex marriage laws that are before (or have been rejected), in five States, as well as the four federal Bills referred to above. The paper then addresses the constitutionality of State and Territory same-sex marriage laws, with particular consideration of the potential inconsistency of such regimes with the Marriage Act, contrary to s 109 of the Constitution. It is argued that, on balance, the Marriage Act does not demonstrate a legislative intention to preclude State or Territory **[*8]** same-sex marriage; nor, at an operational level, is there likely to be any necessary conflict between the Marriage Act and State same-sex marriage laws of the type currently before Australian State Parliaments. The final part of the paper examines the power of the Commonwealth to legislate in respect of same-sex marriage; it concludes that the Commonwealth's constitutional power to legislate with respect to marriage does extend to the enactment of laws for (or against) same-sex marriage.

The Marriage Act

Section 51(xxi) of the Australian Constitution confers power upon the Commonwealth to make laws with respect to 'marriage'. Section 51(xxii) confers power with respect to 'divorce and matrimonial causes'. However, until the passage of the Marriage Act, marriage was governed by the laws of the States and Territories, pursuant to the concurrent nature of the powers conferred on the Commonwealth by s 51 of the Constitution. The Marriage Act was passed to harmonise State and Territory marriage laws.¹³ At the time of its passage, the Marriage Act did not define the term 'marriage', although s 46 of the Act included (and continues to include) a form of words to be used (or words to that **[*9]** effect) by authorised celebrants performing marriages, which includes the following words: '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'.

In 2004, the Liberal-National Coalition, led by former Prime Minister John Howard, passed the Marriage Amendment Act 2004 (Cth) (Marriage Amendment Act) which introduced the following definition into s 5(1) of the Marriage Act:¹⁴

'marriage' means the union of a **[*10]** man and a woman to the exclusion of all others, voluntarily entered into for life.

Former Attorney-General Phillip Ruddock, in the Second Reading Speech accompanying the bill, stated that 'it is time for those words [in s 46 to] form the formal definition of marriage in the Marriage Act' and that the amendment would 'remove any lingering concerns people may have that the legal definition of marriage may become eroded by time'.¹⁵ That the Government's real concern was that the definition of marriage might become eroded, or enlarged, by including homosexual relationships, is apparent from the Attorney-General's statement that '[a] related concern . . . is that there are now some countries that permit same-sex couples to marry'.¹⁶ To forestall the possibility that

¹³ See, eg, Commonwealth Parliamentary Library, *Background Note: Same-sex marriage*, 10 February 2012 at 2.

¹⁴ Arguably, the Marriage Act already confined marriage to persons of the opposite sex: G Lindell, 'Constitutional Issues Regarding Same-Sex Marriage: A Comparative Survey -- North America and Australasia' (2008) 30 *Sydney Law Review* 27 at 42.

¹⁵ Commonwealth, House of Representatives, *Parliamentary Debates*, 27 May 2004 (Phillip Ruddock MP) at 29356.

same-sex marriages conducted in, at that time, the Netherlands, Belgium or parts of Canada, might, under principles of private international law,¹⁷ require recognition in Australia, the Marriage Amendment Act also inserted s 88EA, which provides:

A union solemnised in a foreign country between:

- (a) a man and another man; or
- (b) a woman and another woman;

must not be recognised as a marriage in Australia.

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The Attorney-General explained that this amendment 'will make it absolutely clear that Australia will not recognise same-sex marriages entered into under the laws of another country, whatever country that may be'.¹⁸

Importantly, though, the Marriage Amendment Act did not insert, and no subsequent amending Act has inserted, a provision stipulating that same-sex marriages conducted pursuant to the laws of an Australian State or Territory are contrary to the Marriage Act and must not be recognised even within that State or Territory. It is within this legislative lacuna that a State or Territory regime providing for same-sex marriage will operate, if passed. Tasmanian Premier Lara Giddings has expressed the view that '[t]he Marriage Act 1961, by definition, is specifically about marriage between a man and a woman, thus leaving room for a state to legislate for same-sex marriage'.¹⁹ However, as marriage is an area within the jurisdictional purview of the Commonwealth by reason of s 51(xxi) of **[*12]** the Constitution, State and Territory laws dealing with marriage²⁰ are open to federal challenge on the basis of s 109 of the Constitution, which is concerned with inconsistency between State and federal laws.

Commonwealth, State and Territory Same-Sex Marriage Bills

The Federal Bills

In early September 2012, the Australian Parliament had before it four separate bills seeking to amend the Marriage Act to allow same-sex marriage. The first of these, the Marriage Equality Amendment **[*13]** Bill 2010 (Cth) (Hanson-Young Bill), was introduced to the Senate on 29 September 2010 by Senator Sarah Hanson-Young of the Greens Party. On 8 February 2012, the Hanson-Young Bill was referred to the Senate Committee. Subsequently, on 13 February 2012, two separate bills were introduced to the House of Representatives: the Marriage Equality Amendment Bill 2012 (Cth), introduced by MPs Adam Bandt and Andrew Wilkie (Bandt/Wilkie Bill) and the Marriage Amendment Bill 2012 (Cth), introduced by MP Stephen Jones (Jones Bill). These Bills were referred to the House Committee on 16 February 2012. The Senate Committee issued its report on the Hanson-Young Bill in June 2012, recommending that the Bill be passed, with minor amendments (Recommendation 4).²¹ The House Committee also issued its report on the Bandt/Wilkie Bill and the Jones Bill in June 2012, which recommended amendments to the wording of the Bills, but refrained, in accordance with the terms of reference, from making a recommendation as

¹⁶ Ibid.

¹⁷ See *Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages*.

¹⁸ Ruddock, above n 14.

¹⁹ L Giddings, 'Marriage Equality Speech', 30 August 2012 at <http://www.premier.tas.gov.au/media_room/media_releases/marriage_equality_speech> (accessed 6 May 2013). See also G Williams, 'States could legalise same-sex marriage', *Sydney Morning Herald*, 28 September 2010.

²⁰ Prima facie, it is open to the States and Territories to legislate with respect to the heads of power set out in s51 of the Constitution, but only to the extent that such laws are not inconsistent with laws of the Commonwealth: see ss106-110 of the Constitution.

²¹ Senate Report, above n 3 at [4.44].

to whether either Bill should be passed. On 10 September 2012, four Labor Senators introduced the Marriage Amendment Bill (No 2) (Cth) (Labor Senators' Bill).²² In essence, each of the Federal [*14] Bills would have amended the definition of 'marriage' in s 5(1) of the Marriage Act and removed s 88EA. Appendix 1 summarises the Federal Bills' proposed amendments.

On 19 September 2012, the House of Representatives voted 98 to 42 against the Jones Bill. The next day, the Labor Senators' Bill was defeated in the Senate by a vote of 41 to 26. In each case, Liberal MPs and Senators were prevented from exercising a conscience vote by Opposition Leader Tony Abbott and were thus required to vote in accordance with Liberal Party policy, which rejects same-sex marriage.²³ It is to be observed, however, that members of the governing (minority) Australian Labor Party, including Prime Minister Julia Gillard and Treasurer Wayne Swan, also voted against the Bills, in spite of the Labor Party amending its platform in November 2011 to endorse same-sex [*15] marriage.²⁴ For the time being, and until the Liberal Party allows its members a conscience vote on this issue, it appears that the remaining two bills, the Hanson-Young Bill and the Bandt/Wilkie Bill, have little prospect of enactment.²⁵

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The State Bills²⁶

South Australia was the first of the States in 2012 to have a marriage equality bill introduced, with Labor and the Greens introducing the Marriage Equality Bill 2012 (SA) (South Australian Bill) to the Legislative Council on 15 February 2012.²⁷ The South Australian Parliament is scheduled to debate the South Australian Bill in 2013. Importantly, both the Labor and Liberal leaders at the time granted their members a conscience vote on the issue.²⁸

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²² Collectively, the Hanson-Young Bill, the Bandt/Wilkie Bill, the Jones Bill and the Labor Senators' Bill are referred to as the Federal Bills.

²³ S Cullen, 'Lower House votes down same-sex marriage bill', *ABC News*, 19 September 2012 <<http://www.abc.net.au/news/2012-09-19/same-sex-marriage-bill-voted-down/4270016>> (accessed 6 May 2013). Following the defeat of the Labor Senators' Bill and the Jones Bill, Liberal MP Warren Entsch indicated that he is considering introducing a federal civil partnerships bill: D Harrison and J Ireland, 'Senate rejects gay marriage bill', *Sydney Morning Herald*, 20 September 2012. On the merits (or lack thereof) of civil partnership and civil unions regimes see, eg, Sifris and Gerber, above n 1 at 102-05, 117-19.

²⁴ B Packham, 'ALP platform changes to support gay marriage', *The Australian*, 3 December 2011. A motion to allow MPs a conscience vote was passed at the same time by a vote of 208 to 144: 'Labor votes in favour of gay marriage', *The Age*, 3 December 2011.

²⁵ Despite the defeat of proposed federal marriage equality legislation, other positive steps were taken in 2012 towards full equality at the federal level, with the release of an Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 (Cth) which would for the first time at the federal level prohibit discrimination on the basis of sexual orientation: cl 17(1)(q).

²⁶ Collectively, the Draft NSW Bill, South Australian Bill, Tasmanian Bill, Victorian Bill and West Australian Bill are referred to as the State Bills.

²⁷ M Schliebs, 'South Australia takes centre stage in gay-marriage debate', *The Australian*, 29 September 2012. A previous bill introduced by the Greens, the Marriage Equality Bill 2011 (SA), lapsed due to prorogation.

²⁸ R Croome, 'Guy Barnett's surprise about-face on same-sex marriage', *Tasmanian Times*, 11 August 2012. At present, same-sex couples in South Australia are not able to register their relationship, though they can enter into a domestic partnership agreement pursuant to the Domestic Partners Property Act 1996 (SA). It should also be noted that in late 2012, the Civil Partnerships Bill 2012 (SA) was introduced in South Australia. It would allow same- and opposite-sex couples (one of whom is a resident of South Australia: cl 3(c)) to register their relationship: cl 4. A civil partnership would terminate upon the marriage of one of the parties: cl 10(b). This arguably reinforces the inferior status of civil partnerships as compared with marriage. Civil partnerships under corresponding laws may be recognised if they are prescribed in regulations: cl 30.

Next cab off the rank was Victoria where, on 6 June 2012, the Greens introduced the Marriage Equality Bill 2012 (Vic) (Victorian Bill) into the Legislative Council. In accordance with the Charter of Human Rights and Responsibilities Act 2006 (Vic), a statement of the Victorian Bill's compatibility with the Charter was tabled, which is notable for its references to principles of equality.²⁹ In the Second Reading of the Victorian Bill, it was asserted that the Victorian Bill is constitutionally permissible, or at least arguably so, by reason of the amendments to the Marriage Act made by the Howard Government in 2004. The Victorian Liberal Premier has refused to grant party members a conscience vote, which is likely to see the bill rejected given Coalition control over both Houses of Parliament.³⁰

[*18]

Perhaps foreseeing the likelihood of defeat for same-sex marriage at the federal level, in August 2012, Labor and the Greens introduced the Same-Sex Marriage Bill 2012 (Tas) (Tasmanian Bill) to the Legislative Assembly.³¹ Two days later, the Tasmanian Bill was passed by the Assembly -- the first time in Australia that legislation providing for same-sex marriage has been passed by the lower house of any of the States or federal Parliament.³²

However, the Legislative Council rejected the Tasmanian **[*19]** Bill by an 8 to 6 majority,³³ with Liberal parliamentarians being denied a conscience vote,³⁴ although it is not clear whether this would have made a difference as a number of the majority stated that their reasons for rejecting the Bill were not related to an intrinsic objection to same-sex marriage.³⁵

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In New South Wales, three members of a cross-party working group each gave official notice of the proposed State Marriage Equality Bill on 20 November 2012,³⁶ and a Consultation Draft of the State Marriage Equality Bill 2013 (NSW) (Draft NSW Bill) has been released. The Liberal Premier and the Nationals and Labor leaders have each

²⁹ Victoria, Legislative Council, *Parliamentary Debates*, 6 June 2012 (Sue Pennicuik MLC) at 2893.

³⁰ F Tomazin, 'No conscience vote on gay marriage: Baillieu', *The Age*, 23 September 2012. In the absence of a same-sex marriage regime, Victorian same-sex couples are able to register their relationship in accordance with the Relationships Act 2008 (Vic), ss 5 and 6. See Sifris and Gerber, above n 1 at 96, 100-05, for a discussion of registration schemes and civil unions in Australia, and the Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 (Cth).

³¹ On 27 August 2012, the Legislative Council passed the Surrogacy Bill 2011 (Tas), which allows same-sex and de-facto couples to access surrogacy services: 'Tasmania passes gay, de facto surrogacy bill', *ABC News*, 30 August 2012 < <http://www.abc.net.au/news/2012-08-30/tasmania-passes-gay-surrogacy-bill/4231856>> (accessed 6 May 2013).

³² Same-sex marriage bills were also introduced by the Greens in 2005, 2008 and 2010: Same-Sex Marriage Bill 2005 (Tas); Same-Sex Marriage Bill 2008 (Tas); Same-Sex Marriage Bill 2010 (Tas).

³³ In the meantime, Tasmanian same-sex (and opposite-sex) couples, along with adults in a 'caring relationship', may apply to have their relationship registered in accordance with the Relationships Act 2003 (Tas): s11(2). Proof of registration is proof of the relationship: s4(2). Same-sex couples who have entered into a legal marriage in an overseas jurisdiction are taken to be parties to a significant relationship registered under the Act: s65A. The practical effect of registration is that couples are automatically considered to be in a de facto relationship under federal law: Acts Interpretation Act 1901 (Cth), s2E.

³⁴ 'Libs rule out conscience vote on gay marriage', *ABC News*, 8 August 2012 < <http://www.abc.net.au/news/2012-08-07/lib-to-vote-against-same-sex-marriage/4182722>> (accessed 6 May 2013).

³⁵ For example, Rosemary Armitage MLC questioned whether 'a second-class marriage bill, not relevant anywhere but Tasmania, and possibly not constitutionally legal, [is] the best or equal?' James Wilkinson MLC stated: 'I believe the weight of the authority suggests that what is hoped to be done by this bill will be found to be wanting as a result of commonwealth powers under s51(xxi) of the Constitution and would be found to be inconsistent.' Tasmania, Legislative Council, *Parliamentary Debates*, 27 September 2012.

³⁶ Same-sex marriage bills were previously introduced in NSW in 2005 and 2006 but each time lapsed on prorogation.

granted members of their respective parties a conscience vote,³⁷ greatly increasing the likelihood of a same-sex marriage bill being enacted.

The last of the States to introduce same-sex marriage legislation in 2012 was Western Australia where, on 29 November 2012, the Greens introduced [*21] the Marriage Equality Bill 2012 (West Australian Bill). It is not yet clear whether the Liberal Premier will follow his New South Wales counterpart in allowing Liberal Party parliamentarians a conscience vote. However, the Premier has previously stated he does not support gay marriage³⁸ and views it as a federal matter and a development that Australia will not see in the near future.³⁹

Finally, it is be noted that in August 2012, the ACT Labor Government publicly announced that it was working with the Tasmanian Government 'to develop same-sex marriage legislation that recognises both jurisdictions' proud and progressive history in developing laws to give [*22] same-sex couples equal marriage rights'.⁴⁰ The statement came a day after the enactment of the Civil Unions Act 2012 (ACT),⁴¹ which only applies to same-sex couples.⁴² A same-sex marriage bill has not yet been presented to the Legislative Assembly and it is not clear what impact the defeat of the Tasmanian Bill will have on the development and promulgation of such a bill in the ACT.

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Key provisions of the State Bills

The South Australian Bill states that 'same-sex marriage means the lawful union of 2 people of the same sex to the exclusion of all others, voluntarily entered into for life'.⁴³ The definitions in the Tasmanian Bill, the Victorian and West Australian Bills and the Draft NSW Bill, are substantively the same.⁴⁴ Each Bill, with the exception of the Draft NSW Bill, provides that its Pt 2, which in each case deals with eligibility to enter into a same-sex marriage,

³⁷ 'Gay marriage hopes rise in NSW as leaders agree to conscience vote', *The Australian*, 19 September 2012. New South Wales currently allows same-sex couples to register their relationship, in accordance with the eligibility criteria in s 5 of the Relationships Register Act 2010 (NSW).

³⁸ A DeCeglie, 'Premier Colin Barnett makes web debut with PerthNow', *PerthNow*, 26 July 2011 <<http://www.perthnow.com.au/news/western-australia/premier-colin-barnett-makes-web-debut-with-perthnow/story-e6frg13u-1226102264020>> (accessed 6 May 2013).

³⁹ L Wilson and M Denholm, 'Gay marriage bid exposes Labor's division', *The Australian*, 6 August 2012.

⁴⁰ ACT Government, 'Progressive governments join forces to develop same-sex marriage laws' (Press release, 23 August 2012).

⁴¹ An earlier iteration of the Civil Unions Act 2012 (ACT) was disallowed in 2006 pursuant to powers then conferred by s35(2) of the Australian Capital Territory (Self-Government) Act 1988 (Cth): Australian Capital Territory (Self-Government) Act 1988 (Cth) -- Disallowance: Civil Unions Act 2006 (ACT). Section 35 of the Australian Capital Territory (Self-Government) Act 1988 (Cth) was repealed in 2011 by the Territories Self-Government Legislation Amendment (Disallowance and Amendment of Laws) Act 2011 (Cth) (Sch1).

⁴² Section 7(c) of the Civil Unions Act 2012 (ACT) provides that a person can only enter into a civil union if 'the person cannot marry the person's proposed civil union partner under the Marriage Act'. The Civil Unions Act 2012 (ACT) restricts the entry into a civil union to couples, one or both of whom live in the ACT: s7(e). Section 5 provides that a 'civil union is different to a marriage but is to be treated for all purposes under territory law in the same way as a marriage'. In this respect, one of the key differences between the former civil partnership regime and the current civil union regime is that same-sex couples in the ACT are now able to engage in a ceremony with a celebrant, rather than simply going through an administrative process. The civil union ends, inter alia, upon the marriage of either party: s11(1)(b). Presumably, this is intended to preclude inconsistency between the Marriage Act and the Civil Unions Act 2012 (ACT). The Act also provides for the making of regulations recognising civil unions entered into in other jurisdictions. However, it prevents the recognition of civil unions entered into by people who may marry each other under the Marriage Act or an external law if the marriage can be recognised under that Act: s27(d). Thus, heterosexual civil unions are not to be recognised under the Civil Unions Act 2012 (ACT).

⁴³ South Australian Bill, cl 3.

⁴⁴ Draft NSW Bill, cl 3; Tasmanian Bill, cl 3; Victorian Bill, cl 3; West Australian Bill, cl3.

applies notwithstanding any rule of private international law in relation to same-sex marriages.⁴⁵ Echoing s 11 of the Marriage Act, all the State Bills set the minimum age for same-sex marriage at 18.⁴⁶ Unlike the Marriage Act,⁴⁷ none of the Bills contain provisions enabling persons between the ages of 16 and 18 to seek a judicial order enabling that person to marry.

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It is notable that there is no requirement in any of the Bills (except the Draft NSW Bill) that either or both of the parties to a same-sex marriage in the relevant States are citizens or residents of that State or Australia.⁴⁸ This is in step with jurisdictions such as Ontario, Canada, which does not impose a residency or citizenship requirement on parties to (opposite-sex or same-sex) marriages.⁴⁹ However, in the absence of equivalent legislation in other States, Territories or at the Commonwealth level, a same-sex marriage performed in, for example, South Australia would only be recognised as such in that State (and other States or Territories which pass equivalent legislation providing for the recognition of inter-State same-sex marriages).⁵⁰

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Each Bill requires that a same-sex marriage is solemnised by (or, in South Australia and Western Australia, in the presence of) an authorised celebrant.⁵¹ The Bills also recognise that celebrants who are registered pursuant to the terms of the Marriage Act may not wish to solemnise same-sex marriages and accordingly require persons wishing to become same-sex marriage celebrants to register with the Registrar.⁵² The South Australian, Victorian and West Australian Bills also provide that nothing in each of their respective Pt 2 (in the wording of the South Australian Bill) 'imposes an obligation on an authorised celebrant, being a minister of religion, to solemnise any same-sex marriage'.⁵³ All of the State Bills provide that an authorised celebrant who is not a minister of religion must state certain words (or words to like effect) to the parties regarding the lifelong and exclusive nature of marriage.⁵⁴

⁴⁵ South Australian Bill, cl 4; Tasmanian Bill, cl 5(1); Victorian Bill, cl 4; West Australian Bill, cl4.

⁴⁶ Draft NSW Bill, cl 5 and definition of 'adult' in cl3; South Australian Bill, cl 5; Tasmanian Bill, cl6; West Australian Bill, cl5; Victorian Bill, cl5 and definition of 'adult' in cl3.

⁴⁷ Marriage Act, ss 12-17.

⁴⁸ The Draft NSW Bill provides that 'at least one of the parties must ordinarily reside in New South Wales': cl5(c). It is arguable that a residency requirement infringes s117 of the *Constitution*: G Lindell, 'State legislative power to enact same-sex marriage legislation, and the effect of the Marriage Act 1961 (Cth) as amended by the Marriage Amendment Act 2004 (Cth)' (2006) 9(2) *Constitutional Law and Policy Review* 25, 27.

⁴⁹ Marriage Act, RSO 1990, c M3.

⁵⁰ For example, the Draft NSW Bill, cl44-47.

⁵¹ Draft NSW Bill, cl 6; South Australian Bill, cl 8; Tasmanian Bill, cl 8(1); Victorian Bill, cl8; West Australian Bill, cl8.

⁵² Draft NSW Bill, Pt 5; South Australian Bill, Pt 4; Tasmanian Bill, Pt 7; Victorian Bill, Pt4; West Australian Bill, Pt3. The Draft NSW Bill, Tasmanian Bill and South Australian Bill also require that the Registrar must be satisfied that the applicant is a fit and proper person to be a same-sex marriage celebrant, and set out a list of criteria about which the Registrar must be satisfied in respect of that requirement: Draft NSW Bill, cl35; South Australian Bill, cl49; Tasmanian Bill, cl79.

⁵³ South Australian Bill, cl 9; Victorian Bill, cl 9; West Australian Bill, cl 9. Clause7 of the Draft NSW Bill is headed 'Minister of religion not bound to solemnise same-sex marriage', however, the clause in its present form only provides that a minister of religion may impose longer notice requirements and requirements additional to those in the Act, and that such ministers are not required to make available places for solemnising a same-sex marriage. By reason of s35(2) of the Interpretation Act 1987 (NSW), which provides that headings of provisions are not part of the Act or instrument in question, it is questionable whether ministers of religion would in fact be able to refuse to solemnise a same-sex marriage, as opposed to imposing additional conditions and refusing the use of 'a place'. The Tasmanian Bill also provided authorised celebrants (not just ministers of religion) with the power to set additional requirements to those in the Act: cl8(2).

⁵⁴ Draft NSW Bill, cl 11; South Australian Bill, cl 14; Tasmanian Bill, cl 13; Victorian Bill, cl15; West Australian Bill, cl15. Cf Marriage Act, s46.

However, if the ceremony is performed by a minister of religion, 'it may be solemnised according to any form and ceremony recognised as sufficient for the purpose'.⁵⁵

[*26]

Each Bill also prescribes circumstances in which a same-sex marriage is void.⁵⁶ Most interesting in this regard is the Draft NSW Bill, which alone provides that a same-sex marriage is void if 'either of the parties subsequently marries some other person under the law of the Commonwealth (including a marriage in another jurisdiction that is recognised by the Commonwealth as a valid marriage)'.⁵⁷ Presumably, this is intended to reduce the scope for a finding of invalidity based on inconsistency with the Marriage Act.

There are important differences between each of the Bills with respect to dissolution and nullity of same-sex marriages. Clause 27(1) of the Tasmanian Bill, if passed, would have provided that proceedings under Pt 3 may be instituted 'if any party to the proceedings is an Australian citizen and is ordinarily resident in Tasmania at the relevant date'. **[*27]** Thus, while non-residents would have been able to take advantage of the Bill, if enacted, to enter into a same-sex marriage, they would not have been able to seek dissolution of the marriage without residing in Tasmania,⁵⁸ presumably to discourage forum shopping. Part 4 of the Tasmanian Bill also would have made provision for adjustment of property interests upon the dissolution of a same-sex marriage.⁵⁹ The Draft NSW Bill is similar to the Tasmanian Bill in that proceedings for a dissolution order, decree of nullity or declaration as to validity can only be instituted if any party to the proceedings is an Australian citizen and ordinarily resident in NSW on the date of the application.⁶⁰ However, the Draft NSW Bill does not include provisions concerning property adjustment.⁶¹ The South Australian Bill provides that proceedings for a decree of dissolution may only be instituted if the same-sex marriage took place in South Australia.⁶² However, proceedings seeking orders other than a decree of dissolution may be instituted if either party to a same-sex marriage is an Australian citizen, is ordinarily resident in Australia, *or is present in Australia*, at the relevant date. **[*28]**⁶³ This appears to envisage the making of declarations of validity in respect of same-sex marriages performed in other jurisdictions (though s 88EA of the Marriage Act would seem to preclude such recognition of overseas same-sex marriages). Perhaps more importantly, it also appears to mean that, unlike Tasmania's proposed system, parties from interstate or overseas

⁵⁵ Draft NSW Bill, cl 10(1); South Australian Bill, cl 13(1); Tasmanian Bill, cl 14(1); Victorian Bill, cl14(1); West Australian Bill, cl14(1).

⁵⁶ Draft NSW Bill, cl 19; South Australian Bill, cl 6; Tasmanian Bill, cl 7; Victorian Bill, cl6; West Australian Bill, cl6.

⁵⁷ Draft NSW Bill, cl 19.

⁵⁸ Such a situation has arisen in the United States, where couples from States that do not allow or recognise same-sex marriage have married in States that do, and then found themselves unable to divorce in their home State for lack of recognition, and in the State of marriage because of residency requirements: see E Landau, 'Denied divorce, some same-sex couples "wed-locked"', *CNN*, 7 June 2012 < <http://edition.cnn.com/2012/06/07/living/same-sex-divorce-marriage>> (accessed 6 May 2013); Jesse Green, 'From "I Do" to "I'm Done"', *New York Magazine*, 24 February 2013 < <http://nymag.com/news/features/gay-divorce-2013-3/>> (accessed 6 May 2013).

⁵⁹ Clause 42(2) of the Tasmanian Bill would have allowed an application for property adjustment in the Tasmanian courts irrespective of whether relief was sought under any other Act, for example, the property adjustment provisions concerning de facto couples in PtVIIIAB of the Family Law Act 1975 (Cth). However, the Bill also would have enabled (without requiring) a court to adjourn the hearing of an application for property adjustment if proceedings in relation to that property were commenced in the Family Court of Australia: cl47(1).

⁶⁰ Draft NSW Bill, cl 20.

⁶¹ Presumably, therefore, it is intended that separating same-sex couples seek property adjustment orders under the de facto provisions of the Family Law Act 1975 (Cth) (assuming that such persons would not be considered 'legally married' for the purposes of s4AA of that Act).

⁶² South Australian Bill, cl 19(2).

⁶³ South Australian Bill, cl 19(3) (emphasis added).

would be able to marry *and divorce* in South Australia without being residents of that State.⁶⁴ The Victorian Bill simply provides that one or both parties to a same-sex marriage under Pt 2 may apply to the Supreme Court for a dissolution order, a nullity declaration or a declaration as to the validity of the marriage.⁶⁵ Thus, parties to a Victorian same-sex marriage, whether they are residents of that State or not, would be able to approach the Supreme Court for a dissolution order or declarations.⁶⁶ The situation in Western Australia is somewhat different because of that State's separate Family Court. Accordingly, dissolution is dealt with in the West Australian Bill by proposed amendments to the Family Court Act 1997 (WA) which would create a dissolution regime akin to that provided for in the Victorian Bill. [*29]⁶⁷ However, applicants in Western Australia would be able to seek property adjustment orders in the Family Court of Western Australia.

[*30]

Only two of the State Bills expressly mention recognition of same-sex marriages conducted in other jurisdictions. The Draft NSW Bill is by far the most expansive, providing for the recognition of same-sex marriages conducted 'in another State or Territory or in a country other than Australia' if under the relevant local law 'the marriage was, at the time it was solemnised, recognised as valid', subject to certain exceptions that largely mirror the grounds upon which the Bill provides that a same-sex marriage in New South Wales is void.⁶⁸ The Tasmanian Bill takes a narrower approach, providing only for the recognition of same-sex marriages under a 'corresponding law', which is defined as the 'law of another Australian jurisdiction that substantially corresponds to the provisions of this Act or is prescribed as a corresponding law'.⁶⁹ As noted above, the South Australian Bill appears to envisage the recognition of other Australian same-sex marriages through the making of a declaration of validity.⁷⁰

[*31]

The Constitutionality of State and Territory Same-Sex Marriage Laws

This part of the paper addresses the extent to which laws such as the State Bills, if passed, are open to challenge on the basis of inconsistency with the Marriage Act, by reason of s 109 of the Constitution. It first provides an overview of the current judicial treatment of s 109. This is followed by analysis of the arguments for and against the proposition that State-based same-sex marriage regimes are inconsistent with the Marriage Act.

Section 109 of the Constitution

Section 109 of the Constitution provides:

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

At the outset, it is to be observed that s 109 applies only in respect of laws of the States.⁷¹ In the case of a federal law that evinces an intention to 'make exhaustive or exclusive provision on the subject with which it deals . . . it is to

⁶⁴ The South Australian Bill also does not include provisions concerning property adjustment orders, suggesting that applications under the de facto provisions of the Family Law Act 1975 (Cth) would be necessary.

⁶⁵ Victorian Bill, cl 23. Clause 24 imposes additional requirements for applications for dissolution orders.

⁶⁶ The situation in relation to property adjustment appears to be the same as that which would presumably apply in South Australia and NSW.

⁶⁷ West Australian Bill, cl 44.

⁶⁸ Draft NSW Bill, cl 44 and 45. On its face, this would seem to conflict with s88EA of the Marriage Act.

⁶⁹ Tasmanian Bill, cl 75.

⁷⁰ South Australian Bill, cl 19(2).

⁷¹ See *Northern Territory v GPAO* (1999) 196 CLR 553 at 580; 161 ALR 318; [1999] HCA 8; BC9900714 per Gleeson CJ and Gummow J.

be expected also that this field will be covered with respect to the territories'.⁷² In such a case, it has been said that 'one would be slow to attribute to the Parliament the intention that a law [*32] with respect to . . . marriage would segregate the population by a criterion of residence in a territory'.⁷³ The governing statutes of the Territories are also relevant to this question.⁷⁴

In the recent case of *Momcilovic v The Queen (Momcilovic)*,⁷⁵ Gummow J emphasised that s 109 refers to 'inconsistent' laws; the term 'repugnance', as found in s 22 of the Federal Council of Australasia Act 1885 (Imp), did not find its way into s 109.⁷⁶ While initial jurisprudence on s 109 viewed inconsistency as akin to repugnancy, in the sense of applying only to 'contradictory duties or contradictory rights',⁷⁷ it has since been recognised that 'the position of the Parliament of the Commonwealth as "the paramount legislature" and "essential concepts of federalism" required that fuller scope be given to the term "inconsistent" in s 109'.⁷⁸ In this respect, there is a measure of similarity between inconsistency in Australian constitutional law and the doctrine of pre-emption in United States constitutional law.⁷⁹

[*33]

It is common for discussions of s 109 to proceed by way of a distinction between direct and indirect inconsistency. The former descriptor encapsulates situations involving the imposition of conflicting duties by different legislatures,⁸⁰ and/or the imposition by one legislative body of restrictions on the exercise of rights or privileges conferred by another legislative body.⁸¹ In *Victoria v Commonwealth (The Kakariki)*,⁸² Dixon J adopted a test which looked to whether the impugned State law would 'alter, impair or detract from a law of the Commonwealth Parliament'. This picked up on the earlier formulation 'fetter, control, or interfere with' that was put forth in *D'Emden v Pedder*.⁸³ As

⁷² *Ibid*, at 581-82.

⁷³ *Ibid*.

⁷⁴ See 'State and Territory Same-Sex Marriage Bills' below.

⁷⁵ (2011) 245 CLR 1; 280 ALR 221; [2011] HCA 34; BC201106881.

⁷⁶ *Ibid*, at [212]-[215].

⁷⁷ *Attorney General (Qld) v Attorney General (Cth)* (1915) 20 CLR 148 at 178 per Higgins J.

⁷⁸ *Momcilovic* (2011) 245 CLR 1; 280 ALR 221; [2011] HCA 34; BC201106881 at 103 [216] per Gummow J, referring to Sir O Dixon, 'Marshal and the Australian Constitution', (1955) 29 *Australian Law Journal* 420 at 427.

⁷⁹ See *Crosby v National Foreign Trade Council* (1913) 226 US 426 at 435; 57 L Ed 284; 33 S Ct 174, cited in *Momcilovic* (2011) 245 CLR 1; 280 ALR 221; [2011] HCA 34; BC201106881 at [219] per Gummow J.

⁸⁰ An example of conflicting laws of the type where simultaneous obedience was impossible is seen in *R v Licensing Court of Brisbane; Ex parte Daniell* (1920) 28 CLR 23; 26 ALR 105; BC2000051 where a Queensland law which directed that a local referendum was to occur on a particular day conflicted with a Commonwealth law that expressly forbade a State referendum on that day.

⁸¹ For example, in *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466; [1926] ALR 214; BC2600029, a State law which required employers to pay full award wages for a 44 hour week was found to be inconsistent with a Commonwealth law which authorised employers to require employees to work a 48 hour week. The High Court found that the State law infringed upon the (federally-created) right of employers to require employees to work a 48 hour week: at 477-79 per Knox CJ and Gavan Duffy J, 490 per Isaacs J, 522 per Rich J.

⁸² (1937) 58 CLR 618 at 630; [1938] ALR 97; (1937) 11 ALJR 344a; BC3800001. See also *Telstra Corporation Limited v Worthing* (1999) 197 CLR 61; 161 ALR 489; [1999] HCA 12; BC9901017.

⁸³ (1904) 1 CLR 91 at 111; 10 ALR (CN) 30 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129; 26 ALR 337; BC2000025.

Gummow J noted in *Momcilovic*, in cases of this sort, 'it is the comparison between the texts of the two laws as properly construed which is the focus of attention'.⁸⁴

[*34]

Indirect inconsistency, on the other hand, encapsulates a situation where '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'.⁸⁵ The classic formulation is that given by Dixon J in *Ex parte McLean*:⁸⁶

The inconsistency does not lie in the mere coexistence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount Legislature to express **[*35]** by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter.

In this respect, the level of detail in the Commonwealth law may indicate that it is intended to operate to the exclusion of other laws with respect to that subject matter.⁸⁷ The nomenclature 'cover the field' has been used to describe parliamentary intention in this regard, although as far back as *Stock Motor Ploughs Ltd v Forsyth*⁸⁸ Evatt J cautioned against its use:⁸⁹

It is no more than a cliché for expressing the fact that, by reason of the subject matter dealt with, and the method of dealing with it, and the nature and multiplicity of the regulations prescribed, the Federal authority has adopted a plan or scheme which will be hindered and obstructed if any additional regulations whatever are prescribed upon the subject by any other authority; if, in other words, the subject is either touched or trenched upon by State authority.

[*36]

In this vein, Gummow J in *Momcilovic* cautioned more broadly against dogmatic adherence to the direct/indirect distinction, and said that the metaphor of 'covering the field' 'has only served to confuse what is a matter of statutory interpretation'.⁹⁰ His Honour also noted that '[s]uch usage tends to obscure the task always at hand where reliance is placed upon s 109, namely to apply that provision only after careful analysis of the particular laws in question to determine their true construction'.⁹¹ Similarly, Hayne J observed that such distinctions must not 'mask the central importance of deciding whether there is conflict by diverting attention to the attempt to classify what species of conflict is encountered'.⁹² Justices Crennan and Kiefel in their joint judgment made similar observations.⁹³ Indeed,

⁸⁴ (2011) 245 CLR 1; 280 ALR 221; [2011] HCA 34; BC201106881 at[243].

⁸⁵ *Ibid*, at [244]. See also *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128 at 137 per Dixon J; [1932] ALR 408; (1932) 6 ALJR 197; BC3200019.

⁸⁶ (1930) 43 CLR 472 at 483 per Dixon J; [1930] ALR 377; (1930) 4 ALJR 103; BC3000007; *Momcilovic* (2011) 245 CLR 1; 280 ALR 221; [2011] HCA 34; BC201106881 at [103] per French CJ, [325]-[326] per Hayne J, [637] per Crennan and Kiefel JJ.

⁸⁷ See *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565; [1955] ALR 82; (1954) 28 ALJR 585; BC5400800; *New South Wales v Commonwealth (Work Choices)* (2006) 229 CLR 1; 231 ALR 1; [2006] HCA 52; BC200609129.

⁸⁸ (1932) 48 CLR 128; [1932] ALR 408; (1932) 6 ALJR 197; BC3200019.

⁸⁹ *Ibid*, at CLR 147 per Dixon J; *Momcilovic* (2011) 245 CLR 1; 280 ALR 221; [2011] HCA 34; BC201106881 at [264] per Gummow J.

⁹⁰ *Ibid*, at [263].

⁹¹ *Ibid*, at [245].

⁹² *Ibid*, at [318].

what comes through very clearly in *Momcilovic* is the paramount importance of statutory construction in determining whether there is an inconsistency between federal and state laws for the purposes of s 109 of the *Constitution*:⁹⁴

The first task in any application of s 109 is to construe the federal law in question in accordance with that body of doctrine. Only [*37] when that has been done is it appropriate to consider whether upon its proper construction the State law is 'inconsistent' with the federal law.

This invites attention to matters of legislative intention and statutory purpose.⁹⁵

In *Zheng v Cai*, the High Court stated:⁹⁶

[*38]

It has been said that to attribute an intention to the legislature is to apply something of a fiction. However, what is involved here is not the attribution of a collective mental state to legislators. That would be a misleading use of metaphor. Rather, judicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws.

Thus, while statements of intention by legislators may be relevant, particularly where such statements form part of the legislation that falls to be construed, even an unequivocal statement that a law is or is not intended to be exclusive is not determinative,⁹⁷ since the term 'intention' in this context 'must not be understood as inviting attention to the wishes or hopes of those who promoted the legislation in question'.⁹⁸ Rather, as six members of the High Court observed in *Lacey v Attorney-General (Qld) (Lacey)*,⁹⁹ ascertainment of legislative intention 'involve[s] the identification of a statutory purpose, which may appear from an express statement in the relevant statute, by inference from its terms and by appropriate reference [*39] to extrinsic materials . . . it may be identified by reference to common law and statutory rules of construction'.¹⁰⁰

[*40]

Potential inconsistency: The Marriage Act and State/Territory Same-Sex Marriage Laws

⁹³ Ibid, at [630].

⁹⁴ Ibid, at [258] per Gummow J. See also at[111] per French CJ; [315]-[316], [322] per Hayne J.

⁹⁵ Section 15AA of the Acts Interpretation Act 1901 (Cth) is relevant to such an inquiry. It requires that '[i]n interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation'.

⁹⁶ (2009) 239 CLR 446; (2009) 261 ALR 481; [2009] HCA 52; BC200911042 at[28] per French CJ, Gummow, Crennan, Kiefel and Bell JJ. See also *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573; 275 ALR 646; [2011] HCA 10; BC201101794 at [43] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; *Momcilovic* (2011) 245 CLR 1; 280 ALR 221; [2011] HCA 34; BC201106881 at [111] per French CJ, [315] per Hayne J.

⁹⁷ See *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508; 280 ALR 206; [2011] HCA 33; BC201106844 at [50]. However, that is not to say that the Commonwealth cannot declare by the terms of a law that it intends to govern a subject matter to the exclusion of the States and Territories: see, eg, *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 467; 128 ALR 1; 69 ALJR 309; BC9506415.

⁹⁸ *Momcilovic* (2011) 245 CLR 1; 280 ALR 221; [2011] HCA 34; BC201106881 at [111] per French CJ, [315] per Hayne J. See also *Dickson v The Queen* (2010) 241 CLR 491; 270 ALR 1; [2010] HCA 30; BC201006930.

⁹⁹ (2011) 242 CLR 573; 275 ALR 646; 85 ALJR 508; [2011] HCA 10; BC201101794. See also *Momcilovic* (2011) 245 CLR 1; 280 ALR 221; [2011] HCA 34; BC201106881 at [341] per Hayne J: "'Intention' is a conclusion reached about the proper construction of the law in question and nothing more'.

¹⁰⁰ (2011) 242 CLR 573; 275 ALR 646; [2011] HCA 10; BC201101794 at[44] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

The preceding discussion demonstrates that the primary task in determining whether a State law is invalid by reason of inconsistency with federal law is to construe 'the nature and purpose'¹⁰¹ of the relevant federal laws. At an anterior level, though, it is of course necessary that the relevant State and federal laws (or parts thereof) are permissible exercises of power. Accordingly, the validity of the definition of marriage in the Marriage Act and the power of the States and Territories to pass same-sex marriage laws are briefly considered, before turning to the substantive question of inconsistency.¹⁰²

[*41]

The Marriage Act

There is surprisingly scant authority on the meaning and scope of the marriage power in s 51(xxi) of the Constitution. However, there would seem to be little doubt that the definition of 'marriage' in s 5(1) of the Marriage Act is a valid exercise of the Commonwealth's power to make laws with respect to marriage. In *Attorney-General (Vic) v Commonwealth (Marriage Act Case)*,¹⁰³ McTiernan J stated that:¹⁰⁴

The term 'Marriage' only outlines the power granted by par (xxi) of s 51: it does not particularize its contents, but nothing diverse in kind from what is connoted by the term marriage falls within the scope of the power. The words 'with respect to' are words of 'indication' not of 'enlargement'. The term marriage bears its own limitations and Parliament cannot enlarge its meaning. In the context -- the Constitution -- the term 'marriage' should receive its full grammatical and ordinary sense: plainly **[*42]** in this context it means only monogamous marriage. In my view, the term in par (xxi) refers to marriage as a social transaction: but as the term marks the outer limits of the power conferred by par (xxi) its meaning is not imprecise. In my view, the term cannot be extended further than to embrace uniting in marriage and the status of marriage.

The reference to 'nothing diverse in kind from what is connoted by the term marriage' does not provide a complete answer to what it is that the term actually connotes; in McTiernan J's view it clearly involves monogamy, but other essential features are not made clear. Further guidance was given by Brennan J in *R v L*¹⁰⁵:

In *Hyde v Hyde and Woodmansee*,¹⁰⁶ Lord Penzance defined marriage as 'the voluntary union for life of one man and one woman, to the exclusion of all others' and that definition has been followed in this country and by this Court.¹⁰⁷ It is the definition adopted by the *Family Law Act*, s 43(a) of which requires a court exercising jurisdiction under that Act to have regard to 'the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily **[*43]** entered into for life'. Marriage is an institution which not only creates the status of husband and wife but also, without further or specific agreement, creates certain mutual rights and obligations owed to and by the respective spouses.¹⁰⁸

¹⁰¹ *Commercial Radio Coffs Harbour Ltd v Fuller* (1986) 161 CLR 47 at 49; 66 ALR 217; 60 ALJR 542; BC8601442 per Gibbs CJ and Brennan J; *Momcilovic* (2011) 245 CLR 1 at 115; 280 ALR 221; [2011] HCA 34; BC201106881 at [259] per Gummow J.

¹⁰² It must be borne in mind that the question in this instance is not whether a Commonwealth law (in this case the Marriage Act) has removed State power in an area but rather whether it has, to use the American term, pre-empted State laws dealing with that subject matter.

¹⁰³ (1962) 107 CLR 529; [1962] ALR 673; (1962) 36 ALJR 104; BC6200270.

¹⁰⁴ *Ibid*, at CLR 549.

¹⁰⁵ (1991) 174 CLR 379 at 392; 103 ALR 577; 66 ALJR 36; BC9102611.

¹⁰⁶ (1866) LR 1 P 130 at 133.

¹⁰⁷ *Calverley v Green* (1984) 155 CLR 242 at 259-60; 56 ALR 483; 59 ALJR 111; BC8400459; *Khan v Khan* [1963] VR 203 at 204; [1963] ALR 412; (1962) 3 FLR 496.

¹⁰⁸ W Eversley, *Eversley's Law of Domestic Relations*, 6th ed, Sweet & Maxwell, London, 1951, pp 2-3.

Thus, whether or not the term marriage is *confined* to the *Hyde* formulation, it is apparent that that definition is *within* the scope of the constitutional term 'marriage'. This raises the issue of whether it is permissible for the Commonwealth to prescribe a statutory definition of marriage (or another term such as 'telephonic, and other like services'¹⁰⁹) that is potentially narrower than the outer **[*44]** limits of the constitutional meaning of that word. For example, it is an open question as to whether the term 'marriage' in s 51(xxi), being, in the words of Windeyer J,¹¹⁰ a 'plenary' power, provides the Commonwealth with power to legislate in favour of same-sex marriages, an issue that is considered in further detail below. If so, is it nonetheless legitimate for the Commonwealth to decree that at the federal level, marriage has a narrower meaning that excludes or prevents certain classes of people from availing themselves of that institution? The answer is clearly yes, for at least two related reasons. Firstly, it is well established that the Commonwealth has no obligation to exercise its powers to their full extent.¹¹¹ Secondly, there is no constitutional prohibition on the Commonwealth passing discriminatory legislation.¹¹²

[*45]

State and Territory Same-Sex Marriage Bills

There is little question that the States possess plenary power to make laws deemed necessary or beneficial by their Parliaments. State legislative power in each of the Australian States is vested in their respective Parliaments by the Constitutions of each State, with the exception of South Australia and Tasmania, which continue to rely on the original imperial grant of power in s 14 of the Australian Constitutions Act 1850 (Imp).¹¹³ Sections 106 and 107 of the Australian Constitution confirm that the States continue to have legislative powers over their own affairs.¹¹⁴ Thus, in *Clayton v Heffron*,¹¹⁵ Dixon CJ opined, in respect of the Constitution Act 1902 (NSW):¹¹⁶

[*46]

The first paragraph confers a complete and unrestricted power to make laws with reference to New South Wales. There is doubtless a territorial limitation implied in the reference to New South Wales but there is no limitation of subject matter.

On this basis, and in view of the fact that there does not appear to be any constitutional implication that impedes the *prima facie* power of the States to legislate for same-sex marriage,¹¹⁷ State legislative power 'is obviously wide enough to support the enactment of laws to recognise same-sex marriage'.¹¹⁸

¹⁰⁹ *Constitution*, s 51(v).

¹¹⁰ *Marriage Act Case* (1962) 107 CLR 529 at 577.

¹¹¹ Lindell, above n 13 at 42; Lindell, above n 47 at 30.

¹¹² See *Deputy Federal Commissioner of Taxation (NSW) v Moran* (1939) 61 CLR 735 at 764; [1939] ALR 357; (1939) 13 ALJR 205; BC3900014 per Latham CJ; *Kruger v Commonwealth* (1997) 190 CLR 1; C Saunders, 'Concepts of Equality in the Constitution' in G Lindell (ed), *Future Directions in Australian Constitutional Law*, Federation Press, Sydney, 1994, p 209.

¹¹³ See G Carney, *The Constitutional Systems of the States and Territories*, Cambridge University Press, Port Melbourne, Australia, 2006, p 104. New South Wales, Western Australia and Queensland each use a variation of the formula providing power to make laws for the 'peace, welfare and good government' of the State: Constitution Act 1902 (NSW) s 5; Constitution of Queensland 2001, s 8 and Constitution Act 1867 (Qld) s 2; Constitution Act 1889 (WA), s 2. Section 16 of Victoria's Constitution Act 1975 (Vic) confers power to make laws 'in and for Victoria in all cases whatsoever'. The ACT and the Northern Territory are each granted legislative power by the Commonwealth, in accordance with s 122 of the Constitution: Australian Capital Territory (Self-Government) Act 1988 (Cth); Northern Territory (Self-Government) Act 1978 (Cth).

¹¹⁴ Subject to ss 52, 90, 109, 114 and 115 of the Constitution. In addition, subs2(2) of the Australia Act 1986 (Cth) provides that 'the legislative powers of the Parliament of each State include all legislative powers that the Parliament of the United Kingdom might have exercised before the commencement of this Act for the peace, order and good government of that State'.

¹¹⁵ (1960) 105 CLR 214; [1961] ALR 368; (1960) 34 ALJR 378; BC6000820.

¹¹⁶ *Ibid*, at CLR 249-50.

As for the Territories, each of the ACT, Northern Territory and Norfolk Island are vested with legislative power 'to make laws for the peace, order and good government of the Territory'.¹¹⁹ Furthermore, the Commonwealth's previous ability to override Territory legislation was removed in 2011 by the Territories Self-Government Legislation Amendment (Disallowance and Amendment of Laws) Act 2011 (Cth) (Schedule 1). With respect to the ACT, laws that are inconsistent with federal law have no effect, though 'the criterion for inconsistency -- incapacity of concurrent operation -- is narrower than that which applies under s 109'¹²⁰ [*47] because such laws 'shall be taken to be consistent with such a law to the extent that it is capable of operating concurrently with that law'.

[*48]

Is State-based same-sex marriage inconsistent with the Marriage Act?

Section 6 of the Marriage Act provides:

This 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, but a marriage solemnised after the commencement of this Act is not invalid by reason of a failure to comply with the requirements of such a law.

The Marriage Act thus clearly contemplates State and Territory exercises of power in the field of marriage registration, strongly indicating that the legislative intention underpinning the Marriage Act is not to regulate the field of marriage so comprehensively that *any* State or Territory regulation touching upon that area is necessarily invalid by reason of inconsistency. This, however, simply indicates where the boundaries do not lie; it does not tell us whether State and Territory laws respecting marriage that go beyond matters pertaining to marriage registration are inconsistent with the Marriage Act. This directs attention once again to the subject matter of the Marriage Act and whether its purpose is to regulate and 'protect' only opposite-sex marriage or whether 'the [*49] intention underlying the Commonwealth law was that it should operate to the exclusion of any State law having that effect',¹²¹ including laws providing for same-sex marriage.

As noted above, while the Howard Government did not, at least in the documents accompanying the Marriage Amendment Bill 2004 (Cth), expressly state its intention to exclude same-sex couples from the institution of marriage in Australia, it is a conclusion that can readily be drawn from the Attorney-General's Second Reading Speech.¹²² However, as noted above, the High Court has recently stressed that statements of intention by

¹¹⁷ Constitutional implications which may limit State power, for example, the implied freedom of political communication, do not appear to have any direct bearing on this question. In respect of the application of the implied freedom to the States see *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 142; 108 ALR 577; 66 ALJR 695; BC9202654 per Mason CJ, CLR 168-69 per Deane and Toohey JJ, CLR 216-17 per Gaudron J; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 75; 108 ALR 681; 66 ALJR 658; BC9202684 per Deane and Toohey JJ; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566; 145 ALR 96; 71 ALJR 818; BC9702860.

¹¹⁸ Lindell, above n 47 at 26. See also G Williams, 'Advice regarding the proposed Same-Sex Marriage Act' (2006) 9(2) *Constitutional Law and Policy Review* 21 at 22.

¹¹⁹ Carney, above n 112, p 113-14. Section 23 of the Australian Capital Territory (Self-Government) Act 1988 (Cth) stipulates certain matters over which the ACT has no power, including the acquisition of property otherwise than on just terms, and euthanasia. None of the matters listed infringe the Territory's power to make laws with respect to same-sex marriage.

¹²⁰ *Northern Territory v GPAO* (1999) 196 CLR 553 at 583; 161 ALR 318; [1999] HCA 8; BC9900714 per Gleeson CJ and Gummow J.

¹²¹ *New South Wales v Commonwealth* (1983) 151 CLR 302 at 330; 45 ALR 579; 57 ALJR 268; BC8300060 per Mason J; *APLA Ltd v Legal Services Commissioner of New South Wales* (2005) 224 CLR 322; 219 ALR 403; [2005] HCA 44; BC200506315 at [485] per Callinan J.

¹²² Ruddock, above n 14. The relevance of context when interpreting legislation was made clear by the High Court in *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; 141 ALR 618; 71 ALJR 312; BC9700046 per Brennan CJ, Dawson, Toohey and Gummow JJ.

legislators are merely relevant, not determinative; ¹²³ furthermore, 'the task of statutory interpretation must begin with a consideration of the text itself'. ¹²⁴ At an objective level, there can be no question that certain provisions in the Marriage Act evince a clear intention to exclude same-sex couples from marriage *under federal law*. Whether that extends to a legislative intention to prevent same-sex couples from marrying under State or Territory law is less clear. It is possible that the High Court might view the Marriage Act as imposing 'some additional restrictions on **[*50]** the exercise of that right'; ¹²⁵ namely, that the right to marry applies only to persons in opposite-sex relationships, the effect of which 'is to render [same-sex marriages] unlawful in the sense of not authorising the recognition of such unions as marriages'. ¹²⁶ In the language of direct and indirect inconsistency, this would amount to a finding of direct inconsistency between the Marriage Act and a State or Territory same-sex marriage regime because federal Parliament has designedly excluded such relationships from the institution of marriage, meaning that State same-sex marriage regimes would directly interfere with and detract from that intention. It is on this basis that Lindell has expressed the view that measures such as those proposed in the State Bills are likely to be found inconsistent with the Marriage Act. ¹²⁷ Alternatively, the High Court might be more inclined to base a finding of (indirect) inconsistency on the legislative intention, evident from the terms of the Marriage Act, to exclusively regulate the field of marriage, which would in turn require a finding that that 'field' encompasses all forms of marriage, not only heterosexual marriage. The latter approach **[*51]** may also raise questions concerning the Commonwealth's power to legislate with respect to same-sex marriage, a topic that is considered below.

[*52]

From the perspective of federal harmony, it is also arguable that the intention underpinning the Marriage Act was to create an exclusive uniform law applicable across Australia to the exclusion of parallel State and Territory regimes. ¹²⁸ In the *Marriage Act Case*, Jacobs J observed that '[d]ifferences between the States in the laws governing the status and the relationship of married persons could be socially divisive to the harm of the new community which was being created'. ¹²⁹

However, as Williams has pointed out, the subjective intention of legislators to exclude same-sex couples from *federal* recognition does not amount to an **[*53]** unmistakable legislative intention, evident from the terms of the Marriage Act, to preclude or prevent *State-based* same-sex marriage regimes. ¹³⁰ Indeed, it is possible to view the specificity of the Marriage Amendment Act as providing textual support for a finding that the objective intention of Parliament in defining 'marriage' was not to prevent the States and Territories from enacting same-sex marriage schemes, insofar as those schemes do not conflict with federal law at an operational or practical level. ¹³¹ It could,

¹²³ See above n 96.

¹²⁴ *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27; 260 ALR 1; [2009] HCA 41; BC200908882 at [47] and cases cited therein; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252; 115 ALD 493; [2010] HCA 23; BC201004220 at [33] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ: 'it is erroneous to look at extrinsic materials before exhausting the application of the ordinary rules of construction'. Furthermore, s 15AA of the Acts Interpretation Act 1901 (Cth) 'is not a warrant for redrafting legislation nearer to an assumed desire of the legislature': *R v L* (1994) 49 FCR 534 at 538; (1994) 122 ALR 464; BC9406077.

¹²⁵ *Momcilovic* (2011) 245 CLR 1; 280 ALR 221; [2011] HCA 34; BC201106881 at [240] per Gummow J.

¹²⁶ Lindell, above n 47 at 31.

¹²⁷ *Ibid*, at 30.

¹²⁸ Though it is to be doubted that the Commonwealth could, pursuant to the marriage power, legislate against State civil union regimes: Lindell, above n13 at44.

¹²⁹ *Russell v Russell (Family Law Act Case)* (1976) 134 CLR 495 at 546; 9 ALR 103; 50 ALJR 594; BC7600041. By the same token, it can be argued that federal same-sex marriage would create an even more unified system.

¹³⁰ Williams, above n 117 at 23.

for instance, be inferred that if the intention of Federal Parliament was to exclude State and Territory same-sex marriage, it would have made this point clear, although this interpretative approach must be exercised with caution.¹³² Furthermore, in relation to the uniformity point, it can be argued that State and Territory same-sex marriage would not fracture the system created by the Marriage Act because the class of persons able to avail themselves of its provisions would not change; rather, a distinct, parallel, regime would be created.¹³³

[*54]

As the Court in *Lacey* stressed, assessing legislative intention requires consideration of common law and statutory principles of interpretation. Accordingly, one might expect that the principle of legality, being the 'presumption that, in the absence of unmistakable and unambiguous language, the legislature has not intended to interfere with basic rights, freedoms or immunities',¹³⁴ is of relevance. However, it is clear that Australian common law does not recognise as fundamental the right of marriage,¹³⁵ although it has been said that 'marriage is so fundamental and so universal an institution of society that it is not easy to set limits to a power to make laws with respect to it'.¹³⁶ This is to be contrasted with the position in the United States.¹³⁷ In any event, even if such a right were located, it is by no means clear that it would extend to same-sex marriage. One might then think that the principle of equality could be applied, as it was in Canada,¹³⁸ to ground an argument that excluding same-sex couples from the

¹³¹ Although a rigidly literal approach to statutory interpretation is to be avoided: see *Mills v Meeking* (1990) 169 CLR 214 at 235; 91 ALR 16; 64 ALJR 190; BC9002951 per Dawson J. By the same token, courts should be cautious in attempting to discern overarching purposes in complex pieces of legislation and should pay 'primary attention to the text of the particular section or sections in issue': *Tran v Commonwealth* (2010) 187 FCR 54; 116 ALD 29; [2010] FCAFC 80; BC201004938 at [68] per Rares J.

¹³² See especially *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 213; 108 ALR 577; 66 ALJR 695; BC9202654 per Gaudron J.

¹³³ The opposite conclusion -- that such parallel regimes would lead to even greater fragmentation of Australian family law -- has been posited by Goldworthy as a reason in favour of a finding that the Commonwealth has power to legislate with respect to same-sex marriage: G Goldworthy, 'Interpreting the *Constitution* in its Second Century' (2000) 24 *Melbourne University Law Review* 677 at 700.

¹³⁴ *Lacey* (2011) 242 CLR 573; 275 ALR 646; [2011] HCA 10; BC201101794 at [43] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ, quoting *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384; 153 ALR 490; [1998] HCA 28; BC9801389 n 56 per McHugh, Gummow, Kirby and Hayne JJ; *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 295 ALR 197; [2013] HCA 3; BC201300754 at [42]-[46] per French CJ, [145]-[152] per Heydon J. See also *Coco v The Queen* (1994) 179 CLR 427 at 437; 120 ALR 415; 68 ALJR 401; BC9404609 per Mason CJ, Brennan, Gaudron and McHugh JJ.

¹³⁵ See, eg, the list of common law presumptions that, in the absence of express contrary intent, are assumed by courts not to have been abrogated, in JJ Spigelman, 'The Common Law Bill of Rights', *McPherson Lectures*, 10 March 2008 at 23-24.

¹³⁶ Marriage Act Case (1962) 107 CLR 529 at 576; [1962] ALR 673; (1962) 36 ALJR 104; BC6200270 per Windeyer J.

¹³⁷ The United States Supreme Court has referred to a right or freedom to marry in a number of cases beginning with *Loving v Virginia*, (1967) 388 US 1 at 12; 18 L Ed 2d 1010; 87 S Ct 1817: 'The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.' Perhaps most important in the context of same-sex marriage is the Supreme Court's statement in *Lawrence v Texas* (2003) 539 US 558 at 574; 156 L Ed 2d 508; 123 S Ct 2472 that 'our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, and education. . . . Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.' See further Joseph A Pull, 'Questioning the Fundamental Right to Marry' (2006) 90 *Marquette Law Review* 21.

¹³⁸ In *Halpern v Canada (Attorney General)* (2003) 65 OR (3d) 161, the Ontario Supreme Court found that the common law definition of marriage as between one man and one woman offended the equality guarantee in s 15(1) of the *Canadian Charter Rights and Freedoms*: at 9-10 per Smith ACJSC, 22, 26 per Blair RSJ, 99-112 per LaForme J. Subsequently, in *Reference Re Same-Sex Marriage* 2004 SCC 79; [2004] 3 SCR 698, the Supreme Court of Canada found that the common law definition of marriage is not frozen as at the date of the Constitution Act 1867 (UK), 30 & 31 Vict c 3, and that s 91(26) of the Constitution,

institution of marriage constitutes discrimination based on personal characteristics. However, despite the efforts of Deane and Toohey JJ in *Leeth* [*55] v *Commonwealth*¹³⁹ to unearth and apply an implied constitutional guarantee of equality,¹⁴⁰ the High Court has rejected the existence of such a doctrine in relation to individuals.¹⁴¹ Indeed, in the *Marriage Act Case*, Windeyer J observed that 'generally, the Constitution does not give the national Parliament powers over fundamental private rights'.¹⁴² International law is also of little assistance in this regard. The High Court may have regard to principles of international law when a statute is ambiguous,¹⁴³ however 'the right of men and women of marriageable age to marry and to found a family'¹⁴⁴ does not presently extend to same-sex marriage.¹⁴⁵ While the European Court of Human Rights in *Schalk & Kopf v Austria*¹⁴⁶ recently clarified that the words 'men and women' in art 12 of the *European Convention on Human Rights* do not require an interpretation that the right 'must in all circumstances be limited to marriage between two persons of the opposite sex',¹⁴⁷ the Court held that it is ultimately a matter of national law as to whether same-sex couples should be granted the right to marry.¹⁴⁸

[*56]

Even without the assistance of the legality principle, it is suggested that the better view is that the Marriage Act does not disclose an unambiguous intention to exclude same-sex couples from the institution of marriage

read expansively, does not preclude same-sex marriage. It was found that this is consistent with s 15(1) of the Charter concerning equality.

¹³⁹ (1992) 174 CLR 455; 107 ALR 672; 66 ALJR 529; BC9202676.

¹⁴⁰ *Ibid*, at 484-85. See further J Kirk, 'Constitutional Implications (II): Doctrines of Equality and Democracy' (2001) 25(1) *Melbourne University Law Review* 24.

¹⁴¹ In *Deputy Federal Commissioner of Taxation (NSW) v Moran* (1939) 61 CLR 735 at 764; [1939] ALR 357; (1939) 13 ALJR 205; BC3900014, Latham CJ stated that '[t]here is no general prohibition in the Constitution of some vague thing called "discrimination"'. See also Dawson J in *Kruger v Commonwealth* (1997) 190 CLR 1 at 63-68; 146 ALR 126; 71 ALJR 991; BC9703253 (McHugh J agreeing at CLR 142). Justice Gaudron adhered to her view in *Leeth* that a limited guarantee of equality exists before the courts, 'not an immunity from discriminatory laws': at 112-13. See also at 44-45 per Brennan J (arguably confined to equality in respect of s 122 of the *Constitution*), 153-55 per Gummow J. See also Saunders, above n 111.

¹⁴² (1962) 107 CLR 529 at 582; [1962] ALR 673; (1962) 36 ALJR 104; BC6200270.

¹⁴³ *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287; 39 ALD 206; 128 ALR 353; BC9506417 per Mason CJ and Deane J; *Dietrich v The Queen* (1992) 177 CLR 292 at 348-49; 109 ALR 385; 67 ALJR 1; BC9202663 per Dawson J; *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42; 107 ALR 1; 66 ALJR 408; BC9202681 per Brennan J (with whom Mason CJ and McHugh J agreed). See also D Kinley, 'The Implications of Executive Ratification of Treaties for Democratic Governance' in P Alston and M Chiam (eds), *Treaty-Making and Australia: Globalisation versus Sovereignty?* Federation Press, Sydney, 1995, p 52.

¹⁴⁴ *International Covenant on Civil and Political Rights*, GA Res 2200A (XXI), 16 December 1966 (entered into force 23 March 1976). See also *European Convention on Human Rights*, Rome, 4.XI. 1950, art 12: 'Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right'.

¹⁴⁵ In *General Comment No 19: Protection of the family, the right to marriage and equality of the spouses* (Art 23), 27 July 1990, the United Nations High Commissioner for Human Rights avoided specific reference to same-sex marriage, noting instead that 'the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition'. The European Court of Human Rights in *Sheffield & Horsham v United Kingdom* 31-32/1997/815-816/1018-1019, 30 July 1998, and the Human Rights Committee in *Joslin v New Zealand*, Communication No 902/1999, 17 July 2002, CCPR/C/75/D/902/199 each rejected a claim that the respondent states' refusals to allow same-sex marriage infringed the right to marry and found a family, based largely on the gender specific language in the relevant provisions.

¹⁴⁶ Application no 30141/04, 24 June 2010.

¹⁴⁷ *Ibid*, at [61].

¹⁴⁸ *Ibid*, at [58]-[61].

altogether. The definition of marriage makes it abundantly clear that this was the (subjective) intention at the federal level, however, the specificity of that definition also provides clear textual support for a finding that the Marriage Act is intended only to regulate opposite-sex marriage at the federal level; that is, it is not intended to regulate or exclude same-sex marriage at the State and Territory level. This conclusion is by no means the end of the matter, though, since inconsistency can also arise at an operational level, meaning it is necessary to turn to the question of 'coexistence'.¹⁴⁹ Paraphrasing Hayne J in *Momcilovic*,¹⁵⁰ is this a situation where, like *McWaters v Day*,¹⁵¹ certain State provisions (such as those in the State Bills) 'stand in addition to, and not in substitution for' other potentially conflicting federal provisions (such as the Marriage Act)?

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The resolution of this question requires consideration of the notional concurrent operation of the Marriage Act and one or more of the State Bills. In *Momcilovic*, the laws under question were criminal laws, the contravention of which gave rise to a question as to which law would be relied upon for the purpose of prosecution, whereas in the case of the Marriage Act and the State Bills, a choice arises at the individual level in the form of an election by two individuals to enter, or not to enter, into marriage as prescribed. In terms of the choices available to opposite-sex and same-sex couples, it is difficult to see any antinomy between the State Bills and the Marriage Act: at the federal level, the choice is simply not available for same-sex couples, while at the State level, a same-sex marriage bill, if passed, would only apply to same-sex couples; that is, opposite-sex couples must, if they wish to marry, do so pursuant to the federal Marriage Act. Furthermore, the State Bills expressly prevent a person entering into a same-sex marriage if they are 'lawfully married to some other person'.¹⁵² Thus, a person who is married within the meaning of the Marriage Act is not able **[*58]** to enter into a same-sex marriage until the first marriage is lawfully dissolved. It is possible that inconsistency could arise if the Commonwealth was required to recognise State or Territory same-sex marriages (for example, by reason of principles of private international law concerning the *lex loci celebrationis*¹⁵³); however, the express terms of the Marriage Act are likely to compel the result that the Commonwealth is not required to recognise a marriage that is clearly outside the boundaries of the federal definition of that institution and which is, arguably, contrary to the intention of provisions such as s 88EA of the Marriage Act.¹⁵⁴ Accordingly, at least in this regard, there does not appear to be an operational reason for a finding

¹⁴⁹ *Ex parte McLean* (1930) 43 CLR 472 at 483; [1930] ALR 377; (1930) 4 ALJR 103; BC3000007 per Dixon J; *Momcilovic* (2011) 245 CLR 1; 280 ALR 221; [2011] HCA 34; BC201106881 at [103]-[104] per French CJ, [262] per Gummow J, [306], [325], [351] per Hayne J, [637] per Crennan and Kiefel JJ.

¹⁵⁰ (2011) 245 CLR 1; 280 ALR 221; [2011] HCA 34; BC201106881 at[338].

¹⁵¹ (1989) 168 CLR 289; 89 ALR 83; 64 ALJR 41; BC8902690. The Court held that a provision of the Defence Force Discipline Act 1982 (Cth) was not inconsistent with a provision of the Traffic Act 1949 (Qld) because the federal Act contemplated 'parallel systems of military and ordinary criminal law and [did] not evince any intention that defence force members enjoy an absolute immunity from liability under the ordinary criminal law': at298. See *Momcilovic* (2011) 245 CLR 1; 280 ALR 221; [2011] HCA 34; BC201106881 at [337] per Hayne J.

¹⁵² Draft NSW Bill, cl 19(a); South Australian Bill, cl 6(1); Victorian Bill, cl6(1); Tasmanian Bill, cl7(1); Western Australian Bill cl6(2). The Draft NSW Bill also provides that a same-sex marriage is void if 'either of the parties subsequently marries some other person under the law of the Commonwealth': cl19(b).

¹⁵³ See, eg, M Davies, A Bell and P Le Gay Brereton, *Nygh's Conflict of Laws in Australia*, 8th ed, LexisNexis, Sydney, 2010 at 498-99, 503.

¹⁵⁴ The fact that the States may not refuse such recognition on grounds of public policy does not mean that the Commonwealth is required, by reason of s 118 of the Constitution, to recognise same-sex marriages conducted under the laws of a State or Territory, at least in part because s 118 has no bearing on the choice of which law must be applied: see *Breavington v Godleman* (1988) 169 CLR 41 at 150; 80 ALR 362; 62 ALJR 447; BC8802620 per Dawson J; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36; BC200003351 at [63] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ. Conversely, if the Commonwealth wanted to recognise State same-sex marriages, s 51(xxv) of the Constitution provides it with the power to make laws with respect to the 'recognition throughout the Commonwealth of the laws, public Acts and records, and the judicial proceedings of the States'.

of inconsistency between a State-based same-sex marriage regime that is confined to that State and a federal regime that does not recognise such marriages.¹⁵⁵

[*59]

It could also be argued that inconsistency arises by reason of the international implications of State-based same-sex marriage. For example, Canada recognises marriages that are validly performed according to the laws of the jurisdiction in which the marriage is said to have occurred, and which are in accordance with Canadian law.¹⁵⁶ On this basis, same-sex marriages that are validly performed under an Australian State or Territory regime would be recognised as marriages for the purposes of Canadian law (subject to meeting the requirements for a valid marriage under the relevant provincial law). Obviously, the Marriage Act does not speak to this precise issue because it simply does not provide for same-sex marriages. By inference, it could be said that the express statement in s 88EA of the Marriage Act that foreign same-sex marriages will not be recognised under Australian federal law gives rise to a presumption that Parliament intended that marriages between Australian same-sex couples should not be recognised internationally. However, such a conclusion would require, at an anterior level, a finding that the legislative intention of the Marriage Act is, in part, to prevent Australian **[*60]** same-sex couples from marrying at all; as noted above, that conclusion is far from certain. Indeed, it can be questioned whether the treatment of relationships by other nations is properly a matter to be governed by the Commonwealth or considered when determining inconsistency. The reverse possibility -- a legally married same-sex couple from a jurisdiction such as Canada seeking recognition of their marriage in an Australian State -- is only addressed in the Draft NSW Bill, Pt 6 of which envisages the recognition in NSW of same-sex marriages solemnised 'in another State or Territory or in a country other than Australia', subject to certain conditions and restrictions.¹⁵⁷ As noted above, this is potentially inconsistent with s 88EA of the Marriage Act.

[*61]

It might also be thought that the existence of same-sex marriage legislation in the States or and/or Territories could give rise to vexed issues concerning the ability of same-sex spouses to immigrate to Australia based on their relationship. However, as in the United States,¹⁵⁸ any recognition of same-sex marriage at an Australian State or Territory level would have no bearing on federal immigration law, particularly since only one of the State Bills (the Draft NSW Bill) would recognise overseas same-sex marriages. Thus, a married same-sex couple, whether they are from Canada or another of the increasing number of jurisdictions to recognise same-sex marriage, will not be able to rely on their marriage for immigration reasons, although this does not (unlike in the United States) preclude such couples from applying for entry based on de-facto status. Section 83 of the Migration Act 1958 (Cth) treats spouses and de facto partners equally, although there are threshold requirements for the recognition of de facto relationships that do not apply to married persons.¹⁵⁹

¹⁵⁵ Although provisions such as cl 44 and 45 of the Draft NSW Bill, which would provide for recognition within NSW of overseas same-sex marriages, would arguably conflict with s 88EA of the Marriage Act.

¹⁵⁶ Citizenship and Immigration Canada, *OP 2: Processing Members of the Family Class* (2006) at 22 [5.30].

¹⁵⁷ Clause 75 of the Tasmanian Bill provided that 'parties to a same-sex marriage that is registered under a corresponding law are taken to be parties to a same-sex marriage that is registered under Pt5A of the Births, Deaths and Marriages Registration Act 1999'; the term 'corresponding law' is defined as 'a law of another Australian jurisdiction that substantially corresponds to the provisions of this Act or is prescribed as a corresponding law'. The South Australian, West Australian and Victorian Bills are silent on this issue, although South Australia appears to envisage the making of declarations of validity, pursuant to cl19(3) of its Bill.

¹⁵⁸ Immigration is a federal matter in the United States and, subject to the forthcoming judgment of the Supreme Court in *United States v Windsor* (see above n 10) the federal government, pursuant to the Defence of Marriage Act 1996, 110 Stat 2149, 1 USC §7 and 28 USC §1738C, does not recognise same-sex marriages (or de facto relationships for the purposes of immigration).

¹⁵⁹ The Migration Act 1958 (Cth) defines the terms 'de facto partner' and 'de facto relationship' in s5CB. Interestingly, the definition of 'de facto relationship' differs from that found in s4AA of the Family Law Act 1975 (Cth). Section83 of the Migration

[*62]

A related question, though one that does not involve questions of inconsistency between State and federal law, is whether courts in States and Territories that do not provide for same-sex marriage would be required to recognise a marriage solemnised in accordance with a State or Territory same-sex marriage regime. In his advice regarding the Same-Sex Marriage Bill 2005 (Tas), Lindell, focussing on Tasmania and Victoria, observed that 'such recognition may be accorded by virtue of ss 4(3) and 11(1)(b) and (c) of the Tasmanian and Victorian Jurisdiction of Courts (Cross-Vesting) Acts 1987', although in his view such recognition would be unlikely because a State same-sex marriage regime would be inconsistent with the Marriage Act.¹⁶⁰ Alternatively, Victorian courts could take the view that they are required to determine which law applies to the matter, ie, Tasmanian or Victorian law, in which case the State that does not have a same-sex marriage regime could simply take the view that it is not obliged to recognise a form of marriage that is unknown to its own law. It is also arguable that in such a situation, States that do not provide for same-sex marriage should nevertheless accord [*63] full faith and credit to the laws of a State that does allow same-sex marriage by reason of s 118 of the Constitution. The scope of s 118 is unresolved;¹⁶¹ although it is clear that the section has no bearing on the choice of which law to apply.¹⁶² However, in *John Pfeiffer Pty Ltd v Rogerson*,¹⁶³ the High Court suggested that s 118 may deny 'resort to the contention that one State's courts may deny the application of the rules embodied in the statute law of another State on public policy grounds'.¹⁶⁴ This, according to Lindell, 'should severely limit the extent to which same-sex marriages celebrated in one State can be refused recognition under the applicable common law rules of private international law in Australia'.¹⁶⁵ On the other hand, in *Sweedman v Transport Accident Commission*,¹⁶⁶ the High Court opined that s 118 'does not require certainty and uniformity of legal outcomes in federal jurisdiction or otherwise'.¹⁶⁷

[*64]

The analysis above indicates that there are a number of possible areas in which the High Court *could* detect instances of inconsistency. However, it is suggested that there is no inherent operational conflict between the Marriage Act and the State Bills (or at least none that could not be addressed by amendments). State-based regimes such as those proposed in the Victorian, South Australian, Western Australian, Draft NSW and Tasmanian Bills would involve the creation of parallel regimes applying only to persons for whom the Marriage Act does not make provision. The State Bills also make it impossible for persons to be married simultaneously under different State and federal marriage regimes, and (with the exception of Western Australia) they require or enable deference to federal law in such matters as property settlement if proceedings are commenced in the Family Court of Australia. Furthermore, with the exception of the Draft NSW Bill, the State Bills do not contemplate recognition of overseas same-sex marriages (if indeed such recognition would contravene s 88EA of the Marriage Act); nor would they have an impact on the immigration status of same-sex couples under federal law. [*65] It is unlikely that the Commonwealth would be required, by reason of s 118 of the Constitution or principles of private international law, to recognise State or Territory same-sex marriages; and while it is an open question whether one State would be

Act 1958 (Cth), which is concerned with persons taken to be included on a person's visa, treats married and de facto couples identically.

¹⁶⁰ Lindell, above n 47 at 26.

¹⁶¹ *Ibid*, at 31-33; Lindell, above n 13 at 49.

¹⁶² *Breavington v Godleman* (1988) 169 CLR 41 at 150; 80 ALR 362; 62 ALJR 447; BC8802620 per Dawson J; *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 at 37; 104 ALR 257; 66 ALJR 186; BC9102614 per Brennan, Dawson, Toohey and McHugh JJ.

¹⁶³ (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36; BC200003351.

¹⁶⁴ *Ibid*, at [63] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

¹⁶⁵ Lindell, above n 13 at 49.

¹⁶⁶ (2006) 226 CLR 362; 224 ALR 625; [2006] HCA 8; BC200601021.

¹⁶⁷ *Ibid*, at [20] per Gleeson CJ, Gummow, Kirby and Hayne JJ.

required to recognise a same-sex marriage performed in another State, it is not an issue that gives rise to arguments against the validity of State same-sex marriage on the basis of s 109 of the Constitution. These factors, combined with the conclusion that the legislative intention underpinning the Marriage Act is to exclude same-sex couples from marrying under federal law only, not to regulate the 'field' of marriage to the exclusion of the States (a conclusion supported by the specificity of the definition of marriage in that Act and the absence of any mention of State or Territory same-sex marriage schemes) cumulatively point to the conclusion that State and Territory same-sex marriage schemes are, on balance, constitutionally permissible.

Commonwealth power over same-sex marriage

This part of the paper questions the assumption underlying the Federal Bills, and indeed the push for federal marriage equality -- namely, that the Commonwealth [*66] possesses the constitutional power to legislate with respect to same-sex, as well as opposite-sex, marriage.¹⁶⁸ Necessarily, an absence of Commonwealth power over same-sex marriage would spell the end of amendments to the Marriage Act of the type contemplated by the Federal Bills. It would also dispose of an argument that State same-sex marriage laws are indirectly inconsistent with the Marriage Act. However, it would not necessarily mean that the Commonwealth could not in the future legislate to prevent the use of the term 'marriage' by the States, by reason of the incidental power under s 51(xxxix) of the Constitution.¹⁶⁹

[*67]

Resolution of this question requires characterisation of the term 'marriage' as it appears in the Constitution. Interpretative method becomes crucial at this point; that is, if the question comes before the High Court, is the Court likely to adopt an approach that looks to the meaning of marriage at the time of the drafting of the Constitution?¹⁷⁰ Or, is the Court likely to take a more progressive approach, wherein the Constitution is viewed as a dynamic compact the terms of which are capable of evolution in their scope and meaning?¹⁷¹ (The latter approach does not necessarily guarantee that the constitutional term 'marriage' extends to same-sex marriage.) Current authority indicates that an approach somewhere in-between is likely. In *New South Wales v Commonwealth (Work Choices)*,¹⁷² the majority said, in respect of the scope of the corporations power, that:

[*68]

It is not possible to attribute to [the framers] some intention about how this legislative power operates in respect of these or other subsequent legal, economic, and social developments, without making some assumption to the effect that the framers intended that the legislative power granted to the federal Parliament should be limited, not

¹⁶⁸ Discussion of the Commonwealth's power in this respect is necessarily somewhat speculative. As Brennan J in *Actors and Announcers Equity Association v Fontana Films Ltd* (1982) 150 CLR 169 at 218; 40 ALR 609; 56 ALJR 366; BC8200068 made clear, it is not appropriate to delimit the boundaries of the powers conferred by the *Constitution* in the abstract, meaning that the terms of a notional Commonwealth law dealing with same-sex marriage may be dealt with in unanticipated ways depending on the specifics of the law in question.

¹⁶⁹ See Lindell, above n 13 at 43, noting also that it is questionable whether the Commonwealth could go further and ban same-sex unions if such unions were not described as marriages.

¹⁷⁰ On this and other approaches to constitutional interpretation in relation to same-sex marriage see D Meagher, 'The times are they a-changin'? -- Can the Commonwealth parliament legislate for same sex marriages? (2003) 17 *Australian Journal of Family Law* 1.

¹⁷¹ This approach is the accepted interpretative method in Canada, where it has been said by the Supreme Court that the 'Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life': *Reference Re Same-Sex Marriage* 2004 SCC 79; [2004] 3 SCR 698 at [22]. In Australia, see Kirby J in *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479; 170 ALR 111; [2000] HCA 14; BC200001107; see also M Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?' (2000) 24 *Melbourne University Law Review* 1.

¹⁷² (2006) 229 CLR 1; 231 ALR 1; [2006] HCA 52; BC200609129 at[123] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

only to facts and circumstances of the kind that existed at federation, but also to whatever kinds of legislative solution had then been devised to address the problems then revealed. But the plaintiffs, correctly, made no such explicit contention.

This harks back to the statement made by McHugh J in *Eastman v The Queen (Eastman)* ¹⁷³ that:

Our Constitution is constructed in such a way that most of its concepts and purposes are stated at a sufficient level of abstraction or generality to enable it to be infused with the *current* understanding of those concepts and purposes. This is consistent with the notion that our Constitution was intended to be an enduring document able to apply in emerging circumstances while retaining its essential integrity.

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According to this approach, interpreting 'marriage' as encompassing same-sex marriage would not involve a divergence from the intention of the framers as objectively determined, if the 'current understanding' of marriage views the institution as sufficiently flexible to encompass same-sex marriage. ¹⁷⁴ In this sense, the term 'marriage' is one of the 'many words and phrases of the Constitution [that] are expressed at such a level of generality that the most sensible conclusion to be drawn from their use in a Constitution is that the makers of the Constitution intended that they should apply to whatever facts and circumstances succeeding generations thought they covered'. ¹⁷⁵ However, it must also be asked whether recognising the very notion of same-sex marriage somehow challenges the 'essential integrity' to which McHugh J referred in the passage from *Eastman* above. As a document oriented towards arranging the relationship of the Commonwealth with the States and Territories, it is difficult to see how an argument along such lines could be maintained. ¹⁷⁶ Indeed, as McHugh J observed in *Re Wakim; Ex parte McNally*: ¹⁷⁷

Thus, in 1901 'marriage' was seen as meaning a voluntary **[*70]** 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 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.

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¹⁷³ (2000) 203 CLR 1; 172 ALR 39; 74 ALJR 915; BC 200002716 at[154] per McHugh J (emphasis in original).

¹⁷⁴ Goldsworthy has made a persuasive argument along these lines, adopting he calls 'a non-literal, purposive approach to interpretation': Goldsworthy, above n 132 at699.

¹⁷⁵ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 552; 163 ALR 270; [1999] HCA 27; BC9903189 at [44] per McHugh J. It is on this basis that Meagher has expressed the view that the term 'marriage' is a 'constitutionalised legal term of art whose meaning may be informed by developments in the common law and statute that are consistent with the text and structure of the Constitution': Meagher, above n 169 at 2-3. Social developments may also be relevant to this question. As Brennan J observed in *Fisher v Fisher* (1986) 161 CLR 438 at 456; 67 ALR 513; 60 ALJR 731; BC8601372, constitutional terms referring to a legal institution are to be interpreted 'by reference to the customs of our society'; accordingly, increasing social recognition of the validity of same-sex relationships and the concept of same-sex marriage is potentially relevant to the question of whether the marriage power *presently* extends to same-sex marriage. See further A Zanghellini, 'Marriage and Civil Unions: Legal and Moral Questions' (2007) 35 *Federal Law Review* 263 at 273: 'the very inconceivableness of [same-sex marriage] in 1900 open up the possibility of legitimately considering any different-sex element attaching to the meaning of marriage as used at that time a matter of mere contingency rather than necessity'.

¹⁷⁶ In Goldsworthy's view, the 'purpose of granting power to the Commonwealth Parliament to legislate with respect to "marriage" was not to forbid or prevent same-sex marriage': Goldsworthy, above n132 at700.

¹⁷⁷ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 553; 163 ALR 270; [1999] HCA 27; BC9903189 at [45] per McHugh J (emphasis in original).

It is worth noting also the line of authority that has treated certain heads of power in s 51 of the *Constitution* as amenable to an ambulatory interpretation.¹⁷⁸ Section 51(v), which confers power with respect to 'postal, telegraphic, telephonic, and other like services', has been interpreted as conferring power with respect to radio,¹⁷⁹ television,¹⁸⁰ and licensing of telecommunications carriers.¹⁸¹ Similarly, in *Grain Pool of Western Australia v Commonwealth (Grain Pool)*,¹⁸² the High Court held that the power with respect to 'copyrights, patents of inventions and designs, and trade marks' encompassed recognition by the Commonwealth of rights over plant varieties. Importantly, in *Grain Pool*, the High Court rejected the idea that, at least in relation to s 51(xviii), the Commonwealth's power should be 'ascertained solely by identifying what in 1900 would have been treated as a copyright, patent, design or trade mark'.¹⁸³ In this respect, as Goldsworthy has argued:¹⁸⁴

[T]he important question is surely not whether the unanticipated phenomenon comes within the precise literal meaning of the word chosen by the founders to give effect to their purpose in allocating [*72] legislative power to the national legislature. It is whether the phenomenon comes within that purpose, and is so closely related to the word's original meaning that it can be included by a simple and obvious expansion of that meaning consistent with contemporary conceptions.

If one views the examples in the cases mentioned above as instances of the High Court identifying previously unknown aspects or subsets of overarching constitutional powers, [*73] by parity of reasoning, it is possible to see how the Court might be inclined to find that same-sex marriage falls within the ambit of the Commonwealth's power to make laws with respect to marriage. In this vein, it is noteworthy that the Family Court of Australia has recognised the validity of a marriage between a male transsexual and his (female) spouse, 'on the basis that it is within the power of Parliament to regulate marriages within Australia that are outside the monogamistic Christian tradition'.¹⁸⁵ Indeed, as far back as 1908, Higgins J stated that '[u]nder 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'.¹⁸⁶ As Brock and Meagher have noted, 'a broad construction along these lines is consistent with the High Court's jurisprudence on the marriage power more generally which, at least since the 1960s, has seen the scope of its subject matter considerably expanded'.¹⁸⁷

On the other hand, there can be little doubt that the broadly accepted meaning of the term 'marriage' in Australia at the turn of the 19th century was in accordance with 'the nature of this institution as understood [*74] in Christendom' set forth by Lord Penzance in *Hyde*, that is, 'the voluntary union of one man and one woman for life to

¹⁷⁸ See further Lindell, above n 13 at 38-39.

¹⁷⁹ *R v Brislan; Ex parte Williams* (1935) 54 CLR 262; [1936] ALR 45; (1935) 9 ALJR 348; BC3600010.

¹⁸⁰ *Jones v Commonwealth (No 2)* (1965) 112 CLR 206; [1965] ALR 706; (1965) 38 ALJR 376; BC6500120.

¹⁸¹ *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595; 206 ALR 1; (2004) 78 ALJR 704; [2004] HCA 19; BC200402132.

¹⁸² (2000) 202 CLR 479; 170 ALR 111; [2000] HCA 14; BC200001107.

¹⁸³ *Ibid*, at [23] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

¹⁸⁴ Goldsworthy, above n 132 at 700.

¹⁸⁵ *Attorney General (Cth) v Kevin* (2003) 30 Fam LR 1 at 19; 172 FLR 300; (2003) EOC 93-265; (2003) FLC 93-127 at [100] per Nicholson CJ, Ellis and Brown JJ. See further *AB v Western Australia* (2011) 244 CLR 390; 281 ALR 694; [2011] HCA 42; BC201107621, where it was decided that, at least under the relevant West Australian statutes, gender reassignment surgery is not required for a person to be granted a certificate of gender reassignment.

¹⁸⁶ *R v Registrar of Trade Marks* (1908) 5 CLR 604; 14 ALR 141; [1908] HCA 10; BC0800056.

¹⁸⁷ Margaret Brock and Dan Meagher, 'The legal recognition of same-sex unions in Australia: A constitutional analysis' (2011) 22 *Public Law Review* 266 at 272.

the exclusion of all others'.¹⁸⁸ In 1910, Harrison Moore observed that 'the plenary power over "marriage" would not extend to the establishment or recognition of polygamy, or to any union which did not require the consent of the parties, or to one which was designed to be of a temporary character merely'.¹⁸⁹ Unsurprisingly, no mention is made of the possibility of same-sex marriage.¹⁹⁰ Accordingly, it could be said that enabling same-sex couples to marry goes beyond the scope of the power because it confers on the Commonwealth the ability to make laws on a topic that bears little or no relation to the traditional (which is not to say exclusive) meaning of the term. In this vein, Dawson J stated in *R v L* that:¹⁹¹

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The power of the Commonwealth Parliament to legislate with respect to marriage . . . is predicated upon the existence of marriage as a recognizable (although not immutable) institution. Just how far any attempt to define or redefine, in an abstract way, the rights and obligations of the parties to a marriage may involve a departure from that recognizable institution, and hence travel outside constitutional power, is a question of no small dimension.

In the *Marriage Act Case*, Windeyer J opined that the definition propounded in *Hyde* ought not to be considered as defining the scope of the Commonwealth's power in respect of marriage, which 'can have a wider meaning for law'.¹⁹² His Honour referred to Higgins J's assertion in *Attorney-General for the State of New South Wales; ex rel Tooth & Company Limited v Brewery Employe's Union of New South Wales*¹⁹³ that '[t]he usage [of the term trade marks] in 1900 gives us the central type; it does not give us the circumference of the power' as providing support for the proposition that it is within Commonwealth power, by reason of s 51(xxi) of the *Constitution*, to legislate for the recognition of overseas polygamous marriages **[*76]** conducted in accordance with the relevant national laws.¹⁹⁴ While this by no means provides express support for a reading of the marriage power as extending to same-sex marriage (Windeyer J went on to state that 'marriage law in a primary sense . . . is a body of rules relating to the creation or termination of the status of husband and wife'¹⁹⁵), it suggests that there is considerable scope for a reading of the power as being rather more flexible than the narrow, exclusionary *Hyde* formulation.

The weight of authority therefore favours the view that the Commonwealth does have the power to make laws with respect to same-sex marriage.¹⁹⁶ While nuptials between two men or two women involve a departure from the view of marriage commonly held in 1901, it is suggested that the institution itself retains its fundamental character -- that is, a legally recognised union between two individuals for the purpose of creating a family (with or without children) and accessing legal benefits that accrue as a consequence of spousal status. If one sets aside the moral panic that same-sex marriage generates among certain groups, it is difficult to see how recognising Commonwealth power in **[*77]** this regard differs from recognition that radio and television fall within the rubric of postal, telegraphic, telephonic, and other like services. If this view is correct, it of course has the consequence that a law

¹⁸⁸ (1866) LR 1P 130 at 133.

¹⁸⁹ H Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed, Melbourne, Maxwell, 1910 at 474.

¹⁹⁰ Although Moore also made the rather intriguing suggestion that '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': *ibid*.

¹⁹¹ (1991) 174 CLR 379 at 404; 103 ALR 577; 66 ALJR 36; BC9102611.

¹⁹² (1962) 107 CLR 529 at 576; [1962] ALR 673; (1962) 36 ALJR 104; BC6200270.

¹⁹³ (1908) 6 CLR 469 at 610; 14 ALR 565; [1908] HCA 94; BC0800029.

¹⁹⁴ (1962) 107 CLR 529 at 576; [1962] ALR 673; (1962) 36 ALJR 104; BC6200270.

¹⁹⁵ (1962) 107 CLR 529 at 579; [1962] ALR 673; (1962) 36 ALJR 104; BC6200270.

¹⁹⁶ As noted above, it is also possible that even if the Commonwealth were found not to have the power to legislate *for* same-sex marriage by reason of the marriage power, it could legislate *against* same-sex marriage at the State and Territory level pursuant to the incidental power in s 51(xxix). Lindell has opined that such an exercise would be open to the Commonwealth, if indeed the Marriage Amendment Act did not indirectly achieve that result: Lindell, above n 47 at 43. See also Brock and Meagher, above n 186 at 269.

such as one of the proposed Federal Bills would, if passed, be likely to be found constitutionally permissible. However, it would also mean the States cannot rely on such an absence of Commonwealth power as a basis for their own same-sex marriage laws, though it remains eminently arguable that the specificity of the Marriage Act provides room for State or Territory-based same-sex marriage regimes. A finding in favour of Commonwealth power would also open the way to a conclusion that State schemes are (indirectly) inconsistent with the Marriage Act, though that question is to be determined by discerning the legislative intention underpinning that Act and its operational scope and, for the reasons above, that question should be resolved in favour of State and Territory power to make laws for same-sex marriage.

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Conclusion

With the strong possibility that one or more of the Australian States and/or the ACT will, in 2013, pass legislation providing for same-sex marriage, and the likelihood that such a law will be challenged by the Commonwealth, it is likely that the High Court will be called upon to determine this issue in the near future. Resolution of the matters raised by State and Territory same-sex marriage legislation is likely to depend on a judgment as to whether the Marriage Act is intended to regulate all marriages or simply opposite-sex marriages, as defined in the Act. As Williams has noted, this can involve a subjective judgment. The preceding discussion suggests that there is no necessary inconsistency between the Marriage Act and State or Territory same-sex marriage regimes: a certain class of couples are by definition excluded from marrying under the Marriage Act; those couples, if they meet the requirements of a (putative) State or Territory same-sex marriage regime, are provided with the opportunity to marry under a law that would not extend to the class of persons provided for in the federal Marriage Act. However, if Lindell is correct that 'it is strongly arguable that **[*79]** the amending legislation [Marriage Amendment Act 2004] has attempted to exhaustively define which relationships may be described as *'marriages'* so as to confine the use of that description to the kind of traditional marriage referred to in the definition of marriage in s 5(1) of the Marriage Act',¹⁹⁷ the lack of any necessary or operational inconsistency may be of little currency. That said, even if a State or Territory same-sex marriage scheme is struck down by the High Court on constitutional grounds, the symbolic importance of a State or Territory passing legislation in favour of same-sex marriage will not be lost. Indeed, such a result could galvanise supporters of same-sex marriage across the country and lead to the type of sustained campaigning at the federal level that delivered marriage equality in Maine, Maryland and Washington in the 2012 US election. Given that the Commonwealth probably does have the power to legislate with respect to same-sex marriage, and the clear benefits that would arise from federal recognition, rather than ad hoc State or Territory recognition, a loss for the States in this respect may end up being simply one more step on the path to achieving **[*80]** full equality at the federal level for lesbian, gay, bisexual and transgender Australians.

Appendix 1 n198[SEE ORIGINAL SOURCE FOR GRAPHIC]

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¹⁹⁷ A view that is shared by Brock and Meagher: above n 186 at268.