IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No C13 of 2013

BETWEEN:

COMMONWEALTH OF AUSTRALIA
Plaintiff

and

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AUSTRALIAN CAPITAL TERRITORY
Defendant

ANNOTATED SUBMISSIONS OF THE AUSTRALIAN CAPITAL TERRITORY

ACT Government Solicitor
Level 5, 12 Moore Street
CANBERRA ACT 2601

PO Box 260
CIVIC SQUARE ACT 2608
DX 5602 CANBERRA

Telephone: (02) 6205 3261
Fax: (02) 6207 0650
Ref: Nathan Hancock
File Ref: 624390

Part I: Publication

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

Part II: Issues

2. Noting the issues stated in the questions reserved,[1] the core issue for this proceeding is the proper construction of s 28 of *Australian Capital Territory (Self-Government) Act 1988* (Cth) (***Self-Government Act***).

Part III: Notice

3. The Territory considers that adequate notice has been given under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Facts

4. The relevant factual background is set out in the Amended Statement of Claim at [4]-[9], [18]-[22], [27]-[28].[2] In addition, the *Marriage Equality (Same Sex) Act 2013* (ACT) (***Marriage Equality Act***) commenced on 7 November 2013, pursuant to s 2 of that Act and s 73(1) of the *Legislation Act 2001* (ACT).

Part V: Legislative provisions

5. The applicable legislative provisions are set out in the Commonwealth's Book of Core Legislative Materials.

Part VI: Argument

6. The Territory submits that the *Marriage Equality Act* is capable of operating concurrently with the federal law within the meaning of s 28 of the *Self-Government Act* for the following reasons:

   a. There is no dispute between the parties that the "marriage" power under s 51(xxi) of the Constitution confers legislative power on the Commonwealth with respect to marriage, including same sex marriage.

   b. There is no dispute that marriage is an important social institution. The social institution of marriage, and legislation regulating the formation, ceremony,

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1 Questions Reserved Book (**QRB**), pp 41-42.

2 QRB 11, 13, 15-16. See Annotated Submissions of the Plaintiff (**PS**) fn 3.

rights of spouses and dissolution of a marriage, has evolved over time, as the Commonwealth's submissions from paragraphs 6 – 36 illustrate.

c. Neither the *Marriage Act 1961* (Cth) nor the *Family Law Act 1975* (Cth) manifest an intention to be an exhaustive or exclusive statement of the law governing the institution of marriage.

d. At the present time, the Commonwealth has not exhausted its legislative power with respect to either recognising or prohibiting same sex marriage. The *Marriage Act* is concerned only with marriage as defined by s 5 of that Act, but not otherwise.

e. The Commonwealth has exercised its legislative power in a limited manner to refuse the recognition of foreign same sex marriages but has gone no further. The *Marriage Act* does not speak to same sex marriages solemnised in Australia.

f. For the purpose of the *Marriage Act,* certain marriages are void. The prohibition on a person's capacity to marry is express (see, for example, 23B of the *Marriage Act*). There is no express prohibition directed to persons seeking a same sex marriage in the *Marriage Act*.

g. There is no dispute that the *Marriage Act* was enacted to create uniform Australian laws with respect to marriage as now defined by s 5 of the *Marriage Act*. That does not exclude the Territory from enacting laws consistent with the *Marriage Act* for the recognition of same sex marriage solemnised in the Territory for the purposes of Territory law.

h. Section 28 of the *Self-Government Act* denies inconsistency where a provision of Territory law is capable of operating concurrently with federal law.

i. The Commonwealth has not identified any relevant provision of the *Marriage Equality Act* that demonstrates that it is not capable of operating concurrently with the *Marriage Act* or the *Family Law Act*, which speak only to marriage as defined by s 5 of the *Marriage Act*.

(i) The statutory test of inconsistency

7. As this proceeding raises an issue that is specific and unique to the Territory, it is convenient to start with the operation of the *Self-Government Act*, which establishes the body politic of the Australian Capital Territory (s 7), the Legislative Assembly for the Territory (s 8), and confers on the Assembly the power to make laws for the

peace, order and good government of the Territory (s 22). Those laws, though derived from the Commonwealth's power under s 122 of the Constitution, do not involve the exercise of federal legislative power.[3]

8. Section 28(1) of the *Self-Government Act* provides that:

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

An "enactment" is a law made by the Assembly (s 3). A "law" includes a law in force in the Territory (s 28(2)(a)): namely, a law of the Commonwealth.

10 9. In *Northern Territory v GPAO* (1999) 196 CLR 553 (***GPAO***), when considering the impact upon a law made by the Legislative Assembly of the Northern Territory[4] of a law of the Commonwealth in force in the Northern Territory (and enacted after the Northern Territory law), Gleeson CJ and Gummow J observed that the situation differed both from that of "delegated legislation",[5] and from the regime established by s 109 of the Constitution. Their Honours held that: "The terms of s 109 are not addressed to the relationship between the laws of the Commonwealth and those enacted by legislatures in the territories".[6] Their Honours explained further (at [60]):

> Section 122 of the *Constitution* supports the stipulation by the Parliament, in the law by which a territorial legislature is established, of the criteria which determine concurrent
20 operation of territorial laws and other laws which are made by the Parliament and are in force in the Territory concerned. Section 28 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) (the ACT Self-Government Act) is an example. ... It will be apparent that s 28 operates not as a denial of power otherwise conferred by s 8, but as a denial of effect to a law so made "to the extent" of its inconsistency. To that extent the

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3 *Svikart v Stewart* (1994) 181 CLR 548.

4 The enabling law was in terms relevantly identical to s 22 of the *Self-Government Act*. However, there is no provision in the *Northern Territory (Self-Government) Act 1978* (Cth) which corresponds to s 28 of the *Self-Government Act* (ACT). In that context, the Court applied s 109 principles "by analogy" (Gleeson CJ and Gummow J at [61]; Kirby J at [219]).

5 Their Honours explained (at [52]) that, in the sphere of "delegated legislation", any question of "inconsistency" does not arise as a consequence of the exercise of law-making power enjoyed by two legislative bodies. There is but one legislature involved and the failure of delegated legislation to operate fully in its terms is analysed in terms of ultra vires and of action in excess of the authority delegated by the legislature. Section 46 of the *Acts Interpretation Act 1901* (Cth) makes provision for the "reading down" of a delegated legislation to preserve its operation to the extent to which it is not in excess of power.

6 GPAO at [53]. Their Honours cited *University of Wollongong v Metwally* (1984) 158 CLR 447 (***Metwally***) at 464, where Mason J stated that a conflict between a Commonwealth law and a Territory law "is unaffected by the provisions of s 109", citing *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd* (1929) 42 CLR 582 (***Laristan***) at 588; *Webster v MacIntosh* (1980) 49 FLR 317 (***Webster***) at 320-321; *R v Kearney; Ex parte Japanangka* (1984) 158 CLR 395 (***Japanangka***). Cf. *P v P* (1994) 181 CLR 583 at 602-603.

> analogy with s 109 will be apparent. However, the criterion for inconsistency — incapacity of concurrent operation — is narrower than that which applies under s 109, where the federal law evinces an intention to make exhaustive or exclusive provision upon a topic within the legislative power of the Commonwealth.

10. This passage indicates that s 28 adopts a narrower criterion for inconsistency than that which applies under s 109 of the Constitution.[7] This is a point of departure for the parties.[8] To the extent that this debate steals the focus from the words of s 28, which provide the relevant statutory test of "inconsistency", it is a distraction.

11. In circumstances where the Parliament appears to have intended that the Commonwealth law shall be a complete statement of the law governing a particular relation or thing, the passage in *GPAO* at [60] indicates that the criterion for inconsistency adopted by s 28 of the *Self-Government Act* produces a result that is narrower than s 109 of the Constitution. In the application of s 109, the operation of the Commonwealth law would be impaired if the State law were allowed to alter, impair or detract from the operation of the Commonwealth law.[9] In the application of s 28 of the *Self-Government Act*, the Territory law would not be inconsistent with the Commonwealth law to the extent that the former was capable of operating concurrently with the latter.

12. The criterion for inconsistency adopted in s 28 – incapacity of concurrent operation – has an analogue in the pronouncement which often appears in enactments of the Commonwealth Parliament that a particular Commonwealth law "is not intended to exclude or limit the concurrent operation of any law of a State or Territory". As explained in *The Queen v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545 (***R v Credit Tribunal***) at 563-564, "where there is no direct inconsistency and where inconsistency can only arise if the Commonwealth law is intended to be an exhaustive and exclusive law" a pronouncement of that kind "will be effective to avoid inconsistency by making it clear that the law is not intended to be exhaustive and exclusive". While such a pronouncement may refer to the concurrent operation of State or Territory laws (and thereby not to the extent of the intended operation of the Commonwealth law),[10] nonetheless there is to be

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7 In *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at [75], Gummow and Hayne JJ affirmed the operation of s 28 of the *Self-Government Act* as per the analysis in *GPAO* at [60].

8 The Commonwealth contends that s 28 "has no different operation" from s 109. It is not clear what is meant by the qualification "at least in a case like the present" (PS [52]).

9 *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128 at 136; *GPAO* at [57] (Gleeson CJ and Gummow J).

10 Cf. PS [49].

gathered from such a provision a clear expression of intention that the federal law is not an exhaustive statement on the topic with which it deals, and that it is not intended to operate to the exclusion of State or Territory laws on that topic.[11]

13. The statement in s 28 of the *Self-Government Act* that a law made by the Assembly shall be taken to be consistent with a Commonwealth law in force in the Territory "to the extent that it is capable of operating concurrently with that law" achieves a similar result in that it avoids inconsistency in a case where the Commonwealth law would otherwise be read as intended to be a complete or exhaustive or exclusive statement of the law on a particular topic.[12] That intention is to be distinguished from an attempt to limit the exercise of Territory legislative power "so that the Commonwealth should not be consequentially affected in the ends it is pursuing".[13]

14. The Commonwealth Parliament's choice in s 28 of the *Self-Government Act* to adopt a criterion of inconsistency between a Commonwealth law and a Territory law that is narrower than that applicable by force of s 109 of the Constitution between a Commonwealth law and a State law,[14] should be understood in the context of what was the unconfined power of the Governor-General under s 35 of the *Self-Government Act* (as enacted) to disallow a law made by the Assembly within 6 months after it is made,[15] which was sufficient to address the case where a law made by the Assembly was seen to intrude into a field in which a Commonwealth law was otherwise intended to be exhaustive or exclusive.[16]

15. In any event, as Gleeson CJ and Gummow J explained in *GPAO* at [54], in the context of the *Northern Territory (Self-Government) Act 1978* (Cth), the *Self-Government Act*, which gives life to and sustains the Legislative Assembly and the laws made by it, is a law of the Commonwealth, and as such, itself is subject to express or implied repeal or amendment by subsequent Commonwealth laws. In

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11 See *R v Credit Tribunal* at 564 in relation to the operation of s 75 of the *Trade Practices Act 1974* (Cth).

12 Inconsistency may arise when the Commonwealth Act manifests an intention on the part of the Parliament that its law on the topic of its Act shall be the exclusive law on a topic "both for what it forbids and what it allows": *Miller v Miller* (1978) 141 CLR 269 at 275 (Barwick CJ); see also *GPAO* at [53] (Gleeson CJ and Gummow J).

13 *Wenn v Attorney-General (Vic)* (1948) 77 CLR 84 at 120 (Dixon J), cited with approval in *R v Credit Tribunal* at 562-563.

14 The second reading speech and the Explanatory Memorandum to the Australian Capital Territory (Self-Government) Bill 1988, offer little assistance in this regard.

15 Section 35 was repealed by the *Territories Self-Government Legislation (Disallowance and Amendment of Laws) Act 2011* (Cth).

16 It should also be understood in the context of the carve-out of certain subject-matter from the grant of legislative power (s 23), which do not include marriage or matrimonial causes.

addition, a later law of the Commonwealth may expressly override an existing law made by the Legislative Assembly (as a law made for the government of the Territory within the meaning of s 122 of the Constitution).[17]

16. Section 28 can also be overridden by a specific Commonwealth law expressed to apply to a particular topic to the exclusion of laws of the Australian Capital Territory.[18] Accordingly, in the absence of such expression, the effect of s 28 is to invalidate a law made by the Assembly on the ground of inconsistency with a Commonwealth law *only* where the law made by the Assembly, if valid, would in its legal or practical operation be directly inconsistent with a Commonwealth law.

10 17. The Commonwealth's construction of s 28 renders the second clause of that provision otiose: what the Commonwealth says it achieves (in terms of reading down Territory law) is otherwise achieved by the first clause.[19] A court construing a statutory provision must strive to give meaning to every word of the provision, so that no clause or sentence proves superfluous or insignificant (if by any other construction they may be made useful and pertinent).[20] Whether or not one labels the test a rule of "inconsistency" or of "construction", the question for this Court to determine remains whether the *Marriage Equality Act* is capable of operating concurrently with the federal law. The analogy drawn with delegated legislation (PS [53]), one disavowed in *GPAO* at [52], is inapt and, in any event, does not avoid
20 that question.

(ii) Ascertaining inconsistency

18. In order to determine whether the Territory law is inconsistent with federal law, the first task is to construe the federal law in question, and then to consider whether upon its proper construction the Territory law is "inconsistent" with the federal law in the sense of the narrower statutory test in s 28 of the *Self-Government Act*. The reach and operation of the federal law, and the relevant "intention" is to be revealed by

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17 In this regard, the *Euthanasia Laws Act 1997* (Cth) removed the power of the Legislative Assembly otherwise conferred by s 6 of the Self-Government Act to make laws permitting euthanasia and provided that the enactment of the *Rights of the Terminally Ill Act 1995* (NT) had no force or effect as a law of the Territory, except as regards the lawfulness or validity of anything done in accordance with it prior to the commencement of the Commonwealth law.

18 This has occurred, for example, in s 16 of the *Workplace Relations Act 1996* (Cth) and s 11(1) of the *Native Title Act 1993* (Cth).

19 See PS [49]-[50].

20 *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at [71] (McHugh, Gummow, Kirby and Hayne JJ), citing *Commonwealth v Baume* (1905) 2 CLR 405 at 414 (Griffith CJ).

construction of that law.[21] This "must not be understood as inviting attention to the wishes or hopes of those who promoted the legislation in question. What matters is the reach and operation of the law in question as that reach and operation are ascertained by the conventional processes of statutory construction".[22]

Scope of the federal marriage power

19. The parties accept that the power with respect to "marriage" which is vested in the Parliament by s 51(xxi) of the Constitution encompasses marriage between persons of the same sex (PS [35]).[23] The parties do not contend that there is an intrinsic limit in the power. If, contrary to the approach taken by the parties, the Court determines
10 that s 51(xxi) does not confer a power on the Commonwealth to legislate for marriage between persons of the same sex (either to permit or prohibit such unions), there is nothing to prevent the Territory from legislating on the subject, providing that the power is exercised in accordance with s 22 of the *Self-Government Act*.

20. For constitutional purposes, the word "marriage" encompasses both the act of marrying (ceremony) and the state itself (status).[24] The Commonwealth's submissions proceed on a false premise in that they engage the "status of marriage" as a social, rather than legal, institution, which has existence independent of the law that regulates it. This is a distraction from the real issues in this proceeding.

21. As Dixon CJ said in *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529
20 at 543, "the status of the married parties evidently refers to the particular legal position they hold by reason of their married state considered as a legal position which unmarried persons do not share". While the source of mutual rights and obligations, "marriage" requires the definition, support and the enforcement of the federal law (at 543). As Windeyer J said (at 576): "It refers to marriage as an institution, but as a lawyer understands it rather than with its meaning for an

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21 *Momcilovic v The Queen* (2011) 245 CLR 1 (***Momcilovic***) at [258] (Gummow J) (in the context of the application of s 109).

22 *Momcilovic* at [315] (Hayne J). See also *Certain Lloyd's Underwriters v Cross* (2012) 87 CLR 131 at [25]-[26] (French CJ and Hayne J).

23 PS fn 83. See also *Attorney-General (NSW) v Brewery Employees Union of NSW* (1908) 6 CLR 469 at 610 (Higgins J dissenting but not on this point); *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529 at 576 – 578 (Windeyer J); *In the Marriage of Cormick; Salmon* (1984) 156 CLR 170 at 182 (Brennan J); *Fisher v Fisher* (1986) 161 CLR 438 at 455-456 (Brennan J).

24 *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529 at 576 (Windeyer J). The power under s 51(xxi) was also held to be wide enough to capture "divorce" (notwithstanding provision for that subject-matter in s 51(xxii) of the Constitution).

anthropologist or sociologist". Marriage by law creates a relation between the parties to the marriage (and third parties in some circumstances) and what is called the status of each – that status is created by law.[25]

Construction of the federal law

22. The *Marriage Act 1961* (Cth) is concerned with the capacity to marry under that Act; the formalities required for the solemnisation of marriages in Australia (including the authorisation and registration of marriage celebrants in Div 1 of Part IV, and the solemnisation of marriages in Australia and of members of the Defence Force overseas in Divs 2 & 3 of Part IV and Part V); and the recognition of foreign marriages (Part VA).[26] The Act also provides for legitimation (Part VI) and offences (Part VII).

23. Division 2 of Part IV deals with marriage by authorised celebrants solemnised in Australia (with the exception of marriages to which Div 3 applies), or intended to be solemnised in Australia (s 40). In accordance with the provisions of that Division, a valid marriage (s 48) is one that is solemnised: (a) in the presence of an authorised celebrant (a 41); (b) with prior notice to the celebrant (s 42); (c) in the presence of at least 2 adult witnesses (s 44); and (d) in accordance with a form of religious or civil ceremony (ss 41 and 46).

24. The validity of marriages is also addressed in Part III of the Act, Division 2 of which is expressed to apply to all marriages solemnised *in Australia* (except in relation to marriages by foreign diplomatic or consular offices in Australia) and marriages of members of the Defence Force overseas (s 23A).

25. Since 7 April 1986,[27] s 23B provides that marriages are void where ("and not otherwise"): (a) either of the parties is, at the time of the marriage, lawfully married to some other person; (b) the parties are within a prohibited relationship; (c) the

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25 *Ford v Ford* (1947) 73 CLR 524 at 536 (Dixon J); *In the Marriage of Cormick; Salmon* (1984) 156 CLR 170 at 176 (Gibbs CJ), referring to children of the marriage.

26 The Act does not, however, and by example, attempt to regulate the rights and obligations of the parties to a marriage: *The Queen v L* (1991) 174 CLR 379 at 386 (Mason CJ, Deane and Toohey JJ).

27 This is the date of commencement of the *Marriage Amendment Act 1985*. Marriages prior to that date are governed by s 23 of that Act. Marriages governed by s 23 are those marriages celebrated on or after 20 June 1977 and 6 April 1986. Prior to 20 June 1977, prohibition on the capacity to marry was addressed by s 51 of the *Family Law Act*, which commenced on 5 January 1976. Marriages celebrated prior to 5 January 1976 were subject to s 18 of the *Matrimonial Causes Act 1959* (Cth) or relevant State or Territory law: see *In the Marriage of C and D* (1979) 35 FLR 340 at 343.

marriage is solemnised other than in accordance with Div II of Part 4 (s 48); (d) the consent of either of the parties is not a real consent; or (e) either of the parties is not of marriageable age (s 23B(1)).

26. The expression "*and not otherwise*" in s 23B suggests that the grounds on which a marriage solemnised in Australia will be void are limited to the matters expressly identified in s 23B.[28] If the expression is intended to be exclusive of the categories, then marriage to a person of the same sex will not be void for the purpose of s 23B.[29]

27. Part VA of the Act sets out the circumstances in which a marriage solemnised in a foreign country is to be recognised in Australia as valid. In relation to a marriage not recognised as valid, the criteria of validity (in ss 11 and 23B) are repeated, save for non-compliance with the formalities of solemnisation (s 48), in addition to other circumstances not presently relevant (s 88D).

28. Section 88EA provides that a union solemnised in a foreign country between: (a) a man and a man; or (b) a woman and a woman, must not be recognised as a marriage in Australia. The definition of "marriage" and s 88EA were inserted into the *Marriage Act* by the *Marriage Amendment Act 2004* (Cth). The explanatory memorandum accompanying the Bill explains that the purpose of the amending Act was: "...to give effect to the Government's commitment to protect the institution of marriage by ensuring that marriage means a union of a man and a woman and that same sex relationships cannot be equated to marriage". While the *Family Law Act* does not define "marriage", it is accepted that, to the extent that the Act operates consistently with the *Marriage Act*, it adopts the federal definition.[30]

29. That may be so, but whether the *Marriage Act* achieves this purpose is another matter. It is clear that the Act now defines "marriage" to mean the union of a man and a woman,[31] but that definition circumscribes the area of operation of the Act. It is not a prohibition on same sex marriage or, indeed, on laws recognising relationships that have the indicia of marriage. This is borne out by the criteria of

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[28] Save perhaps for s 113 of the *Marriage Act* concerning second marriage ceremonies between persons who are legally married.

[29] Unlike other jurisdictions, Australia has never expressly provided that a marriage between persons of the same sex is a void marriage. Compare, for example, the *Matrimonial Causes Act 1973* (UK), s 11(c): "that the parties are not respectively male and female". This subsection was repealed by the *Marriage (Same Sex Couples) Act 2013* (UK).

[30] A "de facto relationship" is defined in the *Family Law Act* to refer to persons who are not legally married to each other (s 4AA(1)(a)).

[31] This is consistent with the explanation of the nature of the marriage relationship solemnised under the Act: s 46(1).

essential validity of a marriage for the purposes of the Act, none of which are concerned with same sex marriage. That is, the Act does not prescribe the union of a man and a woman to be a criterion of validity. Importantly, the same sex marriages are not designated as "prohibited relationships" (s 23(2)).

30. On that basis, the Act does not manifest an intention to prohibit the legal recognition of same sex marriage for the purposes of the Act.

31. Consistent with this, s 88EA is addressed to the question of recognition of foreign "marriages" in Australia, but does not extend to the validity of a foreign marriage in *lex loci celebrationis*. The saving provision in s 6 of the Act (where the operation of State and Territory registration laws is preserved) does not operate to exclude every other law pertaining to marriage that does not fall within the circumference of the Act.[32] The Act does not manifest an intention that the States or the Territories are prohibited from legislating for the recognition of Australian same sex marriage.

32. This gives context to what it means to say that the "main purpose" of the *Marriage Act* "is to establish a uniform marriage law throughout the Commonwealth": *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529 at 558 (Taylor J). That is, a uniform law in respect of what the Act regulates: both what it allows and forbids.

Construction of the *Marriage Equality Act*

33. The *Marriage Equality Act* prescribes the eligibility, formalities required for the solemnisation, and the ending of "marriage" under the Act (Parts 2, 4 and 5, respectively). The Act provides for the recognition of same sex marriages under a law of another jurisdiction (Part 6) and offences, including relating to the solemnisation of a marriage and bigamy (Part 7). The Act also provides for consequential amendments to certain enactments (Schedule 2), including the *Domestic Relationships Act 1994* (Cth), so that the enactments apply to those "married" under the *Marriage Equality Act*.

34. "Marriage" is defined in the Dictionary to mean:

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[32] Any reliance on the *expressio unius est exclusio alterius* maxim should be treated with caution. The maxim applies only when the intention it expresses is discoverable upon the face of the instrument: *Houssein v Under Secretary, Department of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88 at 94. Furthermore, when considering Commonwealth legislation, regard should be had to s 33(3B) of the *Acts Interpretation Act 1901* (Cth), which appears to negate the operation of the *expressio unius* approach, and deny any suggestion that the maxim might operate as an automatic presumption or as a rule that produces a result in itself.

(a) the union of 2 people of the same sex to the exclusion of all others, voluntarily entered into for life; but

(b) does not include marriage within the meaning of the *Marriage Act 1961* (Cwlth).

35. In prescribing the criteria of eligibility for marriage under the Act, it is stated that each person cannot marry the person's proposed spouse under the *Marriage Act* because it is not a marriage within the meaning of that Act: s 7(1)(c). Consistent with this, a marriage is void under the Act if either party did not meet the eligibility criteria under s 7 when the marriage was entered into: s 21(1)(a).

36. By way of definition, and the prescription of eligibility for marriage under the *Marriage Equality Act*, the circumference of the operation of that Act stands outside and apart from the scope of operation of the *Marriage Act* (and the *Family Law Act* to the extent that it adopts the federal definition of "marriage"). The Commonwealth and the Territory law do not regulate the same status of "marriage".

(iii) The Marriage Equality Act is not inconsistent with federal law

37. The Commonwealth has failed to demonstrate that the *Marriage Equality Act* is not capable of operating concurrently with any provision(s) of the *Marriage Act* or the *Family Law Act*, in any practical or legal sense. Neither variation, nor overlap, as between Territory and Commonwealth law demonstrates relevant inconsistency, especially in a case such as this where the relevant Acts regulate different subject-matter: the Territory law is concerned with the institution of same sex marriage, and "not marriage within the meaning of the *Marriage Act*".

38. Furthermore, the Commonwealth has not demonstrated an objective intention to provide exhaustively for the status of marriage. The contention that the *Marriage Equality Act* cannot operate alongside the federal law without textual collision is based on a statement of intention, not on a construction of the particular provisions of the *Marriage Act* or *Family Law Act*. The use of "intention" masks a logical fallacy committed by the Commonwealth: namely, the confusion of premise with conclusion. If the proposition that a federal law is an exhaustive and exclusive statement of the rules that govern a particular subject-matter, is taken, not as a conclusion, but as a premise for argument about the application of s 109, "error beckons".[33] The metaphor of intention is used to obscure not only the centrality of determining, by an orthodox process of construction, the reach and operation of the two laws but also the necessity to determine whether the State law alters, impairs or detracts from the federal law.

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33 See *Momcilovic* at [321] (Hayne J).

Response to the Commonwealth's contentions

Contention 5.1[Section 1] – Marriage is a status regulated by law which invites uniform regulation

39. The relevance of a survey of marriage before 1901 (PS [6]-[11]) to the question of constitutional interpretation is not apparent. The Commonwealth presents, for the first time, what it contends to be material facts, as the basis for a conclusion as to the overarching purpose of the federal laws. To the extent that this exercise invites the Court to draw factual inferences, it is not appropriate in this proceeding. The agreed factual background to this matter is as indicated in paragraph 4 above. Furthermore, the Commonwealth commits the error of conflating a range of concepts, such as the capacity to marry, validity and status of marriage, into the one 'institution' of marriage. This error critically infects its ensuing analysis.

Contention 5.2 [Section 2] – It took 60 years for the Commonwealth to exercise its power to enact uniform marriage and divorce laws

40. Aside from the question of administrative convenience, there is nothing about the institution of marriage that dictates uniformity of regulation.[34] As such, uniformity does not characterise the power in s 51(xxi) of the Constitution, although it may be the result or consequence of the exercise of that power.

41. Consequently, the legislative ability of the Commonwealth to enact a uniform scheme for "marriage" within the meaning of the *Marriage Act* is not in issue (cf. PS [12]). The asserted 'fragmentation of law' (PS [15]) assumes a singular, indivisible law. The Commonwealth has not demonstrated this, and their submissions in relation to the state of pre-1961 marriage speak against it. Furthermore, the 'uncertainty' to which Isaacs J adverted to in *Fremlin v Fremlin* (1913) 16 CLR 212 at 230 emanated from the existence of "different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce", such that "a man and wife" in one country might be strangers in another. The *Marriage Equality Act* does not propagate this 'scandal'.

Contentions 5.3 & 5.4 [Section 3] – A uniform set of rules governing the status of marriage (a single and indivisible concept) and the determination of matrimonial causes

42. This is the point of departure for the parties. It is not accepted that the *Marriage Act*, coupled with the *Family Law Act*, provides a uniform set of rules for the holding of the status of marriage for the law of Australia.

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34 Cf. PS [53].

43. To the extent that the Commonwealth's submissions are based upon the motive of the Parliament (PS [16]-[19]), this is irrelevant. In determining that State laws preventing lawyers from advertising did not impair the federal legislative scheme, which was undergirded by a movement towards uniformity resulting in a 'national legal profession', Gleeson CJ and Heydon J in *APLA Ltd v Legal Services Commissioner* (NSW) (2005) 224 CLR 322 at [45], explained that inconsistency "does not spring from the political motives of the respective law-making authorities". The question is one of inconsistency of laws, not inconsistency of political opinion: "Different legislative policies might, or might not, result in inconsistent laws" (at [45]). This is not a contest of statutory objects – those of the *Marriage Act* versus those of the *Marriage Equality Act*.[35]

44. In that regard, the Commonwealth's assessment of the "fundamental legislative object" of the *Marriage Act* is misconceived.

45. *First*, it is an attempt to discover a subjective purpose or intention (in terms of what those who promoted or passed the legislation had in mind when it was enacted), which is not derived from what the legislation says, and which is based on an assumption about the desired or desirable reach or operation of the relevant provisions.[36]

46. *Secondly*, the Commonwealth calls upon extrinsic material to illustrate a social history that is divorced from an assessment of the text of the Act. This approach is contrary to that sanctioned by s 15AB(1) of the *Acts Interpretation Act 1901* (Cth), where consideration may be given to extrinsic material so as to confirm the ordinary meaning of a provision, to determine the meaning of the provision that is ambiguous or obscure, or otherwise where the ordinary meaning leads to a result that is manifestly absurd or unreasonable. In other words, the necessary anchor to a purposive approach to construction and the resort to extrinsic material is the text of the Act.

47. *Thirdly*, the Commonwealth's approach also suffers from the ill described by Gleeson CJ in *Carr v Western Australia* (2007) 232 CLR 138 at [5], where his Honour stated that:

> Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem. For a court to construe the

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35 Cf. PS [50].

36 *Certain Lloyd's Underwriters v Cross* (2012) 87 CLR 131 at [25]-[26] (French CJ and Hayne J); *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [44].

legislation as though it pursued the purpose to the fullest extent may be contrary to the manifest intention of the legislation and a purported exercise of judicial power for a legislative purpose.

48. It is not an answer to this problem to contend that "there can be little doubt about the extent to which the legislation pursued that purpose" (PS at fn 57). That is the very issue in contention. Conclusion cannot parade as premise. As Gleeson CJ explained, a survey of the text may reveal a more specific purpose which helps to answer this question: "Ultimately, it is the text, construed according to such principles of interpretation as provide rational assistance in the circumstances of the particular case, that is controlling" (at [6]).

49. Furthermore, the Commonwealth misrepresents the essential requirements for validity of marriage for the purposes of the *Marriage Act*. Specifically, the requirement in s 46(1) of the *Marriage Act* (PS [20.1]) recalls the common law definition in *Hyde v Hyde* (1866) LR 1P & D 130. Importantly, the failure to comply with the requirements of s 46 does not result in invalidity: s 48(2)(e).

50. In a similar vein, the question of 'recognition' of foreign marriages (PS [20.4]) speaks to the ambit of the operation of the Act, and not to the validity of a marriage. Contrary to the submission of the Commonwealth, s 6 of the *Marriage Act*, which preserves the operation of State or Territory laws with respect to the formal requirements of marriage (namely, registration) does not operate to *exclude* laws with respect to the institution of same sex marriage, an institution that the *Marriage Act* does not regulate. The reference to offences under the Act (PS [20.5]) supports the proposition that same sex marriage is not prohibited under the Act.

51. There is, therefore, no textual basis (or "clear objective intention") for the proposition that the *Marriage Act* "leaves no room for there to be any other laws in Australia which purport to clothe a union with the legal status of marriage" (PS [23]-[24]). It is difficult to see how the *Marriage Act* can be an expression by the Parliament that, "within the field of its sovereignty", the "binary division" in status between married and unmarried will be demarcated by the terms of the Act, when the terms of that Act do not exhaust the field which, it is acknowledged, encompasses same sex marriage.

52. In an area of non-exclusive power, the Commonwealth is asking this Court to do that which it has failed to do in the exercise of its "ample" legislative power: namely, to prohibit the legal recognition of same sex relationships for the purposes of the *Marriage Act*. This failure is underscored by the Commonwealth's submissions that the *Marriage Act* leaves no room for a State or Territory legislature to create a

bigamous, polygamous, involuntary or under age marriage (although, it is not clear how the *Marriage Act* prohibits 'trial' or 'arranged' marriages): PS [26]. It leaves no room because it prohibits these 'institutions' of marriage (either expressly or by making them a condition of validity). Furthermore, the Commonwealth's submission that couples who are not man and woman are and must remain for the purposes of Australian law 'unmarried' persons misstates the law in relation to transgender persons and intersex couples.[37]

53. The Commonwealth's submissions on the manner in which marriage in Australia may be brought to an end (PS [28]-[30]) go no further. As explained above, the concern about a return to "complexity" and "uncertainty" misstates the "scandal" deprecated by Issacs J in *Fremlin*. It is also an appeal to aspiration. The "uniform law" which the *Family Law Act* purports to establish, and the "single form" of federal jurisdiction that the Family Court purports to exercise, pertain to the subject-matter of "marriage" that the federal Act regulates. That is not coterminous with the subject-matter of the *Marriage Equality Act*.

54. In that regard, in relating the impact of the "scheme of Acts" on private international law (PS [31]-[33]), the Commonwealth overstates the parameters of the scheme: there is no provision for a "single legal answer" as to whether the status of marriage is held, attained or retained. This has ramifications for the inference of an objective intent as to the circumscription of a lawful marriage by Commonwealth law (PS 5.4.2 – 5.4.3). That is, it undercuts any inference that it is not open for any other legislature to clothe with the legal status of marriage a union of persons. Furthermore, any submission on Parliament's intent as to the disappearance of the "scope for the patchwork of varying State (or Territory) laws and consequent private international law issues within the nation" (PS at [5.4.1]) is misguided to the extent that is it directed at the desired consequence of the federal law, as opposed to its intended operation (objectively inferred).

Contention 5.5 [Section 4] – 2004 amendments confirm the legislative choice regarding recognition of marriage

55. Contrary to the submission of the Commonwealth, as explained above, the non-recognition of a status of marriage for the purposes of the *Marriage Act* is not a prohibition of that status (cf. PS [34]-[36]). That "legislative choice" does not mean that another legislature cannot provide for the validity, under its law, of a status of marriage (which status is not prohibited by the federal law). By way of the 2004

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[37] *Attorney-General (Cth) v "Kevin and Jennifer"* (2003) 172 FLR 300 at [205], [231]-[232], disapproving *C and D* (1979) 35 FLR 340.

amendments, the Parliament has turned its mind to the recognition of same sex marriage and chosen not to proscribe that relationship as a "prohibited relationship" for the purposes of the *Marriage Act*. This submission demonstrates the Commonwealth's approach in equating: (a) the subjective intention of Parliament with the objective intention as revealed by the proper construction of the Act; and (b) the object(s) of the amendments in 2004 with the object(s) of the Act as a whole.

56. The Commonwealth uses s 88EA (and the stipulation that a same sex union solemnised in a foreign country must not be recognised as a marriage for Australia) to draw a "negative implication" that matters will not be regulated differently by State or Territory law. Justice Gummow in *Momcilovic v The Queen* (2011) 245 CLR 1, adverted to an "implicit negative proposition" in the context of "the detailed character of the federal law" evincing an intention to deal completely and exhaustively with a *particular subject-matter* (at [244], [261]), and the exclusion from a rule of conduct prescribed by federal law significant elements to which the State law attached criminal liability. This was said to have contained an implicit negative that denied the concurrent operation of the State law in respect of the acts the subject of the federal offence (at [276]). There is no analogy with s 88EA. In any event, in its broadest scope, any implicit negative proposition would extend only to same sex unions solemnised in a foreign country, and cannot be used as the basis of a broader proposition that same sex unions solemnised in Australia will not be regulated 'differently', as this subject-matter is not regulated (for present purposes, prohibited) by the federal law.

Contention 5.6 [Sections 5 & 6] – The Marriage Equality Act is inconsistent with, and repugnant to, the Marriage Act and Family Law Act

57. The question of whether or not the Territory law can "achieve its self-stated objective" is simply not relevant to the question of construction before this Court (PS [37]). To the extent that the Commonwealth claims that the Territory law mimics the structure and form of the federal law, substituting the "preferred element" (same sex marriage) and the "preferred court" (the ACT Supreme Court) at critical junctures (PS [38]), it is not clear how this promotes the claim for inconsistency with the *Marriage Act* or *Family Law Act*.[38] The "variances" outlined in the 'Plaintiff's

[38] "Inconsistency is not necessarily demonstrated by the prescription of different conditions to govern the respective exercise of two or more powers, provided the exercise of one power would not trespass upon rights, powers or privileges secured by the conditions governing the exercise of the other or others": *Webster* at 321 (Brennan J).

comparative table of provisions' (PS [39]-[40])[39] demonstrate the concurrent operation of the Acts. They do not reveal any direct inconsistency.

58. It is not clear why the Commonwealth appeals to the qualified exclusion of State and Territory laws in relation to de facto financial provisions to support the proposition that the "national scheme" established by the *Marriage Act* and the *Family Law Act*, is the "sole and exclusive means" by which matrimonial disputes are to be resolved (PS [41]). Further support is sought from the "separate procedure and jurisdiction" for the determination of disputes as to marriage provided for by the *Marriage Equality Act* (PS [42]). The Commonwealth points to 'inevitable conflict' on the basis that the manner in which a marriage under *Marriage Equality Act* ends is different from that provided by the *Family Law Act* (PS [43.1]). Difference in operation does not demonstrate inconsistency. In any event, the operation of s 33 of the *Marriage Equality Act* (ending of marriage on later other marriage) reflects nothing more than the prohibition on bigamy in the *Marriage Act*.

59. Nor does overlap in the operation of these laws demonstrate inconsistency.[40] The Commonwealth argues that, as a result of the "complex patchwork" created by the operation of the *Family Law Act*, the *Marriage Equality Act*, and the *Domestic Relationships Act*, those married under the *Marriage Equality Act* may, under certain unidentified circumstances, end up without relief for property or maintenance under the Territory scheme (PS [43.2]). The Commonwealth argues that this result would be inconsistent with the "objective intention" of the *Family Law Act* that "all married persons" have access to such relief. It seems somewhat at odds for the Commonwealth to now assert an intention to recognise same sex marriage under the *Marriage Equality Act*.

60. Similarly, the assertion that persons may be recognised as married under Territory law, but in a de facto relationship under federal law, does not demonstrate inconsistency (cf PS [43.3]). The Commonwealth argues that these variations give rise to an inconsistency because of an intention to provide exhaustively as to the status of marriage in Australia, and for the resolution of matrimonial causes

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[39] In the 'Plaintiff's comparative table of provisions', the Commonwealth misstates the effect of s 33 of the *Marriage Equality Act*, which is not to permit remarriage. A condition of eligibility of marriage is that the person is not legally married: s 7(1)(b)(i). Furthermore, the 'variances' in relation to property adjustment and maintenance are posited in relation to the *Domestic Relationships Act 1994* (ACT), the validity of which the Commonwealth does not put in issue in this proceeding.

[40] Resolving inconsistency does not resolve all questions of administrative overlapping, even in relation to regulation of the same subject-matter: *Victoria v Commonwealth* (1937) 56 CLR 618 at 636-637 (Evatt J).

(PS [44]). As stated above, that intention is not demonstrated. Moreover, any attempt to draw an analogy with the uniform regulation of bankruptcy on the basis that the subject-matter "practically permit[s] only one system of law and one system of administration",[41] clearly fails.

61. Contrary to the Commonwealth's submission (PS [47]), the statement of Gleeson CJ and Gummow J in *GPAO* that one would be slow to attribute to Parliament the intention that a new law with respect to marriage would segregate the population by a criterion of residence in a territory rather than elsewhere in Australia, has no direct bearing on the present issue. Their Honours were speaking to the situation where Parliament intended that the federal law should be a complete statement of the law governing a particular relation or thing (at [57]). On that basis, one would be slow to attribute to Parliament an intention that the law should operate differentially across Australia. The Commonwealth cannot use that reluctance to infer an intention on the part of Parliament to provide exhaustively on a particular topic, which is the premise to their Honours' observation. Furthermore, the question of resolving a conflict between an Act and subordinate legislation (PS [48]) is not an apt analogy in the context of the application of s 28 of the *Self-Government Act*, for the reasons explained above.

62. The Commonwealth's submissions on the construction of s 28 (PS [49]) address the consequence of an inconsistency; they do not account for how the inconsistency arises. The Commonwealth misstates the "whole object" of the *Marriage Equality Act* as one of altering the definition of the status of marriage, so as to conflict with the objects and text of the federal law (PS [50]). The Territory does not accept that there is one, unitary, status of marriage, nor that the purpose of its law is to effectuate conflict. In any event, it is not the role of the Court in this proceeding to determine a contest of purpose.[42]

63. The linchpin of the Commonwealth's case, both in relation to s 28 and a "narrower test" of inconsistency is the intention of the Parliament to set out a single national set of rules governing the "status of marriage" (PS [51]). That intention is not demonstrated by any supposed reintroduction of the "need" to resort to rules of

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41 *Victoria v Commonwealth* (1937) 58 CLR 618 at 638 (Evatt J).

42 The 'adaption' of Gummow J's approach in *Momcilovic* at [270]-[272], deprecating the use of the "slippery term intention" to convey the notion that a federal law is to be construed so as to accommodate the operation of State laws in specified respects, does not support the Commonwealth's construction of s 28 of the *Self-Government Act*.

private international law to resolve questions of recognition in other jurisdictions (PS [54]).

64. Finally, the Commonwealth seeks to establish a separate test or principle of repugnancy in the context of a contest between two statutes of two different legislatures, such that the statute of the subordinate legislature is void.[43] The authority relied upon by the Commonwealth (PS [51], fn 101; [53], fn 105), which itself defers to authority in the context of a contest between ordinance and statute,[44] does not support the application of a separate test in this context.[45] The anomaly of a separate test is demonstrated by the submission of the Commonwealth, which assumes the conclusion for which the Commonwealth contends: namely, that the Parliament would not have intended to permit the Territory to enact laws inconsistent with federal law (PS [53]). In that regard, inconsistency and repugnancy are coterminous: the former necessarily satisfies the latter. This is unsatisfactory in a context where either is said to yield a different result.

65. Furthermore, and, in any event, the Commonwealth fails to demonstrate that the ACT law destroys or detracts from a right conferred by the Commonwealth law.[46] Similarly, a conclusion that the Territory law "affects" the operation of the Commonwealth law assumes that the Commonwealth enactment is a complete statement of the law governing a particular matter or set of rights and duties. In the absence of exclusive power, overlap of regulation does not demonstrate inconsistency.[47]

Part VII: Orders sought

66. The questions reserved should be answered as follows:

a. Question 1 – *No*.

b. Questions 2 & 3 – *Not necessary to answer*.

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43 See *Metwally* at 464 (Mason J).

44 *Japanangka*, with reference to *Laristan* at 588 (Dixon J); *Webster* at 418-419 (Brennan J).

45 *Japanangka* is concerned with the *construction* of a power granted in the Commonwealth Act vis-à-vis that in a statute of the Northern Territory (at 419-420). The result of 'repugnancy' was a certain construction of the Commonwealth power, not a declaration that the Territory law was void (at 423).

46 In *Japanangka*, the procedure prescribed by the Commonwealth Act was "set at nought" by the operation of the Territory law (at 419). That law also imposed a liability upon the Commonwealth, which would be inconsistent with a right granted to it under the Commonwealth Act (at 421).

47 *Victoria v Commonwealth* (1937) 58 CLR 618 at 630-631 (Dixon J).

c. Question 4 – *No.*

d. Questions 5 & 6 – *Not necessary to answer.*

e. Question 7 – *The proceeding should be dismissed.*

f. Question 8 – *The plaintiff should pay the defendant's costs.*

Part VIII: Oral presentation

67. It is estimated that 2 to 3 hours will be required for the presentation of oral argument.

Dated: 25 November 2013

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P J F Garrisson SC
Solicitor-General
for the Australian Capital Territory
Telephone: (02) 6207 0654
Facsmile: (02) 6207 1162
email: peter.garrisson@act gov.au

.....
K L Eastman SC
Telephone: (02) 9236 8677
Facsimile: (02) 9221 8686
email: eastman@stjames.net.au

.....
H Younan
Telephone: (02) 9231 6546
Facsimile: (02) 9221 5604
email: hyounan@sixthfloor.com.au

Counsel for the Defendant