THE CONSTITUTIONALITY OF THE MARRIAGE EQUALITY ACT 2013 (ACT) AND THE SAME-SEX BILL 2012 (NSW): A COMPARATIVE ANALYSIS

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I INTRODUCTION

Attention has been recently focused on the issue of marriage equality for same-sex couples with the enactment in the Australian Capital Territory of the *Marriage Equality Act 2013* (ACT) (*Marriage Equality Act)* and the drafting of the Same-Sex Marriage Bill 2013 (NSW) (Same-Sex Bill) in the state of New South Wales previous to this enactment. A Commonwealth challenge to the constitutional validity of the *Marriage Equality Act* in the High Court of Australia appears imminent.[1] It thus appears timely to consider the constitutionality of both the Same-Sex Marriage Bill and the *Marriage Equality Act*. As will be shown, the constitutional validity of both instruments turn upon their consistency with the federal *Marriage Act 1961* (Cth) (*Marriage Act)* under s 109 of the *Australian Constitution* (in relation to the *Marriage Equality Act*) and under s 28 of the *Australian Capital Territory (Self-Government) Act* 1988 (ACT) (the *Self-Government Act)* (in relation to the Same-Sex Bill). It is suggested that Same Sex Bill creates or constitutes a fundamentally different status of 'marriage' for same-sex couples - that is the 'same-sex marriage' and thereby avoids inconsistency with the Commonwealth *Marriage Act*.[2] Hence it is argued, if enacted into law, the Same-Sex Bill would survive constitutional challenge. On the other hand, the *Marriage Equality Act* seeks to accord precisely the same status of 'marriage' to same-sex couples as afforded *exclusively* to heterosexual couples under the federal *Marriage Act*. As will be shown, s 51(xxi) of the *Australian Constitution* purports to 'cover the field' in relation to the attainment of the status of 'marriage' and because the Australian Capital Territory seeks to intervene and regulate this status in regard to same-sex couples, it is highly likely that the *Marriage Equality Act* will be held to be inconsistent with the federal *Marriage Act* and will thus be invalid. In its present form, then, it is most probable that the ACT *Marriage Equality Act* will be struck down as constitutionally invalid.

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1 *Christopher Knaus and Lisa* Cox 'Commonwealth to Challenge Same-Sex Marriage Laws Hearing in the High Court', *The Canberra Times*, 25 October, 2013.

2 *Marriage Act 1961* (Cth).

After considering the constitutional validity of the New South Wales Same-Sex Marriage Bill and ACT *Marriage Equality Act* the paper will then canvass developments in marriage equality for same-sex couples in Canada and the United States. As will be shown, recognition has been accorded to same-sex couples seeking marriage equality through the judiciary as opposed to the legislature. As a consequence, judicial activism has achieved a great deal where the legislatures in Canada and the United States have failed. It is suggested that these developments have implications for Australia. If one of the States of Australia can realise genuine marriage equality for same-sex couples, s 117 of the *Australian Constitution* may provide room to manoeuvre for the High Court to secure uniform recognition of marriage equality to same-sex couples throughout Australia.

II THE CONSTITUTIONALITY OF THE NEW SOUTH WALES BILL 2013 (NSW)

This section will consider the constitutional validity of the Same –Sex Bill[3] if were enacted into law. The first question that needs to be considered here is whether it is within the power of the federal parliament to make laws with respect to same-sex marriages - in particular so as to include or exclude same-sex marriage marriages from the federal *Marriage Act*.[4] It will be suggested that the answer to this question lies in the positive. The following section will then consider whether the Same-Sex Marriage Bill is inconsistent with the federal *Marriage Act* for the purposes of s 109 of the *Australian Constitution*.[5]

The federal parliament has power to make legislation on only certain subjects. Section 51(xxi) of the *Australian Constitution* confers power on the federal parliament to make laws 'with respect to marriage'.[6]

At the time of Federation, marriage in the law of England and the Australian colonies meant only marriage between one woman and one man. It was 'the voluntary union for life of one woman and one man, to the exclusion of all others.'[7] There can be little doubt that, as at Federation, the word marriage did not, as a matter of ordinary meaning, encompass a union between two men or two women. The question is whether the power of federal parliament with respect to marriage extends, today, to the enactment of legislation with respect to such a union.

The basic task in interpreting the *Australian Constitution* is to determine the meaning of the words used in the document; it is not to determine the intention of those who drafted, approved or voted for the *Australian Constitution*, though the words meant or intended to mean.[8] In determining the meaning of the words used, some judges of the High Court have

3 Same-Sex Bill 2013 (NSW).
4 *Marriage Act 1961* (Cth).
5 *Australian Constitution* s 109.
6 Ibid s 51(xxi).
7 *Hyde v Hyde* (1866) LR 1 P & D 130 [133].
8 *Tasmania v Commonwealth* (1904) 1 CLR 329 at 338-40; *Engineers' Case* (1920) 28 CLR 129 [148]; *New South Wales c Commonwealth (Work Choices*) (2006) 229 CLR 1 [120]-[121].

considered that the present day meaning is the one which is applicable regardless of whether that meaning might be different from the meaning that the words bore at the time of Federation.[9] However, that view does not represent the accepted doctrine of the Court. Rather, the starting point is that the words of the *Australian Constitution* are given their ordinary and natural meaning which they bore at the time of Federation.[10] Nevertheless, it is well accepted that words or expressions have a different contemporary operation from the one they would have at Federation.[11] There are two principle ways in which academics have considered that this may be so.

Jeffrey Goldsworthy, in particular, distinguishes between the 'connotation' and the 'denotation' of the words of the constitutional text. Goldsworthy argues that this 'connotation/denotation' distinction can operate to produce a quire progressive constitutional interpretive method.[12] This distinction has been embraced by the High Court when McHugh J in *Re Wakim;Ex parte McNally:*[13]

> …where the interpretation of individual words and phrases in the Constitution is in issue, the current doctrine of the Court draws a distinction between connotation and denotation or, in other words, between meaning and application.[14]

This connotation/denotation distinction has been drawn in the following terms:

> The words of the Constitution are to be read in that natural sense they bore in the circumstances of their enactment by their Imperial Parliament in 1900. That meaning remains…The connotation of the words employed in the Constitution does not change, even though changing events and attitudes may in some circumstances extend the denotation or reach of those words.[15]

Specifically, to define the connotation of a word, the High Court must identify 'the set of attributes to which the word referred in 1900 when the Constitution was enacted,'[16] According to Jeffrey Goldsworthy, it is a search for the 'original intended meaning' of the constitutional words which depends, in turn, on the evidence of the founder's intentions which in 1900 was readily available to their intended audience.[17] As Dan Meagher outlines, 'in this respect, discovering what the framers' intended, objectively or otherwise, is the

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9 *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 [171] per Deane J; *Grain Pool (WA) v Commonwealth* (2000) 202 CLR 479 [512] per Kirby J.

10 *Attorney-General (NSW); ex rel Tooth & Co Ltd v Brewery Employees' Union (NSW) (Union Label Case)* (1908) 6 CLR 469 [501]; *Amalgamated Society of Engineers v Adelaide Steamship Co. (Engineers' Case)* (1920) 28 CLR 129 [148]; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 [421]-[425]; *Eastman v The Queen* (2000) 203 CLR 1 [137]-[141].

11 *Singh v Commonwealth* (2004) 222 CLR 322 [159]-[160].

12 Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1, 33.

13 (1999) 198 CLR 511 [555].

14 Ibid.

15 *King v Jones* (1972) 128 CLR 221 [229] per Barwick CJ.

16 Gim del Villar *Connotation and Denotation* in Tony Blackshield, Michael Coper and Geroge Winterton (eds) *The Oxford Companion to the High Court of Australia*. Oxford: Oxford University Press, 2001, 15.

17 Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review*, 1, 33.

crucial step in defining the connotation of the constitutional word or phrase.'[18] The connotation, then, is the unchanging inherent or intrinsic meaning of the constitutional word. However, scope for application of the essential meaning may widen or contract depending on the changing conditions of society to which it applies. According to Brock and Meagher, using this connotation/denotation distinction, the marriage power had a fixed meaning at Federation and it would be unlikely that the power would now accommodate same-sex marriages:

> Thus the Court would likely find that the connotation of the constitutional term "marriage" in 1900 formal, monogamous and heterosexual unions. And if this interpretive technique is something more than a mere linguistic device, then it is difficult to argue that heterosexuality was not an essential or core element of "marriage" in 1900.[19]

Yet, despite this view, it is suggested that there are a number of implications of this connotation/denotation distinction for the marriage power in s 51(xxi) of the *Australian Constitution* and other federal heads of power as well which suggest that the limits of s 51(xxi) are still evolving and may, indeed, still accommodate same-sex unions.

Firstly, the power in s 51(xxii) of the *Australian Constitution* to make laws with respect 'to divorce and matrimonial causes' permitted laws conferring on courts the power to direct a settlement of a deserting husband's property in favour of his wife, though that was not known at Federation.[20] Secondly, the cases recognise that some words in the *Australian Constitution* did not have a fixed meaning at Federation, but described a concept that was evolving or uncertain at that time. In that case, the meaning of the word can encompass growth and developments since Federation.[21]

There is no decision of the High Court, nor any statement of a judge of the High Court which answers the question whether the power with respect to marriage extends to same-sex marriage. However, consistent with the principles stated above, many of the statements concerning the marriage power which have been made by judges of the High Court recognise the prospect of developments in the scope of the term 'marriage' since Federation.[22]

In the 1998 case *Attorney-General (NSW) ex rel Tooth & Co Ltd v Brewery Employees' Union of NSW*,[23] in the context of considering the power with respect to 'trade marks', Justice Higgins declared that:

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18 Dan Meagher 'Guided by Voices?- Constitutional Interpretation on the Gleeson Court' (2002) *Deakin Law Review*, 14 at 20.

19 M Brock and D Meagher 'The Legal Recognition of Same-Sex Unions in Australia: a constitutional Analysis' (2011) 22 *Public Law* 265, 270.

20 *Lansell v Lansell* (1964) 110 CLR 353.

21 *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 [482]; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 203 CLR 82 [34]; *Grain Pools (WA) v Commonwealth* (2000) 202 CLR 479 [22].

22 See *Attorney-General (Cth) v Kevin and Jennife*r (2003) 172 FLR 300 (FamCA FC) [88] –[100].

23 *Attorney-General (NSW) ex rel Tooth & Co Ltd v Brewery Employees' Union of NSW* [1908] 6 CLR 469.

> Under the power to make laws with respect to "marriage", I should say that the Parliament could prescribe what unions are to be regarded as marriages. Under the power to make laws with respect to parental rights, I should day that it could define what those rights are to be. Under the power to make laws with respect to parental rights, I should say that it could define what those rights are to be. Under the power to make laws with respect to "promissory notes", I should say that it could increase the class of documents which in 1900 where known as promissory notes. Under the power to make laws with respect to trade marks, I cannot see why Parliament, cannot, at least, being into the class of trade marks printed trade names and the "getup" of goods – right in the nature of trademarks, things which were treated on the same principles as trade marks, but not hitherto called "marks" in current language.[24]

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

> We are to ascertain the meaning of "trade marks" as in 1900. But having ascertained that meaning, we have then to find the extent of the power to deal with the subject of trade marks….The usage in 1900 gives us the central type; it does not give us the circumference of the power.[25]

In the 1980s case *Re F; ex parte F*[26] it was declared:

> Obviously the Parliament cannot extend the ambit of its own legislative powers by purporting to give to "marriage" an even wider meaning that that which the words bear in its constitutional context. Nor can the Parliament manufacture legislative power by the device of deeming something that is not a marriage to be one.

Similarly, in *Cormick v Salmon:*[27]

> The scope of the marriage power conferred by s 51(xxi) of the Constitution is to be determined by reference to what falls within the conception of marriage in the Constitution, not by reference to what the Parliament deems it to be, or to be within, that conception.

In 1962 in *Attorney-General (Vic) v Commonwealth*[28] citing the reasons referred to by Higgins J above, the Court said:

> It has been suggested that the Constitution speaks of marriage only in form recognised by English law in 1900. The word, it is said, is to be read as defined by the famous phrase of Lord Penzance in *Hyde v Hyde* "the voluntary union for life of one man and one woman, to the exclusion of all others"; and that therefore the legislative power does not extend to marriages that differ essentially from the monogamous marriage of Christianity. That seems to me an unwarranted limitation…I express no view on whether, theoretically, it would be within the power of Federal Parliament to make polygamy lawful in Australia. That question has absolutely no reality. But for some purposes, including the legitimacy of children, and

24 (1908) 6 CLR 469 [610].
25 (1908) 6 CLR 469 [614].
26 [1986] 161 CLR 376 [389].
27 (1984) 156 CLR 170 [182].
28 (1962) 107 CLR 529 [576]-[577].

> rights of succession, our law does recognise polygamous or potentially polygamous marriages contracted in countries where such marriages are lawful by persons domiciled there…If, instead of leaving the resolution of such matters to the principles of comity and private international law, the Commonwealth Parliament were to legislate expressly for the recognition by Australian courts of such unions when lawful by domiciliary law, such an enactment would, I should think, be within its power. And a law dealing with the tribal marriages of Aboriginal inhabitants of Australia, might also, I would think, be within power.

In 1991 in *R v L:*[29]

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

Finally, in 1999, in *Re Wakim; Ex parte McNally:*[30]

> In 1901 "marriage" was seen as meaning a voluntary union for life between one man and one woman to the exclusion of all others. If that level of abstraction were now accepted, it would deny the Parliament of the Commonwealth the power to legislate for same se 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.

To be sure there are statements of the High Court judges which have emphasised the inherent limitations in the concept of 'marriage'. Thus, in 1962, in *Attorney-General (Vic) v Commonwealth:*[31]

> The term marriage only outlines the power granted by par (xxi) of s 51; it does not particularise its contents, but nothing diverse in kind from what is connoted by the term marriage falls within the scope of the power. …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 in his context, it means only monogamous marriage.

Similarly, in 1986 in *Re F; Ex parte F* Brennan J said:

> "Marriage" as a subject of legislative power embraces those relationships which the law (leaving aside statutes enacted in the purported exercise of power) recognises as the relationships which subsist between husband, wife and the children of the marriage. Statutes enacted in purported exercise of the power cannot extend the scope of the power: only those relationships which are already embraced within the subject are amenable to regulation by a law enacted in the exercise of the power.[32]

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29 (1991) 174 CLR 379 [404].
30 (1999) 198 CLR 511[45].
31 (1962) 107 CLR 529 [549].
32 *Re F; Ex parte F* (1986) 161 CLR 376 [399].

However, it is suggested that we should not think that such statements should be read as denying the prospect that federal legislation, supported by the marriage power, may alter the process by which people can be married, or the class of persons who may enter into marriage with each other.

As will be seen, such a limitation would be entirely contrary to the history of marriage as a legal institution up to the time of Federation. Rather these statements emphasise, as Higgins J did over one hundred years ago, that there *is a limit to how far such changes may go before the result is to take the relationship beyond that which may properly be recognised as 'marriage'.*

Nevertheless, that does not answer the question here, namely whether that limit is exceeded by legislation with respect to same-sex marriages. It should be noted that in *Attorney-General (Vic) v Commonwealth,*[33] McTiernan and Windeyer JJ disagreed as to whether laws concerning polygamous marriage would go beyond the concept of 'marriage' in the *Australian Constitution*. It is not necessary to resolve that issue for the purposes of this paper.

III MARRIAGE PRIOR TO FEDERATION

The subject of the history of marriage is vast. It is not necessary to canvass all of it here. At the time of Federation, it had undergone and was still subject to significant legislative changes.[34]

For many hundreds of years, marriage in England was regulated entirely by non-statutory law. Under ecclesiastical law, applicable in Europe from the late 12th century, marriage required nothing more than the consent of the parties.[35] Marriages, indeed, were commonly celebrated at the church door, in the presence of a priest, and followed by a religious service. But private marriages, in the absence of priests and witnesses, were also recognised. In *R v Mills*[36] half of an evenly divided court held that it was a requirement of the English common law that the marriage might be celebrated in the presence of an episcopally ordained priest by reason of ancient-Anglo Saxon law. This involved a misreading of history which it has been suggested was wilful and calculated to end the rise of informal marriages.[37]

The age of consent was fixed by the common law as at 12 years for girls; 14 for boys. A want of consent could be shown in a previous marriage with another spouse and impotence at the time of the marriage. Parties were within the 'prohibited degrees of consanguinity' if they

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33 (1962) 107 CLR 529.

34 Sir Garfield Barwick, 'The Commonwealth Marriage Act 1961', (1961-2) 3 *Melbourne University Law Review*, 277; *In the Marriage of W and T* (1998) 146 FLR 323; Bates 'The History of Marriage and Modern Law' (2000) 74 *Australian Law Journal* 844; Baker, *An Introduction to English Legal History* (Oxford University Press, 4th ed, 2005) Ch 28.

35 See Geoffrey Lindell, 'Constitutional Issues Regarding Same-Sex Marriage: a Comparative Survey', (2008) 30 *Sydney Law Review* 27, 28.

36 (1844) 8 ER 844.

37 *In the Marriage of W and T* (1998) 147 FLR 323 [336]; Baker, *An Introduction to English Legal History* (Oxford University Press, 4th ed, 2005) 483.

were of a blood relationship or were of a relationship by marriage or 'carnal connection'. These prohibited degrees were placed on statutory footing in 1540.[38]

The requirement of two adult witnesses and the presence of a priest was introduced into Western Europe by the Tametsi Decree of the Council of Trent (1545-63).[39] The Council of Trent was an ecumenical council of the Catholic Church. But, being after the reformation this did not apply in England, and the ancient ecclesiastical law continued to apply there for another two hundred years. This was subject to a short period where an *Act Touching Marriages and the Registering Thereof* and also the *Touching Births and Burials* 1653 required the marriage to take place before a JP; but this was repealed during the Restoration.

In 1753 *Lord Hardwicke's Act* (*An Act for the Better Preventing of Clandestine Marriage* 1753 (Eng) 26 Geo II, c 33 significantly reformed the law of marriage in England. The publication of 'banns' (a public announcement in the parish church of an impending marriage); purchase of licence; the securing of parental consent for persons under 21 getting marriage; the presence of at least two witnesses and a minister; the solemnisation of the marriage in a church or chapel; and the recording of the marriage in a public register, were all essential requirements.[40]

Legislative reforms continued in England thereafter. In 1823 *Lord Hardwick's Act* was repealed and replaced and at the same time *bona fide* marriages were protected against invalidity caused by unwitting failure to comply with the law.[41]In 1835 marriages made within the prohibited degrees were void.[42] In 1836 marriage in a register office or registered building, was introduced as an alternative to marriage in a church or chapel.[43] *Lord Hardwick's Act* and other reforms mentioned in the previous paragraph were not expressed to apply outside of England.

They did not apply to established colonies here in Australia. The common law continued to regulate marriages in the colonies[44] until the colonies enacted their own marriage legislation over the course of the nineteenth century. In the colony of New South Wales, the first major legislation in relation to marriage was in 1873.[45]

Among other things, there was a difference of approach between the colonial marriage legislation and English marriage legislation as to the validity of a marriage between a person and a brother or sister of their deceased spouse. The marriage legislation of the Australian colonies of South Australia, Victoria, Tasmania, New South Wales, Queensland and Western

38 *Marriage Act* 1540 (Eng) 32 Henry VIII, c 38.
39 Geoffrey Lindell, 'Constitutional Issues Regarding Same-Sex Marriage: a Comparative Survey', (2008) 30 *Sydney Law Review* 27, 28.
40 *In the Marriage of W and T* (1998) 147 FLR 323 [338]; Baker, *An Introduction to English Legal History* (Oxford University Press, 4th ed, 2005) 485.
41 Marriage Act 1823 (Eng) 4 Geo IV c 76.
42 *Lord Lyndhurst's Act* 1835 (Eng) 5 & 6 Will IV, c 54.
43 *Marriage Act* 1836 (Eng) 6 & 7 Will, IV, c 84.
44 *R v Maloney* (1836) 1 Legge 74; Catterall v Catterrall (1847) 1 Rob ecc 580 [582].
45 *Matrimonial Causes Act 1873*.

Australia countenanced such marriages but English legislation did not.[46] The position in England was not changed until such time after Federation.[47]

Among the Australian colonies, there were also differences of approach, for instance, to marriages within the prohibited degrees. In the older colonies, the English legislation of 1835, which made marriages within the prohibited degrees void, did not apply; but it became part of the law of South Australia upon its establishment, and was expressly adopted in Western Australia.[48]

At the same time as various changes were taking place between to the people who might enter marriage, and the process by which they did so, so changes took place as to the manner in which they might terminate marriage: The common law permitted a right to escape marriage – conferring freedom to remarry – only if there was a want of capacity to intermarry or a want of consent

By the end of the eighteen century the ecclesiastical courts in England had developed a jurisdiction to licence spouses to live apart, though not to marry, in case of marital misconduct, such as adultery, cruelty, sodomy and heresy or if there was fear of future injury. Further, by the end of seventeenth century, it was possible to obtain a private Act of Parliament dissolving a marriage and permitting remarriage in cases of adultery. In 1857 Court of Divorce and Matrimonial Causes was established in England, from which an order for divorce could be obtained on the grounds of adultery.[49]

In the Australian colonies prior to introduction of similar legislation, a party could obtain divorce by private Act. However, jurisdiction to grant an order for divorce was on the basis of adultery was soon after 1857 reposed in Supreme Courts of colonies by colonial legislation.[50]

IV THE AUSTRALASIAN CONVENTION DEBATES

However, the approach to divorce in the colonies was by no means identical. Indeed, during the 1890s Australasian Convention Debates about the marriage power, debate was dominated by concern from South Australian about the more liberal divorce laws of New South Wales and Victoria.[51] In addition to these legislative developments forms of marriage quite different from the Christian tradition, were well known at the time of Federation. As a matter of ordinary language at the time, they were perfectly capable of being described as 'marriages', even if not recognised as 'valid' marriages. In particular, by the time of Federation, there had been cases of polygamous marriages had come before the courts, in which they were without

46 John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901) 608-9.

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

48 *Imperial Acts Adopting Act* 1844 (WA), 7 Vic, No 13.

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

50 In New South Wales the legislation was enacted in 1870: the *Matrimonial Causes Act* 1873. It was formally repealed in 1978.

51 Australasian Convention Debates, 1891, Sydney Convention, 1077 ff.

difficulty being described as 'marriages' (though not valid and sometimes said to be 'falsely called marriages'.[52]

Among the many changes to the legal concept of marriage up to Federation there is no suggestion of marriage between partners of the same sex. Furthermore, the ordinary meaning of the word 'marriage' would not have encompassed the suggestion of marriage between partners of the same sex. Moreover, it impossible to say that the opposite sex of the partners was not an essential feature of the term at Federation. If that is so, adopting a connotation-denotation analysis, a same-sex union would not be within the denotation of the term 'marriage' in the context of the present day.[53]

V MARRIAGE POWER AND SAME-SEX MARRIAGES

However, it is suggested that the marriage power is broad enough today to encompass the concept of same-sex marriage, having regard to the principle that a word with a fixed meaning at the time of Federation, may come to encompass later developments.[54]

First, prior to and even at the time of Federation, marriage was not a static fixed and immutable concept.[55] It had been subject to significant changes throughout history of England and Australia, some in the years not very distant from Federation. It remained the subject of legislative intervention and difference among the colonies and between colonies and England.[56]

Secondly, history reveals that marriage is a legislative construct and that it is inherent amenable or susceptible to legislative change. By the time of Federation, what had once been an ecclesiastical concept, had been adopted in the common law, and then subjected to considerable legislative interference.

Thirdly in addition to being a legal construct it was a social one. In that light it had been changed in response to changing social circumstances. Thus in the early period 'to reduce the chances of exposure to deadly sin through sexual waywardness, the Church maximised the number of ways in which a lawful union could be contracted.'[57] Much later, a reason for the

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52 *Hyde v Hyde* (1866) LR 1 P&D 130*; R v Byrne* (1876) 6 SCR (NSW) 302 T 305; *Harvey v Farnie* (1880) 6 PD 35 at 43; *Re Bethel* (1887) 38 CH D 220.

53 This is certainly what Jeffrey Goldsworthy would believe; Jeffrey Goldsworthy 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1.

54 Aileen Kavanagh 'The Idea of a Living Constitution' (2003) 16 *Canadian Journal of Law and Jurisprudence,* 55, 78; Michael Kirby 'Constitutional Interpretation and Original Intent' (2000) *Melbourne University Law Review*, 24; Michael Kirby 'Judicial Activism? A Riposte to the Counter – Reformation' (2004) 24 *Australian Bar Review,* 219; Greg Craven *The Crises of Constitutional Literalism* in HP Lee and G Winterton (eds) *Australian Constitutional Perspectives* (Law Book Co, 1992).

55 Parliament of Australia, Mary Anne Neilsen 'Same-Sex Marriage', Law and Bills Digest Section, 10 February 2012.

56 See the discussion above.

57 *In the Marriage of W and T* (1998) 146 FLR 323 [334].

establishment of the Court for Divorce and Matrimonial Causes was to avoid the need for a private Act in order to procure a divorce.[58]

Fourthly it seems clear that the contemporary meaning of marriage is wide enough to encompass same-sexual unions: the use of the word to encompass such unions 'does not stretch it beyond the meaning which it may today reasonably bear.'[59]

Fifthly, as a matter of principle, the words of the *Australian Constitution* are to be interpreted broadly. As Dixon J said:

> …it is a constitution we are interpreting, an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances.[60]

Finally, as outlined above, it is settled law that the Commonwealth cannot define the constitutional meaning of marriage through legislation.[61] In *Re F; Ex parte F*[62] Mason and Deane JJ held that:

> Obviously the Parliament cannot extend the ambit of its own legislative powers by purporting to give to "Marriage" an even wider meaning than that which the word bears in its constitutional context. Nor can the Parliament manufacture legislative power by the device of deeming something that is not a marriage to be one or by constructing a superficial connection between the operation of a law and a marriage which examination discloses to be but contrived and illusory.

In this regard, as has been stressed, the High Court has never been called upon to define 'marriage' for the purposes of the marriage power although there have been occasions where the High Court has made observations and given opinions about this power.[63] Nevertheless, some High Court *dicta* indicate that the constitutional meaning of 'marriage' in s 51(xxi) of the *Australian Constitution* is confined to the definition found in *Hyde v Hyde*[64] that is a monogamous, heterosexual union for life. There are also more liberal views that suggest that the label 'marriage' could apply to an extended range of circumstances prescribed by Parliament.[65] In *The Queen v L* Brennan J said:

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58 Baker, *An Introduction to English Legal History* (Oxford University Press, 4th ed, 2005) 496.

59 See generally Neil MacCormick 'Argumentation and Critique in Law' (1993) 6 *Ratio Juris*, 16

60 *Australian National Airlines v Commonwealth* (1945) 71 CLR 29 [81].

61 A. Lynch, G Williams, and B Tegger (Gilbert and Tobin Centre for Public Law) Submission to the Senate Legal Standing Committee on Legal and Constitutional Affairs, Inquiry into the Marriage Equality Amendment Bill 2009, 2.

62 (1986) 161 CLR 376 [389].

63 J Norberry Marriage Legislation Amendment Bill, 2004, *Bills Digest*, No 155 of 2003-04, 2.

64 (1866) LR 1 P & D 130.

65 The Bills Digest to the Marriage Legislation Amendment Bill 2004 sets out a range of examples: J Norberry Marriage Legislation Amendment Bill, 2004, *Bills Digest*, No 155 of 2003-04, 6-7.

> In *Hyde v Hyde* Lord Penzance defined marriage as "voluntary union of 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.[66]

And in *Fisher v Fisher*, Brennan J stated that:

> Although the nature and incidents of a legal institution would ordinarily be susceptible to change by legislation, constitutional interpretation of the marriage power would be an exercise in hopeless circularity in the Parliament could itself define the nature and incidents of marriage by laws enacted in purported pursuance of the power.
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> The nature and incidents of the legal institution which the Constitution recognises as marriage…are ascertained not by reference to laws enacted un purported pursuance of the power but by reference to the customs of our society, especially when they are reflected in the common law, which show the content of the power as it was conferred.[67]

On the other hand, as early as 1908 in *Attorney-General for NSW v Brewery Employees Union of New South Wales*[68] Higgins J declared 'Under the power to make laws with respect to marriage, I should say that the Parliament could prescribe what unions are to be regarded as marriages.'[69]

In 1962, in *Attorney-General (Vic) v Commonwealth* ('the *Marriage Act Case*') McTiernan J and Windeyer J appear to have taken opposing views about whether marriage is limited to monogamous marriages.[70] And more recently McHugh J has stated that:

> The level of abstraction for some terms of the Constitution is, however, much harder to identify than that of those set out above. Thus in 1901 "marriage" was seen as meaning a voluntary union of life between one woman and one man 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 future may mean, a voluntary union for life between two people to the exclusion of others.[71]

As Professor Williams and others have argued, this last opinion raises squarely the possible division of opinion on the High Court over the likely interpretation of the 'marriage power'.[72] Is the power fixed to its 1900 meaning or is it able to evolve or adapt in line with changed events and times? It is suggested an evolving interpretive approach to the marriage power could produce an outcome of validity for the Same-Sex Marriage Bill. This is described by Brock and Meagher in the following manner:

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66 (1991) 174 CLR 379 at 392.
67 (1986) 161 CLR 376 at 456.
68 (1908) 6 CLR 469 [610].
69 Ibid.
70 See 1962 107 CLR 529 at 549 per McTiernan J & [576]-[577] per Windeyer J.
71 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 [553].
72 A. Lynch, G Williams, and B Tegger (Gilbert and Tobin Centre for Public Law) Submission to the Senate Legal Standing Committee on Legal and Constitutional Affairs, Inquiry into the Marriage Equality Amendment Bill 2009, 2.

> …constitutional validity is a possibility if the High Court were to apply a different, though orthodox, interpretive technique. It involves recognising that the subject matter of the power is "marriage" as a *legal* institution, one that before 1900 was the subject of gradual, but significant change by the statutes of the United Kingdom and the Australian colonies as the earlier analysis demonstrates. In this regard, "marriage" is one of a number of legal terms and institutions that become constitutional provisions in 1900. Importantly, these legal terms of art were products of pre-federation common law and statute and their content – consistent with the common law tradition – was still developing (and contested) to varying degrees at the time of federation. Considering this history, is it not reasonable to assume that the framers understood that the legal institution of "marriage" would likely develop further after federation and provided a constitutional mechanism to accommodate this? In other words, to consider that the essential meaning of constitutional terms such as "marriage" was frozen in 1900 would betray the pre-federation history, the common law tradition, and maybe even the intention of the framers?[73]

In a submission to the Senate Committee Inquiry into the Marriage Equality Amendment Bill 2009, Associate Professor Andrew Lynch, Professor George Williams, and Ben Teeger, of the Gilbert and Tobin Centre of Public Law discuss this issue and the likelihood of the High Court providing a wide definition of 'marriage':

> On balance, it cannot be said with any great confidence that the High Court at the present time is likely to find the Commonwealth possesses legislative power to permit same-sex unions under section 51(xxi). Indeed, the most likely conclusion is that the meaning which is currently employed by the *Marriage Act* (between a man and a woman), represents the full extent of the Commonwealth's power. That is, the Commonwealth lacks the power to include same sex unions within the present meaning of "marriage".[74]

However, in September 2010, Professor Williams came down on the side of an expansive interpretation, based on the view that 'the meaning of the *Australian Constitution* must evolve with changes in society'. He concluded that:

> There can be no answer to this dilemma until a federal same-sex marriage law is tested in the High Court. My view is that a majority would lean to the latter view, thereby allowing the federal parliament to provide for same-sex marriage.[75]

Viewed in this light it is thus considered tentatively that the Federal Parliament has power with respect to same-sex marriages because they do fall within the marriage power in s51(xxi) of the *Australian Constitution*. Accordingly, the Commonwealth could amend the *Marriage Act* so as to bring it within the terms of same-sex marriages. Equally it can - as it has done - deliberately exclude same-sex unions from 'marriage'.

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73 M.Brock and D. Meagher 'The Legal Recognition of Same-Sex Unions in Australia: A Constitutional Analysis' (2011) 22 *Public Law Review*, 269, 270.

74 A Lynch, G Williams, and B Tegger (Gilbert and Tobin Centre for Public Law) Submission to the Senate Legal Standing Committee on Legal and Constitutional Affairs, Inquiry into the Marriage Equality Amendment Bill 2009, 3.

75 George Williams 'Could the States legalese Same-Sex Marriage', *Sydney Morning Herald*, 28 September 2010.

Focus now shifts to the validity or constitutionality of provisions of the *Marriage Act*.

VI VALIDITY OF PROVISIONS OF THE MARRIAGE ACT 1961 (CTH)

Now that it has been established that the parliament has power to pass legislation with respect to same-sex marriages, it needs to be established that the definition of 'marriage' in the *Marriage Act* (particular in relation to ss 5, 46(1) and 88EA) is constitutionally valid.

Section 5 defines the marriage to mean 'the union of a man and a woman to the exclusion of all others, voluntarily entered to in life.' This is consistent with the orthodox understanding of marriage at the time of Federation. There is no doubt that regulation of marriages of this kind is within the marriage power.

This provision means that same-sex couples cannot be married under the *Marriage Act*. Section 46 provides that where a marriage is solemnised by an authorised celebrant, who is not a minister of religion the authorised celebrant must say the following words:

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

It is certainly within the marriage power to prescribe the form of ceremony necessary to solemnise a marriage.

To complement ss 46 and 88EA of the *Marriage Act* expressly precludes the recognition of foreign same-sex unions as marriages under the *Marriage Act*. The recognition or non-recognition of foreign marriages is plainly within the marriage power. While recognition of foreign same-sex couples as marriages is within the marriage power, it is, nevertheless, open to Parliament to legislate so that such unions are not so recognised.

Accordingly, then, the provisions of the *Marriage Act* with respect to the definition of marriage is thus constitutionally valid. Focus now shifts to the potential constitutionality of the New South Wales Same-Sex Marriage Bill.

VII THE CONSTITUTIONAL VALIDITY OF THE SAME-SEX MARRIAGE BILL 2013 (NSW)

It is suggested that an Act in the form of the Same-Sex Marriage Bill would *prima facie* be within the legislative power of the parliament of New South Wales to enact.

Subject to only two caveats the legislative power of the parliament of New South Wales is plenary.[76] The parliament of New South Wales has plenary legislative power 'to make laws for the peace, welfare and good government of all whatsoever.'[77] So subject to the *Australian*

[76] *Australian Constitution Act* 1850 (Imp) s 14; *Constitution Act* 1855 s 1; *Australia Act* 1986 (Cth) s 2 (2); *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 [10].

[77] Constitution Act 1902 (NSW) s 5.

Constitution, and any express or implied restrictions on state power arising from that source, the state parliament of New South Wales enjoy general legislative power to make laws for the 'peace, welfare and good government' of that state.[78] The meaning of the phrase 'peace, order and good government' was considered in *Union Steamship Co of Australia Pty Ltd v King.*[79] In that case, the New South Wales Compensation Court made an order under s 46 of the *Workers' Compensation Act* 1926 (NSW) awarding King, an employee of the Union Steamship on a ship registered in New South Wales, compensation for boilermakers' deafness. Union Steamship challenged the award on two grounds in the High Court: that s 46 was not a valid law for the peace, order and good government of New South Wales, and that the provisions of the state law were inconsistent with the *Seamen's Compensation Act* 1911 (Cth), thus rendering the state law invalid to the extent of its inconsistency by virtue of s 109 of the *Australian Constitution*.

The High Court rejected the application, confirming that phrase 'peace, welfare and good government' in s 5 of the *Constitution Act* 1902 (NSW) is a *plenary* power. The word 'plenary' means 'not subject to limitations of exceptions'. In their unanimous judgment, the Court, after a review of the authorities, said:

> These decisions and statements of high authority demonstrate that, within the limits of the grant, a power to make laws for the peace, order and good government of a territory is as ample and plenary as the power possessed by the Imperial Parliament itself. That is, the words "for the peace, order and good government" are not words of limitation. They did not confer on the courts of a colony, just as they do not confer on the courts of a State, jurisdiction to strike down legislation on the grounds that, in the opinion of a court, the legislation does not promote or secure the peace, order and good government of the colony. Just as the courts of the United Kingdom cannot invalidate laws made by the Parliament of the United Kingdom on the ground that they do not secure the welfare and public interest, so the exercise of legislative power conferred on the Parliament of New South Wales is not susceptible to judicial review on that score. Whether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law…is another question which we need not explore.[80]

The High Court based its interpretation of the phrase 'peace, order and good government' on the doctrine of parliamentary supremacy (sometimes referred to as *parliamentary sovereignty*). The Colonies – the predecessors of the States – received their legislative power from the Imperial Parliament at Westminster, which was traditionally regarded as enjoying plenary power. The measure of Imperial parliamentary power was described by the eminent 19th century constitutional scholar, A V Dicey as 'the right to make or unmake any law what soever.'[81] As Dawson explained in his dissenting judgment in *Kable v DPP*[82] in a joint judgment (with whom Brennan CJ, and McHugh J agreed on this point):

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78 *Constitution Act* 1902 (NSW) s 5; see also in a Queensland context *Constitution Act* 1867 (Qld) s 2.
79 (1988) 166 CLR 1.
80 *Union Steamship Co of Australia Pty Ltd v King (*1988) 166 CLR 1 [10].
81 AV Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan London, 1959) 11.
82 (1996) 189 CLR 51 [71]-[72].

> The New South Wales Parliament derives its legislative power from s 5 of the *Constitution Act* 1902 which provides that "the legislature shall, subject to the provisions of the *Commonwealth of Australian Constitution Act*, have power to legislate for the peace, welfare and good government of New South Wales in all cases whatsoever…" It is unnecessary at this point to trace the history which lies behind this provision because it is firmly established that its words confer a plenary power "and it was so recognised, even in an era when emphasis was given to the character of colonial legislatures as subordinate law-making bodies." That was clear before the passage of the *Australia Acts* but it is put beyond question by s 2 of those Acts. The legislative power of the New South Wales legislature is no less than the legislative power of the Parliament of the United Kingdom within the scope of the grant of its power. As s 5 of the *Constitution Act* 1902 itself recognises, the power is subject to the *Commonwealth of Australia Constitution Act* 1900 (Imp). Section 106 of the Commonwealth Constitution makes it clear that that the Constitution of each State is subject to the Commonwealth Constitution, and under s 5 of the *Australia Acts* the powers of the States do not extend to legislation affecting the Commonwealth Constitution, the *Commonwealth of Australia Constitution Act*, the *Statute of Westminster* 1931 (Imp) or the *Australia Acts* themselves. And under s 6 of the *Australia Acts* the States are bound to observe any manner and form requirements for laws respecting the Constitution, powers or procedures of their Parliaments. In addition, the words "peace, welfare and good government of New South Wales" may be the source of whatever territorial restrictions upon the State's legislative powers are made necessary by the federal structure.[83]

Thus, the Parliament of New South Wales is not limited to certain specified subject matters - or *placita* - as the Federal Parliament is. In considering whether an Act in the form of the Same-Sex Marriage Bill would be within the legislative power of New South Wales, there is thus no occasion to ask whether same-sex marriage falls within an enumerated head of power, as is the case in federal legislative enactments.

VIII COMMON LAW CONSTITUTIONALISM

Additionally, the legislative power of the parliament of New South Wales is not limited by the common law. It is well established that legislation prevails over common law. There have been suggestions, however, that common law rights are so fundamental that they are not amenable to parliamentary modification (that is, so-called 'common law constitutionalism').[84] The suggestion has been rejected in England[85] and by various judges in Australia.[86] The suggestion has not been the subject of a definitive statement by the High Court, but the reason given by the High Court for rejecting the contention that there was a

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83 *Kable v. DPP (NSW)* (1996) 189 CLR 51 at 71-3 per Dawson J (with whom Brennan CJ and McHugh J agreed on this point).

84 T R S Allan,'Common Law Constitutionalism: Freedom of Speech*'* in J Beetson and Y Cripps (eds) *Freedom of Expression and Freedom of Speech* (Oxford University Press, 2000); Paul Craig, 'Competing Models of Judicial Review', (1999) *Public Law* 428; Jeffrey Jowell 'The Relationship Between the Individual and the State' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (Oxford University Press, 1994).

85 *Pickin v British Railways Board* (1974) AC 765 [782]-[783].

86 *Building & Construction Employees & Buliders' Labourers Federation (NSW) v Minister for Industrial Relations (NSW)* (1986) 7 NSWLR 372 [385]-[386].

common law right which limited state legislative power to providing just compensation for the compulsory acquisition of property gives no encouragement for the suggestion.[87] It is thus immaterial that the common law definition of marriage does not extend to same-sex unions.

A *Legislative Power Must Have Some Connection with the Territory Of NSW*

The first caveat to the plenary legislative power of the Parliament of New South Wales is that, to be valid, legislation must have some connection, albeit only a remote one, with the geographical territory of New South Wales.[88] That would be satisfied here by reason of the fact that the Same-Sex Marriage Bill is limited to marriages that are solemnised in New South Wales.

B *Section 92 of the Constitution: Interstate Trade and Commerce Must Be Absolutely Free and Implied Freedoms*

The second caveat is that the *Australian Constitution* both expressly (s 92 of the *Australian Constitution* which prohibits state laws that interfere with the absolute freedom of interstate trade, commerce and intercourse)[89] and impliedly (see the implied freedom of communication which prohibits state laws that burden freedom of political communication).[90]

It is suggested that these express and implied limitations confines the legislative powers of the New South Wales Parliament in significant respects. However, there is no such express or implied limitation, which is relevant in this case with respect to same-sex marriages. In particular, no express or implied limitation can be drawn from the conferral of power with respect to marriage upon the federal parliament by s 51(xxi) of the *Australian Constitution*. Unlike the power expressed in s 52 of the *Australian Constitution*,[91] the marriage power is *no*t expressed to be exclusive or independent of the legislative power of the states.

The legislative power of the Commonwealth with respect to marriage is thus *concurrent* with the legislative powers of the parliaments of the state. In other words, both the Commonwealth and the states can legislative on the topic of marriage subject to s 109 of the *Australian Constitution* (that is, to the extent that state laws are consistent with Commonwealth laws with respect to the marriage power).[92] Accordingly, to the extent that federal legislative power extends to same-sex marriage, this does not withdraw legislative power with respect to that subject matter (on same-sex marriages) from the New South Wales Parliament.

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87 *Durham Holdings Pty Ltd v State of New South Wales* (2001) 205 CLR 399.

88 *Union Steamship Co of Australia Ltd v King* (1986) 166 CLR 1 [14]; *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340 [370]-[371].

89 *Cole v Whitfield* (1988) 165 CLR 360.

90 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Nationwide News v Wills* (1992) 177 CLR 1.

91 Section 52 of the *Australian Constitution* confers exclusive power on the Commonwealth with respect to Commonwealth places.

92 See below for further discussion on this issue of inconsistency between the Commonwealth *Marriage Act* and the Same-Sex Marriage Bill 2013 (Cth).

Conversely, to the extent that federal legislative power does not extend to same-sex marriage, that says nothing about the scope of the legislative power of the New South Wales Parliament (on same-sex marriages). This is because, as noted above, the power of New South Wales Parliament is plenary. Thus, the power of the New South Wales Parliament is unconnected or not associated with the scope of legislative powers conferred on the federal Parliament.[93]

IX IS THE NEW SOUTH WALES SAME-SEX MARRIAGE BILL INCONSISTENT WITH THE FEDERAL MARRIAGE ACT?

The real issue is thus nor *prima facie* validity. It is whether an Act in the form of the Same-Sex Marriage Bill would be invalid by reason of inconsistency with the federal *Marriage Act* pursuant to s 109 of the *Australian Constitution*? Section 109 provides that where a law of the state is inconsistent with a law of the Commonwealth, the latter should prevail, and the former shall, to the extent of the inconsistency, be invalid.[94]

There are many cases which elaborate on the operation of this provision. In *Dickson v The Queen*[95] the High Court summarised the basic position as follows:

> The statement of principle respecting s 109 of the Constitution which had been made by Dixon J in *Victoria v. Commonwealth* was taken up in the joint reasons of the whole Court in *Telstra Corporation Ltd v Worthing* as follows:
>
> In *Victoria v Commonwealth* Dixon J stated two propositions which are presently material. The first was: When a State law, if valid, would alter, impair or detract from, the operation of the law of the Commonwealth Parliament, than, to that extent, it is invalid.

The second, which followed immediately in the same passage, was:

> Moreover, if it appears from the terms, the nature or the subject matter of a federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State to regulate or apply to the same matter or relation is regarded as a detraction form the full operation of the Commonwealth law and so as inconsistent.
>
> The second proposition may apply in a given case where the first does not yet, contrary to the approach taken to the Court of Appeal, if the first proposition applies, then s 109 of the Constitution operates even if, and without the occasion to consider whether, the second proposition applies.[96]

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93 There is no basis in precedent or principle to suggest that, if the federal marriage power does not extend to same sex marriage, the scope of the power of the Parliament of New South Wales is similarly restricted.

94 Peter Hanks, *Constitutional L*aw (Butterworths, 1993), 267; Peter Hanks 'Inconsistent Commonwealth and State Laws: Centralising Government Power in the Australian Federation', (1986) 16 *Federal Law Review* 107.

95 (2010) 241 CLR 491 [13]-[14].

96 *Dickson v The Queen* (2010) 241 CLR 491 [13]-[14].

It should be noted that the first proposition is associated with the term 'direct inconsistency'[97] and the second with the expressions 'covering the field' and 'indirect inconsistency'.

The description 'direct inconsistency' is apt to include situations where a:

(a) Commonwealth law compels that which a State law prohibits or prohibits that which a state law compels or permits.[98]

(b) Commonwealth law confers a right, the exercise of which is ether totally or partially prevented by a state law.[99]

(c) Commonwealth law confers either expressly or impliedly a permission or liberty which is ether totally or partially prevented by a state law.[100]

(d) Commonwealth law confers an immunity from a liability imposed by a state law.[101]

In these circumstances, there is a 'direct textual collision' between federal and state law.[102]

The associated descriptions of 'covering the field' or 'indirect inconsistency'[103] are apt to include situations where the federal legislation indicates an intention 'to express… completely, exhaustively or exclusively, what shall be the law, governing the conduct or matter to which its intention is directed.'[104] That does not depend on the subjective intention of any person, such as the Minister who introduced the relevant Bill. Rather, it is a question of determining the objective intention manifested by the legislation.[105] That is a question of construction of the federal legislation.[106]

The necessary objective intention may be manifested by express terms; thus, there may be a provision in the federal legislation to the effect that it is or is not intended to exclude the operation of laws of the states, on the same subject matter.[107] However, it may also be

97 'Direct Inconsistency' means that s 109 is only activated where it is impossible to obey the Commonwealth and State law at the same time. In other words, inconsistency only activates where there is a 'textual collision' between the two enactments.

98 *R v Licensing Court of Brisbane; Ex parte Daniel* (1920) 28 CLR 23 [29].

99 *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 [478].

100 *Colvin v Bradley Bros Pty Ltd* (1943) 68 CLR 151 [160]; *Blackley v Devondale Cream (Vic) Pty Ltd* (1968) 117 CLR 253 [258].

101 *Botany Municipal Council v Federal Airports Authority* (1992) 175 CLR 453 [464]-[465].

102 *Blackley v Devondale Cream (Vic) Pty Ltd* (1968) 117 CLR 253 [258].

103 *Ex parte McLean* (1930) 42 CLR 475.

104 *Ex Parte McLean* (1930) 43 CLR 472 a [483].

105 *Dickson v The Queen* (2010) 241 CLR 491 [31-2].

106 *Momcilovic v The Queen* (2011) 245 CLR 1[111].

107 *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1976) 137 CLR 545 at 562-4; John Holland Pty Ltd v Victorian WorkCover Authority (2009) 239 CLR 518; Momcilovic v The Queen (2011) 245 CLR 1.

manifested absent express words, by implication.[108] In such cases as Gummow J observed in *Momcilovic v The Queen:*[109]

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

Matters such as the level of detail with which the federal legislation regulates the conduct or matter, and the fact that the object of the federal legislation would be frustrated if the conduct or matter were subject to further state regulation, may be indicative of the necessary implication. Especially in cases resting upon an implication of exclusivity, 'there can be little doubt that indirect inconsistency involves 'more subtle… contrariety' than any 'textual' or 'direct collision' between the provisions of a Commonwealth law and a State law.'[110]

In *Clyde Engineering v Cowburn*[111] Isaacs J outlined the test for determining whether two laws might be inconsistent in this 'indirect' sense. The test essentially posed three questions:

1. What field or subject matter does the Commonwealth law deal with or purport to regulate?
2. Was the Commonwealth law intended to cover the field and to regulate that subject matter completely and exhaustively? Was the Commonwealth law intended as *the law* (and not merely *a law*) on that subject matter?
3. Does that state law attempt to regulate some part of that subject matter or to enter on the field covered by the Commonwealth law?

According to this test, it is then necessary to identity with precision what is the 'particular subject matter' that is said to be *exclusively regulated by the federal legislation* - or which the topic upon which the Commonwealth seeks to 'cover the field'. For it is only if the state law intrudes upon this same subject matter will the state law then held to be invalid (because of the inconsistency).[112]

It may, the, be helpful to conceive of the inconsistency of which s 109 of the *Australian Constitution* speaks of in terms of 'direct' and 'indirect' inconsistency.

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108 *R v Credit Tribunal; Ex Parte General Motors Acceptance Corporation* (1976) 137 CLR 545 [562]-[564].

109 (2011) 245 CLR 1 [244].

110 *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 [40].

111 (1926) 37 CLR 466 at 489.

112 *Momcilovic v The Queen* (2011) 245 CLR 1 at [261].The Court in *Jemena Asset Management (3) Pty Ltd v. Coinvest* (2011) 244 CLR 508 at [42] said: 'It is not surprising that different tests of inconsistency directed to the same end are interrelated and in any one case more than one test may be applied in order to establish inconsistency for the purposes of s 109. All tests for inconsistency which have been applied by this Court for the purpose of s 109 are tests for discerning whether a "real conflict" exists between a Commonwealth and State law.' Further in Momcilovic v. The Queen (2011) 245 CLR 1 at [245] Gummow and Hayne JJ urged caution in speaking of different 'classes' or 'species' of inconsistency. As Justice Gummow points out: 'Such usage tends to obscure the task always at hand in cases where reliance is placed on s 109, namely to apply the provision only after analysis of the particular laws in question to discern their true construction'.

A *The Potential Inconsistencies*

The Same-Sex Marriage Bill provides:

(a) a process by which same-sex marriage marriages may be solemnised by authorised celebrants,[113] certain offences connected with that process[114] and a process for persons to become authorised celebrants.[115]
(b) a process by which same-sex marriages may dissolved or declared to be nullities[116]
(c) a process by which the Supreme Court of New South Wales may make orders for financial adjustment and maintenance of persons formerly in same-sex marriages[117] under laws of other jurisdictions;[118] and
(d) for various miscellaneous matters.[119]

Aside from (d), each of these topics has parallels in federal legislation. In considering the potential inconsistencies, I shall consider each of these topics respectively.

B *Solemnisation of Same Sex Marriages*

The provisions in the Same-Sex Marriage Bill for solemnising marriages, the associated offences and the process to become celebrants have equivalent provisions in the federal *Marriage Act.* The issue here is whether these provisions extend beyond being parallel provisions and becoming 'inconsistent' provisions. For the purposes of determining whether there is inconsistency, the relevant provisions in the federal *Marriage Act* are found in Division 2 of Part 4. More specifically, s 40 of the *Marriage Act* provides that the Division applies to, and in relation to all, marriages solemnised, or intended to be solemnised, in Australia. Further, s 41 declares that the marriage shall be solemnised by 'an authorised celebrant'. Section 5 defines this to mean a Minister of Religion registered under, a State or Territory officer authorised under or a marriage celebrant registered under Div 1 of Pt 4 of the *Marriage Act.*

Sections 45 and 46 of the *Marriage Act* provides for the form of the ceremony and certain words that must be spoken by the parties and the authorised celebrants except where the marriage is solemnised by a minister of religion; in the case of a religious ceremony, the form and the ceremony recognised as sufficient in the relevant religion, are sufficient. Where a marriage is solemnised by an authorised celebrant, who is not a minister of religion, it is sufficient for each party to say the words to the following effect:

113 Same-Sex Marriage Bill 2013 (NSW) pt 2, divs 1-4.
114 Ibid pt 2 div 5.
115 Ibid pt 7.
116 Ibid pt 3.
117 Ibid pt 4.
118 Ibid pt 6.
119 Ibid pt 8.

> I call upon the persons here present to witness that I, A.B., take thee C.D. to be my lawful wedded wife" or "I call upon the persons here present to witness I, C.D., take thee A.B. to be my lawful wedded husband

More seriously for the purposes of 'inconsistency', s 46(1) of the *Marriage Act* provides that where a marriage is solemnised by an authorised celebrant who is not a minister of religion, the authorised celebrant must say the words to the following effect:

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

It should be noted that s 48 of the *Marriage Act* reiterates that marriage which does not followed the process outlined above is not a valid marriage for the purposes div 2 of pt 4 of the *Marriage Act.*

It should be noted that when first enacted the *Marriage Act* comprised no definition of 'marriage'. By amendments made in 2004[120] the following definition was inserted into s 5 of the *Marriage Act*:

> In this Act, unless the contrary intention appears, "marriage" means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.

Furthermore, along with this provision, a new provision, s 88AE, was inserted into the Part VA of the *Marriage Act* concerned with the recognition of unions solemnised in foreign countries. It provides that:

> 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,

A new subsection (4) inserted into s 88B provides that 'marriage' throughout pt VA has the meaning given in s 5(1) – the 'definitions' section.

Meanwhile, s 6 of the *Marriage Act*[121] provides that:

> This Act shall not be taken to exclude the operation of a law of the State or of a Territory, insofar 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.

Section 7 of the *Marriage Act* relevantly provides that:

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120 *Marriage Amendment Act 2004* (Cth), sch 1, cl 1.

121 As enacted, s 6 referred also to law of a state or territory, 'making special provision for the welfare of aboriginal natives of Australia or other persons, in so far as that law makes provision for or in relation to requiring the consent of an officer or authority of the State or Territory to the marriage of any person who has attained the age of twenty-one years.' That reference was removed when s 6 was repealed and substituted by s 4 of the *Marriage Amendment Act* 1976 (Cth).

> …before the date fixed under subsection 2(2) of this Act, this Act does not affect the validity or invalidity of a marriage that took place before the date so fixed.

Subsection 2(2) provided for the commencement of the key operative provisions of the *Marriage Act* on a date to be fixed by Proclamation. The date fixed was 1 September 1963.[122]

C *Inconsistency*

It appears that none of the express provisions that have been outlined above manifests any *direct inconsistency* with the Same-Sex Marriage Bill. There is nothing in the *Marriage Act* that expressly prohibits the creation of a status under New South Wales legislation of persons whose union has been solemnised as 'same-sex marriage' or the establishment of a process for conferral of that status. It is important to note, however, that this contention is predicated on the assumption that 'same-sex marriage' is of a *different or independent status* to that of 'marriage' under the *Marriage Act*. If this assumption is indeed correct, it is suggested that nothing in the *Marriage Act* expressly prohibits people from engaging in the conduct contemplated by the Same-Sex Marriage Bill as deemed necessary for that process.

It should be pointed out that if same-sex marriage is *not* of a different status, then solemnising a same-sex marriage under an Act in the form of the Same-Sex Marriage Bill may be a purported solemnisation of a marriage where there is a legal impediment to that marriage under the *Marriage Act*. In that case, conduct envisaged under the Same-Sex Marriage Bill may be expressly prohibited by s 100 of the *Marriage Act* where para (d) of this section makes it an *offence* to solemnise a marriage where there is a reason to believe that there is *a legal impediment to the marriage*. Thus, there is *direct inconsistency or textual collision* between the *Marriage Act* and the Same-Sex Marriage Bill and the latter legislation would be invalidated to the extent of the inconsistency by virtue of s 109 of the *Australian Constitution*. However, it is nevertheless suggested that marriage and same-sex marriage are two fundamentally different statuses (for the purposes of this paper) and the issue of inconsistency does not therefore arise. In this respect, nothing in the *Marriage Act* expressly compels or permits conduct which is prohibited by the Same-Sex Marriage Bill.

In particular, in their express terms, the 2004 amendments are not inconsistent with the Same-Sex Marriage Bill. As already outlined, the amendments provided for the insertion of a definition of 'marriage' into *the Marriage Act*, expressed to apply only in the *Marriage Act*, and an associated prohibition on the recognition as marriages of foreign unions between persons of the same sex. In this manner, neither of these amendments explicitly prohibited the introduction of an Act which sought to bring into existence *a new status*; namely, that of the 'same-sex marriage'.

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122 See *Commonwealth Government Gazette* 1963 p. 1977.

D *Inconsistency and the Offence Provisions*

If focus is shifted to the 'offence' provisions of the Same-Sex Marriage Bill, none of the offence provisions in the Same Sex Marriage Bill criminalises conduct which is expressly permitted by the *Marriage Act*, or able to be characterised as impliedly permitted by the *Marriage Act.* Nevertheless, having said this, there would still conceivably be some overlap between the offences of the two pieces of legislation. For example, s 94(i) of the *Marriage Act* provides that: 'a person who is married shall not go through a form or ceremony of marriage with any person.' Here, if the expression 'form or ceremony of marriage' were broad enough to encompass a form or ceremony described in the Same-Sex Marriage Bill, that offence might cover the same ground as s 19(1) of the Same Sex Marriage Bill. However, the penalty for each offence is identical and, in the event that there is some inconsistency on this point, it would mean at most that the federal offence is the only one available in cases of overlap. It would not result in invalidity of the state offence provision or of any other part of the Same-Sex Marriage Bill.[123]

If there is any potential inconsistency that does invalidate the terms of the Same-Sex Marriage Bill, It would thus need to be found through implication from the express terms of the *Marriage Act.* Another way of putting this is to say that the *Marriage Act* can implicitly be construed as prohibiting something which inheres in the Same-Sex Marriage Bill concerning the solemnisation of same-sex marriages. If that is not established then it is clear that the provisions relating to the authorisation of celebrants is not tainted by any inconsistency vis-a-vis the *Marriage Act.*

E *Inconsistency and Implications from the Marriage Act*

Potentially, it could be argued that there is an implication deriving from the *Marriage Act* that the Act seeks to exclusively regulate subject matter falling under it and that the Same-Sex Marriage Bill seeks to impermissibly regulate the same subject matter. In other words, the *Marriage Act* seeks to 'cover the field' in relation to the subject matter which it purports to regulate and that any state intrusion into this area of regulation constitutes 'indirect inconsistency'.[124] The question needs to be asked: What precisely is the nature of the subject matter which the Commonwealth seeks to regulate?

By the time of Federation, marriage was a recognised legal relationship, between one man and one woman and this conferred a particular *status* on the parties. This was explained in some detail in *Hyde v Hyde*:

> Marriage has been well said to be something more than a contract, either religious or civil – to be an institution. It creates mutual rights and obligations, as all contracts do, but beyond that

123 The particular State offences would simply not apply in cases of overlap with the federal offence, but its operation in other cases, and other provisions of the Same-Sex Marriage Bill, could plainly be severed from that invalid operation; see generally *Interpretation Act* 1987 (NSW) s 3; *Victoria v Commonwealth (Industrial Relations Act Case) (*1996) 187 CLR 416 [502]-[503]; *Momcilovic v The Queen (*2011) 245 CLR 1 [223]-[224].

124 *Clyde Engineering v Cowburn* (1926) 37 CLR 466 [489].

> it confers a status. The position or status of "husband" and "wife" is a recognised one throughout Christendom: the laws of all Christian nations throw about that status a variety of legal incidents during the lives of the parties, and induce definite lights upon their offspring. What, then, is the nature of this institution as understood in Christendom? Its incidents vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must have needs (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.

The Court in *Niboyet v Niboyet* acknowledged the notion of *status* was a well-accepted one and defined it as 'the legal position of the individual in or with regard to the result of the community.'[125] Further, in the *Ampthill Peerage Case* the Court described the concept of 'status' as 'the condition of belonging to a class in society to which the law ascribes peculiar rights and duties, capacities and incapacities.'[126] Finally, *status* has defined as 'a condition attached by law to a person which confers or affects or limits a legal capacity or exercising some power that under other circumstances he could not or could exercise without restriction.'[127]

The proposition that marriage *confers a particular status* on the parties is again well established.[128] Moreover, in confirming this entrenched notion of *status*, Quick and Garran in 1901 described the marriage power in *placita* s 51(xxi) of the *Australian Constitution* in the following terms:

> Marriage is a relationship originating in contract, but it is something more than a contract. It is what is technically called a status, involving a complex bundle of rights, privileges, obligations and responsibilities, which are determined and annexed to it by law independent of contract.[129]

As the two esteemed academics noted in 1901, various rights and obligations are 'annexed' to the status of marriage by other parts of the law. Put simply, various legislative and common law doctrines attach to married persons so as to confer rights and (conversely) impose obligations on the parties.

It is significant that neither *Lord Hardwicke's Act* in the United Kingdom nor Australian colonial legislation sought to define marriage or to attach a status to marriage incidents different from that which was recognised at common law. Rather Australian colonial legislation took as its premise the extant and well-recognised status of marriage at common law. What the colonies did do, however, was to regulate the process by which the status of marriage was attained and who could, indeed, be married. Nevertheless, insofar as the latter

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125 *Niboyet v Niboyet* (1878) 4 PD 1 at 11 (CA).
126 *Ampthill Peerage Case* (1977) AC 547 [577].
127 *Daniel v Daniel* (1906) 4 CLR 563 [566].
128 *Shanks v Shanks* (1942) 65 CLR 334 [336]; *Ford v Ford* (1947) 73 CLR 524 [531]; *Powell v Powell* (1948) 77 CLR 521 [524]; *R v L* (1991) 174 CLR 379 [392].
129 John Quick, Robert Garran *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901) 608.

was concerned, it was well settled in colonial legislation that marriage could only be entered into by one man and one woman.

F *The Subject of Regulation Was the Existing Status of Marriage, Not To Create a New Status of Marriage*

This fundamental approach was adopted by the states after federation. Different marriage legislation applied in different state; but in all cases, *the subject of regulation was the existing status of marriage.* Precisely the same approach was adopted in the federal *Marriage Act*. This federal statute contained no definition of 'marriage' and, indeed, efforts to insert such a definition during the passage of the Marriage Bill were resisted.[130] The *Marriage Act* - and its earlier state counterparts - sought to regulate the existing status of marriage and not to create a new status for the institution of marriage. In other words, the *Marriage Act* conceptualised the status of 'marriage' as existing entirely independent or 'outside' of the legislative enactment.[131]

This contention that the *Marriage Act* did not seek to create a new status for marriage is confirmed by the presence of s 7 of the *Marriage Act* which preserves the validity of marriages entered into prior to the commencement of the *Marriage Act* in 1961 under state legislation. This provision demonstrates quite clearly that the objective of the *Marriage Act* was to preserve the existing status of marriage - not to constitute a new status for the institution of marriage – one that was different from the common law and Australian colonial and, subsequently, state legislation.[132]

Consequently, for the purposes of s 109 of the *Australian Constitution* and the 'covering the field' test, if one was to nominate 'field' with which the *Marriage Act* is concerned to regulate, it would be the *regulation of attainment of the existing status of marriage*. Put simply, the *Marriage Act* purports to regulate the attainment of the status of marriage to the exclusion of state legislation. Garfield Barwick's *Second Reading Speech* makes it clear that the object of the *Marriage Act* was to eliminate the various state regimes and replace them with a single federal code.[133] Provisions of the *Marriage Act* itself also suggest that the *Act* sought to regulate exclusively (to the exclusion of the states) the *attainment of the status of marriage*. For example, the expression provision in s 6 that the *Marriage Act* shall not be taken to exclude the operation of state law, on only specified topics, suggests that, *otherwise*, it does exclude their operation. Further, the preservation by s 7 of the validity of marriages that took place before the commencement of the operative provisions of the *Marriage Act*

130 Commonwealth, *Parliamentary Debates*, Senate, 18 April 1961, 542-555 (unknown).

131 Geoffrey Lindell, Constitutional Issues Regarding Same-Sex Marriage: a Comparative Survey, (2008) 30 *Sydney Law Review* 27, 29.

132 John Quick, Robert Garran *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901) 608.

133 Commonwealth, *Parliamentary Debates*, House of Representatives, 19 May 1960, 1961-2 (Garfield Barwick); see also Barwick 'The Commonwealth *Marriage Act* 1961', (1961-2), 3 *Melbourne University Law Review*, 277.

(under state marriage legislation) implies that the validity of marriages under state marriage legislation is now affected by those provisions of the *Marriage Act* after their commencement. Among them is s 48 of the *Marriage Act* which provides that a marriage solemnised otherwise than according to div 2 of pt 4 (that is, including under state legislation) is not a valid marriage.

Accordingly, what this suggests, then, is that any state legislation which seeks to regulate the attainment of marriage is invalid. That was certainly the case for state marriage legislation which pre-dated the federal *Marriage Act*. Had such legislation not been repealed,[134] it would have been invalid by virtue of the operation of s 109 of the *Australian Constitution*. So, too, for instance, new state legislation which purported to permit persons in 'prohibited relationships' to be married. In those cases, it would be plain that the state legislation was seeking to regulate attainment of the same status as is now exclusively regulated by the *Marriage Act*.

The issue for this paper is whether an Act in the form of a Same-Sex Marriage Bill would do so. That depends on whether it is properly regarded as an attempt to regulate the attainment of the status of marriage, in particular by permitting same-sex couples to attain that status or whether it creates a new status that is different from marriage. If the former is the case, then the New South Wales Bill would be inconsistent with the *Marriage Act*; if the latter is the case, then the New South Wales Bill would not be inconsistent with the *Marriage Act.*

Certainly, the form of ceremony one enters for undertaking a same-sex marriage is similar in form to a ceremony when undertaking marriage under the *Marriage Act.* Secondly, the rights and obligations attaching to person entering same-sex marriages are also similar to those attaching to persons entering marriages under the *Marriage Act.* Notwithstanding these points, it is the contention of this paper that the Same-Sex Marriage Bill creates and seeks to regulate attainment of a status very different from that of marriage.

First, the status of the Same-Sex Marriage Bill is described as being a 'same-sex' marriage; not a 'marriage'. Like expressions as '*de facto* marriage'[135] and 'common law marriage'[136] have been used in the past to describe a status different from '*de jure* marriage', so too is the expression 'same-sex marriage' in the Same-Sex Marriage Bill. As these examples demonstrate, the mere use of the word 'marriage' in no way suggests that the status is the same. To the contrary, it is the preceding words (that, **de facto** marriage; common law marriage etc) that serve to distinguish the status of the relevant relationships from 'marriage' *per se*. In essence, the Same-Sex Marriage Bill does not purport to regulate the same status as the *Marriage Act*. By its terms, it constitutes and regulate a different status. That is so

134 From the commencement of operation of the *Marriage Act*, the various state legislation was repealed.

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

136 *Thwaites v Ryan* (1984) VR 65 [94]. This use of the expression 'common law marriage' is different from the use of that expression to mean 'a marriage valid at common law'; see In the Marriage of W and T (1998) 146 FLR 323 [338]-[339].

whether the status is described as a 'civil union' or 'same-sex marriage'. Crucially, it is not described as a 'marriage'.

Secondly, the status the subject of the Same Sex Marriage Bill may be attained only by persons of the same sex. The status of marriage – regulated by the *Marriage Act* – cannot now be, and has not in the past been, a status which can be attained by same-sex couples. That is made clear by the 2004 amendments. The different in qualifying features or criteria suggests a fundamentally different status.

Thirdly, while the Parliament of New South Wales may choose to attach the same rights, privileges, obligations and responsibilities to marriage (under the *Marriage Act*), and same-sex marriage (under an Act in the form of the Same-Sex Marriage Bill), it need not be so. Indeed, the Same-Sex Marriage Bill does not in general specify what rights and obligations attach to persons who have entered into same-sex marriage. As outlined above, rights and obligations are a characteristic and constitutive of the concept of *status.*

While, superficially, one may expect the New South Wales legislation will treat indifferently persons who are married and those who have entered into same-sex marriages, this lack of differential treatment does not necessarily indicate identity of status. That this is the case is demonstrated by the fact that for some years, various state legislative enactments have drawn no, or almost no, distinction between couples who are married and unmarried couples who have lived together in a domestic relationship for a sufficient period of time. [137]

Fourthly, while marriage (under the *Marriage Act*) would necessarily be treated as such by the legislation of each of the states and federal legislation, the parliaments of the states other than the New South Wales and federal Parliament would not be compelled to afford to couples who had entered same-sex marriages (under an Act in the form of the Same-Sex Marriage Bill) the same rights as couples who were married. While the Parliament of New South Wales may legislate to provide that there is equality of treatment under New South Wales legislation of couples who have entered marriages and couples who have entered same-sex marriages, it could not compel such equality of treatment under the legislation of other states and the federal Parliament. They could provide that references in their legislation to 'marriages' mean only 'marriage under the *Marriage Act'*.

In short, then, same-sex marriage under an Act in the form of the Same-Sex Marriage Bill would be a status different from marriage and that the Act would not be an invalid attempt to regulate the same status as that regulated by the *Marriage Act.*

X THE MARRIAGE EQUALITY ACT 2013 (ACT)

Focus now shifts to the constitutionality of the *Marriage Equality Act*. It is suggested that the *Marriage Equality Act* is of a fundamentally different nature then the Same-Sex Marriage Bill since it accords the same status of marriage to same-sex unions as to when one man and

137 See, for example the distribution of property under the *Family Law Act 1975* (Cth) where the parties dissolve their de facto relationship: ss 79 ff.

one woman seeks to attain the status of marriage. It is for this precise reason it is argued that the *Marriage Equality Act* will be found to be inconsistent with the Same-Sex Marriage Bill.

A *The Territories Power: Section 122 of the Constitution*

Pursuant to s 122 of the *Australian Constitution*, the federal Parliament has power to make laws for the government of any territory. That legislative power is not limited to certain specified subject matters. It is in this sense plenary.[138]

Pursuant to s 122 of the *Australian Constitution*, the Commonwealth enacted the *Self-Government Act*. Section 80 of the *Self-Government Act* establishes a Legislative Assembly for the Act. Section 22 confers power on the Legislative Assembly to make laws for the peace order, and good government of the ACT. Subject to certain exceptions which are not relevant here, the legislative power of the Legislative Assembly is as ample as the legislative powers of the Parliaments of the other states.[139]

Accordingly there is no doubt that *prima facie* the Legislative Assembly for the ACT has power to enact a law in the form of the *Marriage Equality Act*. As with the New South Wales Same-Sex Bill the real question is that of inconsistency with federal legislation, in particular the federal *Marriage Act*.

As outlined above, the issue of inconsistency between state and federal legislation is usually governed by s 109 of the *Australian Constitution.* The question of inconsistency between the *Marriage Equality Act* and federal *Marriage Act* is not governed by s 109 of the *Australian Constitution*, rather it is governed by s 28 of the *Self-Government Act.* It provides that:

> (i) A provision of 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 the law"
>
> (2) In this section "law", means :
>
> …..a law in force in the Territory (other than an enactment or a subordinate law).'

The word 'enactment' is defined in s 3 to mean a law made by the Legislative Assembly for the ACT. An Act of the federal Parliament in force in the ACT, such as the *Marriage Act*, would come within the definition of 'law'.

The effect of s 28 the *Self-Government Act* is that a provision of an Act of the Legislative Assembly, such as an Act in the form of the *Marriage Equality Act*, has no effect to the extent that it is inconsistent with an Act of the federal Parliament and that is taken to be so to the extent that the two Acts are not 'capable of operating concurrently'. While the provision

138 *Teori Tau v Commonwealth* (1969) 119 CLR 563 [570].

139 *R v Toohey; Ex Parte Northern Land Council* (1981) 151 CLR 170 [279]; *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 [281]-[282].

of the *Marriage Equality Act* is not invalid, it is ineffective whilst the federal *Marriage Act* exists.[140]

It has been said that because of the reference to ACT legislation being 'capable of operating concurrently' with federal legislation, the test of inconsistency for the purposes of s 28 of the the *Self-Government Act* is narrower than that applicable to s 109 of the *Australian Constitution*.[141] In particular, it has been said that, it essentially encompasses the notion of 'direct' inconsistency rather than the much broader notion of 'indirect' or 'cover the field' inconsistency.[142] In other words 'indirect' – 'cover the field' - inconsistency test is inapplicable to s 28 of the *Self-Government Act*.[143]

Nevertheless, the High Court has more recently cautioned against differing treatment of different 'species' of inconsistency.[144] In truth, 'indirect' or 'covering the field' inconsistency rests upon recognition of a particular subject matter by another law. If that is so, any attempted regulation of that subject matter by state or territory legislation is inconsistent with that prohibition. In that case, the laws are not capable of operating concurrently.[145]

The position might have been different if s 28 of the *Self-Government Act* that federal legislation is not to be construed as impliedly excluding the concurrent operation of Acts of the Australian Capital Territory Legislative Assembly.[146] Thus, a provision in a federal Act permitting concurrent operation of state or territory laws is effective to deny an implication that the federal Act exclusively regulates a particular field.[147]

However, s 28 of the *Self-Government Act* does not seem to us to be such a provision. It provides only that Australian Capital Territory legislation shall be taken to be inconsistent with federal legislation if the ACT legislation is capable of operating concurrently with the federal legislation. It says nothing about whether a *particular* federal Act should be construed as permitting such concurrent operation. Further, it does not say that all federal Acts should be construed as doing so.

For this reason, while the position is arguable, it is contended here that it is not likely that Australian Capital Territory legislation could be successfully defended from attack, on the ground that it is inconsistent with a federal Act, on the basis of 'direct' or 'indirect' inconsistency. Thus, it is not likely that Australian Capital Territory *Marriage Equality Act* could be held to be effective, pursuant to s 28 of the *Self-Government Act*, in circumstances where a State Act in the same form would be held invalid for inconsistency with a federal Act.

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140 *Re Governor, Gouldburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 [75].
141 *Northern Territory v GPAO* (1999) 196 CLR 553 [60].
142 *Wylkian Pty Ltd v ACT Government* [2000] ACTSC 97[57].
143 *Northern Territory v GPAO* (1999) 196 CLR 553 [60]; Wylkian Pty Ltd v ACT Government (2000) ACTSC 97 [57].
144 Mark Leeming, *Resolving Conflict of Laws* (Federation Press, 2011) chs 4-5.
145 *Clyde Engineering v Cowburn* (1926) 37 CLR 466 [489].
146 Peter Hanks *Constitutional Law*, Sydney: Butterworths, 1993, 269.
147 *Dickson v The Queen* (2010) 241 CLR 491 [34]; *Momcilovic v The Queen* (2011) 245 CLR 1 [244], [261].

B *Inconsistency with the Marriage Act*

As was established above, the federal *Marriage Act* regulates exclusively *the attainment by persons of the existing status of marriage*. In light of the principles described above, the *Marriage Equality Act* has, indeed, precisely sought to regulate the attainment by persons of *that status* and thus would be entering a field over which the Commonwealth purports to regulate *exclusively* and thus the ACT legislation would be held to be ineffective (insofar as it is inconsistent with the federal *Marriage Act).*[148]

Unlike the New South Wales Same-Sex Marriage Bill, which seeks to create and regulate a status *different from marriage*, namely same-sex marriages, it is considered that the Australian Capital Territory *Marriage Equality Act* seeks to regulate the *existing status of marriage*. It does in express terms by repeatedly using words such as 'marry' and 'marriage'. Like the federal *Marriage Act*, and the historical marriage legislation, the ACT legislation focuses upon the existing status of marriage. Yet, as has been demonstrated, the *Marriage Act* does not permit concurrent regulation of the attainment of that status since it purports to 'cover the field' over this precise subject matter. In those circumstances, the *Marriage Equality Act*, would be ineffective to the extent that it sought to do so, pursuant to s 28 of the *Self-Government Act.* In effect, that would render the whole of pt 2 of the *Marriage Equality Act* ineffective.

Once the provisions of the *Marriage Equality Act* concerning the attainment of the status of marriage were ineffective, it would follow that the remaining provisions, which are all essentially ancillary to the provisions of pt 2, would also be ineffective. Thus, the provisions of the *Marriage Equality Act* would be wholly without effect.

XI ARE THERE CONSTITUTIONAL PROTECTIONS – A COMPARATIVE ANALYSIS?

To further evaluate the likelihood of whether Australia will achieve marriage equality in relation to same-sex couples it is perhaps worth considering the position in other jurisdictions- particularly in the United States and Canada. What is interesting is that in these jurisdictions, genuine marriage equality (similar to the position in the Australian Capital Territory in Australia) has been achieved not positively through legislation, but rather, 'negatively' via the mechanism of judicial review of the constitutionality of 'conventional' marriage legislation in these jurisdictions. As the discussion below illustrates, instead of invalidating the (then) existing marriage legislation for violating the 'equal protection' amendment[149] of the US Constitution or section 15 of the Canadian Charter of Rights and Freedoms (the 'equality' provision), the judiciary in both jurisdictions re-worked the relevant marriage legislation so as to accommodate same-sex unions. This piece of judicial activism

148 *Ex Parte McLean* (1930) 43 CLR 472 at 483.

149 See, for example, the Fourteenth Amendment of the US Constitution and its counterparts in the various State Constitutions of the US; see also section 15 (1) of the Canadian Charter of Rights and Freedoms (1982).

has been controversial[150] and is unlikely to occur in the Austrian context since the Australian Constitution has no equivalent 'equal protection' or 'due process' clauses.[151] Nevertheless, s 117 of the *Australian Constitution* does provide for equality of treatment of the States,[152] and if an Act in form of the New South Wales Bill is enacted and validated by the High Court, there would certainly be room for same-sex couples in the other States to seek an action under s 117 of the *Australian Constitution* challenging their unequal status vis-a vis the position of same-sex couples in New South Wales.

The constitutional recognition of same-sex marriage in the United States has not been uniform depending upon the State jurisdiction in which traditional marriage legislation has been constitutionally challenged. There have been several States where the State Supreme Court Courts have upheld challenges to marriage legislation on the basis of *State* (as opposed to federal) constitutional guarantees of equality. In these decisions the Courts have creatively re-worded existing marriage legislation to embrace same-sex marriages. As outlined below, the judgment in *Goodridge* is one such decision.[153] There are several significant State Court decisions where this has occurred.[154] Nevertheless, there have been instances in even the more progressive States, such as the States of California, where the Courts have sought to prevent recognition of marriage for same-sex couples and where they have failed to uphold challenges to existing (heterosexual) marriage legislation[155]. Nevertheless, in *Martinez v County of Monroe,*[156] the Appeals Court established on February 1, 2008, that a same-sex marriage performed in another jurisdiction must be recognised by the State of New York. It was, indeed, the first US Court to require such recognition.

There, Patricia Martinez, an employee of Monroe Community College, in Monroe County New York, married her same-sex partner in Ontario Canada. She then applied for health benefits based on her marriage and was denied. The Appeals Court held that because the State of New York had always recognised out-of-state marriages of different sex couples, it must provide the same recognition for same-sex couples.

As a consequence, the State of New York was in the somewhat paradoxical situation whereby it recognised same-sex marriages elsewhere while, at the same time, not allowing same-sex marriages to be constituted within its own jurisdiction. The opinion written by Justice Erin Peradotto indicated that:

> For well over a century New York has recognised marriages solemnised outside of new York unless they fall into two categories of exception: (i)marriage, the recognition of which is

150 Cass Sunstein, *Designing Democracy: What Constitutions Do* (Oxford University Press, 2001).

151 However, s 117 provides that a resident in one State shall not be discriminated against another state.

152 See *Street v Queensland Bar Association* (1989) 168 CLR 461; Nigel O'Neil, 'Constitutional Human Rights in Australia' (1987) 17 *Federal Law Review* 85, 87.

153 *Goodridge v Department of Public Health* 798 NE 2d 941 (2003).

154 Hawaii: *Baehr v Lewin* 852 P 2d 44 (1983); Vermont: *Baker v State* 744 A 2d 864 (1999); Massachusetts: *Goodridge v Department of Public Health* 798 NE 2d 941 (2003) and *In Re Opinions of the Justices to the Senate* 802 NE 2d 565 (2004). See also Graham Gee 'Same-Sex Marriage in Massachusetts: A Judicial Interplay Between Federal and State Courts', (2004) *Public Law*, 252.

155 In California, the Court of Appeal has declined to recognise same sex marriage: *In re Marriage Cases* 49 Cal Reptr 3d 675 (2006).

156 50 A.D. 3d. 189 (2008).

> prohibited by the positive law of New York and; (ii)marriages involving incest or polygamy, both of which fall within the prohibitions of natural law. Absent any New York statute expressly clearly the Legislature's intent to regulate within this State marriages of its domiciliaries solemnised abroad, there is no positive law in this jurisdiction to prohibit recognition of a marriage that would have been invalid if solemnised in New York…The legislature has not enacted legislation to prohibit the recognition of same-sex marriages validly entered outside of New York, and we thus conclude that the positive law exception to the general rule of foreign marriage recognition is not applicable in this case.[157]

It is suggested that s 117 of the *Australian Constitution* has a similar operation insofar as it provides that a resident must not be burdened or disabled from doing something which he or she is capable of doing in another state. Theoretically, if same-sex couples were able to undertake a 'same-sex marriage' in the state of New South Wales they must not be precluded from achieving this status in, for example, Queensland. This potentially places the validity of Queensland's *Civil Partnership's Act* 2011 (Qld) in doubt since it is of a different and lower status to 'same-sex' marriage. Moreover, if legislation similar to the ACT's *Marriage Equality Act* were enacted by one of the states and subsequently validated by the High Court, s 117 of the *Australia Constitution* would then operate to achieve similar recognition in the other states, thereby placing any 'same-sex' legislation in doubt since it is again suggested to be of a different and lower status to 'marriage' per se.

What is significant about the United States and Canadian situations is that these developments have been achieved judicially and not via Congress. In particular, the Supreme Court of Massachusetts not only invalidated the laws which excluded genuine marriage equality in 2003 but also decided subsequently in 2004, in an advisory opinion, that a law which would have made provision for civil unions between persons of the same sex would have violated the 'equal protection' guarantee, even though the partners to such a union would have enjoyed the same rights and duties as partners to a traditional marriage. The essential flaw in such a law was thought to be the failure of the law to label the civil union as 'marriages'.

It is also worth mentioning in this connection that the leading Canadian decision which upheld the recognition of marriage equality for same-sex couples in that country, did so by reference to the guarantee of equality contained in s 15(1) of the *Canadian Charter of Rights and Freedoms* (1982). This was decided by the Ontario Court of Appeal in *Halpern v Canada (Attorney-General*) in 2003.[158] The law in that case was held to be invalid for not recognising the efficacy of marriage for same-sex couples as it discriminated between those and marriages between persons of the opposite sex. This was in spite of the argument that the laws prohibited men and women doing the same thing, namely marrying persons of the same sex. Yet, although it is true that the failure to recognise marriages for same-sex couples does prohibit both men and women doing the same thing, namely marrying persons of the same sex, this contention ignores the discriminatory effect of such a prohibition on the sexual orientation of homosexual persons. Further, the argument was rejected essentially because it

157 50 A.D. 3d. 189 at 193 (2008).
158 (2003) 225 DLR (4th) 529.

perpetuates a view that same-sex couples are less capable or worthy of recognition or value as human beings, to use the language used by the Ontario Court of Appeal.[159]

Courts in several other Provinces followed this judgment. After the Canadian Supreme Court upheld the ability of the Dominion Parliament to recognise marriage equality for same-sex couples in an advisory opinion in *Reference re Same-Sex Marriage*[160] that Parliament subsequently passed legislation to give effect to such recognition.[161]

The argument proposed in *Halpern* was precisely the same type of contention that was considered and rejected by the United States Supreme Court when it invalidated laws prohibiting persons of different races marrying one another in *Loving v Virginia.*[162] The laws there were rejected on policy grounds that they were designed to keep races apart and predicated on views of racial superiority.

If the laws here were rejected on a 'racial superiority' basis the question this raises is whether there can ever be a legitimate reason for the differential treatment of marriage; that is, whether there can ever be a valid reason for having two kinds of marriage: 'same-sex' marriage and (heterosexual) 'marriage' per se. The Ontario Court of Appeal in *Halpern* found that it is not enough to show that historically and according to religious beliefs that marriage was limited to opposite sex relationships; nor was it enough to assert that marriage was 'heterosexual' because 'it just is' because this was though to amount to circular reasoning.[163] In a similar manner, the Massachusetts Supreme Judicial Court expressed the view that 'it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that it is what it historically has been.'[164]

There were several arguments advanced by the Massachusetts Department of Public Health in *Goodridge* to justify the non-recognition of same-sex marriages- all of which were rebutted. Firstly, the Attorney-General argued that such laws provided a favourable setting for the procreation of children. The Court countered this submission by replying that partners to a valid marriage were not required to show a capacity to procreate before or after the marriage was solemnised.[165] Further, it was not inconceivable for same-sex partners to rely on modern technology as well as adoption laws to allow same-sex couples to have children.

Secondly it was argued that laws do not recognise the efficacy of marriage equality for same-sex couples to ensure an optimal setting for child-rearing. [166] This was rejected because the argument refuses to acknowledge the changing and diverse composition of modern American families and associated changes in adoption and legitimacy. In this context, the Court held

159 *Halpern* (2003) 225 DLR (4th)529 at 554-562 applying the test *in Law v Canada (Minister of Employment and Immigration)* 1999 1 SCR 497 at 525.
160 (2004) 246 DLR (4th) 193.
161 Civil Marriage Act (2005) (Can).
162 388 US 1 (1967).
163 *Halpern* (2003) 225 DLR (4th) 529 at 553.
164 *Goodridge v Department of Public Health* 798 NE 2d 941 (2003) at 961.
165 *Goodridge* 798 NE 2d 941 at 961 -2. Nevertheless, impotence can be a ground for nullifying a marriage at the election of a disaffected party at 961.
166 *Goodridge 7*98 NE 2d 941 at 961, 963.

that the State of Massachusetts failed to show that an increase in the number of same-sex couples will produce a converse decline in birth rates.

The Court also dealt with a range of other issues: issues pertaining to uniformity of laws insofar as several other States also do not recognise same-sex marriage;[167] the assertion that it would destabilise the institution of marriage;[168] and that it could be assumed that same-sex couples are far more independent than married couples and thus less dependent on the state for social assistance.[169]

This raises the issue of how did the Court in *Goodridge* deal with the existing marriage legislation after it was found to have infringed upon the 'equal protection' constitutional guarantee in the Massachusetts State Constitution. One option would have been to invalidate the whole of the legislation dealing with marriage. Instead, the Massachusetts Judicial Supreme Judicial Court engaged in judicial creativity by redefining the definition of marriage to mean the 'voluntary union of two persons as spouses to the exclusion of all others' but suspended the effect of its judicial declaration for 180 days to permit the legislature to take such action as it deemed appropriate in light of the opinion of the Court.[170]

The Court in *Halpern* followed the same course by extending the definition of marriage to mean the 'voluntary union of spouses of two persons to the exclusion of all other others'. However, the Court in Halpern did not see the need to suspend its declaration under which the definition of marriage was declared invalid to the extent that it referred to a 'union between one man and one woman'. The definition was reformulated so as to read 'a voluntary union for life of two persons to the exclusion of all others'. That remedy was best thought to facilitate equality as required by s 15 of the *Canadian Charter of Rights and Freedoms* while also ensuring a degree of certainty in relation to the status of marriage.[171]

It is interesting that developments in the recognition of same-sex marriages have come from the judiciary, as opposed to Congress/Parliament in America and Canada. In a more practical or pragmatic sense, there have been academic warnings that premature judicial (as opposed to legislative) recognition of same-sex marriages will provoke reaction against both the sexual equality movement, as well as activist judiciaries. As Cass Sunstein has observed:

> An immediate judicial vindication of the principle could well jeopardise important interests. It could galvanise opposition. It could weaken the antidiscrimination movement itself. It could provoke more hostility to and even violence against gays and lesbians. It could jeopardise the authority of the judiciary. It could well produce calls for constitutional amendment to overturn the [United States] Supreme Court's decision. At a minimum, courts should generally use their discretion over their dockets in order to limit the nature and timing of relevant intrusions into the political process. Courts should also be reluctant to vindicate even

167 *Goodridge* 798 NE 2d 941 at 967.
168 *Goodridge* 798 NE 2d 941 at 965.
169 *Goodridge* 798 NE 2d 941 at 964.
170 *Goodridge* 798 NE 2d 941 at 968-970.
171 *Halpern* (2003) 225 DLR (4th) 529 at 560-61.

> good principles when the vindication would clearly compromise other important principles, including ultimately the principles themselves.[172]

The perhaps suggests that the Australian courts should be cautious in their recognition of marriage equality for same-sex couples in Australia.

XII CONCLUSION

This paper has focused on the issue of marriage equality for same-sex couples with the enactment in the Australian Capital Territory of the *Marriage Equality Act* and the drafting of the Same-Sex Marriage Bill. At the time of writing, a Commonwealth challenge to the constitutional validity of the *Marriage Equality Act* in the High Court of Australia appears imminent.[173] The paper has thus sought to consider the constitutionality of both the Same-Sex Marriage Bill and *the Marriage Equality Act*). As has been shown, the constitutional validity of both instruments turn upon their consistency with the federal *Marriage Act* under s 109 of the *Australian Constitution* (in relation to the *Marriage Equality Act*) and under s 28 of the *Self-Government Act* (in relation to the Same-Sex Bill). It was suggested that Same Sex Marriage Bill creates or constitutes a fundamentally different status of 'marriage' for same-sex couples - that is the 'same-sex marriage' and it is for this reason that it may avoid inconsistency with the Commonwealth *Marriage Act*. Hence it was argued, if enacted into law, the Same-Sex Marriage Bill would most likely survive constitutional challenge. On the other hand, the *Marriage Equality Act* has sought to accord precisely the same status of 'marriage' to same-sex couples as afforded *exclusively* to heterosexual couples under the federal *Marriage Act*. And it is here that the *Marriage Equality Act* most probably will be rendered constitutionally invalid. As has be shown, s 51(xxi) of the *Australian Constitution* purports to 'cover the field' in relation to the attainment of the status of 'marriage' and because the Australian Capital Territory seeks to intervene and regulate this status in regard to same-sex couples, it is highly likely that the *Marriage Equality Act* will be held to be inconsistent with the federal *Marriage Act* and will thus be invalid.

The paper then canvassed developments in marriage equality for same-sex couples in Canada and the United States. As was shown, recognition has been accorded to same-sex couples seeking marriage equality through the judiciary as opposed to the legislature. As a consequence, judicial activism has achieved a great deal where the legislatures in Canada and the United States have singularly failed to do so. It was suggested that these developments have implications for Australia. For if one of the States of Australia can realise genuine

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172 Cass Sunstein, *Designing Democracy: What Constitutions Do* (Oxford University Press, 2001), 206.

173 Christopher Knaus and Lisa Cox 'Commonwealth to Challenge Same-Sex Marriage Laws Hearing in the High Court', *The Canberra Times*, October 25, 2013.

marriage equality for same-sex couples, s 117 of the *Australian Constitution* may provide room to manoeuvre for the High Court to secure uniform recognition of marriage equality to same-sex couples throughout Australia.