THE ACT MARRIAGE EQUALITY CASE – LOSING THE BATTLE BUT WINNING THE CONSTITUTIONAL WAR

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I CONSCIOUSNESS OF INTERESTS AND BIASES

I pay my respects to the Indigenous people of our country, who have suffered many injustices, which it is the obligation of all Australians to try to correct and cure. Particularly so if they are lawyers, because many of the injustices were inflicted as a result of outmoded views about the law and its obligations.

I also want to pay my respects to Shelley Whincop, who is here tonight. In some ways this will be a painful reminder of the loss of her brother. But also, most recently, of Margaret, her mother. I was looking forward to meeting Margaret Whincop. She died in August 2015. So unfortunately I will not meet her tonight. But she is in my mind and that of others who knew Michael.

I did meet and know Michael Whincop when he was a very young academic. I think that was part of the problem. Michael was a person who succeeded mightily and quickly. People who succeed mightily, naturally enough, sometimes engender resentment. Feelings of envy. I suspect that might have happened in Michael's case, although he never told me so.

He was born in 1968. Now, 1968 is a long while ago. It is 47 years. I know that it is 47 years, because I have been with my partner, Johan, since 1969. And therefore I know every one of those years. For me, they have been years of great happiness. Ups and downs, like those that happen in every relationship. However, overwhelmingly a great blessing in my life.[1]

If you attend medical conferences, before they put their interminable slides on the screen, speakers always begin with acknowledgements of any conflict of interest. Or at least, any activity or any money they have ever taken from anybody and so on. So I suppose I should really begin my talk to you tonight with an

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1 See A J Brown, Michael Kirby: *Paradoxes & Principles* (The Federation Press, 2011) 81f; M D Kirby, *A Private Life: Fragments, Memories, Friends* (Allen & Unwin, 2011) 65ff; Daryl Dellora, Michael Kirby: *Law, Love & Life* (Penguin, 2012) 120 ff.

acknowledgement that some might think that I have a particular interest in the issue of marriage equality or same-sex marriage.

If you have been living with a partner, the one partner, for 46 years, then obviously in recent years the thought, the possibility will arise that, quite contrary to our expectations back when we met on 11 February 1969, marriage might become an option. Therefore, in that sense, I suppose what I am going to talk about tonight is something that could eventually come to have an impact on my own life. So you have to take that into account in considering and weighing everything that I say about the matter. You have to make your own judgments about any opinions or assessments or conclusions that I express. Whether they may be biased or affected by self-interest.

However, I have to tell you that it is not at all certain that my partner and I would get married. If you have been in a relationship with the one person for 46 years, it is getting a little late for the confetti. There is also this consideration that if you have a wonderful relationship, would you want to change the integers? Would you want to bring some new dynamic into the relationship, without there being a really good reason to do so?

There is another consideration, that if you have had a good relationship for such a long time, inevitably you will have attended many heterosexual weddings. Almost all of them have since broken up. All those presents we gave out, and never getting any presents ourselves. If you have done that, there is just a little nagging thought in the back of your mind, if you got married is that like acknowledging that everything to date has been something at a lesser standard or quality? Or a lesser standard of legitimacy? Why would you feel the need to get something extra? To make legitimate what in your own heart you already felt was legitimate. Relationships of such a kind are very intimate and precious. You do not want to do anything that reflects adversely on the relationship.

There is another factor that I should mention. My partner Johan van Vloten, comes from the Netherlands. The people of the Netherlands are very different people. They do not have the politeness of us Anglo-Saxons. They are extremely direct. They are very 'in your face'. Everything has to be absolutely and totally honest. Sometimes I say to Johan, 'Do you think you could have come around that issue differently? Do you think you had to be quite so direct?' He says, 'No, no, no. You Anglos, you're all very polite. But then, when they have gone, you put a knife in their back.'

And so I have raised marriage with him, I have said 'Johan, if it were possible, would we get married?' He always says, 'Too early to tell'. Therefore, I think though I reveal this, I do not really feel it interferes in any way in my capacity to talk to you about the issue of same-sex marriage. Anyway, tonight, I am not going to talk essentially about the merits or demerits. Everyone can have their own opinion on that. Many people, most people who have thought about it, have their own opinions.

But I am going to talk to you about essentially a technical issue. Because Michael Whincop was a very clever technical lawyer. He would be angry if I came along here and just talked about, 'Do you not have it?' He would say, 'That is not legal enough and not interesting enough to me.' If he were here, he would expect me to address a technical question. It is a technical question which I think everyone can understand. You do not have to be a professor of law to understand it. It relates to how we approach the interpretation of the *Constitution of the Commonwealth of Australia*.

What I am going to do is to talk on three issues. The first issue is Michael Whincop. I cannot abide memorial lectures, which are named for a person, and where people turn up and do not make any reference whatsoever to the person who is being memorialised. I went last night to a medical conference in Sydney, and the Professor who was there to speak was a brilliant man. He is one of the top researchers on HIV and AIDS. The lecture was in its seventh year. It is named for a young person whom I knew. I knew him well. He who was one of the early researchers on HIV in Australia. He died of AIDS.

The lecturer who came from the United States, did not know this person. I suppose it was not his fault. But there was no opportunity for him or for somebody else to talk about the person whom we were remembering. To me, who knew the person whom we were remembering, I felt there was just something missing in the lecture. Therefore, when you have a memorial lecture, you should think just for a minute or so about the person who is being honoured. So I invite you to do so now.

II Michael Whincop Remembered

In the case of Michael Whincop, that is actually quite easy. He was a brilliant man. He attended the University of Queensland. He won not one, but two, university medals. One was in economics and one in law. That is a remarkable achievement to be a double medallist. Then he came to Griffith University. He applied to be a lecturer in law, which is almost the lowest echelon (I suppose there are tutors underneath lecturers). But you do not get too much lower than a lecturer. He was immediately appointed. The total space of his professional life was only 12 years from when he began as a lecturer, to senior lecturer, to associate professor to full professor, all in a very short time.

He started with a Masters degree in law, which nowadays would not be enough to get you into an academic life. Now you have to have a doctorate. Eventually he received a doctorate by reason of his publications. That was conferred on him by Griffith University. So everyone acknowledged he was brilliant. Everyone acknowledged that he was extremely hardworking. He became the Deputy to the Head of the School, Charles Sampford. His life ahead of him seemed to be promising: an enormously important career.

His particular area was the law of corporations, and the theory of the company. Now, that is a very important subject for lawyers, because actually the company is one of the very few legal inventions that is really brilliant, and works. It is an artificial construct. You separate the people who put the money into the company (the shareholders) and you then conceive of the thing they create, the receptacle, as having a legal personality distinct from the people who invest the money. It is because there is a limited liability on the people who invest the money, that the corporation can take risks which those people, worried about their money, would probably not themselves take.

So the corporation is a brilliant legal invention. The thing that intrigued and interested Michael Whincop in his legal writings and research, was this dichotomy between the members of the company (the shareholders) and the directors and officers and staff and so on, and the company itself, as a separate legal entity.

That issue became even more important in Australia after 2006 following Michael Whincop's death, because of the decision of the High Court of Australia in the *Work Choices Case*.[2] This breathed new life into the power to make laws with respect to the constitutional corporation under the *Constitution of the Commonwealth of Australia*.[3] With his death we were deprived of Michael Whincop's contribution to thinking through these issues of the corporation. That is a great tragedy, and it is our loss.

So on this beautiful night here in Brisbane, we think of a very distinguished scholar and a great teacher: a person who (by all accounts of his colleagues) despite his brilliance, was very kind and generous to other people. That does not always happen, I can tell you. People who are brilliant are sometimes not quite so nice. Some of us are very nice. But there are other people who are less nice; less respectful to others. But Michael Whincop was a very decent, kind person. He was the sort of person you could approach and he would talk with you about your problems. He had problems of his own. We have honoured him by having this lecture. So we reflect on him and on the loss of his life; on his family, on his late mother and father. We are very glad that Shelley is here tonight with us. So that was the first part of my talk. Michael Whincop – the man and scholar.

III Criminalisation of Gays – Obstacles to Equality

The second part is to remind you of how we arrived at this point of 'marriage' between people of the same-sex. Certainly back in 1900 when the *Australian Constitution* was written, if you had asked the old gentlemen who gathered in Adelaide, Melbourne and Sydney, when they put into s 51 (xxi) the power for the Federal Parliament to make laws 'with respect to marriage', what does marriage mean? If you'd said to them 'What does marriage mean?' Well, overwhelmingly

2 *New South Wales v Commonwealth* (2006) 229 CLR 1.
3 *Constitution* s 51(xx).

I would suggest, probably 95 per cent of them, would have said, 'That is when a man and a woman get married. They form a union, and they probably go on to have children.' That was indeed what the common law had said. In an important case *Hyde v Hyde*,[4] which was a case in England challenging a Mormon marriage, the traditional meaning of marriage was laid down.

The Mormons have (or had under their particular religious text) a belief that you could have multiple sexual partners to a marriage. The question in the case was what was a valid marriage for the law of England? The Court in England in 1866, said 'marriage' means the union for life to the exclusion of all others between a man and a woman: one man and one woman. So that was the common law definition of 'marriage', against the background of which the *Constitution* of the Commonwealth was written when it inserted, 'The Parliament of the Commonwealth shall have power, subject to this Constitution, to make laws… for the peace, order and good government of the Commonwealth with respect to,' down to paragraph (xxi), 'marriage'. In paragraph (xxii), 'divorce and matrimonial causes; and in relation thereto, parental rights and the custody and guardianship of infants' were provided for. So 'marriage' was in there. The question was what does it mean?

That question lay dormant for a very long time in the Commonwealth. For the first 60 years of the Commonwealth there was no federal law on marriage. That was curious, because one of the reasons why the founders of the Commonwealth put paragraph (xxi) in the *Constitution* was because some had been over to the United States where marriage was *not* included in the powers of the Congress. Therefore, marriage was a subject matter left to the legislatures of the States of the United States. The founders had seen the situation in the United States where you had the marriage laws quite significantly different from one State to another. There was the Reno marriage. You could go to Reno and get married and divorced in an afternoon. Why you would bother to do that just for one afternoon I do not know. But people did it.

And the old gentlemen (and they were all gentlemen) who drafted our *Constitution*, did not like the idea of that. So they said, 'Well, we're going to make this a federal power.' They put it in the federal *Constitution* at s 51(xxi). Yet nothing was done about it. For a long time it was not the subject of an Act to give effect to that power. The law differed from one State of Australia to another until 1961. Some States simply relied on the common law, and on *Hyde v Hyde*. That was the case I told you about, concerning the Mormon marriage. They had the common law marriage, the definition by the judges, and they accepted that. And some States had their own Marriage Acts.

Eventually, the Federal Parliament enacted a new law for divorce. That was quickly followed by a new federal law for marriage in 1961. The definition of marriage was left opaque. It was not defined in terms in the *Hyde v Hyde* language. It was

4 *Hyde v Hyde* (1866) LR 1 P & D 130. See also *R v Byrne* (1867) 6 SCR (NSW) 302, 305; *Harvey v Farnie* (1880) 6 PD 35, 43.

simply left 'marriage' undefined. So people generally assumed it just meant what the judges had said in *Hyde v Hyde*. In 1961 the federal law was enacted. That statute continues to operate to this day.

In 1975, as a result of initiatives that were taken first of all in England in 1976, South Australia amended the criminal laws that had existed from the beginning of British settlement in Australia against gay men. In Australia, there were never laws against gay women. But there were criminal laws against gay men. These said that, if they ever had any sexual activity, even though it was in private, even though they were adults, and even though they fully consented, that was criminal. The punishment was very severe.[5] Of course, that law had a number of consequences. In the afternoon newspapers as I was growing up you would see more and more scandals involving somebody who had been caught by an agent provocateur, generally police entrapping middle aged gents. These reports put into the mind of a gay person, growing up in those days, that they were somehow dirty. They were horrible and subject to these criminal laws. A gay man knew that he must really try to avoid the application of these laws because it would be so shameful to him and to his family. Therefore, many of them led lives of great loneliness.

In my own case, my solution was very simple. I became the king of the university committees. I became a student politician extraordinaire. I went from one conference of university students to another, I chaired one committee after another. I was brilliant. And it served very useful purposes for me later, because it taught me the skills of running meetings, and then running courts. So it had a tiny little silver lining to it. But the law meant that people looked down on themselves. It meant that they could not tell the people who were most important in their lives: their parents, their siblings, grandmother. It was not a nice reality. However, it started to change in Australia in 1974. South Australia changed its criminal law.

By 1984 in most of the States of Australia it had changed. It took a long time in Queensland. It was the Goss government that changed it in Queensland. Even then they, and Western Australia,[6] framed amending Acts with a preamble that said words to the effect, 'The Queensland Parliament does not really approve of homosexuals, and the Queensland Parliament is reluctantly doing this. It does not wish by doing this to give any credence or respectability to that lifestyle.' I dislike that word 'lifestyle'. As though your sexual orientation and your feelings of love for another human being constitute a lifestyle. Like collecting butterflies from South America, or being passionate about motor cars. Sexuality is not a

5 See, eg, *Crimes Act 1900* (NSW) s 79 (penal servitude of fourteen years for buggery). Consent was no defence and both parties were equally guilty: *R v McDonald* (1878) 1 SCR (NSW) 173. See also *Criminal Code Act 1899* (Qld) s 208. The beginnings of reform were introduced by the *Criminal Law (Sexual Offences) Act 1978* (Qld) to delete references to 'acts against the order of nature' and to introduce a defence of consent in certain cases.

6 *Criminal Code Act 1913* (WA) s 186(1)(a). The first amendment came with the *Law Reform (Criminalisation of Sodomy) Act 1989* (WA). See John Godwin et al, *Australian HIV/AIDS Legal Guide* (The Federation Press, 1993) 214 (Qld), 220 (WA).

lifestyle choice. It is just part of your being, whether heterosexual orientation or homosexual orientation.[7]

Eventually all of the States, even Tasmania,[8] the last State to change, amended the criminal law. They got rid of the criminal law.[9] You could not even begin to think about same-sex relationship recognition if you had criminal laws against gays. The whole point of the criminal law was to lock them up and throw away the key. It was not to recognise the legitimacy of their relationships.

IV Advent of De Facto Relationship Recognition

Then another thing happened in Australia. By 1984 laws started to be enacted for de facto relationships.[10] Numbers of straight people were forming relationships and not getting married. That was a scandal for those of an earlier generation, 'living in sin'. But some people were quite happy to be 'living in sin'. They just did not bother to get married. The law started to make provisions to deal with the dependency questions. If such people fell out, was the person (usually a woman) to be left completely unprotected by the law? So de facto relationship laws began to be enacted. In New South Wales in 1984. In other States longer.

Eventually, such laws were enacted to protect straight couples, heterosexual couples, who were not married but had dependency relationships and property claims and interests. Then those laws began to be invoked by gay couples, when they split up. So that began to push the envelope just a little bit further. At this stage, in the year 2000, a very unusual thing happened. And where did it happen? Well, where else except the Netherlands? In the Netherlands, a law was enacted by the Netherlands Parliament. It was called 'On the Opening Up of Marriage'. 'Wet openstelling huwelijk' (to open up marriage). It provided, for the first time in the whole world, for legislation to extend marriage to same-sex couples.

Just stop and think. Since 2000 the 'opening up' of marriage has been accepted now by about 25 countries around the world. Most of them are in Europe, and in

7 The 1990 amending Act was the *Criminal Code and Another Act Amendment Act 1990* (Qld). The preamble stated in terms: 'WHEREAS democracy requires proper limits should be placed on the right of any State to interfere in the lives of its citizens AND WHEREAS making criminal the private and voluntary sexual acts of adults, when those acts do not involve circumstances of aggravation and affect only the participants, goes beyond those limits AND WHEREAS Parliament neither condones nor condemns the acts which cease to be criminal because of this legislation AND WHEREAS Parliament reaffirms its determination to enforce its laws prohibiting sexual interference with children and intellectually impaired persons and non-consenting adults AND WHEREAS rational public health policy is undermined by criminal laws which make those who are at high risk of infection unwilling to disclose that they are members of a high risk group'.

8 *Criminal Code Act 1924* (Tas) ss 127, 127A.

9 Following *Human Rights (Sexual Conduct) Act 1994* (Cth) and *Croome v Tasmania* (1997) 191 CLR 119.

10 *De Facto Relationships Act 1984* (NSW) (later renamed *Property Relationships Act*). See M D Kirby, 'Same-sex Relationships: Some Australian Legal Developments' in M D Kirby, *Through the World's Eye* (The Federation Press, 2000) 64, 71.

North America; but also in New Zealand. Then there is Argentina, Uruguay and some parts of Mexico in Latin America. There is only South Africa in the African continent. Nothing in the Caribbean. Nothing in Asia. But in Europe, most of Europe now has either civil partnerships, civil unions or same-sex marriage. It is amazing. This is truly a legal revolution, within such a short space, 15 years. It is amazing, isn't it, if you stop and think of it? Within 15 years the unthinkable and impossible became the normal in many Western democracies. And it does not seem to matter whether they are Protestant countries from the north of Europe, or Catholic countries from the south. Spain and Portugal have adopted marriage equality, Argentina and Uruguay, strong Catholic countries, have adopted it. So it seems to be connected with the state of development of the country. And with civil society groups that get their act together and press for such laws.

V Three Statutes of the Australian Capital Territory

In Australia, the Australian Capital Territory (ACT), that small territory, soon became very troublesome. They were the first jurisdiction in Australia to adopt a law for civil unions of LGBTIQ people. This was in 2004. At the time that was really pushing the envelope. The law was passed in the ACT by an almost unanimous vote in the Legislative Assembly of the ACT. It was sent to be laid on the table, as all the laws passed in the ACT are, of the Federal Parliament, because under the *Constitution* it is a federal territory, including after self-government in 1988. The Federal Parliament had never once earlier set aside a law of the ACT.[11] However, the government led by Mr John Howard decided that this was a bridge too far. It moved the Federal Parliament to adopt a resolution disallowing the Act. This was done.

The only other time that that has ever been done was in respect to the Northern Territory of Australia. It is in the same constitutional relationship. It passed a law on euthanasia. That law was disallowed by the Federal Parliament. Generally, the Federal Parliament does not interfere. Having given those territories self-government they say, 'Well, you are on your own now. You can do what you want.' But on this case, the ACT law was disapproved by the Howard Government and disallowed by Parliament.

As well, alerted to this step in the ACT, Mr Howard and his Government took a step modelled on steps that were occurring at the same time in the United States with the so-called DOMA law: *Defence of Marriage Act* ('DOMA'). That law was extremely important in the reelection of Mr George W Bush to the office of President in 2004. This was because that was a really hot issue in his reelection campaign against John Kerry. It made the difference, so it was said, in Iowa when the vote was almost line ball. Mr George W Bush prevailed by his fight against the pressure for marriage equality. So it was a very hot topic. The federal Congress and lots of the States in the United States passed the DOMA law.

11 *Australian Capital Territory (Self-Government) Act 1988* (Cth).

At this time, in Australia, the ACT Assembly said, 'The Federal Parliament does not like same-sex marriage but we have called it *civil union*.' Mr Howard retorted, 'That is a law mimicking marriage'. Following this disallowance, the ACT legislature said, 'Maybe we have used the wrong word, *union*. Therefore, we will take union out and we will call it a *partnership*.' So the ACT legislature passed a *Civil Partnership Act* and then sent that to the Federal Parliament. By this stage Mr Kevin Rudd, had become the Prime Minister (Kevin 07). The matter came once again to the Federal Parliament. In the course of the election campaign in which he was elected to office, and to government, Mr Rudd had given an undertaking that, in the first term of his Government, the Australian Labor Party would not proceed with any form of law for gay marriage. So when the second Bill came from the ACT Legislative Assembly, it was also disallowed, this time by the Labor Government. The Coalition had sponsored the first disallowance. The Labor Government sponsored the second disallowance.

One has to acknowledge that the ACT people are very pesky. There must be a lot of Dutch people there. They accordingly enacted a third Bill.[12] This was a Bill which was called a Bill for a Marriage Equality Same Sex Act. It was adopted by a very strong vote in the Legislative Assembly of the ACT. They said, 'We are not challenging the federal law on marriage. We are enacting a special ACT law on what is legally a different subject.'

VI The 2004 DOMA Law – Its Intention and Effect

I must now go back a step to 2004. The Howard Government had procured the passage of an Act to amend the 1961 federal *Marriage Act 1961* (Cth) to include a number of provisions in it. No recognition in Australia of foreign same-sex marriages. And in respect of same-sex marriages, no same-sex marriages to be solemnised, or to be conducted, or to be recognised in Australia. These measures were inserted into the federal *Marriage Act*. Then there was a third provision. If you have been to any marriages recently you will know of the requirement that, whoever conducts the marriage (whether it is a priest, a minister of religion, or a civil celebrant) they must read out a little passage, 'Marriage under the law of Australia means a marriage between one man and one woman to the exclusion of all others for life'. That is read out in any marriage ceremony in Australia. It reminds you that, as for these pesky gays and their supporters who are claiming to have the same entitlement, well, they cannot have it. It is against the law in Australia. Expressed in black and white.

Still the ACT pressed on. They enacted their third Act. They tried to get around the provision following the 2004 amendment by saying, 'What we're enacting is not a marriage. No, no, no. Not a marriage of the kind that the Federal Parliament has provided for. This is an "ACT marriage". It is not a marriage of a federal kind. It is just a little territory marriage. Therefore it can survive alongside

12 *Marriage Equality (Same Sex) Act 2013* (ACT).

the law that is enacted by the Federal Parliament'. That was the question that was challenged one month after the third ACT law by the newly elected Abbott Government. The Abbott Government came to power on 18 September 2013. In October 2013 they issued a writ out of the High Court of Australia, challenging the ACT's third piece of legislation. That challenge came before the High Court in December 2013. It was decided in the space of nine days. Very, very quick. The Court brought it on quickly, because people were getting married in the ACT under the law, in faith upon its validity.

The High Court was unanimous.[13] The decision said you cannot have an ACT law on the subject. Whatever you say is the difference, it is still essentially a law on marriage. The game is given away by the fact that you call it the *Marriage Equality Act*. If it is the *Marriage Equality Act*, then this is about *marriage*. The federal law with which the ACT law cannot be inconsistent, has said that you cannot have in Australia the celebration or the recognition of a same-sex marriage. Therefore, the High Court of Australia swiftly decided that it had to strike down this third attempt. So the first attempt was struck down by the Howard Government. The second attempt was struck down by the Rudd Government. The third attempt was struck down by the mightiest striker down of all, the High Court of Australia. I was not serving on the High Court of Australia at that time. As stated, the ruling was unanimous. In my respectful opinion, it was the correct legal decision. This was because the ACT Act of 2013 was inconsistent with the scheme and provisions of the federal Act of 1961.

VII Upholding a Federal Power over Same Sex Marriage

I now come to the important point that I want to explore in this lecture. This point relates to the reasoning that the High Court took on the matter. The reasoning related to the question of the interpretation of 'marriage' in s 51(xxi) of the *Australian Constitution*. Before any of the foregoing happened, some scholars, including lawyers from a religious background, wrote articles arguing there was no way that the Federal Parliament could ever enact a law for same-sex marriage. This was because the *Constitution of Australia* had to be interpreted by what 'marriage' in paragraph (xxi) of s 51 meant at the time the *Constitution* was adopted and brought into force in 1901. At that time, 'marriage' meant marriage between a man and a woman to the exclusion of all others for life. Therefore, that was what the Australian constitutional term meant. Therefore, the Federal Parliament would never have the power to provide otherwise. So some opponents of same-sex marriage said. The Federal Parliament will never have the power to enact a law on same-sex marriage because that is not what was meant by 'marriage' in the legislative power that was given to the Federal Parliament under paragraph (xxi) of s 51 of the *Constitution*.

13 *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441; [2013] HCA 55. (Heard 3 December 2013; decided 12 December 2013).

Some commentators have criticised the High Court for proceeding to decide that the meaning of 'marriage' in the *Constitution* was wide enough to include the power of the Federal Parliament to make a law for same-sex marriage. However, the Court had to say that, in order to indicate that this was a subject within federal power, a power which the Federal Parliament could use, and only the Federal Parliament could use. Accordingly, the criticism of the Court saying, 'You have bought up this matter which is not in dispute between the parties needlessly. There is not a contradictor who is arguing that you are wrong. You have decided an issue which was unnecessary to the case'.

However, in fairness to the High Court, I consider that the question of federal constitutional power had to be decided because an idea had been put around that the Federal Parliament would never have the power to enact same-sex marriage. If that were truly the case, then the argument of the ACT would have been much stronger, perhaps invincible. They would have then been able to say, 'The Federal Parliament cannot enact the law; then surely the ACT could enact the law for the people of the ACT. If the federal lawmaker cannot do it, then the ACT lawmaker could do it, because that lawmaker still has the residue of the power of the people to make laws.'

VIII Rejecting Original Intent on the Meaning of Marriage

So, that step was taken. The High Court said, 'The Federal Parliament has the legislative power. Only the Federal Parliament can now exercise the power. An ACT law that is contrary to the present Marriage Act is not valid under the *Constitution* nor under the self-government law applicable to the ACT, made under the *Constitution*'. So it was an interesting question from a technical point of view. Michael Whincop would have been fascinated with this subject. The interesting question is what was the reason for the High Court proceeding into this issue? Was it essential for it to do so? And does it indicate that the High Court has rejected the 'original intent' opinion of the interpretation of the *Australian Constitution*?

There are judges in the United States of America (Justice Scalia was the strongest proponent) who say in effect, 'Unless you stick to the meaning of the original intent, unless you stick to the meaning of those who framed the Constitution', in the case of the United States in 1791, 'unless you stick with what they intended when they adopted the Constitution you are all at sea. Judges can make up what they think the constitutional words mean'. The value of sticking to original intent, they say, is that you then have an anchor for the meaning. It is an objective search. It is fixed in time. It is objective and discoverable. It is not just left to the judges. The judges are then performing a judge-like activity of finding what 'marriage'

meant in 1900. Or in the United States, what 'due process' meant in 1791 when the text of the Constitution was finalised.[14]

Now, there is clearly a viable argument in favour of this point of view. The argument is essentially that it gives an objectivity to the process of the meaning of the *Constitution*. On the other hand, the fundamental problem with the argument, as it has always seemed to me, is that unfortunately there is always going to be argument about the meaning of a Constitution. The whole point about a Constitution is to be a basic law that will operate in its society over the decades. Over the centuries. In utterly different circumstances. Indeed, that is precisely what a Constitution is for. Therefore, to lock the interpreters back, so that they are always reaching behind them for a 1791 dictionary (or in Australia for a 1900 dictionary), is to impose a very artificial process for giving meaning to the *Constitution* which is supposed to be for the good government of the people from decade to decade, and year to year, and century to century. The propounded interpretive technique is basically incompatible with the function of the document being interpreted.

Insofar as the High Court of Australia has said that you do not impose on the *Constitution* the *Hyde v Hyde* meaning that the word 'marriage' is a legal word had in 1900, the High Court has indicated, without necessarily affirming that it was doing it for this purpose, that it does not regard itself as what being stuck with what Justice Scalia would have said was essential, the meaning of that word at the time the *Constitution* was written. This is a technical question. But it is one very important for the working of the *Australian Constitution*. It is important for the working of the text because we know it is very difficult to amend the *Australian Constitution*. We have had 44 efforts to amend our *Constitution* formally. The number that have succeeded is eight.[15] It is very hard to change the *Constitution*. And that is why having a Constitution which is fixed like stone is going to be very bad for the governance of Australia. Having a Constitution that can adapt and change its meaning is desirable; but also functional. The judges have to give reasons and explanations for why they think a word or phrase has embraced a new and larger meaning. This is, I believe, a much better way to govern a country under the law. It is in fact what the High Court of Australia has done, including in the ACT same-sex marriage case. Of course, the decision was a setback for those who felt that such a law should come. But, in taking that decision, the Court took a bold step to reject a strictly originalist approach for the task of constitutional interpretation.

14 Gary L McDowell, 'Original Intent' in Kermit L Hall (ed), *The Oxford Companion to the Supreme Court of the United States* (Oxford University Press, 1992) 614. Cf *Pennsylvania v Union Gas Co* 491 US 1 (1989) (Scalia J).

15 AR Blackshield and G Williams, *Australian Constitutional Law & Theory* (The Federation Press, 6th ed, 2014) 1339 [30.5].

IX Conclusion – Battle or War?

I have honoured Michael Whincop. I have told you something about the history of how what was unthinkable as to same-sex marriage has suddenly become a large legal revolution which is happening right around the world. Not happening quite so fast in Australia. But the issue is now before the Federal Parliament. There have been several Bills. There has been talk about a plebiscite. There is even talk of a referendum, though there is no need for a constitutional referendum in the light of what the High Court has held is the power of the Federal Parliament. There is no need to get more power to the Federal Parliament. It has the power. The only question is a political one: whether the Parliament is willing to use its power.

Finally, I have raised the tricky, and interesting constitutional question of how the judges go about giving meaning to constitutional words. It is just a little word, 'marriage'. What does it mean? Does it mean what it meant in 1900? If it does, this means one man and one woman, to the exclusion of all others. If it does not, then it can adapt to changing social mores and attitudes. If so, the larger meaning is now available to be used, if the Federal Parliament decides in favour of same-sex marriage. The High Court took the latter view. And the approach they unanimously adopted is not only important for the case of marriage. It is very important for the way the Court goes about interpreting all the other words in the *Constitution*. It does so in the light of the meaning of those words not in the year 1900 but, relevantly, in the year when a case comes before the Court for decision.

The proponents of marriage equality, under the ACT enactment, lost the battle to uphold the Territory law that they propounded. But perhaps they won the larger battle. To endorse the larger powers of the representative democracy of the entire Australian nation, in its Federal Parliament, on this topic. And to uphold the less rigid and more flexible interpretation of a 1901 *Constitution* so that, over time, it may better serve the people of Australia by adapting to their changing beliefs as to how justice, equality and non-discrimination require the words to be read today, In the matter of equality for LGBTIQ people in Australia – or any other minority or contested issue – the 'original intent' approach to the words of the *Constitution* represents a backward looking, and inherently conservative, immovable, approach to the ascertainment of the presence or absence of constitutional power. The approach adopted by the High Court is more flexible, adaptive and contemporary. It is one more welcoming to new insights and new values to be discovered in the words. It is in that victory that the losers of 2013 may have won. They may have stamped clearly on the *Australian Constitution* that its meaning adapts to changing notions. And that is a victory indeed.