IN THE HIGH COURT OF AUSTRALIA

CANBERRA REGISTRY NO C13 OF 2013

BETWEEN: COMMONWEALTH OF AUSTRALIA

Plaintiff

AND: AUSTRALIAN CAPITAL TERRITORY

Defendant

SUBMISSIONS OF THE PLAINTIFF IN REPLY

HIGH COURT OF AUSTRALIA
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PART I FORM OF SUBMISSIONS

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

PART II ARGUMENT

2. These submissions use the same abbreviations as in the Commonwealth's submissions in chief (**CS**). The parties differ on two matters: **First**, do the Marriage Act and the FLA exhaustively set out a uniform set of rules for Australia on the essential and formal characteristics of marriage, the bringing to an end of marriage and the resolution of matrimonial causes; or do such Acts deal only with one form of marriage, 'traditional marriage', and leave it open to the States and Territories to identify and make lawful as many other forms of marriage – varying the integers of 'traditional marriage' – as appeal to them from time to time? Has the boundary in law between 'married' and 'unmarried' been left by the Commonwealth laws infinitely moveable, in the discretion of the States and Territories? **Secondly**, if the ACT Marriage Act, by purporting to create a parallel status of 'marriage', would be inconsistent with the Marriage Act and the FLA under s 109 of the Constitution, does s 28 of the ACT Self-Government Act produce a different result?

3. Before replying to the submissions of the Defendant (**ACT**) and the proposed intervener (**AME**) regarding those matters, it is convenient to address the constitutional issue regarding the reach of s 51(xxi). In that regard, there first arises a question as to which constitutional question it is necessary to decide. The Commonwealth submits that, even on a narrow view of the power, a Commonwealth law could validly state that certain defined unions and no others are to bear the status of marriage.[1] Only if that argument were rejected would it be necessary for the Court to determine the larger constitutional question.

A. Reach of the Marriage Act and FLA

4. ***General construction issues*** There are three aspects of the overall approach of the ACT and AME to construction that should be rejected. First, the persistent attempt to find the narrowest possible basis to read the Commonwealth law, being a scheme which, as is apparent from the text, context and statutory object, was enacted on the basis that marriage is a genus crying out for uniform regulation in relation to the attaining of the status. Instead of following the logical implications of the text and apparent statutory purpose, it is said that the regulation of that status (and its loss and other consequent causes under the Matrimonial Causes Act or the FLA) should be understood as dealing only with a particular form of status at the time of those enactments. That seemingly invites this Court to apply some form of *contemporanea expositio* principle of construction. That has long been abandoned in Australia as a generally applicable approach[2] and is inapposite in the context of the Marriage Act.[3] Marriage is a dynamic and developing institution, a matter that was well understood and anticipated at the time of the enactment of the Marriage Act.[4] And as such, it is inherently unlikely that Parliament intended to provide for what AME accepts was a single Federal code by reference solely to the metes and bounds of the law or institution of marriage frozen in time as at 1961, such that its initial uniformity could be whittled

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[1] AME's submission at [17] to the contrary is incorrect. All that is required is a sufficient connection with the subject matter of 'marriage'. The marriage power allows Parliament to prescribe what unions are to be regarded as 'marriage': *Attorney-General of NSW v Brewery Employees Union of NSW* (1908) 6 CLR 469 at 610. If the power is to be efficacious, that necessarily involves saying what marriage is not. By analogy, the banking power authorises a Commonwealth law that prevents a body that is not licensed as a bank, and could not constitutionally be a bank, from using 'bank' or 'banking' in carrying on a financial service (*Banking Act 1959* (Cth), s 66). To take a closer example, the marriage power plainly extends to the prohibition of polygamous marriage, the regulation of its effects and the creation of associated offences, whether or not it would be within the power of the Commonwealth to make polygamy lawful throughout Australia: *Attorney-General (Vic) v The Commonwealth* (1961) 107 CLR 529, particularly at 577 per Windeyer J. The same is true of same sex marriages.

[2] See eg *Stingel v Clarke* (2006) 226 CLR 442 at 458-459 [27] per Gleeson CJ, Callinan, Heydon and Crennan JJ and *The Council of the Shire of Lake Macquarie v Aberdare County Council* (1970) 123 CLR 327 at 331 per Barwick CJ (Menzies J agreeing at 332).

[3] As was held in *Attorney-General (Cth) v Kevin* (2003) 172 FLR 300 (upon which the ACT relies at [52]) at 362-330 [365]-[371].

[4] *Attorney-General (Vic) v The Commonwealth* (1961) 107 CLR 529 at 577, 579-580 per Windeyer J.

away as the law was further developed by the States and Territories.

5. The second key error, particularly in the submissions of the ACT, is to dismiss the reason for the insertion of the marriage power in the Constitution and the extrinsic materials regarding the subsequent exercise of that power as irrelevant to the task of construction. Viewed correctly, the extrinsic materials and the historical context usefully illuminate the objective statutory purpose of the Marriage Act, which was to exhaustively codify for Australia the law of marriage both at the time of that enactment and prospectively: see CS [11]-[19]. The very authorities upon which the ACT relies for the contrary proposition make plain that such material may be used for that task.[5] Identification of such a purpose is not logically congruent with that of 'subjective purpose or intention' (contra ACT [42]), even if the two coincide.[6] Those matters, and the broader historical context, point to the mischief to be addressed by the Marriage Act[7] and, indeed, the reason for the insertion of the power in s 51 in the first place. It is erroneous to put all of that to one side and pretend that the process of statutory construction may be conducted with the Act in one hand and a dictionary in the other.[8] And none of that involves 'inconsistency of political opinion' (contra ACT [43]). As was explained in *Momcilovic v The Queen*,[9] the question is rather whether, applying orthodox rules of construction, a federal law is a complete statement of the law governing a particular matter so as to give rise to what Gummow J termed an 'implicit negative proposition' that nothing other than what the Federal law provides on that subject matter is to be the subject of State or Territory legislation.

6. The third key error, made by the ACT but not AME, is to construe Commonwealth enactments as objectively intended to have a narrower operation in the Territory than across the Commonwealth as a whole.

7. ***Definition in s 5(1)*** The role of the definition of 'marriage' in s 5(1) of the Marriage Act is to confirm what was implicit in any event, namely that the core essential requirements for the validity of marriage under the law of Australia are the four matters there specified. The specification of each of those four essential requirements, in this particular statutory context, necessarily excludes other variants from that status. And that is so regardless of whether the Commonwealth enactment imposes 'express prohibitions' or rules requiring that people abstain from entry into those variants. The Marriage Act prescribes the rules regulating marriage, and they are uniform and exhaustive for those who wish to acquire that status in the Australian community. The position was aptly summarised by Professor Hart, who observed:

> ...some rules are mandatory in the sense that they require people to behave in certain ways e.g. abstain from violence or pay taxes, whether they wish to or not; other rules such as those prescribing the procedures, formalities and conditions for the making of marriages, wills and contracts indicate what people should do to give effect to the wishes they have.[10]

8. The ACT and AME fail to grapple with the effect of the definition in s 5(1); nor do they explain what alternative role it might sensibly be given in the context of the statute. Rather, they seek to advance the startling proposition that it has confirmed that the Marriage Act does nothing more than regulate unions falling within that 'expressly self-limited' definition: a union between a man and woman to the exclusion of others, voluntarily entered into for life.[11] Again, the contest between

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[5] See, in addition to *Lacey v Attorney-General (QLD)* (2011) 242 CLR 573 at [44] and *Certain Lloyd's Underwriters v Cross* (2012) 87 ALJR 131 at 138 [25] per French CJ and Hayne J, *Akiba v Commonwealth* (2013) 87 ALJR 916 at 925 [31] per French CJ and Crennan J and *Lee v New South Wales Crime Commission* (2013) 302 ALR 363 at 386 [45] per French CJ. See also the discussion of the 'modern approach to statutory interpretation' in *CIC Insurance Limited v Bankstown Football Club Limited* (1997) 187 CLR 384 at 408.

[6] *Lee v New South Wales Crime Commission* (2013) 302 ALR 363 at 386 [45] per French CJ.

[7] See eg *Network Ten Pty Limited v TCN Channel Nine* (2004) 218 CLR 273 at [11]-[12].

[8] *APLA Ltd v Legal Services Commissioner for New South Wales* (2005) 224 CLR 322 at 462 [423] per Hayne J.

[9] (2011) 245 CLR 1 at 111 [244].

[10] *The Concept of Law* (Oxford University Press, 1st ed, 1961) p 9.

[11] AME [55], see also [52], ACT [29], [32] and [55].

these competing views is to be resolved by the application of orthodox principles of statutory interpretation. The Commonwealth's submissions are supported by, and the alternative view denied by, the text of the definition (CS [35]), the purpose of the provision (CS [34]) within the broader purpose of the Marriage Act (CS [16]-[19],[23])), and the context within which it operates, especially having regard to s 6 (CS [22]), s 46(1) (CS [20.1]), and the provisions generally of Division 2 of Part IV (see below [11]-[12]).

9. Further telling against the construction proposed by the ACT and AME, s 88EA (which was inserted with the definition in s 5(1)) would, on their proposed construction, involve some form of anomalous discrimination against persons who married in another country: see CS [36]. The fact that s 88EA was inserted by the very same amending Act which added the definition to s 5(1) confirms the opposite is true: if a same sex marriage took place outside Australia, it would not be recognised; and the addition of s 5(1) put beyond any doubt that such a marriage could not take place under the uniform law of marriage in Australia.[12] The definition obviated the need for a further express provision like s 88EA to apply to unions solemnised in Australia. Moreover, if the ACT and AME are correct, the use of any one of the ingredients of the definition in s 5(1) could be used to develop a statutory cocktail at the State or Territory level with absurd results: eg same-sex, temporary, polygamous, involuntary, underage or incestuous marriages.

10. ***Section 23B of the Marriage Act*** The ACT and AME also radically overstate the significance of the grounds for void marriages under s 23B(1) of the Marriage Act and the fact that the Marriage Act does not specifically designate same sex relationships as 'prohibited relationships' for the purposes of s 23B(2).[13] First, as to prohibited relationships, that submission overlooks the subject matter of s 23B(2), which concerns the prohibited degrees of consanguinity and (to the extent adoptive children do not fall within that notion) affinity. That is, it involves a second order essential requirement, regarding whether there exists a matter of blood or relationship that the law considers too close. One would hardly expect the question of whether same sex parties could marry would be dealt with in such a provision.

11. Secondly, it is well established that there are in fact three possibilities in respect of any ceremony of marriage: it may be valid; it may be void by reason of s 23B(1) or it may be no marriage at all.[14] Obiter observations of the Family Court correctly include same sex marriage in the last mentioned category.[15] So too would be temporary marriages. The search for an 'express prohibition' as regards such unions is therefore futile. They are simply excluded from the status of marriage by the implicit negative proposition that appears from the terms, nature and subject matter of the Marriage Act.

12. Thirdly, the suggestion that an approach 'akin to the principle of legality' is to be applied is similarly misplaced (AME [68]). Little assistance is derived from seeking to invoke a general presumption against the very thing the Act seeks to achieve.[16]

13. ***Division 2 of Part IV*** A third specific issue separating the parties concerns Division 2 of Part IV. The question is whether it is confined to prescribing the procedures, formalities and conditions for the valid formation of some (but by no means all) kinds of marriages, ie those which happen to answer the description in s 5(1) of the Act (as submitted by the ACT and AME); or whether it rather provides a code which applies to any union which seeks to confer upon the parties the status of

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[12] The decision of the Full Family Court the year before in *Attorney-General (Cth) v Kevin* (2003) 172 FLR 300 might have given focus to the question (see at 325 [126]-[127] and [132], 236-7 [137]-[138] and 362-3 [366]-[371]), although it was not an issue in the case (see at 17 [67]).
[13] AME at [56].
[14] See s 113 of the FLA and *In the Marriage of VK and Kapadia* (1991) 14 Fam LR 883 at 886-887; *Dinal and Tohim* (No 2) [2009] Fam CA 540 at [39]; *Carroll and Sinclair* [2011] FamCA 651 at [22]-[26]. See also, in the United Kingdom, *R v Bham* [1965] 1 QB 159.
[15] *In the Marriage of VK and Kapadia* (1991) 14 Fam LR 883 at 886: 'If the parties are not of the opposite sex, there is no marriage.'
[16] *Lee v NSW Crime Commission* (2013) 302 ALR 363 at 452 [314] per Gageler and Keane JJ. In any event, the materials noted at CS [34] show that the Commonwealth Parliament clearly confronted what it was doing and that it accepted the political cost.

'married persons' at general law; i.e. persons who are properly described as 'married' and to whom the law annexes peculiar legal rights, duties, capacities and incapacities. The correct view is the latter: the Division sets out the formal requirements designed to carry into effect the singular notion of marriage for the whole law of Australia, which has been identified through the essential requirements in s 5(1). The text of ss 40(1) and 48(1) points to the fact that the ACT's and AME's submissions regarding s 5(1) involve a red herring: all marriages solemnised in Australia are to be solemnised in accordance with that Division[17] and not otherwise, because the only marriages that may be solemnised in Australia are the marriages which are permissible under the Act (s 5(1) marriages).[18] Other purported unions are simply not marriages at all (including same sex and temporary marriages) or void (bigamous and involuntary marriages).

14. The tie between the essential requirements in s 5(1) and the uniform formal requirements for solemnisation of marriages in Australia is also evident. This can be seen in the notion of a common set of authorised celebrants for marriage in Australia (s 41); a common set of notification provisions which are designed to enable the parties to disclose and the authorised celebrants to verify whether the essential requirements are satisfied (s 42);[19] a common standard for public witnessing (s 44); a common form of ceremony (with some flexibility to allow for religious variations – s 45); and a common statement at ceremonies not solemnised by a minister of a religion of a recognised denomination which affirms that marriage, for the law of Australia, has the requirements of the definition in s 5(1) (s 46(1)). The importance of those various formal requirements is carried through by the recognition in s 48 that the contravention of at least some will result in the marriage being void.

B. ACT Marriage Act is inconsistent with the Marriage Act and the FLA

15. ***Test of inconsistency:*** The central error in the ACT submissions regarding this issue is to seek to draw an analogy between s 28 of the ACT Self-Government Act and a Commonwealth provision stating that a Commonwealth Act is not intended to exclude State laws that are capable of operating concurrently (contra ACT [12]). When a 'concurrent operation provision' is inserted into a Commonwealth Act it may assist in arriving at a conclusion that *that* Act is not intended to be an exhaustive statement of the law on a particular topic for Australia and, in turn, may inform the interpretation of other provisions of the *same* Act. The purpose of s 28 in an Act conferring powers on a subordinate legislature is to place a limit on that power so that, as between two separate laws which conflict, it is the law of the primary legislature which prevails. While concurrency is specified as the test for the identification of inconsistency, concurrency is not ascertained by modifying the true operation of the laws of the primary legislature. It may, depending upon the circumstances, inform the interpretation of *ACT laws*, by permitting them to be 'read down' to avoid an inconsistency.[20]

16. The correctness of that view is confirmed by the context. Under s 34(4) of the ACT Self-Government Act, subject to certain exceptions, the previous ACT ordinances were converted into 'enactments' on the basis that Commonwealth Acts continued to operate fully in the Territory. Equally it would be a bizarre result if s 28 meant that (as at that date) uniform Commonwealth laws intended to be exhaustive statements of law on particular subject matters were rolled back to enable the ACT to pass enactments so as to alter, impair or detract from that uniformity.

17. In examining any argument concerning possible concurrency, it remains critical to properly

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[17] Or Division 3 of Part IV.

[18] See also the long title: An Act relating to marriage.

[19] See also the *Marriage Regulations 1963* (Cth) which prescribe the form of notice (by Form 13) to be given pursuant to s 42 and the form of declaration by a party to a proposed marriage (by Form 14).

[20] See, by way of analogy, *Webster v MacIntosh* (1980) 32 ALR 603 at 605. Writing extra-judicially, Justice Leeming has suggested that a further analogy may be seen in s 73 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) considered in *Gumana v Northern Territory* (2007) 158 FCR 349 at [103] (see M Leeming, *Resolving Conflicts of Laws* (Federation Press, 2011) pp 240-241).

construe the law of the primary legislature. Where, as here, that law is intended to provide an exhaustive statement of law on the topic which operates uniformly across Australia, an ACT law will necessarily be incapable of concurrent operation when it purports to introduce variation in the law for cases concerned with the ACT when such variation would not be permitted in any of the States. And even if it were otherwise, the effect of the 2004 amendments was to impliedly repeal s 28 to that extent.

18. A further error in the ACT's argument is that it would mean that the Commonwealth can only legislate to the exclusion of ACT laws by expressly excluding those laws, or (previously) by exercising the power to disallow ACT laws (ACT [14], [16]). But there is no requirement that an intention of a Commonwealth law to operate to the exclusion of State and Territory laws be stated expressly; this intention can be discerned under the usual rules of interpretation.[21] And removing inconsistency between Commonwealth and ACT laws is not just a matter between polities, but also protects citizens by ensuring they are not subject to inconsistent commands.[22] It cannot be dependent on the exercise of a disallowance power.

19. ***Uncertainty and complexity:*** The assertion that the ACT Marriage Act will not reintroduce the 'scandal' deprecated in *Fremlin v Fremlin*[23] does not withstand analysis. A relationship created by an ACT law cannot operate of its own force in other law areas of Australia (despite s 6 of the ACT Marriage Act) – its recognition outside the ACT will therefore depend on the operation of other rules (particularly rules of private international law). This will inevitably lead to uncertainty and complexity. For example, if a couple are married in the ACT, but a dispute later arises in a State, say NSW, issues will arise with whether their marriage is to be recognised in that State, both generally and for the purpose of State legislation that uses 'marriage' as an operative status.[24] Also, the notion that persons could have the status of 'married' under ACT law but 'de facto' under Commonwealth law is the very consequence that the Commonwealth Acts were enacted to avoid (contra ACT [60]). Private international law rules whether based upon domicile or otherwise will need to be revivified. In so doing, the ACT Marriage Act shatters the uniformity intended by Commonwealth Acts and purports to subordinate their norms to its norm.

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[21] See eg *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565 at 591 (Fullagar J, with Dixon CJ and Kitto J agreeing): the 'extremely elaborate and detailed set of requirements' contained in the Commonwealth regulations excluded State regulations of that subject.
[22] See *Dickson v The Queen* (2010) 241 CLR 491 at 503-504 [19] (the Court).
[23] (1913) 16 CLR 212; CS [15]. Contra ACT [41], [53].
[24] For example, *Succession Act 2006* (NSW), s 12 (a will is revoked by the 'marriage' of the testator); *Property (Relationships) Act 1984* (NSW), s 4(1)(b) (definition of 'de facto relationship' excludes people who are married); *Married Persons (Equality of Status) Act 1996* (NSW), s 13 (a 'spouse' can apply to recover his or her money that was invested without his or her consent by the other spouse).

ERRATA

CORRECTIONS TO COMMONWEALTH'S SUBMISSIONS DATED 13 NOVEMBER 2013

Page 3, footnote 7:	For "*h that*" read "*That*"
Page 10, para 20.2:	For "*18 for females and 16 for males*" read "*16 for females and 18 for males*"
Page 10, para 20.2	For "*a position that previously applied only in South Australia*" read "*a position that previously applied only in South Australia, Tasmania and Western Australia*"
Page 16, para 42 (last line):	For "*under Part of the Domestic Relationships Act 1984*" read "*under Part 3 of the Domestic Relationships Act 1994*"