THE MARRIAGE POWER AND SAME SEX UNIONS

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In Australia, whether or not the law *can* recognise same-sex marriage is a political and constitutional question. But whether or not the law *ought* to recognise same-sex marriage is, ultimately, a question of personal morality in my view. And depending on the individual, that moral view may be informed by a range of factors including personal experience, ethical reflection, professional learning and religious convictions. And moral views inevitably run deep and are generally not negotiable. So those who advocate for same sex marriage and unions may well be right to say that it is a human rights issue; that it is about removing discrimination and securing legal equality for same sex couples.[1] But in making those claims they should be careful not to deny or discount that for many persons of good will it is also a moral question where religious views have a legitimate and significant influence.[2]

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[1] See Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2009* (November 2009) Dissenting Report by Australian Greens 47-51.

[2] See generally Frank Brennan, *Acting on Conscience* (2007) 182-214.

In any event, the topic I have been asked to speak on today is ultimately about characterisation. Specifically, whether the scope of the marriage power is broad enough to encompass same sex marriage or union legislation. There is no High Court authority directly on point, indeed little on the constitutional definition of 'marriage' more generally.[3] The most relevant judicial discussion comes from *Re Kevin and Jennifer* where the Full Court of the Family Court wrote:

> It seems to be inconsistent with the approach of the High Court to the interpretation of other heads of Commonwealth power to place marriage in a special category, frozen in time to 1901. We therefore approach the matter on the basis that it is within the power of Parliament to regulate marriages within Australia that are outside the monogamistic Christian tradition.[4]

There are also the important obiter comments of Justice McHugh in *Re Wakim* that 'arguably "marriage" now means, or in the near future may mean, a voluntary union for life

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[3] The scope of the marriage power has been discussed in the following High Court judgments: *Attorney-General for NSW v Brewery Employees' Union of NSW* (1908) 6 CLR 469, 610 (Higgins J); *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529, 549 (McTiernan J), 576-577 (Windeyer J); C*ormick and Cormick v Salmon (*1984) 156 CLR 170, 182 (Brennan J); *Re F; Ex parte F* (1986) 161 CLR 376, 389 (Mason and Deane JJ), 399 (Brennan J), *Fisher v Fisher* (1986) 161 CLR 438, 454-456 (Brennan J); *The Queen v L* (1991) 174 CLR 379, 392 (Brennan J); *Re Wakim* (1999) 198 CLR 511, 553 (McHugh J).

[4] *Attorney-General (Cth) v Kevin* (2003) Fam LR 1, 19.

between two *people* to the exclusion of others.'[5] And one would assume – maybe incorrectly[6] – that a judge who subscribes to Justice Kirby's living-tree method of constitutional interpretation would have little trouble in finding the marriage power capable of supporting same-sex marriage legislation.[7]

Anyway, my paper will proceed as follows. First, I will make some brief comments about the federal *Marriage Act.* Then I will consider how the High Court might characterise the amendment to the definition of marriage proposed by the Marriage Equality Amendment Bill of 2009; the Bill upon which the Senate Legal and Constitutional Affairs Legislation Committee recently reported.[8] I will then ask whether there might be an inconsistency issue if the States were to enact legislation that provides for same-sex unions which are expressly *not* characterised as 'marriage' but are their functional equivalent. And finally, I will outline the constitutional issues relevant to the Senate Committee's

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[5] *Re Wakim* (1999) 198 CLR 511, 553 (McHugh J)(emphasis in original).
[6] See Dan Meagher, 'The Times Are They A-Changin'? – Can the Commonwealth Parliament Legislate for Same Sex Marriages?' (2003) 17 *Australian Journal Of Family Law* 134, 141-146; Kristen Walker, 'The Same Sex Marriage Debate in Australia' (2007) 11 *International Journal of Human Rights* 109, 116-118.
[7] But see the decision of the Canadian Supreme Court in *Reference re Same-Sex Marriage* [2004] 3 SCR 698 where the Court endorsed the living-tree method of constitutional interpretation in finding same-sex marriage was compatible with the Canadian Charter of Rights and Freedoms.
[8] See above n 1.

recommendation that the Commonwealth ought to consider 'developing a nationally consistent framework to provide official legal recognition for same sex couples'.[9]

The federal *Marriage Act* defines marriage as 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.'[10] This was included – and other important changes made[11] – by the *Marriage Amendment Act 2004* (Cth). And whilst there are different views on the matter, I would argue that as a consequence of these amendments the Commonwealth law now covers the entire field of legal relationships characterised as 'marriages', including for example polygamous and same-sex marriages.[12] Consequently, any attempt by the States to enact same-sex marriage legislation would be rendered inoperative by virtue of section 109 of the *Constitution*.[13]

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[9] Senate Committee Report, above n 1, vii.
[10] *Marriage Act 1961* (Cth) s 5.
[11] See generally Geoffrey Lindell, 'State Legislative Power to Enact Same-Sex Marriage Legislation, and the Effect of the *Marriage Act 1961* (Cth) as Amended by the *Marriage Amendment Act 2004* (Cth)' (2006) 9 *Constitutional Law and Policy Review* 25.
[12] But see Walker, above n 6, 118-119; George Williams, 'Advice Regarding the Proposed *Same-Sex Marriage Act*' (2006) 9 *Constitutional Law and Policy Review* 21, 22-24.
[13] See further Geoffrey Lindell, 'Constitutional Issues Regarding Same-Sex Marriage: A Comparative Survey – North America and Australasia' (2008) 30 *Sydney Law Review* 27, 43-44; Lindell, above n 11, 27-28.

If however I am wrong on this, the Commonwealth could nevertheless legislate to bring about this indirect inconsistency. The *Marriage Act case* of 1962 held that it was at least incidental to the execution of the marriage power to protect the institution of marriage by denying validity to bigamous marriages and making it an offence to undertake such a ceremony.[14] By parity of reasoning it would seem the Commonwealth could do likewise for same-sex marriages, and so make clear its intention to cover the field of marriage.

But how might the High Court characterise that part of the Marriage Equality Amendment Bill that seeks to extend the definition of 'marriage' to include same-sex marriages?[15] First, it is worth noting that as a political matter this Bill has no chance of becoming law, at least for the foreseeable future whilst the two major parties at the federal level continue to oppose same-sex marriage.

However, the incremental expansion of legal rights and protections afforded to same-sex couples is already well and truly under way at the federal,[16] State[17] and Territory

[14] *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529.
[15] Marriage Equality Amendment Bill (Cth) s 5(1).
[16] See for example *Same-Sex Relationships (Equal Treatment in Commonwealth Law-General Law Reform) Act 2008* (Cth).
[17] See for example *Relationships Act 2003* (Tas).

level.[18] And whilst I personally think it may be some time away, the trajectory of this legislative activity in each component of the Australian federation (and overseas) suggests that, eventually, there will exist the requisite level of widespread public support (and therefore political will) to secure same-sex marriage legislation at the federal level.

So if –maybe when - that federal legislation is enacted, will it pass constitutional muster?

If the High Court were to apply the well established though far from universally admired distinction between connotation and denotation, then I would argue 'no'.[19] That is, the Court would likely find that the connotation of the constitutional term 'marriage' in 1900 was formal, monogamous and heterosexual unions.[20] And if this interpretive technique is something more than a mere linguistic device (which I think it must be) then in my view it

[18] See for example *Civil Partnership Act 2008* (ACT).
[19] For critiques of the distinction between connotation and denotation see Simon Evans, 'The Meaning of Constitutional Terms: Essential Features, Family Resemblance and Theory-Based Approaches' (2006) 29 *University of New South Wales Law Journal* 207; Leslie Zines, The High Court and the Constitution (5th ed, 2008) 25-27.
[20] See generally Meagher, above n 6, 137-139.

is difficult to argue that heterosexuality was *not* an essential or core element of 'marriage' in 1900.[21]

However, constitutional validity *is* a possibility if the High Court were to apply a different – though still orthodox – interpretive technique. It involves recognising that the subject matter of the power is 'marriage' as a *legal* institution,[22] one that before 1900 was the subject of gradual but significant change by the statutes of the United Kingdom and the Australian colonies.[23] In this regard 'marriage' is one of a number of legal terms and institutions that became constitutional provisions in 1900.[24] 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 to varying degrees at the time of federation. So considering this history, might it be reasonable to assume that the framers understood that the legal institution of 'marriage' would likely develop further

[21] See Jeffrey Goldsworthy, 'Interpreting the Constitution in its Second Century' (2000) 24 *Melbourne University Law Review* 677, 99; But see Aleardo Zanghellini, 'Marriage and Civil Unions: Legal and Moral Questions' (2007) 35 *Federal Law Review* 265, 274-275.
[22] See *Fisher v Fisher* (1986) 161 CLR 438, 455-456 (Brennan J).
[23] For a brief history of Australian marriage law see *Attorney-General (Cth) v Kevin* (2003) Fam LR 1, 14-18; John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (1901, reprinted in 1995) 608-609. On the history of marriage law more generally see Patrick Parkinson, *Australian Family Law in Context* (4th ed, 2009) Ch 3.
[24] See *Attorney-General (NSW) v Brewery Employees Union of New South Wales* (1908) 6 CLR 469, 531-533 (O'Connor J); *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529, 576 (Windeyer J).

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 that pre-federation history, the common law tradition and maybe even the intentions of the framers.[25]

This is, arguably, the interpretive approach the High Court has increasingly adopted when construing other constitutional provisions of this kind such as the jury guarantee in section 80,[26] the intellectual property power in section 51(xviii),[27] the constitutional writs available under section 75(v)[28] and the scope of Commonwealth executive power in section 61.[29] For example, when considering the scope of the constitutional writ of prohibition in *Aala*, Justices Gaudron and Gummow said:

> An appreciation of the essential characteristics of such an expression is assisted by an examination that involves legal

[25] See further Justice Michael McHugh, 'The Constitutional Jurisprudence of the High Court: 189-2004' (2008) 30 *Sydney Law Review* 5, 9, 21-25; Meagher, above n 6, 149-153.
[26] See *Brownlee v R* (2001) 207 CLR 278, 284 (Gleeson CJ), 286 (McHugh J), 292 (Gummow and Hayne JJ).
[27] See *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 501 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
[28] See *Re Refugee Review Tribunal and Another; Ex parte Aala* (2000) 204 CLR 82, 97 (Gaudron and Gummow JJ).
[29] See *Barton v Commonwealth* (1974) 131 CLR 477, 498 (Mason J); see further Zines, above n 19, 341-349.

> scholarship in preference to intuition or divination. The examination appropriately may include the understanding of that expression at the time of the commencement of the Constitution and *thereafter*.[30]

But doesn't this interpretive approach amount to the stream seeking to rise above its source?[31] Parliament itself cannot of course define the scope of its own constitutional power.[32] But when faced with the difficult task of interpreting legal terms and institutions as constitutional provisions, it is legitimate and sometimes necessary for the High Court to consider post federation developments in legislation and the common law.[33] Indeed maybe this is what Justice Higgins had in mind in the *Trademarks case* when he characterised the intellectual property power as akin to the marriage power before stating that: '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

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[30] (2000) 204 CLR 82, 93 (Gaudron and Gummow JJ).
[31] This approach permits the evolution of constitutional meaning to be informed by developments in the common law and statute law assuming they are otherwise compatible with the text and structure of the Constitution.
[32] For example, on many occasions the High Court have made this point specifically with regards to the marriage power – see *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529, 549 (McTiernan J); C*ormick and Cormick v Salmon (*1984) 156 CLR 170, 182 (Brennan J); *Re F; Ex parte F* (1986) 161 CLR 376, 389 (Mason and Deane JJ), 399 (Brennan J), *Fisher v Fisher* (1986) 161 CLR 438, 455 (Brennan J).
[33] See *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 498-501 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); see further McHugh, above n 25, 9, 21-25.

marriages.'[34] His Honour made clear, though, that this interpretive approach did not mean that 'the Federal Parliament would only have to call a spade a "trade mark," and then legislate as to spades.'[35] But he did characterise 'trademarks' (and so 'marriage') as 'artificial products of society' that 'can be extended.'[36]

In the context of the marriage power, then, legislation cannot control its constitutional meaning but it can inform it; and, most relevantly, it may on this interpretive approach extend to same sex couples the rights (and obligations) of marriage. I should also add that a broad construction along these lines is consistent with the High Court's jurisprudence on the marriage power more generally which, at least since the 1960's, has seen the scope of its subject matter considerably expanded.[37]

I also want to suggest that if and when the High Court is required to consider the validity of a federal same-sex

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[34] *Attorney-General (NSW) v Brewery Employees Union of New South Wales* (1908) 6 CLR 469, 610 (Higgins J).
[35] Ibid 614.
[36] Ibid 611.
[37] It now includes for example the legitimation of children born before their parents marry: *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529; the determination of custody, maintenance and property rights of spouses without the need for principal proceedings for matrimonial relief: *Russell v Russell* (1976) 134 CLR 495; that anyone can institute guardianship, custody or access proceedings regarding a child of a marriage so long as at least one spouse of the marriage is a party: *V v V* (1985) 156 CLR 228.

marriage law, then the intractable nature of the moral issue which such legislation determines ought to be relevant to its characterisation in one important respect. Of course such litigation can only arise after the democratically elected representatives of the Australian people have enacted same-sex marriage legislation. And whilst such a law cannot supply its own constitutional power, its democratic credentials are nevertheless important. Its passage would reflect that there now exists a consensus *throughout Australia* as to the morality and legitimacy of same-sex marriage. In my view, then, the presumption in favour of constitutionality ought to be at its strongest when federal legislation determines complex and intractable moral issues of this kind.[38] For these are issues which judges possess no special wisdom or expertise beyond the ordinary citizen and judicial technique, no matter how high, cannot supply a morally superior outcome. In these instances, I would argue that it is institutionally prudent and constitutionally appropriate for the High Court to acknowledge and respect

[38] On the presumption see *Stenhouse v Coleman* (1944) 69 CLR 457, 466 (Starke J); *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, 180 (Isaacs J); *Attorney-General (Vic); Ex rel Dale v Commonwealth* (1945) 71 CLR 237, 267 (Dixon J); *Commonwealth v Tasmania* (1983) 158 CLR 1, 161 (Murphy J); see also Henry Burmester, 'The Presumption of Constitutionality' (1983) 13 *Federal Law Review* 277.

the democratic significance of such legislation unless the *Constitution* clearly precludes it.[39]

Turning now to the issue of federal or State legislation that provides for the legal recognition of same sex unions. I will assume that such legislation will provide the functional equivalent of marriage but will clearly state it is not a 'marriage' in the traditional sense. The ACT's disallowed *Civil Unions Act* of 2006 provides an example.[40]

If the States legislate for same sex unions of this kind is there likely to be a section 109 issue? As the federal *Marriage Act* currently stands and for reasons I will outline shortly, I would argue 'no'. The only way that I can think an inconsistency issue might possibly arise (in future) is if the marriage power is given a radically conservative construction. That is, the power is limited to heterosexual unions *and* it is considered to be within its incidental range to protect that heterosexual status by precluding any same-

[39] Moreover, note that such a holding would not preclude the institution of 'marriage' being subject to further (progressive of conservative) legislative reform. It would simply confirm that the marriage power is capable of supporting opposite and same sex marriage legislation.

[40] Section 11 of that Act, for example, provided that in order to enter a civil union the two parties must declare that they wish to do so before a civil union celebrant and one other witness. Moreover, its preamble stated that '[t]his Act continues the process of rationalisation by allowing 2 people who choose not to be married, or would not be entitled to be married, to enter into a legally recognised relationship that is to be treated under territory law in the same way as marriage.'

sex union that is functionally equivalent to marriage. This is, arguably, what then Attorney-General Ruddock had in mind when he said the Federal Government would consider disallowing the second and significantly amended ACT Civil Partnership's Bill of 2006 because it still had the capacity to undermine marriage as a heterosexual institution.[41] Moreover, the Rudd Government has also expressed its opposition to State legislation for same-sex unions that seeks to "mimic" marriage.[42]

Such a construction should be rejected in my view. I would argue that, *irrespective of the scope of the marriage power*, civil unions – even if the functional equivalent of marriage - are a distinct, secular and modern legal institution that provide an alternative to marriage for same sex (and other) couples. And legislative terminology ought to be important, if not decisive. The functional equivalent of 'marriage' is not a 'marriage'.[43] On this view, civil unions (like de facto relationships) are legally and constitutionally distinct from

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[41] See Phillip Ruddock, MHR (LP) Attorney-General, 'ACT Civil Partnerships Bill Does Not Remove Concerns' (Press Release, 6 February 2007).
[42] See 'McClelland Repeats Gay Marriage Opposition' 30 April 2008 http://www.abc.net.au/news/stories/2008/04/30/2231128.htm at 29 January 2010. It should, however, be noted that the Rudd Government allowed the passage of the *Civil Partnerships Act 2008* (ACT). Section 8B provides that a declaration of civil partnership can be made before a civil partnership notary and one other witness.
[43] On this point see further Zanghellini, above n 21, 280-282.

marriage and so within the residual legislative competence of the States.

Finally, as earlier mentioned, the recent Senate Committee report recommended the Commonwealth develop a 'nationally consistent framework to provide official recognition for same sex couples'.[44] The Commonwealth has already used its legislative powers with respect to social security benefits, taxation, defence and immigration amongst others to extend many legal benefits of 'marriage' to same-sex couples.[45] But what head of power might support federal legislation that directly provided for same sex unions or some form of legal registration?

I suppose a radically progressive construction of the marriage power might consider it incidental to its execution to be able to legislate for all marriage-like legal unions. Or such a law might be supported by the treaty component of the external affairs power: that is, a law providing for the legal union or registration of same sex couples would be a proportionate discharge of Australia's equality and non-discrimination obligations under the ICCPR.[46] Andrew Lynch

[44] Senate Committee Report, above n 1, vii.
[45] See *Same-Sex Relationships (Equal Treatment in Commonwealth Law-General Law Reform) Act 2008* (Cth).
[46] Walker, above n 6, 120.

and George Williams take the contrary view.[47] Alternatively, Kris Walker has suggested, persuasively in my view, that section 61 and the incidental power may support a national registration system to assist in the administration of the recent Commonwealth legislation that extended many of the legal benefits of marriage to same-sex couples.[48]

A more difficult (though secure) constitutional route would involve the States referring to the Commonwealth their power to legislate for same sex unions. This would allow for the uniform legal recognition and treatment of same sex unions throughout the Commonwealth, a desirable legislative outcome irrespective of how the same sex marriage issue plays out. It would also complement the recent enactment by the Commonwealth of the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008*; legislation made possible by most States referring their power to make laws for maintenance and property division upon the breakdown of de facto relationships of opposite and same-sex couples.[49]

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[47] Andrew Lunch and George Williams, Gilbert + Tobin Centre of Public Law Submission to the Inquiry into the Marriage Equality Amendment Bill 2009, 28 August 2009.
[48] This argument was made to author in email and phone conversations on 9 & 10 February 2009.
[49] See further Anthony Dickey, *Family Law* (5th ed, 2007) 39-40; Parkinson, above n 23, Ch 18.