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Unscrambling the Curate's Egg- the High Court's ACT Same Sex Marriage Decision

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Bishop: "I'm afraid you've got a bad egg, Mr Jones"; Curate: "Oh, no, my Lord, I assure you that parts of it are excellent!"

"True Humility" by George du Maurier, originally published in Punch, 9 November 1895.

The classic 1895 *Punch* cartoon by du Maurier features a stern-faced Bishop having breakfast with a curate who is obsequiously eager to please. The curate has just cracked open his boiled egg and it is clearly off. "I'm afraid you've got a bad egg, Mr Jones," says the Bishop. "Oh, no, my Lord, I assure you that parts of it are excellent!"

Since then the expression "a curate's egg", properly understood, is an expression for something which is really bad, but which the speaker wishes for some reason not to condemn directly. Of course an egg which has gone bad cannot be "good in parts", even if not all the substance smells. The whole thing needs to be thrown out.

With the polite diffidence of the curate, I would like to suggest that decision of the High Court of Australia in *The Commonwealth v Australian Capital Territory* [2013] HCA 55, (2013) 250 CLR 441, striking down the ACT same sex marriage legislation, bears some resemblance to the proverbial egg. The decision on the particular issue directly presented to the court was clearly correct- those parts of it were indeed "excellent". But inextricably mixed in with the correct decision were comments that open the way for a misreading of the Constitution, which may be used to support future Commonwealth legislation authorising a fundamental redefinition of the important social institution of marriage.

In this comment my aim is to delineate the ways in which the decision was correct, but to suggest that the *obiter dicta* on the wider issue (however

"seriously considered" they were)¹ ought not to be regarded as binding by a future bench of the Court called on to consider that issue. There are formal reasons why this is so, based on the doctrine of precedent; but the more important and substantive reason is that the remarks were based on reasons and assumptions which are "plainly wrong".²

Some other academic commentators may share my judgment that the Court got some things right, and some things wrong. But I suspect that many of those will be diametrically opposed to the grounds on which I have reached that view. Many will have thought that the court ought to have upheld the validity of the ACT legislation, but will find comfort in the comments on the extent of the marriage power. My view is that the court was correct to strike down the ACT law, but incorrect in the wide reading they gave to the marriage power, especially when it was not necessary to do so in these proceedings, and where the Court did not have the benefit of serious argument to the contrary.

Background to the proceedings

There is probably no need to describe the increasing call for recognition of same sex relationships as "marriage" in the Western world during the first part of the 21st century. Those in favour of normalising homosexual behaviour have conducted the campaign in a strategic and carefully organised way. In particular the slogan "marriage equality" has been adopted, positioning the recognition of homosexuality as "normal" as similar to the civil rights movement of the 1960's to outlaw racial discrimination. I have argued elsewhere that a refusal to extend the label "marriage" to a same sex relationship cannot sensibly be described as "discrimination", when the term itself *means* a relationship between parties of different sexes.³ However, the slogan has captured the imagination of many.

Laws have now been passed extending the definition of marriage to cover same sex relationships in a number of Western countries. Parkinson⁴ at [10.15] notes some useful resources to survey the debate.⁵ In 2012 10 countries and a number of separate US States had legislated to allow same sex couples to "marry". As of 1 Jan 2015 there are some 17 countries that allow same sex marriage, with individual jurisdictions within the United States and Mexico allowing it and others, not.⁶ (Putting this in perspective, of course, there are 193

¹ See *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 81 ALJR 1107 at [134], discussed below.

² See *Farah*, above n 1, at [135] near n 100.

³ N Foster "Opposing same-sex marriage is not discrimination" (2011); available at: http://works.bepress.com/neil_foster/40.

⁴ P Parkinson, *Australian Family Law in Context* (5th ed; Lawbook Co, 2012).

⁵ See eg L D Wardle, et al (eds) *Marriage and Same-Sex Unions: A Debate* (Praeger, Westport, 2003); N Witzleb, "Marriage as the 'Last Frontier'? Same-Sex Relationship Recognition in Australia" (2011) 25 *International Journal of Law, Policy and the Family* 135. For a wide list of links see also https://www.usfca.edu/Library/handouts/Finding_Information_on_Same-Sex_Marriage/.

⁶ As reluctant as I am to use Wikipedia, on this highly charged and rapidly changing topic it seems to be accurate- see http://en.wikipedia.org/wiki/Same-sex_marriage (consulted 20 Jan 2015).

member states at the United Nations; so overall still only 9% of the world's countries recognise the institution.)

The major policy question, of course, is whether marriage ought to be re-defined. I am one of those who thinks that this is not a good idea. No doubt part of my own reasons for opposing recognition of same sex marriage are based on my Christian convictions. But I am firmly convinced that there are wider public policy reasons that can be put forward for saying that the institution of "conjugal marriage" is one worth supporting, and is best for the continued flourishing of our society.

Girgis et al, in one of the most comprehensive books on the topic, express many of the best reasons far better than I can.⁷ Broadly, they argue that marriage is "conjugal" rather than simply focussed on the interests of the parties involved.

Marriage is, of its essence, a comprehensive union: a union of will (by consent) and body (by sexual union); inherently ordered to procreation and thus the broad sharing of family life; and calling for permanent and exclusive commitment, whatever the spouses' preferences... Marriages have always been the main and most effective means of rearing healthy, happy and well-integrated children. (at p 7)

Brennan J in the High Court decision of *R v L* (1991) 174 CLR 379 at 391 noted:

In *Hyde v. Hyde and Woodmansee*⁸ Lord Penzance defined marriage as "**the voluntary union 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.⁹ It is the definition adopted by the [Family Law Act, s.43\(a\)](#) of which requires a court exercising jurisdiction under that Act to have regard to "the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life". Marriage is an institution which not only creates the status of husband and wife but also, without further or specific agreement, creates certain mutual rights and obligations owed to and by the respective spouses.¹⁰ (emphasis added)

The view that Australia should support the long-accepted definition of marriage from *Hyde* was accepted by the previous Howard government, which strengthened the already clear law on the matter by adding a definition of marriage to s 5(1) of the *Marriage Act* 1961 in 2004, simply stating that: "**marriage** means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life." A similar provision was added to the part of the Act dealing with recognition of overseas marriages, in s 88EA:

88EA Certain unions are not marriages

A union solemnised in a foreign country between:

- (a) a man and another man; or
- (b) a woman and another woman;

⁷ S Girgis, R T Anderson & R P George, *What is Marriage? Man and Woman: A Defence* (Encounter Books, 2012). Other helpful resources arguing on general (not specifically religious) grounds for the retention of the traditional view of marriage as between a man and a woman are S McDowell and J Stonestreet *Same-Sex Marriage* (Baker, 2014), and A Esolen *Defending Marriage: Twelve Arguments for Sanity* (Saint Benedict Press, 2014).

⁸ (1866) LR 1 P and D 130, at p 133.

⁹ (39) Calverley v. Green [1984] HCA 81; [1984] 155 CLR 242, at pp 259-260; Khan v. Khan [1963] VicRp 32; [1963] VR 203, at p 204.

¹⁰ Eversley's Law of Domestic Relations, 6th ed. (1951), pp 2-3.

must not be recognised as a marriage in Australia.

An attempt in 2012 to amend the Act to recognise same sex marriage failed because it was defeated on a vote in the Federal Parliament. An alternative strategy then pursued by proponents was to endeavour to get same sex marriage recognised at a State and Territory level.

Validity of the ACT legislation

The ACT then passed the first of such legislation: the *Marriage Equality (Same Sex) Act* 2013 (ACT) passed the Legislative Assembly on 22 Oct 2013. The key provision was s 6, which said that the Act applied “in relation to all marriages between 2 adults that are not marriages within the meaning of the *Marriage Act* 1961 (Cwlth) solemnised, or intended to be solemnised, in the ACT”. It then went on to replicate in some detail the other provisions of the *Marriage Act* 1961, only in relation to its own version of “marriages”. Clearly its purpose was to recognise same sex marriage.

The Federal Government then challenged this legislation in the High Court, and it was held to be invalid.

In a unanimous decision of a bench of 6 Justices¹¹ in *The Commonwealth v Australian Capital Territory* [2013] HCA 55 (12 December 2013) the Court declared the legislation invalid as contrary to the Federal *Marriage Act* 1961, which was clearly intended to be the uniform law governing marriage in Australia. The mechanism for the invalidity was not s 109 of the Constitution (which only deals with legislation of the States), but s 28 of the *Australian Capital Territory (Self-Government) Act* 1988 (Cth). This provides that legislation enacted by the ACT “has no effect to the extent that it is inconsistent with”, among others things, an Act of the Federal Parliament. In this case the Court took the view that, just as s 109 may over-ride State law where the Commonwealth Parliament has “covered the field”, here s 28 operated to invalidate a Territory law where the Commonwealth law

[I]s a complete statement of the law governing a particular relation or thing. (at para [52])

In rejecting a claim that the Territory law could operate as a law relating to “same sex marriage”, in parallel with the main *Marriage Act* 1961, the Court said:

[56]... The federal Parliament has not made a law *permitting* same sex marriage. But the absence of a provision *permitting* same sex marriage does not mean that the Territory legislature may make such a provision. It does not mean that a Territory law permitting same sex marriage can operate concurrently with the federal law. The question of concurrent operation depends¹² upon the proper construction of the relevant laws. In

¹¹ Justice Gageler did not sit, having announced at the beginning of the hearing that he was recusing himself because he had advised the Commonwealth on similar issues when employed as Solicitor-General before joining the Court. In my view this was unfortunate; the previously written submission provided some very perceptive comments.

¹² *Momcilovic* (2011) 245 CLR 1 at 112 [245], 115-116 [258]-[261].

particular, there cannot be concurrent operation of the federal and Territory laws if, on its true construction, the *Marriage Act* is to be read as providing that the only form of marriage permitted shall be a marriage formed or recognised in accordance with that Act.

[57] **The *Marriage Act* regulates the creation and recognition of the legal status of marriage throughout Australia.** The Act's definition of marriage sets the bounds of that legal status *within* the topic of juristic classification with which the Act deals. Read as a whole, the *Marriage Act*, at least in the form in which it now stands, makes the provisions which it does about marriage as a comprehensive and exhaustive statement of the law with respect to the creation and recognition of the legal status of marriage. Why otherwise was the *Marriage Act* amended, as it was in 2004,¹³ by introducing a definition of marriage in the form which now appears, except for the purpose of demonstrating that the federal law on marriage was to be complete and exhaustive? (**emphasis added**)

So Territories, and pretty clearly States as well, cannot “go it alone” on the question of same sex marriage.¹⁴

The extent of the Constitutional marriage power

However, supporters of same sex marriage took some encouragement from the fact that, in another part of its decision, the High Court very directly took a step further and addressed the width of the “marriage” power under the Constitution, and ruled that the power would be wide enough to allow the Commonwealth Parliament, if it chose to do so, to enact a law allowing same sex marriage. It seems to me, with respect, that the decision to address this matter was unwise, unnecessary and in fact incorrect.

It is very odd, for a start, that the Court chose to address the issue of the breadth of the *Federal* marriage power, when the precise issue at stake was the validity of the *ACT* law. In fact, as the Court itself notes, there was no “contradictor” (ie, no lawyer arguing against the proposition) for this highly controversial issue, all the parties involved conceding that the Federal Parliament did have such a power. For such a wide-ranging decision with massive policy implications, it seems (to put it mildly) unwise for the Court to proceed without at least having the benefit of a carefully thought-through submission putting the opposing point of view.

¹³ *Marriage Amendment Act 2004* (Cth), s 3, Sched 1, item 1.

¹⁴ Hence it seems unlikely that proposals that have been put forward by some same sex marriage supporters, to amend the law of Norfolk Island, can have any hope of success- see <http://www.theaustralian.com.au/news/latest-news/norfolk-island-considers-gay-marriage/story-fn3dxiwe-1227061263356?nk=80753d4c8bd577c211f70f9d0a2eaa8c>. See the Bill at this link: <http://norfolkisland.gov.nf/la/Exposure%20Draft%20of%20Bills/14th%20Legislative%20Assembly/Private%20Members'%20Bill%20Same-Sex%20Marriage%20Bill%202014%20Sept%202014.docx>. The only relevant difference from the ACT legislation seems to be that s 3(2) of the Bill says that “a same-sex marriage within the meaning of this Act is not a marriage.” But I somehow doubt that a High Court which declared ducks to be invalid would be inclined to accept a “rooster” which is yellow with webbed feet and quacks. There have even been comments suggesting that a differently framed Act could support same sex marriage in Western Australia, but an excellent comment by Zimmerman and Finlay demonstrates why this is unlikely- see A Zimmermann and L Finlay “MARRIAGE LAW: Can state parliaments legislate for same-sex marriage?” *News Weekly*, December 6, 2014 (at <http://newsweekly.com.au/article.php?id=56792>).

The Court justifies its decision to address the issue (indeed, interestingly to spend the whole first half of the judgment addressing the issue before it even reaches the ACT law) on the basis that it is only by defining the scope of the Federal marriage power, that it can determine the effect of the ACT legislation. They say this:

[9] This Court must decide whether s 51(xxi) permits the federal Parliament to make a law with respect to same sex marriage because the ACT Act would probably operate concurrently with the *Marriage Act* if the federal Parliament had no power to make a national law¹⁵ providing for same sex marriage. If the federal Parliament did not have power to make a national law with respect to same sex marriage, the ACT Act would provide for a kind of union which the federal Parliament could not legislate to establish. By contrast, if the federal Parliament can make a national law providing for same sex marriage, and has provided that the *only* form of marriage shall be between a man and a woman, the two laws cannot operate concurrently.

With the greatest of respect to the Court, this is wrong! It is not necessary for the Federal Parliament to have power to enact a particular law, for it to be able to prevent a State from passing a law on the general topic. To approach the matter by a somewhat far-fetched analogy, suppose that the ACT had decided to pass legislation saying that someone would be deemed to be “bankrupt” (another topic of Federal power and existing Federal law) if they had red hair. Would it be necessary to find that the Federal bankruptcy power included a power to impose the status of bankruptcy on someone on the basis of hair colour, for the ACT law to be invalid? The proposition is absurd. So long as a Federal law deals exhaustively with a particular status, then any State or Territory law purporting to set up the status on grounds that are either inconsistent with, or not just dealt with, in the Federal law, can easily be seen to be invalid.

It seems that the Court’s logic here can only operate if it is assumed that in the Federation *some legislature* must have the power to enact a law on same sex marriage. But that is not a necessary assumption. It may be that under present Constitutional arrangements *no* legislature in Australia has the power to confer the status “marriage” on a same sex couple. (Just as, to return to my example, it does not seem absurd that no Australian Parliament could choose to declare people bankrupt on the criterion of hair colour.) The solution to this problem (if it is seen to be a problem) is to adopt the authorised method provided for amendment of the Constitution, a referendum under s 128. In that case the people of Australia will have a clear opportunity to have their say.¹⁶ But until

¹⁵ In the sense of a law “of general application throughout the whole of the Commonwealth and its territories”: *Spratt v Hermes* (1965) 114 CLR 226 at 278 per Windeyer J; [1965] HCA 66. See also *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 221-222 per Gaudron J; [1992] HCA 45.

¹⁶ It is interesting (see *Hollingsworth v Perry*, 570 US __, 2013 WL 3196927, No 12-144 (26 June 2013)) that a referendum on the issue in California (often thought to be one of the most “liberal” of States in the US) led to a majority of voters choosing to affirm the historical understanding of marriage as between a man and a woman. In the end the result of this referendum, despite being accepted as a valid result by the California Supreme Court, was over-turned by a single Federal judge in California, and his decision was upheld because the California Attorney-General refused to defend the law in Federal courts, and the US Supreme Court found that no-one else had standing to defend the law. It is also interesting to note that proponents of same sex marriage

that happens, it could be argued that no Parliament can set up “same sex marriage”.

The High Court, though, having entered upon the question, then answered it in a very clear way, holding that the Federal Parliament *would* clearly have the power to enact a law allowing for same sex marriage – see eg the repetitions of the proposition in paras [2] and [38] of the judgment. But they readily concede that in 1900 it would not have been accepted that “marriage” as a topic of power included same-sex relationships. How, then, do they justify their view?

In effect the debate is around the question of how a head of constitutional power is to be defined. It seems to be accepted that any head of power will have a “core” meaning, which is unchanging, and a “penumbral” area at the outer limits where elements of the definition of the concept may change over time. At [20] the Court quotes the judgment of Higgins J in the *Union Label Case* (1908) 6 CLR 469 at 610, where his Honour drew a distinction between the “centre” and the “circumference” of a power.¹⁷

But how is the line to be drawn, which separates “centre” from “circumference”? At what point does an attempt to alter a “central” feature of the legal topic mean that the law is no longer on that topic? This is a question that the High Court seems not to explicitly address here. The Court points out how different elements of the law relating to marriage have changed over the years. Obvious matters such as the length of notices or the formalities of a ceremony would be accepted by all as variable. But the fundamental elements of marriage have long been accepted, flowing from *Hyde v Hyde*, as noted previously, to include

- A relationship between only two people (monogamy);
- Those people being one man and one woman;
- The relationship being exclusive;
- The relationship being voluntary (so that the parties must have freely chosen to enter it, and presumably must have at least a minimal capacity to understand what they are doing);
- The relationship lasting (in theory at least) for life.

But, the court notes, over time some of these elements have been accepted as not essential. In particular, the court says that polygamy is a relationship that today may be recognised as a “marriage”. A key passage is the following:

[32] Second, statements made in cases like *Hyde v Hyde*, suggesting that a potentially polygamous marriage could never be recognised in English law, were later qualified by both judge-made law and statute to the point where in both England and Australia the law now recognises polygamous marriages for many purposes¹⁸.

have regularly opposed the holding of a referendum on the issue, despite continuing to cite various surveys suggesting that a large majority of the Australian public support change.

¹⁷ While Higgins J was in dissent in that decision, his view has more recently been accepted as the better view in *Grain Pool of WA v The Commonwealth* (2000) 202 CLR 479.

¹⁸ See, for example, *Family Law Act* 1975, s 6. As to judge-made law generally and some English statute law, see *Dicey and Morris on the Conflict of Laws*, 10th ed (1980), vol 1 at 308-328 and the discussion by Lord Maugham LC of the nineteenth century cases in *The Sinha Peerage Claim* [1946] 1 All ER 348n at 348-349.

[33] Once it is accepted that "marriage" can include polygamous marriages, it becomes evident that the juristic concept of "marriage" cannot be confined to a union having the characteristics described in *Hyde v Hyde* and other nineteenth century cases. Rather, "marriage" is to be understood in s 51(xxi) of the Constitution as referring to a **consensual union formed between natural persons in accordance with legally prescribed requirements which is not only a union the law recognises as intended to endure and be terminable only in accordance with law but also a union to which the law accords a status affecting and defining mutual rights and obligations.** (emphasis added)

In essence we find in the highlighted words in para [33] the High Court's "core" meaning of marriage.¹⁹ And of course if this is adopted, then there is no reason to exclude same sex persons. But it has to be asked: where did the Court derive this definition? Yes, it includes some of the essentials noted in *Hyde* and other decisions (consensual, intended to endure). But the plain fact is that the Court does not offer a detailed set of reasons to pick and choose certain characteristics, and to leave others out. In fact it seems that the task of arriving at a definition of the word "marriage" which addresses its "core" cannot really be undertaken without a much more wide-ranging review of the history and sociology of marriage across the Western world. The definition adopted by the court, it should be noted, focuses entirely on the interests of the *parties* to the marriage (it refers to their "mutual" rights and obligations.) Yet all the classic discussion on marriage going back into the history of the West notes that one essential purpose of a marriage is the production and nurture of *children* of the marriage.²⁰

Indeed, it can plausibly be argued that the support of children is perhaps the main reason that society is justified in giving special status to the decision of two persons to have sex and live together. Why should the government be interested at all in the personal relationships of individuals? Because, many argue, a natural and common result of sexual intercourse is children, who are vulnerable and whom society cares for by establishing a system that is designed to encourage their biological parents to care for them, and each other.²¹

This of course is only one perspective. But it is a perspective that receives no attention from the High Court in deciding to take on itself, with no opposing views being presented, a redefinition of the core aspects of a fundamental social structure.

The High Court quotes regularly, as indeed it should, from the decision of Windeyer J in the earlier decision of *Attorney-General (Vict) v The Commonwealth*

¹⁹ See also the concluding words of para [42] for a similar phrasing: "a legal status deriving from the agreement of natural persons to form an enduring personal union which can be dissolved only in accordance with law and which entails legal consequences for mutual support".

²⁰ It ought to go without saying, but I will say it anyway, that to say that a major purpose of the institution of marriage is the production and protection of children, is not to say that a marriage which by design or necessity is childless is not a "real" marriage. It is simply to say that in a large proportion of marriages, children arrive and are nurtured, and that this is a key purpose of the institution.

²¹ It may also be noted that the institution of marriage has also long been seen as protecting the interests of women in particular, against the tendency of men to seek short-term pleasure in sexual encounters and then move on. The institution and associated social and legal incentives provide a reason for men to remain in long-term relationships, particularly with the mother of their children.

(1962) 107 CLR 529 (usually known as the *Marriage Act case*). His Honour was well known as one of Australia's leading legal historians. But in that case he says:

And, I am inclined to think, the Commonwealth power would extend to matters concerning the support and care of children, duties that are commonly considered to be **inherent in the institution of matrimony**. (at 580)

Here the presence of children in the relationship is assumed to be “inherent” in a relationship labeled “marriage”. Indeed, his Honour goes on (580-581):

The procreation and upbringing of children is set down in the Prayer Book first among the causes for which matrimony was ordained. If an authority of a different kind be preferred, Voltaire's *Dictionnaire Philosophique* (1764), in the article on canon law, said: *Le mariage dans l'ordre civil est une union legitime de l'homme et de la femme, pour avoir des enfants, pour les clever, et pour leur assurer les droits des proprietes, l'autorite de la loi*. And Puffendorf said that “the natural and regular end of marriage is the obtaining of children whom we may, with certainty, call our own”: *Law of Nature & Nations* vi, I, 15.

In other words, all the historical sources refer not only to men and women, but also to the production of children as a chief end of the institution. It seems hard to imagine that Windeyer J or any historical writer on the topic would have been prepared to call a relationship which from its very nature precluded the “obtaining of children” who are biologically related to the parties, as a “marriage” at all.

These are the sort of arguments that could be made, then, that despite the High Court's judgment and *obiter* comments, the Federal “marriage” power does not include a power to approve same sex “marriage”. In essence the thrust of the argument is that introduction of such an institution would be so radical a change to the institution of marriage as understood in the Constitution, that it does not fall within the use of the term in s 51(xxi).

Frank Brennan, for example, outlines an argument of this sort.²² While s 51(xxi) authorises laws on “marriage”, Brennan notes that in the past the High Court has been clear that the Commonwealth cannot simply “redefine” a word and give itself legislative power. He notes the comments in *In the Marriage of Cormick* (1984) 156 CLR 170 per Gibbs CJ at 177:

It would be a fundamental misconception of the operation of the Constitution to suppose that the Parliament itself could effectively declare that particular facts are sufficient to bring about the necessary connexion with a head of legislative power so as to justify an exercise of that power. It is for the courts, and not for the Parliament, to decide on the validity of legislation, and so it is for this Court to decide in the present case whether there is in truth a sufficient connexion between the institution of marriage and a law which treats as a child of the marriage a child who is not in fact the natural or adopted child of either party to the marriage, but who was, at a particular time, treated by the parties to the marriage as a member of their family and was, at that time, ordinarily a member of their household.

²² F Brennan, “Church-State Concerns about Same Sex Marriage and the Failure to Accord Same Sex Couples their Due”, in C Parker & G Preece (eds) *Theology and Law: Partners or Protagonists?* (Adelaide: ATF Press, 2005) 83-111 (also part of a journal series, *Interface*, (2005) vol 8/1).

In that case this meant that a law deeming a child who was living with a couple to be a “child of the marriage” was held to be beyond power. Brennan J in the same case commented at 182:

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 to be, or to be within, that conception. ... The power does not support a law which so regulates the incidents of marriage as to impair the essence of marriage: per Windeyer J., *Attorney-General (Vict.) v. The Commonwealth* [\[1962\] HCA 37; \(1962\) 107 CLR 529](#), at p 580.

True, previous comments can be found from some that the Commonwealth would have the power to enact a law on this topic. A comment by Nicholson J (writing extra judicially) quotes McHugh J's obiter comment in *Re Wakim; Ex parte McNally* [\[1999\] HCA 27; \(1999\) 198 CLR 511](#), 553:

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 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 sex 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 (emphasis in original).

But given that there are such strongly opposing views from Australia's most respected judges and commentators, it is passing strange that the High Court here ignores these different perspectives.

An interesting recent comment by Professor Anne Twomey, one of Australia's foremost Constitutional scholars, makes some similar points.²³ She notes how odd it is that the Court goes out of its way to rule on the breadth of the marriage power: “the appropriateness of doing so where there was no contradictor to advance the contrary arguments, especially in a case that was rushed both in hearing and in judgment, remains questionable” (at 613).

She notes that since the ACT was clearly intending to set up a form of “marriage”, then whatever the scope of the Federal power “how could an ACT law establishing the status of “marriage” for same sex couples, operate concurrently with the *Marriage Act* 1961 (Cth)”? (at 613-614) She refers to the High Court's move from acknowledging that polygamy could be regarded as “marriage”, to its new definition in para [33], and calls it a “leap of logic” (at 614).

In particular, she queries the odd comment in para [22] which seems to say that marriage is a “topic of juristic classification” which includes “laws of a kind ‘generally considered, for comparative law and private international law, as being the subjects of a country's marriage laws’”. As she notes, why should Australia subject itself to the definitions of other countries? Does this include countries where child marriages are allowed, or forced marriage? Where marriage may be terminated only at the unfettered will of the husband? “What makes some of these characteristics immutable and others not?” (at 614-614)

And Twomey notes that the idea of marriage being a “topic of juristic classification” is unusual; when used by Windeyer J in the *Marriage Act* case, it

²³ Twomey, A “Same-Sex Marriage and Constitutional Interpretation” (2014) 88 *Aust Law Jnl* 613-616.

was simply a way of saying that historically the concept had moved from the ecclesiastical courts into the common law courts. But there seems to have been no intention in that decision to identify the concept of marriage by reference to the laws used in other countries.²⁴

Twomey makes the telling point near the end of her article that, since when looked at on a global scale, by far the vast majority of other nations do *not* recognise same sex marriage, then this “international” criterion is not going to assist the proponents of change unless they can identify some “subset” of countries for comparison.

There are similar, and other, compelling criticisms of the High Court's decision offered by Parkinson and Aroney in another recent comment.²⁵

Conclusion

I have suggested that the High Court's decision in the *ACT Same Sex Marriage Law case* is mixed- good insofar as it clearly recognises that at the moment the only jurisdiction in Australia which could pass a law changing marriage to incorporate same sex relationships, is the Federal Parliament; bad insofar as it suggests that the Federal Parliament could do so under the current Constitution. The view I have put is that the word “marriage” in the Constitution has as its core, essential meaning a legally recognised relationship between two persons of different sexes.

It is to be hoped that should the High Court ever have to consider the Constitutional validity of such a law, it will appreciate that the considerations noted here mean that the matter needs to at least be approached in the light of submissions that may be made from the opposing side, and not preclude discussion on the basis of what was said in *obiter dicta* in a decision where the matter did not need to be resolved at the time.

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20 Jan, 2015

²⁴ It has to be said that the *pragmatic* reason for adopting this somewhat odd category is clear, in the context of a decision that is aiming to approve same sex marriage as a concept. For of course the laws of a number of other common law jurisdictions have been changed recently to recognise same sex marriage. But as a criterion on its own it is hard to justify.

²⁵ See P Parkinson, and N Aroney, “The Territory of Marriage: Constitutional Law, Marriage Law and Family Policy in the ACT Same Sex Marriage Case” (May 9, 2014). University of Queensland TC Beirne School of Law Research Paper No. 14-20. Available at SSRN: <http://ssrn.com/abstract=2435016> or <http://dx.doi.org/10.2139/ssrn.2435016>; now also published in (2014) 28 *Australian Journal of Family Law* 160-192.