Marriage equality

Radhika Withana reports on *The Commonwealth v Australian Capital Territory* [2013] HCA 55 (ACT Same Sex Marriage Act case)

On 3 December 2013, the High Court heard argument on the question of whether the ACT's *Marriage Equality (Same Sex) Act 2013* (ACT law), which purported to legalise same sex marriage in the ACT, was inconsistent with either or both the *Marriage Act 1961* (Cth) and the *Family Law Act 1975* (Cth). By operation of s 28(1) of the *Australian Capital Territory (Self-Government) Act 1988* (Cth), if such an inconsistency were found, the ACT law would be inoperative to the extent of that inconsistency. In a judgment handed down in just over a week after the hearing, a six-member bench of the High Court[1] unanimously found the whole of the ACT law to be inconsistent with the Commonwealth Marriage Act and of no effect (and thus found it unnecessary to answer whether the ACT law was inconsistent with the Family Law Act).

Acknowledging implicitly the current political potency surrounding the issue of same sex marriage, the court emphasised in the opening line of its reasons that '[t]he only issue which this court can decide is a legal issue'.[2] The court held that under the Commonwealth Constitution and federal law as it now stands, it is a matter for the Parliament of Australia to legislate to allow same sex marriage and accordingly, the ACT law was inconsistent with the Marriage Act.

The court reasoned, through an orthodox treatment of well-established principles of constitutional law and statutory interpretation, that the Marriage Act is to be read as providing that the only form of 'marriage' permitted in Australian law is that recognised in that Act. Following reforms introduced by then Prime Minister John Howard in 2004, the Marriage Act defines marriage as 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'. The definition of marriage that was introduced in 2004 (into an Act which, before that time, was silent as to the definition of marriage) was taken from the formulation by Lord Penzance in *Hyde v Hyde* (1866) LR 1 P & D 130, which has now been superseded by legislative reform in the UK.[3]

In order to determine whether there was inconsistency between the ACT and Commonwealth Acts, the court examined the ambit of federal legislative power provided for in s 51(xxi) of the Constitution (the marriage power), the scope of which (and the constitutional concept of 'marriage' more generally) has not been subject to sustained analysis by the court until this case.[4] It is to be noted, however, that both the Commonwealth and the ACT conceded that the marriage power gives the Parliament of Australia power to make a law providing for same-sex marriage.[5] Nonetheless, the court stated that the parties' submissions did not determine that question and that 'parties cannot determine the proper construction of the Constitution by agreement or concession'.[6] It is also notable that the questions for determination by the court, as framed by the Commonwealth, did not mean that it was necessary for the court to examine the marriage power in order to answer the construction question as to inconsistency.[7] The court, on the other hand, saw the analytic task differently, in that to answer the question of inconsistency, it was necessary to first consider the ambit of federal legislative power under s 51(xxi).[8]

Notwithstanding the definition currently in the Marriage Act, the High Court confirmed that the Constitutional definition of marriage is not frozen in time and is not strictly confined to 'the union of a man and a woman'. Rather, the constitutional term 'marriage' is 'a topic of juristic classification' that changes over time.[9] Thus, the court's analysis centred on the legal understanding of the term 'marriage' rather than identifying any particular type of marriage and selecting one or more particular forms of marriage to give content to the constitutional notion of marriage.

The court confronted cases from the nineteenth century including *Hyde*, explicitly debunking antiquarian definitions 'which accord with a preconceived notion of what marriage 'should' be'. The court did so by contextualising the reasons in *Hyde* and other nineteenth century cases. Relevantly, the court observed that *Hyde* and like cases were concerned, in part, with identifying what kind of marriage contracts in foreign jurisdictions would be recognised as marriages within English law. Such cases accepted that there would be other relationships that could properly be described as 'marriage' (such as polygamous relationships) but confined 'marriage' to the *Hyde* definition for the purposes of English law. Thus the genesis of the definition of 'marriage', which *Hyde* and related cases

articulated, arose as a rule of private international law that necessarily accepted that there could be other kinds of relationships that could properly be described as marriage relationships in other legal systems, but would not necessary accept those relationships as marriage under English law.[10] Thus, the High Court reasoned that the legal category of marriage encompasses more than that set out by the *Hyde* definition.

The court cast the question of the interpretation of the ambit of the marriage power as a binary choice between, on the one hand, a particular legal status of marriage as understood at the time of federation and having the legal content which English law accorded it at the time, and on the other hand, use of the word 'marriage' in the sense of a topic of juristic classification the meaning of which was not immutable over time. By doing so, the court side-stepped difficult questions of constitutional theory while expressly eschewing the utility of adopting or applying a single, unified theory of constitutional interpretation and declining to resolve any conflict, real or imagined, between competing theories.[11] Indeed, the court stated that fierce doctrinal debates as to the approach to constitutional interpretation in 'other jurisdictions' between the differing and opposed theories of 'originalism' and 'contemporary meaning' (which appeared to be a thinly veiled reference to American constitutional jurisprudence) serve more to obscure than to illuminate.[12]

The High Court brings Australian constitutional law in line with legislation in countries that have permitted same sex marriage, and now goes further than comparable jurisdictions in other parts of the world in relation to the legal understanding of marriage.

Leaving such debates to one side, the High Court articulated the definition of 'marriage' under s 51(xxi) of the Constitution as 'a consensual union formed between natural persons in accordance with legally prescribed requirements'.[13] Therefore, '[w]hen used in s 51(xxi), 'marriage' is a term which includes a marriage between persons of the same sex'.

...the High Court recognised that there is no constitutional impediment to the Parliament of Australia providing for same sex marriage in federal law.

Although the Parliament of Australia has power under the marriage power to legislate with respect to same sex marriage, the fact that the federal parliament had not made a law permitting same sex marriage did not supply a reason for why the ACT law was capable of operating concurrently with the Marriage Act, since the question of the concurrent operation of the two laws turns on the proper construction of the laws. Since, on its true construction, the Marriage Act is to be read as providing that the only forms of marriage permitted are those formed or recognised in accordance with that Act, the court stated that the ACT law cannot operate concurrently with the federal law and is thus inconsistent.[14]

Finally, the court referred to definitions of marriage in other jurisdictions, not to influence the content of Australian law, but simply to demonstrate that the social institution of marriage 'differs from country to country' and is now more complex than the anachronistic conceptions of 150-year-old English jurisprudence, which itself has been overtaken by legislative amendment. The High Court brings Australian constitutional law in line with legislation in countries that have permitted same sex marriage, and now goes further than comparable jurisdictions in other parts of the world in relation to the legal understanding of marriage.

On the footing that s 51(xxi) does not use a legal term of art, the particular content of which is fixed according to its usage at the time of federation, the High Court recognised that there is no constitutional impediment to the Parliament of Australia providing for same sex marriage in federal law. In clear and unambiguous language, it is a rare unanimous judgment on a constitutional question, carrying the full weight of the court's authority.

Endnotes

1. Justice Gageler did not sit.
2. *The Commonwealth v Australian Capital Territory* [2013] HCA 55 at [1].
3. *Marriage (Same Sex Couples) Act 2013* (UK) applicable in England and Wales. Scotland has introduced separate legislation to recognise same sex marriage, which presently awaits royal assent. Same sex marriage remains unrecognised in Northern Ireland.
4. For cases dealing with the marriage power see: *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); *Cormick 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).
5. *The Commonwealth v Australian Capital Territory* [2013] HCA 55 at [8].
6. Ibid.
7. *The Commonwealth of Australia v The Australian Capital Territory* [2013] HCATrans 299 at p3.
8. *The Commonwealth v Australian Capital Territory* [2013] HCA 55 at [6].
9. *The Commonwealth v Australian Capital Territory* [2013] HCA 55 at [14].
10. *The Commonwealth v Australian Capital Territory* [2013] HCA 55 at [29].
11. Ibid.
12. Ibid.
13. *The Commonwealth v Australian Capital Territory* [2013] HCA 55 at [33].
14. *The Commonwealth v Australian Capital Territory* [2013] HCA 55 at [56].