

ADVICE RE PROPOSED *SAME-SEX MARRIAGE ACT*

Opinion

1. I have been asked to advise on whether the proposed *Same Sex Marriage Act 2005* (Tas) is inconsistent with the *Marriage Act 1961* (Cth) such that it would be rendered inoperative under section 109 of the Australian Constitution.

A THE PROPOSED *SAME SEX MARRIAGE ACT*

2. The proposed *Same-Sex Marriage Act* states in section 3(1):

Same-sex marriage means the lawful union of two people of the same sex to the exclusion of all others, voluntarily entered into for life.

3. The Act, in combination with the proposed *Same Sex Marriage Celebrant and Registration Act 2005* (Tas), then goes on to establish a regime governing same-sex marriage in Tasmania.

4. Part II deals with the age at which a person can enter into a same-sex marriage:

6 Same-sex marriageable age

A person is of same-sex marriageable age if the person has attained the age of 18 years.

5. Part III deals with the grounds on which same-sex marriages are void.
6. Part IV concerns how same-sex marriages in Tasmania are to be solemnized, section 9 providing that same-sex marriages to be solemnized by an ‘authorised celebrant’ (a term defined under section 3(1) as ‘any person who is an authorised celebrant under the *Same Sex Marriage Celebrant and Registration Act, 2005*’).

7. Section 10 provides:

10 Ministers of religion not bound to solemnize same-sex marriage etc.

(2) Nothing in this Part:

- (a) imposes an obligation on an authorized celebrant, being a minister of religion, to solemnize any same-sex marriage; or
- (b) prevents such an authorized celebrant from making it a condition of his or her solemnizing a same-sex marriage that:
 - (i) longer notice of intention to marry than that required by this Act is given; or
 - (ii) requirements additional to those provided by this Act are observed.

8. Part V sets out offences and Part VI miscellaneous provisions.

B THE COMMONWEALTH *MARRIAGE ACT*

9. The *Marriage Act*, as amended by the *Marriage Amendment Act 2004* (Cth), contains the following definition in section 5(1):

marriage means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.

10. Part VA concerns 'Recognition of foreign marriages'. Section 88B(4) states:

To avoid doubt, in this Part (including section 88E) *marriage* has the meaning given by subsection 5(1).

11. Section 88EA then provides:

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;

must not be recognised as a marriage in Australia.

C THE INCONSISTENCY ISSUE

12. The relevant provision in the Australian Constitution is section 109. It provides:

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

13. Where a federal and a State law are in conflict, section 109 resolves that conflict in favour of the Commonwealth law, with the State law being rendered not void but inoperative for the duration of the conflict (*Carter v Egg and Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557 at 573). In other words, a State law is revived and becomes operative again if the federal law is amended to remove the inconsistency.

14. For section 109 to apply, there must be a valid law enacted by the federal Parliament and a valid law enacted by a State Parliament. In this case, it is likely that the proposed *Same-Sex Marriage Act* would be a valid law because plenary legislative power is vested in the Tasmanian Parliament. For the relevant sections of the Commonwealth *Marriage Act* to be valid, they would need to fall under one of the heads of power listed in section 51 of the Constitution, likely in this case to be the 'marriage' power in section 51(21). If the Act did not fall under that or another head of power inconsistency could not arise with the Tasmanian law.

15. The High Court has developed three tests, which it sometimes blurs together, for determining inconsistency between a federal and State law under section 109. According to these tests, inconsistency is present, and the Commonwealth law prevails where:

Type 1: If it is impossible to obey both laws (one law requires that you must do X, the other that you must not do X).

Type 2: If one law purports to confer a legal right, privilege or entitlement which the other law purports to take away or diminish (one law says that you can do X, the other that you cannot do X).

Type 3: If the Commonwealth law evinces a legislative intention to ‘cover the field’. In such a case there need not be any direct contradiction between the two enactments. It may even happen that both require the same conduct, or both pursue the same legislative purpose. What is imputed to the Commonwealth Parliament is a legislative intention that its law shall be all the law there is on that topic. What is inconsistent with the Commonwealth law is the existence of any State law at all on the topic.

16. Types 1 and 2 are often referred to as direct tests of inconsistency. Type 3 involves a more indirect form of inconsistency.
17. Type 1 inconsistency does not arise in this case because it is possible to obey both laws. The Tasmanian Act is a facultative rather than a coercive regime. It does not compel anyone to undertake a same-sex marriage or to solemnize such a marriage. Type 1 inconsistency might have arisen if the Tasmanian law required recognition under the Commonwealth *Marriage Act* that is impermissible due to the wording of that Act.
18. Type 2 inconsistency also does not arise. Same-sex marriage is clearly not permissible under the Commonwealth *Marriage Act*, but that Act says nothing about same-sex marriage under State law. Both Acts confer a right to a form of marriage, but in each case to a different type of union without prohibiting the other. The closest that the federal Act comes to this is section 88EA. However, that section provides only that same-sex unions ‘solemnised *in a foreign country* ... must not be recognised as a marriage in Australia’ (emphasis added).
19. Type 3 inconsistency is the most likely form of inconsistency to arise in this case. It involves answering two questions. First, is the Commonwealth law intended to be exclusive within its field? Second, what field is covered by the Commonwealth law and does the State law operate in that same field?
20. The first question is straightforward where the Commonwealth law evinces an express intention that it is to be exclusive within its field. In other cases, the Court will look to a variety of factors, such as the subject-matter of the law and whether for the law to achieve

its purpose it is necessary that it be a complete statement of the law on the topic (*Viskauskas v Niland* (1983) 153 CLR 280).

21. On whether the *Marriage Act* is intended to be the only law on the topic of marriage, section 6 states:

6 Act not to exclude operation of certain State and Territory laws

This Act shall not be taken to exclude the operation of a law of a State or of a Territory, in so far as that law relates to the registration of marriages, but a marriage solemnized after the commencement of this Act is not invalid by reason of a failure to comply with the requirements of such a law.

22. The section expressly provides for the operation of State laws insofar as they as they relate to the registration of marriages. The section is silent on State laws that deal with other matters. While section 6 is thus not explicit on the issue, it is likely that a Court would find that the Commonwealth *Marriage Act* is intended to be exclusive within its field. The detailed and comprehensive regime in the federal Act as well as the problems of having two sets of laws dealing with marriage are strong indicators of this.
23. The issue is thus to be determined by the second question, that is, the field covered by the Commonwealth law and whether the State law operates in this same field. If it does, the State law will be inoperative under section 109. The field ‘covered’ by a law is often difficult to discern and can require subjective judgment as the High Court has not laid down a precise test that can be applied. In this case, the field covered by the *Marriage Act* is likely to be either the field of marriage generally (whatever the sex of the partners) or more specifically the field of different-sex marriage.
24. My opinion is that the Commonwealth *Marriage Act* covers the field of marriage in so far as the concept is defined by that Act, that is between ‘a man and a woman to the exclusion of all others’. The Act is definite in establishing the boundaries of marriage for the purposes of that Act as being different-sex marriage. It is also significant that the Act only seeks to prevent the recognition of same-sex marriage in respect of certain unions under foreign law. The Act says nothing about such unions if recognised by State law (on the other hand, it is arguable that this is an implication that the Commonwealth law already

covers the field of same-sex marriage in Australia so as to make it unnecessary to insert such a provision with respect to State law).

25. An analogy can be drawn with the approach taken by the High Court to whether a federal industrial award overrides a State award. The court has held that, where a federal award makes no provision on a particular matter, a State award may be able to operate on that matter without being overridden under section 109. In *Metal Trades Industry Association v Amalgamated Metal Workers' and Shipwrights' Union* (1983) 152 CLR 632 at 650 Mason, Brennan and Deane JJ stated:

It may appear from the terms and nature of an award, or from the subject-matter with which it deals, that, notwithstanding that it contains provisions dealing with a particular matter, it is not intended to deal with that matter to the exclusion of any other law ... In this respect it is important to note that an award which apparently regulates an entire subject-matter may leave some small area of it untouched. This area may then become the relevant field capable of regulation by State law.

26. The Tasmanian law does not, in general, operate in the federal field of different-sex marriage. With one exception, it deals with same-sex marriage. That exception is where a person wishes to undertake a same-sex marriage but is still married under the Commonwealth *Marriage Act*. The Tasmanian Act provides:

7 Grounds on which same-sex marriages are void

(1) A same-sex marriage is void where:

(a) either of the parties was, at the time of the same-sex marriage, lawfully married to some other person ...

(2) A same-sex marriage becomes void where either of the parties to the same-sex marriage lawfully marries some other person.

17 Bigamy

A person who is married shall not go through a form or ceremony of same-sex marriage with any person.

27. The Commonwealth *Marriage Act* is in similar terms:

23B Grounds on which marriages are void

(1) A marriage to which this Division applies that takes place after the commencement of section 13 of the *Marriage Amendment Act 1985* is void where:

- (a) either of the parties is, at the time of the marriage, lawfully married to some other person;

94 Bigamy

A person who is married shall not go through a form or ceremony of marriage with any person.

28. Where a person is already married under the Commonwealth *Marriage Act*, the Tasmanian Act renders a subsequent same-sex marriage void and makes it an offence for the person ‘go through a form or ceremony of same-sex marriage’.

29. However, the converse may not be the case in regard to the operation of the Commonwealth *Marriage Act* (although the wording ‘a form or ceremony of marriage’ in s 94 does leave some room for doubt). Because that Act defines marriage to exclusively refer to different-sex marriage, it may not be an offence under section 94 for a person to go through a different-sex marriage after already having had a same-sex ceremony and, if a same-sex ceremony had been undertaken, a subsequent marriage under the federal law may not be void under section 23B.

30. This further illustrates how the Commonwealth Act does not deal with the subject of same-sex marriage. To the extent that it gives rise to a problem, that is, that it might be possible to be married under both Acts, this is remedied by section 7(2) of the proposed *Same-Sex Marriage Act*. The effect of that section is that, where a person already in a same-sex marriage becomes married under the Commonwealth Act, the former same-sex marriage is rendered void. This does not give rise to a type two inconsistency because the right of a person to a different-sex marriage under the federal law remains unimpaired. Only the same-sex marriage is affected.

31. This analysis demonstrates how the State and federal laws both deal with marriage, but in a different form. Apart from the possibility of concurrent marriage, there is little or no interaction between the schemes.
32. If the proposed *Same-Sex Marriage Act* had sought to gain recognition for same-sex marriages under the *Marriage Act* it would be inconsistent with that Act (the *Marriage Act* provides exclusively for the marriage of different-sex couples). However, the Tasmanian Act recognises same-sex marriage without seeking to gain recognition under federal law. The Act instead recognises a form of commitment that is given force by Tasmanian law. The consequence is that, while the federal and States Acts both refer to what they call ‘marriage’, they are two laws that operate in different fields. This is further illustrated by the fact that if the State law provided for same-sex unions without using the term ‘marriage’ they would be even more clearly seen as laws that operate in different fields. This shows how, in substance, they are not inconsistent.

D CONCLUSION

33. The hypothetical nature of the question means that it is not possible to give definitive advice on whether the proposed *Same-Sex Marriage Act* is in its every application consistent with the Commonwealth *Marriage Act* under section 109 of the Constitution. That is because judicial determination of the question will depend upon the facts of each case and the actual interaction between the federal and State law in the context of those facts. It is also important to recognise that the tests to be applied under section 109 are often intuitive and can involve subjective judgment.
34. With these normal caveats in mind, my opinion is that the proposed *Same-Sex Marriage Act* would not be rendered inoperative under section 109 of the Constitution. It is not inconsistent with the Commonwealth *Marriage Act* because the two Acts operate in different fields.