Case Summary

The Commonwealth v Australian Capital Territory [2013] HCA (12 December 2013) C13/2013

1. Reference details

Date of Decision: 12 December 2013

Link to full court judgment:

http://www.austlii.edu.au/au/cases/cth/HCA/2013/55.html

2. Facts of the Case

The case concerns the status of the Marriage Equality (Same Sex) Act 2013, enacted by the Legislative Assembly for the Australian Capital Territory (ACT). Specifically, the issue is whether the Act is inconsistent with or repugnant to either or both of two Acts of the federal Parliament: the Marriage Act 1961 and the Family Law Act 1975; and if it is so inconsistent or repugnant, to what extent is the Act of no effect?

The defendants in this case are the ACT. The Australian Marriage Equality Inc intervened in the case as *amicus curiae*. All parties submitted that the federal Parliament has legislative power to provide for marriage between persons of the same sex.

The Marriage Act does not currently provide for the formation or recognition of marriage between same sex couples and holds that marriage can only be solemnised in Australia between a man and a woman. Moreover, a union solemnised in a foreign country between a same sex couple must not be recognised as a marriage in Australia.

3. Law

- Constitution, ss 51(xxi), 51 (xxii).
- Australian Capital Territory (Self-Government) Act 1988 (Cth), s28(1).
- Marriage Act 1961 (Cth), s 5(1), 88EA.
- Marriage Amendment Act 2004 (Cth).
- Marriage Equality (Same Sex*)* Act 2013 (ACT), s 3.
- Family Law Act 1975

4. Decision

The High Court of Australia found the Territory's argument to be flawed and rejected it on the basis that the Marriage Act regulates the whole domain of "marriage" status. The Court also held that the Marriage Equality (Same Sex) Act 2013 cannot stand concurrently with the Marriage Act and is of no effect.

The Court first considered the issue of federal legislative power with respect to same-sex marriage. It considered whether s 51(xxi) permitted the federal Parliament to make a law with respect to same sex marriage. The question was central because the ACT Act would probably operate concurrently with the Marriage Act if the federal Parliament had no power to make a national law providing for

same sex marriage, whereas if the federal Parliament has power to 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.

Section 51(xxi) is not to be construed as providing legislative power to the federal Parliament only limited to the state of the law with respect to marriage at federation. The status of marriage and the rights and obligations which attach to it are not immutable. The federal Parliament has the power to make laws to amend, limit and extend marriage rights and extend the classes of persons who may enjoy those rights. Past case-law on the definition of marriage does not define the limit of the marriage-power under the Constitution. Other legal systems now provide for marriage between persons of the same sex. The juristic concept of marriage (to which section 51(xxi) refers) embraces such unions. When "marriage" is used in section 51(xxi), it is a term which includes a marriage between persons of the same sex.

Most of the provisions of the ACT Act are similar to the Marriage Act or the Family Law Act although the definition of marriage is "the union of 2 people (...) to the exclusion of all others, voluntarily entered into for life".

Under section 28(1) of the Australian Capital Territory (Self-Government) Act 1988 a provision has no effect to the extent that it is inconsistent with a federal law.

The Court rejected as flawed, the proposition that, because the federal law defines marriage as between persons of the opposite sex, the ACT Act can operate concurrently with respect to marriage of persons of the same sex. It noted that the federal Parliament had the power under section 51(xxi) to make a national law permitting same-sex marriage but had not done so. The absence of a provision *permitting* same sex marriage did not mean that the ACT legislature may make such a provision. It did not mean that an ACT law permitting same sex marriage could operate concurrently with the federal law (Para 56). In particular, there could not be concurrent operation of the federal and ACT laws if, on its true construction, the Marriage Act was to be read as providing that the only form of marriage permitted shall be a marriage formed or recognised in accordance with the Marriage Act (Para 56).

The Marriage Act, read as a whole, 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 (Para 57). This is illustrated through the 2004 amendments to the Marriage Act which applied the newly introduced definition of marriage in that a union solemnised in a foreign country between persons of the same sex must not be recognised as a marriage in Australia. The Court found there to be an implicit negative proposition that the kind of marriage provided for by the Act is the *only* kind of marriage that may be formed or recognised in Australia (Para 59).

It follows that the provisions of the two Acts cannot operate concurrently and accordingly the ACT Act is inoperative. The reasoning stresses that giving effect to the ACT Act provisions would "alter, impair or detract from the Marriage Act" (Para 59). On the ACT's argument that the two Acts do not regulate the same status of "marriage", the Court finds that by providing for marriage equality, the ACT Act seeks to operate within the same domain of juristic classification as the Marriage Act. The negative proposition implied in the Marriage Act governs the whole of the domain by providing that

the *only* form of marriage which may be created or recognised is that from which meets the definition by the Marriage Act (Para 60).

In summary, the Court held that so long as the Marriage Act continues to define "marriage" as it currently does, only a marriage conforming to that definition may be formed or recognised in Australia, the provisions of the ACT Act remain inoperative and have no valid operation. The whole of the ACT Act is inconsistent with the Marriage Act (Para 61).