CASE STUDY

Testing law-making powers

Self-Government (Australian Capital Territory) Act 1988 (Cth), *Civil Unions Act 2006*, *Marriage Equality (Same-Sex) Act 2013*, and *Commonwealth v ACT [2013] HCA 55*.

Between 2006 and 2013, the ACT Legislative Assembly passed laws, pursuant to its general law-making powers under s 22 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth), allowing same-sex couples to enter legally recognised partnerships.

The disputes between the ACT and the Commonwealth Government that followed tested whether the ACT laws could operate alongside federal marriage law and, ultimately, required the High Court to determine the scope of the Commonwealth's constitutional power over marriage.

Background

A key objective of Federation in 1901 was standardising the colonies' separate, sometimes conflicting, legal systems across the continent. Section 51 of the Australian Constitution lists 39 areas of power the drafters granted to the Commonwealth – among them Section 51(xxi), the power to make laws about marriage.



Pexels/Poline Tankilevitch

Most Section 51 powers are shared with the states which continued to operate their own separate marriage laws for 60 years until the federal *Marriage Act 1961* created a single, uniform system for all of Australia.

The Marriage Act did not originally include a statutory definition of 'marriage'. Instead, Australian courts relied on the English common law cases such as *Hyde v Hyde* (1866) which defined marriage as:

> The voluntary union for life of one man and one woman, to the exclusion of all others.

Under this common law definition, same-sex relationships could not receive the legal status that came with marriage.

Advocacy for legal recognition grew significantly during the 1980s HIV/AIDS epidemic, which highlighted how same-sex partners lacked basic rights in hospital visitation, medical decision-making, and inheritance. Internationally, jurisdictions began enacting new models of recognition – starting with civil unions in Denmark (1989) and same-sex marriage in the Netherlands (2001).

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Recognition in forms other than marriage

Recognition without union

The ACT Legislative Assembly had already recognised same-sex couples in 'domestic partnerships' with the *Domestic Relationships Act 1994*. It granted same-sex couples legal rights regarding asset distribution upon separation, inheritance rights, and adoption (from 2004). Because this framework provided legal recognition without creating a legal status comparable to marriage, it raised no constitutional issues.

Recognition with union

On 28 March 2006, Chief Minister Jon Stanhope MLA introduced the Civil Unions Bill 2006 following six months of community consultation. The Bill created 'civil unions' – a new legal status for any couple, regardless of sex, who sought legal recognition but could not or chose not to marry under the federal Marriage Act . This went further than the Domestic Relationships Act, which did not allow for people in domestic partnerships to enter into a ceremonial legal status.

The key question was how closely an ACT civil union could resemble marriage while remaining legally distinct from it. The central controversy was based on Section 5(2) of the Bill:

> 5 (2) A civil union is to be treated for all purposes under territory law in the same way as a marriage.

Federal Attorney-General Philip Ruddock MP argued that the proposed civil unions were functionally identical to marriage and therefore were inconsistent with the Marriage Act:



> We have made it very clear to Mr Stanhope that if he persists with the legislation that he has in its present form, that he seeks to portray civil unions as marriages, then we will use the powers we have in relation to marriage and the powers we have in relation to the territories to ensure that is undone.
>
> **Hon Philip Ruddock MP** 30 March 2006

In response, ACT Attorney-General Simon Corbell MLA argued that civil unions were a distinct, subordinate class of relationships that did not infringe on the federal *Marriage Act*:



> There are different legal opinions on whether the state and territories have constitutional power to pass same-sex union legislation… The Bill is quite clear that a civil union is not a marriage. A person cannot be in both a civil union and a marriage, and an ACT civil union will always give way to a Commonwealth marriage.
>
> **Simon Corbell MLA** 11 May 2006 (pages 1613 & 1616)

To reinforce this distinction, the Assembly amended Section 5(2) to explicitly state that 'a civil union is different to a marriage' and establish separate celebrants for civil unions. However, legal opinions remained divided on whether these changes avoided constitutional overlap:



> Even though the government seems to be attempting to get around the problems with the federal constitution, we still have a problem… I see what the attorney is doing, but I do not think he will succeed. There will be exactly the same problem with the legislation.
>
> **Bill Stefaniak MLA** 11 May 2006 (pages 1630)

On 11 May 2006, the Assembly voted to pass the Civil Unions Bill.

Outcome

Despite the ACT's amendments, the federal government maintained that the *Civil Unions Act 2006* created a legal union too similar to marriage and that the law conflicted with the national system created by the Marriage Act. On 13 June 2006, the Governor-General – acting on advice from the federal government – disallowed the Act using powers under Section 35 of the Self-Government Act.

> In 2006, disallowance powers operated unevenly across Australia: the Governor-General could overturn territory laws but not state laws. The disallowance of the *Civil Unions Act* highlighted this inequality, leading the federal parliament to abolish the Governor-General's power to disallow territory laws in 2011.

In December 2006, a revised Civil Partnerships Bill was presented in the Assembly, changing the terminology from 'unions' to 'partnerships'. However, the federal government again threatened disallowance in early 2007. The ACT delayed debate until May 2008, ultimately aligning its model with Tasmania's *Relationships Act 2003* (Tas).

These developments showed that legal recognition of same-sex relationships was possible, but there was still disagreement about how similar these relationships could be to marriage. Because the federal government overturned the ACT law through disallowance rather than a case in the High Court, the extent of state and territory room to legislate in this space remained legally untested.

By August 2012, political opinions on civil unions had shifted, allowing the ACT to pass the *Civil Unions Act 2012* without federal intervention.

ACT recognition of same-sex marriage

On 19 September 2013, Attorney-General Simon Corbell presented the Marriage Equality (Same-Sex) Bill 2013 to the Assembly. The Bill aimed to create a separate legal scheme for same-sex couples to marry under ACT law.

While the Marriage Act been amended in 2004 to define marriage as a 'union between a man and woman to the exclusion of all others, voluntarily entered into for life', the ACT Government said that this did not regulate same-sex marriage and therefore left room for the ACT law to operate alongside it.

In his presentation speech, Simon Corbell MLA argued that there was room for states and territories to act because the federal Parliament had not allowed same-sex marriage:



> The government agrees that it is preferable for the Commonwealth *Marriage Act* to be amended to provide for same-sex marriage for all Australians. Yet the federal parliament is deadlocked, and the new federal government appears to have no appetite… In this context, then, it falls on the states and territories to consider how they will act.
>
> **Simon Corbell MLA** 19 September 2013 (pages 3432)

Federal Attorney-General, Senator George Brandis, rejected this argument, maintaining that the Bill created a direct inconsistency with the federal *Marriage Act* and signalling that it would be challenged in the High Court if passed:



> It is clearly in Australia's interests that there be nationally consistent marriage laws. At the moment, the Commonwealth *Marriage Act* provides that consistency. The ACT's proposed law is a threat to that well-established position.
>
> **Hon Senator George Brandis** 11 October 2013

The Assembly was divided on whether to force the constitutional issue. Opposition Leader Jeremy Hanson MLA quoted commentary warning against passing legislation destined for a High Court case:



> "It is all very well wanting to be progressive, but grown-up governments also need to act responsibly." And that, Madam Speaker, is the crux of the objection the opposition has to this legislation. This is not a responsible thing for the Assembly to be doing.
>
> **Jeremy Hanson MLA** 22 October 2013 (pages 3557)

On 22 October 2013, the Assembly voted to pass the Marriage Equality (Same-Sex) Bill.

Because the territory disallowance power had been abolished in 2011, the federal government could not simply overturn the ACT law. Instead, it challenged the ACT law in the High Court.

State marriage bills across Australia

The ACT was not the only jurisdiction to consider whether existing federal marriage law left room for a state or territory to legislate for same-sex marriage. Bills in the Victorian, Western Australian, and South Australian upper houses stalled in 2012 without a vote. A second SA bill and a New South Wales bill were both voted down in 2013, while a Tasmanian bill passed the lower house before failing in the upper house in late 2012.

Commonwealth v Australian Capital Territory

The next day, the Commonwealth issued a writ seeking a declaration from the High Court that the ACT's *Marriage Equality (Same Sex) Act 2013* was of no effect. The case became known as *Commonwealth v Australian Capital Territory* [2013]. The main question the High Court had to decide was whether the ACT's Marriage Equality Act could operate concurrently with the federal Marriage Act under Section 28 of the Self-Government Act.

Arguments

The Commonwealth argued that the federal Marriage Act provided a complete national system governing the legal status of marriage and left no room for the ACT to create a separate form of marriage; that the federal law had 'covered the field'. It followed, in the Commonwealth's view, that the ACT law could not operate concurrently with the federal law and would therefore have no effect under section 28 of the Self-Government Act.

The Commonwealth relied in part on the 2004 amendment defining marriage as the union of a man and a woman. It argued that this drew a deliberate legal boundary that excluded other relationships from that status.

The ACT disagreed. It argued that the federal Marriage Act regulated marriage as defined by that Act but did not expressly prohibit another Australian legislature from recognising same-sex marriage under its own law. On this view, the ACT law dealt with a separate form of marriage and could operate alongside the federal law.

The judgement

The High Court delivered its judgement on 12 December 2013 after hearing arguments in front of the six of the Court's seven justices on 3 December. The Court unanimously decided that the ACT's Marriage Equality Act was inconsistent with the federal *Marriage Act*. It found that:



> The 2004 amendments to the *Marriage Act* made plain (if it was not already plain) that the federal marriage law is a comprehensive and exhaustive statement of the law of marriage.
>
> So long as the *Marriage Act* continues to define "marriage" as it now does [as between a man and a women to the exclusion of all others] and to provide, in effect, that only a marriage conforming to that definition may be formed and recognised in Australia, the provisions of the ACT Act providing for marriage... remain inoperative.
>
> *Commonwealth v ACT* (paras 58 & 61)

There were two significant outcomes from the High Court's decision in *Commonwealth v Australian Capital Territory*.

First, by ruling that the ACT Marriage Equality Act was inconsistent with the federal Marriage Act under Section 28 of the Self-Government Act, the ACT law was of no effect. For the 31 same-sex

couples who had married under the ACT law before the decision, their marriages also had no legal effect—in essence, the marriages never legally existed.[1]

Second, the Court confirmed that the Commonwealth's constitutional power over marriage extended to same-sex marriage. All parties had argued for that interpretation, but the Court emphasised that the parties could not determine the meaning of the Constitution by agreement. The Court had to decide the issue itself. It concluded that section 51(xxi) gave the federal Parliament power to make a law providing for same-sex marriage. Four years later, federal parliament passed the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) allowing same-sex couples to marry following a nation postal survey in which 61% of respondents to the Australian Marriage Law Postal Survey answered 'Yes' to changing the law.

Beyond same-sex marriage, the case demonstrates how section 28 of the Self-Government Act operates when an ACT law cannot operate concurrently with federal law. It also illustrates the High Court's role in determining both the scope of Commonwealth constitutional power and whether ACT and federal laws can operate together.

Glossary

Attorney-General	The minister responsible for the justice system and rule of law.
Bill	A draft law for consideration by the Assembly.
Cover the field	A legal concept where a federal law deals with a topic so completely that it leaves no room for a state or territory to make their own law on the same topic, even if it doesn't directly contradict it.
Disallowance	The power of the monarch (or their representative, e.g., a governor-general) to overrule a law passed by a parliament.
High Court	The High Court of Australia, the country's top-level court and final authority on how the Constitution is interpreted.
Inconsistent	Where state/territory law conflicts with federal law.
Marriage Act	The Commonwealth *Marriage Act 1961*.
Postal survey	A national voluntary survey conducted by mail. Unlike a referendum, it has no binding legal effect.
Self-Government Act	The *Australian Capital Territory (Self-Government) Act 1988,* the federal law that acts as the ACT's constitution.

[1] Those couples who chose to re-marry after the federal parliament allowed for same-sex marriage in 2017 had their administrative fees waived by the ACT government.

TEACHERS NOTES

Testing law-making powers

Learning intentions

By the end of this case study, students will be able to:

- **Understand** how the Australian Constitution divides law-making power between the federal and state/territory parliaments.
- **Evaluate** the role of the High Court in resolving disputes between different levels of government.
- **Explain** the idea of Commonwealth and ACT laws operating concurrently or 'at the same time'
- **Reflect** on the relationships between social change, political advocacy, and constitutional law.

Reflection questions

These questions focus on the constitutional, legal, and parliamentary dimensions of this case study. Teachers should be mindful that classroom discussion may extend into the broader social debate around same-sex marriage. This case study is not intended to instruct a position on that debate.

Understanding the issue

- What is a 'head of power' under section 51 of the Constitution? What is the difference between a power held only by the federal Parliament and one shared with the states? Why is the ACT different from a state? What specific legal uncertainties made it unclear whether states or territories could legislate for civil unions and same-sex marriage before the Commonwealth v ACT High Court case?
- What is the difference between disallowing an ACT law and challenging an ACT law in the High Court. Why might the Commonwealth prefer one over the other?

Parliamentary and legal process

- Why did the Assembly amend the Civil Unions Bill in 2006 to explicitly distinguish civil unions from marriage? Did this succeed in avoiding constitutional conflict?
- What were the strongest legal arguments on each side of the 'cover the field' principle in *Commonwealth v ACT*? Which do you think is more legally persuasive, and why?

- Why couldn't the federal government disallow the *Marriage Equality Act* in 2013 the same way it had disallowed the *Civil Unions Act* in 2006?

Evaluating the outcomes

- What happened to the marriages performed under the ACT law when the High Court found that the law was of no effect? What does this show about making laws in an area where the law is uncertain? The six justices that heard the case, ruled unanimously against the ACT. Does a unanimous decision mean that the ACT's legal argument was weak?
- What does this case show about what can happen when federal and ACT laws deal with the same subject?

Broader questions

- What does this case study suggest about the limits of using state/territory-level legislation to test constitutional grey areas? What are the legal and political risks of that strategy?
- Why might a parliament choose to pass a law it suspects could be challenged and overturned?
- Are there other areas of Australian law where a similar contest over 'the field' between federal and state/territory power might arise?

Curriculum links

Curriculum	Subject

ACTBSSS Legal Studies	• **Contemporary Issues and the Law**
	  ◦ (Critically) analyse principle and doctrines related to the role of the law in reform and change in society [A/T]
	  ◦ Evaluate/analyse existing contentions, structures, and processes for change and reform in society, including the courts [A/T]
	  ◦ (Critically) analyse case studies of the intersection of law and reform and change to propose fair, ethical, and creative solutions to problems [A/T]
	  ◦ Evaluate/analyse theories, doctrines, and principles related to rights and responsibilities in contemporary problems [A/T]

ACTBSSS Politics	• **Australia in the World**
	  ◦ (Critically) analyse the nature of politics in Australia and the legitimacy and relative power of different structures and institutions [A/T]
	  ◦ Evaluate/analyse variation in the applications of political systems and process in different places in Australia [A/T]
	• **Activism and Protest**
	  ◦ (Critically) analyse politics of activism and protest at the three levels of government for legitimacy and effectiveness of process and participation [A/T]
	  ◦ (Critically) analyse the political attitudes and beliefs that lead people to be active in politics in their community [A/T]

Curriculum	Subject
NSW Legal Studies 11-12	**Best aligned with the Year 11 *Changing the law* and *Experiences with the law* units.** • Describes/explains legal principles and judicial processes used in the legal system [11/12] • Explains/analyses the role, formation, and reform of law [11/12] • Analyses differing perspectives of individuals, groups, and society in influencing the law [11] • Analyses legal issues to determine the extent to which the law achieves justice for individuals, groups, and society [11] • Uses and analyses a range of sources to assess the effectiveness of the law in addressing issues [11] • Uses (a range of) legal concepts to communicate information and legal reasoning to form a judgement [11/12]