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Legal issues

4.1 This chapter considers the power of the Australian Parliament to make laws in relation to marriage, and then examines the amendments proposed in each bill against the objectives of the bill.

4.2 In this chapter the report makes comment on the text of each bill, specifically in regard to how effectively the bill may achieve its stated purpose.

Marriage power

4.3 Section 51 of the Constitution gives Parliament the power to make laws with respect to marriage. It is not clear, however, if this power includes the power to make laws with respect to same-sex marriage.[1]

4.4 Parliament does not have the power to define the term marriage; only the High Court can define the word 'marriage' as used in the Constitution and interpret the Section 51 power to make laws with respect to marriage.[2] Parliament can pass legislation with a provision that defines marriage, but the High Court is the authority that determines if that provision is consistent with the Constitutional definition, in accordance with the doctrine that 'the stream cannot rise above its source'.[3]

4.5 Australia's constitutional system allows for Parliament to pass legislation that it believes it has the power to do so, and for the legislation to be challenged subsequently in the High Court, should its constitutionality be

1 Law Council of Australia (LCA), *Submission 22*, p. 9.

2 Gilbert + Tobin Centre of Public Law (G+T), *Submission 2*, p. 2; Lawyers for the Preservation of the Definition of Marriage (LPDM), *Submission 9*, p. 3; LCA, *Submission 22*, p. 10.

3 Professor George Williams, Private briefing, Canberra, 22 March 2012, p. 13.

in question. However, a challenge can only be taken to the High Court once a law is passed, not before.[4]

4.6 The process of Parliament passing legislation that is then challenged in the High Court is not an uncommon occurrence, and is at the heart of Australia's democracy and constitutional system of separation of powers.

4.7 Thus far the High Court has not defined marriage or the limits of Commonwealth power to legislate in respect to marriage. The 2004 amendment to the Marriage Act included a provision which defined marriage so narrowly that there was no basis for a challenge.[5]

4.8 Legal pronouncements have been made both in support of and in opposition to the possibility of the High Court defining marriage to include same-sex couples. Some insist that the meaning of marriage in 1901 when the Constitution was enacted must remain the meaning in perpetuity to reflect the intentions of the drafters of the Constitution; others point to High Court precedents where the evolving nature of society has been taken into account.[6]

4.9 Should the High Court subsequently define marriage to include same-sex marriage, then it is likely that the High Court would consider it within Parliament's power to make laws with respect to same-sex marriage. If the High Court retains the original meaning of marriage, it is possible that the High Court would consider that Parliament's power to make law with respect to marriage does not extend to same-sex marriages.

4.10 However, it is not certain how the High Court would approach the issue. As Mr Rocher, of the Lawyers for the Preservation of the Definition of Marriage, noted, 'Nothing in the High Court is a certainty.'[7] Professor George Williams elaborated that:

> [The outcome] would depend upon when it goes to the [High C]ourt given that there are four appointments—the majority of the court—over the coming years and, if nothing else, it will depend upon who those people are and on how they approach the matter.
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> …
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> The simplest way is for the Parliament to pass legislation that it believes has a reasonable chance of passing through the High

4 Professor Williams, Private briefing, Canberra, 22 March 2012, p. 7.

5 Professor Williams, Private briefing, Canberra, 22 March 2012, p. 13.

6 G+T, *Submission 2*, p. 3; LCA, *Submission 22*, p. 9.

7 Mr Neville Rochow, LPDM, *Committee Hansard*, Sydney, 12 April 2012, p. 16.

> Court. If that proves to be incorrect, then matters are taken into hand.[8]

4.11 The Law Council of Australia submitted that it 'considers that there is sufficient scope for the Committee to proceed to examine draft legislation on the basis that the Commonwealth Parliament has such power'.[9]

4.12 The report notes the debate regarding the Commonwealth Parliament's power to enact the changes as proposed in these bills. The report is satisfied that this debate is not central to its inquiry into the two bills or to the consideration of the bills in Parliament. Rightly, arbitration on the powers of Parliament can only take place in the High Court in the event of the enactment of either bill.

Provisions of the bills

4.13 For practical purposes, it may be desirable for the proponents of the two bills to discuss agreeing on the text of a single bill for the Parliament to consider. However, for the purposes of this report, the Committee has considered the two bills referred to it, and has made comments on the texts of these bills.

Objects

4.14 The object of the Marriage Amendment Bill 2012 (the Jones Bill) is to 'amend the *Marriage Act 1961* to ensure equal access to marriage for all adult couples irrespective of sex who have a mutual commitment to a shared life.'

4.15 The Law Council of Australia pointed out that the word 'adult' should be removed to avoid any confusion, as:

> Part II of the Marriage Act allows people under the age of 18 to marry in certain circumstances. Including the word 'adult' in the objects clause leads to inconsistency with Part II.[10]

8 Professor Williams, *Committee Hansard*, Sydney, 12 April 2012, p. 16.

9 LCA, *Submission 22*, p. 10.

10 LCA, *Submission 22*, p. 10.

4.16 The objects of the Marriage Equality Amendment Bill 2012 (the Bandt/Wilkie Bill) are:

- to remove from the *Marriage Act 1961* discrimination against people on the basis of their sex, sexual orientation and gender identity;
- to recognise that freedom of sexual orientation and gender identity are fundamental human rights; and
- to promote acceptance and the celebration of diversity.

4.17 Although several submissions supported the Bandt/Wilkie Bill, the Committee also heard several objections to the wording of the objects of the Bandt/Wilkie Bill.[11] Mr Frederick Brohier, from the Lawyers for the Preservation of the Definition of Marriage, told the Committee that 'Parliament should think very carefully about the objects as expressed in Mr Bandt's bill'.[12]

4.18 FamilyVoice Australia argued that:

> … the claim that 'freedom of sexual orientation and gender identity are fundamental human rights' is not recognised in any declaration or convention adopted by the United Nations.

4.19 The Anglican Church Diocese of Sydney prefers the object in the Jones Bill, pointing out that although the second object of the Bandt/Wilkie Bill purports to recognise human rights:

> …there is no provision in the bill recognising freedom of sexual orientation and gender identity as fundamental human rights.[13]

The Anglican Church also challenged the third object regarding the celebration of diversity:

> Such an object may be appropriate in the context of anti-discrimination legislation but not for a bill to amend the definition of marriage. It is not immediately apparent how objects expressed in such loose terms could affect the construction of the substantive provisions of the Bill. However their retention may give rise to an unintended interpretation of the substantive provisions in view of section 15AA of the *Acts Interpretation Act 1901* (Cth) which requires that in interpreting a provision of an Act, the

11 For example, Australian Psychological Society, *Submission 39*; Gay and Lesbian Rights Lobby, *Submission 8*; UnitingJustice Australia, *Submission 42*; Australian Human Rights Commission, *Submission 10*.

12 Mr Frederick Brohier, LPDM, *Committee Hansard*, Sydney, 12 April 2012, p. 22.

13 Anglican Church Diocese of Sydney (Anglican Church), *Submission 11*, p. 5.

> interpretation that would best achieve the purpose or object of the Act is to be preferred to each other interpretation.[14]

4.20 Australian Marriage Equality (AME) suggested that in addition to protecting the rights of same-sex couples, the objects should include reference to 'the benefits of marriage equality for the families of same-sex partners and for society'.[15]

4.21 Regardless of divisions of opinion on the desirability of the various objects, the text and objects of each bill should be assessed as to how effectively it achieves the purpose of that bill. I

Subsection 5(1) (definition of *marriage*)

4.22 The Bandt/Wilkie Bill proposes that the words 'a man and a woman' in the definition of marriage in the *Marriage Act 1961* (Cth) (the Marriage Act) be replaced with 'two people, regardless of their sex, sexual orientation or gender identity'.

4.23 The Jones Bill proposes that the words 'a man and a woman' in the definition of marriage in the Marriage Act be replaced with 'two people, regardless of their sex'.

4.24 While both definitions seek to enable same-sex couples to marry, the report notes that there are differences regarding the most appropriate wording.

4.25 The Law Council of Australia stated that:

> … the phrase 'regardless of their sex' may be too narrow to achieve marriage equality for same-sex couples as the reference to 'sex' in this context may not encompass all people who consider themselves part of the Lesbian, Gay, Bisexual, Trans and Intersex (LGBTI) community. Other concepts associated with gender or sexual orientation may be more inclusive of members of the LGBTI community.[16]

4.26 New South Wales MLA the Hon. Trevor Khan submitted that:

> In my view, any Bill that seeks to amend s. 5 (1) of the Marriage Act 1961 must not only refer to same sex-couples, but to sexual

14 Anglican Church, *Submission 11*, p. 5.

15 Australian Marriage Equality (AME), *Submission 30*, p. 72.

16 LCA, *Submission 22*, p. 11.

> orientation and gender identity, so as to remove any doubt that transgender and intersex people are caught by the amendment.[17]

4.27 The Australian Human Rights Commission advised that 'we support each bill but we prefer the wider of the definitions.'[18]

4.28 AME also noted that 'the longer definition makes it clear that discrimination on the additional grounds of sexual orientation and gender identity are as unacceptable as discrimination on the grounds of sex.'[19]

4.29 TransGender Victoria expressed preference for the definition in the Bandt/Wilkie Bill:

> … due to the inclusion of the words 'sex, sexual orientation or gender identity' as distinct from simply 'sex.' We would note, however, that we would prefer [the Jones Bill] be passed than neither bill be passed.[20]

4.30 However, legal opinion suggested by Gilbert + Tobin Centre of Public Law that the words 'regardless of sex' would cover people of any sexual orientation or gender identity. They submitted that this wording 'is clearly sufficient to provide for same-sex marriage and it is not apparent that any material difference is made' by the longer definition in the Bandt/Wilkie Bill.[21]

4.31 Professor Williams advised the Committee that he prefers the 'simplicity' of the definition in the Jones Bill, which he considers 'is extremely broad, and the courts would see that'.[22] He elaborated:

> I think that you could go long form and try and set out all the different ways in which people are described, [but this] is problematic because even if you adopt 'gender identity', 'sexual orientation' and 'regardless of sex', perhaps in the future there are other ways in which we understand what it means to be a person.[23]

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17 The Hon. Mr Trevor Khan, *Submission 32*, p. 3.

18 Ms Catherine Branson, President, Australian Human Rights Commission, *Committee Hansard*, Sydney, 12 April 2012, p. 42.

19 AME, *Submission 30*, p. 73.

20 TransGender Victoria, *Submission 20*, p. 2.

21 G+T, *Submission 2*, p. 2.

22 Professor Williams, Private briefing , Canberra, 22 March 2012, p. 15.

23 Professor Williams, *Committee Hansard*, Sydney, 12 April 2012, p. 19.

4.32 Professor Williams then went on to support the even simpler definition of a 'union of two people'.[24]

4.33 The Law Council of Australia noted that in Canada the definition of marriage does not refer to sex at all, simply referring to 'two persons'.[25] They stated that:

> … the phrase "regardless of sex, sexual orientation and gender identity" may need to be defined given that these concepts do not appear to be settled.[26]

4.34 Given the intention of the bills, Professor Williams opined that 'it is problematic that we seek to remove discrimination while still putting in indicators of that, even if it is meant to be in a positive way'[27] and that 'it runs a little perversely against the intention of having equality in the space'.[28]

4.35 Liberty Victoria considers that the phrase 'regardless of their sex, sexual orientation or gender identify' is not required in the definition of marriage and could instead be inserted in a definition of the word 'people':

> While fervently agreeing with the sentiment it expresses, in Liberty's view the statement of non-discrimination would be better located as a separate subsection of the definitions section, leaving the marriage definition simple, and placing the non-discrimination phrase at a more general level.[29]

4.36 The report notes concerns raised that the definition of marriage as proposed in these bills may not encompass transgender or intersex people, or those with non-typical sex chromosomes. As the objects of both bills clearly seek to remove discrimination in the Marriage Act and provide inclusiveness, it is important that the proposed amendments do not inadvertently fall short of removing discrimination against all couples who wish to marry and are eligible to do so under the other sections of the Marriage Act (for example, meeting the eligibility criteria of age, not being married, having provided a valid notice of an intention to marry).

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24 Professor Williams, *Committee Hansard*, Sydney, 12 April 2012, p. 19.

25 LCA, *Submission 22*, p. 15.

26 LCA, *Submission 22*, p. 15.

27 Professor Williams, *Committee Hansard*, Sydney, 12 April 2012, p. 19.

28 Professor Williams, Private briefing, Canberra, 22 March 2012, p. 15.

29 Liberty Victoria, *Submission 34*, p. 6.

4.37 The evidence tendered above by legal organisations suggests that it is preferable to avoid placing limitations on the meaning of 'people' in terms of sex, sexual orientation or gender identity in the definition of marriage.

Section 47 (ministers of religion not bound to solemnise marriage)

4.38 Australia's Constitution provides for freedom of religious practice. This is reflected in the Marriage Act, which specifies in Section 47 that ministers of religion, who are celebrants, are not bound to solemnise any marriage. That is, ministers of religion may refuse to solemnise a marriage that does not comply with that particular religion's prerequisites for marriage.

4.39 Professor Williams advised:

> That is the nature of religious freedom in this particular space—particularly when it comes to marriage, it is recognised that marriage goes to the heart of many religious faiths. To require them to be involved in marriages which may go against those faiths is not appropriate. It also arguably breaches the Constitution. Section 116 says that the federal parliament cannot breach the free exercise of any religion.[30]

4.40 The Committee received overwhelming support for Section 47 to apply to same-sex marriages should such legislation be enacted. In the online survey, more than 200 000 people indicated that they support this exemption.

4.41 Metropolitan Community Church Sydney stated that:

> MCC Sydney supports the freedom of religion for all faiths. … Some Christian churches only marry those who are members of their church. Some Christian churches will marry people who have been divorced while others will not. If legal, some Christian churches will marry same-sex couples while others will choose not to. MCC Sydney supports the rights of all churches to practise their faith according to their own [conscience].[31]

4.42 AME reported that a number of clergy support same-sex marriage, who have noted that:

> While the issue of same-sex marriage is supported by some churches and opposed by others, one area that all churches would agree on is that religious ministers should be under no obligation

30 Professor Williams, Private briefing, Canberra, 22 March 2012, p. 8.

31 Mr Khan, *Submission 32*, p. 33.

> to perform same-sex marriages if it does not accord with the doctrines of their faith.[32]

4.43 AME stated that 'if religious bodies wish to retain an exclusive definition of religious marriage they have that right'.[33]

4.44 The Association of Australian Christadelphian Ecclesias submitted that:

> We appreciate the provision of Section 47 of the Act which allows our marriage celebrants, as ministers of religion, to exercise their individual conscience in accepting or declining to solemnise the marriage of any couple. We firmly believe and uphold that the Bible teaches scriptural marriage is only between a man and woman for life and our marriage celebrants will continue to conduct our ceremonies on that basis. … We request that the clear intent of Section 47 in its current form be preserved.[34]

4.45 Both bills intend for this provision to continue should same-sex marriage be legalised. The Jones Bill proposes the insertion of a clause specifically releasing ministers of religion from being obliged to perform same-sex marriage; whereas the Bandt/Wilkie Bill includes a note on application to emphasise that Section 47 would apply to same-sex marriages. The Bandt/Wilkie Bill also proposes to extend the protections in Section 47 to 'any other law'.

4.46 UnitingJustice noted that both bills 'provide model clauses that effectively balance the rights associated with freedom of religion with the rights of non-discrimination and equality.'[35]

4.47 Gilbert + Tobin Centre of Public Law advised that:

> … section 47 already provides that religious ministers can refuse to solemnise any particular marriage. However, being as explicit as the Bill on this point in the context of same-sex marriage may be desirable, particularly given the Constitution's guarantee in section 116 that the Commonwealth cannot limit the free exercise of religion.[36]

32 AME, *Submission 30, Attachment 9*, p. 1.

33 AME, *Submission 30*, p. 37.

34 Association of Australian Christadelphian Ecclesias, *Submission 41*, p. 1.

35 UnitingJustice Australia, *Submission 42*, p. 6.

36 G+T, *Submission 2*, p. 6.

4.48 Professor Williams added, 'I do not have a problem with section 47 being extended to make it clear to people that it is indeed the case. But as to whether it is a legal necessity, it is not.'[37]

4.49 The Anglican Church Diocese of Sydney prefers that the bills:

> … provide for the insertion of the words 'or any other law' in section 47 of the *Marriage Act 1961* following the words 'Nothing in this Part' to make it clear that there is no other source of legal obligation (such as anti-discrimination or equality laws) for a minister of religion to solemnise a marriage involving a same-sex couple.[38]

4.50 However, it is noted that inserting a specific reference to same-sex marriages to a provision that already covers any marriage, only serves to highlight the very discrimination that is being legislated against. For this reason, AME prefers the Bandt/Wilkie Bill:

> … both Bills still seek to allay outstanding concerns about the freedom of religious celebrants not to marry same-sex couples should either Bill become law. Australian Marriage Equality supports provisions which make it clear that religious celebrants will be under no obligation to marry same-sex couples, should it be against their doctrine, values or wishes … [but] our preference is for the relevant provision in the [Bandt/Wilkie] Bill. It reinforces the religious freedom inherent in s47 without singling out same-sex marriages. The relevant provision of the [Jones] Bill does single out same-sex marriages. This suggests that same-sex marriages are somehow different to, or less acceptable than, other marriages which religious celebrants may be disinclined to solemnise, such as marriages between divorcees or marriages between people of different faiths or no faith. It also suggests there is special repugnance to same-sex marriages among people of faith which is not the case for most Australian Christians, as polls we have cited show.[39]

4.51 Liberty Victoria goes further in its objection to both bills' reassurance that Section 47 would apply to same-sex marriages:

> Liberty … does not endorse adding, as the [Bandt/Wilkie and Jones] Bills seek to do, a special section to emphasize, in relation to same-sex couples, what s.47 already does in relation to other

37 Professor Williams, *Committee Hansard*, Sydney, 12 April 2012, p. 23.

38 Anglican Church, *Submission 11*, p. 7.

39 AME, *Submission 30*, pp. 74–75.

> marriages that religious bodies currently refuse to perform, such as those involving a divorced person, or a non-member of the faith in question. Such unnecessary singling out serves only to leave a residual stench of past discrimination, and should be avoided.[40]

4.52 The emphasis on same-sex marriages in particular may arise from concerns among religious groups that changing the definition of marriage might impinge upon their religious freedom. Bishop Forsyth acknowledged that 'there is a lot of fear out there amongst Christians, which I think is unrealistic. I do not believe there is any intention' to restrict religious freedom.[41]

4.53 Professor Andrew Lynch advised the Committee that such fears are:

> … quite palpable, but section 116 really does provide a very clear answer to that … [as it] ensures that the Commonwealth cannot impose any religious observance upon people. There is quite a clear distinction between talking about marriage recognised in a secular way and solemnisation with respect of churches.[42]

4.54 Section 47 as it currently stands in the Marriage Act is sufficient to protect the religious freedom of ministers of religion when solemnising marriages, including same-sex marriages should they be legal.

4.55 It may be appropriate to insert the words 'or in any other law' into Section 47, as per the Bandt/Wilkie Bill, to allay any fears that freedom of religious conscience might be eroded in future.

4.56 The provisions in Section 47 should apply to all authorised celebrants and not just to ministers of religion, as authorised celebrants are not necessarily secular. The Coalition of Celebrants Association asserted that:

> All authorised celebrants registered under Subdivision C of Division 1 of Part IV of the [Marriage] Act, irrespective of their beliefs, should benefit from this provision. Some civil and non-aligned religious celebrants would have difficulty continuing in their role if this section is not extended to cover their beliefs.[43]

4.57 Engage Celebrants concurred:

> In the same way that religious ministers are able to deny ceremonies to those who don't fit all the requirements of their

40 Liberty Victoria, *Submission 34*, p. 5.

41 Bishop Forsyth, *Committee Hansard*, Sydney, 12 April 2012, p. 15.

42 Professor Andrew Lynch, *Committee Hansard*, Sydney, 12 April 2012, p. 15.

43 Coalition of Celebrants Association, *Submission 15*, p. 2.

> church, celebrants should be able to choose not to offer their services to couples if they feel they cannot fully support that couple. In reality it is unlikely to ever be an issue as couples will choose a celebrant who they get along with and who can deliver their vision of their day. However it is important that legislation is enacted to protect celebrants so that we don't end up with nuisance complaints which are purely attention-seeking and which could cause damage to the celebrant industry.[44]

4.58 The Anglican Church Diocese of Sydney recommended:

> … an extension of the protections in section 47 of the *Marriage Act 1961* to civil celebrants where the marriage to be solemnised is between persons of the same sex.[45]

4.59 Neither of the bills under scrutiny proposes amendments to the sections of the Marriage Act which delineate the categories of authorised celebrants. Consequently these issues are outside the scope of this inquiry. However, advice from the Attorney-General's Department notes that:

> While there is no similar provision in the [Marriage] Act for authorised celebrants who are not ministers of religion, the [Marriage] Act does not impose a positive obligation on such a celebrant to solemnise any marriage. An authorised celebrant with concerns about whether to solemnise a marriage is entitled not to proceed.[46]

4.60 Both bills ensure continuation of the existing Section 47 of the Marriage Act which provides that ministers of religion are not obliged to solemnise any marriage.

4.61 There is no evidence to suggest that either the approach of the Bandt/Wilkie Bill (which relies on the existing Section 47 provisions in the Marriage Act) or the approach of the Jones Bill (which reiterates these provisions) is preferable. Accordingly, the evidence makes no distinction between the bills on these grounds and considers that both adequately ensure that ministers of religion are not obliged as celebrants to solemnise any marriage, including same-sex marriages should they be legalised.

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44 Engage Celebrants, *Submission 26*, p. 3.

45 Anglican Church, *Submission 11*, p. 2.

46 Attorney-General's Department, *Guidelines on the* Marriage Act 1961 *for Marriage Celebrants 2012*, p. 99.

Section 88EA (recognition of overseas same-sex marriages)

4.62 Both bills seek to repeal Section 88EA, which was inserted in the Marriage Act in 2004 to expressly disallow the recognition in Australia of same-sex marriages performed overseas.

4.63 The Law Council of Australia submitted that it has 'previously expressed concerns … that this section may contravene Australia's obligations under Article 9 of the Hague Convention on the Celebration and Recognition of the Validity of Marriages'.[47]

4.64 The Gay and Lesbian Rights Lobby claimed that 88EA is a 'disgraceful demonstration of Australia's discriminatory position on civil marriage equality'.[48]

4.65 Professor Kerryn Phelps, from Parents and Friends of Lesbians and Gays, told the Committee:

> On a professional level, I see people of all ages all the time saying that they feel so discriminated against in Australia that they feel compelled, … like me, to travel overseas to formalise in a legal sense our partnerships.[49]

4.66 Mr Khan provided examples of the experiences of some of his same-sex married constituents:

- When we flew out of Canada bound for our home in Sydney we were somehow unmarried somewhere over the ocean;
- We're 'married' under British law but as soon as we stepped out of the Consulate onto Australian soil (where we are citizen and live), our contract became null and void.[50]

4.67 Given that both bills aim to remove discrimination in the Marriage Act, the report considers repealing Section 88EA to be a necessary amendment in order to achieve this purpose. Both bills propose repealing this section; accordingly the report makes no distinction between the bills on these grounds, and considers that both effectively achieve their stated objects.

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47 LCA, *Submission 22*, p. 13.

48 Gay and Lesbian Rights Lobby, *Submission 8*, p. 10.

49 Professor Kerryn Phelps, Representative, Parents and Friends of Lesbians and Gays, *Committee Hansard*, Sydney, 12 April 2012, p. 49.

50 Mr Khan, *Submission 32*, p. 32.

Consequential amendments

4.68 Item 9 of the Bandt/Wilkie Bill notes that the Governor-General may make regulations to amend other Acts that are consequential to the enactment of the Bandt/Wilkie Bill.

4.69 Liberty Victoria recommended that this item be included in both bills.[51]

4.70 For the bills to effectively achieve their purposes, the need may arise for consequential amendments to other Acts. The report notes the inclusion of this provision in the Bandt/Wilkie Bill and considers that the same inclusion in the Jones Bill would strengthen that bill in achieving its objects.

51 Liberty Victoria, *Submission 34*, p. 5.