

IN THE MATTER OF

THE SAME-SEX MARRIAGE BILL 2013 (NSW)

MEMORANDUM OF ADVICE

1. We are briefed on behalf of Australian Marriage Equality Inc.
2. In a memorandum of advice dated 11 October 2013, we (together with Chris Young) gave our opinion as to the validity of a law enacted by the Parliament of Tasmania in the form of the Same-Sex Marriage Bill 2012 (Tas) (**the Tasmanian Bill**).
3. We are now asked to state our opinion as to the validity of a law enacted by the Parliament of New South Wales in the form of a draft Same-Sex Marriage Bill 2013 (NSW) (**the NSW Bill**). The version of the NSW Bill with which we have been briefed is time stamped 7 May 2013 at 4.03pm.
4. The NSW Bill is similar in substance to the Tasmanian Bill in many respects. Critically, for the same reasons as we gave in paragraphs 105–109 of our 11 October 2013 memorandum in relation to the Tasmanian Bill, we consider that the NSW Bill seeks to create and regulate a new status called “same-sex marriage”, not the existing status of marriage.¹ Accordingly, for the same reasons we gave in relation to the Tasmanian Bill at paragraphs 86–127 of our 11 October 2013 memorandum, in our view, an Act in the form of the NSW Bill would not be inconsistent with the *Marriage Act 1961* (Cth).
5. One of the differences between the NSW Bill and the Tasmanian Bill is that the former does not deal in terms with proceedings for financial adjustment and maintenance orders. That is proposed to be dealt with by way of an amendment to the *Property (Relationships) Act 1984* (NSW) (**the Property Act**). The Property Act deals with such matters in respect of parties to “domestic relationships”. The NSW Bill contemplates amendment to the

¹ We note that cl 31 of the NSW Bill is entitled “Re-marriage”. It might more accurately be entitled something like “Same-sex marriage after dissolution of previous same-sex marriage”.

definition of that expression to include parties to a same-sex marriage under an Act in the form of the NSW Bill (sched 1, cl 1.3).

6. The interaction between the Property Act, amended as proposed, and the *Family Law Act 1975* (Cth) (**the Family Law Act**) will be as explained with respect to the Tasmanian Bill in paragraphs 122–124 of our 11 October 2013 memorandum. In short, many couples who are parties to same-sex marriages would be covered by the financial adjustment and maintenance order provisions of the Family Law Act, as those couples would be in “de facto relationships” within the meaning of the Family Law Act. For those couples, the provisions of the Property Act would not apply. The Property Act provisions would validly apply to parties to same-sex marriages who are not covered by the Family Law Act provisions.

Dated: 22 October 2013.



BRET WALKER
Fifth Floor St James' Hall
Sydney



PERRY HERZFELD
Eleven Wentworth Chambers
Sydney