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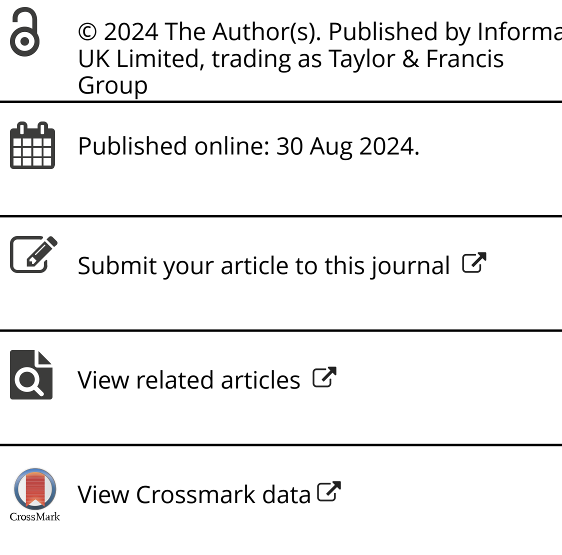

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The common law marriage in Australian private international law

Reid Mortensen * and Kathy Reeves **

The common law marriage is a curiosity in the private international law of marriage in the Commonwealth and Ireland. In some cases, a marriage that is invalid under the law of the place where it was solemnised (*lex loci celebrationis*) may nevertheless be recognised as valid if it meets the requirements of a common law marriage. These originate in the English canon law as it stood in the eighteenth century and include the central requirement of the parties' present declaration that they are married. The parties also had to meet the essentials of a Christian marriage as described in *Hyde v Hyde* (1866): "a voluntary union for life of one man and one woman to the exclusion of all others".

There are more reported cases on common law marriages in private international law in Australia than any other country. Although its Australian development coincided with that of other countries, in the twenty-first century the Australian common law marriage is now in an unusually amorphous condition. The preconditions for a court to ignore the *lex loci* have been significantly liberalised. Additional uncertainty in the nature of a common law marriage is created by a combination of repeated misinterpretations of the Marriage Act, the failure to use precedent outlining its requirements and the dismantling of the *Hyde* definition of marriage in the *Same-Sex Marriage Case* (2013). The article considers that the common law marriage might still serve a useful purpose in Australian private international law, and how it could better do so.

Keywords: choice of law; marriage; common law marriage; canon law marriage; Australia

A. Introduction

The common law marriage is a curiosity in the private international law of marriage. In the Commonwealth and Ireland, it may be invoked as an exception to the usual application of the law of the place where a marriage was solemnised (the *lex*

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loci celebrationis) in questions concerning the formal requirements for a valid marriage.[1] The curious quality of this exception arises in different ways. If the usual governing law is not applied in cross-border proceedings, the outcome is mostly determined by another legal system, often the law of the forum (the *lex fori*). That does not happen when, as an exception to the *lex loci*, resort is made to the common law marriage. Only in parts of Canada and the United States has the common law marriage been available to recognise domestic unions.[2] Elsewhere, it has been displaced by the statutory regulation of marriage and, oddly, it is a common law institution that is only available to validate extra-territorial marriages.

The common law marriage descends from the English canon law marriage, but it is doubtful whether its Australian version now carries any remnant of the canon law. A close assessment of twenty-first century Australian adjudication shows that the conditions in which the common law marriage can be invoked, and even more so its requirements, are close-to-indeterminate. In this article, we therefore give an account and critique of the common law marriage in Australia. In doing so, in Part B, the development of the English common law marriage's preconditions and requirements is explored. This includes its uneasy fit with the basic structures of choice of law for questions of marriage validity. Part B helps to explain some of the uncertainties underlying Australian common law marriage that are addressed in Part C, but which have also been extended by the Australian matrimonial courts' approach to common law marriages in recent adjudication. We conclude in Part D by considering whether the common law marriage might still serve any useful purpose in Australian private international law and, if so, how it might be repaired and given coherence.[3]

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[1]For countries where the common law marriage is recognised, see Australia: Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* (LexisNexis Butterworths, 5th edn, 2023), 398–402; Martin Davies, Andrew Bell, Paul Brereton and Michael Douglas, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 10th edn, 2020), 619–25. Canada: James McLeod, *The Conflict of Laws* (Carswell Legal Publications, 1983), 255. England and Wales: Lord Collins of Mapesbury and Jonathan Harris (eds), *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell, 16th edn, 2022), II 973–5. Ireland: Law Reform Commission, *Report on Private International Law Aspects of Capacity to Marry and Choice of Law in Proceedings for Nullity of Marriage – Ireland* (LRC 19–1985) (Law Reform Commission, 1985), 31–40. New Zealand: Maria Hook and Jack Wass, *The Conflict of Laws in New Zealand* (LexisNexis New Zealand, 2020), 628. See also Directorate of Legal Research, *Recognition of Common Law Marriage in Selected Foreign Countries* (Directorate of Legal Research, 2006).

[2]But cf *Quick v Quick* [1953] VLR 224.

[3]In many common law marriage cases, the presumption that a couple is married because of the parties' long cohabitation also arises. This is subject to rebuttal by evidence that no marriage occurred: Dicey, Morris and Collins, *supra* n 1, II 979–80. This article does not address this presumption of marriage, but instead addresses whether a given ceremony or event constituted a validly solemnised marriage.

B. The development of the English common law marriage

The expression "common law marriage" has often been used colloquially to refer to a de facto relationship, although that is not its legal sense.[4] As recognised by Commonwealth and Irish courts, it descends from the requirements of a lawful marriage as understood in English canon law. Although the requirements of canon law marriage as it stood in the mid-eighteenth century are still contested,[5] its core element has never been questioned: the parties proven consent to be husband and wife.[6] As the canonist Henry Swinburne put it in the early seventeenth century: "For it is a clear Case, That without Consent there cannot be any Matrimony".[7] The canon law also defined how consent was expressed, making a distinction between forms of words that indicated betrothal and those that established marriage. The use of the future tense (*de futuro*) – eg, "I will make thee my Wife" and "I will take thee to my Husband" – suggested a betrothal, whereas declarations in the present tense (*per verba de praesenti*) – "I commend thee for my Wife" – suggested marriage. The only subsequent acts that could turn betrothal into marriage were *verba de praesenti* or sexual intercourse (marriage *per verba de futuro cum copulâ*).[8]

Canon law also prescribed rules of capacity: the parties had to be of marriageable age (boys 14, girls 12), presently unmarried, and outside prohibited degrees of consanguinity and affinity.[9] A recurring question was whether there were any formal requirements: namely the publication of banns and the presence of a clergyman.[10] The Church of England's canons directed these formalities but never mandated them,[11] so a marriage celebrated before the church (*ex facie ecclesiae*)

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[4]Canadian and Irish courts have explicitly reinforced the distinction: *Trowsdale v McDonald* (1980) 20 BCLR 1 [14]-[16]; *Louis v Esslinger* (1981) 29 BCLR 41, [89]-[92]; *Keddie v Currie* (1991) 60 BCLR (2d) 1, [13]; *Hassan v Minister for Justice, Equality and Law Reform* [2013] IESC 8, [26]; cf *Beck v R* [1984] WAR 127, 136.

[5]See generally, RB Outhwaite, *Clandestine Marriage in England, 1500–1850* (The Hambledon Press, 1995), 1–6. Eg, Rebecca Probert, "Common-Law Marriage: Myths and Misunderstandings" (2008) 20 *Child and Family Law Quarterly*, 308 ("*Common-Law Marriage*"); Rebecca Probert, *Marriage Law and Practice in the Long Eighteenth Century: A Reassessment* (Cambridge University Press, 2009), 21–67 ("*Marriage Law*"); Rebecca Probert, "Sir William Scott and the Law of Marriage" in Paul Brand and Joshua Getzler (eds), *Judges and Judging in the History of the Common Law and Civil Law* (Cambridge University Press, 2012), 83, 88–92 ("*Sir William Scott*").

[6]Henry Swinburne, *A Treatise of Spousals or Matrimonial Contracts wherein All the Questions relating to that Subject are Ingeniously Debated and Resolved* (Robert Clavell, 1686), 51 (published posthumously); Thomas Salmon, *A Critical Essay concerning Marriage, By a Gentleman* (Charles Rivington, 1724), 184–5.

[7]Swinburne, *supra* n 6, 51.

[8]*Ibid*, 27–8, 56–7, 74–6, 107–8; Salmon, *supra* n 6, 182–7.

[9]Outhwaite, *supra* n 5, 3–4; Swinburne, *supra* n 6, 45–54.

[10]Outhwaite, *supra* n 5, 4–5.

[11]Constitution and Canons Ecclesiastical of the Church of England 1604, canons 62–3, 70, 99–104.

was "beyond reproach". Accordingly, under the canon law a wedding *ex facie ecclesiae* was sufficient for the marriage to be considered valid, but it was not necessary. The canon law, nevertheless, still allowed the recognition of some marriages conducted outside the parish church.[12]

As a result, the eighteenth century witnessed a boom in "clandestine marriages" held in prison chapels and churches that were outside a bishop's jurisdiction, and for Protestant Dissenters and Catholics trying to avoid weddings in the Church of England.[13] This created widespread social problems: bigamous marriages, caddish opportunism, the doubtful legitimacy of children.[14] The Clandestine Marriages Act – also known as Lord Hardwicke's Act – was passed in 1753 (and came into effect in 1754) to address these mischiefs.[15] It mandated what the Church's canons had only directed: the publishing of banns in the home parish church, and the subsequent marriage in the same church.[16] For all but Quakers and Jews, weddings outside the parish church were generally prohibited.[17] The celebration of a marriage without banns or a licence was made a felony.[18]

An important aspect of Lord Hardwicke's Act that saw the survival of the canon law marriage was its limitation to marriages celebrated in England and Wales. Section 18 stated:

> That nothing in this Act contained shall extend to that Part of Great Britain called Scotland … nor to any Marriages solemnized beyond the Seas.

Accordingly, the English canon law marriage was held to persist after Lord Hardwicke's Act when British subjects were "beyond the Seas". In 1811, Lord Eldon told the House of Lords that the marriage of Lord and Lady Cloncurry in Rome should have been conducted in accordance with Roman canon law, which was, of course, the *lex loci celebrationis*, unless the parties "could not avail themselves of the *lex loci*".[19] The marriage was solemnised in Rome by *verba de praesenti* before a Protestant clergyman. Hearing evidence that Protestants could not be married in Rome, the Lords accepted that the marriage

[12]Outhwaite, *supra* n 5, 20; Salmon, *supra* n 6, 198–204; Henry Consett, *The Practice of the Spiritual or Ecclesiastical Courts, To which is added a Brief Discourse Of the Structure and Manner of Forming the Libel or Declaration* (W Battersby, 2nd edn, 1700), 253–4.
[13]Outhwaite, *supra* n 5, 24–31, 35–8.
[14]*Ibid*, 24–31, 35–8.
[15]*Marriage Law*, *supra* n 5, 206–10.
[16]Clandestine Marriages Act 1753 (UK), s 1.
[17]*Ibid*, ss 4, 6–7, 18.
[18]*Ibid*, s 8; see also the account in *A v A* [2013] Fam 51, 60–62.
[19]William Cruise, *A Treatise on the Origin and Nature of Dignities, or Titles of Honor* (Joseph Butterworth and Son, 2nd edn, 1823), 276 (§ 85).

was valid.[20] Soon after, in *Lautour v Teesdale*,[21] Gibbs CJCP accepted that an Anglican couple had validly married in Madras according to Catholic rites that satisfied English canon law – effectively a marriage *ex facie ecclesiae*.[22] Lord Hardwicke's Act had altered the canon law, but not for British subjects in "foreign settlements".[23]

At this point, and probably until 1877,[24] the law applicable to the recognition of foreign marriages, even when the parties were British subjects, was the *lex loci celebrationis*: "by the law of England, marriages are deemed to be good or bad, according to the laws of the place where they are made".[25] The reference to the pre-1754 canon law marriage in *Lord Cloncurry's Case* and *Lautour* therefore created an exception to the *lex loci* when it did not recognise a marriage.[26] Inherent in this is the principle of *favor matrimonii*, preferring validity and, so, permitting limping marriages across borders. However, the contours of this exception emerged in cases where no exception arose. The influential analysis of the form of words required for a canon law marriage in *Dalrymple v Dalrymple*[27] arose in a case where Sir William Scott (later Lord Stowell) applied Scots law as the *lex loci*. The first reference to a "common law marriage" rather than canon law marriage, and the troubling question of the need for the presence of an episcopally ordained minister – a minister ordained by a bishop – arose domestically. A shift in terminology to "the common law" had already taken place in New York,[28] but in *R v Millis*[29] in 1844 it arose in an Irish bigamy case in a

[20]*Ibid*; see also *The Sussex Peerage Case* (1844) 9 Cl & F 85, 92, 124; 8 ER 1034, 1037–8, 1049 (*arguendo*). The evidence on Roman canon law in *Lord Cloncurry's Case* is questioned: John Westlake, *A Treatise on Private International Law* (Sweet & Maxwell, 4th edn, 1905) 62 (§ 26); Dicey, Morris and Collins, *supra* n 1, II 973.
[21](1816) 8 Taunt 830, 837; 129 ER 606, 609.
[22]*Ibid*, 837; 609.
[23]*Ibid*, 837; 609.
[24]See text to nn 113–132.
[25]*Scrimshire v Scrimshire* (1752) 2 Hag Con 395, 402; 161 ER 782, 785; and *ibid*, 407–8; 787. See also *Butler v Freeman* (1756) Ambl 302, 303; 27 ER 204, 205; *Harford v Morris* (1776) 2 Hag Con 423, 430; 161 ER 792, 795; *Middleton v Janverin* (1802) 2 Hag Con 437, 443; 161 ER 797, 799; *R v Inhabitants of Brampton* (1808) 10 East 281, 290; 103 ER 782, 785; *Dalrymple v Dalrymple* (1811) 2 Hag Con 54, 59; 161 ER 665, 667; *Lacon v Higgins* (1822) 3 Star 178, 183; 171 ER 813, 815; *Swift v Kelly* (1835) 3 Knapp 257, 27284–5; 12 ER 648, 658; eg *Herbert v Herbert* (1819) 3 Phill Ecc 34; 161 ER 1250; *Ruding v Smith* (1821) 2 Hag Con 371, 390–1; 161 ER 774, 781; *Smith v Maxwell* (1824) Ry & Mood 80, 81; 171 ER 950, 950–1; *Kent v Burgess* (1840) 11 Sim 361, 375; 59 ER 913. Cf *Harford*, *ibid*, 433–4; 796, where Sir George Hay refused to apply the *lex loci*. Reversing his sentence on other grounds, the Court of Delegates observed that Sir George "felt great difficulty" on the question of applicable law: *ibid*, 436, 797.
[26]See also *Kent*, *supra* n 25, 369, 375; 916, 918 (*arguendo*).
[27]*Dalrymple*, *supra* n 25. Text to nn 68–80.
[28]*Fenton v Reed*, 4 Johns 52, 53–4 (1809); cf *Marriage Law*, *supra* n 5, 60.
[29](1844) 10 Cl & Fin 534; 8 ER 844. Text to nn 92–101.

successful appeal against conviction to the House of Lords. To convict for bigamy, the question was whether the first "clandestine" union celebrated by the local Presbyterian minister was a valid marriage. The Lords sought the advice of English common law judges[30] – a standard procedure – but the effect was to re-colour the language used for canon law marriages. Both Lord Campbell and Lord Cottenham referred to the requirements for marriage "at common law",[31] although sometimes these just rested on the common law courts' procedural reliance on a consistory court's conclusions.[32] This was a step towards the secularisation of English marriage law, a process completed by the removal of the consistory courts' jurisdiction in questions of marriage in 1857.[33]

1. *Preconditions*

The common law is not available to validate a marriage just because the *lex loci* has not been satisfied. There must be good reasons to ignore it, and over time English adjudication has identified three reasons for allowing recourse to the common law. Although the evidence in *Lord Cloncurry's Case* has been doubted, proof that Protestants could not marry in Rome set the initial rationale for resorting to canon law marriage.[34] This justification has been expressed as the existence of parties confronting an "insuperable difficulty" in complying with the *lex loci*.[35] Insuperable difficulties may include religious or legal impediments,[36] or practical impediments such as those experienced by displaced Poles in post-War Germany.[37] However, as *Kent v Burgess*[38] demonstrated, the difficulty is not "insuperable" when parties can readily access a place where a marriage could be solemnised in accordance with English law. There, Shadwell VC observed that an English couple who married contrary to Belgian law in Antwerp could have simply travelled a few miles to Brussels to marry before a British consul.[39]

Secondly, an alternative precondition arises where parties attached to armed forces marry in an occupied country. In *Burn v Farrar*,[40] a couple was married

[30] *Ibid*, 653; 888. Cf *R v Allen* (1872) LR 1 CCR 367, 371–2.
[31] *Ibid*, 750–1, 758, 766–7, 773–4, 777–80, 784, 787, 790, 795, 797–801; 896, 924–5, 927, 930, 933, 934–5, 937–9, 941, 942–3, 978.
[32] *Ibid*, 661, 758; 891, 927.
[33] Divorce and Matrimonial Causes Act 1857 (UK), ss 2, 6; RB Outhwaite, *The Rise and Fall of the English Ecclesiastical Courts, 1500–1860* (Cambridge UP, 2006), 159–67.
[34] See text to nn 19–20.
[35] *Ruding*, *supra* n 25, 391, 394; 781, 782; *Kent*, *supra* n 25, 376; 918; *Taczanowska v Taczanowski* [1957] P 301, 312, 313, 324, 329, 331, 332 (*Taczanowska* CA); *Kochanski v Kochanska* [1958] P 147, 152; *Preston v Preston* [1963] P 411, 425.
[36] *Ruding*, *supra* n 25, 391; 781.
[37] *Kochanski*, *supra* n 35, 153.
[38] *Kent*, *supra* n 25.
[39] *Ibid*, 369, 376; 916, 918.
[40] (1819) 2 Hag Con 369; 161 ER 773.

by the chaplain for British forces occupying post-Napoleonic France. Although not deciding the case, Lord Stowell doubted that the husband, an army officer, could be subject to French law.[41] This was complicated two years later in *Ruding v Smith*,[42] when Lord Stowell decided that a British couple was validly married by a garrison chaplain in Cape Colony despite not having the parental consent required by Dutch law. The marriage took place in the internationally complex situation that arose after the Dutch had surrendered the Cape, but before the terms of British acquisition were settled. Lord Stowell added that it was "the distinct British character of the parties" that suggested that conformity with the canon law was sufficient,[43] and did not rest on the status of the British forces occupying Cape Colony at the time. The inconclusive nature of *Burn v Farrar* and the mixed reasons for *Ruding v Smith* meant that the question of the application of the *lex loci* to occupying forces was not settled until 1956, when the Court of Appeal decided *Taczanowska v Taczanowski*.[44] This case was the first in a series whereby post-War refugees resorted to the common law to validate marriages. *Taczanowska* involved a Catholic marriage that did not comply with Italian law, between Polish nationals in Polish forces occupying Italy in 1946. The Court of Appeal nevertheless held that the marriage was valid in England because it complied with the common law. Ormerod LJ thought it was decisive that the husband was in Italy under orders, and no submission to Italian law had taken place.[45] More directly, Hodson and Parker LJJ emphasised the significance of "the position of a conquering army in a conquered country".[46]

Thirdly, there is limited authority supporting the view that the exception may apply in "areas where conformity would go contrary to the conscience".[47] Nevertheless, English adjudication has not developed any implications of a conscientious objection to complying with the *lex loci*, although it has been embraced in Australia.[48]

2. *The requirements*

(a) *The parties' nationality*

The earliest cases on the canon law marriage exception involved "English subjects".[49] This provided a juridical rationale for reviving the application of

[41] *Ibid*, 370; 774.
[42] *Ruding*, *supra* n 25.
[43] *Ibid*, 394; 782.
[44] *Taczanowska* CA, *supra* n 35.
[45] *Ibid*, 332.
[46] *Ibid*, 326, 330–1.
[47] *Kochanski*, *supra* n 35, 151–2.
[48] Text to nn 161–174.
[49] *Middleton*, *supra* n 25, 437; 797; *Brampton*, *supra* n 25, 288; 784; *Burn*, *supra* n 40, 369; 773.

dormant canon law because, when English couples were "beyond the Seas", they carried English canon law with them[50] – "the birthright rationale". The connection of "English subjects" was more like residence or domicile but was re-shaped into nationality when courts began to refer to the need for parties to be "British subjects".[51] The Imperial application of British nationality arguably undermined the birthright rationale as English common law therefore applied when the couple in question was from, say, New South Wales, Canada or Singapore.[52] Even so, this might be justified where English law was received in the relevant colony.

A necessary connection with British subject status was initially questioned in South Australia,[53] but was abandoned in England by the Court of Appeal in *Taczanowska*.[54] At first instance, Karminski J held that resort to the common law was not possible to recognise a marriage because the parties were not British subjects.[55] This issue therefore arose squarely on appeal, and the Court of Appeal unanimously held that, in this case, neither party needed to be a British subject for common law marriage to be available. Hodson LJ used the mixed reasons of *Ruding v Smith* to deny that there was such a requirement, and concluded that the common law "knows no distinction of race or nationality".[56] Parker and Ormerod LJJ agreed, and also relied on the confusion of *Burn* and *Ruding*.[57] A year later, *Taczanowska* supported Sachs J's conclusion in *Kochanski v Kochanska*[58] that the common law validated a marriage in a displaced persons' camp in Germany, where Polish inmates had no intention of subjecting themselves to German law. Since then, English courts have continued to apply the common law marriage exception regardless of the couple's nationality.[59]

The loss of the birthright rationale after *Taczanowska* raises the question of the legal justification of applying the common law even though the parties have no personal connection with it and would not have expected that their marriage could be governed by English common law.[60] The best alternative

[50] *Lautour*, *supra* n 21, 837; 609.
[51] *Ruding*, *supra* n 25, 389–90, 392; 781; *Kent*, *supra* n 25, 365, 376; 914, 918; *Catherwood v Caslon* (1844) 13 M&W 261, 264; 153 ER 108, 110; *Culling v Culling* [1896] P 116, 117 (*arguendo*); *Taczanowska v Taczanowski* [1956] 3 WLR 935, 945 (*Taczanowska* PD).
[52] *Catterall v Catterall* (1847) 1 Rob Ecc 580; 163 ER 1142; *Wolfenden v Wolfenden* [1946] P 61, 62; *Penhas v Tan Soo Eng* [1953] AC 304, 306.
[53] Text to nn 177–180.
[54] *Taczanowska* CA, *supra* n 35.
[55] *Taczanowska* PD, *supra* n 51, 945.
[56] *Taczanowska* CA, *supra* n 35, 321–4, 326.
[57] *Ibid*, 330–1, 331–2.
[58] *Kochanski*, *supra* n 35.
[59] *Merker v Merker* [1963] P 283; *Preston*, *supra* n 35; *Tousi v Gaydukova* [2024] 1 WLR 118; cf *Lazarewicz v Lazarewicz* [1962] P 171.
[60] For contemporaneous criticisms of *Taczanowska*, see Máire Ní Shúillebháin, "Taczanowska v Taczanowski (1957)" in William Day and Louise Merrett (eds), *Landmark Cases in Private International Law* (Hart Publishing, 2023), 199, 209–12; David Fine, "The Formal Sufficiency of Foreign Marriages" (1976) 7 *Federal Law Review* 49, 53–6.

explanation is the "second resort" rationale.[61] As stated by Russell LJ in *Preston v Preston*:[62]

> Once the lex loci is rejected, no formal obstacles remain. That … may well leave it open to a court in this country to recognise as marriage (in the context of the common law marriage) that by which the general law of Christendom was recognised as constituting the basic essence of the marriage contract … [63]

The basic structure of English choice of law rules suggests that, if the *lex loci* fails, the law of the place of a party's domicile (the *lex domicilii*) has a strong claim to govern the formalities of marriage.[64] This was Sachs J's preferred approach in *Kochanski*,[65] but it could not be undertaken because of *Taczanowska*.[66] Nothing logically directs application of the requirements of the common law marriage when the *lex loci* has failed although, as we argue,[67] the practicalities probably make that simpler.

(b) *The form of words*

The significance of consent in canon law marriage received its most influential statement in *Dalrymple v Dalrymple*.[68] This involved a clandestine marriage in Scotland in 1804, which if recognised in England would entitle the wife to the remedy of restitution of conjugal rights. The husband had remarried in England "in the most formal and regular manner".[69] Lord Stowell nevertheless held that the marriage in Scotland was valid, and the English marriage was "legally bad".[70] In doing so, he applied Scots law as the *lex loci*, and so all questions were decided in accordance with Scots and not English law.[71] Still, *Dalrymple* was taken to represent the position in English canon law because Lord Stowell assumed that Scots law, English law and "indeed … all systems of law" on this topic were identical.[72] He held that, in classical canon law, "the consent of two parties expressed in words of present mutual acceptance constituted an actual and legal marriage technically known as by the name of … *per verba de praesenti*".[73] Lord Stowell emphasised

[61] Fine, *supra* n 60, 60–3.
[62] *Preston*, *supra* n 35.
[63] *Ibid*, 436.
[64] Text to nn 116–124.
[65] *Kochanski*, *supra* n 35, 153–4.
[66] A referral to the *lex domicilii* was expressly rejected in *Taczanowska* CA, *supra* n 35, 331; cf *Preston*, *supra* n 35; 430; Fine, *supra* n 60, 65.
[67] Text to nn 290–299.
[68] *Dalrymple*, *supra* n 25.
[69] *Ibid*, 58; 667.
[70] *Ibid*, 59, 129, 137; 667–8, 691, 693.
[71] *Ibid*, 58–9; 667.
[72] *Ibid*, 59, 70, 81, 103; 667, 671, 675, 682.
[73] *Ibid*, 64–5; 669.

that this created a valid marriage, although an English consistory court might then enjoin a church wedding "as matter of order".[74] The marriage was established without subsequent sexual relations to the extent, relevant in *Dalrymple*, that it would render a later marriage to another person void.[75] A sharp distinction was made between that position, and "mere promises or engagements".[76] Here, nothing was complete or consummated, and the engagement could be broken by mutual consent.[77] The further distinction with promises to marry was that sexual relations between the parties after the exchange of promises created the marriage. A promise *cum copulâ* "implied a present acceptance".[78] In *Dalrymple*, the correspondence between the parties was carefully sifted, with Lord Stowell concluding that there was a clear intent to enter a marriage.[79] He was prepared to hold that, if "this principal position [was] wrong", both parties' letters proved that sexual relations had taken place.[80]

Rebecca Probert considers that, by concluding that a declaration *per verba de praesenti* constituted marriage, Lord Stowell misunderstood the pre-1754 canon law.[81] She claims that he had not properly distinguished a marriage *per verba de praesenti* from a contract *per verba de praesenti* – which still bound the parties to marry each other (and no one else).[82] Probert argues that the marriage contract was not completed until solemnised in church.[83] It is a plausible claim,[84] but matters little. If *Dalrymple* did change the canon law,[85] it was still treated afterwards as the seminal statement of the form of words needed to establish a canon law marriage.[86]

English courts have consistently maintained that *verba de praesenti* were a requirement of common law marriage.[87] As recently as 2023 in *Tousi v Gaydukova*,[88] Mostyn J referred to "the exchange of vows … *per verba de praesenti*" and that "an essential feature of every marriage is that it is formed by the

[74] *Ibid*, 65; 670.
[75] *Ibid*, 67; 670.
[76] *Ibid*, 65; 670.
[77] *Ibid*, 65–6; 670.
[78] *Ibid*, 67; 670.
[79] *Ibid*, 109; 684.
[80] *Ibid*, 111, 115–28; 685, 686–90.
[81] *Marriage Law*, *supra* n 5, 22; *Common-Law Marriage*, *supra* n 5, 16.
[82] *Marriage Law*, *supra* n 5, 59–65.
[83] *Ibid*, 54.
[84] *Ibid*, 59.
[85] *Ibid*, 22, 62; *Common-Law Marriage*, *supra* n 5, 16.
[86] *Sir William Scott* (n 5) 97–100.
[87] *Beamish v Beamish* (1861) 9 HLC 274, 327–8, 337, 347, 357; 11 ER 735, 756–7, 760, 764, 768; *Lightbody v West* (1902) 87 LT 138, 141; *Mitford v Mitford* [1923] P 130, 137–8; *Apt v Apt* [1947] P 127, 144–5; *Merker*, *supra* n 59, 293–4; *Preston*, *supra* n 35, 436; cf *Ross Smith v Ross Smith* [1963] AC 280, 301. See also *De Thoren v Attorney-General* (1876) 1 App Cas 686, 697–8, 699; *Berthiaume v Dastous* [1930] AC 79, 84.
[88] *Tousi*, *supra* n 59.

parties alone by words spoken by them in person".[89] He nevertheless applied the *lex loci* without reference to the exception,[90] concluding that a ceremony in the Iranian Embassy in Kyiv did not qualify as an embassy marriage and did not comply with the registration requirements of Ukraine law.[91]

(c) *An episcopally ordained minister*

Although before 1754 a marriage celebrated *ex facie ecclesiae* by an Anglican minister was "beyond reproach",[92] in *Dalrymple* Lord Stowell did not think this was needed to hold a marriage valid.[93] Lord Stowell's judgment should have been interred by the decision of the House of Lords in *Millis*[94] that a valid common law marriage required the presence of an episcopally ordained minister. The Lords were evenly divided on that question, but the conclusion stood because, in an evenly divided criminal court, the opinion that led to acquittal prevailed. If an episcopally ordained minister was required, the defendant's first marriage was invalid because it was solemnised by a Presbyterian minister (who was not episcopally ordained). There was no bigamy. In *Catterall v Catterall*,[95] the evenly divided court in *Millis* helped Dr Lushington, a distinguished consistory court judge, to justify holding that he "was not disposed to carry the decision in that case one iota further"[96] – and concluded that a marriage in New South Wales was valid even though celebrated by a Church of Scotland (Presbyterian) minister. *Millis* confronted further resistance. In subsequent cases, marriages celebrated by an Anglican minister[97] or a Catholic priest[98] were accepted as meeting the requirement. However, the English courts themselves tended to accept the reasoning in *Catterall*. They have more generally restricted *Millis* to holding that the requirement of an episcopally ordained minister is only for marriages in England or Ireland;[99] no case since *Taczanowska*

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[89] *Ibid*, [31], [33].
[90] *Ibid*, [65]-[67].
[91] *Ibid*, [80].
[92] Text to n 12.
[93] Text to nn 68–80.
[94] *Millis*, *supra* n 29; text to nn 28–33.
[95] *Catterall*, *supra* n 52.
[96] *Ibid*, 582–3; 1143.
[97] All orders of Anglican ministry, including deacons, had authority to solemnise marriages: *Millis*, *supra* n 29, 573–4, 656, 666–7, 687, 717–18, 746, 750–1, 765, 786–7, 810–11, 859–60; 859, 889, 893, 901, 912, 923, 924, 930, 938, 947, 965. Eg, *Lord Cloncurry's Case*, *supra* nn 19–20.
[98] *Lautour*, *supra* n 21; *Brampton*, *supra* n 25, 288; 785; *Millis*, *supra* n 29, 728, 861–2; 916, 965; *Taczanowska* CA, *supra* n 35, 326; *Kochanski*, *supra* n 35, 153; *Merker*, *supra* n 59; *Preston*, *supra* n 35.
[99] *Wolfenden*, *supra* n 52, 63–4, 66; *Apt v Apt* [1948] P 83, 86; *Penhas*, *supra* n 52, 319; *Merker*, *supra* n 59, 294; *Preston*, *supra* n 35, 436.

has endorsed the requirement for marriages occurring elsewhere.[100] *Millis* was not even mentioned in the 2023 case of *Tousi v Gaydukova*,[101] where the requirements of a common law marriage were recounted in *obiter dicta*.

(d) *A Christian marriage*

The canon law on the parties' capacity to marry led Sir James Wilde (later Lord Penzance) in *Hyde v Hyde*[102] to describe a "Christian marriage" as "a voluntary union for life of one man and one woman to the exclusion of all others".[103] In *Hyde*, Lord Penzance was required to decide the validity of a potentially polygamous Mormon marriage in Utah in 1866, and if it was valid, whether he could grant a divorce. He held that a divorce could not be granted because, the union not being a Christian marriage, it could not be recognised in England despite its validity under the *lex loci*.[104] Although *Hyde* has been considered as stating requirements of a common law marriage in other parts of the Commonwealth,[105] the only citation in England is in *Tousi* where Lord Penzance's distaste for polygamy is referenced.[106] However, essential aspects of Christian marriage such as the requirements that the union be consensual and monogamous have not been doubted.[107] *Hyde*'s requirement of "one man and one woman" was also important in English law's initial refusal to recognise foreign same-sex marriages.[108] Even though statute made same-sex marriage lawful in England and Wales in 2013,[109] Dicey, Morris and Collins consider that a same-sex union could not qualify as a common law marriage.[110] Máire Ní Shúilleabháin is not as convinced that *Hyde* would still deny recognition of same-sex unions, but also suggests that, because the parties' sex is a question of capacity and not a formality of marriage, a prohibition on same-sex marriage in the *locus* may not justify application of the exception.[111] Ní Shúillebháin disregards that a same-sex couple may confront other insuperable difficulties in the *locus*, likely raising the question of its validity as a common law marriage. In any case, the exception is applied in cases where the *locus* imposes an incapacity[112] – reflecting the anachronistic relationship that the common law marriage has with modern choice of law rules.

[100] *Taczanowska* CA, *supra* n 35, 326.
[101] *Tousi*, *supra* n 59.
[102] (1866) LR 1 P&D 130.
[103] *Ibid*, 133.
[104] *Ibid*, 133, 137–8.
[105] Text to nn 241–268.
[106] *Tousi*, *supra* n 59, 128: cf *Penhas*, *supra* n 52, 313, 316 (*arguendo*).
[107] *Taczanowska* CA, *supra* n 35, 326–7; *Kochanski*, *supra* n 35, 154; *Merker*, *supra* n 59, 292–4, 300; *Lazarewicz*, *supra* n 59, 177.
[108] *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam) [11], [112], [128].
[109] Marriage (Same Sex Couples) Act 2013 (UK), s 1.
[110] Dicey, Morris and Collins, *supra* n 1, II 975.
[111] Ní Shúillebháin, *supra* n 60, 213, 215–217.
[112] Text to nn 123–125.

3. *Relationship with choice of law rules*

The common law marriage took shape as an exception to the *lex loci celebrationis* when the *locus* was taken to provide the applicable law for all aspects of marriage. From 1871 at latest, the choice of law rules for marriage in the United Kingdom bifurcated (with comparable developments in the Empire) and the common law marriage became an uneasy fit with the basic choice of law system. The bifurcation arises, probably, because of a misreading of Lord Campbell's speech in *Brook v Brook*.[113] In holding that a question of prohibited degrees of marriage was to be determined by the Marriage Act 1835 (UK, apart from Scotland) and not the *lex loci*, he said:[114]

> … the essentials of a contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated.

This is more likely to be a decision that the Act was applied as a mandatory rule overriding the *lex loci*, and its territorial application was to English-domiciled couples.[115] However, from 1877 *Brook* was read as if all questions of capacity were governed by the *lex domicilii*.[116] Afterwards, the split in choice of law for marriage settled into place with the *lex loci* limited to "questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted".[117] At least in the Commonwealth and Ireland, questions of capacity and consent – or "essential validity" – came to be governed by the *lex domicilii*.[118] In England and Wales, this was the predominant position, although the reference in *Brook* to the place where the matrimonial residence was contemplated and, from the 1980s, the place with a real and substantial connection to the marriage have also been offered as laws applicable to questions of capacity.[119]

There was no necessary reason to conclude that a common law marriage could only be invoked as an exception to questions concerning the formalities of

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[113](1861) 9 HL Cas 193; 11 *ER* 703.
[114]*Ibid*, 207; 709.
[115]Sarah McKibbin, "*Brook v Brook*: Rethinking Marriage Choice of Law" in Sarah McKibbin and Anthony Kennedy (eds), *The Common Law Jurisprudence of the Conflict of Laws* (Hart Publishing, 2023) 1, 16.
[116]*Ibid*, 17–19; see *Sottomayor v De Barros (No 1)* (1877) 3 PD 1, 5.
[117]*Sottomayor (No 1)*, *supra* n 116, 5.
[118]Mortensen, Garnett and Keyes, *supra* n 1, 402–3, 406; McLeod, *supra* n 1, 256–60; Marvin Bauer, Elizabeth Edinger, Geneviève Saumier, Joost Blom, Nicholas Rafferty and Catherine Walsh, *Private International Law in Common Law Canada* (Emond Montgomery, 1997) 749–51; Hook and Wass, *supra* n 1, 629–33. For Ireland, see *Davis v Adair* [1895] IR 379, 386, 416; Law Reform Commission, *supra* n 1, 58–9.
[119]*Dicey, Morris and Collins*, *supra* n 1, II 983–7.

marriage.[120] However, as it had only been an exception to the *lex loci* as the applicable law, when common law marriage was next considered it was assumed that it could only arise when parties did not comply with the formalities of the *locus*.[121] It was not invoked as an exception to the requirements of capacity and consent in the place of domicile.[122]

While the issues to which the *lex loci* applied had narrowed, the scope of the common law marriage did not. The preconditions can be satisfied by religious incapacity – a question of essential validity.[123] The requirements of consent, monogamy and (if it still exists) heterosexuality are questions of essential validity,[124] as would be any lingering canon law requirements for marriageable age, consanguinity and affinity.[125] But through the 20th and 21st centuries, while only resorting to common law marriage as an exception to the applicable law for formal validity, the English courts continued to insist on applying its essential requirements to marriage.[126] In effect, the common law marriage displaced the *lex domicilii* for questions of essential validity when the exception was applied. This is also why, under the second resort rationale,[127] some have suggested that the *lex domicilii* should govern *all* questions concerning the marriage when the formalities of the *locus* fail.[128] However, the Court of Appeal dismissed that in *Taczanowska*, and it is no longer an option in England.[129] It is anomalous that the breadth of the common law marriage was not reduced alongside the narrowing application of the *lex loci*. However, its broader quality is at least compatible with Russell LJ's explanation for it in *Preston*[130] – because the marriage is stripped of its formal requirements, its validity depends on its essential quality of party consent.[131] This remains at the centre of the English understanding of common law marriage.[132]

C. The modern Australian common law marriage

Since the mid-nineteenth century, more common law marriage cases have been reported in Australian courts than elsewhere in the Empire and Commonwealth.

[120]Cf *Ruding*, *supra* n 25, 378–9; 777, where the parties did not meet requirements of marriageable age and parental consent.
[121]*Lightbody*, *supra* n 87, 140–1; *Phillips v Phillips* (1921) 38 TLR 150.
[122]Eg, *Phillips*, *supra* n 121; *Lightbody v West* (1903) 88 LT 484, 485; cf *Lightbody*, *supra* n 87, 139.
[123]*Lord Cloncurry's Case*, *supra* nn 19–20.
[124]Text to nn 102–111; *Dicey, Morris and Collins*, *supra* n 1, II 983, 1002–27.
[125]Text to n 9; *Dicey, Morris and Collins*, *supra* n 1, II 987–91.
[126]Text to nn 102–111.
[127]Text to nn 60–66.
[128]Text to n 65.
[129]Text to n 66.
[130]*Preston* (n 35).
[131]*Ibid*, 436.
[132]*Tousi*, *supra* n 59, 124–5.

Most involved refugees, whether from Europe after World War II or from south-east and central Asia from the 1970s. David Fine observed that the Australian development of the common law marriage had been more fluid, preferring to view precedents as suggestions of potential limitations to the *lex loci* rule where, in other Commonwealth countries and Ireland, they were treated as strict exceptions.[133] In Australia, federal courts exercising special family law jurisdiction have dealt with questions of marriage validity since 1975.[134] Australian developments also have to be considered within the context of large statutory changes, commencing in 1986, to applicable law questions about foreign marriages.

1. *The adoption of the Marriage Validity Convention*

The Hague Conference on Private International Law concluded the Marriage Validity Convention in 1978.[135] Australia implemented it (even before acceding to it) in 1985,[136] and only The Netherlands and Luxembourg have followed. Regarding foreign marriages, the Convention requires that "a marriage validly entered into under the law of the State of celebration" is considered to be valid in a Contracting State.[137] This also applies for marriages that are later validated in the place of celebration.[138] The place of celebration need not be a Contracting State; under the Convention the *lex loci* is applied wherever the *locus* happens to be. The Convention initially expands the reach of the *lex loci* beyond the common law's narrow role in addressing only the formalities of marriage. However, it allows a Contracting State to refuse recognition when its own internal law would not recognise a marriage because of polygamy, consanguinity in the first degree, marriageable age, incapacity or lack of consent.[139] In other words, a Contracting State may opt to have questions of capacity and consent determined by its own law, rather than by the *lex loci*. For Australia, that sees a shift from questions of essential validity being determined by the *lex domicilii* to the application of the *lex fori*. Generally, the Marriage Validity Convention strongly emphasises territoriality in questions of marriage validity. It nevertheless gives a Contracting State the option of pursuing a policy of *favor matrimonii*. Article 13 states:

> This Convention shall not prevent the application in a Contracting State of rules of law more favourable to the recognition of foreign marriages.

[133]Fine, *supra* n 60, 58.
[134]Family Law Act 1975 (Cth), ss 20–38, 41. In Western Australia, a state Family Court exercises federal family jurisdiction.
[135]*Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriage*, concluded at The Hague 14 March 1978 (entered into force 1 May 1991) ("Marriage Validity Convention").
[136]Marriage Amendment Act 1985 (Cth).
[137]Marriage Validity Convention, Art 9.
[138]*Ibid*, Art 9.
[139]*Ibid*, Art 11.

This allows a Contracting State to recognise a limping marriage – invalid under the *lex loci* but valid by application of some other choice of law rule.

Australia's federal Parliament gave effect to the Marriage Validity Convention by amendments to the Marriage Act 1961 (Cth). No other common law country has ever shown any interest in adopting the Convention, and the UK Law Commissions completely rejected it.[140] To some extent the Law Commissions were concerned that Article 13 would undermine the usual purpose of Hague conventions: securing internationally standardised rules of private international law. The Marriage Validity Convention allowed too many issues to be dealt with by "unharmonised, unreformed choice of law rules" in Contracting States.[141]

Part VA of the Marriage Act implements the Convention's provisions for recognising foreign marriages, providing for a marriage that was valid or validated according to "the law in force in the foreign country … in which the marriage was solemnised" to be recognised in Australia.[142] However, these marriages will not be recognised if they do not satisfy the conditions for essential marriage validity under Australian law.[143] Giving effect to Article 13, s 88E preserves the application of the common law choice of law rules where this will result in a marriage being held valid:

> … a marriage solemnised in a foreign country that would be recognised as valid under the common law rules of private international law but is not required by the provisions of this Part … to be recognised as valid shall be recognised in Australia as valid, and the operation of this subsection shall not be limited by any implication arising from any other provision of this Part.

As a result, "the common law rules of private international law" are only applied to recognise a marriage with s 88E's permission. Two observations follow. First, a "marriage" recognised through s 88E therefore must be within the statutory definition of a "marriage" in the Marriage Act: "the union of 2 people to the exclusion of all others, voluntarily entered into for life".[144] Secondly, in the context of Part VA, which deals with the recognition of foreign marriages, the "common law rules of private international law" must mean the common law choice of law rules relating to marriage validity. Those choice of law rules include the common law's application of the *lex loci* that parallels Part VA's statutory rules of recognition, and its exception

[140]The Law Commission and the Scottish Law Commission, *Private International Law – Choice of Law Rules in Marriage* (Working Paper No 89; Consultative Memorandum No 64) (HMSO, 1985) 168–70.
[141]*Ibid*, 169.
[142]Marriage Act 1961 (Cth), ss 88B-88D ("Marriage Act"); Marriage Validity Convention, Arts 7 and 9.
[143]Marriage Act, ss 88D(2)-(5); Marriage Validity Convention, Art 11.
[144]Marriage Act, s 5(1).

allowing, at times, resort to the requirements of a common law marriage. Matrimonial courts have therefore used s 88E to continue to uphold marriages that did not comply with the *lex loci*.[145] However, in doing so the courts have misinterpreted the provision and given it incomplete effect. In *Nouri & Yavari* s 88E was not mentioned, and yet Berman J considered that he could assume that there was "an English common law marriage" with no reference to Part VA or the common law choice of law rules.[146] In both *Nygh & Kasey* and *Lin & Nicoll*, the Family Court seems to have understood "the common law rules of private international law" in s 88E as meaning only the preconditions for invoking a common law marriage[147] – and not the requirements of a common law marriage.[148] In both cases the Court held that the preconditions were satisfied, but did not assess the marriage against the requirements of the common law. In *Nygh* Faulks DCJ upheld the marriage by reference to the legal requirements for an Australian marriage (under the Marriage Act) as the *lex fori* or the *lex domicilii*.[149] That conclusion is itself questionable, because the marriage ceremony conducted in Thailand in that case would not have been celebrated by a religious or secular celebrant authorised under the Australian Marriage Act.[150] In *Lin* Dawe J considered only whether the "event" that he held was a valid marriage was "meaningful" as a south-east Asian custom.[151] Although in the twentieth century Australian courts had partly reshaped the requirements of a common law marriage in tandem with the reshaping undertaken by other Commonwealth courts, the post s 88E decisions lack this coordination – and the discipline of following precedent.

[145] *Hooshmand & Ghasmezadegan* (2000) FLC 93–044; *Nygh & Kasey* [2010] FamCA 145; *Lin & Nicoll* [2016] FamCA 401; *Nouri & Yavari* [2020] FamCA 324.
[146] *Nouri*, *supra* n 145, [21].
[147] Text to *supra* nn 34–48, and *infra* nn 152–174; *Nygh*, *supra* n 145, [57]-[86]; *Lin*, *supra* n 145, [51]-[65].
[148] Text to *supra* nn 49–112, and *infra* nn 175–269.
[149] *Nygh*, *supra* n 145, [87]-[88]; Sirko Harder, "Recent Judicial Aberrations in Australian Private International Law" (2012) 19 *Australian International Law Journal* 161, 178. However, it seems almost certain that, if Faulks DCJ had assessed the marriage against the requirements of a common law marriage, it would have qualified as such. As the marriage was solemnised in a Catholic service, it was in effect *ex facie ecclesiae*. A question of the presumption of marriage also arose, but Faulks DCJ did not rely on it: *Nygh*, *supra* n 145, [60]; and see *supra* n 3.
[150] Marriage Act, ss 25–39M. A marriage must be solemnised by an authorised celebrant and, if not, it is invalid: *ibid*, ss 41, 48; see Harder, *supra* n 149, 177.
[151] *Lin*, *supra* n 145, [69]. It seems likely, though it is not clear, that Dawe J also applied the presumption of marriage after a period of cohabitation to recognise a valid marriage: *ibid*, [60]-[70]. This does require evidence of some wedding ceremony, and is therefore connected with the recognition of the "event" as such. However, as noted *supra* n 3, this article does not address the law relating to the presumption of marriage.

2. *Preconditions*

Australian matrimonial courts followed the English requirements that the common law marriage not be invoked simply because the *lex loci* could not be satisfied.[152] As Smith J summarised it in *Milder v Milder*:[153]

> … there is an exception to the general rule where compliance with the law of the place of celebration is to be regarded as impossible, whether because there is no law in force there, or because facilities are denied, or because compliance would be against conscience …

The "impossible" circumstances have included the inability to be married before a civil registrar in Germany because, immediately post-War, there were none.[154] In some refugee cases, Australian courts have accepted that the *locus* did provide the "facilities" for marriage.[155] In contrast, *Hooshmand & Ghasmezadegan* involved parties who married in Iran where the law disqualified them from marrying in accordance with their faith.[156] *Nouri* was similar, and although Berman J concluded that the marriage was valid in the *locus*, without giving reasons he also thought it was valid "at common law".[157] In *Lin & Nicoll* the parties, having been imprisoned for political offences, were denied citizenship in a Communist-controlled country in south-east Asia. This prohibited them from marrying, causing "insuperable difficulty" in complying with the *lex loci*.[158] Circumstances like those of *Taczanowska* have arisen in Australia. In *Jaroszonek v Jaroszonek*,[159] a Pole and Ukrainian were held to have married in post-War Germany, despite not complying with the *lex loci*, because they had not submitted themselves to German law.[160]

Although in *Milder* Smith J cited no supporting precedent for his reference to "compliance [being] against conscience", this precondition has received substantial development. The Full Court of the Family Court approved Smith J's reference in *Marriage of Banh*,[161] a case involving South Vietnamese refugees, although it was not applied there. In *Marriage of X*,[162] Watson J did not allow

[152] *Hodgson v Stawell* (1854) 1 VLT & Legal Observer 102; *R v Byrne* (1867) 6 SCR (NSW) 302; *Fokas v Fokas* [1952] SASR 152, 154; *Grzybowicz v Grzybowicz* [1963] SASR 62, 63–4.
[153] [1959] VR 95.
[154] *Savenis v Savenis* [1950] SASR 309, 310. See also *Kuklycz v Kuklycz* [1972] VR 5052; *Maksymec v Maksymec* (1956) 72 WN (NSW) 522, 522.
[155] *Milder*, *supra* n 153, 98; *Dukov v Dukov* [1968] QLR 9, 22; *In the Marriage of Katavic* (1977) 3 Fam LR 11,507, 11,509, *Marriage of X* (1983) 65 FLR 132, 146.
[156] *Hooshmand*, *supra* n 145.
[157] *Nouri*, *supra* n 145, [34].
[158] *Lin*, *supra* n 145, [58].
[159] [1962] SASR 157.
[160] *Ibid*, 159; cf *Fokas*, *supra* n 152, 154; *Grzybowicz*, *supra* n 152, 64.
[161] (1981) 6 Fam LR 643, 649.
[162] *X*, *supra* n 155.

recourse to the common law for a Vietnamese couple who had married in South Vietnam according to a customary ceremony, because the marriage had not been "consecrated" by the administrative committee required by Vietnamese law.[163] Although the parties were in an "apparent state of terror", and soon after took refuge in Australia, Watson J would not accept that "[d]eprivation of liberty or risk of punishment" allowed them to refuse to comply with the *lex loci*.[164] This approach has been relaxed – significantly. In the post s 88E case of *Nygh & Kasey*,[165] an Australian couple travelled in January 1982 to Thailand, the wife's home country, and married in a Catholic ceremony in a Catholic church. The marriage was not registered in accordance with Thai law, because the wife objected to Thailand's requirement that she take her husband's surname. She considered this discriminatory.[166] They returned to Australia that same month. Faulks DCJ followed *Milder* and *Banh* and recognised that in both cases a narrow approach was taken to the scope of conscientious objection.[167] However, he considered that all that was required was a conviction that was "sincerely and conscientiously held".[168] Although Faulks DCJ denied that the wife's conviction possessed "the high morality of the sanctity of human life",[169] it was nevertheless "a major matter of conscience" and concerned a woman's individuality regardless of her marital status.[170]

Reservations must be expressed about this conclusion – which allowed resort to the requirements of a common law marriage (although Faulks DCJ actually did not do that).[171] He *did* hold that a mere "whim or fancy" could not qualify as a conscientious objection.[172] However, Faulks DCJ also admitted that his was an "extended definition" of conscience.[173] This makes it too easy to recognise a limping marriage. *Nygh* is not a case where the wife's objection required the couple to marry contrary to the *lex loci* and was not of such degree to equate with an insuperable difficulty. The couple was Australian, and in Thailand for under a month. Following Shadwell VC's observation in *Kent v Burgess*, the judge could have concluded that the couple should have married in Australia with no inconvenience.[174] Secondly, while marriage validity should be a question for the *locus* under Part VA, the incidents of the union are not. Any requirements in Thailand concerning the wife's surname could not bind her in Australia and

[163] *Ibid*, 133–4.
[164] *Ibid*, 134, 146.
[165] *Nygh*, *supra* n 145.
[166] *Ibid*, [23]-[24].
[167] *Ibid*, [63]-[82].
[168] *Ibid*, [83].
[169] *Ibid*, [84].
[170] *Ibid*, [84].
[171] Text to nn 147–149.
[172] *Nygh*, *supra* n 145, [82].
[173] *Ibid*, [86].
[174] Text to nn 38–39; Harder, *supra* n 149, 178.

would not have constrained her individuality. The preconditions for a common law marriage to be invoked have never been so broad as to allow non-compliance with the *lex loci* in a case of wedding tourism.

3. *The requirements*

(a) *The parties' nationality*

The earliest colonial decisions in Australia involved British subjects,[175] even if living outside the Empire.[176] Thus, questions of any nationality requirement did not arise. However, it did arise directly in South Australia in 1950 in *Savenis v Savenis*,[177] the first post-War European refugee case. This involved a marriage of Lithuanians – the husband a former prisoner of war – in a Catholic church in Bavaria in 1945. The German civil registration requirements were not satisfied, and no registrars were available. Lithuania being under Soviet occupation, a return home was impossible. Mayo J considered that the preconditions to ignore the *lex loci* were satisfied, but noted that common law marriages had only been recognised for British subjects.[178] While he toyed with the idea that the *lex domicilii* might govern the case,[179] the place of domicile, Lithuania, had been taken by "an alien power", so he concluded that "it would be proper to extend … the area of legal recognition given to marriages to conform to our own common law".[180] It was not expressly treating British subject status as irrelevant to common law marriage requirements, although the English Court of Appeal later treated *Savenis* that way in *Taczanowska*.[181] Still, *Savenis* was not initially followed in Australia. *Fokas v Fokas*[182] was another South Australian case involving displaced Lithuanians who married in Germany in 1947, but Napier CJ limited access to the common law marriage exception to British subjects.[183] *Savenis* was also not accepted in New South Wales.[184] However, after *Taczanowska* Australian courts consistently recognised a nationality-neutral application of the common law exception – assuming that it could be available to Poles,[185] Ukrainians,[186] Russians,[187]

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[175] *Hodgson*, *supra* 152.
[176] *Byrne*, *supra* 152, 302 (pre-colonial Fiji).
[177] *Savenis*, *supra* n 154.
[178] *Ibid*, 311.
[179] *Ibid*, 311.
[180] *Ibid*, 311.
[181] *Taczanowska* CA, *supra* n 35, 327, 328–9, 331.
[182] *Fokas*, *supra* n 152, 153.
[183] *Ibid*, 153.
[184] *Maksymec*, *supra* n 154, 523–4.
[185] *Milder*, *supra* n 153, 95–6, 97–8; *Jaroszonek*, *supra* n 159, 157–60; *Grzybowicz*, *supra* n 152, 62.
[186] *Jaroszonek*, *supra* n 159, 157–60; *Grzybowicz*, *supra* n 152, 62; *Kuklycz*, *supra* n 154, 51; *Persian v Persian* [1970] 2 NSWR 538, 539.
[187] *Dukov*, *supra* n 154, 20.

Croatians,[188] Vietnamese,[189] Iranians[190] and the stateless.[191] In *Dukov v Dukov*,[192] the Supreme Court of Queensland expressly held that there was no need for either party to be "domiciled in a British country".[193] From the adoption of *Taczanowska,* the requirement to be a British subject was obsolete in Australia.[194]

The only Australian common law marriage case to have involved a British subject or Australian citizen after the nineteenth century was *Nygh & Kasey*, where at the time of the marriage the husband was an Australian citizen and the wife a permanent resident.[195] The birthright rationale for common law marriage was strongly represented in Australian adjudication into the 1950s. Some judges allowed recourse to common law marriage only for British subjects and, when *lex loci* requirements failed for a marriage between other nationals, considered that the governing law for questions of capacity and consent – the *lex domicilii* – would apply.[196] After *Taczanowska*, the second resort rationale for the common law marriage exception was also recognised in Australia.[197] This rationale does not limit us to the common law marriage, especially when, with Australia's bifurcated choice of law regime for marriage, the *lex domicilii* has some claim to be the law of second resort.[198] Oddly, amongst the unorthodoxies of *Nygh* is a potential claim to refer all questions of marriage validity to the *lex domicilii*. Having decided that the wife's conscientious objection to compliance with Thai marriage law justified his ignoring the *lex loci*, Faulks DCJ (without citing precedent) pondered whether he should apply the *lex fori* or the *lex domicilii*.[199] As the parties were domiciled in Australia at the time of the marriage, he did not have to decide between them, and applied the present Australian marriage law.[200] However, as we discuss later,[201] there are simpler answers than application of the *lex domicilii*.

[188] *Katavic*, *supra* n 154, 11, 507.
[189] *Banh*, *supra* n 161, 644; *X*, *supra* n 154, 133.
[190] *Hooshmand*, *supra* n 145, 87,678; *Nouri*, *supra* n 145, [2].
[191] *Milder*, *supra* n 153, 95–6, 97–8; cf *Lin*, supra n 145, [9].
[192] *Dukov*, *supra* n 154.
[193] *Ibid*, 21.
[194] Australian Citizenship was introduced in 1948, but co-existed with British subject status until the latter was abolished for the purposes of Australian law from 1987: Australian Citizenship Amendment Act 1984 (Cth), s 33, repealing Australian Citizenship Act 1948 (Cth), s 51.
[195] *Nygh*, *supra* n 145, [5].
[196] *Fokas*, *supra* n 152, 153–4; *Maksymec*, *supra* n 154, 525; *X*, *supra* n 155, 135; cf *Banh*, *supra* n 161, 649.
[197] *Kuklycz*, *supra* n 154, 53; *Persian*, *supra* n 186, 542; *X*, *supra* n 155, 135. Cf *Banh*, *supra* n 161, 649, where the common law marriage seems to be treated as the law of third resort, after the *lex loci* and the *lex domicilii*.
[198] Text to nn 60–66.
[199] *Nygh*, *supra* n 145, [87].
[200] *Ibid*, [87].
[201] Text to nn 290–299.

(b) *The form of words*

The requirement of *verba de praesenti* was recognised in the 1854 decision of the Full Court of the Supreme Court of Victoria in *Hodgson v Stawell*,[202] the first case in the Australian colonies in which the question of recognising a common law marriage arose. This was followed quickly in New South Wales in *R v Byrne*,[203] although in both cases the courts also demanded the presence of an episcopally ordained minister.[204] *Dalrymple* was still being cited and approved in the 1950s.[205] As was the case in Canada,[206] the need for *verba de praesenti* or *de futuro* "followed by cohabitation" was consistently supported in Australia into the late 1990s.[207] This was endorsed by the Full Court of the Family Court in *W v T*,[208] a 1998 case in which common law marriage requirements were used to illuminate domestic ceremonial requirements under the Marriage Act. There, Fogarty J made the canon law distinction between betrothals *per verba de futuro* and declarations *de praesenti* – the former only creating marriages on "subsequent consummation".[209] Baker J similarly judged that canon law required only the parties' "mutual consent " – "exchanging mutual promises of marriage *de praesenti*".[210] In *Hooshmand* in 2000, the only post s 88E decision to mention this requirement, *W v T*'s "requirement concerning the exchanging of promises" was followed and considered to be satisfied by a Bahá'í marriage in Iran.[211]

The preconditions for the common law marriage exception to apply were plainly satisfied in *Lin*.[212] The events took place in 1978 in "a country in South-East Asia" under Communist Party rule. The wife's family was upset that she had fallen pregnant, so the husband arranged "an informal meeting" between the families to "clarify [the] relationship".[213] This meeting involved the sharing of a fruit platter between the families.[214] No evidence was given

[202] *Hodgson*, *supra* 152, 103.
[203] *Byrne*, *supra* 152.
[204] *Hodgson*, *supra* 152, 104.
[205] *Savenis*, *supra* n 154, 310; *Quick*, *supra* n 2, 225; *Maksymec*, *supra* n 154, 523; cf *Katavic*, *supra* n 155, 11,508.
[206] *Robb v Robb* (1890) 20 OR 591, 602; *Blanchett v Hansell* [1941] 1 DLR 21, 26; *Coffin v R* (1955) 21 CR 333, 368–9; *R v Cote* (1971) 22 DLR (3d) 353, [6]; *Dutch v Dutch* (1977) 1 RFL (2d) 177, 180–2; *Louis*, *supra* n 4, [79]-[92]; *Keddie*, *supra*, n 4, [24]-[25].
[207] *Quick*, *supra* n 2, 226, 232–3; *Milder*, *supra* n 153; *Maksymec*, *supra* n 154, 523; *Kuklycz*, *supra* n 154, 53; *X*, *supra* n 155, 142.
[208] (1998) FLC 92–808.
[209] *Ibid*, 85,117–18.
[210] *Ibid*, 85,131, 85,133.
[211] *Hooshmand*, *supra* n 145, 87,683.
[212] Text to n 158.
[213] *Lin*, *supra* n 145, [19].
[214] *Ibid*, [20].

about the nature of this event but, while admitting it was not a "formal ceremony", the wife believed it was "a traditional marriage ceremony" or "a traditional ceremony between the parties' two families".[215] There was no evidence of what, if any, words were spoken at the meeting. In the Family Court, Dawe J referred to common law marriage cases from *Savenis* to *Hooshmand* and *Nygh*[216] but, after expressly finding that the preconditions for resort to a common law marriage were satisfied,[217] made no reference to any of the requirements set out in the cases from *Savenis* to *Hooshmand.* Two considerations led Dawe J to conclude that there was a valid marriage: the parties' families accepted them as husband and wife; and "the event was meaningful".[218]

The correctness of *Lin & Nicoll* must be doubted; there was no precedent for the method Dawe J adopted. As with Faulks DCJ's approach in *Nygh*, the judge seems to have thought s 88E's reference to "the common law rules of private international law" meant the preconditions for a common law marriage, rather than allowing application of the *lex loci celebrationis* in accordance with the common law choice of law rule and its exception of common law marriage if, considering its requirements, that would validate the marriage.[219] Although holding that the event in 1978 constituted a common law marriage, Dawe J made no reference to its requirements. Most concerning was that there was no enquiry into the parties' individual agency – whether they consented to marry and expressed that in a suitable form of words. The emphasis was on what the wife claimed that *the families* thought.[220] Apparently, Dawe J implicitly thought that the common law recognised a customary south-east Asian marriage that the *locus* did not recognise, and that sharing the fruit platter amounted to a customary marriage. However, there is no special provision in common law choice of law rules for recognising such a union unless it would be recognised by the courts of the *locus celebrationis*.[221] The method followed in *Lin* compares unfavourably with *Marriage of X*, where Watson J refused to recognise a customary Vietnamese marriage that had not complied with Vietnamese registration requirements.[222] Although likely to be incorrect, *Lin* does show a judge prepared to use *favor matrimonii* to ignore the need to prove the central element of any marriage: the parties' consent.

[215]*Ibid*, [20], [22].
[216]*Ibid*, [52]-[67].
[217]*Ibid*, [58].
[218]*Ibid*, [69].
[219]*Ibid*, [71]; see text to nn 147–151.
[220]*Ibid*, [10], [14], [19]-[22], [29]-[30], [59], [69].
[221]*McCabe v McCabe* [1994] 1 FLR 410. For an account of when a customary marriage will be recognised in Australia, see John Wade, "Void and *De Facto* Marriages" (1981) 9 *Sydney Law Review* 356, 384–386.
[222]Text to nn 162–164.

(c) *An episcopally ordained minister*

Within a decade of *Millis*,[223] the Full Court of the Supreme Court of Victoria held in *Hodgson v Stawell*[224] that an episcopally ordained priest was necessary for a common law marriage to be recognised. It rejected Dr Lushington's caution in *Catterall* not to extend *Millis* any further than its facts.[225] So, although in *Catterall* a Presbyterian marriage in New South Wales was recognised as a common law marriage, in *Hodgson* a Presbyterian marriage in Van Dieman's Land was not. Two years later, this position was rejected in Upper Canada; Canadian courts have only once required the presence of an episcopally ordained minister for a common law marriage to be recognised.[226] However, *Hodgson* pushed Victorian courts to maintain this requirement longer and, as late as 1971, a Victorian judge held he was bound by *Hodgson* to apply *Millis*.[227] In South Australia and Queensland, the question never arose directly because, in all cases, an episcopally ordained priest was present and the marriages were *ex facie ecclesiae*.[228] In Australia, this requirement has been satisfied by the presence of an Anglican minister,[229] Catholic priest,[230] Russian Orthodox priest[231] and Ukrainian Orthodox priest.[232]

After *R v Byrne* the New South Wales courts never accepted *Millis*,[233] and once matrimonial causes were taken into the federal courts the requirement was completely abandoned.[234] In 1998 in *W v T*,[235] the Full Court of the Family Court considered at length the need for an episcopally ordained minister to be present.[236] Fogarty J observed:[237]

[223] *Millis*, *supra* n 29. Text to nn 92–101.
[224] *Hodgson*, *supra* n 152.
[225] *Ibid*, 104.
[226] *Doe d Breakey v Breakey* (1846) 2 UCQB 349; *Blanchett*, *supra* n 206, 25–6; *Desjarlais v Macdonell Estate* (1988) 23 BCLR (2d) 195, [15]; *Keddie*, *supra* n 4, [41]-[44]; cf *Cote*, *supra* n 206, [20]-[24]; Allan Hilton, "The Validity of 'Common Law' Marriages" (1973) 19 *McGill Law Review* 577, 581–3.
[227] *Kuklycz*, *supra* n 154, 52–3; see also *Quick*, *supra* n 2, 226–9, 238D, 240–1.
[228] *Savenis*, *supra* n 154, 311; *Fokas*, *supra* n 152; *Jaroszonek*, *supra* n 159; *Grzybowicz*, *supra* n 152; *Dukov*, *supra* n 154.
[229] *Quick*, *supra* n 2, 226–9, 238D, 240–1; cf *Persian*, *supra* n 186, 542.
[230] *Savenis*, *supra* n 154, 310; *Jaroszonek*, *supra* n 159; cf *Fokas*, *supra* n 152; *Grzybowicz*, *supra* n 152.
[231] Cf *Dukov*, *supra* n 154.
[232] *Kuklycz*, *supra* n 154, 54.
[233] *Byrne*, *supra* n 152, 305; *Maksymec*, *supra* n 154; *Persian*, *supra* n 186, 541–2.
[234] *Katavic*, *supra* n 154; *Banh*, *supra* n 161; cf *X*, *supra* n 154, 142–4.
[235] *W*, *supra* n 208.
[236] *Ibid*, 85,119–22, 85,132, 85, 143–4.
[237] *Ibid*, 85,121. The reference to witnesses is incorrect; they were not required under English canon law: *Ussher v Ussher* [1912] 2 IR 445; cf *Hodgson*, *supra* n 152, 104; *Julian v Oo* [2001] NZFLR 1116, 1118.

> Australian courts have accepted or felt themselves obliged to accept the decision in *R v Millis* that a common law marriage was effected by the present promise of the parties to take each other as husband and wife and for that ceremony to take place in the presence of two witnesses and of an episcopally ordained minister.

However, in *Hooshmand*, the first post s 88E common law marriage case, Penny J noted that in *W v T* Fogarty J was not commenting "on the correctness or otherwise of that requirement".[238] She expressly rejected both the Victorian line of authorities and the need for an episcopally ordained minister to be present.[239] The only subsequent case to have considered the relevance of an episcopally ordained minister, *Nouri & Yavari*, was similar to *Hooshmand*, with Berman J noting there was no such requirement.[240]

(d) *A Christian marriage*

The *Hyde* definition of a Christian marriage was brought to the attention of the Supreme Court of New South Wales as early as 1867. In *Byrne*,[241] after finding no evidence on the law of Fiji where a marriage was claimed to have taken place, Stephen CJ refused to recognise a common law marriage because the union was polygamous.[242] During the spate of European refugee cases, in *Fokas* Napier CJ held that the elements of *Hyde* were essential requirements of a common law marriage.[243] He refused to make the common law marriage available to Lithuanian refugees, but considered that, when expressing their consent to marry, the parties had to agree to live as husband and wife in accordance with the *Hyde* definition of marriage.[244] The Christian marriage requirements of *Hyde* were generally not in issue in the European refugee cases as they were all marriages *ex facie ecclesiae*.[245] Even after the focus of the adjudication shifted from European to Asian refugees in the 1980s, *Fokas* and its reference to *Hyde* were still regarded as setting conditions for common law marriages.[246]

Two considerations have arisen suggesting changes to this position. First, since 1985 common law marriages are only recognised through s 88E of the Marriage Act and, to the extent that the Act provides a definition of "marriage", the common law requirements are likely to be limited by that definition. The Act

[238] *Hooshmand*, *supra* n 145, 87–684.
[239] *Ibid*, 87–684.
[240] *Nouri*, *supra* n 145, [24]; see also Directorate of Legal Research, *supra* n 1, 3.
[241] *Byrne*, *supra* n 152.
[242] *Ibid*, 305. For the submissions on *Hyde*, see *ibid*, 303.
[243] *Fokas*, *supra* n 152, 153.
[244] *Quick*, *supra* n 2, 238D; *Dukov*, *supra* n 155, 20.
[245] *Savenis*, *supra* n 154; *Fokas*, *supra* n 152; *Jaroszonek supra* n 159; *Grzybowicz supra* n 152; *Katavic*, *supra* n 155; *Maksymec*, *supra* n 154; *Dukov*, *supra* n 155; *Kuklycz*, *supra* n 154; and see *X*, *supra* n 155, 136.
[246] *X*, *supra* n 155, 136.

itself provided no definition of "marriage" until 2004, and then explicitly adopted *Hyde*'s requirement that the union had to be between a man and a woman.[247] To enable same-sex marriage within Australia, it was amended again in 2017 to define a "marriage" as "the union of 2 people".[248]

The second consideration is a likely change even before 2017 to the common law definition of marriage, and the authority of *Hyde* in Australian law. *Hyde* had been a reference point for more than common law marriage, and was used when interpreting the federal Parliament's power under the Australian Constitution to legislate for "marriage".[249] The High Court of Australia had never considered that the essential qualities of a marriage outlined in *Hyde* set the limits of federal power to legislate for marriage because polygamous unions contracted outside Australia could be recognised when considering rights of inheritance.[250] However, *Hyde* did restrain the breadth of the federal marriage power as there were doubts whether Parliament could provide for polygamous marriages to be solemnised within Australia: a possibility, according to Windeyer J, with "absolutely no reality".[251]

In 2013 in *Commonwealth v Australian Capital Territory*[252] (the *Same-Sex Marriage Case*) the question arose whether federal marriage power could extend to legislating for same-sex marriage – and so loosen the constraints of *Hyde* on the marriage power. If federal power did extend even further beyond *Hyde*, federal law could then prohibit (or allow) same-sex marriage throughout Australia. The High Court unanimously held that, in the Australian Constitution, "marriage" means "a consensual union formed between natural persons in accordance with legally prescribed requirements".[253] In reaching that conclusion, the authority of *Hyde* was dismantled. The Court referred to the existing position that the federal marriage power was broader than *Hyde*,[254] English recognition after *Hyde* of non-Christian marriages,[255] the common law's partial recognition of polygamous marriages,[256] the international diversity of the legal nature of marriage,[257] and recent recognition in other countries of same-sex marriage.[258] *Hyde* had an historically contingent quality and had been superseded.

[247]Marriage Amendment Act 2004 (Cth), inserting Marriage Act, ss 5(1), 88EA.
[248]Marriage Amendment (Definition and Religious Freedoms Act) Act 2017 (Cth), sch 1, amending Marriage Act, s 5(1) and repealing s 88EA.
[249]Constitution (Cth), s 51(xxi).
[250]*Attorney-General (Victoria) v Commonwealth* (1962) 107 CLR 529, 577.
[251]*Ibid*, 577.
[252](2013) 250 CLR 441.
[253]*Same-Sex Marriage Case*, *supra* n 252; cf the position in Canada, where the Supreme Court held that "[m]arriage, for civil purposes, is the lawful union of two persons to the exclusion of all others": *Reference re Same Sex Marriage* [2004] 3 SCR 698, 705, 706.
[254]*Same-Sex Marriage Case*, *supra* n 252, 457–8.
[255]*Ibid*, 461.
[256]*Ibid*, 461.
[257]*Ibid*, 462.
[258]*Ibid*, 462.

A likely effect of the *Same-Sex Marriage Case* is that *Hyde* is also redundant for setting requirements for common law marriages. It has not been mentioned in a matrimonial matter since the *Same-Sex Marriage Case* was decided. In analysing *Hyde*'s contingent quality, the High Court relied on common law developments,[259] and concluded not only that this affected federal constitutional power but also the "juristic concept of 'marriage'".[260] In light of the Court's analysis of common law precedent, and the emerging idea that Australian common law must conform to constitutional imperatives,[261] it seems unlikely that matrimonial courts would insist on the conditions of a Christian marriage in common law adjudication. In Canada, *Hyde* had similarly governed the conditions of common law marriage,[262] but same-sex unions are now explicitly included in the common law definition of marriage.[263]

This gives rise to the possibility that same-sex unions contracted outside Australia could be recognised as common law marriages – so long as a precondition allowing an exception to the *lex loci* was satisfied.[264] Although unlikely, another possibility is that the *Same-Sex Marriage Case*'s reference to "natural persons" might upset the longstanding position that polygamous unions could not be recognised as common law marriages.[265] In 2013, the Irish Supreme Court questioned whether a common law marriage could be recognised when the union was actually or potentially polygamous.[266] The Canadian recasting of *Hyde* was also limited to "the lawful union of two persons",[267] and did not open the question of polygamy in the way that the *Same-Sex Marriage Case* does.[268] Regardless of the *Same-Sex Marriage Case*, the 2017 amendments to the Marriage Act define "marriage" as "the union of 2 people".[269] As the recognition of common law marriages is mediated through s 88E, it is likely that they must conform to the Act's definition of marriage as monogamous.

[259]*Ibid*, 461.
[260]*Ibid*, 461; also 455, 459, 462.
[261]*Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
[262]*Cote*, *supra* n 206, [18]; *Louis*, *supra* n 4, [84]; *Keddie*, *supra* n 4, [40].
[263]*Halpern v Toronto (City)* (2003) 65 OR (3d) 161; *EGALE Canada Inc v Canada (Attorney General)* (2003) 13 BCLR (4th) 1; *Dunbar v Yukon* 2004 YKSC 54; *NW v Canada (Attorney General)* (2004) 255 Sask R 298.
[264]Ní Shúillebháin, *supra* n 60, 217.
[265]*Byrne*, *supra* n 203, 305.
[266]*Hassan*, *supra* n 4, 217; and see also *Conlon v Mohamed* [1987] ILRM 172, 179. Cf *Hassan v Minister for Justice, Equality and Law Reform* [2010] IEHC 426 [16]-[17]; *Hamza v Minister for Justice, Equality and Law Reform* [2010] IEHC 427, [27]-[28].
[267]*Reference re Same Sex Marriage*, *supra* n 253, 705, 706.
[268]See also *Austin v Goerz* (2007) 74 BCLR (4th) 39, [39].
[269]Marriage Act, s 5(1).

D. Conclusion: Confusion and purpose

The common law marriage is a curiosity in private international law, but in Australia has become "curiouser and curiouser". As recently as 1998, a federal appellate court in *W v T* gave lengthy unanimous consideration to the development of the common law marriage from the medieval canon law to its reception in Australian adjudication.[270] Soon after, *W v T* was applied in *Hooshmand*,[271] but has since been ignored. As the post s 88E adjudication suggests, it is possible now that no remnant of the canon law remains in the common law marriage in Australia. As we have shown, the law has evolved and, to some extent, Australian common law has evolved differently to its evolution elsewhere in the Commonwealth and Ireland. The problem in Australia is that it is unclear what the common law marriage has evolved to. Given the significant uncertainty that the adjudication has created, it is preferable that Australian law had at least remained aligned with the established position of English law that party consent is central to the recognition of a common law marriage.[272]

There are two large issues giving rise to the uncertainty: the likely demolition in the *Same-Sex Marriage Case* of the requirement that the marriage be heterosexual;[273] and the vagaries brought by the post s 88E adjudication after *Hooshmand*. The *Same-Sex Marriage Case* certainly takes the common law marriage far from the canon law's insistence that marriage is a heterosexual relationship.[274] Although the position in England on the possibility of recognising a same-sex union as a common law marriage is unresolved,[275] the redefinition of "the juristic conception of marriage" in Australia (and Canada) as being between "persons" is more explicit and it is close-to-inconceivable that same-sex unions might not qualify.[276] Even so, the *Same-Sex Marriage Case* does not raise as many doubts about the requirements of a common law marriage as the recent adjudication does. These cases, decided inside Article 13 of the Marriage Validity Convention, arguably justify the UK Law Commissions' reservations about the Convention.[277] They have some glaring errors. In *Nygh* and *Lin*, the judges showed no awareness of any of the earlier requirements of a common law

[270] Text to nn 208–210, 235–237.
[271] *Hooshmand*, *supra* n 145.
[272] Text to nn 88–91.
[273] Text to nn 252–264.
[274] Although some churches have permitted the solemnisation of same-sex marriages, this is not the case in the canon law of the Church of England or the Anglican Church of Australia – which inherited English canon law for its internal purposes: see Mark Hill, *Ecclesiastical Law* (Oxford University Press, 4th edn, 2018), 151; Marriage (Same-Sex Couples) Act 2013 (UK), s 1(4); Anglican Church of Australia General Synod, *Resolution 48/17: Marriage, Same-Sex Marriage and the Blessings of Same Sex Relationships* (2017).
[275] Text to nn 109–112.
[276] Text to nn 249–264.
[277] Text to n 141.

marriage. In *Lin*, Dawe J thought that *Nygh* had involved a ceremony in a refugee camp when it was really a case of wedding tourism in Thailand.[278] As *Nygh*, *Lin* and possibly *Nouri* were decided without any recognition of the numerous appellate decisions on common law marriage in Australia,[279] it may be open to treat them as having been decided *per incuriam*. However, these cases set a trend in common law marriage cases. All assume an understanding of s 88E that ignores the complete span of "the common law rules of private international law". None considers any of the requirements of common law marriage. In circumstances where conscientious objection had never previously justified ignoring the *lex loci*,[280] allowing it to do so in a case of wedding tourism like *Nygh* is extremely hard to justify. To conclude that the union in *Lin* was a common law marriage because the "event" was "meaningful" brings profound vagaries to the law.[281] Just as concerning, the courts after *Hooshmand* have not indicated the need for *verba de praesenti* or *de futuro cum copulâ*. This led in *Lin* to Dawe J's overlooking the need for evidence of the parties' consent to marry, taking common law marriage adjudication even further from its origins than the *Same-Sex Marriage Case* did. The requirement of consent is not only the centrepiece of canon law marriage, it is definitive in the Marriage Act as a "marriage" must be "voluntarily entered".[282] The courts have instead given priority to the principle of *favor matrimonii* and, in doing so, have not set any standards, let alone rules or conditions, which confine the judge's decision to uphold a marriage.

Further, this adjudication may serve no real purpose. In *Lin* and *Nouri,* the marriages were already recognised for reasons other than by resort to the common law marriage.[283] But more significantly, in all three cases a marriage was recognised only to give the court jurisdiction to grant an uncontested divorce.[284] The couples in these cases just did not want to be married. In *Nouri* alone did the judge need to approve secondary relief relating to parenting,[285] but in Australia a marriage does not have to exist before a couple can obtain relief relating to children, property or maintenance.[286] These are also available

[278]*Lin*, *supra* n 145, [52].
[279]*Hodgson*, *supra* 152; *Byrne*, *supra* n 152; *Quick*, *supra* n 2; *Banh*, *supra* n 161; *W*, *supra* n 208.
[280]Text to nn 47, 153–164, 161–164.
[281]*Lin*, *supra* n 145, [69].
[282]Marriage Act, s 5(1).
[283]In *Lin*, *supra* n 145, [60]-[70] because of the presumption of marriage on the basis of a long period of cohabitation and, in *Nouri*, *supra* n 145, [34] because the marriage was valid under the *lex loci celebrationis*.
[284]*Nygh*, *supra* n 145, [1], [35]; *Lin*, *supra* n 145, [72]; *Nouri*, *supra* n 145, [35].
[285]*Nouri*, *supra* n 145, [35].
[286]Family Law Act 1975 (Cth), ss 39A-39G, 60HA, 65C, 90RA, 90WA, 90XC, 90XHA, 90YA-90YZY.

to couples in de facto relationships.[287] A couple's marital status also does not affect their children's rights of inheritance.[288] And while cultural norms of respectability may motivate a party to have a subsequent period of cohabitation recognised as a marriage, this should not come by introducing the significant uncertainties that now surround Australian marriage law.[289]

The common law marriage *can* serve a useful purpose in Australian law, provided that its requirements are limited to party consent proved by *verba de praesenti* or *de futuro* with subsequent sexual relations.

A law of second resort is needed.[290] True, internationally mobile couples are less likely to confront insuperable difficulties that prevent them from marrying. However, the Asian refugee cases remind us that there remain numerous instances where couples might in practice be subject to permanent incapacities to marry. As noted earlier, when the usual governing law is not applied in cross-border proceedings, the *lex fori* is often applied by default.[291] This is sometimes justified on the ground that the application of the governing law is contrary to public policy, although in Australia that is more in theory than in practice.[292] The problem with using the *lex fori* as the law of second resort is that, for Australia, it gives almost no opportunity for the recognition of a marriage unless the formal requirements of the Marriage Act are ignored. Although in *Nygh* Faulks DCJ purported to apply Australian marriage law to recognise the Thai marriage, he only did so by ignoring the need for a celebrant authorised under Australian law.[293] It is extremely unlikely that a foreign marriage would ever be conducted in accordance with those Australian formalities and, therefore, that the *lex fori,* as a whole, could serve as a meaningful law of second resort.

David Fine proposed that the law of second resort should be the *lex domicilii*.[294] This has a logic, preserving the current bifurcated structure of common law choice of law rules for marriage. However, it also does not adequately account for the complication that, in many cases, the *lex loci* and *lex domicilii* are identical. It is almost certain that this was the situation in *Hooshmand*, *Lin*

[287] *Ibid*, s 4AA.

[288] Parentage Act 2004 (ACT), s 38; Status of Children Act 1996 (NSW), s 5; Status of Children Act 1978 (NT), s 4; Status of Children Act 1978 (Qld), s 3; Family Relationships Act 1975 (SA), s 6; Status of Children Act 1974 (Tas), s 3; Status of Children Act 1974 (Vic), s 3; Wills Act 1970 (WA), s 31.

[289] Ní Shúillebháin, *supra* n 60, 213, 216.

[290] Text to nn 60–66, 195–200.

[291] Text to nn 109–112.

[292] *El Oueik v El Oueik* [(1977) 3 Fam LR 11,351 and *Basri & Ahmed* [2016] FamCA 838 are the only instances in Australia of public policy being invoked to refuse recognition of a foreign law or judgment. Both involved decrees of divorce. See Mortensen, Garnett and Keyes, *supra* n 1, 289–96, 440–1; Davies, Bell, Brereton and Douglas, *supra* n 1, 452–8, 660–4.

[293] Text to nn 149–150.

[294] Fine, *supra* n 60, 62–5.

and Berman J's alternative approach to *Nouri* that a common law marriage existed.[295] In all, a religious or political incapacity leading to the failure of the *lex loci* would also lead to invalidity under the *lex domicilii.* Fine's solution in this situation is to apply the requirements of the common law marriage – meaning *verba de praesenti* – as a law of third resort.[296] In our view, this also makes any reference to the *lex domicilii* superfluous and overcomplicating. If proof of consent, through the parties' spoken or written words, is necessary and ultimately sufficient to validate a marriage, there is no need for the court to give a momentary nod to the *lex domicilii* when passing on to the common law marriage. In this respect, it is possible to consider the requirement of the voluntary consent of the parties to a marriage as fundamental public policy in Australian marriage law. The High Court defined marriage in the *Same-Sex Marriage Case* as "a consensual union".[297] Also, by incorporating the Marriage Act's definition of marriage, s 88E itself requires the marriage to be "voluntary entered" if it is to be recognised contrary to the *lex loci*. In that respect, Australian law has the resources in appellate court authority to restore insuperable difficulty as the standard precondition for invoking a common law marriage and the requirement of party consent as its essential quality – and to replace its present amorphous condition with certainty. It also returns the law to Russell LJ's insight in *Preston* that, stripped of its formal requirements, the essential quality of a marriage is party consent – and so would re-align Australian and English law.[298] Although the *Same-Sex Marriage Case* suggests that much of the canon law marriage has already been abandoned, the need for proof of party consent should be the baseline of the recognition of any marriage. "For it is a clear Case, That without Consent there cannot be any Matrimony".[299]

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[295]Text to n 157.
[296]*Ibid*, 65; see also *Banh*, *supra* n 161, 649.
[297]Text to n 253.
[298]*Preston*, *supra* n 35, 427; *Tousi*, *supra* n 59, 125.
[299]Swinburne, *supra* n 6, 51.