IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **NO M106 OF 2017**

BETWEEN: **AUSTRALIAN MARRIAGE EQUALITY LTD**
First Plaintiff

SENATOR JANET RICE
Second Plaintiff

AND: **MINISTER FOR FINANCE MATHIAS CORMANN**
First Defendant

AUSTRALIAN STATISTICIAN
Second Defendant

SUBMISSIONS OF THE FIRST DEFENDANT AND THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

Filed on behalf of the First Defendant and the Attorney-General of the Commonwealth by:

The Australian Government Solicitor
4 National Circuit
Barton ACT 2600
DX 5678 Canberra

Date of this document: 30 August 2017
Contact: Niamh Lenagh-Maguire / Gavin Loughton
File ref: 17007223
Telephone: 02 6253 7557 / 02 6253 7203
Lawyer's E-mail:
niamh.lenagh-maguire@ags.gov.au /
gavin.loughton@ags.gov.au
Facsimile: 02 6253 7303

PART I PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

PART II ISSUES

2. The Special Case sets out the background and the questions of law that arise.

PART III SECTION 78B NOTICE

3. Notice has been provided to the Attorneys-General under s 78B of the *Judiciary Act 1903* (Cth). (SCB 26–28). The First Defendant and the Attorney-General (**Commonwealth**) have filed a further s 78B notice with these submissions.

PART IV FACTS

4. The facts stated at [4]–[35] in the Plaintiffs' Submissions dated 23 August 2017 (**PS**) require the following matters to be stated by way of supplementation, emphasis or correction.

5. First, on 13 September 2016 the Government announced that its policy was that the issue of whether the law should be changed to allow same-sex couples to marry should be the subject of a compulsory attendance plebiscite to be conducted by the Australian Electoral Commission (**AEC**).[1] The Bill providing for the compulsory attendance plebiscite was defeated in the Senate in November 2016.[2]

6. Second, from about March 2017 there were suggestions by some Ministers of alternative means by which the Government's policy of holding a plebiscite on the issue of same-sex marriage might be pursued. The Minister for Immigration was asked about, and referred in general terms, to the option of a postal plebiscite.[3] Those suggestions did not represent Government policy. The evidence of the Finance Minister is that, so far as he was aware, none of those suggestions involved the Australian Bureau of Statistics (**ABS**) or the conduct of a postal survey on same-sex marriage.[4]

7. Third, the most that can be drawn from the Freedom of Information Request and the response referred to at PS [12]–[16] is that between 7 November 2016 and 11 July 2017 there were communications between the Department of Finance and the Attorney General's Department in relation to a "postal vote option for the plebiscite". Two of those communications were emails with attached Ministerial submissions on matters that were, at the time, *proposed* to be submitted to Cabinet for its consideration and one of which was an email forwarding another email from an officer of the AEC to an officer in the Department of Finance.[5] Contrary to PS [22], no inference is available as

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1 Special Case (**SC**) [17]; SCB p 150.

2 SC [20].

3 SCB, pp 185, 196.

4 SCB p 305 [8].

5 SCB pp 204–209 and 174–175.

to the nature of the "postal vote option for a plebiscite" the subject of the communications (other than that it did not involve the ABS), the content of any opinion or advice given by the Attorney General Department to the Department of Finance or whether any "postal vote opinion for a plebiscite" was considered in Cabinet.

8. Fourth, at the time of the 2017 Budget in May 2017 it remained the Government's policy that the issue of same-sex marriage should be the subject of a compulsory attendance plebiscite to be conducted by the AEC. For that reason, it was identified as a fiscal risk in the Budget papers, stating that "the Australian Government will provide $170 million" to conduct that plebiscite "as soon as the necessary legislation is enacted by the Parliament".[6] The Finance Minister's evidence is that he was unaware at this time of any proposal that the ABS should conduct any postal survey on the issue of same-sex marriage.[7]

9. Fifth, on 8 August 2017 the Finance Minister announced the Government's decision to put the Bill for a compulsory plebiscite on the issue of same-sex marriage to the Senate again and that Cabinet had decided the previous day that, if the Bill failed to pass, the Australian Statistician and ABS would be directed to conduct a survey of the views of Australian electors on the question of whether the law should be changed to allow same-sex couples to marry. This was the first time it was Government policy for the ABS to conduct a postal survey on the issue of same-sex marriage.[8]

PART V APPLICABLE PROVISIONS

10. The Commonwealth accepts the plaintiffs' statement of the applicable constitutional and legislative provisions, and annexes some further applicable legislative provisions.

PART VI ARGUMENT

The special character of Appropriation Acts

11. The plaintiffs' case involves an attack on the Advance to the Finance Minister Determination (No 1 of 2017–2018) (**the Determination**), which was made pursuant to s 10 of the *Appropriation Act (No 1) 2017–2018* (SCB p 41, ASOC [42]) (**2017–2018 Act**). The sole effect of the Determination was to cause the 2017-2018 Act to have effect as if Sch 1 (which specifies the amount appropriated to the ABS) were amended to make provision for the expenditure referred to in the Determination.

12. The plaintiffs make no allegation that the ABS lacks authority to expend any funds that were validly appropriated.[9] Their challenge is to whether funds have actually been

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6 SCB p 229. The statement at PS [23] and fn 32 to the effect that in March 2017 the Finance Minister was "aware that legislation authorising a plebiscite was unlikely to pass the Senate" is not supported by the reference given in support of it; namely, a record of interview on 16 February 2017 where it is put to the Finance Minister, but he does not accept, that "[t]here is no chance of the plebiscite getting through the Senate ..." (SCB p 172).

7 SCB p 306 [9].

8 SCB pp 244–245. See also Finance Minister's affidavit: SCB p 306 [10].

9 The relief sought in respect of the expenditure of money (SCB p 42, ASOC [43(e)] is expressed to be in the alternative, and the only pleaded basis for that relief is that the expenditure is not authorised by the relevant departmental item as amended by the Determination.

appropriated for use in conducting the Australian Marriage Law Postal Survey (**AMLPS**). As such, the plaintiffs can succeed only if they overcome the considerable obstacles that this Court has recognised confront attempts to challenge such matters. Those obstacles, which are inter-related, arise particularly from the ordinary principles concerning standing and justiciability when applied to legislation with the special character of an Appropriation Act. While neither s 10 of the 2017–2018 Act, nor the Determination, actually appropriates any funds (that work being done by s 12), an attack on the Determination is even weaker than an attack on an appropriation, for the legal effect of the Determination is not even to appropriate funds, but merely to allocate them to a particular entity (and, perhaps, outcome), as explained in the Wilkie submissions at [36].

13. Given the character of the plaintiffs' case as an attack on steps taken under an Appropriation Act, the following themes will reoccur throughout these submissions.

14. First, Appropriation Acts are a "rara avis in the world of statutes",[10] because an appropriation has no effect on the rights or duties of citizens. An appropriation confers no power to spend the appropriated funds.[11] It does no more than "earmark" the money, "disclos[ing] that the Parliament assents to the expenditure of the moneys appropriated for the purposes stated in the appropriation".[12] As such, appropriations are fiscal rather than regulatory in character.[13] An appropriation does not "confer rights or privileges nor impose duties or obligations" and is "not in any way directed to the citizens of the Commonwealth".[14] That has long been recognised as creating a considerable barrier to private standing to challenge an appropriation.[15]

15. Second, consistently with the limited role and nature of an appropriation, the provisions of the Constitution concerned with appropriations regulate the relationship between the Parliament and the Executive (ss 56, 81 and 83) and between the Houses of Parliament (ss 53 and 54) in relation to proposed appropriations and in matters of finance.[16] These are not matters that lend themselves to supervision by the courts.

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[10] *Victoria v Commonwealth* (1975) 134 CLR 338 (***AAP Case***) at 393 (Mason J); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 (***Pape***) at 80 [202] (Gummow, Crennan and Bell JJ).

[11] *Pape* (2009) 238 CLR 1 at 72–73 [176]–[178] (Gummow, Crennan and Bell JJ).

[12] *AAP Case* (1975) 134 CLR 338 at 411 (Jacobs J), approved in *Pape* (2009) 238 CLR 1 at 73 [177] (Gummow, Crennan and Bell JJ), 211 [602] (Heydon J, dissenting). See also *New South Wales v Commonwealth* (1908) 7 CLR 179 at 200 (Isaacs J), describing an appropriation as "legally segregating" funds from the general mass of the Consolidated Revenue Fund.

[13] *AAP Case* (1975) 134 CLR 338 at386–387 (Stephen J), 392–393 (Mason J); *Combet v Commonwealth* (2005) 224 CLR 494 (***Combet***) at 572–573 [149] (Gummow, Hayne, Callinan and Heydon JJ (plurality)); *Commonwealth v Colonial Ammunition Co Ltd* (1924) 34 CLR 198 at 220–221 (Isaacs and Rich JJ); *Pape* (2009) 238 CLR 1 at 104 [292], 111–112 [317] (Hayne and Kiefel JJ, dissenting).

[14] *AAP Case* (1975) 134 CLR 338 at 386–387 (Stephen J), 393 (Mason J), 411 (Jacobs J); *Pape* (2009) 238 CLR 1 at 73 [177] (Gummow, Crennan and Bell JJ); *Williams v Commonwealth (No 1)* (2012) 248 CLR 156 (***Williams No 1***) at 248 [191] (Hayne J).

[15] See eg, *AAP Case* (1975) 134 CLR 338 at 390 (Stephen J), 394 (Mason J). At 410, Jacobs J held an appropriation could not be the subject of legal challenge at all; *Davis v Commonwealth* (1988) 166 CLR 79 at 95–96 (Mason CJ, Deane and Gaudron JJ).

[16] *Combet* (2005) 224 CLR 494 at 569–570 [140]–[141] (plurality).

16. Third, while Parliament exercises "guardianship" over the Commonwealth's finances, "the manner of exercising that guardianship, within the relevant constitutional limits, is a matter for Parliament". It has long been common for Parliament to state the purposes of appropriations in such broad and general terms as to be inapt for curial assessment. The chief means of limiting expenditures by departments of State in annual appropriations Acts has been to specify the amount that may be spent, rather than further define the purposes or activities for which it may be spent. There is no constitutional inhibition in Parliament adopting this approach.[17]

17. Fourth, while courts have a limited role in policing appropriations, vigorous scrutiny of appropriations emerges from parliamentary processes (including estimates committees) and the audit activities envisaged by s 97 of the Constitution (carried on, since just after Federation, by the Auditor-General).[18]

18. Finally, the limited role of courts in appropriations is confirmed by the difficulty, if not "practical impossibility", which has been observed in fashioning relief against allegedly illegitimate appropriations.[19]

Question 1: Standing

19. The plaintiffs cannot establish standing to challenge the Determination simply by demonstrating that they might be affected by the conduct of the AMLPS. Even if they would have a special interest in challenging expenditure on the AMLPS (which is doubtful, but unnecessary to decide), that cannot be equated to an interest in challenging the Determination. In order to challenge the Determination, the plaintiffs would need to demonstrate an interest in impugning a step that has even less legal effect than an appropriation (although it is closely related to it). Such an interest is necessary, because the interest that gives standing must relate to the relief claimed.[20] But the plaintiff have no such interest, for the Determination has no effect on their rights, and they have no interest in money standing to the credit of the Consolidated Revenue Fund.[21]

20. The conclusion that the plaintiffs do not have a sufficient interest to challenge the Determination is unsurprising. In the *AAP Case*, Stephen J explained that the effect of

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[17] *Combet* (2005) 224 CLR 494 at 522–523 [5]–[7] and [26] (Gleeson CJ), 576–577 [159]–[161] (plurality). See also *Pape* (2009) 238 CLR 1 at 78 [197] (Gummow, Crennan and Bell JJ), 105 [296] (Hayne and Kiefel JJ); *Williams No 1* (2012) 248 CLR 156 at 261 [222] (Hayne J).

[18] *Combet* (2005) 224 CLR 494 at 523 [7] (Gleeson CJ), 569 [140] (plurality). The Finance Minister tables an annual report in Parliament advising on the occasions when the Advance to the Finance Minister has been used and an Independent Review Report is prepared by the Australian National Audit Office: see *Report on Advances provided under the annual Appropriations Acts for the year ended 30 June 2016*: <http://www.finance.gov.au/sites/default/files/report-on-advances-provided-under-the-annual-appropriation-acts-2015-2016.pdf>

[19] *AAP Case* (1975) 134 CLR 338 at 412 (Jacobs J); *Combet* (2005) 224 CLR 494 at 578–579 [165] (plurality).

[20] *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493 at 511 (Aitken J); *Williams No 1* (2012) 248 CLR 156 at 225 [117] (Gummow and Bell JJ, French CJ agreeing with this part of the reasons at 193 [39]).

[21] *AAP Case* (1975) 134 CLR 338 at 402 (Mason J).

an appropriation was so limited (being a matter internal to the polity) that even a State and State Attorney-General lacked standing to challenge it.[22]

21. The second plaintiff asserts a particular interest as a Senator (PS [41]), calling in aid *Brown v West* (1990) 169 CLR 195 and the dissenting opinions of McHugh and Kirby JJ in *Combet*.[23] It is true that the plaintiff in *Brown v West* was a member of the House of Representatives, but he challenged an increase to the postage entitlement *for parliamentarians* such that his standing was rooted in his "interest in knowing whether or not he is entitled to a supplementary allowance",[24] not merely in his status as a parliamentarian. Further, the challenge was to whether there was a residual executive power to increase the allowance (ie, a power to spend), not to the appropriation. As for *Combet*, the majority did not address the standing question, in circumstances where the plaintiffs failed on the substantive grounds, but they said nothing to cast doubt on the Commonwealth's argument. Further, the dissenting opinion of McHugh J, even on its own terms, does not assist the second plaintiff. McHugh J said that Ms Roxon "*as the shadow Attorney-General of the Commonwealth* has sufficient interest ..."[25] and it is not clear that his Honour would have accorded standing to all parliamentarians.[26]

22. The Court should not recognise a particular interest or special role for parliamentarians sounding in standing before the courts. Members of Parliament exercise, *as representatives*, the sovereign power residing in the people.[27] The interest of parliamentarians in ensuring spending in accordance with law is no different from the interest of those whom they represent.[28] Such special status as they might have inheres in their privileges *as representatives*: they can vote and otherwise participate in Parliament and political life. They can participate in decisions in Parliament as to the appropriation of funds, and the authorisation of expenditure by the Executive. That role does not translate into any entitlement to roam the courts enforcing compliance with the law (fiscal or otherwise) or challenging decisions where their vote in Parliament either was not required or did not carry the day. It may be added that the second plaintiff, as a Senator, has an even smaller interest in fiscal laws than a member of the House of Representatives, owing to the relevantly limited powers and responsibilities of the Senate in relation to fiscal laws.

23. The second plaintiff submits that her standing is improved by the circumstance that "the claim in part is that the expenditure was not 'unforeseen' because legislation for a plebiscite was defeated in the Senate" (PS [41]). Section 16(3) of the *Parliamentary Privileges Act 1987* (Cth) does not permit the plaintiffs to rely upon the defeat of a Bill,

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[22] *AAP Case* (1975) 134 CLR 338 at 390. Justice Jacobs held an appropriation could not be the subject of legal challenge at all, as it was "a matter internal to the Government": at 410.

[23] (2005) 224 CLR 494 at 556–557 [97], 620 [308] (Kirby J).

[24] *Brown v West* (1990) 169 CLR 195 at 212 (the Court).

[25] (2005) 224 CLR 494 at 556 [96].

[26] See *Perrett v Attorney-General (Cth)* (2015) 232 FCR 467 at 485 [38] (Dowsett J).

[27] *Unions NSW v New South Wales* (2013) 252 CLR 530 at 548 [17] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

[28] *Robinson v South East Queensland Indigenous Regional Council of the Aboriginal and Torres Strait Islander Commission* (1996) 70 FCR 212 at 226 (Drummond J); *Perrett v Attorney-General (Cth)* (2015) 232 FCR 467 at 485–486 [40] (Dowsett J).

which obviously formed part of proceedings in Parliament, for the purpose of drawing an inference as to whether subsequent expenditure was or was not unforeseen. That being so, it cannot assist the second plaintiff's standing argument.

24. The foregoing is sufficient to deny both plaintiffs standing to seek the relief they claim. In any event, however, neither plaintiff has demonstrated the requisite special interest even in challenging the *conduct of*, and *expenditure* upon, the AMLPS (if that were relevant, which it is not given the confined nature of their challenge).

25. The first plaintiff is an advocacy group. The Commonwealth adopts its submissions in relation to the third plaintiff in the Wilkie Proceeding at [11]. The objects of the group cannot suffice. Nor is there evidence of sufficiently extensive activities. The first plaintiff's participation in *Commonwealth v ACT* (2013) 250 CLR 441 as *amicus curiae* bespeaks only its ability in that case to offer submissions of assistance, and distinctly does not bespeak any affected interests: the discretion to hear an amicus "is exercised on a different basis from that which governs the allowance of intervention".[29] The first plaintiff's "interest" does not rise any higher than that of its supporters and members.

26. The second plaintiff, parliamentary status aside, invokes three other matters in support of her claim to standing (PS [42]). The first matter is that she will receive a survey form in the AMLPS. That is not a special interest for the reasons given in the Commonwealth's submissions in the Wilkie Proceeding at [8]. The second matter is "her activities in the Senate and on behalf of her party including activities specifically connected with LGBTIQ issues". Participating in activities "connected with" an issue — in this case, co-convening a friendship group and being a party spokesperson on LGBTIQ issues — does not generate an interest that would not otherwise exist sufficient to confer standing to challenge decisions (much less matters relating to appropriations) connected with the same issue. The third matter is that she will be "directly affected by any future reform to the Marriage Act removing the requirement that marriage be between a man and a woman". That emphasises that her complaint concerns the operation of *existing* law. The AMLPS will have no direct consequence for future reform of the Marriage Act, and to the extent it has any indirect effect in bringing about reform of the Marriage Act, that effect could only be to change the existing law in a manner regarded by the second plaintiff as beneficial to her. To accord standing on this basis would be to allow any citizen who will be affected by a possible change in the law to challenge expenditure on activities that may inform future law reform.

Question 2: Was s 10(1)(b) enlivened?

27. Contrary to PS [56], s 10 of the 2017–2018 Act is not to be stigmatized with the pejorative label "Henry VIII clause" or seen as a "return to the executive autocracy of the Tudor monarch,"[30] thus meriting a narrow construction. As is demonstrated at [18] of the Commonwealth's submissions in the Wilkie proceedings, s 10 is a provision of a kind which, in various forms, has been in Commonwealth Appropriations Acts since

[29] *Levy v Victoria* (1997) 189 CLR 579 at 604 (Brennan CJ).

[30] *Adco Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1 at 25 [61] (Gageler J).

Federation, and which has an even longer history in Colonial parliaments and in the United Kingdom. Provisions of this kind embody a long held understanding that traditional parliamentary processes for the control of finance must contain mechanisms to provide flexibility for the Executive to meet circumstances that call for urgent expenditure which was unforeseen or overlooked. The exigencies that have inspired the plaintiffs' attack on the Determination should not obscure the well-established and uncontroversial role of provisions in the form of s 10 in the appropriation process, or lead to an interpretation of s 10 that deprives it of utility.

Urgent need for expenditure

28. The Commonwealth adopts paragraphs [37] to [42] of its submissions on the Wilkie proceeding as to the criteria for the exercise of the power conferred by s 10. The first matter of which s 10(1) requires the Finance Minister to be satisfied before a determination can be made under s 10(2) is that there is "an urgent need for expenditure". This matter can itself be broken down into two sub-elements: first, a "need" for expenditure; and, second, its character as "urgent".

29. The section is not prescriptive as to the nature of the events that might give rise to a "need" for expenditure. That "need" might be occasioned by external events, such as natural disasters. Equally, however, the need might be occasioned by a policy decision of the Government that, in its judgment, a particular social or political issue has become pressing and needs to be resolved. The Government could, for example, respond to escalating high profile violent attacks on Centrelink staff by introducing protective service officers at all Centrelink premises. The policy decision to respond in that way would create a "need" for expenditure that did not previously exist, notwithstanding that other policy responses were open, and would not have required that same expenditure. A narrow view of the "need" calling for particular expenditure would be antithetical to the nature and purpose of the power in s 10(1) of 2017–2018 Act.

30. The requirement for "urgency" may be satisfied if the "need" calling for the expenditure cannot practically await an appropriation according to the ordinary budgetary process and schedule of parliamentary appropriations. The urgency of any matter is ordinarily a matter for evaluative judgment. In s 10, that judgment is plainly reposed in the Finance Minister.

31. While it is correct to say that the requirement that the Finance Minister be satisfied that there is an "urgent need for the expenditure" is separate from the requirement that he be satisfied that it was not, or was insufficiently provided for in the Bill that became the Appropriation Act because it was unforeseen, it is not correct to suggest that those matters are always unrelated (cf PS [48]). If the "need" for the expenditure was not foreseen until shortly before the need for the expenditure arose, that circumstance would inform the requirement of "urgency" in s 10(1)(b).

Not provided for because unforeseen

32. The second matter of which s 10(1) requires the Finance Minister to be satisfied is that the expenditure was not, or was insufficiently, provided for because (relevantly) it was unforeseen until the last day in which it was practicable to provide for it in the Bill

which became the Appropriation Act before it was introduced into the House of Representatives. Three observations are relevant to that condition.

33. First, the relevant matter not provided for, or insufficiently provided for, in Sch 1 is the "expenditure" to meet the "need" of which the Finance Minister is satisfied. Where that "need" arises by reason of a decision of the Government to address and resolve a political or social issue within a given time frame and/or by a particular method, it is expenditure to meet that need which must not have been provided for (or have been insufficiently provided for) in Sch 1 of the Appropriation Act. Accordingly, to continue the example above, if the Government decided to employ protective service officers at Centrelink premises, it would not be to the point that the Government had earlier considered making a grant to the States under s 96 to secure additional protection at those premises from State police, or that it had appropriated funds to the Australian Federal Police that could have been re-deployed, because even if it had appropriated funds for those purposes, those funds would not have been available to implement the policy that the Government ultimately adopted.

34. Second, it follows from the first observation that what must be "unforeseen" at the relevant time is "the expenditure" to meet the need so identified (cf PS [54]). The definite article refers back to the phrase "urgent need for expenditure ..." in the chapeau. Therefore, what must be unforeseen is *the* expenditure to meet *the* need that has arisen. As noted at [29] above, that "need" can be a Government decision to address a social or political issue by a particular method in a particular time frame. So, to continue the example, the fact that a possible need for expenditure of *some kind* to protect Centrelink staff was foreseen is irrelevant. If the contemplated expenditure was a grant to the States to obtain the assistance of State police, but ultimately that assistance was not available, foresight of possible expenditure in the form of payment to the States is not inconsistent with the need for the expenditure to engage protective officers being unforeseen.

35. Third, the word "unforeseen" refers to the subjective foresight of the Finance Minister, being the person who is responsible for administering the 2017–2018 Act (s 3), and who must be satisfied that the need for the relevant expenditure was unforeseen (cf PS [51]). The subjective character of the provision is supported by the use of the word "unforeseen", rather than "unforeseeable".[31] Consequently, the Finance Minister's foresight of the relevant Government decisions calling for the "need for expenditure" is centrally relevant to the application of s 10(1) (cf PS [53]). It would be absurd if the fact that a person somewhere in the Government had speculated as to a possible future change of policy prevented the engagement of s 10, notwithstanding the fact that on the last day on which it was practicable to provide for expenditure in the Bill which became the 2017–2018 Act it was not Government policy to incur that expenditure, with the result that it could not rationally have been included as an item in Sch 1. Alternatively, even if it is the foresight of the "Executive government" that is required, the evidence

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[31] The Senate Standing Committee on Finance and Government Operations that made the recommendations that led to the current language specifically rejected the term "unforeseeable" on the basis that it "places too great a restriction on the use of the Advance": *Report on the Advance to the Minister for Finance* (August 1979) at [2.28].

does not establish that the "Executive government" (an imprecise term) foresaw the need for expenditure on a postal plebiscite, let alone the AMLPS.

36. In the result, and contrary to PS [55], in the present case what must have been unforeseen until after the requisite time is "the expenditure" to meet the "need" arising from the Cabinet's decision on 7 August 2017 to address the issue of whether the law should be changed to allow same-sex couples to marry by directing the ABS to conduct a survey with the results to be known no later than 15 November 2017. Earlier proposals for that issue to be addressed by a different mechanism (ie a compulsory attendance plebiscite) by a different agency (the AEC) on a different timeframe are not to the point. Even if, for example, the 2017–2018 Act had included an item appropriating funds for the AEC to conduct a compulsory attendance plebiscite, that would not have prevented an advance under s 10 to the ABS, because funds appropriated to the AEC would not have been available to the ABS to conduct the AMLPS. Foresight (whether it be of the Finance Minister or anyone else) of the possibility that the AEC may conduct a plebiscite therefore does not answer the need for the expenditure by the ABS to which the Determination under s 10 responded.

37. This is confirmed when it is recalled that Sch 1 of the 2017–2018 Act is organised by reference to appropriations for entities within portfolios. For there to be sufficient foresight of expenditure to permit provision for that expenditure to be made in Sch 1 there must, at least, be foresight of the entity that will incur that expenditure. Foresight that different expenditure may be incurred by a different entity within a different portfolio will not render the subsequent need for expenditure foreseen, because foresight of that kind would not have permitted relevant provision to be made in Sch 1 for the relevant need.

Contention that the Finance Minister collapsed the distinction between urgent expenditure and unforeseen expenditure (PS [57]–[61])

38. The allegation that the Explanatory Statement for the Determination reveals that the Finance Minister erred by collapsing the distinction between being satisfied of an "urgent need for expenditure" and that "the expenditure was unforeseen" is not pleaded in the Amended Statement of Claim, and therefore cannot properly be raised in this proceeding. Further, the submission is contrary to the unchallenged affidavit that the Finance Minister has sworn, which clearly reveals that the Finance Minister distinguished between the two matters (SCB p 307 [13]).

39. Similarly, the fact that the Finance Minister's execution of the Determination may have preceded, by a matter of hours at most, the Treasurer making the *Census and Statistics (Statistical Information) Direction 2017* (**Direction**) (referred to at PS [60]) again is not pleaded and cannot be raised. Further, the argument is devoid of merit. At the time of making the Determination on 9 August 2017, the Finance Minister was clearly aware of the Cabinet's decision on 7 August 2017 that the ABS should be directed to conduct a survey of Australian electors on the question of whether the law should be changed to allow same-sex couples to marry (SCB, p 262). In those circumstances, the proposition that an urgent need for expenditure could not arise until the Treasurer actually made the Direction is baseless.

Contention that "the expenditure" was not "unforeseen" (PS [62]–[72])

40. The submissions at PS [62]–[71] that the Determination is invalid because "the expenditure" was not "unforeseen" should be rejected.

41. First, the submission at PS [49]–[50] that the requirement in s 10(1)(b) that the expenditure is unforeseen until after the requisite time is a jurisdictional fact which must objectively exist should be rejected. That submission is contrary to the ordinary, grammatical reading of s 10(1), the terms of which expressly indicate that the power in s 10 is enlivened on the satisfaction of the Finance Minister. There is no textual foundation in the words of s 10(1) for reading it as depending, in part, on the Finance Minister's satisfaction of some matters and, in part, on the objective existence of others. The better construction of the section is that it is enlivened by the Finance Minister's satisfaction of both the matters to which the sub-section refers in a single compound sentence. The submission that the satisfaction requirement relates to both the urgency and "unforeseen" limbs is supported by the drafting history of s 10, for that was unarguably the position in relation to the precursors to the current form of s 10.[32]

42. Second, the submission proceeds from an erroneous identification of "the expenditure" that the Finance Minister must be satisfied was "unforeseen". As noted above, "the expenditure" which must be unforeseen is the expenditure to meet the "need" referred to in the chapeau. Here, that need was the need to implement the Cabinet's decision on 7 August 2017 to address the issue of whether the law should be changed to allow same-sex couples to marry by a survey to be conducted by the ABS with the results to be known no later than 15 November 2017. "[T]he expenditure" which the Finance Minister was required to be satisfied was unforeseen was expenditure to meet that "need".

43. The fact that the Government had previously had a policy of addressing the issue of whether the law should be changed to allow same-sex couples to marry by a compulsory attendance plebiscite, and reference to that policy in the Budget Papers, is not to the point (cf PS [66(a), (b) and (f)]). Foresight of *that* possible policy response logically could not have led to the inclusion of an item in Schedule 1 of the 2017–2018 Act providing funding to the ABS to conduct the AMLPS. Once the Government decided not to proceed with a compulsory attendance plebiscite, and instead to direct the ABS to undertake the AMLPS, the ABS had a "need" for "the expenditure" that was plainly unforeseen and not provided for in the 2017–2018 Act. It was clearly open to the Finance Minister to be satisfied that this condition was met.

44. Neither is it to the point that proposals for a "postal plebiscite" were raised from about March 2017 and those proposals were discussed by senior Ministers (cf PS [66(c), (d)–(e) and [68]). Proposals that have not been adopted as Government policy create no foreseen "need" for expenditure at all. This is so even adopting the definitions referred

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[32] See, for example, Division 310, Appropriation Act (No 1) 1987-1988 (Cth), which appears in the Joint Committee of Public Accounts, Report 289 "Advance to the Finance Minister" (1988), p 28. See also the letter of advice from Dennis Rose to the Secretary of the Department of Finance dated 11 December 1979, responding to the *Report on the Advance to the Finance Minister* (August 1999).

to at PS [63]; it cannot be said that unadopted proposals create a need for expenditure that is "planned" or "expected". Furthermore, the Finance Minister's uncontested evidence is that, at the time the Bill for the 2017–2018 Act was introduced into Parliament, he was unaware of any proposal that the ABS should conduct a survey in relation to same-sex marriage and he did not foresee the Government's decision on 7 August 2017 that the ABS should conduct such a survey.[33] In those circumstances, the 2017–2018 Act clearly could not have provided for expenditure on the AMLPS.

45. It follows that the alternative submission at PS [72] that the Finance Minister's satisfaction that "the expenditure" was unforeseen lacked any reasonable basis must also be rejected. In the result, Question 2 must be answered "No".

Questions 3(a) and 4(a): Justiciability

46. The plaintiffs submit that the purposes of the 2017–2018 Act are limited to purposes falling within the "ordinary annual services of the Government", and that the AMLPS does not fall within this description. This aspect of the plaintiffs' case must fail, because questions concerning whether particular expenditure is within the "ordinary annual services of the Government" are not justiciable by a court or within the scope of any matter which the Court has authority to decide.

47. Sections 53 and 54 of the Constitution refer to "proposed laws" appropriating revenue or moneys "for the ordinary annual services of the Government".[34] These provisions are concerned with the intra-mural relations of Parliament.[35] Thus, it is settled that a failure to comply with s 53 of the Constitution does not result in the invalidity of the resulting Act.[36] By parity of reasoning, s 54 must similarly be non-justiciable.

48. It is incongruous to accept, as the plaintiffs do (PS [78]), that a breach of s 54 is neither justiciable nor capable of rendering a resulting Appropriation Act invalid, but then to argue that an Appropriation Act should be construed as if there had been no such breach. It does not assist in this context to cite the general presumption that the Parliament does not intend to pass beyond constitutional bounds (PS [78]). That presumption is concerned with the constitutional validity of an Act of Parliament, and not with the intra-mural procedure for making the Act. To insist on an interpretation of an Appropriation Act that complies with ss 53 and 54 is to contend that the Court must

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[33] Finance Minister's Affidavit at [9]–[13] (SCB pp 306–207).

[34] *Combet* (2005) 224 CLR 494 at 575 [135] (plurality).

[35] *Osborne v Commonwealth* (1911) 12 CLR 321 at336, 351-352, 355–356 (O'Connor J); *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at578 (Mason CJ, Deane, Toohey and Gaudron JJ); *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vic)* (2004) 220 CLR 388 at 409 [41] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

[36] *Western Australia v Commonwealth* (1995) 183 CLR 373 at 482; *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vic)* (2004) 220 CLR 388 at 409 [41] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ); *Pape* (2009) 238 CLR 1 at 70 [163]-[165] (Gummow, Crennan and Bell JJ); *Combet* (2005) 224 CLR 494 at 575 [155] (plurality).

undertake a non-justiciable inquiry as a step in its task of statutory interpretation,[37] and also to elevate the status of ss 53 and 54 beyond intra-mural procedural requirements.

49. Further, as set out below, the expression "the ordinary annual services of the Government" has no clear or settled meaning.[38] It depends for its content on the practice of the Houses of Parliament. Issues concerning whether or not particular expenditure falls within that expression are therefore not apt for judicial resolution.

50. Contrary to the plaintiffs' submissions (PS [79]), it makes no difference that the long title to the 2017–2018 Act refers to the ordinary annual services of the Government. The long title (in the same way as "(No 1)" in the short title) does no more than signify that the Houses of Parliament treated the Bill as one appropriating money for the ordinary annual services of the Government for the purposes of ss 53 and 54 of the Constitution. It does not invite the Court to interpret the 2017-2018 Act by reference to that concept, which has no relevance beyond the internal affairs of the Parliament.

51. In *Brown v West*,[39] the Court did draw an inference from "parliamentary practice" that the expenditure in that case to supplement the postage allowance determined by the Remuneration Tribunal for parliamentarians was not expenditure which would have been authorised in an odd-numbered Supply Act. However, that was a case in which there was an express standing appropriation in the *Remuneration Tribunal Act 1973* (Cth) authorising the payment of the allowance in accordance with the determination of the Remuneration Tribunal. It was clear that the general appropriation legislation was not intended to override the limits imposed by the *Remuneration Tribunal Act 1973* (Cth).[40] Only "limited reliance"[41] was placed on parliamentary practice in the reasons of the Court in *Brown v West*, to support the obvious point that an Appropriation Act should not be read as overriding legislation specifically limiting a parliamentary entitlement.

52. In view of the above, the Court should answer Questions 3(a) and 4(a) "No".

Questions 3(b) and 4(b): The ordinary annual services of the Government

53. Questions 3(b) and 4(b) are concerned with the proper interpretation of the 2017–2018 Act and whether it appropriates money for the AMLPS. These questions do not raise any issue concerning whether the ABS has statutory authority to expend any appropriated funds. There is therefore no issue of the kind raised in the *Williams* cases in this proceeding. The issue is confined to whether there has been an appropriation of funds that extends to the AMLPS. The plaintiffs contend that there has been no such appropriation, including on the basis that the Determination can appropriate funds only for the ordinary annual services of the Government, and that the AMLPS does not fall within that category.

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[37] Thereby risking trespassing upon the anterior operation of s 53: see *Pape* (2009) 238 CLR 1 at 70 [166] (Gummow, Crennan and Bell JJ).

[38] *Combet* (2005) 224 CLR 494 at 575 [156] (plurality).

[39] (1990) 169 CLR 195 at 211.

[40] *Brown v West* (1990) 169 CLR 195 at 212 (the Court).

[41] *Combet* (2005) 224 CLR 494 at 575 [155] (plurality).

The Determination is valid even if the AMLPS is outside the ordinary annual services of the Government

54. Question 3(b) proceeds on the premise that the effect of the Finance Minister's Determination is to increase the ABS's departmental item in Sch 1 of the 2017–2018 Act by an amount that must be used for a *particular purpose*, namely for the AMLPS, which the plaintiffs argue is not within the "ordinary annual services of the Government".

55. That premise is incorrect. As explained further below, the effect of increasing the ABS's departmental item is to be understood by reference to the definition of "departmental item" in s 3 of the 2017–2018 Act. A "departmental item" is the "total amount set out in Schedule 1 in relation to a non-corporate entity under the heading 'Departmental'" (s 3). Section 7 provides that "[t]he amount specified in a departmental item for a non-corporate entity may be applied for the departmental expenditure of the entity". "Departmental expenditure" is not defined. By reason of those provisions, amounts in departmental items are not allocated to specific purposes.[42] The result is that the additional amount added to the departmental item for the ABS in accordance with the Determination is not quarantined for use only in connection with the AMLPS.

56. It follows that, even if the plaintiffs succeed in their contention that amounts appropriated to the ABS must be used for the "ordinary annual services of the Government" and that the AMLPS does not fall within that description, question 3(b) must still be answered "no". The Determination would still validly have increased the departmental item to be applied for the "departmental expenditure" of the ABS.

57. In any event, for the reasons that follow, the plaintiffs' argument that there has been no appropriation that provides for expenditure on the AMLPS should be rejected.

The AMLPS falls within the 2017–2018 Act

58. In deciding whether the funds necessary to carry out the AMLPS have been appropriated, the starting point is the text of the 2017-2018 Act.[43] That Act provides, in s 12, that the Consolidated Revenue Fund is appropriated "as necessary for the purposes of this Act". Schedule 1 to the Act sets out the "Services for which money is appropriated". Within Sch 1, amounts are appropriated for particular "entities" including (relevantly) "non-corporate entities". Amounts are appropriated either for "departmental" or "administered" items. An administered item is the amount set out in Sch 1 opposite an "outcome" for a non-corporate entity under the heading "Administered" (s 3). These amounts may be applied "for expenditure for the purpose of contributing to achieving that outcome" (s 8(1)).

59. A "departmental item" is the "total amount set out in Schedule 1 in relation to a non-corporate entity under the heading "Departmental" (s 3). In *Combet*, this Court held that, in contrast to administered items, the authority to apply amounts listed as

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[42] *Combet* (2005) 224 CLR 494 at 563–9 (plurality). See also the note under the definition of "departmental item" in s 3 of the 2017–2018 Act.

[43] *Combet* (2005) 224 CLR 494 at 521 [4] (Gleeson CJ), 563 [119], 567 [135] (plurality).

departmental items is not limited to achieving specified "outcomes". Instead, the amount specified in a departmental item for a non-corporate entity may be applied for the "departmental expenditure" of the entity (s 7).[44]

60. Like most statutory non-corporate Commonwealth entities, the ABS has only a "departmental item" in Schedule 1. Non-corporate Commonwealth entities usually have only departmental items, because their expenditure is confined to meeting expenses they incur in discharging their statutory functions.[45] However, notwithstanding the absence of any administered item for the ABS, Schedule 1 states an "outcome" for the ABS as follows:

> "Decisions on important matters made by governments, business and the broader community are informed by objective, relevant and trusted official statistics produced through the collection and integration of data, its analysis, and the provision of statistical information".

61. *Combet* establishes that an outcome for a departmental item may be of assistance in understanding what "departmental expenditure" can be engaged in by the ABS, but that such an outcome is not controlling. However, it is submitted that it is plain that the AMLPS falls squarely within the above outcome. Indeed, the plaintiffs have not submitted otherwise. They appear to contend that, even assuming expenditure on the AMLPS is *within* the outcome, such expenditure nevertheless is not "departmental expenditure" within s 7 of the 2017–2018 Act because it is not for the ordinary annual services of the Government.

62. That submission must be rejected. *Combet* having accepted that expenditure that falls *outside* an outcome specified for a "Departmental item" may nevertheless constitute "departmental expenditure", it is most unlikely that expenditure that falls *within* such an outcome would not constitute "departmental expenditure" within the meaning of s 7. That is particularly so given that appropriations for departmental expenditure should not be narrowly construed, the plurality observing that "[m]aking an appropriation for a departmental item that may be applied only for an entity's departmental expenditure (not otherwise specified or identified) does not represent any radical departure from previous federal parliamentary practice."[46]

63. The conclusion that the AMLPS falls within the departmental expenses of the ABS is supported by the definition of "departmental items" in the Portfolio Budget Statements "User Guide" to which the Court referred in *Combet*.[47] It stated:

> "departmental items" are:
>
> "Assets, liabilities, revenues and expenses in relation to an agency or authority that are controlled by the agency. Departmental expenses include employee and

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[44] *Combet* (2005) 224 CLR 494 at 529 [26] (Gleeson CJ), 565–566 [123]– [131] (plurality).

[45] The relatively few statutory entities that have administered items as well as departmental items generally have functions which include making grants of money to persons (see eg, the National Health and Medical Research Council).

[46] *Combet* (2005) 224 CLR 494 at 576 [158] (plurality).

[47] *Combet* (2005) 224 CLR 494 at 576 [158] (plurality).

supplier expenses and other administrative costs, which are incurred by the agency in providing its goods and services." (emphasis added)

64. The Explanatory Memorandum to the Bill that became the 2017–2018 Act explained the meaning of "departmental items" in comparable terms.[48] That definition confirms that "departmental expenditure" includes, at the very least, expenditure necessary to carry out an entity's statutory functions.

65. As is addressed in the next section of these submissions, expenditure on the AMLPS is expenditure to carry out the statutory functions of the Australian Statistician and the ABS. The plaintiffs in this proceeding (unlike the Wilkie proceeding) do not contend otherwise. Expenditure to carry out the AMLPS must therefore be assumed to be for the statutory purposes of the ABS. That, in itself, is enough to make it "departmental expenditure" within the appropriation made by s 12 of the 2017-2018 Act, read with s 7 and Sch 1.

Expenditure on the AMLPS is to carry out statutory functions of the ABS

66. Section 5 of the *Australian Bureau of Statistics Act 1975* (**ABS Act**) establishes a Bureau to be known as the Australian Bureau of Statistics, and provides that there shall be an Australian Statistician who shall control the operations of the Bureau and have such other functions, powers and duties as are conferred or imposed upon the Statistician by or under any Act. One such function or duty is conferred by s 9(1)(b) of the *Census and Statistics Act 1905* (Cth) (**Statistics Act**). By that provision, the Statistician shall, if the Minister so directs by notice in writing, collect such statistical information in relation to matters prescribed for the purposes of s 9 as is specified in the notice. This function is not new. Section 16 of the Statistics Act, as assented to on 8 December 1905, required the Commonwealth Statistician, subject to the regulations and the directions of the Minister, to collect statistics in relation to certain matters, including matters prescribed in the regulations. Section 9 of the Statistics Act has not been amended since 1988.

67. On 9 August 2017, the Treasurer gave a direction to the Australian Statistician under s 9(1)(b) of the Statistics Act, which required certain statistical information to be collected about the proportion of electors who wish to express a view about whether the law should be changed to allow same-sex couples to marry, and the proportion of participating electors who are in favour of, or against, such a change in the law.[49] The effect of that Direction, operating in conjunction with provisions of the Statistics Act and the ABS Act, is that the functions of the Australian Statistician include the collection of the statistical information specified by the Treasurer. Expenditure for the purposes of complying with the Direction is simply expenditure incurred in carrying out the Australian Statistician's statutory functions. As noted above, that conclusion has not been disputed by the plaintiffs in this proceeding, who (quite correctly) make no argument that the ABS lacks statutory authority to *spend* any validly appropriated funds in the performance of its statutory functions.

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[48] Explanatory Memorandum, Appropriation Bill (No 1) 2017–2018 (Cth) at [13], [20].

[49] SC [40]; SCB p 254.

68. None of the matters referred to by the plaintiffs in support of their argument that the AMLPS is not within the ordinary annual services of the Government (PS [103]–[110]) — including arguments as to the scale of the activity, its cost, or the level of coordination involved — can change the fundamental conclusion that, as an activity falling within the statutory functions of the ABS, expenditure in carrying out the AMLPS necessarily falls within the departmental item appropriating funds to the ABS.

69. In view of the above, drawing money from the Consolidated Revenue Fund for the purposes of the AMLPS is clearly authorised by the appropriation for the ABS in the 2017–2018 Act. There is no uncertainty or ambiguity in the 2017-2018 Act that any argument based on the meaning of the "ordinary annual services of the Government" could assist to resolve. The meaning of that term is therefore immaterial to the outcome in this case.

The "ordinary annual services of the Government" and the Compact of 1965

70. Even if it were useful or appropriate to interpret the 2017–2018 Act by reference to the "ordinary annual services of the Government", the plaintiffs' submissions are not supported by their reference to the Compact of 1965 between the Senate and the Executive concerning the agreed content of that term, and parliamentary practice applying and updating the Compact.[50]

71. The approach taken in the Compact has always been to define what will be regarded as the "ordinary annual services of the Government", and therefore what will be included in odd-numbered Appropriation Bills, by reference to what does *not* fall within that concept. The relevant exclusion in the current context (which has appeared in the Compact since 1965) is "(e) new policies not authorised by special legislation".[51]

72. In 1999, there was some reconsideration of the Compact, as it relates to "new policies not authorised by special legislation", with the introduction of accruals budgeting (and the consequent introduction into Appropriation Acts of "departmental items", and "administered items" linked to "outcomes").[52] More specifically:

    72.1. In February 1999, the Minister for Finance and Administration provided a statement to the Senate Standing Committee on Appropriations and Staffing setting out the changes which he believed were required consequent on the change to accruals budgeting.[53] Among the alterations proposed was that new "administered" expenses that fall within an existing outcome be regarded as part of the ordinary annual services of the Government.[54] The statement indicates that

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50 SC [72], SCB pp 79, 519–520; SC [84], SCB p 719.

51 See SC [72]; SCB pp 519–520 for the 1965 Compact. This general approach did not change with the introduction of accruals budgeting: see SC [74]–[76]; SCB pp 545–567.

52 This change was considered by the Court in *Combet* (2005) 224 CLR 494 at 574–575 [154] (plurality).

53 SC [74], SCB pp 545–552.

54 SC [74], SCB p 549.

"departmental" expenses, like the earlier concept of "running costs", would be regarded as part of the ordinary annual services of the Government.[55]

72.2. The Committee reported to the Senate that it considered that no objections to those proposed changes arose from the constitutional provisions or from the terms of the Compact of 1965.[56] The Senate resolved to endorse the recommendation of the Committee that the Senate agree to the changes.[57]

73. Since that time Appropriation Bills have been prepared in accordance with the position put by the Minister for Finance and Administration in February 1999.[58] In that regard, it is important to emphasise that, on that approach, all "departmental items" concern the ordinary annual services of the Government. The concept of 'new policies' was not treated as relevant to departmental expenditure.

74. It is true that from time to time individual Senators or Senate Committees have expressed the view that any new activity not authorised by special legislation should be excluded from Bills for the ordinary annual services of the Government, whether or not it falls within an existing "outcome", and on that basis have objected to the inclusion of certain items in odd-numbered Bills.[59] However, notwithstanding those objections, both Houses of Parliament have passed Appropriation Bills prepared in accordance with the position put by the Minister for Finance and Administration in February 1999.[60] The Parliament's practice therefore does not support the view expressed by Senators and Senate Committees on which the plaintiffs rely.

75. Furthermore, at various times since 1999 the Executive has expressed its disagreement with the views of individual Senators or Senate Committees referred to above.[61] Contrary to the plaintiffs' submissions (PS [98]), the understanding of the Executive as to what falls within the "ordinary annual services of the Government" is not irrelevant. The Executive has the responsibility for formulating Appropriation Bills (under s 56 of the Constitution) and, understood in the context of responsible government, its position may be taken to be the same as that of the House of Representatives. The Executive is a necessary party to any understanding necessary to give effect to ss 53 and 54 of the Constitution.[62]

76. In any event, on 17 March 2016, the Senate demonstrated bipartisan support for the Executive's view of the Compact, as amended in 1999, under which new administered expenses that fell within an existing outcome would be included in odd-numbered Appropriation Bills.[63] There is therefore no substance in the plaintiffs' submission that

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55 SC [74], SCB pp 547–549. See also SC [80], SCB p 635; SC [87], SCB p 732.

56 SC [75]; SCB pp 553–563.

57 SC [76]; SCB p 567.

58 SC [83], SCB pp 706–707; SC [86], SCB p 730; SC [87], SCB pp 732–733.

59 SC [77]–[82]; SCB pp 570–579, 608–613, 658–660, 696–703; SC [84], SCB pp 714–716.

60 SC [86], SCB p 730; SC [89], SCB p 742.

61 SC [86]–[88]; SCB 730, 732–733, 736–737.

62 See *Combet* (2005) 224 CLR 494 at 570 [143] (plurality); *Pape* (2009) 238 CLR 1 at 53 [105] (French CJ).

63 SC [89]; SCB pp 741–743.

"it is the Senate's understanding of the Compact of 1965, rather than that of the Executive, that should guide the construction of an annual appropriation Act" (PS [98]).

77. In the absence of any settled understanding between the Houses on the question of what falls within the "ordinary annual services of the Government", the reference to "new policies" in the Compact does not provide a proper basis for restricting the text of the 2017–2018 Act. That conclusion is strongly supported by *Combet*,[64] where the plurality expressly agreed with a submission from the Commonwealth that, where the question was whether particular expenditure was within a *departmental item* (the same question that is in issue in this case), the Compact (whether in its original or present form) did not shed "any useful light on that question".[65]

The AMLPS is within the ordinary annual services of the Government

78. Further or alternatively, even if the Court were to hold that departmental items in the 2017–2018 Act should be read down by reference to the "ordinary annual services of the Government", spending on the AMLPS is within that concept, being a concept which this Court has recognised is of "wide import".[66]

79. The plaintiffs argue that expenditure on the AMLPS would fall outside of the "ordinary annual services of the Government" if it could be regarded as a "new policy not authorised by special legislation" (apparently regardless of the fact that it is funded by a departmental item, and regardless of the fact that it falls within an existing outcome). However, as already addressed above, expenditure on the AMLPS is spending to carry out the ABS's statutory functions. The use of funds to discharge a task given to the ABS in accordance with its governing legislation is clearly within the ordinary functions of the ABS.

80. The overarching concern of the plaintiffs appears to be that the Senate has been bypassed (PS [108]). That concern is misplaced for at least three reasons.

81. First, it overstates the degree of control that the Senate usually has over departmental expenditure of the ABS, or any other body performing its statutory functions. The Senate's role is limited to approving or rejecting appropriations for such activities, in circumstances where traditionally the descriptions of the purpose of the proposed appropriations are very brief because "no other course is feasible because in many respects the items of expenditure have not been thought through and elaborated in detail".[67]

82. Second, the Senate had equal power to the House of Representatives in the enactment of the Statistics Act, the ABS Act and subsequent Bills amending those Acts. That being so, there is no basis to complain if the ABS acts to discharge its statutory functions without further recourse to the Senate.

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64 *Combet* (2005) 224 CLR 494 at 531 [30] (Gleeson CJ). See also at 567 [134], 572 [149] (plurality).

65 *Combet* (2005) 224 CLR 494 at 576 [156] (plurality).

66 *Combet* (2005) 224 CLR 494 at 528 [26] (Gleeson CJ). See also at 576 [158]–[159] (plurality).

67 *Combet* (2005) 224 CLR 494 at 577 [160] (plurality), quoting *AAP* (1975) 134 CLR 338 at 394 (Mason CJ). See also *Pape* (2009) 238 CLR 1 at 78 [197] (Gummow, Crennan and Bell JJ).

83. Third, following the decision in *Williams (No 1)*, the Senate now has a greatly increased role in controlling actual *spending* by the Commonwealth Executive of appropriated funds. In practical terms, that role is far more significant than its role in relation to appropriations, which is necessarily limited by ss 53 and 54.

84. The short point is that, in circumstances where the plaintiffs do not challenge the conclusion that the AMLPS falls within the statutory functions of the ABS, there is no substance in their complaint that the Senate was bypassed. They assert an ongoing role for the Senate in controlling expenditure by statutory authorities in the performance of their statutory functions that the Senate simply does not have, such expenditure constituting "departmental expenditure" falling classically within the ordinary annual services of the Government.

85. Finally, in relation to Question 3(b), some further points need to be made in response to the plaintiffs' specific arguments concerning s 10 of the 2017–2018 Act.

85.1. First, the plaintiffs argue (at PS [85]) that it is necessary to read s 10 as being limited to the "ordinary annual services of the Government" in order to ensure that it would not 'amount to an "*appropriation in blank*"'. However, neither s 10, nor a determination under s 10, actually appropriates any funds. That work is done by s 12. In any event, s 10 satisfies any constitutional requirement for an advance statement of purpose in its prescription of the conditions enlivening the exercise of the power. The Commonwealth adopts its submissions on this point in the Wilkie proceeding at [22]–[24].

85.2. Second, the plaintiffs argue (at PS [91]) that a determination under s 10 could not facilitate spending on activities outside the ordinary annual services of the Government given that it is not amenable to disallowance. The Commonwealth refers to its submissions on this point in the Wilkie proceeding at [31]–[34], as well as its submissions at [27] above.

86. For the above reasons, both Questions 3(b) and 4(b) should be answered "No".

Question 5: Relief

87. The plaintiffs claim declarations against and injunctions restraining the making available of funds to the ABS to conduct the AMLPS (ASOC [43a, c, d and e]). Where relief is sought against allegedly illegal drawing from the Treasury of the Commonwealth, the need to carefully, precisely and exhaustively delineate the expenditure the subject of the relief and the difficulty, if not "practical impossibility", of doing so has been stressed.[68] Those warnings have salience in this case, as the relief sought by the plaintiffs makes no attempt to distinguish (if such a distinction could be made) between expenditure incurred, or to be incurred, by the ABS to conduct the AMLPS using moneys drawn from the relevant departmental item as enacted in Sch 1, and expenditure from that item as supplemented by the Determination. It is, of

[68] *AAP Case* (1975) 134 CLR 338 at 412 (Jacobs J); *Combet* (2005) 224 CLR 494 at 578–579 [165] (Kirby J).

course, only the latter expenditure that could be affected by the plaintiffs' challenge to the validity of the Determination.

88. If, and to the extent, the plaintiffs are successful, the better course is for the Court to answer the questions in the Special Case favourably to the plaintiffs, but to make no further substantive orders other than as to costs. This is akin to the course the Court took in *Brown v West* (at 213).

PART VII ESTIMATE OF TIME

89. It is estimated that 4 hours will be required for the combined presentation of the oral argument of the Commonwealth in this matter and the *Wilkie* matter.

Dated: 30 August 2017

Stephen Donaghue QC
Solicitor-General of the Commonwealth
Telephone: (02) 6141 4139
Facsimile: (02) 6141 4149
Email: stephen.donaghue@ag.gov.au

Michael O'Meara
Sixth Floor Selborne Wentworth
Telephone: (02) 9221 0069
Email: omeara@sixthfloor.com.au

Brendan Lim
Eleven Wentworth
Telephone: (02) 8228 7112
Facsimile: (02) 9232 7626
Email: blim@elevenwentworth.com

Anna Lehane
Australian Government Solicitor
Telephone: 02 6253 7330
Facsimile: (02) 6253 7303
Email: anna.lehane@ags.gov.au

Counsel for the First Defendant and the Attorney-General of the Commonwealth

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **NO M106 OF 2017**

BETWEEN: **AUSTRALIAN MARRIAGE EQUALITY LTD**
First Plaintiff

SENATOR JANET RICE
Second Plaintiff

AND: **MINISTER FOR FINANCE MATHIAS CORMANN**
First Defendant

AUSTRALIAN STATISTICIAN
Second Defendant

ANNEXURE TO THE SUBMISSIONS OF THE FIRST DEFENDANT AND THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

Filed on behalf of the First Defendant and the Attorney-General of the Commonwealth by:

The Australian Government Solicitor
4 National Circuit
Barton ACT 2600
DX 5678 Canberra

Date of this document: 30 August 2017
Contact: Niamh Lenagh-Maguire / Gavin Loughton
File ref: 17007223
Telephone: 02 6253 7557 / 02 6253 7203
Lawyer's E-mail: niamh.lenagh-maguire@ags.gov.au / gavin.loughton@ags.gov.au
Facsimile: 02 6253 7303

ANNEXURE – LEGISLATIVE PROVISIONS

These provisions are relied on in addition to those annexed to the plaintiffs' submissions.

Applicable provisions of the *Australian Bureau of Statistics Act 1975* (Cth)

5 Establishment of Bureau and office of Statistician

(1) There is hereby established a Bureau to be known as the Australian Bureau of Statistics.

(2) There shall be an Australian Statistician.

(3) The Bureau shall consist of the Statistician and the staff referred to in subsection 16(1).

(4) The Statistician shall control the operations of the Bureau and shall have such other functions, powers and duties as are conferred or imposed upon the Statistician by or under any Act and such other functions and powers as are conferred upon the Statistician by or under any law of a Territory.

(5) For the purposes of the finance law (within the meaning of the *Public Governance, Performance and Accountability Act 2013*):

(a) the Bureau is a listed entity; and

(b) the Statistician is the accountable authority of the Bureau; and

(c) the following persons are officials of the Bureau:

(i) the Statistician;

(ii) the staff referred to in subsection 16(1);

(iii) persons engaged under subsection 16(2); and

(d) the purposes of the Bureau include:

(i) the functions of the Bureau referred to in section 6; and

(ii) the functions of the Statistician referred to in subsection (4) and section 4.

6 Functions of Bureau

(1) The functions of the Bureau are as follows:

(a) to constitute the central statistical authority for the Australian Government and, by arrangements with the Governments of the States, provide statistical services for those Governments;

(b) to collect, compile, analyse and disseminate statistics and related information;

(c) to ensure co-ordination of the operations of official bodies in the collection, compilation and dissemination of statistics and related information, with particular regard to:

(i) the avoidance of duplication in the collection by official bodies of information for statistical purposes;

(ii) the attainment of compatibility between, and the integration of, statistics compiled by official bodies; and

(iii) the maximum possible utilization, for statistical purposes, of information, and means of collection of information, available to official bodies;

(d) to formulate, and ensure compliance with, standards for the carrying out by official bodies of operations for statistical purposes;

(e) to provide advice and assistance to official bodies in relation to statistics; and

(f) to provide liaison between Australia, on the one hand, and other countries and international organizations, on the other hand, in relation to statistical matters.

(2) For the purpose of the performance of its functions and for the purpose of co-ordinating statistical activities and securing the observance of statistical standards, the Bureau may collaborate with bodies, being Departments and authorities of the States, the Administrations and authorities of the external Territories and local governing bodies, in the collection, compilation, analysis and dissemination of statistics, including statistics obtained from the records of those bodies.

(3) Subject to subsection (4), each new proposal for the collection of information for statistical purposes by the Bureau shall be laid before both Houses of the Parliament before its implementation, unless the proposal is for the collection of information on a voluntary basis.

(4) Where, in relation to a proposal to which subsection (3) is applicable, being a proposal for the collection of information relating to businesses, the Minister considers it necessary to commence implementation of the proposal at a time when it is not practicable to comply with subsection (3) the Minister may authorize the implementation of the proposal without compliance with that subsection but in such a case particulars of the nature of the information to which the authorization relates

shall be laid before each House of the Parliament within 5 sitting days of that House after the giving of the authorization.

(5) For the purposes of this section:

(a) a reference to statistical purposes shall be read as including purposes in connexion with the collection, compilation, analysis and dissemination of statistics; and

(b) a reference to an official body shall be read as a reference to:

(i) an Agency within the meaning of the *Public Service Act 1999*; or

(ii) the holder of an office established for a public purpose by or under an Act or a law of an internal Territory; or

(iii) a body corporate, or other body, established for a public purpose by or under an Act or a law of an internal Territory other than such a body corporate, or other body, that is declared by the regulations not to be an official body for the purposes of this Act.

Applicable provisions of the *Census and Statistics Act 1905* (Cth)

9 Statistical information to be collected

(1) The Statistician:

(a) may from time to time collect such statistical information in relation to the matters prescribed for the purposes of this section as he or she considers appropriate; and

(b) shall, if the Minister so directs by notice in writing, collect such statistical information in relation to the matters so prescribed as is specified in the notice.

Applicable provisions of the *Census and Statistics Act 1905* (Cth) (as enacted)

16. The Statistician shall, subject to the regulations and directions of the Minister, collect, annually, statistics in relation to collected all or any of the following matters:

(a) Population;

(b) Vital, social, and industrial matters;

(c) Employment and non-employment;

(d) Imports and exports;

(e) Inter-State trade;

(f) Postal and telegraphic matters;

(g) Factories, mines, and productive industries generally;

(h) Agricultural, horticultural, viticultural, dairying, and pastoral industries;

(i) Banking, insurance, and finance;

(j) Railways, tramways, shipping, and transport;

(k) Land tenure and occupancy; and

(l) Any other prescribed matters.

Applicable provisions of the *Parliamentary Privileges Act 1987* (Cth)

16 Parliamentary privilege in court proceedings

(1) For the avoidance of doubt, it is hereby declared and enacted that the provisions of article 9 of the Bill of Rights, 1688 apply in relation to the Parliament of the Commonwealth and, as so applying, are to be taken to have, in addition to any other operation, the effect of the subsequent provisions of this section.

(2) For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, ***proceedings in Parliament*** means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:

(a) the giving of evidence before a House or a committee, and evidence so given;

(b) the presentation or submission of a document to a House or a committee;

(c) the preparation of a document for purposes of or incidental to the transacting of any such business; and

(d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

(3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:

(a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;

(b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or

(c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

(4) A court or tribunal shall not:

(a) require to be produced, or admit into evidence, a document that has been prepared for the purpose of submission, and submitted, to a House or a committee and has been directed by a House or a committee to be treated as evidence taken in camera, or admit evidence relating to such a document; or

(b) admit evidence concerning any oral evidence taken by a House or a committee in camera or require to be produced or admit into evidence a document recording or reporting any such oral evidence;

unless a House or a committee has published, or authorised the publication of, that document or a report of that oral evidence.

(5) In relation to proceedings in a court or tribunal so far as they relate to:

(a) a question arising under section 57 of the Constitution; or

(b) the interpretation of an Act;

neither this section nor the Bill of Rights, 1688 shall be taken to prevent or restrict the admission in evidence of a record of proceedings in Parliament published by or with the authority of a House or a committee or the making of statements, submissions or comments based on that record.

(6) In relation to a prosecution for an offence against this Act or an Act establishing a committee, neither this section nor the Bill of Rights, 1688 shall be taken to prevent or restrict the admission of evidence, the asking of questions, or the making of statements, submissions or comments, in relation to proceedings in Parliament to which the offence relates.

(7) Without prejudice to the effect that article 9 of the Bill of Rights, 1688 had, on its true construction, before the commencement of this Act, this

section does not affect proceedings in a court or a tribunal that commenced before the commencement of this Act.