

WILKIE & ORS v THE COMMONWEALTH OF AUSTRALIA & ORS (M105/2017)

Date application referred to Full Court: 17 August 2017

On 9 August 2017, the Commonwealth Treasurer directed the third defendant (the Australian Statistician) to collect statistical information about the proportion of participating electors who are in favour of, and who are against, the law being changed to allow same-sex couples to marry (“the postal survey”). On the same day the Minister for Finance (the second defendant) had issued an “Advance to the Finance Minister Determination” (“the Determination”) under s 10 of the *Appropriation Act (No1) 2017-2018* (Cth) (“the Act”) to increase the departmental item for the Australian Bureau of Statistics (“the ABS”) by \$122 million to pay for the postal survey.

The plaintiffs contend that the Determination is invalid as it was not made in accordance with law and, insofar as the second defendant purported to be satisfied that there was an urgent need for expenditure in the current year that was not provided for, or was insufficiently provided for, either because of an erroneous omission or understatement, or because the expenditure was unforeseen, the exercise of power was not reasonable or involved an error of law. The plaintiffs also contend that subsections (1), (2) and (4) of s 10 of the Act are invalid as they are not a permissible exercise of Commonwealth legislative power to enact Appropriation Acts, and they effect an impermissible delegation of the legislative power of the Commonwealth to the second defendant.

Further grounds for the application are that the Treasurer’s direction of 9 August is invalid because the opinions that are being sought are not “statistical information” within the meaning of the *Australian Bureau of Statistics Act 1975* (Cth) or the *Census and Statistics Act 1905* (Cth); and that the Electoral Commissioner (the fifth defendant) is not authorised by the *Commonwealth Electoral Act 1918* (Cth), and in particular s 7A, to conduct or participate in the conduct of the postal survey.

On 17 August 2017 Kiefel CJ referred the application for consideration by the Full Court, together with the matter of *Australian Marriage Equality Ltd & Anor v Minister for Finance & Anor* (M106/2017). Notices of Constitutional Matter have been served. No Notice of Intervention has been filed to date. The fourth and fifth defendants have filed submitting appearances.

The grounds of the application include:

- The Advance to the Finance Minister Determination (No 1 of 2017-2018) is invalid as the Determination was not made in accordance with law;
- The Census and Statistics (Statistical Information) Direction 2017 is invalid because the opinions which are being sought are not “statistical information” within the meaning of the *Australian Bureau of Statistics Act 1975* (Cth) or the *Census and Statistics Act 1905* (Cth) and are not “statistics” within the meaning of “census and statistics” in s 51(xi) of the Constitution.