

ORIGINAL

IN THE HIGH COURT OF AUSTRALIA  
MELBOURNE REGISTRY

No. M105 of 2017

BETWEEN

**ANDREW DAMIEN WILKIE**  
First Plaintiff

**FELICITY JENNIFER MARLOWE**  
Second Plaintiff

**PFLAG BRISBANE INC**  
Third Plaintiff

AND

**THE COMMONWEALTH OF AUSTRALIA**  
First Defendant

**MINISTER FOR FINANCE**  
Second Defendant

**TREASURER**  
Third Defendant

**AUSTRALIAN STATISTICIAN**  
Fourth Defendant

**ELECTORAL COMMISSIONER**  
Fifth Defendant



**PLAINTIFFS' ANNOTATED SUBMISSIONS**

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## I INTERNET PUBLICATION

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

## II ISSUES

2. (1) Do any of the plaintiffs have standing to obtain the relief which is sought? (2) Is s 10 of the *Appropriation Act (No 1) 2017-2018* (Cth) (**Appropriation Act**) valid? (3) Was the Advance to the Finance Minister Determination (No. 1 of 2017-2018) (**AFM Determination**) lawfully made under s 10 of the Appropriation Act? (4) Was the Census and Statistics (Statistical Information) Direction 2017 (**CS Direction**) lawfully made under the *Census and Statistics Act 1905* (Cth) (**Statistics Act**)? (4) Does the fourth defendant (**the Statistician**) have power under s 61 to carry out the postal vote? (5) Does the fifth defendant (**the Electoral Commissioner**) have power to exercise his powers under the *Commonwealth Electoral Act 1918* (Cth) (**the CE Act**) in relation to the postal vote?

## III SECTION 78B NOTICES

3. The plaintiffs have served notices under s 78B of the *Judiciary Act 1903* (Cth).

## IV NO JUDGMENTS BELOW

4. This proceeding is brought in the original jurisdiction of the Court.

## V MATERIAL FACTS

5. The relevant timeline is set out in [3] to [15] of the First Hunyor Affidavit [**AB 36-37**].

## 20 VI ARGUMENT

### A. STANDING

6. Each of the plaintiffs has a “special interest”<sup>1</sup> in the subject matter of this proceeding, which gives them standing to seek the relief which is claimed.
7. The first plaintiff is a member of the House of Representatives, and he voted against the Plebiscite (Same-Sex Marriage) Bill 2016 (Cth).<sup>2</sup> As a member of the House of Representatives, he has a particular interest in ensuring that public moneys are spent in accordance with law. It was on this basis that two members of this Court held that Nicola Roxon had standing in *Combet v The Commonwealth*.<sup>3</sup> The special role of the House of Representatives in relation to appropriations for the ordinary annual services of the Government is recognised by s 53 of the Constitution, and the interest of the Parliament in appropriations being made by law is recognised in ss 54, 56, 81 and 83.
8. Both the first plaintiff and the second plaintiff are enrolled under the CE Act, and each will therefore receive material for the postal vote in the mail. They are affected, as recipients, if the postal vote is carried out. That receipt – and the public debate that will

<sup>1</sup> *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 530-531, 547-549.

<sup>2</sup> First Hunyor Affidavit at [17] [**AB 38**].

<sup>3</sup> (2005) 224 CLR 494 at 556-557 [97] (McHugh J), 620 [308] (Kirby J).

follow – is involuntary, and will be distressing for the second plaintiff. For her, the process for, and outcome of, this vote will also determine, in the view of electors, the legitimacy of her family unit and “the suitability of Ms Marlowe and her partner to be persons married under Australian law”.<sup>4</sup> She is, therefore, “more particularly affected than other people”.<sup>5</sup>

9. As to the third plaintiff, consistently with its objects as set out in its Constitution, it engages in advocacy on the rights of gay and lesbian people and their families.<sup>6</sup> The third plaintiff itself is affected by the instruments under challenge, for those instruments seek to implement a policy that intersects with, and will be the subject of, its activities.
10. The plaintiffs also seek a writ of prohibition, which is a remedy that “strangers” have standing to obtain<sup>7</sup> even when they have no “special interest”<sup>8</sup> in the matter.
11. If the Court concludes that none of the plaintiffs have standing, then other than the State Attorneys-General and the defendants themselves it would appear that no-one has standing to seek all of the relief sought in this proceeding in relation to s 10 of the Appropriation Act, the CS Direction and the AFM Determination. That is tantamount to concluding that the issues raised in this proceeding are non-justiciable. The Court should not lightly invite what in practice would be an “unbridled discretion”<sup>9</sup> or “islands of power immune from supervision and restraint”<sup>10</sup> into Australia’s legal landscape. That would have serious implications for the rule of law.<sup>11</sup>
- 20 **B. SECTION 10 IS INVALID (GROUNDS TWO AND THREE)**
12. For the following reasons, the plaintiffs contend that s 10 is unconstitutional in whole or in part, and the AFM Determination, made pursuant to s 10, and in a form which purported to prohibit disallowance, is also invalid.

**(a) Reason one: An appropriation in blank**

13. In *Brown v West*, the Court stated that an appropriation “must designate the purpose or purposes for which the moneys appropriated might be expended”.<sup>12</sup> The Court quoted with approval the observation of Latham CJ in *Attorney-General (Vic) v The Commonwealth* that “there cannot be appropriations in blank”,<sup>13</sup> by which his Honour

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<sup>4</sup> First Hunyor Affidavit at [20] [AB 39].

<sup>5</sup> *Davis v The Commonwealth* (1986) 61 ALJR 32 at 35 (Gibbs CJ).

<sup>6</sup> First Hunyor Affidavit at [24] [AB 39].

<sup>7</sup> See, eg, *Bateman’s Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 263 [40]; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 599-600 [2], 611 [44], 627 [95], 652-653 [162], 670 [211], [214]; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 101-105 [43]-[49].

<sup>8</sup> *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 44; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 424 [116]; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 652-653 [162], 670 [211], [214].

<sup>9</sup> *Wotton v Queensland* (2012) 246 CLR 1 at 10 [10].

<sup>10</sup> *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at 581 [99].

<sup>11</sup> Cf *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 69 [155], 99 [274].

<sup>12</sup> (1990) 169 CLR 195 at 208 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

<sup>13</sup> (1945) 71 CLR 237 at 253.

meant (to answer the plurality’s question in *Combet v The Commonwealth*<sup>14</sup>) “appropriations for no designated purpose” or “merely authorizing expenditure with no reference to purpose”.<sup>15</sup> Latham CJ went on to explain that “[a]n Act which merely provided that a minister or some other person could spend a sum of money, no purpose of the expenditure being stated, would not be a valid appropriation Act”.<sup>16</sup> The concept of an appropriation in blank is analogous to the principle that a delegation of power may be so wide or uncertain as to lack a sufficient connection to a head of power.<sup>17</sup>

10 14. The purpose requirement reflects the historical development of parliamentary appropriations in the United Kingdom. Hallam, for example, has said that the principle that “supplies, granted by parliament are only to be expended for particular objects specified by itself, became, from this time [1665] an undisputed principle, recognised by frequent and at length constant practice”.<sup>18</sup> Perhaps more importantly, it has a textual foundation in ss 56 and 81 of the Constitution. *Combet v The Commonwealth* does not hold to the contrary;<sup>19</sup> the majority accepted that the Parliament may define the purpose of an appropriation broadly, but this assumes, consistently with the plaintiffs’ case, that the Parliament must articulate a purpose.

20 15. Section 10 grants the Finance Minister the power to authorise appropriations for any purpose. The statutory conditions for its exercise (ie satisfaction as to urgent need, omission or unforeseen expenditure) amount to an authorisation in blank. Particularly is that so when those statutory conditions are interpreted as broadly as the defendants require them to be in order for the AFM Determination to be valid in this case.

16. Moreover, the circumstances when a determination may be made are not, and are not the same as, purposes for which funds may be appropriated. This is best illustrated by the circumstances of this case. The Finance Minister has purported to appropriate \$122m to the Australian Bureau of Statistics (ABS) for the postal vote as that departmental expenditure is “urgent because it was unforeseen” [AB 56]. That \$122m could have been appropriated for any purpose whatsoever, so long as s 10(1) applied.

**(b) Reason two: by-passing a carefully structured process**

30 17. The provisions of the Constitution on appropriation bills are carefully crafted, and were the subject of extensive discussion during the Convention Debates.<sup>20</sup> The Governor-General must first recommend to the House of Representatives the purpose of the appropriation (s 56). The bill must then originate in the House of Representatives

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<sup>14</sup> (2005) 224 CLR 494 at 568 [135] (Gummow, Hayne, Callinan and Heydon JJ). Cf at 553 [89] (McHugh J), 597 [233], 605 [258], 614 [289], 615 [290] (Kirby J).

<sup>15</sup> (1945) 71 CLR 237 at 253.

<sup>16</sup> (1945) 71 CLR 237 at 253. See also Enid Campbell, ‘Parliamentary Appropriations’ (1971) 4 *Adelaide Law Review* 145 at 156.

<sup>17</sup> See *Victorian Stevedoring and General Contracting Co Ltd v Dignan* (1931) 46 CLR 73 at 101.

<sup>18</sup> H Hallam, *Constitutional History of England*, vol II, p 357.

<sup>19</sup> (2005) 224 CLR 494.

<sup>20</sup> See generally *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 41-43 [68]-[75] (French CJ).

(s 53), and the Senate may not amend it if it relates to the ordinary annual services of the Government (s 54).<sup>21</sup>

18. These provisions recognise the financial initiative of the Executive and parliamentary control over the purse before money is spent.<sup>22</sup> As Erskine May's work explained at the time of federation: "[t]he Crown ... makes known to the Commons the pecuniary necessities of the government; the Commons, in return, grant such aids or supplies as are required to satisfy these demands; and they provide ... by the appropriation of other sources of the public income, the ways and means to meet the supplies which they have granted".<sup>23</sup> That is, "the Crown demands money, the Commons grant it, and the Lords assent to the grant but the Commons do not vote money unless it be required by the Crown".<sup>24</sup> By the appropriation process, it is disclosed "that the Parliament assents to the expenditure of the moneys appropriated for the purposes stated in the appropriation".<sup>25</sup>
19. This was all known to the framers of the Constitution. They "all recognised that although Parliament controls the application of public moneys by the processes of appropriation, it is the Executive that initiates the process by proposing the estimates of expenditure".<sup>26</sup>
20. Section 10 countenances a procedure for appropriating funds to the use of the Executive that by-passes the above procedure. The Finance Minister's determination leaves the Governor-General no role to play in recommending the expenditure; that expenditure was either omitted or unforeseen at the time the Governor-General recommended the appropriation to the House of Representatives.<sup>27</sup> Nor do the Houses of Parliament have any role in controlling the expenditure the subject of the Finance Minister's determination; to the contrary, s 10(4) forbids it. Through the s 10 mechanism, funds are appropriated for the ordinary annual services of government by the Finance Minister, sitting in this case in the Senate, without the House of Representatives having voted for that expenditure, notwithstanding the House's special interest in such appropriations as recognised by s 53 of the Constitution.
21. The dislocation lies not only in the omission of any role for the Governor-General and both Houses of Parliament, but in the capacity for the Finance Minister to alter, without limitation as to any subject matter within Commonwealth power,<sup>28</sup> that which the other institutions of government have had a constitutional role in crafting and agreeing. By

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<sup>21</sup> See generally *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 72 [175].

<sup>22</sup> See Cheryl Saunders, 'Parliamentary Appropriation' in *Current Constitutional Problems in Australia* (1982).

<sup>23</sup> *A Treatise on the Law, Privileges, Proceeding and Usages of Parliament* (1th ed, 1893) at 515-516.

<sup>24</sup> *A Treatise on the Law, Privileges, Proceeding and Usages of Parliament* (1th ed, 1893) at 515-516.

<sup>25</sup> *Victoria v The Commonwealth* (1975) 134 CLR 338 at 411 (Jacobs J). See also *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 73 [177] (Gummow, Crennan and Bell JJ).

<sup>26</sup> *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 110 [310] (French CJ).

<sup>27</sup> It was because s 56 could not be complied with that the Administrative Review Council concluded in 1992 that appropriations could not be effected by delegated legislation: Administrative Review Council, *Rule Making by Commonwealth Agencies* (Report No 35, 1992) at 14-15 [2.27].

<sup>28</sup> Including grants to the States under s 96, if the equivalent power is exercised under *Appropriation Act (No 2) 2017-2018* (Cth).

reason of s 10(2), the Finance Minister's determination has the effect of amending, and increasing, the appropriations which were previously enacted, and s 10(4) then disables the Parliament from having any role in respect of the amendment or increase.

10 22. That the exercise of the power in s 10(2) results in the Executive potentially spending funds which have been appropriated otherwise than going through the steps mandated by the Constitution, reflecting parliamentary practices developed in the United Kingdom, imported to the colonies and then built into the Constitution, demonstrates that there is a constitutional infirmity in the alternative pathway established by s 10. The funding which emerges through this alternative pathway is not the product of the "single, finely wrought and exhaustively considered, procedure"<sup>29</sup> mandated by the Constitution.

**(c) Reason three: No appropriation by executive fiat**

20 23. Appropriation by legislative instrument is inconsistent with s 83 of the Constitution, which requires money to be drawn from the Treasury of the Commonwealth only "under appropriation made by law". Professor Harrison Moore has explained that the words "by law" excluded "the once popular doctrine that money might become legally available for the service of Government upon the mere votes of supply by the Lower House".<sup>30</sup> Section 83 thus "affirms that a vote or resolution of either chamber cannot suffice".<sup>31</sup> It would subvert this object if a single Minister could achieve that which the words "by law" was intended to deny to an entire chamber of the Parliament.

30 24. Moreover, there are statements in the cases that "law" is a reference to laws made by the Parliament and to the Commonwealth Constitution itself,<sup>32</sup> to the exclusion of subordinate legislation. This is consistent with the principle of parliamentary control over the purse, with several of the colonial constitutions expressly stating that appropriations were to be effected by legislative action (and thus, by implication, not executive fiat),<sup>33</sup> and with the Commonwealth's own *Legislation Handbook*.<sup>34</sup> That s 109 of the Constitution has been held to operate with respect to both statutory law and delegated legislation requires no different conclusion. Section 109, which is about preserving the paramountcy of federal law, is very different to the scheme of ss 53, 54, 56, 81 and 83, which are principally about the relationship between the Parliament and the Executive. Reading s 109 expansively to include Commonwealth law, whether made by the Parliament or the Executive, makes sense in that context in a way which does not in the present context.

<sup>29</sup> *Clinton v New York*, 524 US 417 at 439-440 (1998). See also *Raines v Byrd*, 521 US 791 at 836-837 (1997).

<sup>30</sup> Harrison Moore, *The Constitution of the Commonwealth of Australia* (2<sup>nd</sup> ed, 1910) at 522-523.

<sup>31</sup> *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 82 [209]; *Combet v The Commonwealth* (2005) 224 CLR 494 at 558 [103].

<sup>32</sup> See *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 23 [8], 45 [81], 55 [111] (French CJ), 82 [29] (Gummow, Crennan and Bell JJ); *Brown v West* (1990) 169 CLR 195 at 205; *Northern Suburbs General Cemetery Reserve trust v The Commonwealth* (1993) 176 CLR 555 at 580 (Brennan J), 599 (McHugh J).

<sup>33</sup> See *Constitution Act 1855* (NSW) s LIII; *Constitution Act 1854* (Vic) s LV; *Constitution Act 1867* (Qld) s 39; *Constitution Act 1889* (WA) s 72.

<sup>34</sup> *Legislation Handbook* (February 2017) at [1.10(a)].

**(d) Reason four: An impermissible delegation of legislative power**

25. In *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan*,<sup>35</sup> the Court sanctioned broad delegations of legislative power to the Executive, notwithstanding the separation of powers in the Constitution, by hewing to “a conception of that legislative power which depends less upon juristic analysis and perhaps more upon the history and usages of British legislation and the theories of English law”.<sup>36</sup> That endorsement cannot extend to delegating the Parliament’s control over appropriations.
- 10 26. *First, Dignan* was about the Parliament’s power to make laws for the peace, order and good government of the Commonwealth. The relevant question was whether the Parliament could exercise that power by delegating to the Executive the power to make subordinate legislation, and the Court answered resoundingly in the affirmative. Section 10 of the Appropriation Act operates in a radically different context. Appropriation laws are not an outcome of an exercise of legislative power for the peace, order and good government of the Commonwealth.<sup>37</sup> Rather, the relevant provisions of the Constitution (ss 53, 54, 56, 81 and 83) impose parliamentary constraints upon spending by the Executive. Their very purpose is to regulate the relationship between the Parliament and the Executive. “The matter of parliamentary appropriation goes to the essence of relations between the Parliament and the Executive, and of relations between the Senate and the House of Representatives”.<sup>38</sup>
- 20 27. Powers allocated by the Constitution between two branches of government cannot properly be exercised so as to redistribute, by statutory delegation, the roles mandated by the Constitution. It is not open to the Parliament by statute to seek to form a more convenient constitutional settlement. The fact that the Parliament and the Executive appear to have acquiesced in the attempt, by enacting s 10, does not make the damage to the constitutional structure any less. “Abdication of responsibility is not part of the constitutional design”.<sup>39</sup>
- 30 28. The extent to which s 10 involves the Parliament handing over the task of appropriation to the Finance Minister is substantial. Once a determination is made, it cannot be disallowed (as to which, see below). Parliament has no future role other than evening up the books, as it were, in the standard Appropriation Act (No 3) for the financial year to take account of any determination made thus far.<sup>40</sup> The Senate Standing Committee on Finance and Government Operations’ concern in 1979 that “it is theoretically possible for a Government to fund substantial expenditure on an entirely new

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<sup>35</sup> (1931) 46 CLR 73.

<sup>36</sup> (1931) 46 CLR 73 at 101-102 (Dixon J).

<sup>37</sup> *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 45 [81], 55 [111] (French CJ), 72-73 [176]-[178] (Gummow, Crennan and Bell JJ), 102 [289], 104 [292] (Hayne and Kiefel JJ).

<sup>38</sup> *Combet v The Commonwealth* (2005) 224 CLR 494 at 521-522 [4]; see also at 569 [140]; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 104 [291]-[292].

<sup>39</sup> *Clinton v City of New York*, 524 US 417 at 452 (1998). See also *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 95-96, 121; *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365 at 373; *In re The Initiative and Referendum Act* [1919] AC 935 at 945.

<sup>40</sup> See, eg, *Appropriation Act (No 3) 2016-2017* (Cth) s 10.

programme so as to present the Parliament with a fait accompli when it is approached for appropriation”<sup>41</sup> is real.

29. *Second*, s 10(4) prevents either House from disallowing the determination made by the Finance Minister. The usual capacity for the Houses of Parliament to superintend and veto the exercise of delegated power is one of the critical mechanisms available to the Parliament to protect itself from executive overreach.<sup>42</sup> Absent that mechanism, the concerns which usually accompany a Henry VIII clause such as s 10 have force.<sup>43</sup>
- 10 30. *Third*, the legislative justification for s 10(4) and its predecessors does not hold water. According to the Explanatory Memorandum to the Appropriation Bill (No 1) 2017-2018 (Cth), permitting disallowance “would frustrate the purpose of the provision, which is to provide additional appropriation for urgent expenditure”.<sup>44</sup> But the expenditure is only frustrated if it is in fact disallowed (and even then, that is effective only from the date of disallowance). And if it is a kind of expenditure that a House of Parliament would disallow in the discharge of its constitutional responsibilities, on what account is the Finance Minister’s determination entitled to be shielded from that parliamentary sanction? It is perverse to subjugate the wishes of the House to the wishes of the Finance Minister. That is the very opposite of what the history of appropriations demands.
- 20 31. *Fourth*, the delegated power is exercisable on such a broad basis (as to which, see above at paragraphs 15 and 20-21) that, on any view, s 10 goes too far in delegating the Parliament’s power over appropriations.
32. *Finally*, in so far as Dixon J in *Dignan* invoked “the history and usages of British legislation and the theories of English law”<sup>45</sup> to justify delegated legislation, it is as well to note the following matters of history so far as urgent and unforeseen spending is concerned.
- 30 33. In 1861, the Civil Contingencies Fund was established following a recommendation by the Committee of Public Accounts. According to Alpheus Todd, the Treasury could “draw upon this fund, from time to time, to defray new and unforeseen expenditure for civil services at home, for which no votes had been taken, or to meet deficiencies on ordinary votes”.<sup>46</sup> Todd went on to explain that “every advance made from these funds must be repaid out of votes to be taken in Parliament, in the following year, on behalf of the services for which such advances had been made”.<sup>47</sup> This Civil Contingencies Fund “owed its existence to Treasury practice rather than statutory authority”,<sup>48</sup> and

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<sup>41</sup> Commonwealth, *Advance to the Minister for Finance: Report from the Senate Standing Committee on Finance and Government Operations*, Parliamentary Paper No 217 (1979) at 26.

<sup>42</sup> See *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 265.

<sup>43</sup> Cf *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1 at 25 [61] (Gageler J).

<sup>44</sup> Explanatory Memorandum, Appropriation Bill (No 1) 2017-2018 (Cth) at 9 [31].

<sup>45</sup> *Victorian Stevedoring and General Contracting Co Ltd v Dignan* (1931) 46 CLR 73 at 102.

<sup>46</sup> Alpheus Todd, *On Parliamentary Government in England: Its Origin, Development, and Practical Operation* (1867) at 551 (**Todd**).

<sup>47</sup> Todd at 551. See also H D Traill, *Central Government* (1892) 49.

<sup>48</sup> John F McEldowney, ‘The contingencies fund and the parliamentary scrutiny of public finance’ [1988] *Public Law* 232 at 235. See also Todd at 551.

replaced the “irregular items annually included in the estimates under the head of ‘Civil Contingencies’”.<sup>49</sup>

34. In pre-Federation Victoria and New South Wales, each came to provide for limited parliamentary appropriations for contingencies to enable the government to meet expenditure on public necessities,<sup>50</sup> although there were also, at times, overtures towards executive spending without parliamentary appropriation.

10 35. It may well be assumed, therefore, that the framers of the Constitution would be alive to the prospect that the government of a nation may, from time to time, need to spend funds for unforeseen reasons. The framers were familiar with the workings of colonial government and the practices of Westminster and Whitehall but nonetheless required appropriation to be by laws enacted by the Parliament. Hence, between 1901 and 1994 there has been an advance to the Treasurer or the Finance Minister as a line item in each of the annual appropriation Acts. The statutory authorisation for the expenditure of that appropriation was to be found in s 36A of the *Audit Act 1901* (Cth) (**Audit Act**), which was inserted into that Act in 1906. It is only from 1999 that the Advance to the Finance Minister took something like its present form, and its present form has roots only so far back as 2008.

20 36. This history does not, however, support s 10 as an appropriate way to deal with this practical problem of government. Constitutional text and structure mandate that “[t]he actual withdrawal of money from the CRF requires a prior valid appropriation”.<sup>51</sup> There is nothing in this history to suggest that the determination by the executive branch of government to spend ought to take effect as an appropriation by the Parliament, and to the exclusion of any subsequent parliamentary control. In particular, *Brown v West*, which referred to the Advance to the Minister for Finance, does not support s 10 in its current form.<sup>52</sup> In *Brown v West*, the Advance to the Finance Minister was part of the Schedule of appropriated funds, as opposed to a standalone power invested in the Finance Minister himself to cause an appropriation.

### C. THE AFM DETERMINATION IS INVALID (GROUND ONE)

30 37. If, contrary to the submissions in Section B, s 10 is valid, the plaintiffs submit that the AFM Determination was of no legal effect because the Minister erred in law in being satisfied that there was an urgent need for the proposed expenditure because it was unforeseen.

#### (a) The Finance Minister’s determination is reviewable

38. There are three avenues to review the Finance Minister’s determination. *First*, each criterion is a “jurisdictional fact” in the sense that the criteria, satisfaction of which

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<sup>49</sup> Todd at 551.

<sup>50</sup> See generally John Waugh, ‘Evading Parliamentary Control of Government Spending: Some Early Case Studies’ (1998) 9 *Public Law Review* 28.

<sup>51</sup> *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* (1993) 176 CLR 555 at 581.

<sup>52</sup> (1990) 169 CLR 195.

enlivens the power of the Finance Minister to exercise his power under s 10, must exist.<sup>53</sup>

39. In some statutes where the exercise of a power depends upon the formation of a state of mind of the decision-maker (eg a state of satisfaction) it may be difficult to characterise a criterion as a “jurisdictional fact” the existence of which can be reviewed and determined by a court.<sup>54</sup> Here, however, it is not sufficient to engage s 10 merely because the Finance Minister believes that the relevant criteria are satisfied. That approach would be inconsistent with the evident purpose of the section, which is to permit expenditure that has not been expressly approved by the Parliament. It is for this reason that s 10 only permits the Finance Minister to apply the Advance in very limited circumstances. It would also be contrary to the constitutional principle of parliamentary oversight for the Finance Minister’s subjective belief regarding satisfaction of the criteria to govern. This conclusion is not affected by s 10(4), which removes from parliamentary scrutiny only the quantum of any expenditure. It does not speak to whether or not the criteria for the expenditure have been met.

40. *Second*, the Finance Minister’s determination can be challenged if he misconstrued the meaning of the terms “urgent need” and “unforeseen”.<sup>55</sup>

41. *Third*, even if s 10 allows the Finance Minister’s “subjective” views to govern, his decision is reviewable if his subjective opinion is “arbitrary, capricious [or] irrational”. In addition, if the Finance Minister’s subjective views (if that is how they are to be properly characterised) had no basis in fact or were contrary to the overwhelming weight of the material before him his decision should be set aside as a constructive failure to exercise jurisdiction.<sup>56</sup>

**(b) Statutory construction: The constitutional background and legislative history**

42. The correct meaning of the terms “urgent need” and “unforeseen” falls to be determined against the background of constitutional principle.<sup>57</sup> The relevant history and the framework for parliamentary control over executive spending in the Constitution are summarised above. As stated above, a different practice was adopted in Australia to the practice in the United Kingdom. At the federal level the practice was to include in the annual appropriation an Advance to the Minister for Finance (referred to as the Advance to the Treasurer before establishment of the Department of Finance in 1976).<sup>58</sup>

43. Authority for the Advance was initially given by s 36A of the Audit Act. Directions under the Audit Act set out the circumstances in which the Advance could be used.

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<sup>53</sup> *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 148 [28]; *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at 619-620 [20]-[21].

<sup>54</sup> *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 179-180 [57].

<sup>55</sup> *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 351.

<sup>56</sup> *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at 620-621 [23]-[24].

<sup>57</sup> *Combet v The Commonwealth* (2005) 224 CLR 494 at 520-522 [4] (Gleeson CJ); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 36 [54] (French CJ), 75 [187] (Gummow, Crennan and Bell JJ).

<sup>58</sup> Senate Standing Committee on Finance and Government Operations, *The Advance to the Minister for Finance* (August 1979) at [1.5] (**Report on the Advance**).

Finance Direction 29, for example, stated that permission to use the Advance “will be given only in urgent or special circumstances”.<sup>59</sup>

44. The relevant criteria, as now set out in s 10, are that the expenditure was “urgent” and “unforeseen”. This change came about following the Senate Standing Committee on Finance and Government Operations report published in 1979 titled *The Advance to the Minister for Finance (Report on the Advance)*.<sup>60</sup> In that report the Committee:

- 10 • noted that the purpose of the Advance was to provide for expenditure in “urgent and special circumstances” but commented that these criteria had been considerably blurred. The Committee identified the different expressions that had been employed to explain these words. The expressions included: “unforeseen and extraordinary expenditure”, “urgent or special circumstances”, “urgent and unforeseeable requirements”, “urgent and unforeseen expenditure”, “urgent or unforeseen needs”;<sup>61</sup>
- stated there was a need for clarification. The need was based on the “basic principle that the Parliament should be given the maximum opportunity to appropriate moneys before they are drawn from the public purse”;<sup>62</sup>
- 20 • rejected the continued use of the term “urgent and special circumstances” as being too vague and subjective. It also rejected the use of “unforeseeable” because it placed too great a restriction on the use of the Advance.<sup>63</sup> Indeed the Committee recommended that access to the Advance only be given in “urgent and unforeseen circumstances”.<sup>64</sup> The Committee recorded that the term “unforeseen” should be regarded as including “unforeseen as to amount”;<sup>65</sup>
- recommended that the relevant criteria should not be set out in a document that could be changed without Parliament being informed. Therefore, the Committee recommended that the criteria be set out in the Finance Regulations made under the Audit Act which would then ensure Parliamentary scrutiny.<sup>66</sup>

**(c) Meaning of “urgent need” and “unforeseen” in s 10(1)**

45. Having regard to the text, legislative history and constitutional context, it is submitted that that s 10 should be construed in manner set out below.

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<sup>59</sup> Report on the Advance at [1.12].

<sup>60</sup> Following the Report on the Advance, the criteria were added to the Schedules to the Appropriation No 1 and No 2 Acts from 1980/1981: Commonwealth, Parliamentary Debates, Senate, 26 May 1981, 2066-2068. From 1999/2000, the conditions were included in the body of the Act itself. The changes resulted from the move to accrual accounting for government finances. The precise language of the provision continued to be modified between 2001/2002 until 2007/2008. The present form of the s 10 power was first enacted in the 2008/2009 Appropriation Acts.

<sup>61</sup> Report on the Advance at [1.15].

<sup>62</sup> Report on the Advance at [2.27].

<sup>63</sup> Report on the Advance at [2.28].

<sup>64</sup> Report on the Advance at [2.27].

<sup>65</sup> Report on the Advance at [2.29].

<sup>66</sup> Report on the Advance at [2.30].

46. *First*, as a plain reading of s 10(1) shows, each of the criteria (“urgent need” and “unforeseen”) must be separately satisfied. Each criterion deals with a different subject. The “urgent need” qualifies the expenditure. By contrast, that the expenditure was “unforeseen” deals with or explains its absence from the Appropriation Act. The legislative history, in particular the *Report on the Advance* which recommended that the Advance only be available if the expenditure is “urgent and unforeseen”, confirms that s 10(1) imposes two independent criteria.
47. *Second*, there will only be an “urgent need for expenditure” when immediate action is required for which the expenditure is needed. The need for the action must be so immediate that it is not practicable to seek a special appropriation from the Parliament. Unless this strict approach to the meaning of “urgent” is adopted, the fundamental principle of parliamentary control over expenditure will be eroded. Unsurprisingly, it has been observed that the Treasurer’s Advance, like the Civil Contingencies Fund in the United Kingdom, “is as an effective method of by-passing prior parliamentary sanction of expenditure as could be imagined” and that “it gives the Executive substantial freedom from prior parliamentary scrutiny of its policy decisions”.<sup>67</sup>
48. *Third*, expenditure will be “unforeseen” if the proposed expenditure was not anticipated or was unexpected. Expenditure may be unexpected in two senses: the amount of expenditure needed for particular action may be unexpected, or the need for particular action might be unexpected.

**(d) The AFM Determination is invalid**

*First error – conflation of the statutory criteria*

49. The first reason that the AFM Determination is invalid is that the Finance Minister misconstrued the requirements imposed upon him by s 10. In the Explanatory Statement for the AFM Determination, the Finance Minister explained that:<sup>68</sup>
- These government decisions [to hold a voluntary postal plebiscite to be conducted by the ABS] were not made until the Appropriation Bill (No 1) 2017-2018 was introduced into the House of Representatives on Tuesday, 9 May 2017. These circumstances meet the requirements of section 10 of the Act regarding the expenditure *being urgent because it was unforeseen*. (emphasis added).
50. The error is treating something as “urgent” because it is “unforeseen”. Section 10 establishes two criteria, not one; the Finance Minister erroneously conflated the criteria.
51. In his affidavit, the Finance Minister gives an added reason for the expenditure being “urgent”.<sup>69</sup> The reason is that it had become the policy of the Executive that “the results of the survey were to be known no later than 15 November 2017” [AB 181].

<sup>67</sup> Enid Campbell, ‘Parliamentary Appropriations’ [1971] *Adelaide Law Review* 145, 152, citing Reid, *The Politics of Financial Control* (1966) at 82-83.

<sup>68</sup> First Hunyor Affidavit at [13], Exhibit JH-5 [AB 56].

<sup>69</sup> Cormann Affidavit at [13] [AB 180-181].

52. The suggestion that statement of a government policy, without more, can create an “urgent” need should not be accepted. Urgency for the purposes of s 10 cannot be self-created. Expenditure will only be “urgent” if the urgency (including a change in policy) arises from an external circumstance. This narrower approach follows not only from the use of the word “urgent”, but also from the context which contemplates the need for additional expenditure to be both “urgent” and “unforeseen”. External events are likely to be both “urgent” and “unforeseen” and this should be seen as the intended scope of s 10. A mere change in policy giving rise to urgency would give the power in s 10 too wide and malleable a scope.
- 10 53. In any event, the explanation in the Explanatory Statement cannot be supplemented. The Finance Minister’s evidence to supplement his reasons in the explanatory statement is therefore irrelevant. There are two reasons why this is so. *First*, the Determination is a legislative instrument according to the *Legislation Act 2003* (Cth).<sup>70</sup> The “rule-maker” (here the Finance Minister) is required to prepare an explanatory statement for the legislative instrument (the AFM Determination) that must “explain the purpose and operation of the instrument”.<sup>71</sup> It is implicit that the explanatory statement will set out in full the reasons for the creation of the instrument and, when appropriate, the information upon which those reasons are based. The explanatory statement must then be laid before the Parliament along with the legislative instrument.<sup>72</sup> The *Legislation Act 2003* (Cth) makes no provision for an explanation of the purpose of the instrument apart from that which is contained in an explanatory statement.
- 20 54. Second, there is a general principle that ordinarily, a decision-maker is bound by the reasons given for his or her decision.<sup>73</sup> Those reasons cannot be supplemented to, “produce, in substance, different reasons for [the] decision”.<sup>74</sup> There is otherwise a risk that the decision-maker may have “second thoughts designed to remedy an otherwise fatal error exposed by the judicial review proceedings”.<sup>75</sup>
- Second error – not ‘urgent’*
- 30 55. The second error is that the Finance Minister adopted an incorrect meaning of “urgent”. Applying the correct meaning, there was no “urgent” need to undertake the voluntary plebiscite for same-sex marriage for the following reasons:
- whether or not same-sex marriage should be legalised had been a controversial issue for many years;
  - the Executive first considered the possibility of conducting a plebiscite on this issue as early as 12 August 2015;<sup>76</sup>

<sup>70</sup> Appropriations Act, s 10(5); *Legislation Act 2003* (Cth), s 8.

<sup>71</sup> *Legislation Act 2003* (Cth), ss 15G(4), 15J(1), s 15(2)(b).

<sup>72</sup> *Legislation Act 2003* (Cth), ss 38(1), 39(1).

<sup>73</sup> *East Melbourne Group Inc v Minister for Planning* (2009) 23 VR 605 at 675-676 [308].

<sup>74</sup> *Fletcher Construction Australia Ltd v Lines Macfarlane & Marshall Pty Ltd* (2001) 4 VR 28 at 50 [58]; *R v Westminster City Council; Ex parte Ermakov* [1996] 2 All ER 302 at 315-316.

<sup>75</sup> *R v Westminster City Council; Ex parte Ermakov* [1996] 2 All ER 302 at 316.

<sup>76</sup> First Hunyor Affidavit at [3] [AB 36].

- legislation (the Plebiscite (Same-Sex Marriage) Bill 2016) to conduct a plebiscite was first introduced into the House of Representatives on 14 September 2016. This Bill was passed by the House on 20 October 2016 but was rejected by the Senate on 7 November 2016;<sup>77</sup>
- the possibility of conducting a voluntary postal plebiscite was considered by the Executive before 23 March 2017 and the cost of such a postal plebiscite was also being investigated: this possibility was referred to by the Minister for Immigration and Border Protection in several interviews on 23 March 2017<sup>78</sup> and by the Special Minister of State on 24 March 2017 (acknowledging that the Attorney-General had been requested to cost a postal vote on same-sex marriage);<sup>79</sup>
- there was no reason provided as to why the postal plebiscite had to be conducted from 12 September 2017;
- in particular, no event had occurred since 5 May 2017 (the last day it was practicable to provide for expenditure in the Appropriations Bill (No 1) 2017-2018 (Cth))<sup>80</sup> that made it necessary for the postal plebiscite to be conducted immediately and, in particular, before an Appropriation Bill was able to be introduced into the House of Representatives.

10 56. As submitted, a change in government policy cannot, without more, manufacture relevant “urgency”.

20 57. In these circumstances, no decision-maker acting rationally could find that there was an “urgent” need for the expenditure. In any event, a special appropriation could have been introduced before the House of Representatives rose on Friday 18 August 2017. Indeed, the Parliament can still pass a special appropriation when it resumes sitting on 4 September 2017.<sup>81</sup>

*Third error – not “unforeseen”*

30 58. The third error is that the Finance Minister adopted an incorrect meaning of “unforeseen” by regarding the expenditure that is to be unforeseen as the expenditure by a particular agency or department (ie the ABS), rather than the need for the particular expenditure on the postal plebiscite, which was under active consideration before 23 March 2017. In that regard the Finance Minister’s Explanatory Statement [AB 50] states, relevantly, that what were “unforeseen” were the government decisions to make funding available to the ABS to undertake the voluntary postal plebiscite, the final

<sup>77</sup> First Hunyor Affidavit at [5]-[6] [AB 36].

<sup>78</sup> Second Hunyor Affidavit at [8], [9] [AB 90], Exhibits JH-5 [AB 114], JH-6 [AB 122].

<sup>79</sup> Second Hunyor Affidavit at [10] [AB 90], Exhibit JH-7 [AB 132].

<sup>80</sup> Cormann Affidavit at [13] [AB 181]. The Bill was introduced into the House of Representatives on 9 May 2017.

<sup>81</sup> Second Hunyor Affidavit at [15] [AB 91], Exhibit JH-12 [AB 175].

result of which was to be known no later than 15 November 2017. This is confirmed in the affidavit of the Finance Minister [**AB 179** at [8]-[13]].

59. In summary, it may be accepted that prior to 7 August 2017 it was not the Government’s policy that a postal plebiscite be conducted by the ABS.<sup>82</sup> But that is not relevant. What must be “unforeseen” is the need for the particular expenditure, rather than the Government’s policy as to which Department is to administer the policy and incur the expenditure in doing so. The Executive was aware by at least 23 March 2017, if not before, that it was foreseeable that a postal plebiscite might be conducted and that a plebiscite would require funding.
- 10 60. A contention that expenditure is relevantly “unforeseen” because the Executive had not formed its policy as to which body or entity will expend the funds should be rejected. The Parliament is entitled to appropriate funds for a particular purpose or objective without necessarily identifying the body or entity that is to expend those funds.<sup>83</sup>
61. Further, the foreseeability of a postal plebiscite was known before the Appropriation Bill No 1 2017-2018 (Cth) was tabled in the House of Representatives. Provision could have been made to cover its cost, even though the schedules to the Bill would have taken a different form. In these circumstances, no decision-maker acting reasonably could have been satisfied the expenditure was “unforeseen”.
- 20 62. Accordingly, the Finance Minister erred in law in his construction of the terms “urgent” and “unforeseen”, and therefore constructively failed to exercise his power with the consequence that the AFM Determination is invalid.

#### **D. THE CS DIRECTION AND AUTHORITY TO CONDUCT THE PROPOSED POSTAL VOTE (GROUNDS FOUR TO SIX)**

##### **(a) Ground 4 – statistical information**

63. By Ground 4, the plaintiffs contend that the CS Direction 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) (**ABS Act**) or the Statistics Act, and are not “statistics” within the meaning of “census and statistics” in s 51(xi) of the Constitution.
- 30 64. The plaintiffs put their argument in three ways: *first*, it is contended that as a matter of substance, the CS Direction does not direct the Statistician to collect statistical information but, rather, has directed the Statistician to conduct a postal vote by electors enrolled to vote under the CE Act; *second*, it is contended that the power to collect “statistical information” does not encompass seeking personal opinions on a single issue of a change to an existing law; and *third*, the CS Direction conflates electors who wish to express a view about whether the law should be changed with those who participate in the postal vote. In doing so no provision is made for electors who object

<sup>82</sup> Cormann Affidavit at [8] [**AB 179**].

<sup>83</sup> *Brown v West* (1990) 169 CLR 195 at 208 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ); *State of New South Wales v The Commonwealth* (1908) 7 CLR 179 at 200 (Isaacs J); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 78 [197] (Gummow, Crennan and Bell JJ), 105 [296] (Hayne and Kiefel JJ).

to the Statistician seeking views on the topic of same-sex marriage by way of the postal survey, and therefore do not participate in it, but would otherwise wish to express a view about whether the law should be changed. Accordingly, under the CS Direction the Statistician will not be able to collect statistical information 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”.

65. ***The First Argument:*** The CS Direction is expressed as “given under paragraph 9(1)(b)” of the Statistics Act.<sup>84</sup> Section 9(1)(b) provides that the Statistician shall, if directed in writing by the Minister, “collect such statistical information in relation to the matters so prescribed as is specified in the notice”. The CS Direction directs the Statistician to collect “statistical information” in three categories: (a) statistical information 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”; (b) statistical information “about the proportion of participating electors who are in favour” of the law being so changed; and (c) “statistical information about the proportion of participating electors who are against” the law being so changed.<sup>85</sup> The statistical information is to include information about participating electors at the national level, at the level of each State and Territory and at the level of each electoral division.
66. Despite the form of the CS Direction, as a matter of substance<sup>86</sup>, the Statistician is not being directed by the Minister to collect statistics or statistical information at all – he is being directed to conduct a vote by electors enrolled to vote. To consider what the Statistician is being asked to do, the CS Direction needs to be read together with the Explanatory Statement to the AFM Determination [AB 55] which states “funding is being made available to the ABS to undertake the voluntary postal plebiscite” [AB 56], which was the alternative offered to the compulsory plebiscite the subject of the Plebiscite (Same-Sex Marriage) Bill 2016. When read together (the CS Direction [AB 58-60]; the AFM Determination [AB 53-54], the Explanatory Statements [AB 55-57, 61-64] the 2016 Bill; and the Ministerial media statements [AB 47-52]) these materials show that the CS direction directs the Statistician to conduct a voluntary or non-compulsory postal vote by electors on whether the law should be changed to allow same-sex couples to marry, rather than a survey of the opinions of electors.
67. ***The Second Argument:*** The plaintiffs’ second argument turns on the meaning of “statistical information”. This argument is advanced in the alternative to the first argument, in that it proceeds on the basis that (contrary to the plaintiffs’ principal submission) the Statistician has been directed to collect statistical information about personal opinions (rather than to conduct a vote). The term “statistical information” is not defined in the Statistics Act or the ABS Act.<sup>87</sup> Moreover, the plaintiffs have not

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<sup>84</sup> CS Direction at [2] [AB 59].

<sup>85</sup> CS Direction at [3] [AB 59-60].

<sup>86</sup> On substance over form, see *Sweedman v Transport Accident Commission* (2006) 226 CLR 362 at 408 [59].

<sup>87</sup> Noting that the ABS Act uses slightly different terminology, referring to “statistics and related information” and “statistical matters”, see eg s 6(1).

identified any case in which the meaning of “statistical information” for the purposes of the Statistics Act has been considered.

68. In its ordinary meaning, the word “statistical” means “of or relating to statistics; consisting of or based on statistics”.<sup>88</sup> The ordinary meaning of “statistics” is the “science which deals with the collection, classification, and use of numerical facts or data, bearing on a subject or matter” or “the numerical facts or data themselves”.<sup>89</sup> However, the term “statistical information” in the Statistics Act must be understood in context and taking into account statutory purpose, and also by reference to s 51(xi) of the Constitution.
- 10 69. In the context of the Statistics Act, the power to collect statistical information is a power conferred on the Executive Government of the Commonwealth to collect information from the Australian population. The source of power for that to occur is s 51(xi), which was adopted by the 1897-8 Constitutional Convention without debate.<sup>90</sup> Prior to Federation, the Australian colonies collected statistical information through statistical collection bodies. The statistical registers of the colonies produced a multitude of annual statistics (in addition to census statistics). The concept of a “census” was well understood, and was described by Quick and Garran as the “periodical numbering of the people of a country”.<sup>91</sup> However, Quick and Garran do not elaborate on the meaning of “statistics”. Indeed, it appears no attention has been given (whether by the courts or within academia) to the meaning of “statistics” in s 51(xi).<sup>92</sup>
- 20 70. In the plaintiffs’ submission, the word “statistics” in s 51(xi) must be read against the background of the kind of statistical information being collected by statistical collection bodies in the colonies, pre-Federation, as well as other uses of the word “statistics” in the Constitution and the purpose of s 51(xi).
71. As to the collection of statistics pre-Federation, the annual statistics of the colonies were primarily focused on data accumulation with respect to industry, agriculture, employment, trade, education and transportation. Critically, there is no indication in the available material that statistical collection in the colonies strayed into an enquiry into personal beliefs or opinions, with the sole exception of religious affiliation.<sup>93</sup>

<sup>88</sup> *Macquarie Dictionary* (5<sup>th</sup> ed, 2009) at 1610.

<sup>89</sup> *Macquarie Dictionary* (5<sup>th</sup> ed, 2009) at 1610.

<sup>90</sup> Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 572.

<sup>91</sup> Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 572.

<sup>92</sup> Section 51(xi) appears to have been adopted from s 91(6) of the *British North America Act, 1867* (30 & 31 Vic, c. 3) (UK) (now known as the *Constitution Act, 1867*), which forms part of the Constitution of Canada. Section 91(6) reserves exclusively to the federal Parliament of Canada the power to legislate with respect to “The Census and Statistics”. Canadian decisions establish that the reference to “The Census” in s 91(6) is a reference to the “decennial census conducted by the federal government and mandated by s. 8 of the Constitution Act, 1867”: *Lafrance v First Nations Information Governance Centre* (2014) HRTO 1826 at [23]. As to “Statistics”, that term has not been the subject of much judicial attention in Canada, although where it has been considered it has been understood against the backdrop of subsequent legislative developments, in particular the *Statistics Act* R.S.C., 1985: *Lafrance v First Nations Information Governance Centre* (2014) HRTO 1826 at [24].

<sup>93</sup> The following sources have been reviewed in reaching this conclusion: the colonial census reports from 1833 to 1901, as curated by the Historical Census and Colonial Data Archive; the catalogue published by the ABS of the publications and statistical compilations which are available in the Colonial Microfiche, produced by the

Indeed, the collection of information on religious affiliation was not uncontroversial at the time. The Census Conference for the 1901 Census in Tasmania resolved that it should not be compulsory for a person to state their religious belief, and permitted the option of inserting the word “object”.<sup>94</sup>

72. As to other references to “statistics” in the Constitution, the word is found (in addition to s 51(xi)) in ss 24 and 105. In both provisions, the constitutional text requires that a determination of numbers of people (whether of the States or of the Commonwealth) for a particular purpose must occur by reference to “the latest statistics of the Commonwealth”. The evident purpose is to ensure the accuracy of population numbers being used for the purposes of those provisions – in s 24, for the purpose of determining the number of members chosen in each State for the House of Representatives, and in s 105 where (in the context of the federal Parliament being able to take over State public debts) a “proportion” of that public debt may be determined by reference to population size. In these contexts, “statistics” are to be used for Commonwealth purposes. In the plaintiffs’ submission, it is important also to consider the purpose of s 51(xi), a matter which was given some attention in the Second Reading speech for the Census and Statistics Bill in 1905.
73. In the Second Reading Speech, the Minister for Home Affairs, Mr Groom, noted that the s 51(xi) power was a concurrent power, and that each State had its own “statistical department organized to supply information for its own special purposes”.<sup>95</sup> By this Bill, it was not proposed “to interfere more than is necessary with the existing States organizations”.<sup>96</sup> What was envisaged was two-fold: first, “some means of compiling Commonwealth statistics upon a uniform basis”;<sup>97</sup> and secondly, that the “central Department will collect all information in regard to subjects specially controlled by the Commonwealth, such as exports and imports, trade, and commerce generally, including inter-State transactions, navigation, and shipping, postal, defence, and other matters”.<sup>98</sup> The desire was to have “Australian information upon Australian subjects generally – information collected upon sound and uniform lines, fairly representing the growth and development of the nation”.<sup>99</sup> What was sought was information “giving an accurate picture of the conditions of our social and industrial life”.<sup>100</sup> These statements are consistent with an understanding of statistics and statistical information that is focused on information about objective matters, not information about the subjective and

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colonial statistical bureaus and their precursors between 1804 and 1901; and annual statistical reports and registers prepared by the various colonial authorities, including the Colonial Secretary of the Colony of New South Wales from 1822 to 1857, the Registrar-General’s Office of Victoria between 1853 to 1890, the Office of the Government Statist of Victoria, the Queensland Government Statistician’s Office, the Chief Secretary’s Office of South Australia, the Government of Western Australia’s Statistics Office and the Colonial Secretary’s Office of Tasmania.

<sup>94</sup> Australian Data Archive, *HCCDA Document ‘TAS-1901-census’ page iii* (undated) <[http://hccda.ada.edu.au/pages/TAS-1901-census-02\\_iii](http://hccda.ada.edu.au/pages/TAS-1901-census-02_iii)>.

<sup>95</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 23 August 1905, 1384 (Mr Groom).

<sup>96</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 23 August 1905, 1385 (Mr Groom).

<sup>97</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 23 August 1905, 1385 (Mr Groom).

<sup>98</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 23 August 1905, 1385 (Mr Groom).

<sup>99</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 23 August 1905, 1386 (Mr Groom).

<sup>100</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 23 August 1905, 1386 (Mr Groom).

internal beliefs and opinions of the population. This conclusion is underscored by the caution exercised in relation to asking questions about religion, with s 21 of the Statistics Act in its original form providing that “no person shall be liable to any penalty for omitting or refusing to state the religious denomination or sect to which he belongs or adheres”.<sup>101</sup>

74. Having regard to the pre-Federation colonial history, “statistics” about a population will almost always involve objective facts about the population. When it comes to subjective matters of belief or opinion, the field that falls within “statistics” that are permissible for a government to collect from its population is very narrow, and is limited to beliefs which may be described as characteristics of the population (such as religious affiliation). What it does not extend to is information about a person’s subjective belief or opinion on a single issue.
75. The term “statistical information” in the Statistics Act must be read narrowly to ensure it is consistent with the constitutional grant of legislative power in s 51(xi). If the Court accepts the plaintiffs’ construction of “statistics” in s 51(xi), it follows that the CS Direction is invalid because what is being sought extends to personal opinions on a single issue.
76. ***The Third Argument:*** A further difficulty with the CS Direction is that the first matter the subject of the CS Direction could not possibly give rise to “statistical information” in light of the way the matter has been framed and the way the postal survey has been directed to be conducted.
77. There will undoubtedly be many electors who “wish to express a view” about whether the law should be changed, but will decline to do so because they do not consider it appropriate to do so by way of the postal survey. The CS Direction equates electors wishing to express a view on whether the law should be changed with those who express that view by their participation in the postal vote. Under the CS Direction it is not possible for the Statistician to be able to collect statistical information 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”. The Statistician will only be able to collect statistical information about the proportion of electors who wish to express a view on that subject and do so by way of the postal vote. But that is not what the CS Direction asks the Statistician to do.
78. If the Court accepts the plaintiffs’ argument about cl 3(1)(a) of the CS Direction, it follows that cll 3(1)(b) and (c) are not properly the subject of a valid direction, because they rely on the concept of “participating electors”, which is defined in cl 3(1)(a).
- (b) Ground 5 – Census and Statistics Regulations 2016 (Cth)**
79. By Ground 5, the plaintiffs contend that the CS Direction is invalid because the opinions being sought are not in relation to matters prescribed by reg 13 of the Census and Statistics Regulations 2016 (Cth) (**Statistics Regulations**).

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<sup>101</sup> *Census and Statistics Act 1905* (Cth) (No. 15 of 1905).

80. As already stated, s 9(1)(b) provides that the Statistician shall – if directed in writing by the Minister – collect “such statistical information in relation to the matters so prescribed as is specified in the notice”. The words “matters so prescribed” refer to “the matters prescribed for the purposes of [s 9]” (see s 9(1)(a)). The prescribed matters are set out in a table to reg 13 of the Statistics Regulations. Three items from that table – items 5, 30 and 38 – are specifically mentioned in the CS Direction as the relevant prescribed matters (although the CS Direction leaves open the possibility of reliance on other prescribed matters). For the following reasons, the matters the subject of the CS Direction do not fall within any of the matters prescribed by reg 13.
- 10 81. Item 5 is “Births, deaths, marriages and divorces”. In that context, statistical information in relation to “marriage” can only refer to facts about the operation of the institution of marriage itself within the Australian population (for example, the number of married couples in Australia, or the average age at which Australians marry), not opinions on whether the law with respect to institution of marriage should be changed. A fact about a person’s opinion on whether the law should be changed to allow same-sex couples to marry is not a fact “in relation to” marriage, but is a fact in relation to a person’s opinion on whether the law about marriage should be changed.
- 20 82. Item 30 is “Law”. In context, statistical information “in relation to” the subject of “law” does not encompass statistical information about a person’s opinion on that subject, and in any event, “law” must be read as referring to facts concerning the law as it currently exists, not whether the law should be changed (which is a different subject matter, namely law reform).
- 30 83. Item 38 is “Population and the social, economic and demographic characteristics of the population”. The word “characteristics” (in its ordinary meaning) relevantly refers to a feature or quality belonging typically to a person and serving to identify them – a distinguishing feature or quality.<sup>102</sup> An opinion about a single issue of law reform is not something that may be described as a feature or quality belonging typically to a person. A “characteristic” of a person (and of a population) is something more than that. Typical examples include a person’s race, gender or social class. While a person’s religion might be said to be a population “characteristic” in that it is a feature or quality that distinguishes the person, an opinion on the single issue of a change to a law does not fall into that category.

**(c) Ground 7 – Executive power**

84. The Commonwealth has not yet made clear whether, and if so how, it will seek to rely on s 61 of the Constitution in relation to conducting the postal survey. Should the Commonwealth do so, the plaintiffs propose to address it in reply.

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<sup>102</sup> *Macquarie Dictionary* (5<sup>th</sup> ed, 2009) at 291.

**(d) Ground 6 - The role of the Electoral Commissioner**

85. If the Court concludes that the process established by the defendants is not a postal vote, then the plaintiffs contend that it is beyond the statutory powers and functions of the Australian Electoral Commission (AEC) to participate in the process.<sup>103</sup>
86. Conducting a non-binding voluntary postal survey on opinions on a single issue does not fall within the functions and powers of the AEC in s 7 of the CE Act. The AEC is charged with dealing with “electoral matters”, which is defined to mean matters which are intended or likely to affect voting in an election: s 4(1). Surveys of opinions on political issues do not constitute electoral matters and the AEC has no power to be involved in such a process. Importantly, electors enrol under the CE Act for one purpose – to be eligible to vote. By enrolling to vote, electors are not consenting to the AEC providing their personal information to another government department for purposes unconnected with voting. While provisions of the CE Act permit the Electoral Commissioner to disclose information on the Rolls to third parties (see, eg, ss 7A(1C), 90B(1)), provision of this information cannot be for a purpose extraneous to the CE Act.

**VII APPLICABLE PROVISIONS**

87. The applicable statutory provisions are set out in Annexure A.

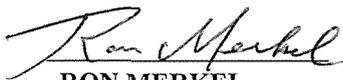
**VIII ORDERS SOUGHT**

88. The plaintiffs seek the orders in the amended application for an order to show cause.

**IX ESTIMATE OF TIME**

89. The plaintiffs estimate that they will require a total of 4 hours for the presentation of oral argument and 20 minutes in reply.

Date: 23 August 2017



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Counsel for the plaintiffs

<sup>103</sup> The AEC’S participation includes updating the electoral roll for the purposes of providing the roll to the ABS and dispatching forms to electors whose addresses have been excluded or deleted from the Roll under s 104: see s 90B(6) of the CE Act.

IN THE HIGH COURT OF AUSTRALIA  
MELBOURNE REGISTRY

No. M105 of 2017

BETWEEN

**ANDREW DAMIEN WILKIE**

First Plaintiff

**FELICITY JENNIFER MARLOWE**

Second Plaintiff

**PFLAG BRISBANE INC**

Third Plaintiff

AND

**THE COMMONWEALTH OF AUSTRALIA**

First Defendant

**MINISTER FOR FINANCE**

Second Defendant

**TREASURER**

Third Defendant

**AUSTRALIAN STATISTICIAN**

Fourth Defendant

**ELECTORAL COMMISSIONER**

Fifth Defendant

**ANNEXURE A TO THE PLAINTIFF'S SUBMISSIONS**

- 10 The applicable provisions are still in force at the date of making the plaintiff's submissions.

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Tel: 02 8898 6500

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Reference: Camilla Pandolfini

## **Applicable provisions of the *Advance to the Finance Minister Determination (No. 1 of 2017-2018)***

I, Mathias Hubert Paul Cormann, Minister for Finance, being satisfied of the matters set out in subsection 10(1) of Appropriation Act (No. 1) 2017-2018 (the Act), make the following determination under subsection 10(2) of the Act:

That the Act have effect as if Schedule 1 of the Act were amended so that the item described in Column 1 of the Table, for the Entity listed in Column 2 of the Table, were increased by the amount listed in Column 3 of the Table.

### 10 **Table**

	<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Item</b>	<b>Appropriation Item</b>	<b>Entity</b>	<b>Amount</b>
1	<i>Appropriation Act (No. 1) 2017-2018</i> Departmental item	Australian Bureau of Statistics	\$122,000,000

Dated 9 August 2017

## **Applicable provisions of the *Appropriation Act (No 1) 2017-2018 (Cth)***

### **10 Advance to the Finance Minister**

- (1) This section applies if the Finance Minister is satisfied that there is an urgent need for expenditure, in the current year, that is not provided for, or is insufficiently provided for, in Schedule 1:
- (a) because of an erroneous omission or understatement; or
- 20 (b) because the expenditure was unforeseen until after the last day on which it was practicable to provide for it in the Bill for this Act before that Bill was introduced into the House of Representatives.
- (2) This Act has effect as if Schedule 1 were amended, in accordance with a determination of the Finance Minister, to make provision for so much (if any) of the expenditure as the Finance Minister determines.
- (3) The total of the amounts determined under subsection (2) cannot be more than \$295 million.
- 30 (4) A determination made under subsection (2) is a legislative instrument, but neither section 42 (disallowance) nor Part 4 of Chapter 3 (sunsetting) of the Legislation Act 2003 applies to the determination.

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

### 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;

10 (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;

20 (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.

30 (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.

40 (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

10 (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 (Statistical Information)***

#### 20 ***Direction 2017 (9 August 2017)***

##### **1 Name**

This is the Census and Statistics (Statistical Information) Direction 2017.

##### **2 Authority**

This direction is given under paragraph 9(1)(b) of the Census and Statistics Act 1905 (the Statistics Act).

##### **3 Collection of statistics**

(1) The Statistician is to collect the following statistical information in relation to matters prescribed for the purposes of section 9 of the Statistics Act (in particular, one or more of items 5, 30 and 38 in the table in regulation 13 of the  
30 Census and Statistics Regulation 2016):

(a) statistical information 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 (participating electors);

(b) statistical information about the proportion of participating electors who are in favour of the law being changed to allow same-sex couples to marry;

(c) statistical information about the proportion of participating electors who are against the law being changed to allow same-sex couples to marry.

- (2) The statistical information is to include information about participating electors at the national level, at the level of each State and Territory, and at the level of each electoral division.
- (3) The statistical information identified is to be published on or before 15 November 2017.
- (4) In this section:  
*elector* means a person:
  - (a) enrolled on the Commonwealth electoral roll at the end of 24 August 2017; or
  - (b) who has made a valid application for enrolment on the Commonwealth electoral roll before the end of 24 August 2017.

**Applicable provisions of the *Census and Statistics (Statistical Information) Direction 2017* (as amended on 16 August 2017)**

**1 Name**

This is the Census and Statistics (Statistical Information) Direction 2017.

**2 Authority**

This direction is given under paragraph 9(1)(b) of the Census and Statistics Act 1905 (the Statistics Act).

**3 Collection of statistics**

- (1) The Statistician is to collect the following statistical information in relation to matters prescribed for the purposes of section 9 of the Statistics Act (in particular, one or more of items 5, 30 and 38 in the table in regulation 13 of the Census and Statistics Regulation 2016):
  - (a) statistical information 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 (participating electors);
  - (b) statistical information about the proportion of participating electors who are in favour of the law being changed to allow same-sex couples to marry;
  - (c) statistical information about the proportion of participating electors who are against the law being changed to allow same-sex couples to marry.
- (2) The statistical information is to include information about participating electors at the national level, at the level of each State and Territory, and at the level of each electoral division.
- (3) In relation to the statistical information identified, the Statistician is to publish the results to which section 12 of the Statistics Act refers on or before 15 November 2017.
- (4) In this section:

*elector* means a person who, at the end of 24 August 2017:

(a) is an elector as defined by subsection 4(1) of the Commonwealth Electoral Act 1918, meets the requirements of paragraphs 93(1)(a) and (b) of that Act, and is not a person to whom subsection 93(8AA) of that Act applies; or

(b) has made a claim or application for enrolment that is in order, is entitled to and qualified for enrolment, meets the requirements of paragraphs 93(1)(a) and (b) of that Act, and is not a person to whom subsection 93(8AA) of that Act applies.

## 10 **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.

(2) The Statistician shall collect such statistical information as is necessary for the purposes of the compilation and analysis, under section 12, of statistics of the number of the people of each State as on the last day of March, June, September and December in each year, but nothing in this subsection shall be taken to limit the generality of subsection (1).

## **Applicable provisions of the *Census and Statistics Act 1905* (Cth) (No. 15 of 1905)**

**21** No person shall be liable to any penalty for omitting or refusing to state the religious denomination or sect to which he belongs or adheres.

## **Applicable provisions of the *Census and Statistics Regulation 2016* (Cth)**

### **13 Statistical information that may be collected for publication**

For section 9 of the Act, the matters mentioned in the following table are prescribed.

<b>Statistical information for publication</b>	
<b>Item</b>	<b>Matter</b>
1	Accidents and injuries
2	Agricultural, apicultural, poultry, dairying and pastoral industries and related service industries

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**Statistical information for publication**

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<b>Item</b>	<b>Matter</b>
3	Assets, liabilities and financial operations and transactions of a natural person or an organisation
4	Banking
5	Births, deaths, marriages and divorces
6	Business, professional, personal and household services
7	Communications
8	Conditions of employment
9	Conservation and environment
10	Construction and demolition
11	Crime
12	Cultural activities
13	The Defence Force and police forces
14	Education
15	Employers' and employees' associations
16	Employment and unemployment
17	Energy
18	Finance
19	Fishing, hunting and trapping
20	Food preparation and food consumption
21	Forestry, saw milling and related service industries
22	Health benefit and health insurance schemes
23	Health, health services and quarantine
24	Housing
25	Income, expenditure and savings in relation to a person, household or family
26	Industrial disputes and arbitration
27	Insurance
28	Investment
29	Land tenure and occupancy
30	Law
31	Local government
32	Manufacturing
33	Migration
34	Mining, mineral and petroleum exploration, quarrying and related service industries
35	Overseas transactions
36	Ownership and control of property
37	Pension and superannuation schemes

<b>Statistical information for publication</b>	
<b>Item</b>	<b>Matter</b>
38	Population and the social, economic and demographic characteristics of the population
39	Prices and charges
40	Public safety
41	Real estate including land and property development
42	Recreation and entertainment
43	Repairs and maintenance
44	Scientific research and development
45	Social and welfare services
46	Taxation
47	Tourism
48	Trade and commerce
49	Transport and storage
50	Wages, earnings, hours of employment and workers' compensation
51	Water resources
52	Wholesaling and retailing

## **Applicable provisions of the *Commonwealth Electoral Act 1918 (Cth)***

### **4 Interpretation**

(1) In this Act unless the contrary intention appears:

*electoral matter* means matter which is intended or likely to affect voting in an election.

...

### **7 Functions and Powers of Commission**

(1) The functions of the Commission are:

(a) to perform functions that are permitted or required to be performed by or under this Act, not being functions that:

(i) a specified person or body, or the holder of a specified office, is expressly permitted or required to perform; or

(ii) consist of the appointment of a person to an office; and

(b) to consider, and report to the Minister on, electoral matters referred to it by the Minister and such other electoral matters as it thinks fit; and

(c) to promote public awareness of electoral and Parliamentary matters by means of the conduct of education and information programs and by other means; and

- (d) to provide information and advice on electoral matters to the Parliament, the Government, Departments and authorities of the Commonwealth; and
- (e) to conduct and promote research into electoral matters and other matters that relate to its functions; and
- (f) to publish material on matters that relate to its functions; and
- (fa) to provide, in cases approved by the Foreign Affairs Minister, assistance in matters relating to elections and referendums (including the secondment of personnel and the supply or loan of materiel) to authorities of foreign countries or to foreign organisations; and
- 10 (g) to perform such other functions as are conferred on it by or under any law of the Commonwealth.

- (2) The Commission may perform any of the functions referred to in paragraphs (1)(b) to (f) (inclusive) in conjunction with the electoral authorities of a State, of the Australian Capital Territory or of the Northern Territory.
- (3) The Commission may do all things necessary or convenient to be done for or in connection with the performance of its functions.

#### **7A Supply of goods and services**

- 20 (1) Subject to this section, the Commission may make arrangements for the supply of goods or services to any person or body. The arrangements that may be made by the Commission include an arrangement under which an authorised person enters into an agreement, on behalf of the Commonwealth, for the supply of goods or services to a person or body. For this purpose, authorised person means a person who is authorised in writing by the Commission to enter into agreements under this subsection.
- (1A) The arrangements the Commission may make under subsection (1) may cover the same matters that may be covered by a section 84 arrangement.
- (1B) An arrangement under subsection (1) may supplement a section 84 arrangement.
- 30 (1C) The use by the Commission of personal information (including information contained in a Roll) for the purposes of conducting an activity (such as a plebiscite) under an arrangement under subsection (1) is taken to be authorised by this Act.  

Note: The effect of this subsection includes (but is not limited to) an authorisation for the purposes of paragraph 6.2(b) of Australian Privacy Principle 6.
- (1D) To avoid doubt, the disclosure by the Commission of personal information (including information contained in a Roll) for the purposes of conducting an activity (such as a plebiscite) under an arrangement under subsection (1) is taken:  
  - 40 (a) to be authorised by this Act; and

(b) not to contravene any provision of this Act.

Note: The effect of paragraph (a) includes (but is not limited to) an authorisation for the purposes of paragraph 6.2(b) of Australian Privacy Principle 6.

(1E) A law of a State or Territory has no effect to the extent to which the law in any way prohibits a person or body from, or penalises or discriminates against a person or body for:

(a) entering into, or proposing to enter into, an arrangement under subsection (1); or

10 (b) taking part in or assisting with, or proposing to take part in or assist with, the conduct of an activity (such as a plebiscite) to which an arrangement under subsection (1) relates.

(1F) If the operation of subsection (1E) would, but for this subsection, exceed the legislative powers of the Commonwealth, it is the intention of the Parliament that it operate to the extent that the law of the State or Territory would be inconsistent with Article 19, or paragraph (a) of Article 25, of the International Covenant on Civil and Political Rights.

Note: Articles 19 and 25 of the International Covenant on Civil and Political Rights are set out in Schedule 2 to the Australian Human Rights Commission Act 1986.

20 (1G) Subsection (1F) does not limit the operation of section 15A of the Acts Interpretation Act 1901.

(2) The Commission may make arrangements for the supply of goods or services only to the extent that it can do so by using:

(a) information or materiel in its possession or in the possession of its officers or members of its staff, either under this Act or any other law; or

(b) expertise that it has acquired or that has been acquired by its officers or members of its staff, either under this Act or any other law.

...

30 **90B Information on Rolls and certified lists of voters to be provided to particular people and organisations**

(1) The following table sets out the persons and organisations to whom the Electoral Commission must give information in relation to the Rolls and

certified lists of voters and specifies the information to be given and the circumstances in which it is to be given:

<b>Provision of information on Rolls and certified lists of voters</b>			
<b>Item</b>	<b>Person or organisation</b>	<b>Information to be given</b>	<b>Circumstances in which information is to be given</b>
1	a candidate in a House of Representatives election	a copy of the certified list of voters for the Division for which the candidate is seeking election	(a) as soon as practicable after the close of the Rolls; and (b) without charge.
2	a registered political party	a copy of the Roll for each State and Territory	(a) as soon as practicable after a general election; and (b) without charge; and (c) subject to subsection (3).
3	a registered political party	a copy of the habitation index for each Division	(a) as soon as practicable after a general election; and (b) without charge; and (c) subject to subsection (3).
4	a registered political party	a copy of a habitation index	(a) on request by the party; and (b) without charge; and (c) subject to subsection (3).
4A	a registered political party	voting information (as defined in subsection (10)) in relation to the election	(a) on request by the party; and (b) without charge; and (c) subject to subsection (3).
5	a registered political party with a member who is a Senator or a member of the	a copy of a Roll See also subsection (2).	(a) on request by the party; and (b) without charge; and (c) subject to subsection (3).

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**Provision of information on Rolls and certified lists of voters**

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Item	Person or organisation	Information to be given	Circumstances in which information is to be given
	House of Representatives		
6	any other registered political party	a copy of a Roll See also subsection (2).	(a) on request by the party; and (b) on payment of the fee (if any) payable under subsection (9); and (c) subject to subsection (3).
7	a Senator for a State or Territory	3 copies of the certified list of voters for each Division in the State or Territory used in a Senate election	(a) as soon as practicable after the result of the Senate election is declared under section 283; and (b) without charge.
8	a Senator for a State or Territory	3 copies of the Roll for the State or Territory	(a) as soon as practicable after a general election; and (b) without charge.
9	a Senator for a State or Territory	3 copies of the certified list of voters for an election of a member of the House of Representatives for a Division in the State or Territory	(a) as soon as practicable after the member of the House of Representatives is declared elected for the Division under section 284; and (b) without charge; and (c) the Senator is not entitled to a copy of the same list under item 7.
10	a Senator for a State or Territory	a copy of the Roll for any Division in that State or Territory	(a) on request by the Senator; and (b) without charge.

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**Provision of information on Rolls and certified lists of voters**

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Item	Person or organisation	Information to be given	Circumstances in which information is to be given
		See also subsection (2).	
10A	a Senator for a State or Territory (other than a member of a registered political party)	voting information (as defined in subsection (10)) in relation to the election in which the Senator was elected	(a) on request by the Senator; and (b) without charge.
11	a member of the House of Representatives	3 copies of the certified list of voters for the Division for which the member is elected	(a) as soon as practicable after the member is declared elected under section 284; and (b) without charge.
12	a member of the House of Representatives	3 copies of the Roll for the Division for which the member is elected	(a) as soon as practicable after a general election; and (b) without charge.
13	a member of the House of Representatives	3 copies of the certified list of voters for the Division for which the member is elected that is provided for the purposes of paragraph 203(1)(b) for a Senate election	(a) as soon as practicable after the result of the Senate election is declared under section 283; and (b) without charge; and (c) the member is not entitled to a copy of the same list under item 11.
14	a member of the House of Representatives	a copy of the Roll for the Division for which the member is elected  See also subsection (2).	(a) on request by the member; and (b) without charge.
14A	a member of the House of Representatives for	voting information (as defined in subsection (10)) in	(a) on request by the member; and (b) without charge.

<b>Provision of information on Rolls and certified lists of voters</b>			
<b>Item</b>	<b>Person or organisation</b>	<b>Information to be given</b>	<b>Circumstances in which information is to be given</b>
	a Division (other than a member of a registered political party)	relation to the election in which the member was elected	
15	a member of the House of Representatives elected for a Division that is affected by a redistribution	a copy of the Roll for any Division that, after the redistribution, includes the Division, or a part of the Division, for which the member is elected  See also subsection (2).	(a) on request by the member; and (b) without charge.
16	an electoral authority of a State or Territory	(a) any information on a Roll; and (b) any other information that an arrangement under section 84 allows or requires the Electoral Commission to provide to the authority	(a) an arrangement under section 84 allows or requires the information to be provided to the authority; and (b) on payment of the fee (if any) payable under subsection (9).

*Electoral Commission may provide additional information in some circumstances*

- (2) If the Electoral Commission provides a copy of a Roll to a person or organisation under item 5, 6, 10, 14 or 15, the Electoral Commission may also provide any additional information held by the Electoral Commission about a person whose name is included on the Roll. The additional information is to be provided without charge.

Note: For **additional information**, see subsection (10).

*Registered political parties for a State or Territory only if the party has branch or division for that State or Territory*

- 10 (3) In spite of subsection (1), the Electoral Commission need not give a registered political party information in relation to persons enrolled in a State or Territory unless a branch or division of the party is organised on the basis of that State or Territory.

*Giving parliamentarians electronic copies on request*

(3A) On request by the Senator or member of the House of Representatives to whom item 7, 9, 11 or 13 of the table in subsection (1) relates, the Electoral Commission may comply with the item by giving the Senator or member:

- (a) a single electronic copy of the relevant certified list; and
- (b) if the Senator or member requests 1 or 2 other copies of the list, that number of other copies of the list.

10

(3B) On request by the Senator or member of the House of Representatives to whom item 8 or 12 of the table in subsection (1) relates, the Electoral Commission may comply with the item by giving the Senator or member:

- (a) a single electronic copy of the relevant Roll; and
- (b) if the Senator or member requests 1 or 2 other copies of that Roll, that number of other copies of that Roll.

(3C) On request by the Senator or member of the House of Representatives to whom item 10, 14 or 15 of the table in subsection (1) relates, the Electoral Commission may comply with the item by giving the Senator or member an electronic copy of the relevant Roll.

20

(3D) Subsections (3A), (3B) and (3C) do not limit the operation of subsections 90(1) and (2) or the *Electronic Transactions Act 1999* in relation to subsection (1) of this section.

*Information on Rolls may be provided to particular people and organisations*

(4) The following table sets out the persons and organisations to whom the Electoral Commission may give information in relation to the Rolls and specifies the information that may be given and the circumstances in which it may be given:

<b>Provision of information on Rolls</b>			
<b>Item</b>	<b>Person or organisation</b>	<b>Information that may be given</b>	<b>Circumstances in which information may be given</b>
1	the persons or organisations (if any) that the Electoral Commission determines are appropriate	a copy of a Roll	(a) as soon as practicable after a general election; and (b) without charge.
2	any person or organisation that conducts medical research or provides a health screening program	(a) a copy of a Roll (or an extract of a Roll); and (b) if the Electoral Commission wishes—	(a) on request by the person or organisation; and (b) on payment of the fee (if any)

<b>Provision of information on Rolls</b>			
<b>Item</b>	<b>Person or organisation</b>	<b>Information that may be given</b>	<b>Circumstances in which information may be given</b>
		<p>information about:</p> <p>(i) the sex of;</p> <p>or</p> <p>(ii) the age range that covers;</p> <p>a person included on the Roll</p> <p>See also subsection (5).</p>	<p>payable under subsection (9).</p>
3	any other person or organisation	a copy of a Roll (or an extract of a Roll)	<p>(a) on request by the person or organisation; and</p> <p>(b) on payment of the fee (if any) payable under subsection (9).</p>
4	a prescribed authority	<p>(a) any information on a Roll; and</p> <p>(b) if the Electoral Commission wishes—</p> <p>information about:</p> <p>(i) the sex of;</p> <p>or</p> <p>(ii) the date of birth of;</p> <p>or</p> <p>(iii) the occupation of;</p> <p>a person whose name is included on the Roll</p>	<p>(a) the provision of the information is authorised by the regulations; and</p> <p>(b) on payment of the fee (if any) payable under subsection (9).</p>
5	a prescribed person or organisation that verifies, or contributes to the verification of, the identity of persons	a copy of a Roll (or an extract of a Roll)	<p>(a) on request by the person or organisation; and</p> <p>(b) on payment of the fee (if any)</p>

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**Provision of information on Rolls**

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<b>Item</b>	<b>Person or organisation</b>	<b>Information that may be given</b>	<b>Circumstances in which information may be given</b>
	for the purposes of the <i>Financial Transaction Reports Act 1988</i>		payable under subsection (9).
6	a prescribed person or organisation that: (a) is a reporting entity or an agent of a reporting entity; and (b) carries out applicable customer identification procedures under the <i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i>	a copy of a Roll (or an extract of a Roll)	(a) on request by the person or organisation; and (b) on payment of the fee (if any) payable under subsection (9).
7	a prescribed person or organisation that, under an arrangement with: (a) a reporting entity; or (b) an agent of a reporting entity; provides information for the purpose of facilitating the carrying out of applicable customer identification procedures under the <i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i>	a copy of a Roll (or an extract of a Roll)	(a) on request by the person or organisation; and (b) on payment of the fee (if any) payable under subsection (9).

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*Item 2 age ranges*

- (5) The Electoral Commission may determine the age ranges to be used for the purposes of item 2 in the table in subsection (4) in a particular case. However, each age range must cover at least 2 years.

*Information about person whose address is not included on Roll*

- (6) The Electoral Commission must not include in information given under subsection (1) or (4) information about a person whose address has been excluded or deleted from a Roll under section 104.

*Restriction on disclosure of information about occupation, sex or date of birth*

- (7) Except as otherwise provided by this Act, the Electoral Commission must not give a person information which discloses particulars of the occupation, sex or date of birth of an elector.
- 10 (8) If an arrangement under section 84 allows information to be given to an electoral authority of a State or Territory, the Electoral Commission may also give that electoral authority information that discloses particulars of the sex or date of birth of an elector who is enrolled in another State or Territory.

*Certain information about defence and AFP personnel not to be disclosed*

- (8A) Nothing in this section (or in an arrangement under section 84) allows or requires the Electoral Commission to give a person or organisation information that the Electoral Commission is aware would or might enable any of the following to be ascertained:
- (a) the fact that a particular person has been, is or will be serving outside Australia as:
- 20 (i) a defence member or a defence civilian; or
- (ii) an AFP officer or staff member;
- (b) the place where a particular person has been, is or will be serving outside Australia in a capacity referred to in subparagraph (a)(i) or (ii);
- (c) the period of time when a particular person has been, is or will be serving outside Australia in a capacity referred to in subparagraph (a)(i) or (ii);
- (d) without limiting any of the preceding paragraphs—the postal address of a person who is serving outside Australia in a capacity referred to in subparagraph (a)(i) or (ii);
- 30 (e) any other information of a kind specified in the regulations, being information that relates to persons who have been, are or will be serving outside Australia in a capacity referred to in subparagraph (a)(i) or (ii).
- (8B) Paragraph (8A)(d) does not apply in relation to the postal address of a person who is a general postal voter.

*Fee*

- (9) The Electoral Commission may charge a fee that covers the cost to the Commission of providing information under:
- (a) item 6 or 16 in the table in subsection (1); or
- (b) item 2, 3, 4, 5, 6 or 7 in the table in subsection (4).

## *Definitions*

(10) In this section:

***additional information*** about a person included on a Roll means the following:

- (a) the person's postal address;
- (b) the person's sex;
- (c) the person's date of birth;
- (d) the person's salutation;
- (e) the census district in which the person lives;
- (f) the most recent enrolment date and enrolment transaction number for the person;
- 10 (g) whether the person is:
  - (i) not entitled to be enrolled as an elector of the Commonwealth; or
  - (ii) not also enrolled as a State elector, Australian Capital Territory elector or Northern Territory elector; or
  - (iii) less than 18 years old;
- (h) whether the person is a general postal voter;
- (i) whether the person has only recently been enrolled;
- (j) whether the person has re-enrolled and, if so:
  - (i) the Division and State or Territory in which they were previously enrolled; and
  - 20 (ii) the enrolment transaction number for the person's previous enrolment;
- (k) the electoral district for the purposes of State or Territory elections in which the person lives;
- (l) the local government area in which the person lives;
- (m) the Australia Post delivery point identifier for each address of the person.

***applicable customer identification procedure*** has the same meaning as in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.

***habitation index***, in relation to a Division, means a list of electors for the Division arranged, in a manner determined by the Electoral Commission, by reference to the respective places of living of the electors whose names are on the Roll for the

30 Division.

***reporting entity*** has the same meaning as in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.

***voting information***, in relation to an election, means information that:

- (a) contains the names and addresses of the electors who voted at the election (other than itinerant electors, eligible overseas electors and electors whose addresses have been excluded from the Roll under section 104); and

- (b) indicates whether or not each of those electors voted at a polling place; and
- (c) if the elector voted at a polling place for the Division for which the elector was enrolled, indicates the location of the polling place.

## **Applicable provisions of the Constitution**

### **24 Constitution of House of Representatives**

The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.

10 The number of members chosen in the several States shall be in proportion to the respective numbers of their people, and shall, until the Parliament otherwise provides, be determined, whenever necessary, in the following manner:

(i) a quota shall be ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of the senators;

(ii) the number of members to be chosen in each State shall be determined by dividing the number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen  
20 in the State.

But notwithstanding anything in this section, five members at least shall be chosen in each Original State.

...

### **51 Legislative powers of the Parliament**

The Parliament shall, subject to this Constitution, have power<sup>12</sup> to make laws for the peace, order, and good government of the Commonwealth with respect to:

(i) trade and commerce with other countries, and among the States;

(ii) taxation; but so as not to discriminate between States or parts of States;

(iii) bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth;

(iv) borrowing money on the public credit of the Commonwealth;

(v) postal, telegraphic, telephonic, and other like services;

(vi) the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth;

(vii) lighthouses, lightships, beacons and buoys;

(viii) astronomical and meteorological observations;

- (ix) quarantine;
- (x) fisheries in Australian waters beyond territorial limits;
- (xi) census and statistics;
- (xii) currency, coinage, and legal tender;
- (xiii) banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money;
- (xiv) insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned;
- 10 (xv) weights and measures;
- (xvi) bills of exchange and promissory notes;
- (xvii) bankruptcy and insolvency;
- (xviii) copyrights, patents of inventions and designs, and trade marks;
- (xix) naturalization and aliens;
- (xx) foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth;
- (xxi) marriage;
- (xxii) divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants;
- 20 (xxiii) invalid and old-age pensions;
- (xxiiiA) the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances;<sup>13</sup>
- (xxiv) the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States;
- (xxv) the recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States;
- 30 (xxvi) the people of any race for whom it is deemed necessary to make special laws;<sup>14</sup>
- (xxvii) immigration and emigration;
- (xxviii) the influx of criminals;
- (xxix) external affairs;
- (xxx) the relations of the Commonwealth with the islands of the Pacific;
- (xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;

(xxxii) the control of railways with respect to transport for the naval and military purposes of the Commonwealth;

(xxxiii) the acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State;

(xxxiv) railway construction and extension in any State with the consent of that State;

(xxxv) conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State;

10 (xxxvi) matters in respect of which this Constitution makes provision until the Parliament otherwise provides;

(xxxvii) matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States,<sup>15</sup> but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law;

(xxxviii) the exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia;

20 (xxxix) matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

...

### **53 Powers of the Houses in respect of legislation**

30 Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law.

The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.

The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.

The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.

Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws.

**54 Appropriation Bills**

The proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation.

...

**56 Recommendation of money votes**

10 A vote, resolution, or proposed law for the appropriation of revenue or moneys shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated.

...

**61 Executive power**

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

...

**81 Consolidated Revenue Fund**

20 All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.

...

**83 Money to be appropriated by law**

No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.

30 But until the expiration of one month after the first meeting of the Parliament the Governor-General in Council may draw from the Treasury and expend such moneys as may be necessary for the maintenance of any department transferred to the Commonwealth and for the holding of the first elections for the Parliament.

...

**105 Taking over public debts of States**

The Parliament may take over from the States their public debts, or a proportion thereof according to the respective numbers of their people as shown by the latest statistics of the Commonwealth, and may convert, renew, or consolidate such debts, or any part thereof; and the States shall indemnify the Commonwealth in respect of the debts taken over, and thereafter the interest payable in respect of the debts shall be deducted and retained from the portions of the surplus revenue of the Commonwealth

payable to the several States, or if such surplus is insufficient, or if there is no surplus, then the deficiency or the whole amount shall be paid by the several States.

...

**109 Inconsistency of laws**

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.