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 REPLY

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I INTERNET PUBLICATION

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

II REPLY

2. ***Standing:*** The first plaintiff has standing to challenge the appropriation of funds essentially for the reasons expressed by McHugh J and Kirby J in *Combet v The Commonwealth*.[1] Further, the role of s 10 in relation to the AFM Determination and the CS Direction has denied to the first plaintiff his constitutional function as a member of the House of Representatives of voting in relation to an amendment to the Appropriation Act and the disallowance of the instruments.[2]

3. While "there is no obligation to complete, or do anything at all with, the survey form" [**Cth [8]**], the first and second plaintiffs have an individualised interest in whether it is lawful for each of them to have to be subjected to the involuntary receipt of the postal vote form forwarded to them by the ABS in the mail. They will receive the form solely because of their compliance with the compulsory enrolment provisions of the CE Act. As in *Pape v Federal Commissioner of Taxation*, the disposition of this controversy "does not turn solely upon facts or circumstances unique to [either plaintiff]", and so the determination of whether each of them may lawfully be sent a form "acquires a permanent, larger, and general dimension" of relevance to all electors that "would vindicate the rule of law under the *Constitution*".[3] And as in *Pape*, it is irrelevant that others will receive that which is impugned. Otherwise, standing will be denied to the larger the group of persons affected; is nobody to have standing (perhaps other than the States) when everyone is affected?[4] Mr Pape had standing, even though he had no obligation to do anything at all with the money he received.

4. The second plaintiff has more than a mere "emotional concern" in this postal vote [**cf Cth [10]**].[5] It affects the repute, status and legitimacy of her and her family unit, which are brought into question by the postal vote sought to be achieved by the mail received by her and other elector's at their homes.[6]

5. As to the constitutional writ of prohibition, it should not be limited to the exercise of judicial or quasi-judicial power. *R v Wright; Ex parte Waterside Workers' Federation of Australia*[7] was decided at a time when *R v Electricity Commissioners; Ex parte London Electricity Joint Committee Co (1920) Ltd*[8] held sway.[9] The prerogative writ

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[1] (2005) 224 CLR 494 at 556-557 [97] (McHugh J), 620 [308] (Kirby J) (*'Pape'*).
[2] Compare the Commonwealth's submission [M106 [21]] in *M106* that a parliamentarian should not be permitted to "challeng[e] decisions where their vote in Parliament either was not required or did not carry the day", which would leave it to a parliamentary majority to enforce the constitutionality of an appropriation.
[3] (2009) 238 CLR 1 at 69 [158] (Gummow, Crennan and Bell JJ).
[4] If the Commonwealth's submission that this is not a 'matter' is correct, the State Attorneys General may have no right to intervene under s 78A of the *Judiciary Act 1903* (Cth). For the position in other jurisdictions, see *R v Inland Revenue Commissioners, Ex parte National Federation of Self-employed and Small Businesses Ltd* [1982] AC 617, 644 (Lord Diplock); *R (Jackson) v A-G* [2006] 1 AC 262, 318 [159]; *Canadian Council of Churches v Canada (Minister of Employment and Immigration)* [1992] 1 S.C.R. 236 at [37]; *Canada (A-G) v Downtown Eastside Sex Workers United Against Violence Society* [2012] 2 S.C.R. 524 at [50], [73]-[74].
[5] That expression was employed in *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 530 to describe an interest in the preservation of the environment, which is far removed from the issues deposed to in relation to the second plaintiff at AB 38-39 [20]-[21].
[6] See *Monis v The Queen* (2013) 249 CLR 92 at 115 [27] (French CJ), 205-206 [321]-[322] (Crennan, Kiefel and Bell JJ); *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.
[7] (1955) 93 CLR 528 at 541-542.
[8] [1924] 1 KB 171 at 204-205.
[9] Cf *Ridge v Baldwin* [1964] AC 40; *R v Panel on Take-overs and Mergers; Ex parte Datafin plc* [1987] 1 QB 815; *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 158-159.

of prohibition now lies whenever the relevant decision-maker is exercising public power.[10] The constitutional writ of prohibition is capable of accommodating such developments,[11] and *R v Wright* should be overruled accordingly.

6. ***Validity of Section 10***: The Appropriation Act must be read together as a whole and it is for this reason that the Commonwealth's retreat into s 12 is of no avail. Section 12 effects an appropriation immediately upon commencement of the Appropriation Act;[12] at that time, what is appropriated is the total of the amounts set out in Sch 1: $88,751,598. The AFM Determination made had effectively amended Sch 1 in the manner set out at **AB 54**. The making of the AFM Determination had the consequence of an additional amount of $122,000,000 being appropriated by the combined operation of ss 6, 10 and 12.[13] By reason of the AFM Determination the total amount previously approved and appropriated by the Parliament was increased by $122,000,000.

7. The Commonwealth's reliance upon history is misplaced. Prior to 1999, the advance did not empower a Minister to amend the Appropriation Act. Rather, the amount of the advance was itself a line item in the schedules of appropriations.[14] What is in question therefore is the particular mechanism adopted by the Parliament since 1999.[15]

8. Relatedly, the Commonwealth overstates the inconvenience of invalidating s 10 [**Cth [32]**]. There are valid ways to attend to the practical concern of government to meet urgent and unforeseen situations; this new way is not one of them.[16]

9. Ultimately, the Commonwealth's submissions on the construction and validity of s 10 (which is in the same form in the Appropriation Act (No 2), lack any effective limiting principle that recognises parliamentary control over expenditure. If correct, Parliament may operate the budget through an annual appropriation Act which contains an appropriation provision such as s 12 and a power to amend as the Minister sees fit to enable effect to be given to changes in Government policy from time to time. While the Parliament has broad power to delegate the power to make laws with respect to a particular head in s 51,[17] fiscal statutes are in a different category, as the Commonwealth itself accepts. In this context, the broad delegation set out in s 10 is not permitted by the constitutional text and structure.

10. **Validity of AFM Determination:** *Conflation of criteria:* The Explanatory Statement is required by s 15J of the *Legislation Act 2003* (Cth) to "explain the purpose and operation" of an instrument. As is evidenced in this case this necessarily includes the

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[10] See *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 at 399 [10], 413-414 [82]-[84], 445 [260]; *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture [No 2]* (2009) 26 VR 172 at 183; Mark Aronson, Matthew Groves, Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (6th ed, 2017) at 856-865.

[11] *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 89 [5], 93 [24], 97 [34], 141-142 [165]. See also *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd.* (2000) 200 CLR 591 at 599-600 [2]-[3]; 611 [44]; 627-628 [95]; 652-653 [162]; 670 [211].

[12] See Explanatory Memorandum, Appropriation Bill (No 1) 2017-2018 (Cth) at 9 [33].

[13] Section 12 is not to be treated as some form of standing appropriation of the kind that was seen historically which is now, outside of annual appropriations comprising the budget: see *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* (1993) 176 CLR 555 at 578-579.

[14] The advance provisions in *Brown v West* (1990) 169 CLR 195 at 209-210 and *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* (1993) 176 CLR 555 at 600-601 were not in the same form, and did not operate in the same fashion, as s 10.

[15] While it is ultimately immaterial, since 1999, some 183 determinations have been made, of which the AFM Determination impugned in this case is the second largest.

[16] In relation to s 10(4), disallowance only operates from the date of the disallowance and accords with the "constitutional principle of parliamentary control over expenditure": see **[Cth [22]]**.

[17] See *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 513 [102].

giving of reasons insofar as they are relevant to the purpose and operation of the instrument. Section 15J, inter alia, enables each House of Parliament to consider whether the instrument should be disallowed: see ss 39 and 42. Hence, the principles of non-supplementation are engaged.[18] An alternative way of considering the Minister's error of law is that, insofar as the purpose that is required by s 15J to be stated, and is stated, included the conflated criteria, it is not a purpose authorised by s 10(1) of the Appropriation Act and the AFM Determination is accordingly vitiated.

11. ***Urgency:*** If the Commonwealth's submissions **[Cth [48]]** to the construction of the "need" for the expenditure because of omission or unforeseen circumstances, were to be accepted, then they leave little or no work for the further requirement that the need be "urgent". The urgency contended for by the Commonwealth is based upon "the achievement of a Government policy in a matter and within a timeframe that the Government judges to be necessary". As is apparent from the Minister's Explanatory Statement **[AB [55]]** and his affidavit **[AB [180-181]]**, it is clear that the Minister did not take into account or have regard to the requisite urgency based on any satisfaction on his part as to there being a need for action "so immediate that it is not practicable to seek a special appropriation from the Parliament" see **PS [47]**. In fact both Houses were sitting between 8-17 August 2017 and will sit between 4-14 September 2017: see **AB 176**. If that is correct then the Minister has further misdirected himself in law.

12. ***Unforseen*:** The point of difference is what must be "unforseen": the expenditure for a particular purpose, that is, a "postal plebiscite" (the plaintiffs' contention) or the government agency which is to incur that expenditure (the Commonwealth's position). If the plaintiffs are correct the Minister has again misdirected himself in law.

13. ***Validity of the CS Direction - this is a vote not a collection of statistics:*** The plaintiffs and the Commonwealth agree that the CS Direction must be characterised as a matter of substance, not form **[Cth [70]]**.[19] Nevertheless, the Commonwealth's analysis overlooks the following. *First*, participation is not open to the Australian population generally, but is restricted to "electors".[20] If the process is merely a "collection of statistical information", rather than a vote, there would be no need to restrict participation to electors.[21] Indeed, it is impermissible under s 9(1)(b) for the Treasurer to restrict the class of participants (or respondents) - the power is to direct collection of statistical information in relation to "matters", and no more. *Second*, the practical operation of the CS Direction is that electors will be asked to answer effectively the same question that was to be the subject of the plebiscite to be effected by the *Plebiscite (Same-Sex Marriage) Bill 2016* (Cth) (s 5(2)) – should the law be changed to allow same-sex couples to marry? Conducting a postal vote required – as the Bill made plain – legislation to (inter alia) confer functions on the Electoral Commissioner (s 7(1)). Without legislation, the Commonwealth now seeks (by the CS Direction) to carry out the same vote and to achieve the same outcome by clothing the process in the language

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[18] cf *R v Westminister City Council; Ex parte Ermakov* [1996] 2 All ER 302 at 316.

[19] The parties also agree that labelling the process as a "survey" or a "vote" is not determinative **[Cth [70]]**.

[20] That is, persons who are enrolled on the Commonwealth electoral roll or who have made a valid application for enrolment by end of 24 August 2017. Further, the information is to include the outcome of the responses of participating electors according to State, Territory and electoral divisions: AB 59-60.

[21] As to the Commonwealth's assertion that one of the "defining characteristics" of a vote in Australia is that it is compulsory **[Cth [71]]**. See, eg, *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027 at [182], [226], [264].

of collection of statistical information. The Court should, look to the practical operation of the CS Direction and not permit restrictions on Commonwealth power "by mere drafting devices".[22]

14. ***The flawed process reveals that this is a device*:** The Commonwealth says "it is not inaccurate to categorise a person within the survey class who does not respond ... as a person who does not wish to express a view about whether the law should be changed" [**Cth [73.1]**]. The plaintiffs disagree. The only way to know whether there are electors who have a view on the subject but do not wish to participate in this particular process (and if so, the size of that group) is to specify that matter as one of the matters the subject of the CS Direction. By not doing so, the real purpose of the CS Direction is revealed. It is not properly characterised as a collection of statistical information about the prescribed matters specified in the Direction, but a vote of electors on the question of whether the law should be changed to allow same-sex marriage.

15. ***The statistics power***: The plaintiffs do not dispute that "statistics" is a broad concept. It was a broad concept at the time of Federation **[Cth [61]]** and remains so today. But that is not what the word "statistics" means, in isolation. Rather, the question is whether the grant of power in s 51(xi) with respect to "statistics" extends to laws enabling the executive government to collect statistics about the personal opinions of the population. At Federation, "statistics" was "a recognised subject-matter of governmental activity" **[Cth [58]]**. But, as stated in chief, what is clear from the pre-Federation colonial resources is that governmental activity with respect to statistics did not extend to collecting statistics of personal opinions held by the population. With respect to religion, the focus of statistics collection in the colonies on this subject was in relation to religious denomination (an objective matter directed to how a person identifies publicly as part of a particular group). The historical material referred to in footnote 93 to **PS [71]** reveals particular concern about the issue. This supports, rather than detracts from, the contention that governmental activity in the colonies with respect to statistics collection did not extend to surveying the population's personal opinions on matters.

16. The Commonwealth's criticism that the plaintiffs seek to draw an unstable distinction between fact and opinion mischaracterises the plaintiffs' argument **[Cth [65]]**. It is not disputed that a survey of opinions can generate facts or numbers. The issue is whether the power conferred by s 51(xi) should be understood as extending to a law empowering the ABS to collect information about the opinions of the population.[23]

17. ***The Regulations:*** Notwithstanding the breadth of the words "in relation to", the matters specified in the CS Direction still need to bear a connection to the subject matter of the prescribed matters. Collecting statistical information about opinions on a change to the law to permit same-sex marriage is collecting statistical information "in relation to" that subject matter (a change to the law with respect to same-sex marriage). It might also be statistical information "in relation to" law reform. But it is not "statistical information" in relation to "marriages", "law" or "the social, economic and demographic characteristics of the population". Importantly, the language of item 5 is "marriages" not "marriage". The use of the plural suggests, particularly when read in

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[22] *Ha v New South Wales* (1997) 189 CLR 465 at 498 (Brennan CJ, McHugh, Gummow and Kirby JJ).

[23] That the ABS has, since the 1960s, collected statistical information about the opinions of the population on various matters does not assist the Court in determining the scope of the grant of power under s 51(xi) **[cf Cth [68]]**. What that material does show is a change in practice over time – a change the plaintiffs say is not consistent with the grant of power under s 51(xi).

the context of "births, deaths, marriages and divorces", that item 5 is directed to the number of "marriages" that occur in a given period.[24] As to item 30, even if statistical information extends to opinions, an opinion about whether a law should be changed is an opinion about law reform, not "Law". As to item 38, the Commonwealth's **[Cth [78]]** does not give the word "characteristics" any real work to do. As submitted in chief, a characteristic is a distinguishing feature or quality. An opinion about whether the law on same-sex marriage should be changed is not a "characteristic of the population".

18. ***The Electoral Commissioner's Role***: The Commonwealth relies on s 7A of the CE Act as supporting the AEC's arrangements with the ABS [**Cth [81]**]. But s 7A confers powers on the AEC. It does not enlarge the AEC's function as set out in s 7, and the powers conferred by s 7A cannot be exercised inconsistently with those functions.[25] The functions in s 7 do not permit the AEC to have a role in relation to the proposed "postal survey". It is to be noted that the relevant definition of "electoral matters" is in s 5 of the CE Act, not s 4(1) (as stated in the plaintiffs' submissions at [86]).[26]

Date: 1 September 2017

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[24] Thus the item is concerned with "marriages" that take place within the population, (and facts about those marriages) rather than "marriage" as a concept.

[25] As much is clear as a matter of statutory construction, but the point is also made in the extrinsic material for the Bill which became the *Electoral and Referendum Amendment Act 1992* (Cth) and inserted s 7A in its original form (by s 6): see Commonwealth, *Parliamentary Debates*, House of Representatives, 16 December 1992, 3866 (Mr Price) and the Explanatory Memorandum to the same effect.

[26] Section 5 refer s to "matters relating to Parliamentary elections, elections, ballots under the *Fair Work Act 2009* or the *Fair Work (Registered Organisations) Act 2009* and referendums."