HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

Matter No M105/2017

ANDREW DAMIEN WILKIE & ORS — PLAINTIFFS

AND

THE COMMONWEALTH OF AUSTRALIA & ORS — DEFENDANTS

Matter No M106/2017

AUSTRALIAN MARRIAGE EQUALITY LTD & ANOR — PLAINTIFFS

AND

MINISTER FOR FINANCE MATHIAS CORMANN & ANOR — DEFENDANTS

Wilkie v The Commonwealth
Australian Marriage Equality Ltd v Cormann
[2017] HCA 40
Date of Order: 7 September 2017
Date of Publication of Reasons: 28 September 2017
M105/2017 & M106/2017

ORDER

Matter No M105/2017

1. Application dismissed.

2. The plaintiffs pay the costs of the first to third defendants.

Matter No M106/2017

Questions 2, 3 and 5 of the Special Case dated 21 August 2017 be amended and the questions stated in the Special Case (as so amended) be answered as follows:

Question 1

Do either of the plaintiffs have standing to seek the relief sought in the Amended Statement of Claim?

Answer

Inappropriate to answer.

Question 2

Is the Advance to the Finance Minister Determination (No 1 of 2017-2018) (Cth) ("the Determination") invalid by reason that the criterion in s 10(1)(b) of the Appropriation Act (No 1) *2017-2018 (Cth) ("the 2017-2018 Act") was not met such that the Finance Minister's power to issue the Determination was not enlivened?*

Answer

No, it is not invalid.

Question 3

(a) Does question 3(b) raise an issue which is justiciable by a court and within the scope of any matter which the Court has authority to decide?

(b) If the answer to question 3(a) is yes, is the Determination invalid by reason that:

(i) on its proper construction, s 10 of the 2017-2018 Act does not authorise the Finance Minister to make a determination, the effect of which is that the 2017-2018 Act takes effect as if Schedule 1 thereto were amended to make provision for expenditure that is outside the ordinary annual services of the Government; and

(ii) the expenditure on the ABS Activity (being the activity described in the Census and Statistics (Statistical Information) Direction 2017 (Cth)) is not within the meaning of "ordinary annual services of the Government"?

Answer

(a) The proper construction of s 10 of the 2017-2018 Act is justiciable.

(b) No. Section 10, on its proper construction, did authorise the Finance Minister to make the Determination.

Question 4

If the answer to question 2 or question 3(b) is yes:

(a) does question 4(b) raise an issue which is justiciable by a court and within the scope of any matter which the Court has authority to decide?

(b) if the answer to question 4(a) is yes, would the drawing of money from the Treasury of the Commonwealth for the ABS Activity in reliance on the appropriation for the departmental item for the [Australian Bureau of Statistics] in the 2017-2018 Act be unauthorised by the 2017-2018 Act on the basis that the expenditure is not within the meaning of "ordinary annual services of the Government"?

Answer

The question does not arise.

Question 5

What, if any, relief sought in the Amended Statement of Claim should the plaintiffs be granted?

Answer

None.

Question 6

Who should pay the costs of this special case?

Answer

The plaintiffs should pay the costs of the special case.

Representation

R Merkel QC and K E Foley with C J Tran for the plaintiffs in M105/2017 (instructed by Public Interest Advocacy Centre)

K M Richardson SC with J S Emmett, G E S Ng and S Palaniappan for the plaintiffs in M106/2017 (instructed by Human Rights Law Centre)

S P Donaghue QC, Solicitor-General of the Commonwealth with M J O'Meara and B K Lim for the first to third defendants in M105/2017, for the first defendant in M106/2017, and for the Attorney-General of the Commonwealth, intervening in M106/2017 (instructed by Australian Government Solicitor)

Submitting appearances for the fourth and fifth defendants in M105/2017 and for the second defendant in M106/2017

CATCHWORDS

Wilkie v The Commonwealth
Australian Marriage Equality Ltd v Cormann

Constitutional law (Cth) – Appropriation of moneys from Consolidated Revenue Fund – Construction of *Appropriation Act (No 1)* 2017-2018 (Cth) – Where Finance Minister made determination under s 10(2) of *Appropriation Act (No 1)* 2017-2018 (Cth) – Where determination sought to provide funding for postal survey – Whether s 10 of *Appropriation Act (No 1)* 2017-2018 (Cth) invalid – Whether appropriation for purpose Parliament lawfully determined may be carried out.

Statutes – Construction of *Appropriation Act (No 1)* 2017-2018 (Cth) – Power of Finance Minister to make determination under s 10(2) of *Appropriation Act (No 1)* 2017-2018 (Cth) – Whether determination made by Finance Minister authorised by s 10 – Whether Finance Minister satisfied urgent need for expenditure not provided for or insufficiently provided for because expenditure unforeseen – Whether Finance Minister erred in law by conflating satisfaction as to urgent need for expenditure with satisfaction as to expenditure being unforeseen – Whether s 10 limited by description of *Appropriation Act (No 1)* 2017-2018 (Cth) as Act for ordinary annual services of Government.

Statutes – Delegated legislation – Validity – Whether direction to Australian Statistician exceeded power of Treasurer under s 9(1)(b) of *Census and Statistics Act* 1905 (Cth) – Whether information to be collected statistical information – Whether information to be collected in relation to matters prescribed in s 13 of Census and Statistics Regulation 2016 (Cth) – Whether Treasurer had power to specify from whom information to be collected – Whether s 7A of *Commonwealth Electoral Act* 1918 (Cth) gave Australian Electoral Commission authority to assist Australian Bureau of Statistics in implementing direction.

Constitutional law (Cth) – Appropriation of moneys from Consolidated Revenue Fund – Standing to bring action for declarations and injunctions – Whether necessary or appropriate to determine if plaintiffs have standing – Standing of Member of House of Representatives – Standing of Senator – Standing of elector – Standing of incorporated body – Standing of association.

Words and phrases – "Advance to the Finance Minister", "appropriation", "Australian Bureau of Statistics", "Australian Electoral Commission", "Australian Statistician", "Consolidated Revenue Fund", "departmental item", "Electoral Commissioner", "expenditure", "Finance Minister", "ordinary annual services of the Government", "plebiscite", "Treasurer", "unforeseen", "urgent need for expenditure".

Constitution, ss 53, 54, 56, 81, 83.
Appropriation Act (No 1) 2017-2018 (Cth), ss 3, 6, 7, 10, 12, Sched 1.
Audit Act 1901 (Cth), s 36A.
Australian Bureau of Statistics Act 1975 (Cth), s 16A.
Census and Statistics Act 1905 (Cth), s 9.
Census and Statistics Regulation 2016 (Cth), s 13.
Commonwealth Electoral Act 1918 (Cth), ss 7, 7A.
Legislation Act 2003 (Cth), ss 15G, 15H, 15J, 38, 39.
Public Governance, Performance and Accountability Act 2013 (Cth), ss 74, 75.

1 KIEFEL CJ, BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ. Two proceedings, each commenced in the original jurisdiction of the High Court on 10 August 2017, challenged the lawfulness of measures taken and proposed to be taken pursuant to statute to implement the decision of the Australian Government, made on 7 August 2017 and announced unconditionally on 9 August 2017, to direct and to fund the conduct of a survey of the views of Australian electors on the question of whether the law should be changed to allow same-sex couples to marry.

2 The Full Court of the High Court heard the proceedings on 5 and 6 September 2017 and, on 7 September 2017, made orders dismissing one proceeding and giving answers to questions reserved in the other proceeding rejecting the challenge on its merits. These are the reasons for those orders.

3 These reasons commence with a narrative of the background to the proceedings in the course of which the terms of the relevant statutes are set out. They then describe the proceedings and note an unresolved question of standing before explaining systematically why the challenge in each proceeding failed on its merits.

The proposed plebiscite

4 The *Marriage Act* 1961 (Cth) ("the Marriage Act"), enacted by the Commonwealth Parliament under s 51(xxi) of the Constitution, has since 2004[1] defined "marriage" to mean "the union of a man and a woman to the exclusion of all others, voluntarily entered into for life"[2]. The Court made clear in *The Commonwealth v Australian Capital Territory*[3] that s 51(xxi) of the Constitution is capable of supporting a law defining marriage to include the union of two persons of the same sex.

5 On 11 August 2015, the then Prime Minister announced that a Liberal and National Party Government would consider holding a plebiscite on same-sex

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1 Section 3 and Sched 1, item 1 of the *Marriage Amendment Act* 2004 (Cth).

2 Section 5(1) of the Marriage Act.

3 (2013) 250 CLR 441; [2013] HCA 55.

marriage. A Liberal and National Party Government was re-elected at the general election on 2 July 2016.

6 On 13 September 2016, the Attorney-General and the Special Minister of State jointly announced the intention of the Government for the Australian Electoral Commission ("the AEC"), established under the *Commonwealth Electoral Act* 1918 (Cth) ("the Electoral Act"), to conduct a plebiscite to ask voters whether the law should be changed to allow same-sex couples to marry. The announcement stated that voting would be compulsory, that the outcome would be determined by a simple majority of votes, and that if the plebiscite passed then the Parliament would promptly amend the Marriage Act to enable same-sex couples to marry. The announcement stated that by having the AEC conduct the plebiscite, the Government was "delivering its election commitment to give the community a say on whether same-sex marriage should be legalised". The announcement also stated that the Government had budgeted $170 million to run the plebiscite.

7 On 14 September 2016, the Plebiscite (Same-Sex Marriage) Bill 2016 ("the 2016 Bill") was introduced into the House of Representatives. The 2016 Bill, if enacted, would have provided for the Governor-General, by writ issued within 120 days after its commencement, to cause a national plebiscite to be conducted by the AEC, in much the same way as a referendum is conducted under the *Referendum (Machinery Provisions) Act* 1984 (Cth). The 2016 Bill identified the question to be submitted to electors at the plebiscite as: "Should the law be changed to allow same-sex couples to marry?"[4] The 2016 Bill stated that the result of the plebiscite would be in favour of the plebiscite proposal if, disregarding informal ballot-papers, more than 50 per cent of the votes cast in the plebiscite were given in favour of the plebiscite proposal[5]. The 2016 Bill went on to include provision to the effect that the Consolidated Revenue Fund was appropriated for the purposes of "paying or discharging the costs, expenses and other obligations incurred by the Commonwealth in relation to the plebiscite"[6].

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4 Clause 5(2) of the 2016 Bill.

5 Clause 6 of the 2016 Bill.

6 Clause 40(a) of the 2016 Bill.

8 The 2016 Bill was passed by the House of Representatives on 20 October 2016 but was defeated in the Senate on 7 November 2016.

The annual budget

9 On Tuesday, 9 May 2017, in accordance with conventional timing, the Treasurer presented the annual Commonwealth budget in the course of moving in the House of Representatives that Appropriation Bill (No 1) 2017-2018 ("Appropriation Bill No 1 2017-2018") be read for a second time. Because of production timeframes, including the financial consolidation process, proofing and printing, the last day on which it was practicable to provide for expenditure in Appropriation Bill No 1 2017-2018 was Friday, 5 May 2017.

10 The *Charter of Budget Honesty Act* 1998 (Cth) ("the CBH Act") requires that the Treasurer table and publicly release at the time of a budget a fiscal strategy statement[7] together with a budget economic and fiscal outlook report[8]. The fiscal strategy statement is required, amongst other things, to specify the Government's fiscal objectives and targets for the budget year and the following three financial years[9]. The budget economic and fiscal outlook report is required, amongst other things, to contain "a statement of the risks ... that may have a material effect on the fiscal outlook"[10].

11 At the time of the budget, on 9 May 2017, the Treasurer accordingly tabled and publicly released "Budget Strategy and Outlook Budget Paper No 1 2017-18" ("Budget Paper No 1"), which contained both a fiscal strategy statement and a budget economic and fiscal outlook report. Budget Paper No 1 comprised a number of "Statements", one of which was headed "Statement of Risks".

12 The Statement of Risks explained that it disclosed, amongst other things, "fiscal risks with a possible impact on the forward estimates greater than

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7 Clauses 2(2) and 6 of Sched 1 to the CBH Act.

8 Clause 10 of Sched 1 to the CBH Act.

9 Clause 9(1)(d)(i) of Sched 1 to the CBH Act.

10 Clause 12(1)(e) of Sched 1 to the CBH Act.

$20 million in any one year, or $50 million over the forward estimates period". The Statement of Risks used "possible" in contradistinction to "probable", which it explained as describing items having a "50 per cent or higher chance of occurrence"[11].

13 Under the heading "Fiscal risks", the Statement of Risks explained[12]:

> "Fiscal risks comprise general developments or specific events that may affect the fiscal outlook. Some developments or events raise the possibility of a fiscal impact. In other cases, the likelihood of a fiscal impact may be reasonably certain, but will not be included in the forward estimates because the timing or magnitude is not known."

14 Under the sub-heading "Finance", the Statement of Risks went on to explain[13]:

> "The Australian Government remains committed to a plebiscite in relation to same-sex marriage, despite the Senate not supporting the *Plebiscite (Same-Sex Marriage) Bill 2016*. To this end, the Australian Government will provide $170 million to conduct a same-sex marriage plebiscite as soon as the necessary legislation is enacted by the Parliament."

Appropriation Act (No 1) 2017-2018 (Cth)

15 *Appropriation Act (No 1)* 2017-2018 (Cth) ("Appropriation Act No 1 2017-2018"), the long title of which is "[a]n Act to appropriate money out of the Consolidated Revenue Fund for the ordinary annual services of the Government, and for related purposes", was in due course enacted. Appropriation Act No 1

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11 Budget Paper No 1 at 9-4, table 1.

12 Budget Paper No 1 at 9-10.

13 Budget Paper No 1 at 9-11.

2017-2018 is expressed to have commenced on 1 July 2017[14] and to remain in force until the start of 1 July 2020[15].

16 Schedule 1 to Appropriation Act No 1 2017-2018 specifies "[s]ervices for which money is appropriated". The Schedule does so by setting out, in tabular form listed by Ministerial portfolio, specified dollar amounts in relation to identified "non-corporate entities" under the headings "administered" items and "departmental" items. To each such "item" is ascribed an "outcome".

17 Section 6 of Appropriation Act No 1 2017-2018 states that the total of the items specified in Sched 1 is $88,751,598,000. There are two notes to s 6, each of which forms part of Appropriation Act No 1 2017-2018[16]. One note states that items in Sched 1 can be adjusted under Pt 3 of Appropriation Act No 1 2017-2018. The sole section within Pt 3 is s 10. The other note states that ss 74 to 75 of the *Public Governance, Performance and Accountability Act* 2013 (Cth) ("the PGPA Act") also provide for adjustment of amounts appropriated by Appropriation Act No 1 2017-2018. Those sections will be referred to later in these reasons.

18 Non-corporate entities within the meaning of Appropriation Act No 1 2017-2018 include "non-corporate Commonwealth entit[ies]" within the meaning of the PGPA Act[17]. Non-corporate Commonwealth entities of that description include Departments of State[18] as well as "any body (except a body corporate)" that is prescribed to be a "listed entity"[19]. The PGPA Act states that each such entity has an "accountable authority"[20], who has duties which include governing

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14 Section 2 of Appropriation Act No 1 2017-2018.

15 Section 13 of Appropriation Act No 1 2017-2018.

16 Section 13(1) of the *Acts Interpretation Act* 1901 (Cth).

17 Section 3 (definition of "non-corporate entity") of Appropriation Act No 1 2017-2018.

18 Sections 10(1)(a) and 11(b) of the PGPA Act.

19 Sections 8 (definition of "listed entity") and 10(1)(c) of the PGPA Act.

20 Sections 8 (definition of "accountable authority") and 12(1) of the PGPA Act.

the entity in a way that promotes the proper use of appropriations for which the entity is responsible[21], and who in the case of a listed entity is the person or group of persons prescribed as the accountable authority of that entity[22].

19 One of the non-corporate entities listed in Sched 1 to Appropriation Act No 1 2017-2018 is the Australian Bureau of Statistics ("the ABS"), established by the *Australian Bureau of Statistics Act* 1975 (Cth) ("the ABS Act"). The ABS Act provides that the ABS consists of the Australian Statistician and staff engaged or providing services under the *Public Service Act* 1999 (Cth)[23]. The ABS Act also prescribes that the ABS is a listed entity and that the Australian Statistician is its accountable authority[24].

20 In respect of the ABS, Sched 1 to Appropriation Act No 1 2017-2018 sets out the following table:

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21 Sections 8 (definition of "public resources") and 15(1)(a) of the PGPA Act.

22 Section 12(2), item 3 of the PGPA Act.

23 Section 5(1)-(3) of the ABS Act.

24 Section 5(5)(a) and (b) of the ABS Act.

TREASURY PORTFOLIO

Appropriation (plain figures)—2017-2018
Actual Available Appropriation (italic figures)—2016-2017

	Departmental	Administered	Total
	$'000	$'000	$'000
AUSTRALIAN BUREAU OF STATISTICS			
Outcome 1 -			
Decisions on important matters made by governments, business and the broader community are informed by objective, relevant and trusted official statistics produced through the collection and integration of data, its analysis, and the provision of statistical information	348,865 *540,765*	- -	348,865 *540,765*
Total: Australian Bureau of Statistics	**348,865** *540,765*	**-** -	**348,865** *540,765*

21 "Departmental item" is defined in Appropriation Act No 1 2017-2018 to mean "the total amount set out in Schedule 1 in relation to a non-corporate entity under the heading 'Departmental'"[25]. A note to that definition, which also forms part of the Act, states:

> "The amounts set out opposite outcomes, under the heading 'Departmental', are 'notional'. They are not part of the item, and do not in any way restrict the scope of the expenditure authorised by the item."

22 Section 7 of Appropriation Act No 1 2017-2018 provides that "[t]he amount specified in a departmental item for a non-corporate entity may be applied for the departmental expenditure of the entity". "Departmental expenditure" is not defined, but "expenditure" is defined to mean "payments for expenses, acquiring assets, making loans or paying liabilities"[26].

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25 Section 3 of Appropriation Act No 1 2017-2018.

26 Section 3 of Appropriation Act No 1 2017-2018.

23 Section 10 of Appropriation Act No 1 2017-2018, which was the central focus of the challenge in each proceeding, is headed "Advance to the Finance Minister". Section 10 provides:

> "(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
>
> (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.
>
> (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."

24 Section 12 of Appropriation Act No 1 2017-2018 provides:

> "The Consolidated Revenue Fund is appropriated as necessary for the purposes of this Act, including the operation of this Act as affected by the *Public Governance, Performance and Accountability Act 2013*."

The Government decision

25 On 8 August 2017, the Finance Minister announced a decision of the Government which had been made in a meeting of Cabinet on 7 August 2017. The Finance Minister's announcement was prefaced by a statement that the Government was "committed to deliver on its pre-election promise to give the Australian people a say on whether or not the law should be changed to allow

same-sex couples to marry" and that the Government's preference was "to deliver on that commitment through a compulsory attendance plebiscite" in accordance with the 2016 Bill and "for such a plebiscite to take place on 25 November 2017".

26 The decision of the Government which the Finance Minister then announced was to re-introduce the 2016 Bill into the Senate and, in the event that the Senate failed again to pass the 2016 Bill, to proceed with a "voluntary postal plebiscite for all Australians enrolled on the Commonwealth Electoral Roll with final results known no later than 15 November 2017". The Finance Minister indicated that the "voluntary postal plebiscite" would be conducted by the ABS, which would exercise statutory power to request information from electors on the question of whether the law should be changed to allow same-sex couples to marry. The Finance Minister also indicated that an appropriation would be made to the ABS from the Advance to the Finance Minister under Appropriation Act No 1 2017-2018.

27 On 9 August 2017, the 2016 Bill was sought to be re-introduced into the Senate and was again defeated.

28 Following that defeat, and consistently with the decision of the Government announced the previous day, the Finance Minister on 9 August 2017 announced that "the Government [was] now pressing ahead with a voluntary postal plebiscite for all Australians". He explained that he had been advised by the Treasurer that the Treasurer would later that day issue a direction to the Australian Statistician asking that the ABS request on a voluntary basis statistical information from all Australians on the electoral roll as to their views on whether or not the law in relation to same-sex marriage should be changed to allow same-sex couples to marry. He stated that, while the ABS, "supported by AEC officers as appropriate", would make relevant announcements, it was anticipated that envelopes would begin to be posted by the ABS from 12 September, that all responses would have to be received by 7 November, and that the result would be announced on 15 November 2017. He also explained that he had himself that day made a determination under s 10 of Appropriation Act No 1 2017-2018 "to provide funding of $122 million to the ABS to enable them to fulfil the Treasurer's direction".

The Finance Minister's Determination

29 The determination which the Finance Minister made on 9 August 2017 was in the form of an instrument styled "Advance to the Finance Minister Determination (No 1 of 2017-2018)" ("the Finance Determination"). The Finance Determination states:

> 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.
>
> **Table**

	Column 1	**Column 2**	**Column 3**
Item	**Appropriation Item**	**Entity**	**Amount**
1	*Appropriation Act (No. 1) 2017-2018* Departmental item	Australian Bureau of Statistics	$122,000,000

30 By force of s 10(2) of Appropriation Act No 1 2017-2018, that Act has effect as if Sched 1 were amended in accordance with the Finance Determination. The immediate effect of the Finance Determination was thereby to increase the departmental item in relation to the ABS, being the total amount set out in Sched 1 in relation to the ABS under the heading "Departmental", from $348,865,000 to $470,865,000. The result of that increase in the departmental item in relation to the ABS was to increase from $348,865,000 to $470,865,000 the total amount that s 7 permits to be applied for the departmental expenditure of the ABS, which expenditure can include but is not restricted to expenditure on carrying out activities directed to the outcome stated in Sched 1 that "[d]ecisions on important matters made by governments, business and the broader community are informed by objective, relevant and trusted official statistics produced through the collection and integration of data, its analysis, and the provision of statistical information". No argument was put in either proceeding that the activities to be carried out by the ABS to fulfil the Treasurer's direction were incapable of answering the description of activities directed to that broadly stated outcome.

31 Because a determination made under s 10(2) of Appropriation Act No 1 2017-2018 is declared by s 10(4) of that Act to be a legislative instrument, the *Legislation Act* 2003 (Cth) ("the Legislation Act") operated to require that the Finance Determination be lodged for registration on the Federal Register of Legislation[27] together with an explanatory statement which was required to be "approved" by the Finance Minister[28], and which was required to "explain the purpose and operation of the instrument"[29]. Once the Finance Determination was lodged, the First Parliamentary Counsel came under a duty to register it[30], the Office of Parliamentary Counsel came under a duty to deliver a copy of it to each House of the Parliament to be laid before each House within six sitting days of that House after the registration[31], and the Office of Parliamentary Counsel came under a further duty to arrange for a copy of the explanatory statement to be delivered to each House of the Parliament also to be laid before each House[32].

32 The Finance Determination was accordingly accompanied, when made, by an Explanatory Statement. Under the heading "Purpose of the Determination", the Explanatory Statement stated:

> "On 8 August 2017, the Government announced that it will recommit the *Plebiscite (Same-Sex Marriage) Bill 2016* to a vote in the Senate and if the Senate does not pass the bill, proceed with a voluntary postal plebiscite for all Australians enrolled on the Commonwealth Electoral Roll conducted by the Australian Bureau of Statistics (ABS).
>
> As the Senate has not passed the *Plebiscite (Same-Sex Marriage) Bill 2016*, funding is being made available to the ABS to undertake the voluntary postal plebiscite. The Government has also announced that the

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27 Section 15G(1) of the Legislation Act.

28 Sections 15G(4) and 15J(2)(a) of the Legislation Act.

29 Section 15J(2)(b) of the Legislation Act.

30 Section 15H(1)(a) of the Legislation Act.

31 Section 38(1) of the Legislation Act.

32 Section 39 of the Legislation Act.

> final result of the voluntary postal plebiscite is to be known no later than 15 November 2017.
>
> These government decisions were not made until after 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."

33 Following the commencement of the proceedings, the Finance Minister swore an affidavit, which has been filed and read in each proceeding, in which he explained on oath his reasons for making the Finance Determination.

34 The Finance Minister explains:

> "From about March 2017 to August 2017 I was aware of suggestions from Ministerial colleagues of alternative means by which the Government's policy of conducting a plebiscite on the issue of whether the law should be changed to allow same-sex couples to marry might be pursued. So far as I was aware, none of these suggestions involved the Australian Bureau of Statistics (ABS) or the conduct by the ABS of a postal survey on the issue of same-sex marriage. Those suggestions did not then represent Government policy and I had not personally decided to support them."

35 After referring to the announcement on 8 August 2017 of the decision of the Government made on 7 August 2017, the Finance Minister explains that before 7 August 2017 "it had not been Government policy for the ABS to carry out a survey in relation to whether the law should be changed to allow same sex couples to marry".

36 The Finance Minister's explanation of his reasons for making the Finance Determination concludes with the following statement:

> "When making the Determination I was satisfied that there was an urgent need for the expenditure provided for in the Determination which had not been provided for in the 2017-2018 Act because that expenditure was unforeseen until the last day it was practical to provide for it in the 2017-2018 Bill before that Bill was introduced into the House of Representatives; that day, being 5 May 2017. I was satisfied that the expenditure was not provided for in that Bill because, at the time that Bill

was introduced, it was not the Government's policy that the ABS should conduct a postal survey on the issue of same sex marriage, and I did not foresee the Government's decision on 7 August 2017 that the ABS should conduct such a survey. I was satisfied that the expenditure was urgent because the Government had, as part of its decision on 7 August 2017 to direct the ABS to conduct a postal survey on same sex marriage, decided that the results of the survey were to be known no later than 15 November 2017."

37 Importantly, the Finance Minister's evidence is unchallenged by the plaintiffs in either proceeding.

The Treasurer's Direction

38 The direction of which the Finance Minister had been advised on 9 August 2017 was given by the Treasurer later that day in the form of an instrument styled "Census and Statistics (Statistical Information) Direction 2017" ("the Statistics Direction"), and was amended by the Finance Minister a week later by a further instrument styled "Census and Statistics (Statistical Information) Amendment Direction 2017".

39 Section 9(1) of the *Census and Statistics Act* 1905 (Cth) ("the Statistics Act") provides:

"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."

40 Section 13 of the Census and Statistics Regulation 2016 (Cth) ("the Statistics Regulation") prescribes 52 matters for the purposes of s 9 of the Statistics Act by listing them in a table and ascribing to each of them an item number. The prescribed matters include "Births, deaths, marriages and divorces" (item 5), "Law" (item 30) and "Population and the social, economic and demographic characteristics of the population" (item 38).

41 The Statistics Direction in its original form was, and in its amended form is, expressed to be a direction to the Australian Statistician under s 9(1)(b) of the Statistics Act. It states in material part[33]:

> "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."

42 The Statistics Direction, as amended, goes on to require the "statistical information identified" to be published on or before 15 November 2017[34] and to define as an "elector", subject to immaterial qualifications and exceptions, a person who at the end of 24 August 2017 was an elector or had made a valid application for enrolment as an elector under the Electoral Act[35].

The Australian Statistician and the AEC

43 As at the end of 24 August 2017, approximately 16 million electors were enrolled under the Electoral Act.

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33 Section 3(1) of the Statistics Direction.

34 Section 3(3) of the Statistics Direction.

35 Section 3(4) of the Statistics Direction.

44 To implement the Statistics Direction, the Australian Statistician proposed to post, or otherwise provide or make available, to all electors as defined in the Statistics Direction a questionnaire seeking their views on the question "Should the law be changed to allow same-sex couples to marry?" and asking for responses to that questionnaire. To do so, it was necessary for the Australian Statistician to seek the assistance of other Commonwealth Departments and agencies and to retain the services of private sector entities.

45 For that purpose, the ABS entered into arrangements which included an arrangement with the AEC for officers and employees of the AEC to assist the ABS in the implementation of the Statistics Direction, but with the Australian Statistician retaining control over that implementation. In entering into that arrangement, the ABS relied on s 16A of the ABS Act and the AEC relied on s 7A of the Electoral Act.

46 Section 16A of the ABS Act relevantly provides that the Australian Statistician may arrange with a governmental agency or authority for the services of officers or employees of the agency or authority to be made available to assist in the carrying out of the functions of the Australian Statistician.

47 Section 7A(1) of the Electoral Act relevantly provides that, subject to presently immaterial limitations, the AEC "may make arrangements for the supply of goods or services to any person or body". Section 7(1)(a) of the Electoral Act provides that, subject again to presently immaterial limitations, the "functions" of the AEC include "to perform functions that are permitted or required to be performed by or under [that] Act".

Proceedings

48 The first of the two proceedings commenced on 10 August 2017 ("the Wilkie proceeding") was commenced by an application for an order to show cause which was subsequently amended. There were three plaintiffs in the Wilkie proceeding. The first was Mr Andrew Wilkie, who is an independent Member of the House of Representatives and who voted against the 2016 Bill. The second was Ms Felicity Marlowe, who is an elector, who lives with her female partner of 17 years and their three young children, and who is a long term advocate for rainbow families (families in which one or more parent or carer is a lesbian, gay, bisexual, transgender, intersex or queer person). The third was PFLAG Brisbane Inc, an association incorporated under the *Associations Incorporation Act* 1981 (Q), which is comprised of individuals who are parents

and friends of gay and lesbian people, which includes amongst its objects "to support the full human rights and civil rights of people who are lesbian and gay and their families" and which in practice advocates on issues of human rights and equality in law for gay and lesbian people.

49 The defendants in the Wilkie proceeding were the Commonwealth of Australia, the Finance Minister, the Treasurer, the Australian Statistician and the Electoral Commissioner.

50 By their amended application for an order to show cause, the plaintiffs in the Wilkie proceeding sought declarations and injunctions directed to each defendant. They also sought writs of prohibition directed to the Australian Statistician, prohibiting him from expending the amount in the Finance Determination and from carrying out the Statistics Direction, and directed to the Electoral Commissioner, prohibiting him from providing goods or services to the Australian Statistician in respect of the Statistics Direction.

51 The grounds on which the plaintiffs in the Wilkie proceeding sought that relief were: that s 10 of Appropriation Act No 1 2017-2018 is invalid, or alternatively that the Finance Determination was not authorised by that section; that the Statistics Direction was not authorised by s 9(1)(b) of the Statistics Act; and that the AEC was not authorised by s 7A of the Electoral Act to assist the ABS in the implementation of the Statistics Direction. A further ground to the effect that s 9(1)(b) of the Statistics Act exceeded the legislative power of Parliament under s 51(xi) of the Constitution if and to the extent that s 9(1)(b) authorised the Statistics Direction was raised in the amended application but was not pressed at the hearing.

52 The second of the two proceedings commenced on 10 August 2017 ("the AME proceeding") was commenced by writ of summons accompanied by a statement of claim. There were two plaintiffs in the AME proceeding. The first was Australian Marriage Equality Ltd, which is a company limited by guarantee and a charity registered under the *Australian Charities and Not-for-profits Commission Act* 2012 (Cth), and which since its formation in 2004 has been advocating for the legalisation of marriage between consenting adults irrespective of gender. The second was Senator Janet Rice, who is a Senator for the State of Victoria and a member of the Australian Greens and who is co-convenor of the Parliamentary Friendship Group for LGBTIQ Australians and the Greens spokesperson for LGBTIQ issues.

53 The defendants in the AME proceeding were the Finance Minister and the Australian Statistician. The Attorney-General of the Commonwealth intervened under s 78A of the *Judiciary Act* 1903 (Cth).

54 By their writ of summons, the plaintiffs in the AME proceeding sought declarations and injunctions directed to both defendants. The sole ground on which they sought that relief was that the Finance Determination was not authorised by s 10 of Appropriation Act No 1 2017-2018. The arguments on which they relied in support of that ground overlapped with, and in some respects went beyond, the arguments of the plaintiffs in the Wilkie proceeding.

55 On 17 August 2017, Kiefel CJ ordered that the amended application for an order to show cause in the Wilkie proceeding be referred for consideration by the Full Court. Four days later, her Honour ordered by consent that a special case filed by the plaintiffs and the Finance Minister in the AME proceeding also be referred to the Full Court for hearing. The questions of law which the plaintiffs and the Finance Minister by the special case agreed in stating for the opinion of the Full Court, in the form to which they were amended and answered by the Full Court on 7 September 2017, are set out at the conclusion of these reasons.

Standing

56 Stated as the first question for the opinion of the Full Court in the special case in the AME proceeding and strongly contested by the defendants in the course of the hearing of both the Wilkie proceeding and the AME proceeding was the standing of the plaintiffs or any of them to seek all or any of the relief they claimed. The contest as to standing gave rise to a number of significant issues. Not least of them was the nature and scope of the constitutional writ of prohibition[36], the sufficiency of the interest of a Senator or Member of the House of Representatives in the performance of his or her parliamentary responsibilities to seek declaratory and injunctive relief to prevent an alleged contravention by the Government of s 83 of the Constitution[37], and the relevance to standing to

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36 Cf *R v Wright; Ex parte Waterside Workers' Federation of Australia* (1955) 93 CLR 528 at 541-542; [1955] HCA 35; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 101-104 [43]-[45], 140-142 [162]-[166]; [2000] HCA 57.

37 Cf *Combet v The Commonwealth* (2005) 224 CLR 494 at 556-557 [97], 620 [308]-[309]; [2005] HCA 61.

seek the relief claimed of conceptions of public interest[38]. No doubt because of the speed with which the proceedings came to be heard, none of those issues was adequately explored in argument.

57 Notwithstanding statements which have linked the need for standing to the need for a "matter" founding jurisdiction[39], the High Court has not in practice insisted on determining standing always as a threshold issue but has treated itself as having discretion in an appropriate case to proceed immediately to an examination of the merits[40]. A notable instance of that occurring in a context not dissimilar to the present was *Combet v The Commonwealth*[41]. There the Full Court, by majority, answered a question reserved for its opinion to the effect that the plaintiffs had not established a basis for any of the relief they sought, whilst stating that it was unnecessary to answer a preceding question reserved which asked whether the plaintiffs or either of them had standing to seek that relief[42]. No argument was put that the approach taken by the majority in *Combet* was wrong or was unavailable to be taken in the Wilkie proceeding or the AME proceeding.

58 The merits of the grounds relied on by the plaintiffs in the Wilkie proceeding and the AME proceeding having been fully argued and the Court having unanimously reached the conclusion that those grounds were demonstrably without substance, it was similarly unnecessary to determine whether the plaintiffs in those proceedings or any of them had standing in order

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38 Cf *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 267 [50]; [1998] HCA 49.

39 Eg *Croome v Tasmania* (1997) 191 CLR 119 at 126-127; [1997] HCA 5; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 35 [50]-[51], 68 [152], 98-99 [271]-[273]; [2009] HCA 23.

40 See *Robinson v Western Australian Museum* (1977) 138 CLR 283 at 302-303; [1977] HCA 46; *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 38; [1981] HCA 50.

41 (2005) 224 CLR 494.

42 (2005) 224 CLR 494 at 625-626, questions (1) and (3). See (2005) 224 CLR 494 at 531 [31], 560 [111].

to reject their claims for relief. Indeed, the inadequacy of the argument on standing made it inappropriate in the circumstances to address standing.

59 Leaving standing therefore entirely to one side, and moving directly to the merits of the grounds relied upon by the plaintiffs in each proceeding, it is most efficient to isolate and address the various strands of the plaintiffs' arguments in the course of considering in turn: the validity of s 10 of Appropriation Act No 1 2017-2018, the construction of that section, the validity of the Finance Determination, the validity of the Statistics Direction, and the authority of the AEC to assist the ABS in the implementation of the Statistics Direction.

The validity of s 10 of Appropriation Act No 1 2017-2018

60 Section 81 of the Constitution provides that "[a]ll 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". Section 83 provides that "[n]o money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law".

61 Sections 81 and 83 together give expression to the foundational principle of representative and responsible government "that no money can be taken out of the consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorization from Parliament itself"[43]. The sections also prescribe the form of the requisite parliamentary authorisation: it must be by "law". They thereby combine to exclude from the scheme of the Constitution "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"[44].

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43 *Brown v West* (1990) 169 CLR 195 at 205, 208; [1990] HCA 7, quoting *Auckland Harbour Board v The King* [1924] AC 318 at 326. See also *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 449; [1922] HCA 62; *The Commonwealth v Colonial Ammunition Co Ltd* (1924) 34 CLR 198 at 224; [1924] HCA 5.

44 Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 522-523.

62 Sections 53, 54 and 56 of the Constitution speak in that context to the manner of enactment of a proposed law for the appropriation of revenue or moneys. Section 56 provides that a 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". Section 53 relevantly provides that a proposed law appropriating revenue or moneys "shall not originate in the Senate" and that the Senate may not amend "proposed laws appropriating revenue or moneys for the ordinary annual services of the Government". Section 54 speaks to the potential for the House of Representatives to take advantage of s 53's limitation on the Senate's power to amend by providing that "[t]he proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation".

63 Each of ss 53, 54 and 56 of the Constitution is a "procedural provision governing the intra-mural activities of the Parliament" in respect of which "this Court does not interfere". A failure to comply with any one or more of them "is not contemporaneously justiciable and does not give rise to invalidity of the resulting Act when it has been passed by the two Houses of the Parliament and has received the royal assent"[45].

64 The procedure set out in ss 53, 54 and 56 for the enactment of a proposed law for the appropriation of revenue or moneys is nevertheless relevant, and important, to understanding the practice of Parliament which provides context for the construction of Appropriation Act No 1 2017-2018. Appropriations by law are in practice either "special appropriations" (one category of special appropriations being "standing appropriations") or "annual appropriations" (pertaining to a fiscal year which runs from 1 July to 30 June)[46].

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45 *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* (1993) 176 CLR 555 at 578; [1993] HCA 12; *Western Australia v The Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373 at 482; [1995] HCA 47; *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vict)* (2004) 220 CLR 388 at 409 [41]; [2004] HCA 53; *Combet v The Commonwealth* (2005) 224 CLR 494 at 570 [141].

46 Wright (ed), *House of Representatives Practice*, 6th ed (2012) at 423, 428.

65 Since 1901, Bills for annual appropriations have in practice been introduced by the Treasurer in the House of Representatives, preceded by a message from the Governor-General, in two principal sets: Appropriation Bills Nos 1 and 2 (which, together now with an Appropriation (Parliamentary Departments) Bill (No 1) and accompanying statements, are typically referred to as the "budget") and Appropriation Bills Nos 3 and 4 (which, together now with an Appropriation (Parliamentary Departments) Bill (No 2), are typically referred to as "additional estimates")[47].

66 Drawing distinctions important for the purposes of ss 53 and 54 of the Constitution, each of Appropriation Bills Nos 1 and 3 was until 1999 typically designated in its long title as a Bill for an Act to appropriate money out of the Consolidated Revenue Fund "for the service of the year ending on 30 June", whereas each of Appropriation Bills Nos 2 and 4 was typically designated in its long title as a Bill for an Act to appropriate money out of the Consolidated Revenue Fund "for certain expenditure". Since 2000, whilst the long titles of Appropriation Bills Nos 2 and 4 have remained the same, the long titles of Appropriation Bills Nos 1 and 3 have explicitly adopted the language of ss 53 and 54 of the Constitution in describing each of them as a Bill for an Act to appropriate money out of the Consolidated Revenue Fund "for the ordinary annual services of the Government".

67 Since 1994, Appropriation Bills Nos 1 and 2 have been introduced in May[48], eliminating the need for the earlier practice of interim appropriations for the fiscal year commencing 1 July being made through the introduction and enactment of Supply Bills[49]. Appropriation Bills Nos 3 and 4 are now generally introduced between October and February[50]. Additional pairs of Appropriation Bills, in the form of Appropriation Bills Nos 5 and 6, have sometimes been

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47 Wright (ed), *House of Representatives Practice*, 6th ed (2012) at 428-430.

48 Wright (ed), *House of Representatives Practice*, 6th ed (2012) at 428 fn 58.

49 Wright (ed), *House of Representatives Practice*, 6th ed (2012) at 437.

50 Wright (ed), *House of Representatives Practice*, 6th ed (2012) at 428 fn 60.

introduced after the enactment of Appropriation Bills Nos 3 and 4 during the same fiscal year but such additional Appropriation Bills are less common[51].

68 Other Appropriation Bills have sometimes been introduced within a fiscal year outside the normal sequence of paired Bills for annual appropriations[52]. The parties have pointed to 16 occasions since 2000 on which Parliament enacted Appropriation Acts which appropriated specific amounts of money for expenditure by Commonwealth entities in addition to amounts appropriated in ordinary annual Appropriation Acts. Some of those Appropriation Acts were designated by their long titles as Acts to appropriate money, or additional money, out of the Consolidated Revenue Fund "for the ordinary annual services of the Government"[53]; some were not[54].

69 Whether a particular appropriation can be characterised as special or annual, and whether or not an annual appropriation is for the ordinary annual services of the Government, that appropriation can only be for a purpose which Parliament has determined. The need for such a determination of purpose is reflected in the language of ss 56 and 81 of the Constitution and is inherent in the nature of an appropriation[55]:

> "'Appropriation of money to a Commonwealth purpose' means legally segregating it from the general mass of the Consolidated Fund and dedicating it to the execution of *some purpose which either the*

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51 Wright (ed), *House of Representatives Practice*, 6th ed (2012) at 436.

52 Wright (ed), *House of Representatives Practice*, 6th ed (2012) at 436.

53 Eg *Appropriation (Tsunami Financial Assistance) Act* 2004-2005 (Cth); *Appropriation (Drought and Equine Influenza Assistance) Act (No 1)* 2007-2008 (Cth).

54 Eg *Appropriation (Economic Security Strategy) Act (No 2)* 2008-2009 (Cth); *Appropriation (Water Entitlements) Act* 2009-2010 (Cth).

55 *Brown v West* (1990) 169 CLR 195 at 208 (emphasis added), quoting *The State of New South Wales v The Commonwealth* (1908) 7 CLR 179 at 200; [1908] HCA 68. See also *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 44 [79], 72 [176], 104 [292].

> *Constitution has itself declared, or Parliament has lawfully determined*, shall be carried out."

70 Together with the prohibition in s 83 of the Constitution, the requirement for an appropriation to be for a legislatively determined purpose results in an appropriation serving a dual function[56]:

> "Not only does it authorize the Crown to withdraw moneys from the Treasury, it 'restrict(s) the expenditure to the particular purpose', as Isaacs and Rich JJ observed in *The Commonwealth v Colonial Ammunition Co Ltd*."

71 "[T]here cannot be appropriations in blank, appropriations for no designated purpose, merely authorizing expenditure with no reference to purpose"[57], just as "[t]here can be no appropriation in gross, authorizing the withdrawal of whatever sum the Executive Government may decide in the exercise of an unfettered discretion"[58]. An appropriation must always be for a purpose identified by the Parliament, albeit that "[i]t is for the Parliament to identify the degree of specificity with which the purpose of an appropriation is identified"[59].

72 The plaintiffs in the Wilkie proceeding argued that, in enacting s 10 of Appropriation Act No 1 2017-2018, Parliament transgressed that constitutional limitation, abdicated its legislative responsibility and impermissibly delegated its power of appropriation to the Finance Minister. To appreciate how the argument was put, regard must be had to the history of inclusion within Appropriation Acts No 1 of Advances to the Finance Minister and, before then, of Advances to the Treasurer.

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56 *Brown v West* (1990) 169 CLR 195 at 208, quoting *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 392; [1975] HCA 52 (footnote omitted).

57 *Brown v West* (1990) 169 CLR 195 at 208, quoting *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237 at 253; [1945] HCA 30.

58 *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* (1993) 176 CLR 555 at 582.

59 *Combet v The Commonwealth* (2005) 224 CLR 494 at 577 [160].

73 The history starts with the first Act ever enacted by Parliament. Its long title was "[a]n Act to grant and apply out of the Consolidated Revenue Fund [a specified total amount of money] to the service of the period ending [30 June 1901]". Section 1 authorised that specified total amount of money to be "issued and applied" out of the Consolidated Revenue Fund "for the purposes and services expressed in the Schedule to this Act". The Schedule then broke down the specified total into designated "heads" of expenditure arranged by Ministerial portfolio. The last of those heads of expenditure, representing approximately 2 per cent of the specified total, was designated "Advance to Treasurer" and was explained in the Schedule as being "[t]o enable the Treasurer to make Advances to Public Officers, and to Pay Expenses of an unforeseen nature, which will afterwards be submitted for Parliamentary Appropriation". That Act set the pattern of including within the total amount appropriated by each annual Appropriation Act a specific amount designated as the Advance to the Treasurer. The pattern was followed in subsequent years.

74 In 1906, the *Audit Act* 1901 (Cth) ("the Audit Act") was amended to include s 36A[60], which provided:

> "Expenditure in excess of specific appropriation or not specifically provided for by appropriation may be charged to such heads as the Treasurer may direct provided that the total expenditure so charged in any financial year, after deduction of amounts of repayments and transfers to heads for which specific appropriation exists, shall not exceed the amount appropriated for that year under the head 'Advance to the Treasurer.'"

75 Section 36A was accurately described at the time of its introduction as a "bookkeeping matter"[61]. The section provided no authority for the Treasurer to withdraw unappropriated money from the Consolidated Revenue Fund. What it did was to permit the Treasurer to authorise the debiting, to other heads of expenditure, of amounts issued from the Consolidated Revenue Fund under the authority of the Advance to the Treasurer for which provision was routinely made in each annual Appropriation Act.

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60 Section 8 of the *Audit Act* 1906 (Cth).

61 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 31 July 1906 at 2068.

76 Except that s 36A of the Audit Act was amended in 1961 to add "at any time" before "exceed"[62] and in 1979 to replace "Advance to the Treasurer" with "Advance to the Minister for Finance"[63] (following the establishment in 1976 of the office of the Finance Minister and with it the creation of the Department of Finance), the section remained substantively in its original form until the repeal of the Audit Act. The repeal of the Audit Act occurred on the commencement of the *Financial Management and Accountability Act* 1997 (Cth)[64], as part of the transition to full accrual accounting which was introduced with the budget which led to the enactment of *Appropriation Act (No 1)* 1999-2000 (Cth) ("Appropriation Act No 1 1999-2000").

77 From 1901, and throughout the period in which s 36A of the Audit Act was in force, the practice was for amounts issued from the Consolidated Revenue Fund under the authority of the Advance to the Treasurer contained in an Appropriation Act No 1 ordinarily to be recouped in the same fiscal year in an Appropriation Act No 3[65].

78 Until 1957, the practice was to include in what were called "supplementary estimates" amounts issued from the Consolidated Revenue Fund under the authority of the Advance to the Treasurer which had not been so recouped. The supplementary estimates were then enacted as a further appropriation in the next fiscal year. Supplementary estimates were abandoned in 1957, when they were replaced by a requirement for particulars of amounts remaining a charge to the Advance to the Finance Minister to be tabled in the Parliament, where they were available to be examined by the Joint Committee of

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62 Section 9 of the *Audit Act* 1961 (Cth).

63 *Audit Amendment Act* 1979 (Cth).

64 *Audit (Transitional and Miscellaneous) Amendment Act* 1997 (Cth).

65 Australia, Senate Standing Committee on Finance and Government Operations, *Advance to the Minister for Finance*, Parliamentary Paper No 217/1979, (1979) at 9-10 [1.16]-[1.17].

Public Accounts established under the *Public Accounts Committee Act* 1951 (Cth)[66].

79 By 1979, the Advance to the Finance Minister had accordingly come routinely to be expressed in the relevant Schedule to an Appropriation Act No 1 as being, relevantly, to enable the Finance Minister "to make advances that will be recovered during the financial year, in respect of expenditure that is expenditure for the ordinary annual services of the Government; and ... to make moneys available for expenditure, being expenditure for the ordinary annual services of the Government ... particulars of which will afterwards be submitted to the Parliament"[67].

80 The manner in which the Advance to the Finance Minister was expressed in the relevant Schedule to an Appropriation Act No 1 changed in 1981 following the partial adoption in that year by the Government of recommendations made in a report of the Senate Standing Committee on Finance and Government Operations in 1979[68]. To the extent that it is now relevant, the standard expression thereafter became[69]:

"To enable the Minister for Finance:

(a) to make advances that will be recovered during the financial year, in respect of expenditure that is expenditure for the ordinary annual services of the Government; [and]

(b) to make money available for expenditure:

(i) that the Minister for Finance is satisfied is expenditure that:

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66 Australia, Parliament, Joint Committee of Public Accounts, *Advance to the Minister for Finance*, Report No 289, (1988) at 3 [1.11]-[1.12].

67 *Appropriation Act (No 1)* 1978-79 (Cth).

68 Australia, Senate Standing Committee on Finance and Government Operations, *Advance to the Minister for Finance*, Parliamentary Paper No 217/1979, (1979) at 24-25 [2.27], 31 [3.1(1)].

69 Eg Sched 3 to the *Appropriation Act (No 1)* 1987-88 (Cth).

(A) is urgently required; and

(B) was unforeseen until after the last day on which it was practicable to include appropriation for that expenditure in the Bill for this Act before the introduction of that Bill into the House of Representatives; and

(ii) particulars of which will afterwards be submitted to the Parliament;

being expenditure for the ordinary annual services of the Government; ..."

81 With the enactment of Appropriation Act No 1 1999-2000, an Appropriation Act No 1 first took substantially the form now seen in Appropriation Act No 1 2017-2018. What had been "heads" of expenditure in a Schedule to previous Appropriation Acts No 1 were replaced by "items" in a Schedule to Appropriation Act No 1 1999-2000; the total of the items specified in the Schedule was stated in the body of the Act; the Advance to the Finance Minister was taken out of the Schedule and placed in the body of the Act; and the body of the Act concluded with a section which simply stated that "[t]he Consolidated Revenue Fund is appropriated as necessary for the purposes of this Act".

82 In *Appropriation Act (No 1)* 2000-2001 (Cth), the section which dealt with the Advance to the Finance Minister came to be expressed as follows[70]:

"(1) This section applies if the Finance Minister is satisfied that:

(a) there is an urgent need for expenditure that is not provided for, or is insufficiently provided for, in the Schedule; and

(b) the additional expenditure is not provided for, or is insufficiently provided for, in the Schedule:

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70 Section 11 of the *Appropriation Act (No 1)* 2000-2001 (Cth).

(i) because of an erroneous omission or understatement; or

(ii) because the additional 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 the Schedule were amended, in accordance with a determination of the Finance Minister, to make provision for so much (if any) of the additional expenditure as the Finance Minister determines.

(3) The total of the amounts determined under this section cannot be more than $175 million.

(4) The Finance Minister must give the Parliament details of amounts determined under this section."

83 The section dealing with the Advance to the Finance Minister was thereafter expressed in substantially identical terms in each subsequent Appropriation Act No 1 up to and including *Appropriation Act (No 1)* 2007-2008 (Cth), except for an alteration to sub-s (4) in and after *Appropriation Act (No 1)* 2005-2006 (Cth) consequential on the commencement of the Legislation Act (then known as the *Legislative Instruments Act* 2003 (Cth)).

84 With the enactment of *Appropriation Act (No 1)* 2008-2009 (Cth) ("Appropriation Act No 1 2008-2009"), the section dealing with the Advance to the Finance Minister took the form now seen in Appropriation Act No 1 2017-2018. Since 2008, nothing material has changed from year to year. Even the particular amount that has been specified in sub-s (3) has remained constant at $295 million.

85 The plaintiffs in the Wilkie proceeding emphasised that their argument did not call into question the validity of the Advance to the Treasurer in the form in which it was enacted in 1901. At its most extreme, as advanced orally in reply, their argument did appear to call into question the validity of the Advance to the Treasurer and the Advance to the Finance Minister to the extent to which they were relied on after 1957 to support drawings from the Consolidated Revenue Fund which were not recouped by a further appropriation. At its core, however,

their argument was directed to establishing the invalidity of s 10 of Appropriation Act No 1 2017-2018 by reference to features which have been constant in sections which dealt with the Advance to the Finance Minister in each Appropriation Act No 1 since Appropriation Act No 1 1999-2000.

86 The argument was that s 10 of Appropriation Act No 1 2017-2018 purported to confer power on the Finance Minister to alter Appropriation Act No 1 2017-2018 so as to supplement "by executive fiat" the amount appropriated by Parliament in Sched 1.

87 The argument was based on a fundamental misconstruction. The provision of Appropriation Act No 1 2017-2018 which appropriates the Consolidated Revenue Fund is s 12. "Significantly", to adopt the description of its operation given in the explanatory memorandum to Appropriation Act No 1 2017-2018, that section "means that there is an appropriation in law when the Act commences. That is, the appropriations are not made or brought into existence just before they are paid, but when the Act commences."[71]

88 Section 12 operated on and from the commencement of Appropriation Act No 1 2017-2018 as an immediate appropriation of money from the Consolidated Revenue Fund for the totality of the purposes of the Act. Section 12 so operated as an immediate appropriation of the amount of $295 million specified in s 10(3) in the same way as it operated as an immediate appropriation of the amount of $88,751,598,000 noted in s 6 to be the total of the items specified in Sched 1. The appropriation constituted authorisation, subject to the restrictions imposed by the Act, for the withdrawal from the Consolidated Revenue Fund of the whole or any part of each of those amounts to be applied for the purposes identified in Appropriation Act No 1 2017-2018.

89 The power of the Finance Minister to make a determination under s 10(2) of Appropriation Act No 1 2017-2018 is not a power to supplement the total amount that has otherwise been appropriated by Parliament. The power is rather a power to allocate the whole or some part of the amount of $295 million that is already appropriated by s 12 operating on s 10(3).

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71 Australia, House of Representatives, Appropriation Bill (No 1) 2017-2018, Explanatory Memorandum at 9 [33].

90 Nor is the power of the Finance Minister to make a determination under s 10(2) of Appropriation Act No 1 2017-2018 at large if the precondition to the exercise of that power set out in s 10(1) is met. The legislative fiction that the Act "has effect as if Schedule 1 were amended" in accordance with a determination under s 10(2) has the limiting effect that the power conferred by s 10(2) can only be exercised through the Finance Minister determining to allocate the whole or some part of the amount of $295 million to a specified "item" in respect of a specified "entity" in a manner in which another section of the Act can then pick up on those specifications to authorise the allocated amount to be applied. Section 10(2) of Appropriation Act No 1 2017-2018 is in that respect not dissimilar in its operation to s 36A of the Audit Act.

91 Passing scepticism has from time to time been expressed academically[72], in the Senate[73] and in this Court[74] as to how the Advance to the Finance Minister or the Treasurer in the form in which it existed in the century before enactment of Appropriation Act No 1 1999-2000 could be reconciled with the constitutional requirement for an appropriation to be for a legislatively determined purpose. The reconciliation lies in recalling that the degree of specificity of the purpose of an appropriation is for Parliament to determine.

92 The constitutional requirement for Parliament to determine the purpose of an appropriation cannot be so constraining of legislative options as to ignore "practical necessity"[75]. The Joint Committee of Public Accounts observed in a report on the Advance to the Finance Minister published in 1988 that the

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72 Campbell, "Parliamentary Appropriations", (1971) 4 *Adelaide Law Review* 145 at 151-152.

73 Australia, Senate Standing Committee on Finance and Government Operations, *Advance to the Minister for Finance*, Parliamentary Paper No 217/1979, (1979) at 13 [2.1].

74 *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* (1993) 176 CLR 555 at 600-601.

75 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 394.

Advance is "necessary for the smooth running of the Government"[76]. The Joint Committee went on to explain[77]:

> "In the normal course of events detailed specific appropriations for expenditure are passed by the Parliament in the Appropriation Acts prior to actual expenditure. However, there will always be cases where, due to various reasons particularly in urgent and unforeseen circumstances, moneys will be required for expenditure before the next Appropriation Bills are passed by the Parliament."

93 The restrictions legislatively imposed on the application of the Advance to the Finance Minister have been no less stringent in the nearly two decades since the enactment of Appropriation Act No 1 1999-2000 than they were in the century before. Neither in this century nor the last has the standard legislative provision for the Advance to the Finance Minister contravened the constitutional requirement that an appropriation be for a legislatively determined purpose.

94 To appropriate by s 12 of Appropriation Act No 1 2017-2018 the amount specified in s 10(3) to be applied, relevantly under s 7, in accordance with a direction under s 10(2) if the precondition in s 10(1) is met is to appropriate that amount for a purpose which Parliament has lawfully determined may be carried out.

95 The constitutional challenge of the plaintiffs in the Wilkie proceeding, for those reasons, failed.

The construction of s 10 of Appropriation Act No 1 2017-2018

96 The plaintiffs' arguments concerning the validity of the Finance Determination were primarily directed to establishing that the precondition set out in s 10(1) of Appropriation Act No 1 2017-2018 to the exercise of the power of the Finance Minister to make a determination under s 10(2) was not met. Before addressing factual aspects of those arguments, it is convenient to isolate

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76 Australia, Parliament, Joint Committee of Public Accounts, *Advance to the Minister for Finance*, Report No 289, (1988) at v.

77 Australia, Parliament, Joint Committee of Public Accounts, *Advance to the Minister for Finance*, Report No 289, (1988) at 1 [1.2].

and address as a discrete topic those aspects of the arguments which bore on the construction of s 10(1).

97 Section 10(1), in its relevant operation, makes it a precondition to the application of the remainder of s 10 that "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 … 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".

98 The casting of that precondition by reference to the Finance Minister's "satisfaction" invokes an "established drafting technique" which has for more than a century been "used to make the holding of a particular state of mind by the repository a precondition to the performance of a duty or to the exercise of a power"[78]. The particular use of that drafting technique to express the precondition to the application of the Advance to the Finance Minister is of long standing and has been the subject of careful deliberation.

99 The decision to adopt that drafting technique to express the precondition to the application of the Advance to the Finance Minister was first taken by the Government in 1981 as a considered response to one of the recommendations which had been made in 1979 in the report of the Senate Standing Committee on Finance and Government Operations to which reference has earlier been made. The Standing Committee recommended that criteria to the effect that expenditure from the Advance to the Finance Minister "be permitted only in 'urgent and unforeseen' circumstances" should be set out in regulations made under the Audit Act[79]. The Government response, announced in the Senate, was to reject the

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78 *Plaintiff M96A/2016 v The Commonwealth* (2017) 91 ALJR 579 at 588 [39]; 343 ALR 362 at 372; [2017] HCA 16, citing *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165; 198 ALR 59; [2003] HCA 30 and *Bankstown Municipal Council v Fripp* (1919) 26 CLR 385; [1919] HCA 41.

79 Australia, Senate Standing Committee on Finance and Government Operations, *Advance to the Minister for Finance*, Parliamentary Paper No 217/1979, (1979) at 31 [3.1(1)-(2)].

recommendation on the basis of "legal advising to the effect that practical legal difficulties would arise in dealing with requests for the issue of funds from the Advance if the words 'urgent and unforeseen' were to be included in legislation". In recognition of the Standing Committee's concern "to see some form of legislative provision constraining the use of the Advances", however, the Government indicated its preparedness, which had already been put into effect in *Appropriation Act (No 1)* 1980-81 (Cth), to include in the relevant Schedule to an Appropriation Act "a clause which provides for the Minister for Finance to be satisfied that expenditure from the [Advance] is urgent and unforeseen"[80].

100 Informing the Government's response in 1981 was advice from the Attorney-General's Department in the form of a letter from the Secretary of the Attorney-General's Department to the Secretary of the Department of Finance dated 11 December 1979, a copy of which was included within the material adduced by the parties at the hearing of the proceedings. The author of that advice was Mr Dennis Rose. The practical legal difficulties which had the potential to occur if the Standing Committee's recommendation were accepted were spelt out by Mr Rose as follows:

> "A restriction in these terms would mean that expenditure from an Advance could legally be made only if the correct legal conclusion, given all the circumstances, was that the circumstances were 'urgent and unforeseen'. Contrary to the Committee's suggestion ..., the question would not simply be one of 'fact'. It would be necessary to decide in each case, on the basis of all the facts, whether the legal criteria of 'urgent and unforeseen circumstances' were met. That involves a matter of judgment, not simply a question of 'fact'. Legal advice would need to be sought from the Attorney-General's Department wherever the Department of Finance was in doubt. The Attorney-General's Department would need to examine all the circumstances of the proposed expenditure and express its opinion. The Auditor-General would be obliged to examine the matter as a question of the legality of the expenditure. There would still be no absolute assurance that, if the matter were tested in a court, the court would reach the same conclusion. If the matter were in issue in a court, evidentiary questions could arise – eg in relation to Crown privilege on matters relevant to the questions whether the circumstances were 'urgent

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80 Australia, Senate, *Parliamentary Debates* (Hansard), 26 May 1981 at 2067.

and unforeseen'. Moneys incorrectly paid out pursuant to an erroneous decision would be recoverable from the payees subject only to certain limited qualifications (*Auckland Harbour Board v The King* [1924] AC 318)."

101 Mr Rose added, the emphasis being his:

"It would be possible to avoid the difficulties outlined above, and at the same time to provide some legislative endorsement of the Committee's desire to limit the Advances to 'urgent and unforeseen' expenditure. One possible means of doing this would be to express the Advances as appropriating moneys for expenditure in the various categories only where the Minister for Finance was '*satisfied*' that the expenditure was 'urgent and unforeseen'."

102 The nature of the constraint imposed by the legislative requirement in the relevant Schedule to an Appropriation Act for the Finance Minister to be "satisfied" that expenditure was "urgent and unforeseen" was the subject of further written advice from the Attorney-General's Department to the Joint Committee of Public Accounts in 1988. Noting that a requirement that the Finance Minister be "satisfied" that expenditure was "urgent and unforeseen" had been routinely incorporated into the relevant Schedules of Appropriation Acts from 1980, the Joint Committee asked[81]:

"Is the interpretation of what is 'urgent and unforeseen' a subjective one ie as long as the Minister for Finance (or his delegate) is satisfied that the expenditure was urgent and unforeseen and certifies as such, then it meets all legal requirements?"

103 The answer then given, in advice jointly authored by Mr Peter Clay and Ms Sandra Power, was[82]:

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81 Australia, Parliament, Joint Committee of Public Accounts, *Advance to the Minister for Finance*, Report No 289, (1988) at 26.

82 Australia, Parliament, Joint Committee of Public Accounts, *Advance to the Minister for Finance*, Report No 289, (1988) at 36.

> "The relevant provision commits to the Minister, and to no one else, the power to form an opinion that particular expenditure meets the requirements ... It is a power expressed in subjective terms. However, the Minister is not free to form any opinion he pleases. His opinion must be not unreasonable and it must be formed having regard to relevant considerations – including the correct legal meaning of the expressions 'urgently required' and 'unforeseen' and for permissible purposes."

104 That further advice – clearly expressed and clearly correct – was published as an appendix to the report of the Joint Committee of Public Accounts on the Advance to the Minister for Finance in 1988. The advice can be taken to have informed the consistent legislative usage since 1988 of the terminology first legislatively adopted in 1980 on the basis of Mr Rose's advice.

105 Acknowledging that the requirement for the Finance Minister's satisfaction had been applicable to expenditure being both "urgent" and "unforeseen" in the expression of the Advance to the Finance Minister in the relevant Schedules to Appropriation Acts from 1980, and had continued to be applicable to the expression of the Advance to the Finance Minister in the bodies of Appropriation Acts from 1999, the plaintiffs in the AME proceeding argued that there was significance in the change in expression which occurred with the enactment of Appropriation Act No 1 2008-2009, the language of which has been replicated in each subsequent Appropriation Act No 1. They argued that the change had the effect of taking the question of whether expenditure was "unforeseen" outside the scope of the Minister's satisfaction so as to make it an objective question for determination by a court.

106 That suggested departure from the previously established legislated position would have been a radical one. The inference of such a departure is not compelled by the statutory text. The opening reference in s 10(1) of Appropriation Act No 1 2017-2018 to the Finance Minister being "satisfied" is naturally read as governing each subordinate clause which begins with "because". That any departure from the previously established practice was intended in 2008 is contradicted by the explanatory memorandum for Appropriation Act No 1 2008-2009, which explained the section of that Act which was equivalent to s 10(1) of Appropriation Act No 1 2017-2018 as establishing "the criteria about which the Finance Minister must be satisfied before he or she may determine to add an amount from the [Advance to the

Finance Minister] to an item of an agency"[83]. An explanation to the same effect appears in the explanatory memorandum for Appropriation Act No 1 2017-2018[84].

107 The change of expression which occurred with the enactment of Appropriation Act No 1 2008-2009 involved the removal of duplicated verbiage. It was not a change of substance. The change is properly attributable to a change of drafting style and cannot be taken to indicate a change of meaning[85].

108 The qualities of the satisfaction required of the Finance Minister in order to meet the precondition set by s 10(1) of Appropriation Act No 1 2017-2018 are informed by a number of statutory indications. One is the statutory requirement that the satisfaction be that of the Finance Minister. Another is the requirement of s 10(4) operating in conjunction with provisions of the Legislation Act that any exercise of the Finance Minister's power of determination under s 10(2) following formation of the requisite state of satisfaction is required to be promptly notified to the Senate and the House of Representatives together with an explanation of purpose. Another is the established practice of the Secretary to the Department of Finance reporting annually to Parliament on advances provided under annual Appropriation Acts in each fiscal year in reports which are reviewed by the Auditor-General.

109 The Finance Minister's satisfaction must be formed reasonably and on a correct understanding of the law[86]. The Finance Minister must not take into account a consideration which a court can determine in retrospect "to be

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83 Australia, House of Representatives, Appropriation Bill (No 1) 2008-2009, Explanatory Memorandum at 15 [54].

84 Australia, House of Representatives, Appropriation Bill (No 1) 2017-2018, Explanatory Memorandum at 8 [28].

85 Section 15AC of the *Acts Interpretation Act* 1901 (Cth).

86 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 651-654 [130]-[137]; [1999] HCA 21; *Graham v Minister for Immigration and Border Protection* [2017] HCA 33 at [57].

definitely extraneous to any objects the legislature could have had in view"[87]. But the Finance Minister is not obliged to act apolitically or quasi-judicially[88].

110 What then, on a correct understanding of the law, is the satisfaction which the Finance Minister is required to form in order to meet the precondition to the exercise of power set by s 10(1)?

111 First, the Finance Minister must be satisfied that there is a need for expenditure, in the current fiscal year, that is not provided for, or is insufficiently provided for, in Sched 1 to Appropriation Act No 1 2017-2018. The notion of expenditure is that given by the statutory definition of that term as meaning payments for expenses, acquiring assets, making loans or paying liabilities. The notion of need does not require that the expenditure be critical or imperative. To set the bar that high would tend to render the other considerations of which the Finance Minister must be satisfied contradictory, not complementary. The notion of need must rather be of expenditure which ought to occur, whether for legal or practical or other reasons.

112 The plaintiffs in each proceeding argued in substance that the need must arise from some source external to Government. They pointed, however, to nothing in the context of the section or in the long history of the Advance to the Finance Minister which might warrant importation of that unexpressed limitation. The very nature of expenditure by Government is incompatible with importation of the limitation. Even where expenditure might be responsive to some external circumstance, the incurrence of that expenditure will be the result of an internal decision in which options, consequences and competing priorities will be weighed.

113 Next, the Finance Minister must be satisfied that the need for the expenditure is urgent. Urgency, of course, is a relative concept. The concept here is of urgency in the context of the ordinary sequence of annual Appropriation Acts. The question for the Finance Minister to weigh is why the expenditure that is needed in the current fiscal year and that is not provided for,

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87 *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505; [1947] HCA 21.

88 Cf *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 539 [102]; [2001] HCA 17.

or is insufficiently provided for, in the relevant Schedule to Appropriation Act No 1 cannot await inclusion in Appropriation Act No 3, or (if the time for inclusion of the expenditure within Appropriation Act No 3 has already passed) why it might not be included in an Appropriation Act No 5.

114 The plaintiffs in each proceeding argued that the Finance Minister is obliged to weigh the additional or alternative question of whether it is reasonable or practicable for the Government to introduce a Bill for a special appropriation into the House of Representatives so as to permit that Bill to be considered by the Senate. Again, however, they were unable to point to any support for that argument in the text or context of the section. The history of the use of the Advance to the Finance Minister, at least since 1957, contradicts it. Were needed expenditure to exceed the amount of the Advance to the Finance Minister, the Government would have no option but to introduce a Bill for a further appropriation outside the ordinary sequence of annual Appropriation Acts. Where needed expenditure does not exceed the amount of the Advance to the Finance Minister, that amount is already immediately available to meet the expenditure provided only that the precondition in s 10(1) is met. That is the reason the amount – specified in s 10(3) – was appropriated in the first place.

115 The plaintiffs in the AME proceeding drew attention to a reference in the explanatory memorandum for Appropriation Act No 1 2008-2009 to the existence of "AFM guidelines" according to which "an urgent need for expenditure [was] expenditure that [was] required within two weeks"[89]. The reference was to non-statutory guidelines issued by the Department of Finance. Those guidelines were expressed to provide guidance to officers within other Commonwealth entities who may have been considering approaching the Department of Finance to request the Finance Minister to exercise the Finance Minister's power of determination under the equivalent of s 10(2) of Appropriation Act No 1 2017-2018. Their existence did not constrain, and could not have constrained, the Finance Minister in considering the question of urgency under the equivalent of s 10(1) of Appropriation Act No 1 2017-2018. The explanatory memorandum for Appropriation Act No 1 2008-2009 contained no suggestion that they did.

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89 Australia, House of Representatives, Appropriation Bill (No 1) 2008-2009, Explanatory Memorandum at 15 [54].

116 The plaintiffs in the AME proceeding also drew attention to a statement in the explanatory memorandum for Appropriation Act No 1 2017-2018 to the effect that "[g]enerally, options under sections 74 to 75 of the PGPA Act must be considered, where applicable, before the Finance Minister will make a determination under subclause 10(2)"[90]. The statement is in its terms directed to the exercise of the Finance Minister's discretion under s 10(2) rather than to the formation of the Finance Minister's satisfaction under s 10(1). Moreover, the statement is descriptive, not prescriptive.

117 Section 74 of the PGPA Act provides for an amount received by a non-corporate Commonwealth entity in some circumstances to be credited to a departmental item for that entity in an Appropriation Act. Section 75 of the PGPA Act applies only if a function of a non-corporate Commonwealth entity is transferred to another non-corporate Commonwealth entity. In those circumstances, s 75 allows for the Finance Minister to determine that the operation of one or more Schedules to one or more Appropriation Acts is modified in a specified way.

118 As the notes to s 6 of Appropriation Act No 1 2017-2018 indicate, ss 74 and 75 of the PGPA Act operate as additional means of providing for adjustment of amounts appropriated by Appropriation Act No 1 2017-2018. Their existence does not constrain the Finance Minister's satisfaction as to the need for or urgency of expenditure under s 10(1) and the potential for their exercise is not a consideration which the Finance Minister is bound to take into account in the formation of that satisfaction.

119 Finally, the Finance Minister must be satisfied that the additional expenditure in the current fiscal year is not provided for, or is insufficiently provided for, in Sched 1 because the expenditure was unforeseen until after the last day on which it was practicable to provide for it in the Bill for Appropriation Act No 1 2017-2018.

120 The question for the Finance Minister at that final stage of inquiry concerns the expenditure that the Finance Minister is satisfied is needed; that is to say, the actual payments that are to be made. The question is: was that

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90 Australia, House of Representatives, Appropriation Bill (No 1) 2017-2018, Explanatory Memorandum at 8 [29].

expenditure unforeseen by the Executive Government? The question is not whether some other expenditure directed to achieving the same or a similar result might have been foreseen by the Executive Government. Nor is it whether the actual payments to be made might have been foreseen other than by the Executive Government.

121 When recommending the adoption of "unforeseen" in its 1979 report, the Senate Standing Committee on Finance and Government Operations specifically rejected "unforeseeable" on the basis that the term would have placed "too great a restriction on the use of the Advance", commenting that "[i]t may be necessary to expend funds urgently which although inherently 'foreseeable' at the time of the preparation of the Appropriation Bills were not in fact 'foreseen'"[91]. Nothing in the subsequent history of the Advance to the Finance Minister suggests that the term in s 10 of Appropriation Act No 1 2017-2018 should be construed other than consistently with that exposition.

122 The overlay of the CBH Act since 1998 has meant that a risk of additional expenditure being needed in the current fiscal year which is foreseen before the last day on which it is practicable to provide for it in the Bill for an Appropriation Act No 1 and which may have a material effect on the fiscal outlook ought to be disclosed in the budget economic and fiscal outlook report released by the Treasurer at the time of the budget. The fact that additional expenditure in an amount above the threshold of materiality set at $20 million was not disclosed in the Statement of Risks in Budget Paper No 1 tabled by the Treasurer at the time of the budget on 9 May 2017 is against that background an objective indication that the additional expenditure was unforeseen until after the last day on which it was practicable to provide for it in the Bill for Appropriation Act No 1 2017-2018.

123 The plaintiffs in the AME proceeding raised an additional and free-standing constructional argument. The argument was to the effect that the precondition in s 10(1), or perhaps the scope of the power conferred by s 10(2), is in some relevant respect limited by the description in the long title of Appropriation Act No 1 2017-2018 of it as an Act to appropriate money out of

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91 Australia, Senate Standing Committee on Finance and Government Operations, *Advance to the Minister for Finance*, Parliamentary Paper No 217/1979, (1979) at 25 [2.28].

the Consolidated Revenue Fund "for the ordinary annual services of the Government".

124 To the extent that the argument sought to draw some statutory limitation from the statutory description of Appropriation Act No 1 2017-2018 as appropriating money "for the ordinary annual services of the Government", the argument needed only to be stated to be rejected. That language, of course, is drawn from ss 53 and 54 of the Constitution.

125 Language drawn from ss 53 and 54 of the Constitution in the long title of an Appropriation Act cannot sensibly be interpreted as operating to convert the non-justiciable constitutional conception of the ordinary annual services of the Government into some justiciable but undefined statutory conception of the ordinary annual services of the Government. The statutory description in the long title of Appropriation Act No 1 2017-2018 in truth does no more than signify the agreement of the House of Representatives and the Senate that the Appropriation Act is for the ordinary annual services of the Government. The statutory language has no justiciable content.

126 To the extent that the argument sought to draw an implication as to the scope of the appropriations contained in Appropriation Act No 1 2017-2018 from parliamentary practice concerning the content of an Appropriation Act agreed by the House of Representatives and the Senate to be for the ordinary annual services of the Government, the argument was on conceptually firmer ground. Parliamentary practice is relevant to the construction of an Appropriation Act, and in particular is relevant to the construction of s 10 of Appropriation Act No 1 2017-2018. Moreover, parliamentary practice, as it appeared then to have been settled in 1965 and consistently followed between 1965 and 1990 to the effect that a proposed law for the appropriation of money for the ordinary annual services of the Government would not seek to appropriate money for a "new policy", was treated in *Brown v West*[92] as bearing relevantly on construction of an Advance to the Finance Minister in *Supply Act (No 1)* 1989-90 (Cth).

127 The difficulty for the plaintiffs in the AME proceeding on this branch of their argument is that what appeared in 1990 to be settled and consistent parliamentary practice has not been so since at least 1999. By 2005, as was

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92 (1990) 169 CLR 195 at 211.

observed in *Combet*[93], there had ceased to be any "clear distinction between 'new' policies and modifications of existing policy". The contemporary position has become even less certain[94].

128 The plaintiffs' invitation to parse recent correspondence passing between Ministers and Senate officers so as to draw disputed inferences as to parliamentary practice in respect of the identification of the ordinary annual services of the Government must be rejected. Even if such inferences could be drawn by a court consistently with the privileges of the Senate and the House of Representatives secured by s 53 of the Constitution (a topic on which it is unnecessary to reach any concluded view), the inferences to be drawn from the correspondence would provide an insufficient foundation for drawing a statutory implication which would confine the operation of s 10 to expenditure which a court might characterise as expenditure other than on new policies. Particularly is that so in light of the contents of reports to Parliament of the Secretary to the Department of Finance on advances provided under annual Appropriation Acts to which some of the defendants pointed as demonstrating an asserted practice acquiesced in by the Senate of utilising the Advance to the Finance Minister in Appropriation Acts No 1 to fund new expenditure.

The validity of the Finance Determination

129 Having regard to the conclusions stated as to the construction of s 10 of Appropriation Act No 1 2017-2018, the factual arguments of the plaintiffs concerning the validity of the Finance Determination can be addressed quite shortly.

130 Basing their argument on the single sentence in the already quoted passage in the Explanatory Statement accompanying the Finance Determination, which stated that "[t]hese circumstances meet the requirements of section 10 of the Act regarding the expenditure being urgent because it was unforeseen", the plaintiffs in each proceeding argued that the Finance Minister erred in law by conflating the statutory question of his satisfaction as to the expenditure being

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93 (2005) 224 CLR 494 at 525 [11], 575 [155].

94 See Evans and Laing (eds), *Odgers' Australian Senate Practice*, 14th ed (2016) at 385-391.

urgent with the distinct statutory question of his satisfaction as to the expenditure being unforeseen.

131 The argument treated the Explanatory Statement as if it were a statement of reasons for an administrative decision as distinct from what it is – an explanation of the purpose and operation of a legislative instrument. The argument then invited the Explanatory Statement to be interpreted with "an eye keenly attuned to the perception of error"[95]. Fairly read, it is simply impossible to treat the sentence as intended to do more than to identify in a truncated form the relevant part of s 10(1) on which the Finance Minister relied in making the Finance Determination.

132 Any question as to the Finance Minister's actual process of reasoning in making the Finance Determination is in any event displaced by his affidavit. The Finance Minister makes plain in his affidavit that he considered the urgency of the expenditure and the unforeseen nature of the expenditure separately.

133 The Finance Minister identified the expenditure as the $122 million which the ABS needed to spend to conduct the postal survey in accordance with the then anticipated Statistics Direction, which was to give effect to the Cabinet decision of 7 August 2017. He was satisfied that the need for that expenditure was urgent because the results of the survey were to be known no later than 15 November 2017. He was satisfied that the expenditure was not provided for in the relevant Schedule because it was unforeseen as at 5 May 2017, being the last day on which the Bill containing the Schedule could have included that expenditure.

134 For reasons already explained, the Finance Minister was not disentitled from regarding the expenditure as urgent merely because the need of the ABS to incur that expenditure, and to do so within the limited timeframe, resulted from the recent decision of the Government itself. Nor was he obliged to take into account the potential operation of ss 74 and 75 of the PGPA Act. The special case in the AME proceeding in any event reveals no basis for considering that either of those sections was engaged. As to s 75, the assistance to be provided by

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95 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272; [1996] HCA 6, quoting *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287.

the AEC to the ABS could not sensibly be characterised as a transfer of functions.

135 The plaintiffs in the AME proceeding, with the support of the plaintiffs in the Wilkie proceeding, argued that the Finance Minister's explanation in his affidavit that he was "satisfied that the expenditure was not provided for in that Bill because, at the time that Bill was introduced, it was not the Government's policy that the ABS should conduct a postal survey on the issue of same sex marriage, and [he] did not foresee the Government's decision on 7 August 2017 that the ABS should conduct such a survey" must be understood in light of the earlier statement in his affidavit that he was aware from about March 2017 "of suggestions from Ministerial colleagues of alternative means by which the Government's policy of conducting a plebiscite on the issue of whether the law should be changed to allow same-sex couples to marry might be pursued". They argued that the explanation discloses that the Finance Minister erred in law in his consideration of whether the expenditure was unforeseen as at 5 May 2017. The legal error was said to be twofold. First, it was said that the Finance Minister erred by focussing narrowly on expenditure by the ABS on a postal survey rather than treating the expenditure as a species of the genus of expenditure on a plebiscite. Second, it was said that the Finance Minister erred by confining his consideration to whether expenditure by the ABS on a postal survey was foreseen by him personally.

136 The first of those criticisms was itself legally erroneous. Again for reasons already explained, the question for the Finance Minister at that final stage of the inquiry mandated was properly confined to the expenditure that the Finance Minister was satisfied as at 9 August 2017 was needed: the expenditure of $122 million by the ABS on the conduct of the postal survey. He correctly asked: was that expenditure unforeseen as at 5 May 2017?

137 The second of the criticisms was based on too narrow a reading of the Finance Minister's affidavit. The Finance Minister cannot fairly be read as deposing to having confined his attention to whether expenditure by the ABS on a postal survey was personally foreseen by him as at 5 May 2017. He correctly asked: was the expenditure then unforeseen by the Executive Government? The thrust of his evidence was that the conduct of a postal survey was not then Government policy, as it became on 7 August 2017, and that there appeared to him in forming his satisfaction on 9 August 2017 to have been no reason for any Minister to have foreseen as at 5 May 2017 that it might become Government policy. That view of the Finance Minister's evidence is consistent with the

disclosure within Budget Paper No 1 of the fiscal risk, within the Finance Minister's portfolio, of needing to spend $170 million to implement the Government's strategy of conducting a same-sex marriage plebiscite under legislation along the lines of the 2016 Bill and the telling absence of disclosure of any fiscal risk of needing to spend that or some lesser amount on some alternative means of conducting a same-sex marriage plebiscite.

138 The process of reasoning disclosed by the Finance Minister involved no error of law. The conclusion he reached through that process of reasoning has not been demonstrated to have been beyond the bounds of legal reasonableness.

The validity of the Statistics Direction

139 The Statistics Direction, it will be recalled, directed the Australian Statistician to collect, in relation to specified matters prescribed in specified items in the table in s 13 of the Statistics Regulation, "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 and about the proportion of those electors who are respectively in favour of and against the law being changed to allow same-sex couples to marry.

140 The plaintiffs in the Wilkie proceeding argued that the Statistics Direction exceeded the power of the Treasurer under s 9(1)(b) of the Statistics Act, by notice in writing, to direct the Australian Statistician to "collect such statistical information in relation to [prescribed matters] as is specified in the notice", for three main reasons.

141 First, it was said that the information to be collected did not truly answer the statutory description of statistical information. Next, it was said that the information to be collected was not truly "in relation to" specified matters prescribed in specified items in the table in s 13 of the Statistics Regulation. Lastly, it was said that the power to direct the Australian Statistician to collect such statistical information in relation to prescribed matters as is specified in a notice did not permit the Treasurer to specify from whom the information was to be collected.

142 The first of those arguments itself had two quite distinct strands. One strand of the argument sought to draw a dichotomy between a "vote" or a "plebiscite", on the one hand, and the collection of "statistical information", on the other. The dichotomy is false. The only legally relevant question is whether

the Statistics Direction directed the collection of "statistical information". What it directed might well also be described as a "vote" or a "plebiscite". That, or any other, alternative characterisation is irrelevant to its validity.

143 The other strand of the first argument was refined in oral submissions to gossamer. That remaining strand sought to confine the reference to "statistical information" in the Statistics Act so as to exclude information about personal opinion or belief. It was not put, nor could it realistically be put, that the exclusion was by reason of some limitation inherent in the term "statistics" as understood in 1905, when the Statistics Act was enacted, or as understood now.

144 What was argued was that the historical record contains no indication of a colonial practice of collecting information about personal beliefs or opinions, and that the parliamentary debates which preceded the enactment of the Statistics Act reveal a focus on the collection of information about "objective matters". Attention was drawn to the existence within the Statistics Act as enacted of a provision to the effect that "[n]o person shall be liable to any penalty for omitting or refusing to state the religious denomination or sect to which he belongs or adheres"[96]. The current functional equivalent is a provision which excludes criminal liability "in relation to a person's failure to answer a question, or to supply particulars, relating to the person's religious beliefs"[97]. That was the "exception", it was said, which proved the "rule".

145 The argument went close to inviting the Court to give effect to a sentiment which was asserted, but by no means demonstrated, to be capable of being inferred to have existed at the time of enactment of the Statistics Act as distinct from giving meaning to its enacted, frequently amended and continuously speaking text. The Court, apparently, was to ignore the fact that the ABS had in practice collected a wide range of data concerning opinions and beliefs in the administration of the Statistics Act since at least the 1960s[98].

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96 Section 21 of the Statistics Act (as enacted).

97 Section 14(3) of the Statistics Act (as currently in force).

98 See generally Australian Bureau of Statistics, *Informing a Nation: The Evolution of the Australian Bureau of Statistics 1905-2005*, (2005).

146 Against the background of the principle of construction, articulated in the year of enactment of the Statistics Act, that statutory language is not lightly to be treated as "superfluous, void or insignificant"[99], the original and continuing existence within the Statistics Act of a statutory exclusion for collection under compulsion of information about religious belief can indeed be treated as an exception which proves a rule. The rule which the exception proves is that information about personal opinion or belief, including information as to the proportion of persons holding a particular opinion or belief, is and always has been "statistical information".

147 The argument that information about views on whether the law should be changed to allow same-sex couples to marry was not "in relation to" any of the matters prescribed in the items in the table in s 13 of the Statistics Regulation specified in the Statistics Direction was equally untenable. The context of the Statistics Act provides no justification for reading "in relation to" as requiring anything more than the existence of a relationship, whether direct or indirect, between the information to be collected and the subject-matter prescribed[100]. The information to be collected was plainly "in relation to" each of the subject-matters referred to in the items in the table in s 13 of the Statistics Regulation as "marriages", "Law" and "the social … characteristics of the population".

148 As to the remaining argument concerning the validity of the Statistics Direction, it is sufficient to state that there is nothing in the subject-matter, scope or purpose of the Treasurer's power of direction under s 9(1)(b) of the Statistics Act to exclude specification of a target population.

The authority of the AEC

149 The challenge of the plaintiffs in the Wilkie proceeding to the authority of the AEC to assist the ABS in the implementation of the Statistics Direction was founded on the proposition that s 7A of the Electoral Act, in empowering the AEC to make "arrangements for the supply of goods or services", confers a

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99 *The Commonwealth v Baume* (1905) 2 CLR 405 at 414; [1905] HCA 11, quoted in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71]; [1998] HCA 28.

100 Cf *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356 at 374, 376; [1990] HCA 16.

"power" on the AEC which is incapable of being exercised outside the "functions" of the AEC identified in s 7 of the Electoral Act. Those functions, it was said, do not extend to allowing the AEC to have a role in a postal survey.

150 The distinction between "functions" and "powers", often drawn in Commonwealth legislation, is not rigid and is not rigidly maintained in the Electoral Act. The reconciliation of ss 7 and 7A of the Electoral Act lies in recognising that making and honouring arrangements under s 7A is itself one of the functions of the AEC identified compendiously in s 7(1)(a) of the Electoral Act.

Conclusion

151 Accordingly, the order in the Wilkie proceeding was to the effect that the amended application for an order to show cause be dismissed with costs, and the order in the AME proceeding was that the questions stated by the special case for the opinion of the Full Court be amended and answered as follows:

1. Do either of the plaintiffs have standing to seek the relief sought in the Amended Statement of Claim?

   Answer: Inappropriate to answer.

2. Is the Advance to the Finance Minister Determination (No 1 of 2017-2018) (Cth) ("the Determination") invalid by reason that the criterion in s 10(1)(b) of the *Appropriation Act (No 1)* 2017-2018 (Cth) ("the 2017-2018 Act") was not met such that the Finance Minister's power to issue the Determination was not enlivened?

   Answer: No, it is not invalid.

3. (a) Does question 3(b) raise an issue which is justiciable by a court and within the scope of any matter which the Court has authority to decide?

   (b) If the answer to question 3(a) is yes, is the Determination invalid by reason that:

      (i) on its proper construction, s 10 of the 2017-2018 Act does not authorise the Finance Minister to make a determination, the effect of which is that the

2017-2018 Act takes effect as if Schedule 1 thereto were amended to make provision for expenditure that is outside the ordinary annual services of the Government; and

(ii) the expenditure on the ABS Activity (being the activity described in the Census and Statistics (Statistical Information) Direction 2017 (Cth)) is not within the meaning of "ordinary annual services of the Government"?

Answer:

(a) The proper construction of s 10 of the 2017-2018 Act is justiciable.

(b) No. Section 10, on its proper construction, did authorise the Finance Minister to make the Determination.

4. If the answer to question 2 or question 3(b) is yes:

(a) does question 4(b) raise an issue which is justiciable by a court and within the scope of any matter which the Court has authority to decide?

(b) if the answer to question 4(a) is yes, would the drawing of money from the Treasury of the Commonwealth for the ABS Activity in reliance on the appropriation for the departmental item for the [Australian Bureau of Statistics] in the 2017-2018 Act be unauthorised by the 2017-2018 Act on the basis that the expenditure is not within the meaning of "ordinary annual services of the Government"?

Answer: The question does not arise.

5. What, if any, relief sought in the Amended Statement of Claim should the plaintiffs be granted?

Answer: None.

6. Who should pay the costs of this special case?

Kiefel *CJ*
Bell *J*
Gageler *J*
Keane *J*
Nettle *J*
Gordon *J*
Edelman *J*

Answer: The plaintiffs should pay the costs of the special case.