IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **NO M105 OF 2017**

BETWEEN: **ANDREW DAMIEN WILKIE**
First Plaintiff
FELICITY JENNIFER MARLOWE
Second Plaintiff
PFLAG BRISBANE INC
Third Plaintiff

AND: **THE COMMONWEALTH OF AUSTRALIA**
First Defendant
MINISTER FOR FINANCE
Second Defendant
TREASURER
Third Defendant
AUSTRALIAN STATISTICIAN
Fourth Defendant
ELECTORAL COMMISSIONER
Fifth Defendant

SUBMISSIONS OF THE FIRST TO THIRD DEFENDANTS

Filed on behalf of the First to Third Defendants by:

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PART I PUBLICATION

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

PART II ISSUES

2. The issues are as stated in the Plaintiffs' Annotated Submissions (**PS**) at [2]. However, issue 4 concerning whether the fourth defendant has power under s 61 of the Constitution to carry out the Australian Marriage Law Postal Survey (**AMLPS**) does not arise, as the AMLPS is to be carried out in the exercise of statutory functions and powers.

PART III SECTION 78B NOTICE

3. The plaintiffs have filed a notice pursuant to s 78B of the *Judiciary Act 1903* (Cth). The First, Second and Third Defendants (**Commonwealth**) will file a further s 78B notice with these submissions.

PART IV FACTS

4. The facts are as stated in the Plaintiffs' submissions. Pursuant to the consent order filed on 25 August 2017, they also include the facts stated in the special case filed in proceeding M106 of 2017 (*Australian Marriage Equality Ltd & Anor v Minister for Finance & Anor*) and the Statement of Agreed Facts filed on 25 August 2017 (AB 185).

PART V APPLICABLE PROVISIONS

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

PART VI ARGUMENT

A. STANDING

6. The plaintiffs in this proceeding seek relief directed to:

   6.1. the actual conduct of the AMLPS, including the expenditure of money on that conduct[1] (Prayers 3–11);

   6.2. the validity of the Advance to the Finance Minister Determination (No 1 of 2017–2018) (the **Determination**) (Prayer 1); and

   6.3. the validity of s 10 of *Appropriation Act (No 1) 2017–2018* (Cth) (**2017–2018 Act**) (Prayer 2).

7. None of the plaintiffs has demonstrated a special interest that is sufficient to give standing to seek these categories of relief. None of the plaintiffs is "likely to gain some advantage … or to suffer some disadvantage" of the requisite kind if his or her or its

[1] However, the only pleaded ground for any challenge to expenditure is based on the challenge to the validity of the appropriation of funds for the purpose of the AMLPS: see grounds 1-3: AB 13-14. There is no submission that the ABS lacks statutory authority to spend validly appropriated funds.

action succeeds or fails.[2] Questions of standing are subsumed within the constitutional requirement of a matter.[3]

Relief in respect of conduct of and expenditure upon AMLPS (Prayers 3–11)

8. The first and second plaintiffs assert standing in part based on their status as recipients of a survey form if the AMLPS proceeds (PS [8]). That does not amount to a special interest for two reasons. First, these plaintiffs share that status with the approximately 16 million other persons enrolled on the Commonwealth electoral roll, which does not sufficiently distinguish them from the general public so as to give them a "special" interest.[4] Secondly, the mere receipt of the survey form is not a sufficiently substantial interest in circumstances where there is no obligation to complete, or do anything at all with, the survey form.

9. The first plaintiff appears to call in aid the fact that he voted against the Plebiscite (Same-Sex Marriage) Bill 2016 (Cth) (PS [7]). A parliamentarian does not derive standing to challenge a law or activities because he or she voted against some measure on a similar topic, any more than a citizen has standing to challenge a law because he or she disagrees with it. He points to no authority that suggests otherwise. The absence of such authority is not surprising, for the submission seeks to draw an inference about the first plaintiff's interest from actions that form part of proceedings in Parliament, and therefore invites the Court to do something that s 16 of the *Parliamentary Privileges Act 1987* (Cth) prohibits. The operation of that section tells against the proposition that a parliamentarian might derive standing from actions taken in Parliament.

10. The second plaintiff relies additionally upon the claim that the receipt of the survey form and public debate about the AMLPS will be distressing for her (PS [8]). The pertinent evidence relied on in the plaintiffs' affidavit rises no higher than the second plaintiff's own subjective belief and concern. However strongly or genuinely felt, an apprehension of the kind claimed goes no higher than an "emotional concern" that does not constitute a special interest sufficient to attract standing.[5] To establish standing, the plaintiff must demonstrate that her "legal position", in the sense of her "rights, duties, liabilities and obligations", "is immediately or significantly affected".[6] It is not sufficient that the conduct of the AMLPS will impact her "in a way which would be peculiar to [her], in the sense that members of the general public would not be similarly affected".[7] Further, the cause of her apprehended distress (being principally what third parties might do in response to the AMLPS) is insufficiently connected with the relief

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2 *Kuczborski v Queensland* (2014) 254 CLR 51 at 106 [176] (Crennan, Kiefel, Gageler and Keane JJ), quoting *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493 at 530 (Gibbs J).

3 See, eg, *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 ***(Pape)*** at [50]-[51] (French CJ), [152] (Gummow, Crennan and Bell JJ) and the cases cited there.

4 *Anderson v Commonwealth* (1932) 47 CLR 50 at 52 (Gavan Duffy CJ, Starke and Evatt JJ); *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493; *Pape* (2009) 238 CLR 1 at 34 [47] (French CJ).

5 *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493 at 530 (Gibbs J).

6 *Kuczborski v Queensland* (2014) 254 CLR 51 at [182], also at [184] (Crennan, Kiefel, Gageler and Keane JJ); *British Medical Association v Commonwealth* (1949) 79 CLR 201 at 257 (Dixon J).

7 *Kuczborski v Queensland* (2014) 254 CLR 51 at [182] (Crennan, Kiefel, Gageler and Keane JJ).

that she seeks against the conduct of the AMLPS, and even more so against the Determination.

11. The third plaintiff is an advocacy group and claims to be affected because the AMLPS "intersects with, and will be the subject of, its activities" (PS [9]). Its objectives, as specified in its Constitution, encompass "support" for human and civil rights of lesbian and gay people and their families, and to "help change attitudes" and "provide education" (**AB 68**). An organisation does not derive standing to challenge a law because its objects "intersect with", or are even directly concerned with, the subject of the law.[8] A body corporate formed to advance certain beliefs is in no stronger position than a natural person who "does not acquire standing simply by reason of the fact that he holds certain beliefs and wishes to translate them into action".[9] Just as an anti-abortion group was denied standing to challenge a clinical trial of an abortion pill (which did not "resolve the debate on the question" of abortion), so a pro-same sex marriage group does not have standing to challenge an inquiry into attitudes about the marriage law (which does not itself resolve the question it poses).[10] That is so especially as there is "no evidence adduced of activities of the scale or significance of the kind" that would be required in addition to the mere stated objects of the group.[11]

12. All three plaintiffs submit that they have standing as "strangers" to seek writs of prohibition (Prayers 5, 7 and 9) directed to the fourth and fifth defendants (PS [10]). Prohibition is not properly claimed because there is no relevant exercise of judicial or quasi-judicial power by the fourth or fifth defendants amenable to the writ.[12] The constitutional distinction between prohibition and injunction, and the contemplation that both remedies continue to exist, speaks against the plaintiffs' attempt to convert the writ into an injunction with no standing requirement. The writs sought in this case are superfluous to the declaratory relief sought in Prayers 1–4, as it is unnecessary to prohibit Commonwealth officers from acting upon provisions or decisions declared to be of no effect,[13] and self-evidently superfluous to the injunctive relief sought in Prayers 6, 8, 10, and 11. There would also be no basis for the writ to issue unless the declarations of invalidity were first made, which highlights the vice in the application: a plaintiff who otherwise lacks standing to obtain a declaration cannot manufacture it by including spurious claims for prohibition. In any event, the proposition that a "stranger" can seek prohibition is more accurately that a "stranger *to a dispute*" can seek prohibition,[14] and does not comprehend circumstances other than where a judicial or quasi-judicial resolution of a dispute already on foot is sought to be prohibited.

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8 *British Medical Association v Commonwealth* (1949) 79 CLR 201 at 257 (Dixon J); *North Coast Environmental Council Inc v Minister for Resources* (1994) 55 FCR 49 2 at 512 (Sackville J).

9 *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493 at 531 (Gibbs J).

10 *Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health* (1995) 56 FCR 50 at 67–69 (Lockhart J).

11 *Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health* (1995) 56 FCR 50 at 82 (Beaumont J).

12 *R v Wright; Ex parte Waterside Workers' Federation of Australia* (1955) 93 CLR 528 at 541–542 (the Court).

13 See eg *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

14 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 263 [40] (Gaudron, Gummow and Kirby JJ), 275 [77] (McHugh J).

Relief in respect of the appropriation of funds (Prayers 1–2)

13. The submissions to which Parts B and C below respond are submissions by which the plaintiffs' attack the validity of steps pertaining to the appropriation of funds. Those attacks encounter the obstacles set out at [11]–[18] of the submissions of the First Defendant and the Attorney General of the Commonwealth in the AME proceeding, where the special character of Appropriation Acts is addressed. The Commonwealth adopts those submissions, together with the specific submissions in the AME proceeding at [19]–[20] that the plaintiffs lack standing to challenge steps pertaining to an appropriation because such steps have no effect on their rights.

14. The first plaintiff attempts to overcome this difficulty by asserting a particular interest as a member of the House of Representatives in ensuring that public monies are spent in accordance with law (PS [7]). In response to this point, the Commonwealth adopts its submissions in the AME Proceeding at [21]–[22].

15. The plaintiffs' rhetorical invocation of "unbridled discretions" and "islands of power" overlooks the simple point that the actions they impugn do not affect rights, at least so widely that the "rule of law" would demand relaxation of the ordinary principles governing standing. Their point is likewise undermined by the concession that there are other potential plaintiffs with standing to seek relief, including the States (PS [11]).

B. VALIDITY OF SECTION 10 OF THE 2017–2018 ACT

16. If the plaintiffs have standing to challenge matters relating to an appropriation, then it is necessary to address their challenge to the validity of s 10 of the 2017-2018 Act.

The operation of section 10

17. Section 10(1) of the 2017–2018 Act empowers the Finance Minister to make a determination which, by force of sub-sec (2), causes the 2017–2018 Act to have effect as if Sch 1 were amended to make provision for the expenditure referred to in the determination. The determination operates to increase, by the amount stated in it, the amount provided for in the item in Sch 1 in relation to which it is made. The total amount that may be subject of determinations under s 10 is $295 million (sub-sec (3)). This is around 0.3% of the $88.75 billion itemised in Sch 1 (s 6).

18. The provision of contingency funds to the Treasurer (and later the Finance Minister) to meet unforeseen needs for expenditure can be traced back to the first Appropriation Act passed by the Commonwealth Parliament and, prior to that, to colonial and English practice.[15] The form of the provisions by which that was achieved changed over time. Until the 1980s, the power of the Treasurer and then Finance Minister to make advances up to the specified limit was unattended by express criteria.[16] By the late

[15] See *Appropriation Act 1901–1902*, Sch 2; Enid Campbell, "Parliamentary Appropriations" (1971) 4(1) *Adelaide Law Review* 145 at pp 151–152. The English practice of a Civil Contingency Fund is discussed in Alpheus Todd, *On Parliamentary Government in England* (2nd ed, 1889) at pp 20–21.

[16] See eg Sch 2 of the *Appropriation Acts* for 1901–1902 to 1910–1911; Sch 2 of each of the *Appropriation Acts* for 1920–1921, 1930–1931, 1940–1941, 1950–1951, 1960–1961; *Appropriation Act (No 1) 1970–1971* (Cth) s 5; *Appropriation Act 1980–1981* (Cth) s 7. There were, however,

1980s, the requirement that the Finance Minister be satisfied that the expenditure was urgent and either unforeseen or erroneously omitted from the Appropriation Act had been introduced. By the *Appropriation Act (No 1) 2000–2001* the "Advance to the Finance Minister" had taken a recognisably modern form (s 11).

19. Before addressing each of the four bases on which the plaintiffs challenge the validity of s 10 (PS [12]–[36]), a basic misconception that underlies those attacks must be addressed. All four attacks proceed from the premise that a determination made by the Minister under s 10 effects an appropriation. Thus, at PS [15] it is said that s 10 "grants the Finance Minister the power to authorise appropriations". At PS [20] it is said that "[t]hrough the s 10 mechanism, funds are appropriated". PS [23] makes reference to "[a]ppropriation by legislative instrument". These statements misconceive the role of, and relationship between, ss 10 and 12 of the 2017–2018 Act.

20. An "appropriation" is an authority to withdraw funds from the Treasury of the Commonwealth (ie, the Consolidated Revenue Fund). Appropriation Acts operate as an authority to make the disbursements from the Consolidated Revenue Fund specified therein.[17] Neither s 10 of the 2017–2018 Act, nor a determination made under it, appropriate anything. They confer no authority to withdraw funds from the Treasury. Instead, s 10(1) lays down criteria according to which the Finance Minister can make provision for expenditure of up to $295 million against any part of Sch 1, by making a determination that has effect "as if" Sch 1 was amended in accordance with that determination. The effect is to link the part of the $295 million that is the subject of the determination to the entity (and normally also the "outcome") identified in the relevant part of Sch 1. Section 10 therefore operates in a way that is similar to that of s 36A of the *Audit Act 1901* (Cth), which from 1906 to 1998 empowered the Treasurer to direct that funds that were appropriated for the Advance to the Treasurer be charged to such heads as the Treasurer may direct.

21. It is obvious that s 36A of the *Audit Act 1901* (Cth) did not appropriate funds. The same is true of s 10 of the 2017-2018 Act. The appropriation of funds that may be the subject of the Advance to Finance Minister is effected by s 12, not by s 10. Being based on a false premise, all the plaintiffs' attacks on s 10 fall away. However, in addition to the above reason, each attack fails for the further reasons addressed below.

First attack: s 10 is an "appropriation in blank" (PS [12]–[16])

22. Section 10 of the 2017–2018 Act is not an impermissible "appropriation in blank … merely authorizing expenditure with no reference to purpose".[18] Nor is it an "appropriation in gross, authorizing the withdrawal of whatever sum the Executive Government may decide in the exercise of an unfettered discretion".[19] This is for two

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criteria set out in directions under s 71(2)(a) of the Audit Act, which referred to the use of the Advance in "urgent and special circumstances": see Senate Standing Committee on Finance and Government, *Report on the Advance to the Minister for Finance* (August 1979) [1.12] and [1.15].

[17] *Pape* (2009) 238 CLR 1 at 72 [176] (Gummow, Crennan and Bell JJ), 105 [295] (Hayne and Kiefel JJ).

[18] *Attorney General (Vic) v Commonwealth; Ex rel Dale* (1945) 71 CLR 237 ***(Ex rel Dale)*** at 253 (Latham CJ); *Brown v West* (1990) 169 CLR 195 at 208 (the Court).

[19] *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 ***(Northern Suburbs)*** at 582 (Brennan J).

reasons. First, as noted above, s 10 is not an appropriation at all; the relevant appropriation for moneys the subject of a determination made under s 10 is found in s 12. Second, s 10 permits the Finance Minister to make provision for (out of appropriated funds) expenditure (up to the pre-determined maximum set by Parliament) for purposes stated in the Items in Sch 1 where the conditions that enliven the power arise. The fact that the need for the expenditure was unforeseen or overlooked means (by hypothesis) that the particular Items in Sch 1 to which any particular determination under s 10 relates cannot be identified in advance. However, the end of providing for needs for expenditure that the Finance Minister is satisfied are urgent and unforeseen or omitted at the time of the Bill for Appropriation Act is introduced into the House is itself a purpose that is sufficient to satisfy any constitutional requirement for an advance statement of purpose of an appropriation of funds (particularly as any such constitutional requirement requires, at most, a very general identification of purpose[20]).

23. It is not correct to say (cf PS [16]), that where s 10 applies appropriated funds may be used for "any purpose whatsoever". The only possible effect of a determination under s 10 is to increase the amount appropriated against an item in Sch 1. The power of the Commonwealth to *spend* an amount of appropriated funds referred to in an item in Sch1 must be found in the Constitution or in the statutes made under it.[21]

24. In any event, underlying the asserted constitutional stricture against "appropriations in blank" was the view that the words "for the purposes of the Commonwealth" in s 81 of the Constitution both empowered and limited the spending by the Executive of money appropriated by the Parliament.[22] In *Pape*, the Court rejected that view.[23] Following *Pape* and the *Williams* cases, it is now settled that Parliament has control over the *expenditure* of appropriated funds by the Executive, which in many cases can occur only with legislative authority. The existence of that form of parliamentary control over expenditure removes the rationale for the suggested limitation on "appropriations in blank", for it necessarily ensures that all Commonwealth expenditure will be for the "purposes of the Commonwealth" irrespective of the specificity of an appropriation.

Second attack: s 10 by-passes the steps mandated by the Constitution (PS [17]–[22])

25. The 2017–2018 Act, like any other proposed law for the appropriation of revenue, may be assumed to have followed the usual constitutional procedure of being recommended by the Governor-General to the House of Representative (s 56), originating in and passing the House (s 53) before being passed by the Senate without amendment (s 53). In this orthodox and constitutionally mandated fashion, Parliament decided to appropriate funds not just as itemised in Sch 1, but also to deal with urgent and unforeseen need for expenditure (through the mechanism of enacting s 10).

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[20] *Combet v Commonwealth* (2005) 224 CLR 494 (***Combet***) at 576-577 [159]-[161] (Gummow, Hayne, Callinan and Heydon JJ) and 529 [26]-[27] (Gleeson CJ).

[21] *Williams v Commonwealth (No 2)* (2014) 252 CLR 416 (***Williams No 2***) at 453–454 [20], 455 [25] and 470 [86] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

[22] *Ex rel Dale* (1975) 135 CLR 1 at 253 (Latham CJ).

[23] *Pape* (2009) 238 CLR 1 at 55–56 [111]–[113] (French CJ), 74–75 [184]–[185] (Gummow, Crennan and Bell JJ), 111–112 [316]–[318] (Hayne and Kiefel JJ).

26. Accordingly, is not correct to say that there has been any "dislocation" (PS [21]) in the constitutional roles of the Governor-General or either House of Parliament. The constitutional roles of the Governor-General and each House of Parliament were fully discharged in the passage of the 2017–2018 Act, including s 10. The Governor-General has recommended to the House and the House and Senate have authorised (inter alia) the Finance Minister to have power to make provision for expenditure of up to $295 million to meet what (s)he is satisfied are urgent needs for unforeseen or omitted expenditure. For the same reason, it is equally incorrect to say that s 10 involves the potential for the expenditure of funds without authorization by Parliament through steps mandated by the Constitution (cf PS [22]).

Third attack: s 10 involves appropriations by "executive fiat" (PS [23]-[24])

27. The requirement of s 83 of the Constitution that no moneys may be drawn from the Treasury of the Commonwealth "except under an appropriation made by law", reflects and cements the constitutional principle of parliamentary control over expenditure.[24] However, s 10 does no violence to that principle. Where moneys are drawn from the Treasury following a determination made under s 10(1), those monies are "drawn under an appropriation made by law" because they are drawn under the authority of s 12 of the 2017–2018 Act. That satisfies the requirements of s 83 of the Constitution.

28. For that reason, a determination made under s 10 of the 2017–2018 Act does not involve any appropriation by "executive fiat" or any question of a single Minister achieving what is denied to an entire House of Parliament (cf PS [24]).

Fourth attack: An impermissible delegation of legislative power (PS [25]—[36])

29. The capacity of the Parliament to delegate legislative power, even in wide and general terms, cannot be doubted.[25] There is no constitutional objection to a provision in an Appropriation Act which vests in a Minister a power, arising on his or her satisfaction, to make provision for urgent and unforeseen expenditure up to a specified limit. Such a provision cannot be seen as an "abdication" by Parliament of any of its powers (cf PS [27]), particularly as Parliament may repeal or amend the provision at any time.[26]

30. An exercise of the power in s 10 of the 2017–2018 Act is merely a utilization by the Finance Minister of funds which Parliament intended that (s)he should have available, and that have, by law, been appropriated. Parliament has determined that the funds so appropriated should be available in the circumstances s 10 describes and on satisfaction of the conditions it specifies. Consequently, s 10 of the 2017–2018 Act cannot be described as any "redistribution" of the constitutional roles of the branches of

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[24] *Northern Suburbs* (1993) 176 CLR 555 at 581 (Brennan J); *Pape* (2009) 238 CLR 1 at 81–83 [206]–[210] (Gummow, Crennan and Bell JJ), 113 [320] (Hayne and Kiefel JJ).

[25] *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 100, 101 (Dixon J), 119–122 (Evatt J); *Capital Duplicators Pty Limited v Australian Capital Territory* (1992) 177 CLR 248 (***Capital Duplicators***) at 264–265 (Mason CJ, Dawson and McHugh JJ); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 512–513 [102] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

[26] *Capital Duplicators* (1992) 177 CLR 248 at 265 (Mason CJ, Dawson and McHugh JJ); *Permanent Trustee Australia Ltd v Commissioner for State Revenue (Vic)* (2004) 220 CLR 388 at 420–421 [77] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

Government or the attempted formation of a "more convenient constitutional settlement" (cf PS [27]). Still less can it be described as a substantial "handing over [of] the task of appropriation" (cf PS [28]).

31. The inability of either House of Parliament to disallow a determination under s 10 under s 42 of the *Legislation Act 2003* (Cth) takes the plaintiffs' argument no further. Contrary to PS [30], constitutional principle and obvious good sense underlies the exclusion of a determination made under s 10 from the legislative instruments which can be disallowed by either House of Parliament.

32. First, if a determination was amenable to disallowance, uncertainty would attend the dispersal and receipt of that expenditure and, in the event of a disallowance, disruption and inconvenience would be occasioned to the operations of Government in (by hypothesis) urgent circumstances (including by reason of the fact that it may result in programs or activities being forced to cease when only partially complete). For example, disallowance could leave workers who were using funds the subject of an advance under s 10 to provide urgent overseas aid with no legal capacity to use those funds even to return personnel and equipment to Australia.

33. Second, given the principles of responsible government, it would be rare for the House of Representatives to disallow action taken by a Minister, meaning the main prospect of disallowance would arise in the Senate. However, being a law for the ordinary annual services of Government, the 2017–2018 Act, when a bill, was not susceptible to amendment by the Senate (s 53). A power of the Senate to disallow a determination providing for specific expenditure under an Appropriation Act for the ordinary annual services of government would, at least, be in tension with the constitutional incapacity of the Senate to amend the Appropriation Bill before its passage into law.

34. The proposition that the incapacity of either House of Parliament to disallow a determination made under s 10 is fatal to its constitutional validity cannot be accepted (cf PS [29]–[32]). The absence of that capacity does not render s 10(2) an impermissible abdication by Parliament of its functions or render s 10 other than a law with respect to one or more of the Parliament's heads of legislative power (cf PS [31]). While parliamentary control of expenditure is a constitutional principle and a feature of the Constitution (especially ss 81 and 83),[27] "[i]t is for Parliament, consistently with the Constitution, to decide how it exercises that control".[28] There is no constitutional principle preventing Parliament reposing in the Finance Minister the power to draw down on moneys specifically appropriated to cover what (s)he considers as a need for urgent and unforeseen without reserving to both Houses the power to disallow it.

35. The matters of history referred to at PS [32]—[36] do not cast any doubt on the consistency of s 10 of the 2017–2018 Act with the constitutional requirements for a valid appropriation. Indeed, the long history of provision being made, both before Federation and afterwards, for contingency funds or an Advance to the Treasurer or Finance Minister to cover unforeseen needs for expenditure strongly suggests the contrary. That was how the matter appeared to McHugh J in *Northern Suburbs* (at

[27] *Northern Suburbs* (1993) 176 CLR 555 at 579 (Brennan J), 598–599 (McHugh J).

[28] *Combet* (2005) 224 CLR 494 at 522–523 [5] (Gleeson CJ), 577 [160] (Gummow, Hayne, Callinan and Heydon JJ).

600–601). The plaintiffs' argument necessitates the conclusion that Parliament has, consistently since Federation, made unconstitutional provision for unforeseen needs for expenditure and, in fact, that it is constitutionally disabled from making such provision. Such an unlikely and inconvenient conclusion should not be accepted, particularly as this Court has never suggested there is any constitutional problem with the Advance despite having opportunities to do so. For example, the Supply Act considered in *Brown v West* (at 209–210) would have been susceptible to all the objections now levelled at s 10, but no concerns were expressed as to the validity of the provisions in that Act concerning the Advance.

C. ATTACK ON THE VALIDITY OF THE DETERMINATION

36. It is only necessary to address the plaintiffs' challenge to the validity of the Finance Minister's determination if they have standing to challenge matters relating to an appropriation. While a determination under s 10 does not itself effect an appropriation ([17]–[21]), the same objections to standing apply in respect of a challenge to its validity: see AME submissions at [14], [19]–[22]. In fact, the legal effect of a s 10 determination is even less than that of an appropriation. It does not even confer authority to withdraw funds, but merely earmarks money for a particular entity and particular purpose with no effect on rights or duties of citizens.

Criteria for the exercise of the power in s 10

37. The power conferred by s 10(1) of the 2017–2018 Act is expressly conditioned on the Finance Minister's *satisfaction* of two matters: first, that there is an urgent need for expenditure in the current year; and, second, that the expenditure is not, or is insufficiently, provided for in Sch 1 because of one of the reasons identified in para (a) or (b). Being a provision expressly conditioned on the formation by the Finance Minister of a state of mind, it is the formation by the Minister of that state of mind, and not the existence of objective facts, which calls into existence the power to make a determination under s 10(2).[29] In this way, s 10(1) uses "established drafting techniques" to avoid litigation directly on factual questions relevant to the exercise of the statutory power.[30] The submission to the contrary at PS [39] should be rejected.

38. The conclusion that the preconditions in s 10(1) concern the satisfaction of the Finance Minister, rather than objective facts, is supported not only by the express words of s 10(1), but also by the subject matter, scope and purpose of the section. Section 10 provides the Executive with capacity to make provision for expenditure to meet urgent needs which were unforeseen or overlooked. It is wholly to be expected that the evaluative judgment as to when those conditions are satisfied would be reposed in the Executive. It would be incongruous, and potentially productive of inconvenience and apt to frustrate the purpose of the section to meet urgent and unforeseen circumstances,

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[29] *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 179–180 [57] (French CJ), 193–194 [106]–[107] (Gummow, Hayne, Crennan and Bell JJ); *Australian Heritage Commission v Mount Isa Mines Ltd* (1997) 187 CLR 297 at 303–304, 306 (the Court).

[30] *Plaintiff M96A/2016 v Commonwealth* (2017) 91 ALJR 579 at 588 [39] (Gageler J); *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at 1175 [54] (McHugh and Gummow JJ); *Bankstown Municipal Council v Fripp* (1919) 26 CLR 385 at 403 (Isaacs and Rich JJ). Those techniques were deliberately deployed for that very purpose when a provision in the form of s 10 was first enacted: see paragraph [41] below.

to interpret s 10 as depending upon the objective existence of the conditions which enliven the power, as to do so would create substantial room to dispute whether the power was enlivened in particular cases, potentially resulting in significant delays (whether as a result of the need for legal advice, or as a result of litigation), and in the potential for money incorrectly paid out pursuant to a reasonable and good faith (but objectively incorrect) judgment to be recoverable from payees.

39. While the state of satisfaction which calls the power in s 10(1) into existence is the Finance Minister's, it of course remains examinable by the courts. Both the availability of judicial review of powers of that kind, and the limits of such review, are well understood.[31] For example, if the Minister has misconceived the matters of which (s)he must be satisfied, or the state of satisfaction is reached in bad faith, or if the Minister could not reasonably have reached the state of satisfaction required, the resultant exercise of power may be set aside. But an error of such a kind must be demonstrated. The exercise of power cannot be impugned simply because the Court would have reached a different conclusion on the facts as to whether the conditions were satisfied.

40. There is nothing in the 1979 Senate "Report on the Advance to the Minister for Finance" (**Report on the Advance**) (referred to at PS [44])[32] to support any narrow or restricted construction being given to s 10. In particular, at [2.32]–[2.40] the Report on the Advance observed that the potential for abuse of the Advance to the Finance Minister was best addressed, not through limiting the flexibility of its use, but through improved Parliamentary scrutiny by making provision for earlier and more explicit disclosure of expenditure from the Advance.

41. In response to the recommendations in the 1979 Report, on 11 December 1979 Mr Dennis Rose, on behalf of the Secretary of the Attorney General's Department, wrote to the Secretary of the Department of Finance expressing concern as to the recommendations in that report.[33] He suggested that any criteria for the use of the Advance relating to "urgent and unforeseen circumstances" should be expressed in terms of the Minister's "satisfaction" as to those matters, so as to avoid the difficulties arising from judicial review concerning whether those criteria were objectively satisfied. According to a 1988 report of the Joint Committee of Public Accounts, the wording of the criteria for utilising the Advance to the Finance Minister was amended following Mr Rose's advice,[34] and the provisions thereafter enacted took in substance the same form as is now found in s 10 of the 2017–2018 Act.

First alleged error – alleged conflation of the statutory criteria (PS [49]–[54])

42. This alleged error focuses on the second sentence of the fourth paragraph of the Explanatory Statement for the Determination (the **Explanatory Statement**). That

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[31] See eg *R v Connell; Ex parte Hetton Bellbird Colleries Ltd* (1944) 69 CLR 407 at 430–432 (Latham CJ); *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360 (Dixon J); *Buck v Bavone* (1976) 135 CLR 110 at 118 (Gibbs J); *Minister for Immigration v SZMDS* (2010) 240 CLR 611 (***SZMDS***) at 638–639 [102]–[105], 644–645 [121]–[122] (Crennan and Bell JJ).

[32] Senate Standing Committee on Finance and Government, *Report on the Advance to the Minister for Finance* (August 1979).

[33] A copy of that letter will be provided to the Court.

[34] Joint Committee of Public Accounts, *Advance to the Finance Minister* (Report 289, 1988), p 25.

sentence contains the impugned phrase "the expenditure being urgent because it was unforeseen".

43. The plaintiffs' submissions on this point assume that an Explanatory Statement for a legislative instrument can be equated with the statement of reasons of an administrative decision-maker. That assumption is unjustified. While the Explanatory Statement (like an Explanatory Memorandum) may be an extrinsic aid to interpretation,[35] it does not purport to be a statement of reasons that sets out the Minister's conclusions or state of mind before making an instrument. Indeed, s 15J of the *Legislation Act 2003* (Cth) requires the Explanatory Statement to "explain the purpose and operation of the instrument", not to set out the reasons the instrument was made. In those circumstances, there is no basis to prefer the Explanatory Statement over the unchallenged affidavit evidence of the Finance Minister as to his satisfaction of the statutory preconditions set out in s 10(1) before he made the Determination under s 10(2) of the 2017–2018 Act. That affidavit (at [13]) clearly distinguishes between the Minister's satisfaction of the "urgent need for the expenditure" the subject of the Determination and his satisfaction that the expenditure was "unforeseen". .Given that evidence, there was clearly no "conflation" of the criteria. Contrary to PS [54], there is no principle that the Court cannot have regard to the Finance Minister's affidavit. Nothing in the *Legislation Act* so provides. Nor is there any question of "supplementing" the Minister's reasons: no statement of reasons having previously been provided, there was no such statement to supplement.[36]

44. In any event, even focusing just on the Explanatory Statement, the plaintiffs' argument should be rejected. As with the reasons for decision of a Tribunal, an Explanatory Statement should not be construed over-zealously, with an eye focussed on the perception of error.[37] Read fairly and as a whole, the Explanatory Statement does not bespeak error. The first paragraph correctly states the two requirements of which the Finance Minister must be satisfied by s 10(1) before making a determination. The seventh paragraph likewise refers to two requirements.

45. In the light of the correct separation of the two elements of s 10(1) in the first paragraph, the second sentence of the fourth paragraph is properly viewed as merely containing an ellipsis and being an instance of "unhappy phrasing" or "looseness of language".[38] It should not be read as revealing any misconception on the part of the Finance Minister that s 10(1) did not contain separate requirements of urgency and a failure to make provision for one of the reasons identified in para (a) and (b). That would be inconsistent with the first paragraph. The better reading of the second sentence of the fourth paragraph of the Explanatory Statement is that it is saying that the expenditure was both urgent and unforeseen, because the Government's decision to conduct the AMLPS and to have results published by 15 November came about only on 7 August 2017. That decision (referred to in the previous paragraphs) is one of "[t]hese circumstances" referred to in the second sentence of the fourth paragraph meeting the

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[35] See *Legislation Act 2003* (Cth) ss 13, 15J and 39; *Acts Interpretation Act 1901* (Cth) s 15AB(2)(e).

[36] Cf *East Melbourne Group Inc v Minister for Planning* (2008) 23 VR 605 at 676–678 [309]–[315].

[37] *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 (***Wu Shan Liang***) at 271–272 (Brennan CJ, Toohey, McHugh and Gummow J); *SZMDS* (2010) 240 CLR 611 at 624–625 [35] (Gummow A-CJ and Kiefel J).

[38] *Wu Shan Liang* (1996) 185 CLR 259 at 272 (Brennan CJ, Toohey, McHugh and Gummow JJ).

requirements of s 10(1). The sentence is indicating s 10(1)(b) is being relied on, not s 10(1)(a). So understood, the impugned sentence does not reveal any misconception by the Finance Minister as to the separate matters of urgency and the unforeseen nature of the expenditure.

46. Of course, even if the asserted error was made (which is denied), unless the plaintiffs' other arguments succeed it would be open to the Finance Minister to make a new determination under s 10, and the AMLPS could then proceed.

Second alleged error – Minister misconstrued urgency (PS [52] and [55]–[57])

47. The Commonwealth adopts paragraphs [28]–[31] of the submissions of the First Defendant and Attorney-General in the AME proceedings as to the meaning of this criterion.

48. The submission at PS [52] and [55]–[57] that "urgency" must arise from "an external circumstance", and cannot arise from a Government policy, should be rejected. The "urgency" with which s 10(1) is concerned relates to the "need" which is the subject of the proposed expenditure. There is no textual foundation, or reason in the scope, object or purpose of s 10(1), to construe the "need" with which s 10 is concerned in such a way as to exclude the achievement of a Government policy in a matter and within a time frame that the Government judges to be necessary. As Gleeson CJ pointed out in *Combet*, government policy is not frozen over a given budget period.[39] The "departmental expenditure" authorised by s 7 of the 2017–2018 Act accommodates "the potential for developments and changes both in policy and circumstance".[40] If that is so for the appropriations originally itemised in Sch 1, there is no reason it is not equally true for increases to those figures pursuant to s 10(2).

49. Once the concept of "urgent need" is properly understood, is it apparent that it is not to the point that the issue of same sex marriage has been controversial for some years, or that the Government had, prior to 7 August 2017, a policy that that issue should be addressed by a compulsory plebiscite carried out otherwise than through the Australian Bureau of Statistics (**ABS**) (cf PS [55]). The power conferred by s 10 is responsive to changes in policy that result in the "need" for expenditure within time frames determined by the Government. It was to that need that the Finance Minister's determination was directed. Given the timeframe for the implementation of AMLPS announced on 8 August 2016, the large amount of work involved in the ABS carrying out that survey, and the obvious need for the ABS to commence the task as soon as possible, it was open to the Minister to be satisfied that the need for expenditure was urgent. No error has been demonstrated in his state of satisfaction in this regard.

Third alleged error – the expenditure was not "unforeseen" (PS [58]–[62])

50. The Commonwealth adopts paragraphs [32]–[37] of the submissions of the First Defendant and Attorney-General in the AME proceedings as to the meaning of this criterion.

51. The submission at PS [58]–[62] to the effect that the Minister erred in being satisfied

[39] *Combet* (2005) 224 CLR 494 at 525 [11] (Gleeson CJ).

[40] *Combet* (2005) 224 CLR 494 at 528 [24] (Gleeson CJ).

that "the expenditure was unforeseen" at the relevant time because there were proposals for a postal plebiscite by March 2017 should be rejected for the following reasons.

52. First, the submission misidentifies the relevant "need" which, as noted above, is not simply a general desire that Australian electors should have some facility to express a direct view on the issue of whether the law should be changed to allow same-sex couples to marry, but, more precisely, a need to achieve the Government's policy that that issue be addressed by the ABS carrying out a survey of Australian electors on that issue with the results to be available by 15 November 2017.

53. Second, once the relevant "need" is correctly identified it is clear that the need for that expenditure was unforeseen at the relevant date by the relevant person (viz., the Finance Minister). The evidence of the Finance Minister is that when the Bill for the 2017–2018 Act was introduced into the House of Representatives he was unaware of any proposal for the ABS to conduct a survey on the issue of same-sex marriage and it was not Government policy for it to do so.[41]

54. Third, generalised proposals for a postal plebiscite floated by individual Ministers, but which had not been adopted as Government policy, do not create a foreseen "need" for expenditure to achieve the proposal. In that regard, it is important to recall that the purpose of s 10 is to allow the Finance Minister to make provision for the expenditure of funds not provided for in the 2017–2018 Act itself because, relevantly, the expenditure is unforeseen. Even if it was foreseen that the *Australian Electoral Commission* (**AEC**) might be asked to conduct a postal plebiscite, that foresight logically could not have led to the inclusion in the 2017–2018 Act of an appropriation of funds to the ABS. Accordingly, once the Government decided to direct the ABS to conduct the AMLPS, the ABS had a need for funding that was unforeseen. Any foresight of alternative possible policy responses is irrelevant to whether expenditure by the ABS on the AMLPS was foreseen.

55. For those reasons, no reviewable error in the formation by the Finance Minister of the state of satisfaction required by s 10(1) has been demonstrated.

D. ATTACK ON THE VALIDITY OF THE DIRECTION

The Direction is valid — "statistical information"

56. Section 9 of the *Census and Statistics Act 1905* (Cth) (**Statistics Act**) authorises the Statistician to collect certain "statistical information". "Information" is a word of extremely broad connotation in its ordinary meaning of "knowledge … concerning some fact or circumstance".[42] It extends to data of any kind. The adjective "statistical" qualifies the word "information" and connotes an aggregation of data across a population or a sample of the population. It is not necessary in this case to consider the outer limits of the word, as the plaintiffs allege only that the word is confined by s 51(xi) of the Constitution so as not to extend to "information about a person's subjective belief or opinion on a single issue" (PS [75]).

Section 51(xi) of the Constitution

[41] Affidavit of the Finance Minister at [9].

[42] Macquarie Dictionary (5th ed, 2009).

57. The grant of power in s 51(xi) of the Constitution was completely uncontroversial. It attracted no discussion during the Convention Debates, and it has never been the subject of litigation in this Court. That is unsurprising, for s 51(xi) is naturally understood as a wide power that responds to the need for and desirability of a broad capacity in the Commonwealth to collect statistics on all manner of subjects as may be thought desirable to inform the governance and administration of the polity.

58. The words of s 51(xi) must be construed with "sufficient allowance for the dynamism which, even in 1900, was inherent in any understanding of the terms".[43] In that regard, "statistics" was a recognised subject-matter of governmental activity at the time of Federation, although it was in a state of development or evolution. Sir Alfred Flux, a British economist and statistician, authored the entry on "Statistics" in Palgrave's *Dictionary of Political Economy*, "a specialist dictionary of high authority the publication of which was closely contemporaneous with the drafting of the Constitution"[44] and to which this Court has referred on several occasions.[45] Sir Alfred noted that "controversy [was] not slight as to [the] precise content" of the field and, in particular, "whether it be concerned only with the examination of conditions, past and present, of different states and peoples, and the best modes of securing knowledge in this field" and "whether the facts with which it is concerned are limited to those which permit of presentation in numerical form".[46] He referred also to some German literature on "the development of official statistics and their present position", apparently contemplating the on-going development of official statistics as a subject-matter of governmental activity.[47]

59. Later, in 1918, the American Statistical Association (in a publication marking its 75th anniversary) said of the "history of the development and organization of official statistics" that it was (AME SCB p 314):

> not a barren record of steps in a scientific process of dealing with facts, but of efforts to get a working knowledge about the fundamental elements in the life of a country — the population, its environment, and its manifold economic and social relations. By taking measure of these elements, statistics reveal the condition of growth and trend in every direction and set out the milestones for the guidance of the administrator and legislator.

60. In Palgrave's entry on "Statistical Method", Richmond Mayo-Smith, who was "indisputably the foremost American scientific statistician",[48] said that statistical

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[43] *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 (***Grain Pool***) at 495–496 [23] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). See also *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 89 [5] (Gleeson CJ), 97 [34] (Gaudron and Gummow JJ), 141–142 [165] (Hayne J).

[44] *Seamen's Union of Australia v Utah Development Co* (1978) 144 CLR 120 at 141 (Stephen J).

[45] See, recently, *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 455 [23], 457 [27], [28] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

[46] Alfred William Flux, "Statistics" in R.H. Inglis Palgrave (ed), *Dictionary of Political Economy*, Vol III (first published 1899) 469 at p 469.

[47] Alfred William Flux, "Statistics" in R.H. Inglis Palgrave (ed), *Dictionary of Political Economy*, Vol III (first published 1899) 469 at p 470.

[48] E R Seligman, "Richmond Mayo-Smith 1854–1901" in National Academy of Sciences, Vol XVII Second Memoir (1919).

method "consists in the study of social phenomena which can be counted or expressed in figures" and that the observations made and analysis undertaken "may yield facts for social science".[49] Two important points emerge from this: even at the time of Federation, it was not seen to be necessary for a statistical inquiry to examine phenomena which can be expressed in figures, provided that they could "be counted"; and the relevant relationship between statistics and facts was that statistical method may yield facts, which is importantly different from a more limited notion, embraced by the plaintiffs, that statistics is concerned only with observing facts.

61. Notwithstanding the continuing evolution of the field of statistics at the time of Federation, the word had already acquired a wide meaning in its natural and ordinary sense. The first edition of the Concise Oxford English Dictionary, published in 1911, defined "statistics" as "numerical facts systematically collected" and the "science of collecting, classifying and using statistics". These definitions are broad enough notions to encompass the systematic counting of the number or proportion of a given population who hold or do not hold a particular belief or opinion, or who agree or disagree with a particular proposition.

62. The words "census and statistics" in s 51(xi) of the Constitution must, of course, be construed "with all the generality which the words used admit".[50] That is itself sufficient reason to reject the plaintiffs' narrow reading that would exclude the collection of information concerning opinions. But not only must s 51(xi) be read with all the generality the words admit, so must all the other heads of power. That means that it would be peculiarly inappropriate to confine s 51(xi), which enables the polity to marshal statistical information in furtherance of its wide legislative and administrative functions. As Littleton Groom recognised upon the second reading of the Census and Statistics Bill 1905 (Cth), "Now that the Commonwealth has been brought into existence, and the Constitution has conferred upon Parliament large powers both of legislation and administration, we have to look at the matter [of statistics] from a broader point of view".[51]

63. Contrary to PS [70]–[71] and [74], the subjects within s 51(xi) are not to be confined by the particular examples or practices evident at the time of Federation. That confinement would deny to the words their true connotation of a developing social and scientific field of practical endeavour.[52] It could render the Commonwealth incompetent to carry

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[49] Richmond Mayo-Smith, "Statistical Method" in R H Inglis Palgrave (ed), *Dictionary of Political Economy*, Vol III (first published 1899) 467 at p 467. Mayo-Smith's conception was later referred to in the entry for "statistics" (released in 1919) in the first edition of the Oxford English Dictionary.

[50] *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225-226 (the Court); *Grain Pool* (2000) 202 CLR 479 at 492 [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 103–104 [142] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[51] Commonwealth of Australia, House of Representatives, *Parliamentary Debates*, 23 August 1905, 1385.

[52] *Attorney-General (NSW) v Brewery Employees Union of New South Wales* (1908) 6 CLR 469 at 610 (Higgins J); *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Professional Engineers' Association* (1959) 107 CLR 208 at 267 (Windeyer J); *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 551–554 [40]—[49] (McHugh J); *Grain Pool* (2000) 202 CLR 479 at 495–496 [23] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

out modern statistical activities appropriate to its status as a modern and developed nation, and deny to the Commonwealth the capacity to apply new statistical methods to data not previously recognised to be amenable to such analysis.

64. Nor, contrary to PS [72], is the meaning of "statistics" in s 51(xi) confined by the usages of that word elsewhere in the Constitution. While it may be accepted that the Constitution contemplates that the "statistics of the Commonwealth" will *include* the number of people of the Commonwealth and each State (ss 24, 105), that unsurprising proposition provides no basis to read down the words used in s 51(xi).

Statistics can concern opinions

65. There is no reason to limit the words of s 51(xi) by reference to a supposed distinction between fact and opinion. The instability of that claimed distinction underscores its inutility as a conceptual or linguistic limitation upon s 51(xi). The claimed distinction breaks down because whether a person holds a particular opinion is itself a fact: "the state of a man's mind is as much a fact as the state of his digestion".[53] An opinion can be recorded numerically in a variety of ways, for example: 1 for Yes and 0 for No; or 5 for strongly agree, 4 for agree, 3 for neither agree nor disagree, 2 for disagree, 1 for strongly disagree; or X number of people hold the opinion etc. The very concept of an "opinion poll" demonstrates the routine nature of the application of statistical techniques to opinions.

66. Indeed, at least one current statistics textbook gives the tracking of attitudes about same-sex marriage as an example of a proper subject of statistical inquiry.[54] The example illustrates the extent to which the plaintiffs' contention that the AMLPS does not involve statistics flies in the face of the settled meaning of "statistics".

67. The plaintiffs' submissions frankly acknowledge that statistical collections have, since before Federation, inquired into religious beliefs. The argument at PS [74] that a religious affiliation is a "characteristic of the population", whereas adherence to some other kind of belief is not a characteristic of a population, is unexplained and unsound.

68. There are many other examples of legislation enacted pursuant to s 51(xi) being used to collect information about opinions, without any suggestion that it fell outside the scope of the power. For example, the Census has long asked people to respond to a question about how well they speak English.[55] That question plainly enough calls for the expression of an opinion as to a person's own proficiency in the language. Outside of the Census, statistical practice in the Commonwealth has long included attitudinal surveys. References to many of these surveys are collected at [59]–[68] of the Special Case in the AME Proceeding. The earliest example identified dates back to the 1960s, in which the ABS asked respondents about the kind of childcare arrangements they would want and prefer (SCB 74 [60], 322). More recently, in 2010 and 2014, the ABS asked "To what extent do you agree or disagree that it is a good thing for a society to be made up of people from different cultures?" (SCB 76 [64], 292). Other examples

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[53] *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483 (Bowen LJ).

[54] Joseph F Healey, *Statistics – A Tool for Social Research* (10th ed, 2015) at p 1.

[55] First asked in the Commonwealth Census of Population and Housing in 1981. See also Report on the Census of the State of Tasmania 1901, pages xlix, l, li.

spanning this period of about 50 years include questions about: which song was preferred for the national anthem (SCB 74 [61], 324); opinions about environmental problems and the relative importance of environmental protection and economic growth (SCB 75 [62], 336–358); feelings about the need for more support for carers (SCB 75 [63], 237); feelings about one's ability to have a say within the community, and about the level of trust in particular institutions (SCB 76 [64]); and perceptions and opinions about social disorder problems in local areas (SCB 78 [65]). These examples illustrate the point made by the Commonwealth Bureau of Census and Statistics (the predecessor to the ABS) in 1973:[56]

> With a view to meeting as far as possible the now mounting demands of Government Departments, the Bureau of Census and Statistics is devoting an increasing effort to social statistics, and to social surveys in particular. In doing so, Australia is following the pattern evident for some time in comparable overseas jurisdictions. ... Social surveys of this type are already an essential instrument of national statistics.

69. For the foregoing reasons, the Direction is not ultra vires the Statistics Act by reason that it directs the Statistician to collect information about opinions on a single issue. The plaintiffs' "second argument" (PS [67]–[75]) should be rejected.

The plaintiffs' other arguments

70. The plaintiffs' "first argument" (PS [65]–[66]), that the Direction is ultra vires because, in truth, it directs the Statistician to conduct a vote, should also be rejected. The plaintiffs urge the Court to characterise the Direction "as a matter of substance over form". The Commonwealth agrees. Attention to substance over form means that it does not matter whether one labels or describes the AMLPS as a survey or a vote. What matters is the activity itself, and whether it answers the description of a "collect[ion] [of] statistical information" within the meaning of s 9 of the Statistics Act. Once it is accepted that the opinions of the chosen population upon the chosen question can be counted, aggregated, and used to "yield facts" about the holding of those opinions, and are therefore "statistical information", it matters not whether one can also describe that activity as a vote.

71. In any event, it is not correct to characterise the activity as a vote. Among the defining characteristics of a vote, as understood in Australia, are that it has immediate consequences and is compulsory. The AMLPS has neither of those features.

72. The plaintiffs' "third argument" (PS [76]–[77]), that one aspect of the Direction "could not possibly give rise to statistical information", should also be rejected, both on the facts and as a matter of principle.

73. On the facts: the plaintiffs have not demonstrated the minor premise of their argument, namely, that the Statistician will be unable to collect statistical information about the proportion of electors who wish to express a view about whether the law should be changed:

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[56] E K Foreman, Commonwealth Bureau of Census and Statistics, "Social Surveys in Australian Government Statistics" (1973) at p 1.

73.1. First, it is not inaccurate to categorise a person within the survey class who does not respond to the AMLPS as a person who does not wish to express a view about whether the law should be changed. The argument to the contrary depends on an unduly narrow conception of not wishing to express a view.

73.2. Secondly, even if the response rate to the AMLPS is an imperfect reflection of the proportion of electors who wish to express a view, it is nonetheless a logical indicator and is not shown to be outside the realm of accepted statistical methods such as to deny the information collected the character of statistical information.

73.3. Thirdly, the argument assumes that there is in fact a material number of electors who wish to express a view about whether the law should be changed, but who nevertheless will not respond to the survey for other reasons. There is no evidence of that fact. Neither the first or second plaintiff says that they are such an elector. Nor does the third plaintiff, a representative group, identify a single person from its membership or networks who is such an elector. The fact was eminently within the power of the plaintiffs to prove and they are wholly silent on it.

74. As a matter of principle: even if it were the case that para 3(1)(a) of the Direction "could not possibly give rise to statistical information", that would not lead to the invalidity of the Direction. The plaintiffs identify no juridical basis for the claim that it would. At most, it might have the consequence that the Statistician fails to comply with para 3(1)(a) of the Direction.

75. Further, and contrary to PS [78], the validity of paras 3(1)(b) and (c) do not depend upon the validity of para 3(1)(a) merely because they "rely on" the concept of participating electors. "Participating electors" is defined in para 3(1)(a) as "electors who wish to express a view ...". Even if it were not possible to collect "statistical information" about the proportion of electors who are such electors, it would remain possible to give to the phrase "electors who wish to express a view..." a legal meaning corresponding with electors who respond to the AMLPS, such that paras 3(1)(b) and (c) would operate without difficulty.

The Direction is valid — *Census and Statistics Regulations 2016* (Cth)

76. Conformably with s 9(1)(b) of the Statistics Act, the Direction requires the Statistician to collect statistical information "in relation to" matters prescribed for the purposes of s 9, including "Births, deaths, marriages and divorces", "Law", and "Population and the social, economic and demographic characteristics of the population".[57] Given the wide purposes served by the collection of statistical information, each of the prescribed matters should be construed broadly, and without undue or artificial limitations not found in the words themselves. It is relevant to note one aspect of the drafting history, namely, that the original regulation made in 1950 prescribed a matter of "law and crime".[58] In 1982, the regulation was replaced and the matters of "law" and "crime" were separated.[59] That separation indicates the broader conception of "law" as a matter in relation to which statistical information could be collected.

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[57] *Census and Statistics Regulation 2016* (Cth), reg 13, its 5, 30, and 38.

[58] *Statistics Regulations*, Statutory Rules 1950 No 43, reg 5(q).

[59] *Statistics Regulations (Amendment)*, Statutory Rules 1982 No. 228, regs 5(j) and 5(k).

77. Similarly, the phrase "in relation to" should be construed broadly. That phrase is intrinsically "of broad import" and "requires no more than a relationship, whether direct or indirect, between two subject matters".[60] Like all expressions of relationship or connection, the phrase may of course "be used in a variety of contexts, in which the degree of connection that must be shown between the two subject matters joined by the expression may differ"[61] such that "the nature and breadth of the relationships [it] cover[s] will depend upon [its] statutory context and purpose".[62] Here, however, the statutory context and purpose favours a broad reading. The power to collect statistical information should be given no narrow construction having regard to the central importance of a solid evidentiary foundation for policy formulation in modern public administration, and to the relatively slight impact a wide reading of the power may have on the rights of individuals.

78. The plaintiffs assert that, but do not explain why, the information to be collected pursuant to the Direction is not "in relation to" any of the prescribed matters. The argument appears to be that the prescribed matters refer only to facts not opinions. That distinction has no textual basis and is not sound for the reasons given in relation to the construction of s 51(xi) and the Statistics Act. Once it is accepted that there is no necessary constraint upon collecting information about opinions as "statistical information", there is no reason to think, contrary to PS [82]-[83], that a power to collect statistical information in relation to the matter of "Law" would not extend to collecting the population's attitudes to the law or a law, or their opinions about whether a law should be changed or not. There is also no reason to think that a power to collect statistical information in relation to the social characteristics of a population does not extend to information about social views about changes to the law, or views about changes to laws that bear upon the character of society. Nor is there any reason to think that a power to collect statistical information about marriages can refer only to facts about the operation of the institution of marriage itself (PS [81]). That would be somewhat at odds with reg 9, which prescribes for the different purposes of s 8(3) of the Statistics Act the matter of "present marital status", which is noticeably narrower than "marriages" as it appears in reg 13.

Role of the Electoral Commissioner

79. The plaintiffs contend (at PS [85]–[86]) that if the Court concludes that the process established by the defendants is not a "postal vote", then it is beyond the statutory powers and functions of the AEC to participate in the process. The participation to which they refer appears (from footnote 103) to be the AEC's participation by way of updating the electoral roll for the purposes of providing the roll to the ABS, and dispatching forms to electors whose addresses have been excluded or deleted from the Roll under s 104 of the *Commonwealth Electoral Act 1918* (**Electoral Act**).

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[60] *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356 at 374 (Toohey and Gaudron JJ), 376 (McHugh J).

[61] *Travelex Ltd v Commissioner of Taxation* (2010) 241 CLR 510 at 519-520 [25] (French CJ and Hayne J).

[62] *R v Khazaal* (2012) 246 CLR 601 at 613 [31] (French CJ); *Workers' Compensation Board of Queensland v Technical Products Pty Ltd* (1988) 165 CLR 642 at 653 (Deane, Dawson and Toohey JJ).

80. The first argument to support this contention appears to be that the AEC's functions in s 7 of the Electoral Act are confined by reference to "electoral matters", a term defined to mean matters which are intended or likely to affect voting in an election (s 4(1)). The argument is misconceived, for the first of the AEC's functions, listed in s 7(1)(a) of the Electoral Act, is "to perform functions that are permitted or required to be performed by or under this Act". The defined term "electoral matters" does not appear in s 7(1)(a). While a number of other paragraphs of s 7(1) confer functions that do refer to "electoral matters", none of those functions are relevant in the present context.

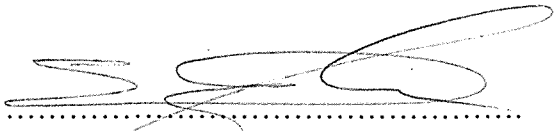
81. Section 7A of the Electoral Act, which is one of the provisions that supports the AEC's arrangements with the ABS, makes it clear that the AEC can assist other persons or bodies with matters other than elections. It enables the AEC to make arrangements for the supply of "goods or services" to any person or body (subject to the requirements of that section). Furthermore, it expressly authorises the use of information contained in a Roll for the purposes of conducting an activity under an arrangement entered into under that section. The performance of such an arrangement is plainly within the functions of the AEC pursuant to s 7(1)(a) of the Electoral Act.

82. The plaintiffs further argue that the Electoral Act does not permit the Electoral Commissioner to disclose information on the Rolls to third parties "for a purpose extraneous to the [Electoral Act]". However, that submission overlooks the fact that the Electoral Act and associated regulations make it clear that the AEC may give the Statistician information on the Rolls for the purpose of the ABS "collecting, compiling, analysing and disseminating statistics and related information".[63]

PART VII ESTIMATE OF TIME

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

Dated: 30 August 2017



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[63] Electoral Act ss 90B(4) (it 4) and 91A, and the definition of "prescribed authority" in s 4(1); reg 6 and cl 1 (it 2) of Sch 1 to the *Electoral and Referendum Regulation 2016* (Cth).