ORIGINAL

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY
BETWEEN:

No. M106 of 2017

AUSTRALIAN MARRIAGE EQUALITY LTD
First Plaintiff

SENATOR JANET RICE
Second Plaintiff

And

MINISTER FOR FINANCE MATHIAS CORMANN
First Defendant

AUSTRALIAN STATISTICIAN
Second Defendant

PLAINTIFFS' SUBMISSIONS

Part I: Certification of form suitable for publication on the Internet

1. The plaintiffs certify that these submissions are in a form suitable for publication on the Internet.

Part II: Concise statement of issues

2. The Special Case dated 21 August 2017 sets out the background to this matter and the questions of law that arise.

Part III: Certification regarding section 78B notice

3. The Plaintiffs consider that notices should be given in compliance with s 78B of the Judiciary Act and issued such notices on 11 August 2017.

Part IV: N/A

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Part V: Statement of the relevant facts

4. As early as 24 August 2016, the Finance Minister propounded the Coalition Government's election promise that it "would conduct a plebiscite, that we would put this before the Australian people for the Australian people to resolve."[1]

5. This "commitment to the Australian people" and the notion that the Government would "give the Australian people the opportunity to pass judgment on this issue"[2] is a sentiment that has been echoed from August 2016 until the present day.[3] When asked in an interview on 26 August 2016 in relation to the plebiscite, "there is no other avenue then if this doesn't succeed in the Parliament?", the Finance Minister replied "[o]ur commitment to the Australian people is what we will deliver on."[4]

6. On 13 September 2016, the Government announced its intention to hold a compulsory attendance plebiscite on 11 February 2017, to be conducted by the AEC, on the question of whether the law should be changed to allow same-sex couples to marry.[5]

7. In a media release issued by the Special Minister of State and the Attorney General also on 13 September 2016, the Government outlined its proposal for the conduct of the "plebiscite", and stated that "[t]he Turnbull Government is delivering its election commitment to give the community a say on whether same-sex marriage should be legalised."[6] The media release recorded that the Australian Government had budgeted $170 million to run the plebiscite.

8. On 14 September 2016, the *Plebiscite (Same-Sex Marriage) Bill 2016* (**2016 Bill**) was introduced into the House of Representatives.[7] On 14 October 2016, the Finance Minister noted that the Government "went to the last election making a promise to the Australian people that we would give them their say on this issue."[8] The 2016 Bill was passed by the House of Representatives on 20 October 2016.[9] On 7 November 2016, the 2016 Bill was defeated in the Senate.[10]

9. On 9 February 2017, the Special Minister for State stated that: "Sadly the marriage plebiscite – explicit promise we made – has been blocked for opportunistic reasons by the Labor Party and the Greens and some members of the crossbench. But we've still got a lot of work to do to continue to implement the policies we said we'd do seven months ago."[11]

10. On 16 February 2017, the Finance Minister stated that: "Our policy is to give the Australian people the opportunity to have their say at a plebiscite. That remains our policy... our policy remains to have a plebiscite first".[12] When asked, "There is no chance

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[1] Cormann interview 24 August 2016, Special Case Book p 142.20. All page references are to the Special Case Book (**SCB**) page numbers. All references to "SC para [x]" are to paragraph numbers in the Special Case (see SCB 64ff).
[2] Cormann interview 26 August 2016, SCB p 147.50.
[3] Eg Cormann interview 14 October 2016 ("the best way to resolve this on a more permanent basis, is to put this to the Australian people."), SCB p 159.17; Cormann interview 16 February 2017 ("Our commitment was when it comes to the definition of marriage, we would give the Australian people the opportunity to have their say") SCB p 172.05; Cormann media release 9 August 2017 ("The Turnbull Government is 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"), SCB p 262.20.
[4] Cormann interview 26 August 2016, SCB p 147.55.
[5] SC para [17].
[6] SC para [17]; SCB p 150.30.
[7] SC para [18].
[8] Cormann interview 14 October 2016, SCB p 159.25.
[9] SC para [18].
[10] SC para [20].
[11] SCB p 164.55.
[12] SCB p 171.50.

of the plebiscite getting through the Senate though, when is the Government going to deal with that reality?", the Finance Minister replied, "The Government's policy is clear."[13]

11. In March 2017, the Department of Finance sought advice from the Attorney General's Department.[14] The advice sought was not in relation to a plebiscite by postal vote or survey to be conducted by the ABS,[15] but from the following, it can be inferred that the advice was sought in relation to a postal plebiscite to be conducted by a government entity other than the ABS, namely the Australian Electoral Commission (**AEC**).

12. On 24 March 2017, a journalist Mr Josh Taylor submitted a Freedom of Information Request to the Department of Finance.[16] The request was then refined by agreement such that it thereafter involved a request for all communications between the Department of Finance and the Attorney-General's Department regarding "the postal vote option for the plebiscite" on same-sex marriage created from the defeat of the 2016 Bill in the Senate to the time when the request was lodged, being 24 March 2017 (**FOI Request**).[17]

13. The Department of Finance identified five documents to be within the scope of the FOI Request.[18] In releasing the documents subject to the FOI Request, the Department of Finance stated that: "Documents 3 and 5 comprise emails with attached Ministerial submissions. I am satisfied that the Ministerial submissions were brought into existence for the dominant purpose of briefing a Minister (specifically, the Special Minister of State) on matters that were, at that time, proposed by the Minister to be **submitted to Cabinet** for its consideration. In particular, the documents were intended to inform the Minister on certain matters which were proposed, at the time, to be the subject of discussion **with the Cabinet**, the existence of which have not been officially disclosed".[19]

14. Further in relation to documents "3", "4" and "5", it was said by the decision maker that "I am satisfied that the relevant documents contain deliberative matters in the nature of opinion, advice and recommendations prepared by Finance for the Special Minister of State in relation to the plebiscite."[20]

15. Significantly, the decision maker went on to note that s/he "accept[ed] that the release of the documents ["3", "4" and "5"] could potentially promote effective oversight of public expenditure".[21] Ultimately, access to documents "3", "4" and "5" was refused.[22]

16. One of the documents that was released under the FOI Request was an email of 20 March 2017, sent from the Department of Finance to the Attorney-General's Department, attaching a document entitled "*Memorandum of Understanding to Fund Plebiscites v6*".[23] The email stated "[a]s discussed, this is the draft agreement that the AGD would need to enter into." The previous email in the same chain, sent 17 March 2017 from Paul Pirani, Chief Legal Officer at the AEC, recorded "*[t]he previous MOU as promised*", and forwarded an email dated 13 April 2016 from Mr Paul Pirani to a person whose identity was redacted attaching a "copy of the MOU that was entered into with the Department of Transport and regional Services in 2007 for the Qld Local Government Plebiscite."[24]

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[13] SCB p 172.10.
[14] SC para [23]; see Defence filed by the Finance Minister at para [32].
[15] SC para [23].
[16] SC para [28].
[17] SC para [28]; SCB p 204.40.
[18] SC para [28]; SCB p 204.
[19] SCB p 206.05 (emphasis supplied).
[20] SCB p 207.30 (emphasis supplied).
[21] SCB p 208.15 (emphasis supplied).
[22] SCB p 204.55, 208.43.
[23] SCB p 174.10.
[24] SCB p 175.05.

17. From about March 2017 onwards, the Finance Minister accepts that he 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.[25]

18. On 23 March 2017, Peter Dutton, Minister for Immigration, stated that:

> "There is this option of a postal plebiscite which doesn't require legislation as I understand. It may achieve in some ways the same outcome to a plebiscite that you would think of in the traditional sense. ... my position is very clear that the Liberal Party went to the last election with a policy for a plebiscite. We should abide by that. That's the position of the Prime Minister and others within the Government ..."[26]

19. The interviewer then raised with Mr Dutton the cost of funding a postal plebiscite (suggesting that funding for a postal plebiscite would require the agreement of Parliament). Mr Dutton responded by saying that "with the postal plebiscite there is no legislation required as I understand it ..." and expressed the view that the Government had to "deal with the reality of the Senate and the Senate knocked back the plebiscite."[27]

20. On the same day, in another interview, Mr Dutton was asked a question "about this postal vote on gay marriage we're hearing about". Mr Dutton replied stating that "[o]bviously the Senate has knocked back the legislation and there is no prospect of the plebiscite proper passing through the Senate and there is an option, as I understand in relation to the postal plebiscite; that's to be contemplated".[28] Mr Dutton then stated that: "Well I think others can comment on the legality or otherwise of it, but I'm **advised** that it is an option. It adheres with our policy that we took to the last election", and expressed a view that he wanted the Government to "stay true to the policy that we took to the last election."[29]

21. On 24 March 2017, Special Minister for State, Scott Ryan, was asked by a journalist about "news today that the Attorney-General's Department has been asked to cost a postal vote for same-sex marriage. So Scott Ryan this is clearly, actively being considered by the Government".[30] As part of his response, Mr Ryan stated that when he developed the policy for a plebiscite, he "considered a lot of options".[31] He then stated that; "I'm committed to the Government's policy which is to have a plebiscite to determine the issue and then immediately address the issue in Parliament."

22. Thus, it is submitted that the inferences to be drawn from the factual matters referred to in paragraphs [11]-[21] above are that: (i) advice that was sought in March 2017 by the Department of Finance from the Attorney General's Department in relation to "the postal vote option for the plebiscite" to be conducted by a government entity other than the ABS, namely the AEC; (ii) the funding of, or expenditure on, a postal plebiscite was considered as part of the "opinion, advice and recommendations" given by the Attorney General's Department to the Department of Finance; (iii) Cabinet considered these matters and (iv) this advice was sought, and these matters were considered by Cabinet, not because of an abstract interest in the topic, but in pursuit of the Government's general policy of holding a plebiscite on the same-sex marriage question.

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[25] SCB p 305 (Cormann affidavit) at [8].
[26] Dutton interview with Ray Hadley 23 March 2017, SCB p 185.25-35 (emphasis supplied).
[27] Dutton interview with Ray Hadley 23 March 2017, SCB p 185.55, p 186.10.
[28] SC para [26]; SCB p 196.10 (emphasis supplied)
[29] 23 March 2017 Dutton interview, SCB p 196.30 (emphasis supplied)
[30] SC para [24]; SCB p 201.25 (emphasis supplied)
[31] 24 March 2017 Lateline interview, SCB p 201.30.

23. Despite senior members of Government by March 2017 being aware that legislation authorising a plebiscite was unlikely to pass in the Senate,[32] the 2017-2018 Budget Paper still contained a contingent liability which remained unchanged, whereby $170 million was recorded as a Fiscal Risk.[33] The 2017-2018 Budget Paper further stated that "[t]he Australian Government remains committed to a plebiscite in relation to same sex marriage, despite the Senate not supporting the" 2016 Bill.[34] The sections of the 2017-2018 Budget Paper dealing with the plebiscite were finalised by 5 May 2017.[35]

24. The last day on which it was practicable to provide for expenditure in the 2017-2018 Bill was 5 May 2017.[36]

25. On 3 August 2017, Mr Dutton, noting that the Government "can't get the plebiscite through the Parliament", stated "[t]his is why the discussion around a postal plebiscite has come up and that's worth debating because with a postal plebiscite there's no legislation required and people would still have their say so we'd keep the spirit of the commitment that we made at the last election."[37]

26. On 7 August 2017, the Cabinet made a decision to (i) re-introduce the 2016 Bill into the Senate and (ii) if the Senate again rejected the 2016 Bill, to proceed with a "voluntary postal plebiscite" for all Australians enrolled on the Commonwealth Electoral Roll conducted by the Australian Bureau of Statistics (**ABS**).[38]

27. On 8 August 2017, the Finance Minister publically announced the terms of the decision Cabinet had made the day before.[39] The Finance Minister issued a press release stating that "[t]he Turnbull Government is 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." The press release stated that the Government would "proceed with a voluntary postal plebiscite" if the Senate again failed to pass the Bill for a compulsory attendance plebiscite.[40]

28. On 9 August 2017, the 2016 Bill was re-introduced in, and again defeated by, the Senate.[41]

29. Thereafter, on 9 August 2017, the Finance Minister made a determination under s 10(2) of the *Appropriation Act (No 1) 2017-2018* (Cth) (the **2017-2018 Act** and the **Determination**).[42] After that, the Treasurer then gave a direction under s 9(1)(b) of the *Census and Statistics Act 1905* (Cth) that the Australian Statistician collect statistical information as specified in the notice (the **Statistics Direction**).[43] In this respect, it is plain from the media release issued by the Finance Minister on 9 August 2017 that the Statistics Direction was signed by the Treasurer after the Finance Minister made the Determination.[44]

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[32] Cormann interview 16 February 2017 (he is asked "[t]here is no chance of the plebiscite getting through the Senate though, when is the Government going to deal with that reality"), SCB p 172.12; Dutton Doorstop interview 23 March 2017 ("Obviously the Senate has knocked back the legislation and there is no prospect of the plebiscite proper passing through the Senate"), SCB p 196.10.
[33] Budget Paper No 1 9-11, SCB p 228.10; see also 9-6, SCB p 223.18.
[34] Budget Paper No 1 9-11; SCB p 228.10.
[35] SC para [30].
[36] SC para [29].
[37] SC para [35]; SCB p 240.25-35.
[38] SCB p 306-307 (Comman Affidavit para [10], [13]); see SCB p 250 (Explanatory Statement to Determination) describing the decision to "proceed with a "voluntary postal plebiscite" if the Senate does not pass the 2016 Bill.
[39] SC para [36]; SCB p 244; see SCB p 306 (Comman Affidavit para [10]).
[40] SC para [36]; SCB p 244.
[41] SCB p 306 (Comman Affidavit para [11]).
[42] SC para [37]; SCB 248.
[43] SC para [40]; SCB p 254.
[44] SCB p 262.28.

30. The Finance Minister accepts that the Statistics Direction was issued "*as a result of*" the 2016 Bill being defeated in the Senate on 9 August 2017 (and "*in accordance with*" the Cabinet's decision that had been announced the previous day).[45]

31. As each of the Statistics Direction and the Determination was a Legislative Instrument,[46] an Explanatory Statement was issued accompanying each.[47] The Explanatory Statement to the Determination stated that "funding is being made available to the ABS to undertake the voluntary postal plebiscite".[48]

32. In other statements made on 9 August 2017, in addition to those contained in the Explanatory Statement, the Finance Minister continued to call the proposal a "voluntary postal plebiscite".[49] Notably, the Finance Minister's Press Release issued on 9 August 2017 – issued after the 2016 Bill was defeated for a second time in the Senate – is titled "*Next Steps For A National Plebiscite On Same Sex Marriage*".[50]

33. The scale of the postal plebiscite is such that the staff ordinarily carrying out the functions of the ABS will be insufficient to conduct the plebiscite.[51] As such, the ABS will need to enter into arrangements with the AEC for the provision of services by the AEC, pursuant to s 7A of the *Commonwealth Electoral Act* 1918 (Cth) (the **Electoral Act**).[52]

34. On 10 August 2017, plaintiffs commenced these proceedings.

35. On 16 August 2017, the Finance Minister, acting on behalf of the Treasurer, amended the Treasurer's direction,[53] and a further Explanatory Statement was issued under the Finance Minister's authority.[54] On 17 August 2017, the Amended Statistics Direction took effect.[55]

Part VI: Argument

Question 1: The plaintiffs have standing

36. To have standing, a plaintiff must have a special interest in the relief sought. The rule is flexible and the nature and subject matter of the litigation will dictate what amounts to a special interest.[56]

37. In *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund* (1998) 194 CLR 247 (***Bateman's Bay***) at 267 [50], Gaudron, Gummow and Kirby JJ adverted to "the public interest in the observance by … statutory authorities, particularly those with recourse to public revenues, of the limitations upon their activities which the legislature has imposed." The requirement for a sufficient material interest is to be construed as an enabling, not a restrictive, procedural stipulation.

38. The interest of a plaintiff must be such as to warrant the grant of the relief claimed; it must be "related to" the relief claimed.[57] The relief sought in these proceedings is declaratory and injunctive relief to prevent public funds being drawn down for an expenditure which the plaintiffs say is not authorised, being an expenditure to invite every enrolled elector in

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[45] SCB p 306 (Cormman Affidavit para [11]).
[46] See s 8 of the *Legislation Act 2003* (Cth).
[47] SC para [38], [41]; SCB p 250, SCB p 258.
[48] SC para [38], SCB p 250.20.
[49] 9 August 2017 press release, SCB 262.23.
[50] SCB p 262.05.
[51] SC para [52]-[53].
[52] SC para [53].
[53] SC para [46]; SCB p 286.
[54] SC para [47]; SCB p 290.
[55] SC para [48]; SCB p 295.10.
[56] *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552 at 558.
[57] *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493 at 511; *Bateman's Bay* at 266 [47].

the Commonwealth to state whether they are in favour of, or opposed to, the law being changed to allow same sex couples to marry.

39. The first plaintiff, AME, was formed to campaign in relation to marriage of couples irrespective of gender. AME's role advocating for legislation to allow same-sex law couples to marry is set out at SC para [5]-[9] (SCB 65-66).

40. The nature of the impugned expenditure directly affects AME's operations. If the defendants were permitted to spend public funds on a postal plebiscite, the Court would readily infer the Equality Campaign run in partnership by AME would be enormously different in scope. There would be a substantial increase on the demands on AME's assets, which may only be applied to AME's objects.[58] This impact is "immediate, significant and peculiar to"[59] AME and certain other special purpose advocacy bodies. When that impact is taken together with AME's history and objects, AME is uniquely placed to challenge a decision in relation to funding a postal plebiscite about same-sex marriage.

41. The second plaintiff, Senator Rice, is a member of the legislature, as was the plaintiff in *Brown v West* (1990) 169 CLR 195 (***Brown v West***). In *Combet v Commonwealth*, McHugh J at 556-557 [97] and Kirby J at 620 [309] concluded that the second plaintiff had standing to challenge expenditure by reason of her status as a member of Parliament.[60] Senator Rice has a particular interest seeking relief in opposing the use of public funds without legislative approval, especially where the claim in part is that the expenditure was not "unforeseen" because legislation for a plebiscite was defeated in the Senate. It is submitted that, given the modern role of the Attorney-General as a member of the Government, members of the legislature, such as Senator Rice, must have standing in order to make it meaningful in a practical sense that "by ss 81 and 83 ... our Constitution assures to the people effective control of the public purse".[61]

42. If it were necessary, there are three other matters that support Senator Rice's standing. *First*, as a person enrolled on the Commonwealth electoral roll (SCB at 66.10), Senator Rice is accordingly one of the electors who will, if the expenditure is permitted, receive the postal voting papers. In this respect, her interest is analogous to the interest of the plaintiff in *Brown v West* in receiving the supplementary postal allowance[62] and the plaintiff in *Pape* in receiving a bonus entitlement.[63] *Secondly*, Senator Rice has a significant personal interest beyond that of an ordinary member of the public. Her activities in the Senate and on behalf of her party include activities specifically connected with LGBTIQ issues (SCB at 66.15). *Thirdly*, Senator Rice is married to a trans same-sex partner who is unable to affirm her gender as female on her birth certificate unless the couple divorces and therefore will be directly impacted by any future reform to the Marriage Act removing the requirement that marriage be between a man and a woman (SCB at 66.15).

43. If the Court were not otherwise satisfied of Senator Rice's standing, these additional matters should be held to be sufficient.

44. Finally, as their Honours remarked in *Bateman's Bay* at 262 [38], it may be "somewhat visionary" to rely upon the grant of the Attorney-General's fiat for protection against ultra vires action of statutory bodies. The present case is a stark illustration of why this should inform questions of standing. The State Attorneys-General are each in charge of a department administering numerous statutes and are likely to be members of Cabinet.[64]

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[58] SCB at 109.20 (Constitution of AME, clause 2.3(a)).
[59] *Bateman's Bay* at 267 [52].
[60] (2005) 224 CLR 494 (***Combet***). The other judges did not address the issue of standing.
[61] *Brown v West* at 205.
[62] *Brown v West* at 212.
[63] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 (***Pape***) at 69 [156]-[158].
[64] *Bateman's Bay* at 262 [38].

Each State enacts legislation that includes the equivalent of a Treasurer's advance or an advance to meet unforeseen expenditure.[65] In this context, it is to be expected that State Attorneys-General will not see it as being within their respective interests to either intervene in a matter involving a challenge to such an Advance or to give a fiat. As such, vindication of the public interest in protection against an ultra vires action of the Finance Minister ought not be left to the State Attorneys-General.

45. Question 1 should be answered "yes" with respect to both plaintiffs.

Question 2: section 10(1)(b) was not enlivened

Proper construction of s 10

46. It is common ground that s 10(1)(a) has no application to this case.[66] The following matters are relevant to the interpretation of s 10(1)(b), upon which the Finance Minister relies.

47. *First*, by reason of the term "if" in s 10(1), it is apparent that the power of the Minister to make a determination under s 10(1) depends upon the existence of conditions therein described. There are two distinct conditions that must be met in order to enliven s 10(1)(b).

48. The first condition – that there is an *urgent* need for expenditure – is a matter for the satisfaction of the Finance Minister. As is evidenced by the use of the word "because" in s 10(1)(b), it is the "expenditure" that *is not provided for* because it was unforeseen. There is not an "urgent need" for expenditure simply because of an error or because it was unforeseen. Rather, there is a stand-alone criterion of "urgent need".

49. *Secondly,* and by contrast, the second condition – that the expenditure was *unforeseen* – is a jurisdictional fact, which must objectively exist before the Minister's power is enlivened.[67] Thus, if the criterion is not satisfied, then the decision purportedly made in exercise of the power or discretion will have been made without the necessary statutory authority required of the decision maker.[68] The question of whether the expenditure was unforeseen is a question that can be properly determined by this Court on the material before it,[69] and the Finance Minister's satisfaction that this criteria is met, is irrelevant.[70]

50. *Thirdly*, the temporal aspect of s 10(1)(b) is that 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". The parties agree that the "last day" for present purposes is 5 May 2017.[71] This lends further support to the fact that the *unforeseen* criterion is a jurisdictional fact and not a matter that is for the satisfaction of the Finance Minister at the time of making the Determination (relevantly here, on 9 August 2017).

51. *Fourthly*, s 10 speaks of the expenditure being unforeseen, yet does not nominate to whom it must have been unforeseen.

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[65] *Financial Management Act* 1996 (ACT), s 18; *Public Finance and Auditing Act* 1983 (NSW), s 22; *Financial Management Act* (NT), s 14; *Financial Accountability Act* 2009 (Qld), s 34; *Public Finance and Auditing Act* 1987 (SA), s 12; *Public Account Act* 1986 (Tas), ss 14-14A; *Appropriation (2017-2018) Act* 2017 (Vic), ss 35-36; *Financial Management Act* 2006 (WA), s 28.
[66] SC para [39].
[67] *M70* (2011) 244 CLR 144 at [57] (French CJ); [107]-[109] (Gummow, Hayne, Crennan and Bell JJ).
[68] *Gedeon v Commissioner of the New South Wales Crime Commission* (2008) 236 CLR 120 at [43]; *M70* at 179 [56] (French CJ).
[69] *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 (***Enfield***) at 148 [22].
[70] *Enfield* at 148 [28].
[71] SC para [29].

52. At the outset, it is not Parliament to whom it must have been unforeseen. The text of s 10(1) is such that the point in time at which the expenditure was unforeseen is *prior* to the point in time at which the matters contained in the Bill become part of an Act passed by Parliament. Whether matters are unforeseen such that they are not provided in the Bill accordingly has no correlation to Parliament's contemplation.

53. Rather, given "the Executive Government [] begins the process of appropriation"[72], it is from the perspective of the Executive that the expenditure must have been "unforeseen" within s 10(1)(b) as at 5 May 2017. For this reason, whether or not, as at 5 May 2017, the Finance Minister did not foresee the Cabinet decision of 7 August 2017 for the ABS to conduct a postal plebiscite is not to the point.[73]

54. *Fifthly,* the clear language of s 10(1)(b) is that what needs to have been unforeseen is the expenditure, and not the specifics of any particular policy that the Government was contemplating as part of incurring that expenditure. In this respect, it is noted that "expenditure" is defined in s 3 of the 2017-2018 Act, to mean "payments for expenses, acquiring assets, making loans or paying liabilities."

55. In the present matter, it is the need to put public funds towards the "payment for expenses" in the conduct of a postal plebiscite that must be unforeseen. Or, otherwise stated, it is the "liability" of the Commonwealth in respect of the conduct of a postal plebiscite that must be unforeseen. Consistent with this position, the Budget Paper identifies a liability attaching to the Commonwealth to pay expenses to effect a plebiscite, rather than attaching that liability to the activities of any particular agency. To adopt a contrary construction – namely, that expenditure on the specific form of an activity and on a specific set of terms must be unforeseen – would permit appropriations to be made across such a breadth of circumstances , that the "unforeseen" limitation in s 10(1)(b) would impose no real constraint at all.

56. *Sixthly,* and relevantly to the interpretation of s 10 as a whole, by operation of s 10(2), an amendment by executive action has the effect of amending the Act itself, absent any action by Parliament, and is therefore what has been referred to as an "Henry VIII clause". Such clauses have been "frequently criticised for good reason".[74] Further, any determination made under s 10 is not subject to disallowance under s 42 of the *Legislation Act 2003* (Cth) by virtue of s 10(4). Further, the context in which s 10 of the 2017-2018 Act operates is to be understood in the context of the *Constitution*, and in particular, that the power associated with control of funding through appropriation is ordinarily reserved to the Parliament, as is discussed in detail in relation to Question 3 below. As such, s 10 should be interpreted narrowly. [75]

Analysis – Question 2

(i) Collapsing of two conditions by Finance Minister

57. The first condition – satisfaction of the Finance Minister that there is an *urgent* need for expenditure – is a stand-alone criterion. It is not the case that there will necessarily be an "urgent need" for the expenditure simply because it was unforeseen (or because there was

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[72] *Combet* at [142]-[143] (Gummow, Hayne, Callinan and Heydon JJ).
[73] SCB p 307 (Cormann affidavit at [13]).
[74] *Adco Constructions v Goudappel* (2014) 254 CLR 1 at 16 [31] (French CJ, Crennan, Kiefel and Keane JJ).
[75] *Combined State Unions v State Service Co-ordinating Committee* [1982] 1 NZLR 742 at 745; see also Pearce and Argument, Delegated Legislation in Australia, 5th ed (2017), p 498; *Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v State of New South Wales* [2014] NSWCA 116 at [102]-[108] (Basten JA) ; *R v Secretary of State for Social Security, Ex parte Britnell* [1991] 1 WLR 198 at 204, Lord Keith of Kinkel (with whom other members of the House agreed); *R v Secretary of State for the Environment, Transport and the Regions; Ex parte Spath Holme Ltd* [2001] 2 AC 349 at 382 (Lord Bingham of Cornhill); see also *Adco Constructions v Goudappel* (2014) 254 CLR 1 at 25 [64] (Gageler J), citing "a return to the executive autocracy of a Tudor monarch."

an erroneous omission or understatement). To the contrary, there may be many instances where expenditure is not provided for because it was unforeseen but there is no urgent need for that expenditure to be incurred in the period to which the Appropriation Act applies.

58. Rather, s 10 requires that the Finance Minister be separately satisfied that there is in fact an urgent need for the expenditure (being the expenditure that was not provided for because it was unforeseen). To interpret the legislation in a way that collapses the "urgent need" and "unforeseen" criteria into one would be to ignore the words "*that is not provided for*" in the chapeau to s 10(1).

59. In this respect, it is plain that the Finance Minister in fact collapsed the criteria of "urgent need" and "unforeseen" when he made the Determination. So much is apparent from the Explanatory Statement which states that: "These government decisions were not made until after the [2017-2018 Act] was introduced into the House of Representatives on Tuesday, 9 August 2017. These circumstances meet the requirements of section 10 of the Act regarding the expenditure being urgent *because* it was unforeseen".[76] This in itself demonstrates legal error in the Minister's Determination (noting that the Explanatory Statement is "a document that sets out how a legislative instrument is expected to operate and details about individual provisions", and an instrument to which s 15AB(1) of the *Acts Interpretation Act 1901* (Cth) applies[77]).

60. Further, and in any event, it is plain that the Determination was actually signed by the Finance Minister before the Statistics Direction was issued by the Treasurer (see para [29] above). Thus, even if the Minister did not collapse the two criteria, he must have concluded that there was an "urgent need" for expenditure at a time when the Australian Statistician was not under any obligation to conduct the plebiscite.

61. Thus, it is submitted that Question 2 should be answered "yes" on these bases alone.

(ii) Expenditure not unforeseen

62. ***Meaning of "unforeseen"***. The meaning of "unforeseen" in the 2017-2018 Act, begins with the consideration of the text, context and legislative purpose.[78]

63. The term "unforeseen" is not defined in the 2017-2018 Act and has not been considered by this Court in the context of any Appropriation Act. While conscious of not making a "fortress out of the dictionary",[79] dictionary definitions of "unforeseen" include "not anticipated or predicted",[80] "not predicted; unexpected"[81] and "not expected or planned".[82]

64. Contextual guidance as to what "unforeseen" is may be gleaned by consideration of what "unforeseen" is *not*. For example, expenditure that was not provided for because it was "unforeseen" is not expenditure that was not provided for because of an "erroneous omission" or an "understatement". Something else – other than omission or understatement – is required.

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[76] SCB 250.28 (emphasis supplied).
[77] See s 2(1) of the *Acts Interpretation Act 1901* (Cth). For examples when an Explanatory Statement has been used as an aid to interpretation see *EC v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 978 at [29] and *Minister for Immigration and Citizenship v Kamal* [2009] FCAFC 98 at [15].
[78] *Alcan (NT) Alumina v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47] (Hayne, Heydon, Crennan, Kiefel JJ); *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ); *Combet v The Commonwealth* (2005) 224 CLR 494 at [4] (Gleeson CJ).
[79] *Thiess v Collector of Customs* (2014) 250 CLR 664 at [23].
[80] Oxford Dictionary of English (3 ed).
[81] Macquarie Dictionary.
[82] Cambridge Dictionary.

65. ***What is the expenditure for?*** The Finance Minister stated in the Determination that "funding is being made available to the ABS to undertake the voluntary postal plebiscite".[83] It is common ground that the proposal is that ABS will post or make available to *every* person on the Commonwealth Electoral Roll 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.[84]

66. Thus, it is apparent that what the ABS has been directed to do in substance, if not form, involves the holding of a "plebiscite" within the ordinary meaning of that term (being "a direct vote of all the qualified electors in regard to some important issue": Macquarie Dictionary).

67. ***On the facts the expenditure is not "unforeseen".*** It is submitted that given the facts set out at paragraphs [5]-[32] above, expenditure on a postal plebiscite was not "unforeseen" as at 5 May 2017:

(a) The Government had a pre-election promise that it would conduct a plebiscite to give the Australian people a say on whether same-sex marriage should be legalised.[85]

(b) The Government knew that an aspect of that promise about the plebiscite – that it would involve compulsory attendance – could not be delivered as it had been defeated by the Senate. However, senior members of the Government, including the Finance Minister, remained committed to putting the question to the Australian people.[86]

(c) Senior members of the Government were expressly "contemplating" as an "option" a postal plebiscite – as a way of adhering to the pre-election policy to put the matter before the Australian people – being an option that would not require legislation.[87]

(d) The Government took advice about those options, including receiving "opinion, advice and recommendations" about the public expenditure that would be incurred with "the postal vote option for the plebiscite".[88]

(e) Cabinet considered the advice about "the postal vote option for the plebiscite" and the public expenditure that the plebiscite would involve.[89]

(f) The Government also noted the "fiscal risk" in the 2018 Budget Paper in relation to a compulsory "same-sex marriage plebiscite".[90]

68. In these circumstances, it can be seen that the expenditure for a postal plebiscite was not only not "unforeseen", it was in fact specifically contemplated. It was specifically contemplated prior to 5 May 2017 that there was an "option" of a postal plebiscite that – while it would not require specific authorising legislation – would involve public expenditure.

69. In circumstances where the Government has identified and considered an expenditure, that expenditure is not "unforeseen" merely because the Government has not yet determined the

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[83] SC para [38], SCB p 250.20.
[84] SC para [51].

[85] See paragraphs [5]-[8] above.

[86] See paragraphs [9]-[10], [18]-[21] above.

[87] See paragraphs [17]-[21] above.

[88] See paragraphs [11]-[22] above.

[89] See paragraphs [13]-[22] above.

[90] See paragraph [23] above.

specific quantum; the specific way in which funds will be expended or which organ of the Government will bear the relevant cost.

70. If it were otherwise, the Government could seek to characterise any expenditure as being "unforeseen" merely by refraining from, or deferring, until *after* the parliamentary oversight process is complete, the decision as to the specifics of the policy or the decision as to which organ of the Government will bear the contemplated expenditure. Such an outcome would thwart Parliamentary oversight of funding through appropriation (as discussed in relation to Question 3 below).

71. For these reasons, it is submitted that the expenditure on the postal plebiscite was not "unforeseen" within the meaning of s 10(1)(b) of the 2017-2018 Act and that Question 2 should be answered "yes".

72. In the alternative, if the Court concludes that the "unforeseen" criterion is not a jurisdictional fact, but rather is a matter for the satisfaction of the Minister, then it is submitted, given the matters set out at paragraphs [5]-[22] above, that there is no basis on which a reasonable person in the position of the Finance Minister could form the view that the expenditure for the postal plebiscite was "unforeseen" within the meaning of s 10(1)(b) of the 2017-2018 Act as of 5 May 2017. For these reasons, it is submitted that Question 2 should be answered "yes".

Questions 3 and 4: Expenditure on the postal plebiscite is not supported by an appropriation

73. The task of construing s 10 must necessarily be informed by the constitutional setting in which Acts appropriating funds for the ordinary annual services of the Government are enacted. Accordingly, that constitutional setting is considered first.

The constitutional background

74. Sections 81 and 83 of the *Constitution* respectively provide for the formation of the Consolidated Revenue Fund and a prohibition on drawing money from the Treasury of the Commonwealth except under appropriation made by law. The Parliament is in turn prohibited by s 56 from passing such a law "unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General to the House in which proposal the originated." Accordingly, as the plurality in *Combet* observed at [143], "it is the Executive Government which begins the process of appropriation."

75. Section 53 prohibits proposed laws appropriating revenue or moneys from originating in the Senate, and denies that chamber the power to amend proposed laws appropriating revenue or moneys for the ordinary annual services of the Government. To that extent, the *Constitution* reflects what was, at the time of federation, "the received understanding in the United Kingdom of the place of appropriations in the relationship between the executive and the legislature",[91] namely, "the Crown demands money, the Commons grant it, and the Lords assent to the grant".[92]

76. Nonetheless, it would be an error to ascribe to the Senate the inferior status suggested by the term "assent", when juxtaposed with the word "grant". In particular:

(a) section 53 provides that the power of the Senate in respect of all laws other than ordinary annual services of the Government is equal to that of the House of Representatives;

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[91] *Pape* at 76 [192].

[92] Sir R F D Palgrave and A Bonham-Carter (eds), *A Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 10th ed (1893), pp 515-516.

(b) section 54 purports to afford the Senate some measure of protection from prejudice by requiring that any proposed law which appropriates revenue or moneys for the ordinary annual services of the Government deal only with such appropriation;[93]

(c) section 57, by providing for a mechanism to resolve disagreement between the House of Representatives and the Senate, indicates, in the starkest of terms, that the Senate is not a mere analogue of the House of Lords.

77. Thus, the power of the Senate to control spending by the Commonwealth Executive on governmental activity that is neither "ordinary" nor "annual" is equal to that of the House of Representatives.

78. It is accepted that a breach of s 54 is neither justiciable nor capable of rendering a resulting appropriation Act invalid.[94] Nonetheless, the matters outlined above support the conclusion that a construction of an appropriation Act, the logical conclusion of which is that its enactment involved such a breach, should not lightly be adopted. This is particularly because "[t]here is always an initial presumption that Parliament did not intend to pass beyond constitutional bounds".[95]

79. Moreover, the basis upon which an alleged breach of s 54 is non-justiciable is the fact that that section speaks, not of "laws", but of "proposed laws", and is therefore better seen as a provision concerning parliamentary procedure, in relation to which Courts are reluctant to interfere. This is quite different from suggesting, as the Finance Minister now apparently does, that the expression "the ordinary annual services of the Government" where it appears in the 2017-2018 Act is not justiciable and thus should be quarantined from judicial consideration (see Question 3(a)). As will be developed below, that proposition sits ill alongside the reasoning of the Court in *Brown v West* and *Williams v Commonwealth (No. 1)*.[96] Parliament has passed valid legislation using the words, "the ordinary annual services of the Government". It is submitted the duty of this Court is to consider the consequences of those words for the construction of the 2017-2018 Act. The Court should answer Questions 3(a) and 4(a), "Yes".

The proper construction of the 2017-2018 Act

80. The plaintiffs' submission is that the relevant purposes of the 2017-2018 Act, for which s 12 appropriates the Consolidated Revenue Fund, are limited to purposes falling within the ordinary annual services of the Government. Consequently, the power conferred by s 10 is confined in this way, as are the departmental items specified in Schedule 1. The reasons for this are as follows.

81. *First*, the long title of the 2017-2018 Act – "An Act to appropriate money out of the Consolidated Revenue Fund for the ordinary annual services of the Government, and for related purposes" – is part of the Act.[97] It thus provides a firm basis for construing s 10 in the manner for which the plaintiffs contend. The circumstance that the long title speaks also of "related purposes" other than providing for appropriations for the ordinary annual services of the Government does not detract from that proposition. This is because:

(a) purposes "related" to the ordinary annual services of the Government cannot, on any view, include governmental activity that is wholly outside the scope of those ordinary annual services; and

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[93] J Quick and R R Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 674.
[94] *Osborne v The Commonwealth* (1911) 12 CLR 321 at 336, 351-352, 355-356; *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* (1993) 176 CLR 555 at 578; *Native Title Act Case* (1995) 183 CLR 373 at 482.
[95] *Federal Commissioner of Taxation v Munro; British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (1926) 38 CLR 153 at 180.
[96] (2012) 248 CLR 156 (***Williams (No. 1)***).
[97] *Acts Interpretation Act 1901*, s 13(2).

(b) it is possible to give the expression "and for related purposes" in the long title work to do that does not extend to appropriating money for such activity.

82. Like the legislation considered in *Combet*, the 2017-2018 Act distinguishes between two different kinds of appropriated amount:

(a) a "departmental item", defined in s 3 to mean "the total amount set out in Schedule 1 in relation to a non-corporate entity under the heading 'Departmental'"; and

(b) an "administered item", defined in s 3 being "an amount set out in Schedule 1 opposite an outcome for a non-corporate entity under the heading 'Administered'".

10 83. Section 7 of the 2017-2018 Act 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." In contrast, s 8(1) provides that "the amount specified in an administered item for an outcome for a non-corporate entity may be applied for expenditure for the purpose of contributing to achieving that outcome."

84. In *Pape*,[98] the Court distinguished between an appropriation, which operates merely as a "provisional setting apart or diversion from the Consolidated Revenue Fund of the sum appropriated",[99] and the granting, whether by Parliament or by the *Constitution* itself, of authority to spend the amount appropriated. In *Williams (No. 1)*, Hayne J said of provisions in the *Appropriation Act (No. 3) 2006-2007* (Cth) similar to ss 7 and 8 that they
20 could be understood as not merely making an appropriation for, but also authorising, the expenditure to which they refer.[100] The Commonwealth made a submission to similar effect in *Williams v Commonwealth (No. 2)*, though the point was ultimately not decided.[101] It may well be then that the 2017-2018 Act does not merely appropriate money for the ordinary annual services of the Government; it also authorises the spending of that money in connection with those ordinary annual services. In this way, the 2017-2018 Act might be taken to serve a purpose which is "related to" appropriating money out of the Consolidated Revenue Fund for the ordinary annual services of the Government, but which does not extend to making appropriations for purposes that do not fall within those ordinary annual services.

30 85. *Secondly*, s 10 does not expressly designate any purposes for which advances to the Finance Minister may be deployed. In the absence of an implied limitation that confines the Minister's power to make a determination to forms of expenditure for the ordinary annual services of the Government, s 10 (read in conjunction with s 12) would amount to an "*appropriation in blank*" merely authorizing expenditure with no reference to purpose.[102] It would thus not answer the description of a segregation of money "from the general mass of the Consolidated Fund" and the dedication of it "to the execution of some purpose which either the Constitution has itself declared, or Parliament has lawfully determined, shall be carried out".[103] In the plaintiffs' submission, the relevant purpose – the dedication of money for the ordinary annual services of the Government – is supplied
40 by the reference in the long title to the 2017-2018 Act.

86. *Thirdly*, the approach to the construction of an annual appropriation Act for which the plaintiffs contend is reflected in the reasoning in *Brown v West*. In that case, the Court referred to:

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[98] (2009) 238 CLR 1 at 55 [111], 73 [178], 113 [320], 210-213 [600]-[607].
[99] *Surplus Revenue Case* (1908) 7 CLR 179 at 190-191.
[100] (2012) 248 CLR 156 at 264 [231].
[101] (2014) 252 CLR 416 (***Williams (No. 2)***) at 461-463 [52]-[56].
[102] *Attorney-General (Vic) v Commonwealth* (1945) 71 CLR 237 at 253; *Brown v West* at 208.
[103] *Surplus Revenue Case* (1908) 7 CLR 179 at 200; see also the *AAP Case* (1975) 134 CLR 338 at 392.

(a) the parliamentary practice of designating odd-numbered appropriation or supply Acts as Acts for the ordinary annual services of the Government;[104]

(b) the terms of what is known as the Compact of 1965,[105] an accommodation between the Houses of Parliament by which it was agreed, amongst other things, that new policies not authorised by special legislation would not be included in appropriation Bills for the ordinary annual services,

in concluding that the *Supply Act (No. 1) 1989-1990* (Cth) (the **Supply Act**) did not contain an appropriation for the provision of a supplement to the postal allowance enjoyed by members of Parliament.[106] The Court thus perceived no difficulty in assuming the task of giving content to the expression "the ordinary annual services of the Government" in the Supply Act there under consideration.

87. It should also be observed that the long title of the Supply Act in *Brown v West* was "An Act to make interim provision for the appropriation of money out of the Consolidated Revenue Fund for the service of the year ending on 30 June 1990, and for other purposes." The words "and for other purposes" did not cause the Court to conclude that the scope of the appropriations made by the Supply Act had been expanded to embrace purposes other than the ordinary annual services of the Government.

88. Critically, the Court further concluded that the Advance to the Minister for Finance in the Supply Act (similar in effect to s 10 of the 2017-2018 Act) was not intended "to be an appropriation for purposes different from the purposes to be found in other parts of the Schedule to the [Supply Act]".[107] It is implicit in this conclusion that advances to the Minister for Finance were not available under the Supply Act for purposes other than expenditure on the ordinary annual services of the Government.

89. *Fourthly*, reference has already been made to the possibility that the 2017-2018 Act does not merely appropriate money for, but also authorises, spending by the Executive Government. If that were so, then an approach that does not limit the meaning of the 2017-2018 Act by reference to the ordinary annual services of the Government would produce exactly the bypassing of the Senate that the reasoning of the majority Justices in *Williams (No. 1)* sought to avoid. That is, it would permit the Executive to expend money in implementing new policies that were never subjected to the prior scrutiny of the Senate, notwithstanding that an Appropriation Bill (No. 1) is "a lynch-pin of the annual budget" and "extensively debated".[108]

90. In particular, one could posit circumstances in which the Finance Minister, perceiving an urgent need for some group of Australians to receive tax relief, could seek to exercise the power conferred by s 10 of the 2017-2018 Act to produce an increase in the amounts appropriated by way of departmental items for the Treasury, which amounts could then, in reliance on s 7, be distributed by that department to taxpayers as a partial tax refund. It would represent a distortion in the relationship between Chapters I and II of the *Constitution* if an appropriation Act, ostensibly directed to the ordinary annual services of the Government, could nonetheless provide the statutory foundation for a tax cut by executive fiat, and possibly against the will of the Senate.

91. *Fifthly*, s 10 of the 2017-2018 Act is, for the reasons given in paragraphs [56] above, a paradigm example of a "Henry VIII" clause, and a determination made pursuant to its terms

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[104] *Brown v West* at 208.
[105] See SC para [72]; SCB p 517.
[106] *Brown v West* at 211; see also at 200 (making plain that the Minister expressly relied on the Advance to the Minister for Finance in contending that the increased postal allowance was authorised).
[107] *Brown v West* at 211.
[108] *Brown v West* at 210.

is, by reason of s 10(2), not amenable to disallowance under the *Legislation Act 2003* (Cth). That the exercise of the power conferred by s 10 is thus exempt from one form of legislative oversight over delegated legislation, particularly by the Senate, makes it all the more incongruous to suggest that it is a vehicle by which spending on activities outside the ordinary annual services of the Government can be facilitated.

92. *Sixthly*, a construction of s 10 that circumscribes its purposes by reference to those ordinary annual services dovetails with what has previously been said by this Court concerning the scope of the executive power of the Commonwealth to spend. In *Williams (No. 1)*, Gummow and Bell JJ accepted as "a partial description of the executive power to spend"[109] the proposition that it extended to "the ordinary and well-recognised functions of the Government of the Commonwealth". Similarly, Crennan J saw as fatal to the validity of the contract in issue in that case the fact that the National School Chaplaincy Program "was not ... a recognised part of Commonwealth government administration"[110] in the sense explained in *New South Wales v Bardolph*.[111] Her Honour further observed that the expressions used in *Bardolph* for the purpose of describing government contracts which do not require statutory authorisation "are apt for application to the constitutional phrase 'the ordinary annual services of the Government'".[112] There is consequently no basis for concluding that the content of the expression "the ordinary annual services of the Government" is too indeterminate to provide a reliable guide to, let alone a limit on, the breadth and meaning of annual appropriation Acts.

93. *Seventhly,* as was accepted in *Brown v West*, the content of that expression is informed by parliamentary practice. The Houses of Parliament agreed, in the Compact of 1965, to the division of annual appropriation Bills into two classes – one for the ordinary annual services; and the other for expenditure on other matters including "new policies" not authorised by special legislation.[113] Reference has already been made to the practice of designating appropriation Acts for the ordinary annual services of the Government by odd numbers.

94. In 1999, the Commonwealth Government adopted a system of accruals budgeting, which, amongst other things, involved a new method of specifying the purpose of an appropriation in an annual appropriation Bill – that is, by reference to outcomes and outputs, as distinct from programs and inputs. In order to accommodate this budgeting framework, the Senate Standing Committee on Appropriations and Staff, in its Thirtieth Report published in March 1999, recommended the following changes to the "interpretation" of the Compact of 1965, as proposed by the Minister for Finance: (a) items regarded as equity injections and loans be regarded as not part of the ordinary annual services; (b) all appropriation items for continuing activities for which appropriation have been made in the past be regarded as part of ordinary annual services; and (c) all appropriations for existing asset replacement by regarded as provision for depreciation and part of ordinary annual services.[114] By a resolution passed on 22 April 1999, the Senate endorsed this recommendation.[115]

95. The Parliament, specifically the Senate, has thus repeatedly affirmed the notion that the ordinary annual services do not include new policies either not authorised by special legislation or in respect of which no appropriation has been made in the past. Indeed, by a resolution passed on 17 February 1977, the Senate clarified, amongst other things, that special legislation authorising a new policy was required to have been enacted "previously"

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[109] (2012) 248 CLR 156 at 234 [141]-[143].
[110] (2012) 248 CLR 156 at 355 [532].
[111] (1934) 52 CLR 455.
[112] (2012) 248 CLR 156 at 354 [530].
[113] SC para [72]; SCB p 520.20.
[114] SC para [75]; SCB p 556.30.
[115] SC para [76]; SCB p 567.35.

for any appropriation in relation to that policy to fall within the ordinary annual services.[116] And it again resolved in similar terms on 22 June 2010.[117] To this may be added the Senate's resolution of 8 December 2004 assenting to the proposition that an initial payment by the Commonwealth to an international aid organisation represents a new policy requiring a special appropriation, though subsequent payments would be part of the ordinary annual services.[118]

96. Of course, it appears that since the introduction of accruals budgeting, the Executive has taken a different view, namely, that the ordinary annual services encompass any activity directed towards achieving an outcome for which an appropriation has previously been made.[119] This would presumably be so, notwithstanding that any such activity might answer the description of a new policy.

97. However, the Court need not presently resolve this dispute between the Executive and the Senate (assuming that it is even open to do so). This is because, as was decided in *Combet*, the outcomes stated in Schedule 1 to each Appropriation Act (No. 1) relate only to *administered items*. In contrast, this case is concerned with a determination by the Finance Minister, the purported effect of which was to alter the amount specified in a *departmental item*, specifically for the ABS. Consequently, the disagreement between the Executive and the Senate concerning the meaning of the Compact of 1965, and the significance of the outcomes stated in the Schedule to an appropriation Act, is of no relevance to this proceeding.

98. *Eighthly,* and in any event, the views of the Executive concerning the categories of spending that fall within the ambit of the ordinary annual services of the Government are irrelevant as an aid to the construction of an Appropriation Act (No. 1). It is true that the Executive initiates the process of appropriation. However, a recommendation by the Governor-General of the purpose of an appropriation is merely a condition precedent to the passage of a proposed law for the appropriation of revenue or moneys (s 56 *Constitution*). The requirement for that statement of purpose does not detract from the circumstance that an appropriation Act, once passed, represents an expression of the will, not of the Executive, but of Parliament. It is thus "to be expounded according to the intent of the Parliament that made it",[120] and not of the Executive whose expenditure it authorises. Therefore, it is submitted that it is the Senate's understanding of the Compact of 1965, rather than that of the Executive, that should guide the construction of an annual appropriation Act.

99. It is true that the plurality in *Combet* accepted a submission by the Commonwealth that "neither the Compact of 1965 in its original form, nor in the form it now takes, sheds any useful light" on the types of expenditure included within a departmental item.[121] However, this was said in the course of rejecting the suggestion that departmental items are tied to, or limited by, the purposes expressed in respect of administered items. Their Honours should not be understood as having laid down a more general principle relating to the construction of annual appropriation Acts. This is particularly because:

(a) as made clear above, the plaintiffs' argument relies upon matters of parliamentary practice, including the Compact of 1965, in the same manner as the Court did in *Brown v West*; and

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[116] SC para [73]; SCB p 526.10.
[117] SC para [85]; SCB p 728.25.
[118] SC para [77]; SCB p 573.15; SCB p 583.30.
[119] SC paras [78]-[84], [86], SCB pp 585-724, 729.
[120] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 161.
[121] (2005) 224 CLR 494 at 576 [156].

(b) neither the parties nor the Court in *Combet*[122] saw fit to doubt the appropriateness of the reliance placed in *Brown v West* on those matters.

100. More importantly, the plurality in *Combet* also noted that "departmental items" correspond to what were referred to, in appropriation Acts drafted before the adoption of accruals budgeting, as "running costs",[123] and that such costs encompassed "salaries, administrative expenses and operational expenses".[124] *Combet* is not authority, then, for the proposition that there is no limit upon what may constitute a "departmental item", or that if there is, the enforcement of any such limit is the exclusive province of the political branches of government.

101. That being so, neither s 10 of the 2017-2018 Act nor the departmental items identified in Schedule 1 should be construed as supporting expenditure outside the ordinary annual services of the Government, and in the case of departmental items specifically, expenditure on new policies which go beyond paying "salaries, administrative expenses and operational expenses".

102. For these reasons, the Court should answer question 3(b)(i) "Yes". This also addresses the question of construction that forms part of question 4(b).

The postal plebiscite is not part of the ordinary annual services of the Government

103. *First,* as set out at paragraph [66] above, it is apparent that what the ABS has been directed to do in substance, if not form, involves the holding of a "plebiscite". Apart from Constitutional referenda, there have been three national plebiscites since federation, in 1916 (on conscription), 1917 (on conscription) and in 1977 (on the national anthem). Each was supported by legislation.[125]

104. *Secondly*, the matters referred to at SC paras [50]-[53], [69]-[70] (SCB 72, 79) make amply clear that use of the ABS to conduct a voluntary plebiscite (or survey) by post of all persons on the Commonwealth electoral roll on the question of same-sex marriage is unprecedented in Australian history. The scale of the plebiscite even exceeds the Census in terms of reach given that the ABS only provides one survey *per household* in the Census (whereas here every person on the Commonwealth electoral roll may participate in the plebiscite). The scale of the plebiscite also vastly exceeds that of any survey that the ABS has been called upon to conduct in the past. In this respect, the largest sample of Australians to have previously participated in a survey of public opinion conducted by the ABS consisted of approximately 60,000 individuals,[126] which equates to some 0.375% of the nearly 16 million persons currently on the Roll. It is accordingly plain that the $122m expenditure on the conduct of the plebiscite is no mere running cost of the ABS. It represents a new policy (in the sense of a policy never previously implemented nor previously the subject of a special appropriation).

105. *Thirdly*, the scale of the postal plebiscite is such that ABS staff will be insufficient and, as such, the ABS will need to enter into arrangement with the AEC for the provision of services by the AEC, pursuant to s 7A of the Electoral Act.[127] Let it be assumed that there had been no Statistics Direction and the Commonwealth had instead proposed to enter into an arrangement directly with the AEC for the latter to conduct a voluntary postal plebiscite on the question of same-sex marriage under s 7A of the Electoral Act (which it appears was

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[122] (2005) 224 CLR 494 at 575 [155].
[123] (2005) 224 CLR 494 at 575 [156].
[124] (2005) 224 CLR 494 at 574 [152].
[125] *Military Service Referendum Act* 1916 (Cth); *War Precautions (Military Service Referendum) Regulation* 1917; *Referendum (Constitution Alteration) Modification Act* 1977 (Cth).
[126] SC para [61]; see also ABS surveys referred to at SC para [60]-[68].
[127] SC para [52]-[53].

the Executive's initially-preferred option[128]). In the absence of an authorising statute, the executive power of the Commonwealth would not support the payment of any such fee to the AEC (as such a fee would not answer the description of expenditure in respect of "the ordinary and well-recognised functions of the Government of the Commonwealth"[129]). Under the current proposal that the *ABS* conduct the plebiscite, the fee that would have been payable to the AEC is now to be paid directly to the Australian Statistician (which will then re-route part of the money to the AEC under the fee-for-service arrangement).

106. *Fourthly,* as set out at paragraph [26] above, on 7 August 2017 a decision was made by Cabinet to proceed with a "voluntary postal plebiscite" for all Australians enrolled on the Commonwealth Electoral Roll conducted by the ABS *if* the Senate again rejected the 2016 Bill. In this respect, the Explanatory Statement for the Determination records that "ABS departmental appropriations are insufficient for this activity".[130] It follows that the Court should infer that the government decision on 7 August 2017 (and the actions taken on the 9th) were made in the context of an awareness by the Executive that the then existing appropriation for the ABS in the 2017-2018 Act was insufficient to meet the expense involved in conducting the postal plebiscite; hence there would also be the need for the Determination to be made by the Finance Minister. Thus, the Executive Government made a decision on 7 August 2017 to implement a policy for which it knew there was not a sufficient appropriation.

107. Regardless of the sequence in which the Determination and the Statistics Direction were signed on 9 August 2017, on any view, "*as a result of*" the 2016 Bill being defeated in the Senate earlier that day[131] – and in accordance with the course that had been pre-determined by Cabinet on 7 August 2017 – the Treasurer issued the Statistics Direction and the Finance Minister made the Determination. As such, there must have been a level of coordination in relation to the issuing of these instruments on the same day. So much is apparent from the fact that both were needed to implement the plan that Cabinet had determined on 7 August 2017 would be implemented if the 2016 Bill was defeated in the Senate (as was readily apparent would occur[132]). The sequence of events – and evident coordination – required to implement the Cabinet decision of 7 August 2017 supports the conclusion that the Finance Minister's Determination on 9 August 2017 was not for the ordinary annual services of the Government within the meaning of the 2017-2018 Act.

108. For these reasons, this case is concerned with a unique, and arguably extreme, set of circumstances. In the result, from the perspective of the Executive, it has delivered 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"[133], but has done so by bypassing Senate approval of the $122m required to pay for it.

109. For the reasons set out above, the expenditure on the postal plebiscite does not answer the description of the "ordinary annual services of the Government" within the meaning of the 2017-2018 Act.

110. It follows then that the drawing of funds from the Treasury to meet the cost of the postal plebiscite cannot be supported by an appropriation under the 2017-2018 Act, irrespective of whether the operation of that Act has been amended by a determination under s 10. The Court should answer questions 3(b)(ii) and 4(b), "Yes".

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[128] See paragraphs [11]-[22] above.
[129] *Combet* (2012) 248 CLR 156 at 234 [141]-[143].
[130] SCB p 250.37.
[131] SCB p 306 (Cormann affidavit para [11]).
[132] SC [35]; SCB p 240.15.
[133] See paragraphs [27] above.

Part VII: Applicable constitutional and legislative provisions

111. The applicable constitutional and legislative provisions are annexed.

Part VIII: Form of orders sought by the appellant

112. *Question 5.* If the plaintiffs' arguments are correct, the Court should direct the justice disposing of the action to grant declaratory relief, as it did in *Pape* (see especially at [157]) and in *Williams (No. 1)* (see at [165]). If the Court answers "Yes" to question 2, it should grant the declaration in prayer 2. If the Court answers "Yes" to questions 3 and 4, it should grant the declaration in prayer 1. If Court answers "Yes" to question 3 but not question 4, it may be appropriate to grant declaratory relief in different terms. That would be a matter for submissions before the justice disposing of the matter.

113. The plaintiffs acknowledge that injunctive relief raises more difficult discretionary considerations. They may depend on factual matters that do not form part of the Special Case. The Court should take the same approach as was taken in *Williams (No. 2)*, by answering that the justice disposing of the proceeding should grant such relief as appears appropriate in light of the answers given to the questions on the Special Case.

114. *Question 6.* The Minister should pay the plaintiffs' costs of Special Case.

Part IX: Estimate of the number of hours required for oral argument

115. The plaintiffs estimate that 3 hours will be required for the presentation of their oral argument (including reply).

Dated: **23 August 2017**

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