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 IN REPLY

Filed on behalf of the Plaintiffs by:

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Part I: Publication

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

Part II: Reply submissions

2. ***Factual matters.*** As to CS [7], the reference to 11 July 2017 is incorrect. The advice about the postal plebiscite option (including advice about "public expenditure" on the postal plebiscite) must have been provided at some point between 7 November 2016 and *24 March 2017* (as that was the scope of the FOI Request): see PS [12]-[14]. As to CS [9], the Government described the process that the ABS would undertake as a "postal plebiscite": see PS [27], [32].

3. ***Standing.*** The plaintiffs do not challenge the validity of the 2017-2018 Act (unlike the *AAP Case*). A determination made under s 10 amends Schedule 1. In turn, s 12 operates to cause an appropriation. The plaintiffs challenge the executive action, purportedly taken under s 10 of the Act, and the threatened expenditure of public funds contrary to that Act (a subject-matter squarely within the purview of judicial scrutiny as *Brown v West* demonstrates). The plaintiffs seek to uphold the appropriation in the 2017-2018 Act, properly construed, and to restrain unlawful executive action. Difficulties that may arise in fashioning relief (CS [18]) do not detract from the Court's duty to pronounce on the validity of executive action when it is challenged (indeed, the justification for reviewing the validity of executive acts is even stronger than in the case of reviewing the validity of legislation).[1]

4. The proper approach is as set out in *Onus v Alcoa*[2] and *Bateman's Bay*.[3] CS [22]-[23] fail to take into account the public interest in the observance of statutory limitations on activities that have recourse to public funds.[4] Once that public interest is taken into account, a "sufficient interest" for standing must include either or both of the interest of a Senator (since the assent of the legislature is being circumvented by the impugned executive action[5]) and the interest of a corporation like AME (which will face a materially different financial position if a plebiscite is conducted).

5. ***Was s 10(1)(b) enlivened?*** As to CS [38], that matter is an additional reason why question 2 ought to be answered "yes". It arises on the matters contained in the SCB and is an issue that the Commonwealth is already addressing in the M105 case (however, the plaintiffs will file a further ASOC if necessary). As to CS [39], the Commonwealth accepts that the Minister made the Determination before the Treasurer made the Statistics Direction.

6. *Jurisdictional fact.* As to CS [28], [41], the Commonwealth's contention that the "unforeseen" criterion is not a jurisdictional fact is inconsistent with a review of the legislative history of the Advance to Finance Minister. That review shows that the structure and terms of the Advance have changed materially since enacted (CS [41]).[6] In 2005-2006, the provision excluding disallowance

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[1] (1975) 134 CLR 338 at 380 per Gibbs J.
[2] (1981) 149 CLR 27 at 35-36 per Gibbs CJ, 41-42 per Stephen J, 74 per Brennan J.
[3] (1998) 194 CLR 247 at 265-266 [46]-[47] and 267 [50] per Gaudron, Gummow and Kirby JJ.
[4] *Bateman's Bay* (1998) 194 CLR 247 at 267 [50] per Gaudron, Gummow and Kirby JJ. Neither of the Federal Court decisions cited at CS n28 address this public interest.
[5] *Unions NSW v NSW* (2013) 252 CLR 530 says nothing about the standing or otherwise of an individual member of the Senate in any given case. The reliance on s 16(3) of the *Parliamentary Privileges Act* 1987 in relation to the Senate defeat of the Plebiscite Bills is unfounded. The defeat of the Bills is in the Special Case agreed between the parties and is deployed by the defendants later in their submissions.
[6] A table extracting the terms of the Advance as contained in the No 1 Appropriation Acts spanning a 20 year period will be provided to the Court. See recently *Western Australian Planning Commission v Southregal Pty Ltd* (2017) 91 ALJR 369 at [69] (Gageler and Nettle JJ)("[c]onsideration of a statutory provision's legislative history, and particularly

was introduced. Then in 2008-2009 the structure of the Advance changed again; upon which it took its "modern" form. Prior versions of the Advance indicated – by the content of the chapeau and the placement of the colon – the matters which were subject of the Minister's satisfaction, in a way that the current form distinctly eschews. Moreover, as part of the change in 2008-2009, the maximum amount of the Advance jumped by $120 m to $295 m (having been fixed at $175 m for eight consecutive years prior to that), thereby affording the Minister greater power to cause appropriations. Importantly, these changes were not merely a change in style, but a change to the structure of the section itself.[7]

7. Thus, even if the Minister's evaluative judgment as to expenditure being unforeseen may have been a "drafting technique" initially deployed at the time the section was introduced (whether or not on the advice of Mr Rose), that interpretation has been superseded by a distinct change in the statutory landscape. The plaintiffs' interpretation of s 10 limits the "potential for abuse by a Government"[8] particularly in light of the exclusion of disallowance, and increase in the limit, by limiting the relevant expenditure under the section to expenditure that was "not *in fact* foreseen".[9]

8. *Construction of s 10.* Next, the Commonwealth's submissions distort the meaning of s 10 by placing unwarranted weight on the phrase "urgent need" in the chapeau to s 10(1). The effect of the Commonwealth's submissions is to collapse the criteria of "unforeseen expenditure" and "urgent need": see SC [33], [34], [42], [43]. However, it is erroneous to ask: was the "urgent need" unforeseen? (cf. CS [31], [33], [34], [35], [42]). The term "because" in s 10(1)(b) describes why the *expenditure* was not provided for as at 5 May 2017 (it does not describe whether there is an "urgent need" as at 9 August 2017). That is, was the *expenditure* (as defined in s 3) not provided for because it was "unforeseen" as at 5 May 2017? It is a separate inquiry as to whether there is an urgent need for that expenditure.

9. Contrary to CS [35], this is not a case of a "person somewhere in the government speculating" about a postal plebiscite, nor does the plaintiffs' construction permit such a result: PS [52]-[53]. Here, the government had a long-standing policy of holding a plebiscite on same-sex marriage: PS [5]-[8], [67]. More specifically, the issue of a *postal* plebiscite was under active consideration as at March 2017 (including by obtaining advice that dealt with "public expenditure" for the postal plebiscite): PS [12]-[22]. In this respect, the Commonwealth does not dispute the factual matters relied upon at PS [65], [66], [67(a)-(d), (f)], [68]. Rather, its case hinges upon the fact that prior to 5 May 2017 it was contemplated that the *AEC* would conduct the plebiscite, not the *ABS*.

10. In doing so, the Commonwealth formulates what must have been "unforeseen" with an absurd and unwarranted degree of precision (ie. what was unforeseen was that Cabinet would make a decision on 7 August 2017 that *the ABS* should conduct the postal plebiscite: CS [36], [42], [44]). *First*, that is contrary to the text of s 10 which fixes upon "expenditure" (defined as various types of

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the provision's predecessors, serves to illuminate the meaning most apt to be attributed to it, especially where its meaning appears equivocal").

[7] See s 15AC of the *Acts Interpretation Act 1901* (Cth).

[8] Senate Standing Committee on Finance and Government, *Report on the Advance to the Minister for Finance* (August 1979) **(Report on the Advance)** at [2.33]. Regarding CS [27] and CS [18] (M105), the historical record does not support the Commonwealth's characterisation of the traditional role of such powers and provisions as 'uncontroversial'. Such matters were the subject of disagreement in the Colonies, where there existed concern that such powers might be abused: AB Keith, *Responsible Government in the Dominions (Vol 1)* (Oxford University Press, 1912), at 248-257; and see EH Young Kennet, *The System of National Finance* (Smith Elder & Co, 1915), at 226, where the function of the Civil Contingency Fund is described as merely extending to "overspend[ing] to a small extent" and "small payments".

[9] Report on the Advance at [2.28] (emphasis supplied); see *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, at 194 [109].

"payment" in s 3) and not the particular body that will bear the cost of the expenditure.[10] *Secondly,* that degree of precision gives the power conferred by s 10 an unjustifiably expansive scope: see PS [56], [69]-[70]. It would allow, as the Commonwealth appears to accept, the Executive to simply refrain from making a decision about implementing a long-standing policy until after the Budget each year in order to bypass the Senate: see PS [70], [80]. If a Cabinet decision to implement a long-standing policy is enough to trigger the power in s 10, then the power is surely broad enough to fund anything at all.

11. The fact that s 10 focuses on *expenditure* (and not on the particular body that will require that expenditure) is unsurprising given the terms of the *Public Governance, Performance and Accountability Act 2013* (Cth) (**PGPA Act**), being an Act that expressly affects the operation of the 2017-18 Act: see s 12. Section 75 of the PGPA Act has two key implications here. *First*, it was open to the Government prior to 5 May 2017 (when senior Ministers were actively contemplating the option of a postal plebiscite by the AEC) to include a line item for the AEC to conduct the plebiscite in Appropriation Act (No 2). Then, if the Government's proposal changed to the ABS carrying out the plebiscite, the Minister could have transferred the amount for the plebiscite in the Schedule from the AEC to the ABS.[11] *Secondly*, the existence of the transfer power in s 75 of the PGPA Act demonstrates that the term "unforeseen" in s 10 of the 2017-2018 Act does not encompass the notion of unforeseen as to which *entity* required the expenditure: cf. CS [37], [43], [44]; see Explanatory Memorandum ("**EM**") to 2017-2018 Bill at [29]. In light of this transfer regime, the conclusions drawn from the Centrelink example at CS [33], and with respect to the AEC and the ABS at CS [36]-[37] are plainly incorrect.

12. ***Justiciability.*** Contrary to CS [48], it is not to undertake a non-justiciable inquiry to ask whether an act by the Executive is within power (where one of the limits on that power is whether the expenditure is for the ordinary annual services of Government). Were it otherwise, the partial limits on the Commonwealth's executive power identified in *Williams (No. 1)*, to which reference was made at PS [92], would not be limits at all. The Commonwealth's submissions erroneously conflate an inquiry into the content of the limitation in the 2017-2018 Act that it is for "ordinary annual services of the Government" with an inquiry into whether the Houses of Parliament failed to observe a constitutional provision regulating their intra-mural interactions. Only the latter inquiry is non-justiciable.

13. ***Implied limitation on scope of s 10.*** The effect of the plaintiffs' construction of s 10 is that the term "expenditure" in the chapeau means "expenditure for purposes within the ordinary annual services of Government": PS [80]-[102]. The Commonwealth makes no attempt to argue that that construction is incorrect. Rather, it seeks to re-cast question 3(b)(i) as being whether the postal plebiscite "falls within the 2017-2018 Act" (*after* amendment by a determination under s 10) and then proceeds to analyse what a "departmental item" is: see CS [58]-[65], [68]. But that is not the question. Rather, the issue raised by question 3(b)(i) is whether – *before* Schedule 1 is amended – the power in s 10 extends to making a determination to provide for expenditure that is outside the ordinary annual services of Government. The answer is that a need for expenditure for purposes *outside* those ordinary annual services is not capable of enlivening the Minister's power under s 10. Contrary to CS [54]-[56], the Determination would be invalid if the postal plebiscite were not part of the ordinary annual services, notwithstanding that it did no more than increase the departmental item of the ABS.

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[10] It is also contrary to the Department of Finance's own "Guide to Appropriations (RMG-100)": "The AFM provision makes clear that for the proposed expenditure to be considered 'unforeseen' it must be *expenditure* that was not within the contemplation of the government when the Appropriation Bills were introduced to parliament." (emphasis supplied)

[11] Both the AEC and the ABS are "listed entities" and therefore Commonwealth entities to which s 75 of the PGPA Act applies. See s 5(5)(a) of the *Australian Bureau of Statistics Act 1975* and s 6(2A)(a) of the *Electoral Act 1918*.

14. The next question that arises – question 3(b)(ii) – is whether expenditure on the postal plebiscite is within the meaning of "ordinary annual services of Government". Even if carrying out the postal plebiscite is authorised by the *Census and Statistics Act 1905* (Cth) (CS [68], [79]), the expenditure on the postal plebiscite is outside "ordinary annual services of Government" for the reasons set out at PS [103]-[109].[12] The Commonwealth does not dispute any of those matters: see CS [68]. Instead, it re-casts the question and argues that expenditure on the postal plebiscite is authorised because it falls within a "*departmental item*": CS [66]-[68].

15. While that is not the relevant inquiry as part of question 3(b), in any event expenditure on the postal plebiscite does not fall within a "*departmental item*" for three reasons. *First,* the contentions at CS [61]-[62] are contrary to the reasons of the plurality in *Combet*; specifically the observation that "[t]he outcomes stated throughout Sch 1 [of an Appropriation Act] cannot assist the characterisation of expenditures as 'departmental expenditure', whether or not in respect of the entity or agency in question there are no Administered Expenses".[13] Their Honours further remarked that "departmental items" correspond to what were labelled, in appropriation Acts drafted before the adoption of accruals and output-based budgeting, as "running costs",[14] and that such costs extended to "salaries, administrative expenses and operational expenses".[15] These costs are plainly a narrower set of expenditures than those which might contribute to the achievement of an entity's stated "outcome".

16. *Secondly,* as for the Portfolio Budget Statements "User Guide" referred to at CS [63], the Commonwealth fails to record the fact that that document defines "administered items" as "[r]evenues, expenses, assets and liabilities that are *managed* by an agency or authority on behalf of the Government *according to set government directions*".[16] Similarly, the EM to the 2017-2018 Bill describes "administered items" as being "those administered by a non-corporate entity on behalf of the Government". This supports the view that the incurring of expenses at the direction of government falls outside the ambit of the expression "departmental item".

17. *Thirdly,* that being so, it does not assist the Commonwealth to point to s 9 of the *Census and Statistics Act 1905* (Cth) (CS [66]-[67]). The fact that, on the Commonwealth's case, the ABS will be expending money on the conduct of the postal plebiscite as a result of a direction from the Treasurer, simply bolsters the conclusion that such expenditures will not answer the description of a "departmental item". It is to state the matter too broadly, then, to say that "departmental expenditure" includes "at the very least, expenditure necessary to carry out an entity's statutory functions": CS [64].

18. Next, as to CS [70]-[77], the Commonwealth argues that the plaintiffs' contentions regarding what are "ordinary annual services of Government" are not supported by parliamentary practice. CS [72] misstates the import of the modifications made to the Compact of 1965 as a result of the adoption in 1999 of accruals and outcome-based budgeting: see PS [94]-[96]. At no point has the Senate

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[12] To this may be added the incongruity in the fact that the ABS and the AEC have entered into an arrangement pursuant to s 7A of the *Commonwealth Electoral Act 1918* (Cth) for the AEC to provide services to the ABS in the conduct of the postal plebiscite: SC para [53]. Neither is a body corporate; neither has a legal personality separate from that of the Commonwealth. It may be asked whether an appropriation for the ordinary annual services of the Government can support the expending of funds pursuant to a purported agreement by the Commonwealth with itself.

[13] (2005) 224 CLR 494 at 566 [130] (emphasis supplied)

[14] (2005) 224 CLR 494 at 575 [156].

[15] (2005) 224 CLR 494 at 574 [152]. The Minister himself acknowledged, in a letter dated 17 July 2014 to the Chair of the Senate Standing Committee for the Scrutiny of Bills, the departmental expenses are "equivalent to the previous concept of running costs": SCB 732.

[16] (2005) 224 CLR 494 at 576 [158] (emphasis added)

endorsed a view that the concept of "new policies" is relevant only to administered, as distinct from departmental, expenses.[17] Whatever else might be said about the Compact of 1965 in its various iterations, one point has remained constant – the exclusion from the ordinary annual services of "new policies". This buttresses what arises from the meaning of "departmental item". Given that the "departmental item" encompasses assets, liabilities, revenues and expenses *controlled* by an entity, rather than managed by that entity at the direction of the Government, it is plain that expenditure on new policies cannot form part of "departmental expenditure" within s 7 of the 2017-2018 Act. This is because new policies are quintessentially the subject of directions by the Government.

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19. Finally, the Commonwealth seeks to argue that any concerns about bypassing the Senate are misplaced: CS [80]-[85]. As to CS [81]-[83], it is precisely because the Senate's function in overseeing departmental expenditure is so limited that the Court should be slow to accede to the proposition that such expenditure extends to all spending by a department or entity, irrespective of whether it would fall within the ordinary annual services of the Government. It is no answer to say that *Williams (No. 1)* expanded the role of the Senate in authorising actual spending by the Commonwealth Executive. These proceedings concern an attempt, openly avowed at CS [80], to circumvent Senate disapproval of government policy.

20 20. Contrary to CS [85.1], it is common ground that s 12 of the 2017-2018 Act appropriates the CRF for the purposes of that Act, not s 10. However, s 12 did not, upon commencement, appropriate a sum of $295m for the purposes of s 10. Rather, the Minister is given the power to cause additional appropriations (via an amendment of Schedule 1) – if certain circumstances exist – up to a cap of $295m. In this respect, the power to cause appropriations under s 10 is apparently broad in other respects. The EM to the 2017-2018 Bill suggests that s 10(2) would enable the Finance Minister to make a determination to allocate an amount: (i) to an existing item in Schedule 1, (ii) to a new item not already in Schedule 1, or (iii) to a new outcome. Against that background, the Minister's attempts at allaying any concern over an "appropriation in blank" are wholly inadequate.

30 21. In fact, the Commonwealth's position is that the Minister can cause an appropriation under s 10(1)(b) for any purpose whatsoever (so long as the expenditure is unforeseen and there is an urgent need): CS [85.1]. However, this erroneously confuses the circumstances that enliven the power to cause an appropriation under s 10(1)(b) – here, urgent need and unforeseen expenditure – with the "purpose" for which the Minister causes the expenditure to be appropriated under s 10; namely, for a postal plebiscite: see PS [65]. This would also amount to a power to cause an "*appropriation in blank*": PS [85].

22. ***Relief.*** As to CS [87], the plaintiffs do not limit the relief they seek to expenditure in the departmental item of the ABS as supplemented by the Determination. To the contrary, the
40 plaintiffs' contention is that (quite apart from the monies made available as a result of the Determination), the departmental item identified in Schedule 1 cannot be used to fund the postal plebiscite because the plebiscite is outside the ordinary annual services of the Government: see PS [100]-[102]; see question 4(b); see paragraphs [15]-[17] above.

Dated: **1 September 2017**

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[17] See, for example, SCB 728.

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ANNEXURE

Applicable Legislative Provisions

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

(Current version for 9 July 2017)

12 Appropriation of the Consolidated Revenue Fund

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

Public Governance, Performance and Accountability Act 2013 (Cth)

(Compilation date: 23 August 2017)

(Note: the language extracted from the current compilation, below, came into force on 17 April 2015 and was in force as at 5 May 2017).

5 Objects of this Act

The objects of this Act are:

(a) to establish a coherent system of governance and accountability across Commonwealth entities; and

...

(c) to require the Commonwealth and Commonwealth entities:

...

(iii) to use and manage public resources properly; and
(iv) to work cooperatively with others to achieve common objectives, where practicable

8 The Dictionary

finance law means:

(a) this Act; or

(b) the rules; or

(c) any instrument made under this Act; or

(d) an Appropriation Act.

listed entity means:

(a) any body (except a body corporate), person, group of persons or organisation (whether or not part of a Department of State

...

that is prescribed by an Act or the rules to be a listed entity.

10 Commonwealth entities

(1) A Commonwealth entity is:

...

(c) a listed entity

11 Types of Commonwealth entities

There are 2 types of Commonwealth entities:

(a) a ***corporate Commonwealth entity***, which is a Commonwealth entity that is a body corporate; and

(b) a ***non-corporate Commonwealth entity***, which is a Commonwealth entity that is not a body corporate.

75 Transfers of functions between non-corporate Commonwealth entities

When this section applies

(1) This section applies if a function of a non corporate Commonwealth entity (the ***transferring entity***) is transferred to another non corporate Commonwealth entity, either because the transferring entity is abolished or for any other reason.

Adjustments to appropriations

(2) The Finance Minister may determine that one or more Schedules to one or more Appropriation Acts is modified in a specified way. The modification must be related to the transfer of function.

(3) Each Appropriation Act concerned has effect as if the Schedule concerned were modified in accordance with the determination.

No increase in overall appropriation etc.

(4) A determination under subsection (2) must not result in:

(a) a change in the total amount appropriated in relation to the financial year in which the determination is made; or

(b) an increase in the total amount appropriated in relation to any previous financial year.

...

Legislation Act

(7) A determination under subsection (2) is a legislative instrument, but section 42 (disallowance) of the *Legislation Act 2003* does not apply to the determination

Australian Bureau of Statistics Act 1975

(Compilation date: 22 March 2017)

5 Establishment of Bureau and office of Statistician

...

(5) For the purposes of the finance law (within the meaning of the *Public Governance, Performance and Accountability Act 2013*):

(a) the Bureau is a listed entity

Commonwealth Electoral Act 1918

(Compilation date: 21 October 2016)

6 Establishment of the Commission

...

(2A) For the purposes of the finance law (within the meaning of the *Public Governance, Performance and Accountability Act 2013*):

(a) the Commission is a listed entity