



# Executive decisions in the time of Australian marriage equality

Karen Petch reports on *Wilkie v Commonwealth; Australian Marriage Equality Ltd v Cormann* [2017] HCA 40; (2017) 91 ALJR 1035

Following the announcement of the Australian Marriage Equality Postal Survey, the High Court considered whether the application of funds from the Consolidated Revenue Fund and a direction to the ABS to carry out the survey were validly exercised and whether section 10 of the *Appropriation Act (No 1) 2017-2018* (Cth) was constitutionally valid.

## Facts

In August 2017 the Australian Government announced that it would direct and fund a postal survey, to be administered by the Australian Bureau of Statistics, on the question of 'whether the law should be changed to allow same-sex couples to marry' (Postal Survey). To facilitate the proposal, the finance minister purported to make a determination under

section 10 of the *Appropriation Act (No 1) 2017-2018* (Cth) (Act) to make provision for the \$122 million required to fund the ABS to conduct the Postal Survey (Finance Determination). The treasurer issued a direction pursuant to section 9(1) of the *Census and Statistics Act 1905* (Cth) that the statistician carry out the Postal Survey (the Statistics Direction).

Relevantly, section 10 of the Act provides for an advance to the finance minister to make a Finance Determination, subject to the precondition that he/she is 'satisfied that there is an urgent need for expenditure in the current year, that is not provided for, or is insufficiently provided for, in Schedule 1' and that the lack of provision / sufficient provision is 'because of an erroneous omission or understatement' or 'because the expenditure was unforeseen' at the time of finalising the Budget (section 10(1)).

The determination operates to amend the appropriations in Schedule 1 of the Act and is capped at \$295 million (section 10(2), (3)). This form of the Finance Determination power was contained in each Appropriation Act No 1 since 2008-2009.<sup>1</sup>

Proceedings were commenced by two sets of plaintiffs, the *Wilkie* plaintiffs (led by Andrew Wilkie MP and including an elector and member of a rainbow family, and PFLAG Brisbane Inc) and the *AME plaintiffs* (Australian Marriage Equality Ltd and Victorian Senator Janet Rice). The essential issues were whether (i) section 10 of the Act was constitutionally valid; (ii) whether the Finance Determination was validly made; and (iii) whether the Statistics Direction was validly issued. The proceedings were heard together.

## Issues before the High Court<sup>2</sup>

### Whether section 10 of the Act was constitutionally valid:

It was common ground that an appropriation from the Consolidated Revenue Fund can only be for a purpose which Parliament has determined (Sections 81 and 83 of the Constitution).<sup>3</sup> The *Wilkie* plaintiffs argued that section 10 of the Act purported to allow the finance minister to supplement the amount appropriated by Parliament under Schedule 1



Senators Louise Pratt, Janet Rice, Penny Wong and Dean Smith after the Marriage Amendment Bill is introduced to the Senate at Parliament House in Canberra on Wednesday 15 November 2017. Photo: Alex Ellinghausen / Fairfax Photos

of the Act and was therefore constitutionally invalid. The court held that this construction of s 10 was incorrect. Section 12 of the Act provides for appropriation of the Consolidated Revenue Fund for the purposes of the Act, so that the power of the finance minister under section 10 is merely one of allocation of the advanced sum of \$295 million, which has already been appropriated pursuant to section 12 operating on s 10(3).<sup>4</sup> Accordingly, section 10 of the Act is not constitutionally invalid.<sup>5</sup>

### Whether the preconditions to exercise of the section 10 power had been met:

Both plaintiffs argued that, on a construction of section 10, the Finance Determination was not authorised because the preconditions to exercise had not been met. The court held that the preconditions were met and the Finance Determination validly issued. Section 10 has a number of different elements:

- a) that there is a need for expenditure;
- b) that the need is urgent; and
- c) that the need was, at the time of the Budget being finalised, either erroneously omitted / underestimated or unforeseen (the latter being the relevant criterion for the Finance Determination).

As to the first element, the court held that the notion of 'need' 'does not require that the expenditure be critical or imperative', rather, it refers to expenditure which ought to occur, whether for legal or practical or other reasons<sup>6</sup>. It is unnecessary to constrain the notion of 'need' by reference to some source external to government.<sup>7</sup>

As to the second element, the court recognised that 'urgency' is a relative concept, defined in the present context as urgent in the ordinary sequence of the annual Appropria-

tion Acts. In coming to a view as to whether the expenditure is urgent, the finance minister has to weigh why the expenditure is needed in the current fiscal year and why it cannot wait for inclusion in the additional estimates Acts being Appropriation Acts No. 3 or No. 5<sup>8</sup>.

As to the third element, expenditure is 'unforeseen' if it was actually unforeseen at the time of finalising the Budget. The question is not whether some other expenditure directed to achieving the same or a similar result might have been foreseen, nor whether the actual payment may have been foreseen other than by the Executive Government<sup>9</sup>.

The court held that the finance minister considered the above elements separately and correctly in making the Finance Determination.<sup>10</sup> Most significantly, the court held that the Minister could not have foreseen the additional expenditure because the conduct of a plebiscite by postal survey undertaken by the ABS was not government policy at the time of submission of the budget. This was so even though the conduct of a plebiscite was government policy at that time: the form of the plebiscite was not determined until its announcement on 7 August 2017.<sup>11</sup>

### Whether the Statistics Direction was valid:

The *Wilkie* plaintiffs argued that the Statis-

tics Direction exceed the treasurer's power under section 9(1) of the *Census and Statistics Act 1905* (Cth). The court held it did not. The subject matter of the Postal Survey was 'statistical information'. Statistical information includes information about personal opinion or belief including information as to the proportion of persons holding a particular opinion or belief<sup>12</sup>. The subject matter of the Postal Survey was, for the purposes of section 13 of the Statistics Regulation, 'in relation to' 'marriages', 'Law' and 'the social... characteristics of the population'<sup>13</sup>. There was nothing in the Statistics Act to exclude specification of a target population<sup>14</sup>.

## Implications

It follows from this decision that if a type of expenditure to which section 10 applies is, in the finance minister's view, urgently required and was actually unforeseen at the time of finalisation of the Budget, then he/she may apply funds appropriated from the Consolidated Revenue Fund up to the limit of the \$295 million allocated by section 10(3). That may be so even if, a similar, albeit different, proposal has been put to, and dismissed, by Parliament. The cause for expenditure does not have to arise 'external' to government and can be an issue of government policy.

The Australian Marriage Equality Postal Survey went ahead, administered by the ABS. 79.5% of eligible voters participated, with 7,817,247 (61.6%) responding Yes and 4,873,987 (38.4%) responding No. On 8 December 2017, the law was changed to allow same-sex couples to marry.<sup>15</sup>

## END NOTES

- 1 *Wilkie* at [84].
- 2 The High Court was also asked to consider, as a threshold issue, whether the plaintiffs in both the *Wilkie* Proceedings and the AME Proceedings had standing to seek all or any of the relief they claimed. The court availed itself of the discretion to 'proceed immediately to an examination of the issues' ([57]), and for reasons of its determination on the substantive issues did not revisit the issue of standing.
- 3 *Wilkie* at [70]-[71].
- 4 *Wilkie* at [87]-[90].
- 5 *Wilkie* at [95].
- 6 *Wilkie* at [111].
- 7 *Wilkie* at [112].
- 8 *Wilkie* at [113].
- 9 *Wilkie* at [120].
- 10 *Wilkie* at [132]-[133].
- 11 *Wilkie* at [137].
- 12 *Wilkie* at [146].
- 13 *Wilkie* at [147].
- 14 *Wilkie* at [148].
- 15 *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth), passed 7 December 2017.