



HIGH COURT OF AUSTRALIA

28 September 2017

ANDREW DAMIEN WILKIE & ORS v THE COMMONWEALTH OF AUSTRALIA & ORS;
AUSTRALIAN MARRIAGE EQUALITY LTD & ANOR v MINISTER FOR FINANCE
MATHIAS CORMANN & ANOR
[2017] HCA 40

Today the High Court published unanimous reasons in two proceedings, each commenced in the Court's original jurisdiction, in which the Court upheld the validity of s 10 of the *Appropriation Act (No 1) 2017-2018* (Cth) ("the Act"), the Advance to the Finance Minister Determination (No 1 of 2017-2018) ("the Finance Determination") and the Census and Statistics (Statistical Information) Direction 2017 ("the Statistics Direction"). On 7 September 2017, the High Court dismissed the first proceeding ("the Wilkie proceeding") and gave answers to questions reserved in the second proceeding ("the AME proceeding") rejecting the challenge on its merits.

Section 12 of the Act provided that the Consolidated Revenue Fund was appropriated as necessary for the purposes of the Act. Schedule 1 to the Act specified services for which money was appropriated. Section 10 of the Act provided for an "Advance to the Finance Minister", up to a total amount of \$295 million, which could be used if the Finance Minister was satisfied that there was an urgent need for expenditure, in the current year, that was not provided for, or was insufficiently provided for, in Schedule 1 because the expenditure was unforeseen until after the last day on which it was practicable to provide for it in the Bill for the Act. The last day on which it was practicable to provide for expenditure in that Bill was 5 May 2017.

On 9 August 2017, the Finance Minister announced that the Government would proceed with a voluntary postal plebiscite to ask electors whether the law should be changed to allow same-sex couples to marry. The Finance Minister also announced that he had made the Finance Determination, under s 10 of the Act, to provide \$122 million to the Australian Bureau of Statistics ("the ABS") to allow it to conduct the postal plebiscite. On the same day, the Treasurer gave the Statistics Direction, which directed the Australian Statistician to collect statistical information about the proportion of electors who wished to express a view about whether the law should be changed to allow same-sex couples to marry and the proportions of such electors who were in favour of and against the law being changed.

The plaintiffs in the Wilkie proceeding submitted that s 10 of the Act was constitutionally invalid as it was not an appropriation for a purpose that Parliament had lawfully determined may be carried out and impermissibly delegated Parliament's power of appropriation to the Finance Minister. The Court held that these arguments were based on a fundamental misconstruction of the Act. The provision of the Act which appropriated the Consolidated Revenue Fund was s 12, not s 10. The power of the Finance Minister to make a determination under s 10(2) was a power to allocate the whole or part of the \$295 million specified in s 10(3), which was already appropriated. The Court held that it was for Parliament to determine the degree of specificity with which the purpose of an appropriation is identified and that to appropriate by s 12 the amount specified in s 10(3) to be applied in accordance with a direction by the Finance Minister under s 10(2) was to appropriate that amount for a purpose which Parliament had lawfully determined may be carried out.

In addition, the plaintiffs in each proceeding submitted that the Finance Determination was not authorised by s 10 of the Act because the preconditions in s 10 had not been met and because the Finance Minister had erred in law by conflating the statutory question of his satisfaction as to the expenditure being urgent with the distinct statutory question of his satisfaction as to the expenditure being unforeseen. The Court held that whether expenditure was unforeseen was a matter for the Minister's satisfaction. Further, the need for the expenditure did not have to arise from a source external to Government. The Court held that the Finance Minister formed the requisite state of satisfaction and there was no error of law in either his reasoning or his conclusion.

The plaintiffs in the Wilkie proceeding also argued that the Statistics Direction exceeded the power of the Treasurer under s 9(1)(b) of the *Census and Statistics Act 1905* (Cth). The Court held that the Statistics Direction was valid on the basis that the information to be collected by the Australian Statistician was "statistical information", that the information was "in relation to" matters prescribed in the *Census and Statistics Regulation 2016* (Cth), and that there was nothing in s 9(1)(b) to prevent the Treasurer from specifying from whom information was to be collected. An argument that the Australian Electoral Commission was not authorised to assist the ABS in the implementation of the Statistics Direction also failed.

The merits of the grounds in each proceeding having been fully argued and the Court having unanimously reached the conclusion that those grounds were without substance, the Court held that it was unnecessary and inappropriate in the circumstances to determine whether the plaintiffs in each proceeding, or any of them, had standing.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*