

**IN THE HIGH COURT OF AUSTRALIA  
MELBOURNE REGISTRY**

No *M05* of 2017

BETWEEN

**ANDREW DAMIEN WILKIE**

First Plaintiff

**FELICITY JENNIFER MARLOWE**

Second Plaintiff

**PFLAG BRISBANE INC**

Third Plaintiff

10

and

**THE COMMONWEALTH OF AUSTRALIA**

First Defendant

**MINISTER FOR FINANCE**

Second Defendant

**TREASURER**

Third Defendant

**AUSTRALIAN STATISTICIAN**

Fourth Defendant

20

**ELECTORAL COMMISSIONER**

Fifth Defendant



**APPLICATION FOR AN ORDER TO SHOW CAUSE**

To: The first defendant

C/- Australian Government Solicitor

of: Level 34, 600 Bourke Street, Melbourne VIC 3000

To: The second defendant

30 of: Parliament House, Canberra ACT 2600

**Date of document:** 10 August 2017

Filed on behalf of the Plaintiff by:

**PUBLIC INTEREST ADVOCACY CENTRE LTD**

Level 5, 175 Liverpool St

Sydney NSW 2000

Australia

Contact: Camilla Pandolfini

Tel: +61 2 8898 6527

Fax: +61 2 8898 6555

To: The third defendant

of: Parliament House, Canberra ACT 2600

To: The fourth defendant

of: The Australian Bureau of Statistics, ABS House, Ground Floor, 45 Benjamin Way, Belconnen ACT 2617

10 To: The fifth defendant

of: The Australian Electoral Commission, 50 Marcus Clarke Street, Canberra ACT 2600

TAKE NOTICE that this application has been made by the plaintiffs for the relief that is set out below on the grounds that are set out below.

IF YOU INTEND TO DEFEND the proceeding you must file a notice of appearance in the office of the Registry named above.

IF YOU ARE WILLING TO SUBMIT to any order that the Court may make, save as to costs, you may file a submitting appearance in the office of the Registry named above.

THE TIME FOR FILING AN APPEARANCE is as follows:

- 10 (a) where you are served with the application within Australia — 14 days from the date of service;
- (b) in any other case — 42 days from the date of service.

THE INTERLOCUTORY RELIEF CLAIMED is:

1. Such orders as are necessary to enable an expedited hearing of this proceeding to take place prior to 12 September 2017 or such later time as the Court directs.
2. Further or alternatively, an interlocutory injunction until the hearing and determination of this proceeding or until further order restraining:
- 20 (a) the fourth defendant, by himself or by his servants, agents or delegates, from spending any of the sum of \$122,000,000 in the Advance to the Finance Minister Determination (No. 1 of 2017-2018);
- (b) the fourth defendant, by himself or by his servants, agents or delegates, from taking any steps to carry out the Census and Statistics (Statistical Information) Direction 2017;
- (c) the fifth defendant, by himself or by his servants, agents or delegates, from taking any steps to provide goods or services to the fourth defendant in respect of the Census and Statistics (Statistical Information) Direction 2017.

## THE FINAL RELIEF CLAIMED is:

1. A declaration that the Advance to the Finance Minister Determination (No. 1 of 2017-2018) is invalid.
2. A declaration that s 10 of the *Appropriation Act (No. 1) 2017-2018* (Cth) (the ***Appropriation Act***) is invalid.
3. A declaration that the Census and Statistics (Statistical Information) Direction 2017 is invalid.
4. A declaration that the fourth defendant does not have the power, under statute or otherwise, to conduct a postal vote on the opinions on same-sex marriage of those enrolled to vote under the *Commonwealth Electoral Act 1918* (Cth) and voluntarily participating in such process (the **postal vote**).
5. A writ of prohibition issue directed to the fourth defendant from spending the sum in the Advance to the Finance Minister Determination (No. 1 of 2017-2018).
6. In the alternative to the relief sought in paragraph 5, an injunction restraining the fourth defendant, by himself or by his servants, agents or delegates, from spending the sum in the Advance to the Finance Minister Determination (No. 1 of 2017-2018).
7. A writ of prohibition issue directed to the fourth defendant from taking any steps to carry out the Census and Statistics (Statistical Information) Direction 2017.
8. In the alternative to the relief sought in paragraph 7, an injunction restraining the fourth defendant, by himself or by his servants, agents or delegates, from taking any steps to carry out the Census and Statistics (Statistical Information) Direction 2017.
9. A writ of prohibition issue directed to the fifth defendant from providing goods or services to the fourth defendant in respect of the Census and Statistics (Statistical Information) Direction 2017.

10. In the alternative to the relief sought in paragraph 9, an injunction restraining the fifth defendant, by himself or by his servants, agents or delegates, from providing goods or services to the fourth defendant in respect of the Census and Statistics (Statistical Information) Direction 2017.
11. An injunction restraining the first defendant, whether by its servants, agents or howsoever otherwise, from conducting, or taking any further steps to conduct, the postal vote in reliance upon or pursuant to the Advance to the Finance Minister Determination (No 1 of 2017-2018) or the Census and Statistics (Statistical Information) Direction 2017.
- 10 12. Costs.
13. Such other orders or relief as the Court thinks just and necessary.

THE GROUNDS ON WHICH THE RELIEF IS CLAIMED are

#### **Jurisdiction**

1. The application is made pursuant to ss 75(iii) and 75(v) of the Constitution, and is a matter arising under the Constitution and involving its interpretation pursuant to s 30(a) of the *Judiciary Act 1903* (Cth).

#### **Standing**

2. The first plaintiff is a Member of Parliament for the electorate of Denison.
3. The first plaintiff's interests are affected because:
  - 20 (a) he has an interest in ensuring that public monies are spent in accordance with law;
  - (b) he has an interest in ensuring that the powers of the Parliament are not impermissibly delegated to members of the Executive without appropriate parliamentary scrutiny of those powers; and
  - (c) he voted against the Bills which would have given statutory authorisation for a plebiscite on same-sex marriage.
4. The second plaintiff:
  - (a) is in a same-sex relationship with her partner of 17 years; and

- (b) has three young children.
5. The second plaintiff's interests are affected by the postal vote because:
- (a) she is an elector;
  - (b) she will receive the postal vote material in the mail; and
  - (c) she believes the postal vote will have an adverse impact on the mental health and wellbeing of herself, her partner and her children, and that it will harm the reputation and bring into question the legitimacy of her family unit.;
6. The third plaintiff:
- 10 (a) is an association incorporated pursuant to the *Associations Incorporations Act 1981* (Qld);
- (b) is comprised of individuals who are parents, family and friends of gay and lesbian people;
  - (c) advocates on issues of human rights and equality in law for gay and lesbian people, but also for inclusion and social acceptance of the members' children and friends.
7. The third plaintiff's interests are affected by the postal vote because:
- (a) the postal vote is on a subject matter about which the third plaintiff has engaged in advocacy and other activities;
- 20 (b) the means by which views on same-sex marriage are gauged and the steps which may be taken to legalise same-sex marriage will affect the activities which the third plaintiff will carry out on this subject.
8. Moreover, in so far as a writ of prohibition is sought, strangers have standing to seek such relief.

## Grounds

### Grounds pertaining to spending

9. Ground One is that the Advance to the Finance Minister Determination (No 1 of 2017-2018) made by the second defendant is invalid as the Determination was not made in accordance with law and, in particular, insofar as the Second Defendant purported to be satisfied that there is an urgent need for expenditure in the circumstances set out in s 10(1)(a) or (b) of the *Appropriation Act* the exercise of power:

(a) was not reasonable; and

10 (b) involved an error of law.

10. Ground Two is that, sub-sections (1), (2) and (4) of s 10 of the *Appropriation Act* are invalid because:

(a) these sub-sections are not a permissible exercise of Commonwealth legislative power to enact Appropriation Acts;

(b) further and alternatively, these sub-sections effect an impermissible delegation of the legislative power of the Commonwealth to the second defendant;

20 (c) without limiting sub-paragraphs (a) or (b), the conferral of legislative power on the Finance Minister under ss 10(1), (2) and (4) to make a legislative instrument that is not disallowable by the Parliament on the basis of the Minister's "satisfaction" as to an indeterminate "urgent need for expenditure" and the other circumstances set out in s 10(1) is not a permissible delegation or exercise of the legislative power of the Commonwealth.

11. If Ground Two is successful, then s 10(3), which depends for its operation upon s 10(1) and (2), is also invalid.

12. In the alternative to paragraph 10, Ground Three is that s 10(4) is invalid because:

- (a) it is not a permissible exercise of the Commonwealth legislative power to enact Appropriation Acts, and is not supportable by any incidental power;
- (b) further or alternatively, it effects, when read with s 10(1) and (2), an impermissible delegation of the legislative power of the Commonwealth to the Finance Minister.

**Grounds pertaining to authority to conduct the postal survey**

- 10 13. Ground Four is that the Census and Statistics (Statistical Information) Direction 2017 is invalid because the opinions which are being sought are not "statistical information" within the meaning of the *Australian Bureau of Statistics Act 1975* (Cth) or the *Census and Statistics Act 1905* (Cth) and are not "statistics" within the meaning of "census and statistics" in s 51(xi) of the Constitution.
14. Ground Five is that the Census and Statistics (Statistical Information) Direction 2017 is invalid because the opinions which are being sought are not in relation to matters prescribed for the purposes of that section by s 13 of the *Census and Statistics Regulations 1916* (Cth).
- 20 15. Ground Six is that, by reason of the foregoing matters and in particular the lack of statutory authorisation for the fourth defendant to carry out the postal survey, the fifth defendant is not authorised by the *Commonwealth Electoral Act 1918* (Cth), and in particular s 7A, to conduct or participate in the conduct of the postal survey.
16. Ground Seven is that, in circumstances where there is no statutory authorisation, the executive power of the Commonwealth in s 61 does not permit the fourth defendant to carry out the postal vote.

This application shall be heard at the time and place stated in the summons served with this application.

This application was filed by the Public Interest Advocacy Centre on behalf of the plaintiffs.

Dated: 10 August 2017



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Laura Lombardo  
Public Interest Advocacy Centre  
Solicitor for the plaintiffs

The first plaintiff's address is:

188 Collins Street Hobart Tasmania 7000

10 The second plaintiff's address is:



The third plaintiff's address is:



The plaintiffs' address for service is C/O PIAC, 5/175 Liverpool Street SYDNEY NSW 2000.